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Administrative Problems With Social Security Disability Programs: Some Solutions

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Nearly all large employers in the United States provide their workers with long-term disability insurance plans, although many medium-size and most small employers do not. Overall worker coverage rates have not increased recently. In most plans, the employer pays the entire premium, although there has been a recent trend toward workers contributing part of the cost. In the vast majority of plans, when a worker makes a disability claim on the employer plan, he or she must also make a claim for Social Security Disability Insurance (DI) and pursue that claim through appeals. If the Social Security claim is granted, the resulting benefits to the disabled worker are subtracted from the often larger benefits provided by the employer's plan. [1] Therefore, what is happening and what might change with SSDI is of direct relevance to employers and the design and costs of their disability insurance plans.

[1] These observations about large and medium-size employer disability plans are based on current statistics in the Towers Watson Benefits Data Source.

Over the last year, there have been several media accounts of significant problems in the Social Security disability programs (both DI and Supplemental Security Income). In particular, these problems relate to administrative law judges (ALJs) apparently blithely or possibly corruptly granting benefits, and representing attorneys possibly hiding relevant evidence at hearings. The ALJs—the level of adjudication at which claims for disability benefits denied at the initial first and oftentimes second administrative levels are appealed—represent essentially the final line of defense in the program for the taxpayer to ensure that costly income and medical benefits are given only to those people permanently disabled and unable to work.

Revelations of systemic problems cause particular concern at a time when claims for disability benefits are at all-time highs and the number of disabled beneficiaries has risen rapidly over the past decade (even as general survey indicators of the rates of disability in the working-age population are flat). Also, the exhaustion of the DI Trust Fund (which would cut significantly and permanently the amount of DI benefits paid to all beneficiaries) is imminent; according to the Congressional Budget Office, the fund is projected to be exhausted by 2016. What is an empirical estimate of the extent of the adjudication problems, have they gotten better or worse over time, and what can be done to solve them going forward?

The Problems: A Description and Estimate of Their Extent

Although the Social Security Administration (SSA) asserts that it decides almost all claims correctly at the initial levels, about 60 percent to 70 percent of ALJ rulings in disability benefit appeals, on average, are in the claimant's favor, that is, only 30 percent to 40 percent of ALJ decisions are denials of disability claims. [2] Some of this discrepancy between what SSA asserts and what ALJs are ruling owes to a significant percentage of the presumably less justified denied initial claims being dropped by claimants without appeal. Some of the discrepancy likely also is a result of the natural progression of some types of disabilities—over time they worsen, and therefore between when the initial claim is made and an appeal is decided, the claim might ripen and legitimately be granted.

[2] Hereafter, all statistics and analysis of claim denial rates by ALJs are based on my calculations of data provided from public files of SSA.

Another unknown portion of the discrepancy may be due to the fact that most claimants on appeal use legal counsel, and it is possible that what were always fair, but not well-documented, claims for benefits become more adequately represented. Alternatively, the introduction of counsel might give more scope for the slanting of evidence or otherwise gaming the system, through, for example, strategic requests for dismissals.

But at least some of the discrepancy between the agency assertion of near-perfect adjudication at the initial level and the reality of relatively low claim denial rates at the appeals level owes to a worrisome segment within the ALJ ranks itself. Some ALJs have been deciding an unusually large number of cases and consistently denying few claims. There are indications that this is occurring on merits other than what the law and regulations allow, with the ALJs perhaps being inappropriately influenced by the unemployment conditions in the local economy or by personal considerations, such as their past occupations or political views. [3]

[3] See Congressional Response Report of the Office of the Inspector General, Social Security Administration, "Oversight of Administrative Law Judge Workload Trends," A-12-11-01138, February 2012.

Using annual SSA statistics on ALJ decisions from 2005 through 2011, I separate ALJs into two groups—those that deny claims in less than 10 percent of their decisions and those that deny claims in more than 10 percent. This demarcation line may be regarded as an indicator for ALJs who have a penchant for granting claims against SSA, given that disability cases are supposed to be randomly assigned. In 2008, for example, 9 percent of judges were, and 11 percent of decisions were made by, ALJs with claim denial rates below 10 percent.

My analysis of the data shows that average claim denial rates are positively associated, and decision counts are negatively associated, with the deviation of claim denial rates over time for each ALJ. Stated more simply, ALJs who have low average claim denial rates and who decide many cases have a fixed tendency over time to rarely deny claims, whereas those with higher average denial rates are more variable in their behavior and outcomes over time, as a natural and random variation of cases would more likely produce.

Removing the indicated problem (low claim denial rate) ALJs from the statistics and then recalculating the overall annual ALJ claim denial rate increases the claim denial rate in the system at the ALJ level by 2 to 3 percentage points each year. Translating these percentages to the number of resulting beneficiaries gives an estimate of about 14,000 apparently incorrect grants of disability benefits every year. At roughly $250,000 in present value for lifetime disability income and the associated medical benefits per average beneficiary, this means that about $23 billion has been lost to the taxpayer since 2005 as a result of problem ALJs.

The 10 percent ALJ claim denial threshold is clearly very conservative given that cases presented to ALJs have already been considered and denied at earlier stages, and most other judges have higher claim denial rates. If a 15 percent threshold were used instead, the estimated unwarranted taxpayer cost becomes $41 billion.

Some Solutions

The good news is that in 2011, there was a significant improvement in decision accuracy, to a 1 percentage point error rate using the 10 percent demarcation line, even as overall claim denial rates, which had been around 28.5 percent from 2005 through 2008 and 33 percent in 2010, increased to 37.5 percent. Only 3 percent of judges were, and 4 percent of decisions were made by, ALJs with claim denial rates below 10 percent in 2011.

The labor market and economic cycle no doubt has played an important role, as many more claims than usual were economy-motivated and therefore denied. SSA's commissioner, Michael Astrue, should also be credited with this improvement, as he has sought to reduce a large claims backlog. He has hired and trained a record number of new ALJs, drawn from fresh candidate lists, even as many long-serving ALJs retired. He has limited the number of cases that can be heard by any ALJ each year to 1,000 or so, and now allows only one application for benefits per worker in the system at a time.

Astrue has set up a more rigorous method of assuring the rotation of cases among judges. Additionally, he has recently begun a program of random review of ALJ decisions to grant benefits before effectuation, and has funded a larger study of the problem.

In my opinion, these improvements need to be enhanced and made permanent. Indeed, to ensure turnover of ALJs going forward, while assuring judicial independence, a fixed term limit of 15 years of service, rather than the current lifetime appointment, should be established. [4] The review program of ALJ decisions needs to be expanded and made permanent. The limit on the number of cases heard by each ALJ could be further lowered to send the signal to ALJs that denial decisions, which take longer and require more documentation than approvals, are also acceptable. Only one application for disability benefits per worker should be allowed in the system in a three-year period.

[4] Professor Richard Pierce of George Washington University Law School has advocated the elimination of all 1,400 Social Security ALJs because of his perception of their poor performance as a cadre and his view that they are exercising executive powers unconstitutionally; he would use the money released to enhance and increase continuing disability reviews of existing beneficiaries. See Richard Pierce, "What Should We Do About Social Security Disability Appeals?" *Regulation*, Fall 2011.

The law and regulations for establishing the right to disability benefits need to be reviewed to make sure that there is not inappropriate scope for judicial subjectivity or even mischief. Granted benefits more and more cover mental and musculoskeletal ailments for which adjudication for the inability to do work can be difficult and more subjective.

Also, granted benefits are increasingly being given to workers with lower educational levels or above the age of 50, where the regulatory standards for eligibility are considerably relaxed. These relaxed standards by age have not changed since they were put in place decades ago, even though the average health, interest, and opportunity of "older" workers and the technologies and medications available to assist disabled people have improved, and retirement ages in the overall labor force have increased. On-the-job and other training and experience can substitute and correct for lower educational levels.

Finally, nearly all claims are now represented by legal counsel or another third party at the ALJ level, and the administration of the program needs to reflect this already long-standing change. The record needs to be closed in a timely manner, there should be no gaming allowed through asking for case withdrawals or on-the-record decisions (which cannot ever be subsequently reviewed by the agency), and judges should be instructed to question the completeness of the evidence brought by representing attorneys. They need to regard themselves as the agency's representative as well as the impartial judge—the third hat of claimant representative is now fully occupied by other third parties, and the ALJ no longer fills that role except in the now rare circumstances where there is no professional third-party representation.

A Larger Context

But even implementing all these changes will not be enough. There are reform proposals now circulating to cost-shift—that is, transfer to the employer liability for the first year or so of workers' SSDI claim costs—to help achieve solvency, on the notion that employers need to be incentivized to encourage their workers to stay in the labor force. But employers offering disability insurance are already paying for rehabilitation and other return-to-work programs with at least some of the resulting financial advantage going to the general DI Trust Fund. Others advocates propose payroll tax increases for DI, or the transfer of the retirement Trust Fund assets to the DI Trust Fund, which amounts essentially to a tax increase anyway, just with a delay.

More fundamentally, therefore, we need to be thinking creatively and boldly now about comprehensive ways to bring the burgeoning disability programs under control so increases in taxes and transfers of public program costs to employers can be avoided, benefits targeted to those who need them the most, and work effort encouraged, both to reduce initial claims as well as to incentivize rehabilitation and return to work for all beneficiaries.

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