Resolved, That the American Bar Association supports the following reforms in the Social Security disability adjudication process to eliminate the backlog that threatens the ability of Social Security administrative law judges to assure due process. These reforms include:

1. In reengineering the initial decision process, including its present procedures by which persons whose application is initially denied, seek reconsideration or hearing before an administrative law judge, the Social Security Administration should:
   a. assure appropriate legal standards by establishment of one standard for disability determination at all levels of decision making; and
   b. encourage disability claims managers to consult with legal as well as medical resources as appropriate.
   c. designate Federal adjudication officers with supporting staff who, not later than immediately following the initial denial of a claim shall be responsible to work together with the disability claims manager to develop the evidence, assemble the file, and who may make a medical/legal decision to allow the claim.

2. That measures at the hearing level be taken to assure the integrity of the factfinding function by:
   a. in an appropriate case, permitting the Federal adjudication officer to act as a "presenter" before the administrative law judge by drawing attention to salient facts in the record, calling witnesses and presenting witnesses where appropriate.
   b. assigning responsibility for development of the evidence to the agency's adjudication officer, subject to the provisions of paragraph c.
   c. allowing the administrative law judge to assert authority for developing the record in cases where claimants are unrepresented, by providing for direct control over and access to investigative resources, by remand to the adjudication officer or other appropriate orders.
   d. realigning personnel to reflect the realignment of the developmental, investigative and representative functions, placing Federal adjudication officers and their assistants in an office other than the Office of Hearings and Appeals, and providing judges with law clerks and clerical staff only.
3. That each and every claimant for disability benefits under the Social Security Act, Title 42 U.S.C. §223 et seq. continue to be entitled to a due process hearing, on the record, before an administrative law judge appointed pursuant to §3105 of the Administrative Procedure Act, Title 5 U.S.C., applying standards consistent with the law and published regulations.
INTRODUCTION

Longstanding problems in the Social Security Administration's approach to the disability programs it administers are currently under intensive review. While SSA's consideration of "reengineering" involves the whole of its process (treating over three million claims annually), its implementation initiatives to date have been directed to the processes for initial processing of claims. Its initiatives at the initial stages look toward individualized handling of claims by disability claims managers. The training, personal responsibility and face-to-face contact with claimants it is exploring may go far to improving efficiency, employee morale, and claimant acceptance. Greater processing speed and higher accuracy would be welcome products of a bureaucracy whose denials of benefits, when challenged before an administrative law judge, currently fail at approximately a 75% rate.

Undoubtedly, however, the new processes will continue to result in denial of some claims and will not substantially reduce the backlog without reform of the entire adjudication process from filing of the application through final administrative appeal. Indeed, a larger proportion of initial claims has been denied in the last year or so than has previously been denied. Prompt attention is therefore required not only to the role of the disability claims manager, but to both the initial and post-denial levels with an eye to their functioning as an effective, integrated system.

There is currently pending before a corps of approximately 1020 judges a several hundred thousand case backlog, each of which has an average actuarial value of $90,000. The amount currently at issue before the judges thus amounts to approximately $45 billion and is climbing. The Office of Hearings and Appeals (OHA) of the Social Security Administration projects more than 500,000 additional requests for hearing per year for the next three years, and thus the backlog will continue to increase and the judges will continue to fall further behind. The solution to the problem does not lie in simply hiring more judges and/or increasing the dispositional goals for the judges, which has been the agency's traditional approach to caseload management.

The fundamental tasks facing the agency, in our judgment are: first, to

Of about 3,000,000 claims annually, about 45% have been granted at initial stages; about 35% are not pursued further, and 20% are taken to ALJ hearing.

It is noteworthy that the current backlog arose at a time when nearly 50% of the claims were granted by the agency at the initial or reconsideration levels. The grant rate at these levels has fallen noticeably within the last year or so, to 30%. This reduced grant rate, coupled with the well-known reversal rate, has increased the flood of hearing requests coming into OHA, an alarming new circumstance given the already unmanageable backlog.

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encourage initial decisions well informed both about applicant circumstances and about governing law; second, to provide an effective case development and screening mechanism for early identification and resolution of meritorious claims that are denied by the initial process; and then to provide an appropriate and balanced adjudication procedure for those claims that continue to be asserted despite initial agency denial. These are, we believe, goals with which the SSA agrees. Achieving them will only be possible with enhanced accuracy in identifying meritorious claims at earlier stages.

SSA's discussions of reengineering envision a significantly enhanced role for federal civil servants identified as "adjudication officers." It has been suggested that adjudication officers will have the responsibility for second-level processing of denied claims, including giving assurance that proper legal standards are applied, that claimant files have been fully and appropriately developed, and that claims meritorious in fact are approved. We are encouraged by this discussion. At the present time, cases appealed to the administrative law judge level are, for the most part, poorly developed, developed inconsistently throughout the nation, and "dumped" at the judge level, for the Office of Hearings and Appeals to sort out. We believe this is a substantial cause for the grant rate to claimants whose applications have been denied by the agency previously. We are unaware of any other appellate system in the world in which there is such a discrepancy between determinations at the first level of decision making and the level at which an impartial factfinder becomes involved.

Moreover, currently, administrative law judges are burdened with responsibilities for evidence collection that are not appropriate for their judicial function. Worse, the judges are expected to perform these development functions without adequate resources, adequate means to tap the resources of the agency, or adequate means to assess the quality and control the timeliness of the available information (which comes largely from claimants' attorneys). Judges throughout the country are frustrated with their inability to "get at" the evidence they need, and to access resources—particularly personnel—so that the job can be done properly.

Finally, the erosion of the "substantial evidence" rule, along with an open record approach and a lack of finality in the system, means that cases are adjudicated time and time again. Claimants may submit new information at any time in the administrative process, regardless of whether it was previously available at the hearing level. Many cases are remanded because the Appeals Council disagrees with the judge's factual findings, even as to credibility. Because the administrative law judge has virtually no remand authority to the agency, all such cases must be re-adjudicated at the hearing level. Other claimants must wait even longer for their day in court, and the public suffers the cost of redoing and doing again the same claimant's case.
The substantial backlog of cases is the culmination of these problems, and does not arise from the lack of diligence or production by the judges. The large majority of judges have continually risen to the challenge of the increased workload, and now produce an average of more than 44 dispositions per month per judge, a tremendous output under the circumstances of an increasingly complex set of legal requirements. The number of incoming requests for hearing is so enormous, the authority and resources of the judges so scant, that more production cannot be demanded of the judges without risking serious harm to individual claims. Fundamental changes are needed.

Summary of recommendations: As we explain in detail below, our recommendations consist of the following broad categories:

Prehearing measures designed to assure the appropriate development of cases prior to hearing, using adjudication officers to apply legal standards incorporating current law, and to work with medical experts and others within the agency to identify and grant meritorious claims.

Hearing measures designed to ensure complete and balanced development of the evidence: restoration of the administrative law judge to the function of neutral fact finder; placing responsibility for development of the evidence on the adjudication officer and the claimant; and opening the possibility that the adjudication officer will assist in developing the record at hearing.

Post-hearing measures to bring finality, and restore the substantial evidence test on appeal.

DISCUSSION AND RECOMMENDATIONS

Claims for disability benefits are decided under the insured portion [Title II] of the Social Security Act or under the supplemental security income provisions [Title XVI] of the Act, 42 U.S.C. The ultimate issue in a disability matter is whether the individual claimant suffers from a medically determinable impairment that renders or will render him or her incapable of substantial gainful activity for a period of at least twelve months. To answer this question, a five-step sequential evaluation process has been promulgated for application at all levels of administrative adjudication. 20 C.F.R. §404.1520 et seq. and §416.960 et seq.

The Office of Hearings and Appeals projects 600,000 dispositions for FY 1995, with a corps of 1700 administrative law judges.
Such a claim may undergo as many as four levels of administrative review: (1) an initial determination by disability examiners at the Disability Determination Services or "DDS." If the claim is denied at the initial level and appealed, it undergoes (2) a reconsideration determination by different disability examiners at the same DDS office, applying the same standards. If the claim is denied at the reconsideration level and appealed, it undergoes (3) a hearing before an administrative law judge at the Office of Hearings and Appeals or "OHA," who issues a decision that may become the final decision of the Secretary. If the claim is denied at this level and appealed, it undergoes (4) review by the Appeals Council. If denied by the Appeals Council, the claimant may challenge the agency's decision by filing a complaint in the federal district court. The Secretary has no right to appeal at any of the foregoing stages. The claimant may submit new evidence at any point in the administrative process, although leave to do so is required once he or she enters the federal court system.

I. The prehearing process.

DDS is charged with the initial development of the case. In the usual case, neither the claimant nor the Secretary is represented by counsel at this juncture. DDS has at its disposal teams of in-house physicians who review the medical record and make recommendations to disability examiners. Disability examiners virtually never see the claimant. Additionally, DDS may seek consultative examinations from outside physicians who actually examine the claimant and render a report. In deciding claims, the DDS offices are guided by the POMS, the Program and Operation Manual System, a voluminous set of standards representing the SSA view of disability adjudication. The assessment of disability examiners is based entirely on the medical record, applying the standards of the POMS. The POMS is updated periodically by the agency but frequently does not reflect current statutory, regulatory, and case law standards.

This level of SSA process is beyond the purview of this recommendation although its general principles would apply. We note three factors that may contribute to the current experience in which an unusually high proportion of appealed denials are granted after hearing.

First, while SSA is understandably concerned to prevent incorrect granting as

DDS is composed of state offices which contract with the agency to perform the initial and reconsideration determinations.

OHA consists of the 132 field offices throughout the nation employing administrative law judges; and the Appeals Council, which sits in Falls Church, Virginia and handles administrative appeals largely on the record established at hearing. The Appeals Council sometimes hears argument on cases.
As denial of benefits, its quality control measures may be communicating to workers at the DDS level that it is troubled only by erroneous grants. At the DDS level, a sampling of claims is review by the Disability Quality Branch or "DQB." Data available indicate that historically DQB has not sampled randomly: 95% of the claims it review are those granted by DDS; only 5% are the claims denied. Common sense dictates that if a reviewing entity second-guesses the initial or reconsideration determination and scrutinizes most closely those granted, DDS examiners will quite naturally think twice about granting claims. The Judicial Administration Division has no evidence that any disability examiner at DDS has succumbed to these no-so-subtle pressures. Nevertheless, these pressures are a systemic reality and create an unhealthy climate for impartial adjudication at the DDS level.

Second, as SSA's reengineering process appears to recognize, currently available procedures for reevaluating denials at applicants' request are relatively ineffective. The "reconsideration" procedure SSA is considering eliminating produces a grant in only about [17%] of cases in which it is invoked, as compared with the 69% to 75% of claims then appealed to administrative law judges that are granted. We understand the proposal for federal adjudication officers as a means intended to change these results.

Third, and perhaps most important, we believe the most obvious source of this discrepancy lies in the failure of the POMS accurately to reflect the statute, the regulations and the case law—the law that administrative law judges apply. Reform is unlikely to be effective unless the adjudication officers SSA is creating are equally attentive to governing legal standards—and indeed, unless their advice is available to the disability claims managers in DDS, as medical advice will be.

The [Judicial Administration Division] therefore recommend[s] as follows:

1. **Institution of one standard for determining disability.** SSA acts under an unambiguous congressional directive in 1984 to institute a single standard to be applied at every level of administrative disability adjudication. Achieving compliance with this directive has proved difficult, however, in a practical context in which the substantive law governing disability has been largely defined by standards established in a judicial setting. Absent Supreme Court Review, the result may be that one standard is enunciated by the Fourth Circuit, another by the Eighth, while other circuits have taken no view. SSA can achieve consistency of results with circuit law only by abandoning, to that extent, national uniformity. The ABA has previously urged that it do so, so that it uses consistent standards to determine eligibility at all levels. SSA's
ALJs have no choice but to apply the governing law of the circuit in which they sit; SSA should revise its POMs to reflect that current law and also make available adjudication officers for consultation with its disability claims managers, to help them understand governing legal principles. Legal oversight or input at all levels will result in earlier payment for worthy cases, better preparation of cases for hearing and reduction of the caseload on appeal. We note that the agency has recognized the foregoing problems, and in its current process redesign report proposed to create a "one book" approach whereby both the DDS and OHA are using the same book to make decisions. DDS disability examiners are currently kept in the dark about the case law, and often even when advised, are ill-advised by the agency.

As earlier remarked, the agency is considering the creation of a new position to be known as an "adjudicative officer" or AO. The agency proposes that the AO will be the focal point of all prehearing activities, following initial denial of a claim. The AO's functions include (1) providing the claimant with an in-depth understanding of the hearing process; (2) identifying the issues in dispute, and developing any additional evidence needed; (3) full authority to issue revised fully favorable decisions if the evidence warrants. The Judicial Administration Division applauds much of this approach. We anticipate that if the AO functions well, much of the caseload now presently appealed to administrative law judges will be resolved without need for hearing, resulting in earlier payment for worthy cases, better preparation of the cases for hearing, and reduction of the caseload on appeal with concomitant freeing of time and resources to devote to those cases genuinely in dispute. Through consultation, AOs will also be able to help claims managers put files in a proper posture. In our view, the unavailability of legal input at the DDS level has resulted in unequal justice. Those who do not pursue appeal beyond the denial at DDS have been denied benefits based on a set of standards that does not fully embrace the legal standards that should be applied. Those who do pursue appeal and are ultimately granted benefits have often experienced needless delay; for claimants who are disabled and in straitened financial circumstances, delay is more than mere inconvenience.

The original reengineering proposal is unclear, however, about where the AO fits into the SSA structure—whether at DDS or OHA. The Task Team report recommends co-locating the AO with the ALJ at OHA. The original proposal suggested that the adjudication officer have the same knowledge, skills and abilities as those who decided the claims initially, as well as specialized knowledge regarding...
hearing and appeal procedures. The Task Team recommends a number of minimum qualifications, such as communications, negotiation, and analytical skills, as well as a college degree or the equivalent. It states that desirable but not required qualifications would include additional training or experience such as a law or medical degree, vocational rehabilitation experience, disability decision making experience, or paralegal training or the equivalent. The Task Team description sets out an AO who acts very independently, collects evidence, assists those who are not represented and works with those who are, and streamlines the issues for hearing.

In our view, however, the AOs should be attorneys whose office is placed outside the OHA. We believe it follows from the nature of their assignments that an AO should be an attorney. The AO is, after all, called upon to make what is a legal determination by applying evidence to an established standard. As the ABA knows from previous reports, failure to apply the courts' legal standards has contributed to wrong decisions and the tide of appeals to OHA. The AO function should be performed by a person trained to apply legal standards.

Placing the AO's at the OHA level, co-housing them as it were, would result in blurring lines of authority between the AO and the judge. The Task Team report acknowledges this difficulty and proposes to deal with it by creation of a "firewall." We assume the Team meant something analogous to the Chinese wall used when conflicts of interest arise in one office. The Team's report recommends that appealed claims not be assigned to an administrative law judge upon filing of a request for hearing, that the AO handle it independently until a hearing is deemed necessary, and that the AO not confer with or interfere with the administrative law judge in his or her handling of the case once it is to be heard. While co-locating an AO with an ALJ has certainly managerial advantages (fewer opportunities for losing files in the hand off, for example), the disadvantages outweigh them.

The primary disadvantage is that envisioned and prohibited by the Administrative Procedure Act, 5 U.S.C. §554(d), which precludes any employee engaged in the performance of investigative or prosecuting functions for an agency from participating or advising in the decision or recommending decision, except as witness or counsel in public proceedings. Although the role envisioned for AOs is hardly advisory in the usual sense—as a principal function will be identifying and granting meritorious claims—still the work of organizing the file for hearing and perhaps participating in its presentation is best kept distinct from the role of judging. The AO will acquire a view of the case that cannot avoid being reflected in myriad subtle ways. AOs will, appropriately, receive communications and quality control oversight from SSA that could not appropriately be directed to an ALJ. The placement of the AO in OHA would create an unhealthy atmosphere allowing for ex parte
communications, non-independent development of the evidence, and the appearance of non-independent decision making.

We have three additional recommendations, all of which have previously been adopted by the House of Delegates. We restate them here solely for the sake of a unified presentation of our proposed reforms:

2. **Authorize face-to-face interviews** at the initial DDS determination. SSA appears to be moving in this direction.

3. **Abolish the reconsideration decision.** Currently, DDS makes an initial determination under the POMS, which, if appealed, is simply reviewed once again on reconsideration (by a different person) but again under the POMS. The AO process, with its commitment to governing legal standards, is superior to this largely empty exercise. Again, SSA has this change under serious consideration.

4. **Reform the DQB review process.** Currently "quality control" at the DDS level involves reviewing only the decisions granting benefits. Even assuming that this one-sided review does not actually skew the system, it certainly has the appearance of doing so. We recommend that quality control include an equal random sampling of both grant and denial decisions, in conformity with acceptable statistical practices designed to ensure integrity of the sample, to assure that all decisions are carefully made at the outset.

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In 1986 the House of Delegates approved Report No. 126A of the Legal Problems of the Elderly:

*SSA should implement the Social Security Disability Benefits Reform Act of 1984 by pursuing and evaluating demonstration projects with face-to-face interaction between claimants and decision makers at the earliest practicable levels.*

In 1991 the House of Delegates approved Report No. 109A-E of the Section of Administrative Law and Regulatory Practice:

*Eliminate the reconsideration stage, with appeals from the final decision in the initial determination process going directly to an administrative law judge.*

In 1986, the House of Delegates approved the following recommendation of Report 126A:

**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 with the decision making process.*
II. The Hearing Process

A. Current organization. The current field organization of the Office of Hearings and Appeals consists of approximately 1020 administrative law judges located in 132 hearing offices throughout the nation. SSA administrative law judges are delegates of the Secretary of Health and Human Services, appointed pursuant to the Administrative Procedure Act as independent adjudicators. The current head of OHA is Associate Commissioner Daniel Skoler, who is appointed by the SSA Commissioner. A central office consisting of the Associate Commissioner, the Chief Administrative Law Judge, and staff, sits in Falls Church, Virginia.

B. Historical perspective: the evolution of disability law and factors that have changed the adjudicative landscape. Disability adjudication has changed dramatically over the years, resulting in tremendous demands at the administrative law judge level, particularly when viewed against a system of mass justice. In years past, administrative law judges (and disability examiners at DDS as well) confronted mostly physical, objectively verifiable impairments. Over the past two decades the law in this area has evolved tremendously, no doubt as a reflection of medical and social recognition that other, more subtle, problems can also impact a claimant's ability to be productive. Currently, evidence in a disability case must be assessed under strict court-established standards. The greatest impact has resulted from development in three areas of the law: assessment of subjective complaints, both physical and non-exertional; assessment of opinion evidence; and assessment of drug and alcohol abuse.

There have been three significant developments since the Social Security Amendments of 1956 (P.L.90-248) (90th Cong., 1st Sess.).

First, early on the federal courts began to add a gloss to the strict objective test. This resulted in an increasingly subjective system of disability adjudication and in a practical sense displaced the burden of proof on the ultimate issue of disability from the claimant to the administrative law judge. This was accomplished by requiring that the judge show that a claimant's allegations of disabling pain or other symptoms were not credible, rather than requiring that the claimant prove on a medical basis that the allegations were supportable. Similar rules were posited and proliferated with respect to pronouncements of disability on the part of treating physicians; if a treating physician pronounced a claimant disabled, it became incumbent on the administrative law judge to provide clear and convincing reasons not to accept this opinion. This shifting of burden occurred without regard for the understandable possibility that a treating physician would be inclined to help his patient obtain financial benefits from an...
impersonal system. Another area that the agency continues to find troublesome is a line of cases establishing that drug and alcohol addiction are legitimate, disabling impairments when they are of such severity that the claimant cannot control them, and they render the person so unreliable that he cannot be expected to sustain competitive employment.

In 1984, Congress revisited the issue (having issued amendments in 1967) and the role of the courts in interpreting the statute. A cornerstone of the 1984 amendments was Congress' insistence that the agency bring the four levels of adjudication into line, that is, that it assure disability adjudication be based on one uniform standard at each level. While Congress took one track and the agency another, the federal courts continued as they had, to develop the gloss on the disability system. In the face of this redefinition of fundamental aspects of the Social Security disability program, the agency embarked upon the questionable tactic of "non-acquiescence." Rather than appeal much of the troublesome precedent flowing from the courts, the agency proceeded simply to ignore such precedent in deciding similar issues in subsequent cases. Another related tactic was to fail to inform the DDS offices of the current caselaw, making it difficult for disability examiners to apply the applicable law.

This in turn has been the cause of a considerable rift between the SSA administration, and the administrative law judges, who by oath of office and professional tradition must accept the appellate judicial decisions as controlling. The ALJs have been caught in the middle of the faceoff between the agency and the courts.

See in this latter regard, Novick et al., "Physicians' Attitudes toward Using Deception to Resolve Difficult Ethical Problems." Journal of the American Medical Association (JAMA), May 6, 1989, indicating statistically a willingness of physicians to deceive insurers for the global well-being of their patients.

The American Bar Association has condemned the practice of non-acquiescence. In 1985 the House of Delegates approved the recommendation of the Federal Judicial Improvements Committee, presented jointly with the Commission on Legal Problems of the Elderly:

Be it resolved: That the American Bar Association urge the Social Security Administration to observe, in all stages of administrative proceedings, the applicable decisions of the United States Court of Appeals for the circuit in which the matter has arisen, subject to the agency seeking review in the United States Supreme Court.

Be it further resolved: That the American Bar Association urge that, in the event the Social Security Administration continues its non-acquiescence policy, in its former or present form, Congress enact legislation to mandate the agency to observe fully within each circuit the decisions of the Court of Appeals within that circuit, subject to the agency seeking review in the United States Supreme Court.
Second, current management practices and allocation of resources do not permit the administrative law judges to do their jobs. At the hearing level, although the judge is charged with responsibility for continuing to develop the file—a carry-over from the days when most claimants were unrepresented—a judge has no meaningful development authority. If the judge believes a consultative examination is called for, backlog pressures dictate against it. The judge must request the examination from DDS, which is not required to respond as requested and in turn faces its own backlog pressures. Many disability examiners question the judges' requests, decline to carry them out, or simply carry them out as they think best. Judges' requests for further development at DDS are often ignored or delayed for extended periods of time.

Judges have neither the authority to place time limits on the development or to reach presumptive conclusions about the agency's failure to develop. Judges are expected to call medical or vocational experts to testify at hearing, although no funds have been allocated to train these experts nor do the judges have any meaningful input into the question of whether the doctors or vocational counselors are qualified to be placed on the expert roster. The judge can issue a subpoena for documents or testimony, although these are routinely ignored, particularly by doctors (both in and outside the government), and there is no independent sanction or enforcement power. In practical effect, because over 80% of claimants are represented at the hearing level, the judge depends on the claimant's attorney to supply information, and must essentially rely on the ethical practice of the attorney to assure that all relevant information has been supplied.

Not only do the judges lack authority over DDS staff; they have no authority over the staff in the hearing offices. Several years ago a managerial decision was made to take away from the administrative law judge all supervisory authority over hearing office support personnel, including staff attorneys, decision writers, clerical support staff and typists. In 1981, confronted by a Congress concerned about increasing volumes and delays in adjudication, the agency committed to increase support staff to a ratio of five personnel to one judge. While statistics from the agency appear to show such a ratio, they do not reflect the structural change. In 1976, when data were first compiled regarding support staffs, the staff was directly assigned to the individual judge, who directed and supervised them on a daily basis in managing his or her docket. This system was known as the "unit" system. Each judge was assigned a unit of support staff members. This system was apparently perceived by agency management officials as "insulating" the judge from agency control. Eventually, there was a wholesale removal of staff from judges, and removal of their

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It is worthy of note here that the duty to develop has come to include, in practice, a responsibility for creating the written record before hearing, rather than simply assuring that the record at hearing is complete by way of exploring the issues through witnesses testimony.
authority to act as supervisors of the staff.

The result of this office reconfiguration is that administrative law judges have no power or authority to expedite the work or assure that it is done correctly. Managerial decisions are often made, without consultation with the judges, for the purpose of facilitating management itself, whose concern is primarily production rather than quality professional work. Resources such as computers have for years been devoted to composing production reports rather than to issuance of hearing decisions. Judges are dependent on staff who are not supervised by judges but by others who assess their performance. Thus, many times judges make requests only to find that they have been countermanded or ignored by mid-level supervisory staff. The judges have become exceedingly frustrated in trying to assure that their work is done properly, especially with the added pressure to issue a large volume of decisions.

Thus it is no longer meaningful to speak of support staff ratio to judges, and this has been true for over a decade. The staff do not exist to support the judges' work, but that of management. The true support staff ratio of office personnel to individual judges is now zero to one, as a result of pooling the staff, a situation that is quite contrary to the agency's representations to the Congress. With the inception of the reconfiguration system the judge became isolated, with needless adverse affect. There is no end of irony in the result: the limitations of judicial authority in the hearing office severely undercut the judges' ability to develop evidence favorable to the agency, and place the claimant's counsel in control of the evidence.

Third, at hearing, over 80% of claimants are represented, the overwhelming majority by experienced lawyers. The substantive law has become increasingly complex and the target the judge must hit in denying a case continues to be a moving one. Moreover, there are no rules of procedure such as those by which other judges throughout the United States manage their dockets. There is no provision for prehearing motions, dispositive motions, settlement or discovery, or control over attorney conduct (for example, no sanctions are available for failure to provide evidence timely, or failure to disclose all evidence). Judges are issuing more than 40 dispositions per month. This currently translates into two or more written decisions per day, in addition to the duties to review, develop, and hear cases, and travel to remote sites. The amalgam of these factors—only evidence in favor of the claimant is readily available; that the judge must bear the burden of rebutting the presumption that subjective allegations and treating physicians' conclusions are supportable; and that two decisions must be issued daily—creates an inevitable pressure on the system, and may well explain the more than 70% allowance rate by the judges.

We therefore support the apparent direction of SSA's reengineering effort, to
create adjudication officers who will be responsible for preparing records for hearing, for identifying and granting meritorious claims, and (in appropriate cases) for assisting in presentation at hearing. Consistent with prior ABA recommendations that the hearing should not be conducted in an adversarial setting, we are not recommending a resurrection of the government representation program. Rather, as in Great Britain, the AO's function should be to assist the decision maker in coming to the correct decision by developing the file to draw attention to salient facts. In Great Britain, the majority of presenting officers play a relatively passive role, confining themselves to a brief explanation of the decision and answering any questions put to them. Appealing claimants and the presenting officer both enjoy the right to give evidence and call witnesses.¹⁵

Some claimants are not represented by an attorney. Where claimants appear pro se, procedures must be adapted accordingly, as seen below.

In this respect, we recommend that SSA assign the responsibility for development of the evidence to the agency, and largely remove that responsibility from the administrative law judge. The current system retains the fiction that the administrative law judge should and can successfully wear three hats, representing the interests of the claimant, and the Secretary, while acting as a neutral fact-finder. This fiction ill serves all parties. The first and most practical reason is that, while judges are given that responsibility in theory, in practice they are provided no useful tools for carrying it out. Indeed, they are more often thwarted in their efforts to fulfill this responsibility, depending on DDS personnel who may or may not respond to requests, depending on claimants' attorneys who may or may not supply all relevant evidence, and without recourse to personnel in their own hearing offices or field offices.

In 1996, the House of Delegates approved the following recommendation from Report 126A of the Commission on Legal Problems of the Elderly:

A. Protect the ALJ's Role as Factfinder
1. Whether or not the claimant or government as 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.

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

The second, and most compelling reason is that conflict of interest is simply unavoidable. An impartial factfinder must not be in the business of developing evidence and questioning witnesses; he or she should be evaluating the evidence, not generating it. Moreover, the interests of the two litigants are so obviously adverse that a judge wearing three hats cannot do justice to one without doing injustice to another. Establishing the AO will go far toward accomplishing the placement of this responsibility where it belongs—within the agency—where it should remain at all phases of adjudication.

The third reason is that responsibility for seeing that the entire record is defensible should rest with the agency, which has, after all, determined that the claim is non-meritorious, and it should be prepared to back up that decision.

In cases where the claimant is unrepresented, the administrative law judge should be allowed to assert authority for developing the record, and should be given direct control over and access to investigative resources, primarily by way of remand or other appropriate orders to the AO. Three key reforms are needed in this regard. First, the regulations must be amended to grant authority to administrative law judges to issue orders of remand, requiring the AO to carry out the particulars of those orders. Second, judges must be given enforceable subpoena power, and the agency must be required to supply agency witnesses for hearing when requested. Third, adequate funds must be allocated for the AO to call high-quality expert witnesses, obtain subpoenaed documents, and the like.

Realignment of personnel to reflect the reassignment of the developmental, investigatory, and representative functions. The agency's claim of a five-to-one staff/judge ratio, as mentioned above, actually translates to the judges having no staff. Judges need staff but do not need five support personnel. We believe a judge's chambers are well served by a law clerk or staff attorney, a clerk/typist, and a centralized docketing function, much as the federal courts now employ. Currently, hearing offices house career staff attorneys and hearing assistants. The hearing assistants put the file received from DDS in order, and are responsible for independent development as well as carrying out the judges' requests for their development. Virtually all of the work is prehearing. These positions can be eliminated at the hearing level because they would be transferred to the AO's. The legal research and drafting functions at the hearing level should be performed by law clerks assigned to and supervised by the judges, with a two- or three-year tenure, rather than by career attorneys whose talents are best used elsewhere. The net result of this would be a reduction of staff at the hearing level, with a concomitant increase at the agency level, under direct control of the agency.
III. The Posthearing process.

Close the record at the conclusion of the hearing and reinstate the substantial evidence test on appeal; provided, however, that within one year of the ALJ's decision and with leave of the ALJ before whom the hearing was originally held, the claimant shall be entitled to reopen the record for good cause shown such as a material change in condition or newly discovered evidence. Cumulative evidence or evidence that could have been offered at hearing shall not constitute good cause. As discussed above, the current system allows introduction of evidence at virtually every level of adjudication, even as far as the U.S. district courts. One must keep in mind that a claimant has six potential levels of adjudication available: initial, reconsideration, hearing, administrative appeal, appeal to district court and appeal to circuit court. Yet the evidence of record is a moving target and subject to change at every level except the last. As a result, claimants and their attorneys are able to keep a case spinning for any number of years, up and down the ladder. No appellate system can function under such circumstances; nor does due process require such an open-ended opportunity to make one's case. Rules of finality are required to get and keep the backlog under control. Therefore, the record must close at the hearing level, the only exception being for good cause.

The issues on appeal should be narrowed. Currently, claimants can raise issues for the first time before the Appeals Council and the district court, which, rather than deal with them on the merits, simply remand for yet another hearing. This is an untenable situation, particularly where 80% of the claimants are represented. A true appellate system should be instituted where the issues reviewed are those raised below, findings of fact are sustained when supported by substantial evidence, and the focus is on appropriate legal standards and conclusions. This is consistent with existing ABA policy. In 1986 the House of Delegates adopted the following provision from Report 126A of the Commission on Legal Problems of the Elderly:

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 factual conclusions. Moreover, the ALJ's findings as to witness credibility ordinarily should not be subject to review. If the Appeals Council overturns factual determinations by ALJ, 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.
August, 1995

Respectfully Submitted,

Phillip J. Roth  
Chair, Judicial Administration  
Division

Janet E. Belkin  
Chair, Section of Administrative  
Law & Regulatory Practice

August, 1995
1. Summary of Recommendation(s).

The Recommendation provides prehearing measures, hearing measures and post-hearing measures to address the monumental backlog of Social Security disability appeals which threatens to overwhelm the system.

2. Approval by Submitting Entity.

The Judicial Administration Division's Council approved this report and recommendation by a poll of its members conducted on May 2, 1995. The Section of Administrative Law and Regulatory Practice's Council voted to co-sponsor the report and recommendation at its meeting on May 7, 1995.

3. Has this or a similar recommendation been submitted to the House or Board previously?

Yes. Resolution 109 was presented at the 1995 midyear meeting in Miami, Florida and was withdrawn to permit consultation with other ABA entities.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The resolution augments but does not change existing Association policies. Existing policy is contained in the following:

- Resolution No. 126A proposed by the Commission on Legal Problems of the Elderly adopted by the House of Delegates in 1986.

5. **What urgency exists which requires action at this meeting of the House?**

   The number of Social Security disability appeals has jumped by 40% since 1989 from 2.5 million to 3.5 million per year. Projections indicate 500,000 additional requests for hearing for the next 3 years. The system is being overwhelmed and immediate action needs to be taken to prevent its breakdown.

6. **Status of Legislation.**

   There is no pending legislation which deals with the issues covered by these recommendations.

7. **Cost to Association.**

   None.

8. **Disclosure of Interest.**

   One Section of the Judicial Administration Division is the National Conference of Administrative Law Judges, of which some members are Social Security Administration judges.

9. **Referrals.**

   Commission on Mental & Physical Disability Law; Commission on Legal Problems of the Elderly; Section of Administrative Law and Regulatory Practice; Consortium on Legal Services and the Public; all ABA Sections and Divisions; and other interested entities.

10. **Contact Person.**

    Honorable Donald B. Jarvis
    211 Main Street
    San Francisco, CA 94105
    Telephone: 415/744-6577
    Facsimile: 415/744-6569
11. **Contact Person.** Who will present the report to the House.

Honorable Norma L. Shapiro  
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Facsimile: 215/580-2146

12. **Contact Person Regarding Amendments to This Recommendation.** (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax and ABA/net number of the person to contact below.)

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