PROCESSING OF ATTORNEY FEES BY THE SOCIAL SECURITY ADMINISTRATION

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

JUNE 14, 2000

Serial 106–70

Printed for the use of the Committee on Ways and Means

U.S. GOVERNMENT PRINTING OFFICE
67–585 CC WASHINGTON : 2000

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

COMMITTEE ON WAYS AND MEANS

BILL ARCHER, Texas, *Chairman*

PHILIP M. CRANE, Illinois
BILL THOMAS, California
E. CLAY SHAW, JR., Florida
NANCY L. JOHNSON, Connecticut
AMO HOUGHTON, New York
WALLY HERGER, California
JIM MCCRERY, Louisiana
DAVE CAMP, Michigan
JIM RAMSTAD, Minnesota
JIM NUSSLE, Iowa
SAM JOHNSON, Texas
JENNIFER DUNN, Washington
MAC COLLINS, Georgia
ROB PORTMAN, Ohio
PHILIP S. ENGLISH, Pennsylvania
WES WATKINS, Oklahoma
J.D. HAYWORTH, Arizona
JERRY WELLER, Illinois
KENNY HULSHOF, Missouri
SCOTT MCINNIS, Colorado
RON LEWIS, Kentucky
MARK FOLEY, Florida

CHARLES B. RANGEL, New York
FORTNEY PETE STARK, California
ROBERT T. MATSUI, California
WILLIAM J. COYNE, Pennsylvania
SANDER M. LEVIN, Michigan
BENJAMIN L. CARDIN, Maryland
JIM MCDERMOTT, Washington
GERALD D. KLECZKA, Wisconsin
JOHN LEWIS, Georgia
RICHARD E. NEAL, Massachusetts
MICHAEL R. MCNULTY, New York
WILLIAM J. JEFFERSON, Louisiana
JOHN S. TANNER, Tennessee
XAVIER BECERRA, California
KAREN L. THURMAN, Florida
LLOYD DOGGETT, Texas

A.L. SINGLETON, *Chief of Staff*
JANICE MAYS, *Minority Chief Counsel*

SUBCOMMITTEE ON SOCIAL SECURITY

E. CLAY SHAW, JR., Florida, *Chairman*

SAM JOHNSON, Texas
MAC COLLINS, Georgia
ROB PORTMAN, Ohio
J.D. HAYWORTH, Arizona
JERRY WELLER, Illinois
KENNY HULSHOF, Missouri
JIM MCCRERY, Louisiana

ROBERT T. MATSUI, California
SANDER M. LEVIN, Michigan
JOHN S. TANNER, Tennessee
LLOYD DOGGETT, Texas
BENJAMIN L. CARDIN, Maryland

Pursuant to clause 2(e)(4) of Rule XI of the Rules of the House, public hearing records of the Committee on Ways and Means are also published in electronic form. **The printed hearing record remains the official version.** Because electronic submissions are used to prepare both printed and electronic versions of the hearing record, the process of converting between various electronic formats may introduce unintentional errors or omissions. Such occurrences are inherent in the current publication process and should diminish as the process is further refined.

CONTENTS

PROCESSING OF ATTORNEY FEES BY THE SOCIAL SECURITY ADMINISTRATION

WEDNESDAY, JUNE 14, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON SOCIAL SECURITY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:10 p.m., in room B–318, Rayburn House Office Building, Hon. E. Clay Shaw, Jr. (Chairman of the Subcommittee) presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON SOCIAL SECURITY

FOR IMMEDIATE RELEASE
June 7, 2000
No. SS–18

Shaw Announces Hearing on Processing of Attorney Fees by the Social Security Administration

Congressman E. Clay Shaw, Jr., (R–FL), Chairman, Subcommittee on Social Security of the Committee on Ways and Means, today announced that the Subcommittee will hold a hearing on the processing of attorney fees by the Social Security Administration (SSA). The hearing will take place on Wednesday, June 14, 2000, in room B–318 Rayburn House Office Building, beginning at 2:00 p.m.

In view of the limited time available to hear witnesses, oral testimony at this hearing will be from invited witnesses only. Witnesses will include representatives of the U.S. General Accounting Office (GAO), SSA, and individuals affected by the procedures for processing attorney fees. However, any individual or organization not scheduled for an oral appearance may submit a written statement for consideration by the Committee and for inclusion in the printed record of the hearing.

BACKGROUND:

Individuals seeking Social Security benefits may choose to have attorneys or other individuals represent them in their claims. The Commissioner of Social Security through regulation establishes a limit on the amount of the representation fee that may be charged and approves each fee charged by any representative. In favorable decisions, the Commissioner withholds the attorney's fee from the claimant's past-due benefits and payment is made directly to the attorney. Prior to 2000, the costs associated with the processing, withholding, and approving direct payment of attorney fees were absorbed in the administrative budget for the SSA.

The Ticket to Work and Work Incentives Improvement Act of 1999 (P.L. 106–170) requires the Commissioner to cover the costs of paying attorney fees directly to attorneys out of the fees collected. Attorneys are prohibited from recouping this cost from their clients. Effective February 1, 2000, the assessment for calendar year 2000 is 6.3 percent of the approved attorney's fee. For future years, the assessment will be set at a rate to achieve full recovery of the costs of determining, processing, withholding, and distributing payment of fees to attorneys, but it may not exceed 6.3 percent. The legislation also eliminated a 15-day delay before attorney fees could be paid and directed a study by the GAO of a number of issues related to representation and payment of attorney fees with a report due by December 2000.

Increasingly, many attorneys have expressed concerns about long wait times for attorney fee payments. For many small practices, these delays have caused serious financial setbacks, resulting in attorneys giving up their practice representing Social Security applicants.

In announcing the hearing, Chairman Shaw stated: "People wait a lifetime to be able to claim Social Security benefits. They shouldn't have to wait again to get the benefits they are entitled to. That the Social Security application process is so complex people feel obliged to hire an attorney to help them is in itself a serious problem. It is especially troubling given the expected rapid growth in the number of ap-

plicants and beneficiaries with the aging and eventual retirement of the Baby Boomers. Much work remains in the area of simplifying the application process, which will benefit applicants, the SSA, and ultimately taxpayers. For now, though, a good start would be finding a better way to pay claimants' representatives and to have SSA process this workload as quickly and efficiently as possible."

FOCUS OF THE HEARING:

The hearing will focus on the timeliness and accuracy of SSA's processing of attorney fee payments, the impact of recent legislation on this process, and recommendations for additional changes to improve the process.

DETAILS FOR SUBMISSION OF WRITTEN COMMENTS:

Any person or organization wishing to submit a written statement for the printed record of the hearing should submit six (6) single-spaced copies of their statement, along with an IBM compatible 3.5-inch diskette in WordPerfect or MS Word format, with their name, address, and hearing date noted on a label, by the *close of business*, Wednesday, June 28, 2000, to A.L. Singleton, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 200 additional copies for this purpose to the Subcommittee on Social Security office, room B–316 Rayburn House Office Building, by close of business the day before the hearing.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be submitted on an IBM compatible 3.5-inch diskette in WordPerfect or MS Word format, typed in single space and may not exceed a total of 10 pages including attachments. Witnesses are advised that the Committee will rely on electronic submissions for printing the official hearing record.

2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.

3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.

4. A supplemental sheet must accompany each statement listing the name, company, address, telephone and fax numbers where the witness or the designated representative may be reached. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press, and the public during the course of a public hearing may be submitted in other forms.

Note: All Committee advisories and news releases are available on the World Wide Web at "http://waysandmeans.house.gov".

The Committee seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202–225–1721 or 202–226–3411 TTD/TTY in advance of the event (four business days notice is requested). Questions with regard to special accommodation needs in general (including availability of Committee materials in alternative formats) may be directed to the Committee as noted above.

Chairman SHAW. I am sorry we are a few minutes late starting the hearing this afternoon. Welcome to today's hearing on processing of attorney fees by the Social Security Administration.

Filing for Social Security benefits, especially disability benefits, is so complicated that many people must hire attorneys to help them through the process. The mind-boggling complexity of the Social Security application process is itself a serious problem that I think needs to be addressed, and perhaps it will be addressed in future hearings. But today we will focus on how attorneys are paid once an individual is awarded benefits.

Attorneys may choose to receive their benefits directly from the Social Security Administration. Under this option, SSA deducts the fee from the claimant's past-due benefits and forwards it to the attorney. Prior to this year, taxpayers picked up the tab for SSA's costs of processing, withholding, and forwarding this fee to the attorney.

The Ticket to Work and Work Incentives Improvement Act changed that. Many people on both sides of the aisle thought that having lawyers, not taxpayers, pay for Social Security's processing of their paychecks was the right thing to do.

In addition to requiring that attorneys pay their own processing costs, the law also required the General Accounting Office to examine a number of related issues, including how these costs should be assessed. Although the General Accounting Office report is not due until the end of this year, today they will share with us an interim progress report of their findings.

Since the passage of the Ticket to Work legislation, I have become increasingly concerned about the delay in SSA's processing of attorney's fees. Attorneys should not have to wait months or sometimes years to receive their payment from the agency.

That is why ranking member Matsui and I, with the support of several members of this subcommittee, introduced H.R. 4633 last week. This bill would allow SSA to impose the assessment of attorney's fees only if the fee is processed and approved for payment within 30 days of benefit approval.

Today, I look forward to the hearing of our witnesses' views regarding this proposal, as well as other suggestions that we may have for improving the attorney's fee process.

Mr. Matsui.

Mr. MATSUI. Thank you, Mr. Chairman. I do not have anything to add to what you put in. I will just submit my statement for the record, but I have endorsed the legislation and I appreciate the fact that we have done it together.

Chairman SHAW. We are doing too much, Bob.

Mr. MATSUI. I know. We are the only ones, though. [Laughter.]

[The opening statement follows:]

Opening Statement of Hon. Robert T. Matsui, a Representative in Congress from the State of California

I want to thank Chairman Shaw for holding this hearing today. I think it is very important that we examine the issue of Social Security benefit claimant attorney fees as it has been raised many times over the last year. In particular, we have

heard from numerous individuals and groups about this topic since we passed the Ticket to Work and Work Incentives Improvement Act of 1999 last fall.

The Ticket to Work and Work Incentives Improvement Act imposed a new administrative assessment upon direct payments from the Social Security Administration to attorneys. I think it is our duty to review the Social Security Administration's procedures for determining, withholding, and certifying such payments and to examine possible improvements to those procedures.

I am also very pleased that a number of Members of the Committee on Ways and Means—Democrats and Republicans alike—came together in a bipartisan fashion last week to introduce legislation to make one improvement to SSA's procedures for paying attorneys' fees. Our legislation is simple—it would prohibit the Social Security Administration from charging an attorney the new 6.3 percent administrative assessment unless the agency certifies his or her fee for payment within 30 days of the award of past-due benefits to his or her client.

Some maintain that the new 6.3 percent assessment is necessary to cover the costs that SSA incurs in withholding and processing fee payments for attorneys. If this is indeed the case, and the 6.3 percent assessment is simply compensation for services rendered, then it is reasonable to expect that SSA will process fee payments to attorneys in a timely fashion. Our legislation simply seeks to put that reasonable expectation into law.

As we review SSA's procedures for making attorney fee payments and as we consider ways to improve those procedures—including the legislation I just described—I think we can all agree that our first priority must be to ensure that benefit claimants—whether they are filing a claim for Old-Age Insurance, Disability Insurance, or Supplemental Security Income—receive the benefits to which they are entitled.

Given the complexity of these programs, achieving this goal requires that benefit claimants have access to skilled legal professionals to help them with their claims. All too often, claimants must rely on an attorney or another representative in order to negotiate the claims process successfully. Therefore, I think we can agree that simplification of the administration of the OASDI and SSI programs and the maintenance of a pool of qualified legal representatives must be one of our top priorities.

Finally, we must be cognizant of the workloads that programmatic or administrative changes may create for SSA. As we all know from the hearings the Subcommittee held earlier this year, SSA faces a number of long-term challenges in preparation for the aging of the Baby Boomers. However, the agency does not have the resources it requires to meet those challenges. The Labor, Health and Human Services Appropriations bill reported for FY 01 by the Appropriations Committee would provide $156 million less for SSA's administrative budget than the President's request. We cannot continue to ask the Social Security Administration to do more with less each year.

I look forward to hearing from our witnesses this afternoon and, in particular, to hearing their views on possible improvements to SSA's attorney fee procedures.

Thank you, Mr. Chairman.

Chairman SHAW. Our first witness from the Social Security Administration will be Dr. William C. Taylor, who is Deputy Associate Commissioner for Hearings and Appeals.

Dr. Taylor, welcome to the hearing. We have your full statement which will be made part of the record, and we invite you to summarize as you see fit.

STATEMENT OF WILLIAM C. TAYLOR, DEPUTY ASSOCIATE COMMISSIONER, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION

Mr. TAYLOR. Thank you, Mr. Chairman. If I could begin with a slight correction, I am not a doctor.

Chairman SHAW. Well, they've J.D. You are a doctor.

Mr. TAYLOR. Oh, thank you very much. [Laughter.]

Mr. TAYLOR. I have never had the courage to say that.

Chairman SHAW. And so are we.

Mr. TAYLOR. Mr. Chairman, Mr. Matsui, and members of the subcommittee, good afternoon. I am William Taylor, Deputy Associate Commissioner for SSA's Office of Hearings and Appeals. I have been with the agency for almost 30 years and in my present position since 1995.

Thank you for the opportunity to discuss the process by which the Social Security Administration approves and pays attorney fees. It is an important, multifaceted issue. Last year about 57 percent of all cases at the ALJ hearing level involved claimants with attorneys, and in 1999, SSA paid almost 200,000 fee payments totaling more than $450 million to attorney representatives.

We are working to make this payment process as fair, efficient, and timely as possible. My written statement details the history of the attorney fee process, SSA's implementation of the recent fee payment legislation, and planned payment process improvements. I ask that my written statement be placed in the record.

Last year, the Ticket to Work and Work Incentives Improvement Act of 1999 eliminated the 15-day waiting period for certification of an attorney fee. In addition, it allowed SSA to charge an assessment, not to exceed 6.3 percent of the direct payment amount to recover the costs for determining withholding and certifying fees to attorneys.

In other words, the current 6.3 percent assessment is the cost of providing the attorney with the service of calculating withholding and paying the fee. SSA began charging the assessment in cases in which the decision was made on and after February 1, 2000.

SSA has not received any additional resources with which to address this issue, hindering our ability to make significant improvements to our current performance. While we did clear out our attorney fee claim backlogs before the user fee became effective, we had to redirect limited resources that could have been used to provide better overall public service, for example, on our 800 telephone number.

With the heightened awareness of the attorney fee process generated by the enactment of the 6.3 percent assessment has come an increase in the number of complaints from attorneys about the fee process. We recognize the importance of timely payment to attorneys who successfully represent their clients. In fact, we have taken several measures to clear the backlog of outstanding fee claims. Among these measures are providing 111 work years to technical staffs, diverting resources from other workloads to process attorney fee claims, giving priority to those outstanding fee claims to see if they can be paid immediately.

These measures have worked. By March 21 of this year, SSA had reviewed approximately 79,700, or about 93 percent, of the 85,991 claims that were outstanding as of February 2 of this year. Based on these reviews, we immediately paid fully developed claims. When additional development was needed, we requested it on a priority basis.

Furthermore, as of May 15 of this year, SSA had paid 167, or approximately 84 percent, of the 197 fee claims that were brought to our attention by this subcommittee. We plan to resolve the outstanding claims soon. Although we have resolved many of these cases, we realize that there continue to be concerns about delays

in paying attorney fees. That is why the commissioner has requested a review of the attorney fee process that is currently underway.

The current fee payment process, whether fee agreement or fee petition, requires manual action and considerable coordination between hearing office functions and processing center functions. Because this is a complex process involving many steps, manual actions and even mailing time, the new legislation would require that SSA forfeit the amount we assess the attorney in two-thirds of the attorney fee cases. My written statement describes this process in more detail.

The legislation enacted last year did not allow SSA to deposit the fees raised as a result of the assessment in our LAE account. In the absence of that provision, the 6.3 percent assessment is directed back to the Title II trust funds. Thus, any restriction on SSA's ability to impose the assessment will result in a loss to the trust funds. For instance, in the case of a 30-day time limit, our actuaries estimate that about two-thirds of the payments would be lost.

In conclusion, Mr. Chairman, the Social Security Administration needs more resources. Lack of adequate resources affect our ability to timely process not only attorney fees but all agency workloads. The Commissioner has presented SSA's FY 2001 budget to the House Appropriations Subcommittee on Labor, Health and Human Services and Education.

That subcommittee has, however, recommended a reduction of $156 million below the President's request. This reduction is even greater when compared to the Commissioner's budget request. The Commissioner is on record as saying that funding at this level would seriously undermine stable staffing and performance for the agency.

As to attorney fee processing, we are committed to providing the best service possible to the attorneys who represent our claimants, but we face serious challenges as we work to improve our performance in this area. Without the benefit of additional administrative funds, we must shift existing resources to balance the needs of this workload to pay attorneys with other workloads serving applicants and beneficiaries.

Last year we estimated that we could pay attorneys generally within 60 days the first year after enactment and 45 days the second year if adequate resources were provided. Until our review of the attorney fee process is complete, we do not know what our level of performance will be. As I have pointed out, however, the 30-day time restriction imposed by the bill could result in the loss to the Social Security trust funds in excess of $80 million over five years.

We look forward to working with you and other members of the subcommittee to find ways to meet our resource needs. I will be happy to answer any questions that you may have. Thank you, Mr. Chairman.

[The prepared statement follows:]

Statement of William C. Taylor, Deputy Associate Commisssioner, Office of Hearings and Appeals, Social Security Administration

Mr. Chairman, Mr. Matsui, and Members of the Subcommittee:

Thank you for inviting me to discuss the process by which attorneys may request that the Social Security Administration (SSA) approves and pays attorney fees. We recognize the importance of timely payment to attorneys who successfully represent their clients. Representatives are entitled to world class service, as are all of SSA's customers, and in 1999, SSA made 200,000 fee payments to attorneys totaling almost more $450 million. Today, I will discuss with you the history of the attorney fee process, SSA's current process, implementation of the new law, and some planned improvements in this area. In addition, I will present SSA's views on H.R. 4633, which would make further changes to the attorney fee process.

History of Attorney Representation and Fee Approval

The Social Security Act has recognized a role for attorneys as claimants' representatives since 1939, with the enactment of the *Social Security Amendments of 1939*. Pursuant to statutory authority, the Social Security Board's Administrator promulgated rules and regulations governing representatives of claimants and set the maximum fee attorneys could charge.

At first, the maximum an attorney could charge was $10 unless a petition was filed and a higher amount was authorized. In 1960, the amount an attorney could charge without approval was increased to $20 for representation before the Bureau of Federal Old-Age Benefits with amounts up to $50 for representation before the Bureau and a hearing examiner and/or the Appeals Council. Disability cash benefits had begun in 1956 and more and more appeals were on disability claims.

The *Social Security Amendments of 1965* provided for withholding up to 25 percent of past-due benefits for direct payment to an attorney in court cases to ensure that claimants had access to effective legal representation at a fair rate of compensation. *The Social Security Amendments of 1967* required the Secretary to approve "reasonable" attorney fees, not to exceed 25 percent of the past-due benefits, for services rendered in administrative proceedings, and authorized the Secretary to certify payment directly to an attorney from a claimant's past-due benefits.

When the Ways and Means Committee designed the Supplemental Security Income (SSI) program in 1972, it decided not to authorize any similar withholding from a claimant's past-due benefits. The Committee concluded that such a withholding would be "contrary to the purpose of the program." This conclusion still makes sense. To paraphrase Justice Brennan in the Supreme Court's decision in Bowen v. Galbreath in 1988, given the extreme financial need of SSI beneficiaries, one can conclude that withholding past-due benefits under the SSI program will cause greater hardship than withholding past due benefits from insured individuals under the Old-Age, Survivors and Disability Insurance programs.

The *Omnibus Budget Reconciliation Act of 1990* created the fee agreement process to streamline payment of attorney fees by permitting SSA to routinely approve fees that were within certain limits (the lesser of $4,000 or 25 percent of past-due benefits) if the representative and client both agreed in writing to the fee. Payment of the fee could not be certified pending a 15-day administrative review period after receipt of the award notice. The 1990 legislation also continued the exclusion of SSI claims from the direct payment of attorney fees from a claimant's past-due benefits.

The Ticket to Work and Work Incentives Improvement Act of 1999 eliminated the 15-day waiting period for certification of an attorney fee and allowed SSA to charge an assessment, not to exceed 6.3 percent of the fee, to recover the costs for determining and certifying fees to attorneys. In other words, the current 6.3 percent assessment is the cost of providing the attorney with the service of calculating, withholding, and paying the fee. SSA began charging the assessment on cases on which the decision was made on or after February 1, 2000.

Process in General

Section 206 of the Social Security Act provides that a representative may not charge or collect, directly or indirectly, a fee in any amount not approved by SSA or a Federal court. SSA, under either the fee petition or fee agreement process, approves the fee that may be charged to represent a claimant for Social Security and SSI benefits in administrative proceedings. At each level of the determination process, applicants may be represented by an attorney or other individual in pursuing their claim. Over the last 20 years, the proportion of applicants with representation at the hearing level has increased dramatically; and in fiscal year 1999, about 57 percent of all cases decided at the Administrative Law Judge (ALJ) hearing level involved attorneys.

Obtaining payment from clients is often difficult for attorneys, who sometimes have to expend considerable resources to get paid. In virtually all successful Social Security claims, SSA ensures that the attorney receives payment. By paying attorneys from withheld past-due benefits, SSA is providing a valuable service to attor-

neys, guaranteeing payment of all or a portion of any fees due. In SSI cases, the attorney must look to the claimant for payment.

Representatives may request payment for services through either a fee petition or a fee agreement process.

Fee Petition Process

After completing his or her services for the claimant, the representative (attorney or non-attorney) must request the Commissioner's approval of fees. Each fee petition requires an individual evaluation by an ALJ or other authorized personnel of the worth of the services. Adjudicators, in authorizing a fee, consider factors such as the extent and nature of the services performed, the complexity of the case, and the amount of time the representative spent on the case. Fees over $5,000 require additional review.

After SSA authorizes a fee, we notify the claimant and their representative of the authorized fee and their right to administrative review. Because of the highly involved nature of this process, fee petition claims are very rarely paid within 30 days.

While we do not routinely track data on the use of fee agreements and fee petitions, we have just completed a special systems run on a sample of attorney fee cases. That data show that the percentage of fee payments that were withheld and paid using the fee petition process has steadily declined from 1995 through 1999, from 30 percent in 1995 to just 13 percent in 1999. In addition, that decline appears to be continuing in 2000. From January 2000 through the end of May 2000, the percentage of fee petitions fell to just under 12 percent.

What this tells us is that more attorneys are electing to receive their fees through the fee agreement process, which I will discuss next, even though fees received through that process are capped at a specified amount. The decline in the number of fee petition requests filed suggests that, contrary to some reports, attorneys are not seeking to have their fees paid through the fee petition process because they can get a higher fee than what they could receive under the alternate process. In fact, in addition to the decline in the number of attorneys requesting payment through fee petition, 91 percent of fee petition payments approved are for less than $4,000 (generally, the amount which a fee under an approved agreement may not exceed).

Fee Agreement Process

The fee agreement process was developed to be a simpler alternative to the fee petition process. Under the fee agreement process, if the representative and claimant sign and submit a written agreement as to the amount of the fee, SSA will generally approve the agreement if the specified fee does not exceed the lesser of 25 percent of the claimant's past-due benefits or $4,000. SSA does not withhold past-due benefits for non-attorney representatives or in SSI cases, but still must approve the fee. The Commissioner then notifies the respective parties of the maximum fee and right to request administrative review. This is usually the quicker and more common method to set the fee.

Based on the sample run just completed, the number of fee agreement cases accounted for almost 87 percent of fee payments processed in 1999. The sample for 1995 showed 70 percent were fee agreement cases. The percentage for this year through the end of May rose to 88 percent. Obviously, more and more attorneys prefer to use the more streamlined process, which suggests that attorneys are not concerned about the $4,000 limitation. The $4,000 limit was put in place based on a recommendation that SSA adopt a rebuttable presumption that a fee equaling 25 percent of the claimant's past-due benefits, up to $4,000, is reasonable. In 1999, the average payment under the fee agreement process was $2,555.

Implementation of the New Law

With the heightened awareness of the attorney fee process generated by enactment of the 6.3 percent assessment has come an increase in the number of complaints from attorneys about the fee process. We recognize the importance of timely payment to attorneys who successfully represent their clients. With elimination of the 15-day waiting period, some cases are being paid more quickly. Other cases, however, are only being helped marginally.

To address this issue, we have taken several measures to clear the backlog of outstanding fee claims. Among these measures are providing 111 work years to technical staffs, diverting resources from other work loads to process the attorney fee claims, and giving priority to these outstanding fee claims to see if they can be paid immediately.

These measures have worked. By March 21, 2000, SSA had reviewed approximately 79,700 (or 93 percent) of the 85,991 claims that were outstanding as of Feb-

ruary 2, 2000. Based on these reviews, we immediately paid fully developed claims. When additional development was needed, we requested it on a priority basis.

Furthermore, as of May 15, 2000, SSA had paid 167 (or approximately 84 percent) of the 197 fee claims that were brought to our attention by this subcommittee. We plan to resolve the outstanding claims soon. Although we have resolved many of these cases, we realize that there continue to be concerns about delays in paying attorney fees.

The legislation introducing the attorney assessments is being implemented in phases, beginning with an all manual process, with plans to automate steps of the process as time and resources were to permit. This is not unlike implementation of many SSA legislative initiatives. The process of paying the attorney in Title II cases is not completely manual, although it does require a manual review and input to begin the Treasury payment process.

SSA's systems are set up to contain information on the primary numberholder and any auxiliary beneficiaries only. Information about third party payments, such as attorney fee payments, is not captured on SSA's Master Beneficiary Record (MBR) system.

If the Agency decides to automate attorney payments, the effort would be extremely significant, involving major redesign of the Title II data structures and client files. One requirement for paying non-beneficiaries would be to develop and record some discrete identifier for each payment and payee to maintain a good audit trail. This might be the attorney's SSN or a firm's Tax ID number or Employer ID number. Up to now, the attorneys and their advocacy groups have been adamant that they not be required to supply this or similar identifying information to SSA.

Proposal to Change the Attorney Fee Process

H.R.4633, recently introduced by you and other members of the Subcommittee, would not allow SSA to impose the attorney fee assessment if payment is not made to the attorney within 30 days after the initial certification of payments to the beneficiary.

The current fee determination process, whether fee agreement or fee petition, requires manual actions and considerable coordination between hearing office functions and processing center functions. Because this is a complex process, as I will describe, involving many steps, manual actions, and even mailing time, the new legislation would require that SSA forfeit the amount we assess the attorney in two-thirds of the attorney fee cases.

While some fee agreement cases may require only limited development, and SSA may even pay the attorney and the claimant at the same time, that is not always the case. Many fee agreement cases require additional development (for instance, if a workers' compensation computation is needed to calculate the proper amount of past-due benefits or if we need to develop applications for the children or spouse of the claimant), and the claimant is awarded ongoing benefits pending determination of past-due benefits. In those cases the attorney is not paid until past-due benefits are awarded.

In fee petition cases, direct payment to the attorney must await both the calculation of the past-due benefits and authorization of the fee. Once past-due benefits have been calculated and the fee has been approved, direct payment is made to the attorney.

Fee authorizations for larger amounts can also take longer to process because they often occur in difficult, complicated cases involving a lengthy appeals process. This results in SSA having to consider a long, detailed record of all the services that were performed in order to determine a "reasonable fee." In addition, fee authorizations for more than $5,000 involve an additional step, i.e., our policy requires a review and an approval by the Attorney Fee Officer in the Office of Hearings and Appeals, a Regional Chief ALJ, or the Deputy Chief Administrative ALJ.

As you know, SSA does not have a tracking system in place from the start to the finish of the process to measure the time it takes us to pay attorney fees; however, attorney fees in fee agreement cases have generally been paid within 90 days of the award notice. As a result of changes that we have already made, including the elimination of the 15-day pre-payment holding period for fee agreement cases, payment of attorney fees can now generally be made within 60 days of the award notice.

As I mentioned, H.R.4633 would not allow SSA to impose the attorney fee assessment if payment is not made to the attorney within 30 days after the initial certification of payments to the beneficiary. There are cases in which we are not able to pay the attorney until completion of the additional development I have described. Any time limitation that would restrict SSA from imposing the user fee assessment

should exclude both fee petition cases and fee agreement cases for which there is outstanding development.

While we agree that, in general, attorneys should receive their fees timely, there are cases in which the extra time needed to process the attorney fee payment is not within SSA's control. These cases include not only fee agreement cases with outstanding development, but virtually all fee petition cases, since the attorney is not required to file a request for payment until 60 days from the date of the decision, and may even request an extension beyond the 60 days. In addition, some cases take significantly longer to pay because of the need to develop additional evidence, such as proof of workers' compensation payments.

The estimated $123 million in proceeds from the 6.3 percent assessment over the first 5 years would be directed to the title II trust funds. Thus, any restriction on SSA's ability to impose the assessment would result in a loss to the trust funds. For instance, in the case of a 30-day time limit, the Actuaries estimate that about two-thirds of the payments would be lost.

Extending Attorney Fee Withholding to the SSI Program

SSI is a means-tested program providing cash assistance to aged, blind, and disabled individuals whose incomes and resources are below minimal levels set by law. Currently, individuals with countable income above $512 a month and countable resources above $2,000 are not eligible for SSI. As you can see, SSI beneficiaries are among the most vulnerable Americans in that they have little in the way of other income or personal savings.

Arguably, SSI applicants are even worse off in that they often have very small amounts of monthly income and are even poorer than SSI beneficiaries. Any income or resources that they do have is needed for food, clothing and shelter. It is likely that they may go into debt while they are waiting for their SSI applications to be processed.

When they finally receive their SSI benefits, those benefits often are used to pay bills or repay loans that they incurred during the months that their SSI applications were pending. We are concerned that withholding 25 percent of accumulated benefits might take away funds needed for basic needs. It would also eliminate the option that SSI beneficiaries and their attorneys could work out agreements to pay the fee out over time.

In addition, there are other implications with regard to direct withholding from SSI payments apart from the financial impact on SSI beneficiaries. There are also serious workload implications for SSA regarding extending the service we offer attorneys representing Social Security claimants to SSI claimants. For instance, it would require major systems changes to existing SSA programs, and would require our field office employees to take direct actions to pay the attorney fees, which they do not currently do, as well as responding to requests for information regarding payments to SSI attorneys and explaining notices. At this time, we do not have an estimate for the number of workyears we will need to implement direct withholding of attorney fees in SSI cases.

Review Process

Our procedures to pay attorneys, particularly in fee petition cases involving large amounts, are admittedly complex. That is why the Commissioner has requested a review of the attorney fee process that is currently underway.

Part of the Commissioner's review will be to study ways in which we can better measure our performance in attorney fee processing. This review will allow us to identify those areas in which we may be able to improve that performance. You can be assured that we will share the results of that review. It is expected to be completed by the end of this year.

Until our review is completed, however, I urge you not to make changes in the current process. We need time to evaluate the current assessment process, which has been in place for a very short time. Until we have the results of our review, we would view any further changes to the program with extreme hesitation.

Our review of the process will cover a number of issues, including:

- Gathering more current data on the attorney fee process, including a comparison of fee processing before and after the elimination of the 15-day waiting period and the imposition of the 6.3 percent assessment;
- Ascertaining how best to assemble and maintain management information about the fee authorization and payment process;
- Reevaluating the need to increase the $4,000 cap;
- Reevaluating our rules for approving fees, especially additional review for larger fees; and

• Studying how best to coordinate fees among multiple representatives and within law firms.

We hope to use the results of this review to significantly improve the process. I will keep you informed of our progress. I would also point out that the legislation allows SSA to lower the 6.3 percent assessment if the cost of administering the attorney fee process is less than the revenue raised by the assessment. As part of our overall review, we are beginning a study to see whether our original estimates of the costs of providing the attorney fee payment process and the 6.3 percent assessment are still roughly equal. If they are not, we will lower the assessment.

Prompt Payment Act

You asked me to comment on the applicability of the Prompt Payment Act to the attorney fee process. The Prompt Payment Act, enacted in 1982 and amended in 1988, ensures that companies providing goods or services to the government are paid in a timely manner. Under Section 3901 of title 31 of the U.S. Code, a business can collect an interest penalty on late payments from the government. According to regulations, the Prompt Payment Act applies in the areas of procurement contracts, vendor payments, utility payments, and Commodity Credit Corporation payments.

According to the plain language of the statute and its regulations, SSA's direct payment of attorney fees on behalf of Social Security claimants is not subject to the Prompt Payment Act. Through the direct payment system, SSA merely serves as an intermediary to facilitate and ensure payment of attorney fees owed by the client, the Social Security claimant. In fact, SSA does not use its own funds to make direct payment of attorney fees, but simply issues the payment on the claimant's behalf through the Treasury Department. Consequently, Section 3901 does not apply to SSA's unique relationship with claimants' attorneys, and SSA is not required by that law to add interest to the attorney fees it directly pays.

Conclusion

In conclusion, Mr. Chairman, the Social Security Administration needs sufficient resources in order to process its work effectively. Lack of adequate resources affects our ability to timely process not only attorney fees but all Agency workloads. The Commissioner has presented SSA's FY 2001 budget to the House Appropriations Subcommittee on Labor, Health and Human Services and Education. That subcommittee has, however, recommended a reduction of $156 million below the President's request. This reduction is even greater when compared to the Commissioner's budget request. The Commissioner is on record saying that funding at this level would seriously undermine stable staffing and performance for the agency.

As to attorney fee processing, we are committed to providing the best service possible to the attorneys who represent our claimants, but we face serious challenges as we work to improve our performance in this area.

Until our review of the attorney fee process is complete, we do not know what our level of performance will be. As I have pointed out, however, the 30-day time restriction imposed by the bill could result in a loss to the Social Security trust funds in excess of $80 million over five years.

We look forward to working with you and the other members of the Subcommittee to find ways to meet our resource needs. I will be happy to answer any questions you may have.

Chairman SHAW. Mr. Collins.

Mr. COLLINS. Thank you, Mr. Taylor. Just kind of walk me through the fee process itself, please.

Mr. TAYLOR. Certainly. Our fee process consists of two basic ways that attorneys can have fee arrangements with their clients. The first, and the one that has been in existence for the longest, is the fee petition process whereby the attorney typically has a contingency arrangement with the client and submits after the successful conclusion of the claim the attorney submits a petition detailing the services that were provided to that claimant, and that petition is then subject to review through a review process. Usually in our case, it is by the administrative law judge who held the hearing.

The other basic process is the fee agreement process which was begun in 1991 and that is a more streamlined process whereby the claimant and the attorney agree up front prior to the decision that the attorney will accept either 25 percent of the past due benefit payment or $4,000, whichever is less, so effectively there is a $4,000 maximum.

If that agreement is approved, and they almost always are, by the administrative law judge that completes the first stage of the fee authorization payment process. After that, the fee agreement along with the favorable decision is sent to a processing center. We have six processing centers plus another processing center located near the Social Security Administration headquarters in Baltimore. It is their job to then determine the amount of past due benefits that are payable to the claimant. In a direct payment case under title II they will make a rough determination of the past due benefit amounts and will issue an award notice to the claimant, put the claimant in continuing benefit status, and pay a past due benefit amount. At the same time they will withhold 25 percent of that past due benefit for eventual payment to the attorney subject to final approval of the fee.

In the fee petition process and in the fee agreement process, the final amount is subject to some adjustments depending upon such things as the receipt of workers' compensation benefits by the claimant. That information has to be obtained, if it has not already been obtained, and considered in calculation of the actual past due benefit amount and adjustments are made, and when that process has been completed, the final determination of the 25 percent can be made and the direct payment can be made to the attorney of the attorney's fee.

Mr. COLLINS. You may have stated it. What percent goes with first the fee petition and what percentage of claimants go with the fee agreement? Do you have any idea?

Mr. TAYLOR. Yes, congressman, I do.

Mr. COLLINS. And is there a cap on the fee petition?

Mr. TAYLOR. To answer the second question first, there is no cap on the fee petition process. SSA will only withhold 25 percent of past-due benefits, but there is no cap on the actual amount of the fee that can be authorized. Anything over the 25 percent must be collected directly by the attorney.

In terms of the use of the fee agreement versus the fee petition process, currently it is running about 88 percent of the fee payments are made pursuant to the fee agreement process and about 13 or 12 percent under the fee petition process. That is a substantial change from the situation that existed several years ago. The usage of the fee agreement process has been increasing in recent years and continues to increase and that, I think, was the intention of the legislation that the process would be streamlined and that most, if not all, of the fee payments would be made pursuant to this simplified process.

Mr. COLLINS. Okay. Well, I see my time is about out, but I appreciate that very much. Thank you. I may have another question.

Chairman SHAW. Mr. Matsui.

Mr. MATSUI. Thank you, Mr. Chairman. Mr. Taylor, you get the claimant's check out once the case is resolved within how many days on the average?

Mr. TAYLOR. I do not know that I have that information readily available.

Mr. MATSUI. But it is less than 30 days?

Mr. TAYLOR. Well, I am not sure that it—

Mr. MATSUI. It is not?

Mr. TAYLOR. I am not sure that it is less than 30 days.

Mr. MATSUI. Really. So in other words, if somebody has a $5,000 claim that is adjudicated and it is awarded, the disabled individual then may have to wait more than 30 days, and I know you do not have the exact number, but I am trying to—

Mr. TAYLOR. I can certainly get the information for you. If you are going from the date of the decision, the favorable decision, which must then be transmitted to the processing center where the past due benefits are calculated, I cannot say for sure that it is always within 30 days, but I would be happy to obtain the average time. I am sure that we maintain that.

[The information follows:]

We estimate that the average processing time for hearing-level cases from the date of the decision to payment effectuation/award notice to the claimant is about 30 days.

Mr. MATSUI. Does the check to the claimant usually go out at the same time the check to his or her attorney goes out or is it two separate actions?

Mr. TAYLOR. It may go out at the same time, but in those cases in which there is a need to develop additional information, such as cases regarding workers' compensation or auxiliary beneficiaries who may be entitled, before that final past due benefit amount can be exactly calculated. In cases such as these the payment to the attorney would be made later than the payment to the claimant.

Mr. MATSUI. In normal cases, later, because you have to calculate how much you are going to take off the top to the claimant; is that right? And then after that—

Mr. TAYLOR. Well, to make the exact calculation in cases where the processing center has to do additional development to determine the past due benefits, they would make the payment to the claimant when they make the initial payment, but they would not release the payment to the attorney until they had made a final calculation of past-due benefits after development. And then there may be adjustments made to the claimant's payments as well at that time.

Mr. MATSUI. So you really cannot do all the checks at the same time, it sounds like, because you have too many calculations?

Mr. TAYLOR. I believe there are instances in which we can do it at the same time, but we could not—

Mr. MATSUI. When there are no other claims on the—

Mr. TAYLOR. That is right. We cannot do that all of the time under our current process.

Mr. MATSUI. It is hard to argue that the attorney should be paid sooner than the claimant, although I guess you could see a few cases where that could happen given the 30 day requirement but no requirement with respect to the claimant. But let me ask you

this. The check to the claimant has to be—that is a very high priority, I would imagine, right, in the department?

Mr. TAYLOR. Absolutely.

Mr. MATSUI. Now, how high of a priority is it to pay the attorneys? I mean, you know, again, I know you cannot calculate it on a scale one to 1,000 or something like that.

Mr. TAYLOR. Certainly.

Mr. MATSUI. But there must be some evaluation that goes into how you allocate your budget?

Mr. TAYLOR. We do, of course, consider these to be matters of priority, but as you have suggested, we have a number of competing priorities.

Mr. MATSUI. Right.

Mr. TAYLOR. And these attorney fee payment processes, as much as we want to make them as quickly as we can, have to be handled with competing workloads such as the payments to claimants. I think—

Mr. MATSUI. In a way, your testimony puts us in a dilemma because what we wanted to do is avoid a deficit in the trust fund and that is why we came up with this.

Mr. TAYLOR. I understand.

Mr. MATSUI. But now you are suggesting, and obviously you are right, if what you are saying is correct, and I am assuming that it is, we are going to create a deficit in the trust fund anyway because the money will not be paid into the trust fund.

Mr. TAYLOR. Under the proposed legislation, we sacrifice the fee with the 30-day limit, yes, that is correct.

Mr. MATSUI. It creates a real problem for us. And obviously the appropriations, $156 million short of what you are asking, plays a role in that, although I do not know if the $156 million would solve this problem because I think your request probably came before we made this decision or at least simultaneously.

Mr. TAYLOR. I do not know that I could say it would solve this problem, but again it allows us to address the competing workloads a little more easily than we are able to do so now.

Mr. MATSUI. See the problem is that I do not think any of us want to micromanage. On the other hand, we want to try to come up with a resolution of this and it does not sound like—and again maybe when we hear from others—but it does not sound like you are offering us any hope for some solution to this problem right now.

Mr. TAYLOR. Well, I—

Mr. MATSUI. I understand the problem which you raise and I certainly appreciate that. On the other hand, it would seem to me that, you know, we are trying to fix something right now, and there are obviously some industry groups out there that have a problem, and we would like to solve it without doing too much damage to anybody, particularly the administration.

On the other hand, I think you have an obligation to at least try to give us some ideas instead of saying, you know, we are kind of stuck. We need $156 million more, you know.

Mr. TAYLOR. Congressman, I apologize if I have given that impression.

Mr. MATSUI. Maybe what you are suggesting is the fact that you have no solution and you are not going to come up with one, in which case we just have to make a tough decision, but it just seems to me that—

Mr. TAYLOR. I would not want to leave you with that impression because, as I believe I referenced briefly in my statement, we do, first of all, consider this to be a process that needs attention and it may be subject to improvement, and for that reason the Commissioner has requested, and we are currently in the process of doing, a review of the entire process and looking for ways in which we can streamline and make improvements that may allow us to address this workload in a more expeditious manner than we have thus far.

Mr. MATSUI. I appreciate your offer there. My time has run out, but I just want to make a suggestion that all of us on this subcommittee want to work this out in a way that is reasonably acceptable to all parties. I mean nobody is trying to be adversarial on this area.

Mr. TAYLOR. We would be anxious to cooperate.

Mr. MATSUI. And we would hope that we can find some way to achieve that goal.

Mr. TAYLOR. We would be very anxious to cooperate with the subcommittee in trying to work out a solution.

Mr. MATSUI. I thank the chairman.

Chairman SHAW. Thank you. You say that in 1999, the SSA processed 200,000 fee payments to the attorneys. Could you tell me why your Freedom of Information Officer, Mr. Blevins, said that the SSA does not maintain this data when it was requested by one of our later witnesses, Ms. Shor? Are you familiar with that letter?

Mr. TAYLOR. I am not familiar with that response by Mr. Blevins.

[The information follows:]

March 2, 2000

NOSSCR
Attn: Nancy Shor
6 Prospect Street
Midland Park, NJ 07432

RE: Freedom of Information Act (FOIA) Request

Dear Ms. Shor:

This is in response to the subject request for a copy of the data reflecting the number of attorney's checks issued in each month CY1998 and CY1999.

We are unable to comply with your request since we do not maintain the data you requested.

If you disagree with this decision, you may request a review. Any appeal should be mailed within 30 days of receipt of this letter to the Associate Commissioner for the Office of Program Support, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235 in an envelope marked "Freedom of Information Appeal."

Sincerely,

DARRELL BLEVINS
Freedom of Information Officer

Mr. TAYLOR. Mr. Chairman, just looking at the request, I notice that the request was for data month by month during calendar years, and it may be that the data that was available was not maintained on a monthly basis, but I do not know.

Chairman SHAW. Could you follow up on that?

Mr. TAYLOR. I certainly will be happy to follow up on that.

Chairman SHAW. And fill it in for the record.

[The information follows:]

The request was for data month by month during calendar years, but we do not maintain that information for each month.

Chairman SHAW. As you know, the administration proposed charging the attorneys for the cost related to the processing of their fees. These costs, on average, were estimated to equal 6.3 percent of the fee and this percentage is now established in law. The General Accounting Office will testify that the SSA has developed a way to capture actual costs and that you currently do not have a way to determine costs? Is that a correct statement?

Mr. TAYLOR. I am not sure that it is exactly correct. We did—

Chairman SHAW. How did you arrive at the 6.3 percent?

Mr. TAYLOR. Mr. Chairman, in arriving at the 6.3 percent, we took available data that we had regarding the attorney fee process including the number of petitions and the number of fee agreements and information that we obtained about how much time it took to process those two things and we looked at the average payments that had been made under those processes on a yearly basis, and I believe using those two bases of information, and then extrapolating from some debt collection information that we had access to, we came up with a figure of 6.3 percent. Basically we did the best calculation we could to figure out what the cost of the process had been in past years and then taking the number of payments and the average fee payment based on historical data, what percentage of that would cover those costs?

I might add that as a part of the review process that is underway now, we are going to develop a better methodology for examining and capturing those costs so that we can carry out the obligation of updating that fee assessment figure if it turns out it is not—it is overstating, for example, the true cost of the process.

Chairman SHAW. Mr. McCrery.

Mr. MCCRERY. Mr. Taylor, have you considered issuing just one check to the attorney, made out jointly to the beneficiary and the attorney, as a possible way to make the system more efficient, to cut down on the time it takes to process these things?

Mr. TAYLOR. This is a possibility that has been given consideration in the past. We have not considered it recently. I would just say that we have a couple of reservations about that, one of which is that by doing so, if my understanding is correct, we would be issuing a check in the full amount of past due benefits that would be jointly drawn to the claimant and to the attorney, and when it was negotiated, the attorney would then take the fee out of those funds.

One of our concerns is that would then place outside of the Social Security Administration's control the actual payment of Social Security benefits to the beneficiaries and we would have lost any control over the actual amount or the timing. We would be depending upon a process outside of the Social Security Administration to do that.

The second, major consideration is one of operational issues. It would be a substantial operations and systems undertaking to de-

velop a system that would efficiently prepare and execute two-party checks involving attorneys who are third-parties who are not anywhere in our database presently. There would be a substantial amount of work that would be involved in doing that, but in answer to your question we have not recently considered that possibility, but those are a couple of the reservations that we had when this was considered some time ago.

Mr. MCCRERY. Well, of course, outside of the Social Security arena, in lawyers' offices everyday checks are made payable to both the claimant in a personal injury case and the attorney, and the division is made in the attorney's office. And it happens everyday. So I do not know why you could not enlist the services of the attorney representing the client to effectively do what you are doing in Baltimore by dividing the check and issuing two checks. He could do all that for you. All you would have to do is withhold the 6.3 percent of 25 percent. Just something to consider. I frankly, I just got it from this list of questions that somebody handed me and it seemed like a good idea to explore.

Mr. TAYLOR. Okay.

Mr. MCCRERY. I am an attorney and I do not trust all attorneys either, but generally they are honorable people and they will do what they should do with their clients and if they do not, they can get in a lot of trouble. So, you know, maybe we could make it a federal crime not to divide the payment properly.

Mr. TAYLOR. I was trying to avoid mentioning the third reason.

Mr. MCCRERY. Well, that was implicit in your first reason, but anyway something to think about.

Chairman SHAW. Mr. Hulshof.

Mr. HULSHOF. Thank you, Mr. Chairman. Are you an attorney, Mr. McCrery? I am a recovering attorney myself. Let me ask a question regarding something that is in your extensive statement, Mr. Taylor, on page eight that indicates in the middle of the page that SSA does not have a tracking system in place from the start to finish of the process to measure the time it takes to pay attorneys' fees.

You say generally, though, the fees can be paid within 60 days and I guess, forgive me, a very simplistic question, how do you know if you have no tracking system?

Mr. TAYLOR. That is a great question. The answer is both things are true. We do not have a tracking system. This 90 days was done from a special study that we did just before the legislation that enacted the 6.3 percent assessment, and that is what the special study showed and I do not have the exact data that the study disclosed. I am sure we could make that available, if necessary.

Mr. HULSHOF. Let me ask, too, that the legislation that the chairman and Mr. Matsui have introduced, that I have cosponsored and others on this committee, you indicate that the Social Security Administration might forfeit as much as two-thirds of the attorney fees assessments, and again how do we know that if you cannot track the processing time?

Mr. TAYLOR. Again, I would have to confirm this. It may have been based upon the results of this special study. Looking at the number of cases that were done within 30 days versus those that were done outside of 30 days.

Mr. HULSHOF. Do you have available or maybe some of your folks behind you of what percentage of SSI cases are represented by counsel? Do you have that available?

Mr. TAYLOR. Yes, I do. According to data that we maintain, in fiscal year 1999, just over 43 percent of SSI cases that went to a decision before an administrative law judge were represented by attorneys. Now there were more that were represented by non-attorneys, but for counsel that is the figure.

Mr. HULSHOF. Refresh my recollection how that compares to the percentage in disability cases?

Mr. TAYLOR. 73½ percent of what we would normally call the title II disability cases were represented by attorneys.

Mr. HULSHOF. I know that the General Accounting Office reports that the Association of Administrative Law Judges believed that extending the direct payment of attorneys' fees to SSI cases would actually benefit the claimants because cases with attorney representation in their belief have a better chance of receiving a favorable decision. Do you have an opinion, agree or disagree with that report?

Mr. TAYLOR. I have not seen that report. I have heard the speculation that that might account for some of the disparity and I cannot say that it does not account for some of the disparity. I would be hard-pressed to say that it accounts for all of it because there are other factors involved in whether or not a claimant is represented.

Attorneys, I am sure, exercise a screening function of their own in determining whether or not to take a case for representation. There are requirements in many states where interim assistance is being provided that claimants pursue their claims, at least through the hearing level, so there may be some less likely favorable decision cases reaching hearing levels in higher proportions.

Mr. HULSHOF. My time is about to expire so probably this would be my final question. Would the Social Security Administration support extending attorney fee withholding to the SSI program or not?

Mr. TAYLOR. Our present position is that we would not support that and I would be happy to share some of the reasons if you would like.

Mr. HULSHOF. If you could do that—

Mr. TAYLOR. Very quickly.

Mr. HULSHOF.—I will give you the opportunity, yes, sir.

Mr. TAYLOR. Sure. First of all, it has been the position ever since the SSI program was enacted that—and this was done specifically by the Congress—that these cases because of the purpose of the program and the needs of the claimants, would not be appropriate for a withholding process of their initial payment.

I think that is probably the main reason and it goes to the fact that many of these claimants, while they have been waiting for their case to be decided, have many pressing needs of basic necessities and that to remove this 25 percent from the initial payment might put them in a worse position, at least temporarily.

Secondly, as I mentioned before, many claimants are receiving interim assistance and they have agreements to reimburse the states for that assistance and if 25 percent of accumulated benefits

were carved out for direct payment off the top, we are not sure how the choice would be made as to who got paid first if there had to be a choice made.

And finally, this is a substantial operational endeavor for us because it would require our 1,300 field offices to get into the business of making attorney fee payments and they do not currently have to do that. Currently, the payments are confined to the small number of half a dozen or so processing centers. You would have to bring up a manual process, at least initially, and over 1,300 offices would be very difficult to manage.

We have done a very quick estimate of the impact and cost of doing this, and it runs at $23 million and 400 work years annually. This is our initial rough estimate of what it would cost to extend the direct payment to title XVI cases, and, of course, those work years would be competing against work years that are needed for other priority workloads.

Mr. HULSHOF. Thank you.

Chairman SHAW. Mr. Taylor, I want to pursue a question, the questioning that Mr. Matsui was doing awhile ago, because frankly the answer you gave I think was not totally in response to what he was saying, what he was trying to get at. And that question is why do you not just write the fee at the same time that you write the settlement figure? All you are doing is requiring someone to go back to the file a second time. And why can't all that be done at the same time?

Now you talked about there may be other litigants and what not. But if you have an assigned fee arrangement, at that point you know at least exactly what that particular litigant is entitled to. Why not just go ahead and write the fee at the same time?

Mr. TAYLOR. Mr. Chairman, I am sorry if I was not—

Chairman SHAW. Well, you may have been and I may have not understood it. So explain it to me. I do not mean to say that you were not responsive, but—

Mr. TAYLOR. Let me just try. We want to make accurate payments to claimants and we want to make accurate fee payments to attorneys. And those two things have to go hand in hand.

Chairman SHAW. Now if they have a fee agreement and it is a certain percentage with a $4,000 cap, what is so difficult about that?

Mr. TAYLOR. In fact, the average fee agreement is not $4,000. The average fee agreement paid is about $2,500. So—

Chairman SHAW. Well, it is a percentage with a $4,000 cap.

Mr. TAYLOR. And my point is that the fee agreements are most often paid based upon a percentage of the past due benefits and in order to calculate accurately the past due benefits in many cases, there is additional development that must be done such as the calculation of the offset by workers' compensation, for receipt of workmen's compensation.

Chairman SHAW. But you do not pay the claimant until you know how much you owe them.

Mr. TAYLOR. Well, we have placed a priority in the Social Security Administration upon making prompt payments to the claimants because we figure they have been waiting for these payments.

Chairman SHAW. Right.

Mr. TAYLOR. So we take a risk that there may need to be an adjustment at some point a little ways down the road of the claimant's payments. We want to get them in payment status and give them as much of the past due benefits as we can.

Chairman SHAW. Well, would it not be just as easy to go back and get the overage from the attorney as it is the claimant? Probably easier; would it not? I mean you are talking about lesser dollars and you are talking about deeper pockets in most cases. So I mean if you overpay a claimant, in all probability it is going to be very difficult to get any of the money back except deduct it from future payments.

If you overpay the lawyer, to begin with, you are talking about a maximum of $4,000, and if there is a calculation that has to be made where the lawyer has to return a certain percentage of that, I do not see the difference, and I think this may be probably the nut of the problem here is that if you wait until there is very little possibility of an offset, and then you pay the attorney—I do not think that is quite fair. I think you should, as you pay the claimant, go ahead and pay the attorney.

And I would guess that the little bit of money that you may lose would be more than offset by the administrative costs that you would save in not having to go back to the same file and calculate it. As long as you got the papers spread out, figure out what you owe everybody and get rid of it.

Mr. TAYLOR. Do it all at once.

Chairman SHAW. If you would look into that—I think somebody is handing you a note there. In fact, I know she handed you a note.

Mr. TAYLOR. I better read it. Well, I have had the record corrected for me here. The current payment that is made, the initial payment, is simply to put the claimant into current payment status. I was in error. The back payment is made at the time that the payment is made to the attorney. So I think I may have misled you.

Chairman SHAW. Wait a minute. What you are saying is the amount that the attorney's fees would apply to in the arrearages, I assume—I assume there is no attorney's fees on what goes forward.

Mr. TAYLOR. That is right.

Chairman SHAW. It is only on the arrearages—that then is made at the time?

Mr. TAYLOR. At the time the past due payment is made to the claimant.

Chairman SHAW. Oh, okay.

Mr. TAYLOR. So I am sorry if I—

Chairman SHAW. Well, then that makes sense.

Mr. TAYLOR. Okay.

Chairman SHAW. Okay. Do you have anything further to follow-up on that?

Mr. MATSUI. I am sorry. In view of the fact that I did not get the answer that I thought I understood, if I could follow up on this. So, in other words, the initial payment to the claimant is not the amount adjudicated. Is the amount that from certain date forward the claimant received money to keep him or her in a state of where

they can survive? Is that kind of the purpose of that initial payment?

Mr. TAYLOR. Get them in payment status.

Mr. MATSUI. Okay. Then when is the final adjudicated payment made to the claimant? How many days usually goes by? Because I think that is a critical issue as well. Do you happen to know that number?

Mr. TAYLOR. I do not know that number off the top of my head.

Mr. MATSUI. See the reason I am asking that, I mean I know they need the initial payment, but most of these people, if you are disabled, and it is a five, six, seven, $10,000 amount of the adjudicated claim that is awarded, it would seem to me that they need that money, too, because they are probably in arrearage on rent payments and a lot of other things at the same time. How many days goes by before they receive that amount?

It seems to me that is kind of an important factor because I mean if your priority is to pay the claimant, you know, I would hope that somebody would know that. Perhaps somebody knows in the back there because—on average, you know, is it six months or six weeks? From what—and again, maybe—this letter to Mr. Doggett dated February 16 this year from Mr. Apfel says that the average processing time for these cases from the date of decision to payment and the award notice to the claimant is about 30 days. So is that a correct figure? So basically what is it that then the entire—

[The information follows:]

February 16, 2000

The Hon. Lloyd Doggett
House of Representatives
Washington, D.C. 20515–3217

Dear Mr. Doggett:

This is in response to your letter concerning the implementation of the new attorney user fee. You requested specific information concerning the length of time it usually takes for fees to be paid, what actions are being taken to speed up that process, when the actions will be implemented and what the specific goals are for paying the fees.

The majority of cases involving the payment of attorney fees are decided at the hearing level. The average processing time for these cases from date of decision to payment effectuation/award notice to the claimant is about 30 days. Prior to the recent legislative changes, the Social Security Administration (SSA), as required by law, provided a 15-day administrative review period after the receipt of the award notice, so the claimant, representative and the administrative law judge or other adjudicator could review the approved fee amount. This requirement delayed the processing of attorney fees by at least 30 days after the date the claimant received past-due benefits. In addition, after the decision is made that the individual is eligible for benefits, SSA cannot calculate the past-due benefits due to the claimant and pay the attorney until all the development on the nondisability factors of the case is complete. So in some cases, we begin paying current benefits to the beneficiary pending completion of development and then pay the past due benefits later.

SSA does not have a direct measurement of attorney fee processing times, however, attorney fees are generally paid within 90 days of the award notice. Some cases take significantly longer to pay because of the need to develop additional evidence, such as proof of worker's compensation payments. SSA estimates that as a result of changes that we have made while implementing P.L.106–170, including the elimination of the 15-day pre-payment holding period for fee agreement payments, payments of attorney fees can now generally be made within 60 days of the award notice. After effectuating payment to the beneficiary, a separate action is required to process the attorney fee. We manually compute the fee, then the user fee, and finally update systems and effectuate payment through a separate manual payment

process. The new attorney fee process, as described above, was implemented on February 1, 2000.

You may be interested to know that last year, when the Administration proposed legislation to improve the attorney fee payment process, it included a provision to deposit the funds raised as a result of the 6.3 percent user fee to SSA's Limitation on Administrative Expenses (LAE) account. We intended to use the funds raised by the fee to improve the administration of the payment process. However, when the provision establishing the user fee was passed, as part of P.L. 106–170, it did not provide for the fees to be deposited in SSA's LAE account. Therefore, we are not receiving additional resources, which hinders our ability to make additional significant improvements on our current performance.

We implemented the changes described above to reduce the attorney fee processing time as much as possible, consistent with maintaining the program's integrity, and in concert with the other automation improvements currently underway within the Agency.

Thank you for your interest. I hope this information is helpful to you.

Sincerely,

KENNETH S. APFEL
Commissioner
of Social Security

Mr. TAYLOR. I am advised that the payment is made on average within 60 days.

Mr. MATSUI. 60 days, not 30 days.

Mr. TAYLOR. Which is about the same time that we think we can make the payment to the attorney which would be made at the same time.

Mr. MATSUI. Okay. I guess this 30 days then refers to the kind of initial payment?

Mr. TAYLOR. Well, it could refer to—I'm not sure what it refers to actually.

Mr. MATSUI. Yeah, you may want to look at this letter.

Mr. TAYLOR. I will.

Mr. MATSUI. Because it is different from your letter, from what you just said.

Mr. TAYLOR. Yes.

Chairman SHAW. What percentage of the claimants is Workers' Comp involved; do you know the percentage of that?

Mr. TAYLOR. We do not maintain that information.

Chairman SHAW. I understand from the people behind you that you just flat do not have that information.

Mr. TAYLOR. Yes.

Chairman SHAW. Well, at prior hearings we went through this claims process, from the day the petition was filed to the day of settlement. So I mean we have traveled through this and it is terribly long. I mean it is unconscionably long particularly when you are talking about people many of which are desperate. As Bob said, their rent is in arrearage and what not. I mean they can really be devastated during this period of time.

I think we need ways, once the case has been adjudicated, why you have to go 60 days. I mean if you or I were the defendant and went 60 days and there was an appeal involved, our bank accounts would have been frozen and everything else, and there is no reason why we cannot pay these claims efficiently. Obviously, and I think we probably all agree, you do not want to pay the attorney before

you would pay the client. However, it should be done simultaneously and really it should not take 60 days.

Mr. TAYLOR. Well, I would like to have the opportunity to provide exact information on that.

Chairman SHAW. I do not understand. Perhaps we will have to have another hearing to really zero in on that information, so that we are well advised as to what exactly—what is going wrong here, and it should be that these payments should be made very expeditiously. I think Mr. Collins had another question.

Mr. COLLINS. Mr. Taylor, I am a non-lawyer member of this committee. So my question will not be in favor of the lawyers. My understanding is that their fee is based on the back payment that is due.

Mr. TAYLOR. That is correct.

Mr. COLLINS. What is the length of time that it takes to process a claim from an applicant that is represented by an attorney or a lawyer versus those who are not?

Mr. TAYLOR. Congressman, I am not aware of a report that makes that distinction. There may be one. I am not aware of one that makes that distinction. I have no reason to believe that there is a great distinction, but I really cannot answer your question.

Mr. COLLINS. But the length of time that it takes to process the claim also determines the back pay?

Mr. TAYLOR. In general, that is right, yes.

Mr. COLLINS. Okay. It seems to me that the lawyer's fee ought to be based on the date of a calculation that would be back payment from the time the first claim was filed to the day the attorney took the case so that any extended period of time to process that claim would not increase the attorney's fee. You might get your claims processed a little bit faster by the attorney because I am told by the administrative law judge that a lot of these attorneys do not come to the hearings prepared and it drags out the case and the longer you drag it out, the percentage goes up with the amount of back payment.

Mr. TAYLOR. Congressman, I am sure that happens in some instances, but in other instances, many instances, I believe, attorneys who represent clients do a fine job before our administrative law judges.

Mr. COLLINS. Well, I tell you what. It just bothers me that we have a government agency that a person who is entitled to benefits from that agency would have to go hire a lawyer to represent them before the agency, because I understand all of the questions that become involved in it, too. Someone has to make a judgment. Sometimes the judgment is not according to the applicant's intent.

But I just, you know, it bothers me, too, that the longer you drag it out and processing the system, through the system, the larger the payment is, or the larger the fee is, and if you could handle the thing up front or have a set fee that when that lawyer took the case, they would not be enhanced by a longer period of time or dragging it out. Maybe they would get their stuff together, their act together when they went before these administrative law judges and help this process along much better than it has been done in the past. Thank you.

Chairman SHAW. Is there a process by which these cases can be reviewed so that some of them can be kicked out as deserving of payment before you get to that hearing process? Do you have to go through the hearing process on all of them? Is there a review process once these claims are filed where SSA may say well, gee, this one should have been allowed in the first place and just kick it out without a hearing? I mean pay it.

Mr. TAYLOR. Well, yes, within our existing process, we always have the option to decide the case favorably without holding the hearing and that happens in a significant number of cases currently.

Chairman SHAW. For the record, and we went through this once before, once somebody actually files their claim, what is the period of time before the hearing?

Mr. TAYLOR. The time from the request for hearing to the date the hearing is held?

Chairman SHAW. I guess the claim is the request for hearing. I suppose that is what it is.

Mr. TAYLOR. The reason I asked if you went from the date that the initial application for benefits was filed and took it forward to the date that the—

Chairman SHAW. Well, it has got to be denied by—

Mr. TAYLOR. That is right.

Chairman SHAW. And then once it is denied, that is when it gets into your court.

Mr. TAYLOR. That is right.

Chairman SHAW. So this is, in effect, an appeal process?

Mr. TAYLOR. Our current average processing time, and I would be happy to give you the exact figure, and I am quoting this from memory, is something slightly in excess of 300 days from the date the request for hearing is filed to the date that the decision is issued. Now this is an average of all cases, favorable and unfavorable.

[The information follows:]

Average processing time from the date of the request for a hearing to the date the decision is issued is 301 days.

Chairman SHAW. So you add 60 days to it, it is going to be a year for you to get a hearing.

Mr. TAYLOR. And we have done a great deal, Mr. Chairman, in the past several years to bring that figure down.

Chairman SHAW. And what percentage of the appeals prevail?

Mr. TAYLOR. About 55 percent prevailed in the past year. Again, I could give you the exact number, but I think that is pretty close.

[The information follows:]

Including partially favorable decisions, 54.5 percent of hearing level cases are allowed.

Chairman SHAW. That is close enough. Okay. Anybody else have anything else?

Mr. MCCRERY. Mr. Chairman, just one more question.

Chairman SHAW. Okay.

Mr. MCCRERY. Mr. Taylor, I am told that there are two arrangements that an attorney can make for being paid a fee. One is a straight 25 percent of the arrearages and the other is that he could

itemize his expenses and submit that to the Social Security Administration for payment; is that right?

Mr. TAYLOR. That is correct.

Mr. MCCRERY. Can you tell me how many attorneys opt for the latter, itemizing the expenses, the percentage?

Mr. TAYLOR. Congressman, I cannot tell you how many attorneys, but I can tell you that as a percentage of fee payments that are made, our most recent data current through this year is that about 12 percent of the payments are based upon that fee petition, the detailed itemization process, and 88 percent are fee agreements.

Mr. MCCRERY. And I assume it takes longer to process the itemization—

Mr. TAYLOR. That is correct.

Mr. MCCRERY.—arrangement?

Mr. TAYLOR. That is correct.

Mr. MCCRERY. Does the bill that we are considering make a distinction between the two types of reimbursement?

Chairman SHAW. I do not think so, no.

Mr. MCCRERY. We probably should do that. If an attorney chooses to itemize—

Chairman SHAW. That is a good point.

Mr. MCCRERY.—I do not think he should be surprised that it is going to take longer to get his payment. Thank you.

Chairman SHAW. I think also—and this is giving me a little trouble right now—that we do not want to get the attorneys' fees out in front of the claimants' payments, but I do not think either one should go 60 days unless there is some complicating factor. I think we need to look further into that.

Mr. Taylor, thank you.

Mr. TAYLOR. Thank you.

[Questions submitted by Chairman Shaw, and Mr. Taylor's responses, are as follow:]

1. *If representatives are entitled to world class service, why hasn't SSA developed performance standards for this workload and developed methods for measuring this performance before now?*

SSA believes that attorneys are entitled to world class service. However, SSA uses separate systems to track decision dates and attorney fee payment dates, and these two systems are not compatible. Moreover, the main system arranges its records according to the beneficiary's data only. This increases the difficulty of tracking attorney payment data. Therefore, although SSA can conduct special runs to obtain fee payment processing data, it cannot obtain this data on an ongoing basis. Because of competing priority workloads, SSA did not routinely conduct these special runs. Therefore, SSA did not develop these performance standards.

2. *Recently, I wrote to the Commissioner regarding whether SSA should increase the $4,000 limit under the fee agreement process. He agreed that an updated assessment of the issue is appropriate. What is the status of this assessment?*

A recommendation regarding action on the $4,000 limit is in preparation for the Commissioner's review.

3. *Does SSA maintain data on attorney fees charged in SSI and disability cases? Is there anything to show, as indicated by the National Senior Citizens Law Center, that many attorneys lower fees for SSI cases? If so, what is the difference in fees?*

SSA does not maintain a central data pool on fees for representation. We have no evidence that attorneys generally charge lower fees for working on SSI cases.

4. *Why did SSA originally recommend that the attorney fee assessment be set as a percentage of the fee as opposed to a flat fee? Do you have information to show that*

SSA's costs increase as the amount of the fee increases? What are your views regarding expressing the user fee as a fixed amount instead of a percentage? Why?

SSA designed the current rate to recover $26 million, the estimated cost in 1995 of processing attorney fee payments and collecting the assessment. SSA does not have information which shows that processing costs increase as fee amounts increase. However, we prefer the current method of assessment to a flat rate for several reasons. A fixed dollar amount would be unfair to those who had small fees, because the flat assessment would represent a very large proportion of the attorney's fee. In fact, some members of Congress objected to a fixed dollar amount in the past for this reason. An equal percentage for all cases distributes the cost of the service proportionately among the cases. Furthermore, charging a fixed rate for all cases would prevent SSA from covering the rising cost of processing fees.

5. *Some critics of the present attorney fee payment process have proposed that the Prompt Payment Act provisions be expanded to cover attorney fee payments so that interest and late charges can be assessed on SSA when payment are not made timely. What is SSA's position on this proposal?*

The Prompt Payment Act (PPA) allows vendors from whom the government purchases goods or services to collect interest on late payments for those sales. However, SSA does not purchase services from the claimants' attorneys. Instead, it provides a service by collecting and paying their fees. SSA does not support expanding the PPA to include late fee payments. Certain fee actions, such as fee petitions or cases involving offset computations, require longer to process. Therefore, it is possible that SSA would have to pay an interest penalty even when it properly processed an action.

6. *Based on what you have learned from your review of the attorney fee process so far, do you expect the rate to be reduced for 2001?*

Our review of the attorney fee process is not yet complete. It would be premature at this time to judge whether the rate should be reduced.

7. *Testimony from Ms.Shor said that when SSA pays electronically, it pays the claimant but does not pay the attorney at the same time. Why is this? In what percentage of cases, theoretically, could the benefit and the fee be paid at the same time? In what percentage of cases are they actually paid at the same time? Please explain any difference in the two figures.*

The SSA mainframe payment system is designed to recognize only beneficiaries and store data that is based on the beneficiary's social security number. In order to pay a non-beneficiary, we must use a manual payment process. Therefore, we cannot pay the beneficiary and attorney at exactly the same time.

8. *What was the Administration's position on the disposition of the proceeds of the attorney fee assessment? Specifically, did OMB and SSA agree on the proposed legislative language on the issue?*

OMB and SSA agreed on the proposed legislative language to deposit the funds raised as a result of the 6.3 percent user fee to SSA's Limitation on Administrative Expenses Account (LAE). OMB and SSA also agreed on the final legislative language to deposit the funds to the Trust Fund.

9. *How much time elapses in attorney fee cases, on average, between the issuance of the favorable decision and the issuance of the first check to the claimant?*

We estimate that the average processing time for hearing-level cases from the date of the decision to payment effectuation/award notice to the claimant is about 30 days.

10. *What percentage of attorney fee cases involve worker's compensation issues? What other types of issues require additional development by SSA before the past-due benefits can be computed and paid? What percentage of the attorney fee caseload do these other issues constitute?*

Based on a special system selection for the month of May 2000, we estimate that 25% of the attorney fee payment cases involved worker's compensation. The other types of issues requiring development before the past-due benefits could be calculated are prisoner suspension, verification of military service and subsequent auxiliary development. Unfortunately, we do not maintain management information on these workloads with respect to attorney involvement.

11. *Why was SSA unable to provide information about the number of attorney fee checks issued in each month in calendar year 1998 and 1999 in response to Nancy*

Shor's Freedom of Information Act request when you were able to provide some of these data at the June 14 hearing?

The request was for data month by month during calendar years, but we do not maintain that information for each month.

Chairman SHAW. Our next witness is from the General Accounting Office. We have got Barbara Bovbjerg, who we welcome back. She is the Associate Director, Education, Workforce and Income Security Issues, and she is accompanied by Debra Sebastian and Valerie Melvin. Welcome and again, you are familiar, Barbara, with this committee. We welcome you back. Again, we have your full testimony and you may proceed as you see fit. I finally mastered your name.

Ms. BOVBJERG. I noticed that. I was very impressed.

Chairman SHAW. I had to work on it.

Ms. BOVBJERG. I have a unique identifier besides a Social Security number.

STATEMENT OF BARBARA D. BOVBJERG, ASSOCIATE DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, HEALTH, EDUCATION, AND HUMAN SERVICES DIVISION, U.S. GENERAL ACCOUNTING OFFICE; ACCOMPANIED BY DEBRA SEBASTIAN, ASSISTANT DIRECTOR, AND VALERIE MELVIN, ASSISTANT DIRECTOR, ACCOUNTING AND INFORMATION MANAGEMENT DIVISION

Ms. BOVBJERG. Mr. Chairman and members of the subcommittee, I really am pleased to be back before this body to discuss issues regarding payment of attorney fees in Social Security's disability programs. The Disability Insurance and Supplemental Security Income programs provide benefits to millions of people with severe long-term disabilities. At any time during SSA's disability determination process, applicants may seek help from an attorney in pursuing their claim and attorneys are entitled to be paid if the benefit claim is successful.

Under the DI program, SSA pays attorney fees directly from any past-due benefits awarded to the claimant. Complaints about the timeliness of these payments coupled with a new 6.3 percent user charge on attorneys has raised questions about this payment process.

Although my written statement covers a variety of issues related to the attorney fee payment, I would like to focus my oral remarks on just three aspects of this topic: the process itself, the costs associated with it, and the proposed changes to the way the user charge is assessed.

My testimony is based on our ongoing review of the attorney fee payment process mandated by the Ticket to Work Act.

First, let me talk about the process. Although SSA has been paying attorney fees from past-due benefits for 30 years, the process remains inefficient and involves many steps, a lot of them manual. Once an applicant is found to be disabled and SSA officials approve

the attorney fee in principle, the case will be forwarded to an SSA processing center for determination of benefits.

SSA must calculate not only what benefits have been earned, but also to what extent they should be offset by any other payments like workers' compensation. This process can take six months or more to complete.

Once the benefit amount is determined, SSA prepares an award notice to the beneficiary which also states how much will be paid to the attorney and how much is for past-due benefits. At this point, for SSI cases, SSA pays beneficiaries all of the past-due benefits and the beneficiaries assume responsibility for paying the attorney.

For DI cases, however, SSA pays the beneficiary but withholds the attorney's fee for separate payment. This process involves a manual calculation of the 6.3 percent user charge to be withheld and hand carrying lists of attorneys and the fees owed to them to staff, who then enter these data manually into a system that ultimately gives Treasury the information to write and mail a check.

We do not know what this process costs. The 6.3 percent user charge specified in the Ticket to Work Act and designed to recover SSA's costs came from an SSA estimate made in 1994. Actual costs are not known because SSA was not previously required to capture them in its information systems and so had no methodology to do that.

For the future, however, SSA is indeed developing such a methodology. They told us last month that they would capture the costs of withholding and paying the attorney fees but not the costs of the ALJ time spent reviewing and approving the fees, although these are costs that the law appears to require and were included in the original 6.3 estimate.

However, in commenting on a draft of my statement yesterday, SSA has said that they do plan to capture these other costs, but now we have not had time to determine really which approach is ultimately to be taken. But if SSA indeed is to recover the ALJ review costs, it will be important not only to begin collecting this information right away but also to separate the costs associated only with DI cases so the DI attorneys are not shouldering costs associated with SSI claims. We hope to be able to report more on these issues in December.

Finally, let me turn to the proposed changes in the user charge, specifically whether to waive the charge if the payment is not timely. SSA has struggled with making timely payments to attorneys. Legislation is proposed that would require the attorney fees to be paid within 30 days or the user charge would be waived. The available data suggest that SSA will have trouble meeting this deadline. While it is possible for SSA to increase the efficiency of the process, it will be important for attorneys to understand that some factors that delay payments are outside the agency's control and are unlikely to change regardless of a time limit.

In conclusion, SSA is still in the early stages of implementing changes required by the Ticket to Work Act and data are not yet available on the effects of these changes or on the underlying cost of processing attorney fees. We look forward to learning more about this process and working with SSA to complete our evaluation. And

that concludes my statement. We are happy to answer any questions you have. I am the program person, but I was afraid of having to have a lot of notes passed up, too, and so I have brought with me Debra Sebastian, who is our audit and accounting expert, and Valerie Melvin, who is our systems expert.

[The prepared statement follows:]

Statement of Barbara D. Bovbjerg, Associate Director, Education, Workforce, and Income Security Issues, Health, Education, and Human Services Division, U.S. General Accounting Office

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss issues involving the Social Security Administration's (SSA) process for paying attorneys representing applicants for disability benefits. SSA operates the nation's two largest programs providing benefits to people with severe long-term disabilities—the Disability Insurance (DI) program and the Supplemental Security Income (SSI) program—which together provide an important economic safety net for individuals and families. At any point in the disability determination process, applicants may seek help from an attorney or other individual as they pursue their claim. In many instances, when applicants are found eligible for DI benefits, SSA will pay the attorney directly from the beneficiaries' past-due benefits. Complaints about the time it takes SSA to pay attorneys coupled with recent legislative changes to the attorney payment process—changes that include collecting a user fee for paying the attorney—have raised questions about whether additional changes are needed to the payment process.

As you requested, today I will discuss three areas of the attorney payment process: the process itself, including the costs of processing the payments; possible changes to the way the user fee is charged; and changes being considered for the attorney fee payment process overall. My testimony is based on our ongoing review of the attorney fee process, which was mandated by the Ticket to Work and Work Incentives Improvement Act of 1999 (the Ticket to Work Act).[1] Our final report is due to the Congress by December 2000.

In summary, while SSA has been paying attorney fees from beneficiaries' past-due benefits for over 30 years, the payment process remains inefficient, and little historical data are available to help us analyze proposed changes. Under the current procedures, the inefficiencies in processing fee payments to attorneys result from using a number of different staff in different units and various information systems that are not linked, and are not designed to calculate and process all aspects of the attorney fee payment, thus necessitating manual calculations. The Ticket to Work Act includes a provision that requires SSA to charge an assessment—referred to in my statement as a user fee—to recover the costs of this service. We have only begun to analyze the estimate that was used as a basis for the current user fee, and SSA does not know the actual cost it incurs in processing attorney fees; however, the agency is currently developing a methodology to better capture these costs.

SSA has trouble with making timely payments to attorneys, and some have questioned the appropriateness of charging a user fee for a service that takes so long. A recent legislative proposal calls for eliminating the user fee if SSA does not pay the attorney within 30 days. In many cases, it will be difficult for SSA to meet these timeframes. Attorneys need to realize that, while it is possible for SSA to improve the efficiency of the process it uses to pay them, some factors that delay their payments are outside SSA's control and are unlikely to change at this time.

Three possible changes to the attorney fee payment process include whether (1) joint checks for past-due benefits should be issued to the beneficiary and the attorney, (2) the dollar limit on certain attorney fees should be raised, and (3) SSA's attorney fee payment process should be expanded to the SSI program. These changes would have both policy and administrative implications that need to be considered. Some of the changes could increase attorney representation for disability applicants, according to attorneys we spoke with. However, not everyone agrees with this premise. Moreover, there are some drawbacks to these changes. For example, issuing joint checks to the beneficiary and the attorney might delay payments to the beneficiary and might increase the chance that attorneys would short change beneficiaries. Finally, SSA indicated it may need to make significant modifications to its

[1] P.L. 106–170 primarily focuses on strategies to help disabled beneficiaries work by providing access to vocational rehabilitation, employment, and other support services.

information systems to issue joint checks or pay attorneys who represent SSI recipients.

BACKGROUND

The DI program, created in 1954, provides monthly cash benefits to workers who have become severely disabled and to their dependents and survivors. These benefits are financed through payroll taxes paid by workers and their employers and by the self-employed. In fiscal year 1999, 6.5 million individuals received DI benefits. The SSI program was created in 1972 as an income assistance program for aged, blind, or disabled individuals whose income and resources are below a certain threshold. SSI payments are financed from general tax revenues, and SSI recipients are usually poorer than DI beneficiaries. In fiscal year 1999, about 5.3 million blind and disabled individuals received SSI benefits.[2] For both programs, disability for adults is defined as an inability to engage in any substantial gainful activity because of a severe physical or mental impairment. The standards for determining whether the severity of an applicant's impairment qualifies him or her for disability benefits are set out in the Social Security Act and SSA regulations and rulings.

SSA's disability claims process is complex, multilayered, and lengthy. Potential beneficiaries apply for benefits at any one of SSA's local field offices, where applications are screened for nonmedical eligibility: applicants for DI must meet certain work history requirements, and applicants for SSI must meet financial eligibility requirements. If the applicants meet the nonmedical eligibility requirements, their applications are forwarded to a state disability determination service (DDS), which gathers, develops, and reviews the medical evidence and prior work history to determine the individual's medical eligibility; the DDS then issues an initial determination on the case. Applicants who are dissatisfied with the determination may request a reconsideration decision by the DDS. Those who disagree with this decision may appeal to SSA's Office of Hearings and Appeals (OHA) and have the right to a hearing before one of the administrative law judges (ALJ) located in hearings offices across the country. Individuals who disagree with the ALJ decision may pursue their claim with SSA's Appeals Council and ultimately may appeal to a federal district court.

This process can be both time-consuming and confusing for the applicants and may compel many of them to seek help from an attorney. Obtaining representation for a pending case has become increasingly popular because disability representatives have been successful in obtaining favorable decisions for their clients upon appeal.[3] In fiscal year 1997, about 70 percent of all cases decided at the ALJ-hearing level involved representatives.

The fees attorneys representing DI and SSI applicants can charge are limited by law and must be approved by SSA. In order to be compensated, attorneys must file either a fee agreement—a formal contract signed by the applicant and the attorney setting the fee as a percentage of the applicant's past-due benefits—or a fee petition that details the specific costs associated with the case. Past-due benefits are calculated by multiplying the monthly benefit amount by the total number of months from the onset of the illness or injury to the time when the beneficiary begins receiving monthly payments. When fee agreements are filed, attorney fees are limited to 25 percent of the applicant's past-due benefits, up to $4,000 per case.[4] In fee petition cases, however, SSA can approve any fee amount as long as it does not exceed 25 percent of the beneficiary's past-due benefits. For DI cases, SSA usually withholds the amount of the fee from the beneficiaries' past-due benefits and pays the attorneys directly, in effect guaranteeing payment for the attorney. In SSI cases, however, SSA does not have the authority to pay attorneys directly, and only calculates the amount an attorney is due. Attorneys must instead collect their fees from the SSI recipients.

Effective February 1, 2000, the Ticket to Work Act imposed a 6.3 percent user fee on attorneys for SSA's costs associated with "determining and certifying" attorney fees on the basis of beneficiaries' past-due benefits. This amount is deducted from the approved attorney's fee. The act also directed us to study a number of issues related to the costs of determining and certifying the attorney fees, "effi-

---

[2] Some DI benefit recipients have incomes low enough to qualify them for SSI as well and receive benefits from both programs.

[3] Data from fiscal year 1997 show that the percentage of favorable hearings decisions for claimants with representation was about 58 percent, compared with 39 percent for individuals without representation; however, because attorneys might select only cases that they feel will result in a favorable decision, the data might be misleading.

[4] In certain fee agreement cases, attorneys may request fees up to $5,000 if they feel that work on the case warrants a higher fee.

ciencies" available to reduce these costs, changes to the attorney fee requirements, and the new user fee.

THE PROCESS AND COST OF PAYING ATTORNEYS

While SSA has been paying attorney fees for over 30 years, the payment process itself is inefficient, and the costs of the process are not known. Approving and paying attorney fees is a complex process that involves many steps; a number of staff in different units and locations; and various information systems that are not linked and that, therefore, require considerable manual intervention. Regarding the costs to administer this multistep process, we have not yet fully determined whether SSA's past estimate appropriately captured the costs associated with administering attorney fees; however, the agency is currently developing a way to capture actual costs.

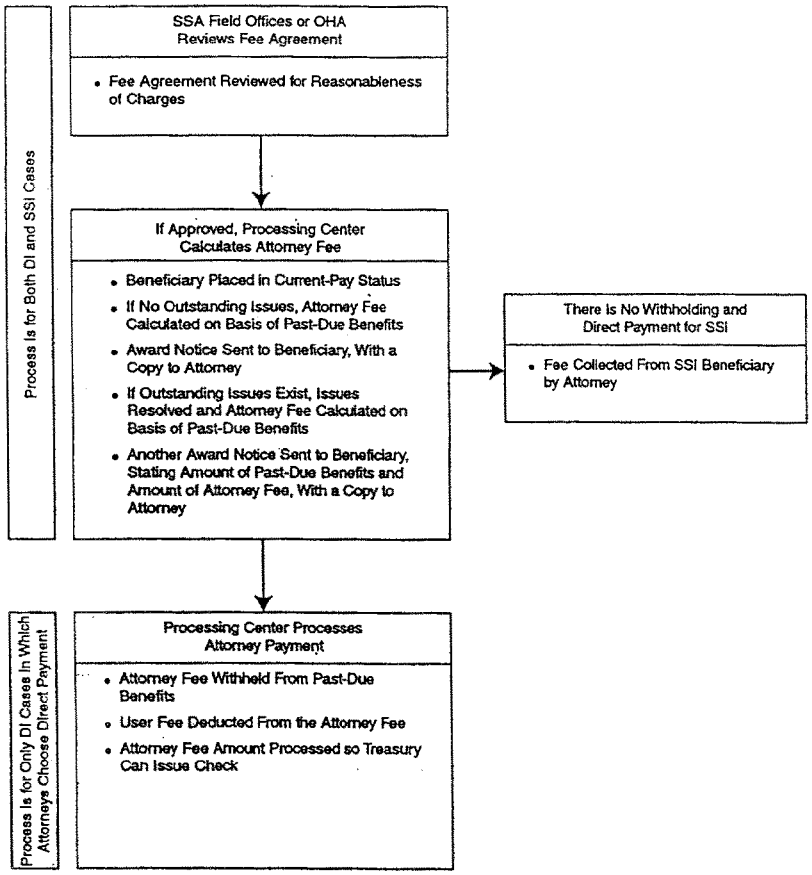
The Payment Process Involves Many Steps

Attorneys are compensated for their services through either a fee agreement or a fee petition. Attorneys told us that the fee agreement is usually an easier, quicker way to get paid and that, although the fee petition is useful, it is also a more cumbersome tool used primarily when potential fees exceed the statutory limits or when attorneys were unable to file a fee agreement at the beginning of a case. In 1999, fee agreements accounted for about 85 percent of attorney payments, and fee petitions accounted for the balance.

Figure 1 shows the steps involved in processing attorney fee agreements. First, officials in SSA's field offices or ALJs in OHA—depending on where the case is being determined—review fee agreements for DI and SSI cases to assess the reasonableness of the attorney fee charges.[5] If a favorable decision is made on the case and SSA approves the fee agreement, both items—the applicant's case and the fee agreement—are forwarded to a processing center for payment.

[5] All parties involved—SSA, the beneficiary, and the attorney—may question the amount of the attorney's fee, and the fee may be changed if warranted.

Figure 1: Key Steps for Processing Attorney Fee Agreements



Source: GAO analysis based on SSA information.

At the processing centers, SSA takes the steps necessary to effectuate payment to the beneficiary and calculate the attorney fees. For both DI and SSI cases, the processing center staff first place the beneficiary in current-pay status so that he or she can begin receiving monthly benefits as soon as possible. The processing center also calculates the attorney's fee—25 percent of past-due benefits up to $4,000. The processing center then sends the beneficiary an award notice, which states the amount of benefits the beneficiary will receive and the amount of money that the beneficiary agreed to pay the attorney as stipulated in the fee agreement. A copy of the award notice is also sent to the attorney.

In some cases, however, SSA must obtain additional information to determine the final amount of the beneficiary's benefits, which also affects the amount the attorney receives. In these cases, the agency withholds past-due benefits until this additional information is obtained, as the beneficiary's past-due benefit amount may be reduced—or offset—by other payments that have been made to the beneficiary, such as workers' compensation payments. Additionally, in cases in which the applicant was determined eligible for both DI and SSI, benefit amounts to be paid by the two

programs need to be adjusted before the final past-due benefit payment is made. These offset and coordination activities involve manual steps—such as dealing with payers of workers' compensation insurance—and can take as long as 6 months to complete. When SSA has had to take extra steps to determine the final past-due benefit amount and the amount the attorney should receive, the agency prepares and mails another award notice to the beneficiary and the attorney. At the time this award notice is sent, the beneficiary's past-due benefits are also processed for payment on one of SSA's information systems. These information systems—the Modernized Claims System (MCS) and the Modernized Supplemental Security Income Claims System (MSSICS)—are designed to process payments for beneficiaries or their representatives only—they are not designed to effectuate payments for nonbeneficiaries, such as attorneys.

In DI cases only, after the award notice has been mailed, and if the attorney has elected to have SSA withhold his or her fee from the past-due benefits, SSA begins steps to have the Department of the Treasury issue a check to the attorney. Staff must manually calculate the 6.3 percent user fee and deduct it from the total fee amount. Then various information systems and many manual steps are involved in communicating the attorney fee information to Treasury. For example, data from one information system on the amount of each attorney payment are copied by hand to form a list of payees. Staff then deliver the list to another part of the processing center where the payee data are then manually entered into another information system for further processing. As soon as all the attorney fee information has been verified, SSA sends the information to Treasury so that a check can be issued.

For SSI fee agreement cases, the beneficiary and attorney receive an award notice similar to the one for DI cases—that is, the amount of past-due benefits is stated as well as the amount of money that the beneficiary agreed to pay to pay the attorney. SSA is not authorized to withhold and to direct payment for SSI cases. The attorney must obtain payment directly from the beneficiary.

When a fee petition is involved, the attorney submits a statement detailing his or her charges for the case following a favorable decision. The petition is usually reviewed by an ALJ. If the ALJ approves the fee, the petition is sent to the processing center, where it is processed in the same manner as the fee agreements.

The Cost to SSA of Paying Attorneys Is Unclear

The Ticket to Work Act requires SSA to impose an assessment, or user fee, to pay for the costs the agency incurs when paying attorneys directly from a claimant's past-due benefits. For calendar year 2000, the act established the user fee at 6.3 percent of the attorney fees; for calendar years after that, the percentage charged is to be based on the amount the Commissioner determines necessary to fully recover the costs of "determining and certifying" fees to attorneys, but no more than 6.3 percent.

The actual costs of administering attorney fees are not yet known because SSA was not required to capture these costs in its information systems and did not have a methodology to do so. The 6.3 percent user fee found in the law was based on an estimate prepared by the agency. Documentation SSA provided us indicates that the percentage was computed by multiplying the numbers of fee petitions and fee agreements the agency processed in 1994 by the amount of time SSA determined it spent on various related activities. When data were not available on the volume of activities or the time spent on them, SSA used estimates. The agency's overall cost estimate included both the time spent by the ALJs reviewing documentation to support the attorney fees—that is, the fee petitions and fee agreements—as well as the processing centers' costs associated with calculating the fees, choosing the notice language, and preparing the notices. In addition, the agency included the cost of administering the user fee itself. We recently received information on the basis for SSA's 6.3 percent user fee calculation and have only begun to analyze the assumptions the agency used to compute it.

In order to comply with the Ticket to Work Act, SSA is currently in the process of developing a methodology to capture the current costs of administering the attorney fee provisions. These costs could then provide the foundation for the agency's decisions about what the rate should be to achieve full recovery of costs. SSA has established a work group to identify the components of administering attorney fees and to develop its new methodology. Thus far, the work group has identified four components associated with the cost of administering attorney fees: (1) the time that SSA field office staff spend informing claimants that they are entitled to legal representation when filing an appeal; (2) the time it takes an ALJ to review and approve the fee; (3) the charges incurred by SSA's Office of Systems to program systems to track attorney fee cases and related computing time to generate a payment file/tape for Treasury to use to pay the attorney; and (4) the process for calculating

the attorney fee, entering relevant attorney and other key data into SSA's information systems, and certifying related amounts for payment.

In April and May of this year, SSA work group officials told us that they do not plan to capture cost information from the first two components because it would be time-consuming to do so, and the methods currently available to SSA for capturing these two types of costs may not produce reliable results. For the third component, SSA officials told us they can readily gather cost information related to time spent on programming SSA's systems to track attorney fees. However, SSA does not have a cost allocation methodology in place to determine related computing time for processing attorney fees. SSA officials indicated that computing time would constitute an insignificant portion of SSA's total costs to administer attorney fees. To capture data on the fourth component, SSA modified one of its information systems in February 2000 to determine the number of attorney fee cases it administers. Using the number of cases it processes, SSA is working on a methodology to estimate the costs involved in this fourth component for paying attorneys. SSA plans to have this cost data available by the end of fiscal year 2000.

However, in commenting on a draft of this statement, SSA officials told us that they do plan to capture costs for the second component—the time it takes the ALJ to review and approve the fee. In reviewing the law, the cost of ALJ time spent reviewing and approving fees appears to be part of the cost of "determining and certifying" fees and may represent a significant portion of the total costs. As SSA determines the ALJ costs in its current approach, it will need an allocation methodology that accurately allocates the costs associated with DI cases for which SSA is paying an attorney directly to those cases. Attorneys we talked with told us they are concerned now that they are paying more than their fair share of the cost of the process.

POSSIBLE CHANGES TO THE WAY THE USER FEE IS CHARGED

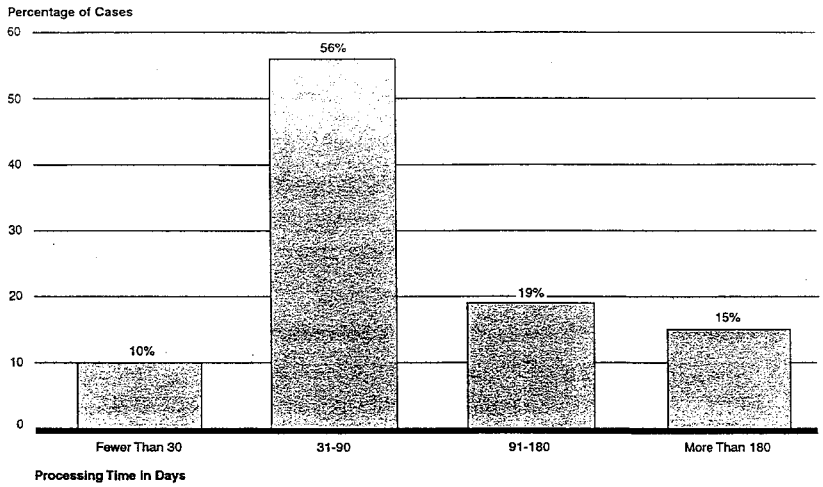
Attorneys have expressed concern about the length of time it takes SSA to process their fees and have questioned the appropriateness of charging a user fee for a service that takes so long. In regard to the user fee, you specifically asked us to look at issues surrounding (1) linking the amount of the user fee to the timeliness of the payment to the attorney and (2) expressing the user fee as a fixed amount instead of a percentage. When considering one or both of these changes, certain policy and administrative implications would need to be addressed.

Timeliness of Payments to Attorneys

According to the National Organization of Social Security Claimants' Representatives (NOSSCR),[6] individual attorneys, and SSA officials, SSA often has trouble making timely payments to attorneys. Processing attorney fees represents a small part of SSA's overall activities—in 1999, we estimate that SSA processed about 6 billion beneficiary payments and SSA reported it processed less than 200,000 attorney payments. Additionally, SSA officials told us that they view such responsibilities as paying beneficiaries as more directly linked to their mission than paying attorneys. As a result, SSA has not routinely gathered and monitored performance data on the length of time it has taken to pay attorneys. However, recently tabulated data show that from January 1995 through May 2000, only 10 percent of attorney fees for fee agreements were paid within 30 days from the time of the beneficiary is put on current-pay status to payment of fees. As figure 2 shows, there is a wide range of elapsed processing times for payments.

[6] NOSSCR is an interest group for Social Security lawyers.

Figure 2: Processing Time of Fee Agreement Cases From January 1995 to May 2000



Source: SSA.

Note: These data refer only to cases in which the beneficiary was eligible for DI; they do not include cases in which beneficiaries were eligible for both DI and SSI, which take longer to process.

This sometimes lengthy payment process can be attributed to a number of factors—some within and some outside SSA's control. Factors within SSA's control include the actual processing steps and systems used as well as the relative priority attorney fee payments are given compared with other SSA activities. As mentioned earlier, SSA's process for administering attorney payments includes many manual steps. For instance, staff manually record attorney fee information—names, addresses, and amount to be paid—on SSA forms and then physically walk the information to different units for processing. This manual intervention is needed because SSA's information systems are not currently programmed to handle this work. Manual processes leave room for human error and require additional work to check for accuracy, which results in a longer fee processing time. Additionally, we were told that it can take months for an ALJ to review and approve fee petitions; during this time, the attorney waits for payment.

Competing work priorities can also contribute to payment delays. Processing technicians have responsibilities other than their attorney fee workload. When these other workloads grow, attorney fee payment processing may receive less priority. For example, recently SSA had to redirect the work of a substantial number of processing technicians to handle the temporary workload increase that resulted from the new law eliminating the earnings test for individuals who receive retirement benefits and continue to work.[7] In addition to work surges caused by legislation, some processing center staff routinely answer SSA's 800 number during peak hours.

[7] Before the Senior Citizen's Freedom to Work Act of 2000, when retired beneficiaries worked, benefits were lowered according to a formula based on their earnings. Under the new law, beneficiaries at the full retirement age of 65 can earn any amount without reductions in their benefits. Adjusting benefits and notifying affected beneficiaries created a temporary surge in SSA's workload.

These staffing fluctuations may result in a temporary halt to attorney fee and other work while the priority workload is completed.

Some payment delays are outside SSA's control, such as when SSA is waiting for information from other agencies or individuals. After a favorable decision, SSA processes the case for payment of past-due benefits and for attorney fees. SSA refers to dealing with all outstanding issues as "developing the case." This must be done before the amount of past-due benefits are finalized and the attorney fees can be determined and payments processed. Issues such as dealing with payers of state workers' compensation insurance can substantially increase processing times. Further, in fee petition cases, SSA has to wait until after the attorney files the petition before beginning payment action for the attorney.

However, one recent change may actually speed up processing times for attorney payments. The Ticket to Work Act eliminated a compulsory 15-day waiting period that had been in place to permit the beneficiary, SSA, or the attorney to protest the attorney fee amount. While these affected parties still have the option to protest a fee, SSA is no longer required to wait to process the attorney's fee. NOSSCR and some individual attorneys told us that it appears SSA's fee processing has been faster since February 1, 2000, when the agency began implementing this change; however, data are not available to compare the current time frames with the ones shown in figure 2.

Linking the User Fee to the Timeliness of Attorney Fee Payments

To address timeliness concerns, a recent legislative proposal (H.R. 4633) would permit the user fee to be assessed against attorneys only if SSA pays attorneys within 30 days from the time of initial certification of benefits. Figure 2 above shows that from 1995 to the present, SSA has only been able to meet this timeframe in 10 percent of the cases. However, certain issues related to this proposal should be clearly understood by both SSA and the attorneys. All parties involved must clearly understand at what point in the process the clock starts ticking, when it stops, and what activities are performed during this period. When considering the current legislative proposal or contemplating other options, concerned parties need to weigh the attorneys' right to be paid in a timely manner with SSA's need to ensure the accuracy of its payments.

While SSA's current process is inefficient and the agency can make some improvements, not all factors are within SSA's control, such as awaiting fee petition information from attorneys and coordinating workers' compensation offsets. The current legislative proposal states that the clock starts ticking with initial certification of benefits—also referred to as the point when the beneficiary is put in current-pay status. At this point, SSA might be developing the case for final calculation of past-due benefits and might not have control over processing times. Attorneys need to realize that because the proposal starts the clock with initial certification, and additional work may still need to be done to develop the case, the total elapsed time from favorable decision to attorney fee payment might not actually be decreased. Information on these issues needs to be clearly communicated or the frustration and complaints with the process are likely to continue. In addition, having the clock start before SSA has complete control over the process could create perverse incentives that may actually delay payments to attorneys. Because SSA does not have control over all the activities that occur following initial certification of benefits, it is conceivable that some attorneys might view this as an opportunity to delay providing needed information to SSA in hopes of avoiding the user fee.

Further Efficiencies Are Possible

Aside from the delays that are outside its control, SSA is aware that there are steps it could take to make the process more efficient. For example, agency officials have said that instituting direct deposit of attorney fees is more efficient; it could shorten the time it takes for the fee payment to reach the attorney, and could eliminate delays that result when attorneys change their addresses without notifying SSA.[8] SSA currently pays 65 percent of beneficiaries by means of direct deposit and wants to expand this approach to all its transactions.

Possible improvements to SSA's information systems may also help reduce processing times. For instance, enhancements to SSA's information systems could eliminate much of the manual workload involved in processing and certifying attorney fees. As stated earlier, various information systems are currently used to process SSA's attorney fee workload associated with DI cases. These systems capture data on various aspects of the disability claims process, but are not linked to one another

[8] SSA would need information such as attorneys' Social Security numbers or tax identification numbers to make direct deposit payments to attorneys.

and, thus, require some manual intervention. As a result, without linked systems or a more streamlined process it is difficult for SSA to capture the data required to measure the timeliness of the total range of activities involved in paying attorneys. To efficiently administer user fees that are based on timeliness of fee payments to attorneys, SSA will need to develop new software code to link these standalone information systems, or develop a new system to process the entire attorney fee workload.

SSA currently has plans for systems enhancements to improve the attorney fee process, which should help improve case processing time. According to SSA, these enhancements would automate the steps in order for systems to recognize attorney fee agreement cases, compute and withhold the 6.3 percent user fee, pay the actual attorney fee, and release the remainder of the past-due benefits immediately to the beneficiary.[9] If SSA were to make the proposed system enhancements to process attorney fees, it may be advisable to revisit requirements for how quickly the agency could be expected to process an attorney fee.

Expressing the User Fee as a Fixed Amount Instead of a Percentage

A number of issues surround the question of whether the user fee should be expressed as a fixed amount or as a percentage, and these are linked in large part to the question of what costs the user fee should cover. On one hand, expressing the user fee as a percentage of the attorney fee, as is currently the case, assumes that the costs SSA incurs in processing user fees grow in proportion to the fees. This could be the case, for example, if an ALJ spends extra time reviewing a fee petition in cases involving more activity and larger fees. On the other hand, expressing the user fee as a fixed amount assumes that the costs of processing the attorney fees are relatively the same and, therefore, a higher attorney fee does not translate into higher processing costs. This could be the case if the costs are fixed and do not vary from case to case.

To adequately weigh the relative merits of both options, we need to further study the cost estimate information SSA used to develop the 6.3 percent user fee, the cost data that SSA is currently capturing, and the percentage of DI versus SSI cases processed. This analysis will be included in our final report, due to the Congress by the end of this year.

CHANGES BEING CONSIDERED FOR PAYING ATTORNEY FEES

Attorneys, NOSSCR, and advocates have discussed various changes related to attorney fees: issuing joint checks for past-due benefits to both the attorney and the beneficiary, raising the $4,000 limit on attorney fees allowable under the fee agreement process, and extending the statutory withholding of attorney fees to the SSI program. Each of these proposals involves trade-offs that should be considered before its implementation.

Joint Checks: Attorneys May Get Payments Sooner, but Policy and Practical Issues Arise

Under the current process, when an individual receives a favorable DI decision, SSA makes an effort to issue the beneficiary's past-due benefits as soon as possible and withholds the amount of the attorney fee. After the fee is processed, Treasury issues a check to the attorney. Individual attorneys have suggested changing this process from one in which two separate payments are made to one in which a single check for the total amount of the past-due benefits—made out jointly to the beneficiary and the attorney—is sent directly to the attorney. The attorney would deposit the check into an escrow account and pay the past-due benefits, minus his or her fee, to the beneficiary. Attorneys told us that joint checks would help expedite the attorney fee process because the beneficiary's money and attorney fees would be linked, and SSA views paying beneficiaries as a priority.

Such a change could have serious policy implications, however. For instance, SSA currently attempts to pay the beneficiary as soon as possible following a favorable decision. Issuing joint checks might delay payment to the beneficiary because the beneficiary would have to wait until after the attorney deposited the money into an escrow account to receive benefits. In addition, when SSA controls the payment, it is assured that no more than 25 percent is deducted from the past-due benefits. Sending joint checks to the attorney would reduce SSA's ability to enforce attorney fee limits and could increase the risk that attorneys would short change bene-

[9] The Office of Systems is in the early planning and analysis phase for this modification effort. Therefore, the extent of the actual modifications and when the work will be completed have not yet been determined.

ficiaries. In turn, control over payment to the beneficiary would shift to the attorney, while accountability for the payment would remain with SSA.

In addition, a number of administrative issues dealing with the implementation of joint checks would need to be addressed. First, SSA needs to know when the beneficiary receives his or her benefits. SSA is responsible for sending out benefit statements, SSA–1099s, to beneficiaries because sometimes Social Security benefits are taxable. With joint checks, SSA might have difficulty tracking when beneficiaries received their benefits. If attorneys were responsible for paying the past-due benefits from their escrow accounts, SSA would need a system certifying when—in which tax year—the beneficiary was paid. This reporting system would be needed to ensure the accuracy of the SSA–1099s.

Another administrative consideration is that the current information system used for processing DI cases—MCS—would need to be modified so that joint payments could be issued. As noted earlier, this system is designed to effectuate payments to the beneficiary or his or her representative payee only.

Adjusting the $4,000 Cap on Attorney Fees in Fee Agreements

Another change being discussed is raising the $4,000 cap on attorney fees for the fee agreement process. As I explained earlier, under the fee agreement process, attorneys can receive 25 percent of the past-due benefits up to $4,000, whichever is less. By statute, the Commissioner of SSA has the authority to adjust the cap at his or her discretion.

Debate on this issue centers around how legal representation for DI applicants might be affected. Attorneys we spoke with told us that higher fees would increase the attractiveness of DI claims. According to this argument, attractive fees could result in more attorneys for DI cases, which could increase the rate of representation for this population. Further, an increased rate of representation might result in more favorable decisions for DI applicants.

The opposing argument is that representation is readily available to DI applicants. According to an SSA official, the agency has not raised the cap because it determined that a higher cap was not needed to support representation.

In either case, evaluating this issue is difficult in the absence of such data as historical and current representation rates and without knowing the proportion of applicants who could not secure representation and why.

Issues With Expanding Withholding of Attorney Fees to SSI Cases

A final change being discussed would be to expand withholding to the SSI program. SSA currently calculates the amount of attorney fees due in SSI cases but does not withhold the fee from beneficiaries' past-due benefits. Current law explicitly differentiates between DI and SSI regarding attorney fees, stating that withholding and paying attorney fees is only permissible for DI cases.

Many believe that extending withholding to SSI is appropriate because it would increase representation for SSI applicants and alleviate a perceived equity imbalance for attorneys who represent both DI and SSI applicants. Because there is no guarantee that attorneys will receive fees due to them for SSI cases, some attorneys told us that they are reluctant to accept SSI cases. The attorneys maintained that expanding withholding to SSI would increase the attractiveness of the cases, and representation would increase. In fact 1999 data show that at the hearing level, applicants for DI and combined DI/SSI benefits were more likely to be represented by an attorney than those applying for SSI only. Additionally, according to an official from an association of ALJs, expanding withholding to SSI would be beneficial to the applicants because cases with representation are better presented and have a better chance of receiving a favorable decision than nonrepresented cases.[10]

Proponents of extending withholding to SSI also told us that the current situation is unfair to attorneys representing SSI applicants. According to this view, it is inequitable for attorneys to be guaranteed payment for DI cases but not for SSI cases. As with the DI cases, the SSI recipient has an obligation to pay for his or her legal services; however, in DI cases, SSA ensures that this happens. For SSI cases, the attorney must obtain payment directly from the beneficiary.

The opposing view of extending withholding to SSI is based on the relative economic status of DI beneficiaries and SSI recipients. SSI recipients tend to be poorer than DI beneficiaries, and some advocates have expressed concern that taking money from a recipient's past-due benefits to pay attorneys would be detrimental to the recipient's economic well-being. SSI recipients often have many financial obligations, such as overdue rent and utility bills that need to be paid. Advocates main-

[10] The Association of Administrative Law Judges represents about 700 of the 1,100 administrative judges at SSA.

tain that deducting the attorney fee from the past-due benefits might make it impossible for recipients to pay these bills. However, if an attorney successfully appeals a case for an SSI recipient, the recipient should be in a better position financially.

From an administrative standpoint, if SSA was required to withhold attorney fees for SSI cases, it will need to develop new information systems or significantly modify existing systems to process this new workload. However, as with any system effort, SSA's ability to carry out this task will depend on its available resources and the priority that it gives to this initiative.

Mr. Chairman, this concludes my prepared statement. At this time, I will be happy to answer any questions you or other Members of the Subcommittee may have.

GAO CONTACT AND STAFF ACKNOWLEDGMENTS

For information regarding this testimony, please contact Barbara Bovbjerg at (202) 512–7215. Individuals who made key contributions to this testimony include Yvette Banks, Kelsey Bright, Kay Brown, Abbey Frank, Valerie Freeman, Valerie Melvin, Sheila Nicholson, Daniel Schwimer, and Debra Sebastian.

Chairman SHAW. Mr. Matsui.

Mr. MATSUI. Thank you, Mr. Chairman. Thank you, Ms. Bovbjerg. I am learning, too. Do you happen to know from your research on this issue how quickly the claimant is paid his or her full amount after the adjudication of the claim is resolved?

Ms. BOVBJERG. The data we have on how long it takes is in figure two of our statement and we got this from SSA. This represents processing time, times taken from January 1995 to May 2000, and my understanding is that the time is measured from the point when the individual goes into current pay status—that is, when they can begin the process of getting their monthly benefit.

Mr. MATSUI. Okay.

Ms. BOVBJERG. And then SSA begins to develop the case and figure out whether there is a benefit offset and what the past-due benefits might be. From that time, the average is somewhere between 30 and 90 days.

Mr. MATSUI. 30 and 90 days.

Ms. BOVBJERG. The figures that we have say only ten percent of cases are processed in less than 30 days.

Mr. MATSUI. Ten percent is within 30 days and the balance is—most—okay. But 58 percent of them are between 31 and 80 days and I guess that cannot be broken down. Is that right? Oh, 56. 56 percent. I am sorry. That is a wide number. 31 to 90 days. And you said that the method is manual and it is somewhat inefficient, I think, in the first part of your testimony.

Ms. BOVBJERG. Yes.

Mr. MATSUI. And you are suggesting, I guess, by that statement that they can improve without additional resources or if they became more efficient and came up with a better process. Is that what you are suggesting? Without identifying it yet because you are still in your study.

Ms. BOVBJERG. Well, there are some things that are within the agency's control in this process and some things that are not. And I know earlier Chairman Shaw mentioned the workers' comp program. Waiting to figure out what kinds of workers' compensation benefits people may have applied for and received is not really

within the agency's control and that can take a long time. There are other things that could be done differently, but it will take time and resources to do that.

Now whether the resources are new resources, as you suggest, or whether they are taken from somewhere else, we have not done any work on that. But there are the many manual steps and there is a lot of opportunity for error. The process takes time. The ALJs can take a long time to review cases and, as I believe Mr. Collins pointed out, it depends on how complex the case may be and whether it is a fee agreement or a fee petition. Petitions might still take longer, but SSA could improve their information systems to help eliminate the manual steps and streamline the process.

How complex that might be depends on the approach that SSA takes and what other things, what other priorities, are competing for systems resources.

Mr. MATSUI. I think it was Mr. McCrery that raised the issue of a check to both the attorney and the claimant. Is that something that you looked into or is that just purely a discretionary matter for us to make?

Ms. BOVBJERG. Well, we know that people are thinking about it and we did ask about it when we talked to attorneys.

Mr. MATSUI. Right.

Ms. BOVBJERG. And we talked to people at SSA about issuing joint checks. Our understanding of this is that you would have the single check made out to both parties, sent to the attorney, the attorney would deposit it in an escrow account and then withhold their attorney fee but pay the beneficiary his/her share. I know that attorneys expressed a view to us that because the beneficiaries do get paid more quickly, the attorneys thought that this could speed up their payment.

We did hear, however, that it may, in fact, delay the payment to the beneficiary. So there is the other side. Whether or not this is a good idea, we cannot say, but that SSA may not issue the check as quickly as they would to the beneficiary because they do need to be sure that it is accurate. They do have some recourse with beneficiaries that they do not always have with attorneys. So that might delay the joint check.

And whether the attorney sends the dollars to the beneficiary right away, you know, SSA loses some control there. SSA cannot fulfill its responsibility to make sure the beneficiary is paid.

Mr. MATSUI. If I could just ask—I know my time has run—

Chairman SHAW. It does not sound like SSA is really concerned—

Ms. BOVBJERG. Well, there are some administrative issues for them as well in doing something like this.

Mr. MATSUI. What would make SSA have to delay for purposes beyond their control if they just made one check out? I mean after calculating all the offsets and everything, that is when they decide what the attorneys' fees are, in any event, so you get that gross amount, and they send that check out. I do not know what—what could result in a delay?

Ms. BOVBJERG. Well, part of the problem is a systems problem. The system that they tell to pay the beneficiary does not have the attorney fee capability in it.

Chairman SHAW. Are we talking about a computer program?

Mr. MATSUI. Yeah, it sounds like it.

Ms. BOVBJERG. That is part of it.

Mr. MATSUI. But I think that could be fixed? Can it? I mean computers, I mean—

Ms. BOVBJERG. Things can be fixed, but they will take time. There are separate systems involved.

Mr. MATSUI. We can implement the legislation, you know, give them that time, you know, implement it, months, whatever it is. That does not seem to be a real problem. Now in terms of the—we can put a provision, I guess, or, you know, maybe SSA can have regulations, and if the attorney does not, upon receipt of the check, does not disburse the check to the claimant within "x" number of days or hours even, you know, that person could be barred from bringing cases before SSA for a year or two years or a hundred years or whatever it may be. So there are penalties that you can put to the attorney to make sure—besides an attorney can be, you know, if the attorney takes the money and runs away with it, there is even more severe penalties.

And so it would seem to me that there are some built-in safeguards in terms of the speedy effort to put it in the trust account and then disburse it immediately, particularly with electronic transfer.

Ms. BOVBJERG. You are correct. None of these things is insurmountable. They are just there.

Mr. MATSUI. Yeah. That is why I mean it is so hard to deal with this issue. It seems like there is some—not with you—but there has been so much resistance in terms of, you know, something pretty simple all of a sudden becomes so complex and then we find out it is a computer problem—I do not know—or software problem. But I do not know. I mean I cannot see why we cannot figure this one out. I mean this is pretty simple to me, but maybe it is beyond my ability to understand. But thank you. I appreciate your testimony and look forward to the balance of it as well.

Ms. BOVBJERG. Thank you.

Chairman SHAW. Mr. Collins.

Mr. COLLINS. You heard the question I asked Mr. Taylor about the time of processing the claims. Have ya'll done any type of study as to how long it takes to process claims with attorneys involved versus claims with non-attorneys?

Ms. BOVBJERG. We have not done exactly that. We did do some work for you on looking at whether attorneys were delaying the process by not showing up or not providing the information on time, whether they were lengthening the time it took to reach a decision on a case. And we found that, anecdotally, people think, particularly some ALJs, that this is true. We simply could find no documentation of that. It is just not the kind of record that is kept in the files.

We did speak to some attorneys who said that it was not worth it to them to delay because they were not being paid enough to begin with. So we could see that there were at least two sides to this issue. What the Office of Hearings and Appeals staff did say to us was that they thought that there were other things that caused delay: they identified the open record, that you can always

add more information and more evidence to a case, and the fact that frequently the Office of Hearings and Appeals is asked to develop the case, that the attorneys do not do very much of that, and they are asked to go out and get the medical information. So there are many things that could contribute to the length of time that it takes.

Mr. COLLINS. But there was no documentation by the ALJs as to delay?

Ms. BOVBJERG. No. We heard talk about it. One of the things we did report back is that there are means by which ALJs can sanction attorneys and that those means were not really being used. They can deny them their fee, for example, if they think that they really have not done a good job. At the time of that report, there were new standards of conduct that came out for attorneys that the ALJs were looking forward to, and we have not gone back to look and see how effective they have been.

Mr. COLLINS. Okay. Well, asking the attorneys is like asking the fox to guard the hen house.

Ms. BOVBJERG. We have to talk to both sides.

Chairman SHAW. You are surrounded, Collins. [Laughter.]

Mr. MATSUI. Hey, I am with you.

Mr. COLLINS. I am packing; are you? Oh, no, you know, I do, I am very much more concerned about the applicant and their receiving their benefits versus the attorney and the attorney receiving his or her fee. Usually it is the case of the applicant has much more need than the attorney has. But we appreciate your coming today and thanks for your testimony.

Ms. BOVBJERG. Thank you, sir.

Chairman SHAW. Mr. Hulshof.

Mr. HULSHOF. Thank you, Mr. Chairman. Ms. Bovbjerg, in the figure two and your chart that Mr. Matsui referred to, does that processing time include delays by the ALJ? You mentioned at the bottom of page nine that it can take months for an ALJ to review and approve fee petitions. Is that also included in your chart?

Ms. BOVBJERG. Only fee agreement cases are included in the chart; no ALJ time or delays associated with review and approval of fee petitions are included in the chart.

Mr. HULSHOF. Also it is interesting to note on the top of page ten that sometimes—you mention competing work priorities and, in particular, with the Senior Citizens Freedom to Work Act of 2000, which, of course, was taking the earnings limit off 65 to 69, and then SSA redirected the work of a substantial number of processing technicians to handle that workload increase. I think everybody agrees that was a fairly unique situation that we are not likely to see again.

But let me just ask you regarding this legislation and the 30 day period when, in your view, should the clock start ticking to measure SSA's processing time?

Ms. BOVBJERG. I think it depends on what you want to achieve with the time limit. A 30-day limit based on the data here—now I know that Mr. Taylor was using other data suggests that they will only get their fee in ten percent of the cases. A lot of the cases will not be done faster if workers' comp or something like that is the problem. If you want to think about getting SSA to change

things that are under its control, I do not know if the 30 day limit is the right one because it is so dramatically different from what is happening right now and it is binary. It is on/off. You either get the fee or you do not. So if SSA does not think it can even get close to the 30 days, there may not be an incentive to improve.

Mr. HULSHOF. I asked of Mr. Taylor the possibility of withholding attorneys' fees in SSI cases. Can you generalize for me what issues may be associated with expanding withholding of attorneys' fees to SSI cases?

Ms. BOVBJERG. Yes, I can. We did talk to a number of people who are involved in some way in the SSI program, attorneys, advocates, people at SSA, and we found that some believe that because SSI claimants are by definition low income that you should not withhold attorney fees for the past-due benefits because that makes their situation worse.

There are others who think that if you extend the withholding to the SSI program, that you will increase representation among SSI claimants. Right now, the figures that we got from Social Security suggest that representation is about 50 percent for SSI claimants, whereas it is around 70 percent for DI claimants. I think that one of the things to think about and I hate to keep bringing this up, but you would have to think about how long it would take to implement that change because the SSI system, which is a different one than the Title II system, is not set up to withhold attorney fees.

Mr. HULSHOF. As someone who started his legal career actually in the public defender system, which is, again, representing indigent cases, is it your belief that the sources of low cost legal representation or free legal representation for SSI claimants, has the availability of those services gone up or gone down over the last several years?

Ms. BOVBJERG. I do not know the answer to that question. You can think about this as being either a loss to them if you withhold attorney fees, that instead of getting $5,000 in past-due benefits, they get three something, or you can think that if attorney representation improves claimants' chances of reaching a favorable decision, then they are getting 3,000 something that they might not have had otherwise. It is difficult to know what effect representation has on favorable decisions. There is some evidence that something like 60 percent with attorneys get favorable decisions versus about half that for those without attorneys. But you do not know to what extent there is cream skimming in who accepts what client.

Mr. HULSHOF. Thank you, ma'am.

Chairman SHAW. Thank you.

Ms. BOVBJERG. Thank you.

Mr. COLLINS. Are you a lawyer, Ms. Bovbjerg?

Ms. BOVBJERG. I am not a lawyer.

Mr. COLLINS. Great. [Laughter.]

Ms. BOVBJERG. You could tell.

Chairman SHAW. The final panel—and I have been told that we are going to have a vote on the floor in about ten minutes so we are going to try to at least get well into the testimony of this next panel before we are called out of here—Nancy Shor, who is Execu-

tive Director of the National Organization for Social Security Claimants from Midland Park, New Jersey; Lyle Lieberman, who is either in my district or close to it, is a Social Security practitioner, Law Offices of Lieberman and—

Mr. LIEBERMAN. Gutierrez.

Chairman SHAW. Okay. Offices in Miami, Florida, and I have also been told he has got offices in Fort Lauderdale, Boca Raton and West Palm Beach, all of which are in my district; Jenny Kaufmann, staff attorney of the National Senior Citizens Law Center; and Marty Ford, who is co-chair of the Social Security Task Force Consortium for Citizens with Disabilities. Again, we have your written testimony and you all may proceed as you see fit. Ms. Shor.

STATEMENT OF NANCY G. SHOR, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES, MIDLAND PARK, NEW JERSEY

Ms. SHOR. Thank you, Chairman Shaw. As executive director for the National Organization of Social Security Claimants' Representatives, which we for obvious reasons refer to as NOSSCR, I thank you very much for the opportunity to speak today at this important hearing. The issues you are discussing this afternoon are of great importance to claimants, to beneficiaries, and to those whom they choose to represent them.

By way of background, NOSSCR is an association of attorneys and non-attorneys who represent Social Security and SSI claimants in proceedings before the Social Security Administration and in federal court. Our current membership of 3,400 is committed to the highest quality legal representation for claimants in an increasingly complicated disability determination process.

My name is Nancy Shor. It has been my privilege to serve as executive director of NOSSCR since its inception 20 years ago. For three years prior to that, I represented Social Security claimants on Cape Cod.

I want to turn first to questions about the user fee. The new 6.3 percent assessment on attorney fees paid by the administration is now, as you know, in effect. To explain it, to illustrate, if an attorney is authorized a fee of $500 for legal services, the amount of the check that Social Security sends to that attorney is now $468.50. If the attorney is authorized a fee of $4,000, the amount of the check that SSA sends is $3,748.

As we did when the user fee was enacted, we continue to oppose it. We fail to understand the rationale for why a service that the statute has required SSA to perform for more than 35 years at no charge now has a charge. The balance that the attorneys' fee statute at Section 42 of the Code has traditionally struck is that on the one hand the amount of the attorney fee is regulated by Social Security, while on the other hand fee payment by the agency is assured.

This balance has now gone awry. We do not understand how the 6.3 percent amount was derived as the cost of providing a check or why the cost of providing a check varies with the amount of the check. Even more discouraging to our members is the statement by the commissioner that there is no what I call "closed circuit," that is, revenues generated by the user fee do not return to the compo-

nents inside Social Security that process fees to enable them to provide any better service.

In a March 3 letter that you, Chairman Shaw, received from Social Security, the following statement was made: When we proposed legislation to improve the attorney fee payment process—I underscore improve—we included a provision to deposit the funds raised as a result of the 6.3 percent user fee into our Limitation on Administrative Expenses account. We intended to use the funds raised by the fee to improve the administration of the payment process. However, when Congress passed the provision establishing the user fee, it did not provide for the fees to be deposited in the LAE account. Therefore, we are not receiving additional resources, which hinders our ability to make additional significant improvements on our current performance.

Since the amount of the user fee is not tied to the cost of writing a check and user fee funds do not return to the check writing components at SSA, it seems clear that this user fee is simply a new tax on attorneys' fees, which we oppose as unfair. We believe that if a user fee is to be assessed, it should be kept at no more than $25 per check, a figure that appears eminently reasonable in light of SSA's statements that the cost of writing and mailing an individual benefit check is 42 cents.

Second, I would like to briefly touch on a way to improve access for SSI claimants to legal representation. And the question is: why is it that a Social Security disability claimant can usually find an attorney, but in many parts of the country, a similarly situated SSI claimant cannot? What is the reason according to SSA's data for fiscal year 1999, 83.4 percent of Title II claimants were represented at the OHA level while only 57.1 percent of Title XVI claimants were represented?

We maintain a large part of the answer lies with the difference between the Social Security and SSI programs with regard to payment of attorneys' fees. In both programs, the amount of fees is regulated and ultimately set by SSA. But only in the Social Security program is the fee paid directly by SSA out of the claimant's past due benefits.

In the SSI program, the successful claimant is responsible for payment of the approved fee, but unfortunately often does not make that payment. The concern that we have is as a result of that history, many private attorneys will decline to represent SSI claimants with meritorious cases.

This is particularly true in light of the revenue decrease engendered by the user fee. In light of the revenue decrease with their Social Security cases, many attorneys who used to take SSI cases on a pro bono basis now feel they can no longer continue to do so. Many attorneys who used to represent SSI claimants with the knowledge that some cases would produce no fees now feel they can no longer afford to do so.

I want to be clear that we wholeheartedly support all the existing services, representation services from legal services, from attorneys working on a pro bono basis, from state-funded advocacy programs, from any and every source that provides legal representation to claimants. We want to be the lawyers of last resort. We want to be there for the SSI claimant who cannot find free rep-

resentation from any other source. To assist these individuals, we advocate extension of the fee payment process used in Social Security cases to SSI claims.

We know from the referral service that NOSSCR maintains we get dozens of calls a day from claimants with SSI cases all over the country who are not able to find any free legal help and we are often not able to find them a private attorney who is willing to take the case because of the uncertainty of payment.

An additional hurdle has been a consequence of the installment payments contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which directs Social Security to issue past due SSI payments in installments if they are over a certain amount, approximately $5,500.

There is a provision, a statutory provision, that the first installment of $5,500 will be increased when the recipient can document unpaid shelter, food and medical bills. We suggest that one approach to the problem is to add the amount of the authorized attorney fees to the list of items for which the first installment payment may be increased.

Third, I would like to touch on the need for an inflationary adjustment to the current attorneys' fee cap. The attorney fee statute was significantly amended in 1989 to create a fee agreement system which provides that the attorney and client can enter into a streamlined attorney fee world where fees are capped at 25 percent or $4,000, whichever is lower.

Authority was given to the commissioner as part of that statute to adjust that $4,000 cap for cost of living adjustments given to beneficiaries over the years. Ten years have passed with no adjustment. The consequence is that the number of cases being processed as fee petition cases could be decreased. Those could be processed as fee agreement cases which is much less expensive for the administration, but the fee petition cases have started to go up because attorneys have more time in on the cases than the $4,000 ceiling will compensate them for.

We are not advocating the increase in fees. We are advocating an increase in use of the fee agreement system and if the COLA adjustment were made to the fee agreement cap, we maintain the number of fee petitions would be decreased.

Chairman SHAW. Okay. Ms. Shor, you are going to have to wrap up now. You have gone way over the time that we have set aside.

Ms. SHOR. We are very enthusiastic about the bill that you have introduced that links performance by Social Security to the payment of the user fee. As I am sure you know from the cascade of letters that your office receives, attorneys currently have absolutely no mechanism to use to avail themselves of when the fee payments are not made and we certainly support efforts to make a linkage, but always—and let me be clear—always the beneficiary is paid first. Nobody has any sort of notion that the attorneys would get paid first. Thank you very much.

Chairman SHAW. Thank you.

[The prepared statement follows:]

Statement of Nancy G. Shor, Executive Director, National Organization of Social Security Claimants' Representatives, Midland Park, New Jersey

As Executive Director for the National Organization of Social Security Claimants' Representatives, I thank you for the opportunity to speak today at this important hearing. The issues you are discussing this afternoon are of great importance to claimants, to beneficiaries, and to those whom they choose to represent them. As requested by the Subcommittee, I state that neither NOSSCR nor I have received any government grants or contracts in the past two years. A copy of my curriculum vitae is attached.

NOSSCR is an association of attorneys and non-attorneys who represent Social Security and SSI claimants in proceedings before the Social Security Administration and in federal court. Our current membership of 3,400 is committed to the highest quality legal representation for claimants.

My name is Nancy Shor. It has been my privilege to serve as Executive Director of NOSSCR since its inception more than twenty years ago. For three years prior to that, I represented Social Security claimants in Massachusetts.

Rationalize the Amount of the "User Fee"

The new 6.3% assessment on attorneys' fees paid by the Administration is now in effect. To illustrate, if an attorney is authorized a fee of $500.00 for legal services, the amount of the check that SSA sends is $468.50. If an attorney is authorized a fee of $4,000.00, the amount of the check that SSA sends is $3,748.00.

As we did when the user fee was enacted, we continue to oppose it. We fail to understand the rationale for why a service that the statute has required SSA to perform for more than thirty-five years at no charge now has a charge. The balance that the attorneys' fee statute at 42 U.S.C. has traditionally struck is that, on the one hand, the amount of the attorney's fee is regulated by SSA while on the other, fee payment by the agency is assured. This balance is now awry.

We believe that no case has been made to explain how the 6.3% amount was derived as the cost of providing a check or why the cost of providing a check varies with the amount of the check.

Even more discouraging to us is the statement of the Commissioner that there is no "closed circuit," that is, the revenues generated by the "user fee" do not return to the offices that process fees to enable them to provide better service. In his March 3, 2000 letter to Chairman Shaw, Charles H. Mullen, Associate Commissioner of SSA's Office of Public Inquiries, states, "[W]hen we proposed legislation to improve the attorney fee payment process, we included a provision to deposit the funds raised as a result of the 6.3 percent user fee into our Limitation on Administrative Expenses (LAE) account. We intended to use the funds raised by the fee to improve the administration of the payment process. However, when Congress passed the provision establishing the user fee, it did not provide for the fees to be deposited in the LAE account. Therefore, we are not receiving additional resources, which hinders our ability to make additional significant improvements on our current performance."

Since the amount of the "user fee" is not tied to the cost of writing a check, and the "user fee" funds do not return to the check-writing component at SSA, then this "user fee" is clearly and simply a new "tax" on attorneys' fees. We oppose it as unfair. We believe that, if a "user fee" is to be assessed, it should be capped at no more than $25.00 per check, a figure that appears eminently reasonable in light of SSA's statements that the cost of writing and mailing an individual benefit check is forty-two cents.

Improve Claimants' Access to Assistance with SSA's Complex System

Why is it that a Social Security claimant with a disability case usually can find an attorney, but in many parts of the country, an SSI claimant with an identical disability case cannot? What is the reason that, according to SSA's data for FY 1999, 83.4% of Title II claimants were represented at the OHA level, while only 57.1 % of Title XVI claimants were represented?

A large part of the answer lies with the difference between the Social Security and the SSI programs with regard to payment of attorneys' fees. In both programs, the amount of the attorneys' fees is regulated and ultimately set by SSA. But only in the Social Security program is the fee paid directly by SSA out of the claimant's past-due benefits. In the SSI program, the successful claimant is responsible for payment of the approved fee. Unfortunately many do not pay fees.

Our concern lies with those SSI claimants who want to be represented but who at present are unable to hire a lawyer, not because of the lack of merit of their claim but because of the lawyer's concern about the uncertainty of eventual fee payment.

We recently surveyed our members and learned that one no doubt unintended consequence of the new "user fee" is that many attorneys are changing their practice with regard to SSI cases. In light of the revenue decrease with their Social Security cases, many attorneys who used to take SSI cases on a pro bono basis now feel they can no longer afford to do so. Many attorneys who used to represent SSI claimants with the knowledge that some cases would produce no fees now feel they can no longer afford to do so.

We wholeheartedly support all of those currently providing representation to SSI claimants, including the legal services programs, the attorneys who accept SSI cases on a pro bono basis, the state-funded advocacy programs, and the state-created fee payment systems for interim assistance recipients. All of these are invaluable resources that should be preserved or extended. But we know that many SSI claimants who want to be represented are not able to find it through these sources. To assist these individuals, we advocate the extension of the fee payment process used in Social Security claims to SSI claims. Our intention is to provide a supplement to the existing sources of representation.

Another hurdle for an attorney who is asked to take an SSI case lies with the recent statutory provisions for installment payments of large retroactive SSI benefits that result in multiple smaller payments for beneficiaries. At a minimum, we recommend that a change be made in the installment payment provision enacted in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Currently, when an SSI recipient's past-due benefits exceed the amount of one year's benefits, the agency pays the past-due benefits in installments, at six-month intervals. The first installment is capped at an amount equal to one year's benefits; there is a statutory provision that the agency will increase the amount of the first installment when the recipient can document unpaid shelter, food, and medical bills. We advocate that the amount of the authorized attorney's fee be added to the list of items for which the first installment may be increased.

Inflationary Adjustment to the Attorneys' Fee Cap

The attorneys' fee statute was significantly amended in 1989 to create a new process known as the "fee agreement." The "fee agreement" was enacted as an alternative to the long-standing "fee petition" system, which was seen as an expensive use of limited administrative time. The "fee agreement" process has proved to be popular with representatives.

In 1990, Congress created the streamlined fee agreement process, and set a cap of $4,000.00, with the following, "The Secretary may from time to time increase the dollar amount under clause (ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 215(i) since such date. The Secretary shall publish any such increased amount in the Federal Register." 42 U.S.A. § 406 (a)(2)(A)(iii). Ten years have passed with no adjustment. For this reason, use of the "fee agreement" process has begun to decrease, and at the same time, the number of fee petitions filed has started to rise. The time has come for an adjustment in the cap, to return the effectiveness of the statute to what Congress intended when enacting it.

We are not advocating an increase in fees. Currently, the representative who wishes to charge a fee between $4,000.00 and $5,000.00 files a fee petition and generally is authorized a fee in the amount requested. But it often takes the agency adjudicators upwards of a year to act on a fee petition and issue the fee authorization. Adjusting the fee agreement cap would reduce some of this fee petition workload for the agency. Adjusting the cap would of course in no way diminish the current fee agreement provision that an aggrieved claimant can protest the amount of the fee.

Improve Efficiency of SSA's Attorney Fee Payment System

Attorneys have long complained about the length of time the Social Security Administration takes to pay their attorneys' fees. When either the fee setting or fee-payment processes are unreasonably delayed, attorneys who have earned these fees and who rely on their receipt find themselves in financial distress. Many have been compelled to borrow money; others are deciding to leave the practice altogether. Short of filing mandamus actions in federal court and bombarding their Members of Congress with requests for help, they presently have no recourse. Our members report that the slowdown in payment processing happens regularly each year during the months of November and December; they report that the number of fee payments diminishes, sometimes to none. (In response to our FOIA request for the number of attorney's fee checks issued each month during 1998 and 1999, we re-

ceived the following response, "We are unable to comply with your request since we do not maintain the data you requested.").

One reason for the attorneys' dismay at the enactment last December of the 6.3% "user fee" was that there was no linkage, express or implied, to improved service. We believe that it is eminently fair to tie assessment of any "user fee" to a performance standard on the agency's part. We suggest that the agency be permitted to assess any "user fee" only if the attorney's fee payment is made within 30 days of certification of payment of past-due benefits to the claimant.

The pace of attorneys' fee payments has increased somewhat since the first of this year. We believe that this is due in part to the interest in this matter that Chairman Shaw and this Subcommittee have expressed to the agency. It is also due to another provision in the Ticket to Work and Work Incentives Improvement Act that eliminated an unnecessary waiting period from SSA's effectuating procedures for cases in which the attorney used the fee agreement process. The faster payments seen earlier this year demonstrate that the agency is capable of meeting the proposed 30-day deadline.

Another way to enhance SSA's efficiency in fee payments and reduce its administrative expenses would be to implement a joint check system where payments are not electronically transmitted. Many comparable programs in both the public and private sectors utilize joint checks, that is, a single check payable jointly to the claimant and the attorney. This includes most state workers' compensation programs and virtually all personal injury cases. Upon the endorsement of both the client and the attorney, the proceeds of the check are placed in an escrow account and then apportioned according to the statute and regulations (public sector) or the litigants' agreement (private sector). Where claimants' benefits *are* electronically transmitted, we believe it only fair and equally efficient to require that the attorneys' fee be electronically transmitted at the same time. If the agency were to determine that the cost of administering a program of joint checks is significantly less expensive than the current two-check system, we would support its use.

In conclusion, we thank the Chair and all the members of this Subcommittee for your interest in these issues. I would be pleased to respond to any questions you may have.

Chairman SHAW. Mr. Lieberman. And what will happen you will go ahead and give us your remarks and then we are going to have to recess to go make this vote and then we will come back and try to wrap up.

STATEMENT OF LYLE D. LIEBERMAN, SOCIAL SECURITY PRACTITIONER, LIEBERMAN & GUTIERREZ, P.A., MIAMI, FLORIDA

Mr. LIEBERMAN. Thank you, Chairman Shaw, and good afternoon to you and members of the committee. My name is Lyle Lieberman. I am an attorney in private practice with the firm of Lieberman and Gutierrez in Miami, Florida, and represent Social Security claimants primarily from Dade and Broward counties, but also Palm Beach County, and I appear frequently at administrative hearings at the Social Security Administration's Office of Hearings and Appeals in Fort Lauderdale, Miami and West Palm Beach.

I hope that my observations will be useful to you today. They come from my tenure as administrative law judge with the Social Security Administration's Office of Hearings and Appeals, from my 28 years of private practice in representing Social Security claimants, and indeed in my 42 years of private practice and being proud to be a member of both the Illinois and Florida bars.

From my tenure as an ALJ, I learned that good legal advocacy is a boon to the decision-making process. Good advocates develop and marshal the evidence and present arguments at a hearing. From my many years in private practice, I have learned that good advocacy is much more. It includes a great deal of time in speaking

with potential clients to explain how the Social Security process operates and what to expect in their cases, other benefits and community services which might be available to them, and in some instances informing them why they are not going to be found eligible for benefits notwithstanding their particular impairments.

I also answer many questions and provide information that my clients would otherwise try to seek from the Social Security Administration, and as you know from previous hearings, the amount of time that SSA personnel spend with individual claimants and their questions has become very limited.

I would like to just briefly address the new user fee which Ms. Shor has discussed. This charge we have now just begun to feel its impact because the agency did not start it until February 1. The figure of 6.3 percent may not seem a lot and indeed when I first saw it, I did not think it was that much until we realized that it translates in the reduction of our net revenue of about 20 percent because I cannot reduce payments to anyone of my staff including our landlord, our publisher, the legal documents, the post office; no one except myself.

And my colleagues who practice in this field and I are certainly very distressed by this user fee because it simply appears to be a tax. I have never seen an explanation of why it costs $250 for the agency to write a check when the attorney's authorized fee is $4,000. The Miami office of one of our private payroll services charges $3 to write each employee's payroll check for an office with ten employees which includes calculating and processing the appropriate payroll deductions. I would think that this service is quite comparable to SSA's in writing attorneys' fee checks and if there must be a charge for SSA's costs in writing the check, I do not understand why the fee should be more than the $3 charged by this private service.

I also think there should be some performance required of SSA. Over the years, I have generally received payments from SSA more than six months after the award notices were issued. I have experienced annual slowdowns from the agency when no checks were received for months. Recently, I am pleased to report that this has improved somewhat, but there is no way to determine that this improvement will continue, and it is nothing more than temporary in many instances.

The requirement that SSA may not assess the user fee until the attorney's fee is paid within 30 days of a certification for payment of retroactive benefits to the claimant would no doubt provide SSA with a necessary inducement to ensure proper payment. This payment would be made 30 days after the certification was made that the claimant should be paid.

I think it is only fair that once the representation for the client has been completed and all of SSA's other requirements are complied with, that prompt payment should be utilized. The fee agreement process is a good one. Compared with the fee petition process, it is certainly more streamlined. It saves time for the administration. It saves time for the lawyers and indeed statistics show that most lawyers utilize this process. For many years before 1990, the only methodology was the fee petition process and it was very

lengthy and many times the fee was not paid for at least a year or more.

But I do not use the fee agreement process as often as I once did because of the current cap of $4,000. I am now filing more fee petitions, which many other attorneys are doing, which SSA is extremely slow in processing, particularly at levels below the ALJ hearing level and the attorney fee branch.

The cost of living cap has not changed in ten years, but I would suggest that the cap and the statute be increased to $5,000. The result would be that many of the fee petitions currently being submitted would disappear and the attorneys would choose to use the streamlined fee agreement process instead. And indeed most of the cases under the fee agreement process would be below the $5,000 figure anyway.

And finally with regard to SSI claimants, my office receives many calls from claimants with SSI cases. Because there is no direct withholding and direct payment of attorneys' fees, with great reluctance, I do not accept SSI claimants as clients unless they have concurrent cases with Title II benefits available or when, in a lot of situations, I just cannot turn these people away.

The SSI cases that our office handles constitute all of our pro bono efforts that I and my associates do. And we wish we could do more. We get referrals from Legal Aid Services because they are so burdened with cases and do not have the support to do them. They ask us particularly if we have a particular interest, which I do, in cases that involve lupus or multiple sclerosis, and we will handle those cases on a pro bono basis.

But we would handle SSI cases if there was a fee petition or withholding in place once we learned that Legal Aid could not handle those cases. Thank you for holding this hearing today and providing me with the opportunity to testify and I would be happy to answer any questions the chairman has.

Chairman SHAW. Thank you, Mr. Lieberman.

[The prepared statement follows:]

Statement of Lyle D. Lieberman, Social Security Practitioner, Lieberman & Gutierrez, P.A., Miami, Florida

Good morning. My name is Lyle Lieberman. I am an attorney in private practice with the firm of Lieberman & Gutierrez in Miami, Florida. I represent Social Security claimants primarily from Dade and Broward Counties. I appear frequently at administrative hearings at the Social Security Administration's Offices of Hearings and Appeals in Fort Lauderdale and in Miami.

Thank you very much for the opportunity to appear before you today. I hope that my observations will be useful to you. They come from my tenure as an Administrative Law Judge with the Social Security Administration's Office of Hearings and Appeals and from my 28 years of private practice in representing Social Security claimants. To comply with the rule referenced in the Subcommittee's invitation, I have provided a copy of my curriculum vitae with this statement. I have received no government grants or contracts in the past two years.

Role of Representation

From my tenure as an ALJ, I learned that good legal advocacy is a boon to the decision-making process. Good advocates develop and marshal the evidence and present arguments at hearing. From my many years in private practice, I have learned that good advocacy is much more. It includes a great deal of time in speaking with potential clients to explain what how the Social Security process operates and what to expect in their cases; other benefits and community services might be available to them; and in some instances, informing them why they are not going to be found eligible for benefits, notwithstanding their particular impairments. I

also answer many questions and provide information that my clients would otherwise try to seek from the Social Security Administration. As you know from previous hearings, the amount of time that SSA personnel spend with individual claimants and their questions has become very limited.

The New User Fee

A charge of 6.3% of the amount of the attorney's fee was enacted last December. We have just begun to see the impact of this new fee, because the agency did not begin to apply it until February 1. A figure of 6.3% may seem not significant to you. But in private practice, a reduction of 6.3% of our gross revenue translates into an almost 20% reduction in our net revenue. This is because I cannot reduce payments to anyone, including my landlord, my legal publisher, the post office, or my office staff by 6.3%—no one except myself.

My colleagues who practice in this field and I are certainly very distressed by this user fee. It seems to us to be simply a tax. I have never seen an explanation of why it costs $252.00 for the agency to write a check when the attorney's authorized fee is $4,000. I cannot fathom this. The Miami office of a private payroll services company charges approximately $3.00 to write each employee's payroll check for an office with ten employees (this includes calculating and processing the appropriate payroll deductions). I would think that this service is quite comparable to SSA's in writing attorney's fee checks. If there must be a charge for SSA's cost in writing the check, I do not understand why any fee charged should be more than $3.00.

I also think that there should be some performance required of SSA. Over the years, I have generally received payments of my fees from SSA more than six months after the Award Notices were issued. I have experienced annual slow-downs from the agency when I received no checks at all for several months. Recently I am pleased to report that this has improved somewhat. But I have no confidence at all that this improvement will continue, and that it is nothing more than temporary. A requirement that SSA may not assess any user fee unless the attorney's fee is paid within thirty days of the certification for payment of retroactive benefits to the claimant would no doubt provide SSA with the necessary inducement to ensure prompt payment. I think it is only fair that once I have finished the representation for my client and complied with SSA's fee approval process that I should be able to count on prompt payment of the authorized fee.

Fee Agreement Process

The fee agreement process is a good one. Compared with the fee petition process, it is certainly more streamlined. The fee agreement saves time for the Administration and saves time for lawyers. It preserves the opportunity for claimants to object if they feel they have been overcharged.

But I do not use the fee agreement process as often as I once did, because of the current fee cap of $4,000. I am now filing more fee petitions, which SSA is extremely slow in processing, particularly at the levels below the administrative hearing and at the Attorney Fee Branch. The fee cap has not changed in ten years; I would suggest that the cap in the statute be increased to $5,000. The result would be that many of the fee petitions currently being submitted would disappear; the attorneys would choose to use the streamlined fee agreement process instead.

Representation for SSI Claimants

My office receives many calls from claimants with SSI cases. But there is no withholding and direct payment of attorneys' fees in SSI cases. This is the reason that, with great reluctance, I can not accept SSI claimants as clients, except those who have a concurrent Social Security claim (where I will receive direct payment for my services on the Social Security disability portion of the claim), or when it is a person whom I just can't turn away. My experience has taught me that I am not likely to be paid for my time. I am not able to expand my pro bono commitment, especially in light of the reduced revenue caused by the user fee.

If a fee payment procedure were in place, could I accept the cases from the many SSI claimants who call my office? My answer is yes, if the person were not able to obtain free legal representation from the legal services programs in my area.

Thank you for holding this hearing today and for providing me with the opportunity to testify. I would be pleased to answer any questions you might have.

Chairman SHAW. We have got about five minutes to make this vote so we will stand in recess for about—we should be gone about ten or 15 minutes. Thank you.

[Recess.]

Chairman SHAW. Okay. There may be another vote in about ten or 15 minutes, maybe 20 minutes, so I would like to try to finish up with ya'll so you will not have to sit around here waiting on us. We are waiting for Ms. Kaufmann. She is not here. So we will go to Ms. Ford.

STATEMENT OF MARTY FORD, CO-CHAIR, SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES

Ms. FORD. Thank you, Chairman Shaw, and members of the subcommittee for this opportunity to testify. I am here today in my role as co-chair of the Social Security Task Force of the Consortium for Citizens with Disabilities. The CCD Social Security Task Force urges the subcommittee to support a statutory change that would allow SSI claimants to voluntarily enter into an agreement with attorneys for SSA to withhold and provide direct payment of attorneys' fees from their past due SSI benefits.

We support such a provision because it will help ensure that claimants have adequate representation to appeal their cases. The disability determination and adjudication system is a complex, multi-level process involving the evaluation of medical and vocational factors and the process is simply too complicated for many claimants to navigate on their own.

However, because there is no direct payment of attorneys' fees in SSI cases, many attorneys are unable to provide representation in these cases. Since SSI benefits cannot be attached if the client does not pay, claimants with significant physical and mental impairments who are in difficult financial circumstances must often fend for themselves with SSA.

We recognize that there may be reluctance to consider the withholding of attorneys' fees from SSI claimants who by definition have extremely low income and assets, if any. It could be argued that SSI claimants would be better off using pro bono legal services or relying on legal services attorneys or protection and advocacy system attorneys to pursue their claims.

The CCD Social Security Task Force acknowledges these concerns and we strongly support the valuable service that these programs provide claimants, but we do not see this proposal as affecting their efforts in any way. Since legal services and P&A system resources, as well as the availability of pro bono legal services, are significantly limited, we concluded that SSI claimants would benefit from voluntary access to the attorneys' fee payment system as an additional resource, especially where they have been unsuccessful in finding legal assistance elsewhere.

Further, we believe that the potential loss of eligibility and benefits due to a lack of experienced legal representation is a far greater harm or burden to the claimant than payment of reasonable attorneys' fees out of the back benefit.

Given the low income and resources and limited ability of many SSI claimants to successfully pursue their own claims, we can see no compelling reason not to create parity in the payment system, especially since many individuals could be eligible for SSI, Title II, or both, depending upon when they apply.

The withholding and direct payment mechanism in the Title II program has helped to ensure that there is a pool of private attorneys who are willing and have the expertise to pursue claimants' cases. We urge you to establish a similar mechanism in SSI cases to provide these claimants with the same opportunity to obtain representation and the benefits to which they are entitled. And we would be happy to work with you to ensure that issues specific to the SSI population, such as the repayment of interim benefits, are taken into account in crafting such a provision. Thank you.

Chairman SHAW. Thank you, Ms. Ford.

[The prepared statement follows:]

Statement of Marty Ford, Co-Chair, Social Security Task Force, Consortium for Citizens with Disabilities

ON BEHALF OF:

Adapted Physical Activity Council
American Association on Mental Retardation
American Association of University Affiliated Programs
American Network of Community Options and Resources
Association for Persons in Supported Employment
Brain Injury Association
International Association of Psychosocial Rehabilitation Services
National Alliance for the Mentally Ill
National Association of Developmental Disabilities Councils
NISH
National Mental Health Association
National Organization of Social Security Claimants' Representatives
Paralyzed Veterans of America
Research Institute for Independent Living
The Arc of the United States
Title II Community AIDS National Network

Chairman Shaw, Congressman Matsui, and Members of the Subcommittee, thank you for this opportunity to testify about the collection of attorneys fees in the Social Security disability programs.

I am Assistant Director of the Governmental Affairs Office of The Arc of the United States. I am testifying here today in my role as co-chair of the Social Security Task Force of the Consortium for Citizens with Disabilities. CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 54 million children and adults with disabilities and their families living in the United States. The CCD Social Security Task Force focuses on disability policy issues and concerns in the SSI program and the Title II disability programs.

The CCD Social Security Task Force urges the Subcommittee to support a statutory change that would allow SSI claimants to voluntarily enter into an agreement with attorneys for SSA to withhold and provide direct payment of attorneys fees from their past due SSI benefits. The CCD Social Security Task Force supports such a provision because it will help ensure that claimants have adequate representation to appeal their cases. The reasons behind the withholding and direct payment of attorneys' fees in Title II cases apply with equal force to SSI cases.

The disability determination and adjudication system is a complex, multi-level process, involving the evaluation of medical and vocational factors. The process simply is too complicated for many claimants to navigate on their own. Most claimants seek representation only after their own efforts to pursue applications have resulted in denial of their claims.

However, because there is no direct payment of attorneys' fees in SSI cases, many attorneys are unable to provide representation in these cases. Since SSI benefits cannot be attached, an attorney cannot collect a fee from a successful client if the client has only SSI income and does not pay. Due to the resulting limited number

of attorneys willing to take SSI cases, claimants with significant physical and mental impairments who are in difficult financial circumstances are often left to fend for themselves with SSA.

We recognize that there may be reluctance to consider the withholding of attorneys' fees from SSI claimants, who, by definition, have extremely low income and assets, if any. It could be argued that SSI claimants would be better off using pro bono legal services or relying on legal services attorneys or protection and advocacy system attorneys to pursue their claims.

The CCD Social Security Task Force acknowledges these concerns. We strongly support the valuable service these programs provide SSI claimants in offering representation and do not see this proposal as affecting their efforts in any way. However, since legal services and P&A system resources, as well as the availability of pro bono legal services, are significantly limited, we concluded that SSI claimants would benefit from voluntary access to the attorneys fee payment system, as an additional resource, especially where they have been unsuccessful in finding legal assistance elsewhere. Further, we believe that the potential loss of eligibility/benefits due to a lack of experienced legal representation is a far greater harm or burden to the claimant than the payment of reasonable attorneys' fees out of the back benefit. Given the low income and resources and the limited ability of many SSI claimants to successfully pursue their own claims, we can see no compelling reason not to create parity in the payment system, especially since many individuals could be eligible for SSI, Title II, or both, depending upon when they apply.

The withholding and direct payment mechanism in the Title II program has helped to ensure that there is a pool of private attorneys who are willing and have the expertise to pursue claimants' cases. We urge you to establish a similar mechanism in SSI cases to provide these claimants with the same opportunity to obtain representation and the benefits to which they are entitled.

Chairman SHAW. Ms. Kaufmann.

STATEMENT OF JENNY KAUFMANN, STAFF ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER

Ms. KAUFMANN. Thank you, Chairman Shaw. Thank you for providing me with the opportunity to present the position of the National Senior Citizens Law Center and SSI advocates throughout the country on expanding the withholding of attorneys' fees to SSI claimants.

We are opposed to the elimination of the current protection for SSI recipients from attorney fee withholding. As a recently former legal services attorney, I represented SSI claimants and some SSDI claimants at all stages of the SSA disability appeals process for more than six years.

I also represented them on other legal issues as well. We were and I was a one-stop shop for SSI claimants. These clients represent the most vulnerable members of our society and the legal problems they encounter are numerous, complex and invariably tied to their financial situation. The proposal to withhold attorneys' fees from retroactive SSI awards would create undue hardship and defeat the very purpose of the SSI program which is to provide a minimum subsistence level that falls below the poverty level.

This issue has been considered by Congress in the past and it has concluded that withholding past due benefits from financially needy individuals under Title XVI would cause greater hardship than Title II withholding. This is just as true today as it has been in the past.

The Social Security Administration would be put in the untenable position of serving as a collection agent who is required to automatically place the payment of an attorney fee debt before le-

gitimate debts, necessary debts, to a landlord, to a grocer, to a health care provider or even a neighbor who provided transportation to doctors' appointments and other places.

Many times my only negotiating tool to delay or waive legal proceedings was the fact that I could verify with a creditor that I would not receive a fee for my services. Payments or loans for food and shelter are the outstanding debts that SSA requires a claimant to verify under penalty of perjury to avoid a reduction in SSI benefits. These are the in-kind support deductions. Often an SSI retroactive award is fully consumed by the repayment of these necessary debts.

The payment of attorneys' fees when coupled with repayment of a state interim assistance grant would effectively wipe out the retroactive award especially the first installment. As an example, a Virginia claimant who has only waited a year to obtain SSI benefits normally would be entitled to $6,144 in a retroactive award if there were no other deductions for in-kind support or other countable income.

A 25 percent attorney fee would reduce that award to $4,608. If the claimant also received interim assistance during this time, which is only $220 a month in the Commonwealth, the state would be entitled to direct payment of $2,640 leaving less than $2,000 for a claimant to repay any rent that is owed to her landlord or any other payments to creditors.

Further complicating the calculation is that at a minimum, an SSI claimant who does not receive a government subsidized housing grant must incur a rental liability and verify under oath that liability to SSA. If they do not, they face a reduction in their SSI benefits. Arguably, that rental liability at a minimum must equal the value of the one-third reduction rule which for fiscal year 2000 is $170.66 or $2,048 a year. Less than $2,000 in a retroactive award is not going to meet their minimum rental liability to avoid a reduction in their SSI benefits.

Payment of an attorney fee and repayment of interim assistance would not allow the SSI claimant to meet that rental obligation or debt. A vulnerable SSI claimant should not be put in the predicament of defaulting on rental obligations or other credit obligations.

There is no evidence that the withholding of attorneys' fees would increase the availability of representation for SSI claimants. Other factors go into that decision including the many income deductions that are associated with SSI benefits that may reduce the ultimate back award.

It will, however, increase the cost to the SSI claimant who can now negotiate for lower fees commensurate with their ability to pay. If SSA collects a set fee, the attorney no longer needs to consider any other factors in the fee that is charged. In the absence of solid assurance that SSI attorney fee withholding will result in significantly greater levels of representation for SSI claimants, Congress should not take an action that will eliminate fee negotiation and create hardship for some of the poorest Americans who will bear the brunt of increased fees and costs.

We are sympathetic to the concerns of the private bar who must endure long delays in payment of their hard-earned fees. But Congress should not correct this in a manner that places the burden

on those least able to shoulder it. There are other less burdensome methods to do that including assurance that the attorney fees are timely processed by Social Security.

Chairman SHAW. Thank you.

[The prepared statement follows:]

Statement of Jenny Kaufmann, Staff Attorney, National Senior Citizens Law Center

Mr. Chairman and Members:

My name is Jenny Kaufmann. Thank you for the opportunity to present our views to the Committee. The National Senior Citizens Law Center (NSCLC) works directly with legal services programs and other agencies across the country, providing assistance on a broad range of issues that affect the elderly and disabled poor. The Social Security and SSI programs have been at the core of our priorities since NSCLC was founded in 1972. I began working at NSCLC a little over a month ago after serving as the managing attorney of a legal services public benefits unit for almost six years. I am making this statement on behalf of NSCLC and other SSI advocates.

We wish to express our opposition to a proposal that would abolish the existing protection for SSI recipients and authorize the withholding of attorneys fees from retroactive awards of SSI benefits. This proposal would create undue hardship for an extremely vulnerable segment of society. At the same time, we are not convinced that it would offer a countervailing increase in the availability of representation for SSI claimants. It is highly unusual for the government to offer its services as a collection agent for a private enterprise and it is especially inappropriate for the Social Security Administration (SSA) to serve as a collection agent for attorneys seeking to recover fees from this uniquely disadvantaged population.

Elderly and or disabled SSI claimants constitute one of the most vulnerable segments of our population. The purpose of the SSI program is to provide a minimum subsistence level of income to aged, blind, or disabled individuals who have little or no income or resources to enable them to meet their basic needs for food, clothing, and shelter. The federal benefit rate for an individual living alone is pegged at 74% of the federal poverty level, or $512 per month. A modest state supplement is also provided in approximately half of the states. In order to qualify for SSI, an individual's countable income, from all sources, cannot exceed these basic subsistence benefit levels. In addition, countable resources cannot exceed $2,000.

With such extraordinarily limited income and resources, the ability of an SSI claimant to survive for a lengthy period, while awaiting a determination of his claim, often depends on loans from friends and relatives. These friends and relatives are themselves often struggling on limited incomes and count on being repaid. It is common for retroactive awards to be fully consumed by the repayment of loans from friends and relatives, payment of past due rent to an understanding landlord, payment of a security deposit on an apartment, or purchase of furniture or other items the individual has foregone and will never be able to purchase on a meager SSI grant.

In some states, SSI claimants receive interim assistance benefits to meet a portion of their needs while they await a determination of their SSI claims. These benefits must also be repaid from the retroactive award. The amount of the temporary assistance is withheld from the retroactive award by SSA and paid directly to the state.

The withholding of attorneys fees from an SSI retroactive award is contrary to the purpose of the SSI program. The payment of attorney fees when coupled with repayment of a state interim assistance grant could effectively wipe out a claimant's retroactive award, leaving her little money to repay the debts she incurred for food and shelter while awaiting a decision from SSA. For SSI children, in many instances, it would result in little, if any, money for the dedicated accounts that Congress required to be established with the proceeds of retroactive awards. These accounts, required by legislation enacted in 1996, must be used for the purchase of items or services that improve or treat the child's condition or otherwise relate to the child's disability.

There is no evidence that the withholding of attorneys fees from retroactive SSI awards will increase the availability of representation for SSI claimants. However, there is reason to believe that it will increase the cost of representation for those who do have representation. In determining the fee to be charged, an attorney normally acts in the same manner as other business people and considers the cost of providing the service and the amount the client is willing and able to pay. However, when the attorney is in the enviable position of having the government act as his

collection agent, there is no need to consider the client's willingness and ability to pay. At present, many private attorneys providing representation to SSI claimants do so at a reduced fee, in some instances out of a genuine concern for the needs of the SSI population and, in other instances, out of a practical realization that a fee will be paid voluntarily only if it is set at a level that is reasonable for clients with limited financial means. Once the government takes assumes responsibility for collection of the fee, we can expect that almost all attorneys who accept these cases for a fee will raise their rates and charge the maximum amount allowed under the fee agreement. Price competition in SSI representation will be a thing of the past.[1]

Perhaps, the higher fees and elimination of price competition could be justified if there were some assurance of significantly greater access to representation for SSI claimants. We have not seen any such assurance. While we have not seen statistics on the percentage of SSI claimants represented as opposed to SSDI claimants, we would expect the percentage of SSI claimants with representation to be lower for several reasons: 1) retroactive awards are significantly lower than for SSDI; 2) the SSI population is perceived by many attorneys as being more difficult to work with; 3) medical records for SSI claimants tend to be less developed because, in many instances, they have less access to health care and are less likely to have consistent treatment from a single medical source; and 4) SSI claimants are likely to have a lower level of awareness concerning available options for representation. Government collection of the fee will do little to address these problems. Thus, a disparity in the level of representation would be expected to continue even with SSI fee withholding.

In the absence of solid assurance that SSI attorneys fee withholding will result in significantly greater levels of representation, Congress should not take an action that will eliminate fee negotiation for SSI claimants and create severe hardship for some of the poorest Americans who will bear the brunt of the increase in fees and costs. We are sympathetic to the situation of those attorneys who have had a significant reduction in their income as the result of imposition of the user fee on retroactive Title II awards earlier this year. However, Congress should not correct the situation of those attorneys in a manner that places the burden on those least able to shoulder it.

Chairman SHAW. The vote has cut down on the attendance here at this hearing. I am going to ask each one of you if we could submit questions to you and if you could reply in writing, we would be most appreciative. I just have one area that I do want to briefly touch on. You have heard all of us up here comment on the length of time in which it takes one of these cases, 300 days from the day the appeal is filed to the day that the adjudication is made, and then roughly 60 days after that for the amounts received. That is unconscionable length of time.

Mr. Lieberman, as a former judge in this inefficient system, could you comment to me as to exactly why does it take this long, how could we streamline it, and what could this committee do in order to facilitate those suggestions?

Mr. LIEBERMAN. Well, of course, the simple answer, Chairman Shaw, would be to give greater funding to the administration so that they would have the personnel to do that. But absent that, one of the reasons for the delays is that people generally, if they are going to get representation, do not get that until the time that the hearing is set. And under the statute, as it presently is given, 20 days notice is given before the hearing takes place. I would suggest that 20 days be increased to 60 days because the sooner an individ-

---

[1] At present, the government serves as collection agent for fees in Title II cases where the attorney has a fee agreement with the client for a fee not to exceed $4,000 or 25% of the retroactive award, whichever is less. The result has been a total elimination of price competition in Title II cases with almost all attorneys uniformly charging the maximum amount allowable since collection is assured.

ual goes out and gets an attorney, they could then have the attorney do what is necessary, which is mainly developing the medical evidence and producing it in a fashion that substantiates their entitlement to the benefits.

At one time, the time limit was ten days, and when Commissioner Bradley was associate commissioner, she changed that to 20, but there is nothing written in stone. I would say the sooner that the Social Security Administration gives a notice of when a hearing is going to take place, the sooner that case can start getting developed. And that would save a considerable amount of time because what typically happens is someone will come to my office ten days before the hearing, say they need an attorney, and we try very hard not to have that continued because it is hard to get on the docket again.

But many times we are not able to get all the evidence in in that short period of time. If we had an additional period of time to do it, we could. The hearing would take place and there would not be those delays and continuances that the administration abhors.

Chairman SHAW. Never having practiced in this arena, is it very similar to a case before the bar where you go out and you do your discovery, you take your depositions, you set up the times for the deposition and all of this, or do you just—

Mr. LIEBERMAN. Well, the rules of evidence are greatly relaxed because it is a non-adversarial proceeding. As a result, there are no such things as depositions although I frequently do take sworn statements from the medical doctors that are treating the patient.

Chairman SHAW. There is no lawyer before the judge that is taking the side to uphold the decision of the Social Security Administration?

Mr. LIEBERMAN. No, Chairman Shaw. The administrative law judges are the only type of judiciary where they wear three hats. They wear one hat to protect the integrity of the trust funds, they wear a second hat to represent the claimant, even if the claimant is represented, and they wear the third hat to be the adjudicator in the case. It is almost impossible.

Chairman SHAW. It is almost a Chinese courtroom; is it not?

[Laughter.]

Mr. LIEBERMAN. And it is most difficult, but they do that, and to their credit in general I think they do it well. But because the rules of evidence are so different and because you can accept hearsay in evidence, for whatever it is worth, to an outside person who is an attorney practicing in a different field, it all seems like a Chinese courtroom.

Chairman SHAW. Yes. That is interesting. I have a number of questions right here and I will go ahead and submit them to you and also give the other members of this committee, an opportunity to submit them also.

Chairman SHAW. I want to thank you all very much for taking the time to be with us this afternoon. There is a lot of work I think we need to do. On the funding, in order to try to do that, it would appear to me that unless we are getting further and further and further and further behind, in other words, that 300 days is soon going to be 400 days, it would seem to me that we could do something to get this backlog so we could get this thing right where you

at least reduce the time to six months, which it seems like an awful lot to me even there.

Mr. LIEBERMAN. Well, there are things in place, Mr. Shaw, that with the Hearing Improvement Process that are going to start to be implemented throughout the country and I think that will have some impact on the delay.

Chairman SHAW. I would like all four of you to feel free if you have any suggestions that you want to put in writing to me of areas that we might look into. I feel as the chairman of the subcommittee that we are really leaving the most vulnerable among us in limbo and in harm's way by not doing what we can to expedite the process. I mean it is easy for us to sit here and say, well, that is a year, but so what, you get your money, not if you are not buying groceries and not if the landlord is putting you out on the street. That is a terrible situation and most of the people who qualify to come before this court are down on their luck, and that is too bad.

[Questions submitted by Chairman Shaw, and Ms. Shor's, Mr. Liberman's, Ms. Ford's, and Ms. Kaufmann's responses follow:]

NATIONAL ORGANIZATION OF SOCIAL SECURITY
CLAIMENTS' REPRESENTATIVES
MIDLAND PARK, NJ 07432
July 13, 2000

The Hon. E. Clay Shaw, Jr., Chairman
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Shaw:

This letter provides our responses to the questions you posed in your letter of June 22. That letter was a follow up to the hearing you conducted on attorneys' fees in June 14. We appreciate your on-going interest in these important issues.

The questions posed follow.

1. What suggestions do you have to improve the hearings and appeals process to provide more timely decisions and more timely benefits in successful claims?
2. As you know, Mr. Shaw and Mr. Matsui have introduced legislation to encourage SSA to improve their processing time of attorneys fees. If the fee is not paid within 30 days, no assessment would be charged. How would this incentive work in your view and can the time frame be achieved?
3. You indicate in your testimony that many successful claimants in the SSI program do not pay their representatives an approved fee. Do you have any specific data to support your claim?
4. You indicate that many SSI claimants who do not have representation would be more likely to have representation if their attorney fees were directly paid to them by SSA. According to your testimony, today 57% of SSI claimants are represented by an attorney compared with 83% of Social Security claimants. What improvement would you expect to see with the percent of SSI claimants represented?
5. Testimony from the National Senior Citizens Law Center indicates that there is no evidence that the withholding of attorneys fees from retroactive SSI awards will increase the availability of representation for SSI claimants. How do you respond?
6. You indicated that the use of fee petitions (where specific costs associated with a case are detailed and subject to approval) has increased over the past several years because SSA has not increased the $4,000 cap on fee agreements. Yet SSA testified that the use of fee petitions has declined from 30 percent in 1995 to 13 percent in 1999. Do you have any problems with their numbers?
7. Do you have any suggestions on how to streamline the fee payment process?
8. You indicate that SSA sometimes takes upwards of a year to act on a fee petition. What changes to the process would you recommend to lessen this time frame?

Recommendations to improve the hearings and appeals process

1. Provide SSA with adequate resources to meet current and future needs by removing its Limitation on Administrative Expenses (LAE) budget authority from the domestic discretionary spending category.

NOSSCR is concerned about SSA's readiness to deal with the impending increase in its workload as the "baby boom" generation approaches the peak age for onset of disability and, subsequently, retirement. Testimony at the Subcommittee hearings on February 10 and March 16, 2000, painted a bleak picture regarding SSA's ability to deal with the increased work, at the same time that its own workforce will reach peak retirement numbers. To exacerbate this problem, SSA's budget continues to be cut from levels that would allow it to adequately address current and future service delivery needs.

Most cases handled by NOSSCR members are at the hearing or Appeals Council level. While current processing times at most Offices of Hearings and Appeals are decreasing, they are still unacceptably high. Delays at the Appeals Council level are far worse with many of our members reporting a wait of up to two years from the time the appeal is filed. A claimant cannot proceed with an appeal in federal district court until the Appeals Council has acted. Thus, while their medical and financial situations are deteriorating, claimants are forced to wait for many months before receiving a decision.

To improve delays, better develop cases and implement technological advances, SSA requires adequate staffing and resources. NOSSCR strongly agrees with the Social Security Advisory Board's unanimous and bipartisan recommendation that SSA's administrative budget, like its program budget, be removed from the discretionary domestic spending caps. This would allow Congress to approve funding for SSA that would permit the agency to address current service delivery needs and planning for the future.

2. Improve full development of the record earlier in the process

Developing the record so that relevant evidence from all sources can be considered is fundamental to full and fair adjudication of claims. Unfortunately, very often the files that denied claimants bring to our members show that little development was done at the initial and reconsideration levels. Claimants are denied not because the evidence establishes that the person is not disabled, but because the limited evidence gathered cannot establish that the person is disabled. The key to a successful disability determination process is having an adequate documentation base and properly evaluating the documentation that is obtained. Unless claims are better developed, the procedural changes currently being implemented by SSA will not improve the disability determination process.

NOSSCR supports full development of the record at the beginning of the claim so that the correct decision can be made at the earliest point possible. Claimants should be encouraged to submit evidence as early as possible. The benefit is obvious: the earlier a claim is adequately developed, the sooner it can be approved and the sooner payment can begin. However, the fact that early submission of evidence does not occur more frequently is usually due to reasons beyond the claimant's control. Recommendations to improve the development process include:

- SSA should explain to the claimant, at the beginning of the process, what evidence is important and necessary.
- DDSs need to obtain necessary and relevant evidence. Representatives often are able to obtain more relevant medical information because they use letters and forms that ask questions relevant to the disability determination process. DDS forms usually ask for general medical information (diagnoses, findings, etc.) without tailoring questions to the Social Security disability standard. The same effort should be made with non-physician sources (therapists, social workers) who see the claimant more frequently than the treating doctor and have a more thorough knowledge of the limitations caused by the claimant's impairments.
- Improve provider response rates to requests for records, including more appropriate reimbursement rates for medical records and reports.
- Provide better explanations to medical providers, in particular treating sources, about the disability standard and ask for evidence relevant to the standard.

3. Streamline the process without impairing the claimant's right to a full and fair hearing.

NOSSCR supports SSA's recent efforts to reduce unnecessary delays for claimants, so long as they do not affect the fairness of the process to determine a claimant's entitlement to benefits.

a. Initial and reconsideration levels

In 10 prototype states, SSA currently is testing two significant changes at the prehearing levels of the process: elimination of the reconsideration level and adding a predecision interview, also known as a "claimant conference." We believe that these changes are positive and NOSSCR has long advocated the value of providing claimants with a face-to-face meeting with the decision maker.

However, we have concerns how the claimant conference is being implemented. Reports from members indicate that most conferences are not in person and are conducted by phone. The content varies, depending on the particular DDS adjudicator involved. Further, claimants should not be discouraged from pursuing an appeal if the decision is denied.

b. Hearings and appeals levels

Current processing times at the ALJ and Appeals Council levels are unacceptably high. In FY 99, the average processing time was 313 days at the ALJ level and 460 days at the Appeals Council level. SSA has announced plans to address the delivery of service at both levels in the Hearings Process Improvement plan (HPI) and the Appeals Council Process Improvement plan (ACPI). Both plans set forth goals for processing of claims: 193 days by FY 2002 (HPI) and 90 days by FY 2003 (ACPI).

We certainly support these goals. However, we approach the HPI plan with serious concerns for any violations of claimants' due process rights to a full and fair hearing, as well as any encroachments on the decisional independence of ALJs. The HPI plan, in contrast to the ACPI plan, involves a top-to-bottom reorganization of the hearings-level process, including office organization. We urge the Subcommittee to exercise its oversight authority to ensure that processing times in fact do improve but not at the expense of the rights of claimants. Issues to be monitored include:

- Are ALJ functions being inappropriately removed and reallocated to non-ALJ staff?
- What is the impact on the complete development of cases and recognition of issues? Are cases "certified" as ready to hear before they actually are?
- Are cases adequately screened for early, on-the-record decisions?
- Has the claimant's right to submit new evidence to the ALJ, including post-hearing evidence been limited? Have ALJs been discouraged from admitting such evidence?
- Will prehearing conferences have value or will they be a formality, adding another step to the process?

SSA recently announced expansion of its test to eliminate a claimant's right to request review of a hearing decision by the Appeals Council. We oppose the elimination of a claimant's right to request review by the Appeals Council. The Appeals Council currently provides relief to nearly one-fourth of the claimants who request review of ALJ denials, either through outright reversal or remand back to the ALJ. Review by the Appeals Council, when it is able to operate properly and in a timely manner, provides claimants with effective review of ALJ decisions and acts as a screen between the ALJ and federal court levels.

Given the low percentage of Appeals Council decisions appealed to federal court, it appears that claimants largely accept the decision as the final adjudication. In addition, elimination of Appeals Council review could have a serious negative impact on the federal courts. We agree with the Judicial Conference of the United States' 1994 statement opposing this plan when first proposed as "likely to be inefficient and counter-productive." Access to review in the federal courts is the last and very important component of the hearings and appeals structure. Court review is not de novo but, rather, is based on the substantial evidence test. We believe that both individual claimants and the system as a whole benefit from federal court review. The district courts are not equipped, given their many other responsibilities, to act as the initial screen for ALJ denials.

4. Technological improvements

The HPI plan includes a number of improvements to enhance automation and management data collection and analysis. It also includes a modest expansion of videoconferencing ALJ hearings at five OHA offices. This allows ALJs to conduct hearings without being at the same geographical site as the claimant and representative and has the potential to reduce processing times and increase productivity. Initial reports from our members indicate that videoconferencing has worked well and does not compromise the claimant's right to a full and fair hearing. The ALJ is able to observe and hear the claimant, a key factor for an adjudicator in a disability claim. Although not mentioned in the HPI plan, we would vehemently oppose any effort to use telephonic hearings.

Tie timeliness of fee payment to imposition of user fee

H.R. 4633 would tie the assessment of the user fee to prompt payment of the attorney's fee. Specifically, the user fee could be charged only if the attorney's fee is processed and certified for payment within 30 days of the certification of the client's benefits.

There was some confusion during the hearing as to the "starting point" for the 30-day requirement. The confusion arose because some witnesses used the date the beneficiary is placed in "current pay" status as the starting point for the 30-day period; others used the date that the beneficiary's "past-due" benefits are certified as the starting point for the 30-day period.

William C. Taylor, Deputy Associate Commissioner for the Office of Hearings and Appeals, stated in his testimony, "H.R. 4633 would not allow SSA to impose the attorney fee assessment if payment is not made to the attorney within 30 days after the initial certification of payments to the beneficiary." He indicated that only 10% of the cases could be processed under this standard, and that two-thirds of the expected revenue from the user fee would be lost.

But the intent of the bill is to "start the clock" with the date that the beneficiary's "past-due" benefits are certified. At this point, the amount of the attorney's fee is known and ready to be certified. A thirty-day time limit appears eminently reasonable, particularly in light of many attorneys' experience in the early spring of 2000 when they were receiving their attorneys' fees checks within 30 days of their clients' receipt of their "past-due" benefit checks. This standard is reasonable, and SSA has demonstrated an ability to meet it.

Representation for SSI Claimants

Our association maintains a referral service for claimants seeking representation. Many of the attorneys who participate in our referral service indicate that they do not want referrals of SSI claimants; they decline to represent SSI claimants because of their past experience with unpaid attorneys' fees. We routinely receive dozens of calls daily from SSI claimants who are seeking lawyers. We often are unable to make referrals for these callers because, although there are attorneys in their area who accept Social Security cases, there are no attorneys in their area who accept SSI cases.

On June 7, 2000 we surveyed a sample of our members on several topics. On the subject of SSI cases, we asked the following question: "Do SSI claimants contact you for representation? Do you take SSI cases? Would a withholding and direct payment mechanism in SSI cases change your practice?"

All of the respondents supported a fee payment mechanism for SSI cases. These are typical responses:

"I do take SSI cases but in a very reluctant manner. Since there is no guarantee that my legal fees will be paid, I prefer the Title II cases. I would certainly increase my practice in SSI cases if the direct payment mechanism for SSI cases were implemented. There are a lot of people who need legal representation in this area, but because of previous bad experiences in collecting my fees, I will not get involved with them." Margarita Marchan-Mankus, Esq., Aurora, IL

"Effective January 1, 2000 I stopped taking SSI claimants after twenty one years of accepting them on the same basis as Social Security Disability clients. I stopped taking them because I was unpaid by so many SSI clients recently that I was losing money. If fees were withheld and paid directly, I would happily resume accepting them on the same basis as DIB clients." Charles D. Bennett, Jr., Esq., Roanoke, VA

"Yes, SSI claimants frequently contact me for representation. I only take these claims if they also have an arguable SSDI claim. I do not take straight SSI claims because it is so hard to collect the fee. (I stopped taking SSI-only claims about 5 years ago when I was repeatedly not paid my approved fee). If a fee withholding mechanism was instituted, I most definitely would again take SSI-only claims."

"My office receives MANY calls from SSI claimants. I do accept some SSI cases, however, I have had to increasingly decline to do SSI cases because many claimants do not pay the attorney's fee awarded. This problem has occurred particularly with child's SSI cases to the extent that I almost never accept a child's case anymore. In EACH of the last two years, I have lost more than $25,000 in fees not paid by SSI claimants. If withholding and direct payment is instituted on SSI cases as on Social Security disability cases, I would be happy to assist SSI claimants again." Betty M. Tharrington, Esq., Norfolk, VA

"SSI claimants frequently contact us for representation. We are very selective in deciding to represent a client where there is no substantial DIB component to the claim. This is based upon our experience of having problems collecting our fee in SSI-only cases. A withholding and direct payment mechanism would drastically af-

fect our practice in this area. We would definitely accept many more SSI cases." Cynthia C. Berger, Esq., Pittsburgh, PA

"We do very few SSI cases because we have a hard time getting paid. We view SSI cases as the equivalent to pro-bono work. We take SSI cases on a case-by-case basis due to payment problems. If fees were withheld, we would do more SSI work." Michael A. Comisky, Esq., Shawnee Mission, KS

"Yes, SSI claimants contact me, usually to beg me to take their case. I usually refuse because in the majority of SSI cases, the successful claimant needs the money more than I do, in their own minds, and they do not pay. That's a majority of my experience, as in about 70%. Thus, I only take an SSI case where I have some reasonable expectation of payment. I'm softer when it comes to children's SSI cases, but the parent usually does not pay either. I would like to take on SSI cases as I do SSDIB cases, but I can't do so without being paid. I think it's terrible that the government knowingly discriminates against the poor this way." Richard D. Tolin, Esq., Southfield, MI

"A great many SSI claimants contact me for representation. I do take SSI cases, though I take many less than I used to because I frequently have been left unpaid for cases which I won. A withholding and direct payment mechanism would greatly change my practice -I would no longer be reticent to take these cases." Susan M. Evans, Esq., Cleveland, OH

"I do not handle SSI claims solely. If there is a dual claim, Title II and SSI, I will handle them. I have found, in the past, because the checks are sent directly to the claimant, they have so many other commitments for money that I am the last to be paid and usually by the time it comes to pay me there are no funds. I have been 'stiffed' so often I have just refused to take anymore SSI claims. I believe I can do a good job of handling SSI claims, but unless I have some assurance of being compensated I cannot and will not handle a solely SSI claim. I guess if Social Security does not want the claimant to be represented by a competent and capable attorney, this is one way to keep them from doing it and that is seeing the attorney is not paid." Richard W. Cardot, Esq., Elkins, WV

If the attorney received assurance as to the payment of a fee for a successful claim, I would anticipate the same rate of representation for SSI claimants as for Social Security claimants. The administrative processes for the two types of claims, from initial application through federal court review, are almost identical. The disability determination standards are the same. We know from SSA's statistics that the rate of representation for SSI claimants is significantly lower than for Social Security claimants. We know that attorneys would represent SSI claimants if the fee payment structure of the two programs were the same. The sources of free legal representation currently available to SSI claimants are unfortunately inadequate to fully meet the need. As Eileen P. Sweeney from the National Senior Citizens Law Center testified before this Subcommittee at a hearing on May 13, 1987, "While the legal services programs represent thousands of people on Social Security and SSI issues annually, there is no way that these programs can possibly meet the entire demand. As a result, mechanisms are needed which will assure the private attorney that, upon successfully resolving a Social Security or SSI case, s/he will be able to secure his/her fee. This is the only way to assure that competent counsel is available and accessible to disabled individuals when they require assistance." Attorneys' Fees in Social Security Disability Cases: Hearing before the Subcommittee on Social Security, page 96, 100th Cong., 1st Sess. (1987).

Fee agreement ceiling

Many claimants' representatives report that their use of fee petitions instead of fee agreements has increased recently because of the fee agreement's fee cap. In his testimony, OHA Deputy Commissioner Taylor referred to a "special systems run on a sample of attorney fee cases." We have no information as to the size of the sample or the reliability of the extrapolated percentages.

With a COLA adjustment, the fee ceiling would be $5,000. This matches the current authority of Administrative Law Judges in fee petition cases.

Streamlining the fee payment process

Once the adjudicator, at any level of the process, has found that a claimant is eligible for benefits, the first effectuating task is for SSA to put that claimant into "current pay status" and to begin the on-going monthly checks. Not until this is completed does SSA turn to payment of the claimant's past-due benefits, or to calculation and payment of the fee. We concur that this is the appropriate priority for administrative tasks.

Once the claimant is in "current pay status," the most straightforward procedure for fee agreement cases is to process the claimant's past-due benefit payment and the attorney's fee payment at the same time.

Streamlining the fee petition process

Many representatives believe that the agency's slow processing of fee petitions is deliberate, that it is designed to discourage use of the fee petition process and to promote use of the fee agreement process. This is a serious concern, because the choice of fee method belongs solely to the individual representative and is outside the agency's purview. If the agency were to streamline its process to reduce the number of "hand-offs" that occur before a fee petition reaches the adjudicator with authority to act on it, this concern could be set aside as erroneous.

Currently, Administrative Law Judges have limited authority to approve fees. They may approve fees up to $5,000. If they believe a higher fee is warranted, their role is to forward the fee petition to the Regional Chief

ALJ. The length of time that fee petitions wait to be forwarded is often inexplicably long. SSA should institute an internal tracking system to ensure that fee petitions are, where necessary, forwarded promptly. The number of instances where this forwarding process is needed would be reduced if the authority of Administrative Law Judges to set fees were increased.

Claimants' representatives wait until they have received and reviewed the award information for their clients and for any eligible dependents before they file their fee petitions. Clearly the often-substantial delays in providing the award information will cause the fee petition process to be lengthened. Faster effectuation and notification would enable representatives to submit their fee petitions more quickly.

We appreciate the opportunity to respond to your questions. Please let me know if we may provide any additional information.

Very truly yours,

NANCY G. SHOR
Executive Director

LIEBERMAN & GUTIERREZ, P.A.
MIAMI, FL 33130
July 13, 2000

The Honorable E. Clay Shaw, Jr., Chairman
Social Security Subcommittee
United States House of Representatives
Washington, D.C. 20515

RE: June 14, 2000 Hearing

Dear Chairman Shaw

Thank you for the opportunity to testify before the Subcommittee on June 14, 2000. I am pleased to respond to the written questions you have asked.

The amount of the attorney fee "user fee" appears to be excessive. OHA Deputy Commissioner William Taylor testified at the hearing at 87% of fees paid in 1999 were processed under the fee agreement system. This requires approving a usually standard contract between the parties; calculating 25% of the past-due benefits (up to a $4,000 ceiling); inserting the form fee language into the claimant's award notice; and notifying the Treasury of the payee and the amount of the payment. I would characterize these as generally very routine tasks.

My own experience is that I am filing considerably more fee petitions now. Many of my colleagues in Florida tell me that they are more frequently turning to the fee petition process. Although we generally do receive a fee authorization for the fee amount we have requested, we are very discouraged about the length of time this process takes. Adjusting the ceiling for the fee agreement process would certainly be helpful, since more cases would be submitted with a fee agreement.

Between February and June, my attorney's fee payments speeded up considerably and then slowed. The elimination of the 15-day waiting period for fee agreement cases has doubtless been a positive factor.

Based on my conversations with employees in various components at the Social Security Administration, I can report that the most frequent comment I hear is that there are not enough personnel to process the workload. This comment comes from personnel inside the Offices of Hearings and Appeals with regard to cases at the

administrative hearings level, as well as from benefit authorizers who process current and past-due benefits for successful claimants.

I would endorse the specific recommendations that Nancy Shor has provided in the written responses to her questions.

Thank you for this opportunity to respond to your questions. Please let me know if there is any additional information that I could provide. I thank you for your leadership in considering these issues of such importance to claimants and to their representatives.

Very truly yours,

LYLE D. LIEBERMAN

CONSORTIUM FOR CITIZENS WITH DISABILITIES
WASHINGTON, DC 20006
July 14, 2000

The Hon. E. Clay Shaw, Chairman
Subcommittee on Social Security
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Shaw:

This is in response to your letter of June 22 requesting additional information on processing of attorneys fees by the Social Security Administration. Specifically, you asked:

1. You indicate that the current process for the payment of attorneys fees under title II (Social Security) cases should be extended to title XVI (SSI) cases. Could you elaborate. Should there be restrictions as to the limit of the fee? For example, do you believe that the current cap of $4,000 or 25% of the back pay for a fee agreement be raised?

2. How do you reconcile your position on the extension of direct payment to the SSI program to that of Jenny Kaufmann of the National Senior Citizens Law Center? Ms. Kaufmann has indicated that withholding attorney fees from past-due benefits is contrary to the purpose of the SSI program and, when coupled with the need to repay interim assistance agreements, could wipe out the claimant's ability to repay debts for food and shelter.

3. What suggestions do you have to improve the hearings and appeals process to provide more timely decisions and more timely benefits in successful claims?

In response to your first question, I believe that the limits for SSI should be the same as the limits for Title II cases. In addition, while the 25% overall limitation should remain the same, I believe that the $4,000 cap should be indexed for inflation.

The CCD Social Security Task Force believes that all dollar limits in the Title II and XVI programs should be annually indexed for inflation. These programs are designed to assist the individual to deal with the costs of everyday life when the person is restricted from working due to disability. Those everyday costs are most certainly affected by annual increases in the cost of living. The dollar figures that set limits on income and resources and various disregards should also reflect increases in the cost of living. Otherwise, the dollar limits become meaningless over extended periods of time, further restricting the definition of disability annually.

The same arguments apply to the attorneys fee program designed to encourage attorneys to represent people in difficult SSI and Title II cases. Without annual cost of living increases, the incentive diminishes each year.

In response to your second question, the CCD Social Security Task Force position is based upon balancing the interests of the individual in meeting his/her needs both past and present. While the payment of attorneys fees certainly will reduce the amount that the individual has available to meet accumulated obligations and current needs, it is important to note that, for the payment of attorneys fees to occur, the individual would have been successful in proving eligibility for benefits and, therefore, will be better able to meet future needs as well. We reiterate that the system for determining disability is so complex that without the assistance of competent, experienced legal representatives, many applicants for SSI would be unable to prove their eligibility and would, therefore, have no benefits to assist them in meeting their obligations, past, current, or future.

In response to your final question, I believe that there are several things that can be done to improve the process and provide more timely decisions. First, SSA must

be provided with the resources to fully meet its administrative responsibilities. This requires that the Limitation on Administrative Expenses budget authority be removed from the domestic discretionary spending category. In addition, better case development before a decision is made is important. The response to questions submitted by Nancy Shor of NOSSCR includes several important recommendations for addressing better case development. (The CCD Social Security Task Force also submitted a statement discussing some of these issues for the record of a hearing in this Subcommittee on August 3, 1995.) Finally, SSA's current testing for streamlining the adjudication process could yield positive results for beneficiaries. However, we urge the Subcommittee to remain vigilant to ensure that any recommended changes are, in fact, improvements that do not harm beneficiaries or impair their rights to a full and fair hearing.

Thank you for this opportunity to provide additional information. Please let me know if the CCD Social Security Task Force can provide any further information or assistance.

Sincerely,

MARTY FORD
Co-Chair
Social Security Task Force

NATIONAL SENIOR CITIZENS LAW CENTER
WASHINGTON, DC 20005
July 14, 2000

The Hon. E. Clay Shaw, Jr.
Chairman, Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

RE: SSI Withholding

Dear Chairman Shaw:

Thank you for your letter of June 22, 2000, posing several questions to follow up on my testimony before the subcommittee on June 14, 2000. We have answered the questions individually and as completely as we are able to do. If you have further questions, I would be happy to respond to them.

1. Our statement that the fee agreement process has eliminated price competition is not based on any study and we are not aware of any formal study having been undertaken. Rather it is based on a large amount of anecdotal evidence, including personal experience, which we have not heard contradicted and is supported by testimony presented by SSA (see page 5 of their written statement) and Mr. Lieberman to the Subcommittee on June 14, 2000. The fee agreement provision makes the approval process fairly simple for the Social Security Administration (SSA). Every T–II fee agreement we have seen or heard of, in all parts of the country, provides for payment of 25% of past due benefits or $4,000, whichever is less.

2. The evidence that some attorneys charge reduced fees for SSI cases is based on statements made by private attorneys, in public and private forums, as to their individual practices. We are not able to quantify this, except to say that, from what private attorneys tell us about their practices, there is more variation in fees charged to SSI claimants and the methods of collecting the fee. Obviously, neither the proponents or opponents of direct payment of fees in SSI cases have any objective quantifiable evidence as to the impact of such a change. However, under the current system, if an attorney wishes to have the client voluntarily pay the fee, the fee must be set at a level the client can pay. If the fee is set too high, it will conflict with other debt obligations the client has and the client may choose to pay the landlord, the grocer and the utility company and leave the lawyer with nothing.

3. We agree with Ms. Ford of the Consortium for Citizens with Disabilities on the importance of representation for persons seeking both Social Security and SSI Disability benefits. Indeed, a case can be made that representation is even more important for SSI claimants because of the greater complexity of the SSI program with its income and resource rules. We agree that attorneys who provide this service should be paid. But so should the landlord who has waited for the rent, the local grocer who has provided food on credit, the doctor who has spent time evaluating and diagnosing the disability, and the relative who has loaned his or her scarce funds to enable the individual to survive while awaiting SSI benefits. Any state that

has paid interim assistance benefits to the client pending the approval of disability benefits also expects to be repaid those benefits. Many of these claimants have children or child support obligations that must be met and they feel an obligation to provide for their children out of their own meager funds. We do not believe that it is appropriate for Congress to give any one creditor priority over other creditors who have also provided valuable services.

4. We agree with Ms. Ford and others that the available options for representation for SSI claimants are limited. At present, representation is provided by some private attorneys, some legal services organizations, some Protection and Advocacy programs and some law school clinic programs. Availability of representation varies significantly from place to place and from time to time. In most places, it is not sufficient to meet the need. However, we are not convinced that a provision for withholding attorneys fees from past due SSI benefits would make a significant impact on the availability of representation for SSI claimants even though it would have a significant impact on loss of income and individual autonomy for those recipients.

Obviously, neither side can present any hard data on the impact of fee withholding on the availability of SSI representation. A simple comparison of statistics for T–II claimants and SSI claimants may not be completely informative and may not be an accurate comparison since the selection criteria are also different. Although the disability standard is the same, the SSDI and SSI populations are different. The SSI claimant is less likely to have well developed medical records and will ultimately receive a significantly smaller retroactive award because of the lower SSI grant level and the inability to provide benefits for periods prior to the date of application. SSI claimants often do not have access to continuing health care coverage or are dependent on the existence of free medical and mental health clinics who do not have the time to complete reports for submission to SSA. SSI claimants cannot afford to purchase costly consultative examinations that are sometimes necessary to prove their case (e.g. neuropsychological examinations). Instead, they depend on SSA and that state disability determination agencies to order and pay for substandard consultative examinations. Finally, there are numerous changes occurring in the appeals process that are shortening the time a claimant must wait to appear before an administrative law judge. In many areas, claimants are having hearings within a year of application, substantially reducing back awards and making it more difficult for clients to prove that they meet SSA's strict all or nothing disability definition.

You also ask about the percentage of the our workload that consists of SSI claimants. The National Senior Citizens Law Center is not a direct provider of legal services to individual claimants for SSI, Title II or any other program. Our role is to advocate policies beneficial to older individuals and individuals with disabilities, to litigate cases impacting on significant numbers of individuals and to provide technical assistance to attorneys and other advocates across the country who are providing direct representation to individuals. We occasionally co-counsel with attorneys on SSI issues of broader impact. In this latter role, we provide assistance to a large number of attorneys who are representing SSI claimants. This includes both attorneys in private practice as well as those employed by various legal services organizations. We are familiar with the valuable, often unheralded work, being done by both legal services lawyers and private attorneys on behalf of SSI claimants.

5. We have three recommendations to fee withholding that can be taken, both by SSA and by Congress, to provide greater assurance that attorneys representing SSI claimants will receive their fees.

- SSA can see to it that all attorneys representing SSI claimants receive timely notice of payment of the past due award to their clients, so that they might be able to contact the client while the client has the money rather than a few months later.
- Congress can amend 42 U.S.C. 1383(a)(10)(B)(iii)(I) the provision for installment payment of large past due SSI benefits, by simply providing for the addition of attorney fees to the first installment just as outstanding debts for food, clothing, shelter or medicine can now be added to the initial installment payment.

This amendment would be reasonable because of the statutory limitations placed on payment of SSI benefits through installments. It would allow the beneficiary to access more funds, up front, to repay necessary food, clothing and shelter debts and any agreed attorney fees. It would retain the ability of the SSI claimant to sit down and negotiate a fair attorney fee agreement.

As we stated previously, initially the back award is often consumed by debts to landlords and family members who have been supporting the claimant pending receipt of benefits. These debts need to be repaid as quickly as possible after benefits are awarded. This is even more true because of the smaller initial installment of the back award. However, an SSI beneficiary can request an "advance" on the remaining funds to repay additional outstanding debts beyond the first installment

payment. It would result in no additional administrative burden to the local SSA field offices to process these requests since they are already processing similar requests under the current rules. A client would merely have to submit a copy of the approved fee agreement and the field office could process the request. The check is still issued to the client but there is a greater incentive to pay the attorney because the SSI beneficiary has signed a document verifying to SSA that this is a debt that needs to be paid.

• A third alternative is to make changes to the payment process of Title II attorney fees. Many private practice attorneys have found that they can no longer afford to represent SSI claimants because of the increasing costs of representing claimants. Elimination of the burdensome "user fee" would help.

Private practice attorneys have seen the value of their services for SSDI and SSI recipients eroded over time. Taking these steps, in combination with allowing for advancement of attorney fees to SSI recipients from their back awards, should go a long way in restoring the willingness and ability for the private practice bar to assume responsibility for representing SSI claimants.

6. We agree with the characterization of the complexity of the disability determination and adjudication system and certainly agree that representatives provide a valuable service to SSI claimants as already stated above. The objection we have is in placing the debt to an attorney before the basic living expenses that the SSI program was enacted to cover.

7. There are many suggestions to improve the hearings and appeals process to provide more timely decisions that would constitute a hearing in and of itself. The most important suggestion we have is to provide SSA with the funds it needs to administer the program. We support the position of the Consortium for Citizens with Disabilities Social Security Task Force in urging Congress to remove SSA's limitation on administrative expenses from the domestic discretionary budget caps. SSA's workloads are increasing and it cannot keep up with the demands being placed on it as the baby boomers retire and as it implements the Ticket to Work program. SSA has been forced to downsize its workforce over the past few years just as the demands for services has increased. Without adequate staffing, the processing of applications for all benefits, not just disability benefits, is unduly delayed. The Appropriations Committees need to have the flexibility to approve adequate funds for the administration of Social Security programs without hurting or weakening other human services programs.

SSA and all the state disability determination programs (DDS) should have adequate funds and be required to purchase medical exams that utilize advances in medical technology and psychiatric evaluations to document an individual's physical and mental functional capacities.

Respectfully submitted,

JENNY KAUFMANN,
Staff Attorney
GERALD MCINTYRE,
Managing Attorney, LA

Well, thank you all again and we will conclude this hearing.
[Whereupon, at 4:12 p.m., the hearing was adjourned.]
[Submissions for the record follows:]

ADVOCATES FOR THE DISABLED, INC.
PHOENIX, AZ 85012

The Honorable E. Clay Shaw, Chair
Social Security Subcommittee
Committee on Ways and Means
United States House of Representatives
Washington, D.C. 20515

RE: Social Security attorney fees

Dear Mr. Shaw:

We are administrators of a non-profit social work agency that assists individuals with claims for public benefits provided by the state and federal governments, including Social Security Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI). We are aware of the process by which lawyers are able to charge and receive fees for work on such cases, and the relative availability of legal counsel

for DIB and SSI claimants. SSI claims are treated differently than DIB cases, with no procedure for withholding and direct payment of fees to the lawyer from the claimant's back benefits.

It is our experience that more attorneys represent DIB claimants, and that different fee payment mechanisms is the reason for the discrepancy. If the same process currently used for DIB claims is available to SSI claimants, they will have an easier time obtaining, and a choice of, legal representation. The recently expanded and enhanced vocational rehabilitation opportunities for DIB and SSI recipients makes it critical that all eligible claimants have the best chance of qualifying for benefits. The Social Security Administration has recognized the positive contributions of legal counsel in disability cases, and we also endorse the increased participation of attorneys in these claims.

We are available to answer additional, specific questions, and hope that the proposal to add SSI cases to the current attorneys' fee process used in DIB claims will be approved. Thank you for your consideration.

Sincerely,

SUE SCHAAFSMA
Executive Director

PAT CAMPBELL
Casework Supervisor

AMENT, WULF & FROKJER, S.C.
MERRILL, WI 54452
June 27, 2000

A L Singleton
Chief of Staff
Committee on Ways & Means
US House of Representatives
1102 Longworth House Office Bldg
Washington DC 20515

Members of the Social Security Subcommittee:

I have represented individuals in social security disability cases since 1971. Over time, inaccuracies and delays in payment of attorneys fees have become commonplace.

As I dictate this statement, I have a file before me where the claimant was paid his benefits on or about June 10, 1999. I am dictating this statement on June 13, 2000. I have yet to receive a fee.

I have followed up with the Great Lakes Service Center any number of times, both directly and through the Wausau District Social Security Office. For reasons never explained to me by the Service Center, my fee remains in a back log status.

My client has not contested the fee. There is no plausible reason, whatsoever, for payment of this fee to take this long.

In the last several years, I cannot remember an instance where I have felt that I was paid a fee in reasonably prompt fashion. I typically have to wait at least four months after the client gets his or her money before I receive my fee. Six months is not at all unusual.

Another problem that arises is duplicate payment. To my recollection, at least a couple of times a year, we are paid our fee twice on a case. Thankfully, we keep accurate records and have returned such duplicate payments.

I feel that recently adopted assessment for payment of fees is an insult to those of us who have continued to represent claimants despite the problems in receiving our fees in timely fashion. Personally, I look upon the assessment as a reward for an agency that does its job poorly.

Respectfully submitted,

WILLIAM A. WULF

AMERICAN BAR ASSOCIATION
CHICAGO, IL 60611
June 28, 2000

The Honorable E. Clay Shaw, Jr., Chairman
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I am writing to you on behalf of the American Bar Association in connection with the hearings your Subcommittee held June 14, 2000, on processing attorneys' fees by the Social Security Administration (SSA). I ask that this letter be made a part of the record of those hearings.

The ABA supports repeal of the provisions in P.L. 106–170 that impose an assessment on attorneys' fees in Social Security Disability Insurance and Supplemental Security Income disability cases. The attorney's fee in these cases is already highly regulated and capped. The additional assessment of a "user fee" discourages attorneys from representing claimants in these matters. Many such claimants are in poor health, and have little education and few resources. Without representation, they will not be able to navigate the appeals process successfully, and will not receive the benefits to which they are entitled.

H.R. 4633 would allow SSA to impose a "user fee" assessment on attorneys' fees only if the fees are processed and approved for payment within thirty days of benefit approval. We believe this legislation is a step in the right direction. Excessive delays in payment of authorized fees by SSA make it difficult for attorneys to accept cases representing Social Security applicants. H.R. 4633 would encourage the prompt payment of these fees by SSA. Thus, we would support enactment of H.R. 4633.

Please let me know if you have any questions or if I can be of assistance to your Subcommittee.

Sincerely,

EDWARD E. KALLGREN
Chair

AMERICAN DISABILITY REPRESENTATION SPECIALIST ASSOCIATION
HATTIESBURG, MS 39404–5296
June 23, 2000

A.L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Singleton:

I am the Executive Director of American Disability Representation Specialist Association. I represent a group of non-attorney disability representation practitioners. ADRSA Associates serve all areas of the United States including Alaska, Hawaii, and Puerto Rico.

No non-attorney representatives have fees withheld for payment. In spite of not having fees withheld, we continue to provide consistent high quality services and maintain our professional practices. It is the position of ADRSA that no fees should be withheld by the federal government to pay attorneys or non-attorneys for social security disability representation fees. Our clients pay us direct without having money withheld by the Social Security Administration. Our fees are approved by the Social Security Administration before we collect them.

The quality of representation services can suffer if payment is automatic. ADRSA Associates sit down face to face with clients and collect fees as approved by the Social Security Administration. It makes ADRSA Associates more conscientious and promotes greater effort in the provision for our services to satisfy our clients.

Having the Social Security Administration collect fees prevents the individual American taxpayer from having the opportunity to sit with the person to whom they owe a fee and discuss the provision of services.

In addition, having to collect fees for attorneys is a burden on the Social Security Administration's limited staff, provides an unequal playing field for non-attorney representatives and is a burden on the American taxpayer in supporting this group, attorneys, that demand special privileges. No workload should be placed on Social Security Administration employees to collect fees.

I request to appear as a witness before the Committee on Ways and Means to submit a testimony on this issue.

Sincerely,

FRANK P. EDWARDS
Executive Director

Statement of Dolores J. Bowers, Brown, Kinsey & Funkhouser, P.L.C., Mason City, IA

The following details of our recent experience with the SSA document the pressures that limit the number of attorneys available to assist claimants.

On Jan. 7, 1999, a copy of the Attorney Fee Agreement signed by the claimant on July 16, 1998, was mailed to Judge J. Michael Johnson, Office of Hearings and Appeals, West Des Moines, IA.

On July 21, 1999, we received Notice of Decision—Fully Favorable.

On Sept. 3, 1999, we received the Notice of Award stating that $2,801.50 had been withheld from the first check for the lawyer's fee.

I had been told by someone at our local Social Security Office to wait three months before making inquiry as to why payment of fee had not been received. On December 1, 1999, I left a message on a machine at our local Social Security Office. A response was never received.

On Jan. 5, 2000, I called 800–772–1213 and talked to Debbie Bryant in Kansas City. She said our attorney fee claim was in Baltimore. The Baltimore office was behind and had not released payment yet. She said she would send our inquiry on to Baltimore and we should follow up in two weeks. She also said that was all we could do.

On or about Jan. 19, 2000, I called 800–772–1213 and was told our attorney fee claim was still in the payment center and we should give it 6 to 8 weeks from December 21, 1999.

On Feb. 15, 2000, I called 800–772–1213 and was told our inquiry would be forwarded to Processing Center and someone would contact us. No one did.

On March 14, 2000, I called 800–772–1213 and was told the paperwork just went to the Payment Center on March 6 and we should allow six weeks from March 6 to receive payment.

On March 23, 2000, Linda Hermanstorfer, Hearing Office Clerk, Office of Hearings and Appeals, West Des Moines, IA, wrote stating that if we wanted to collect a fee, a fee petition needed to be completed.

On March 29, 2000, the fee petition was received for completion.

On April 7, 2000, the claimant signed the fee petition.

On May 2, 2000, we received Authorization to Charge and Collect Fee.

Payment has not yet been received.

Please add this statement to the record on the above-referenced hearing.

MEMPHIS, TN 38104
June 28, 2000

The Honorable E. Clay Shaw
Chair of the House Social Security Subcommittee

RE: H.R. 4633

Dear Congressman Shaw:

As vice chairman of the Social Security Section of the Federal Bar Association I applaud the introduction of H. R. 4633 and the Federal Bar Association wholly endorses its passage. The "user fee" which took affect earlier this year will likely inhibit effective representation in Social Security matters. The Federal Bar Associa-

tion believes that the passage of H. R. 4633 will alleviate part of the problem in requiring Social Security to at least pay attorney fees in a timely manner, but a better solution would be a repeal of the 6.3% user fee totally. The Federal Bar Association acknowledges and appreciates the effort by yourself and other members of the Subcommittee and would be more than happy to work with the Subcommittee on any issues in the future.

Very truly yours,

CHRIS A. CORNAGHIE

DAVID ALLEN & ASSOCIATES
SACRAMENTO, CA 95819
June 14, 2000

The Honorable E. Clay Shaw, Jr., Chairman
Subcommittee on Social Security
Committee on Ways and Means
U.S. House of Representatives
Washington, D.C. 20515

Mr. Chairman and Honorable Members of the Committee, thank you for conducting a hearing to address the manner in which the Social Security Administration processes attorney fees and for providing this opportunity to provide comment on this issue.

I am an attorney with David Allen & Associates, which provides representation to disabled persons seeking Title II Social Security Disability Insurance (SSDI) and/or Title XVI Supplemental Security Income (SSI) benefits before the Social Security Administration. This law firm has counseled thousands of people seeking those benefits.

In announcing the hearing on this issue, you stated, "That the Social Security application process is so complex people feel obliged to hire an attorney to help them is in itself a serious problem." My experience with my clients confirms the sad accuracy of your observation. I routinely hear comments that claimants had not pursued their applications because the Social Security representative told them that they had no basis for their claims, or that they had given up because they kept receiving one denial after another, or that they declined to pursue their claims because they were treated rudely at the Social Security field office. As a result, untold numbers of deserving claimants never have their claims heard on the merits by an Administrative Law Judge.

The fact that claimants for benefits from the Social Security Administration face these types of obstacles is ironic, given that the claims process is supposedly non-adversarial in nature. I have had many claimants tell me that, when they mentioned to the Social Security representative that they plan to hire an attorney, the representative states that they do not need an attorney. Yet, persons who receive assistance from attorneys in these claims statistically have a better chance of success than do those claimants who are not represented. If the claims process is non-adversarial, why should attorney representation alter the success rate?

The answer to this question lies in part in the inherent complexity of the Social Security system, which creates hurdles for the unrepresented claimant. These deterrents include the following:

First, claimants must often exhaust review through the initial, reconsideration, hearing, and Appeals Council levels before achieving success. This multi-step process discourages the unrepresented claimant.

Second, the claims process takes an unacceptably long period of time. The claimant often must wait more than one year simply to have a hearing before the Administrative Law Judge. Faced with this delay, a significant percentage of claimants abandon their claims, or simply start the application process anew, resulting in even further delay in the consideration of their claims on the merits.

Third, the unrepresented claimant generally does not understand that it is vitally important for the claimant to secure an assessment setting forth functional limitations from the treating physician. Without this information, the report of a consultative examiner retained on behalf of the Social Security Administration who has seen the claimant on only a single occasion, or worse yet, the report of a non-treating physician who has not examined the claimant even once, likely becomes the basis of the decision. Social Security Ruling 96–5p provides that the treating physician's opinion is entitled to great weight, and in some cases to controlling weight,

in the evaluation of a claim. Yet, the unrepresented claimant is generally unfamiliar with this rule and may therefore not secure this important information.

Fourth, the Social Security Administration often does not secure certain critical medical records. The claimant's attorney ensures that such evidence is identified, obtained, and routed to the Social Security Administration for proper consideration.

Fifth, many cases involve complex legal issues, such as whether work activity during the period of disability constitutes substantial gainful activity, whether a claimant's disability began on or before the date on which the claimant was last insured for SSDI benefits, and whether the claimant's impairments meet or equal the level of severity set forth in the Listing of Impairments (20 C. F. R. Part 404, Subpart "P," Appendix 1). An attorney ensures that these complicated issues are properly developed and evaluated.

Given the multitude of ways in which a meritorious claim may be improperly denied, attorney involvement is critical to assure that deserving claimants receive their benefits. Nevertheless, the Ticket to Work and Work Incentives Improvement Act of 1999 (P. L. 106–170) and the way in which the Social Security Administration is implementing the Act's provisions are raising barriers to attorneys representing these claimants.

The Social Security Administration had previously required the submission of a fee petition for approval and payment of an attorney's fee. This requirement was eliminated by the implementation of the process which allowed payment to an attorney under the terms of the fee agreement between the attorney and the claimant. A condition of this new procedure was that the attorney must agree to accept a fee no greater than $4,000. Nevertheless, attorneys found incentive in agreeing to this approach, since it implied that the Social Security Administration would effectuate payment faster than in those cases in which the fee petition is used. Of course, a corresponding benefit to the Social Security Administration was the elimination of time spent processing fee petitions.

By utilizing the expedited fee payment procedure, the income which an attorney may generate in a Social Security practice is now reduced. My practice is limited almost exclusively to Social Security disability claims. Therefore, the fee cap on SSDI claims requires that I maintain a substantial volume of cases for the practice to generate even a slight profit. Public Law 106–170 has further impacted the income to attorneys, by reducing attorney fees by a "user fee" of 6.3%. A case which previously would have resulted in a fee of $4,000 now results in a fee of $3,748. This amount, in isolation, is small. However, when the amount is factored over an entire caseload, the amount is critical.

For attorneys whose Social Security practice represents a small percentage of their entire caseload, the "user fee" will likely drive them away from Social Security practice entirely.

This office has noticed some improvement in the processing time for payment of attorney's fees, since the new law has been implemented. Nevertheless, we do continue to experience ongoing problems. We are still required to inquire repeatedly from the Office of Central Operations when payment will be made. The average payment cycle still remains months.

As long as the 6.3% "user fee" remains the law, the Social Security Administration should be required to adhere to performance standards for entitlement to this payment. At each stage of the claims process, claimants are required to file their appeals to the next level within 60 days of receipt of an unfavorable determination. If 60 days is reasonable in that context, it should be no less reasonable to require the Social Security Administration to pay the attorney's fee within 60 days of its favorable determination finding the claimant medically disabled. I ask that the Committee carefully consider the GAO's findings, as mandated by Public Law 106–170, to determine whether the Social Security Administration is acting appropriately for payment of the "user fee."

The Committee should consider legislation to address certain flaws in Public Law 106–170.

First, the "user fee" should be eliminated in its entirety. The funds "generated" by the "user fee" have never gone toward the purpose originally intended by the legislation. The "user fee" therefore has failed as a funding mechanism, a fact which I fear may remain unknown to the vast majority of Members of Congress.

Second, the 6.3% figure is an arbitrary amount. The amount of time to compute the attorney's fee and issue instructions for its payment is no less in a case in which the attorney's fee is $1,000 than in a case in which the attorney's fee is $4,000. Therefore, if the "user fee," which is merely a processing fee, is to remain in place, the amount should be limited to $25, a reasonable amount for the expense associated with the issuance of the check for the attorney's fee.

At this time, the Committee should consider revisions to existing law. Rather than perpetuating the ill-advised concept of the "user fee," Congress should consider creating incentives for attorneys to represent needy claimants. The time is long overdue for instituting withholding of attorney's fees on not only SSDI claims but also SSI claims. Many attorneys shy away from representing indigent clients seeking SSI benefits, or at the very least limit the number of SSI claimants who they represent, due to the fear of inability to guarantee payment at the favorable conclusion of the claim. The standard for a finding of disability is no different for the SSI claimant than for the individual seeking SSDI benefits. Why should it therefore be more difficult for an SSI claimant to obtain an attorney than for an SSDI claimant to do so?

Public Law 106–170 continues to be a cancer. It saps the ability of attorneys to continue to represent claimants for Social Security disability benefits at a time when attorney representation is critical to success on meritorious claims. Amendments to its existing provisions, in line with the recommendations set forth above, will secure attorney representation for disabled Americans at a time when that access is being seriously eroded by a well-intentioned but harmful law.

I thank you, Mr. Chairman and Honorable Members of the Committee, for the opportunity to provide this statement.

Very truly yours,

ROSCOE L. BARROW II

Statement of Ray Cebula, Disability Law Center, Inc., Boston, MA

Chairman Shaw, Mr. Matsui, and Members of the Subcommittee, thank you for considering these remarks during your deliberation of the proposed withholding of attorney fees in Supplemental Security Income (SSI) cases.

I am a Senior Staff Attorney with the Disability Law Center of Boston, Massachusetts. In that role I am responsible for the implementation of the statewide Disability Benefits Project which has, since 1983, been funded to provide representation to SSI claimants seeking disability based benefits. I have been practicing in this area of the law for some 18 years.

I urge the committee members to reject the proposed withholding of attorney fee in SSI cases and do so after careful thought and for several reasons. SSI applicants are among the poorest of the poor. Generally with minimal physical, mental and financial resources, these individuals will still be living at more than 30% below the federal poverty line even after securing SSI benefits. In Massachusetts, including the state funded supplement, a disabled SSI recipient will receive a maximum monthly award of $626.39. The average benefit paid in

Massachusetts is significantly lower. In 1998, the average SSI award paid in Massachusetts was only $401.38.[1] The average retroactive award received by SSI claimants represented by the Disability Benefits Project in 1998 was about $8000. Using the current attorney fee formula of $4000 or 25%, whichever is less, such a retroactive award will only produce a fee in the amount of $2000. This is hardly sufficient to attract private bar involvement in SSI work.

SSI benefits are protected from legal process by the anti-assignment clause contained within the Social Security Act. This clause provides very strict protection of these needs-based, subsistence level payments. Appropriately, benefits that are provided and needed to meet the most basic human needs of food, clothing and shelter, should be so well protected. Allowing an exception for attorney fees will create a crack in this firm protection that can only grow when other special interests determine that they require access to life sustaining benefits.

Most importantly, the SSI program is not simply the disability determination process that is very familiar to all advocates practicing before the Social Security Administration. The SSI program is controlled by very complex income and resource rules. Rules that create an extra level of determination in order to secure the proper payment for an SSI applicant. These income and resource rules are foreign territory to much of the private bar who routinely deal with Title II insurance claims having no income or resource restrictions. A large part of my work time is taken up by the provision of technical assistance and support to social security claimants representatives—public and private. Income and resource issues are simply not issues being handled by the private bar. However, these issues are intimately involved with

[1] See, SSI Recipients by State and County 1998, Social Security Administration, Office of Policy, Office of Research, Evaluation and Statistics, SSA Pub. No. 13–11976, July 1999.

every SSI claim. Only through a mastery of these rules can a representative be assured that his client is receiving the correct amount of SSI. Living arrangements, exempt resources and in-kind income are terms of art unique to the SSI program. Knowledge of these terms is critical to proper and thorough representation.

Poor people have suffered a significant lack of access to our health care system. The average SSI claimant has been treated at emergency rooms, clinics, or "health stops" and rarely has a coherent medical history. A large portion of this population suffer from undocumented or untreated impairments as a direct result of poverty. Health care providers are reluctant to provide medical records or provide narrative reports knowing that these services must be provided free of charge. An SSI claimant is unable to pay the "going rate" for production of a medical narrative to support their SSI claim. These issues make the prosecution of an SSI claim often much more difficult, and always more time consuming, than that of a disability insurance claim.

Frankly, there are better uses for retroactive SSI awards. Again, SSI recipients are living well below the poverty line. When disability occurs, the fragile life lines to which these claimants cling become frayed. Having lost the ability to work, the often poorly educated SSI claimant cannot rely upon private disability policies to provide necessary income. Rent payments are missed. Debts are incurred to meet the need for food and clothing. Medical bills remain unpaid. It is often these basic life needs that absorb the vast majority of the retroactive SSI dollars received by a successful claimant. Meeting these overextended debts is a means of attempting to secure the lives of their families and themselves.

I do not pretend that there are adequate resources to meet the representation needs of all SSI claimants. Legal Services and Protection & Advocacy advocates can only handle a limited number of claims each year. However, these resources are extremely talented and able to deal with ALL aspects of an SSI claim and not simply the disability determination process. This situation is not unlike that facing a disability insurance claimant in Massachusetts. There are simply not sufficient private bar resources to handle the need. There are very few private attorneys who handle this type of case. Those that do are often talented and dedicated representatives. We are fortunate to have an active coalition of social security advocates in our state. However, together we are unable to meet the need. I do not believe that allowing SSI fee withholding will change this situation.

As a result of these thoughts, I would encourage the Members of the Subcommittee to reject the notion of SSI fee withholding.

Thank you for your attention and consideration.

FEDERAL BAR ASSOCIATION
WASHINGTON, DC 20037–1416
June 28, 2000

Honorable Clay Shaw, Jr., Chairman
Subcommittee on Social Security
U.S. House of Representatives
B–316 Rayburn House Office Building
Washington, D.C. 20015

Dear Chairman Shaw:

Thank you for holding the hearing on June 14 on the processing of attorney fees by the Social Security Administration. This matter is of considerable interest to the membership of the Social Security Section of the Federal Bar Association, and I request that this correspondence be entered into the hearing record. The comments presented herein are exclusively those of the Social Security Section of the FBA and do not represent the official views of the Social Security Administration, in whose employment I serve as an Administrative Law Judge.

As you know, the Federal Bar Association is the foremost professional association for attorneys engaged in the practice of law before federal administrative agencies and the federal courts. Fifteen thousand members of the legal profession belong to the Federal Bar Association. They are affiliated with over 100 FBA chapters across the nation. There are also over a dozen sections organized by substantive areas of practice such as the Social Security Section, of which I am the Chair.

Unlike other organizations associated with Social Security disability practice that tend to represent the narrow interests of one specific group, the Federal Bar Association's Social Security Section encompasses all attorneys involved in Social Security disability adjudication. Our members include:

- Attorney Representatives of claimants
- Administrative Law Judges (ALJs)
- Staff Attorneys at the Office of Hearings and Appeals
- Attorneys at the Social Security Administration's Office of General Counsel
- U.S. Attorneys
- U.S. Magistrate Judges, District Court Judges and Circuit Court Judges

The primary interest of the FBA's Social Security Section is in the effectiveness of the adjudicatory processes associated with hearings in the Office of Hearings and Appeals (OHA), the appeal process at the Appeals Council, and judicial review in the federal courts. We believe that representation of claimants by attorneys is a positive contribution to those processes and should be encouraged. Since the Social Security Administration's handling of the payment of fees to attorneys has an impact on their willingness to accept disability cases, the matter is of considerable importance to them and the conduct of their legal practice.

Having reviewed the testimony of all the witnesses at the subcommittee's recent hearing, I wish to address three areas relating to SSA's processing of attorney fee requests: 1) extension of the withholding of fees to Supplemental Security Income (SSI) cases; 2) the amount of the fee charged by SSA to process the fee withholding; and 3) raising the cap in attorney fee agreements to $5000.

Extension of Fee Withholding to Supplemental Security Income (SSI) Cases

Attorneys who practice Social Security disability law overwhelmingly endorse the extension of withholding fees in SSI cases for direct payment. There is no question that attorneys are reluctant to take SSI cases due to the high risk of nonpayment for services rendered. This is reflected in SSA's 1999 statistics at the OHA level, which show that 83.4% of Title II claimants were represented while only 57.1% of Title XVI claimants were represented. Many attorneys simply refuse to handle SSI cases. Those who do tend to do so out of a sense of obligation and often in the spirit of pro bono work. Moreover, of those attorneys who now take SSI cases, it is likely that some will discontinue doing so, given the 6.3% reduction in the amount of fees they collect in Title II cases where there is direct payment by SSA. SSI claimants should not have to rely upon the collective good conscience of a few attorneys for representation.

The reality is that nearly half of SSI claimants are unrepresented. While Administrative Law Judges are charged with protecting the interests of pro se claimants and do their best to meet that obligation, it is done in the context of a very heavy caseload. ALJs carry hundreds of cases on their dockets. The reality is that a represented claimant, by virtue of the time, attention and expertise that a representative can provide, has a better chance of success. This is recognized by the Consortium for Citizens with Disabilities as reflected in Marty Ford's recent testimony. While resources such as legal services and pro bono attorney work are invaluable, they are limited. As the CCD pointed out, the potential denial of benefits for SSI claimants due to lack of experienced legal representation far outweighs the burden of having reasonable attorney fees withheld from their back benefits.

SSA and others oppose the extension of withholding of attorney fees to SSI cases in large part based upon the extremely low income status of SSI recipients. They point to the obligation and need of SSI recipients to repay various debts incurred during the application process such as loans for basic needs. Further, they say that withholding of fees from past due benefits might wipe out the ability of recipients to repay those just debts. The FBA likewise recognizes and appreciates the financial dilemma of SSI recipients. Nonetheless, the FBA does not understand the reluctance to view an incurred attorney fee debt as a debt equally worthy of repayment out of an SSI recipient's back benefits. The attorney who assisted the claimant in obtaining the benefits has a legitimate claim on the claimant's available assets. The bottom line is that SSI claimants are better off if awarded benefits and the likelihood of that happening rises when they are ably assisted by counsel. The FBA perceives no persuasive reason to treat SSI cases differently from Title II cases vis-a-vis the withholding of reasonable attorney fees from past due benefits.

The 6.3% Assessment Charged by SSA to Process the Attorney Fee

FBA historically has opposed the imposition of any SSA assessment for withholding and direct payment of attorney fees from past due benefits. The FBA on April 15, 1998, through action by its National Council, adopted a resolution in opposition to the assessment of fees in Social Security and SSI cases, recognizing that such fees are "likely to severely and adversely impact the ability of claimants to obtain legal representation." We communicated those views to the Subcommittee and others in Congress prior to passage of the "Ticket to Work" legislation, which established the 6.3% assessment.

Indeed, we concur with the hearing testimony of Nancy Shor, made on behalf of NOSSCR, that it is troubling that there does not appear to be any logical connection between the amount of the fee and the actual cost to SSA to withhold and issue a check for attorney fees. We understand that this is the subject of study by SSA as well as GAO, and we urge that the results of those studies be applied in setting a rational amount for the fee, should it be determined that a fee must continue to be levied.

It has come to the attention of the FBA that attorneys are increasingly trying to avoid the current 6.3% "tax" on their services by waiving direct payment and filing a fee petition in lieu of a fee agreement. It requires no study to know that approval of a fee agreement by an ALJ takes a matter of moments and virtually no staff time within OHA. In contrast, when a fee petition is filed, ALJ and staff time rise dramatically—at no small cost to SSA. Yet, SSA receives no fee for processing a fee petition if there is no direct payment of fees. Thus, if this trend continues, the imposition of the 6.3% user fee may actually create greater costs for SSA given the increased cost of ALJ and OHA staff time in handling fee petitions. Attorney attempts to avoid what is viewed as a confiscatory tax on direct payment of their fees may give new life to the cumbersome fee petition process that the fee agreement and direct payment were designed to avoid.

In sum, the FBA urges elimination of the user fee altogether. In the alternative, we urge review of the user fee when the full GAO report is completed in December. When the actual cost of processing withholding and direct payment is ascertained, any fee should be set based on that actual cost rather than the current 6.3% of the awarded fee.

Finally, with respect to the linkage of payment of a fee to some benchmark for prompt payment by SSA, the FBA considers that to be a reasonable and desirable approach. While 30 days in some instances may be unrealistic due to workers' compensation offsets and dependent claims, we fully support the idea that imposition of any user fee be tied to payment by SSA within a specific, realistic period of time.

Raising the Limit in Fee Agreements to $5,000

The FBA urges SSA to raise the cap in fee agreements to $5,000. While this issue is not currently controlled by statute, we believe the Subcommittee should devote renewed attention to revision of the cap. It has been ten years since this cap was raised to the current amount of $4000. Inflation over the last ten years would support the need for such an increase. The reality is that with the faster processing of claimants' cases at OHA, back benefits are not as great as they were once likely to be. Thus, in many cases the amount of the attorney fee is considerably less than the current $4,000 cap. As Deputy Associate Commissioner of the Office of Hearings and Appeals William Taylor indicated at the hearing, the average payment in 1999 in a fee agreement was $2,555. Nonetheless, in those protracted cases where 25% of back benefits reach $5,000, there is no reason to exclude those cases from the fee agreement process and subject them to the cumbersome fee petition process. ALJs can approve up to $5,000 in fees when requested in a fee petition; there is no logical reason to limit the amount approvable by an ALJ in a fee agreement to less than that amount. To reduce time expended by attorneys, ALJs and OHA staff, we urge that the cap on fees in a fee agreement be raised to $5000.

In closing, I want to thank you and the Subcommittee for your interest in this issue and the opportunity to submit these comments for your consideration. The Social Security Section of the Federal Bar Association looks forward to working with you on this and future issues relating to Social Security disability case adjudication.

Sincerely,

KATHLEEN MCGRAW, CHAIR
Social Security Section

DENVER, CO 80204
June 22, 2000

A.L. Singleton
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, DC 20515

Re: Attorney Fees in Social Security Disability Cases

Dear Sir or Madam:

I am an attorney at law with a solo practice in Denver, Colorado. I have been practicing for fifteen years.

I have two areas of specialization in law practice: Social Security disability and employment law. Over the past three years I have dealt with a business consultant specializing in small professional practices for the purpose of advising me about ways to improve the efficiency of my law practice. My business consultant, after reviewing all of my records, has advised me that I should reduce the Social Security disability portion of my law practice, because of the delays in getting paid on Title II disability cases and the occasional, but still significant, instances in which a client receiving Supplemental Security Income fails to pay my attorney fee. I have followed my advisor's recommendation and have reduced the number of Social Security cases that I have handled over the past year. The Administration's recent imposition of a user fee for Title II attorney fees has also influenced my decision to take fewer Social Security cases.

Feel free to call me if you have any questions.

Very truly yours,

THOMAS A. FELDMAN

Enclosure
cc: Congresswoman DeGette

AUSTIN, TX 78731
June 15, 2000

Congressman E. Clay Shaw, Jr.
Chairman, Subcommittee on Social Security
Ways and Means Committee

Re: Hearing June 14: Attorney's Fees for Representatives of Social Security Claimants

Thank you, Congressman Shaw, for recognizing that the process for obtaining Social Security is cumbersome and costly. I have represented claimants for over twenty-five years. During that time every effort to simplify or improve the system has only made it worse. I have often said that if private companies can process correspondence and payments efficiently, then it seems exceedingly odd that our government can make it so complicated and difficult.

A very simple solution to the problem of processing attorney's fees is to make one check payable to the claimant and his or her representative for the lump sum. This has been done by insurance carriers in personal injury and worker's compensation cases for many years. There would be less work and cost by using one check. The delays would be reduced. In order to avoid the representative abusing the claimant by taking more than 25%, simply require that a statement be submitted by the representative and claimant showing the division of the check. This too has been done by workers' compensation agencies for many years. This one payment could cover SSI and Title II benefits without the delay while these sums are calculated which results in frequent errors.

The multitude of confusing letters could be reduced to one letter explaining the payment, attorney's fees, and Medicare/Medicaid.

This would save any number of trees as well as reducing pollution, and reducing waste in our government. Perhaps this is too simple and easy to ever be accepted.

MARY ELLEN FELPS

GINGER LANIGAN AND ASSOCIATES, INC.
BROCKTON, MA 02301
June 14, 2000

A.L. Singleton, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Dear Chief of Staff Singleton:

I am an independent, Non-Attorney Social Security Representative. My Offices are located in Brockton and New Bedford, Massachusetts, and Margate, Florida. I employ 7 full time case managers; two are Bi-Lingual. I have been in business for 5½ years. I pay every tax imaginable. Because of my locations, many of my clients are indigent.

I feel that the federal government discriminates against me each and every time i win a case. Because i am not a lawyer, and non-attorney representatives do not have clout behind them, the retroactive checks are sent to the claimant, and the claimant assumes the responsibility of paying my fee.

Let's look at one scenario: for the most part, SSI cases mean that the claimant has no apparent work history, is probably collecting money from the state's welfare system, and has debts from months, if not years, of being disabled. That person's retroactive check will first go to pay back the state (if that person collected state benefits), and then the remainder will go to pay off relatives and friends, etc. My fee is long gone. I have to file court proceedings, usually reduce my fee, and then settle for $10.00 a month payments.

Claimants who have Social Security Disability Insurance benefits are more likely to pay my fee, although there have been numerous cases where I have had to wait many months to be paid.

We also have instances when, inadvertently, either the Social Security District office or the payment center enters us into the computer as attorneys. In this case scenario, the payment center holds our fee, sends a letter to the claimant stating that very fact. . .down the line realizes that we are non-attorneys; then releases our fee to the claimant, who, at that point, thinks we were already paid.

I deserve to be treated in the same manner as my adversaries. I would gladly pay a user fee to insure that my fee was withheld from retroactive benefits and sent directly to me.

Thank you for the opportunity to express my opinion.

Sincerely,

GINGER LANIGAN

Statement of John R. Heard, Attorney at Law, San Antonio, TX

My name is John Robert Heard. I am in attorney in private practice, and I have had the privilege of representing Social Security Disability and Supplemental Security Income claimants since 1976. These comments are submitted on my own behalf, and not on behalf of any client, organization, or other person. Our firm currently includes 5 attorneys who represent claimants in San Antonio, the Corpus Christi area, and the Rio Grande Valley of Texas. I appear frequently at administrative hearings at the Social Security Administration's Office of Hearings and Appeals in San Antonio. I would like to first address my comments from the perspective of a former board member and chairman of the community mental health Center in San Antonio, Bexar County, Texas.

I served on the board of the Bexar County MHMR Center from 1980–1990. Our community mental health center is the primary service provider for underprivileged people who suffer from problems of mental disability, mental retardation, and substance abuse. In the decade that I served on the community mental health center board, I observed the tremendous lack of resources to which our clients were subjected, despite the best efforts of our agency. Unfortunately, our agency was woefully under funded, and we were only able to reach a relatively small percentage of those individuals in greatest need for our services, who invariably had no other resource to turn to.

In the early 1980's, as my experience on the board grew, parallel to my experience as a lawyer representing Social Security and Supplemental Security Income claimants, I observed a terrible irony: Our underserved client population would have been able to access a range of medical services by obtaining Supplemental Security Income and the Medicaid benefits which accompany SSI, but they lacked the wherewithal and resources to pursue their claim for benefits. Although the Bexar County Legal Aid does an excellent job with limited resources, it frequently had to shut off access to SSI clients, sometimes for months at a time, in order to prevent an administrative overload within the Bexar County Legal Aid. At the same time, the claimants were unable to obtain representation from private sector lawyers, since there is no withholding of attorneys fees in Supplemental Security Income claims, and the cases were regarded as difficult and unprofitable. Because the community MHMR center lacked the resources and the expertise necessary to assist our clients in obtaining SSI benefits, these clients remained without access to ongoing medical care or income, and frequently fell out of contact with the MHMR center, as they relocated from place to place based on the availability of sympathetic relatives, or the necessity of seeking public shelter.

This situation continues today, and the lack of resources to assist the chronically mentally ill in obtaining their Supplemental Security Income benefits is particularly acute, since the private sector is understandably reluctant to assist these very difficult clients when there is no guarantee of fee payment. Nevertheless, some lawyers, including lawyers in our firm, accept these cases understanding that there will be times when they are not paid, viewing these situations as a *de facto* pro bono service. However, even that limited availability of representation of SSI claimants in the private sector is now threatened by the 6.3% user fee imposed on attorneys fees in Title II cases.

THE IMPACT OF THE USER FEE ON SSI REPRESENTATION

Office overhead for our firm runs at approximately 75% of gross receipts. Accordingly, a 6.3% reduction in our gross income from Title II represents a 25% reduction in our profits, before taxes. When the user fee hit our law firm, we had no choice but to look for areas in which we could recoup this very significant loss. We could not layoff employees without reducing the quality of our services. Virtually all of our other expenses are also fixed. Therefore, we have been forced to decline to accept cases which are marginal, and in which the fee is not guaranteed. Specifically, we have found it necessary to take fewer Supplemental Security Income cases, including especially children's SSI cases. We are especially saddened by this later consequence, since our firm is one the few private law firms in our part of Texas which will take children's SSI claims.

Supplemental Security Income cases generally produce a smaller back award of benefits than Social Security Disability (Title II) cases for two reasons: They are only retroactive to the first day of the first full month after the month in which the claimant applies, and the amount of SSI monthly payments is typically smaller than the average amount of payments under the Social Security Disability program. Accordingly, as our firm looks forward to the future we have no choice but to conclude that, unless the Congress changes the existing situation, we will be forced to decrease the size of our operations through attrition, and focus our energies on Title II claims where there is a greater likelihood of being awarded, and actually being paid, a reasonable fee.

THE PRESENT BILL

The passage of HR 4633 is an important first step in the direction of restoring equity and fairness to the social security claimant and her representative. It is difficult to understand how the Social Security Administration can argue that it should be entitled to $252.00 for preparing a check (assuming a $4,000.00 fee), without even being required to forward that check to the attorney in a timely manner! Apparently, the Social Security Administration feels that it should be allowed to further increase its revenue by having the advantage of the float on the lawyer's hard earned fees. This situation is outrageous and unconscionable, and should be remedied immediately.

The protestations of the Social Security Administration regarding the inability to pay fees in 30 days are incongruous, and are certainly inconsistent with the procedures employed by other parts of the Federal Government. If the Social Security Administration cannot design a system which will allow payment of attorneys fees within a 30 day window, then the user fee should be eliminated entirely until such time as the Social Security Administration can design and implement procedures that will allow it to pay fees in a timely manner.

OTHER ESSENTIAL CHANGES

The Congress should immediately extend fee withholding to Supplemental Security Income (Title XVI) cases. As previously stated, Supplemental Security Income cases are less attractive to the private sector attorney, since they produce smaller fees. Moreover, the claimants are frequently homeless, and suffer mental and emotional problems more frequently than Title II claimants.

The plight of SSI claimants seeking representation is well demonstrated by the recent case of *Maldonado v. Apfel,* 55 F. Supp 2d 296 (S.D.N.Y. 1999). This case involved children seeking SSI benefits, who were represented by their parents. However, the parents represented their children not by choice, but from necessity. As described in the Maldonado decision:

Throughout these administrative proceedings, Ms. Maldonado represented Rogelio. This was not, however, due to a lack of effort in trying to find an attorney. Soon after the SSA sent Ms. Maldonado the October 13, 1995 letter containing the list of groups that provide legal assistance to individuals seeking SSI benefits, she and her husband began to try to find a lawyer to represent Rogelio and "contacted every organization on the list in Manhattan and the Bronx." (Maldonado Aff. ¶¶ 5–6). None of these lawyers offered Ms. Maldonado so much as an initial appointment. (Id. ¶ 6). Ms. Maldonado then sought the services of private lawyers who advertised that they took disability cases. (Id.). Some replied that they did not take children's cases, while others said that they might take a child's case, but only if the family paid a retainer of $1,000. (Id.). The family, however, was not financially able to pay the requested retainer and thus Ms. Maldonado continued to represent her son. (Id.). *Maldonado,* at 299.

The other Plaintiff in the case, Ms. Olavarria, encountered similar obstacles. Unable to obtain legal representation for her child, each mother pursued the matter to Federal Court, where they the encountered the objection of the Government that they were not competent to represent their children, since they were not attorneys. Ms. Olavarria continued to seek counsel:

After receiving a letter from the government dated February 24, 1999, which explained the government's position that Ms. Olavarria may not represent her son in these proceedings without counsel, the Court scheduled a conference for March 19, 1999. Ms. Olavarria attempted to obtain counsel to attend the conference. (Olavarria Aff. 8–9). Both Bronx Legal Services and the Legal Aid Society informed her that no lawyers were available to accompany her to the conference. (Id. ¶ 9). She also contacted approximately five or six other legal aid offices, all of which informed plaintiff that they did not handle children's SSI cases. (Id.). Ultimately, the Court's Pro Se Office arranged for lawyers with Legal Services for the Elderly and Bronx Legal Services to attend the conference. At the conference, these organizations agreed to represent plaintiff for the limited purpose of determining whether she could continue to represent her son without an attorney. *Maldonado,* at 301.

The attempts of these mothers to obtain legal services for their children are is typical of the hurdles faced by Supplemental Security Income claimants. Many adult SSI claimants, suffering from physical and mental disabilities, lack the persistence of Mrs. Maldonado and Ms. Olavarria to seek legal services as diligently as they did. Accordingly, after an initial denial or two by a private sector attorney or a legal aid office, SSI claimants often simply give up, and accept their fate, returning to the back streets and the back wards.

The *Maldonado* court ultimately allowed Mrs. Maldonado and Ms. Olavarria to proceed, *pro se,* on behalf of their children. The court grounded its finding, in substantial part, on the unavailability of counsel for children's SSI cases. The court held:

Unfortunately, these social security appeals often "are not very attractive cases" to non-volunteer private attorneys. (Tr. at 36). As plaintiffs' counsel explained: "In general, attorneys in private practice, including members of the Social Security bar, will not accept children's SSI cases." [FN13] (See Baker Aff. ¶ 4). Further, legal services organizations cannot be expected to accept all of the children's SSI cases. Due to lack of funding, the loss of staff positions, and other responsibilities, most organizations are operating at or near capacity. (*307 See id. ¶¶ 5–7). See also Bruce A. Green, Foreword, Rationing Lawyers: Ethical and Professional Issues in the Delivery of Legal Services to Low-Income Clients, 67 Fordham L.Rev. 1713, 1713 (1999) ("It is . . . commonly understood that the present level of government and private funding for legal services for low-income persons is woefully inadequate to meet the pressing legal need."). *Maldonado,* 306–307.

The holding in *Maldonado* was recently accepted by the 5th Circuit in the case of *Harris v. Apfel,* 209 F3d. 413 (5th Cir. 2000). The court in Harris agreed with the policy considerations articulated in the *Maldonado* case, and found that parents

should be allowed to represent their children *pro se* in appeals from administrative SSI decisions, in order to avoid jeopardizing the child's statutory right to judicial review.

CONCLUSION

The unavailability of counsel for children and adults in Supplemental Security Income appeals is well known throughout the legal and social service communities. In order for legal services to be available to Supplemental Security Income claimants, it is imperative that withholding of attorneys fees be extended to Supplemental Security Income cases. In addition, the 6.3% user fee should be eliminated, and replaced by a reasonable fee that more accurately reflects the actual cost for withholding attorneys fees and certifying payment to the attorney. Congress should act immediately to pass HR 4633, and to extend withholding of attorneys fees to Supplemental Security Income cases, in order to remedy the longstanding injustice suffered by our mentally and physically disabled citizens who are entitled to Supplemental Security Income assistance but who cannot receive it without legal representation.

SACRAMENTO, CA 95821
June 21, 2000

A.L. Singleton
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
102 Longworth House Office Building
Washington, D.C. 20515

RE: Subcommittee Hearing on Processing of Attorney's Fees by the Social Security Administration

Dear Mr. Singleton:

Although I am a dedicated attorney with a small practice, I am becoming unwilling to represent S.S.I. recipients because Social Security has made it so hard to collect a fee. Not only are S.S.I. claimants an unstable population, on the periphery of society, but SSA now requires that they receive their retroactive benefit in six-month installments. Furthermore, SSA does not issue a fee approval on a concurrent (or Title XVI and Title II) case until all the work is completed on the Title II portion, which often takes many months. For all these reasons, I, along with many other attorneys, am reluctant to represent S.S.I. claimants.

But attorneys are necessary to Social Security and to the judges. Attorneys weed out undeserving cases and gather evidence and medical opinions; they also lighten the load for the state agencies.

A 6.3% user's fee applied to Title XVI cases to allow those fees to be automatically withheld would ensure that attorneys take these cases and therefore would ensure that the poor get the help they need.

It is to be noted that the S.S.I. payments are made out of the general fund, not out of money the claimant has earned. It is public assistance. The law says that the lawyer's fee is contingent and to be paid out of retroactive benefits. When the lawyer has performed this public service, it is mete and right that the lawyer be paid out of the public fund the claimant is receiving.

Sincerely,

JOAN JENNINGS

Statement of Joel F. Friedman, Jerome, Gibson, Stewart, Friedman, Stevenson & Engle, P.C., Phoenix, AZ

Chairman Shaw and members of the Social Security Subcommittee, please accept these comments for inclusion in the public record of the hearing that took place on Wednesday, June 14, 2000, on Processing of Attorney Fees by the Social Security Administration.

My name is Joel F Friedman and I am an attorney in private practice with a small law firm in Phoenix, Arizona. I have been representing Social Security Dis-

ability Insurance Benefits (DIB) and Supplemental Security Income (SSI) claimants before District and Field offices, and the Office of Hearings and Appeals, primarily in the Phoenix metropolitan area, for nearly 18 years. I have been actively involved in the legislative process as well, I have periodically represented the interests of a group of private Social Security attorneys in the Phoenix area, and I am presently a member of the Board of Directors and national Secretary of the National Organization of Social Security Claimants Representatives (NOSSCR). I am attaching to this statement a copy of my curriculum vitae.

I am writing to you as an attorney in private practice concerned about the directions taken recently by the Social Security Administration (SSA) on matters involving the payment of benefits to successful claimants for DIB and SSI, which then is coordinated with payment of my attorneys' fees. I would appreciate your consideration of the following:

The representation and claims process

I represent individual adult and child claimants for exclusively DIB and SSI benefits, as well as concurrent claims in which benefits are paid under the two programs subject to the maximum SSI benefit amount. I meet directly with and interview potential clients, explaining how the system works, including the agency review procedures, likely time frames for claim processing, and medical requirements of proving a "disability." I will also advise potential clients if I consider their claim improbable, but I sometimes undertake even a borderline case if it is the only realistic opportunity for the individual to qualify for DIB (e.g., coverage based on work history is expiring or has expired).

When I accept a client, I generally assist personally with preparation of required Social Security questionnaires and forms. My staff supports Social Security and state disability determination agency offices with gathering medical records and reports. We will advance to most clients the cost of "purchasing" treating source records, narrative reports, or even consultative evaluations. These services are provided to both DIB and SSI claimants. In an SSI case, though, I must consider the risk of not recovering individual case expenses as well as the chance of not being paid for my time (attorneys' fees), and we may instead request that the state agency obtain medical proofs, which generally delays processing of the case. The recent implementation of a 6.3 percent charge against my DIB case fees has now made the same potential for not recovering the advanced expenses a more substantial factor, and we more frequently ask the SSA office where the claim is being processed to obtain those documents for which we receive what we deem to be excessive billings.

I am available for all of my clients, for all of their medical or legal problems. We refer clients to specific medical care providers if possible; we recommend other lawyers for legal matters we cannot provide direct help with; and we refer clients to public or private agencies for assistance, including with possible vocational rehabilitation, while the Social Security claim is pending. We do not charge extra for ancillary services unless part of a separate claim (e.g., workers' compensation, personal injury) we can assist with, and often we informally reduce fees in one or both cases.

Comments you have received from certain individuals as a part of this legislative hearing process suggest SSI claimants are unique in the disability system, and that their special vulnerability somehow separates them from a "typical" DIB claimant. I can provide you only with anecdotal information from my own practice, which I can assure you demonstrates that there is no such distinction. The DIB claimant's loss of employment due to illness or injury is actually likely to be financially more difficult, as that individual and his or her family is unexpectedly and suddenly no longer able to support a lifestyle established by regular, often substantial, income that simply cannot be and is not replaced. Private disability and workers compensation benefits replace no more than a fraction of actual earnings, and a spouse who has not been working does not just re-enter the work force at the same income level as a skilled trade or craftsman, for example, who has been the family's primary provider.

The loss of employment due to disability creates very real hardship, savings may be limited or not realistically available (e.g., pension funds to which there is no reasonable access), and it is my understanding that a significant percentage of personal bankruptcy filings are attributable to this phenomenon. The amount of household and personal expenses incurred while working, expecting continued employment, are no less real than the expenses described of the SSI claimant. The DIB claimant is equally, if not more, likely than the SSI claimant to owe both pre-and post-disability debts, and contentions that SSI claimants are indebted for "food and shelter while awaiting" SSA's decision ignores that non-working individuals probably have qualified for other state or federal benefits, such as Food Stamps, Aid for Families

with Dependent Children(AFDC)—Temporary Aid for Needy Families (TANF), subsidized or sheltered housing, and/or welfare—general assistance.

The Committee should not be persuaded that there is a legitimate distinction to be made in the need for quality legal representation merely because a claimant applies for DIB or SSI. The formerly employed and now disabled are in fact more likely to have more substantial financial pressures than the never-employed, and that is recognized by arbitrary disparities in benefits amounts. In similar fashion, the Committee should reject unsubstantiated and illogical claims that particular segments of the disabled community, more than other essentially similarly situated demographic groups, require more "protection" from the very individuals who represent the claimant's best and greatest interests—attorneys who accept these cases with no significant financial contribution from or risk to the claimant.

Commentators demanding continued distinction between DIB and SSI claimants on the basis of relative "vulnerability" also disregard agency statistics about the nature of DIB claimants' alleged disabilities, data that have been available for many years. In the 10 year period from 1985 to 1995, for example, "the typical new" recipient of DIB changed from " a male over 50 years old with either a cardiovascular or musculoskeletal impairment" to someone "younger and mentally impaired." May 23, 1995 Statement/testimony of Jane L. Ross, Director—Income Security Issues; Health, Education, and Human Services Division, General Accounting Office, (GAO) Before the Subcommittee on Social Security, "DISABILITY INSURANCE: Broader Management Focus Needed to better Control Caseload" at p. 9 (Appendix A). The recent distribution of disabling conditions differs materially in DIB and SSI claims populations—almost twice as many SSI as DIB claims are approved due either to mental retardation or another mental disorder. Annual Statistical Supplement 1999, Social Security Bulletin (SSI—58.6 percent; DIB—31.9 percent)(Appendix B). The statistics appear at least to be compatible with the premise that lack of a consistent work history that would qualify a claimant for DIB, relegating the claimant to SSI, is more characteristic of chronic psychiatric patients than those who become disabled due to sudden injury or even gradual illness.

The Social Security system's complications and intransigencies dictate that every claimant have access to qualified legal representatives. The SSA has historical data, moreover, demonstrating a correlation with increased representation of claimants by attorneys and institution of a direct fee payment mechanism. The same study by the SSA revealed that DIB claimants wanting attorney representation were able to obtain legal counsel, ostensibly corresponding again to the direct payment of fees from claimants' back benefits. July 1988 "Report to Congress: Attorney Fees Under Title II of the Social Security Act;" Department of Health and Human Service, Social Security Administration, Office of Hearings and Appeals, at pp. 8–9 & 13 (Appendix C).

The continued access to a variety and choice of qualified, and quality, legal representatives for disability benefits claimants, whether Title II DIB or Title XVI SSI, should remain a paramount interest of the Committee and the SSA—it is an unequivocal interest of the disabled community. The Committee must understand the details and nuances of legal representation in Social Security cases, which properly is considered unique within the law, and make its decisions based on complete and accurate information. DIB and SSI claimants are not very different at all, and they are entitled to equal access to legal assistance.

The representative's fee payment process

Once the reasons why legal representation is important in Social Security cases are understood and appreciated, the significance of a direct attorney fee payment process becomes clearer. There are valid justifications for distinctions between attorneys and non-attorneys, including the professional and economic accountability of an attorney who negligently or intentionally harms a client. The SSA has data, moreover, showing that claimants, when offered a choice, prefer lawyers to non-lawyers. July 1988 "Report to Congress: Attorney Fees Under Title II of the Social Security Act" at p. 14 (Appendix C). The Committee should thus focus its present deliberations only on the statutory mechanism for payment of fees to attorneys.

The present system is theoretically acceptable and is not fatally flawed except in its implementation by the SSA. The principal excuse you have been offered for delays in payment of claimants' retroactive benefits and attorneys' fees is the need to develop additional information, such as receipt of workers' compensation benefits, after medical approval of a claim. See June 14, 2000 Hearing Testimony—Written Comments of William C. Taylor, J.D., Deputy Associate Commissioner for Hearings and Appeals, at p. 7; Barbara D. Bovbjerg, Associate Director—Education, Workforce, and Income Security Issues, Health, Education, and Human Services Division,

General Accounting Office (GAO), at pp. 5–6 & 10). The workers' compensation benefits question is an excuse, however, and not a valid explanation.

The problem is not that the SSA does not have or cannot obtain non-medical eligibility/entitlement information at or prior to processing of back benefits. The failure of the system is that such information provided to the agency with the medical evidence is just plain ignored. It is the policy and practice of my office to submit workers' compensation benefits details, including from the insurance carrier, to the Administrative Law Judge (ALJ) hearing the disability portion of a case. We also solicit from outside attorneys, or provide from within our office, information about creditable attorneys' fees, litigation costs, and medical expenses that will reduce the amount that lawfully can be set off against the DIB.

That information is, and generally can be, a part of the OHA—SSA file well in advance of back benefits processing, but it does no good. We are continually asked to submit the same information to other processing offices, sometimes on several occasions. We now transmit the information via facsimile only to a specific individual, to assure it is actually received by a human being and not merely filed away, again, never to be reviewed.

The system failure is that the SSA rarely, if ever, maintains any semblance of file folder integrity, and processes the same case through different stages, at different physical locations, without coordinating what has already been submitted and is a part of that file folder. There is no legitimate reason why back benefits payments cannot be segregated by standard percentages and/or fixed dollar amounts. These questions you are addressing now—should we encourage lawyers to represent Social Security claimants, do we discriminate against SSI claimants who want a lawyer, how do we assure a supply of qualified and quality lawyers to represent disabled Social Security claimants (many of whom have severe psychiatric disorders), is withholding and direct payment of attorney fees or a two-party check an acceptable method—have been recurrent themes in ongoing deliberations about the Social Security system, and the SSA has chosen not to establish a computer system that performs basic, necessary accounting functions.

My office already has a computerized accounting program that takes client workers' compensation payments received from several insurance companies and automatically deducts the same fee and cost recovery amounts each time a check is processed. The fee deduction can be programmed as a percentage or a fixed amount, and cost recovery deductions are generally a fixed amount. It is not difficult to modify the distribution of money if factors change, and we have only two part-time bookkeepers performing these same functions for nearly one thousand clients every month. The numbers of payments we process is certainly different than the SSA's workload, but it is safe to assume that if a small business in Phoenix, Arizona can provide these services (and others as well) to almost 1,000 clients with approximately 250 person-hours per month, the SSA can provide equivalent service to many more disability benefits recipients with the vastly greater resources at its disposal.

You have been told it would be difficult, at best, to incorporate into SSI cases the same type of benefits and attorneys' fee processing that we currently have in DIB claims. That again is an artificial and circular rationalization—SSI claims have historically been processed differently than DIB cases so we must continue to do so regardless of enhanced technology and changes in claimant population demographics that no longer justify continuation of inherently inefficient procedures. If SSI and DIB case processing were coordinated, the SSA, claimants, and legal representatives would benefit from economies of scale and centralization of the process. The same justification for all final administrative reviews being processed at one Appeals Council seems to be equally applicable in benefits processing, and historical inertia and the cost of repairing it should be rejected as reasons to leave two different, both inefficient and ineffective, DIB and SSI systems in place.

The same accountability that sets lawyers apart from non-lawyers is sufficient reason to consider realistically the implementation of a two-party check system that would expedite payment of both back benefits to the claimant and fees to the attorney. The claimants and their attorneys would be paid at the same time, and claimants, or representative payees when there is a question about the claimant's competence with financial matters, are able to ascertain if the amount charged is the same amount that would have been previously authorized, in writing. The SSA would also be available as an oversight agency to respond to and investigate those cases in which the claimant has additional questions not answered satisfactorily by the attorney. The instances in which disputes require intervention are likely to be extremely rare, a much smaller burden on the agency's resources than the current system.

There is no logical or valid reason to maintain the current distinction between DIB and SSI fee payment processes, and the complaint that SSI claimants are more financially vulnerable or needy is unwarranted. If a claimant is denied either type of benefits because they are not able to obtain desired legal counsel, there simply is no money to repay any debt. When more than 58 percent of SSI disability claims are approved because the claimant has a mental disorder (including mental retardation), Annual Statistical Supplement 1999, Social Security Bulletin (Appendix C), the need for qualified, and quality, legal representation that will in fact protect all of the claimant's interests becomes indisputable.

I thank this Committee for the opportunity to address the concerns you have demonstrated by the legislative hearing process, by submitting written comments. I would be pleased to respond to any other questions you may have during your deliberations. Thank you.

JOEL F. FRIEDMAN

[Attachments are being retained in the Committee files.]

LAW OFFICES OF BARBARA B. COMERFORD, P.A.
RIDGEWOOD, NJ 07451–5107
June 9, 2000

The Honorable Marge Roukema
United States Congress
1200 East Ridgewood Ave
Ridgewood, New Jersey 07450

Re: House Ways and Means Subcommittee on Social Security

Dear Congresswoman Roukema:

I have written you before on social security topics. I feel particularly moved to write you at this time for two reasons: the House Ways and Means Subcommittee on Social Security is in the midst of conducting hearings on the issue of attorney fees, and my office is relocating directly across the atrium from yours at the above address as of July 1, 2000. Please understand that the issue of attorney fees impacts whether thousands of New Jersey residents will be able to secure competent legal counsel in social security cases, so I implore you to support the cause of disability lawyers on this issue. The National Organization of Social Security Claimants Representatives, which is based in Midland Park, New Jersey, has, I am sure, collected letters from practitioners around the nation who are as concerned as me about this issue.

I have been concentrating my practice in the area of Social Security law for roughly fifteen years. I have written extensively on the topic and have lectured around the country on the issue to other lawyers, lay persons, Social Security officials and members of the bench. Indeed, I have been asked to author a book on the topic by American Jurisprudence Trials. I also chair the Bergen County Bar Association Social Security Committee.

Historically, the fee generating cases subsidize my pro bono work which is considerable. Most of my pro bono work is done on behalf of disabled children. Indeed, I trained attorneys throughout the state at the request of the American Bar Association and the New Jersey Bar Association on SSI childhood disability cases in the aftermath of the Welfare Reform Act.

I have provided a brief glimpse into my professional background to explain why I would be sickened to give up representing social security disability clients. But like many of my colleagues, I may not be able to afford to continue my disability practice if the law regarding attorney fees is not changed.

Under the Ticket to Work and Work Incentive Improvement Act of 1999, attorney fees were reduced 6.3%, as a "user fee." Not only must we suffer delays of several months from the time we win the case until the time we are paid, but to ensure payment at all, I must have one employee do NOTHING but call the attorney payment center to nag them into mailing my fees. I have an added complication in that I changed my primary business address two years ago, and in spite of the fact that I notified Social Security of my new address in every case, my attorney fees were still forwarded to the wrong address. In roughly twenty-nine (29) cases, I have not been paid in cases I have won since 1999. The level of incompetence is beyond exaggeration. And for this, my fee has been taxed 6.3%.

An increase in the present $4000.00 limit (and it is frequently much less because benefits are CAPPED at $4,000.00) is long overdue. The best practitioners will not be able to adequately represent clients if the fees remain so low, and if the delays, which the Act was intended to correct, continue. My clients are the weakest and most vulnerable in our society. I love my work, and they need my help. Social Security has statistics on the success rates of unrepresented claimants. It is abysmal. While I agree with Congressman Shaw that the process should be so easy for individuals with disabilities that they no longer need attorneys, the truth is that without experienced lawyers, disabled individuals cannot succeed under the present system.

Sincerely,

BARBARA B. COMERFORD

PEKOE, REED, WRIGHT & ASSOCIATES
WINTER PARK, FL 32789
June 14, 2000

A.L. Singleton
Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington D.C. 20515

Dear Mr. Singleton,

I would like to submit this written statement to you in reference to the Hearing which is scheduled to take place today, June 14, 2000, concerning the processing of Attorney Fees by the Social Security Administration. I have a recommendation and suggestion which I believe can mitigate the negative response which I trust you are receiving from Attorneys affected by the cost recovery provisions.

I am a former Social Security Administration employee who worked for the Administration for approximately 20 years. In 1992, I resigned and started my own company which represents individuals applying for Social Security benefits. I am not an Attorney

As you know, individuals seeking Social Security benefits may choose to have Attorneys or other individuals represent them in their claims. The Commissioner of Social Security through regulation establishes a limit on the amount of the representation fee that may be charged and approves each fee charged by any representative.

The payment of fees to Attorneys is accomplished directly by the Social Security Administration after a fee has been approved. However, the payment of fees to Non-attorneys is *not* made by the Social Security Administration after a fee has been approved. For Non-attorneys, although the same approval process must occur, payments must be secured by Non-attorneys from the clients.

This inequity is clearly unfair and unnecessary. Since the same exact approval process by the Commissioner of Social Security must take place for Attorneys and Non-attorneys alike, the direct payment of any approved fees should similarly take place.

I would suggest that rather than eliminate the recoupment fee enacted through the Ticket to Work and Work Incentives Improvement Act of 1999 (P.L. 106–170) which requires the Commissioner to cover the costs of paying Attorney fees directly to Attorneys, that you include direct payment of approved Non-attorney fees. Inclusion of Non-attorneys will establish equity and fairness and will increase the revenue obtained from the recoupment process. This increased revenue from Non-attorneys can be used to reduce the actual percentage of recovery cost from 6.3% to a lower figure which will be more palatable to Attorneys.

I thank you for considering my recommendations and hope that you can establish them. Both the public and those representating them will be benefitted by these changes. If you have any questions, please feel free to contact me at 407–647–8533.

Respectfully,

RON PEKOE

WARD WHITE & ASSOCIATES
HOLIDAY, FL 34690–0549
June 27, 2000

A.L. Singleton,
Chief of Staff,
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office building
Washington, D.C. 20515

Re: Technical changes to Title II,406 and Title XVI, 1383 of the Social Security Act

Dear Chairman Shaw,

I wish to thank you for allowing me the opportunity to explain the disparity in the method of payment of fees between an attorney and a non-attorney representative in Social Security disability cases.

As presently enacted, neither the provisions of Title II nor Title XVI provides for withholding of an "attorney's fee" for non-attorney representatives. This inequity results in losses of approximately 10% of my firm's gross revenues. It results in a loss of revenue to the government given the current user fee legislation, and the lack of a unified fee process creates internal havoc for Social Security Administration personnel mandating a system within a system creating additional harm and delays for both claimants and representatives. The proposed changes will increase the amount of revenue the federal government receives through the user fee, and they will insure SSA treat both attorney and non-attorney representatives equally by withholding the "'attorney's fee" due to the representative if the claimant is successful in obtaining disability benefits. (The technical changes are included in the addendum.)

Title II is an insurance policy. Enacted in 1935, it provided, among other things, disability benefits to insured individuals irrespective of financial need. From 1935 until 1965, Title II contained no express provision authorizing an award of attorney's tees to a claimant's counsel. In 1965, the Fifth Circuit Court of Appeals in Celebreeze v. Sparks, 342 F2d 286(1965), held that 42 U S.C. 405(g) implicitly authorized federal district courts to order the payment of attorney's fees out of past due benefits. The court's rationale was that where a statute confers upon a federal court full judicial power to handle litigation before it, it must be presumed, absent any indication to the contrary, that the power allows it to provide for the payment of attorney's fees from past due benefits recovered by the claimant in the litigation.

In 1965, Congress codified the Sparks decision by amending 42 U.S.C. 406 by adding section (b)(1). This new subsection provided for the withholding of past due benefits to pay attorney's fees incurred in judicial litigation under Title II.

In 1968, Congress amended section 406(a) of Title II authorizing the now Commissioner of Social Security to withhold a portion of past-due benefits to pay attorney's fees incurred in administrative proceedings under Title II.

Non-attorney representatives were not active in this arena of the law prior to the mid-1970's. Thus, the issue of whether non-attorney representatives should be paid in the same manner as attorneys was not before the courts, nor Congress. Therefore non-attorney representatives were not in the class entitled to receive direct payment from past-due benefits.

The proposed changes to section 406 are merely technical in nature and recognize the contribution those non-attorney representatives whether as individuals, or members of a partnership or corporation make in representing uninformed and/or indigent claimants. As non-attorney representatives and attorney representatives' develop, prepare and argue their cases in an identical manner they should be paid in an identical manner. These technical changes shall be effective on the day of enactment and the regulations amended within 60 days from the date of enactment Title XVI is a welfare program. Enacted in 1972, it provides supplemental security income benefits to financially needy disabled individuals regardless of their insured status.

In Bowen v. Galbreath, 485 U.S. 74, 108 S.Ct. 892, 99 L..Ed. 2d 68 (1988), the Supreme Court referred to the Committee reports and quoted them as stating to withhold attorney fees from past-due benefits would be contrary to the purpose of the program.

This view has recently changed. In 1996, Congress enacted the Personal Responsibi1ity and Work Opportunity Reconciliation Act of 1996, Public Law 104–

193, enacted on August 22, 1996. Section 221 provides that large past-due benefits payab1e to SSI recipients should be paid in installments not in a lump sum. This legislative provision reflects a change in Congress' view that withholding benefits from Title XVI recipients wi11 not cause greater hardship than withholding from Title II recipients. The Act also provides for a waiver provision if hardship is found.

Recognizing both the change in Congressional view and that non-attorney representatives assure claimant's complete development and preparation of their cases, a good opportunity to secure their benefits despite complex medical-legal issues, and regulations, attorney and non-attorney representatives should be paid in the same method whether a claim is filed under Title II or Title XVI. If these proposed changes become legislation the federal government will benefit from increased revenues through the user fee and claimants will have access to competent and qualified representatives.

At the present time, SSA is required to expend time and personnel on tracking non-attorney representative fees. Social Security personnel are required to review all cases awarding benefits. Cases involving non-attorney representatives are coded differently because direct payment by SSA to the non-attorney representative is not allowed. Often times the payment center incorrectly codes files resulting in a withholding of 25% of claimant's benefits. In these cases, the non-attorney representative is required to make numerous telephone calls and write to SSA in an effort to have the incorrectly withheld funds released to the claimant. There are also the cases where SSA withholds and sends the non-attorney representative a government check for 25% of the claimant's past due benefits. In this case, the non-attorney representative is required to send the government's check back to SSA and request that a new check be re-issued to the claimant. In requesting, a new check be issued to the claimant, the non-attorney representative will make no less than three phone calls to the payment center to follow up on the matter until the claimant has received all past due benefits. In other instances government employees are uninformed with respect to the differences in the withholding procedures for attorneys and non-attorneys. Uninformed government employees advise claimants the government is withholding the fee resulting in the claimant spending all past due benefits and no longer having the resources to pay the non-attorney for the professional services rendered in securing claimant's entitlement to benefits. Thousands of dollars become un-collectable with claimant's laying the blame directly on information received from the Social Security Administration workers. This can lead to additional litigation against a claimant who has endured a tremendous amount of hardship in securing disability benefits. If the proposed technical amendments were adopted, they would provide positive benefits to SSA. Employees would not have to track non-attorney representative fees and could be assigned other duties making the operation more efficient. The government would benefit generally from the additional revenue collected from the non-attorney user fee. Finally the government would not be risking liability from non-attorney representatives who have lost revenue due to misinformation provided to claimants from agency employees.

Another positive benefit would be in the area of oversight over all representatives. In select instances there are individuals who do not subscribe to the highest standards of representation of Social Security and SSI claimants'. These non-professional individuals (attorney's and non-attorney's alike) cast a shadow over all conscientious professionals who represent Social Security disability claimants. In adopting the proposed technical changes Social Security would retain a greater level of control over all representatives in the administrative disability arena.

Respectfully yours,

A. SCOTT FLEXER

ADDENDUM

The proposed technical changes to the Social Security Act are as follows:

TITLE II

42 U.S.C. 406 (a)(1) after the phrase "if the claimant was represented by an attorney." insert the following: *or non-attorney representative whether an individual, partnership or corporation.* This technical change shall be effective on the day of enactment and the regulations amended within 60 days from the date of enactment.

After the phrase "a reasonable fee to compensate such attorney" insert the following *"or non-attorney representative whether an individual, partnership or corporation"* This technical change shall be effective on the date of enactment and the regulations amended within 60 days from the date of enactment.

406 (4)(A) after the phrase "the person representing the claimant is an attorney" insert the following: *or non-attorney representative whether an individual, partnership or corporation.*

After the phrase "to such attorney" insert the following:*or non-attorney representative whether an individual, partnership or corporation.* This technical change shall be effective on the day of enactment and the regulations amended within 60 days from the date of enactment.

406 (4)(B) after the phrase "to the attorney" insert the following: or non-attorney representative whether an individual, partnership or corporation. This technical change shall be effective on the day of enactment and the regulations amended within 60 days from the date of enactment.

406 (c) This section is re-titled: *Notification of Options for Obtaining Representation.* After the phrase "options for obtaining attorney" insert or *non-attorney representation whether an individual, partnership or corporation.*

TITLE XVI

U.S.C. 1383 (d)(2)(A) Substitute the following: *The provisions of section 406(a) of this title shall apply to this part to the same extent as they apply in the case of Subchapter II.*

1383(d)(2)(B) after the phrase "options for obtaining attorneys" insert *"or non-attorney representative whether an individual, partnership or corporation."*

CHICAGO, IL 60707–4429
June 22, 2000

Congressman E. Clay Shaw
Subcommittee on Social Security
Of the Committee on Ways and means
C/o A.L. Singleton, Chief of Staff,
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Re: Fairness of 6.3% User Fee

Dear Congressman E. Clay Shaw,

To paraphrase Ronald Reagan, if you want less of something, you tax it. The 6.3% user fee does not ensure an adequate method of securing attorney's fees in Social Security claims. Indeed, attorneys were very dissatisfied with the process before the fee; they are naturally more dissatisfied with the process since they must now pay for it. Since the fee has made no difference in the unsatisfactory process of fee withholding, it can only be concluded that the user fee is no more than a tax. A fee for a service of no use to the payer is not a user fee, it is a tax. As Ronald Reagan's statement suggests, this tax will serve to ensure less representation of Social Security claimants.

I have included a current list of the attorney's fees that have been withheld from claimants, but which have not been paid to me. You will note that I am currently owed over $100,000.00, interest free, with some fees owed for as long as two years. This amount has held relatively steady for at least the past five years. This list would be longer, except that I must pay a secretary to nag the national payment centers on a daily basis. Otherwise, many fees would not be paid at all.

I have also enclosed sample Notices of Award. Please note that the payment centers continue to include the 15-day payment delay language in the notices, even while collecting the user fees. Since the payment centers do not diary future actions, a 15-day delay can often be a 15-month delay, or such delay until we call to goad them into processing payment. You will also note that sometimes they do not withhold the fee, or they do not withhold a sufficient amount. Requiring attorneys to pay for such a process is not fair, since the process does not lead to a fair payment of attorney's fees.

Unfortunately, this tax, or user fee is timed to discourage attorney's seeking to represent Social Security claimants, while other factors already provide a strong disincentive to this practice. We all are thankful for a good economy and for the faster processing times of Social Security claims. Indeed, the two are related. Because of the high demand for labor, employers are more tolerant of employees with disabil-

ities. There are thus fewer people claiming Social Security disability, because a job pays better. As a result, there are fewer claimants, a smaller backlog of unadjudicated claims, and faster processing times. Faster processing times means smaller past due benefit amounts. The practical effect on attorneys with Social Security practices is that there are fewer clients and lower fees.

Attorneys who are considering whether to continue in the practice of representing Social Security claimants are discouraged from staying with the practice for several reasons. Their incomes are substantially less because of fewer clients and lower attorney's fees. Their expenses are higher as well. They have always had to pay clerical staff to track the payment of their fees. They have always had to tolerate accounts receivable with the government stretching fee payments many months, and even years, interest free. Now, the government not only uses their money interest free for prolonged periods of time, but also charges them a 6.3% fee for the privilege of being abused. If you were an attorney in such circumstances, in the midst of prosperity in other areas of the law, and in many areas outside the law, you might very well decide to feed your family in greener pastures.

The common wisdom is that in two years the baby boomers will impact the Social Security system by increasing the volume of claims. No doubt this is true, but of much greater significance would be a downturn in the economy. Higher unemployment rates will increase the disability claim rate more than the effect of aging baby boomers. The combined effect will again lead to long delays in processing and poor decisions by hard pressed bureaucrats. The need for attorneys specializing in the representation of Social Security claimants will again be significant. Unfortunately, those attorneys will no longer be available, until supply again catches up with demand. Until that time, people may well ask why the government had chosen to tax away their right to competent legal representation.

Sincerely,

ROBERT G. WHITE

[Attachments are being retained in the Committee files.]