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Fixing Disability Courts^{*}

By D. Randall Frye[†]

It's hard to imagine a more cynical fraud. According to an indictment unsealed last week by the Manhattan district attorney's office, post-9/11 phobias of airplanes and skyscrapers were among the fictitious ailments described by retired New York City police officers and firefighters who, in a scheme involving as many as 1,000 people, are accused of ripping off the Social Security disability system by filing false claims.

As an administrative law judge responsible for hearing Social Security disability cases, I'm more familiar than most people with the system. But everyone has a right to be outraged by the recent charges. Officials estimate that the fraud cost the federal government \$400 million. If true, it is the largest theft in the history of Social Security.

According to court papers, the fraudsters claimed to be so ill that they could not leave their homes to work, but many posted photographs on Facebook of themselves on motorcycles and water scooters, fishing and playing sports. How did they expect to get away with it?

Well, here's a little-known fact. Neither the staff members of the Social Security Administration, who review initial claims, nor judges like myself, who hear disputed cases, are allowed to look at Facebook in the context of a case. Even if something in the case file suggests a claimant is not telling the whole truth, Social Security Administration policy prevents us from looking at social media, for fear that we cannot be trusted to properly assess the information gathered there. No Facebook, no Pinterest, no Twitter, no Tumblr. None of the sources that most employers routinely use to check the

^{*} D. Randall Frye, Op-Ed., *Fixing Disability Courts*, N.Y. TIMES, Jan. 20, 2014, at A17, available at http://www.nytimes.com/2014/01/20/opinion/fixing-disability-courts.html?_r=0. This article was first published in the January 20, 2014 issue of the New York Times and is republished here with permission.

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credibility of potential employees are available to us.

It gets worse. When a disputed case comes before an administrative law judge, a vast majority of claimants bring an attorney. After all, the average claim, if successful, will yield a payout of some \$300,000 in lifetime benefits. With so much at stake, it's only reasonable that a person who believes that he has wrongly been denied benefits would hire a lawyer. But isn't it equally reasonable that the taxpayers should have an attorney present to challenge a claim that might be false?

Sorry, no luck. When I conduct a hearing (which occurs with no members of the press or public present, because of privacy concerns), the claimant can bring an attorney, but the system does not provide the government with one. The taxpayers have no advocate on their behalf to ask questions, challenge medical evidence or review the 500 to 700 pages of materials that make up a typical case file. Not only that, but because of Social Security Administration policy, I am no longer allowed to order independent psychological testing to help determine whether a claimant is telling the truth.

Social Security disability courts have millions of claimants and constitute one of the world's largest judicial systems. But the system is not run by anyone with real judicial experience. Instead, we are at the mercy of unelected bureaucrats whose only concern is how many cases each judge can churn out and how fast we can do it. The Social Security Administration is currently run by an acting commissioner; President Obama should appoint a permanent leader with recognized professional experience in the field of social insurance.

The Association of Administrative Law Judges, for which I serve as president, favors modernizing disability hearings so that we can give claimants a fair hearing while also protecting taxpayers. Our courtrooms ought to look more like what you see on "Law and Order" or "The Good Wife." Each side should have an advocate, allowing judges to narrow the facts in dispute and apply the law in a neutral manner. And judges and their staff members should be able to use social media, including Facebook.

Though it is not clear from the Manhattan district attorney's indictment if any of the claims in question ever wound up before an administrative law judge, it is clear than the current antiquated system handicaps the effective review of cases and encourages brazen behavior.

The system needs to be made more trustworthy and fully transparent. The actions of a few crooks must not be allowed to threaten the disability payments of millions of people who are genuinely disabled, many of whom paid into the disability insurance fund during their working lives. An adversarial system with both sides represented and all evidence on the table is the best way to root out fraud and ensure that legitimate claims are paid.