



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

Joint Hearing on

Social Security Disability Claims Backlogs

Subcommittee on Income Security and Family Support

Subcommittee on Social Security

House Committee on Ways & Means

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**Testimony of
Nancy G. Shor**

**On behalf of the
Consortium for Citizens with Disabilities
Social Security Task Force**

ON BEHALF OF:

American Association on Intellectual & Developmental Disabilities
American Foundation for the Blind
American Network of Community Options and Resources
Bazelon Center for Mental Health Law
National Alliance on Mental Illness
National Association of Disability Representatives
National Council for Community Behavioral Healthcare
National Multiple Sclerosis Society
National Organization of Social Security Claimants' Representatives
National Spinal Cord Injury Association
NISH
Paralyzed Veterans of America
The Arc of the United States
United Cerebral Palsy
United Spinal Association

TESTIMONY OF NANCY G. SHOR, ON BEHALF OF THE SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES

Chairman Pomeroy, Chairman McDermott, Ranking Member Johnson, Ranking Member Linder, and Members of the Subcommittees, thank you for inviting me to testify at today's hearing on the backlogs in disability claims.

I am the Executive Director of the National Organization of Social Security Claimants' Representatives (NOSSCR). I am testifying today on behalf of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force, of which NOSSCR is an active member. CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the more than 54 million children and adults with disabilities and their families living in the United States. The CCD Social Security Task Force (hereinafter CCD) focuses on disability policy issues in the Title II disability programs and the SSI program.

The focus of this hearing is extremely important to people with disabilities. Title II and SSI cash benefits, along with the related Medicaid and Medicare benefits, are the means of survival for millions of individuals with severe disabilities. They rely on the Social Security Administration (SSA) to promptly and fairly adjudicate their applications for disability benefits. They also rely on the agency to handle many other actions critical to their well-being including: timely payment of the monthly Title II and SSI benefits to which they are entitled; accurate withholding of Medicare Parts B and D premiums; and timely determinations on post-entitlement issues that may arise (e.g., overpayments, income issues, prompt recording of earnings).

Because the economic downturn has led to an unexpected surge of new applications, SSA finds itself at a critical crossroads. The wave of new claims is having a very significant impact at the state Disability Determination Services (DDSs) where processing times are on the rise. The news has been more positive at the hearing level where, for the first time in a decade, SSA finished FY 2009 with fewer hearing level cases waiting for a hearing and decision than at the beginning of the year and processing times have been reduced. But we are deeply concerned that any progress in eliminating the hearing level backlog will be delayed due to the increased number of new applications that are denied and then appealed, putting SSA's plan to eliminate the hearing level backlog by 2013 at risk.

As the backlogs in disability claims have grown, people with severe disabilities have been bearing the brunt of the delays. Behind the numbers are individuals with disabilities whose lives have unraveled while waiting for decisions – families are torn apart; homes are lost; medical conditions deteriorate; once stable financial security crumbles; and many individuals die. Numerous recent media reports across the country have documented the suffering experienced by these individuals. Your constituent services staffs are likely to be well aware of the situations faced by people living in your districts and they are extremely helpful, when they are able to assist.

SSA'S NEED FOR ADEQUATE RESOURCES TO ADDRESS GROWING BACKLOGS

As you know, for many years, SSA did not receive adequate funds to provide its mandated services, a key reason for the hearings backlog. Between FY 2000 and FY 2007, the resulting administrative funding shortfall was more than \$4 billion. The dramatic increase in the hearing level disability claims backlog coincided with this period of significant under-funding.

Recent Congressional efforts to provide SSA with adequate funding for its administrative budget have been encouraging. In FY 2008, the tide finally changed for the first time in a decade, when Congress appropriated \$148 million over the President's budget. The FY 2009 appropriation provided SSA with more than \$700 million over the FY 2008 appropriation.

We are extremely grateful to Congress for recognizing SSA's need for adequate resources and including additional funds for SSA in the American Recovery and Reinvestment Act of 2009 (ARRA). ARRA provided SSA with \$500 million to handle the unexpected surge in both retirement and disability applications due to the economic downturn. SSA also received badly needed funds to replace its aged National Computer Center. With the FY 2009 appropriation and the ARRA funding, SSA was able to hire thousands of new employees, including additional ALJs and hearing level support staff. This additional staff undoubtedly led to SSA's ability to make progress on the backlog at the hearing level.

The FY 2010 appropriation of \$11.45 billion for SSA's Limitation on Administrative Expenses (LAE), a 10 percent increase over the FY 2009 appropriation, continues to provide SSA with the resources it needs to meet its service delivery needs. SSA plans to hire more staff, including 226 additional ALJs and support staff. The Commissioner recently announced the hiring of 900 new employees, primarily to staff over-burdened and under-resourced field offices.

CCD RECOMMENDATION REGARDING FY 2011 FUNDING FOR SSA

SSA will use the FY 2010 appropriation and about \$350 million from the ARRA funding to address the growing workloads facing the agency. Based on these funding levels, during FY 2010, SSA will be spending at least \$11.8 billion to maintain the current staffing levels and associated costs necessary for the agency to function.

In FY 2011, SSA will be faced with additional costs of nearly \$620 million just to deal with inflationary increases associated with items such as salaries, benefits, rents, and facility security. We urge support for the full \$12.52 billion FY 2011 appropriation requested by President Obama for SSA's LAE. This level of funding is the minimum amount necessary to address the unprecedented increase in workloads, to prevent a severe disruption in service delivery by keeping field offices open and better staffed, to provide adequate telephone services to the public, and to maintain the integrity of its programs by performing more continuing disability reviews and SSI redeterminations.

WILL THE HEARING LEVEL BACKLOG BE ELIMINATED BY 2013?

The most significant delays in SSA's disability determination process are at the hearing level. The average processing time for cases at the hearing level has increased dramatically since 2000, when the average time was 274 days. In FY 2009, the average processing time for disability claims at the hearing level was 491 days, about 16.5 months. In March 2010, the average processing time had dropped to 437 days, a little more than 14 months, the lowest processing time since December 2004. There also has been improvement for hearing offices averaging over 600 days – there were 20 offices averaging over 600 days at the end of FY 2009, but only 5 such offices in March 2010.

Is the Hearing Backlog Improving? By the end of FY 2009, it was clear that ODAR was making slow but steady process in key areas to address its backlog and improve processing times, thanks to the hard work of ODAR ALJs and staff and the additional resources available due to Congressional

appropriations, including the ARRA funding. In addition to average processing times, other areas of improvement include:

- **Pending cases.** For the first time in a decade, ODAR finished FY 2009 with fewer hearings pending than in the prior year. Through March 2010, pending cases dropped for the 15th straight month and were at the lowest level since June 2005.
- **Dispositions.** In FY 2009, the number of dispositions cleared by ALJs increased by 20% over the prior year. The increase is concomitant with the record number of ALJs now on duty. Dispositions this year have continued to increase through March 2010.
- **Age of pending cases.** The length of time cases are pending is also improving. The percentage of requests for hearing pending over one year was 31% in September 2009 and dropped to 27% in March 2010, the lowest percent since October 2004.

Improvement Is Not Uniform. Despite the improvement, current processing times in some hearing offices are much longer than the 437-day average at the end of March 2010. There is significant variation in times from a low of 252 days in Middlesboro, KY, to a high of 642 days in Anchorage, AK. In March 2010, the average processing time at 74 of 144 hearing offices was above the 437 day national average.

Delays in receiving benefits after favorable decision. Even after waiting many months – or years – and finally receiving a favorable ALJ decision, a claimant may wait months to actually receive the past due benefit payments. SSA’s policy is that disability claimants file applications for both Title II and SSI, even if they eventually will not be eligible for SSI because of their Title II monthly benefit amount. The Social Security Act requires that retroactive Title II benefits are reduced by the amount of SSI that would not have been paid if the Title II benefits had been paid in a timely fashion when due, known as the “windfall offset.” Since 1995, SSA policy requires that the SSI past due benefits are computed and paid to the claimant before the release of the Title II retroactive benefits. This policy ensures that the receipt of the Title II benefits does not jeopardize eligibility for SSI and thus Medicaid during the retroactive period.

SSA’s windfall offset rules require that past due Title II benefits are not paid until the amount of the SSI past due benefits is computed. The gross past due Title II amount is computed by the SSA program service centers (PSCs). However, the local SSA field offices have the job of computing the retroactive SSI benefits, which involves post-entitlement contact with the claimant to determine income and resources, living arrangements, and other nondisability issues that affect SSI eligibility and payment amounts. As a result, it means hands-on time with a claimant. Whether the field office is adequately staffed will affect how promptly (or not promptly) the past due SSI benefit calculation is completed. This amount is communicated back to the PSC, which then applies the windfall offset, computes, and pays to the claimant the retroactive Title II benefits.

Last year, we looked into this problem and a staff person in a Nevada attorney’s office told us that there is a “horrible delay,” sometimes as long as six months. The staff person said there was a problem with communication between field offices and the PSCs, with PSC staff sending multiple requests to the field offices for the necessary SSI calculations. We believe that this is another example of the consequences of understaffed field offices that are unable, despite their best efforts, to keep up with this work activity, important as it is.

Hearing level improvements are fragile. SSA has set a long-term goal of a 270-day average processing time by FY 2013. We appreciate the effort by SSA to reduce the processing time, but the current average of more than 14 months is still too long for individuals waiting for a hearing decision. And it is important to factor in the increase in average processing times at the initial and reconsideration levels (discussed below), which diminishes the impact of shorter hearing level processing times. When the average initial level and reconsideration level processing time of nine months is added to the hearing level time, it may be two years or longer to receive a hearing decision from the time that the application was filed. For individuals with disabilities who have no health insurance, have lost their homes, have declared bankruptcy, or who have died, that is simply too long to wait.

SIGNIFICANT INCREASE IN NEW CLAIMS FILED AND GROWING DDS BACKLOGS: HOW DOES IT IMPACT THE HEARING LEVEL?

While the trends at the hearing level are positive, the same cannot be said at the initial and reconsideration levels. Since the end of FY 2008, new disability claims filed have been climbing steadily, up nearly 15% by the end of FY 2009. The most alarming trend is the increase in the number of pending claims (initial and reconsideration levels), up 38.8% since the end of FY 2008 to the end of FY 2009. Through February 2010, about 1 million disability applicants were waiting for a decision on their claims at the initial and reconsideration levels. When you add the pending cases at the hearing level, nearly 1.65 million people with disabilities were waiting for a decision.

Claimants' representatives in some states have noticed the increase in processing times. This is not surprising since the percentage increase of pending cases in some states is much higher than the national average. For example, at the initial application level, the number of pending claims increased nationwide by 38.1% at the end of FY 2009, compared to the end of FY 2008. States with significantly higher percentage increases in FY 2009 versus FY 2008 included: North Dakota (68.5%); Tennessee (66.2%); Ohio (59.3%); and Texas (55.8%).

What does the increase in applications and pending claims at the DDSs mean for the hearing level? Approximately 22% of the initial claims will result in a hearing request. Hearing requests have increased this year. For now, ODAR has been able to keep up with the increase due to the hard work of ALJs and staff and the increased number of ALJs in place. However, a continuing monthly increase underscores the fragility of the ODAR progress accomplished in FY 2009.

Exacerbating the problem of a significant increase in new claims is the impact on DDSs of state budget crises. Even though DDS salaries, offices, and overhead are fully funded by SSA, some states are imposing hiring restrictions and furloughs of employees, including DDS workers, because of budget problems. These furloughs lead to loss of administrative funding for the state DDSs and, more importantly, delay payment of benefits to disabled beneficiaries.

THE RECONSIDERATION LEVEL: IS IT NECESSARY?

The President's FY 2011 budget request includes a provision that would begin to reinstate the reconsideration step in 10 states, starting with Michigan. Since 2000, SSA has tested the elimination of reconsideration in the ten "prototype" states since 2000: Alabama, Alaska, California (Los Angeles), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York (Albany and New

York City), and Pennsylvania.¹ The FY 2011 budget request states that reinstating reconsideration in these states will allow some individuals to be allowed sooner, resulting in a certain number of cases that will be kept out of the hearing level.

In most states where it still exists, many representatives and claimants view the reconsideration level as a “rubber stamp” step that must be endured before moving on to a hearing before an ALJ. Until recent years, the reconsideration processing time was 60 to 90 days; however, the current average processing time for reconsideration has gradually increased.

As discussed below, the CCD Social Security Task Force has, for many years, supported elimination of the reconsideration level. Unless the DDS levels can provide a more meaningful evaluation of disability claims, based on a complete record, we question whether reinstating the reconsideration level in the ten prototype states will truly benefit claimants, rather than just add another barrier.

We asked claimants’ representatives in the ten prototype states for feedback on their experience over the last decade with no reconsideration step. They report that the process works well without the reconsideration level between the initial determination and the ALJ level and they do not believe that reinstating reconsideration will benefit their clients. Their comments include the following:

Michigan

- ... [B]ringing reconsideration back to Michigan would be an absolute tragedy adding more time to the decision making process. We have had great success in getting “dire need” claims allowed early on by alerting senior staff attorneys at the various ODARs in our State that [the appeals] we are filing are extremely strong and deserve immediate attention when they arrive. We are able to provide additional evidence that the staff attorney needs to expedite the allowance. When you are dealing with a staff attorney, you are dealing with someone who is able to take immediate action on behalf of the seriously disabled claimant. I cannot tell you how many times we have been able to get claims allowed within weeks of the file arriving at the ODAR. Putting reconsideration in front of this process would cause tremendous delay.
- Due to the high volume of cases we are experiencing here in Michigan, our ODARs already rank among the longest delays in the nation for obtaining a hearing (approximately 2 years from the time the Request for Hearing is filed). Very few claimants are able to endure this delay without suffering extreme financial hardship. It is a terrible tragedy that during this wait period, many claimants will lose the homes and estates that they have spent their entire adult lives accumulating. This is happening at a time when the State government is in financial crisis, and welfare programs are being scaled back. While the proposal to reinstate reconsideration as another level of administrative review before the claimant can progress to a hearing may yield an earlier resolution for a small percentage of claimants, adding yet another barrier to the ability to obtain a hearing would only further compound this problem for a significant percentage of claimants, with unjustifiably cruel results. Administrative fairness requires that the claimant be provided with the opportunity to appear and personally present the case directly to an adjudicator at the earliest possible date. In Michigan, it is the wrong time to reinstate the reconsideration level of review.

Alabama

- I handle initial claims and have had some success with initial approvals. I think it’s a terrible idea [to reinstate reconsideration]. It would create an unnecessary diversion of resources, both in money

¹ It was recently extended through September 28, 2012. 74 Fed. Reg. 48797 (Sept. 24, 2009).

and manpower, at a stage where the overwhelming majority of claims [decisions] are affirmed. While I do tell my clients in Florida and Mississippi [states where reconsideration is in place] what to expect, I don't doubt that unrepresented or uninformed claimants get discouraged by being turned down twice. It's a "what's the use?" feeling on top of a depressing situation of health and financial problems.

Alaska

- I would not regard favorably the reintroduction of the reconsideration phase in the disability claims process in Alaska, a prototype state. Reinstating reconsideration would reintroduce delay at a critical time when Alaska is just managing to get out from under the weight of delays as part of the western Washington hearing office. Until weeks ago, Alaska did not have its own hearing office and our cases were heard as part of the workload of the Seattle hearing office. With the late February 2010 launch of the Alaska office in Anchorage, I am more hopeful than ever that the wait time can be substantially diminished from the date of the Request for Hearing until a claimant has a hearing before an administrative law judge.

Most importantly, I believe that our prototype has worked well ... The key for Alaska would be to have in place an effective hearing office that can adjudicate claims expeditiously. We have that now and it should be given a fair chance to have an impact on claims.

California

- The reconsideration step is wasteful of Social Security's money. The reason is that the evidence is reviewed by the same people who originally evaluated it. The statistics show very few reversals on reconsideration. Further, the reconsideration step needlessly prolongs the time before the case reaches an administrative law judge ... When a claimant for benefits is told by an ALJ that certain documents are needed to substantiate a claim, he or she makes redoubled efforts to obtain the evidence if it is available. At reconsideration, the person is not told what is missing from the evidence that would change the decision. This generally means a rubber stamp of the original finding.

Colorado

- I would be very much against reinstating reconsideration. Back when we had it, we had very few reversals at reconsideration. I always felt it was just a time-consuming hoop a claimant had to jump through to get to a hearing where someone would give full consideration to the case.

I continue to believe that the DDS does not actually evaluate cases through Step 5 [of the sequential evaluation] in any meaningful way. I think they look for a Listing and if the claimant does not obviously meet one, the claim is developed to justify a denial. They go through the motions of evaluation at Steps 4 and 5, but I have found "smoking gun" memos time after time from a [DDS] claims examiner to a medical examiner, where the claims examiner has filled out the RFC [residual functional capacity form] to set up a denial, and then sent it to the medical examiner for signature ... I have even seen statements such as, "we need light [RFC] to deny" or "sedentary would allow claim" and so forth, thus telling the medical examiner what to do. I think their method of developing cases is intellectually dishonest and designed to deny claims, not make the right decision. As long as that is how they are going to do business, I think the reconsideration process is a total waste of time.

Initially after becoming a prototype state, we saw our backlogs at ODAR increase as those cases that would have spent another 6 months at DDS doing reconsideration were instead sent up to ODAR, but that settled down eventually as that onetime bubble of additional cases worked through the system. When we still had reconsideration, I do not think enough cases were granted at reconsideration to make a difference in terms of the volume of cases appealed to ODAR. It may have served to be one more hurdle that discouraged some claimants from further appeals, but overall I don't think it made much difference in ODAR's workload.

New Hampshire

- New Hampshire's tale of experiments in disability claims processing with a level between the initial determination and the ALJ hearing includes moving from having reconsideration, to prototype, to Disability Service Improvement (DSI) with the Federal Reviewing Official (FedRO), and back to prototype. [DSI and the FedRO are described in more detail later in this testimony.] In the end, having lived through all of these changes, the elimination of reconsideration and then the FedRO has had a positive impact on getting the right decision at the earliest point in the process. Reinstating reconsideration into the disability determination process would be a big step backward.

There were efforts in the mid-1990s to get DDSs and ODAR (then the Office of Hearings and Appeals) to evaluate claims in a consistent manner. For several years during the early stages of the prototype, when New Hampshire's DDS followed these guidelines, we had the highest rates of allowance at the initial level in the nation, approaching or even exceeding 60% while the rest of the states hovered near 40%. The non-prototype states then denied 80% or more of the reconsideration requests, while New Hampshire's claimants went directly to the ALJ hearing level.

We attribute our high level of allowance at the initial level during that period to proper training on evaluation of disability claims. SSA should focus on training and consistency at the DDS rather than reinstating reconsideration, which has proven to be a time-consuming, useless, and expensive step for more than 80% of Social Security and SSI disability applicants.

New York

- An attorney in New York opposes reinstate of reconsideration. He said that when New York had reconsideration, cases would sit at that level for 4 to 5 months and were almost always denied. In contrast, he finds that cases now denied at the initial level move to the hearing level more quickly and time is saved for all parties. He described a case that was denied initially on February 5, 2010. He filed a request for hearing on February 19, 2010, and it has already been scheduled for a hearing on June 25, 2010 – 4 months after the appeal was filed.
- Having represented Social Security and SSI claimants in New York City since 1983, I have had experience with both the former process, which included a reconsideration stage, and the present process, which does not. In my opinion, the current process – without reconsideration – is much more efficient. It is also much cheaper.

At the initial application phase, the claimant meets with a claims representative; the state agency gathers medical documents. Often the agency sends the claimant to a consultative examination. The Social Security Administration asks a review physician to review all of the medical data. Then the agency makes a decision. Since the reconsideration stage of the process was virtually identical

to the application stage, it is not surprising that the overwhelming majority of claimants who sought reconsideration were denied at that stage. Thus, the reconsideration stage was expensive, entailing costs for staff, consultative physicians, review physicians, processing of paperwork, etc. That stage also added months to the painfully slow process for making disability determinations.

To reinstate the reconsideration stage would not lead to more correct decisions in Social Security cases. At that stage, as at the initial application stage, the claimant does not meet face to face with the person who makes the disability determination. It is not until the administrative hearing that the fact-finder actually meets with and talks to the claimant. The personal interaction leads to decision-making which is more accurate than a mere paper review.

To reinstate the reconsideration stage would do nothing more than prolong the process, a process which has been justifiably criticized for entailing far too much delay.

Pennsylvania

- If reinstated in Pennsylvania, I do not see the State Agency doing any better at reconsideration. The allowance rate, when reconsideration existed, was very low and the process took another 4 to 6 months. All it did was add additional time to the process and used additional resources in funding the process, with very little positive results for the claimants. Reinstating reconsideration will be bad for the claimants because it will add a lot of time to the process since most of them will be denied

I did not really see much change in the actual outcome at the initial level [when reconsideration was eliminated] and bringing it back won't change ... Ten years have given us plenty of time to see that allowance rates have not improved at the state agency level. However, the good part is that you go right to the hearing level without the extra months of waiting.

... [A]t first glance, adding reconsideration, which only takes a few months rather than years, sounds helpful. In practice, it doesn't work that way. In fact, some of the recent initiatives taken by ODAR are actually helpful. ODAR has started a Virtual Screening Unit initiative, which means that certain staff attorneys are asked to screen files of certain claimants. Because the files are paperless, the staff attorney can be at any ODAR and review the file ... Sometimes you just get a favorable [on the record] decision in the mail. Other times you get a call from the staff attorney with questions ... in cases that they might be able to pay with a little more evidence. It seems to be working well and a significant number of cases are being paid at a much earlier stage than waiting for a hearing ... Also, the increased [ODAR] personnel has definitely caused more claims to be worked up and more hearings scheduled. It is very obvious that more people doing more work makes hearings come up faster. This is good for claimants. Don't take a step back by starting reconsideration in the prototype states.

For many years, the CCD Social Security Task Force has been on record as supporting elimination of the reconsideration level and providing more time and effort to better develop disability claims at the initial level. As long ago as May 1994, in response to SSA's "reengineering" proposal,² the Task Force submitted comments in favor of eliminating reconsideration, while urging SSA to "collect the correct information at the earliest possible time in the process to ensure that correct decisions are made the first time. SSA must improve the collection of medical and nonmedical evidence by explaining what is needed and asking the correct questions, with appropriate variations for different sources."

² 59 Fed. Reg. 18188 (Apr. 15, 1994).

These comments, made nearly 16 years ago, still remain true today. While the 1994 reengineering proposal was not implemented, it seems to have evolved into the 10-state prototype, which was announced in 1999 and started in October 2000. SSA planned to eliminate reconsideration nationwide, with a proposed regulation issued in January 2001.³ Our understanding was that SSA intended to issue a final regulation in September 2001, with the first phase to start in April 2002. The nationwide implementation plan was based on the preliminary results from the prototype states, which showed that claims were awarded earlier in the process; that accuracy was comparable to non-prototype cases; and that denied claims moved to the hearing level sooner.

However, in May 2001, just a few months after the proposed rule was issued, SSA announced that the national rollout would be deferred because of increased program costs due to the higher allowance rate “since some of the additional people we are paying at the DDS level would not have appealed and been paid by OHA [now ODAR] under the old process.”⁴ This is a sad commentary – that it is better to exhaust claimants and prevent appeals which might lead to payment of benefits to which they are entitled. The system should not deliberately construct barriers to legitimate receipt of critical benefits and the related medical coverage.

In 2005, SSA again attempted to deal with the less than adequate reconsideration level as part of its “Disability Service Improvement” (DSI) proposal. As part of the overhaul of the entire disability claims process, SSA proposed to eliminate reconsideration, end the disability prototype, and institute a “Federal Reviewing Official (FedRO).”⁵ The final DSI regulations were issued in March 2006 and applied in SSA Region I states (CT, MA, ME, NH, RI, VT).⁶ Under DSI, the claimant could appeal an initial determination denial to the FedRO who was authorized to allow or deny the claim. The FedRO, a federal and not DDS employee, was supposed to more thoroughly develop the record and address legal issues in the case.

From the outset, the CCD Social Security Task Force opposed creation of the FedRO level. In comments to the proposed rule, we noted our long-time support for creating a more streamlined process by eliminating the reconsideration level and adding some type of pre-decision contact with the claimant. We noted our concern that the FedRO level would become a replacement for reconsideration and, as a result, would not streamline the process. We also were concerned that by requiring a separate appeal to the ALJ level, many claimants would be discouraged from appealing FedRO denials and would drop out of the process.

Unfortunately, our concerns were realized. Claimants’ representatives in Region I states overwhelmingly found the FedRO level to be a barrier for their clients: processing times were much longer; there was a very low appeal rate from FedRO denials to the ALJ level; and records were not better developed. As a result, advocates strongly supported Commissioner Astrue’s August 2007 proposal to suspend new cases at the FedRO level,⁷ which was issued as a final rule in January 2008.⁸

³ 66 Fed. Reg. 5494 (Jan. 19, 2001).

⁴ Disability Determination Services Administrators’ Letter No. 566 from Associate Commissioner for Disability (May 1, 2001).

⁵ 70 Fed. Reg. 43590 (July 25, 2005).

⁶ 71 Fed. Reg. 16424 (Mar. 31, 2006).

⁷ 72 Fed. Reg. 45701 (Aug. 15, 2007).

⁸ 73 Fed. Reg. 2411 (Jan. 15, 2008).

Over the years, the Task Force has continued to support elimination of the reconsideration level. We have stated many times in testimony before these Subcommittees and in comments to SSA that elimination of reconsideration with better development of evidence and some type of pre-decision contact with the claimant will create a more streamlined process and better serve individuals with disabilities applying for benefits. Statements from claimants' representatives in States where the reconsideration level is still in place support the Task Force's position:

North Dakota

- By eliminating reconsideration, claimants would be allowed sooner if they need to appeal to the hearing level. It also "would help relieve the workload of the field offices and DDS. The last number I saw for North Dakota was a 90 percent denial rate for reconsideration [10.8% allowance rate in FY 2009], which would be consistent with my experience. Reconsideration, as practiced here, just adds to the long delay to get to a hearing."

Washington

- My view on reconsideration here in the State of Washington is that it is presently a hoop which clients are required to jump through before their cases will be reviewed in detail at a hearing before an administrative law judge. Rarely do the clients I have represented have their cases reviewed and benefits awarded at reconsideration after receiving their initial denial. I believe the statistics show that benefits are awarded approximately 11% [10.8% in FY 2009] of the time at the reconsideration level. Given the delays that clients face at the reconsideration level and the low reversal rate in our state, I have grave questions about the value of retaining the reconsideration stage of the appeal process.

Texas

- I do not see that reconsideration serves any useful purpose. It just adds to the time period that claimants must wait to get a decision and delays them from getting a hearing, if they must appeal. While reconsideration might correct a few cases that are decided wrongly, usually these are cases where mistakes were made at the initial decision ... If the proper care and development were done at the initial stage then this "do over" would not be necessary. Furthermore, I would think that the delay that everyone must go through by having the case re-decided at reconsideration would not justify the few errors that are "fixed." Instead, if everyone who appealed had their hearing quicker, more individuals would benefit by having their claims heard earlier (and, thus, getting a decision quicker). Reconsideration is a process that helps few, but hurts many by adding delay into the system.

I also think getting denied twice discourages some individuals with good claims from appealing further (requesting a hearing); thus, some who deserve benefits drop out of the system. I would suspect that these individuals are often the ones that most "trust" the government to make the correct decision. Of course, some would say that reconsideration has been kept precisely for this exact reason - to reduce the number of individuals who request a hearing.

Georgia

- I have represented claimants in Social Security disability hearings for 35 years in metropolitan Atlanta, Georgia. In relatively few cases, the State disability adjudication section properly finds a claimant to be disabled at the reconsideration level. This decision saves the Administration time and effort. These savings are greatly outweighed by the many cases where the disability adjudication section wrongfully determines disabled claimants to be "not disabled." Both

claimants and the Administration would be better off if the costs of reconsideration were spent for faster and more accurate initial decisions or ODAR hearings.

- The reconsideration stage of the disability appeals process is a wasteful step we cannot afford, and which does not correct a significant number of wrongly-denied claims. If the resources now spent on re-denying almost all claims (85%) were devoted to developing better evidence at the initial stage, even at the cost of additional time, more wrong denials could be avoided at a cost that would likely be far less than is now wasted on the reconsideration stage. Virtually all cases now denied at reconsideration are appealed to a hearing, which costs far more than the initial determination stage, so getting the decisions right at the initial level would be highly cost-effective. Resources now spent on the ineffective reconsideration process should be redirected to better medical development at the initial level.

Why do we continue to support elimination of the reconsideration level?

- **Processing times are high.** Reconsideration processing times for many years averaged 60 to 90 days. However, reconsideration processing times have increased and may continue to do so, while there is a focus on dealing with new claims at the initial level. A Massachusetts attorney on that State's DDS Advisory Committee notes:

Through Advisory Committee meetings, we have learned that reconsideration backlogs have been growing due to increased receipts. Average processing time has increased from the usual 60 - 90 days and further increases are expected. Although the DDS has been trying to maintain a balance of initial and reconsideration work, there has been some slippage due to focus on initial claims.

- **Allowance rates are very low.** Denial rates at reconsideration are extremely high. As a result, few claimants benefit from the paper review at that level. In FY 2009, the national reconsideration allowance rate was only 13.8 percent. However, many states were well below that rate: North Dakota – 10.8%; Delaware – 10.1%; West Virginia – 8.2%; Kentucky – 8.8%; Mississippi – 6.9%; Tennessee – 9.3%; Indiana – 6.6%; Ohio – 10.4%; Iowa: 10.4%; Wyoming: 7.0%.
- **Pending claims have increased.** At the end of FY 2008, 115,059 reconsideration level cases were pending. The number grew to 160,642 at the end of FY 2009. In FY 2010, just through February, the number increased to 181,275. We are concerned that some DDSs may reallocate personnel resources to focus on the surge of incoming applications, which may be a factor in the significantly longer reconsideration processing times.

Our concerns stem from action taken in June 2006 when a former SSA Deputy Commissioner for Operations sent a memorandum to all DDSs, directing them to shift their available resources to initial determinations because the number of pending initial applications had ballooned over the prior year. At that time, we heard from claimants' representatives in several states that their DDSs had in fact stopped processing claims at the reconsideration level. In fact, for a time, SSA did deploy "all available resources" to processing initial applications, while allowing only "dire need" reconsideration cases to be considered, if they were identified.

- **Disabled claimants do not appeal.** For a variety of reasons, many claimants denied at the initial level do not appeal to the reconsideration level, even though they may be as likely to be entitled to benefits as those who do appeal. We have long been concerned about claimants being discouraged

from appealing denials and dropping out of the process. While an imperfect measure of the appeal rate since the data is not longitudinal, an SSA chart for fiscal year 2008, “Fiscal Year 2008 Workload Data: Disability Decisions,” does provide a very general idea about the difference in appeal rates after initial claim denials and after reconsideration denials. Far less than half of claimants whose initial claims are denied go on to request reconsideration. In contrast, far more than 50% of claimants who receive reconsideration denials appeal to the ALJ hearing level.

- **Pressure on DDSs to deny claims based on incomplete records.** In 2008, media reports raised the question whether a “culture of denial” exists at the initial and reconsideration levels because of the high denial rates at those levels, while a majority of cases appealed to the ALJ hearing level are allowed. We do not know of any specific written documents that encourage denials at the earlier levels, but there are several reasons, in addition to the high denial rate, why there is a perception that a “culture of denial” exists.

By law, SSA must review at least 50 percent of all favorable disability determinations made by the state agencies.⁹ However, there is no similar requirement for the review of denials. As a result, state agency disability examiners know that they will receive more review – and possible feedback – if they incorrectly allow a claim, but not if it is incorrectly denied. A key question is whether this process influences or makes it easier for a disability examiner to deny – rather than allow – a claim.

In addition, the state agencies are held to “standards of performance,” by which SSA measures their compliance with SSA regulations and policy.¹⁰ The “standards of performance” include processing time standards.¹¹ Because of the processing time levels, we believe that the state agencies are under pressure to cut short efforts to obtain medical information and to make decisions on cases with incomplete records. In testimony provided at an April 2008 hearing before the full Ways and Means Committee, the former Chairman of the Social Security Advisory Board, Sylvester Schieber stated:

DDS claims processors operate under processing time, productivity measures, and quality control rules that put unreasonable stress on their process and, as a result, change behavior. Forcing managers to choose to adjudicate one type of claim, whether it is an initial claim or a request for reconsideration, over another sends a very strong message about their relative importance. Moreover, a quality review process that targets allowance decisions almost exclusively also sends an unintended message. Only a small fraction of denied cases are selected for quality review. The chance of an insufficiently documented denial determination sliding through the system unchecked cannot be discounted ... When faced with pressure to clear cases quickly, adjudicators may take shortcuts and those shortcuts can lead to unintended outcomes.

Informal remands to DDSs. One of the Commissioner’s May 2007 backlog elimination initiatives involves the informal remand of cases at the hearing level back to the DDSs for another review. While we are uncertain whether the initiative is still in place given the backlogs at the DDS level, tens of thousands of cases were remanded back to the DDSs following the May 2007 announcement. In his April 2008 testimony, Mr. Schieber noted that the DDSs allowed 43 percent of the informal remands and “well over two-thirds of those were allowed without any additional development.” He stated:

⁹ Sections 221(c)(3)(A)[Title II] and 1633(e)(2)(A)[SSI] of the Social Security Act.

¹⁰ 20 C.F.R. §§ 404.1640 to 404.1643.

¹¹ *Id.* § 404.1642.

There are a variety of reasons why these cases are now being approved without gathering more evidence than was gathered months or years ago, but we cannot discount that processing pressures in earlier stages of adjudication could have caused inadequate review the first time around.

As discussed below, we believe that the process can be improved at the “front end” through better development of cases as early as possible. We have a number of suggestions that would improve the process by allowing appropriate cases earlier and keeping cases from being appealed to hearings.

RECOMMENDATIONS FOR IMPROVING THE DISABILITY CLAIMS PROCESS

Money alone will not solve SSA’s crisis in meeting its responsibilities. CCD has numerous suggestions for improving the disability claims process for people with disabilities. We believe that these recommendations and agency initiatives, which overall are not controversial and which we generally support, can go a long way towards reducing, and eventually eliminating, the disability claims backlog.

Caution Regarding the Search for Efficiencies. While we generally support the goal of achieving increased efficiency throughout the adjudicatory process, we caution that limits must be placed on the goal of administrative efficiency for efficiency’s sake alone. The purposes of the Social Security and SSI programs are to provide cash benefits to those who need them and have earned them and who meet the eligibility criteria. While there may be ways to improve the decision-making process from the perspective of the adjudicators, the critical measure for assessing initiatives for achieving administrative efficiencies must be how they affect the very claimants and beneficiaries for whom the system exists.

Technological Improvements

Commissioner Astrue has made a strong commitment to improve and expand the technology used in the disability determination process. CCD generally supports these efforts to improve the disability claims process, so long as they do not infringe on claimants’ rights. Some of the technological improvements that we believe can help reduce the backlog include the following:

1. Expanding Internet access for representatives. Under Electronic Records Express (ERE), registered claimants’ representatives are able to submit evidence electronically through an SSA secure website or to a dedicated fax number, using a unique barcode assigned to the claim. Many use ERE to submit evidence, but we receive many reports that evidence is not in the exhibited, i.e., “pulled,” record at the time of the hearing. Representatives are to be provided with a CD of the exhibited or “pulled” file shortly before the hearing. Due to staffing and training issues in some hearing offices, there are problems obtaining the CDs and the CDs are incomplete, which can result in delays and more work for ODAR staff if paper records are submitted, which may be duplicative but is the only way to ensure that evidence is received.

A small group of representatives is involved in an SSA pilot that gives them direct access to their clients’ electronic folders, allowing them to download the contents through the ERE website. SSA has been working on security and authentication issues that should lead to an eventual rollout nationwide. Once implemented, the Internet access will make the hearing process more efficient for all parties involved – claimants, their representatives, and SSA.

2. Use of video hearings. Video hearings allow ALJs to conduct hearings without being at the same geographical site as the claimant and representative and have the potential to reduce processing

times and increase productivity. We support the use of video teleconference hearings so long as the right to a full and fair hearing is adequately protected; the quality of video teleconference hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations¹² and SSA policy. We have received reports from representatives that some ALJs are discouraging claimants from exercising their right to an in-person hearing.

Other Improvements at the Hearing Level

1. The Senior Attorney Program. This program allows senior staff attorneys in hearing offices to issue fully favorable decisions in cases that can be decided without a hearing (i.e. “on the record”). This cuts off many months in claimants’ wait for payment of benefits. We support Commissioner Astrue’s decision to authorize the program for at least the next two years.¹³ In FY 2009, senior attorneys decided more than 36,300 cases, a 50% increase over FY 2008. We expect this number to be significantly surpassed this year. Through the first six months of FY 2010, nearly 26,000 cases have been approved by senior attorneys – a real benefit for claimants.

2. Findings Integrated Templates (FIT). FIT is used for ALJ decisions and integrates the ALJ’s findings of fact into the body of the decision. While the FIT does not dictate the ultimate decision, it requires the ALJ to follow a series of templates to support the ultimate decision. Representatives can use the FIT template, which is available on the SSA website, to draft proposed favorable decisions and thus expedite the case. The key factor is that FIT does not dictate the decision and we do not support any process that would interfere with the ALJ’s independence.

3. Scheduling cases.

- **Increase the time for notices.** We recommend that the time for providing advance notice of the hearing date be increased from the current 20 days to 75 days. We believe that this increase will allow more time to obtain medical evidence before the hearing and make it far more likely that the record will be complete when the ALJ reviews the file before the hearing. The 75-day time period has been in effect in SSA’s Region I states since August 2006¹⁴ and, based on reports from representatives, has worked well.

- **Filling ALJ hearing dockets to capacity.** One of the Commissioner’s May 2007 initiatives focuses on ensuring that there are adequate numbers of cases ready to be scheduled for hearing. We realize that having adequate staff to “pull” cases is a key factor to accomplishing this goal and to ensure that cases that have been pending the longest are scheduled for hearing before later appealed cases, with the exception of cases that meet SSA’s expedited consideration criteria, e.g., “dire circumstances,” terminally ill, or compassionate allowances.

Improvements at the Initial Levels

CCD supports initiatives to improve the process at the initial levels so that the correct decision can be made at the earliest point possible and unnecessary appeals can be avoided. Inadequate case development at the DDS level means that ALJs will need to spend more time reviewing cases prior to the hearing. This leads to longer processing times at the hearing level. Improvements at the front end of the process can have a significant beneficial impact on preventing the backlog and delays later in the appeals process.

¹² 20 C.F.R. §§ 404.936 and 416.1436.

¹³ The program is extended through August 10, 2011. 74 Fed. Reg. 33327 (July 13, 2009).

¹⁴ 20 C.F.R. § 405.315(a).

1. New Screening Initiatives. We support SSA's efforts to accelerate decisions and develop new mechanisms for expedited eligibility throughout the application and review process. We encourage the use of ongoing screening as claimants obtain more documentation to support their applications. However, SSA must work to ensure that there is no negative inference when a claim is not selected by the screening tool or allowed at that initial evaluation. There are two initiatives that appear to be working well, with SSA increasing the number of claims considered in these categories each fiscal year:

- **Quick Disability Determinations.** We have supported the Quick Disability Determination (QDD) process since it first began in SSA Region I states in August 2006 and was expanded nationwide by Commissioner Astrue in September 2007.¹⁵ The QDD process has the potential of providing a prompt disability decision to those claimants who are the most severely disabled. Since its inception, the vast majority of QDD cases have been decided favorably in less than 20 days, and sometimes in just a few days.

- **Compassionate Allowances.** This initiative allows SSA to create "an extensive list of impairments that we [SSA] can allow quickly with minimal objective medical evidence that is based on clinical signs or laboratory findings or a combination of both..." SSA published an initial list of 50 conditions on its website and recently added 38 more. Unlike the QDD screening, which occurs only when an application is filed, screening for compassionate allowances can occur at any level of the administrative appeals process.

2. Improve development of evidence earlier in the process. In previous testimony, CCD has made a number of recommendations to ensure that disability claims are properly developed at the beginning of the process. In contrast to other states, Massachusetts has a reconsideration allowance rate of 27.4% that is nearly twice as high as the national average of 13.8%. Why? According to an attorney in that state:

I think the main reason for the higher rate of Massachusetts DDS reconsideration allowances is that the Massachusetts DDS is serious about developing the evidence necessary to make accurate determinations – at reconsideration, as well as at the initial level. Another reason is that the DDS has long specialized work in two areas that can be difficult to adjudicate – applications involving homeless individuals and HIV/AIDS claims. With specialization, the DDS examiners have developed both familiarity with the relevant treatment and expertise in the issues involved with the relevant medical conditions, providing for greater accuracy in adjudications. A very experienced DDS examiner helps people at a large homeless shelter with applications and disability forms once a month. The DDS has found that this well-prepared documentation facilitates accurate and timely decision-making in these cases.

The attorney also points out that the process has improved due to the existence of the Massachusetts DDS Advisory Committee. Established in the mid-1980s, the Advisory Committee consists of advocates, agency staff, and individuals with disabilities. The Advisory Committee meets on a quarterly basis to discuss the DDS's performance, trends, and problems, and to hear reports of subcommittees to work out better ways to adjudicate claims.

Task Force recommendations include the following:

¹⁵ 20 C.F.R. §§ 404.1619 and 416.1019.

- **Provide more assistance to claimants at the application level.** At the beginning of the process, SSA should explain to the claimant what evidence is important and necessary. SSA should also provide applicants with more help completing the application, particularly in light of electronic filings, so that all impairments and sources of information are identified, including non-physician and other professional sources.
- **DDSs need to obtain necessary and relevant evidence.** Representatives often are able to obtain better medical information because they use letters and forms that ask questions relevant to the disability determination process. However, DDS forms usually ask for general medical information (diagnoses, findings, etc.) without tailoring questions to the Social Security disability standard. One way to address this would be for SSA to encourage DDSs to send Medical Source Statement forms to treating and examining doctors. These simple forms translate complex, detailed medical source opinions into practical functional terms useful to the vocational professionals at DDSs and hearing offices.
- **Increase reimbursement rates for providers.** To improve provider response to requests for records, appropriate reimbursement rates for medical records and reports need to be established. Appropriate rates should also be paid for consultative examinations and for medical experts.
- **Provide better explanations to medical providers.** SSA and DDSs should provide better explanations to all providers, in particular to physician and non-physician treating sources, about the disability standard and ask for evidence relevant to the standard.
- **Provide more training and guidance to adjudicators.** Many reversals at the appeals levels are due to earlier erroneous application of existing SSA policy. Additional training should be provided on important evaluation rules such as: weighing medical evidence, including treating source opinions; the role of non-physician evidence; the evaluation of mental impairments, pain, and other subjective symptoms; the evaluation of childhood disability; and the use of the Social Security Rulings.
- **Improve the quality of consultative examinations.** Steps should be taken to improve the quality of the consultative examination (CE) process. There are far too many reports of inappropriate referrals, short perfunctory examinations, and examinations conducted in languages other than the applicant's.

3. Help claimants obtain representation earlier in the process to assist with development.

Representatives play an important role in obtaining medical and other information to support their clients' disability claims and helping SSA to streamline the disability determination process. They routinely explain the process and procedures to their clients with more specificity than SSA. They obtain evidence from all medical sources, other treating professionals, school systems, previous employers, and others who can shed light on the claimant's entitlement to disability benefits. Given the importance of representation, the Social Security Act requires SSA to provide information on options for seeking legal representation, whenever the agency issues a notice of any "adverse determination." 42 U.S.C. § 406(c); 42 U.S.C. § 1383(d)(2)(D). In reality, this statutorily required information is rarely provided.

Most representation occurs at the hearing level. A major reason is that it is only at that level, after the request for hearing is filed, that claimants are given concrete information regarding local and national legal resources to contact. Even though many claimants' representatives will represent claimants prior to the hearing level, the rate of representation is extremely low when compared to the hearing level because little or no information is provided that is specific or targeted to the area where claimants live. Another reason is that many advocates report that claimants are in fact actively discouraged from obtaining representation by SSA claims representatives or telephone representatives.

Given the statutory requirement, we recommend that SSA include more information on options for legal representation in initial and reconsideration denial notices similar to that provided at the hearing level.

* * * *

CONCLUSION

Delays in decisionmaking on eligibility for disability programs can have devastating effects on people already struggling with difficult situations. On behalf of people with disabilities, it is critical that SSA be given substantial and adequate funding to make disability decisions in a timely manner and to carry out its other mandated workloads. We appreciate your continued oversight of the administration of the Social Security programs and the manner in which those programs meet the needs of people with disabilities.

Thank you for the opportunity to testify today. I would be happy to answer questions.

ON BEHALF OF:

American Association on Intellectual & Developmental Disabilities
American Foundation for the Blind
American Network of Community Options and Resources
Bazelon Center for Mental Health Law
National Alliance on Mental Illness
National Association of Disability Representatives
National Council for Community Behavioral Healthcare
National Multiple Sclerosis Society
National Organization of Social Security Claimants' Representatives
National Spinal Cord Injury Association
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Paralyzed Veterans of America
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United Spinal Association