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A RESPONSE TO BLOCH, LUBBERS & VERKUIL'S
*THE SOCIAL SECURITY ADMINISTRATION'S
NEW DISABILITY ADJUDICATION RULES: A
CAUSE FOR OPTIMISM . . .
AND CONCERN*

Robert E. Rains[†]

Professors Bloch, Lubbers, and Verkuil have performed a yeomen's service in advising the Commissioner of the Social Security Administration (SSA) on reforming the process for administrative decision making and appeals.¹ In a well-balanced article for this Symposium, the professors generally praise the Commissioner's new Disability Service Improvement (DSI) process, which SSA will phase in starting with claims filed on or after August 1, 2006, in SSA Region I.² The professors also note their disagreements with and reservations regarding certain aspects of the DSI plan.

I wish I were as optimistic as Professors Bloch, Lubbers, and Verkuil as to the expected benefits of the DSI process. Certain aspects of the new process are undoubtedly beneficial.³ However, if DSI is ever fully implemented in its current form nationwide, one particular aspect of the plan—eliminating a claimant's right to seek administrative review of a wholly or partially unfavorable administrative law judge (ALJ) decision—is cause for great concern.

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¹ See FRANK BLOCH ET AL., INTRODUCING NONADVERSARIAL GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISION IN SOCIAL SECURITY DISABILITY ADJUDICATIONS: A REPORT TO THE SOCIAL SECURITY ADVISORY BOARD (2003), <http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf>; PAUL VERKUIL & JEFFERY LUBBERS, ALTERNATIVE APPROACHES TO JUDICIAL REVIEW OF SOCIAL SECURITY DISABILITY CASES: A REPORT TO THE SOCIAL SECURITY ADVISORY BOARD (2002), <http://www.ssab.gov/Publications/Disability/VerkuilLubbers.pdf>.

² See *Administrative Review Process for Adjudicating Initial Disability Claims*, 71 Fed. Reg. 16,424 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

³ See *Legislation & Regulations*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 478, 478 (2006) (noting that DSI is "an effort to improve accuracy, consistency and timeliness of decision-making throughout the disability determination process").

I surely agree with Professors Bloch, Lubbers, and Verkuil that “any effort to reform the disability determination process must target the prompt development of a full and complete record.”⁴ Indeed, development of a full and complete record is central to my own article for this Symposium.

Eliminating the reconsideration level of administrative decision making could benefit the disability determination process. Indeed, in Pennsylvania, the reconsideration step for initial claims has not existed for several years.⁵ Given the statistical unlikelihood of a claimant obtaining a different result on reconsideration than on initial consideration,⁶ this is generally perceived as eliminating a roadblock to meaningful appeal rather than as eliminating a valuable avenue to rectifying incorrect decisions. SSA’s statistics for Fiscal Year (FY) 2005 indicate that claimants were successful at the reconsideration stage for initial claims only 14% of the time.⁷ On the other hand, reconsideration has benefited individuals already receiving benefits who were going through Continuing Disability Reviews (CDRs), with a 50% reversal rate in FY 2005.⁸ Thus, eliminating the reconsideration step in CDR cases may result in unnecessary delay for those previously found to be disabled.⁹

However, it is hard to see how use of a federal reviewing official (FedRO) will be a significant improvement over the reconsideration stage. In practice, claims often are not fairly and adequately developed by the state agencies at the initial determination stage.¹⁰ While this situation has improved over the years, in our clinical work, we

⁴ See Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *The Social Security Administration’s New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235, 237 (2007).

⁵ See, e.g., Daniel J. Siegel, *Don’t Overlook Social Security: Injured Workers Benefit from Social Security*, LEGAL INTELLIGENCER, Nov. 9, 2000, at 5 (noting that “in Pennsylvania and some other states, an experimental program has eliminated the reconsideration step”).

⁶ See OFFICE OF POLICY & OFFICE OF RESEARCH, EVALUATION & STATISTICS, SOC. SEC. ADMIN., ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2004, at 129 tbl.55 (2006), http://www.ssa.gov/policy/docs/statcomps/di_asr/2004/di_asr04.pdf (demonstrating low allowance rates for medical decisions at the reconsideration level between 1992 and 2003).

⁷ See, e.g., *Disability Determinations and Appeals Fiscal Year 2005*, SOC. SECURITY F. (Nat’l Org. of Soc. Sec. Claimants’ Representatives, Englewood Cliffs, N.J.), Mar. 2006, at 55.

⁸ See *id.*

⁹ The regulatory scheme is unclear as to if and when the DSI process will apply to CDRs. On one hand, the Commissioner declares in a Supplementary Information section in the Federal Register that “[t]he new process will apply to claims for DI benefits and for SSI payments based on disability or blindness.” Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,427 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422). On the other hand, the actual DSI regulations state that “the terms ‘disability claim’ or ‘claim’ do not include a continuing disability review or age-18 redetermination.” 20 C.F.R. § 405.5 (2006).

¹⁰ See *Testimony Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 108th Cong. (2003) (statement of Sylvester J. Schieber, Member, Social Security Advisory

continue to see denials at the initial level that are due to incomplete records and residual functional capacity forms filled out by state agency reviewing physicians and psychologists that bear little or no relationship to the evidence provided by treating and consulting medical and psychological examiners. Similarly, at the ALJ level, we see that the Office of Disability Adjudication and Review (ODAR) (formerly the Office of Hearings and Appeals) continues to lack the resources to carefully review claimants' medical records and ensure their completion. 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.

There is, however, one aspect of the DSI that should work as an unalloyed blessing for claimants, representatives, and ALJs alike. Under current rules, the ALJ or the hearings office staff must send notice of a hearing to the claimant and representative only twenty days prior to the scheduled hearing.¹¹ As a result, representatives face a dilemma: If they request records and reports from ongoing treatment sources shortly after they are retained, at a time when the hearing is not yet scheduled and likely will not be for several more months, the representatives will have to duplicate their efforts and expenses when the hearing is finally scheduled. If, on the other hand, they wait until after the hearing is scheduled to get records and reports, they run the very real risk that they will get the records and reports just before or even after the hearing date. It is understandably frustrating for ALJs to receive a pile of medical information shortly before, during, or after a hearing. This minimal notice requirement also leads to legal battles over "closing the record."

The new DSI rule requires that ALJs provide notice to the claimant or representative at least seventy-five days prior to a hearing unless the claimant or representative agrees otherwise.¹² The DSI also includes a general requirement that written evidence be submitted no fewer than five business days before the date of the scheduled hearing.¹³ With seventy-five days' notice, representatives who have previously been retained will normally be able to provide medical

Board) (stating that one major problem for the Social Security hearings office is inadequately developed appeals).

¹¹ See OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-2-3-15 (2005), http://www.ssa.gov/OP_Home/hallex/ ("The ALJ or the [hearings office] staff must send notice of the hearing to the claimant and representative at least 20 days before the hearing.")

¹² 20 C.F.R. § 405.315 (2006).

¹³ *Id.* § 405.331.

information to the ALJs in a timely fashion.¹⁴ This should be a win-win situation, and these parts of the new rules should be implemented nationwide immediately.

Professors Bloch, Lubbers, and Verkuil are correct to question how the new Disability Review Board (DRB) will adequately carry out the Appeals Council's review function.¹⁵ Despite concerns voiced in many comments on the proposed rules,¹⁶ the Commissioner has insisted on eliminating a claimant's right to administratively appeal an ALJ denial on the merits.¹⁷ The reasoning behind the Commissioner's decision is obscure at best. The explanation provided in the final rule—that the DRB will be phased in gradually¹⁸—is unenlightening. One possible rationale for eliminating this valuable right is the paternalistic, "Big Brother" rationale that SSA knows better than the aggrieved claimants themselves who has been wrongfully denied benefits. Another rationale, which is crassly economic, is that the Commissioner, knowing that many aggrieved claimants will lack the resources and stamina to appeal to federal court, wishes to save the government money.¹⁹ Finally, despite her protestations to the contrary, the Commissioner may have a hidden agenda rationale for her actions in that she may wish to have the federal district courts flooded with Social Security appeals in order to lay the groundwork for advocating the removal of these cases from the Article III federal district courts and the setting up of an Article I Social Security Court in their stead. Under this rationale, since SSA will become more arbitrary by denying numerous claimants an administrative appeal from unfavorable ALJ decisions, the government must also deny those aggrieved claimants judicial review by generalist Article III federal district court judges.²⁰

¹⁴ There will always be situations in which representatives are retained shortly before a scheduled hearing, claimants get treatment shortly before a hearing, a medical source is recalcitrant about producing requested records, or older medical records are simply difficult—or impossible—to obtain.

¹⁵ See Soc. Sec. Admin., Social Security's Appeals Council Review Process, http://www.ssa.gov/appeals/appeals_process.html (last visited Oct. 17, 2006) (explaining the Appeals Council's function).

¹⁶ See Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,438–40 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

¹⁷ See *id.* (providing the Commissioner's responses to comments received regarding the proposal to establish the DRB).

¹⁸ See *id.* at 16,438.

¹⁹ See Michael Abramowitz, *President Remains Eager to Cut Entitlement Spending*, WASH. POST, Aug. 11, 2006, at A7 (discussing the Bush Administration's pledge to reduce spending on Medicare, Medicaid, and Social Security following the November midterm elections).

²⁰ One Social Security ALJ is already using the new DSI regulations as a basis for advocating the elimination of Article III judicial review. In a statement to the 2006 Summer Council Meeting of the ABA Section of Administrative Law and Regulatory Practice, ALJ Robin J. Arzt argued:

In the March 31, 2006 final rulemaking, the Commissioner purported to be sensitive to the concern that eliminating claimants' right to administrative review of ALJ denials would flood the federal courts:

Many commentators, including the Administrative Office of United States Courts, thought that the shift of the Appeals Council's functions to the DRB would have an adverse effect on the Federal court system and would result in an increase in the number of cases appealed to the Federal courts. To address these concerns, we plan a gradual rollout to minimize the impact on the judiciary. We plan to begin implementation of the new process in the Boston region, which is one of our smallest regions.²¹

But the very next sentence makes clear that this "rollout" in Region I cannot possibly demonstrate what in fact will happen when claimant-initiated administrative review is eliminated: "Because we are beginning in a small region, we will be able to have the DRB initially review all or most of the administrative law judge decisions that are issued in the Boston region."²²

In her June 15, 2006 statement to the Subcommittee on Social Security of the House Committee on Ways and Means, the Commissioner expanded on her declaration that the DRB will initially review "all or most" ALJ decisions in Region I:

[W]e have decided that the DRB will initially review *all* of the administrative law judge decisions—allowances and denials—issued in the Boston region. This 100 percent review will allow us carefully to design, test, and validate a predictive model for selecting a subset of all ALJ decisions for DRB review that include those most likely to be remanded by the U.S. District Courts. During this same period, we will analyze the effects of the new approach on the workload of the Federal courts within the region.²³

However, the rollout in Region I will not show the actual consequences of denying aggrieved claimants the right to seek review by the DRB. First, the new process will only apply to claims filed on or after August 1, 2006. Second, the Commissioner pledges to wait only one

Since the SSA is about to phase out having a specialized administrative tribunal to which a Social Security disability benefits claimant can appeal an ALJ's decision, this is yet another factor that supports creating a specialized court to handle the expected increased caseload in the stead of the district courts.

Robin J. Arzt, Proposal for a United States Social Security Court 6 (2006) (unpublished manuscript), <http://www.abanet.org/adminlaw/annual2006/Tab8Bproposal.pdf>.

²¹ Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,439.

²² *Id.*

²³ *Testimony Before the Subcomm. on Social Security of the H. Comm. on Ways and Means, 109th Cong. (2006)* (statement of the Honorable Jo Anne B. Barnhart, Commissioner, Social Security Administration).

year after full implementation in Region I to assess the impact of the changes, making it unclear how many, if any, cases will have progressed through the DRB level. Third, and most importantly, during this phase-in period, the DRB will review *all* denials of benefits. Since the concern is that the federal courts will be flooded with cases *not* reviewed by the DRB, a rollout in which all ALJ decisions *are* reviewed by the DRB will not test the impact of the final regulations on the federal docket.

If eliminating administrative appeal of ALJ denials does insulate from administrative review a significant number of legally unsupportable ALJ decisions, the proper response is for SSA to modify the DSI plan to allow claimants to appeal to the DRB, not to truncate their right to judicial review when it is most needed. In their article, Professors Bloch, Lubbers, and Verkuil note that Professors Lubbers and Verkuil have elsewhere "recommended renewed consideration of an Article I Social Security Court to deal with Article III court caseload concerns."²⁴ However, if the operations of the DRB do result in large numbers of unsupportable ALJ denials escaping administrative review, in fact, that would be the exact situation in which claimants would most need redress to a strong and independent Article III judiciary (not a lesser court housed within the executive branch) to ensure appropriate relief until SSA corrects its course of conduct.

The Consortium for Citizens with Disabilities has addressed this issue:

The Commissioner's proposal does not make any recommendations regarding creation of a Social Security Court. However, other stakeholders, in their recent responses to the Commissioner's proposal, recommend creation of such a court.

We support the current system of judicial review and strongly oppose creation of a Social Security Court. Proposals to create either a Social Security Court to replace the federal district courts or a Social Security Court of Appeals to provide for consideration of appeals of all Social Security cases from district courts have been considered, and rejected, by Congress and SSA over the past twenty years.

We believe that both individual claimants and the system as a whole benefit from the federal courts deciding Social Security cases. Over the years, the federal courts have played a critical role in protecting the rights of claimants. The system is well-served by regular, and not specialized, federal judges who hear a wide variety of federal cases and have a broad background against which to measure the reasonableness of SSA's practices.²⁵

²⁴ See Bloch, Lubbers & Verkuil, *supra* note 4, at 239 n.24.

²⁵ CONSORTIUM FOR CITIZENS WITH DISABILITIES, POSITION PAPER ON THE COMMISSIONER'S PROPOSAL TO CHANGE THE DISABILITY CLAIMS PROCESS 17 (May 2004), *available at*

In the early 1980s, when SSA undertook a draconian purge of the disability rolls and thereby caused massive hardship for hundreds of thousands of disabled Americans, it was the federal judiciary—along with many ALJs—who compelled SSA to comply with settled law.²⁶ One hopes that SSA's intended elimination of claimant-initiated administrative review of ALJ decisions will not have similar results. If it does, however, SSA must take corrective action and must not seek to insulate itself from the judicial censure it would deserve.

<http://www.aapd-dc.org/policies/ccdclaimprocess.html> (statement on behalf of the American Association of Mental Retardation, American Association of People with Disabilities, American Foundation for the Blind, American Network of Community Options & Resources, Bazelon Center for Mental Health Law, Brain Injury Association of America, Council for Exceptional Children, Helen Keller National Center, International Association of Psychosocial Rehabilitation Services, National Alliance for the Mentally Ill, National Association of Protection & Advocacy Systems, National Coalition on Deaf-Blindness, National Law Center on Homelessness & Poverty, National Mental Health Association, National Organization of Social Security Claimants' Representatives, National Rehabilitation Association, NISH, Paralyzed Veterans of America, Spina Bifida Association of America, The Arc of the United States, United Cerebral Palsy, United Spinal Association, and the World Institute on Disability).

²⁶ See, e.g., Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1, 7–8 (1987).