July 2, 2014

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


Dear Chairman Verkuil:

On behalf of the American Bar Association, which has nearly 400,000 members, I am writing with regard to your Questionnaire concerning the above-referenced study that the Administrative Conference of the United States (ACUS) is conducting on the Social Security Administration’s (SSA’s) current process for evaluating claimants’ symptoms, including pain. Although the ABA does not have specific policy on many of the detailed questions posed by the Questionnaire, we offer the following comments regarding the general process that should be followed in any fact finding, including those involving a SSA disability claimant’s symptoms.

The ABA has a longstanding interest in the SSA’s disability benefits decision-making process, and we have worked actively for over two decades to protect the adjudicative independence of the administrative judiciary and promote increased efficiency and fairness in the 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 claimant representatives, administrative law judges (ALJs), academicians and agency staff who are active in the ABA—to develop a wide-ranging body of recommendations on the administrative adjudication process.

Vast numbers of Americans are involved in administrative adjudicative proceedings every day, and the decisions rendered by ALJs in these proceedings often affect their lives in profound ways. Congress recognized the unique function of the administrative law judge when it passed the Administrative Procedure Act (APA), which established the adjudicative independence of the administrative judiciary. The ALJ should be the impartial fact finder in administrative proceedings, and agency policies and procedural rules that affect the public should be published in the Code of Federal Regulations in accordance with the APA.

While the determination of the role and degree of pain in an administrative disability proceeding has its unique challenges, it is a fact finding challenge like that found in many civil adjudications in every type of forum. As the U.S. Supreme Court has stated on several occasions, ALJs are the “functional equivalent of district court judges.”
The courts have recognized there are at least three broad public policy interests to be considered in due process hearings with respect to entitlements: the desire for accuracy, the need for accountability, and the necessity for a decision-making procedure perceived as fair. *Gray Panther v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980). Only in an on the record hearing, before an impartial administrative law judge who can assert authority for development of the record, can a claimant be assured that he or she is receiving a fair decision based upon the facts and the law.

In a due process hearing the ALJ, as independent fact finder, must determine based on the record that the claimant has an impairment which reasonably can be expected to cause pain. There is no known exact test to measure the degree of pain. The evaluation of pain involves the evaluation of facts, medical science and the credibility of the claimant. The ALJ should evaluate the complaints of pain and determine their level of reasonableness using the law and regulations that provide a framework in which this should be done.

Only by providing the claimants with a fair, impartial, and independent ALJ who follows the law and regulations, as provided in the APA, can the claimants be assured that they are receiving a decision that is based on a transparent and fair process as intended by the applicable laws and regulations.

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: The Honorable Joe D. Whitley, Chair, ABA Section of Administrative Law and Regulatory Practice
   The Honorable Bruce T. Cooper, Chair, ABA Judicial Division National Conference of the Administrative Law Judiciary
   The Honorable 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
   The Honorable Thomas W. Snook, Co-Chair, Federal Administration Adjudication Committee, ABA Judicial Division National Conference of the Administrative Law Judiciary