REPORT NO. 3 OF THE
COMMISSION ON LEGAL PROBLEMS
OF THE ELDERLY
PRESENTED JOINTLY WITH THE
COMMISSION ON THE MENTALLY DISABLED

RECOMMENDATIONS*

BE IT RESOLVED, That the American Bar Association supports efforts to improve the administrative process utilized by the Social Security Administration in accordance with the following principles recommended by the Symposium on Federal Disability Benefit Programs.

I. Further Clarification of Disability Standards
   A. The Social Security Administration (SSA) should continue its efforts to clarify the definition of disability through the issuance of regulations open to notice and comment. Issuance of these regulations should not be unduly delayed by the Office of Management and Budget’s review process.
   B. The standards utilized to determine eligibility should be consistent at all levels: in state disability determinations, SSA decisions (including ALJ determinations) and judicial decisions. To help ensure consistency, SSA should abandon its policy of intra-circuit non-acquiescence at all levels.
   C. SSA should foster and participate in future symposia and other meetings between SSA officials (including ALJs) and practitioners and others involved in the disability process.

II. State Level Procedures
   A. Improve Quality of Initial Determinations
      1. The initial application intake process should be improved. Productivity guidelines and form questionnaires used by SSA must be revised to promote development of complete, accurate information during the initial intake interview with the claimant.
      2. Strong emphasis should be given to improving the quality of state determinations so that fewer appeals will be necessary.
      3. Better training should be given to state disability examiners, and emphasis should be placed on the quality, not simply the speed, of their determinations. More realistic assessments of

*The recommendation was amended and approved. See page 46.
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Bar Association supports
the following principles
of Disability Benefit Pro-

1. SSA should continue dis-
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2. Eligibility should be con-
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3. SSA should abandon its
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4. Improving the quality of
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ability to engage in substantial gainful activity should be
made by state disability determination offices.

4. SSA should implement the Social Security Disability Ben-
efits Reform Act of 1984 by pursuing and evaluating demon-
stration projects with face-to-face interaction between
claimants and decisionmakers at the earliest practicable lev-
els.

B. Provide More Information to Claimants on Procedures and
Burdens of Proof
1. Claimants should receive, at the earliest feasible point, clear
information regarding the elements which they must prove
at each stage of the disability determination process (in-
cluding ALJ hearing).

2. Before any action is taken in a case, claimants should re-
ceive a report of the status of their file, along with copies of
any records placed in their file by the government or any
third party. Claimants should also receive notice of any in-
formation not in the file, which under normal procedures
would have been included.

3. In particular, claimants should receive copies of all reports
made by consultative and treating physicians and other spe-
cialists or experts.

4. SSA should carry through its intention to publish, and make
widely available, portions of the Program Operations Manual System (POMS)
that are relevant to handling and de-
ciding disability claims.

5. SSA should promulgate regulations on how determinations
of medical equivalency to the listings of impairment should
be made.

C. Improve the Quality of Medical Evidence
1. SSA should give special weight to the reports of treating
physicians and should communicate that policy throughout
the system.

2. Vigorous efforts should be made to obtain treating physi-
cians’ reports. When a treating physician’s report is not de-
tailed or comprehensive enough, every practicable effort
should be made to obtain a supplemental report from the
treating physician, and claimants and their representatives
should be notified of this policy.

3. SSA should increase efforts to educate the medical com-
community regarding the eligibility criteria used in the disabil-
ity program and the kind of medical evidence SSA requires,
in order to increase the number of physicians capable of
meeting SSA standards and requirements.

4. Consultative examiners should be held to the highest med-
ic standards in communicating with, examining and di-
agnosing applicants. Their reports should also be required to
conform to the highest standards. The examiners should
note the length and extent of the examination on the re-
port.
5. Consultative physicians should be provided with all prior medical records available. SSA should periodically audit the performance of consultative physicians based on the consistency of their reports with prior and later medical opinions.

6. SSA should reconsider the usefulness of the Department of Labor's Dictionary of Occupational Titles in accurately describing the existing relationship between medical conditions and vocational opportunities.

D. Make the Quality Assurance Program More Constructive
The SSA's quality assurance program should strive to operate with objective criteria and should be based on regulatory guidelines. It should not be used primarily as a means to cut the budget. It should not limit itself to merely remanding cases, but should promote a constructive dialogue within the decisionmaking process.

III. Administrative Law Judge (ALJ) Hearings
A. Protect ALJ's Role as Factfinder
   1. Whether or not the claimant or government has a representative at the hearing, the role of the ALJ is special and should continue to require development of the factual record and close contact with the claimant. The hearing should not be conducted in an adversarial setting.
   2. Performance reviews of ALJs should be based as much on the quality of their product, as on the quantity of product.
   3. SSA should ensure that staff attorneys be directly responsible to individual ALJs and that ALJs remain ultimately responsible for decisions. To that end, SSA should strive to hire sufficient staff attorneys so that individual attorneys are assigned to one or two individual ALJs.
   4. Office of Hearings and Appeals (OHA) should continue to develop its practice and procedure manual for ALJ hearings.
   5. SSA should encourage U.S. Attorneys to keep ALJs informed of all subsequent court actions pertaining to their decisions.
   6. ALJs should be obliged to make individualized findings of fact that apprise claimants of the specific basis of decisions.

B. Review Merits of Government Representation Project
   1. SSA should develop and disseminate more statistical data on the Government Representation Project, including its effectiveness and fairness to claimants, and should continue to regard it as experimental.
   2. SSA should examine carefully the cost-effectiveness of continuing the Government Representation Project.

IV. Appeals Council
A. Limit Scope of Review
   1. The Appeals Council's scope of review should be limited to clear errors of law or lack of substantial evidence for
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review should be limited
ubstantial evidence for
factual conclusions. Moreover, the ALJ’s findings as to
witness credibility ordinarily should not be subject to re-
view. If the Appeals Council overturns factual determi-
nations by ALJs, it should cite specific reasons for doing
so.
2. ALJ findings of fact should never be reversed without a
review of the tape recording of the hearing by the Appeals
Council.

B. Time Limit
Congress should provide that if the Appeals Council does not
act upon a request for review within a specified period of
time, then claimants are deemed to have exhausted their ad-
ministrative remedies and may seek review in federal district
court.

BE IT FURTHER RESOLVED, That the American Bar Associa-
tion opposes continuation of the Social Security Administration
Representation Project;

BE IT FURTHER RESOLVED, That the American Bar Associa-
tion supports legislation or administrative action to provide that if
the Appeals Council does not render a final decision upon a re-
quest for review within 90 days, it shall notify the claimant that the
claimant may elect to seek review in federal district court without
further exhaustion of administrative remedies within 60 days after
receipt of the notice from the Appeals Council or within such fur-
ther time as is extended by the Appeals Council; and

BE IT FURTHER RESOLVED, That the American Bar Associa-
tion urges a complete study of Appeals Council procedures and
functions to determine whether Appeals Council review is necessary
and to suggest any needed changes in its structure, methods of op-
eration, delegation of authority, and role as policy maker.

REPORT

I. THE ABA SHOULD
ENDORSE THE CONSENSUS
RECOMMENDATIONS OF
THE SYMPOSIUM ON
FEDERAL DISABILITY
BENEFIT PROGRAMS

On October 11–12, 1983 leading
jurists, government officials, acad-
emicians, representatives of Social
Security claimants, and Congress-
ional staff attended the Sympo-
sium on Federal Disability Benefit

Programs cosponsored by the
American Bar Association, the
ABA Administrative Law Section
and the Commission on Legal
Problems of the Elderly, the Ad-
ministrative Conference of the
United States, Case Western Re-
serve School of Law and the Cleve-
land Foundation. The Symposium
provided a forum for experts in the
field to discuss the current system
utilized by the Social Security Ad-
administration (SSA) to determine eligibility for Social Security Disability and Supplemental Security Income Benefits and the administrative appeals process available to claimants. Included in this report is the “Report and Recommendations” of the Symposium. That Report contains a summary of the conference discussions, recommendations upon which consensus was generally reached and comments of participants on the Recommendations.

Because one primary goal of the ABA is to improve the American system of justice, it is particularly important for us to study and make constructive suggestions for improving the administrative review process available to aggrieved Social Security claimants to ensure that it is both efficient and fair. The Social Security ALJ hearing system is the largest adjudicatory system in the world, holding more trial-type hearings annually than the entire federal court system. Social Security ALJs handle more than 275,000 appeals each year. In FY 1984, over 1,225,000 people applied for Social Security retirement or disability benefits.

Besides the sheer volume of administrative claims handled by the Social Security Administration, the quality of decisionmaking in this system can have a profound effect on the lives and well-being of literally millions of Americans. As we have seen in recent years, decisions to stop benefits can be actually “life and death” decisions in some cases, as individuals have died as a result of losing benefits. On the other hand, accurate decisions are needed to ensure that ineligible individuals do not receive benefits. As the federal government faces unprecedented federal deficits, it is extremely important that benefits are not granted to persons who do not meet statutory eligibility standards.

Therefore, the Symposium cosponsored by the ABA was of critical importance. It enabled a widely diverse group of experts, many of whom have been adversaries in court, to examine the SSA disability determination process and suggest changes.

The Symposium fostered the creation of thoughtful, well-reasoned recommendations to form a foundation for ABA policy. The invited Symposium participants heard presentations on the following topics: initial determinations, reconsideration, ALJ hearings, the Appeals Council and alternatives to the current process. Panels comprised of experts with often competing or conflicting views discussed current practices and recommendations for change. Each panel was followed by lively discussion between panel members and participants. The Symposium provided a truly unique opportunity for partisans to air divergent views and to attempt to reach a consensus about extremely controversial issues.

The process produced a set of recommendations which were circulated to participants for review and comment. These recommendations, modified slightly in response to comments from participants, were largely agreed upon. It is important to observe that the Social Security Administration has endorsed most of the suggested changes in its procedures, with the exception of the recommendation to limit the scope of review of the Appeals Council. (Comments of participants are appended to the Symposium Report and Recommendations in alphabetical order by
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of the "Symposium on Federal Disability
program, refer to pages 2–13 of the
"Symposium on Federal Disability
and Recommendations" appended to this
The ABA, as called for by the first
resolution submitted by this report.

II. THE ABA SHOULD ADOPT
THREE ADDITIONAL
RECOMMENDATIONS

The three additional recommenda-
tions submitted with this report
cover additional matters which
arose out of the recommendations
from the Symposium. Because the
Symposium recommendations are
general as is typical of consensus
resolutions, several, more specific,
concrete recommendations have been prepared to provide the basis
for clear ABA policy.

A. The Government
Representation Project
Should Be Abolished

The first additional and more-
specific recommendation opposes
continuation of the Social Security
Government Representation Project
(GRP). The GRP was initiated in

1The GRP is officially titled the Social Se-
curity Administration Representative Pro-
gram (SSARP) 20 C.F.R. §404.965. Serious
concerns about the GRP were raised by
Symposium participants and others. These
color can be summarized as follows:

1. MORE EFFICIENT AND FAIR
METHODS EXIST TO DEVELOP
BETTER FACTUAL RECORDS
FOR HEARINGS

If the purpose of the GRP is to ensure
that a better factual record is developed
upon which an ALJ can make a determina-
tion, it is unnecessary, and counterproduc-
tive to have this evidence gathered by
a person whose role is to represent SSA
against the claimant. Further factual de-
velopment of claimants’ records can and
should be conducted by someone who is
objective rather than in an adversarial re-
lation to claimants. The $1 million spent
per year on the project could be used to
improve initial determinations to minimize the
number of appeals. Fact gathering by an
SSA representative may result in skewing
the investigation against the claimant, or-
dering unnecessary medical tests, and de-
laying the process.

2. THE GRP MAKES THE HEARING
PROCESS MORE ADVERSARIAL

Social Security is a public agency
charged with the duty to provide benefits
to everyone who applies and meets stated
eligibility requirements. In the GRP, Social
Security staff persons represent the inter-
est of the Social Security Administration as
if SSA’s interest is to protect Social Security
funds from claims of eligible claimants.
Symposium participants agreed that the ALJ
hearing procedure should remain nonad-
versarial.

As one court recently noted:
"Under the notice of proposed rule mak-
ing and the final rule making by the Secre-
tary in the adoption of the SSARP
regulations, it was represented that the
SSAR’s would be non-adversarial. It has
become manifestly apparent to this court
that the SSAR’s in practice have been
almost totally adversative, and that their
pre-hearing development of claims has
been one-sided in development in favor of
the Secretary in disregard of their duty to
fairly and fully develop the claim not
only for the Secretary but also for the
claimant. This case just represents one
bad example among dozens of others that
the Court has observed since the incep-
tion of the program in October of 1982,
at the Kingsport, Tennessee Office of
Hearings and Appeals. The court cannot
help but observe that if the experimental
program cannot be fairly administered
and if the SSAR’s cannot act in a non-
adversary manner in developing pending
1982 as an “experiment” in four cities slated to last for one year to study the effect of participation of attorneys and others representing the Social Security Administration at administrative hearings. 47 Fed. Reg. 36117, August 19, 1982. Despite the lack of conclusive data (or perhaps because of the lack of conclusive data) the GRP is still operating four years later. The GRP was created by administrative action of the Social Security Administration and could be abolished without Congressional action. However, legislation (HR 3854) is pending to prohibit SSA from continuing the GRP should SSA fail to end the Project.

The GRP is a radical departure from current practice utilized in ALJ hearings. Normally, SSA ALJ hearings are structured to be non-adversarial. The presiding ALJ fulfills two roles: developing the record and making findings of fact and conclusions of law involving Social Security or SSI disability benefits (95% of ALJ workload). 20 C.F.R. §404.946, §404.952 (1985). This is in accord with the Supreme Court’s recent statement that SSA has a duty to ensure that the “84-1923 fair and neutral procedure required by the statute and regulation” is provided to claimants who appeal benefit denials. See, Bowen v. City of New York No. 84-1923, June 2, 1986, unanimously affirming Heckler v. City of New York 742 F.2d 729 (2d. Cir. 1984). (The ABA filed a brief as amicus curiae on behalf of Social Security claimants in the Supreme Court this case urging affirmance.)


(3) THE GRP IS NOT AN “EXPERIMENT”

The GRP was originally justified as an “experiment.” However, it is quite clear that the GRP was not designed to yield helpful data. No rigorous or formal study has been conducted and only minimal data has been gathered. Unfortunately, despite the fact that little data exists about or has been made public regarding the cost of the experiment (including the cost of additional consultative medical examinations requested by the Government Representative) or its impact on clients, the Social Security Administration continues to conduct the GRP. Four years of experimental data are certainly ade-
The GRP alters this nonadversarial hearing structure. The Government Representative develops the case file to add information more “favorable” to the Social Security Administration. If the claimant is not represented, the Government Representative’s role ends at that point. If the claimant is represented, whether by a skilled attorney or lay advocate, the government representative attends the hearing, may cross-examine witnesses and the claimant, and introduce evidence. 20 C.F.R. §404.965 (1985). The ALJ hearing, then, becomes much more adversarial than the informal, factfinding hearing process that has traditionally existed.

B. The Appeals Council process should be further improved in certain respects and other basic issues should be studied.

The Symposium recommended specific reforms of the process utilized by the SSA Appeals Council to review ALJ decisions. Although the Symposium made recommendations with respect to the Appeals Council, we have offered two additional recommendations.

The Appeals Council is a 20 member adjudicative body created by the Social Security Administration to review decisions of Administrative Law Judges either on its “own motion” or upon a request from a claimant to determine whether they should become the final decisions of the Secretary of Health and Human Services, which can be reviewed by federal district courts. 20 C.F.R. §404.967 et. seq. (1985). The Appeals Council was not created by Congress, but by regulations of the Social Security Administration which delegate the Secretary’s authority to render final agency decisions to this body.

The Appeals Council was sharply criticized by Symposium participants. While Social Security maintains that the Appeals Council may conduct a de novo review of findings of disability, the regulations for the Appeals Council do not appear to grant this power. 20 C.F.R. §404.947(a) (1985). At the same time claimants’ representatives note that Appeals Council review imposes extreme hardship on clients. Claimants whose benefits are approved at the ALJ stage may find their case being reviewed by the Appeals Council on its “own motion.” At best, this results in long delays in starting to receive benefits. At worst, the Appeals Council sometimes overturns findings of credibility or other factual determinations made by an ALJ, for which there was substantial evidence, sometimes without reviewing the tape recording of the hearing. To have benefits reinstated, the claimant must appeal to federal district court.

On the other hand, the Council rarely agrees to review ALJ denials of benefits. The Council only agrees to review an ALJ denial when it finds an error in the ALJ decision. However, it often takes a long time for the council to decide to grant a claimant’s request for review and the decision to grant a review may be based on only a superficial or cursory review of the record by one of the more than 350 paralegal “analysts” who assist Appeals Council members.

To address the problem of long delays, the Symposium recommended if the Appeals Council fails to reach a decision on a claim within a specified period of time, that the claimant be deemed to have ex-
hausted his/her administrative remedies and may appeal directly to Court. In the proposed resolution, we have made this recommendation more specific so that no doubt remains about the recommendation and how it operates. We have specified that if the Appeals Council fails to render a final decision within 90 days from the time the Appeals Council review is requested, the claimant may proceed to federal district court.

Symposium participants also noted that some basic aspects of the function and role of the Appeals Council have not been adequately studied. Important unexamined issues include: whether the appropriate role of the Appeals Council is error correction, policy making, fact finding or precedent setting; the relationship between Appeals Council members and the staff who review ALJ hearing decisions and recommend Council action; and standards for determining which cases are appropriate for review by the Appeals Council. Despite the fact that over 100,000 cases are filed with the Appeals Council annually, the processes it utilizes have not been the subject of study and debate. While the Symposium identified serious issues, participants did not have time to adequately explore these issues and to do more than make simple recommendations. The issues enumerated above deserve serious study and analysis. We recommend that the Appeals Council be studied in greater depth by organizations interested in improving the Social Security system.

CONCLUSION

The Social Security system affects millions of Americans each year. For many, decisions regarding eligibility for disability benefits will have profound effects on their well being. The processes used to make the difficult decisions regarding eligibility for benefits and the process claimants can utilize to appeal adverse decisions should, therefore, be fair and accurate. In fact, they should be the best that the American system of justice can provide. The ABA-sponsored Symposium on Federal Disability Benefit Programs provided an opportunity for experts with differing perspectives to offer recommendations for changes in this system to improve its functioning. Given the primary goal of the ABA—to improve the American system of justice—it is fitting for the ABA to participate actively in efforts to ensure that the Social Security Disability determination and appeals process is the best that this country can offer to its citizens. The resolutions submitted with this report should be adopted.

Respectfully submitted,

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Chairman
Commission on Legal Problems of the Elderly

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Chairman
Commission on the Mentally Disabled

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