

# A Government Success Story: How Data Analysis by the Social Security Appeals Council (with a Push from the Administrative Conference of the United States) Is Transforming Social Security Disability Adjudication

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## ABSTRACT

*This Article for the special issue on the Administrative Conference of the United States (“ACUS”) focuses on how a collaboration between ACUS and the Social Security Administration (“SSA”) has helped SSA use data analysis to bring about significant improvements in the quality and consistency of disability case review. SSA’s efforts to closely analyze numerous data points in the disability adjudication process (encouraged by ACUS recommendations) have produced information that has led to breakthroughs in how training is provided and feedback is given to Administrative Law Judges and other key staff, which has in turn led to improved productivity and accuracy of work products. The data analyses have also helped inform the agency about differences between agency and federal court interpretation of agency policies, thereby helping to inform policy drafting discussions. These techniques advanced by the SSA Appeals Council have potentially far-reaching applicability to other federal and state government programs and could promote more effective, efficient, and consistent government service at a lower cost in such programs.*

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## INTRODUCTION

In the past several years, data analysis has played a key role in transforming the Social Security Administration's ("SSA") disability adjudication process. Data analysis efforts, particularly those undertaken primarily by the SSA Appeals Council,<sup>1</sup> an administrative appellate body under the agency's Office of Disability Adjudication and Review ("ODAR"), have led to significant improvements in the quality and consistency of disability case review. These efforts have provided information that has led to breakthroughs in how SSA conducts training and gives feedback to staff, which has in turn led to improved productivity and accuracy of work products.<sup>2</sup> The data analysis has also helped apprise the agency about differences between agency and federal court interpretation of agency policies, thereby helping to in-

<sup>1</sup> The Appeals Council, and its support staff, constitute the Office of Appellate Operations ("OAO"). See *Information About SSA's Office of Disability Adjudication and Review*, SOC. SECURITY ADMIN., [http://www.ssa.gov/appeals/about\\_odar.html](http://www.ssa.gov/appeals/about_odar.html) (last visited Sept. 7, 2015). OAO is part of the Office of Disability Adjudication and Review, one of eight Deputy Commissioner-level offices within the Social Security Administration. See *id.*

<sup>2</sup> See, e.g., OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-12-13-13039, REQUEST FOR REVIEW WORKLOADS AT THE APPEALS COUNCIL 7-10, 15 (2014) <http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-13-13039.pdf>.

form policy drafting discussions.<sup>3</sup> Moreover, techniques advanced by the Appeals Council have potentially far-reaching applicability to other federal and state government programs, and could promote more effective, efficient, and consistent government service at lower cost in such programs. Although the agency has actively begun to apply similar data analysis to all of its business lines, this Article briefly discusses the evolution of SSA's disability hearings and appeals process and focuses primarily on the efforts undertaken at the Appeals Council in that process. We also explain how these efforts are bearing fruit and how they were stimulated by a series of recommendations made by ACUS.<sup>4</sup>

To some extent, the development and implementation of the data analysis efforts were enabled by the introduction of the electronic disability folder,<sup>5</sup> which provided SSA with new opportunities to improve both its business process and the quality of service it provides to applicants for disability benefits and payments under Titles II and XVI of the Social Security Act.<sup>6</sup> The most dramatic effects have been seen in the work performed in ODAR, which is producing higher quality, more policy-compliant decisions since the introduction of the electronic case folder and the electronic business process.

Part I of this Article describes the history of the Appeals Council and its early development. The Article describes the scope of the Ap-

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<sup>3</sup> See, e.g., *id.* at 13–15.

<sup>4</sup> Professor Lubbers was ACUS's Research Director from 1982–95. ACUS lost its funding in October 1995, see Jeffrey Lubbers, "If It Didn't Exist, It Would Have to Be Invented"—Reviving the Administrative Conference, 30 ARIZ. ST. L.J. 147, 147 (1998), but was re-funded and reconstituted in 2010. See generally *History*, ADMIN. CONF. U.S., <http://www.acus.gov/history> (last visited Sept. 7, 2015).

<sup>5</sup> See Office of Disability & Income Sec. Policy, Soc. Sec. Admin., *Addressing the Challenges Facing SSA's Disability Programs*, SOC. SECURITY BULL., Aug. 2006, at 29, 30–31, <http://www.ssa.gov/policy/docs/ssb/v66n3/v66n3p29.html>.

<sup>6</sup> Social Security Act of 1935, 42 U.S.C. §§ 301–1397mm (2012). The Social Security Administration administers two programs that provide benefits based on disability. Both programs apply the same definition of disability for adults—an inability to perform any substantial gainful activity by reason of a medically determinable impairment that is expected to last at least twelve months or result in death. See 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The two programs, however, have different criteria defining who may become a beneficiary or recipient of payments. Title II provides for payment of disability insurance benefits to individuals who are insured under the Social Security Act, as well as to certain disabled and non-disabled dependents of insured individuals. See *id.* § 402. Workers earn a right to benefits by working and paying Social Security taxes on their earnings. See *id.* § 401. Title XVI provides for supplemental security income ("SSI") payments to individuals (including children under age eighteen) who are disabled and have limited income and resources. See *id.* § 1381. Individuals can apply for SSI benefits even if they have never worked or their work history has not earned them the credits needed to qualify for benefits under Title II. See *id.* § 1382.

peals Council's review authority, the development of that authority, and the growth of the Appeals Council's workload. Part II describes various outside influences on the Appeals Council. The Appeals Council was experiencing growing pains from the massive expansion in workload, and ACUS and federal courts exerted strong influence on the SSA's revisions of its policies regarding operations of the Appeals Council. Part III describes various agency initiatives in order to improve agency performance. These initiatives focused on data collection, analysis, and feedback mechanisms. Finally, Part IV describes subsequent ACUS analyses and recommendations, and outlines various quality assurance improvements noted by the Appeals Council over the years since implementing data analysis programs.

## I. EARLY HISTORY OF THE APPEALS COUNCIL

### A. *The SSA Hearings and Appeals Process*

In January 1940, the Federal Security Agency's<sup>7</sup> Social Security Board, the predecessor to the Social Security Administration, approved "[fourteen] basic provisions regarding the procedure and necessary organization for hearing and reviewing appeals by claimants under the old-age and survivors insurance program."<sup>8</sup> At that time, the Office consisted of twelve "referees" who were responsible for conducting hearings and issuing decisions, and three Members of the Appeals Council who reviewed appeals of those decisions.<sup>9</sup> The Council was delegated "all necessary and appropriate powers to direct and supervise the holding of hearings, direct and supervise the referees appointed by the Board and to review decisions in accordance with such regulations as the Board shall adopt."<sup>10</sup>

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7 The Federal Security Agency was established in 1939 pursuant to the Reorganization Act of 1939, Pub. L. No. 76-19, 53 Stat. 561 (codified at 5 U.S.C. § 133 (1940)). See *Organizational History*, SOC. SECURITY ADMIN., <http://www.ssa.gov/history/orghist.html> (last visited Sept. 8, 2015). It was responsible for overseeing food and drug safety, education funding, and the administration of the Social Security old-age pension program, among other things. See *id.* It was later abolished, several years after enactment of the Reorganization Act of 1949, 5 U.S.C. § 901 (2012), and most of its functions were transferred to the United States Department of Health, Education, and Welfare ("HEW"). See *Organizational History*, *supra*.

8 ATTORNEY GEN.'S COMM. ON ADMIN. PROCEDURE, MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, PART 3: SOCIAL SECURITY BOARD, S. DOC. NO. 77-10, app. at 33 (1st Sess. 1941) [hereinafter SOCIAL SECURITY BOARD MONOGRAPH]. The monograph included an appendix entitled *Basic Provisions Adopted By the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims with a Discussion of Certain Administrative Problems and Legal Considerations (Jan. 1940)*. In essence these provisions became the core operating procedures for what is now known as ODAR.

9 See SOCIAL SECURITY BOARD MONOGRAPH, *supra* note 8, at 16, app. at 36.

10 Meeting Note, Soc. Sec. Bd. (Mar. 6, 1940) (on file with the Appeals Council). The

No more than half of the original referees were lawyers.<sup>11</sup> The Appeals Council Members worked with staff from the Federal Security Agency's Office of the General Counsel to develop procedures for holding hearings and eliciting evidence and developed a framework for decisionmaking.<sup>12</sup> The Council Members provided training to the new referees, and an attorney from the General Counsel's staff served as a "consulting referee" for a time by providing feedback, particularly to the non-attorney referees, on how to determine when the record was complete, how to conduct a hearing, how to evaluate the evidence, and how to apply the law.<sup>13</sup>

The referees were tasked with eliciting evidence, conducting a hearing, and issuing a decision.<sup>14</sup> Referees could also dismiss a request for a hearing "if all parties have consented to or requested the dismissal or have abandoned the hearing."<sup>15</sup> Much like it is today, a hearing was considered abandoned if neither the party nor an appointed representative appeared at the scheduled hearing and did not establish good cause for failing to appear.<sup>16</sup> The referees also could certify cases with proposed findings of fact and conclusions to the Appeals Council for a final decision.<sup>17</sup> The Appeals Council had the authority to review decisions and dismissals upon petition of any party to

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Board considered and adopted a memorandum from Joseph E. McElvain, *Establishment of Appeals Council and Delegation of Appropriate Powers to It and the Referees*, pursuant to authority granted by the Social Security Act Amendments of 1939. *See id.*

<sup>11</sup> *See* Interview by Abe Bortz with Joseph E. McElvain, in Washington, D.C., at 6 (Feb. 16, 1966) [hereinafter Bortz/McElvain Interview] (indicating that half of the original referees were attorneys and half were not) (transcript on file with *The George Washington Law Review*). A more contemporaneous statement is contained in the SOCIAL SECURITY BOARD MONOGRAPH, *supra* note 8, at 16 ("[O]nly 3 of the referees chosen have law degrees, 2 more have some legal training, and 7 of the 12 are wholly without legal training.").

<sup>12</sup> *See* Bortz/McElvain Interview, *supra* note 11, at 11–12 (describing the Appeals Council's initial struggle to promulgate regulations to support its operations); *see also* SOCIAL SECURITY BOARD MONOGRAPH, *supra* note 8, at 24 (noting that "[t]he burden of the work of preparing both the procedural and the substantive regulations has been borne by the Bureau of Old Age and Survivors Insurance and the General Counsel's staff," although "[i]n the brief period since their appointment, the Appeals Council and consulting referee have participated in the formulation of procedural regulations").

<sup>13</sup> *See* Bortz/McElvain Interview, *supra* note 11, at 7 ("One of the . . . big jobs . . . as consulting referee was to acquaint [the non-lawyer referees] with the fundamentals of a fair hearing, how to conduct a hearing, and how to weigh evidence.").

<sup>14</sup> *See* 20 C.F.R. § 403.709(g) (1943); Bortz/McElvain Interview, *supra* note 11, at 7.

<sup>15</sup> 20 C.F.R. § 403.709(j).

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* § 403.709(k).

a hearing, upon certification from a referee, or upon the Appeals Council's own motion.<sup>18</sup>

The Administrative Procedure Act ("APA"),<sup>19</sup> enacted in 1946, further clarified the relationship between the referees and the Appeals Council. The regulations were revised again in 1949 to make clear the Council's authority to remand cases to the referees for substantial failure to follow provisions of the law or regulations.<sup>20</sup> At first, the Appeals Council Members acted en banc to review the hearing decisions.<sup>21</sup> The Appeals Council had the authority to grant review, deny, or dismiss the request for review.<sup>22</sup> In each case, the Council would determine whether there was a basis for granting review according to the standards set forth in the regulations.<sup>23</sup> If the Council found that those standards were not met, it dismissed or denied the request for review, rendering the initial decision by the hearing examiner the final agency decision.<sup>24</sup> The denial actions could be appealed to federal district court.<sup>25</sup> A dismissal by the Appeals Council is a procedural action not based on the merits of the claim, and generally affords no right to file a civil action in federal district court.<sup>26</sup> If the Appeals Council granted review, it could affirm the hearing examiner's denial, reverse the hearing decision in whole or in part, or vacate the hearing decision and either dismiss the case or remand the request for hearing.<sup>27</sup>

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<sup>18</sup> See *id.* § 403.710.

<sup>19</sup> Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. § 551-559, 701-706 (2012)).

<sup>20</sup> See 20 C.F.R. § 403.710(d)(1) (1949).

<sup>21</sup> Compare SOCIAL SECURITY BOARD MONOGRAPH, *supra* note 8, at 16 (discussing the three-member Appeals Council "to whom appeals [could] be taken" in the early 1940s), with 20 C.F.R. § 422.205 (2014) (providing for panels of Council Members). The claimant could appeal any decision or dismissal order. See 20 C.F.R. § 403.710(b) (1949). The Appeals Council receives a small number of appeals of favorable decisions, usually arguing that the ALJ's decision is correct, but the underlying disabling impairment is something other than what the ALJ found.

<sup>22</sup> Pursuant to 20 C.F.R. § 403.710(g) (1947), the Appeals Council could dismiss a request for review upon application of the party filing the request for hearing or the request for review. Subsequently, the authority to dismiss was expanded to include abandonment by the party, and dismissal for cause. See 20 C.F.R. §§ 404.936-.937 (1961).

<sup>23</sup> See 20 C.F.R. § 404.947 (1961).

<sup>24</sup> See *id.* § 404.951.

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* § 404.937b. Claimants are afforded the right to file a civil action in the Eleventh Circuit, pursuant to *Bloodsworth v Heckler*, 703 F.2d 1233 (11th Cir. 1983), later incorporated in Social Security Acquiescence Ruling 99-4(11).

<sup>27</sup> See *id.* § 404.950 ("If the Appeals Council decides to review a hearing examiner's decision as provided in § 404[.947], the Appeals Council may either make a decision in such case or remand the case to a hearing examiner . . .").

This process largely remains intact today, although the Council long ago moved away from acting en banc because of the high volume of work. Instead, panels of two or three Council Members are convened to grant a request for review, while only one Member is needed to deny review.<sup>28</sup> Regulatory authority for appellate review largely has remained unchanged since 1976, providing four bases for granting review.<sup>29</sup> The current regulations state:

The Appeals Council will review a case if—

- (1) There appears to be an abuse of discretion by the administrative law judge;
- (2) There is an error of law;
- (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or
- (4) There is a broad policy or procedural issue that may affect the general public interest.<sup>30</sup>

Additionally:

If new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. The Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.<sup>31</sup>

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<sup>28</sup> See 20 C.F.R. § 422.205 (2014).

<sup>29</sup> The Federal Old-Age, Survivors, and Disability Insurance regulation specified four categories of cases the Appeals Council would review. See 20 C.F.R. § 404.947a (1977). These regulations were subsequently amended and codified at 20 C.F.R. §§ 404.970(a), 416.1470(a) (2014).

<sup>30</sup> 20 C.F.R. § 416.1470(a) (2014). It is interesting that only the first criterion contains the broadening language, “[t]here appears to be.” *Id.* The others seem more conclusory, but presumably the Council would grant review under criteria two and three if there seems to be a colorable allegation that there has been a legal error or a lack of substantial evidence. See *id.*

<sup>31</sup> *Id.* § 404.970(b); see also *id.* § 416.1470(b). As explained below, regulations implemented as part of an initiative known as the Disability Service Improvements changed the evaluation of new and material evidence by the Appeals Council in cases arising in the Boston Region. See *infra* Part III.A. In those cases, the Appeals Council only considers additional evidence when it relates to the period on or before the date of the hearing decision, and only if the claimant shows a reasonable probability that the evidence, alone or when considered with the other evidence of record would change the outcome of the case. See 20 C.F.R. § 405.401. The claimant also must show that an agency action misled the claimant, or that the claimant had limitations that prevented the claimant from submitting the evidence earlier, or that there was

The Council also has own-motion authority, the authority to review cases sua sponte without an appeal from the claimant.<sup>32</sup> For the most part, until recently, the Council exercised this authority primarily to review cases decided favorably to claimants that had been selected for quality assurance review and were referred to the Council by other SSA components.<sup>33</sup>

### *B. Growth of the Program and Workloads*

The Social Security Amendments of 1956<sup>34</sup> introduced the Disability Insurance Benefits program.<sup>35</sup> Immediately thereafter, the volume of work at all levels expanded rapidly, with requests for hearing more than doubling between 1955 and 1956, and nearly tripling again by 1958.<sup>36</sup> At that time, 13% of the hearing decisions issued by the examiners<sup>37</sup> were favorable to the claimants.<sup>38</sup> In addition, the Appeals Council remanded another 13% of cases to the examiners.<sup>39</sup> The Council also expanded to nine members by 1960.<sup>40</sup>

As the volume of work increased, so did the number of hearing examiners. Their number grew from 23 in 1955 to 132 by 1959.<sup>41</sup> Examiners during this period were expected to process and decide ten cases each month.<sup>42</sup> Nearly half were unable to meet that expectation in 1958.<sup>43</sup> The number of decisions favorable to claimants also began to rise, climbing from 15.2% in Fiscal Year (“FY”) 1960, to 28% in FY 1965, and to 41.6% by FY 1970.<sup>44</sup>

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some other unusual, unexpected, or unavoidable circumstance beyond the control of the claimant that prevented the claimant from submitting the evidence earlier. *See id.*

<sup>32</sup> 20 C.F.R. §§ 404.969, 416.1469 (2014).

<sup>33</sup> *See* OFFICE OF HEARINGS & APPEALS, SOC. SEC. ADMIN., KEY WORKLOAD INDICATORS 24 n.2 (1994) (referencing referrals from other SSA components, which at the time were called bureau protest cases).

<sup>34</sup> Social Security Amendments of 1956, ch. 836, 70 Stat. 807.

<sup>35</sup> *See id.* sec. 103, § 223, 70 Stat. at 815–16; Charles I. Schottland, *Social Security Amendments of 1956: A Summary and Legislative History*, SOC. SECURITY BULL., Sept. 1956, at 3, 4, <http://www.ssa.gov/policy/docs/ssb/v19n9/v19n9p3.pdf>.

<sup>36</sup> TOM D. CAPSHAW & CLARK ROBINSON, OFFICE OF HEARINGS & APPEALS, SOC. SEC. ADMIN., A QUEST FOR QUALITY, SPEEDY JUSTICE 5 (1991).

<sup>37</sup> By this time referees had been renamed “examiners,” and then “hearing examiners” in 1959. *See* 20 C.F.R. § 404.2(b)(5) (1966); *see also* 20 C.F.R. § 404.921 (1961).

<sup>38</sup> *See* CAPSHAW & ROBINSON, *supra* note 36, at 5.

<sup>39</sup> *See id.*

<sup>40</sup> *Spanning the Decades*, 3 OHA TODAY, Mar.-Apr. 1990, at 6, 7.

<sup>41</sup> *See* CAPSHAW & ROBINSON, *supra* note 36, at 5.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 10–11.

Two factors may have contributed to the rise in allowance rates during this period. First, because of a Second Circuit opinion in 1960 that required specific vocational evidence of the existence of jobs, the agency placed an increased emphasis on obtaining vocational expert information.<sup>45</sup> Second, an amendment to the Social Security Act in 1965<sup>46</sup> changed the duration requirement for establishing disability from “long-continued and indefinite duration” to the current definition of “expected to last for a continuous period of not less than 12 months.”<sup>47</sup> The number of requests for hearing continued to expand throughout the 1960s and 1970s. By 1969, approximately 27,000 hearing requests were filed.<sup>48</sup> Following incorporation of the Supplemental Security Income (“SSI”) program into the Social Security program in 1972,<sup>49</sup> the number of hearing requests climbed to more than 121,000 in FY 1974, and to more than 196,000 in FY 1978.<sup>50</sup> By 1973, there were more than 500 administrative law judges (“ALJs”),<sup>51</sup> the new name for hearing examiners based on a name change made via a Civil Service Commission regulation in 1972,<sup>52</sup> and then a statutory amendment to the APA in 1978.<sup>53</sup>

Originally the hearing examiners deciding SSI cases were not ALJs, but after a series of negotiations with the Civil Service Commission about their status,<sup>54</sup> Congress stepped in to confer “temporary ALJ” status to these SSI hearing officers for two years.<sup>55</sup> In Decem-

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<sup>45</sup> See *Kerner v. Fleming*, 283 F.2d 916, 918, 922 (2d Cir. 1960) (reversing summary judgment and requiring the Government to show what work the applicant for disability pension can or cannot do, and employment opportunities or the lack thereof for persons of the applicant’s skills and limitations).

<sup>46</sup> Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

<sup>47</sup> *Id.* sec. 303, § 216(i)(1), 79 Stat. at 366 (codified at 42 U.S.C. § 416(i)(1) (2012)).

<sup>48</sup> CAPSHAW & ROBINSON, *supra* note 36, at 12.

<sup>49</sup> See Social Security Amendments of 1972, Pub. L. No. 92-603, sec. 301, § 1601, 86 Stat. 1329, 1465.

<sup>50</sup> See CAPSHAW & ROBINSON, *supra* note 36, at 20.

<sup>51</sup> *Id.* at 19.

<sup>52</sup> Change of Title to Administrative Law Judge, 37 Fed. Reg. 16,787, 16,787 (Aug. 19, 1972).

<sup>53</sup> Pub. L. No. 95-251, sec. 2, §§ 554(a)(2), 556(b)(3), 559, 92 Stat. 183, 183 (1978).

<sup>54</sup> See STAFF OF H. COMM. ON WAYS & MEANS, 93D CONG., DISABILITY INSURANCE PROGRAM 58-59 (Comm. Print 1974) (describing the back-and-forth on the negotiations with the Civil Service Commission).

<sup>55</sup> See Pub. L. No. 94-202, sec. 3, § 1631(d)(2), 89 Stat. 1135, 1135-36 (1976).

The persons appointed . . . to serve as hearing examiners in hearings under section 1631(c) of [the Social Security] Act may conduct hearings under titles II, XVI, and XVIII of the Social Security Act if the Secretary of Health, Education, and Welfare finds it will promote the achievement of the objectives of such titles, notwithstanding the fact that their appointments were made without meeting the requirements

ber 1977, Congress enacted legislation “deeming” these temporary ALJs to be full-fledged, permanent ALJs.<sup>56</sup> The agency created the Chief Administrative Law Judge position and began hiring decision writers to assist the ALJs with decision drafting.<sup>57</sup>

Requests for hearing and requests for review continued to rise, and more ALJs and Council Members were hired. By 1983, hearing requests exceeded 360,000, and there were more than 700 ALJs, including 20 who had been discharged from other federal agencies under a process known as a reduction in force.<sup>58</sup> By that time both the workload and the size of the Council had increased. The Council received 93,168 requests for review in 1983.<sup>59</sup> By the end of the 1980s, the Council added Appeals Officers, who later were authorized by regulation to sign denials of review.<sup>60</sup>

As the number of claims appealed to both the ALJ and Appeals Council levels increased, so did the percentage of cases in which benefits were awarded. The allowance rate at the hearing level climbed from 42% of all cases decided in 1970 to 58% of all cases decided in 1980.<sup>61</sup> Expressing concern about the quality and accuracy of hearing decisions, Congress enacted the Bellmon Amendment,<sup>62</sup> which mandated review of hearing decisions under existing own-motion review authority.<sup>63</sup> The agency initially implemented this requirement by targeting decisions issued by ALJs who had high allowance rates.<sup>64</sup>

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for [ALJs] appointed under section 3105 of title 5, United States Code; but their appointments shall terminate not later than at the close of the period ending December 31, 1978, and during that period they shall be deemed to be hearing examiners appointed under such section 3105 and subject . . . to all of the other provisions of such title 5 which apply to [ALJs] . . . .

*Id.*

<sup>56</sup> Social Security Amendments of 1977, Pub. L. No. 95-216, sec. 371, § 1383, 91 Stat. 1509, 1559.

<sup>57</sup> See STAFF OF H. COMM. ON WAYS & MEANS, 93D CONG., *supra* note 54, at 140, 143–44.

<sup>58</sup> CAPSHAW & ROBINSON, *supra* note 36, at 29.

<sup>59</sup> OFFICE OF HEARINGS & APPEALS, SOC. SEC. ADMIN., *supra* note 33, at 24.

<sup>60</sup> See *History of the Appeals Council*, SOC. SEC. ADMIN. (last visited Mar. 13, 2015), <http://odar.ba.ssa.gov/hq-components/oao/history-of-the-appeals-council/> (internal SSA website on file with author); 20 C.F.R. § 422.205(c) (2014).

<sup>61</sup> Soc. Sec. Admin., *The Bellmon Report*, SOC. SECURITY BULL., May 1982, at 3, 8–10, <http://www.ssa.gov/policy/docs/ssb/v45n5/v45n5p3.pdf>.

<sup>62</sup> Officially known as the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441. See U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-89-48BR, SOCIAL SECURITY: RESULTS OF REQUIRED REVIEWS OF ADMINISTRATIVE LAW JUDGE DECISIONS 6–7 (1989) (attributing authorship of the amendment to Senator Henry Bellmon).

<sup>63</sup> See H.R. REP. NO. 96-944, at 57 (1980) (Conf. Rep.), *reprinted in* 1980 U.S.C.C.A.N. 1392, 1405

<sup>64</sup> See Soc. Sec. Admin., *supra* note 61, at 3–5.

An association of SSA ALJs challenged the agency's implementation of the Bellmon Amendment as an unwarranted intrusion into their qualified decisional independence in violation of the APA.<sup>65</sup> By the time the lawsuit was filed, however, the agency had "stopped using allowance rates to target ALJs for Bellmon Review once own motion data became available. The ALJs whose allowance decisions were reviewed were selected for individual review solely on the basis of their own motion rates under the national random sample."<sup>66</sup> Additionally, by June 1982, the agency had "eliminated entirely the individual ALJ portion of Bellmon Review."<sup>67</sup> The agency agreed to not target individual ALJs or hearing offices for own-motion review by issuing a regulation to this effect, although the agency continued to conduct a small random sample review of hearing decisions.<sup>68</sup>

## II. OUTSIDE INFLUENCE ON THE APPEALS COUNCIL

### A. *First Round of ACUS Studies and Recommendations*

In the late 1970s, the Administrative Conference of the United States, which has operated from 1968 to 1995 and from 2010 to the present, began what became a series of studies about the SSA disability adjudication process and issued a series of recommendations addressed to all phases of the process.<sup>69</sup> In 1978, ACUS issued a

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<sup>65</sup> See *Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132, 1133–36 (D.D.C. 1984).

<sup>66</sup> *Id.* at 1135 (footnote omitted). "Own motion rates" refers to the "frequency with which the Appeals Council takes action to correct an ALJ decision." *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> 20 C.F.R. §§ 404.969(b)(1), 416.1469(b)(1) (2014).

<sup>69</sup> See *Recommendations*, ADMIN. CONF. U.S., <http://www.acus.gov/recommendations> (last visited Sep. 8, 2015). For these specific recommendations, see ACUS Recommendation 91-3, The Social Security Representative Payee Program, 1 C.F.R. § 305.91-3 (1993); ACUS Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 1 C.F.R. § 305.90-4 (1993); ACUS Recommendation 89-10, Improved Use of Medical Personnel in Social Security Disability, 1 C.F.R. § 305.89-10 (1993); ACUS Recommendation 87-7, A New Role for the Social Security Appeals Council, 1 C.F.R. § 305.87-7 (1993); ACUS Recommendation 87-6, State-Level Determinations in Social Security Disability Cases, 1 C.F.R. § 305.87-6 (1993); ACUS Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 1 C.F.R. § 305.78-2 (1993); ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352 (July 10, 2013); see also ACUS Recommendation 89-8, Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions, 1 C.F.R. § 305.89-8 (1993); ACUS Recommendation 86-7, Case Management as a Tool for Improving Agency Adjudication, 1 C.F.R. § 305.86-7 (1993); ACUS Recommendation 73-3, Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation, 1 C.F.R. § 305.73-3 (1988); ACUS Recommendation 2011-4, Agency Use of Video Hearings: Best Practices and Possibilities for Expansion, 76 Fed. Reg. 48,795 (Aug. 9, 2011).

recommendation that addressed primarily the administrative hearing stage of the disability benefit claim processing and appeals process.<sup>70</sup> It reaffirmed the need for continued use of ALJs, but it also made suggestions concerning the development of the evidentiary hearing record.<sup>71</sup> These included suggestions that ALJs take more care in questioning claimants, seek to collect as much evidence prior to the hearing as possible, make greater use of prehearing interviews, and make better use of treating physicians as sources of information.<sup>72</sup> ACUS also recommended closing the record at the ALJ stage, before review by the SSA Appeals Council.<sup>73</sup> It recommended that SSA “devote more attention to the development and dissemination of precedent materials” and publish “fact-based precedent decisions.”<sup>74</sup> Finally, it called on the SSA Bureau of Hearings and Appeals to “continue an aggressive quality assurance program to identify errors, determine their causes and prevent their recurrence.”<sup>75</sup>

In 1987, ACUS focused on the Appeals Council. Based on the comprehensive study by Professors Charles Koch and David Koplow,<sup>76</sup> ACUS adopted Recommendation 87-7.<sup>77</sup> It recommended fundamental change in the Appeals Council “that redirects the institution’s goals and operation from an exclusive focus on processing the stream of individual cases and toward an emphasis on improved organizational effectiveness.”<sup>78</sup> To that end, ACUS recommended that SSA should take steps to reduce the Appeals Council’s caseload and adopt structural reforms to allow the Appeals Council to perform the following functions:

- a. *Focus on System Improvements.* SSA should make clear that the primary function of the Appeals Council is to focus on adjudicatory principles and decisional standards concerning disability law and procedures and transmit advice

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<sup>70</sup> See ACUS Recommendation 78-2, 1 C.F.R. § 305.78-2.

<sup>71</sup> See *id.* § 305.78-2(A)–(B).

<sup>72</sup> See *id.* § 305.78-2(B)(1)–(4).

<sup>73</sup> See *id.* § 305.78-2(C)(1).

<sup>74</sup> See *id.* § 305.78-2(C)(2).

<sup>75</sup> See *id.* § 305.78-2(C)(3). The Bureau of Hearings and Appeals was later renamed the Office of Hearings and Appeals.

<sup>76</sup> Charles H. Koch, Jr. & David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration’s Appeals Council*, 17 FLA. ST. U. L. REV. 199 (1990). This recommendation by Professors Koch and Koplow was adopted by ACUS in 1987. See *id.* at 202 n.1.

<sup>77</sup> ACUS Recommendation 87-7, A New Role for the Social Security Appeals Council, 1 C.F.R. § 305.87-7 (1993).

<sup>78</sup> *Id.* § 305.87-7(1).

thereon to SSA policymakers and guidance to lower-level decisionmakers. Thus the Appeals Council should advise and assist SSA policymakers and decisionmakers by:

- (1) Conducting independent studies of the agency's cases and procedures, and providing appropriate advice and recommendations to SSA policymakers; and
- (2) Providing appropriate guidance to agency adjudicators (primarily ALJs, but conceivably [disability determination services] hearing officers in some cases) by: (a) Issuing, after coordination with other SSA policymakers, interpretive "minutes" on questions of adjudicatory principles and procedures, and (b) articulating the proper handling of specific issues in case review opinions to be given precedential significance. The minutes and opinions should be consistent with the Commissioner's Social Security Rulings. Such guidance papers should be distributed throughout the system, made publicly available, and indexed.

b. *Control of its Caseload.* In order to fulfill its responsibility to develop, and to encourage utilization of, sound decisional principles and practices throughout SSA, the Appeals Council must be empowered to exercise its review sparingly, so that it may concentrate its attention on types of cases identified in advance by the Appeals Council. These types of cases might include a small sample of random cases or categories identified by the Secretary of Health and Human Services from time to time. To that end, the Secretary should direct the Appeals Council to design a new review process, subject to the Secretary's approval, that would continue to be part of the available administrative remedy for a claimant dissatisfied with an [ALJ's] initial decision, but that would enable the Appeals Council to deny a petition for review if the issues it sought to raise are deemed inappropriate for the Appeals Council's attention. If a petition for review is denied, the ALJ's decision should be deemed to be final agency action.<sup>79</sup>

More portentously, ACUS ended its recommendation by urging that "[i]f the reconstituted Appeals Council does not result in improved policy development or case-handling performance within a certain number of years (to be determined by Congress and SSA), serious consideration should be given to abolishing it."<sup>80</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* § 305.87-7(2). ACUS also issued several other recommendations pertaining to other aspects of the disability adjudication process. See ACUS Recommendation 89-10, Improved Use

Despite ACUS's strong urging that the Appeals Council take actions to expand its quality assurance efforts, that was not done immediately. For two years beginning in 1995, some of the analysts who assisted the Appeals Council Members were detailed to support hearing-level efforts to reduce the hearing backlog of work under the Short Term Disability Project.<sup>81</sup> The redeployment of staff contributed to the development of a backlog of unworked cases at the Council level, so new efforts to oversee the quality of hearing decisions, such as those proposed by ACUS, were not implemented at that time.

### *B. Court Influence on SSA Decisionmaking*

For many years, the agency promulgated few requirements beyond the general requirements stated in the Social Security Act regarding the extent to which ALJs were required to provide rationales in support of the weight they accorded to various medical opinions or in support of the conclusions reached in their hearing decisions. Section 205(b)(1) of the Social Security Act, as codified in 42 U.S.C. § 405(b)(1), states:

The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based.<sup>82</sup>

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of Medical Personnel in Social Security Disability, 1 C.F.R. § 305.89-10 (1993) (proposing enhancement of the role of medical decision makers, increased effort to develop medical evidence in the record, and improved training of medical staff on legal and program issues); ACUS Recommendation 86-7, Case Management as a Tool for Improving Agency Adjudication, 1 C.F.R. § 305.86-7 (1993) (addressing the first level of determination and review in the disability program); *see also* ACUS Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 1 C.F.R. § 305.90-4 (1993) (synthesizing and strengthening the foregoing recommendations).

<sup>81</sup> *See* SOC. SEC. ADMIN., SOCIAL SECURITY: ACCOUNTABILITY REPORT FOR FISCAL YEAR 1997, at 20, 76 (1997), <http://www.ssa.gov/finance/1997/Full%20Report.pdf>.

<sup>82</sup> 42 U.S.C. § 405(b)(1) (2012).

Over time, the rapidly growing and increasingly sophisticated representative community began to persuade more federal courts to remand more cases for failure to comply with this provision.<sup>83</sup>

The federal courts also began to impose their own requirements regarding articulation of rationales. At first, the agency declined to acquiesce in circuit court decisions based on a statutory requirement that it maintain a uniform national disability program,<sup>84</sup> but the courts pushed back by certifying several large class actions that required the agency to re-adjudicate large numbers of claims.<sup>85</sup> Eventually the agency published a regulation explaining how it would apply circuit court precedent, noting that unless the agency planned to seek relitigation or further judicial review, the agency would acquiesce in circuit court decisions that conflict with the agency interpretation of a provision of the Social Security Act or regulations.<sup>86</sup> In 1996, the agency issued a series of Social Security Rulings, consistent with its authority under the Social Security Act and the APA, to clarify the articulation of rationales requirements.<sup>87</sup>

The courts continued to remand at a high rate, shifting their focus from an inability to evaluate the decisions to findings of legal error for failure to comply with the new agency guidelines requiring the additional rationales.<sup>88</sup> The Council did not have sufficient staff to issue corrective decisions to fill in the missing rationales, but the rate at which the Council granted review to remand, dismiss or issue a decision climbed from 8.6% in 1983 to as high as 47.6% in 1990.<sup>89</sup> The Council was also unable to leverage the information it saw in review-

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<sup>83</sup> See Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 *YALE L.J.* 679, 699 (1989).

<sup>84</sup> 42 U.S.C. § 421(a)(2) (2012).

<sup>85</sup> See Estreicher & Revesz, *supra* note 83, at 692–704.

<sup>86</sup> 20 C.F.R. §§ 404.985, 416.1485 (2014).

<sup>87</sup> In 1996, SSA published eight Social Security Rulings (“SSR”) that collectively are known as the Process Unification Rulings. See SSR 96-2p, 61 Fed. Reg. 34,490 (July 2, 1996); SSR 96-3p, 61 Fed. Reg. 34,468 (July 2, 1996); SSR 96-4p, 61 Fed. Reg. 34,488 (July 2, 1996); SSR 96-5p, 61 Fed. Reg. 34,471 (July 2, 1996); SSR 96-6p, 61 Fed. Reg. 34,466 (July 2, 1996); SSR 96-7p, 61 Fed. Reg. 34,483 (July 2, 1996); SSR 96-8p, 61 Fed. Reg. 34,474 (July 2, 1996); SSR 96-9p, 61 Fed. Reg. 34,478 (July 2, 1996).

<sup>88</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-331, *DISABILITY PROGRAMS: SSA HAS TAKEN STEPS TO ADDRESS CONFLICTING COURT DECISIONS, BUT NEEDS TO MANAGE DATA BETTER ON THE INCREASING NUMBER OF COURT REMANDS 3–5* (2007) (examining the trend, between FYs 1995 and 2005, of the increasing number of disability appeals reviewed by federal district courts, along with the proportion of those decisions that were remanded).

<sup>89</sup> See OFFICE OF HEARINGS & APPEALS, SOC. SEC. ADMIN., *supra* note 33, at 14; CAPSHAW & ROBINSON, *supra* note 36, at 30 (stating that in FY 1986, 17% of those seeking reconsideration received favorable determinations).

ing the hearing decisions because it was not able to capture that information about the decisions in the form of structured data.<sup>90</sup> Anecdotally, many Council Members were aware of the types of problems that they frequently saw in their reviews of hearing decisions, but without data to support their conclusions, they were unable to effect significant programmatic or policy changes.

### III. AGENCY INITIATIVES TO STREAMLINE AND IMPROVE THE APPELLATE PROCESS

#### A. *The Short-Lived Disability Service Improvement Program*

The Appeals Council workload grew substantially in the late 1990s but the Council regained control of its workload in 2001 through its Appeals Council Process Improvement Initiative.<sup>91</sup> Nonetheless, in late 2003, Commissioner Joanne Barnhart developed a new program initiative, known as the Disability Service Improvement (“DSI”) process,<sup>92</sup> which, among other things, was designed to test phasing out the request for review to the Appeals Council.<sup>93</sup> The DSI initiative, which was only tested in the Boston region,<sup>94</sup> was intended to filter out hearing cases by generating more allowances at the newly created Federal Reviewing Official (“FedRO”) level,<sup>95</sup> thereby obviating the need for a hearing for claimants who were clearly disabled, thus reducing allowance decisions at the hearing level.<sup>96</sup> The FedRO step took the place of the reconsideration step in the appellate process.<sup>97</sup> Under the DSI regulations, the ALJs were required to address the FedRO find-

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<sup>90</sup> See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 88, at 3–4, 17–20 (“Stakeholders commonly cited two reasons for remands: written explanations that did not support the decisions and inadequate documentation of consideration given to medical evidence.”).

<sup>91</sup> See Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 13 (2003) (“[T]he Appeals Council Process Improvement Initiative was implemented in fiscal year 2000 and has resulted in some improvements. The time required to process a case in the Appeals Council has been reduced by 11 days to 447 days and the backlog of cases pending review has been reduced from 144,500 (fiscal year 1999) to 95,400 (fiscal year 2001).”).

<sup>92</sup> Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006) (to be codified at 20 C.F.R. pt. 404, 405, 416, 422).

<sup>93</sup> See *id.* at 16,437.

<sup>94</sup> See *id.* at 16,428.

<sup>95</sup> This new position was to be staffed by lawyers who were required to consult with medical, psychological, or vocational experts before they could reverse an initial determination by the state Disability Determination Service (“DDS”). See *id.* at 16,431–33. They also were charged with providing legally sufficient rationale for each conclusion they reached. See *id.* at 16,433.

<sup>96</sup> See *id.* at 16,442.

<sup>97</sup> See *id.* at 16,432–34 (formerly codified at 20 C.F.R. § 405 subpt. C (2011)).

ings.<sup>98</sup> DSI also contemplated replacing the Appeals Council with the Decision Review Board, which would no longer rely on appeals by claimants, but would instead select cases for review by using sophisticated natural language processing techniques to identify cases likely to have errors.<sup>99</sup>

While the DSI program was being developed and rolled out in the Boston region, the agency also moved toward electronic processing of cases.<sup>100</sup> Appeals Council Members were quick to understand the benefits of capturing structured data in an electronic case-processing environment.<sup>101</sup> Over the years, many Council Members had observed that the most frequent reasons for remand had remained relatively static; it was obvious that remands alone were not changing behavior or helping ALJs and decision writers improve the quality of their work.<sup>102</sup> Quality assurance efforts were not changing behaviors either. Those efforts were largely based on relatively small random-sample reviews, with quality assurance reviewers trying to determine whether the outcomes of the decisions reviewed were appropriate.<sup>103</sup> Reports were issued containing the findings of these reviews, but the reports did not have the effect of significantly altering the quality of the decisions.<sup>104</sup>

### B. Collection of Structured Data

Some Appeals Council Members believed that capturing structured data about the types of errors made and providing more feedback to adjudicators would be effective in reducing errors.<sup>105</sup> In addition, such information would be helpful in determining whether agency policies were achieving anticipated results and could lead to improvements in policy drafting.<sup>106</sup>

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<sup>98</sup> *Id.* at 16,435, 16,453 (formerly codified at 20 C.F.R. § 405.370 (2011)).

<sup>99</sup> *Id.* at 16,437–440, 16,454–56 (formerly codified at 20 C.F.R. § 405 subpt. E (2011)).

<sup>100</sup> *See id.* at 16,424–25 (describing the transition to eDib, the electronic system intended to replace the old paper disability approach).

<sup>101</sup> *See id.* at 16,425 (noting that all Office of Hearings and Appeals hearing offices were outfitted with the new electronic case processing system).

<sup>102</sup> *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 88, at 17–20 (attributing the common reasons for remand to high SSA workloads).

<sup>103</sup> This observation is based on the personal observations of Judge Ray from his experience at the Appeals Council.

<sup>104</sup> This assessment is based on the personal observation of Judge Ray from his experience at the Appeals Council.

<sup>105</sup> *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 88, at 19–20.

<sup>106</sup> *See* OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at 13–15.

As part of the DSI effort, the Office of Systems developed a case management tracking system to track cases processed by the Decision Review Board. As part of that system, a series of electronic pages were developed that were designed to capture structured data about the hearing decisions the Decision Review Board was expected to review. About the time this new system became operational, Commissioner Michael Astrue decided to pare back the DSI effort.<sup>107</sup> The Office of Systems revised the electronic pages to capture data in Appeals Council reviews and eliminated the pages specific to DSI. Collectively these electronic pages became known as the Appeals Case Analysis Tool (“ACAT”).<sup>108</sup>

ACAT remains an integral part of the Council’s overall case management tracking system known as the Appeals Review Processing System (“ARPS”).<sup>109</sup> The primary purpose of ARPS was to count cases and keep track of processing times, but Council Members also added status codes to reflect the specific activities performed by all staff involved in the processing of a given case.<sup>110</sup> Thus, rather than simply tracking the movement of cases among individuals, ARPS also enabled the Council to capture structured data on the activities taken at each step in the business process.<sup>111</sup> ARPS, including the ACAT electronic data capture pages and new status codes, was rolled out for the processing of disability cases at the Appeals Council in March 2008.<sup>112</sup> It included electronic data capture pages designed for evaluating dismissals,<sup>113</sup> requests for reopening,<sup>114</sup> and hearing decisions.<sup>115</sup>

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<sup>107</sup> Suspension of New Claims to the Federal Reviewing Official Review Level, 73 Fed. Reg. 2411, 2412–16 (Jan. 15, 2008) (to be codified at 20 C.F.R. pt. 404, 405, 416); Eliminating the Decision Review Board, 76 Fed. Reg. 24,802, 24,802 (May 3, 2011) (to be codified at 20 C.F.R. pt. 404, 405, 416, 422). Changes in the way the Appeals Council evaluates new and material evidence in cases arising in the Boston Region, however, were preserved. *See id.* at 24,802; *supra* note 31.

<sup>108</sup> OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at E-1 (describing the Appeals Case Analysis Tool as an analytical template tool).

<sup>109</sup> *See id.*

<sup>110</sup> *See id.*

<sup>111</sup> *Id.* (“ARPS can generate detailed and structured management information reports . . .”).

<sup>112</sup> *See id.*

<sup>113</sup> *See, e.g.*, SOC. SEC. ADMIN., HALLEX I-3-4-2, REQUEST FOR REVIEW NOT TIMELY FILED ¶ C (2014), [http://www.socialsecurity.gov/OP\\_Home/hallex/I-03/I-3-4-2.html](http://www.socialsecurity.gov/OP_Home/hallex/I-03/I-3-4-2.html). HALLEX, or the Hearings, Appeals and Litigation Law manual, is published by the Deputy Commissioner for Disability Adjudication and Review, and “conveys guiding principles, procedural guidance, and information” to that office’s staff. SOC. SEC. ADMIN., HALLEX I-1-0-1, PURPOSE (2011), [http://ssa.gov/OP\\_Home/hallex/I-01/I-1-0-1.html](http://ssa.gov/OP_Home/hallex/I-01/I-1-0-1.html).

<sup>114</sup> *See, e.g.*, SOC. SEC. ADMIN., HALLEX I-3-5-50, APPEALS COUNCIL RECEIVES ADDI-

Other updates have been released by the Office of Systems since that time.

After the initial release of ACAT, the Appeals Council developed other data capture pages for use in processing the work of the Appeals Council's Division of Civil Actions. That division processes newly filed court cases (i.e., actions in federal district court filed by claimants seeking review of final agency decisions), reviews evidence submitted to the Agency or to the court after court actions are filed, and processes any ensuing remands from the courts.<sup>116</sup> The data capture pages used in the performance of this work, which include the reasons expressed by the courts for remands, became operational in March 2009. The Council also recognized the need to capture structured data regarding the quality of hearing decisions that are *favorable* to claimants, and in the summer of 2011, the Appeals Council rolled out ACAT data capture pages for this purpose.<sup>117</sup>

### C. Policy Compliant Pathing

ALJs are required to follow agency policies in reaching their decisions.<sup>118</sup> Some Council Members recognized that these policy variables could be assembled into a decision tree showing the appropriate paths that should be followed to reach each of the approximately 2000 possible outcomes in disability claims.<sup>119</sup> Of course, judgment is involved in many of the steps, so it was not the intent of the Council to produce a decision tree to direct ALJ conclusions. Instead, the Coun-

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TIONAL EVIDENCE AFTER ISSUING DENIAL OF REQUEST FOR REVIEW ¶ D (2014), [http://www.socialsecurity.gov/OP\\_Home/hallex/I-03/I-3-5-50.html](http://www.socialsecurity.gov/OP_Home/hallex/I-03/I-3-5-50.html).

<sup>115</sup> See, e.g., SOC. SEC. ADMIN., HALLEX I-5-3-18, ELIMINATION OF DECISION REVIEW BOARD (DRB) AND RELATED HEARING LEVEL PROCESSING CHANGES ¶ IV(A)(1) (2011), [http://www.socialsecurity.gov/OP\\_Home/hallex/I-05/I-5-3-18.html](http://www.socialsecurity.gov/OP_Home/hallex/I-05/I-5-3-18.html).

<sup>116</sup> See OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at 15; *SSA Organizational Manual, Chapter TL: Office of Disability Adjudication and Review*, SOC. SEC. ADMIN., <http://ssa.gov/org/orgdcdar.htm> (last visited Sept. 8, 2015).

<sup>117</sup> See Office of Appellate Operations, Soc. Sec. Admin., *DQ Dives Deep Into Quality Data*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Jan. 20, 2012, at 3, 3 [hereinafter *DQ Dives Deep Into Quality Data*].

<sup>118</sup> See Morrell E. Mullins, *Manual For Administrative Law Judges*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES (SPECIAL ISSUE) i, 138 (2004) ("An ALJ's responsibility is to follow agency policy, or where necessary in a case of first impression, establish a policy consistent with existing agency policy.").

<sup>119</sup> Judge Ray was involved in the production of most of the decision tree. The decision tree facilitated his ability to build the ACAT tool and to provide input into analytical tools used in other parts of the SSA. Absent knowledge of the correct policy compliant pathing, the SSA would have been unable to determine consistently whether pathing was followed. Thus, this effort was a crucial step in improving quality and consistency in disability adjudication.

cil sought to determine whether adjudicators were following the proper pathing and exercising judgment where appropriate to do so within the context of that pathing. The Council believed that if adjudicators followed the proper pathing, errors caused by the failure to consider appropriate issues in the cases decided could be significantly reduced. Essentially this was an effort to use policy compliant pathing to deconstruct hearing decisions in order to find errors in the analysis of the record.

The various ACAT data capture pages propagate information captured at the initial, reconsideration, and hearing levels, and include a series of questions in conjunction with the policy compliant pathing to help reviewers identify legal errors. The various ACAT screens include meta-data questions relating to policy application as well as medical and vocational issues. Together the various ACAT data capture pages include more than 500 questions.<sup>120</sup> In any given case, a paralegal specialist or attorney adviser must answer a varying specific subset of these questions as part of the post-decisional analysis they perform to verify that the hearing decision meets the requirements for a legally sufficient application of policy in deciding the disability claim.<sup>121</sup>

#### *D. A More Balanced Approach to Decisional Quality*

At the start of FY 2011, the Council reinvigorated its own-motion review process, for the first time using a dedicated staff in the Appeals Council's newly created Division of Quality.<sup>122</sup> The SSA tasked this division with conducting random reviews of unappealed dismissals and hearing decisions under the Council's own-motion authority using the new ACAT data capture pages in order to collect structured data about the quality of those decisions.<sup>123</sup> Several permanent Appeals

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<sup>120</sup> See, e.g., *DQ Dives Deep Into Quality Data*, *supra* note 117, at 3. The OAO has added about 100 questions to the part of ACAT used by the Division of Quality in reviewing favorable ALJ decisions. *Id.* That is a small part of ACAT, however, as there are tools for dismissals, continuing disability reviews, childhood claims, favorable decision, unfavorable decision, reopenings, civil actions, and many more. The questions are revised, updated, and expanded with each systems release, which occur twice annually.

<sup>121</sup> See OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at A-1 to A-2.

<sup>122</sup> *Id.* at 7 n.21 (describing the Division of Quality and the scope of its duties).

<sup>123</sup> See *id.* a 1 n.6; Office of Appellate Operations, Soc. Sec. Admin., *Division of Quality Brings New Data, Insight to Disability Process*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Jan. 20, 2012, at 1, 1. The Division has so far primarily performed random reviews of awards, although it also has conducted special studies of dismissals and child claims involving attention deficit and hyperactive disorders. It was set up to look at all types of actions, and the size of the Division was doubled in the summer of 2014, when it began to conduct selective

Council Members and two ALJs, serving on rotational assignments as Acting Administrative Appeals Judges, process the work of this division.<sup>124</sup> Since 2010, Quality Review Branch employees in the Division of Quality have randomly sampled between 3500 and 7100 cases each year, capturing structured data about the quality of the work reviewed.<sup>125</sup> The sample size is sufficient to gather statistically valid information at the regional level.<sup>126</sup>

The Division of Quality also conducts focused reviews of outlier behaviors and issues identified through data analysis.<sup>127</sup> The Council recently began to implement selective sampling of decisions and dismissals under the Appeals Council's own-motion authority.<sup>128</sup>

### *E. Other Agency Analysis Tools*

ACAT was one part of a multi-pronged approach the SSA developed to address the quality of agency disability decisions and determinations.<sup>129</sup> Council Members worked with other agency employees to build policy compliant pathing into case analysis tools that agency em-

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sampling reviews. The Division hopes to conduct random sample reviews of unappealed denials as well as awards and dismissals in the near future.

<sup>124</sup> See Office of Appellate Operations, Soc. Sec. Admin., *DQ Plans ALJ Participation*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Jan. 20, 2012, at 2, 2 (describing the Division of Quality's plans to include two ALJs in its review process).

<sup>125</sup> See, e.g., OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-07-12-21234, CONGRESSIONAL RESPONSE REPORT: THE SOCIAL SECURITY ADMINISTRATION'S REVIEW OF ADMINISTRATIVE LAW JUDGES' DECISIONS 7-8 & n.38 (2012); see also OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at 7 n.21; Office of Appellate Operations, Soc. Sec. Admin., *OAO Achieves 162K RR Dispos in Year of Workload Challenges*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Oct. 24, 2014, at 1, 2 (FY 2014 random sample of 4,738 cases); Office of Appellate Operations, Soc. Sec. Admin., *FY 2013 Ends with More Cases Processed, Goals Exceeded*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Nov. 1, 2013, at 1, 3 (FY 2013 random sample of 6,167) [hereinafter *FY 2013 Ends with More Cases Processed*]; Office of Appellate Operations, Soc. Sec. Admin., *OAO Staff Accomplish Much in Service to Public in FY 2012*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Oct. 19, 2012, at 1, 3 (FY 2012 random sample of 7,074 cases) [hereinafter *OAO Staff Accomplish Much in Service to Public*]; Office of Appellate Operations, Soc. Sec. Admin., *OAO Wraps Up a Busy FY 2011 with Many Accomplishments*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Oct. 7, 2011, at 1, 3 (FY 2011 random sample of 3,692) [hereinafter *OAO Wraps Up a Busy FY 2011*].

<sup>126</sup> See Office of Appellate Operations, Soc. Sec. Admin., *DQ Sampling Method Seeks Objectivity*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Jan. 20, 2012, at 3, 3.

<sup>127</sup> See Office of Appellate Operations, Soc. Sec. Admin., "*Focused Quality Reviews*" *Enhance DQ's Mission*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Jan. 20, 2012, at 1, 4 [hereinafter "*Focused Quality Reviews*" *Enhance DQ's Mission*]. The authority for both random and selective sampling can be found at Appeals Council Review Rules, 20 C.F.R. §§ 404.969(b), 416.1469(b) (2014).

<sup>128</sup> See "*Focused Quality Reviews*" *Enhance DQ's Mission*, *supra* note 127, at 4.

<sup>129</sup> See OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at E-1.

ployees could use to analyze disability issues in making disability determinations and decisions at all adjudicative levels. The Office of Disability Programs (“ODP”) and the Office of Disability Systems (“ODS”) developed the electronic claims analysis tool (“eCAT”), a system now in wide use by each of the state DDSs. The eCAT constructs variable decision trees following policy compliant pathing for the DDS’s disability determinations.<sup>130</sup> Preliminary data about the use of eCAT reflect that it has helped to improve consistency in adjudication at the DDS level.<sup>131</sup> ODP and ODS employees, guided by ALJs, also constructed the electronic bench book, a tool the ALJs now use at the hearing level to help them navigate the policy compliant pathing in the construction of policy compliant decisions.<sup>132</sup>

The Council is also involved in the analysis of the data captured by the various analytical tools that the agency has developed. Council Members work directly with mathematicians, computer scientists, economists, and operations research specialists who aggregate the data and utilize sophisticated techniques to identify problem areas in case adjudication. The data analysis usually takes one of three forms: (1) correlations between various data sets; (2) regression analyses to highlight specific variables of interest in the data; and, (3) clustering techniques to identify complex relationships in the data. The results are often displayed in one of many types of data visualizations, including standard pie and line charts and bar graphs. Other types of visualizations commonly used by the Appeals Council include: heat maps, which add color to highlight data in matrix form; tree maps, which display hierarchical data in nested rectangular form; radar or spider charts, which reflect multivariate data along multiple axes originating at the same point; histograms, which depict graphical representations of probability distributions; and, choropleth maps, which use color to project proportional measurement of a particular variable on a geographic map. These and other visualizations are used to identify outlier behaviors and anomalies that the Council can investigate to determine whether and what type of corrective action might be needed.<sup>133</sup>

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<sup>130</sup> See OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-01-11-21193, QUICK RESPONSE EVALUATION: THE EFFECTS OF THE ELECTRONIC CLAIMS ANALYSIS TOOL 4 (2011) (describing the results of implementing eCAT).

<sup>131</sup> See *id.* at 4, 12.

<sup>132</sup> See SOC. SEC. ADMIN., OPEN GOVERNMENT PLAN 2.0, at 19 (2013), <http://www.ssa.gov/open/2012-og-plan.pdf> (describing the planned release of the electronic Bench Book).

<sup>133</sup> See generally EDWARD R. TUFTE, BEAUTIFUL EVIDENCE (2006); EDWARD R. TUFTE,

Under current regulations, cases may be sampled for potential own-motion review either randomly or selectively, but such sampling for the purpose of corrective action in individual cases cannot be based on the originating hearing office of the case or on the name of the ALJ who issued the decision.<sup>134</sup> The authority to take corrective action by exercising own-motion review is time-limited.<sup>135</sup> The Council nonetheless may review cases for other reasons originating from one ALJ or hearing office on behalf of the SSA Commissioner (e.g., to collect information about the cases), and can use the information collected to provide feedback to individuals or offices.<sup>136</sup> The Council, through its Division of Quality, does this through a process known as focused reviews.<sup>137</sup>

Focused reviews may be conducted on any issue related to Social Security programs or on the work of any person who processes claims or provides evidence to the agency.<sup>138</sup> They are designed to provide the Commissioner with information about how agency policies are applied, how evidence is obtained and considered, and how the application of agency policies affects claimants for benefits or payments.<sup>139</sup> A board comprised of executives of ODAR, including the Chief and Deputy Chief ALJ, and the Chair, Deputy Chair and Assistant Deputy Chair of the Appeals Council, selects and prioritizes issues for focused review.<sup>140</sup> Most frequently, specific issues come to the attention of the board because data analysis identifies an anomaly.<sup>141</sup> Once an

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THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION (2d ed. 2001); EDWARD R. TUFTE, VISUAL EXPLANATIONS (1997); EDWARD R. TUFTE, ENVISIONING INFORMATION (1990).

<sup>134</sup> 20 C.F.R. §§ 404.969(b), 416.1469(b) (2014).

<sup>135</sup> *Id.* § 416.1469(a) (limiting own-motion review to within sixty days after the date of decision or dismissal).

<sup>136</sup> *Oversight of Rising Social Security Disability Claims and the Role of Administrative Law Judges: Hearing Before the Subcomm. on Energy Policy, Health Care & Entitlements of the H. Comm. on Oversight & Gov't Reform*, 113th Cong. 66 (2013) [hereinafter *Oversight Hearing*] (prepared statement of Glenn Sklar, Deputy Comm'r for Disability Adjudication and Review, Social Security Administration).

<sup>137</sup> *See id.*; OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at 7 n.21 (“[Division of Quality] also conducts focused reviews on ALJ-related issues to ensure compliance with SSA policies and procedures.”).

<sup>138</sup> *See Oversight Hearing*, *supra* note 136, at 66.

<sup>139</sup> *See STAFF OF H. COMM. ON OVERSIGHT & GOV'T REFORM*, 113TH CONG., MISPLACED PRIORITIES: HOW THE SOCIAL SECURITY ADMINISTRATION SACRIFICED QUALITY FOR QUANTITY IN THE DISABILITY DETERMINATION PROCESS 12 (2014) [hereinafter *MISPLACED PRIORITIES*].

<sup>140</sup> *See id.* (describing how and by whom ALJs are prioritized for focused review).

<sup>141</sup> Debra Bice, *Statement Before the Senate Committee on Homeland Security and Government Affairs*, SOC. SEC. ADMIN. (Oct. 7, 2013) [hereinafter *Bice Statement*], [http://www.ssa.gov/legislation/testimony\\_100713.html](http://www.ssa.gov/legislation/testimony_100713.html) (“We review our electronic records for anomalies; when we

issue is chosen for a focused review, the Appeals Council's Division of Quality assigns a team of attorney-advisors to review a sample of sixty or more cases involving the anomaly identified.<sup>142</sup> The attorneys then conduct more in-depth reviews of a smaller sample of cases.<sup>143</sup> The attorneys discuss their findings and reach a consensus. One of those attorneys drafts a written report explaining the findings, and the team provides an oral presentation to senior managers and executives who decide on an appropriate course of action. These reviews are conducted after benefit payments are effectuated, and the Appeals Council takes no action to alter the outcome of the particular decisions reviewed or to stop benefit payments even if the decision is not policy compliant or not supported by the evidence of record.<sup>144</sup> In very limited circumstances, such as when the review identifies possible fraud or similar fault, the Division of Quality may refer individual cases for possible reopening, continuing disability review,<sup>145</sup> or for investigation by the Office of the Inspector General.<sup>146</sup> The Division of Quality may also refer individual cases for continuing disability review following focused reviews, evaluating specific issues rather than the work of individual ALJs or hearing offices.

The Council operates on the assumption that, in general, the DDSs and federal employees and officers involved in disability adjudication are doing their best to follow the law and regulations and take accurate and appropriate actions. When an error is made, it may be because the employee has not developed a proper heuristic model for applying a particular aspect of the law or regulations.<sup>147</sup> Part of the

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find them, we look to identify whether such anomalies can be explained or whether administrative action is appropriate.”).

<sup>142</sup> See, e.g., MISPLACED PRIORITIES, *supra* note 139, at 17 (describing a review of sixty favorable decisions and subsequent examination of a smaller subset of those decisions to determine whether they were supported by the evidence).

<sup>143</sup> *Id.*

<sup>144</sup> *Oversight Hearing*, *supra* note 136, at 66 (“Because [post-effectuation focused] reviews occur after the 60-day period a claimant has to appeal the ALJ decision, they do not result in a change to the decision.”).

<sup>145</sup> Continuing disability reviews (“CDR”) are conducted by the SSA of persons currently receiving disability benefits to determine whether a person is still disabled. See 20 C.F.R. §§ 404.1589–90, 416.989a, 416.990 (2014). Occasionally, SSA may conduct a CDR and find a person was erroneously entitled in the first place. In that circumstance, a showing of medical improvement is not necessary. See *id.* § 404.1594(d)(4).

<sup>146</sup> See Bice Statement, *supra* note 141.

<sup>147</sup> Heuristics are shortcuts in analytical thinking that people develop over time to guide them through complex problems. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 98 (2011) (defining heuristics as “a simple procedure that helps find adequate, though often imperfect, answers to difficult questions”). Generally, heuristics help employees become more pro-

focused review analysis highlights any shortcuts being taken and ensures that these shortcuts are policy compliant. Typically, when anomalous behaviors are pointed out to employees, and when the proper model for evaluating disability in a policy compliant manner is explained to them, they make the appropriate changes in their behavior, with resultant improvements in the quality of their work.

#### *F. Training Improvements*

Nobel Laureate Daniel Kahneman has noted that three things are required to become an expert in a given field: immersion in the field, relatively static processes, and recurrent and immediate feedback to help develop a proper heuristic model of the work to be done.<sup>148</sup> What has been missing in the disability process is appropriate feedback.<sup>149</sup> The Council concluded that for the most part, appropriate feedback could be provided through various training initiatives.

In 2009, several Council Members reviewed the existing training guides and materials to assess how they could be improved. Agency training up to that point had been primarily lecture-based, with a strong emphasis on presenting the rules, regulations, and other legal requirements, and some discussion of how to read and analyze medical reports. Council Members studied adult learning techniques and realized that adding a contextual framework helps adults retain information and better understand work processes.<sup>150</sup> They also considered motivational techniques, particularly as they relate to learning. They identified new methodologies for training adjudicators and developed highly interactive training designed to teach adjudicators how to apply the law and regulations rather than simply train them on what the law and regulations say, as had been done in the past.<sup>151</sup>

The Appeals Council training staff integrated casework into the training of newly hired paralegal specialists and attorney advisers,

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ductive and efficient. However, if the employees apply these shortcuts without critical feedback, they become increasingly more comfortable in using them routinely.

<sup>148</sup> See *id.* at 234–44.

<sup>149</sup> See, e.g., OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 125, at 11 (“[M]ost ALJs were not notified of the quality review results of their decisions.”).

<sup>150</sup> See generally BETH CRANDALL ET AL., WORKING MINDS: A PRACTITIONER’S GUIDE TO COGNITIVE TASK ANALYSIS (2006); JUDY WILLIS, RESEARCH-BASED STRATEGIES TO IGNITE STUDENT LEARNING: INSIGHTS FROM A NEUROLOGIST AND CLASSROOM TEACHER (2006); THE NEUROSCIENCE OF ADULT LEARNING (Sandra Johnson & Kathleen Taylor eds., 2006); MEL SILBERMAN & CAROL AUERBACH, ACTIVE TRAINING: A HANDBOOK OF TECHNIQUES, DESIGNS, CASE EXAMPLES, AND TIPS (2d ed. 1998).

<sup>151</sup> See, e.g., *Oversight Hearing*, *supra* note 136, at 66–67 (describing transition from “anecdotal” to “data-driven identification of training . . . gaps”).

teaching them to navigate the file and evidence, to apply Appeals Council's practices, to determine where to find and how to apply the laws, regulations, rulings and sub-regulatory procedures, and to read and evaluate the medical and non-medical evidence. The training staff replaced lectures with interactive sessions using proctors to guide the employees on how to navigate the information provided.<sup>152</sup> Group exercises and discussions became an integral part of the training effort.<sup>153</sup> Additionally, to ensure that the training sessions were effective, the Council developed scaled response surveys to ensure that the employees are satisfied with the training they received and that they actually learn the materials presented.<sup>154</sup> These new techniques allowed actual classroom training time for newly hired staff to be reduced from eight weeks to six weeks.<sup>155</sup> The Council also tracked post-training performance, and found a reduction in the learning curve for newly hired paralegal specialists and attorney advisers from eighteen months to about five months.<sup>156</sup> For all these efforts, in FY 2011, the Appeals Council won the prestigious Deming Award from the Graduate School USA for exemplary training.<sup>157</sup>

Perhaps most importantly, the Council has begun to develop specific training modules to address numerous types of errors identified as reasons for remand in its reviews.<sup>158</sup> Once the Council identifies a pattern of specific errors made by individual adjudicators, the Council is able to provide individuals with the training they need to improve their work by providing the training modules directly to them.<sup>159</sup> This

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<sup>152</sup> See Patricia A. Jonas, Exec. Dir. of the Office of Appellate Operations and Deputy Chair of the Appeals Council, Soc. Sec. Admin., Statement Before the Internal Revenue Service Oversight Board 3 [hereinafter Jonas Statement] (Feb. 28, 2012), <http://www.treasury.gov/irsob/documents/Panel%203-Patricia%20Jonas.pdf>.

<sup>153</sup> See Office of Appellate Operations, Soc. Sec. Admin., *OAO Wins Prestigious Deming Award for Training Excellence*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Mar. 18, 2011, at 1, 3.

<sup>154</sup> See Jonas Statement, *supra* note 152, at 3 (describing "employee feedback loops that guided [the SSA] in making changes to the delivery and content of the training").

<sup>155</sup> See Office of Appellate Operations, Soc. Sec. Admin., *supra* note 153, at 3.

<sup>156</sup> See Jonas Statement, *supra* note 152, at 3.

<sup>157</sup> For a list of recent Deming Award winners, including the SSA's Office of Appellate Operation, see *Deming Award Winners*, GRADUATE SCH. USA, [http://graduateschool.edu/index.php?option=com\\_content&task=view&id=132&Itemid=](http://graduateschool.edu/index.php?option=com_content&task=view&id=132&Itemid=) (last visited Sept. 8, 2015).

<sup>158</sup> *Social Security Disability Programs: Improving the Quality of Benefit Award Decisions: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 60 (2012) (statement of Judge Patricia Jonas, Appellate Operations Executive Director and Deputy Chair, Appeals Council, Social Security Administration) (describing the 170 types of errors identified at that time, and noting that the number can change over time).

<sup>159</sup> See *id.* at 58.

approach focuses training on individual behaviors, which may be more effective than providing general training to large numbers of people, many of whom do not have problems applying the particular policies included in the training. The Council is in the process of attaching the training modules to an existing program called “How MI Doing” that pushes management information about adjudication directly to ALJs and other employees.<sup>160</sup> The “How MI Doing” training modules have multiple tiers, ranging from a printable desk-guide to extensive explanations of the regulations and rulings with hyperlinks that connect directly to agency policy.<sup>161</sup>

The notion behind the training modules, which are self-directed, is that employees are motivated to become experts at what they do and will engage in self-directed training on issues in which they have problems. By pushing the training to employees with explanations of the errors they make, the Council is able to provide immediate and direct feedback beyond that provided in remand orders, including detailed explanations of how the regulations should be applied, issues to consider when applying the regulations, and information about common misapplications of the regulations cited and how to avoid them.

While proper training can improve the work of individuals, sometimes the data shows nearly *all* adjudicators have similar problems with application of certain policies, suggesting that the policies are not clear enough. Using one particular type of data visualization, known as heat maps, the Council was able to identify areas of policy that appear to be open to varying interpretations and where policy clarification could be effective.

#### IV. SECOND ROUND OF ACUS STUDIES AND RECOMMENDATIONS

##### A. ACUS's Recommendations

After ACUS was reestablished in 2010, SSA enlisted its aid to consider the data, the policies, and the positions of parties with interest in SSA programs in order to craft recommendations for the agency to pursue in clarifying its policies.<sup>162</sup> The most significant study the

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<sup>160</sup> *Id.* at 60; see also OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at E-1.

<sup>161</sup> See Office of Appellate Operations, Soc. Sec. Admin., *OAO Launches Remand-Reason Training Modules for Hearing Level*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Aug. 8, 2014, at 1, 3.

<sup>162</sup> See *Social Security Administration*, ADMIN. CONF. U.S., <http://acus.gov/agencies/social-security-administration> (last visited Sept. 8, 2014) (listing ACUS reports and recommendations about the SSA).

SSA requested of ACUS was of the inconsistency in ALJ decisions with an eye to what the Appeals Council could do about it. The resulting study and recommendation<sup>163</sup> illuminated the problem and recognized many of the activities of the Appeals Council described above.

The recommendation stated, “[t]o be sure, an ALJ faces an enormous task in adjudicating hundreds of cases annually. Nonetheless, divergent allowance rates among ALJs suggest that claims are being resolved in an inconsistent, if not inaccurate, manner.”<sup>164</sup> But it also recognized that the problem had lessened since 2010, and that the Appeals Council had played a key role in ameliorating that problem. ACUS stated:

SSA should continue to promote the consistent application of policy to the adjudication of disability benefits claims across a nationwide program. SSA should ensure that the Appeals Council strikes an appropriate balance between its error-correction function when exercising discretionary review of individual claimants’ requests for review, and its mandate to improve organizational effectiveness, decisional consistency, and communication of agency policy through use of “own motion” review (as to both allowances and unappealed denials) and other types of systemic quality assurance measures.<sup>165</sup>

More specifically, ACUS suggested:

In order to focus attention on the unappealed decisions that most warrant review, thereby enhancing both accuracy and consistency, SSA should expand the Appeals Council’s use of its “own motion” review by using selective review in a manner consistent with ALJ decisional independence. The Appeals Council should use announced, neutral, and objective criteria, including statistical assessments, to identify problematic issues or fact patterns that increase the likelihood of error and, thereby, warrant focused review. In addition, SSA should review unappealed decisions that raise issues whose resolution likely would provide guidance to

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<sup>163</sup> ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352 (July 10, 2013); HAROLD J. KRENT & SCOTT MORRIS, ADMIN. CONFERENCE OF THE U.S., ACHIEVING GREATER CONSISTENCY IN SOCIAL SECURITY DISABILITY ADJUDICATION: AN EMPIRICAL STUDY AND SUGGESTED REFORMS (2013), [http://www.acus.gov/sites/default/files/documents/Achieving\\_Greater\\_Consistency\\_Final\\_Report\\_4-3-2013\\_clean.pdf](http://www.acus.gov/sites/default/files/documents/Achieving_Greater_Consistency_Final_Report_4-3-2013_clean.pdf).

<sup>164</sup> ACUS Recommendation 2013-1, 78 Fed. Reg. at 41,353 (footnote omitted).

<sup>165</sup> *Id.* at 41,354.

ALJs and adjudicators. In expanding its “own motion” review, SSA must ensure that (i) selection-of-review criteria are developed in a neutral fashion without targeting particular ALJs or other decisionmakers, and that (ii) inclusion of cases in such review does not serve as the basis for evaluation or discipline. Thus, if necessary, SSA should revise its regulations through notice-and-comment rulemaking to clarify and expand the Appeals Council’s use of selective sampling to identify for review decisions that:

(a) Raise issues for which resolution by the Appeals Council would provide policy clarifications to agency adjudicators or the public;

(b) appear, based on statistical or predictive analysis of case characteristics, to have a likelihood of error or lack of policy compliance; or

(c) otherwise raise challenging issues of fact or law, or have case characteristics, that increase the likelihood of error.<sup>166</sup>

In addition to consistency issues, ACUS has conducted studies for SSA on several other issues relating to disability adjudication such as: (1) use of opinion evidence from medical professionals (the “treating source rule”),<sup>167</sup> and; (2) the “duty of candor” in the submission of evidence by claimants.<sup>168</sup> Most recently, SSA asked the Office of the Chairman of ACUS to conduct a study “reviewing and analyzing SSA’s laws, regulations, policies, and practices concerning evaluation of claimants’ symptoms in the adjudication of social security disability claims.”<sup>169</sup> The Office of the Chairman was requested to “advise SSA on how to best articulate the scope of symptom evaluation in its adjudication process, so as to improve consistency in disability determinations, reduce complaints of bias and misconduct against SSA ad-

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<sup>166</sup> *Id.*

<sup>167</sup> *See id.* (urging SSA to revise its regulations through notice-and-comment rulemaking to eliminate the controlling weight aspect of the treating source rule in favor of a more flexible approach based on specific regulatory factors).

<sup>168</sup> *See* ADMIN. CONFERENCE OF THE U.S., SSA Disability Benefits Programs: The Duty of Candor and Submission of All Evidence (2012), [http://www.acus.gov/sites/default/files/documents/ACUS\\_Final\\_Report\\_SSA\\_Duty\\_of\\_Candor.pdf](http://www.acus.gov/sites/default/files/documents/ACUS_Final_Report_SSA_Duty_of_Candor.pdf). SSA followed up with a proposed rule, Submission of Evidence in Disability Claims, 79 Fed. Reg. 9663, 9665–66 (Feb. 20, 2014) (to be codified at 20 C.F.R. pt. 404, 405, 416) (proposing revisions, based on the ACUS’s report, to require claimants to submit all evidence obtained from any source in its entirety, unless subject to one of listed exceptions).

<sup>169</sup> *SSA Symptom Evaluation in Disability Determinations*, ADMIN. CONF. U.S., <http://www.acus.gov/research-projects/ssa-symptom-evaluation-disability-determinations> (last visited Sept. 8, 2015).

judicators, and lessen the frequency of remands attributable to credibility evaluation.”<sup>170</sup> Many of the issues covered in these ACUS studies for SSA were those that the Appeals Council identified by using the enhanced data analysis described in this Article.<sup>171</sup>

*B. The Results: Dramatic Gains in Productivity and Quality of Decisionmaking*

The SSA Appeals Council has been able to use data analysis to improve internal business processes, realign staff and workloads, and manage its workloads with fewer resources. Because of these efforts, the average age of the pending workload has been reduced and more claimants are served in less time even though the receipts and pending workloads have increased. The Council was able to decrease the age of its longest pending cases. Whereas there were many cases pending longer than 1000 days at the end of FY 2007,<sup>172</sup> there were only 37 cases pending longer than 650 days as of the end of FY 2011,<sup>173</sup> and only 355 cases pending longer than 545 days as of the end of FY 2012.<sup>174</sup> By the end of FY 2013, the number of cases pending more than 545 days was reduced to less than 0.4% of all pending requests for review.<sup>175</sup> Furthermore, the staff is much more productive, saving administrative costs. For example, in FY 2011, the Council’s 1269 employees<sup>176</sup> processed 126,992 requests for review.<sup>177</sup> In FY 2013, the Council’s 1210 employees<sup>178</sup> processed more than 176,251 requests for review.<sup>179</sup> The sizeable increases in dispositions on a per capita basis have had the effect of reducing administrative staffing costs by tens of millions of dollars per year.<sup>180</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> *See supra* Part III.E.

<sup>172</sup> *See Oversight Hearing, supra* note 136, at 57.

<sup>173</sup> *OAo Wraps Up a Busy FY 2011, supra* note 125, at 2.

<sup>174</sup> *OAo Staff Accomplish Much in Service to Public, supra* note 125, at 1. During FY 2012, the office processed 90,141 requests for review that were 545 days old or projected to be by the end of that year, exceeding its goal to process 99% of those cases. *See id.*

<sup>175</sup> *See* OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at 6 (“In FY 2013, the AC focused on cases that would be 545 days or older by the end of the FY, completing 99.74 percent of them by the end of the FY.”) (footnote omitted).

<sup>176</sup> *OAo Wraps Up a Busy FY 2011, supra* note 125, at 5.

<sup>177</sup> OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 2, at 7.

<sup>178</sup> *FY 2013 Ends with More Cases Processed, supra* note 125, at 8.

<sup>179</sup> SOC. SEC. ADMIN., SSA’S FY 2013 AGENCY FINANCIAL REPORT 8 (2013), <http://www.ssa.gov/finance/2013/Full%20FY%202013%20AFR.pdf>.

<sup>180</sup> This figure is estimated. The estimate was developed by calculating the number of additional employees that would have been needed to process the number of cases processed in FY 2013 had the employees performed at the same pace they had in FY 2011, and by multiplying

As far as we know, no other adjudicative process has attempted to capture structured data on the application of law and policy and use the data to improve the quality of the decisions being produced. The results have been impressive, as reflected the Table 1 below:

TABLE 1. DECLINING APPEALS AND REMANDS—FY 2010-2014

|  | FY 2010 | FY 2011 | FY 2012 | FY 2013 | FY 2014 |
|--|---------|---------|---------|---------|---------|
| <b>Appeals to AC as a Percentage of Appealable Cases</b> <sup>181</sup>              | 39.48%  | 45.17%  | 38.85%  | 37.59%  | 37.36%  |
| <b>AC Grant Review Actions as a Percentage of All AC Dispositions</b> <sup>182</sup> | 24.94%  | 24.43%  | 21.16%  | 18.98%  | 16.12%  |
| <b>AC Remands as a Percentage of All AC Dispositions</b> <sup>183</sup>              | 21.77%  | 21.19%  | 18.62%  | 17.11%  | 14.34%  |
| <b>Appeals to Court as a Percentage of Appealable Dispositions</b> <sup>184</sup>    | 16.23%  | 15.07%  | 12.99%  | 13.67%  | 14.04%  |
| <b>Court Remands as a Percentage of New Court Cases Filed</b> <sup>185</sup>         | 49.54%  | 43.71%  | 40.35%  | 37.24%  | 47.39%  |

The rate of claimant appeals to the Appeals Council has started to fall since FY 2011 while the percentage of hearing level decisions

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that figure by an estimated average base salary for employees in the Office of Appellate Operations and the Appeals Council. The 1269 employees working in OAO processed 126,992 requests for review in FY 2011, or an average of 100.07 each. In FY 2013, the 1210 employees processed 176,251 requests for review, or 145.66 each. To process 176,251 cases at a rate of 100.07 per employee would have required 1761 employees. Assuming an average annual salary and benefit package cost of \$78,500, savings of \$42,978,000 would have been realized. See Eric Yoder, *Despite Salary Rate Freeze, Average Federal Salary Rises*, WASH. POST, (Apr. 9, 2013), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/04/09/despite-salary-rate-freeze-average-federal-salary-rises>. In reality, the Council also increased the amount of work processed in other areas of responsibility during this period, so the savings are likely higher.

<sup>181</sup> *Appeals to the AC as a Percentage of Appealable Hearing Level Dispositions*, SOC. SECURITY ADMIN., [http://www.ssa.gov/appeals/DataSets/AC01\\_RR\\_Appealable\\_HO\\_Dispositions.html](http://www.ssa.gov/appeals/DataSets/AC01_RR_Appealable_HO_Dispositions.html) (last visited Sept. 8, 2015).

<sup>182</sup> *AC Grant Review Actions as a Percentage of All AC Dispositions*, SOC. SECURITY ADMIN., [http://www.ssa.gov/appeals/DataSets/AC02\\_AC\\_GrantReview\\_All\\_Dispositions.html](http://www.ssa.gov/appeals/DataSets/AC02_AC_GrantReview_All_Dispositions.html) (last visited Sept. 8, 2015).

<sup>183</sup> *AC Remands as a Percentage of All AC Dispositions*, SOC. SECURITY ADMIN., [http://www.ssa.gov/appeals/DataSets/AC03\\_AC\\_Remands\\_All\\_Dispositions.html](http://www.ssa.gov/appeals/DataSets/AC03_AC_Remands_All_Dispositions.html) (last visited Sept. 8, 2015).

<sup>184</sup> *Appeals to Court as a Percentage of Appealable AC Dispositions*, SOC. SECURITY ADMIN., [http://www.ssa.gov/appeals/DataSets/AC04\\_NCC\\_Filed\\_Appealable.html](http://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html) (last visited Sept. 8, 2015).

<sup>185</sup> *Court Remands as a Percentage of New Court Cases Filed*, SOC. SECURITY ADMIN., [http://www.ssa.gov/appeals/DataSets/AC05\\_Court\\_Remands\\_NCC\\_Filed.html](http://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html) (last visited Sept. 8, 2015).

denying benefits has climbed.<sup>186</sup> The rate at which the Appeals Council grants review of denied claims to take corrective action has declined, as has the rate at which the Council remands to the hearing level. Despite the significant increase in dispositions by the Appeals Council, including a significant increase in denials of review, the percentage of denied claims appealed to district court and claims remanded from the district courts have also declined. In addition, great strides have been made in eliminating inconsistencies in decision patterns among “outlier” ALJs at both ends of the spectrum—those who award benefits in a high percentages of cases, and those who deny benefits in a high percentages of cases.<sup>187</sup> This quality improvement likely has resulted in significant programmatic cost savings, and the improvement in adjudicative consistency responds to the concerns expressed in ACUS Recommendation 2013-1.<sup>188</sup>

These efforts have also recently been recognized by the SSA Office of Inspector General. It found that the number of outlier ALJs had decreased annually since FY 2009, and that “[t]he number of ALJ decisions we identified as having quality issues decreased since FY 2010, with the number of cases [it] identified as having quality issues decreased from 66 percent in FY 2010 to 28 percent in FY 2013.”<sup>189</sup>

The OIG report recognized that:

In recent years, ODAR has increased oversight and monitoring of ALJ workloads. For instance, ODAR

- created an early monitoring system and conducted focused quality reviews on outlier ALJs;
- developed the *How MI Doing?* tool allowing ALJs and others to compare their workload performance to their peers’ performance;
- restricted and reduced case assignments to ALJs; and
- assessed the quality of ALJ decisions by conducting pre-effectuation reviews of favorable ALJ decisions

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<sup>186</sup> See, e.g., *Appeals to the AC as a Percentage of Appealable Hearing Level Dispositions*, *supra* note 181. The number of appealable hearing level decisions, defined as “unfavorable or partially unfavorable decisions or dismissals,” reached a high of 458,869 in FY 2013. *Id.*

<sup>187</sup> See OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., A-12-14-24092, CONGRESSIONAL RESPONSE REPORT: ADMINISTRATIVE LAW JUDGES WITH BOTH HIGH DISPOSITIONS AND HIGH ALLOWANCE RATES 7–8 (2014), [http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-14-24092\\_0.pdf](http://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-14-24092_0.pdf).

<sup>188</sup> ACUS Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudications, 78 Fed. Reg. 41,352 (July 10, 2013); see *supra* note 164 and accompanying text.

<sup>189</sup> OFFICE OF THE INSPECTOR GEN., SOC. SEC. ADMIN., *supra* note 187, at 8.

and developed appropriate training for adjudicators focused on the errors identified in the reviews.<sup>190</sup>

The Council has primarily used data analysis to identify errors in adjudication and provide training to those in need of it. To the extent there are gaps, inconsistencies, or ambiguities in the regulations, the Council has also used data analysis to assist the Commissioner and the Agency in improving the clarity of regulatory and policy guidance, consistent with the Social Security Act, as amended. The intent of these data-driven efforts is to enhance the consistent and correct application of SSA policy. These techniques appear to be working at the hearing level; however, SSA's efforts are not confined to that level of adjudication. Widespread use of the eCAT tool has been shown to improve overall consistency at the initial and reconsideration steps. As the Council expands its analyses of data, it is also expanding its review of work done at the initial and reconsideration levels. Additionally, the Council has captured structured data identifying great variance in how federal district courts apply agency policy in disability adjudication. SSA and ACUS have reached an interagency agreement to study this issue in more detail.<sup>191</sup>

#### CONCLUSION

Data analysis techniques such as those developed and implemented at the Appeals Council have applicability far beyond disability adjudication. Many federal and state agencies have business processes that center on the application of law and regulations. These agencies could also undertake to map their processes into decision trees to identify the proper policy compliant pathing, and that pathing could be incorporated into analysis tools to either facilitate consistent application of those policies or ensure compliance with those policies. Many agencies already capture large amounts of structured and unstructured data, and they could analyze the available data to identify outlier behaviors. They could also construct effective feedback mechanisms to change behaviors and root out fraudulent activities. The net effect of these activities would be improved service delivery, consistent results, and cost savings.

The science of data analysis is still in its infancy. Even more sophisticated data analysis is already on the horizon.<sup>192</sup> The Appeals

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<sup>190</sup> *Id.* at 9–10 (footnotes omitted).

<sup>191</sup> See *SSA Federal Courts Analysis*, ADMIN. CONF. U.S., <https://www.acus.gov/research-projects/ssa-federal-courts-analysis> (last visited Sept. 8, 2015).

<sup>192</sup> See Office of Appellate Operations, Soc. Sec. Admin, *Natural Language Processing*

Council and its agency partners are developing more complex types of data analysis, including techniques capable of teasing out relationships and patterns in categorical data that otherwise would not likely be discerned. Natural language processing holds further promise for improving the consistency of policy application and the Appeals Council currently is employing this technique to assist in identifying certain specific types of errors in agency decisions.<sup>193</sup> These techniques, and other data analysis efforts, hold further promise for improving the quality and consistency of disability adjudication by the SSA. Indeed, ACUS is well-positioned to study the potential benefits of using such data analysis in other federal mass adjudication programs.

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*Aids Data Analytics Efforts*, OFF. APP. OPERATIONS EXECUTIVE DIRECTOR'S BROADCAST, Mar. 13, 2015, at 1, 3.

<sup>193</sup> The Appeals Council quality improvement efforts have helped the Council categorize a wide range of errors. Staff at the Appeals Council has worked with data scientists to develop algorithms that enable computers to identify electronic cases that may contain those errors and cull out those cases for review under the selective sampling process. *See id.* at 1. As with all other cases adjudicated at the Appeals Council, each case so identified and selected for review is given a thorough and independent review by adjudicators before the Council takes any type of corrective action. *See id.* at 3.