

Work of Administrative Law Judges Generates Concern About Disparities

Daniel Wise

09-06-2011

The Social Security Administration is encountering growing skepticism about the performance of its administrative law judges, who scrutinize hundreds of thousands of petitions for disability benefits each year.

In April, a federal suit filed in the Eastern District ([See Complaint](#)) accused several administrative law judges in Queens of erecting "a brick wall of bias" to stymie legitimate claims by disabled individuals with "extremely limited means of subsistence."

On July 4, an independent think-tank at Syracuse University released [an office-by-office study](#) of close to 2 million benefit determinations showing so many hard-to-explain disparities as to "suggest" that "the chance a disability claim is granted or denied is often determined more by the particular judge assigned to handle it than by the facts and circumstances presented in the case."

Finally, prodded by revelations that a West Virginia administrative law judge had granted virtually all the applications he considered in 18 months, a congressional committee on July 11 grilled Social Security Commissioner Michael J. Astrue about supervision of the ALJs ([See Testimony](#)).

Attorneys from the Urban Justice Center and Gibson Dunn & Crutcher for 11 unsuccessful applicants for disability benefits in the Eastern District are seeking an order sidelining five of eight hearing officers in the Queens office and new hearings before a different ALJ for anyone who has received an adverse decision from one of the five. The putative class action, *Patro v. Astrue*, 11-cv-1788, claims that the applicants have been "systematically deprived of their rights" to a "full and fair hearing before an impartial ALJ."

"These ALJs conduct adversarial hearings, routinely cherry-pick and manipulate facts to support their preordained conclusions, willfully ignore established law, even with explicit instructions from federal district courts and the Social Security Appeals Council, disregard evidence from treating physicians, engage in bullying and unprofessional behavior, thwart meaningful review of their decisions by deliberately failing to develop the evidentiary record, and effectively hold claimants to a higher evidentiary standard than what is set forth by law," the suit charges.

Hearing Office	Number of Decisions*	Number of Judges**	Lowest Grant Rate	Highest Grant Rate
Brooklyn	9,108	14	47.9%	96.6%
Manhattan	8,200	15	42.9%	83.1%
Syracuse	6,127	12	35.9%	77.0%
Jericho	5,614	8	62.7%	90.5%
Albany	5,253	8	71.5%	91.6%
Buffalo	4,942	11	44.5%	97.2%
Bronx	4,002	9	52.1%	84.0%
Queens	3,946	8	25.8%	76.1%
White Plains	3,706	7	51.3%	84.7%
Rochester	1,981	4	59.9%	80.8%

*From Oct. 1, 2004 through March 31, 2011

**Number of administrative law judges who have decided 100 or more cases

SOURCE: Transactional Records Access Clearinghouse

According to the plaintiffs, 72 percent of disability claims were granted nationwide by administrative law judges from 2005 to 2008. But four of the Queens judges granted only 31 percent to 45 percent of the cases they heard during that period. The fifth approved 61 percent of the petitions before her, the plaintiffs claim.

The government has prepared a motion to dismiss the lawsuit, which has not yet been filed. However, on July 21, Eastern District Assistant U.S. Attorney Gail A. Matthews and Senior Trial Counsel Carlotta P. Wells of the Justice Department, wrote Eastern District Judge Carol B. Amon that the case consists of "a few examples of legal error and publicly available statistics showing that ALJs who denied their respective claims have a higher-than-average denial rate" ([See Letter](#)).

This "alleged statistical evidence is insufficient to demonstrate generalized bias," they wrote.

The complaint charges that the five named ALJs were reversed in 80 percent of their 72 cases challenged in the Eastern and Southern districts between January 2008 and May 2011.

Charles E. Binder, whose company nationwide employs 100 disability advocates, about half of them lawyers, said in an interview that the decisions of ALJs at the Queens office are reversed by federal judges "far more often" than any other office in the metropolitan area. But, he added, other offices elsewhere in the country are worse.

Mr. Binder said about one-quarter of the advocates employed by the company, Binder & Binder, are based in the metropolitan area.

Ethel Zelenski, director of government affairs for the National Organization of Social Security Claimants' Representatives, a group with 4,000 members, agreed that the "very low" grant rates

depicted in the *Bailey* complaint are found in hearing offices elsewhere across the country.

'Pre-existing Predilections'

The July study by the Transactional Records Access Clearinghouse at Syracuse University provides some statistical support for those observations.

It found that in 80 percent of the 155 hearing offices studied, the difference in grant rates between the ALJ who approved the highest percentage of petitions and the ALJ who granted the lowest percentage was at least 30 percentage points. Further, it said the disparities actually grew in the last five years.

The Queens Office of Disability Adjudication of Review ranked 47th out the 155 studied with a spread of 50.3 percentage points between the two ALJs with the highest and lowest grant rates for the 18 months that ended on March 31, 2011.

However, others of the 10 review offices in New York covered by the study showed similarly large disparities: 48.7 points in Brooklyn, 40.1 in Manhattan and 31.6 in the Bronx, for example.

Since characteristics of disability applications may vary considerably from office to office, TRAC's conclusions are limited to a comparison within individual offices. The study did not compute an average nationwide rate and cautions against comparing the grant rates of different offices.

Judges within the individual offices are assigned cases on a random basis, so the proportion of claims granted by each judge should be roughly the same, the study reasons. Thus, it argues that "these differences cannot be explained on the basis of the worthiness of the cases handled by individual judges."

Instead, the two authors, Susan Long, a professor of managerial statistics at Syracuse and David Burnham, a former investigative reporter for The New York Times, wrote, "one or more other factors—such as the pre-existing predilections of the judges assigned—must be the source for these disparities."

Moreover, the study comments that the findings show that "to a surprising extent the records of disability decisions show again and again that even within the individual offices there is not a clear consensus among the judges about which claims should be awarded versus which should be denied."

The Social Security Administration issued a statement ripping TRAC's report as "unsupportable grandstanding masquerading as academic research."

Because federal law gives disability ALJs "substantial decisional independence," the statement continued, variations among judges in the way they decide cases are "a predictable consequence of Congressional decisions."

Congressional Scrutiny

While the Queens plaintiffs are challenging the decisions of several ALJs for allegedly granting too few claims, a congressional hearing was prompted by the possibility that a West Virginia ALJ may have granted too many.

The Wall Street Journal reported that David B. Daugherty awarded benefits in each of the 729 cases he considered in the first six months of fiscal 2011 and denied benefits in just four of the 1,284 cases he decided last year. He was put on administrative leave pending an investigation and subsequently retired.

Ranking members of the House Ways and Means Subcommittee on Social Security wrote a letter to Social Security's inspector general asking for a review of instances in which some ALJs "differ very significantly from their peers in...productivity or outcomes."

The letter also said the article about Mr. Daugherty's rulings "raises serious concerns about the degree and effectiveness of [the Social Security Administration's] management oversight."

On July 11, two House Ways and Means subcommittees held a joint hearing on the issue. At the hearing, Howard Coble, R-N.C., the head of the Ways and Means judiciary subcommittee, complained that disability ALJs have a "near complete lack of accountability."

According to data available on Social Security's website, the agency's 1,400 administrative law judges approved an average of 65.5 percent of the applications before them from Sept. 26, 2009, through this June 24.

But in its call for the hearings, the committee noted that 54 administrative law judges consistently awarded benefits in 85 percent of their cases, and two denied them in at least 80 percent of their cases.

Social Security Commissioner Astrue, in testimony prepared for the hearing, noted that "recent news stories have raised serious questions about a few ALJs."

To address those questions, he said, the agency is willing to examine the use of statistical evidence to identify the "small number of ALJs" whose decision rates show a "very significant variation" with their peers "whether in the direction of approving or denying claims."

But he also warned that there are limits on the degree of oversight the agency can impose without infringing on the independence of the ALJs, which Congress specifically protected in adopting the Administrative Procedure Act.

"We support Congress' intent that ALJs act as independent adjudicators," he said, "and we respect the qualified decisional independence that is integral to that role."

Marilyn Zahn, the executive vice president of the Association of Administrative Law Judges,

said that Social Security ALJs "are under pressure from the agency to grant benefits."

The agency has set a "goal" of 500 to 700 cases to be decided per year by ALJs, said Ms. Zahn, who hears disability appeals in Buffalo. She said that ALJs who do not meet the goal are "hassled" by managers.

The caseload standard puts pressure on ALJs to grant benefits, Ms. Zahn explained, because both an internal appeals council and district court judges scrutinize their denials "to make sure every 'i' is dotted and 't' is crossed." By contrast, she added, an ALJ "can write any gibberish" in granting benefits.

@Daniel Wise can be contacted at dwise@alm.com.