May 15, 2013

The Honorable Paul R. Verkuil  
Chairman  
Administrative Conference of the United States  
1120 20th Street, N.W., Suite 706 South  
Washington, D.C. 20036

Re: ACUS Study to Assess Social Security Administration’s Region I Pilot Program

Dear Chairman Verkuil:

On behalf of the American Bar Association and its nearly 400,000 members, and in response to your request, I am pleased to present the ABA’s views and comments regarding the impact of the current Social Security Administration (SSA) pilot program in Region I.

The ABA has a long-standing interest in the SSA’s disability benefits decision-making process, and we have worked actively for over two decades to promote increased efficiency and fairness in this system. As the national voice of the legal profession, the ABA has been able to draw upon the considerable expertise of our diverse membership, including many claimants’ lawyers, administrative law judges (ALJs), academicians and agency staff who are active in the ABA.

We have for many years expressed our support for a prompt disability adjudication process for those who are obviously disabled. In past years, many eligible individuals have waited—and many continue to wait—far too long to receive their benefits, which in many cases may be their only source of income and access to medical care. The backlog of SSA cases awaiting an ALJ decision has continued to grow. Clearly, something needs to be done to improve the operation of the program, alleviate backlogs in the system and reduce the delays that are so detrimental—and sometimes deadly—to the disabled claimants who desperately need the financial benefits to which they are entitled under the law. Applicants who by definition are totally disabled and unable to do any kind of work often must wait years before they can get a hearing and begin to receive their benefits.

We support efforts to move cases quickly and reduce the backlog of SSA disability claims by encouraging a greater effort to issue a correct decision as early in the process as possible. If the quality of intake and the development of evidence is improved at the early stages, it follows that there will be fewer appeals and a reduction in the number of cases awaiting a decision. We also are concerned about the tremendous waste of agency resources involved in providing an appellate process for claims that should have been approved initially, as well as the very real, negative impact on the lives of those who are waiting for their hearings and the approval of their benefits.
We believe it is important that claimants be advised that their claims may be determined more rapidly if they ensure that all of their medical records and work histories are provided in as timely a manner as possible.

The ABA has long supported an informal and non-adversarial hearing before an ALJ that allows the ALJ to function as a true independent fact-finder who has a duty to develop the record as acknowledged by the United States Supreme Court. We believe this role should continue, rather than moving towards a more “truly appellate” and legalistic process.

Although the ABA does not have specific policy on the issue of closing the record in SSA hearings, the ABA House of Delegates did adopt policy in 2003 relating to the Medicare claims adjudication process that states in pertinent part: “The record should not be closed prior to the hearing. After the ALJ hearing, beneficiaries should be provided the opportunity to reopen the record for good cause.” (See ABA Resolution 107 and the related background report at: http://www.americanbar.org/content/dam/aba/directories/policy/2003_am_107.authcheckdam.pdf)

While the SSA pilot program appears to address our general concern that claimants be afforded their opportunity to present relevant evidence into the record, we nonetheless urge you to proceed with extreme caution before recommending restricting claimants’ ability to submit relevant evidence within five days prior to or at the hearing. If the SSA chooses to adopt a rule that limits the submission of evidence within five days of a hearing, we believe that ALJs should retain broad discretion to waive the restriction to ensure that the record is complete.

In a letter to then-SSA Commissioner Michael Astrue dated December 21, 2007, the ABA raised concerns regarding a proposal to limit the submission of new evidence to the ALJ to five business days before the hearing date. In particular, we expressed concerns that such a proposal seemed directly to conflict with 42 U.S.C. § 405 (b)(1), which provides that the Commissioner “shall, on the basis of evidence adduced at the hearing, affirm, modify or reverse” a decision.

The current SSA pilot program allows for a good cause exception to the closing of the record. Closing of the record occurs only after the ALJ issues a decision. Allowing the submission of newly discovered or newly obtained evidence that could not have been acquired previously is important for due process. This is why the earliest submission of records is key. The rights of the claimant are not served when attorneys or representatives delay in preparation or submission of records based on their belief that they routinely will be granted an exception. Similarly, claimants are not served when an ALJ routinely denies requests for exceptions because the ALJ believes that procedure should prevail over substance. Claimants are served best by an ALJ, as an independent decision maker, who is held to the highest ethical standards contained in the ABA Model Code of Judicial Conduct, and by lawyers and representatives who similarly are held to the highest ethical standards. This best bolsters due process.

To its credit, the SSA pilot program also attempts to achieve two highly important goals by developing the evidence before the hearing by personnel other than the judge and bringing finality by closing the record. In addition, it appears the pilot program will support and advance Congress’ intent to ensure that worthy claimants are awarded benefits at the earliest possible time.
and in the most efficient manner, while maintaining the integrity of the Administrative Procedure Act’s hearing process.

In sum, we believe the SSA pilot program should be continued and expanded to address the issues affecting the hearing of claimants’ cases—including poorly or inconsistently developed cases—in order to ensure claimants are provided appropriate due process protections; i.e., de novo hearings presided over by independent ALJs who are held to the highest of ethical standards contained in the Model Code of Judicial Conduct.

Thank you for the opportunity to express our views on this subject. If you would like to discuss the ABA’s views in greater detail, please feel free to contact me at (202) 662-1965 or Hon. Jodi B. Levine, Co-Chair of the Benefits Committee of the ABA Section of Administrative Law and Regulatory Practice, at (866) 701-8094.

Sincerely,

Thomas M. Susman

cc: Jodi B. Levine, Co-Chair, Benefits Committee, ABA Section of Administrative Law and Regulatory Practice
    Thomas D. Sutton, Co-Chair, Benefits Committee, ABA Section of Administrative Law and Regulatory Practice
    Thomas W. Snook, Co-Chair, Federal Administration Adjudication Committee, National Conference of the Administrative Law Judiciary
    James W. Conrad, Jr., Chair, ABA Section of Administrative Law and Regulatory Practice