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Testimony of Richard J. Pierce, Jr.
Before the Social Security Subcommittee
of the House Ways and Means Committee
June 27, 2012

My name is Richard J. Pierce, Jr. I am Lyle T. Alverson Professor of Law at George Washington University. I have taught and written about administrative law for 35 years. I have written over 20 books and over 120 articles on administrative law. The Supreme Court has relied on my books and articles in over a dozen opinions. One of the topics I have addressed in my teaching, research and writing is disability decision making by the Social Security Administration (SSA). My most recent writing on that subject is “What Should We Do About Social Security Disability Appeals?” 34 Regulation 34 (2011).

There are two major problems with the social security disability decision making process. First, the SSA disability program has become increasingly and unsustainably generous. Over the past four decades, the proportion of the population that has been determined to be permanently disabled has doubled. The cost of the program has increased four-fold over the past two decades. During that period, the cost of disability benefit awards has increased from 10% of SSA’s total budget to 18% of its budget. The trust fund from which disability benefits are paid is projected to be exhausted in 2016, long before the projected dates for exhaustion of the Social Security or Medicare trust funds.

Second, there is a large disparity in the rates at which benefits are granted by the Administrative Law Judges (ALJs) who have the final say in the SSA decision making process in the vast majority of cases. Thus, for instance, the SSA Office of Inspector

General found that, while the average grant rate for SSA's 1400 ALJ's was 67%, the range of grant rates was 8.6% to 99.7%. An applicant in San Juan has an 87.92% probability of obtaining a favorable decision from an SSA ALJ, while an applicant in Shreveport has only a 37.42% probability of getting a favorable decision from an SSA ALJ. In every case in which an ALJ grants benefits, a team consisting of a disability examiner and a medical advisor has determined that the applicant is not disabled. In most cases, two such teams have determined that the applicant is not disabled.

The root of these two problems is the inherent difficulty of the decision making process in the cases in which one or two examiner/medical advisor teams have determined that an applicant is not so disabled that he can not work and that decision is appealed to an ALJ. Most such cases involve claims that the applicant is unable to work because of one of two conditions—mental illness or chronic pain. These conditions are extremely common in the population that is potentially eligible for disability benefits. The National Institute of Medicine (NIM) has determined that 116,000,000 Americans suffer from chronic pain, while the National Institute of Mental Health (NIMH) has determined that 61,000,000 Americans suffer from mental illness. The incidence of chronic pain is higher in the relatively older population that accounts for most disability applications than in the total population. Thus, over half of the relevant population suffers from one or both of the two health conditions that account for most of the ALJ decisions to reverse denials of benefits by disability examiner/medical advisor teams.

Given the prevalence of mental illness and chronic pain in the population that is potentially eligible for disability benefits, it would make no sense to say that anyone who suffers from one of those conditions is eligible for permanent benefits without

considering the severity of the condition. Thus, the task for the decision maker is to determine whether the applicant suffers from mental illness or chronic pain so severe that he should be classified as permanently disabled. Determining the severity of an individual's mental illness or chronic pain is extremely difficult. Chronic pain illustrates the problem. Pain is completely subjective. The same underlying physical condition can cause one person to suffer an unbearable level of chronic pain, while another person with the same physical source of pain experiences only minor and sporadic pain.

In this difficult context, all that a decision maker can do is to attempt, however imperfectly, to determine the severity of an applicant's pain or mental illness and to grant benefits only to applicants who fall on the severe end of the spectrum of the population of applicants. The large increase in the per cent of the population that has been determined to be disabled in recent years demonstrates that ALJs, on average, have granted benefits to many applicants with less severe mental illness or pain than ALJs considered sufficient to qualify for disability benefits in the recent past. That is the primary cause of the first problem I identified—an increasingly and unsustainably generous rate of granting disability benefits. The large variation in the grant rates of individual ALJs demonstrates that ALJs vary greatly in the place on the spectrum of severity of mental illness or chronic pain where each draws the eligibility line. Some ALJs grant benefits to applicants who suffer minor mental illness or pain, while other ALJs grant benefits only to applicants with severe mental illness or pain.

The task of managing the SSA disability decision making process is greatly complicated by three factors—the decisional independence of SSA ALJs, the new role of

lawyers for disability applicants, and the attitude of the courts that review the ALJ decisions. I will discuss each in turn.

The roughly 1400 SSA ALJs have complete decisional independence. By statute, their performance cannot be evaluated, and their decision making can not be subjected to any form of quality control. When SSA attempted to implement modest quality assurance programs in the past, ALJs enjoyed a great deal of success in persuading district courts to block SSA's attempts to implement quality controls of any type. In a recent survey, SSA staff attributed the large disparity in ALJ grant rates primarily to ALJs' decisional independence. By statute, SSA can not take any action against an ALJ without persuading another ALJ, who works at the Merit Systems Performance Board, that it has "good cause" to take some action against the ALJ. Without some major change in applicable law, it would be impossible for SSA to establish "good cause" to take any action against an ALJ based on the ALJ's pattern of decisions. Thus an ALJ can, if he chooses, grant benefits in 100% of the cases that come before him without any concern that SSA will take any action against him.

In my opinion, the institutional structure in which SSA ALJs can take final actions and can only be removed for cause by someone who, in turn, can only be removed for cause, violates both the Appointments Clause and the Take Care Clause of the Constitution. I recommend that Congress eliminate the role of ALJs in the disability decision making process. The ability to appeal a denial of benefits by two disability examiner/medical advisor teams to an ALJ introduces far more errors in decision making than it eliminates. At a minimum, Congress should amend the statute that limits SSA's ability to act against ALJs by making it clear that SSA has the power to evaluate the

performance of ALJs and to take such actions as SSA considers necessary to insure that ALJs are not unduly generous in their grant rates and do not grant or deny benefits at a rate that diverges significantly from the rate at which most SSA ALJs grant or deny benefits.

As the Supreme Court has recognized, the SSA disability decision making process is designed to be implemented by SSA without any involvement of lawyers or other professional advocates either for applicants or for the government. Today, however, over 80% of applicants are represented by lawyers or other professional advocates, while the government is never represented. This systemic imbalance between applicants and the government undoubtedly has contributed to the increase in the rate at which ALJs grant benefits. Lawyers and other professional advocates for disability applicants have devised systems for maximizing the probability of a decision granting benefits to their clients by soliciting and emphasizing medical evidence favorable to their clients while withholding medical evidence that is unfavorable to their clients. The government is helpless to stop these abusive practices, since the ALJ has a statutory duty to help the applicant develop the record and the government is not represented. This gaming of the system by lawyers and other professional advocates has become extremely lucrative. One firm made \$81,000,000 in a single year representing disability applicants. When the role of lawyers and other professional advocates is combined with the statutorily-based rule that allows an applicant to supplement his application and the evidence in support of his application with additional claims and evidence at any time, the results are awful, measured by any criteria. Lawyers and other professional advocates regularly sand bag SSA and its ALJs by declining to present important evidence until late in a proceeding.

I recommend that Congress limit the fees that can be earned by lawyers and other professional advocates for SSA disability advocates. The Supreme Court has upheld a fee limit of \$10 for advocates for VA disability benefits, so Congress has broad discretion to limit the fees of advocates for SSA disability benefits. I also recommend that Congress amend the Social Security Act to empower SSA to issue rules that govern the time when claims can be made and evidence can be submitted in support of an application for SSA disability benefits. Virtually all other federal agency decision making processes have rules that require parties to submit all of their claims and all of the evidence in support of their claims no later than a point relatively early in the decision making process.

Federal courts are required by statute to engage in deferential review of SSA disability decisions, but courts routinely ignore that statutory command. Courts are required by statute to uphold SSA findings of fact if they are supported by substantial evidence. The Supreme Court has characterized the substantial evidence test as highly deferential. In the Supreme Court's words, a court must uphold any agency finding that is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Paul Verkuil, a well-respected scholar who is now Chairman of the Administrative Conference of the United States, published the results of his careful empirical study of judicial review of social security disability decisions in "An Outcomes Analysis of Scope of Review Standards," 44 *William & Mary Law Review* 679 (2002). Verkuil's findings were surprising. He expected to find that courts applying the deferential substantial evidence standard would uphold 75-85% of SSA decisions denying benefits. He also expected the rate of affirmance of decisions denying disability

benefits to be higher than the rate of affirmance of a class of agency decisions that are subject to de novo review. His findings were inconsistent with both of those expectations. He found that courts uphold less than 50% of decisions that deny social security disability benefits and that courts reverse a much higher proportion of disability decisions than of agency decisions that are subject to de novo judicial review. Verkuil expressed doubt that “Congress wants judicial scope of review to be an irrelevant labeling exercise,” but his findings demonstrate that it is “an irrelevant labeling exercise” in the context of judicial review of social security disability decisions. District courts and circuit courts routinely pay lip service to the deferential substantial evidence standard while actually applying a standard more demanding even than de novo review.

A sequence of events that took place between 1978 and 2003 illustrates the extreme tendency of district courts and circuit courts to refuse to apply the substantial evidence standard and to apply instead a much more demanding standard of their own choosing. Beginning in 1978 and extending through the 1980s, several circuit courts adopted the “treating physician rule,” a rule that required SSA to make a decision consistent with the opinion of a physician who treats a disability applicant unless SSA can amass a great deal of evidence that contradicts that opinion. The treating physician rule was obviously inconsistent with the deferential substantial evidence test, but that blatant inconsistency had no apparent effect on the courts. After over a decade of unsuccessful attempts to persuade the courts to accord it the deference that Congress required, SSA capitulated and issued a rule in which it codified the treating physician rule and instructed its ALJs to apply the rule.

After successfully persuading the courts to defy Congress and to force SSA to adopt the treating physician rule, disability advocates embarked on efforts to require other agencies with responsibility to implement other disability programs to adopt the treating physician rule. They enjoyed initial success in that effort when they persuaded the Ninth Circuit to require the Department of Labor to adopt the treating physician rule in the context of the disability programs it implements under ERISA. The Ninth Circuit concluded that “there is no reason why the treating physician rule should not be used under ERISA” The Supreme Court *unanimously* reversed the Ninth Circuit in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). Justice Ginsburg explained:

The question whether a treating physician rule would “increase the accuracy of disability determinations” under ERISA plans, as the Ninth Circuit believed it would . . . seems to us one the Legislature or superintending administrative agency is best positioned to address. As compared to consultants retained by a plan, it may be true that treating physicians, as a rule, “have greater opportunity to know and observe the patient as an individual.” Nor do we question the Court of Appeals’ concern that physicians repeatedly retained by benefits plans may have an “incentive to make a finding of ‘not disabled’ in order to save their employers money and to preserve their own consulting arrangements.” But the assumption that the opinions of a treating physician warrant greater credit than the opinions of plan consultants may make scant sense when, for example, the relationship between the claimant and the treating physician has been of short duration, or when a specialist engaged by a plan has expertise the treating physician lacks.

And if a consultant engaged by a plan has an “incentive” to make a finding of “not disabled,” so a treating physician, in a close case, may favor a finding of “disabled.” Intelligent resolution of the question whether routine deference to the opinion of a claimant’s treating physician would yield more accurate disability determinations, it thus appears, might be aided by empirical investigation of the kind courts are ill equipped to perform.

An experienced SSA ALJ explained to me the effects that lawless judicial decisions like those that require SSA to apply the treating physician rule have on the behavior of SSA ALJs. Congress and the Social Security Commissioner impose a great deal of entirely appropriate pressure on SSA’s ALJs to decide a large number of disability cases promptly. ALJs know that they can write a brief opinion explaining a decision to grant benefits with little risk of reversal. Courts can not review decisions that grant benefits, and the Social Security Appeals Council reviews only a tiny proportion of ALJ decisions to grant benefits. By contrast, ALJs know that they must write an extremely long and detailed opinion explaining a decision to deny benefits to have any chance of surviving judicial review.

The incentive effects of such an unbalanced system of judicial review are obvious. My academic colleagues understand the bizarre incentive effects immediately when I analogize to a grading system in which a school gives a professor complete discretion to choose the grade he awards each student but couples that unlimited discretion with a rule that requires the professor to write a three page explanation for every A he awards and a twenty page explanation for every grade he awards that is less

than A. Such a bizarre asymmetric set of grading rules would produce a pattern of grades in which the vast majority of students receive an A. ALJs respond to the asymmetric system of review of disability benefit decisions in a similar manner.

It is hard to identify a promising means of persuading reviewing courts to apply the deferential scope of review standard Congress requires them to apply to SSA disability decisions. Congress always has the option of amending the Social Security Act to preclude all judicial review of SSA decisions in disability cases except the exceedingly rare case in which an applicant makes a plausible claim that the denial violates his constitutional rights. If the courts persist in their pattern of lawless behavior in this context, Congress will have no choice but to take that step.

I recommend an alternative approach initially, however. Congress should encourage SSA to take two actions. First, SSA should rescind the treating physician rule. That would be a major step in the right direction. Second, SSA should choose one of the many circuit court opinions that exhibit judicial defiance of the congressional command to engage in deferential review of disability decisions as the basis for filing a petition for writ of certiorari from the Supreme Court. As the Court's unanimous opinion in *Black and Decker* illustrates, the Supreme Court is far more respectful of congressional commands to engage in deferential review of SSA disability determinations than are most district courts and circuit courts. It makes sense to provide the Supreme Court the opportunity to do its job of keeping the lower courts within statutory bounds before Congress gives up completely on the ability and willingness of the judicial branch to perform its review function in a manner consistent with law.

Thank you for the opportunity to share my views on this important topic. I would be pleased to answer any questions you may have.