

Volume 29, Number 4

April, 2007

Baltimore NOSSCR Conference: SSA Addresses Backlog Reduction Efforts

The recent NOSSCR conference in Baltimore, MD, April 18 to 21, 2007, drew a record 1,087 attendees. NOSSCR thanks all those who attended and those who were session presenters, which were major reasons for the success of the conference.

The Thursday morning plenary session featured two speakers from the Social Security Administration, Lisa de Soto, the Deputy Commissioner for ODAR, and Glenn Sklar, the Associate Commissioner for the Office of Disability Programs.

Deputy Commissioner de Soto discussed two major SSA initiatives in which ODAR is significantly involved – DSI in Region I and addressing the disability claims backlog. She also mentioned that a new ODAR organization will be announced shortly.

continued on page 3

House Hearing on ALJ Hiring

On May 1, 2007, the House Ways and Means Social Security Subcommittee held a hearing on the “Hiring of Administrative Law Judges at the Social Security Administration.” This hearing was a follow-up to the Subcommittee’s February 14, 2007 hearing on the growing backlog problem. The problem with hiring new ALJs has focused on budgetary issues; but, at the February 2007 hearing, the Commissioner raised issues with the ALJ register maintained by the Office of Personnel Management (OPM) and the lack of a new ALJ examination. There were only two witnesses at the May 1 hearing: SSA Commissioner Michael J. Astrue and OPM Director Linda M. Springer. Their written statements are available on the Ways and Means Committee’s hearings website:

<http://waysandmeans.house.gov/Hearings.asp?congress=18>.

continued on page 10

SSA Issues Regulations on 2004 SSPA Fee Changes

SSA has issued interim final regulations on withholding of attorneys’ fees in SSI claims and in both SSI and title II claims for non-attorneys participating in the demonstration project. 72 Fed. Reg. 16720 (April 5, 2007)[available at www.gpoaccess.gov/fr/index.html]. By issuing these regulations as “interim, final” they are effective as of the date of publication, April 5, 2007, but there is also a comment period. Comments must be submitted to SSA by June 4, 2007.

These regulations reflect the legislative changes to the Social Security Act (Social Security Protection Act of 2004, Pub. L. 108-203) that permit fee withholding in SSI cases and for certain non-attorney representatives, and are simply the codification of practices that have

continued on page 7

Inside this issue ...

| | |
|--|---------|
| DSI Update: What Do the Number Tell Us? | page 5 |
| Federal Register Update | page 9 |
| GAO Reviews Earnings After Voc Rehab | page 6 |
| House Holds Hearing on SSI for Refugees | page 9 |
| Nomination Form for Eileen P. Sweeney Distinguished Service Award | page 15 |
| Nominations Open for Eileen P. Sweeney Distinguished Service Award | page 2 |
| NOSSCR Sustaining Members List | page 20 |
| Online Appeals on the Horizon | page 2 |
| Social Security Trust Funds Outlook Improves Slightly | page 7 |
| SSA Response to NOSSCR FOIA Request on DSI | page 12 |
| Why So Many Court Remands? The GAO Tries to Find Answers | page 4 |
| Available Materials | page 18 |
| NOSSCR News | page 2 |
| Practice Tip: Appeals Council Postmarks | page 8 |
| Selected Cases | page 16 |

Hearing on ALJ Hiring continued from page 1

The hearing started with an opening statement by Subcommittee Chairman Michael McNulty (D-NY). Rep. McNulty expressed his deep concerns about the hardships endured by disability claimants because of the backlog delays and repeated the story of one of his constituents who had lost her home and custody of her children while waiting for a hearing. (The facts about this claimant first appeared in NOSSCR's testimony for the February 2007 hearing. She is the client of a NOSSCR member in Rep. McNulty's district). While relating bipartisan efforts to increase SSA's budget, Rep. McNulty raised concerns about barriers and obstacles created by OPM that prevented SSA from hiring ALJs.

Background on OPM's role in hiring ALJs. While SSA ultimately selects and hires its ALJs, OPM plays a very critical role. OPM administers the government-wide selection process. It develops the ALJ examination, determines applicant qualifications, conducts and scores the examination and maintains the ALJ register. When an agency, in this case SSA, contacts OPM about ALJ vacancies, OPM prepares a "certificate of eligibles," which contains names of the highest scoring ALJ candidates. Scoring is based on examination scores, veteran status, and geographic preferences. Three or four names per vacancy are provided. SSA interviews the candidates and then makes the selections.

Why has there been a problem with hiring ALJs from the OPM-maintained register? In 1993, OPM used a new ALJ examination. In 1996, applicants who took the examination were rescored after an investigation into fraudulent scoring under which 80% failed to make the register. Under the 1996 rescoring, many applicants were placed on the ALJ register. However, in 1997, the *Azdell* lawsuit was filed, with disadvantaged plaintiffs asking that the 1996 rescoring process be overturned. After many appeals, the Federal Circuit Court of Appeals eventually upheld OPM's original rescoring process in 2003. Through most of the litigation, the ALJ register was suspended and no hirings were allowed. When *Azdell* concluded, OPM closed the ALJ examination to new applicants, but it made the existing register, which included applicants from the 1990's, open again to agencies, including SSA, to make ALJ hires. At that time, OPM also said it would resume work on a new examination. To date, a new

examination is not yet in place, and it is this delay that caused the Subcommittee's concerns in scheduling this hearing.

The current status on hiring SSA ALJs. SSA Commissioner Astrue stated that there are currently 1082 ALJs in active status; there are 1108 ALJs including those out on leave or on detail. For now, he is looking at hiring 150 new ALJs for a total of 1250 in the next fiscal year (which starts October 1, 2007). He explained that additional support staff also needs to be hired (750 to 850 full-time employees) and that the agency can absorb only a certain number of ALJs and support staff at a given time. He emphasized that the 1250 number is not a cap and that he will hire, or seek funds to hire, additional ALJs in subsequent years.

The Commissioner did admit that SSA's budgetary limitations was the major reason for the agency's inability to hire ALJs. While the current ALJ register is "stale," it has been used. Since the backlog began to worsen in about 2000, a total of 363 new ALJs have been hired by SSA; however, there also has been ALJ attrition. And as pointed out by Rep. Earl Pomeroy (D-ND), there is a correlation between the number of ALJs and the size of the backlog, with SSA having fewer ALJs now than in 1998 but more than double the number of pending cases. Rep. Pomeroy referred to OPM's "deeply disturbing record" in updating the ALJ register and how claimants are hurt because of "bureaucratic bumbling."

OPM Director Springer outlined an "expedited" timeline for the 2007 ALJ examination-assessment process. Under the new OPM plan, a new examination and assessment should take place from mid-July to October 2007. By late October 2007, the final scoring should be completed and a new register established. More information about the new ALJ application process is at the end of this article.

OPM's revised timeline was clearly not quick enough to satisfy most Subcommittee Members, with Ranking Minority Member Sam Johnson (R-TX) describing it as "criminal." Ms. Springer did note that she compressed the schedule after speaking with Rep. Pomeroy following the February 2007 Subcommittee hearing. She promised to provide monthly status reports to the Subcommittee.

Commissioner Astrue said that there have not been any new ALJ hires in fiscal year 2007 (which began October 1, 2006), and only 38 hired in the prior year.

In response to a question from Ranking Member Johnson, the Commissioner said that he prefers to hire the additional permanent ALJs off of the new ALJ register. Until then, he will look to some stop-gap measures, including looking at the senior ALJ list.

The Commissioner also discussed how Disability Service Improvement (DSI) issues impact on the budget. He said that he is preparing a package of proposals to be sent to the Office of Management and Budget (OMB) for approval, and that his written statement gives some direction regarding initiatives that will be retained and those that will not. However, he said he could not provide specifics until OMB acted. When asked by Rep. Stephanie Tubbs Jones (D-OH) whether some DSI proposals would have to be set aside to hire ALJs, he responded "yes."

The desperate circumstances of disability claimants were always near the surface of questions asked by Subcommittee Members. Near the end of the hearing, Rep. Sander Levin described the hardships endured by his constituents and how difficult it was for his district office workers to tell claimants that they will need to wait two years for a decision in their cases. Noting that the delays were caused by a combination of incompetence and insensitivity, he rhetorically asked how the witnesses could continue to work with these results. The hearing closed with Chairman McNulty describing the current situation as a "major embarrassment."

In addition to the written statements provided by the hearing witnesses, the Social Security Advisory Board (SSAB) has weighed in on the issue of recruiting and hiring ALJs. It has just issued a paper, *Recruiting SSA Administrative Law Judges: Need for review of OPM role and performance* (April 2007). It is available online at: http://www.ssab.gov/documents/ALJ_Issue_Brief_3.pdf. The issue brief describes OPM's role in the SSA ALJ hiring process and provides three options for change that Congress should consider: (1) develop a separate OPM register for SSA ALJs (who represent about 80% of all federal ALJs); (2) keep the single register but establish supplemental qualification data; or (3) transfer management of the selection process to SSA, giving SSA authority to conduct its own merit selection process.

The new ALJ application process. According to information from OPM Director Springer, OPM will soon issue an announcement on ALJ vacancies and to introduce the new ALJ examination. [The existing register will remain in effect until the new ALJ register is established.] The new register will be established after OPM completes processing of all ALJ applications based on the new examination.

More information on the new ALJ vacancy announcement will be posted on OPM's "USAJOBS" website: www.usajobs.opm.gov. A search can be conducted by inserting the job title "ALJ" to locate the ALJ vacancy announcement. The announcement will contain full details about the application and examination process.