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May 1, 2014

The Honorable Carolyn Colvin
Acting Commissioner
Social Security Administration
1905 9th Street NE
Washington, DC 20018

Dear Acting Commissioner Colvin:

I write to express my concerns about the expanding number of individuals now qualified for Social Security Disability Insurance (SSDI), and to raise a specific issue, the basis for many of these individuals' disability classification, where the inability to speak English is a determinative factor.

The number of people receiving SSDI increased from just under 6.7 million in 2000 to almost 11 million in 2012.¹ The population of the United States grew by 9.7 percent between 2000 and 2010, but the number of SSDI applications grew by 230 percent.² According to an *Investor's Business Daily* article, between 2009 and April 2012, the number of people who signed up for disability benefits was twice the number of people who started new jobs.³ Michael Astrue, former Commissioner of the Social Security Administration, has testified that the agency paid out approximately \$175 billion in disability benefits in 2011.⁴ This is an unsustainable path. Indeed, benefit payments are already exceeding tax revenues collected for SSDI and the trust fund is projected to reach exhaustion in as little as two years.

¹ The Board of Trustees, Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, *The 2012 Annual Report*, Table V.C5, p. 131, available at <http://1.usa.gov/QR97mn>.

² In the year 2000, 1,364,323 disability applications were filed. Office of Research, Evaluation, & Statistics, *Annual Statistical Report on the Social Security Disability Insurance Program, 2010*, available at <http://1.usa.gov/QRhCxN>. In 2010, 3,161,314 applications for disability benefits were filed. Social Security Administration, *Summary of Performance and Financial Information, Fiscal Year 2010*, available at <http://1.usa.gov/QRhYVd>.

³ "5.4 Million Join Disability Rolls Under Obama," published April 20, 2012.

⁴ House Ways and Means Committee hearing on "Securing the Future of the Social Security Disability Insurance Program," testimony by Commissioner Astrue, available at <http://1.usa.gov/QRjMxA>.

SSDI was created to provide replacement income to individuals unable to work. The Social Security Act defines a disability as “inability to engage in any substantial gainful activity [e.g., work] by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” SSDI was specifically created for those whose loss of employment was caused by injury or some other medical condition. Today, however, widespread anecdotal accounts reveal that a number of people immediately file for SSDI after being laid off or losing their job for reasons unrelated to injury or illness.

One contributing factor in the rise of SSDI payments might be the policy of allowing people to qualify for benefits more quickly if they are incapable of communicating in English. The Social Security Act has a medical-vocational allowance, which includes a matrix of four factors—physical ability, age, education, and work experience. The education factor is not limited to actual education as it relates to schooling, but includes a linguistic limitation on the ability to communicate in the English language. I’m concerned that the Administration might be misconstruing 42 U.S.C. §1383(c)(1)(A), which requires that a claimant’s “physical, mental, educational, or linguistic limitation of such individual (including any lack of facility with the English language)” be taken into account when making disability determinations.⁵

I am inclined to agree with former Social Security Administrative Law Judge Drew A. Swank, who concludes that the inability to communicate in English should not qualify under the general disability definition.⁶

There are a number of reasons to be concerned about the claimed inability to speak English serving as a determinative factor in disability cases. For instance, the number of non-English-speaking workers in the United States is growing substantially and in U.S. territories like Puerto Rico, English might not be the predominant language, but I believe this “education” rule applies in Puerto Rico. Indeed, in 2010, 63 percent of the applicants in Puerto Rico were awarded disability benefits. In one instance, shortly after 300 workers at a Puerto Rico plant was closed down, 290 of the workers filed for SSDI.⁷

⁵ *“Inability to communicate in English.* Since the ability to speak, read and understand English is generally learned or increased at school, we may consider this an educational factor. Because English is the dominant language of the country, it may be difficult for someone who doesn’t speak and understand English to do a job, regardless of the amount of education the person may have in another language. Therefore, we consider a person’s ability to communicate in English when we evaluate what work, if any, he or she can do. It generally doesn’t matter what other language a person may be fluent in.” 20 C.F.R. §404.1564(b)(5)

⁶ Judge Drew A. Swank, “Money for Nothing: Five Small Steps to Begin the Long Journey of Restoring Integrity to the Social Security Administration’s Disability Programs,” 41 Hofstra L. Rev. 155,164-165 (Fall 2012).

⁷ *Wall Street Journal*, “Puerto Rico Disability Claims Probed,” available at <http://on.wsj.com/1kcH4Vy>.

There appears to be serious concerns about how a claimant's ability to speak English is determined and whether it can be adequately determined at all, given certain SSA rules. The Hearings Appeal and Litigation Law Manual (HALLEX) requires that an interpreter be provided at the request of a claimant, even if the claimant is capable of speaking English.⁸ This makes it difficult for an Administrative Law Judge to adequately determine English proficiency. Once an interpreter is provided, the claimant, perhaps under instructions from his lawyer, never speaks a word of English at the hearing.

Administrative Law Judge Larry Butler provides an example of this problem. On July 22, 2012, Judge Butler conducted a hearing with an unrepresented claimant. The Judge had an on-the-record conversation with the claimant in English, before the claimant requested to postpone the hearing and find an attorney. Once the claimant found an attorney, even though he was capable of speaking English, the claimant's lawyer demanded to have an interpreter at the hearing.

The procedure for determining whether someone can speak English is not exhaustive. There are two questions asked: "Can you speak and understand English?"; and, "Can you read and understand English?" If the applicant answers "no" to these questions, the ALJ does not probe any further. It is difficult to see how someone is a U.S. citizen and incapable of speaking or reading the English language. In one case handled by Judge Butler, the claimant answered "no" to both questions in a January 2012 hearing, but had been naturalized as a U.S. citizen in August 1987. As, you know, naturalization requires individuals to have a working knowledge of the English language.⁹

The potential abuse of this process has an important motivation. Individuals who allegedly cannot communicate in English can qualify for benefits five years earlier than those who can. If you cannot communicate in English, you can establish disability at the age of 45. Otherwise, you might be required to wait until the age of 50.

Judge Swank and Judge Butler have both, through congressional testimony and other writings, noted that an English proficiency requirement might be leading to fraud in the evaluation process. Judge Swank recently testified: "there is no burden of proof placed on the individual to demonstrate an inability to communicate in English."¹⁰ Both judges have written about attorneys intentionally concealing information in the

⁸ Social Security Administration HALLEX, "Hearing Procedures -- Foreign Language Interpreters," available at <http://1.usa.gov/1kcjwN>.

⁹ Sec. 312. [8 U.S.C. 1423]

¹⁰ Statement provided to the House Oversight and Government Reform Committee, available at <http://1.usa.gov/1pLgf3a>.

disability determination process which would allow a thorough evaluation of the claim. Judge Butler said of his experience: “when an interpreter is present at a hearing, claimant’s testimony will be entirely in the claimant’s native language – with no attempt to use the English language. When that occurs an ALJ’s ability to determine whether the claimant ‘can communicate in English’ for purposes of making the required finding of fact is almost entirely compromised.”¹¹

It is important for Congress to understand the standards the Social Security Administration uses to determine whether a person “can communicate in English” and how it is guarding the disability process from fraud and abuse, as well as what kind of impact this English rule is having. To this end, please respond to the following:

1. Please list the total number of interpreters provided during a hearing process for disability determination in the last five years, broken down by year. As well, please indicate, for each year, the percentage of hearings where an interpreter was provided.
2. At what age does your agency believe an individual is incapable of learning to speak in English?
3. Is SSDI limited to U.S. citizens and if not, how many non-citizens are now receiving benefits?
4. The primary language in Puerto Rico is Spanish. Are Administrative Law Judges required to consider whether an individual in Puerto Rico is capable of communicating in English for disability purposes? If so, what other U.S. territories fall in a category where English is the second language, but benefits are provided in reference to the inability to communicate in English?
5. For each of the past five years, list the total number of decisions made where the inability to communicate in English served as a factor in the determination. In addition, for each of the past five years, please provide information as to how much is currently being paid out to claimants who qualify in this category?
6. When an interpreter is requested, what tools, resources, evidence, or other information is available to Administrative Law Judges to assist them in determining whether an individual is capable of communicating in English?
7. Does the Social Security Administration believe that an interpreter is mandatory in any instance where one is requested, even where there is evidence a claimant is capable of communicating in English?
8. Please provide your agency’s legal interpretation on what it means to be able to “communicate in English.”

¹¹ February 24, 2013, Unpublished Opinion

9. For each of the past five years, please provide a breakdown of the number of people applying for disability insurance by age, for those 45 and older.

Individuals who have been naturalized as U.S. citizen can and should be able to communicate in English. The Administration has an enormous responsibility to ensure that benefits are paid only to those who are truly disabled.

Please have your staff provide this information both in hard copy and in an electronic, searchable format no later than June 5, 2014, to William Smith on the Senate Committee on the Budget. If you have any questions, please contact me or have your staff contact Mr. Smith at (202) 224-6308 or william_smith@budget.senate.gov.

Very truly yours,



Jeff Sessions
Ranking Member