

**Testimony
of
James A. Hill**

**Office of Hearings and Appeals
Social Security Administration**

**President
Chapter 224
National Treasury Employees Union
Cleveland, Ohio**

On

Solving the Social Security Disability Backlog

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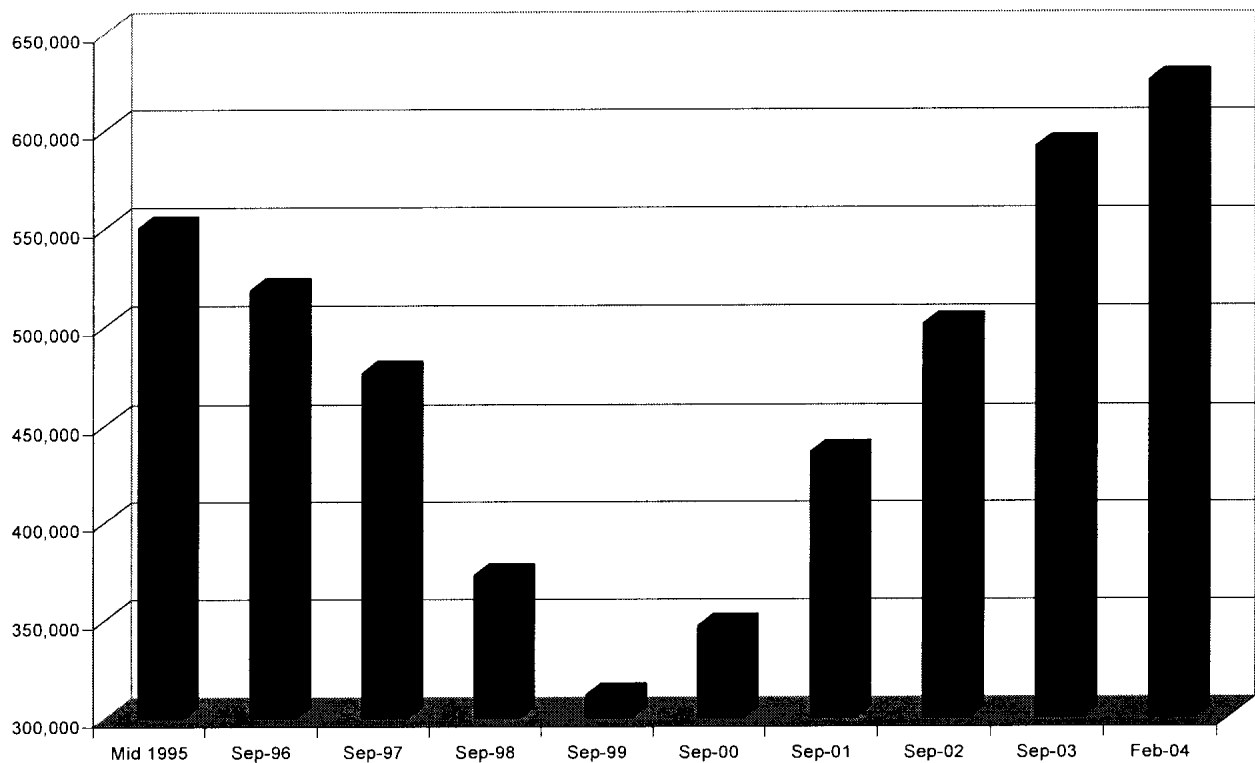
**Vocational Guidance Services Headquarters
2235 East 55th Street
Cleveland, Ohio**

My name is James Hill. I have worked as an Attorney-Adviser in the Office of Hearings and Appeals for over 21 years. I am also the President of Chapter 224 of the National Treasury Employees Union (NTEU) that represents Attorney-Advisers and other staff members in approximately 110 OHA Hearing and Regional Offices across the United States. I thank the Subcommittee for allowing me to testify regarding The Road to Recovery -- Solving the Social Security Disability Backlog.

The Backlog at OHA – A Problem Inherited by Commissioner Barnhart

The disability backlog problem at OHA is neither recent nor unique to the Cleveland Hearing Office. Nonetheless, a quick review of the history of the number of cases pending at OHA demonstrates that the backlog problem is not altogether intractable. The backlog problem in the SSA disability program began in the early 1990s. Primarily as a result of increased receipts and SSA inaction, cases pending at OHA hearing offices rose from approximately 180,000 in 1991 to approximately 550,000 cases nationwide by mid-1995 with over 9000 cases pending in Cleveland. However, by October 1999 the number of cases pending was reduced to 311,000 nationally and to slightly over 4000 cases in Cleveland. Since 1999, a number of factors including the termination of the Senior Attorney Program, increased receipts, and the implementation of the disastrous Hearings Process Improvement Plan (HPI) have resulted in a record number of cases pending. Currently, there are approximately 625,000 cases pending at OHA hearing offices and processing times in some hearing offices are significantly in excess of one year. The number of cases pending in Cleveland rose to over 11,000 because of record receipts, fewer ALJs and the demise of the Senior Attorney Program.

Cases Pending at OHA Hearing Offices



As discouraging as the increase of cases pending may be, it does not fully reflect the harmful effect of the inefficient disability process on the public. Average processing time at OHA was approximately 270 days in 2000; it is currently 388 days and shortly will top 400 days. This is an unconscionably long wait for a disability decision, and it is causing untold harm to some of the most vulnerable members of society. None will dispute that the public deserves far better service than SSA is presently providing.

There is no question that the current disability system is fundamentally flawed and that wide ranging systemic changes are necessary. SSA recognized this as early as 1993, yet despite several major initiatives, the situation remains essentially the same. These initiatives not only failed, but in the case of HPI, they actually made things worse. A persistent lack of vision and leadership at SSA resulted in programs that were more in tune with then senior SSA officials' personal philosophy than actual operational requirements. They were massive, expensive programs that introduced untested and ill-advised changes with little concern for operational realities. Simply stated, the previous initiatives, the Redesigned Disability Process and HPI did not address the root causes of the problems. Not surprisingly, they failed to improve the disability process, and in fact, wasted resources while actually harming the adjudicatory process.

There was one notable exception to the steady train of ineffective (or worse) initiatives. The Senior Attorney Program, which authorized experienced OHA Attorney Advisors to issue fully favorable on-the-record decisions where justified, during the period from 1995 through 1999 produced over 220,000 fully favorable on-the-record decisions with an average processing time of just over 100 days. It is not a coincidence that during the time the Senior Attorney Program was in operation the number of cases pending at OHA hearing offices dropped from 550,000 to 311,000. The Senior Attorney Program was focused on a specific problem: the many cases coming to OHA that could be adjudicated favorably to the claimant without the need for an ALJ hearing. It was a small, low cost program that addressed a specific operational reality. Additional benefits of the Senior Attorney Program included a reduced case pulling workload and focusing ALJs on cases requiring a hearing. The termination of the Senior Attorney Program was simply a bureaucratic blunder. SSA Management believed that HPI obviated the need for the Senior Attorney Program. Since the advent of HPI the number of cases pending in OHA hearing offices has nearly doubled.

The Beginning of a Solution

At the beginning of her term, Commissioner Barnhart was confronting a discredited disability process with severe structural and operational problems at all levels. Commissioner Barnhart and Deputy Commissioner Martin Gerry conducted a truly objective review of the entire disability system resulting in a remarkably accurate picture of its strengths and weaknesses. I believe that for the first time senior SSA officials truly understand the deficiencies of the current system. This insight combined with the Commissioner's commitment to create a process which serves the needs of the public rather than the dictates of the bureaucracy, has led her to propose a plan for implementing fundamental process changes that will provide a level of service of which we all can be proud.

It is apparent that a considerable amount of research and thought went into the process of formulating this plan. The systemic problems that have plagued the disability adjudicatory process have been identified and politically plausible and operationally sound solutions have been advanced. Specifically, problems including the State Agencies' inadequate development of the record, the State Agencies' cursory rationale for unfavorable determinations, and the State Agencies' chronic failure to award many deserving claimants are all addressed and potentially solved through the "Quick Decision Process", the elimination of the Reconsideration Determination, and the creation of the Reviewing Official. Additional problems including long delays at the hearing level, the lack of adequate development prior to the ALJ hearing, closing the record after the ALJ decision, the lack of decisional consistency at the various levels of adjudication, the excessive number of voluntary remands from the U.S District Courts, and the lack of an effective appellate process are also addressed and potentially solved.

Other mechanisms which will be employed to improve the adjudication process are the elimination of regional Disability Quality Bureaus (DQBs) and the introduction of an integrated quality control process, the placement at the regional level of medical and vocational experts who are available to adjudicators at all levels, and the replacement of the Appeals Council with three judge review panels.

The SSA disability adjudication system must be a truly integrated system that better utilizes the expertise of its various components in the most efficient manner. To view or analyze each component individually without considering its role in the entire system leads to a distorted view and introduces needless inefficiencies. The Commissioner's Approach must be viewed in its totality recognizing the effects changes at one level have at the other levels.

Quick Decision – An Excellent Idea

In order to provide benefits to those who are "obviously disabled, the Commissioner has proposed "The Quick Decision Process" It will significantly improve the disability adjudication process for those claimants with specified medical conditions that normally result in a finding of disability. A Panel of Medical Experts that will be located in various regional offices will review those with verified medical conditions and quickly determine whether these claimants should receive disability benefits. The Commissioner projects that approximately 10 % of initial claims can be handled through the this process. The Quick Decision process will perform a valuable service in identifying those "obviously" disabled claimants.

The Role of the State Agency

The disability adjudication process is an integrated process that should promote the efficient, accurate, and fair adjudication of disability claims. Accurate adjudication of disability claims requires a relatively complete compilation of the record. Decisional consistency is significantly enhanced if at the different levels of adjudication, the adjudicators are considering essentially the same record. Therefore increased emphasis should be placed upon full development of the record at the earliest practicable time – at the State Agency level.

The time constraints under which the State Agencies currently operate, the lack of a realistic incentive to properly develop the record before sending the case to OHA, and the backlog of cases at OHA have created a situation in which OHA is forced to expend considerable time and resources developing the record. An efficient disability adjudication process must recognize that some adjudicatory tasks are better performed by one component than by others. The State Agencies are far better situated to develop the record than either the Reviewing Official or the OHA Hearing Office.

Consequently, primary responsibility for developing the record should be placed upon the State Agencies. Securing possession of the medical documents necessary to adjudicate a claim is a difficult and at times a time-consuming process. Dealing with medical professionals can be difficult and time-consuming, particularly when you are asking them to perform a function for which they are poorly, or not at all, compensated. Currently, much of the mail now received in Hearing Offices is "trailer mail" that consists of documentation that was requested by the State Agency. Adequately developing the record not only permits the State Agency to engage in a more accurate decision-making process, it also decreases the time that must be taken at subsequent adjudicatory levels. Better development at the State Agency means better decision making at that level, fewer cases being appealed to OHA, and fewer resources being expended at the OHA level to develop cases. It also permits both the State Agency and OHA to make the right decision as quickly as possible.

The Commissioner's Approach will provide the resources for the State Agencies to more completely develop a case. The Commissioner has promised that the appropriations provided to the State Agencies will not be decreased. The State Agencies will receive 10% fewer cases because of the Quick Decision Process, and this combined with the elimination of the Reconsideration Determination will permit more resources to be directed toward more completely developing the record.

Heretofore, there has been no adverse consequence to the State Agencies for forwarding incompletely developed cases to OHA. The ability of the Reviewing Official to remand inadequately developed cases to the State Agency will certainly provide the incentive to more completely develop the case. The overall efficiency of the adjudication process is enhanced by the changes suggested by the Commissioner.

The Role of the Reviewing Official (RO)

Perhaps the most innovative initiative contained in the Commissioner's approach is the creation of the Reviewing Official (RO), a federal attorney with complete adjudicatory authority placed between the State Agency and the ALJ. The RO process does more than replace the current Reconsideration Phase. The Reconsideration Determination has very little credibility with the public or with ALJs because it is viewed as a mere rubber stamp of the initial determination. One of the most important aspects of the RO process is to introduce an element of credibility that is presently lacking prior to the ALJ hearing because the State Agencies persistent denial of benefits to many claimants who are obviously disabled. The reversal rate of State Agency

determinations by ALJs clearly demonstrates that the current process fails to make the right decision at the earliest possible time.

The RO will apply the same adjudicatory standards as will the ALJs. Past experience with the Senior Attorney Program and the current ALJ review of unpulled files demonstrates that the application of those standards results in a fully favorable decision in approximately 30% of the cases reviewed. The review and decision making by the RO will result in many disabled claimants being awarded benefits in as little as 30 days rather than subjecting the claimant and the Agency to the time and resource consuming activities associated with conducting a full ALJ hearing.

Currently, the State Agency provides almost no rationale for their unfavorable determinations further undermining their credibility. The introduction of the RO will permit State Agencies to focus on developing the record and issuing disability determinations that do not require the detail of a legally defensible decision. They do not have the personnel qualified to craft legally defensible decisions that must withstand U.S. District Court and Appeals Court review.

The RO will have the legal expertise of an attorney to apply the law, regulations, and rules established by the Agency to the evidence and draft and issue a convincing, well-reasoned and legally defensible decision. Fortunately, SSA already employs personnel with the education, training, and experience to decide and draft disability decisions necessary to assure the success of the RO process -- OHA Attorney Advisers. Attorney Advisers have many years of experience in deciding and/or drafting disability cases.

To be effective the RO must establish its credibility to a number of interested parties including the claimant, the State Agency, the Administrative Law Judge, and of course the American public. The importance of an accurate, complete, convincing, and legally defensible decision that explains in detail the rationale for each finding of fact and conclusion of law cannot be overstated. The credibility of the RO and the entire process at the pre-ALJ level hinges upon the quality and credibility of that decision. This necessitates that the RO have extensive legal and disability program knowledge and experience.

One of the chief objectives of the RO position is to facilitate decisional consistency at all decisional levels. While the Agency has for some time contended that there was decisional consistency at all levels, none, except perhaps some SSA officials, gave those protestations much credit. The inconsistency of decision-making between the State Agencies and the ALJs is undeniable. Through the Process Unification effort, the agency did take some measures to attempt to create a higher level of consistency. Despite some level of success, primarily represented by an increase in payment rates by some State Agencies, decisional consistency still eludes the Agency.

The RO stands between the State Agencies and the ALJs and as such must be able to speak the language of each. The successful performance at the RO level requires a high degree of expertise not only in the medical aspects of disability but the legal aspects as well. It should be understood, that in the end, despite the importance of the medical facts, the decision of whether an individual is disabled is a legal and not medical decision. The ALJ due process hearing is a "legal procedure" and the ALJ decision is the product of "legal reasoning". The RO's

“Recommended Disallowance” is a legally defensible decision with a “legal” analysis of why the claimant is not disabled. If the RO “Recommended Disallowance” is to be credible, it must be in the legal terms using the legal concepts that the Administrative Law Judges use in their decision-making process. In fact, one of the recommendations from the Association of Administrative Law Judges, and one that we fully support, is that the RO and the ALJ use the same standards for adjudication.

It is essential to the success of the Commissioner’s Approach that the decisions made by the RO be recognized as independent decisions by an individual who has the discretion to award or deny benefits as justified by the record. To attain credibility with the American public, ROs must have the discretion to decide and issue favorable and unfavorable decisions that are recognized as well reasoned, comprehensive and literate explanations of why a claimant is or is not entitled to disability benefits.

The introduction of the RO will significantly improve decisional quality as well as consistency through all the levels of adjudication. The RO will be a federal employee whose primary function is to review claimant appeals from the State Agency and render a decision. The RO will conduct an essentially paper review of the file, but will perform some development if needed. The RO will provide a legally defensible decision which contains a detailed rationale explaining why the claimant is or is not entitled to disability benefits.

The RO is responsible for performing an independent evaluation of the evidence and exercising his/her independent judgment in determining whether the claimant is or is not disabled. It is essential that the claimants and their representatives recognize that the RO is conducting an independent review of the record and has the decisional independence to issue the appropriate decision. The “Recommended Disallowance” will be a comprehensive, legally defensible decision explaining why the claimant is not entitled to disability benefits, while not affecting the claimant’s right to a due process hearing before an Administrative Law Judge.

The result of the RO adjudication process will be a comprehensive decision that commands the respect of claimants, their representatives and ALJs. The increased level of decisional consistency promoted by the RO will result in the reality and perception that the proper decision is being made at the lowest possible level.

The ALJ Hearing

The Commissioner’s approach wisely retains the Administrative Law Judge hearing process essentially unchanged. Hearing offices will continue to prepare cases for hearing, Administrative Law Judges will continue to conduct due process hearings, and the decisional independence of the ALJ continues to be protected by the APA. However, concern has been expressed about the relationship between the RO and the ALJ. It must be made perfectly clear that the RO decision is not entitled to any deference on the part of the ALJ. The reality of the *de novo* hearing must be maintained.

Elimination of the Appeals Council

As currently constituted the Appeals Council serves two distinct purposes. It serves as an appellate body and as a quality assurance entity, but performs neither with distinction. This is not intended to disparage the hard-working employees at the Appeals Council, but rather its basic concept and design. The Commissioner's approach replaces the Appeals Council with an end-of-line review by a centralized quality control staff and then a potential review by the Commissioner's Oversight Panel. The Agency, in its effort to improve quality assurance at the ALJ level of adjudication, should take care not to repeat its mistakes of the early 1980s when it attempted to interfere with ALJ decisional independence. In order to avoid the appearance of interference with ALJ decisional independence, it is essential that ALJs be intimately involved in any quality assurance program. The function of the QA review of ALJ hearing decisions and the Oversight Panels should be combined in one entity and one process.

There is a concern that the lack of a right of administrative appeal of the decision of the Administrative Law Judge will result in a substantial increase in the caseload of the District Courts. We agree that any action that significantly increases the caseload of the district courts is unacceptable. However, assuming that this step will not significantly increase District Court caseload, an administrative appeal of the ALJ decision is unnecessary in the context of the entire adjudication system set forth in the Commissioner's Approach.

Currently, the State Agency unfavorable determinations are given little credibility due to their nearly complete lack of a comprehensive explanation to the claimant and his/her representatives why he/she is not entitled to the disability benefits. Consequently, it is commonly believed that the first step at which an individual can receive fair consideration of his/her application is at the ALJ level. Therefore, appeal to the Appeals Council represents the second time that the claimant's application receives fair consideration. The lack of credibility of the determinations made prior to the ALJ decision virtually mandates an additional (second) level of appeal.

The Commissioner's approach contains an entirely new step, the review and decision by the Reviewing Official. The fact that the RO is an attorney enhances the view that the RO is an independent decision maker, and therefore the decision of the RO will have a higher level of credibility with ALJs and the public. For those cases that the RO cannot issue a decision favorable to the claimant, the Commissioner's approach mandates that the RO prepare a detailed explanation of why the claimant is ineligible for benefits. It is essential that the explanation of why the claimant is, or is not, entitled to disability benefits be thorough, fair and unbiased. As such, the decision of the RO represents the first step at which the claimant receives a detailed and credible explanation of why he/she is not entitled to disability benefits. Under the Commissioner's approach, the ALJ is the second level at which a claimant receives a detailed decision from an independent decision maker. In as much as the ALJ process involves a *de novo* hearing rather than the appellate review currently performed by the Appeals Council, dissatisfied claimants actually have more substantial reviews and greater opportunities to achieve a favorable result than provided by the current system. The combination of the RO process and the ALJ hearing process render an additional administrative appellate step unnecessary.

The Commissioner's Approach calls for major changes in the SSA disability process, and if properly implemented, will result in substantial improvement in disability adjudication. However, because it will require substantial changes in both organization and process, and because it is predicated upon the completion of Ae-DIB, it will be at least two years before her Approach results in substantial improvement in the disability process.

Ae-DIB

The year 2004 will be notable in SSA history for a number of reasons, not the least of which are the changes in business processes driven by Information Technology (IT). This year will see the introduction of a new case tracking system (CPMS), the change from analogue to digital recording of hearing proceedings, the further expansion of videoteleconferencing for conducting hearings, and the implementation of the electronic folder as part of the Ae-DIB. Each of these programs, once installed and operating properly, will improve Agency operations. By far the most far reaching change will be brought about by the electronic folder. The savings, both in time and money, that can be realized by converting from paper folders to electronic folders are substantial and will result in improved service to the public. The electronic folder will significantly increase the Agency's flexibility in managing its workload and permit cases to be processed more expeditiously.

These innovations recognize the advances in information technology and demonstrate SSA's commitment to maximize the efficient use of its limited resources. My concern is that the current schedule for implementation is overly aggressive. Information technology changes are notoriously problematic, and significant disruptions in operations may occur as the result of IT problems. I am also concerned that the implementation of the Commissioner's Approach to Disability Adjudication is dependent upon the operational success of Ae-DIB. While it is clear that functional electronic folders can greatly enhance the operational efficiency of the Commissioner's Approach, it is considerably less clear that its implementation requires Ae-DIB to be fully functional. It makes little sense to delay the improvement in service that the Commissioner's new approach will cause, simply because of IT delays involving the electronic folder.

Short-Term Fixes

The Commissioner's Approach to disability adjudication will not be implemented until October 2005 at the earliest. While it promises to significantly increase the level and quality of service, it will not help those currently awaiting disability decisions. Furthermore, the backlog continues to grow and has reached such proportions that it may well strangle the new, more effective process planned for the future. Something must be done about the backlog now.

SSA is hiring 50 new ALJs who will begin work in the hearing offices by July 2004. Of course they will not be very productive at first, and even after a nine-month learning curve their productivity will probably be less than that of their more experienced colleagues for some time to come. While the new ALJs are certainly welcome, they do require more staff support than experienced ALJs. OHA hearing offices are already understaffed and this creates a regrettable but unavoidable loss of overall productivity. Hiring additional ALJs, while necessary, will not

bring immediate relief and will require the acquisition of additional staff (4.7 employees for each additional ALJ). Unfortunately, SSA can only supply adequate staffing at the cost of decreased productivity elsewhere in the organization. Robbing Peter to pay Paul is seldom a successful strategy.

SSA implemented a series of “Short-term Initiatives” intended to increase productivity. Most of these initiatives which included contract pulling, hiring 11 law clerks, having ALJs rummage through the master docket files looking for on-the-record favorable decisions rather than holding hearings and deciding the more aged cases have been ineffectual at best. Heretofore, little attention has been paid to the past. The last time SSA faced such a backlog crisis it turned to the Senior Attorney Program. The results were striking. The backlog actually disappeared. Unfortunately, SSA sometimes fails to learn from its successes. SSA needs to revisit the successes in the past.

The Best Short-Term Solution – Reinstitute the Senior Attorney Program

Given the present state of resources, the current workload, and the direction that the Commissioner’s Approach is taking the Agency, the Commissioner should immediately reinstate the original Senior Attorney Program. In addition to making a positive, immediate, and effective impact on the backlog, it would act as a good transition to the Reviewing Official.

SSA should return to a Senior Attorney (Decisionmaker) Program modeled on the original successful Senior Attorney program that began in 1995. All OHA Attorney Advisors with at least one year experience at the GS-12 level should be promoted to join the current Senior Attorneys at GS-13. The Commissioner should republish the Senior Attorney regulation, deleting the sunset date, which authorized her to delegate her authority to issue fully favorable decisions to these GS-13 Senior Attorneys.

A well designed and well managed Senior Attorney program should be able to process at least 60,000 fully favorable reversals in a year without reducing the number of ALJ decisions or affecting the overall reversal rate at OHA. Based on experience, and looking at profiled cases that are more likely to be reversals, those 60,000 cases should be processed in an average of less than 120 days each. This will enable ALJs to handle the more difficult and complex cases that require a hearing before an ALJ before a decision can be made rather than handling cases that should have been paid before they came to an ALJ.

This program would require limited new hiring to maintain the attorney decision drafting support that the ALJs now have, as new Senior Attorneys would continue, in most cases, to draft ALJ decisions at least part of the time. The new attorneys will not only help with current decision writing but will be able to handle decision writing when the Commissioner’s new disability approach is implemented. To produce the same 120,000 plus cases over a two year period without Senior Attorney Decisionmakers, SSA would have to hire at least 150 ALJs and approximately 600 additional support staff, and train them all. These ALJs would be in addition to the ALJs that must be replaced due to attrition.

The great majority of the attorneys I represent are experienced decision makers who were temporary GS-13 Senior Attorney Decisionmakers in the 1995-2000 time period prior to the disastrous implementation of HPI. They can begin deciding cases again as soon as the Commissioner can republish the regulation. They helped this Agency eliminate the backlog once before and they can do it again.

Recommendations

NTEU makes the following recommendations for action necessary to ensure that the Office of Hearings and Appeals delivers the quality of service demanded by the American people currently and in the future:

1. SSA should pursue the development of the Commissioner's Approach to disability adjudication as expeditiously as possible. Implementation of the Approach or parts thereof should not, unless absolutely necessary, depend on the status of the electronic folder.
2. All qualified OHA Attorney Advisers should be converted to Senior Attorney decision makers and given the authority to issue fully favorable on-the-record decisions. These Senior Attorney decision makers would review profiled cases as well as provide decision writing support for the ALJs and should transition to the RO position as soon as possible.
3. SSA should commence a limited hiring of new Attorney Advisers to maintain current ALJ decision writing resources as well as the necessary writing resources for the future.