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Effectiveness of the Social Security Review System in Disability Cases

William D. Popkin*

1. AGENCY CONSTRAINTS

The effectiveness of administrative adjudication can be determined only in the context of the constraints faced by an agency. Three major constraints confront the Social Security Administration in resolving disability disputes; the large volume of cases; the difficulty of the legal issue to be resolved; and the relationship of the federal government to the state agencies which make the initial disability determination.

The disability program¹ generated over one million applications last year. Less than twenty percent of these claims were easily disposed of on technical grounds and the remainder involved varying degrees of complexity. Some cases were resolved easily in the claimant's favor by the application of rules of thumb contained in the regulations based on the age, work experience, and education of the claimant. Another group of cases was decided in favor of the claimant solely on the basis of medical impairments specified by regulation. The medical issue might have been an easy one, based on unambiguous diagnostic tests, or a complex one, involving lower back injuries or psycho-neurotic disturbances.

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¹Our discussion is limited to the disability program funded by payroll taxes. The new Supplementary Security Income program will generate additional claims.

The agency has only limited authority, however, to issue regulations to dispose of cases on simple legal criteria or on the basis of medical judgment. The ultimate issue in Social Security disability cases not disposed of on the grounds just mentioned is the most difficult of all disability issues. The individual's residual capacity to function must be determined after account is taken of the medical impairment, and this capacity must be matched with jobs available on the national market in the light of the individual's vocational background. Furthermore, the disability issue is "all or nothing." There is no room for surreptitious compromise. The claimant is either disabled or not disabled and there is no opportunity, by allowing a recovery for partial disability, to satisfy the claimant with a portion of a loaf. Finally, the government is unable to indulge a simplifying presumption in favor of the claimant as it does in the Federal Employees Compensation and the Veterans disability programs. Social Security is not limited to a favored group of individuals, such as veterans and workers who suffer disabilities in connection with their work.

The third constraint, besides the volume of cases and the difficulty of the legal issue, is the relationship of the federal agency to state Vocational Rehabilitation Agencies. These state agencies are responsible for initial disability determinations and they are extremely jealous of their prerogatives. They are staffed by doctors and vocational evaluators, who are not lawyers. No critique of the current system can avoid these political and personnel limitations on changes in the present way of doing things.

With this background, the effectiveness of the review system can be examined from several perspectives. The first is the managerial perspective: how effective is the agency in sifting out easier cases at earlier stages of decision. The second perspective is judicial: does the judge function properly at the hearing level. The third perspective is from the claimant's point of view: does the claimant have adequate access to representation to present his case effectively.

2. MANAGERIAL PERSPECTIVE

As noted above, the Social Security Administration has a limited ability to simplify the issues to avoid the question of economic disability. The state agencies are able to dispose of approximately 94% of the cases, either by allowing a little less than one-half of the claims on grounds other than economic disability, or by disallowing a little less than one-half of the claims on technical grounds or because the

claimant was not economically disabled. The state agency is instructed by the federal Bureau of Disability Insurance to presume that a claimant is not economically disabled. Of the remaining 6% of the cases (around 60,000) which are reviewed by an administrative law judge (ALJ), almost half are reversed.

At the outset, it should be remembered that this reversal rate does not necessarily reflect adversely on the state's decision-making process. The file is "open" in the sense that new evidence may be submitted to the ALJ. Many "reversals" are really "allowances" based on evidence not previously presented. One suggestion which deserves consideration is to allow the ALJ to remand the case to the state agency for further development and decision whenever there is new evidence.

The "reversal" rate is also understandable for another reason. Most of the cases which reach the hearing stage involve economic disability issues. It is no reflection on the state agency that it has been unable to resolve cases in favor of claimants on this ground. First, the doctors and vocational specialists who decide cases at the state level do not see the claimant and it is difficult to make judgments concerning inability to work unless the claimant has been confronted. An experiment allowing state officials to interview claimants has been tried but apparently rejected because of uncertain costs.

Even if a personal meeting were arranged, however, there would be a second reason for not expecting the state agency to decide in favor of the claimant on grounds of economic disability. Economic disability is not an issue which can best be handled by doctors and civil servants who are not lawyers. The issue is a complex legal one involving careful scrutiny of the validity of medical judgments and the application of the standards of employability contained in the Act to those medical judgments, translated from medical terminology into specific impairments of bodily functions. The inappropriateness of state agency adjudication of these issues has been recognized, as we noted earlier, by the presumption against economic disability contained in the federal instructions to the state officials.

It might be suggested that the state agency's inability to deal with economic disability is not really a problem because the claimant can always get an evidentiary hearing before an ALJ. But many claimants do not appeal. Furthermore, claimants have six months to appeal to an ALJ and they often delay until this period has almost expired. Meanwhile, they are not receiving payments.

The solution is to find some way of identifying cases involving economic disability issues at an early stage of adjudication and to present

these cases to qualified judges for decision. Differentiation of cases within an agency for handling by officials with disparate training is not a novelty. The analogy that comes to mind is the Internal Revenue Service's use of revenue agents for more complicated business audits and revenue officers for the simpler cases involving individual personal returns. The Social Security Administration currently classifies cases by 13 body systems (*e.g.*, cardiovascular, sense organs, etc.). Perhaps a study of the relationship of the affected body system to the issues arising on appeal might enable advance identification of economic disability cases.

If the appropriate cases can be identified, who should the judge be? One possibility is for the case to be immediately referred to an ALJ for a determination based on an evidentiary hearing. This will mean more work for the ALJs, however, and also encroach upon the state agency's prerogatives. Another alternative is to require state agencies to hire individuals who are capable of hearing and deciding such issues and to allow a *de novo* appeal to ALJs, much as the Tax Court currently reviews the decisions of IRS personnel.

3. JUDICIAL PERSPECTIVE

Even if the problem of sifting out difficult cases is effectively handled, the role of the ALJ must be evaluated. The problem of the ALJ's role is the much discussed question of the non-adversary nature of the evidentiary hearing. By non-adversary I refer to the fact that the government does not have an attorney; the claimant's lack of an attorney is discussed in a later section.

Two problems arise from the government's failure to have an attorney. First, a government attorney can perform many useful functions in developing a case which are presently thrust upon the ALJ. However, the problem of case development does not necessarily have to be resolved by hiring government attorneys. Effective utilization by ALJs of hearing assistants, if a sufficient number were provided, might handle the case development problem and free ALJs for deciding cases. The assignment of law clerks to judges is, of course, not unfamiliar. Law clerks are available to the Board of Veterans Appeals and to the Appeals Council in the Bureau of Hearings and Appeals of the Social Security Administration.

A second problem is the danger of bias and appearance of bias when the ALJ is responsible for developing a case and then deciding it. My own guess concerning the appearance of bias is that claimants do not

have this perception. It seems likely that the claimant's pleasure at seeing the person who is deciding his case and the ALJ's effectiveness in bending over backwards to appear fair prevent any appearance of pro-government prejudice.

The risks of actual bias also appear to be slight. The danger of a predetermined bias in favor of the government seems greatest when an ALJ has responsibility for the initial development of a case and when the case arises to vindicate agency policy. Neither of these problems are presented in Social Security disability adjudication. The ALJ's responsibility is not to handle the initial development of the case, but to probe an already well-developed case. Furthermore, the case is initiated by a claimant seeking benefits under a mass benefit program, not by an agency which has selected the case to implement its policies.

Even if the adjudication process could benefit from the presence of government attorneys, however, careful attention must be paid to the disadvantages. First, the problem of the claimant's lack of representation, discussed below, becomes far more serious if the government has an attorney. The appearance of unfairness would be considerable. Second, the hiring of a government attorney is likely to accentuate the spirit of adversariness. Each side would be more prone to hire its own experts. There is serious doubt whether conflicting experts bring enough (or any) advantages in determining the truth to offset the social cost that this would involve, especially in view of the shortage of good doctors to perform this task. The recent trend in personal injury litigation has been away from courtroom resolution of such disputes, as evidenced by "no-fault" insurance.

There are two qualifications to these observations which might affect a very limited number of cases heard by ALJs. First, if disputes which do not involve a clash of experts can be identified, the government might be represented with little risk of an increase in adversary spirit. Cases involving legal issues devoid of medical questions, such as the status of a person as an employee eligible for social security benefits, would fit the description. Attorneys represent the government in Federal Employee Compensation Appeals and their primary role is to be useful when there are difficult legal questions not involving a dispute over the degree of disability.

Second, there may be advantages to allowing government attorneys to handle cases on remand from a court. ALJs may be especially sensitive about probing the facts in these cases because they have already been reversed by a higher authority. Furthermore, claimants are represented in virtually all of these cases.

A final word of caution about non-adversary hearings concerns the GS-15 grade level of Social Security ALJs and the higher grade level usually held by ALJs in the regulatory agencies. The delicate role of investigating and judging medical evidence as it relates to economic disability calls for extreme sensitivity to the complex role that the judge must play, and requires considerable skills in cross-examination. These facts alone would seem to justify a grade GS-16 for Social Security ALJs. There is a further reason for equalizing the grade levels, however. The judge's legal skills must be supplemented by a thorough knowledge of the substantive features of the disability program. The qualifications of an ALJ, which are primarily those of a skilled lawyer familiar with adjudication, are not enough. If ALJs seek jobs in the regulatory agencies to improve their status, they are likely to leave the Social Security Administration just when they are acquiring the necessary expertise. Indeed, if there were a heavy turnover in Social Security ALJs, it might be necessary to reconsider the recommendation made above that government attorneys are unnecessary. Such attorneys might be essential to compensate for inexperienced ALJs.

4. CLAIMANT'S PERSPECTIVE

The third perspective for evaluating the effectiveness of Social Security adjudication is the claimant's access to a representative to present his case effectively. One Social Security study has shown a positive relationship between a representative and claimant success. Much more information is needed, however, before translating this finding into a recommendation. First, it is possible that representatives take easy cases in the first place. Second, even if representatives are effective in winning cases, it is unclear by what process this would be accomplished. Is it by marshalling evidence, by written argument, by examining or cross-examining witnesses, or by some other means? If their major function is to gather expert testimony, the solution may not be more representatives for claimants, but rather greater care by the agency in developing cases for the claimants and perhaps even free medical examinations by doctors chosen by the claimant. Third, different kinds of representatives may have varying effects. Representatives may be attorneys, law students, non-attorney specialists in disability adjudication, employees of unions or of veterans' organizations, or other para-professionals.

My own guess is that representatives help claimants, but that there is no need that they be attorneys. Indeed, non-attorney specialists

(para-professionals) may do a far more effective job in an area as unfamiliar to most practitioners as disability claims adjudication, where gathering evidence for orderly presentation and reinforcing the claimant's confidence may be the major skills needed. Attorneys, especially if their training is in courtroom litigation, may even have an adverse effect on the proceedings by mystifying the claimant and "over-proceduralizing" the hearing.

The major skill para-professionals may lack is the ability to cross-examine. The recent Supreme Court case of *Richardson v. Wright* (405 U.S. 208 (1972)) has questioned the importance of cross-examination when conclusory judgments are being challenged (whether the claimant is disabled, for example), rather than the credibility or veracity of the witness. But even if we concede the importance of cross-examination in probing the assumptions which lie behind conclusions about medical impairments and disability, a note of realism is in order. Most attorneys cannot cross-examine very well. As long as that is true, it is better to accept and even encourage para-professionals to represent claimants than to hold out for an unattainable ideal.

There are elements of unrealism, however, in a decision to encourage para-professional assistance in Social Security adjudication. There is no natural group, such as a union or a veterans organization, which can produce para-professionals to represent claimants on a large scale, and law students are not likely to fill the vacuum. It is very difficult to organize para-professional assistance from the bottom up when economic rewards are not great.

I, therefore, have no recommendation to make at present about representation for claimants. I simply do not know how effective representatives are, what they would do for the claimant if they were effective, how different kinds of representatives would perform, and where the representatives would come from. I am sure, however, that the current standards of due process set by the Supreme Court should not limit our consideration of this problem. Even though the Court has not extended the right to free counsel to civil cases,² our concern with access to effective administrative review need not be so restricted. The shortage of representatives, the uncertainty about their utility and their effect on the hearing process, and the varieties of possible financing techniques to provide free representation probably make it desirable for the Court to be wary of a hasty extension of a right to free

²Nor is it likely to do so in the near future. Cf., *U.S. v. Kras*, 409 U.S. 434 (1973) (no waiver of filing fee in bankruptcy cases); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (no waiver of filing fee on appeal in welfare cases).

counsel outside of the criminal area. The Court's legitimate impotence to resolve this problem, however, is a challenge to others to develop appropriate solutions.

5. CONCLUSION

A final word is in order concerning the role of the legal profession in considering the issues I have discussed. It is no accident that the problems referred to in this paper—managerial considerations, non-adversary procedures, and the use of para-professionals in administrative adjudication—have not received much attention from the profession. Lawyers have not been too concerned with administering their own offices, let alone public administration. Non-adversary procedures are not very Anglo-Saxon and are even faintly immoral. Para-professionals are often thought of as a threat to the profession and discussion of the subject usually ends up with a debate over unauthorized practice of the law. Nonetheless we must face these problems if the legal profession is to meet the challenge of mass administration of distributive justice.