



Compression and Rationalization: Demarcating the Roles of DDS and ALJs in the Disability Determination Process

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March 2019



Abstract

Given the excessive wait that claimants must endure before a Social Security disability hearing can be scheduled in front of a federal Administrative Law Judge (ALJ), this paper examines a wide variety of alternative administrative review structures both in the United States and abroad for suggestions to streamline the process. After considering the basic differences in administrative design, the paper focuses on the key criterion of whether new evidence can be freely added to the record after the initial agency decision is made. The paper argues that much of the delay in slating ALJ hearings stems both from the claimant's effort to acquire more medical information after his or her claim is denied by the state Disability Determination Service (DDS) and the ALJ's subsequent need to assess that new evidence. If the record could be closed, then ALJs could act in an appellate capacity when reviewing medical evidence that previously was submitted to DDS and resolve the claim more quickly. Currently, ALJs pay no formal deference to prior DDS findings, even when those findings entail assessment of medical records. ALJs may be in a better position than DDS to assess contested historical facts, but DDS should be more expert in reviewing the medical evidence. Although moving to a closed model is not feasible at this point for a number of reasons, including the difficulty in obtaining medical evidence, demarcating the task of DDS and ALJs more sharply in the long run should result in a more efficient adjudication process and one that should increase accuracy as well.

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This paper has been published as part of the McCrery-Pomeroy SSDI Solutions Initiative, a project dedicated to identifying practical policy changes to improve the Social Security Disability Insurance (SSDI) program and other policies for people with disabilities. More information about the SSDI Solutions Initiative is available at <http://www.SSDISolutions.org/>.

The SSDI Solution Initiative is a project of the Fiscal Institute at the Committee for a Responsible Federal Budget. The views expressed in this paper represent those of its authors and not organizations or individuals affiliated with the authors, the McCrery-Pomeroy SSDI Solutions Initiative, or the Committee for a Responsible Federal Budget.

Permanent Link: <http://www.crfb.org/project/ssdi/compression-and-rationalization-demarcating-roles-dds-and-aljs-disability-determination>

I. Introduction

The four-stage administrative review structure for assessing claims of disability under the Social Security Act has been widely analyzed. Claimants first present claims to state Disability Determination Services (DDS), which assess the claims pursuant to a delegation from the federal agency. A state DDS disability examiner works with a medical or psychological consultant in determining whether the claimant is disabled. Then, in forty states, disappointed claimants can seek review by different decisionmakers within the DDS and furnish supplemental information about their disability if they so choose. At the third stage, claimants can seek a hearing before a Social Security Administration (SSA) Administrative Law Judge (ALJ) and present new evidence of disability as well as examine witnesses. Currently, claimants must wait on average for over a year before receiving that hearing due to the backlog.¹ If a claimant loses before the ALJ, he or she can appeal to the Appeals Council within the agency that can then issue a final decision on behalf of the agency based in most cases on the written record.² Problems of accuracy and efficiency exist at each of the four stages. For instance, ALJs reverse DDS determinations at a rate of almost fifty percent, and in some of those cases, the claimant has presented no new evidence.³ Moreover, even though SSA cannot formally appeal the award of a claim, congressional investigators and the agency itself have concluded that ALJ grants of disability are seriously flawed.^{4,5} Federal district court judges reverse or remand denials of claims in almost fifty percent of the cases they hear.⁶

Systems of mass adjudication pose serious challenges with respect to accuracy, efficiency, and fairness. To consider alternatives to the current system, I examined different administrative systems both within and without the United States.

The comparative assessment revealed that at least some of the inefficiency in ALJ adjudication stems from the ALJ *de novo* review of the medical evidence. There are two dimensions to the issue: first, why should ALJs second-guess medical experts' assessment of the medical evidence; and second, ALJs – who have no formal medical training – are forced to assess the evidence anew in the many cases in which medical

1 See Hearings before the Subcommittee on Social Security, Ways and Means Committee, U.S. House of Representatives, July 25, 2018 (statement of William R. Morton), at 3. <https://gop-waysandmeans.house.gov/wp-content/uploads/2018/07/Morton-Testimony.pdf>.

2 Statement of Patricia Jonas, Deputy Commissioner of the Office of Analytics, Review, and Oversight, Social Security Administration, Subcommittee on Social Security, Ways and Means Committee, U.S. House of Representatives, July 25, 2018, at 5. <https://gop-waysandmeans.house.gov/wp-content/uploads/2018/07/Jonas-Testimony.pdf>. For an in depth description of the four stages of review, see Charles H. Koch, Jr. and David Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 Fla. St. U. L. Rev. 199 (1990).

3 The allowance rate has been dropping. As recently as 2009, the allowance rate was 61%. Harold J. Krent and Scott Morris, *Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms*, Administrative Conference of the United States, April 3, 2013. https://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf.

4 Minority Staff of the Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, U.S. Senate; *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions*, September 13, 2012, at 5. [https://www.hsgac.senate.gov/imo/media/doc/PSI%20Minority%20Report%20-%20Social%20Security%20Disability%20Programs%20\(9-13-12\)2.pdf](https://www.hsgac.senate.gov/imo/media/doc/PSI%20Minority%20Report%20-%20Social%20Security%20Disability%20Programs%20(9-13-12)2.pdf).

5 The Office of General Counsel for the period from 2006 through 2011 voluntarily remanded fifteen percent of the cases appealed to the federal courts for a variety of reasons, such as inadequate ALJ analysis or contradictions within the ALJ decision itself. Krent & Morris, *supra* note 3, at 9. Furthermore, internal SSA review of a sampling of ALJ decisions, both with respect to denials and grants, reveal weaknesses in ALJ analysis. Krent & Morris, *supra*, at 52.

6 Krent and Morris, *supra* note 3, at 9.

evidence is introduced after the DDS determination.⁷ The essay concludes by suggesting a reform for the future under which ALJs would defer to others' assessment of medical evidence and would focus instead principally on the fact-specific vocational evidence presented at the hearing.

II. Brief Comparative Assessment

I initially compared administrative systems along four standard axes, although other points of comparison are possible. I considered the status of the adjudicative officer, the type of hearing held, the number of levels of review, and whether the decisionmakers considered open or closed records.

A. Status of Adjudicative Officer

The independence of the adjudicator differs markedly with respect both to appointment and removal across administrative adjudicative systems. Adjudicators in most systems are appointed by the agency in which they serve. For instance, the qualifications of DDS decisionmakers are set by SSA, and the qualifications of ALJs now are as well because the screening that before was undertaken by the Office of Personnel Management (OPM) recently changed.⁸ In contrast, ALJs in many states are now appointed by an independent agency to serve many agencies at once on a central panel.⁹ With a central panel system, agencies have less influence in determining the type of adjudicator they wish to resolve claims within their jurisdiction.

With respect to removal of adjudicators, there is great variety. Some adjudicators, like the DDS decisionmakers, are monitored closely by the agency. Immigration judges in the Department of Justice (DOJ) pose a similar example – DOJ can fire immigration judges with whom they disagree, and it can set performance standards.¹⁰ Many other administrative judges such as those at boards of contracts appeals act with the same lack of independence, and courts have held that no Due Process issue arises simply because the agency can fire the adjudicator at will.^{11,12} Many administrative systems in Europe and Asia are structured similarly.¹³ Indeed, the decisionmaking itself may be privatized, and the private contractors as under the Medicare Act can be replaced if the agency is displeased with the process.¹⁴

7 See generally Statistical Abstract to ACUS Report, *supra* note 3, at 43-44 (new evidence is submitted in at least 25% of ALJ cases).

8 The Supreme Court in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), determined that ALJs, at least at the Securities and Exchange Commission, are inferior officers and thus must be appointed by the President or head of a department. In response to that decision, agencies such as SSA have ratified prior appointments of ALJs, and now have assumed responsibilities for defining the relevant characteristics for ALJs. See Executive Order 13843 (July 10, 2018) (minimizing OPM's role in setting hiring criteria for ALJs).

9 Larry J. Craddock, *Final Decision Authority and the Central Panel ALJ*, 33 *Journal of the National Association of Administrative Law Judiciary* Issue 2 (2013). Available at: <https://digitalcommons.pepperdine.edu/naalj/vol33/iss2/1/>.

10 See, e.g., Ana Campoy, *Diorama of Dysfunction*, Quartz (Feb. 21, 2017), <https://qz.com/889607/us-immigration-courts-are-a-bureaucratic-backwater-ripe-for-manipulation-by-trumps-white-house/>; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 *Cornell Law Review* 369, 373 (2006).

11 See, e.g., James G. Gilbert & Robert S. Cohen, *Administrative Adjudication in the United States*, 37 *J. Nat'l Ass'n L. Jud.* 222, 232 (2017). *Armed Services board of Contract Appeals*, www.asbca.mil.

12 See, e.g., *Kalaris v. Donovan*, 697 F.2d 376 (D.C. Cir. 1983).

13 Michael Asimow, *Five Models of Administrative Adjudication*, 63 *Am. J. Comp. L.* 3, 11 (2015).

14 See, e.g. *Schweiker v. McClure*, 456 U.S. 188, 195-200 (1982) (addressing role of private adjudicators in Medicare system).

ALJs under the Administrative Procedure Act, on the other hand, are protected from removal except for “cause,” and that cause is to be determined by an independent agency, the Merit Systems Protection Board.^{15,16} Moreover, the pay of individual ALJs cannot be lowered, and ALJs cannot be subjected to performance appraisals. In comparison to the DDS and immigration judge examples, therefore, ALJs are more secure in their jobs and thus arguably more independent in judging.

Congress has made some adjudicative systems even more independent by taking them out of an agency and making them instead a standalone agency. The Courts of Veterans Appeals and the Tax Court provide two cases in point.¹⁷

B. Type of Hearing

Decisions in most global administrative contexts turn on presentation of a written record. Private parties are entitled to notice of the government’s evidence, and then the parties assemble as much of a written record as they can to defend their position.¹⁸ DDS decisionmakers also rely almost entirely on the written medical records that are forwarded to them, and sometimes they supplement those records with medical expert opinions that they solicit. Oral testimony, which is the keystone of the hearing under the Administrative Procedure Act, is a relatively rare phenomenon. Moreover, many hearings at the federal and state administrative level in the United States are adversary in that attorneys represent both sides. In contrast, in SSDI hearings, as in much of the rest of the world, the hearings are magisterial – the decisionmaker marshals and assesses the evidence to recommend a decision to the agency.¹⁹

C. Levels of Review

Almost all administrative adjudication mechanisms involve several layers of review. Under the SSA model, as under Medicare, there are four levels. In sharp contrast, ALJs under some state administrative schemes are final decisionmakers.²⁰ In the federal system, Congress under the Veterans Access, Choice, and Accountability Act of 2014 designated them the final decisionmakers for the purpose of deciding whether to uphold particular discipline meted out against senior Department of Veterans Affairs officials.²¹

Agencies devote a varying level of resources to each administrative level. For SSDI adjudication, more resources per case are invested in the ALJ level – 1,500 ALJs adjudicate approximately 800,000 cases a year. In contrast, the 120,000 appeals each year are adjudicated at SSA by the 70 administrative appeals judges on the Appeals Council.²² SSA expends much less per each of the two million claims filed at the DDS level each year than for each ALJ hearing.²³

15 5 U.S.C. 500 et seq.

16 5 U.S.C. 7521.

17 See Asimow, *supra* note 13, at 14-15; see also www.ustaxcourt.gov; www.uscourts.cavc.gov.

18 Asimow, *supra* note 13, at 17.

19 See, e.g., Asimow, *supra* note 13, at 15-18.

20 See, e.g., <https://doa.wi.gov/Pages/LicensesHearings/DHAALJ.aspx>. For a discussion, see Craddock, *supra* note 9.

21 Pub. L. No. 113-146, Section 707, 128 Stat. 1754, 1798-99 (Aug. 7, 2014).

22 Krent & Morris, *supra* note 3, at 55.

23 See Morton, *supra* note 1, at 4.

In contrast, British agencies tend to devote most resources to the reconsideration stage. Unlike under SSDI, reconsideration typically is provided by a tribunal independent of the agency that made the initial decision.²⁴ The tribunals do not defer to the initial decision, but thereafter, their decisions are subject only to judicial review for legal errors.²⁵ Review in court, therefore, is more narrow than in the United States.²⁶

D. Closed or Open Record

Some administrative systems, such as in state workers' compensation schemes and under SSA, encourage consideration of new evidence at each stage of the administrative review process. Continuous trips to the physician or hospital can highlight a claimant's condition. What may have been murky before can gain clarity. Japanese administrative systems similarly permit introduction of new evidence as it becomes available. In China and Argentina, new evidence can be submitted even at the court level.²⁷ In France, new evidence can be submitted before a specialized administrative court.²⁸

In contrast, many systems close the record after the private party introduces the relevant evidence. In that way, the case file can be reviewed by different entities within the government more seamlessly. For instance, in the security clearance context, both the agency and applicant can appeal an adverse decision to the Defense Office of Hearings Appeals Board, but the Appeals Board may not consider new evidence.²⁹ Absent exceptional circumstances, parties may not introduce new evidence to the SEC Commissioners after the ALJ decision.³⁰ At other times, the second reviewer reviews information in the record de novo as at the SSDI reconsideration and ALJ levels. Moreover, some agencies pay deference to the initial factfinder, as under an appellate model.³¹ No formal deference is paid to ALJ findings under the Administrative Procedure Act.³²

In sum, agency adjudications both within the United States and in other parts of the world vary significantly along the four vectors discussed above: independence of the adjudicator, type of evidence relied upon, levels of review, and an open or closed record.

E. An Additional Variable – the Nature of the Disagreement with the Agency

Absent from this conventional comparison of administrative adjudication is any examination of the nature and character of the individual's or firm's disagreement with the government. That omission is unfortunate, for we can learn much from considering the issues underlying the disagreement.

24 Asimow, *supra* note 13, at 18.

25 *Id.*

26 See H.W.R. Wade & C.F. Forsyth, *Administrative Law* 793-800 (10th ed. 2009).

27 Asimow, *supra* note 13, at 23.

28 *Id.* at 25-26.

29 32 CFR 155 app. A PP 29; see also Nadia A. Patel, "YOU'RE FIRED: Egan and MSPB Review of Security Clearance Divisions," 21 *Fed. Cir. B. J.* 93, 100 (2011).

30 42 CFR 3.548.

31 See, e.g., *New Orleans Stevedores v. Turner*, 661 F.2d 1031, 1037 (5th Cir. 1981) (Benefits Review Board should defer to ALJ findings); see also 32 CFR 155 app. A 32 (deference should be paid to ALJ findings in security clearance context).

32 See, e.g., *Universal Camera v. NLRB*, 340 U.S. 474 (1951) (reasoning that Congress delegated authority to the agency, not the ALJ).

Disagreements with the government may stem from different understanding of applicable legal principles, different view of facts, or over the appropriate policy to follow. Those disagreements all may lead to legal challenges before agency adjudicators, but the role for agency adjudicators may well differ depending on the type of disagreement. Most familiarly, government officials and private parties disagree about historical facts that have prevented an individual or firm from enjoying a government benefit. Licenses for export are granted or revoked after consideration of the underlying facts. Benefits are granted by SSA or the Department of Veterans Affairs after considering the factual situation of the claimant. Such an adjudicative process ensures that the parties have the opportunity to present facts, whether testimony or written evidence, and a hearing officer can resolve differences, creating a record that permits further review. In contrast, agency adjudicators, with some exceptions, have little role in formulating policy.³³ State property tax boards, for instance, may determine payments due based on an algorithm, leaving the ALJ little discretion in considering a challenge from a property owner as to the amount owed.³⁴ Similarly, when government officials value property in a condemnation sale, only a mathematical formula may be used – there may be nothing for the ALJ to consider. Private parties might be able to challenge such general government policy but rarely through administrative adjudication.³⁵

At other times, a private party’s disagreement with the government may be based on a legal disagreement. In those contexts, the ALJ need not conduct a hearing but can enter summary judgment.³⁶ Indeed, most ALJs as at SSA must follow the legal interpretations previously adopted by the agency so must defer when the agency’s interpretation of a statute or regulation governs the government’s disagreement with a private party.³⁷ For another example, employees’ right to unionize may turn on the legal conclusion whether the individuals are employees or independent contractors.³⁸ Little administrative review is needed of such claims because the agency already may have interpreted the statute and regulation, although judges thereafter may disagree on review. In other words, when disagreements about facts exist, there is much for a hearing officer to do: consider testimony, exhibits, records, and so forth. Process protections are critical in that context. In contrast, an ALJ need not afford as much process if the dispute between a private party and the government stems from matters of policy or law.

In the closely related context of Due Process analysis, the Supreme Court has focused on the risk of error that can arise from failing to apply additional procedural protections. The Court’s decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), suggests that the type of hearing held by the ALJ should turn in part on the type of disagreement between private party and the government. As applied to the SSDI context, the Court stated that “by contrast, the decision whether to discontinue disability benefits will turn, in most cases, ‘upon routine, standard, and unbiased medical reports by physician specialists,’ concerning

33 Some agencies, such as the SEC, enjoy the power to fashion policy through a common law process. ALJs in those agencies are more free, as an initial matter, to determine whether the agency is likely to change policy because of recent legal or social changes.

34 See, e.g., *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915) (holding that no hearing constitutionally required to challenge general tax rate).

35 See, e.g., *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271, 283-87 (1984) (“The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy.”).

36 Currently, ALJs typically issue summary judgment when no issues of material fact exist. See, e.g., *United State v. Tom & Yu, Inc.*, 3 OCAHO 796, 1992 OCAHO LEXIS 18 (Mar. 19, 1992). *Flake v. New World Past Co.*, 2003-Sox-18, at 2 (July 7, 2003).

37 See, e.g., Victor G. Rosenblum, *The Right to Cross-Examine Physicians in Social Security Cases*, 26 Fl. St. U. L. Rev. 1049, 1064 (1999).

38 See, e.g., *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (holding that newsboys are employees and not independent contractors within the meaning of the National Labor Relations Act).

a subject whom they have personally examined” *Id.* at 344 (citation omitted). The Court continued that while “there may be professional disagreement with the medical conclusions, the specter of questionable credibility and veracity is not present.” *Id.* Accordingly, the Court held that a full evidentiary hearing was not required before an agency decision to discontinue benefits. Although, at times, medical evidence may be less than convincing on its face, the Court concluded that an ALJ’s role is less critical when faced with such evidence.

In considering the factors explored above in *Mathews v. Eldridge*, the key fact-finding role ascribed to ALJs under the Administrative Procedure Act may be more critical in resolving some types of disagreements than others.³⁹ The underlying question is the extent to which the ALJ can and should reexamine the agency’s evidence or stance that led to the disagreement with the government.⁴⁰

III. Assessment of SSDI Context

As applied more broadly to the SSDI context, all decisions by DDS are not equal. Some are based on a legal question as to eligibility. Some are based on treating physician records, some on whether there are relevant jobs in the economy, and some on the disability onset date. DDS (and ALJs thereafter) must undertake a five-step sequential evaluation process: 1) whether the claimant engages in substantial gainful activity; 2) does the claimant have a severe medical impairment; 3) does the severity of the claimant’s impairment meet or equal the agency’s previously published list of impairments; 4) can the claimant perform past relevant work; and if not, 5) can the claimant perform any work in the national economy?

We are accustomed under the Administrative Procedure Act to ALJ fact-finding that relates to all five steps, but the DDS experts arguably should be just as well placed if not better to make certain determinations under the SSDI program. For instance, if DDS decisionmakers assess the salience of x-rays and medical tests, should ALJs review those same tests without deferring to what the DDS decisionmakers already held? Of course, if ALJs consider factual evidence that the DDS decisionmakers did not consider, then deference would not be due. Similarly, if DDS examiners determine an onset date based on medical records, why should the ALJ review that evidence *de novo*? Consider the first two steps in the sequential assessment. The question of whether the claimant engaged in gainful activity entails both medical and

39 See also Social Security Administration “Use of Functional / Vocational Expertise” Project (2007) <http://www.webility.md/pdfs/SSA-FVE-Core-Report-2007-08-27a.pdf> (suggesting that some medical decisions are more appropriate for deference than others).

40 Consider as well a typical school district. In meting discipline for student misbehavior, the district must consider teacher testimony of historical fact. Those testifying on behalf of the school district are self-interested in the sense of justifying their decision to levy punishment. On the other hand, in deciding what grade level an incoming student is eligible for, the district generally relies on objective factors such as age and prior education. A mistake can still be made, but the evidence underlying the decision is far more objective than the disciplinary decision and, accordingly, the administrative appeals mechanism can be more straightforward, with deference paid to the administrative decision. In between lies the decision of placement for special education. The decision relies upon subjective judgments, but the district only reaches that decision after a thorough discussion by professionals, as indeed is mandated under the Individuals with Disabilities Education Act, 20 USC 1400 et seq. Input must be received from the child’s parent, one of the child’s general education teachers, a special education teacher, a school psychologist, and a district representative with authority over special education. The participation of so many experts minimizes, to a degree, the prospect that the final decision will be hasty or ill thought out. In considering the propriety of any administrative adjudicative mechanism, therefore, legislators should consider the nature of the dispute between the parties.

claimant testimony. Focusing on medical evidence to the exclusion of all else may result in too myopic a view. On the other hand, determining the severity of the claimant's impairment and, indeed, whether it meets the agency's listing depends little on testimony. Although the medical information may conflict, why should the agency privilege the ALJ's resolution of potentially conflicting medical evidence over that of DDS unless new information is submitted?

With respect to the vocational inquiry, ALJs should be in a better position than DDS to assess whether the claimant can perform past relevant work or any work in the national economy. The ALJ, not DDS, examines the claimant in person or via video, and DDS decisionmakers have no particular expertise in determining whether suitable jobs exist in the economy.⁴¹

Deference is consistent with the overall structure of the Social Security Act, which provides in part that the "Commissioner shall give [claimants] . . . reasonable notice and opportunity for a hearing with respect to [an adverse] decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision."⁴² That statutory directive does not remove the potential that the ALJ, in addition to receiving evidence at the hearing, may defer to some findings previously made at the DDS level.

As a theoretical matter, therefore, SSA should consider restructuring the SSDI hearing so that ALJs can use the medical findings as a baseline instead of reinventing the wheel. The question framed for resolution would then be either whether the medical findings of DDS are unreasonable or whether the testimony of the claimant convinces the ALJ that the prior findings are untenable. In short, ALJs should act in both an appellate and fact-finding capacity.⁴³ That new understanding could streamline the ALJ stage of administrative review and reduce the backlog significantly.

Some might argue that ALJs today often defer to assessment of the medical testimony at the DDS level. Perhaps, yet the inquiry formally is *de novo* and that standard of review governs the inquiry. Acknowledging an appellate role frames the ALJ decision differently and might well lead to different results. The shift, at a minimum, should bring more efficiency, permitting ALJs to resolve appeals more expeditiously and, possibly, more accurately.

At present, however, the above proposal is not feasible. The proposal could only work if the record were closed after the DDS determinations. Closing the record would be critical to allow the ALJ to focus on whether there is sufficient testimony or mistakes to undercut reliance on the medical information relied on at the DDS level. Appellate review, in other words, cannot exist if the target is moving.

Currently, there is no way to close the record after the DDS determination. First, claimants have a difficult time obtaining pertinent medical records, both because of cost and time. Hospitals and doctors

41 DDS and ALJs would benefit from updated vocational guidelines. The Department of Labor last updated the list of relevant jobs and related skills in 1991, well before the digital revolution. Indeed, courts have chided SSA for relying on such an outdated occupational classification system, see, e.g., *Browning v. Colvin*, 766 F.3d 702, 708 (7th Cir. 2014). and SSA has acknowledged the problem. See, e.g., *Jonas*, supra note 2, at 6.

42 42 U.S.C. 405(b)(1).

43 For a rare example of an ALJ acting in an appellate context, see *Al-Shabazz v. State*, 527 S.E.2d 742 (S. Car. 1999).

understandably do not prioritize requests for records, and some charge a good deal for copying costs. Indeed, concern for HIPAA compliance may compound the delays.⁴⁴ Second, given the year plus lag time between the DDS decision and the hearing before the ALJ, new medical records are generated that may be germane to the disability decision.⁴⁵ Finally, both DDS and ALJs struggle because of the growing prevalence of disability based in whole or in part on subjective complaints of pain and fatigue. There is very little that medicine can tell us about the severity of pain experienced or the degree to which a mental impairment prevents someone from tackling a particular job. SSA has acknowledged the problem and has announced that it is trying to update the musculoskeletal listings, but whether it will be able to attain greater specificity is unclear.⁴⁶ And, when one factors in the difficulty in assessing mental illness, the task confronting the SSA decisionmaker is even more daunting.

Nonetheless, over time, SSA could keep the ALJ hearing as a centerpiece of the claims process but limit the ALJ fact-finding so as not to second-guess what the agency's own experts have concluded from the medical evidence. The more objective the disability test, the less there would be for the ALJ to consider.⁴⁷ The ALJ hearing could proceed much more expeditiously – it would serve as a critical safety valve either if DDS examiners miss critical steps or if the claimant testimony undermines faith in the prior medical determinations. To be sure, any ALJ deference would require SSA to put more resources into making sure that the DDS get the disability determination correct, much as current arguments for gutting reconsideration make the case that shift in resources into the first DDS hearing would enhance accuracy significantly.⁴⁸ And, there would be less objection to closing the record if the ALJ had to hear the case within 60 days or so of the DDS decision.⁴⁹ As one step, SSA could direct DDS to help ensure that the record is complete before a determination is reached. Updating the Department of Labor's occupational classification system, as mentioned earlier, also would represent a significant step toward making the DDS decision more uniform and dependable.

At the end of the day, ALJ determinations have transformed out of necessity into de novo consideration of new medical evidence. That necessity has arisen as delays between DDS determination and ALJ hearings have increased. An experiment to shorten the waiting time radically should bring with it a concomitant shift in the role of the ALJ. DDS offices are to evaluate medical evidence; ALJs are to evaluate testimony. Under a compressed system, one would expect more accurate determinations at the DDS level as the

44 See generally SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region I Pilot Project (ACUS Dec. 23, 2013), at 63-64. Available at https://www.acus.gov/sites/default/files/documents/Assessing%20Impact%20of%20Region%20I%20Pilot%20Program%20Report_12_23_13_final.pdf.

45 https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html.

46 Jonas, *supra* note 2, at 8.

47 Interestingly, at its inception, the authors of SSDI intended that most of the determinations would rest on objective factors. See, e.g., Robert G. Dixon, *Social Security Disability and Mass Justice* 15 (1973) (noting that the Advisory Committee to the Senate Committee charged with drafting the statute “recommends that compensable disabilities be restricted to those which can be objectively determined by medical examination or test. In this way, the problems involved in the adjudication of claims based on purely subjective symptoms can be avoided.”).

48 See, e.g., Jon C. Dubin, *Social Security Disability Adjudicative Reform: Ending the Reconsideration State of SSDI Adjudication after Sixteen Years of Testing and Enhancing Initial Stage Record Developments* 180-82 (SSDI Solutions 2016). Available at <http://crfb.org/sites/default/files/dubin.pdf>.

49 On the one hand, the change might precipitate more appeals because some disappointed claimants currently may drop requests for hearings due to the time lag. If the claims are sound, that delay can be tragic. On the other hand, given that the record is closed, claimants may have less interest in pursuing a hearing if they lose at the DDS level. SSA would need to build a pilot project to test the impact on filing rates.

agency shifts resources there; the availability of expedited appeals for disappointed claimants; and less administrative expenses for the agency at the ALJ level. Disappointed claimants might struggle to find attorneys to represent them on appeal because of the reduced waiting time and therefore might opt instead to resubmit a claim to DDS when new medical evidence is obtained – a result that might square with goals of efficiency and ensuring that disabled individuals receive benefits when due.

IV. Conclusion

In short, Congress and agencies rarely have utilized ALJs in an appellate capacity. ALJs may be in a better position than agencies to assess contested historical facts, but they generally are not in a better position to formulate agency policy or to examine medical evidence. Relying on DDS to get the medical evidence right would then free up the ALJ to serve as a backstop for any unreasonable DDS assessment and to consider whether any proffered testimony was salient enough to warrant overruling the DDS determination. Demarcating the task of DDS and ALJs more sharply can result in a more effective, streamlined adjudication process, and one that should increase accuracy as well.

About the McCrery-Pomeroy SSDI Solutions Initiative

The McCrery-Pomeroy SSDI Solutions Initiative is a project dedicated to identifying practical policy changes to improve the Social Security Disability Insurance (SSDI) program and other policies for people with disabilities. Launched in 2014, the initiative originally commissioned a number of accomplished policy experts from a variety of backgrounds to put forward 12 different policy proposals, each addressing a unique issue with current disability policy. These papers were peer-reviewed, presented at the Initiative’s 2015 SSDI Solutions Conference, and ultimately published in the 2016 book [SSDI Solutions: Ideas to Strengthen the Social Security Disability Insurance Program](#). The Initiative’s work helped to elevate SSDI to the attention of policymakers and has led to the proposal, enactment, and implementation of numerous legislative and regulatory improvements.

Beginning in 2018, the SSDI Solutions Initiative commissioned seven additional papers designed to build upon the work of the 2016 book. These papers will present additional research, offer implementation guidance, or offer new ideas to further improve disability policy in the United States.

The SSDI Solutions Initiative is co-chaired by former Congressmen Earl Pomeroy (D-ND) and Jim McCrery (R-LA), both former Chairmen of the House Ways & Means Social Security Subcommittee. The SSDI Solutions Initiative is a project of the Fiscal Institute at the Committee for a Responsible Federal Budget.

More information about the SSDI Solutions Initiative is available at <http://www.SSDISolutions.org/>.

Other Papers in This Series

- [“Developing Social Security Disability \(SSDI\) Reform Demonstrations to Improve Opportunities and Outcomes Based on Lessons Learned”](#) by Jason Fichtner and Jason Seligman
- [“Development of an Employment/Eligibility Services \(EES\) System”](#) by David Stapleton, Yonatan Ben-Shalom, and David Mann