

Notes

Introduction

1. For a recent discussion of a related issue, see 20 C.F.R. 410.670 (c) and Pear 1997. In this latest development, SSA is suggesting that ALJs follow agency policy even when it conflicts with circuit precedent, unless an Acquiescence Ruling has been issued authorizing ALJs to follow the circuit court decision. Remedial training and disciplinary action has been threatened for noncompliance with agency policy (Pear 1997). Acting President ALJ Ronald Bernoski (1997) of the Association of Administrative Law Judges, expressed concern over this matter at a congressional hearing on issues related to OHA backlogs and decisional inconsistencies.

2. There is some evidence that the presence of an SSA attorney would relieve ALJs of this complex burden. See, for example, GAO 1997.

3. It has been suggested that because these cases have been appealed, they are not representative of typical hearings or decisions. I am not contending that my case sample is representative, only that it reveals some of the dynamics that occur between ALJs and claimants.

4. More recent statistics reveal similar trends. Approximately 88 percent of the ALJs are men and approximately 90 percent are white (Balkus 1998).

Chapter 1

1. *Hallex* is not binding on judges; it communicates guiding principles and serves as a reference source. However, its significance should not be underestimated. When SSA developed its data collection form to test ALJ compliance with the rules, *Hallex* figured prominently in its hearings review process (SSA 1995, 1997).

Chapter 2

1. As part of its Disability Redesign Plan (see note 2), SSA is testing the use of a “predecision interview” with a claimant by a DDS examiner in an effort to increase consistency in decision making between DDS examiners and ALJs (GAO

1997). Apparently there is some evidence to suggest that a face-to-face interview positively affects ALJ award rates (GAO 1997).

2. For an overview of some of the incremental steps Social Security is or is proposing to take through its Redesign Plan, see Apfel (1998). For a critique of the Plan, see Mashaw 1996. For recent proposed or final rules relating to the hearings and appeals process, see 62 Fed. Reg. 48963 (18 September 1997); 62 Fed. Reg. 49598 (23 September 1997); and 62 Fed. Reg. 50266 (25 September 1997).

3. See *Cruz v. Califano*, Civ. No. 77-2234 (E.D. Pa. 1979), a class-action lawsuit, which required SSA to provide certain Social Security and SSI notices in Spanish to Spanish-speaking claimants to remedy the fact that they had received notices in English, which they were unable to read, and hence were unaware of their appeal rights and procedures. Notices are not available in languages other than English and Spanish, however, SSA personnel have suggested the need to develop strategies that address the particular needs of diverse communities with large numbers of non-English speaking applicants (NOSSCR 1995). Recent congressional action suggests that these special services, including Spanish-language notices may be eliminated in the near future (NOSSCR 1996).

4. ALJs have rendered increasingly higher percentages of favorable decisions over the years. In 1958, they granted 4.1 percent of the cases they heard. In 1967, they granted 13.9 percent. By 1965, they granted nearly 30 percent of the cases they heard. By 1970, they granted 44 percent (Dixon 1973, 40). In the 1980s, ALJs' favorable decisions rose to 50 percent (U.S. Senate 1982, 146–47). By 1993, ALJs on average granted 74 percent of the cases they heard (GAO 1997). More recently, ALJ allowance rates have decreased (NOSSCR 1998). For a discussion of this issue, see chapter 2.

5. The cases I rely on for support for this argument vary according to circuit. I have attempted to cite cases from as many jurisdictions as possible to ensure that my argument is derived from broad principles of law. Recently, Social Security has attempted to limit the application and relevance of federal court decisions by limiting ALJ reliance on circuit precedent. See 20 C.F.R. 410.670 (c); Pear 1997; see also Introduction, note 1.

6. The two cases cited are the most famous illustrations of this point. See also *Miranda v. Secretary of Health, Education and Welfare* 514 F.2d 996 (1st Cir. 1975); *Heggarty v. Sullivan* 947 F.2d 990 (1st Cir. 1991); *Cutler v. Weinberger* 516 F.2d 1282 (2d Cir. 1975); *DeChirico v. Callahan* 134 F.3d 1177 (2d Cir. 1998); *Jozefick v. Shalala* 854 F. Supp 342 (M.D. Pa. 1994); *Sims v. Harris* 631 F.2d 26 (4th Cir. 1980); *Craig v. Chater* 76 F.3d 585 (4th Cir. 1996); *Clark v. Schweiker* 652 F.2d 399 (5th Cir. 1981); *Lashley v. Secretary of Health and Human Services* 708 F.2d 1048 (6th Cir. 1983); *Born v. Secretary of Health and Human Services* 923 F.2d 1168 (6th Cir. 1990); *Smith v. Secretary of Health, Education and Welfare* 587 F. 2d 857 (7th Cir. 1978); *Nelson v. Apfel* 131 F.3d 1228 (7th Cir. 1997); *Sellars v. Secretary of Health, Education and Welfare* 458 F.2d 984 (8th Cir. 1972); *Shannon v. Chater* 54 F.3d 484 (8th Cir. 1995); *Cox v. Califano* 587 F.2d 988 (9th Cir. 1978); *Crane v. Shalala* 76 F.3d 251 (9th Cir. 1995); *Dixon v. Heckler* 811 F.2d 506 (10th Cir. 1987); *Hawkins v. Chater* 113 F.3d 1162 (10th Cir. 1997); *Cowart v. Schweiker* 662 F.2d 731 (11th Cir. 1981); *Graham v. Apfel* 129 F.3d 1420 (11th Cir. 1997).

See also *Hess v. Secretary of Health, Education and Welfare* 497 F.2d 837 (3d Cir. 1974); *Brock v. Chater* 84 F.3d 726 (5th Cir. 1996); and *Binion v. Shalala* 13 F.3d 243 (7th Cir. 1994) for relevant legal elaborations and distinctions.

7. For other relevant cases on this point, see *Cruz v. Schweiker*, 645 F.2d 812 (9th Cir. 1981); *DeLorme v. Sullivan* 924 F.2d 841 (9th Cir. 1991); *Thompson v. Sullivan*, 987 F.2d 1482 (10th Cir. 1993).

8. A legal mandate is not the only reason why judges should make a concerted effort to accommodate claimants with special needs; as officers of the court, it is judges' ethical and social obligation to enable claimants to tell their stories in an environment that does not stifle what often requires great effort for people with special needs to report (Durstun and Mills 1996).

9. See note 6 for relevant citations.

Chapter 3

1. See, for example, *Shore v. Callahan* 977 F. Supp. 1075 (D. Or. 1997) for the kinds of problems applicants encounter with Chronic Fatigue Syndrome. See also NOSSCR 1998 for a general discussion of the issues applicants face when they allege these impairments.

2. The GAO gender-bias study (1994) confirmed that 20 years later, the same problems could be detected in the disability decision-making process—namely, that “women had occupations that, among older applicants, had lower allowance rates regardless of gender” (4).

3. For other descriptions and interpretations of gender bias in the Social Security system, see *Williams v. Shalala* 997 F.2d 1494 (D.C. Cir. 1993); see also Becker 1989; Coughenour, et al. 1994; Dubin, 1993; Golin 1995; Jackson and Deller-Ross 1996; Lee, Porath, and Schaffner 1994; Masson 1995; Zelenske and Udell 1994.

4. Mashaw's (1995–96) more recent work on administrative adjudication seems more compassionate to claimants. He acknowledges that certain “immutable adversities” persist in mass justice systems that make it difficult to pursue the often conflicting values of accuracy, timeliness, and fairness (22). He makes several suggestions, including the implementation of quality assurance programs that identify problems and seek solutions and the adherence to program values and principles rather than technical rules. These ideas support my thesis that judges should be held accountable for their hearing and decision-making practices. In addition, these notions acknowledge that we need much more than rules to ensure that an engaged adjudicatory process is pursued.

5. SSA's decision to peer review these cases suggests that they may be reluctant to address the issue of bias directly.

Chapter 4

1. In two of the fifty federal court cases, (Allen, 89-2788, IL and O'Connor, 89-4412, IL), claimants appealed their federal court decisions affirming the ALJ's denial of benefits to the Court of Appeals. The Court of Appeals' decisions were contained in the file folders with the federal court records.

2. It is interesting to note that the racial and ethnic backgrounds of the claimants were readily available in the record, either through identifiers in the medical records or through Social Security records documenting the need for a translator. There is therefore little doubt that adjudicators know the racial or ethnic make-up of the claimants' cases they are adjudicating.

3. The GAO (1989) compiled a statistical analysis of the national pool of disability applicants who had been denied benefits. I used these statistics to compare the national pool of denied applicants to my sample. These were the only statistics and characteristics available for comparison. The only other statistics SSA compiles and publishes are of the recipients and beneficiaries of Social Security benefits. Since my study is specifically designed to look at denied applicants, the most relevant comparison is with other denied applicants.

4. The term *other* is used by Social Security to designate all people of color except African Americans. I use this term only for the purposes of comparison.

5. I could find no current data on the variations of ALJ award rates. I base this conclusion on my own practice and on the experience of my colleagues who still represent disability applicants.

6. The GAO (1997) opines that one reason ALJs grant more cases than DDS examiners is that claimants are represented at hearings by attorneys who aggressively pursue new evidence that the judge considers. This finding suggests that claimants who are represented by counsel at the ALJ hearing level may have a higher likelihood of success on their claims. This would comport with my experience as an advocate.

7. ALJs seem particularly influenced by treating physician evidence. A study by the Social Security Administration (1995) reveals that a treating physician's report was one of five primary influences on the ALJ to award or deny benefits.

8. For a discussion of this and related issues, see chapter 2, note 3.

9. Federal court cases that have addressed the issue of retaining an attorney directly, include *Yother v. Secretary of Health and Human Services* 705 F.2d 460 (6th Cir. 1982); and *Binion v. Shalala* 13 F.3d 243 (7th Cir. 1994). For cases on the right to representation more generally, see *Heggarty v. Sullivan* 947 F.2d 990 (1st Cir. 1991) (per curiam); *Robinson v. Secretary of Health and Human Services* 733 F.2d 255 (2d Cir. 1984); *Dobrowolsky v. Califano* 909 F.2d 403 (3d Cir. 1979); *Brock v. Chater* 84 F.3d 726 (5th Cir. 1996) (per curiam); *Yother v. Secretary of Health and Human Services* 705 F.2d 460 (6th Cir. 1982); *Binion v. Shalala* 13 F.3d 243 (7th Cir. 1994); *Carter v. Chater* 73 F.3d 1019 (10th Cir. 1996); *Graham v. Apfel* 129 F.3d 1420 (11th Cir. 1997) (per curiam).

10. For similar cases on this point see *Thompson v. Sullivan* 933 F.2d 581 (7th Cir. 1991); *DeLorme v. Sullivan* 924 F.2d 841 (9th Cir. 1991).

11. See chapter 2, note 6 for support for this contention.

12. These materials are now disseminated to all ALJs through the Justice and Diversity Training Series, which gives ALJs sensitivity training on race and gender issues (Skoler 1994).

13. For a definitive work on the topic of the social and cultural significance of such terms, see Collins 1991, chap. 4, "Mammies, Matriarchs, and Other Control-

ling Images.” My references to claimants as “Miss” and “Mrs.” are consistent with their responses to questions regarding their marital status. When I am in doubt, I use “Ms.”

14. This interpretation is based on my 10 years’ experience as an attorney for Social Security disability claimants, during which time I supervised the processing of more than 500 cases.

15. For case law related to this point, see *Bosch v. Secretary of Health and Human Services* No. 85 CV 3536 (E.D.N.Y. 1988); *Holloway v. Heckler* 607 F. Supp. 71 (D. Kan. 1985).

16. For a sample of relevant cases supporting this contention, see *Ferraris v. Heckler* 728 F.2d 582 (2d Cir. 1984); *Murray v. Heckler* 722 F.2d 499 (9th Cir. 1983); *Brandon v. Bowen* 666 F. Supp 604 (S.D.N.Y. 1987); *Byron v. Heckler* 742 F.2d 1232 (10th Cir. 1984); *Reed v. Secretary of Health and Human Services* 804 F. Supp. 914 (E.D. Mich. 1992). See also *Allen v. Heckler* 749 F.2d 577 (9th Cir. 1984) for an argument limiting the application of *Murray v. Heckler*.

17. Deciding any case involves a dialectic between evidence and credibility: a claimant’s credibility is inextricably intertwined in the evidence, and the evidence is influenced in the judge’s mind by the claimant’s credibility. This process is complex; however, for purposes of my analysis, it is important only to recognize that a give-and-take occurs between the two.

18. Several federal court cases address the issue of household chores. I am not arguing that daily activities are not relevant to the consideration of a claimant’s ability to do paid work, but rather that the ability to do these chores does not necessarily translate to the ability to work. See for example, *Gold v. Secretary of Health, Education and Welfare* 463 F.2d 38 (2d Cir. 1972); *Leggett v. Chater* 67 F.3d 558 (5th Cir. 1995); *Light v. Social Security Administration* 119 F.3d 789 (9th Cir. 1997); *Orteza v. Shalala* 50 F.3d 748 (9th Cir. 1995); *Cavitt v. Schweiker* 704 F.2d 1193 (10th Cir. 1983); *Ragland v. Shalala* 992 F.2d 1056 (10th Cir. 1993); *Mullen v. Gardner* 256 F. Supp. 588 (E.D.N.Y. 1966); *Kelley v. Callahan* 113 F.3d 583 (8th Cir. 1998).

19. For other cases analyzing the use of the “sit and squirm” test, see *Aubeuf v. Schweiker* 649 F.2d 107 (2d Cir. 1981); *Van Horn v. Schweiker* 717 F.2d 871 (3d Cir. 1983); *Jenkins v. Sullivan* 906 F.2d 107 (4th Cir. 1990); *Spencer v. Schweiker* 678 F.2d 42 (5th Cir. 1982); *Weaver v. Secretary of Health and Human Services* 722 F.2d 310 (6th Cir. 1983); *Bishop v. Sullivan* 900 F.2d 1259 (8th Cir. 1990); *Teter v. Heckler* 775 F.2d 1104 (10th Cir. 1985); *Gay v. Sullivan* 986 F.2d 1336 (10th Cir. 1993); *Johns v. Bowen* 821 F.2d 551 (11th Cir. 1987); *Tyler v. Weinberger* 409 F. Supp. 776 (E.D. Va. 1976).

20. The sample sizes shift because only certain cases invoke each rule. For example, in some cases, ALJs did not make a negative credibility determination, denying the claim on other grounds, such as a failure to comply with prescribed treatment. In these cases, the rule was not relevant. In other cases, there were no extramedical factors to substantiate or validate the determination, rendering this aspect of the credibility rules irrelevant.

21. For a sample of relevant Social Security federal court cases, see note 19.

22. Mr. Tommie (89-4093, CA) served in Vietnam, and his alleged impairments stemmed from that military service. Based on my reading of the transcripts, no other service-related impairments were alleged.

23. The preference historically afforded ALJ applicants who are veterans has disproportionately filled the ALJ corps with men who previously served in the military (Verkuil et al. 1992). This factor could have some bearing on the proclivity of some judges to establish whether claimants have a history of military service. If military service influences judges' credibility determinations, there is little doubt that women are disadvantaged by this practice.

Chapter 5

1. The only other studies that have examined these issues are the DHQRP Reviews (SSA 1995, 1997; chap. 3). However, the SSA's findings did not do a detailed text analysis of the hearing and decision-making process. Instead, RJs found, in general terms, that ALJs did or did not protect claimants' rights or did or did not inform claimants of their right to representation.

2. For a sample of relevant cases on this issue, see chapter 4, note 10.

3. Based on my 10 years' experience representing disability claimants before the SSA, judges are reluctant to postpone hearings because of the pressure to process claims quickly. See also GAO 1997; SSA 1995, 1997, for recent discussions on OHA hearing and decision-making practices.

4. This contention is based on informal conversations with several ALJs regarding their objections to claimants who wished to postpone.

5. For a full discussion of this issue see chapter 2, note 6.

6. For other relevant cases on unrepresented applicants, see chapter 4, note 10.

Chapter 6

1. The 1994 amendments to the Social Security Act (P.L. 103–296) place a 36-month cap on disability benefits for people with addictions and require drug testing. The 1996 amendments to the Social Security Act (P.L. 104–121) eliminated benefits to people who allege drug or alcohol addictions unless claimants can prove an underlying or unrelated impairment (Mills and Arjo 1996).

2. Relevant cases on involuntariness and alcohol or drug addiction include *Arroyo v. Secretary of Health and Human Services* 932 F.2d 82 (1st Cir. 1991); *Rutherford v. Schweiker* 685 F.2d 60 (2d Cir. 1982); *Jones v. Sullivan* 954 F.2d 125 (3d Cir. 1991); *Matullo v. Bowen* 926 F.2d 240 (3d Cir. 1990) *King v. Califano* 599 F.2d 597 (4th Cir. 1979); *Neal v. Bowen* 829 F.2d 528 (5th Cir. 1987); *Smith v. Secretary of Health and Human Services* 893 F.2d 106 (6th Cir. 1989); *O'Connor v. Sullivan* 938 F.2d 70 (7th Cir. 1991); *Thompson v. Sullivan* 957 F.2d 611 (8th Cir. 1992); *Hardy v. Chater* 64 F.3d 405 (8th Cir. 1995); *Tylitzki v. Shalala* 999 F.2d 1411 (9th Cir. 1993); *Andrews v. Shalala* 53 F.3d 1035 (9th Cir. 1995); *Saleem v. Chater* 86 F.3d 176 (10th Cir. 1996).

3. See Rice 1992 for a discussion of codependency theory and its ramifications on people's lives.

4. In a similar case, another ALJ felt justified lecturing a claimant on her tobacco use (Moore, 89-6436, IL). Interestingly, at least one circuit court recognized the discrimination smokers encounter and reversed the decision of an ALJ who denied the claimant benefits due to her habit, on the grounds that her problems would not be relieved by quitting smoking (*Kelley v. Callahan* 133 F.3d 583 (8th Cir. 1998)).

5. See Link, Mirotznik, and Cullen 1991; Melton and Garrison 1987 for a discussion of the stigma people with mental disabilities experience and the stereotypical assumptions the larger culture holds. These attitudes are frighteningly consistent with Nagi's (1969) findings on the biases of judges in cases involving mental impairments. That these attitudes persist among judges thirty years later is disturbing.

6. A number of federal court cases recognize that educational levels achieved by claimants do not necessarily reflect their capacity to read and write. Toward this end, ALJs are encouraged to inquire into a claimant's literacy. See, for example, *Albrilton v. Sullivan* 889 F.2d 640 (5th Cir. 1989); *Wilcults v. Apfel* 143 F.3d 1134 (8th Cir. 1998); *Dollar v. Bowen* 821 F.2d 530 (10th Cir. 1987); *Wolfe v. Chater* 86 F.3d 1072 (11th Cir. 1996). For relevant definitions of literacy and related issues, see 20 C.F.R. 404.1564 (b) (1) and *Wolfe v. Chater* 86 F.3d 1072 (11th Cir. 1996).

7. See Schoultz 1986 for a discussion of the discrimination faced by people who are illiterate. The National Center for Education Statistics (1993) reported that adults who demonstrate limited reading skills describe themselves as reading or writing English well. Matthew Adams (1994) of the Student Coalition for Action in Literacy Education, confirmed the view that people who are illiterate will overestimate their ability rather than admit to their limitations.

8. See Mills 1993 for a more elaborate discussion of the issue of gender bias in Social Security decision making. See also U.S. Court of Appeals [Ninth Circuit] (1992, 1993); and chapter 3, notes 1–3, for other insight into the gender bias in the system.

9. For an insightful discussion of the social pressure, particularly on black women, to be attractive, see Collins 1991, chap. 4.

10. See chapter 4, note 19 for relevant case law prohibiting judges from basing their decisions on personal observations alone.

Chapter 7

1. Evidence of this dynamic was detected in the recent study of ALJ decision making (SSA 1995), which revealed that claimant credibility was one of five primary factors affecting ALJ award rates. Implicit in this finding is the assumption that credibility can also have a negative effect on ALJ decision making.

2. SSA could and should add to the DHQR Data Collection Form explicit questions about the influence of bias on ALJ hearing and decision-making practices. See, for example, Mills 1993.

3. Some of these ideas come from the Justice and Diversity training I designed for OHA with Benchmark Institute, a continuing legal and leadership education training center in San Francisco, Calif.

Table of Claimants' Cases

The cases listed below form the database of hearings and decisions from which the substantive analysis is derived.

Acevedo, Maria. 87-2767, CA.
Alexander, Elwood. 90-1220, CA.
Allen, Bervin. 89-2788, IL.
Alva, Maria Luisa. 84-0617, CA.
Bell, George. 90-5548, IL.
Brown-Blick, Marion. 89-2659, CA.
Burr, Glendine. 87-10636, IL.
Costello, Frank. 88-7350, IL.
Curran, Katherine S. 88-2459, MA.
Davenport, Renee R. 89-1268, MA.
Davidson, Gerald. 88-4892, IL.
DeAlmeida, Jose R. 87-3402, CA.
Degryse, Linda. 88-2082, MA.
DeMeo, A. Louise. 90-10131, MA.
Diaz, Lauro. 86-20473, CA.
Flynn, Lawrence H. 88-9370, IL.
Forsyth, Claire. 99-1887, MA.
Foster, Benjamin. 89-3214, IL.
Galasso, Beatrice. 88-0280, MA.
Garcia, Maria D. 87-5693, CA.
Harner, Ruth. 86-4185, CA.
Harold, Eugene. 89-5168, IL.
Harper, John. 89-4374, IL.
Hereford, James. 90-1115, CA.

Hilton, Amos. 89-2370, MA.
James, Arthur G. 88-1712, CA.
Karkar, Lourice. 89-3486, CA.
LaPensee, Kevin J. 89-2492, MA.
Lawton, G. Arnold. 87-5180, CA.
Marques, Maria Alice. 89-01257, MA.
McGee, Robert. 88-6320, IL.
McMahon, George. 89-1084, MA.
Mendoza, Josefa. 87-2376, CA.
Miller, Richard D. 89-4239, CA.
Moore, Barbara. 89-6436, IL.
Neri, Mary. 84-20289, CA.
O'Connor, Thomas. 89-4412, IL.
Petrie, Joan Marie. 87-9100, IL.
Plain, Bobbie L. 87-5258, IL.
Price, Gussie. 89-4298, IL.
Prince, Ralph. 87-9662, IL.
Redd, Selina. 87-3348, IL.
Reed, Seymour. 88-6170, IL.
Rodriguez, Virgilio. 87-878, IL.
Slevin, Terrence K. 84-3092, CA.
Smith, Gladys. 86-6054, IL.
Thompson, Darlene V. 88-6104, IL.
Tommie, Patrick. 89-4093, CA.
Vatistas, Savas. 88-6532, IL.
Ventura, Rafael. 88-9490, IL.

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