Statement before the House Committee on Ways and Means
Subcommittee on Social Security
One Million Claims and Growing: Improving Social Security's Disability Adjudication Process

Simplifying and Modernizing the Disability Adjudication Process

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Chairman Ferguson, Ranking Member Larson, and Members of the Subcommittee,

I am Mark Warshawsky, a Senior Fellow at the American Enterprise Institute, where I conduct research on Social Security, retirement and pensions, long-term care, disability, and the federal budget. From July 2017 through January 2021, I was Deputy Commissioner for Retirement and Disability Policy at the Social Security Administration, where I was in charge of research, data sharing, international agreements, and the development of many regulatory and legislative proposals for the agency, especially including a revamp of the medical-vocational rules for eligibility to disability benefits. I was a member of the Social Security Advisory Board, from 2006 to 2012, a time of intense problems with the disability adjudicative process at SSA.

I understand that now is also a difficult time at the agency. Wait times for calls to the "800 number" have increased from 20 to 30 minutes, while drop-call rates have also risen. The average time from application to initial decision on disability claims has nearly doubled from about 120 days before the pandemic to over 220 days currently. Similarly, wait times for the second stage of adjudication, the first level of appeal, reconsideration, have risen from 110 days before the pandemic to 183 days in 2022. Unlike in the 2006 to 2012 period when the deterioration was mainly in the later, hearings, level of appeals at SSA, where backlogs have occurred in the past, the current severe service problems are now occurring at the initial and reconsideration levels of adjudication at the state adjudication agency DDSs, which have traditionally been quite stable. And unlike in the 2006 to 2012 period, when the number of disability claims was exploding, now the number of disability claims is falling over several years, including during the pandemic, the large loads of continuing disability reviews and other work was paused during and following the pandemic, field offices were finally re-opened last April, and the agency received large increases in its budget. And, according to the Federal Employment Viewpoint Survey scores, employee morale at SSA has collapsed from 2020 to 2022.

No doubt there are many causes for this sharp deterioration, both short-term and long-term in nature. As part of your oversight work, the subcommittee should explore management and labor problems at the agency, including the use of telework, chaotic conditions at urban field offices, the overriding priority given at the agency to diversity and equity, and scheduling appointments. Also, the reintroduction of the reconsideration step in the disability adjudication process in ten prototype states in 2019 and 2020 should be carefully reviewed, with data from the agency, to see if the added work load at the DDSs is causing some of the current problem. And, consider whether it is worthwhile, in terms of changes in ultimate allowance rates through the hearings and appeals levels of adjudication, total wait times for claimants, agency costs, and so on, to have a reconsideration step at all.

But I want to focus my testimony today on two longer-term solutions to the service and resource problems at the agency. First, disability claimants, particularly from poor backgrounds, especially for SSI, should be supported early in their claim process by external assistance, to ease the agency burden and improve overall efficiency. And, second and more significantly, the current needlessly complex and outdated rules that both claimants and the agency use to determine eligibility for disability benefits have to be simplified, modernized, and automated.

With respect to the first proposal, we need to recall that claimant representatives, mainly attorneys, are compensated based on past due benefits. Therefore these representatives have an incentive to delay the process or to only take cases in later levels of stages of adjudication. SSA research and operations officials therefore should field a demonstration project to test whether more fully compensated

attorney representation during the initial stage of adjudication at the DDSs — where such representation is now relatively uncommon — could speed up the overall process without a loss of accuracy or change in ultimate award rates. Some econometric evidence suggests that this change could indeed be useful because, as hypothesized, in order to be paid their contingent fee, the claimant representatives work diligently to win the case by collecting relevant medical and vocational evidence and knowing the agency eligibility and administrative rules. The demonstration project should test the hypothesis by paying more for attorney representation of a randomly selected set of SSI applicants beyond the current low fees that their representatives would now be paid for a successful but quick award at the initial level – a bump-up closer to average fees at the hearings level. The project could be jointly funded by SSA research and external resources from foundations, like the Rockefeller, MacArthur, Smith-Richardson, or Arnold.

There is much more to say about the second proposal, disability eligibility simplification and modernization, because a fully specified version already currently exists at the agency, waiting to be published! But first some background. To determine eligibility for disability benefits, SSA uses a five-step evaluation. First, the agency determines whether the claimant had sufficient years of coverage to be insured for DI, or if not and is poor, eligible for SSI, whether she is still working, and is earning above the substantial gainful-activity level. Second, it determines whether the claimant's disability is of sufficient significance and duration (actual or expected) to be considered further. Third, the SSA determines whether a pure medical determination can be made as to whether the disability is sufficiently severe to meet the agency's body-system listings. If not, it determines whether the claimant can still perform his previous work despite the disability (step four), or if other work is reasonably available in the economy in significant numbers for him to perform (step five), given the person's residual functional capacity (RFC) and taking into account his age, education, and work experience.

The latter two steps constitute the medical-vocational rules, and they have not changed since 1978. They rely largely on job-requirements data from the Dictionary of Occupational Titles (DOT), which was created during the Great Depression and last (partially) updated by the Department of Labor in 1991. Given how dated they are, it shouldn't come as a surprise that the rules refer to occupations long extinct and omit newer ones: Among its 14,000 occupations, which are deemed to exist in significant numbers in the economy, the DOT has a phonograph-cartridge assembler and web-press operator (print), but no web designer.

Further, it has never included the mental requirements of work — an increasingly important factor in the modern work environment. And the regulation adopted in 1978 includes a fairly prescriptive medical-vocational grid for step five, which is both outdated and largely inadequate. It presumes a workforce with low levels of education which is largely involved in physical labor, works long hours, has little flexibility in work schedules, low adaptability, little access to assistive technology, never works from home, and retires early fairly often.

The grid used in carrying out the medical-vocational inquiry is made up of four charts — one each for sedentary, light, medium, and heavy work — which are plotted against age, education, and skill level. The grid was designed to allow officials to determine, without further analysis, whether an individual is vocationally disabled, and thereby making claim adjudication simpler and more consistent among different agency actors and across levels of adjudication (initial, reconsideration, and administrative-law judge). However, it is now used directly in only about 10 percent of step-five cases. For the rest, it serves

as a guide that requires detailed but often semi-informed analysis of job requirements and numbers of available jobs in the labor market by SSA vocational specialists or vocational experts paid by SSA, given the individual's RFC. If a claim involves any assertion of mental impairment or a non-exertional factor (like pain or fatigue) in any aspect of work — and even if these assertions are combined with physical impairments — the case goes off the grid and into an often subjective judgment of how many fewer jobs are available due to the additional impairments. As a result, the extensive need for vocational experts and administrative law hearings — which add expense and months and sometimes years to the benefit-application process — has risen significantly. The rules also dictate a difficult, expensive and often inconsistent and arbitrary assessment of the ability to adjust or transition to new work at older ages. There are also three outdated allowance profiles now rarely used.

In cases where the grid is applied or used as a framework, it can produce arbitrary and inequitable results, often related to age. For example, a 32-year-old veteran with a consistent work record who has a traumatic brain injury but can work at a sedentary job would be deemed not disabled, but a 51-year-old with no past relevant work experience and a relatively minor musculoskeletal impairment would be found disabled.

Additionally, a 49-year-old with a consistent record of heavy work who suffers a neurological injury and can only do unskilled sedentary work would be judged not disabled, but a similarly situated 50-year-old would be found disabled. In fact, at the initial level of adjudication, those age 55 and older are three times more likely to be awarded disability benefits than those age 49 and younger. There are particularly noticeable jumps in awards at the 50- ("closely approaching advanced age"), 55- ("advanced age"), and 60-year demarcations in the current regulations giving considerable and increasing leniencies in eligibility standards. The natural increase in disability awards, according to objective definitions of disability, would be much more gradual with age without those rules.

Changes in American labor-force trends since the 1970s only add weight to the case for reform. The current rules presume that people ages 50, 55, and 60 warrant determination of vocational disability in many circumstances due to presumed age-related job discrimination, social difficulty, or employer expectations. But for many years already before the Covid-19 pandemic, the labor-force participation rates were actually rising among older people. Advances in technology and changes in the economy have reduced the physical aspect of many jobs, including some that were considered "heavy effort" long ago. Light or sedentary work is more common now, even for those with less education or limited experience. Workers are also more educated, many with post-high-school training. Work hours and conditions have become more flexible for many jobs, even before the pandemic-induced work-from-home revolution. Substantial part-time work, paying above the level of substantial gainful employment, is more common in many occupations. Research indicates that more individuals at higher ages have the mental and, for some, the physical capacity to adjust to new work. At the same time, studies by labor economists show that the extent of physical work associated with routine manual tasks has declined dramatically in the economy, while work associated with abstract, non-routine cognitive tasks has increased. Current rules do not reflect this reality. Among disabled people, the labor force participation rate has increased and the unemployment rate has dropped. This is particularly so in "teleworkable" occupations. Policymakers should seek out opportunities to update the disability rules in light of these changes.

A modernized vocational database should also replace the woefully out of date data currently in use. After consultations with experts, public meetings, six years of preparation, testing, internal study, and surveying of a statistically representative sample of employers based on the National Compensation Survey, the Bureau of Labor Statistics and its team of nearly 200 field economists, in conjunction with the SSA, produced in 2019 and 2020 a complete first wave of detailed occupational requirements survey (ORS) information. This new data set includes requirements related to exertional elements (e.g., climbing stairs), additional physical elements (e.g., fine manipulation), sensory elements (e.g., hearing), and environmental elements (e.g., extreme cold). Because the ORS categorizes occupations according to about 900 standard occupational classifications (SOCs) — the same classification system that the federal government uses for myriad other statistical and administrative purposes — data from ORS can be matched with other federal survey data like task and training features (O*NET), and number of workers (OES). The data can be sorted by or restricted based on education, skill, strength, work schedule, prior work experience, or training requirements as dictated by law or policy. Any missing elements in the data should be interpreted in the claimant's favor, although this will likely be less necessary over time as second and subsequent waves of data collection fill in the blanks.

Though the first wave of ORS did not successfully include mental requirements (memory, adapting, etc.), these data are available through a validated Delphi study that Abt Associates conducted for the SSA in 2019 and 2020. ORS's second wave includes these requirements, and it will be interesting to see how the Abt results compare.

The first wave of ORS was completed in 2019 and analyzed in 2020; the second wave — which uses a larger sample of survey respondents, is supposed to rely more extensively on new statistical techniques to overcome disclosure restrictions, and includes the Covid-19 experience — will be available in 2024. Thus far, ORS has cost the SSA about $300 million, now roughly $40 million a year to run the survey.

By way of illustration, look at Figure 1, which shows some recent ORS work requirement data in the aggregate, for work strength levels, education levels, and other elements. Or consider Figure 2, which shows for a particular occupation, library assistant, the characteristics and requirements of the occupation.

Figure 1. ORS Work Requirements, 2022 (% of Civilian Workers)

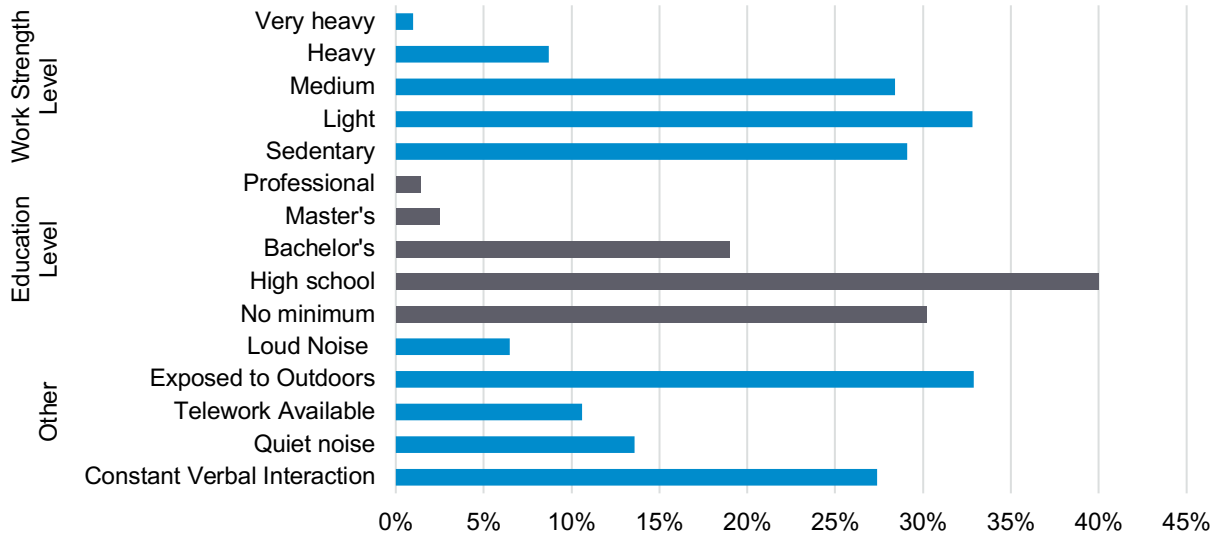
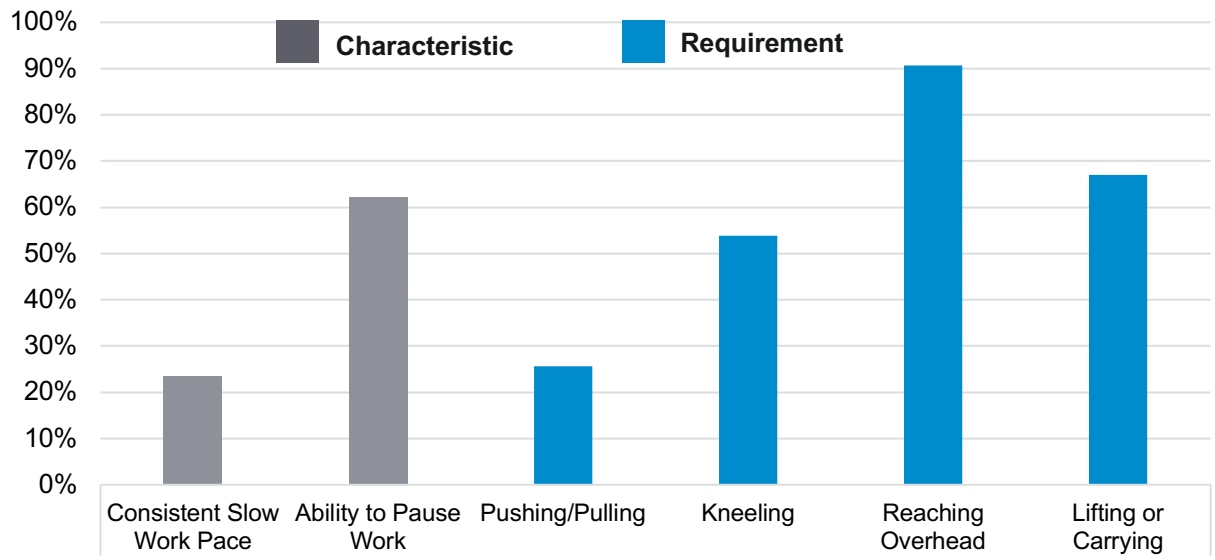


Figure 2. Occupational Requirements for Library Assistants, 2022 (% of Library Assistants)



With this new, nationally representative data on work requirements, policymakers can make sensible policy changes to existing disability programs. For instance, if only entry-level work is considered at step five, the complex and time-consuming transferability-of-skills analysis performed at older ages can be omitted entirely — a significant simplification. The educational levels can also be simplified and extended to those that are vocationally relevant. To the extent that ORS data are sufficiently "thick" at the SOC level, or that some SOCs can be combined, college education should be added as a factor, as even sedentary work at this educational level may differ from that of jobs requiring only a high-school education.

Finally, vocational and economic research indicates that age 60 is now a natural break point for disability policy, as individuals over that age are more prone to injury and take longer to heal. The rules, therefore, should not take heavy work into consideration for these older workers as possible alternative employment at step five. Aging-related impairments should indeed be considered, but in the individual's RFC assessment, and not double-counted in the rules. Disability decisions should be based on individual capabilities and modern job requirements, not outdated arbitrary rules, with little foundation in either law or evidence.

It should be noted that the ORS data would be the main source of information in the new Occupational Information System (OIS), but other sources, such as job requirements from the military services and Department of Labor's Occupational Information Network (O*NET), would also be used. All of this data would be housed in a public platform called the Vocational Information Tool (VIT), that combined with the streamlined new regulations, would simplify and automate the vast majority of claims. The use of the OIS will allow for more individualized assessments, given RFC, than the current grid, for the vast majority of cases. The agency has spent about $10 million on the VIT to date, but has frozen its development.

When I left the SSA in January 2021, the Notice of Proposed Rule-Making on Vocational Regulations Modernization (VRM) was ready to publish. The agency had then been working hard on the new disability-eligibility regulation for the last 10 years. Within the federal government, there were extensive

policy discussions and analyses, data investigations, literature reviews, field and administrative-law judge consultations, legal consultations, actuarial- and economic-impact estimates, distributional analyses, cost estimates, automation-software preparation, and thorough documentation. My rough guess of the additional manpower and resource cost for this effort is $100 million, resulting in a total cost to the taxpayer for VRM of at least $400 million.

Of course, any change is difficult, and some advocates will try to misrepresent, cherry-pick data or studies, and define the relevant population down to almost a tautology in order to show people experiencing losses. But we know that under current rules that some claimants are being inappropriately denied benefits while others are inappropriately being awarded benefits. Studies show that the current disability program is inappropriately sensitive to economic considerations and this is especially concerning at a time when labor shortages are projected with the aging of the population. Another study of public disability insurance reform in Austria found the gradual removal of generous eligibility standards for older workers increases employment among the affected almost one-for-one with the denial of benefits, with no harm to earnings or health.

The SSA, as a non-political agency, should rise to the continual need for prudent stewardship of the program as well as the recent emergent need for more simplicity, efficiency and automation in the adjudication process, and publish the proposed disability-reform regulation now, based on all the work that has been done. It was always planned that the eligibility standards would be automatically updated when the second wave of ORS data is available in 2024, on the five-year cycle, and that plan can continue to be followed.

Before I conclude, allow me to comment briefly on a recently proposed SSA regulation to reduce from 15 to five the number of years used to define past relevant (PRW) in steps four and five of the adjudicative process. This so-called “intermediate improvement” (intermediate to what is not stated) would increase disability benefits by $27 billion over ten years. This proposal is clearly a violation of the bipartisan budget agreement signed this past summer by President Biden, forbidding the issuance of regulations significantly increasing the budget deficit that have no immediate necessity. Moreover, the NPRM document is largely incomplete, containing no regulatory impact analysis of alternatives considered or distributional and federalism impact, and missing the budget consequences of large increases in Medicare, Medicaid, and other federal and state welfare program spending. Also, the evidence used in the NPRM is misleading and incomplete. At best the evidence cited supports a more modest change that we in the last Administration were going to propose as part of the larger package – to reduce the PRW period from 15 to ten years, fixed at the initial filing date or at the first level of a continuing disability review, at much lower cost in the context of our other proposed changes, while still reducing the claimant and agency administrative burden.

Thank you for your invitation to speak and I am glad to answer your questions.