CHAPTER 5

Disengaging Discourses

No previous research has documented in any detail how well judges' fulfill their affirmative duty to engage or accommodate claimants when hearing and deciding their cases.[1] How effective or ineffective are Social Security judges in providing affective or positive justice to the claimants whose cases they deny? To present my findings, I draw on the texts of hearing transcripts and decisions as well as the relevant federal court decisions that support my evolving thesis that judges are emotionally incapable of affirmatively accommodating the special needs of claimants and of taking their differences into account when the law or other compelling circumstances demand. I focus my discussion on two areas visited in the previous chapter: judges' difficulties in accommodating unrepresented claimants and judges' problems in attending to claimants' needs while eliciting their testimony.

Judges' Failure to Engage or Accommodate Unrepresented Applicants

As previously noted, Social Security regulatory and case law clearly establishes that ALJs are required to accommodate unrepresented claimants. *Hallex* establishes the methods ALJs must follow to ensure that they protect claimants' right to an attorney; these methods include the requirement that judges "secure on the record an unrepresented claimant's acknowledgment of the right to representation and affirmation of the claimant's decision to proceed without a representative" (SSA 1992, I-2-652). Federal courts have further described this responsibility. In the *Cruz* case, a federal district judge in California remanded the decision of an ALJ, ordering him to reconsider the evidence in this non-English-speaking claimant's case, on

the grounds that he had “little if any understanding of the deficiencies in the evidence presented and of how counsel could have assisted him” (*Cruz v. Schweiker* 645 F.2d 812, 813 (9th Cir. 1981)). Similarly, the *Vidal* court remanded a case involving a claimant who could not read well, had an IQ that measured between 73 and 78, was not familiar with hearing procedures, and was unable to challenge the conclusions of the VE (*Vidal v. Harris* 637 F.2d 710, 714–15 (9th Cir. 1981)). Other courts have required judges to inform claimants of their right to free or contingency-fee counsel and to assist them in obtaining lawyers.[2]

The text analysis in this section supplements my findings in chapter 4, which suggest that the ALJs in my sample of cases seem consistently incapable of complying with rules mandating them to assist unrepresented claimants. Here I consider excerpts from six hearing transcripts and decisions to illustrate the ways in which ALJs fail to uphold their positive duty to engage and accommodate unrepresented claimants.

Ms. Acevedo (87-2767, CA), a 54-year-old Spanish-speaking applicant, was assisted only by her sister-in-law, who spoke limited English, when appearing before an ALJ. Through an interpreter, the judge presented the issue of exercising or waiving the right to representation as follows:

> *ALJ:* The hearing is going to be informal. The testimony’s going to be given under oath and it is now being recorded by a tape recorder. Now when we received your application we sent you a notice on June 11th, 1986, and we indicated in the notice that if you wished to you could be represented by a lawyer or other qualified person. We also indicated in the notice and included a list of organizations that would help you in securing a lawyer if you wished to. Now, it’s left entirely to you whether you wish to have a lawyer. But I do wish to be sure that this is what you wish. Now do—do you wish me to hear the case without a lawyer?
>
> *CLMT:* Well, I feel that I have enough evidence right now without needing assistance—any legal assistance.

On the face of it, this dialogue seems to satisfy the legal requirements that the claimant acknowledge and waive her right to an attorney. However, testimony that came later in the transcript raises an important question about whether the claimant could adequately acknowledge that she indeed was waiving her right to counsel. The following testimony immediately followed her comment about not needing legal assistance:

ALJ: We also indicated in a notice of hearing that you could come to the office any day between 3:30 and—excuse me, 8:30 and 3:30 to review the file. Now, do you have any objection to any of the documents you saw in the file?

CLMT: Since I don't read English, she is the one who read it [referring to her sister-in-law].

ALJ: I beg your pardon?

CLMT: I do not read English, she is the one who read it.

ALJ: Well, all I'm asking is do you have any objection to the documents that we have regardless of—regardless of who read it. I'm indicating that we asked you to come or we suggested to come to the office if you wish to read the file. Now again I'm asking do you have an objection to the documents you saw in the file?

CLMT: Well, I didn't see them. [The translator says:] She gave them to her [referring to her sister-in-law] so she can read them.

ALJ: Do you have an objection to any of the documents in this file?

CLMT: No.

The situation of the Acevedo case is very similar to that of the *Cruz* case, in which the federal court mandated that the ALJ assist a claimant who did not have the benefit of representation and who, because of a language barrier, could not fully appreciate the process. In the Acevedo decision, the ALJ ignored this mandate, reporting in the decision:

> Although fully advised of her rights to an attorney, the claimant *voluntarily* waived such rights and chose to proceed without representation. (emphasis added)

But can a Spanish-speaking claimant "voluntarily" waive her right to counsel when she fails to realize that the exhibit file, which she is unable to read, is the basis on which the judge will decide the case? Throughout the hearing, Ms. Acevedo often became confused and obviously could have benefited from the assistance either of the judge or of counsel. Her confusion became especially apparent in this passage:

ALJ [asking questions through the translator]: Where does she work? Your answer, where does she work? She isn't testifying. Do you know where she works?

CLMT: Where she works?

ALJ: Works? Your sister.

CLMT: My sister.

ALJ: No, I'm not asking her. I'm asking her. Look—look at this—

CLMT: I don't remember.

ALJ: Okay. Wait a minute. Do you remember that I said if you don't know you're supposed to say I don't know.

CLMT: Well, I don't know.

Furthermore, whenever Ms. Acevedo relied for assistance on her sister-in-law, her only representative at the hearing, the judge seemed to chastise her. At one point, the ALJ even suggested the possible removal of the sister-in-law:

ALJ: Now you said that you have problems sleeping because of the pain. What pain—what—what hurts you? You were in an automobile accident, I believe, weren't you? Okay, what hurts you?

CLMT: Everything.

ALJ: No. You know, if you don't stop looking at your sister I'm going to have your sister to go out. I want you to answer the questions. You answer the questions to the best of your ability, and if you can't answer you just say I don't know. Don't look at your sister to give you the answers. Okay. We were talking about where you have the pain or what hurts you. Okay, now what hurts you, your back? Your feet? What?

This passage raises serious questions regarding the judge's compliance with such cases as *Cruz,* which require the ALJ to be particularly attentive especially to the needs of an unrepresented claimant with an inability to speak English well. In fact, assuming that Ms. Acevedo's sister-in-law was the only "counsel" or "representative" she had, the ALJ's threat to remove her could be construed as depriving the claimant of her right to counsel. On appeal, Ms. Acevedo's attorney argued that the case should be remanded on the ground that the ALJ failed to discharge the duty of upholding claimants' rights. A federal district court granted that remand.

A second case of an unrepresented claimant involved Mr. Costello (88-7350, IL), an illiterate white man who had no formal education. The ALJ's decision in the Costello case contained several statements that contradicted testimony in the transcript, suggesting that the judge failed to accommodate Mr. Costello in much the same way Ms. Acevedo was neglected in the process. First, in the hearing, the ALJ neglected to inform

the claimant of his right to an attorney; however, in the decision, the ALJ reported that the claimant was informed of his right to counsel and voluntarily waived it. Second, during the short time the hearing lasted (approximately 15 minutes), the ALJ never asked the claimant about his most severe impairments—his knees, heart, depression, alcoholism, and inability to complete tasks. Then in the decision, the judge wrote:

> The claimant is alert and oriented. The claimant also has a history of alcohol abuse, now in remission. . . . The ALJ finds that the claimant seldom experiences deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner (in work settings or elsewhere). . . . The ALJ finds that the claimant has never experienced any episodes of deterioration or decompensation in work or work-like settings which have caused him to withdraw from that situation or to experience exacerbation of signs and symptoms.

The contradiction here between the lack of testimony and the conviction of the judge's decision seems particularly troubling because the claimant, without the assistance of counsel, relied entirely on the ALJ's inadequate evidentiary development of the case. A third, explicit contradiction in the record can be found in the ALJ's conclusion that the claimant "takes no medications." One of the few things the ALJ and the claimant discussed was his list of medications.

Given the number of inconsistencies in this record and the number of times the judge construed facts against the claimant without eliciting testimony to support them, the judge seems obviously in this case to have failed to satisfy the standard set forth in *Cruz,* which requires the judge to "scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts" and to "be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited" (*Cruz v. Schweiker* 645 F.2d 812, 814 (9th Cir. 1981), citing *Vidal v. Harris* 637 F.2d 710, 713 (9th Cir. 1981)). In this regard, the ALJ clearly failed to accommodate the claimant, who as uneducated, illiterate, and unrepresented had several special needs that required particular attention.

Not all cases reviewed for this study indicated the same disregard for the rights of unrepresented claimants and unwillingness to accommodate. Yet even when ALJs took special care to ensure that unrepresented claimants voluntarily waived their right to counsel, the judge could discover in later testimony that the claimants were unable to represent them-

selves. The following interchange between a more sensitive judge and Ms. Price (89-4298, IL), an illiterate African-American woman, on the issue of obtaining the claimant's acknowledgment and waiver of her right to counsel seemed to start this hearing off well:

ALJ: There are several preliminary things that we need to mention before we begin though. One is that you appear this morning, representing yourself.
CLMT: Yes.
ALJ: Now, you have received information from us—from us about the possibility of getting represented by an attorney or another representative if you want to be. Most people are represented by attorneys or other representatives in these hearings but—
CLMT: All right.
ALJ:—one need not be and it's my responsibility to make sure that all of the evidence is considered and that you receive a fair determination of your claim whether or not you have a representative—
CLMT: All right.
ALJ:—but one thing that we do need to do is to make sure that you have completely understood your right to be represented if you want to be represented by an attorney or another representative. Now, did you know that you could be represented by a lawyer or somebody else in this hearing if you wished?
CLMT: Well, I knew it but I didn't have no money or anything and I didn't try to get one.
ALJ: All right. Well, money is generally not a barrier in these cases to be represented because there are—there are any number of organizations and attorneys that will take a case like yours without being paid anything at the beginning.
CLMT: I understand.
ALJ: Now, if you want to investigate that possibility further, I will be glad to continue the hearing so that you can get a representative but as I say, you don't—
CLMT: Well—
ALJ:—you don't need—
CLMT:—if it's all right with you, I can just go on through with it—
ALJ: Sure.
CLMT:—for today.
ALJ: Okay. That's—

CLMT: That will be fine.

ALJ:—fine. Yeah, I'm not trying to talk you into that.

CLMT: I understand.

ALJ: I'm just—

CLMT: I know what you—

ALJ:—I'm just making sure that you understand that you could be represented if you wanted to.

CLMT: That will be just fine.

ALJ: All right. We'll find that you have understood the right to counsel and that you've waived that right and that you are prepared to proceed this morning.

However, almost immediately after this very supportive discussion about the right to an attorney, the claimant and the judge were confronted with Ms. Price's inability to represent herself. Here is the claimant's response to the judge's question regarding whether she objected to any of the exhibits contained in the file:

ALJ: Now, Miss Price, you had an opportunity to look over the exhibits that are associated with your claim, did you not?

CLMT: Yes, sir.

ALJ: Are you aware of any other evidence, particularly any medical evidence, that might be included in the file but isn't here now?

CLMT: Well, I got—I think they got them all pretty near but—all of them in there that I have because I mostly suffer with my—my back, my numb—my back gets numb. I have a hernia because of it. I can't lift. My doctor told me not to lift nothing and my—really—really what bothers me is this side. It just gets numb. At times, I can't pick up nothing with this—

ALJ: Okay. Now, we'll—we'll talk more about those things in a few minutes but for the moment, you're not—you haven't been in the hospital or been examined by any doctors that would have resulted in reports that we don't have, have you?

CLMT: No, sir. I haven't been—

ALJ: Okay. So you think that we have everything we need to?

CLMT: That's right.

ALJ: All right. We'll find that the record is complete and we'll admit into the record Exhibits 1 through 17.

Ms. Price, who had only a fourth-grade education and could not read, here appeared incapable of discussing the exhibit file. Instead of speaking about the file as containing the evidence on which the decision depends, she responded to the judge's question about the contents of the file with testimony regarding her impairments. In this instance alone, Ms. Price was clearly disadvantaged by her lack of counsel. Furthermore, her hearing lasted only 20 minutes. Beyond the initial supportive introduction, in which the judge attempted to accommodate Ms. Price's inexperience in these matters and her apparent lack of education, he did little or nothing, once he discharged his duty of obtaining the acknowledgment and waiver, to accommodate Ms. Price's needs during the hearing. Her case was ultimately remanded by the federal district court for further proceedings.

In a fourth case involving an unrepresented claimant, Ms. Moore (89-6436, IL), the ALJ appears on the surface to attempt to meet the requirements set forth by the *Cruz* and *Vidal* courts, but he probably in fact did not even comply with the *Hallex* requirements to obtain an acknowledgment and waiver:

ALJ: You're willing to proceed without an attorney, is that correct?

CLMT: Yeah.

ALJ: That you signed a document here today, saying that you do not wish to be represented.

CLMT: No. I didn't know how to go about getting one. I don't have no money for an attorney.

ALJ: Well, there's over—what 7,000 or 8,000 attorneys in the phone book, and we sent you a letter, originally, giving you the list of Legal Aid Attorneys. You had ample opportunity. You had another trial before another Judge so you know about whether or not you're entitled to an attorney.

CLMT: Yeah, but I—at the time I didn't feel like it was—one would know enough about the case to take it.

ALJ: All right. Well, I want you to know that whether or not you have an attorney, I will do everything in my power to protect your rights. I want you to understand that. That's my job. I won't let—I won't let the government, I won't let anybody take advantage of you. So with that understanding, you're willing to proceed without an attorney. Is that correct?

CLMT: Right.

Here, the judge professed that he would "protect" the claimant, as the *Cruz* and *Vidal* decisions require. However, the judge did so by infantilizing the claimant. Instead of responding to the claimant's ill-informed reasoning (she did not think an attorney could represent her because no attorney was familiar with her case) and instead of explaining that his role as claimant's protector may and often does conflict with his duty to act as judge, prosecutor, and defense counsel, the ALJ rushed to provide an unqualified promise to take care of her.

The quick pace and shallow presentation of the judge's response to Ms. Moore's explanation for not seeking counsel suggests that the ALJ may have made his promise to protect the claimant to avoid postponing the case to give the claimant an opportunity to get an attorney. Since cases are tracked by the local OHA for the length of time a judge has them, and since judges are pressured to move cases along, a midhearing postponement would not only cause the judge to "lose" the hour or so set aside for a given hearing but would also prolong the time it takes the judge to handle the case.[3] Such factors might have weighed into the judge's decision to subtly pressure the claimant to proceed without counsel.[4] If this statement influenced the claimant's decision to proceed, the judge clearly failed to fully accommodate her special need for patience in helping her to obtain counsel.

Although this judge never prepared a decision because he was taken off the case (probably due to illness or some other benign reason), the ALJ who ultimately decided the case recommended that Ms. Moore be denied benefits. However, the claimant's case was effectively argued in federal district court, and the case was remanded to an ALJ for additional workup on the grounds that "in reaching his decision the ALJ had a heightened duty to develop a full record because plaintiff was not represented by counsel and was unfamiliar with hearing procedures" (referring to *Lashley v. Secretary of Health and Human Services* 708 F.2d 1048 (6th Cir. 1983)).

In a fifth case involving an unrepresented claimant, Mr. Bell (90-5548, IL), a literate African-American SSI applicant, the ALJ seems, as in the Acevedo case, to satisfy the *Hallex* requirement to obtain an acknowledgment and a waiver of the claimant's right to counsel. Again, however, as in Ms. Price's case, it later became clear that the claimant was unable to represent himself and that the judge failed to discharge his duty of accommodating and, hence, engaging an unrepresented claimant:

ALJ: Mr. Bell, we sent you a letter back in—where is that—back when we sent you the notice of hearing, that you had the right to be

represented by an attorney or other representative, although that's not required. And you've appeared here today without a representative. Do you wish to proceed anyway?

CLMT: Yes, I wish to proceed.

ALJ: Thank you.

This dialogue seems typical of the interchange between ALJs and unrepresented claimants in the cases I reviewed and outwardly satisfied the *Hallex* requirements. However, consider the following interchange between the judge and a vocational expert (VE) about Mr. Bell's ability to do his previous work:

ALJ: Now, I'd like to describe for you an individual who is not Mr. Bell. But he has these characteristics. He's 47 years of age, he has a GED and he has a past work record as you just explained it. The listed person has the limitations described by Dr. Shana upon examination on his residual functional capacity form attached to the examination, I will pass to you . . .

VE: Thank you.

ALJ: Do you have such an individual in mind?

VE: Yes, I do.

ALJ: Could such an individual do any of Mr. Bell's past work?

VE: I just have a question [referring to the report the judge has passed to him, which we can assume was not passed to the claimant since there would be only one copy of that report in the hearing room]. Nothing is checked off on page 2. Am I to assume that—

ALJ: Right.

VE: All of those would be "no."

ALJ: Yes.

VE: Okay, yes, he would be able to perform all of his past work given that.

ALJ: Any further explication?

VE: No.

ALJ: All right, sir [referring to Mr. Bell], now it's your turn to ask her about her opinion, if you wish. Do you have any questions?

CLMT: No, I don't think anything is relevant to—

ALJ: I'm sorry?

CLMT: I don't have anything that is relevant to—you're speaking about another person than myself?

ALJ: Well, we're talking about a hypothetical person, an imaginary person, but who has your characteristics.
CLMT: Oh, I see.
ALJ: Because she advises me.
CLMT: Um-hum.

In short, Mr. Bell was not familiar enough with hearing practices and procedures to follow the discussion of his own case. When he waived his right to an attorney, in other words, he did not fully comprehend his need for representation, and the judge did little or nothing to help him understand it more fully. Surely, at the point that he expressed his misunderstanding of the method the ALJ used to interrogate the VE, Mr. Bell could easily have been informed by the judge that such practices were a means of inquiring whether a VE believed that medical problems similar to Mr. Bell's precluded work activity and, if so, more specifically what work activity it precluded.

Indeed, a VE's presence at a hearing can make or break the case for a claimant; consequently, careful cross-examination of a VE can be extremely important to a claimant's ultimate success. Since disability claimants rarely consult with experts on vocational matters unless judges invite VEs to hearings, claimants almost never have evidence in their exhibit files to contradict the VEs' testimony. Unless, then, the unfavorable testimony of a VE present at the hearing is persuasively cross-examined, the opinion of one VE will likely figure prominently in the judge's decision and ultimately in the mind of an appellate court.

Even if the judge denies the applicant's claim, careful cross-examination of a VE at a hearing can still have critical importance to claimants who decide to appeal their cases to federal district courts. On appeal, a court's standard of review is whether there was substantial evidence at the hearing level to deny the case. Cross-examination of a VE at the hearing is therefore also important to establish a record for appeal. Conversely, if the testimony of a VE at the hearing goes without cross-examination, it is likely to stand unopposed as the substantial evidence on which a federal district court would rely in making its decision.

Mr. Bell never pointed to other medical records or reports (other than one doctor's report on which the VE's testimony was based and which may not have considered all of Mr. Bell's impairments) to cross-examine the testimony of the VE at his hearing. In the end, Mr. Bell's claim was denied, and his case was never heard in federal district court. Mr. Bell

attempted to represent himself on further appeal; however, his federal district court file indicates that he failed to properly complete the paperwork.

The Bell hearing highlights several of the ALJs' problems in their efforts to accommodate unrepresented applicants. The first problem can be traced to the ALJ's opening statement. The ALJ in Mr. Bell's case neglected to fully explain to the claimant what role the VE played in the process and the fact that both the judge and Mr. Bell would have an opportunity to ask the VE questions about whether she believed, based on the medical records and reports, that he could do his previous work.

A second problem pertains to the ALJs' convention of phrasing questions to VEs in a way that is likely to mystify the claimant—that is, by referring to the claimant as a hypothetical person. Many judges follow this procedure to avoid appearing to have decided the case in advance. By questioning VEs in hypothetical terms, judges can characterize applicants with whatever impairments the ALJs believe are severe, excluding from consideration those impairments believed not to be severe. The ALJ hearing Mr. Bell's case might, at a minimum, have explained this convention and its purpose to the claimant.

Third, ALJs may help or hinder claimants with instructions relevant to materials they must procure to complete their files. For example, the ALJ hearing Mr. Bell's case failed to properly assist the claimant when asking him to get his doctor to fill out an additional medical form. The judge gave Mr. Bell the form without explaining its relevance to his case (in fact, it was key) and then said only, "All right. . . . And if nothing comes back, I'll make my decision anyway." The judge did not explain that some doctors may be unwilling to fill out medical forms without being compensated; that both OHA and DDS have funds for compensating doctors who fill out medical forms; or that DDS and OHA, as standard practice, will send the form for claimants (SSA 1992, I-2-520).

In the final case of an unrepresented claimant to be reviewed here, that involving Mrs. Redd (87-3348, IL), a literate African-American claimant, the ALJ initially neglected to ask Mrs. Redd whether she was aware of her right to be represented and whether she waived that right. Roughly five minutes into the hearing, the ALJ said:

> *ALJ:* And you were advised of your right to appear with an attorney. And you've elective [*sic*] to be here on your own [inaudible], is that correct?
>
> *CLMT:* Yes sir.

ALJ: Alright.
CLMT: I didn't think I needed one.
ALJ: Alright.

The judge did nothing to follow up Ms. Redd's comment that she didn't think she needed an attorney. Again a judge seemed to meet the minimum *Hallex* requirements but did not take the time to accommodate Ms. Redd as the *Cruz* and *Vidal* cases demand. In response to the question, "Did you review the exhibit file?" Ms. Redd answered, "Briefly." This response should have alerted the judge that Ms. Redd did not fully understand the importance of the medical evidence in her case. Ms. Redd's case was remanded by federal district court because

> the ALJ failed to develop a full record and failed to give [claimant] a fair hearing. [T]he hearing record suggests that the ALJ spent minimal time and effort developing the record and implied before the testimony was complete that he would rule against [claimant]. The remand . . . should be adequate to correct the deficiencies of the hearing.

From these cases, it is clear that some judges do not adequately accommodate or engage claimants by meeting even the minimum requirements set forth in the *Hallex* rules that require ALJs to obtain an acknowledgment and a waiver of a claimant's right to representation. Other judges meet the minimum requirements set forth in *Hallex* to obtain waivers from claimants. However, judges use different tactics to obtain waivers. One judge reassured the claimant that he would "protect" her, without explaining that he must play contradictory roles, including that of defense lawyer, prosecutor, and judge. That judge also did not truly give the claimant the option to freely "choose" not to be represented. Instead, he reassured her with a promise to protect her and then said, in effect, "Knowing what I've just told you, you want to proceed, right?" He afforded her little or no choice in the matter.

Other judges obtained the acknowledgment and waiver and hence satisfied *Hallex* requirements but did not probe further into an understanding of whether claimants truly appreciated their need for counsel. When judges hear that claimants have reviewed the exhibit folder "briefly" or did not or could not review it at all, the judges should at a minimum honor rules mandating them to accommodate the claimants and become and remain alert to signs of whether or not such claimants really under-

stand the process and appreciate their need for counsel. Insincere or incomplete efforts to accommodate unrepresented claimants reveal, on the one hand, the heavy burden ALJs bear when having to assist such claimants through the process and, on the other, the inadequate job they do to satisfy their duty.

Judges' Failure to Engage or Accommodate Claimants while Eliciting Testimony

The requirement on ALJs to inquire fully into each issue and, hence, to accommodate claimants with special needs extends to the practices judges follow to elicit testimony.[5] Specific ways in which judges failed to accommodate claimants with special needs included leading the claimant, infantilizing the claimant, acting unnecessarily judgmental and rude, failing to follow up on relevant questions, and implying that the claimant's perspective was wrong.

Leading the Claimant

Leading a claimant is a technique used by ALJs to ask questions that "lead" a claimant to say or not say certain things. Generally, the answers elicited to leading questions are used against claimants to deny their application for benefits. This technique is particularly devastating when it is used with claimants who have special needs.

A clear example of a judge leading a claimant is the hearing of Miss Plain (87-5258, IL), a case also mentioned in chapter 1. Miss Plain was an unrepresented, illiterate African-American nurse's aide with a third-grade education. At the hearing, the claimant testified that she had not worked since 1966 because "would be nobody hire me no more." The judge, wanting clarification of why the claimant had not worked, asked the following question: "And during that time, did you, did you not work because nobody would hire you or did you not work because you were raising a family?" suggesting that her lack of work history was related to factors other than illness.

Here is how the judge pursued his questioning regarding her ability to work at the time of the hearing:

ALJ: Now, have you got a job now, if there was a job now available in a nursing home—would you work now?

CLMT: No because I can't be able to lift patients like I used to be.

ALJ: Could you do any other things, besides lifting a patient? What

else does a nurse's aid do in the hospital, so you wouldn't have to lift anybody. Any other jobs there?

CLMT: That's the only thing I would know to do, just change a patient and lift them because I can't read.

ALJ: Can you answer the telephone?

CLMT: Yes, I can answer the telephone.

ALJ: Could you—

CLMT: But I can't—

ALJ: Could you be a receptionist?

CLMT: I can't sit long enough for that because my legs and thighs get real numb. I have to stand and move around.

Here it seems likely that the judge's leading questions are designed to persuade the claimant that she can work, despite her myriad of limitations. Could Miss Plain realistically be a receptionist without being able to read and write? If the judge truly was interested in learning what jobs Miss Plain could do, wouldn't he have considered her illiteracy and related educational factors when questioning her about her ability to do alternative jobs?

Infantilizing

Judges also commonly infantilized claimants—that is, treated them like infants to minimize their testimony, to delegitimize their stories. Judges most frequently infantilized claimants with such special needs as lack of counsel and an inability to speak English well. This problem surfaced in chapter 4, when I described some of the inappropriate titles that ALJs used to refer to claimants. This section describes other, more complicated interactions in which ALJs infantilized claimants.

Ms. Acevedo (87-2767, CA) was unrepresented. She required the assistance of an interpreter at the hearing. As previously noted, her sister-in-law was also present. The judge treated the claimant like a small child when she said, "Okay. Wait a minute. Do you remember that I said if you don't know you're supposed to say I don't know."

The judge hearing the case of Ms. Alva (84-0617, CA), a claimant who also required an interpreter, also infantilized the claimant:

ALJ: When is the last time you saw Doctor Robinson?

CLMT: I think it was in April, in April I think.

ALJ: Of this year?

CLMT: Yes.
ALJ: Ms. Alva, please pay attention to what I'm asking you. When is the last time you saw Doctor Robinson?

It seems in this passage that instead of accepting the claimant's memory lapse, the judge scolds her as though she were a small child who is deliberately withholding information.

In another case, involving Mrs. Moore (89-6436, IL), an African-American woman with a tenth-grade education, the judge infantilized the claimant relying on a slightly different approach: "I don't want you to walk out of here and say, oh my goodness, I forgot to tell him something. Now, you take your time." While this comment in and of itself may be benign, the judge's comments following the claimant's testimony that she smoked are illuminating: "Do you really? Can I get you to quit? Can you quit smoking, for your own good health?" She responded, "I don't know. I have a lots of pains over my—" Then the judge tried a different tactic, saying, "Well, everybody does that, but cigarettes—that cuts into your income. Do you realize that you must spend—what? Ten, fifteen, twenty dollars for cigarettes, a month?" When the judge asked whether the claimant's physician told her to quit, the following dialogue ensued:

CLMT: Well, he didn't tell me that to quit, but he says slow down.
ALJ: Is that all? That's an unusual doctor nowadays.
CLMT: Well, he always said, you know, cut it down. That's what—that's all I ever remember him telling me.
ALJ: He didn't tell you to quit?
CLMT: Well, he probably did.
ALJ: All right.
CLMT: I would say he did.
ALJ: And you haven't?
CLMT: No I haven't.
ALJ: All right.

The judge did not ask why Mrs. Moore continued smoking despite her doctor's advice to quit; it is as though the judge, as with a child, was not interested in her explanation (which is certainly relevant to a disability determination that will deny benefits to an applicant who does not follow the prescribed treatment of a treating physician) but rather felt the need to lecture her. At the end of this interaction, one cannot be sure whether the

doctor ever really told Mrs. Moore to quit or whether she conceded so because the ALJ convinced her that it was true.

These transcripts revealed that some judges, in their efforts to accommodate claimants with special needs, actually instead infantilize and probably alienate them. Even more problematic is the recognition that these practices ultimately affect the outcome of a claimant's case; in Mrs. Moore's hearing, the judge essentially forced her to concede that smoking constituted a failure to follow prescribed treatment.

Acting Unnecessarily Judgmental

In transcripts in which judges seemed unnecessarily judgmental, I inferred, particularly in cases involving claimants with special needs, that the judge believed he knew better and wanted to give advice. The special needs of these claimants usually involved mental impairments, including drug and alcohol addictions. The advice given in these instances could at least as easily be read as an uninvited intrusion into personal matters as an effort to accommodate claimants, especially considering that the advice given typically seemed to reveal the judges tendency to stereotype. In the case of Mr. James (88-1712, CA), for example, after the claimant's wife testified that her husband used cocaine "too often," the judge responded as follows: "Well, can you give us some idea how often is too often? I mean, is that—frankly once every 10 years is too often as far as I'm concerned." In the same transcript, the judge gave Mrs. James the following lecture:

> *ALJ:* Now, before we close, let me point out to you Mrs. James, just as it—you can certainly ignore what I'm going to say, and you may well. But, I want you to understand that it comes as [*sic*] a disinterested observer. Not—not a lawyer for any side here. And I have no stake in it other than to judge what's going on. But, you're an enabler [phonetic]. You're causing a lot of this. And you ought to—I would suggest that you go to Alanon [phonetic]. If you don't believe me, because I think they will tell you the same thing that I'm going to tell you. That people don't drink regularly without someone helping them on the way. And you're a large part of that. And sure you can decide that all of the doctors in the world are wrong, and there must be a diagnosis. But, that's not the way most people approach a medical problem, I can tell you that. Most people go to a doctor, and the [*sic*] accept the doctor's word for what's wrong with them. And they feel better if the doctor [says] there's nothing

wrong. And it's a lot better to have it in your mind than in your body. Because, you can cure minds. You can cure attitudes and you can cure emotions. But, if there is something really wrong with your body it's a lot hard[er] then if you're—people are telling you, I'm not the doctor, but there sure is a slew of doctors that said there's nothing wrong physically with your husband. Or at least nothing that major wrong.

CLMT'S WIFE: That they can find.

ALJ: No, not that they can find. Nothing major wrong period. As I say you can shop forever and somebody will agree with you. There's enough doctors, lawyers, and people in the world, so you can always find someone for enough funds to agree with you.

CLMT'S WIFE: Well, I am a professional.

ALJ: I'm not—wait a minute, I'm not telling you to argue.

CLMT'S WIFE: No.

ALJ: I'm just telling you, because I want to tell you because it will be on my conscience if I didn't say something. I'm telling you talk to Alanon, because—or any of the groups that deal with alcoholics. But, you don't get to be one—you don't abuse alcohol or drugs without someone in the family enabling you. That's where you fit in. You ought to understand your role in the process, because he's not going to get better unless dynamics in the family change. And I mean both of you working at it.

CLMT'S WIFE: Well, I don't drink.

ALJ: No, you're causing him to drink.

CLMT'S WIFE: No, I don't drink. The pain is causing Arthur to drink.

ALJ: Oh, people always find a reason to drink.

CLMT'S WIFE: The pain is causing Arthur to drink. And I also go back to say that I am a professional. And I see my husband in pain. And I want to know why he's in pain. He's been in pain too long.

ALJ: Well, okay. I think I have . . . much more insight [in]to what's going on.

CLMT'S WIFE: He's been in pain too long.

ALJ: And I appreciate it.

CLMT'S WIFE: You know, it doesn't make sense. And it's like his body is not getting any better.

ALJ: It's not going to. I can tell you that. . . . Until the family dynamics change, he's not going to get any better.

CLMT'S WIFE: Well, he has no family problems. My going to get his liquor, that's—

ALJ: That's not a problem?

CLMT'S WIFE: That's not a problem. I can stop doing that right now. But, he still has a physical disability.

ALJ: Well—

The judge then proceeded to lecture the claimant:

> *ALJ:* Mr. James, let me say one thing. . . . You know whether or not your going to get Social Security benefits is obviously within my control. But whether or not you recover [is] within your control. You got to start taking some active interest in your recovery, or it's not going to occur and you are running out of employable time, you're 47 years old. Regardless of what I do or don't do, you're going to become less and less attractive to [future] employers as time goes along. An awful lot of doctors seem to feel you can make it. . . . that's a vote of faith in your ability to recover. . . . I think Mr. Waxman [the claimant's attorney] has done an excellent job in trying to get you in an appropriate program. . . . You ought to look into your own vocational recovery. . . . And while you have to wait a long time at County Hospital, it's there for you. You're going to have to make some efforts, cause it isn't going to happen without your effort.

In this passage, a man alleging an alcohol addiction in a Social Security disability claim and his wife were subjected to a lecture by an ALJ. This seems a clear violation of both the affirmative duty of judges to positively accommodate and engage claimants and the rules mandating judges to avoid personal judgments. To accommodate in this case would have been to inquire into the nature of the claimant's mental impairment and addiction patiently and with understanding and to apply the law. Ideally, in a more affectively oriented legal system, described in more detail in chapter 7, the judge would also be encouraged to describe why he was concerned about the claimant's persistent and disabling addiction in a manner that revealed the judge's sensitivity to and personal experience with situations similar to that of the claimant. Given prevailing rules and interpretations, however, the judge's disapproval of the claimant's behavior and expression of that disapproval seemed both alienating and prejudicial.

In another case, one involving a white woman who also was an alcoholic, Ms. Degryse (88-2082, MA), the ALJ dismissed the applicant's claim because she gave alcoholism as her primary excuse for not filing a timely request for hearing. The Appeals Council reversed this decision, concluding that the claimant's alcoholism was good cause for filing a late request for hearing. However, once the case was returned to the judge, the judge subjected the claimant to a series of abuses. Before the claimant's testimony was taken, the ALJ required the paralegal representing the claimant to go through her analysis of the five-step sequential evaluation process on the grounds that he "hate[s] to walk into these things blind [referring to the testimony to be taken]. What is it we're going to be looking for?"

In another case heard by the same judge, which involved a female applicant alleging diabetes and high blood pressure (Galasso, 88-0280, MA), the judge proceeded, as do most judges, by taking the claimant's testimony. No questions were asked of this claimant's representative about the five-step sequential evaluation process, and the judge made no comment about hating to walk into hearings "blind." It is possible that the judge was punishing either Ms. Degryse or the paralegal for having challenged his dismissal before the Appeals Council or that he resented having to hear the claim of an alcoholic and wanted to make it as difficult for her as possible.

Another example of how this ALJ was harshly judgmental in the Degryse case is illustrated in the following testimony, in which the judge asked the claimant about her pulmonary problems and her smoking:

> *ALJ:* And he does pulmonary function tests on you, you say, fairly regularly?
> *CLMT:* Yeah, he does.
> *ALJ:* What does Dr. Sabba say about smoking 2 packs per day?
> *CLMT:* I shouldn't be doing it.
> *ALJ:* Well, I think that's probably an understatement, isn't it?
> *CLMT:* It certainly is. I have tried to quit, it never worked. That's why we have the catapras [phonetic] patch.

Again, the judge's language in this case implies his disdain for the claimant's lifestyle ("Well, I think that's probably an understatement, isn't it?").

Another case, this one involving an uneducated, illiterate African-American man, Mr. Prince (87-9662, IL), raises similar problems. The judge opened the hearing as follows:

ALJ: Is that the loudest you can speak?
CLMT: Yes.
ALJ: Now, Mr. Prince, let me tell you so we don't have, cause it is very disconcerting. You're going to have to hold your voice up. If you can't do it we'll have to postpone the hearing because you have to speak up, do you understand.

The judge goes on to ask Mr. Prince how far he went in school:

ALJ: How far did you get in school?
CLMT: About six grade; seven, almost to seven something like that.
ALJ: Did you finish the sixth grade?
CLMT: I don't know. I really don't know. I really don't know cause I start to work then.
ALJ: You don't know how far you went in school?
CLMT: About the sixth grade.
ALJ: Did you finish the sixth grade?
CLMT: I was still in it when I quit.

In this passage the ALJ seems judgmental about the fact that this man, to whom school was obviously never very relevant, could not remember how many grades he completed.

These cases suggest that ALJs may be judgmental about claimants with special needs such as mental impairments, including addictions, illiteracy, and lack of education, when in fact the law requires not personal judgment or disrespect but accommodation; the judges in my sample did not go far enough to meet the requirement to positively accommodate claimants with special needs.

Being Rude

Examples of rude judges abound in the transcripts. This manifestation of failing to accommodate claimants is, again, particularly troubling when it involves claimants with special needs.

Judges' rudeness takes many forms in the transcripts. In the case of Mr. Hilton (89-2370, MA), the judge used language in his decision that only a college- or law-school-educated person would understand. Yet the judge used this elevated language in a decision written for an illiterate claimant:

> Evaluating his pain within the guidelines of *Avery, supra* [a standard for cases involving allegation of pain in that district], the Administrative Law Judge finds that the nature, duration, and frequency of the claimant's pain are *de minimis,* and that there is little evidence of more than minimal true functional limitation secondary to his allegations of pain, based on his own description of his daily activities.

Judges also very often make sarcastic comments and innuendos when eliciting the testimony of claimants with special needs. The following claimant, a native speaker of Portuguese, Ms. Marques (89-01257, MA), was doing her best to answer the judge's questions:

> *CLMT:* When my daughter comes home around two-thirty she gives me lunch.
> *ALJ:* What is that?
> *CLMT:* The pains, I don't know the pains, what she makes.
> *ALJ:* What you do eat for lunch, madam? Tell me a typical week of eating!
> *CLMT:* More or less Portuguese food.
> *ALJ:* We are going to get this sooner or later, aren't we?
> *CLMT:* Fish—

The judge's comments ("We are going to get to this sooner or later, aren't we?") were unnecessary and rude. They may well have alienated the claimant, which would likely hinder her testimony further.

Likewise, in trying to find out how much Miss Plain (87-5258, IL) did to care for her grandchildren, several of whom lived with her, the judge in that case adopted a sarcastic tone that showed disdain for the claimant's lifestyle, asking, "Do you do anything to your grandchildren? Do you feed them, do you dress them, do you bathe them?" She responded, "No, their mothers do that." Then the judge said: "Their mothers do that. Their mothers are in the home all day too? They're not working?" She responded: "One of my daughters, be home at all times."

The judge hearing the case of Mr. Reed (88-6170, IL), an uneducated African-American man, likewise turned sarcastic. Mr. Reed described his previous job, and then the following exchange took place:

> *ALJ:* I take it these boxes were put into another box for shipping?
> *CLMT:* What's you say?

ALJ: Weren't the boxes that you made put into another box to be shipped out to these customers?
CLMT: No.
ALJ: What did you do with the boxes after they were formed?
CLMT: That's what I'm explaining now.
ALJ: Well, get to it.

Subsequently, the conversation continued:

ALJ: You're putting them on a pallet.
CLMT: Yeah.
ALJ: Okay. At least we got that far.

In context, all of these claimants seem to be struggling as well as they can to negotiate the complex hearing procedure. The ALJs' rudeness through sarcasm can hardly be expected to facilitate the process and probably has the opposite effect.

ALJs also show rudeness toward claimants with special needs by growing visibly impatient with them. The ALJ taking testimony of the following claimant, Ms. Burr, an African-American woman suffering from both physical and mental impairments (87-10636, IL), seemingly could not hurry her story along fast enough:

ALJ: How long were you hospitalized there or were you, did you continue to go to Cook County Hospital after that?
CLMT: No, I was in there for about a week. And Cook County, they didn't give me no seizure medicine, they sent a psychiatrist in—
ALJ: Uh huh.
CLMT:—and I didn't see why I needed a psychiatrist.
ALJ: Alright and then what happened, just tell me that?
CLMT: Because I told them that I—
ALJ: I know what you told them but, I mean, what did you do next, you stayed there for about a week and then you left?"

Likewise, the ALJ grew impatient when taking the testimony of Mr. Prince (87-9662, IL):

ALJ: When did you start falling?
CLMT: I've been falling for a good while.

ALJ: What's a good while?
CLMT: Bout—
ALJ: Now, how long Mr. Prince?
CLMT: I don't know the exact year and—
ALJ: Mr. Prince, you have to try and tell me as best as you can recall, how long it's been since you've been falling.
CLMT: Only been, I been falling four or five years and so on.
ALJ: Okay. And how often do you fall?
CLMT: Well, like I be, I just get out of breath and stuff and it locks my leg and I just get weak and it all depends. Sometimes I be walking and grab something.
ALJ: Okay. How often does it happen that you fall?
CLMT: When this feeling hits me.
ALJ: How often does it happen?
CLMT: Well, lately is just come like every two or three weeks or something like that.
ALJ: no, —

And later in Mr. Prince's testimony:

ALJ: How long have you had the cramps [in your legs]?
CLMT: Four or five years, I guess.
ALJ: Okay. Every day you've had them four or five years?
CLMT: I have cramps every day.
ALJ: Has that been true for four or five years?
CLMT: Yeah, but I didn't know what it was.
ALJ: No, please, Mr. you have to answer my questions, do you understand.
CLMT: I am trying to answer them the best I can.

While questioning Mr. Rodriguez (87-878, IL), a Puerto Rican claimant with an eighth-grade education, another judge grew similarly impatient:

ALJ: What problems, if any, do you have climbing stairs?
CLMT: Very much, I get to uncomfortable, you know I get—
ALJ: Do you have chest pains from climbing stairs?
CLMT: Yes.

ALJ: Just answer yes.
CLMT: Yes.

It is hard to imagine that the impatience conveyed by these judges could help these claimants come forth with their testimony and realize as fully as they might the burden of proof on them to demonstrate their claims.

In each of the following three passages, ALJs demonstrate a different form of rudeness, a propensity to put claimants to the test unnecessarily and place considerable pressure on them. The judge hearing Mr. Reed's case (88-6170, IL) pressed as follows:

ALJ: All right. What's the heaviest thing you had to lift?
CLMT: I would say mostly maybe one box would weigh 2–3 pounds.
ALJ: An empty cardboard box or a pressboard box would weigh 2 or 3 pounds, 14 inches?
CLMT: Some of them would have like wax on them or something like that. Maybe, double wall, some of them would be. It wouldn't be that often—
ALJ: Let me ask you this. What's a gallon of milk in a paper carton weigh?
CLMT: A gallon of milk?
ALJ: In a paper carton. Give me your answer as quickly as you can. You don't get any prize. It just tells me what kind of judge at weight you are.
CLMT: I'd say maybe five pounds.
ALJ: Three pounds as a matter of fact.

Later in the transcript, the judge pressed still harder:

ALJ: Where do you have arthritis in your legs?
CLMT: It's in my hip and low back and down my spine.
ALJ: What's the difference between your lower back and spine?
CLMT: Well the spine is in the center of your back . . .
ALJ: . . . I don't know the difference between the spine and the low back. What distinction are you making?
CLMT: I said right above the hip.
CLMT: Above the hips.
CLMT: Right.

ALJ: What's that, the spine or the lower back?
CLMT: The lower back.
ALJ: Okay. Now where's the spine then?
CLMT: Right in the center.
ALJ: Same spot?
CLMT: No, down, I said the spine is in the center of your back.
ALJ: Yes, the spine is in the center all the way from your neck to your tailbone. And so that includes your lower back I would think.

In this passage, as in the following one, it appears that the judge may be more concerned with revealing the claimant's ignorance than with eliciting testimony about his condition.

CLMT: I have emphysema.
ALJ: Emphysema. What's that?
CLMT: It's like a respiratory problem, breathing, something with the lungs.
ALJ: Okay. What else?
CLMT: And asthma.
ALJ: You have emphysema and asthma?
CLMT: Yeah, that's what the doctor tells me.
CLMT: What's the difference between those two things? If you know.
CLMT: I don't know.
ALJ: Okay. I don't know either.

Finally, judges show rudeness by becoming accusatory. In the following passage also from Mr. Reed's hearing, the judge, during testimony elicited by claimant's attorney, makes an accusation against the claimant, only to recognize his error. The really troubling point is that the information the judge seeks to extract from the claimant is easily verifiable by a doctor and does not require the judge's rude tone:

ATTY: Now do your medications help at all with the pain?
CLMT: Sometimes they slow it down but it don't never stop.
ATTY: And you said that you're taking Tylenol, is that Tylenol number 3?
CLMT: Yeah.
ATTY: With Codeine?

ALJ: Wait, wait, wait, hold it, stop. If you're going to testify, Counsel, we'll swear you in. Where do you get Tylenol number 3 without a prescription?

CLMT: From the same doctor—I said I had it, I told you I take Tylenol.

ALJ: You told me you take Tylenol but you didn't put a number on it. That makes a big difference.

ATTY: So you meant to say Tylenol number 3?

CLMT: Yeah, I meant to say that.

ALJ: You meant to say that.

CLMT: Yeah.

ALJ: Where's the bottle?

CLMT: I told you, I said I didn't bring it.

ALJ: Why? You brought all your other medicine?

CLMT: I thought I had it in there. Sorry, I thought I had it in there.

This interchange concluded as follows:

ATTY: How many of those [Tylenol with codeine] do you take a day?

CLMT: About one every four hours.

ALJ: Will this testimony ever stay consistent? You told me in your testimony, Tylenol, yeah, I'm sorry, my apologies, one every four hours was the same thing you testified.

These findings of judges being rude to claimants, particularly to claimants requiring accommodation given their special needs, suggest that ALJs may be hindering the testimony of claimants with special needs, and in the process, putting these vulnerable claimants at a distinct disadvantage in the hearing and decision-making process.

Failing to Follow Up

In several cases, ALJs failed to follow up testimony of claimants or were indifferent to testimony that claimants with special needs perceived as important. In the case of the unrepresented claimant Ms. Acevedo (87-2767, CA), for example, the claimant testified that she had visited a psychiatrist, but the ALJ never followed this testimony up. Instead of asking the claimant why she visited a psychiatrist or what came of the visit, the judge concluded, "We have reports from him." This finding seems con-

trary to law, given the judge's duty to adequately develop the cases of an unrepresented applicant (*Vidal v. Harris,* 637 F.2d 710 (9th Cir. 1981); *Cruz v. Schweiker,* 645 F.2d 812 (9th Cir. 1981)).[6]

In the case involving Ms. Degryse (88-2082, MA), an alcoholic, the ALJ failed to follow up on a number of pertinent comments. In one passage the ALJ seemed concerned only with the quantity of alcohol consumed and not with whether Ms. Degryse became drunk or passed out (i.e., the physical manifestations of impairments stemming from her consumption) or with why she drank. The decision explained his interest in the quantity of alcohol she consumed: the judge concluded that the claimant's credibility was tarnished because her income prevented her from ingesting the level of alcohol she testified to drinking.

Another judge disregarded the testimony of Ms. Alexander (90-1220, CA), who reported that she went to a psychiatrist because she wanted to run her husband over with a car. The judge followed this disturbing comment with "How do you sleep at night?" Later in this case, the claimant testified that she lived downstairs in one apartment and her son lived upstairs with her mother, his grandmother. The ALJ never followed up with her about how or why this claimant could not care for her son and what the situation might suggest about her ability to function in general. Finally, Ms. Alexander testified that if she had a little extra money, she liked to "you know, free-base." The judge responded by asking, "You like to what?" And the claimant repeated, "Free-base." While it is obvious that the judge did not know what "free-basing" was, he never asked the claimant to explain.

In the case involving Mr. DeAlmeida (87-3402, CA), a Portuguese claimant, the judge failed to follow up on two important comments. First, the claimant testified that he had a strange feeling in his head, "as if there's a ball emptying and filling up, emptying and filling up." The judge then turned the questioning over to the attorney without asking for further clarification. Second, neither the judge nor the attorney followed up when the claimant said, "I have other problems that I should not be discussing here. My sexual life is not what it used to be" when asked whether he had other problems as a result of his diabetes. Questions on the subject could certainly have been asked sensitively and could have provided relevant testimony regarding the effect of Mr. DeAlmeida's diabetes on his functioning. In fact, the judge was so oblivious to this testimony that he erroneously concluded in his decision, "there has been no change in [Mr. DeAlmeida's] family life."

In the case involving Mrs. Karkar (89-3486, CA), a Jordanian woman with a sixth-grade education, a judge failed to follow up the following testimony:

CLMT: I got sick when I was working, and since then, I just can't concentrate on anything.
ALJ: So you—the main reason you couldn't do it would be because you wouldn't be able to concentrate on the job. Is that correct?
CLMT: No, it's because I am sick and nervous.
ALJ: When you say you are sick, what are you referring to?
CLMT: I feel pressure coming to my chest and my—my arms—they get very nervous and tense, and I cry and I scream.
ALJ: You take this medication for your nervousness and your anxiety. Does it help you?

In this passage, the ALJ failed to ask the claimant how often she cried and screamed or what made her do so. Instead, he superficially probed the issue by asking her if the medications helped.

In a similar case involving Mr. Slevin (84-3092, CA), a man suffering from manic-depressive disorder, the claimant revealed a number of detailed stories about his depression, outlining how on one occasion he could not leave his hotel room for two days because of his debilitating sadness. The judge asked no follow-up questions to these relevant and important stories.

In another case, Ms. Galasso (88-0280, MA), an Italian-speaking claimant, asked the judge to look at her hands in general and to look at the bones of her fingers in particular. The judge responded, "I'm not a physician and I would have to say that I don't see anything at this distance which is obvious to me, if you care to describe some." The attorney also asked the judge to look at Ms. Galasso's hands. What is noteworthy about this passage is not whether the judge should or should not have examined her hands but rather his expressed indifference. He concluded the interaction by saying, "Wouldn't mean anything to me."

In Mr. Costello's case (88-7350, IL), the judge asked this unrepresented, illiterate claimant with no formal education to describe any other problems he has. The claimant testified, "I have, I have a ulcer in my stomach. I had it for a long, long time. Sometimes, you know, I forget things, you know." Instead of following up on Mr. Costello's memory problems, the judge responded, "Go ahead. Anything else?"

In the case of Ms. Moore (89-6436, IL), the claimant alleging a mental impairment answered the question "what's bothering you that you can't go to work?" with "Well, I have the—they say it's not [inaudible] in the fact, but I do have constant back pain. Maybe it could be my nerves; I don't know what it is." The judge asked: "Constant rot—where's the pain? Right?" without ever following up on her testimony that her nerves might be bothering her. The judge concluded, "the claimant showed no obvious sign of significant pain or distress either at the hearing or at the prior interviews conducted by Social Security representatives." Can a judge make an eyeball assessment of a claimant's pain or distress if he fails to ask her to elaborate on her nervousness?

These cases are particularly troubling because they involve claimants who do not have the emotional or linguistic capacity to give testimony to fully document their cases; judges further hinder these claimants' testimony by failing to follow up on relevant comments that should have elicited interest.

Implying That the Claimant's Perspective Is Wrong

Judges also often responded negatively to claimants by implying that their perspective was wrong, even though it was frequently later revealed that the judge's negative response was incorrect. One way ALJs imply that claimants' perspectives are wrong is by disregarding them in the decisions. For example, Ms. Acevedo (87-2767, CA) testified that the physician she sees is a specialist. In the decision, however, the judge said that the physician was not shown to have a medical specialty. The federal court decision shows the claimant to be correct, referring to her doctor as an orthopedic surgeon.

The methods judges use to elicit testimony affects, in most instances, both the process and the outcome of the cases. Particularly in cases involving claimants with special needs, judges who lead claimants, infantilize, are unnecessarily judgmental, fail to follow up relevant questions, and imply that claimants' perspectives are wrong can inappropriately prevent an already vulnerable claimant from providing the testimony needed to fully develop the record. These practices reveal the difficulties judges seem to have when required to accommodate or engage claimants and raises serious questions about ALJs' ability to carry out their mandate to provide a hearing process that is fair to all applicants.

These examples provide qualitative evidence that at least some judges

fall far short of their affirmative duty to positively engage or affirmatively assist disability claimants who have special needs. Taking this analysis one step further, these findings provide additional evidence that this sample of Social Security ALJs has tremendous difficulty accommodating claimants and consequently systematically disadvantages certain groups in the hearing and decision-making process.

Unrepresented claimants who are uneducated, are linguistically limited, and/or have alleged mental impairments seem to be severely disadvantaged as they try to negotiate the complicated hearing and decision-making process. My findings show that while judges generally satisfy, at least on the surface, their duty to obtain claimants' acknowledgments and waivers of right to representation, the ALJs do little to help such claimants sincerely participate in the hearing process once the acknowledgment and waiver are obtained.

In addition, the methods ALJs use to elicit testimony indicate that judges put claimants with these special problems at a particular disadvantage. It is not uncommon in cases involving these claimants for ALJs to lead testimony to the point of manipulating it, to infantilize claimants, to be unnecessarily judgmental about behaviors or lifestyles, to be rude, to fail to follow up on relevant questions, and to imply that the claimant's perspective is wrong or to ignore it, particularly when doing so serves the purpose of denying them benefits.

My qualitative data suggest that ALJs' failure to accommodate claimants stems, at least in part, from judges' prejudicial images regarding certain applicants, the evidence they present or do not present, or the impairments they allege. These findings suggest that certain claimants, including the uneducated, the linguistically limited, people alleging mental disabilities, people of color, and women may enter the Social Security disability hearing and decision-making process at a disadvantage. These findings imply that the most vulnerable members of our society, who may present their cases to ALJs without the benefit of the resources available to other claimants, may be confronted with judges who neglect their affirmative duty to accommodate.

The next chapter explores in more depth the stereotypes detected in the hearing transcripts and decisions that may at least begin to explain the results of the numerous quantitative studies that suggest that certain disability claimants are disadvantaged, and even discriminated against, in the process. This evidence too, may help explain why Social Security judges seem to have difficulty engaging claimants demanding special attention.