

7. Social Security Disability Adjudicative Reform: Ending the Reconsideration Stage of SSDI Adjudication after Sixteen Years of Testing and Enhancing Initial Stage Record Development

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INTRODUCTION

The Social Security Administration’s (SSA) system of administrative adjudication of disability claims has been referred to as “the largest adjudicative agency in the western world” (Mashaw et al. 1978). It processes nearly three million new claims and issues over four million decisions at its various stages each year (SSA 2015b, 143). SSA system contains a four-stage adjudication process. The first two stages are an initial application and reconsideration stage before the state disability determination services agencies (DDS). The latter two stages are hearings and appeals at SSA Office of Disability Adjudication and Review’s (ODAR) hearing offices and Appeals Council, respectively.

The vast majority of agency decision-making is done at the first two levels of adjudication before the state (DDS) agencies. Whereas over 3.5 million claims are processed annually at the first two levels—most at the initial stage—less than one million are handled at the latter two hearings and appeals stages (SSA 2015b, 143). Thus, to avert the common criticism that debates about SSA adjudicative process have “an instinct for the capillary” by focusing largely on reform of the more newsworthy hearings and appeals stages rather than the largely “invisible” yet far more numerically significant DDS stages (Mashaw et al. 1984, 19), this paper will focus on the earlier two stages.

Of the approximately 750,000 claims handled at the reconsideration stage each year, only approximately 11 percent obtain a different outcome than at the first or initial stage of the process. This compares with a claimant success rate at the initial stage of approximately 32 percent, and a 45 percent rate of change or claim approval at the Administrative Law Judge (ALJ) stage (SSA 2016b, 143). For over 30 years, the agency, at Congress’s urging, has itself formally questioned the efficacy and efficiency of continuing the reconsideration step, at least in its current form; it has piloted alterations or eliminations of reconsideration since 1984.¹ SSA is currently testing an elimination of reconsideration in 10 states with an initially announced goal of eliminating the reconsideration stage nationally.² That goal has not been realized and the testing, while continuing at least through the Fall 2015 and likely thereafter,³ was proposed for a reduction in scope by the most recently confirmed SSA commissioner (SSA 2010a, 13), thus calling into question SSA’s present policy direction on this issue.

¹ See Pub. L. No. 98-860, § 6(d), (e), 98 Stat. 1794, 1802-03 (Oct. 9, 1984).

² Process Re-engineering Program; Disability Reengineering Project Plan, 59 Fed. Reg. 47,887 (Sept. 14, 1994); Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47,218, 47,219 (Aug. 20, 1999); New Disability Claims Process, 66 Fed. Reg. 5494 (Jan. 19, 2001).

³ See 79 Fed. Reg. 39,453 (July 10, 2014).

This paper argues that SSA is well overdue for eliminating the reconsideration stage once and for all and streamlining the adjudicative process from four stages to three.⁴ The reasons provided for not acting on the initial plan to abolish the reconsideration process provide insufficient policy justification and perhaps even questionable legal rationale for continuing this highly inefficient stage.⁵

In addition, during the same greater than 30-year period that SSA has experimented with altering reconsideration, it has also, at the direction of Congress, experimented with ways to promote greater record development at the initial determination stage to enhance the decisional value of this stage.⁶ While some limited progress has been made in this area, this paper also includes a series of recommendations to make the initial stage more meaningful to promote greater decisional fairness, consistency, efficiency and integrity in lieu of and with a diversion of focus, resources and person power from the largely superfluous, rubber stamp reconsideration stage. These measures seek to promote fuller record development at the initial stage to better mirror well-developed administrative records adjudicated at the third (ALJ hearing) adjudication stage in order to reach more accurate decisions earlier in the process.⁷

THE PROBLEM

Discussion: Reconsideration Structure

The Social Security Administration (SSA) utilizes a four- stage administrative adjudicative process for the disposition of claims under the Social Security Disability Insurance (SSDI) and Supplemental

⁴ Some studies have also questioned the continued need for and utility of the Appeals Council. *See, e.g.*, Koch and Koplow (1990). The Appeals Council has a remand rate of only 14 percent and a reversal rate of only 1 percent (SSA 2016b, 143). This has led to proposals and pilot projects for the elimination of this fourth adjudicative stage as well. *See, e.g.*, Administrative Review Process, Testing Elimination of the Fourth Step of Administrative Review in the Disability Claims Process (Request for Review by the Appeals Council), 62 Fed. Reg. 49,598 (Sept. 23, 1997); see also 59 Fed. Reg. 47,887, 47,917-18 (Sept. 19, 1994). However, the Appeals Council provides a different and potentially more policy-oriented agency review stage to observe trends and make policy decisions about the handling of types or patterns of cases and issues before those cases enter the federal courts for judicial review. *See* SSA HALLEX II-5-0-1, 2003 WL 25498917, at *1 (“The Appeals Council is admirably well-suited and well-situated to serve a major role in promoting policy integrity. The Appeals Council is the only unit in SSA which regularly receives and adjudicates a broad run of ordinary and extraordinary cases.”). As such, the Appeals Council furthers more classical administrative exhaustion functions than what is essentially a do-over of the initial stage through the reconsideration process. *See* generally McCarthy (1992) describing purposes of the administrative exhaustion doctrine such as protecting agency autonomy and promoting judicial efficiency. Thus, whatever can be argued about the utility and efficacy of the Appeals Council stage, stronger and more obvious rationale is manifest for eliminating the largely repetitive and duplicative reconsideration process.

⁵ *See infra* text accompanying note 17-18, 80 (discussing the potential for creating excessive and unreasonable delay in contravention of 42 U.S.C. § 405(b) and the Due Process Clause and the potential legal issues raised by bureaucratic disenfranchisement).

⁶ *See* Pub. L. No. 98-860, § 6(d), (e), 98 Stat. 1794, 1802-03 (Oct. 9, 1984)

⁷ This is not to imply that all hearing stage cases have well-developed records but only that the ALJs possess tools and a culture established to promote greater development through, face-to-face inquiry, identification of evidentiary lapses, subpoena power to order evidence, and the ability to procure the testimony of medical advisors and vocational experts. *See* Dubin and Rains (2012), 113-14. As such, fuller record development than what occurs at the DDS is the norm. Nevertheless, federal case law is replete with examples of inadequate record development at the ALJ stage necessitating court remands for additional development, particularly in cases where claimants lack attorney representation. *See* Kubitschek and Dubin (2015), §§ 6:8, 6:9, 6:11, 6:12, 6:17 (collecting cases); *see also* Sims (2000) noting that a large and significant number of claimants either lack attorney representation or any representation in SSA hearings.

SOCIAL SECURITY: RESTRUCTURING DISABILITY ADJUDICATION

Security Income Disability (SSID) programs. A claimant initiates the process by filing an application online using SSA website or at one of SSA's district or branch offices.⁸ SSA district office determines financial or non-disability eligibility and, if such eligibility is found, forwards the claim to a state agency operating as the state's federally funded Disability Determination Service (DDS) pursuant to SSA regulations (SSA 2015a).⁹

The state's DDS proceeds to develop the claim by seeking medical records and reports from the claimants' treating sources, hospitals, and clinics. If those records or documents are unavailable or insufficient to make a determination, "the DDS will arrange for a consultative examination (CE) to obtain the additional information needed" (SSA 2015a). Although SSA regulations designate the claimant's treating physician as the preferred source for the CE,¹⁰ the DDS rarely obtains the CE from treating sources (Wittenberg et al. 2012, 26).¹¹ After completing its development of the evidence, the DDS then usually employs a two-person team consisting of an internal medical or psychological consultant and a disability examiner to determine the DDS's initial disability decision (SSA 2015d).

After rendering its decision, the DDS returns the case to SSA field office for appropriate action. If the DDS found that the claimant is disabled, SSA completes any outstanding non-disability development, computes the benefit amount, and begins paying benefits. If the claimant was found not to be disabled, the file is kept in the field office in case the claimant decides to appeal the determination to the next stage to obtain reconsideration.

The reconsideration stage is handled under the identical procedures as the initial application stage except that different personnel within the respective DDS offices make the reconsidered decisions.¹² The claimant can submit additional evidence at the reconsideration stage although is neither required to do so nor is informed of specific evidence that was lacking or ways to remedy those deficiencies through additional evidence. Nor is the DDS mandated to solicit additional evidence to address identified deficiencies at the initial stage, and additional development is largely focused on obtaining evidence only in the relatively limited situations where there is significant worsening in condition, new ailments (or allegations of the same) or newly developed evidence (SSA 2014).¹³ With the exception

⁸ See 20 C.F.R. §§ 404.611, 404.614, 422.505(a) (2015). While claims under the SSI program utilize the same process, only the regulations pertaining to the SSDI program will be referenced henceforth.

⁹ 20 C.F.R. § 404.1620 (2015).

¹⁰ See 20 C.F.R. §§ 404.1519h (2015); 416.919h (2015).

¹¹ Aa study of CE evaluations found that in less than 5 percent of the cases were treating sources even requested to perform a needed CE evaluation and that none of the CEs in the study were ultimately performed by treating sources.

¹² See generally (SSA 2014) (noting the requirement of a different two-person DDS team than that used for the initial determination); (SSA 2013) (noting that the process is essentially the same for reconsideration as in initial application determinations except when there is a continuing disability review (CDR) in the case of a benefits termination decision which triggers resort to a DDS hearing examiner at the reconsideration stage).

¹³ "2. Case development at reconsideration. Once a reconsideration case on an initial claim has been received from the FO, the disability examiner is responsible for reviewing the case *to determine if additional development is warranted. If further case development is warranted, the disability examiner:*

Obtains additional information needed to document *new* allegations or *a worsening* of the claimant's condition (*e.g.*, SSA-3373 Function Report).

Contacts all medical sources from which the claimant received examination or treatment *since the initial determination* for any medical evidence they may be able to provide."

(emphasis added).

of a pilot project conducted during the mid-1980s,¹⁴ the claimant ordinarily does not appear in person before SSA or DDS decision makers during reconsideration of initial applications.

Evidence that Outlines or Quantifies the Problem

Although the number of applications to the disability programs appears to have crested and is on the decline, dropping from 3,391,000 initial disability claims in fiscal year 2011 to 3,207,000 in FY 2012 to 2,998,000 in FY 2013 to 2,862,000 in FY 2014 (SSA 2015c, 10), the present load is still considerable. In FY 2014, 32 percent of initial claims were granted (SSA 2015b, 143). The average processing time from application to notification in 2014 was 110 days.

In the past year, 761,772 claimants appealed denial of their initial applications to the reconsideration stage. Eleven percent of the 744,336 reconsideration decisions were favorable and the other 89 percent were affirmed (SSA 2015b, 143). The average processing time at the reconsideration level was 108 days (SSA 2015c, 10). This reflects a significant increase over reconsideration processing times in prior decades (Bertoni 2007, 20).¹⁵ To put this 108-day average reconsideration processing time in context, SSA has acknowledged before the United States Supreme Court, (*Heckler v. Day* 1983, 111)¹⁶ and a lower court has ruled, (*Barnett v. Bowen* 1987)¹⁷ that a reconsideration processing time in excess of 90 days is excessive and violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed. Furthermore, the extended reconsideration processing times exacerbate a four-stage process with significant delays and time lapses at each of the other stages. Adjudicative delays at the other stages are also substantial. For example, the median adjudicative delay at the third (ALJ hearing) stage is up to 422 days from request to decision (SSA 2015c, 10).

Thus, by largely duplicating the initial application stage, the reconsideration stage is not designed to produce meaningful additional adjudicative benefits or results beyond those achieved at the prior stage. Its limited alteration rate is an inevitable byproduct of its limited design. As such, the reconsideration stage lacks meaningful or sound public policy justification. It mandates devotion of agency resources for an entire additional adjudicative stage with attendant personnel and administrative costs for three quarter of a million annual reconsideration decisions, imposes significant delays in adjudicative results for the vast majority of claims initially denied, and produces limited tangible adjudicative benefits.

Past Initiatives aimed at Addressing the Problem

For many years, SSA has experimented with eliminating or altering the reconsideration stage due to its limited benefits, and SSA is still testing the elimination of reconsideration at least until September 2015. In the Social Security Disability Benefits Reform Act of 1984 (DBRA), Congress mandated that SSA initiate demonstration projects in at least five states that would alter the process at the state DDS

¹⁴ See, e.g., 54 Fed. Reg 54,533 (1993) (describing the 1984-87 Personal Appearance Demonstration (PAD) Pilot).

¹⁵ Noting that the process from request for reconsideration to reconsidered decision had increased by 50 percent over the previous decade and had risen to 72 days by 2007.

¹⁶ SSA concedes before the U.S. Supreme Court that a 90-day or greater period between reconsideration request and reconsideration decision violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed.

¹⁷The court finds that excessive delays in reconsideration and hearing determinations defined, in the context of reconsideration determinations, as decisions exceeding greater than 90 days from reconsideration request, violate § 405(b) and it orders various forms of injunctive relief on behalf of delayed claimants.

stages.¹⁸ The Administrative Conference of the United States (ACUS) issued a report in 1987 discussing the rationale for and structure of the 1984 pilot project initiated pursuant to Congress's direction in the Act; ACUS interpreted the Act as a mandate for select DDS offices "to try a one-step proceeding, allowing a personal interview *but eliminating the reconsideration step.*"¹⁹ It noted that SSA's adjudicative process "has been subject to criticism" because, among other reasons, "the current system with its four tiers of successive reviews often results in the replacement of one decision maker's determination with that of the next, but without necessarily improving the quality of any of the actual decisions."²⁰ In that regard, it observed that the reconsideration stage was "*essentially a repeat of the initial determination process.*"²¹ Although SSA was required to report the project results to the House Ways and Means Committee no later than December 31, 1986, the agency "issued no final report" and "made no definitive findings" (Carrow 1994, 297).²²

Then, in 1993, SSA proposed to test five models for altering the DDS stages of adjudication in order to: "provide assistance to the disability applicant by making the filing of a disability claim simpler, more responsive and more compassionate; promote fairness in each disability determination by ensuring that each disability applicant is given an opportunity to provide all the necessary information to complete the claim and is aware of his/her rights under the program; and ensure that the Agency's determination is both inclusive and equitable."²³ One model entitled "the reconsideration elimination model" was "designed to test whether the disability process is improved by the elimination of the reconsideration step."²⁴ Under this model, if a claimant was not satisfied with the initial determination, he or she could proceed directly to request a hearing before an ALJ.²⁵

Just one year later, in 1994, the agency announced the more far-reaching Process Reengineering Program—Disability Reengineering Project Plan.²⁶ In the agency's words: "[t]he Process Reengineering Program essentially asks the question, 'If SSA had the opportunity today to design its processes, what would they look like?' In other words, 'how would we design a process if we were starting over?'"²⁷ The program's "objective is to fundamentally rethink and radically redesign SSA's processes to achieve dramatic improvements in critical measures of performance such as quality of service, speed and efficiency."²⁸ A component of the Reengineering Project Plan was the elimination of the reconsideration step which was planned to commence with further testing and then be "fully implemented nationwide" by FY 1998.²⁹ The agency noted that of all the proposed process and substantive changes to the disability determination process recommended in the Reengineering Project, the "most popular concept" reflected in the most frequently mentioned comments received during the agency's notice and comment period was the proposal to eliminate the reconsideration

¹⁸ Pub.L. 98-860, § 6(d), (e), 98 Stat. 1794, 1802-03 (Oct. 9, 1984).

¹⁹ Administrative Conference of the United States, State Level Determinations in Social Security Disability Cases, ACUS No. 87-6 (Dec. 17, 1987), 52 Fed. Reg. 49,142 (Dec. 30, 1987) (emphasis added).

²⁰ *Ibid.* (emphasis added).

²¹ *Ibid.* (emphasis added).

²² See 58 Fed. Reg. 54,533 (Oct. 22, 1993).

²³ See Testing Modifications to the Disability Determination Procedures, 58 Fed. Reg. 54,532, 54,533 (Oct. 22, 1993).

²⁴ *Ibid.* at 54,535.

²⁵ *Ibid.*

²⁶ Process Re-engineering Program; Disability Reengineering Project Plan, 59 Fed. Reg. 47,887 (Sept. 14, 1994).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.* at 47, 923.

stage.³⁰

After a few years of testing various aspects of the Reengineering Plan on a smaller scale,³¹ SSA announced in 1999 that it was selecting 10 states, representing approximately 20 percent of all disability benefits applicants, for more focused testing of three aspects of the disability redesign process.³² It noted that “several tests have been conducted” and as a result, the agency is “now announcing a prototype that incorporates multiple modifications to the disability determination procedures employed by State Disability Determination Services (DDS) which have been shown to be effective in earlier tests.”³³ The four changes shown to be effective by “improv[ing] the initial disability determination process” and therefore included in the 10-state prototype included: “providing greater decisional authority to the disability examiner and more effective use of the expertise of the medical consultant; ensuring appropriate development and explanation of key issues; increasing opportunities for claimant interaction with the decision maker before a determination is made; and simplifying the appeals process by eliminating the reconsideration step.”³⁴

Finally, in 2001, SSA issued a notice of proposed rulemaking indicating its intent to apply three of these process modifications nationally over the next year until they were implemented in every state with a “projected completion date” no later than 2003.³⁵ It stated:

1. We are proposing to change our rules for how State agencies make disability determinations for us. The change would allow State agency adjudicators, called “disability examiners,” to decide whether input from a medical or psychological consultant is needed to make a disability determination. The medical or psychological consultant would not be responsible for the determination; i.e., would not be an adjudicator of the claim.
2. We are proposing to add rules providing that disability examiners will offer claimants an opportunity for an informal conference whenever it appears that the evidence does not support a fully favorable determination.³⁶
3. We are proposing to eliminate the reconsideration step of our administrative review process.³⁷

The agency then supplied the rationale for making these changes permanent based on its analysis of the costs and benefits from the years of testing. It stated:

³⁰ *Ibid.* at 47, 940.

³¹ See, e.g., 60 Fed. Reg. 20,023 (April 24, 1995); 60 Fed. Reg. 47, 469 (Sept. 13, 1995); 62 Fed. Reg. 16,209 (April 4, 1997); 62 Fed. Reg. 41,457 (Aug. 1, 1997); 63 Fed. Reg. 40,946 (July 31, 1998); 63 Fed. Reg. 58444 (Oct. 30, 1998).

³² Modifications to the Disability Determination Procedures; Disability Claims Process Redesign Prototype, 64 Fed. Reg. 47,218, 47,219 (Aug. 20, 1999).

³³ *Ibid.* at 47,218.

³⁴ *Ibid.*

³⁵ New Disability Claims Process, 66 Fed. Reg. 5494 (Jan. 19, 2001).

³⁶ The conferencing aspect of the prototype was time-consuming and was discontinued in 2002. See Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features, 67 Fed. Reg. 42594 (June 24, 2002); See also (Robinson 2002a, 16) (noting initial decisions in prototype with claimant conferences took approximately 14 days longer).

³⁷ *Ibid.*

We found that these actions resulted in better determinations at the initial level, with more allowances of claims that should have been allowed. We believe that many claims that would have been allowed only after appeal under the old process were allowed at the initial step under the new process. These claimants were able to receive benefits months sooner than they otherwise would have, an important protection for individuals who are unable to work. By eliminating the reconsideration step, claimants who appealed reached the hearing level an average of 2 months sooner than claimants who went through the reconsideration step and therefore had an opportunity to receive their hearing decisions sooner. Also, the quality of our determinations improved. Reviews of disability determinations from the FPM by SSA's Office of Quality Assessment indicated that the new process improved the accuracy of initial decisions to deny claims from 92.6 percent to 94.8 percent. If implemented nationally, this would translate to approximately 34,000 fewer disabled claimants being erroneously denied benefits and facing the prospect of a lengthy appeal. **We believe that these positive results were due to a number of factors. For example, we know that removing the reconsideration step permitted the State agencies to redirect their resources so that the individuals who formerly worked on reconsideration claims could work on initial claims. This permitted increased contact with the claimants and improved documentation of the disability determinations.**³⁸

The agency had earlier concluded that: “Although the prototype is continuing and we continue to gather information and gain operational experience, we believe that we now have sufficient information to propose changes to our regulations.”³⁹ Accordingly, further comments received on these proposed changes will assist only to the extent of “fine-tuning” these changes.”⁴⁰

However, rather than moving toward the promised national implementation, on May 1, 2001, a mere five months later, SSA Associate Commissioner for Disability Kenneth Nibali issued DDS Administrators’ Letter No. 566 explaining that because “preliminary data from the prototypes have raised questions about the program costs of national implementation final decision about rollout will be reserved until more complete data are available,” which was expected by the end of the year. The letter explained in somewhat ambiguous language that significant additional program costs for national rollout were anticipated “since some of the people we are paying at the DDS level would not have appealed and been paid by OHA [now ODAR] under the old process.”

From 2001 to 2005, the agency continued the prototype in the 10 selected states. Then, in 2005 and 2006, the agency proposed and partially implemented yet another new process reform program entitled Disability Service Improvement (DSI) process.⁴¹ Among other process changes proposed in DSI, the agency called for eliminating the reconsideration step but replacing it with review by a federal reviewing officer (FRO).⁴² A claimant denied at the initial stage would be required to seek review by

³⁸ Ibid. at 5495 (emphasis added).

³⁹ Ibid. at 5394.

⁴⁰ Ibid.

⁴¹ Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590 (proposed July 27, 2005); Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (to be codified at 20 C.F.R., pts. 404,405, 416 & 422).

⁴² See Ibid.

the FRO, who would then issue a decision on that request for review.⁴³ Failure to seek FRO review would preclude access to an ALJ hearing.⁴⁴ The FRO would work outside the DDS and would possess some evidence-gathering capabilities beyond that exercised by the DDS on reconsideration, such as the ability to develop the evidence in the file, issue subpoenas, and consult with experts through a new Medical and Vocational Expert System (MVES) operated within a newly created federal Office of Medical and Vocational Expertise (OMVE). The FRO could then issue decisions based on the evidence.⁴⁵ Nevertheless, even among prominent proponents of DSI, a significant critique of the proposed FRO process was the likelihood that the structure would simply replicate reconsideration and supply yet an additional barrier with attendant delays and insufficient countervailing benefits to justify its existence.⁴⁶

SSA implemented DSI only in one of its smallest regions (Boston).⁴⁷ While it proceeded to national implementation with one aspect of DSI that it determined was working effectively—a process for quick disability determinations (QDD) for certain types of obvious claims⁴⁸—it ultimately suspended the FRO and much of the rest of DSI in 2008 citing budgetary constraints.⁴⁹ In describing its rationale for suspending FRO, the agency cited overwhelming support for eliminating FRO in public comments and offered its response to those comments:

All but one of the commenters specifically expressed support for the suspension of new claims to the FedRO and MVES/OMVE. Several of these commenters discussed concerns over the processing time for claims and the claimant's or the representative's ability to contact the FedRO. One commenter also discussed concerns over FedRO case development and the quality of FedRO decisions.

Response: The primary reason for the processing time and service issues raised in the comments is the staffing levels of the OFedRO and MVES/OMVE. The staffing levels for these organizations have been approximately 50 percent of the levels we believed would be needed to handle the Boston region workload. . . . Accordingly, we staffed the OFedRO and MVES/OMVE to the greatest extent possible while also focusing our scarce resources on the backlog of disability hearings.⁵⁰

⁴³ See *Ibid.*

⁴⁴ See *Ibid.*

⁴⁵ See *Ibid.*; see generally BLOCH ON SOCIAL SECURITY § 1:11 (2015) (describing DSI).

⁴⁶ See, e.g., (Bloch, Lubbers and Verkuil 2007, 237) (“The concern remains, however, that authorizing the FRO to issue a decision to deny benefits will excessively formalize this stage of the process, canceling out the streamlining provided by eliminating the reconsideration stage.”); cf. (Rains 2007, 250) (“[I]t is hard to see how use of a federal reviewing official (FedRO) will be a significant improvement over the reconsideration stage. . . . Rather than add the FedRO, SSA should put more resources into the initial determination process and the ODAR in order to encourage full and timely development of the record at these two critical stages.”).

⁴⁷ 71 Fed. Reg. at 16440. The Boston Region is Region I and includes (Connecticut, Massachusetts, Maine, New Hampshire Rhode Island and Vermont). See *Ibid.*

⁴⁸ Amendments to the Quick Disability Determination Process, 72 Fed. Reg. 51,173 (Sept. 6, 2007).

⁴⁹ See, e.g., Suspension of New Claims to the Federal Reviewing Official Review Level, 73 Fed. Reg. 2411 (Jan. 15, 2008).

⁵⁰ *Ibid.* at 2412.

With the end of the FRO stage of DSI, the agency restored reconsideration in the Boston region states with the exception of New Hampshire which, as one of the 10 prototype states testing elimination of reconsideration, was restored to that ongoing test.⁵¹

On April 27, 2010, SSA Commissioner Michael J. Astrue signaled a potential change in policy direction on the elimination of reconsideration. In testimony before the House Ways and Means Committee during a hearing on the backlog of hearing-stage cases, Commissioner Astrue revealed that one way the agency was evaluating possible improvements in the disability process and hearing backlog was to take a “new look” at the disability caseloads in prototype states which have been testing elimination of reconsideration (SSA 2010b, 3). As a function of that new look, the commissioner proposed reducing the testing by two states by removing Michigan and perhaps Colorado from the tests. He observed:

We expected that eliminating the reconsideration step in the prototype states would result in earlier decisions and reduced waiting times for claimants; however, we have found the opposite is true. In 1998, prior to the start of the prototype test, the proportion of initial decisions that ended up at the hearings level was 1.4 percentage points higher in the prototype states than in the non-prototype states. By 2007, that difference between prototype and non-prototype states had grown to 7.5 percentage points. . . .

In Michigan, an economically hard-hit state, we have concluded that too many cases are needlessly going to the hearings level from the DDSs. Therefore, we plan to reinstate reconsideration in Michigan next fiscal year. Of all the prototype states, Michigan has the highest percentage of hearing requests, not to mention some of the most backlogged hearing offices in the country. Reinstating reconsideration would allow a significant number of cases to be allowed at reconsideration, resulting in earlier payment to those claimants and a reduction in the number of hearing requests. Moreover, those cases that do go to hearing would be more thoroughly developed, having already been through the reconsideration step. . . . In addition to Michigan, we are also looking at reinstating reconsideration in Colorado[.]

Although the president’s FY 2011 budget called for curtailing of the elimination of reconsideration testing with the removal of Michigan (SSA 2010a, 13), SSA nevertheless chose to continue testing unabated and to retain Michigan and Colorado in the prototype program. Although the agency has indicated that the tests of elimination of reconsideration were supposed to end by 2009 unless extended,⁵² notwithstanding the former commissioner’s announced misgivings and apparent attempted change of policy direction, the tests have been extended each year and are fully operative until at least September 2015 and likely thereafter.⁵³

⁵¹ Modifications to the Disability Determination Procedures; Reinstatement of “Prototype” and “Single Decisionmaker” Tests in States in the Boston Region, 73 Fed. Reg. 12,495 (March 7, 2008).

⁵² Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features, 71 Fed. Reg. 45,890 (Aug. 3, 2006).

⁵³ 79 Fed. Reg. 39, 453 (July 10, 2014).

DETAILED PROPOSAL

For many years, Congress, ACUS, Social Security disability scholars, and the agency itself have urged improvement of SSA's massive disability adjudicative system by focusing on streamlining and consolidating resources at the DDS levels—where the vast majority of decision-making occurs—through elimination of reconsideration and strengthening of record development at the initial application stage. An unbroken series of initiatives commencing with the congressionally mandated demonstration projects in the 1984 DBRA, through the 1994 Reengineering Project and even including aspects of the 2006 Disability Service Improvements and the continuation of the prototype testing thereafter and to the present, effect this policy priority.

Nationwide Elimination of Reconsideration

This paper suggests that more than 16 years of testing with no end in sight is sufficient. It proposes as a first process recommendation that SSA finally make permanent the nationwide elimination of reconsideration. Undoubtedly SSA could study and test reconsideration elimination for another 16 years and the most recent 16-year period of focused testing appears to have been continued indefinitely. However, the agency has supplied no indication of what it seeks to gain from further extended testing of reconsideration elimination that it has been unable to observe or obtain in the past 16 years, or why it has taken 16 years to identify the deficiencies of its current testing protocols. Nor has the agency indicated what it would do differently through further extended testing and how different testing protocols or results would likely lead to different public policy conclusions or options.

Initial Stage Modifications to Promote Better Record Development

A significant criticism of SSA adjudicative process is the relatively high, albeit diminishing, approval rates by the ALJs (Pierce 2011). ALJs currently approve 45 percent of decisions, down from 63 percent six years ago (SSA 2015b).⁵⁴ Rather than necessarily suggestive of adjudicative inconsistency and reversals of the DDS, these still relatively significant ALJ approval rates are explainable in part by the utilization of significantly different and more developed medical and evidentiary records at the entirely *de novo* ALJ stage than at the initial application stage (Dubin and Rains 2012, 113-14).⁵⁵ ALJs possess tools and a culture established to promote greater development through, face-to-face inquiry and conferencing with the claimant, identification of evidentiary lapses and subpoena power to procure evidence from treating sources and order evidence, and the ability to obtain the testimony of medical advisors and vocational experts.⁵⁶ The development of medical and evidentiary records at the initial stage which are closer to the ultimate records developed at the ALJ stage would not only promote greater inter-stage consistency but also more accurate decision-making earlier in the process—a major objective of the past thirty years of the SSA's adjudicative process reform proposals. Accordingly, the second process recommendation in this paper is to divert DDS resources and personnel liberated from assignment to processing three quarters of a million annual reconsideration claims to work on enhancing record development at the initial stage. As a start, the agency should adopt the prototype changes it is already utilizing and has evaluated on multiple occasions as more productive of decisional

⁵⁴ (Office of Disability Program Management information) FY 2009, FY 2010, FY 2011, FY 2012, FY 2013, and FY 2014.

⁵⁵ It is also explainable in part by the claimants' age and the fact that their conditions sometimes deteriorate between the DDS and hearing stages. See *Ibid.*

⁵⁶ *Ibid.*

accuracy and quality than initial determinations in non-prototype states. This includes the components of the prototype that have also been tested since 1999.⁵⁷

In addition, since the existing prototype does not focus significantly on enhancing initial stage evidentiary development, beyond freeing up time for development through the use of a single decision maker model (SSAB 2015, 4),⁵⁸ other recommendations for greater initial stage steps to develop initial stage records closer to those developed at the hearing stage should include:

- 1) Developing and providing questionnaires and forms that track SSA listing criteria and listing equivalency considerations and residual functional capacity relevant criteria, including assessing the full range of vocationally relevant medical restrictions that vocational experts rely upon in assessing ability to make an adjustment to work other than jobs performed in the past, as reflected in agency Social Security Rulings and relevant vocational source materials;
- 2) Providing such forms to both treating and consulting physicians in the process and, where needed, explanation and training to them, to advance firmer and more supportable rationales for decision-making earlier in the process and ensuring the medical sources responses are appropriately supported and not mere box-checking as is often present in DDS internal agency physician form and questionnaire evaluations.⁵⁹

With respect to those first two recommendations, SSA personnel sometimes assert the position that because SSA decision makers are responsible for determining residual functional capacity (RFC), meeting or equaling listings, and the ultimate determination of disability and these matters are “reserved to the Commissioner” under agency regulations,⁶⁰ they should not be seeking treating medical opinions on, and should give no weight to, treating findings and opinions that are components of RFC and listings. This is in error. SSA regulations also mandate that as a general matter significant and sometimes controlling weight be given to treating physician findings and opinions noting:

Generally, we give more weight to opinions from your treating sources, since these sources are likely the medical professionals most able to provide a detailed, longitudinal picture of [the claimant’s] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations.⁶¹

Accordingly, the courts reconcile SSA adjudicators’ responsibility for rendering the ultimate legal decision of disability reserved to the commissioner with the generally substantial solicitude accorded

⁵⁷ See *supra* notes 38-39 and accompanying text.

⁵⁸ The prototype’s single decision maker (SDM) model significantly reduces initial decision time and was projected to shave eleven days off of initial decision time if the SDM model were implemented nationally.

⁵⁹ See, e.g., (*Frey v. Bowen* 1986, 515) (“In comparison with the objective tests and measurements described by [claimant’s treating physicians’] report in this regard consists solely of boxes checked on the secretary’s form to indicate his conclusion of no limitation on right arm use.”); (*Laird v. Stidwell* 1997, 1193) (“plaintiffs point out that the check-box type forms the DDS consultants use to prepare the RFCs are of limited value in assessing a claimant’s vocational abilities.”); see also (*Mason v. Shalala* 1993, 1065) (“In contrast to the other two medical reports, the report from the New Jersey Division of Vocational Rehabilitation is but a two-page form, entitled ‘General Basic Medical Examination,’ that requires the physician only to check boxes and briefly to fill in the blanks.”).

⁶⁰ See 20 C.F.R. § 404.1527(d) (2015).

⁶¹ 20 C.F.R. § 404.1527(c)(2)(2015).

treating physician evidence under the regulations by explaining that it is the underlying treating medical findings and medical opinions that must be accorded great and sometimes “controlling weight” under agency regulations; not the ultimate legal determination of disability, RFC or listing status.⁶² As the United States Court of Appeals for the Tenth Circuit recently elaborated, medical findings as to work-related limitations would, if accepted, always “impact the ALJ’s determination of RFC—they always do, because that is what they are for—but that does not make the medical findings an impermissible opinion on RFC itself. If doctors could only give opinions on matters that could not affect RFC, medical opinions would be inherently useless in disability determinations” (*Krauser v. Astrue* 2011, 1330). Thus, for example, a treating physician finding that a claimant’s clinically and diagnostically well-supported severe spinal impairment limited the claimant to ten pounds of lifting, two hours standing and walking and six hours of sitting—the exertional medical components of sedentary work⁶³—may be entitled to great or controlling weight under SSA’s regulations. However, a treating opinion indicating merely that a claimant was “disabled” or limited to “sedentary work” would not warrant the same consideration. Accordingly, DDS personnel should attempt to acquire treating physician findings and opinions on listing and RFC components earlier in the process. Indeed, as discussed above, SSA regulations further acknowledge the importance of treating physician evaluation by expressing a preference that treating sources supply needed consultative evaluations (CEs) at all levels of adjudication.⁶⁴ As also discussed above, despite SSA’s express regulatory preference, treating physician CEs are exceedingly rare (Wittenberg et al. 2012, 26).

- 3) Employing vocational sources to provide “step-five” work assessments to guide decisions at the fifth substantive stage of SSA’s five-step regulatory sequential evaluation process involving the issue of a claimant’s ability to make a work adjustment to other work (not previously performed) based on the claimant’s age, education, past relevant work experience and residual functional capacity (RFC);⁶⁵
- 4) Providing greater identification of and assistance to mentally challenged and language-challenged claimants earlier in the process through the use of interpreters and adjudicative staff to avert impediments to record development attributable to those barriers;
- 5) Publication and effective enforcement of minimal quality standards for the conduct of consultative examinations (CEs); and
- 6) More comprehensive training to state agency adjudicators on the many important evaluative rules which, the author’s multi-decade clinical practice and consultation with disability advocates and claimant organizations reveal, are often, perhaps systematically (*Laird v. Stidwell* 1997),⁶⁶ disregarded at the DDS stages including: a) application of the standards and factors for assessing impairment symptomology;⁶⁷ b) assessing listing equivalency;⁶⁸ c) weighing medical evidence including treating physician evidence and applying the criteria and factors in the medical evidence regulations for so doing⁶⁹ and; d) proper application of vocational considerations in cases involving

⁶² See, e.g., (*Ralph v. Colvin* 2015, 16) (collecting cases and authority on this point).

⁶³ 20 C.F.R. 404.1567(a) (2015); SSR 83-10.

⁶⁴ See 20 C.F.R. § 404.1519h; 416.916h (2015).

⁶⁵ See 20 C.F.R. § 404.1520(g) (2015).

⁶⁶ The court grants partial summary judgment finding that the DDS in Iowa systematically failed to apply proper application of subjective symptomology and pain regulations in initial and reconsideration stage determinations.

⁶⁷ See 20 C.F.R. § 404.1529 et seq. (2015); Social Security Ruling 96-7p.

⁶⁸ See 20 C.F.R. § 404.1526 (2015).

⁶⁹ See 20 C.F.R. § 404.1527 et seq. (2015); Social Security Ruling 96-2p.

non-exertional limitations or otherwise not resolvable solely through direct and conclusive application of SSA's medical-vocational guidelines or "grid" regulations.⁷⁰

With respect to the above recommendations of "step-five" consultations with vocational sources and training on and proper application of vocational considerations (##3, 6d), it is of course, manifest that SSA develop an acceptable, empirically supported and non-obsolete occupational taxonomy to permit meaningful and accurate development of step-five medical-vocational "other work" conclusions by vocational sources at the initial level and other levels of adjudication (Dubin 2011). The courts,⁷¹ the U.S. Department of Labor (DOL),⁷² and U.S. General Accounting Office (GAO) (Robinson 2002b, 23)⁷³ have each found that the present occupational classification system, DOL's Dictionary of Occupational Titles ["DOT"] (1991) is "obsolete" as it has not been updated in nearly 25 years and is based largely on data from a fundamentally different 1960's labor market and American economy (Traver 2009, § 1403.1).⁷⁴ Furthermore, the DOL's current labor market classification system, the O*NET, is inadequate for disability determination purposes due to its failure to classify jobs by RFC (Tippins and Hilton 2010, 159-70). In addition, the courts have increasingly rejected step-five assessments based on questionable job incidence data as the DOT never supplied information on the number of occupations or jobs defined in its classification system and their location, and there is no apparent current data source collecting numerical job data linked to DOT codes and occupational titles, even assuming DOT job classifications were not obsolete.⁷⁵

⁷⁰ See Social Security Rulings 96-9p; 83-14; 85-15; 82-41; 83-10; 83-11; 83-12.

⁷¹ See, e.g., (*Browning v. Colvin* 2014, 709) ("A further problem is that the job descriptions used by the Social Security Administration come from a 23-year-old edition of the *Dictionary of Occupational Titles*, [DOT] which is no longer published, and mainly moreover from information from 1977—37 years ago. No doubt many of the jobs have changed and some have disappeared. We have no idea how vocational experts and administrative law judges deal with this problem."); (*Cunningham v. Astrue* 2010, 614-16) ("[C]ommon sense dictates that when such [DOT] descriptions appear obsolete, a more recent source of information should be consulted. . . . [W]e conclude that the VE's dependence on the DOT listings alone does not warrant a presumption of reliability."); (*Abbott v. Astrue* 2010, 559) (referencing "the now-defunct DOT").

⁷² Letter from Dixie Somers, Assistant Commissioner, U.S. Department of Labor, Office of Occupational Statistics, to David Lowery (Nov. 26, 2007) (noting that DOL's Bureau of Labor Statistics (BLS) regards the DOT as "obsolete since much of the information contained in the most recent [1991] version is based on research conducted at least two decades [earlier than 1991].").

⁷³ "Labor has not updated DOT since 1991 and does not plan to do so. . . . Meanwhile, as new jobs and job requirements evolve in the national economy, SSA's reliance upon an outdated database further distances the agency from the current market place."

⁷⁴ "The Social Security Administration figures the DOT and its related data are 'better than nothing.' But 'better than nothing' is not a reliable basis to award or deny life-sustaining benefits to the disabled and disadvantaged."; see (DOL 1991) (noting SSA's continuing reliance on the DOT and related data that derives from a time "when the Beatles ruled the AM pop charts, and Elvis was still the king"). Indeed, SSA regulations acknowledge that occupational information more than 15 years old is assumed unreliable because: "A gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job done then continue to apply." 20 C.F.R. §§ 404.1565(a); 416.965(a) (2015).

⁷⁵ See, e.g. (*Voigt v. Colvin* 2015, 879) ("There is no official source of number of jobs for each job classification in the *Dictionary of Occupational Titles*, and while there are unofficial estimates of jobs in some categories, the vocational experts do not in general, and the vocational expert in this case did not, indicate what those data sources are or vouch for their accuracy."); (*Herrmann v. Colvin* 2014, 1113-14) ("Asked at oral argument, the government lawyers in both social security disability cases argued before us on October 28 confessed ignorance of the source and accuracy of such statistics. . . . We do not know how the vocational expert in this case calculated the numbers to which he testified. Nothing in the record enables us to verify those numbers, which the administrative law judge accepted."); (*Browning v. Colvin* 2014, 709) (We also have no idea what the source or accuracy of the number of jobs that

Thus, at a minimum, SSA must pursue three steps to restore integrity to non-grid (Dubin 2011, 63-64),⁷⁶ step- five, adjudications:

- i) It must develop or obtain, with DOL, a valid, updated occupational taxonomy that includes residual functional capacity (RFC) and exertional and non-exertional impairment SSA medical criteria in occupational classifications so that this system can be employed in disability determinations;
- ii) After completion of a proper occupational taxonomy, it should develop or obtain (also likely with DOL/BLS) a data source to determine the incidence and location of such accurately classified occupations in order to inform decision-making under the statutory criteria that looks to whether claimants unable to perform their past relevant work can adjust to “work which exists in significant numbers either in the region where such individual lives or in several regions of the country;”⁷⁷ and
- iii) Finally, because any such new labor market classification systems and data sources will become obsolete in a dynamic and fluid labor market, SSA (again most likely in collaboration with DOL) should establish a mechanism for mandatory periodic revisions that account for the inevitable and foreseeable labor market evolution.

SSA appears to have finally accepted recommendations to discontinue its own recently unsuccessful solo project (the Occupational Information Disability Advisory Panel “OIDAP”)⁷⁸ and is currently collaborating with the U.S. Department of Labor, Bureau of Labor Statistics (BLS) in an effort to create a taxonomy useful for both for DOL employment placement and SSA adjudicative needs, which it also plans to update regularly (SSA 2015e). The success of this effort will be an essential first step to restoring integrity to SSA step-five adjudications, regardless of whatever process improvements and efficiencies are adopted. However, this work alone as currently described will not be enough. As an additional recommendation beyond SSA and DOL’s current joint project, these agencies must also develop a regularly updateable data source for job incidence and job location information based on any new post-DOT occupational taxonomy created.

ANALYSIS OF PROPOSAL

The only public rationale supplied for not nationally eliminating reconsideration stems from concerns raised by the associate commissioner for disability in his May 2001 DDS Administrators’ Letter 566 and from the former commissioner’s 2010 testimony to Congress. However, a closer look at those statements and the rationales supplied for retaining the reconsideration stage and the status quo

vocational experts (including the one in this case, whose estimates the administrative law judge accepted without comment) claim the plaintiff could perform that exist in the plaintiff’s area, the region, or the nation . . . vocational experts do not in general, and the vocational expert in this case did not, indicate what those data sources are or vouch for their accuracy.”).

⁷⁶ As I have previously argued, since the grid regulations are based in large part on the now-obsolete DOT classifications, its provisions must also eventually be updated as consistent with the newly developed occupational taxonomy and valid job incidence and locational data related thereto.

⁷⁷ 42 U.S.C. § 423(d)(2)(A).

⁷⁸ See (Dubin 2011, 63) (recommending SSA abandon OIDAP and collaborate with DOL on a new occupational taxonomy).

approach to initial determinations demonstrates that they lack sufficiently supportable public justification.

First, the May 2001 DDS Administrators' Letter did not attempt to reconcile the somewhat cryptic and unelaborated "anticipation" that significant new net program costs would be generated from the prototype with the agency's extensive contrary prior findings and glowing accounts of prototype successes in the notice of proposed rulemaking issued just five months earlier in January 2001 based on the results of several years of testing. Nor did the letter explain how the administrative costs of additional hearings for the small percentage of claimants who would have been granted benefits under the non-prototype system at reconsideration, were now calculated to significantly exceed the costs of devoting personnel, resources and time for a full reconsideration process for the large percentage of persons whose reconsideration would amount to little more than a rubber-stamp denial of the initial stage.

Perhaps the DDS Administrators' Letter's ambiguous language also meant to suggest that the agency could further escape the additional costs from hearings and eventual benefit awards in prototype states attributable to otherwise eligible claimants improperly denied at the initial stage, who, in non-prototype states, would also be denied benefits at both the initial and reconsideration stages and then become frustrated with the process after a second improper denial and decline to pursue a meritorious appeal to a hearing. However, an administrative process principally justified by its ability to produce "bureaucratic disenfranchisement" of otherwise eligible claimants produces neither cost-effective decisional accuracy nor fairness, is contrary to public policy (Lipsky 1984), and calls into question statutory and constitutional prohibitions against unjustified, excessive or unreasonable delay in Social Security adjudication.⁷⁹

Moreover, one month after the DDS Administrators' Letter, on June 25, 2001, SSA's Management Information and Evaluation Workgroup issued a Draft Disability Prototype Interim Report that listed successes and challenges identified by mid-2001. It stated:

Overview of Successes

Perhaps the most significant observation regarding successful aspects of the Prototype at this time is that generally there is a consensus among DDS managers and staff that the new process results in better initial determinations. A common theme in Prototype discussions is the comment that the new process is 'the right way to do business.'

- One of the goals of the Prototype is to allow claimants who should be allowed as early as possible in the process. The increased allowances in the DDSs under the Prototype are meeting that goal by processing as many allowances in one step as these States did in two steps under the old process. In addition, some claimants

⁷⁹ See, e.g. (*Heckler v. Day* 1983, 111) (SSA concedes before the U.S Supreme Court that a 90-day or greater period between reconsideration request and reconsideration decision violates the Social Security Act's requirement in 42 U.S.C. § 405(b) that SSA agency action not be unreasonably delayed); (*Barnett v. Bowen* 1987) (excessive delays in reconsideration and hearing determinations defined, in the context of reconsideration determinations, as decisions exceeding greater than 90 days from reconsideration request, violates § 405(b) and entitles delayed claimants to various forms of injunctive relief); (*White v. Mathews* 1976, 1259-61) (excessive delays in SSA hearing decision times violate both the Fifth Amendment's Due Process Clause and the Social Security Act, 42 U.S.C. § 405(b)); see generally (Blasi 1988)

may be allowed under the process who might have been denied under the old but would never be allowed because of their not appealing to a higher level.

- Quality Review data indicate that allowances being made under the Prototype are appropriate. Prototype accuracy is better than the historical accuracy in Prototype sites.
- Customer survey data indicate that claimants are better satisfied with a process that offers a claimant conference and increased contact with the adjudicators who decide their claims.
- For those claimants who appeal for a hearing, it is clear that their cases reach OHA considerably faster under the new process.

Areas of Challenge

The major challenge is meeting the demands of the new process with current resources. Most managers and adjudicators agree that the process needs to be refined particularly in the areas of documents and the claimant conference to make the process less resource intensive.⁸⁰

Thus, whatever could be determined about the public policy desirability of the prototype by the middle of 2001 after issuance of DDS Letter 566, the quantified benefits in terms of increased initial decisional quality and accuracy, significant reduction in unjustified delays for those proceeding to hearing, and increased customer satisfaction appeared to outweigh any serious identified countervailing detriments.

Second, with respect to the commissioner's 2010 congressional testimony, the agency again failed to reconcile its new conclusion on the waiting times for decision in prototype states with the agency's earlier statistical and empirical findings and contrary conclusions after years of testing in the 2001 NPRM or conclusions in the Interim Prototype Report. Nor did the commissioner supply a basis for the conclusion that the mere 11-14 percent reconsideration reversal rate would result in earlier payment to a sufficiently significant number of claimants to justify the delays and administrative costs of continuing reconsideration for the 86-89 percent of claimants who would experience a rubber stamp of the initial denial decision from a reconsideration process and a delay from that process to an ultimate administrative decision.

Indeed, at the same April 27, 2010 hearing (on hearing level delays and backlog), at which the former SSA commissioner testified, SSA's inspector general (IG), Patrick P. O'Carroll Jr., explained the delay issues alluded to by the commissioner through the elimination of reconsideration. O'Carroll noted that SSA had reassessed its policy on reconsideration elimination since commencing the prototype in 1999, then in 2010 "believing that reinstating this process will get benefits to deserving beneficiaries more quickly than an administrative hearing." The IG assessed four scenarios from the planned reinstatement of reconsideration in Michigan in FY 2011, finding that: "[i]f SSA reinstates and fully funds the reconsideration process in Michigan, Initial claims will take 123 days; Reconsideration claims will take 276 days; and Claims requiring hearings will take 915 days." However, "[i]f SSA does not

⁸⁰ SSA Management Information and Evaluation Workgroup, Disability Prototype Interim Report, June 25, 2001, p.26 (emphasis in original) (copy on file with author).

reinstate the reconsideration process in Michigan, and there is no additional funding: Initial claims will take 123 days; and Claims requiring hearings will take 762 days.”

The IG then discussed the administrative opportunity costs or savings from reconsideration elimination by noting that: “[i]f SSA does not reinstate the reconsideration process in Michigan, and the funding that would be used for reconsideration is instead devoted to processing initial claims: The DDS could process 25,300 additional claims.” Similarly, “[i]f SSA does not reinstate the reconsideration process in Michigan, and the funding that would be used for reconsiderations is instead devoted to processing hearings: ODAR could process 17,600 additional hearings per year.”

The IG concluded:

In summary, by reinstating the reconsideration step, some individuals who appeal will get an allowance decision sooner and some would get an allowance decision later. For example, if SSA reinstates the reconsideration step in Michigan, the claimant denied at the initial level could get an allowance decision in 276 days, which is 486 days sooner than if they had to appeal to ODAR without going through the reconsideration step. However, if the claimant is denied at the reconsideration level and appeals to ODAR, it would take 915 cumulative days for a decision, which is 153 days longer than the current processing time (762 days) for cases that go to ODAR without a reconsideration step (SSA 2010c, 3).

As described above there are eight to nine times as many claimants denied at the reconsideration level than approved and therefore potentially subject to the latter delays, in comparison to the much smaller percentage benefited with a quicker final decision from the very low reconsideration approval rate.⁸¹ Accordingly, it is hard to determine how or why the commissioner quantified the delay factor as supporting the imposition of reconsideration based on the IG’s data and conclusions.

Furthermore, the increase in the rate of hearing requests in prototype states which the Commissioner also identified in his testimony as a justification supporting the reconsideration stage, is explainable in part by the likelihood that most of those whose claims would have been approved at reconsideration stage (persons in the 11-14 percent reconsideration approval rate) would request a hearing and become additional hearing appellants in prototype states. It is also likely that some persons, including those with meritorious claims, would have become discouraged and surrendered their pursuit of benefits when forced to endure the long delays culminating in yet another administrative denial decision at the reconsideration stage in non-prototype states. In addition, because of the only 60-day appeal or limitations period for challenging decisions between each level, it is also likely that some claimants, perhaps understandably preoccupied with serious medical and mental health concerns or financial hardships and exigencies, would have simply failed to complete an appeal in that relatively short time-

⁸¹ An argument could be made that the delays in successful hearing decision receipt attributable to the reconsideration stage relative to those in prototype states where reconsideration has been eliminated may be somewhat overstated because the reduction of the 11 percent of cases in which benefits are awarded at the reconsideration stage also reduces the flow of cases and hearing backlog in such states relative to prototype states. However, the GAO found that the approval rate in one stage (initial) in prototype jurisdictions (40.4 percent) was actually slightly higher than the approval rate after two stages (initial and reconsideration), in non-prototype jurisdictions (39.8 percent) (Robinson 2002a, 16). Therefore, the increases in hearing requests in the prototype states are less likely attributable to claimants who otherwise would have prevailed earlier at reconsideration in non-prototype states and more likely due to the lesser attrition of claimants who would otherwise have been discouraged from appealing further due to the frustration of receiving two administrative denials if rejected at reconsideration.

frame through this additional step and would therefore be barred from proceeding to the hearing stage in non-prototype states. In short, none of these likely explanations for an increased hearing rate in prototype states suggest end results or meaningful public policy justifications for continuing the reconsideration stage.

Finally, the Commissioner's only other suggestion of tangible benefit for continuing the reconsideration stage is the unexplained suggestion that cases which have proceeded to hearing "would be more thoroughly developed having been through the reconsideration step" (SSA 2010b, 3). However, this conclusion is questionable on two grounds: 1) the reconsideration process does not generally compel meaningfully additional case development, but only a similar claim reevaluation by a different DDS team;⁸² and 2) SSA has on multiple occasions determined that prototype DDS's are diverting resources and personnel from the eliminated reconsideration stage to case development tasks at the initial stage to produce ultimately better developed, more accurate and higher quality decisions in the one-stage DDS process than in the two-stage process in non-prototype cases.

Summary of Costs and Benefits

In short, SSA has offered no meaningful public justification for failing to implement the elimination of reconsideration nationally after multiple decades of experimentation and testing. The benefits from the combination of the above process recommendations, as described in SSA's 2001 NPRM, the prototype interim report, and SSA Inspector General's testimony to Congress, include greater decisional accuracy, lesser delays for more claimants, earlier final decisions, greater customer satisfaction, and opportunity savings at other adjudicative levels from the diversion of resources from reconsideration to the initial and/or hearing levels. The costs appear to be somewhat greater benefits outlays due to slightly greater approval rates in the prototype attributable to more accurate decisions and greater appeal rates in prototype states.⁸³ These costs also seem understandable and justified since lower grant rates would be expected in cases with less record development as underdeveloped cases produce benefit denials in otherwise meritorious claims.

Other largely unavoidable costs include an increased burden on the hearing process, especially at the initial point when a decision is made to transition appeals from initial stage denials to the hearing stage without the historic reconsideration-stage buffer. While the hearing backlog and unprecedented and growing level of applications in 2010 led the commissioner to suggest that reconsideration elimination would have overly adverse consequences on hearing delay times, as indicated above, the application wave has crested now and is in decline and the commissioner has also reduced the hearing backlog somewhat in that time period. In addition, as indicated in the inspector general's testimony, perhaps the agency could consider diverting some of the considerable administrative resources saved from the

⁸² See note 14 *supra* and accompanying text.

⁸³ SSA has not made generally available to the public granular cost data regarding the prototype costs attributable to reconsideration elimination or its projections for reconsideration elimination costs if the prototype went national as originally projected 16 years ago. The agency's chief actuary, Stephen C. Goss, has indicated in a letter to Senator Tom Coburn that nationwide reconsideration would increase the actuarial deficit by 0.02 percent and in the same letter has characterized other potential agency measures which would reduce the deficit by less than 0.005 percent as a "negligible amount." Letter from Stephen C. Goss to the Honorable Tom Coburn, United States Senate, July 18, 2011 (copy on file with the author). I have requested from Chief Actuary Goss more granular data on these costs including the specific administrative savings from the elimination of the 750,000 annual reconsideration evaluations and decisions and additional expenses including the costs from projected additional benefit outlays to claimants who would prevail at the hearing or appeal stage who would have abandoned pursuit of benefits and not appealed if denied at the reconsideration stage. That data or information has not been supplied as of the date of this writing.

elimination of three quarters of a million annual reconsideration evaluations and decisions, to the processing of hearings if this problem were to reach similar levels in the future.

INTERMEDIATE STEPS

Fortunately, many decades of experimentation and testing should have prepared the agency with intermediate protocols for a national rollout of the prototype. However, apart from reconsideration elimination which can be extended nationally now after 16 years of testing, the aspects of the recommendation for enhanced initial stage record development utilized in conjunction with current prototype initial stage modifications such as the SDM Model, would benefit from testing and a more gradual roll-out to refine their application based on experience and evaluation and to permit an extended period of analysis.

With respect to the SDM modification at the initial stage, the Social Security Advisory Board has recently found that SSA's 16 years of testing of the SDM model, both employed in the prototype and in separate tests outside of the prototype, supplied neither a "well-considered research design" nor a "data collection plan with tight administration over the past 16 years" (SSAB 2015, 2). It recommended a better-considered research plan with tighter state-to-state administration to more confidently permit acting on the agency's positive conclusions that the SDM had helped decrease processing time adjudicative delays while slightly improving both accuracy and allowance rates (8-10). Obviously, if the data and research design can be realistically improved, an appropriate intermediate measure would be to take better steps to produce higher quality data on the SDM as SSAB has recommended.

However, it merits comment that 16 years is a long time for testing without being able to meaningfully evaluate and act on those test results, and it is not clear from SSAB report whether some of the data sought can be produced or significantly improved. For example, the report suggests that there should be a basis for isolating the specific reasons why the SDM model slightly increases the initial stage allowance rates (SSAB 2015, 9). However, there simply might not be a way to definitively isolate those reasons. It may be that since multiple decisions makers (MDMs) take and require more decision time, (4, 5) there is more pressure on MDMs to work more promptly than is comfortable sometimes, and when stressed and in doubt they are more likely to issue a potentially incorrect denial. By law, SSA must review 50 percent of all state agency approval decisions but there is no such requirement for denials.⁸⁴ Accordingly, there are incentives to err on the side of benefit denial to avert scrutiny. As former SSAB Chairman Sylvester J. Schieber explained on April 23, 2008 to the House Ways and Means Committee:

[A] quality review process that targets almost exclusively allowance decisions sends an unintended message. Only a small fraction of denied cases are selected for quality review. The chance of an insufficiently documented denial determination slipping through the system unchecked cannot be discounted. There may be many reasons why there has been a steady decline in allowance rates in the DDS, but it certainly seems likely that inadequate investment which has led to a 'start and stop' type of work environment is a major factor. This is not about a culture of denial but about human

⁸⁴ See 42 U.S.C. § 42 USC 421(c)(3)(A).

nature. When faced with pressure to clear cases quickly, adjudicators may take shortcuts and those shortcuts can lead to unintended consequences (SSAB 2008, 3).⁸⁵

This suggestion is a theory and possible explanation for higher SDM allowance rates, but there may simply be no definitive protocol to prove it. It would not be a desirable result if the agency pursued another 16 years of testing with no significant initial stage improvements extended nationally, due to the pursuit of facts or data that simply might not be definitively proven or obtainable. On the other hand, other SSAB cited data deficiencies, such as not controlling for adjudicator tenure and experience, (SSAB 2015, 9) could presumably be corrected more promptly and definitively.

QUESTIONS OR CONCERNS

It is inevitable that observations and conclusions during the many years of testing about issues and problems that have arisen in the prototype should be fully evaluated and ongoing consideration provided to consistently fine-tuning and upgrading initial stage case development under the modifications implemented. Similarly, as additional modifications are implemented, further evaluation should guide additional fine-tuning to assure maximal benefit from these process recommendations. In addition, granular cost data should be made available and examined to permit consideration of greater efficiencies and to identify obstacles to implementation and subsequent rationale for modification or abandonment of aspects of this initiative.

CONCLUSION

More than 20 years ago, the former director of the National Center for Administrative Justice, Milton Carrow, observed that “reforms recommended by congressional committees, the GAO, the Administrative Conference of the United States, the Advisory Committee to the Commissioner of Social Security, and the studies of responsible organizations such as the American Bar Association,” (304) all propose the elimination of reconsideration and steps to enhance initial-stage record development (302).⁸⁶ Carrow decried the slow pace towards implementing these needed and obvious reforms and argued that further proposed testing was unnecessary as it was time for these changes simply and finally to be enacted (304). He concluded that SSA “has been dilatory in implementing sound recommendations” and that it “is unconscionable to delay further.” Certainly with respect to the elimination of the reconsideration stage, Director Carrow’s observations hold obviously greater force more than two decades later after additional experimentation and focused testing has further demonstrated the benefits of the proposed reforms.

⁸⁵ See also (*Bowen v. City of New York* 1986, 474-75 n.5) (a unanimous Supreme Court affirms and relies on lower court finding that DDS physicians in MDM teams “were pressured to reach ‘conclusions’ contrary to their own professional beliefs in cases where they felt, at the very least, that additional evidence needed to be gathered in the form of a realistic work assessment.”).

⁸⁶ “The studies recommend eliminating the entire reconsideration stage of the initial claims process”; see also 297-301 (describing and summarizing those studies and reports). Indeed, as Professor Gay Gellhorn has observed, although one might have expected ALJs facing a hearing case backlog and pressures to adjudicate cases more rapidly, to express opposition to “the removal of a buffer between them and disappointed claimants, in fact the National Conference of Administrative Law Judges favor[ed] abolition of Reconsideration.” (Gellhorn 1995, 989); see also (Carrow 1994, n.150) (citing a former SSA ALJ’s article, also recommending elimination of reconsideration which had reasoned that “under the present system, DDS is simply doing half the job, but doing it twice.” Quoting (Moore 1994, 43).

SOCIAL SECURITY: RESTRUCTURING DISABILITY ADJUDICATION

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