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SSA's "New Approach" to disability benefits: Overview and commentary

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INTRODUCTION

The Social Security Administration's process for making disability determinations has long been considered slow and inefficient in spite of various attempts at reform over the past decade. As of August 2006, the Social Security Administration (SSA), under Commissioner Jo Anne Barnhart, is beginning the implementation of a major overhaul of the disability determination process. The final regulation on changing the disability claims process, "Disability Service Improvement" (DSI) was published on March 31, 2006.¹ This publication follows almost two years of proposals and extensive public comments on the exact changes to be implemented, known as the "new approach." The "new approach" will involve the creation of several new institutions and the replacement of some present process steps.

Some concerns of disabled people and disability advocates have been addressed during the public comment period for the regulations, while others have not. Although increased efficiency is one of the goals of the "new approach," it is not clear that the changes will increase efficiency for most cases. The flexibility and informality of the process that unrepresented claimants depend on may be jeopardized by the increase in regimentation of the "new approach" and the quest for efficiency may undermine the rights of claimants to present evidence and appeal decisions. Also, the "new approach" is heavily dependent on an electronic Disability System (eDIB) to replace all paper records with electronic records. While eDIB has been expanded widely in the past two years, its implementation is not complete.

I. IMPLEMENTATION OF THE "NEW APPROACH"

The implementation of the new approach will occur slowly on a region by region basis.² The first region is to be the Boston region, which includes Connecticut, Massachusetts, Maine,

¹ 71 Fed. Reg. 16424; <http://www.ssa.gov/disability-new-approach/3203Fed.Reg.eg.htm>

² 71 Fed. Reg. 16424, 16440.

New Hampshire, Rhode Island, and Vermont.³ Starting on August 1, 2006, new SSI and Title II disability applications will use the “new approach” in the Boston region.⁴ Old and ongoing claims in the Boston Region will continue to use the old approach in its entirety as will the rest of the country.⁵ No other region will begin implementation of the new approach until at least a year after the Boston region begins its use.⁶ Monitoring and evaluation of the implementation in the Boston region is expected to inform the process for expanding the “new approach” to other regions.⁷

The Appeal Council in the Boston region will slowly be phased out⁸ and the Quick Disability Determination step will begin with a small set of claims and expand over time.⁹ The Decision Review Board for the Boston region is expected to begin functioning in early 2007 and will initially review all or almost all cases.¹⁰

II. BACKGROUND: THE FOUR STEPS OF THE CURRENT APPROACH.

Currently, disability determination and appeals follow a four-step process: (1) an initial determination by a disability determination service (DDS); (2) a reconsideration step; (3) a hearing before an Administrative Law Judge (ALJ); and (4) an appeal to the Appeals Council.¹¹ Medical information is provided by private or government doctors and paid for by SSA.¹² Claimants who do not receive benefits through the disability determination process may appeal

³ 71 Fed. Reg. 16424, 16441.

⁴ 71 Fed. Reg. 16424, 16424, 16441; Testimony before House Ways and Means Subcommittee on Social Security by SSA Commissioner Jo Anne Barnhart, June 15, 2006 (<http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4982>).

⁵ 71 Fed. Reg. 16424, 16441.

⁶ Id.

⁷ Id.

⁸ 71 Fed. Reg. 16424, 16437-16438, 16441.

⁹ 71 Fed. Reg. 16424, 16430.

¹⁰ 71 Fed. Reg. 16424, 16441; Testimony before House Ways and Means Subcommittee on Social Security by SSA Commissioner Jo Anne Barnhart, June 15, 2006 (<http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4982>).

¹¹ 20 C.F.R. § 404.900 (2004) et seq.

¹² 20 C.F.R. § 404.1513 (2004).

to the federal courts.¹³

A. Initial determinations are made by state disability determination services.

Generally the first step in disability determination is made by a state disability determination service (DDS).¹⁴ SSA imposes by regulation a number of requirements on each state DDS, requiring adequate facilities, personnel, management, and accounting practices.¹⁵ The state is specifically required to provide qualified psychiatrists and psychologists to evaluate mental impairments.¹⁶ If the state is unable to do so, the Commissioner may provide for evaluation of mental impairments directly.¹⁷

If an initial decision is denied, the next step is to request Reconsideration.¹⁸ This must be made in writing at an SSA office within 60 days of receiving in the denial.¹⁹

B. The Reconsideration step allows the presentation of further evidence.

If a claimant is denied benefits at the initial determination, the claimant's next step generally is to request reconsideration, which gives the claimant a chance to make his or her case again, including with additional evidence.²⁰ Reconsideration decisions are made by SSA.²¹ Reconsideration follows case review procedure, meaning that: (1) the review consists of a review of the record rather than a hearing; and (2) the claimant may submit new evidence.²²

On a related note, a disability hearing before a disability hearing officer is available in cases where the claimant had been receiving disability benefits but SSA is proposing that the

¹³ 20 C.F.R. § 404.981 (2004).

¹⁴ 20 C.F.R. § 404.1503(a) (2004).

¹⁵ 20 C.F.R. § 404.1603 (2004).

¹⁶ 20 C.F.R. § 404.1503(e).

¹⁷ Id.

¹⁸ 20 C.F.R. § 404.909(a) (2004).

¹⁹ Id.

²⁰ 20 C.F.R. § 404.907 (2004).

²¹ Id.

²² 20 C.F.R. § 404.913 (2004).

benefits should end because a disability no longer exists.²³ The disability hearing officer will be appointed by the agency who made the disability determination, which may be a state agency or SSA.²⁴ The disability hearing officer will not have been involved in the initial determination.²⁵

A Reconsideration can be appealed by filing a written request for an appeal at an SSA office within 60 days of receiving the reconsidered decision.²⁶

C. An Administrative Law Judge hearing follows reconsideration.

The next step in the appeals process following a denial of benefits at the reconsideration stage is a hearing before an Administrative Law Judge, unless there is a prehearing case review.²⁷ The claimant may testify, present evidence and witnesses, and respond to questions from the ALJ at the hearing.²⁸ The time and place of the hearing will be determined by the ALJ.²⁹ Material evidence should be submitted to the ALJ at least ten days before the hearing.³⁰

In some cases a prehearing case review may occur at the request of SSA after the request for the hearing but before the hearing itself.³¹ Prehearing case reviews occur when: (1) additional evidence is submitted; (2) there is an indication that additional evidence is available; (3) there is a change in the law or regulation; or (4) there is an error in the file or some other indication that the prior determination may be revised.³² The prehearing case review will be undertaken by the component of SSA (including a state agency) that made the initial determination.³³ If the decision in the prehearing case review is partially favorable, the hearing will be held unless the

²³ 20 C.F.R. § 404.914(a) (2004).

²⁴ 20 C.F.R. § 404.915(b),(c) (2004).

²⁵ Id. at (a).

²⁶ 20 C.F.R. § 404.933 (2004).

²⁷ 20 C.F.R. § 404.929 (2004).

²⁸ Id.

²⁹ 20 C.F.R. § 404.936(a) (2004).

³⁰ 20 C.F.R. § 404.935 (2004).

³¹ 20 C.F.R. § 404.941 (2004), § 404.942 (2004).

³² 20 C.F.R. § 404.941(b), § 404.942(b).

³³ 20 C.F.R. § 404.941.

claimant chooses to dismiss it.³⁴ If the decision is wholly favorable, the ALJ will dismiss the hearing unless the claimant requests that the hearing proceed.³⁵

Following the ALJ decision, certain cases may be appealed to the Appeals Council.³⁶

Appeals must be filed with 60 days at an SSA office.³⁷

D. The Appeals Council accepts certain appeals from the Administrative Law Judge level.

The Appeals Council offers another opportunity for a hearing if the claimant is dissatisfied with the result at the ALJ level.³⁸ The Appeals Council will review an ALJ decision when: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the action, findings or conclusions of the Administrative Law Judge are not supported by substantial evidence; or (4) there is a broad policy or procedural issue that may affect the general public interest.³⁹ The Appeals Council will also occasionally review selected cases of its own initiative to promote consistency.⁴⁰ It will mail notice of this review to all parties within 60 days of the ALJ decision.⁴¹

Unlike the Reconsideration and ALJ hearing steps, the Appeals Council will not consider all new evidence.⁴² It will only consider new evidence that relates to the period before or on the date of the administrative hearing.⁴³ Claimants may request leave to present oral arguments if that would be helpful in determining an issue of law or policy.⁴⁴ If additional evidence is needed, the Appeals Council may remand the case to the ALJ or it may obtain the evidence itself if doing

³⁴ Id. at (e).

³⁵ Id. at (d).

³⁶ 20 C.F.R. § 404.970(a) (2004).

³⁷ 20 C.F.R. § 404.968(a) (2004).

³⁸ 20 C.F.R. § 404.967 (2004).

³⁹ 20 C.F.R. § 404.970(a) (2004).

⁴⁰ 20 C.F.R. § 404.969(b) (2004).

⁴¹ Id. at (d).

⁴² 20 C.F.R. § 404.976(b).

⁴³ Id.

⁴⁴ Id. at (c).

so would be quicker and would not affect the claimant's rights.⁴⁵

The decision of the Appeals Council is binding unless the claimant files an appeal in Federal district court within 60 days of receiving the decision.⁴⁶

⁴⁵ Id. at (b)(2).

⁴⁶ 20 C.F.R. § 404.981 (2004).

III. THE FOUR STEPS OF THE “NEW APPROACH,” ELIMINATED STEPS, AND NEWLY CREATED INSTITUTIONS.

Like the current disability determination and appeals process, the proposed “new approach” has four steps before reaching federal court. Two of these steps would remain largely the same with only a few changes: disability determination services and the Administrative Law Judge hearing. The reconsideration step and the Appeals Council would be eliminated under the “new approach.” Two new steps would be added: (1) a Quick Decision step preceding the DDS; and (2) a Federal Reviewing Official between the DDS and the ALJ hearing.

Two new institutions would be created under the “new approach.” A Medical and Vocational Expert System (MVES) will be established to provide expert assistance to adjudicators, particularly for the Federal Reviewing Official (FRO) and Administrative Law Judge (ALJ). The MVES will be composed of the Medical and Vocational Expert Unit and a national network of medical, psychological, and vocational experts who meet qualifications set by the Commissioner. Assistance from the MVES in reviewing a claim at the Decision Review Board level is not explicitly provided for.

Second, while the Appeals Council will slowly be phased out, it will be replaced by a new Decision Review Board (DRB). The Decision Review Board will not be an appeal by right body; instead, it will select certain cases for review at its own discretion to ensure uniformity in disability determinations. At its initial implementation, the DRB will review all cases, but over time, fewer cases will be reviewed. The DRB will be composed of a rotating panel of Administrative Law Judges and Administrative Appeals Judges serving fixed terms.

A. The four steps of the “new approach.”

Like the current approach, the “new approach” involves four steps at the end of which the claimant can appeal to federal court. The steps are as follows: (1) a new Quick Decision step grants benefits to some claimants who are obviously disabled; (2) Disability Determination Services continue to deal with all other cases; (3) a Federal Reviewing Official evaluates cases

denied by a DDS, issues a new decision, and prepares a report for the Administrative Law Judge (ALJ); (4) the ALJ holds a hearing after which the record is closed. Review by the Decision Review Board may be a fifth step, but the DRB will only review cases of its own selection. Claimants do not have a right to appeal ALJ decisions to the DRB.

1. A Quick Decision step would be created.

An initial Quick Decision step (the Quick Disability Determination or QDD) will be created to identify and quickly grant benefits to some persons who are obviously disabled.⁴⁷ Initially only a few cases will utilize this step.⁴⁸ Over time the process will be refined to better identify characteristics of cases which may be effectively assessed by the Quick Decision step.⁴⁹

When a claim is filed at an SSA field office, a predictive model will perform a selection to determine if the case should be routed to the State QDD unit.⁵⁰ If selected, the case will be evaluated by a team comprised of a disability examiner and a medical expert, both of whom must agree to on the claim.⁵¹ If either disagree on the claim under the Quick Decision standards, the claim will be transferred to the Disability Determination Service for the normal DDS process without penalty.⁵²

2. The Disability Determination Service step would remain largely the same.

A state DDS would continue to evaluate most disability claims, with some changes.⁵³ Under the “new approach,” DDS staff would be able to receive medical information from the Medical and Vocational Expert System and from their own in-house medical experts and

⁴⁷ *Hearings on the Social Security Administration’s Management of the Office of Hearings and Appeals*, 108th Cong.

⁴⁸ 71 Fed. Reg. 16424, 16430.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ *Hearings on the Social Security Administration’s Management of the Office of Hearings and Appeals*, 108th Cong.

independent doctors.⁵⁴ Each state DDS, as well as other parts of the disability determination process, would be subject to new agency-wide system of in-line and end-of-line quality control.⁵⁵ The Commissioner is also concerned about the frequency with which cases need to be remanded from the ALJ hearing to the DDS because of incomplete documentation.⁵⁶ Under the “new approach” a DDS would be required to fully document its decisions to minimize the need for cases to be remanded for further determination.⁵⁷

3. The new Federal Reviewing Official step would be created.

Under the “new approach,” appeals from the DDS would go to a Federal Reviewing Official (FRO), an attorney who would do one of the following: (1) approve a claim even if it had been denied by DDS; (2) agree with the denial and prepare it for an ALJ hearing; or (3) modify the initial determination.⁵⁸ Developing disability cases is a responsibility of the FRO, who may seek evidence, clarification or additional information from the State agency about the basis for its determination, and may seek additional information or evidence from the claimant’s treating sources or other sources.⁵⁹ The FRO would have the power to subpoena evidence from uncooperative sources.⁶⁰ In cases involving new evidence not considered by the DDS, the FRO will consult with an MVES medical, psychological, or vocational expert.⁶¹ In the instance of issuing a decision that disagrees with the DDS determination, the FRO will first consult with an MVES expert.⁶² Claimants may submit additional evidence up until the time the FRO issues a decision, although the earliest possible submission of evidence is encouraged.⁶³

⁵⁴ 71 Fed. Reg. 16424, 16431.

⁵⁵ 71 Fed. Reg. 16424, 16425.

⁵⁶ *Hearings on the Social Security Administration’s Management of the Office of Hearings and Appeals*, 108th Cong.

⁵⁷ Id.

⁵⁸ 71 Fed. Reg. 16424, 16432-16433.

⁵⁹ 71 Fed. Reg. 16424, 16433.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ Id.

The FRO is required to write a decision detailing the specific reasons for the decision and why he or she agrees or disagrees with the initial determination from the DDS.⁶⁴ The Commissioner believes that the Federal Reviewing Official step would help standardize allowances of benefits by clarifying what evidence must be shown for an allowance.⁶⁵

4. De novo Administrative Law Judge hearings would continue.

Administrative Law Judge hearings would follow the FRO step and would function largely as they do now, except that after the hearing the record would be closed, unless there is a good cause showing for a specific exception.⁶⁶

After a FRO decision that is less than fully favorable, the claimant has 60 days to file an appeal to the Administrative Law Judge (ALJ) step.⁶⁷ In an appeal an ALJ would schedule a hearing on the claim, which would be reviewed by the ALJ de novo as is the current policy.⁶⁸ Under the “new approach,” the ALJ would be required to specifically note reasons for disagreeing with the FRO’s written decision.⁶⁹ Also, under the “new approach,” the record would be closed after the ALJ’s decision, unless there is a good cause showing for an exception.⁷⁰

One significant change in the operation of the ALJ hearings would be increased emphasis on timelines and schedules for both the hearings and the submission of evidence. At least 75 days before the date of the hearing, ALJs must provide the claimant notice of the time and place of the hearing, unless the claimant agrees to a shorter notice period.⁷¹ (Claimants have 30 days from receipt of notice to object to the time or place of a hearing.⁷²) If possible the claimant should

⁶⁴ 71 Fed. Reg. 16424, 16433-16434.

⁶⁵ *Hearings on the Social Security Administration’s Management of the Office of Hearings and Appeals*, 108th Cong.

⁶⁶ 71 Fed. Reg. 16424, 16428.

⁶⁷ to be codified at 20 C.F.R. § 405.230.

⁶⁸ 71 Fed. Reg. 16424, 16434.

⁶⁹ Id.

⁷⁰ 71 Fed. Reg. 16424, 16428.

⁷¹ 71 Fed. Reg. 16424, 16434.

⁷² Id.

submit evidence, or a summary of the evidence, within 10 days after filing the request for an ALJ hearing⁷³; all evidence must be submitted five business days prior to the ALJ hearing with some limited exceptions.⁷⁴

The written decisions of the ALJ are to explain the specific reasons for the decision in comprehensible language.⁷⁵ Although the ALJ does not consider the FRO's decision as evidence, the ALJ's decision will explain in detail why he or she agrees or disagrees with the FRO.⁷⁶

The Decision Review Board may, at its own discretion, review the decision and claim for quality after the ALJ hearing.⁷⁷ If benefits were denied and the case was not sent to the Decision Review Board, the claimant would still be allowed to appeal to the Federal court system.⁷⁸

B. Eliminated Steps.

Two steps will be eliminated. The Commissioner claims that the Reconsideration and Appeals Council steps merely affirm earlier decisions and become a waste of time.

1. The Reconsideration step would be eliminated.

The "new approach" would eliminate the reconsideration step in which an applicant appeals a denial by the DDS back to the DDS.⁷⁹ The Reconsideration step often functions as a "rubber stamp," changing the decision in only about 15 percent of cases.⁸⁰ According to SSA, the Reconsideration takes up time and fails to provide meaningful input to the process.⁸¹ SSA further claims that studies in some states where the Reconsideration was temporarily eliminated resulted in similar numbers of cases being allowed at the initial step as were previously being

⁷³ Id.

⁷⁴ Id.

⁷⁵ 71 Fed. Reg. 16424, 16435.

⁷⁶ Id.

⁷⁷ 71 Fed. Reg. 16424, 16437.

⁷⁸ 71 Fed. Reg. 16424, 16436.

⁷⁹ *Hearings on the Social Security Administration's Management of the Office of Hearings and Appeals*, 108th Cong.

⁸⁰ National Chronic Fatigue Syndrome and Fibromyalgia Association (<http://www.ncfsfa.org/Patients/ssbenefits.htm>)

⁸¹ 70 Fed. Reg. 43590, 43595.

allowed at both the initial step and the reconsideration step combined.⁸²

2. The Appeals Council would be eliminated.

Appeals Council would also ultimately be eliminated under the “new approach.”⁸³

Commissioner Barnhart claims that the Appeals Council adds processing time and usually affirms the ALJ finding.⁸⁴ Some of the functions of the Appeals Council would in time be taken over by the Decision Review Board.⁸⁵

C. New Institutions.

1. Medical and Vocational Expert System

The Medical and Vocational Expert System (MVES) (previously known as the Federal Expert Unit) is a new bureaucracy established with the “new approach.” The MVES will consist of a Medical and Vocational Expert Unit that will oversee a national network of medical, psychological, and vocational experts and will also maintain a national registry of vocational experts.⁸⁶ The MVES will provide assistance to all levels of the disability review process except the DRB.⁸⁷ The national network of medical, psychological, and vocational experts will meet qualification standards specified by the Commissioner.⁸⁸ The SSA pledged to issue the initial qualification standards soon in the final rule issued March 31, 2006.⁸⁹ Once the standards have been issued, experts employed by state agencies will have one year to meet the qualifications.⁹⁰

When FROs and ALJs request consultative examinations the MVES will arrange them,⁹¹

⁸² 70 Fed. Reg. 43590, 43593-43595.

⁸³ *Hearings on the Social Security Administration’s Management of the Office of Hearings and Appeals*, 108th Cong.

⁸⁴ Id.

⁸⁵ 71 Fed. Reg. 16424, 16433.

⁸⁶ 71 Fed. Reg. 16424, 16431.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ 71 Fed. Reg. 16424, 16432.

⁹⁰ 71 Fed. Reg. 16424, 16431.

⁹¹ Id.

and ensure that experts involved in the claim at a prior level of adjudication are not reused.⁹² The FROs and ALJs will be required to use the MVEU to request the assistance of a medical, psychological, or vocational expert.⁹³ If a DDS lacks a medical or psychological expert meeting the established qualification standards, the MVES will provide such an expert.⁹⁴ While ALJs and FROs may request evidence from a claimant's treating source, additional medical, psychological, or vocational documentary or testimonial evidence to adjudicate a claim must come from the MVES.⁹⁵

2. Decision Review Board

The Appeals Council step is eliminated in the "new approach" and in its place the Decision Review Board (DRB) has been created, although it lacks the appeal by right for claimants and serves a somewhat different role.⁹⁶ Instead of claimants appealing ALJ decisions to the Appeals Council, ALJ decisions will be final unless the DRB selects the decision at its own discretion.⁹⁷ The purpose of DRB is to promote accurate, consistent, and fair decision-making by identifying and correcting errors in ALJ decisions as well as identifying issues that may impede consistent adjudication at all levels of the process.⁹⁸ Ultimately, the DRB will take on the other secondary functions performed by the Appeals Council as well.⁹⁹

Once fully established the DRB will select 10 to 20 percent of ALJ decisions both favorable and unfavorable for review before the ALJ decisions are effectuated using a predictive sampling procedure.¹⁰⁰ The selection process will focus on claims with an increased likelihood of error, or

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ 71 Fed. Reg. 16424, 16432.

⁹⁶ 71 Fed. Reg. 16424, 16437.

⁹⁷ 71 Fed. Reg. 16424, 16435-16436.

⁹⁸ 71 Fed. Reg. 16424, 16437.

⁹⁹ 71 Fed. Reg. 16424, 16433, 16441.

¹⁰⁰ Report of GAO testimony before House Ways and Means Subcommittee on Social Security, June 15, 2006. <http://www.gao.gov/new.items/d06779t.pdf> [hereinafter GAO Testimony].

that involve new policies, rules, or procedures to ensure their proper implementation.¹⁰¹ The DRB may affirm, modify, or reverse the ALJ's decision, or it may remand a claim to the ALJ for further action and decision.¹⁰² Claimants whose decisions are reviewed by the DRB may submit statements a 2,000 word statement explaining why they agree or disagree with the ALJ's decision.¹⁰³

The DRB will be comprised of experienced ALJs and Administrative Appeals Judges who are selected for staggered terms of fixed duration by the Commissioner.¹⁰⁴ The implementation of the DRB will be gradual with the Appeals Council being phased out slowly.¹⁰⁵

IV. CONCERNS ABOUT THE "NEW APPROACH."

While some elements of the "new approach" have potential benefits if properly implemented, many others present concerns; hundreds of individuals and groups presented a very wide variety of concerns in comments. Summarized below are some of the concerns that have been raised by disabled people and disability advocates regarding the "new approach."

A. Concerns about the steps and new institutions of the "new approach."

A major, overarching and frequently expressed concern was that fairness was being sacrificed for perceived efficiency in the "new approach."¹⁰⁶ There are many specific concerns

¹⁰¹ 71 Fed. Reg. 16424, 16437

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ 71 Fed. Reg. 16424, 16438.

¹⁰⁵ 71 Fed. Reg. 16424, 16439-16440.

¹⁰⁶ Testimony of Sarah H. Bohr, President, National Organization of Social Security Claimants' Representatives (NOSSCR) before House Ways and Means Subcommittee on Social Security, June 15, 2006. <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4985>. SSA Policy Site: Administrative Review Process for Adjudicating Initial Disability Claims (<https://s044a90.ssa.gov/apps10/erm/rules.nsf/5da82b031a6677dc85256b41006b7f8d/3112961b7090db578525704b00508cac!OpenDocument>) [hereinafter SSA Comments Website] posting of James Shea, esq.

regarding the “new approach.” Is the Federal Reviewing Official a helpful step?¹⁰⁷ Will there be a substantial increase in cases going to federal court?¹⁰⁸ Will the Decision Review Board be effective given its composition and the claimant’s lack of right to appeal to it?¹⁰⁹ Will the deadlines imposed around the ALJ stage impede claimants?¹¹⁰ Will staffing levels be adequate to implement the new approach?¹¹¹

1. Quick Decisions might be helpful in quickly delivering benefits, but questions remain as to staffing and what claims will use QDD.

Although the Quick Disability Determination (QDD) has encountered comparatively less criticism, questions remain as to the selection and types of claims to be considered by the QDD step,¹¹² as well as the adequacy of staffing resources.¹¹³ SSA plans to use a predictive model based on a variety of factors to determine which claims are most conducive to using QDD.¹¹⁴ For staffing the QDD, SSA intends to use more experienced or the most experienced disability examiners from DDSs in a team combination with a medical or psychological expert.¹¹⁵ Will assigning the most experienced examiners to the easiest cases (the QDD) result in inexperienced examiners handling more of the most difficult disability claims and failing to address them well?¹¹⁶

2. Without qualification standards in place, the Medical and Vocational Expert System leaves much in doubt.

¹⁰⁷ 71 Fed. Reg. 16424, 16433.

¹⁰⁸ 71 Fed. Reg. 16424, 16425, 16439.

¹⁰⁹ GAO Testimony.

¹¹⁰ 71 Fed. Reg. 16424, 16436.

¹¹¹ Testimony of Witold Skwierczynski, President, National Council of SSA Field Operations Locals, AFGE, AFL-CIO before House Ways and Means Subcommittee on Social Security, June 15, 2006. (<http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4999>)

¹¹² 71 Fed. Reg. 16424, 16429-16430; SSA Comments Website postings of Elaine M. Ryan of the American Public Human Services Association; Rodger DeRose of the Crohn's & Colitis Foundation of America; and Michael Miskowiec, esq.

¹¹³ 71 Fed. Reg. 16424, 16429-16430.

¹¹⁴ 71 Fed. Reg. 16424, 16430 (Some factors may include medical history, treatment protocols, and medical signs and finding.)

¹¹⁵ 71 Fed. Reg. 16424, 16429.

¹¹⁶ 71 Fed. Reg. 16424, 16430.

Some commenters supported the creation of the Medical and Vocational Expert System (MVES).¹¹⁷ The strongest criticism of the MVES is that the important qualification standards for the national network of medical, psychological, and vocational experts have not been issued.¹¹⁸ These qualification standards for experts are central to the MVES.¹¹⁹ There is uncertainty about experts relied upon by state DDSs (both employees and outside sources) potentially not meeting the qualification standards as will be required within a year of the standards' publication.¹²⁰

The location and centralization of the MVES raised concerns among some organizations.¹²¹ Some commenters raised concerns about medical experts with expertise in one specific field not properly evaluating the intersection of multiple medical and psychological problems that are common among people with disabilities.¹²² A myopic analysis by experts in subspecialties of medical and psychological conditions does not serve claimants well. Some commenters also feared that the experts from MVES would serve as company doctors and act in the interest of SSA rather than performing fairly.¹²³ Finally, commenters noted that the rate of pay, which for vocational experts has not changed in 30 years, is critical to ensuring proper expert medical, psychological, and vocational advice.¹²⁴

3. Introduction of the Federal Reviewing Official has raised many concerns.

The second step of the old approach, Reconsideration, has been eliminated and replaced

¹¹⁷ SSA Comments Website postings of Bazelon Center for Mental Health Law; and Gerald McIntyre of National Senior Citizens Law Center.

¹¹⁸ SSA Comments Website posting of Russ Newman of American Psychological Association.

¹¹⁹ 71 Fed. Reg. 16424, 16431-16432. SSA Comments Website postings of Bay Area Legal Aid.

¹²⁰ SSA Comments Website posting of Alan L. Auerbach, m.d.

¹²¹ 71 Fed. Reg. 16424, 16432; SSA Comments Website posting of National Disability Rights Network; Consortium for Citizens with Disabilities; Steven Rollins, esq.; and National Organization of Social Security Claimants' Representatives (NOSSCR).

¹²² SSA Comments Website posting of National Disability Rights Network.

¹²³ SSA Comments Website postings of Brian Clymer, esq.; Mitchell H. Dugan, esq.; and Rudolph Patterson, esq.

¹²⁴ SSA Comments Website postings of Brian Clymer, esq.; National Disability Rights Network; Thomas Dunleavy; and Lynne Tracy.

by a new step, the Federal Reviewing Official (FRO).¹²⁵ Many commenters criticized the FRO (a waste of time, unnecessary, unclear).¹²⁶ Generally there was not much popular support for the FRO's creation.¹²⁷ (Elimination of the Reconsideration step would be fine without a replacement.)¹²⁸ Several commenters compared the FRO to the much criticized AO experiment of the 1990s, which replaced the Reconsideration step with an Adjudication Officer that, while not an attorney, was similar to FRO.¹²⁹

Some commenters worried that the reports created by the FRO would be easy for the ALJ to sign off on without considering the case carefully, or that the FROs' decisions would unduly influence the ALJs and undermine their ability to conduct de novo review because the ALJs are to respond to the FRO's decision in their written reports.¹³⁰

There were also concerns about staffing for the FRO. Some commenters questioned the need for attorneys to fill the position.¹³¹ FROs would need support staff. The number of FROs was considered important by some commenters who noted that without two FROs for every ALJ there would be potential for the step to become a bottleneck in the "new approach."¹³²

There were many concerns about the relationship and decision making responsibility between the Medical and Vocational Expert System (MVES) and the FRO.¹³³ These concerns

¹²⁵ 71 Fed. Reg. 16424, 16428, 16431-16433.

¹²⁶ 71 Fed. Reg. 16424, 16433; SSA Comments Website postings of Empire Justice Center.

¹²⁷ SSA Comments Website postings of Patrick Ray, esq.; Beverley Losey, esq.; Jason C Mastrangelo, esq.; and Janet Lyles, esq.;

¹²⁸ SSA Comments Website posting of Empire Justice Center; Homeless Advocacy Project; Howard B. Haas, esq.; Tony Arjo, esq.; and Donald J. Hanrahan, esq.

¹²⁹ SSA Comments Website postings of Michael Styles of Federal Managers Association; Brian Clymer, esq.; Richard Feinstein, esq.; Steven Rollins, esq.; and ALJ Robin J. Arzt, esq.

¹³⁰ 71 Fed. Reg. 16424, 16437; SSA Comments Website posting of National Organization of Social Security Claimants' Representatives (NOSSCR).

¹³¹ 71 Fed. Reg. 16424, 16432.

¹³² SSA Comments Website postings of Cynthia Berger, esq.

¹³³ SSA Comments Website postings of National Organization of Social Security Claimants' Representatives (NOSSCR); Mitchell H. Dugan, esq.; and Cynthia Berger, esq.

have been addressed in part by clarifying that the FRO makes the decisions, not the MVES.¹³⁴ In conclusion it is not clear that the disability determination process is helped by the inclusion of the FRO step and as formulated it is not a well supported addition.

4. SSA has addressed some of the concerns about ALJ step changes.

The problem most frequently raised by commenters on the proposed rules was the strict deadlines at the Administrative Law Judge step for evidence submission and scheduling of ALJ hearings.¹³⁵ Commenters repeatedly stressed that the deadlines would artificially deny claims and were contrary to the goals of SSA legislation.¹³⁶ These deadlines have been changed in final rule.¹³⁷ Instead of requiring claimants to submit all evidence 20 days before a hearing, the deadline was changed to 5 days before a hearing and exceptions to this deadline may be granted in some instances.¹³⁸ Seventy-five days notice will be given to claimants of the scheduling of an ALJ hearing instead of 45 days notice, and claimants have 30 days to object to the time or place of the scheduled ALJ hearing. In the old approach claimants could submit new evidence up to and at the ALJ hearing.¹³⁹

Another critical concern of many commenters on evidence was a requirement in the proposed rule to submit evidence adverse to the claimant's claim.¹⁴⁰ In response commenters raised points about conflict with state bar's rules of ethics and evidence.¹⁴¹ The language on

¹³⁴ 71 Fed. Reg. 16424, 16433.

¹³⁵ SSA Comments Website postings of Senator Susan Collins on behalf of MOSSCR; William Stanley, esq.; Lynn McKenzie, esq.; Matthew Howard, esq.; Linda Mathis, esq.; New Jersey Protection and Advocacy; and Congressmen Jim McCrery and Sander Levin.

¹³⁶ SSA Comments Website postings of Congressman Tom Allen; Michael Miskowiec, esq.; Sharon Gornstein, esq.; Cynthia Starkey, esq.; Empire Justice Center; and Protection & Advocacy, Inc.

¹³⁷ 71 Fed. Reg. 16424, 16434-16436.

¹³⁸ Id.

¹³⁹ Id.

¹⁴⁰ 71 Fed. Reg. 16424, 16437; SSA Comments Website posting of Empire Justice Center.

¹⁴¹ SSA Comments Website postings of National Disability Rights Network; Winona Zimmerlin, esq.; Feg. Reg. ederick S. Spencer, esq.; Steven Rollins, esq.; and Paul Burkhalter, esq. for the Houston Bar Association.

adverse evidence was removed in the final rule.¹⁴²

A frequently noted problem was the closing of the record after the ALJ hearing, which disallowed claimants from submitting new information.¹⁴³ Exceptions to the automatic closing of the record have been liberalized to some degree, and the ALJ has the ability to hold the record open for additional evidence.¹⁴⁴

The independence of ALJs was another common concern;¹⁴⁵ commenters feared that the FRO's written decision would undermine de novo review by the ALJ.¹⁴⁶ Additional language was added to the final rule clarifying the independence of the ALJ in response to concerns.¹⁴⁷ However, ALJs must address the FRO's substantive findings and rationale in their writing.¹⁴⁸ Some commenters feared the DRB's review of positive and negative decisions by the ALJ could chill the independence of the ALJs, in particular noting the discretionary selection of cases by the DRB.¹⁴⁹ The final rule specified that the DRB will not select cases based on which ALJ heard the claim.¹⁵⁰

5. The Decision Review Board does not yet exist and has little support.

Overall there was not much support from commenters for the creation of the DRB in place of the Appeals Council.¹⁵¹ Some commenters noted that the likelihood of erroneous ALJ decisions being reviewed and overturned would decrease because of the lack of an appeal by right to the

¹⁴² 71 Fed. Reg. 16424, 16437.

¹⁴³ Id. SSA Comments Website postings of National Organization of Social Security Claimants' Representatives (NOSSCR); National Disability Rights Network; and Bay Area Legal Aid.

¹⁴⁴ 71 Fed. Reg. 16424, 16437.

¹⁴⁵ SSA Comments Website postings of ALJ Robin J. Arzt, esq.; Beverley Losey, esq.; Feg. Reg. ancis Jackson, esq.; and Marcie Goldbloom Daley, esq.

¹⁴⁶ 71 Fed. Reg. 16424, 16437.

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Testimony of Gary Flack, Chairman, Social Security Section, Federal Bar Association before House Ways and Means Subcommittee on Social Security, June 15, 2006 (<http://waysandmeans.house.gov/hearings.asp?formmode=view&id=4988>).

¹⁵⁰ 71 Fed. Reg. 16424, 16439.

¹⁵¹ GAO Testimony.

DRB.¹⁵² Some commenters thought the DRB step would generally cause confusion and discourage claimants.¹⁵³

Other commenters found problematic the DRB composition of having peer ALJs take part in review of other ALJs.¹⁵⁴ There are also concerns about the selection of DRB members by the commissioner: what are the qualifications to serve on the DRB,¹⁵⁵ and will those selected be fair to claimants.¹⁵⁶ Which cases the DRB should review drew some commenters' ire; the use of a computer system to select cases for DRB review was not well received.¹⁵⁷

Because the DRB does not yet exist and will be phased in slowly starting in the Boston Region, initially reviewing all claims instead of 10 to 20 percent, it is difficult to determine its impact.¹⁵⁸ Also, because it does not exist in any form presently there are questions about how it will operate and its impartiality.¹⁵⁹ The largest concerns with the DRB, however, are the concerns from the elimination of the Appeals Council: the loss of claimants' right to appeal and the increase in cases being appealed to Federal court. (For discussion, see Part IV.B, below.)

6. Other concerns include reopening of the record, eDIB, and implementation.

Commenters raised a variety of other serious concerns about the "new approach." The proposed rule had changed regulations to disallow the reopening of closed cases.¹⁶⁰ This was

¹⁵² SSA Comments Website postings of Jason Thompson, esq.; and Jeffrey Lichtman, esq.

¹⁵³ SSA Comments Website posting of Mitchell H. Dugan, esq.

¹⁵⁴ 71 Fed. Reg. 16424, 16439.

¹⁵⁵ SSA Comments Website posting of Association of Administrative Law Judges.

¹⁵⁶ SSA Comments Website postings of Elena Ackel for Legal Aid of Los Angeles; and Richard Weishaupt, esq. for Community Legal Services, Inc. of Philadelphia.

¹⁵⁷ SSA Comments Website postings of Bazelon Center for Mental Health Law; Jason Thompson, esq.; and David Calvert for Bay Area Social Security Claimants Representatives.

¹⁵⁸ GAO Testimony.

¹⁵⁹ SSA Comments Website postings of Beverley Losey, esq.; and Richard Weishaupt, esq. for Community Legal Services, Inc. of Philadelphia.

¹⁶⁰ 70 Fed. Reg. 43590, 43603.

harshly and frequently criticized as unfair, inefficient, and potentially illegal.¹⁶¹ SSA changed this in the final rule, keeping the old approach's allowance of reopening cases until the ALJ decision, after which there is a six-month period in which reopening may be permitted for good cause.¹⁶²

Some commenters expressed concern about the implementation and use of the eDIB electronic record system.¹⁶³ While the lack of time for testing and the aggressive schedule for further adoption of eDIB remain concerns, as noted by the GAO,¹⁶⁴ in the past year eDIB has been introduced nationally.¹⁶⁵ The efficiency of eDIB remains a concern, with very slow response time reported in some instances.¹⁶⁶

The implementation of the "new approach" caused concern among some commenters. Many commenters were opposed to any implementation of the "new approach" anywhere.¹⁶⁷ Congressman Tom Allen of Maine wrote, "I believe the proposed changes will erode the rights of Americans with disabilities to obtain the benefits to which they are entitled."¹⁶⁸ While implementing the "new approach" in one smaller region and waiting a year before expanding to other regions was considered a positive by most of those who favored some implementation,¹⁶⁹ a few commenters noted that the Boston Region is very small, and unrepresentative of other regions with greater efficiency, higher rates of disability claim approval, and far fewer federal

¹⁶¹ SSA Comments Website postings of SSA Comments Website postings of Congressman Tom Allen; Michelle Marcus, esq.; Feg. Reg.ederick S. Spencer, esq.; Richard Weishaupt, esq. for Community Legal Services, Inc. of Philadelphia; and Congressmen Jim McCrery and Sander Levin.

¹⁶² 71 Fed. Reg. 16424, 16428.

¹⁶³ SSA Comments Website postings of Rodger DeRose of the Crohn's & Colitis Foundation of America; ALJ Christine P. Benagh, esq.; and Minnesota Legal Services Coalition.

¹⁶⁴ GAO Testimony

¹⁶⁵ All 1,338 SSA field offices process records electronically, and DDSs of 47 states are equipped to handle records electronically. 71 Fed. Reg. 16424, 16425. Cf SSA Comments Website posting of Michael Styles of Federal Managers Association.

¹⁶⁶ SSA Comments Website posting of ALJ Christine P. Benagh, esq.

¹⁶⁷ SSA Comments Website postings of Kerry Spencer-Johnson for the Michigan Social Security Bar; John Phillips, esq.; Cynthia Berger, esq.; David Namba, esq.; and Winona Zimmerlin, esq.

¹⁶⁸ SSA Comments Website postings of Tom Allen, member of Congress, Maine 1st District.

¹⁶⁹ SSA Comments Website posting of National Council of Disability Determination Directors.

court cases.¹⁷⁰

B. Concerns about the two eliminated steps.

1. Elimination of the Reconsideration step creates efficiency, but replacing it with the Federal Reviewing Official step negates any gain.

The elimination of the reconsideration step would increase the efficiency of the process¹⁷¹ and most commenters did not oppose or supported the elimination of reconsideration.¹⁷²

However, any gains in efficiency from eliminating the Reconsideration step are expected to be lost by the addition of the Federal Reviewing Official step.¹⁷³

2. The two major concerns from the elimination of the Appeals Council are the claimants' loss of a right to appeal ALJ decisions and the potential for a large increase in cases going to federal court.

Claimants' representatives frequently opposed the elimination of the Appeals Council, noting that 25 percent of cases are remanded by the body at present;¹⁷⁴ and while the Appeals Council is no paradigm of efficiency, it has performed better in recent years.¹⁷⁵ Commenters consistently expressed concern that the elimination of the Appeals Council would deprive claimants of an important right to appeal ALJ decisions.¹⁷⁶ Some claimants would be intimidated and deterred from appealing ALJ decisions due to the greater expense and difficulty of Federal court, which would be the appellate option after the ALJ decision.¹⁷⁷ The SSA responded that the Appeals Council is inefficient and not effective, as evidenced by the long time taken to issue a decision and the high rate of remands from federal court; the SSA emphasizes the "new

¹⁷⁰ SSA Comments Website postings of anonymous civil servant on October 21, 2005;

¹⁷¹ Consortium for Citizens with Disabilities, *Position Paper on the Commissioner's Proposal to Change the Disability Claims Process* (May 2004) (<http://www.nosscr.org/dibposition.pdf>).

¹⁷² SSA Comments Website postings of Congressmen Jim McCrery and Sander Levin; Rudolph Patterson, esq.; Jeff Feg. Reg. ey Lichtman, esq.; Cynthia Berger, esq.; Peter McKee, esq.; and David M. Pantos, esq. for Legal Services of New Jersey.

¹⁷³ SSA Comments Website posting of Brian Clymer, esq.

¹⁷⁴ SSA Comments Website postings of Feg. Reg. ancis Jackson, esq.; Carol Leyshock; William R. Bates; Thomas Chambers, III, esq.; Steven Rollins, esq.; and National Organization of Social Security Claimants' Representatives (NOSSCR).

¹⁷⁵ GAO Testimony.

¹⁷⁶ 71 Fed. Reg. 16424, 16438; GAO Testimony.

¹⁷⁷ GAO Testimony; SSA Comments Website posting of Cynthia Starkey, esq.

approach” will be faster.¹⁷⁸ Also, the SSA notes that with the FRO step in addition to the ALJ, claimants will have had two opportunities to have their case heard before federal adjudicators.¹⁷⁹

Many sources expect the elimination of the Appeals Council to result in a substantial increase in the number of SSA disability cases being appealed to federal court.¹⁸⁰ The SSA responded to this concern by asserting that the “new approach” will be more accurate with better decisions earlier in the process and thus reduce the need for appeal beyond the ALJ.¹⁸¹ The SSA also notes that the elimination of the Appeals Council will be gradual and in coordination with the implementation.¹⁸²

CONCLUSION

SSA is implementing a sweeping overhaul of the disability determination process, albeit slowly. While gains in efficiency would be welcomed by all, the price of reduced fairness is considered too high by most. While some concerns have been addressed by the SSA, many remain. Major changes including the replacement of the Reconsideration step with the Federal Reviewing Official, the replacement of the Appeals Council with a Disability Review Board lacking an appeal by right, and the increased emphasis on strict schedules at the Administrative Law Judge level are unwelcome. In sum the changes of SSA’s “new approach” are generally not supported and disabled people may suffer as a consequence of the “new approach.”

¹⁷⁸ GAO Testimony.

¹⁷⁹ 71 Fed. Reg. 16424, 16438.

¹⁸⁰ 71 Fed. Reg. 16424, 16438-16439; GAO Testimony; SSA Comments Website posting of Tom Allen.

¹⁸¹ 71 Fed. Reg. 16424, 16438; GAO Testimony.

¹⁸² 71 Fed. Reg. 16424, 16438; GAO Testimony.