VIA U.S. MAIL & EMAIL (suzanne.payne@ssa.gov)

The Honorable Michael J. Astrue
Commissioner
United States Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235

Dear Commissioner Astrue:

I write to express my concern regarding the Social Security Administration’s (“SSA”) decision to no longer fund the ordering of Symptom Validity Tests (“SVTs”), which determine if a claimant applying for disability benefits is malingering. This policy prevents both Disability Determination Services (“DDS”) employees and Administrative Law Judges (“ALJs”), who make decisions regarding whether an applicant qualifies for these programs, from requesting these helpful tests. During the Psychological Consultative Exam, these SVTs are used to detect malingering in applicants for the agency’s disability programs, Social Security Disability Insurance (“SSDI”) or Supplemental Security Income (“SSI”).

According to the American Psychiatric Association, the term malingering is defined as the intentional production of false or grossly exaggerated physical or psychological symptoms that are motivated by external incentives, such as avoiding work or obtaining reliable compensation. Malingering is particularly problematic in the Social Security disability context because claimants are seeking a determination of total disability to qualify for monetary payments. With the number of individuals asserting disabilities that prevent them from working, these tests are important in understanding the validity of each claim.

In response to my question as to why the agency no longer funds SVTs at the September 13, 2012 Senate Permanent Subcommittee on Investigations hearing, SSA responded:

We no longer purchase symptom validity tests such as the MMPI because there is no test that, when passed or failed, conclusively establishes a claimant’s credibility. While a definitive statement regarding credibility would make an adjudicator’s job easier, the MMPI cannot provide it; therefore, using it may cause the adjudicator to ignore the totality of the evidence, as required and issue an incorrect decision.

Additionally, tests such as the MMPI have weaknesses in their psychometric properties that limit their consistent applicability in our program. For example, the MMPI is generally inappropriate for use with persons who have English as a second language, who cannot read at the eighth-grade level, or who have a low IQ.

1 American Psychiatric Association (2000). Diagnostic and statistical manual of mental disorders—text revision (4th ed.).
2 See Social Security Disability Programs: Improving the Quality of Benefit Award Decisions; Hearing before the U.S. Senate Permanent Subcommittee on Investigations, 112th Cong. (2012); Response of Social Security Administration to “Questions from Subcommittee Staff Regarding Issues Raised at the September 13, 2012 Hearing on Improving the Quality of Disability Benefit
These assertions, however, differ greatly from commonly accepted doctrines of the psychological community regarding SVTs. Nor are they supported by scientific research.

As an initial matter, the assertion that SVTs do not conclusively establish a claimant’s credibility is inapposite. This criticism could be made of any psychological test, including IQ testing, which SSA relies on to assess developmental disability and determine if claimants qualify for benefits under certain medical listings. Psychological tests and measures have limits to their reliability and validity, and thus some degree of error could be added to the assessment process. Therefore, it is unclear why SSA has singled out SVTs as invalid when the same limitations apply across the board with regard to psychological testing.

The agency relies on adjudicators (both at DDS and ALJs) to evaluate medical evidence, including SVTs, and assign evidence the proper weight in adjudicating the claim. SSA’s justifications run counter to the specific reason SSA relies on DDS examiners and ALJs to weigh the evidence presented in disability claims. Agency policy makes clear that SSA depends on these individuals to review medical evidence and assign evidence the proper evidentiary weight in determining if a claimant meets the criteria of the disability programs. While DDS are state-run agencies (funded by SSA), disability determinations are made using SSA’s regulations and procedures. Disability Examiners consult with medical and psychological consultants “to resolve medical issues and evidence interpretations.” DDS medical and psychological consultants are responsible for (in pertinent part):

- reviewing requests for [consultative exams] in specific claims to ensure they are necessary and will resolve the issues as intended;
- reviewing consultative exam reports for deficiencies in content and recommending ways to avoid deficient reports;
- evaluating medical questions;
- improving [disability examiners] understanding and use of [medical evidence of record] by working with training staff;
- reviewing determinations to ensure their integrity.

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Award Decisions.” See also Social Security Administration, Program Operations Manual System (“POMS”) Section: DI 22510.007 “Consultative Examination Expedients,” https://secure.ssa.gov/poms.nsf/lnx/0422510007, which states “do not purchase CE’s that include tests for malingering” and specifically lists “Malingering Probability Scale, Structured Interview of Reported Symptoms, Test of Memory Malingering, and Validity Indicator Profile.”

2 SSA’s Medical Listings state “[t]he results of standardized intelligence tests may provide data that help verify the presence of mental retardation or organic mental disorder, as well as the extent of any compromise in cognitive functioning.” See Social Security Administration, Disability Evaluation Under Social Security, 12.00 Mental Disorders – Adult (Blue Book, September 2008), http://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm. Further, certain medical listings require submission of IQ test results as direct evidence of a qualifying disability. For example, Medical Listing 12.05(B), which requires “[a] valid verbal, performance, or full scale IQ of 59 or less.”


6 POMS Section: DI24501.001, The Disability Determination Services (DDS) Disability Examiner (DE), Medical Consultant (MC), and Psychological Consultant (PC) Team, https://secure.ssa.gov/poms.nsf/lnx/0424501001.001.

7 Social Security Administration, POMS, Section DI 24501.001, “The Disability Determination Services (DDS) Disability Examiner (DE), Medical Consultant (MC), and Psychological Consultant (PC) Team,” https://secure.ssa.gov/poms.nsf/lnx/0424501001.
At the hearing level of appeal, under the Administrative Procedures Act ("APA") ALJs are specifically tasked to preside over the taking of evidence at agency hearings and act as the finder of facts in the proceedings. In executing this duty, ALJs are authorized to regulate the course of the hearing, issue subpoenas, rule on offers of proof and relevant evidence, rule on procedural requests, question witnesses, and make findings of fact and conclusions of law. Indeed, the Supreme Court of the United States made clear "[i]t is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting [disability] benefits." This is especially important in the context of Social Security disability claims since "the Commissioner [of the Social Security Administration] has no representative before the ALJ to oppose the claim for benefits."

Therefore, under the agency’s internal policies and the APA, it is up to DDS and ALJs, respectively, to determine the weight given the medical evidence submitted or to be secured during the disability application process. By refusing to fund SVTs, SSA is effectively violating its own policies, as well as potentially violating the APA and mandate of the Supreme Court.

Most concerning, the agency’s decision stands in stark contrast to current scientific research and findings, which support the use of SVTs to identify malingering in psychological evaluations. In fact, there is broad consensus within the medical community that malingering is a problem and must be addressed. For example, the American Academy of Clinical Neuropsychology ("AACN") in a 2009 consensus report on the Neuropsychological Assessment of Effort, Response Bias, and Malingering wholly endorsed the use of SVTs. The AACN explained "there is now abundant research evidence that stand-alone cognitive effort tests (SVTs) are extremely useful within forensic evaluations, which have been shown to be associated with a high risk of invalid responding." The report also specifically noted the disability proceeding is such a forensic setting in which an increased risk of negative response bias exists. It also makes clear that relying on assessment and observation of the claimant alone is not sufficient, which is SSA's current policy, "because research has shown repeatedly that experienced experts are inaccurate in identifying valid versus invalid ability performances from mere observation of behavior." The report continued "there is consensus that a decision not to use effort tests and embedded validity indicators would only rarely be justified." Additionally, in cases in which claimants are seeking compensation with conditions such as chronic pain, a common complaint in the disability context, the report strongly recommended the use of a SVT.

Accepted research on the frequency of malingering in disability consultative exams highlights the importance of SVTs. Dr. Michael D. Chafetz, a specialist in forensic and clinical neuropsychology who has written extensively on the use of SVTs in the disability consultative exam, found

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11 Id.
13 Heilbronner et al, supra note 12 at 1101.
14 Heilbronner et al, supra note 12 at 1105.
15 Heilbronner et al, supra note 12 at 1105.
16 Heilbronner et al, supra note 12 at 1109.
base-rate estimates of adult DDS [disability] claimants scoring significantly below chance on forced choice symptom validity testing are about 13 percent. Below-chance performance on a forced choice test has been termed “the smoking gun of intent,” as it provides a marker for the most extreme level of non-credible behavior, given that the claimant would have scored better (i.e., at chance levels) even if unable to see or hear the test stimuli (emphasis added).17

Further, other researchers have determined the base-rate of malingering by a Social Security disability claimant in the consultative exam, using several different SVTs and scales, is over 40 percent.18 A more recent study by Dr. Chafetz that “sought to eliminate truly impaired individuals from the sample indicated a base-rate of 41.8 percent.”19 As Dr. Chafetz explained “before the examiner knows anything about the claimant, the expectation is that the claimant has a 41.8 percent chance of malingering the examination.”20 Using these evidence-based methods, once a claimant has failed two or three SVTs, the level of certainty the claimant is malingering rises to well over 90 percent.

Translating these base-rates of malingering to benefit payments is alarming. Considering only adult beneficiaries asserting mental disorders and using the widely accepted figure of 40 percent malingering in medicolegal cases,21 SSA paid approximately $20.02 billion in SSI and SSDI benefits in 2011 for claims based on malingered mental disorders alone.22 If one considers that “disability,” which is defined as an inability to work, can be feigned no matter what the illness,23 then the agency spent approximately $68 billion (or 40 percent of $170 billion in total net benefit payments) in 2011 on disability beneficiaries who were likely malingering.24

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20 Chafetz, supra note 12, at 1054.
23 No one is asserting that diabetes or liver disease is being feigned, only the inability to work “because of” the disease process can be a malingered functional claim, much like the inability to work from back pain can be malingered.
These amounts are staggering, especially in the context of the 2012 Social Security Trustees report, which estimated the DI Trust Fund would be exhausted by 2015 under high-cost assumptions and unable to pay full benefits.\textsuperscript{25}

At bottom, this policy decision skews the adjudicator towards a finding of disability in an already claimant-friendly process. As Dr. Chafetz noted, "[i]f a psychologist does not use methods for detecting non-credible behavior in the Psychological Consultative Examination for Social Security, the examination will be biased toward disability, as psychologists are generally unable to detect malingering without the use of specific methods and there is certainly nothing to be gained from merely observing claimants when challenged with typical forms of testing."\textsuperscript{26}

SVTs are emphatically supported by the scientific community and are an important tool for the examining psychological evaluator. In my opinion, SVTs should be required in disability determinations to help determine if an individual truly qualifies for benefits. At the same time, SSA cites no authority for its policy change. Further, since SSA does not track the number of SVTs requested each year or the total amount spent on them, the agency has no idea of its inability to measure the impact of the fraud occurring under its own roof.\textsuperscript{27}

As a final matter, it is also unclear why the agency asserts SVTs are not appropriate for individuals with English as a second language, since many SVTs are available in multiple languages, including Spanish.\textsuperscript{28}

I respectfully request SSA reverse its unsubstantiated decision and reinstate funding for SVTs requested by DDS employees and ALJs.

Sincerely,

\textit{\underline{Tom Coburn, M.D.}}

United States Senator

\textsuperscript{25} See The 2012 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, \url{http://www.ssa.gov/oact/TR/2012/tr2012.pdf}


\textsuperscript{27} See Hearings, supra note 2, stating "we do not track the incidence of request for symptom validity tests or the costs specifically associated with their purchase."

\textsuperscript{28} For example, the following website noting the MMPI is available for purchase of Spanish speaking individuals: \url{http://psychcorp.pearsonassessments.com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=MMP1-2&Mode=summary}. 

