

***DENIAL BY DESIGN....
....THE ONTARIO DISABILITY SUPPORT
PROGRAM***

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1. INTRODUCTION

“This government has kept yet another promise. We have created a separate income support program for people with disabilities that meets their unique needs. One more important commitment of the Common Sense Revolution has been realized for the benefit of these Ontarians.” – Minister of Community and Social Services, Jane Ecker, announcing the proclamation of the Ontario Disability Support Program, June 2, 1998.¹

“A lot of people being denied ODSP really do qualify at the very onset when they apply. But they are denied...Some of these people have to go through the whole appeal system, and it's costing a lot of taxpayers' money, when they shouldn't have been denied in the first place. I fail to see how this is streamlining the process to work better for disabled people and to work better for the taxpayers.” – Sonia Levesque-Parsons, West End Legal Services, Ottawa, November 29, 2000.²

In June 1998, Ontario's provincial government proclaimed the *Ontario Disability Support Program Act* (ODSPA), legislation intended to provide income and employment supports for people with disabilities. The ODSPA was purported to be based on extensive consultation with the disabled community and, according to the Minister of Community and Social Services at the time, marked the “start of a new era of fairer treatment and more opportunity” for these people.³ The reality has been very different.

While the financial and employment supports associated with the Ontario Disability Support Program (ODSP) surpass those found in Ontario's welfare program, large numbers of disabled people are simply unable to access them. Individuals are caught in an exceedingly complex application process of lengthy medical reports, tight timelines, delays and unfair, unaccountable adjudication. No supports are built into the process – individuals are on their own. It is a system that would be difficult for anyone to navigate. For people with special needs, the barriers are often insurmountable.

As a result, thousands of people who should be receiving ODSP supports are struggling to survive on meagre welfare benefits or no income at all. Their health, housing and overall well-being are being jeopardized because of a process seemingly designed to ensure failure. Of those who succeed in accessing ODSP,

¹ Legislative Assembly of Ontario, *Hansard* (June 2, 1998). Accessed online: http://www.ontla.on.ca/hansard/house_debates/36_parl/session2/L019a.htm#P95_21312

² Social Planning Council of Ottawa, *The Experience of People with Disabilities in Ottawa and the Ontario Disability Support Program: Report of the Public Forum held November 29, 2000* (Ottawa, October 2001) at p.13.

³ Hon. Janet Ecker, Legislative Assembly of Ontario, *Hansard*.

many must do so through the appeal process, an additional layer of complexity and delays. The cost to individuals of the complicated and unfair ODSP application process is huge. The cost to the community, in terms of resources devoted to assisting applicants and appealing poor decisions to deny benefits, is equally enormous. This is not a system that meets the “unique needs” of disabled people, as the provincial government boasted in 1998. Rather it is a system that fails to accommodate their needs.

About this report

The following report is an attempt to outline the most problematic aspects of the ODSP application and adjudication process and make recommendations for change. Our focus is the “front end” procedural issues associated with ODSP, from the point where an individual first applies for disability benefits to where he/she is either denied or granted those benefits. There are many problems associated with ODSP for those *receiving* benefits, such as the adequacy of the benefit levels, employment supports, and client services. Those problems will not be discussed in this report. Similarly, discussion of problems with the definition of disability under the ODSPA and the social assistance appeal process, generally, will have to be saved for a future report.

We would also like to stress that in our view ODSP and Ontario’s social assistance system need far more than mere reform. The entire income security system needs an overhaul. The current system is based on discriminatory and misguided assumptions, and is fundamentally flawed. We need to develop a new income security system that truly meets the needs of Ontarians.

2. BACKGROUND TO THE ONTARIO DISABILITY SUPPORT PROGRAM LEGISLATION

As part of its election platform, the Progressive Conservative Party proposed to reform the social assistance system that had been in place in Ontario for over thirty years. In May and June 1998, the new legislation came into effect: the *Ontario Works Act* (OWA) and the *Ontario Disability Support Program Act* (ODSPA) replaced the *General Welfare Assistance Act*, the *Family Benefits Act*, and the *Vocational Rehabilitation Services Act*.

The two crucial elements of the government’s social assistance reform consisted in establishing a unique income supplement program for the disabled and seniors, which would be separate from the program for all other social assistance

recipients, and adopting stricter enforcement mechanisms with respect to welfare recipients.

The development of a separate social assistance program for persons with disabilities began shortly after the election of the new Ontario Conservative government in June 1995. Details of the ODSP were announced in June 1997 by the Ministry of Community and Social Services (now the Ministry of Community, Family and Children's Services, hereinafter the Ministry), the provincial ministry responsible for social assistance programs. The program was described as a response to the concerns and needs of persons with disabilities that would protect and preserve the benefits which persons with disabilities had received under the *Family Benefits Act*, while assisting them to become independent and securing employment.

The ODSP did contain some improvements over the Family Benefits system, particularly in relation to the amount of earnings and assets that a recipient could retain and in the concept of developing a program focused on the needs of disabled residents. These improvements were clearly directed at gaining the approval of the disability community, which commands significant public support for its issues.

There are, however, broader implications associated with the creation of a separate social assistance program for persons with disabilities and the artificial divide it creates between so-called "deserving" and "undeserving" poor, as well as the specific changes to entitlements within the ODSPA. Unfortunately, discussion of these issues is beyond the scope of this report.

3. OVERVIEW OF THE ODSP APPLICATION AND DISABILITY DETERMINATION PROCESS

The application process for ODSP is a two step process that involves an initial screening to determine basic *financial* eligibility, followed by a process for establishing *medical* eligibility. Applicants must first qualify financially for ODSP before they can obtain the information package needed to document their disabling condition(s).

Applicants for ODSP follow one of two possible routes depending upon whether there is also a need for immediate financial assistance. Where there is such a need, an application is initiated with the local Ontario Works office which does an initial financial screening for ODSP and, where it determines appropriate, provides a Disability Determination Package (DDP) to the applicant. If the

applicant's asset level is above the legislated limits for OW, he/she has the once-in-a-lifetime option of using the ODSP cut-off, which is substantially higher.⁴

Applicants who are not eligible or who do not wish to apply for OW, can apply directly to a local ODSP office which also does an initial financial screening, provides the DDP and makes the electronic referral to the Disability Adjudication Unit (DAU). The two following charts illustrate the steps in the two methods of application.

Figure 1: Applying through the OW office

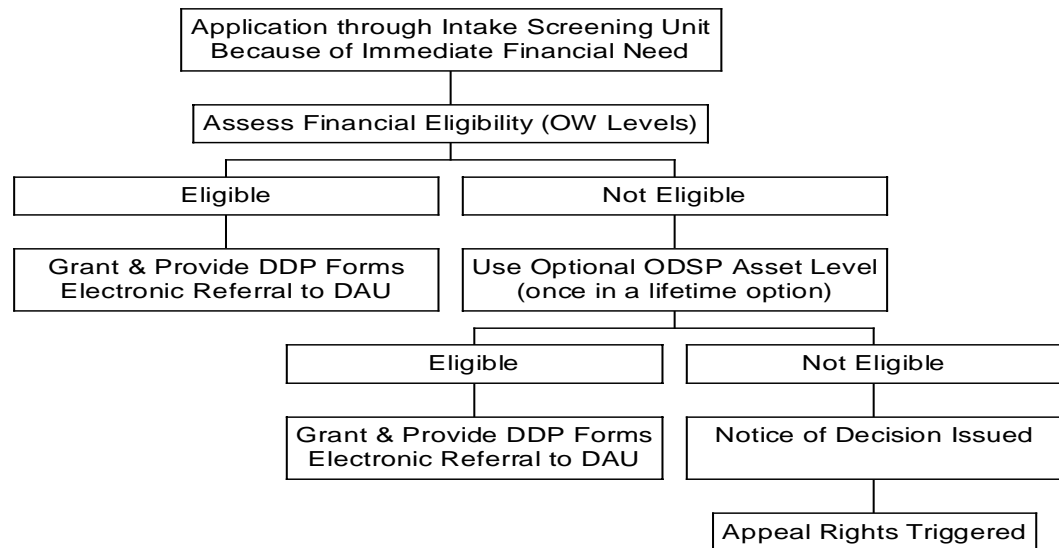
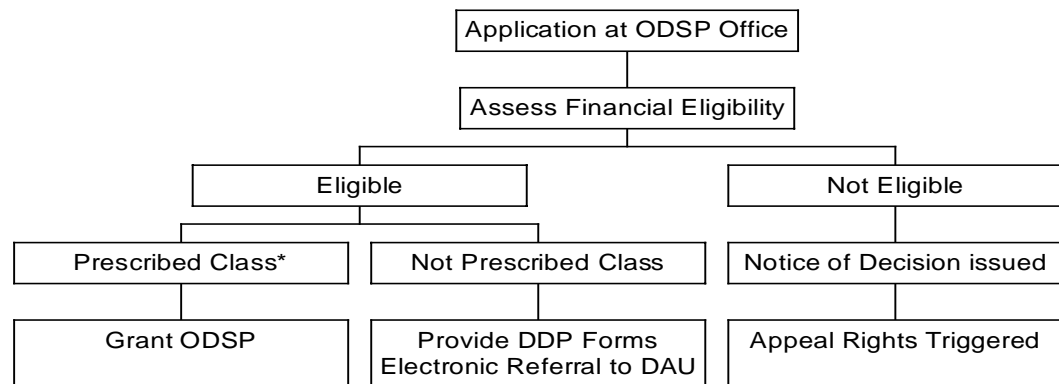


Figure 2: Self-referrals to ODSP



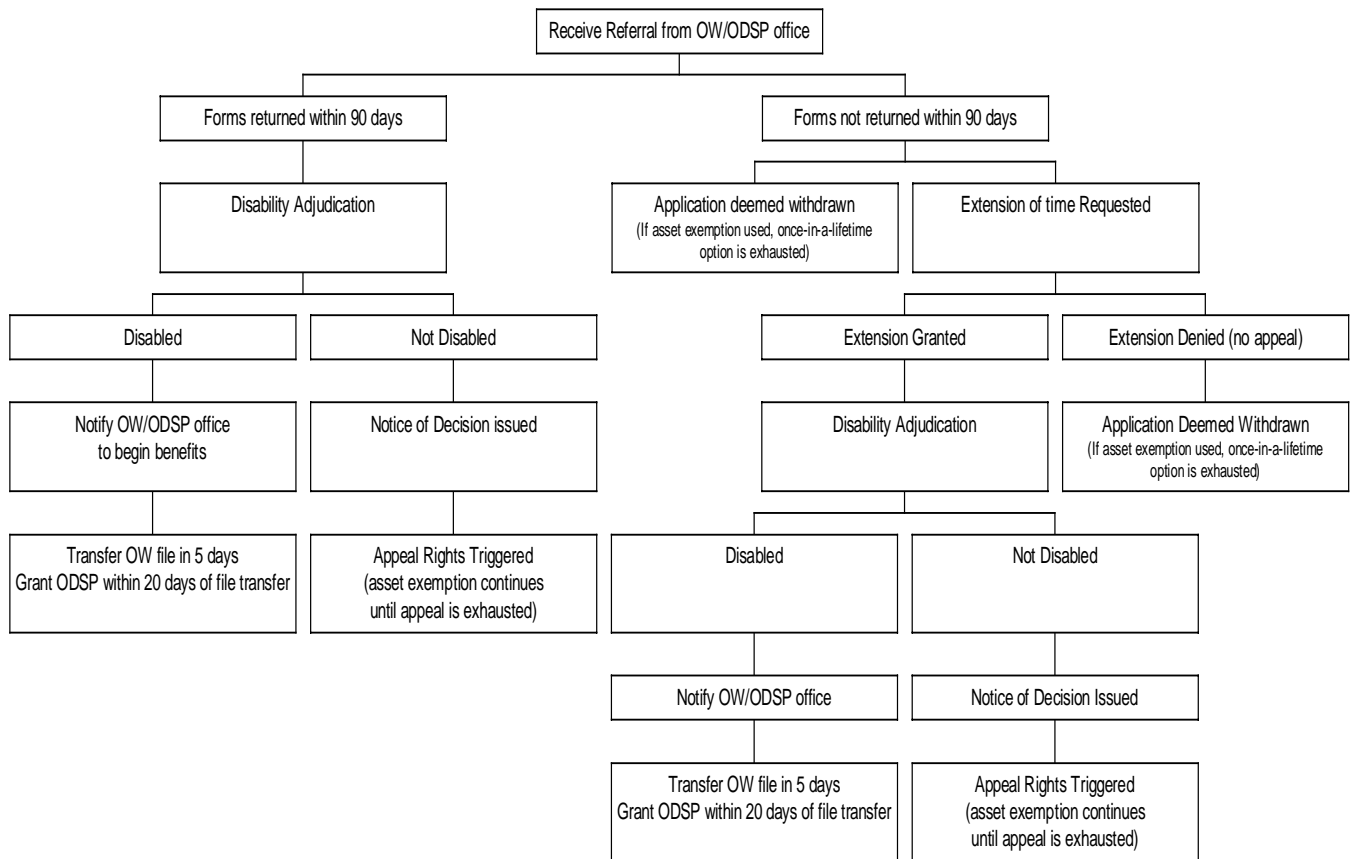
*Applicants in prescribed classes can be held eligible for ODSP without going through the disability adjudication process. Prescribed classes include: applicants 65 years or older who are not eligible for Old Age Security; applicants receiving Canada Pension Plan disability benefits; residents of psychiatric facilities; residents of a facility under the *Developmental Services Act*; and residents of a home under the *Homes for Special Care Act*.⁵

⁴ Under ODSP, an individual is permitted an asset level of \$5000 while under OW, he/she is only permitted assets of \$520 (Ontario Regulation 134/98, Section 38(1); Ontario Regulation 222/98, Section 27(1)).

⁵ Ontario Regulation 222/98, Section 4.

Once an applicant has passed the financial screen, he/she has the responsibility of ensuring that the DDP is completed by the specified health professionals and returned to the DAU within 90 days. If it is not returned within that period and no extension has been requested and granted, the application will be deemed abandoned and an applicant who still wishes to apply will have to start again. When the necessary parts of the DDP are received by the DAU, the application is assessed by a health professional and a determination is made as to whether the applicant’s condition meets the definition of “disability” in the ODSPA. An applicant who is turned down by the DAU can request an Internal Review and, if as is usually the case, the Internal Review is not successful, the applicant can appeal to the Social Benefits Tribunal (SBT) for a hearing. The SBT is a quasi-judicial tribunal that reviews decisions related to Ontario’s social assistance programs. The chart that follows illustrates how in the disability adjudication process is supposed to work:

Figure 3: The disability adjudication process



4. THE APPLICATION PROCESS IN MORE DETAIL

In late January 2000, the Province launched a new delivery model for both ODSP and the municipally managed OW program. According to the Province, its Service Delivery Model (SDM) was intended to, among other things, “modernize the delivery of social assistance, improve client service... and save taxpayers money.”⁶ The reality has been decreased accessibility and service standards for both applicants and agencies assisting applicants. Municipal OW delivery agents such as the City of Toronto have publicly expressed their concern that the new model adversely affects the ability of their clients to access ODSP.⁷

A) FINANCIAL SCREENING THROUGH THE LOCAL OW OFFICE

About 56% of all ODSP applications are initiated through Ontario Works.

About 56% of all ODSP applications are initiated through Ontario Works.⁸ Formerly, applicants for municipal social assistance, including those who might also wish to apply for disability benefits, could go to a local social assistance office and make a personal application. The new delivery model requires all OW offices to operate a centralized call centre called an Intake Screening Unit (ISU), to carry out the initial eligibility screening for OW and, where indicated, OSDP. This means applications can no longer be initiated in person.

What happens in this initial interview is extremely important. The ISU is authorized to reject an applicant if he/she:

- i) has total income or assets in excess of legislated limits;
- ii) resides with his/her parents, is not financially independent and has no dependants his/her own;
- iii) is a single person and ineligible because of Ontario Works fraud.
- iv) is a single person who is incarcerated fulltime;
- v) is a single person without dependents and in receipt of a student loan; or
- vi) resides outside of Ontario.

Applicants who are rejected at this stage are not given the forms necessary to complete an ODSP application and, most importantly, are not scheduled for an in-person *Intake Verification Interview*. In theory, applicants are entitled to object to a rejection by the ISU, which will then trigger an in-person interview. In practice, serious access issues, such as the following, create a high risk of premature and inappropriate rejection:

⁶ Ontario Ministry of Community and Social Services, *Roles and Responsibilities – 2001: the Provincial Municipal Relationship in Human Services* (Toronto, 2001) at p.25.

⁷ Commissioner of Community and Neighbourhood Services, *Report to the Community Services Committee on Ontario Disability Support Program Impacts* (Toronto, August 9, 2001).

⁸ Meeting between the Steering Committee on Social Assistance, a provincial group of legal clinic advocates, and the Director and other representatives of the OSDP Branch, January 14, 2002.

Lack of access to a telephone

The ISU telephone interviews can take from 40 minutes to an hour or more to complete. That is *after* the applicant may have waited on hold for an extended period. It should come as no surprise that many potential applicants, particularly those without permanent housing, do not have telephones. The length of the interview process makes it difficult for community agencies to provide telephones for this purpose. The need to find telephone access impacts the most isolated and vulnerable of potential applicants most severely.

Communication barriers

A telephone eligibility interview requires at least a basic level of proficiency in conversational English or French. Aside from the intimidating effect of having to conduct a telephone interview, the chance of misunderstanding the meaning or significance of questions in a telephone interview are extremely high. The concepts relating to income and assets within the meaning of the *Ontario Works Act* are not easy to communicate or understand. Without body language, documents or other aids to communication, those with limited official language skills or limited communication ability are extremely disadvantaged.

Mental disabilities

Mental illness, cognitive impairment, attentional deficits, memory problems, or severe anti-social behaviour can make a productive telephone interview impossible for the most vulnerable and needy applicants. This is a particularly troubling problem for the homeless, whose marginalized condition makes participation in this kind of screening process exceptionally difficult. Estimates suggest that a large number of the homeless population are suffering from mental illnesses, but are unable to access appropriate community supports such as ODSP.⁹

Estimates suggest that a large number of the homeless population are suffering from mental illnesses, but are unable to access appropriate community supports such as ODSP.

⁹ According to the City of Toronto's Report of the Mayor's Homelessness Action Task Force, *Taking Responsibility for Homelessness* (January 1999), approximately one third of the homeless population suffers from mental illness. As many as 75% of single women in hostels have a mental illness. The *Report on Homelessness in Sudbury* (October 2001) prepared by the Sudbury Social Planning Council found that approximately 17% of homeless people surveyed identified illness or mental illness as the cause of their homelessness. In *Describing the Homeless Population of Ottawa-Carleton* (February 2000) by the University of Ottawa, a diagnosable mental health problem was found in 60% of adult men surveyed who were using the shelter system and 74% of adult women. 14% of the men and almost 40% of the women had been hospitalized for mental health problems. The Income Protection Working Group, a volunteer group that works with homeless people in Toronto, reported that a "very large proportion" of the homeless people they surveyed in the summer of 1999 should have been entitled to ODSP benefits (*Report of the Income Protection Working Group* (June 9, 2000) at p. 8).

ISU policy requires that applicants deemed “not suitable” for the call centre process be referred to local OW offices for an in-person interview. However, effective operation of that policy presumes that callers are first, able to use a telephone at all and second, able to communicate to a level that will allow for a mutual understanding that a referral to the local office is to be made. Furthermore, cognitive impairment, attentional deficit and memory problems may be too subtle to be identified in a telephone screening interview as a basis for local office referral.

Physical disabilities

The call centre approach is not at all sensitive to those with disabilities such as hearing impairment, deafness or speech impairment. Even if applicants did happen to have access to TTY equipment, few ISU’s are so equipped. Alternatives such as interpretation or Bell Relay Services are difficult to co-ordinate with ISU access and require organization well beyond the capability of the most marginalized applicants. Similarly, applicants with disabilities that make it difficult to tolerate the physical demands of a prolonged telephone call will be unable to effectively initiate an application using the required method.

Cultural barriers

The telephone screening interview requires the explorations of personal and family information that most of us would consider to be extremely private. To successfully complete the process, applicants must give verbal agreement to disclose the information that has been provided. A telephone interview provides little opportunity to develop the personal rapport or support that some individuals will need to provide the necessary level of disclosure. Applicants who are uncomfortable with the format and reticent to provide information will find themselves disqualified.

Level of legal and administrative sophistication

As noted above, the telephone screening process gathers a broad range of personal information related to personal and family composition, assets and income, some of which is far from straightforward. In addition, the process is primarily designed to assess eligibility with respect to OW. An applicant who focuses on financial need, but not disability, may never be assessed for a potential ODSP application. This is significant because eligibility requirements, especially in the area of assets, are much stricter for OW than ODSP. An applicant who is being screened out because of assets might not think to specifically raise the issue of disability or know to request the special asset treatment that can be made available where an ODSP application is to be made. Finally, an unsophisticated

applicant who is rejected during the telephone screening may simply give up or may fail to understand the right to object or may be unable to meet the incredibly short 10 day time limit for filing an objection.

Inconsistent practices across the province and from worker to worker

The ISU experience across the province and even within the same delivery area can be remarkably inconsistent. Some areas use fully experienced caseworkers who have a depth of knowledge with respect to program eligibility issues. Others have recruited entirely new staff for their call centres. Reports from advocates around the province have identified inconsistent conclusions by call centre staff as to eligibility as well as an ongoing failure to appropriately identify “complex cases” for whom telephone assessment is inappropriate. A recently completed “Intake Study” conducted for the Province found that some ISU workers are making determinations of “ineligibility” but recording only that the “applicant chose to discontinue” on the file, thus extinguishing appeal rights and depriving the applicant of required notification.¹⁰

A recently completed Provincial “Intake Study” found that some ISU workers are making determinations of “ineligibility” but recording only that the “applicant chose to discontinue”, thus extinguishing appeal rights.

B) DIRECT APPLICATION TO ODSP

For individuals who do not intend to apply for OW while they are waiting for the ODSP eligibility process to take place, applications are made directly to the local ODSP office. Approximately 44% of ODSP applications are made in this way.¹¹

Application to a local ODSP office also requires an initial determination of financial eligibility as a condition of providing the Disability Determination Package (DDP) that will allow the applicant to move to establishing medical eligibility. While direct application has the advantage of being an in-person process, there has been a very serious problem with respect to establishing the proper eligibility date where an initial denial of financial eligibility was successfully appealed many months later. In addition, representatives from agencies serving those who are not able to attend an office interview, including those who are not mobile or who suffer from extreme social marginalization, have reported significant difficulties with getting appropriate levels of co-operation from some local ODSP offices.

¹⁰ Government of Ontario, *Intake Study – Final Report: Study of the Ontario Works New Application Process* (Toronto, December 2001).

¹¹ Meeting between the Steering Committee on Social Assistance, and the Director and other representatives of the OSDP Branch, January 14, 2002.

C) RAPID REINSTATEMENT OF ODSP

Some former ODSP recipients can re-apply for ODSP after a period of financial ineligibility and be granted benefits without going through the full adjudication process again. This is called “rapid reinstatement”. For example, former Family Benefits recipients who had been transferred, or “grandparented”, to ODSP and who subsequently become ineligible due to excessive employment or business earnings are entitled to rapid reinstatement of their benefits if they become financially eligible again within a year of leaving ODSP. Similarly, former recipients who were originally found eligible for ODSP through the DAU’s adjudication process are entitled to rapid reinstatement without having to re-establish medical eligibility as long as they re-apply before any scheduled medical review date. These former recipients should be able to get back onto ODSP quickly and simply. In practice, however, the Ministry often fails to apply its rapid reinstatement policies, forcing these applicants to start from scratch and go through the entire application and adjudication process. This is particularly problematic for grandparented FB recipients, who will lose their “grandparented” status and may find it difficult to meet the ODSPA definition of disability as interpreted by the Disability Adjudication Unit.

D) ELECTRONIC REFERRAL TO THE DISABILITY ADJUDICATION UNIT

Once an applicant has passed through the initial financial screening and has been given a DDP, an electronic referral is made by the OW office or the ODSP office to the Disability Adjudication Unit (DAU). The electronic referral gives the DAU notice that the application has been made and also marks the beginning of the time period for the applicant to get the completed DDP in to the DAU.

There are many instances of a failure of OW to actually make the electronic referral. When this happens, the DAU does not know that the applicant has passed the financial screening and will not proceed with the application. Considerable time may pass before the applicant realizes that there is a problem with the application. Often an unusual delay will be noted by the applicant’s OW caseworker but because the new delivery model has eliminated any easy liaison between OW and ODSP, OW caseworkers cannot confirm that a delay is due to a missed electronic referral.

Even when the problem is identified, there can be prolonged difficulties with getting an electronic referral registered retroactively and getting the correct application date recognized. The latter is important because it will establish the effective date from which retroactive benefits will be paid if the application is successful.

E) COMPLETING THE DISABILITY DETERMINATION PACKAGE

Adequate completion of the Disability Determination Package (DDP) is the most significant challenge for ODSP applicants. As the Commissioner of Community and Neighbourhood Services for the City of Toronto notes,

It is generally acknowledged that the ODSP application process is involved and complex.

...

To that end, all individuals applying for ODSP must obtain and complete a Disability Determination Package (hereafter referred to as the Package). Complex information is requested, which must usually be provided by a range of medical specialists, depending on the nature of the disability claim. In most cases, substantial support is required to complete the forms included in the Package. Applicants may also face direct costs related to obtaining information and assistance from medical professionals, which can range from \$50.00 to \$120.00. The package must be filled out and forwarded to the DAU within the allotted 90 days.¹²

“Self-reliance” or “free fall” for the most vulnerable?

There are four components to the DDP:

- the Health Status Report (HSR);
- the Activities of Daily Living (ADL) form;
- the Self Report (SR); and
- the Consent to Release Medical Information (Consent) form.

The ODSP delivery model does not include assistance or support to applicants in getting these forms completed adequately. Formerly, municipal social assistance caseworkers could make direct referrals of clients to ODSP and could directly observe and document obvious limitations, but that is no longer permitted. OW workers are expected to do no more than hand out a DDP and, perhaps, make a referral to a community agency.

Ironically, the complexity of the package, the lack of any resources to provide support to applicants or even to reasonably accommodate the very disabilities that underlie the program, make the program least accessible to those who are most vulnerable. The Province justifies its approach as one that emphasizes “self-reliance”. The reality is that many disabled persons simply fall through the cracks and are unable to make or effectively complete the application process. In the 2000/2001 fiscal year, almost 40% of applicants referred to the DAU did not, ultimately, submit a DDP package.¹³

The complexity of the application package, the lack of any resources to provide support to applicants or even to reasonably accommodate the very disabilities that underlie the program, make the program least accessible to those who are most vulnerable.

¹² Commissioner of Community and Neighbourhood Services, *Report to the Community Services Committee on Ontario Disability Support Program Impacts*, at p. 3.

¹³ Based on statistics provided by the Ministry of Community and Social Services, ODSP branch, 2002.

Medical practitioners are similarly left without adequate supports and many find the package confusing and difficult to complete. Frequently, they do not understand the content of the forms or the perplexing grading systems that are used. It has been reported in the legal clinic system that there is significant regional variation in how practitioners complete the different parts of the DDP suggesting that the forms are not sufficiently clear. Nowhere within this package can one actually find the legislated definition of disability; practitioners are expected to complete the forms without knowing what the disability adjudicators are actually looking for. Health practitioners also frequently complain that the \$70 to \$75 which the Province provides to complete the HSR and ADL forms is insufficient.¹⁴ As a result, many practitioners rush through the forms, providing insufficient detail on the applicant's impairments. Others charge an extra fee to applicants for completing the forms.¹⁵

While these issues cut across the entire DDP, each form has its own particular problems. These are briefly discussed below:

The Health Status Report

The Health Status Report is intended to bring together information regarding the applicant's disabling medical condition. It includes questions on, among other things, the applicant's diagnosis, the date on which the condition first occurred, the likely duration of the impairments, any hospitalizations, and required medications. Only physicians, psychologists, optometrists and certain registered nurse practitioners are qualified to complete the HSR.¹⁶

A common complaint about the HSR is that it fails to adequately capture multiple disabilities and their combined impacts on applicants. Question after question is focused on the applicant's "principal" condition. It is only toward the end of the form that a question explicitly requests information on "other" conditions. This bias in favour of individual ailments seemingly contradicts the Province's own guide to disability determination which stresses the "whole person concept": an applicant's conditions and their impact on his/her life must be considered together, cumulatively.¹⁷

The focus on principal impairments is particularly damaging where one of the applicant's conditions is cognitive. The HSR includes an *optional* section called

¹⁴ Ontario Ministry of Community, Family and Children's Services, ODSP Policy Directive 0201-03. Health practitioners receive \$50 for the completion of the HSR and \$25 for the completion of the ADL. However, if the same practitioner completes both forms, he/she only receives \$70.

¹⁵ Social Assistance Action Committee, *Report of the Toronto Access to ODSP Forum* (Toronto, March 18, 2002).

¹⁶ Registered nurses who hold an extended certificate of registration only became qualified to complete the HSR in December 2001.

¹⁷ Ontario Ministry of Community and Social Services, *Disability Determination Manual* (Toronto, June 1998) at p.i.

the Intellectual and Emotional Wellness Scale, which provides additional questions relating to psychological functioning. The instructions to the HSR state that practitioners should only complete this section if the applicant's *principal* condition is mental or intellectual. As a result, health practitioners completing the HSR regularly fail to adequately document applicants' cognitive conditions, which can be extremely debilitating.

The Scale itself presents problems as it does not correspond with the ODSP legislation. While the ODSPA refers to "substantial" impairments and restrictions in its definition of disability, the choices in the Intellectual and Emotional Wellness Scale are "mild", "moderate" and "severe".¹⁸ In addition, some of the questions collapse multiple mental conditions into a single category, potentially misrepresenting the extent of an applicant's disability.

The HSR also fails to clearly stress the necessity of including supporting documents such as hospital records, laboratory reports, x-rays, etc. Many health practitioners do not recognize the need to submit these documents, and, as a result, applications are often held up, or more likely, denied outright due to insufficient medical documentation.

The Activities of Daily Living Form

The most confounding form in the DDP is the Activities of Daily Living form. As its title suggests, this form is intended to collect information on the applicant's ability to perform "daily living" activities, such as eating, grooming, shopping, socializing, taking care of his/her home, going to work, and handling finances. In addition to the practitioners qualified to complete the HSR, occupational therapists, physiotherapists and chiropractors can complete the ADL form.

A major concern with the ADL form is the grading system used to determine an applicant's level of impairment. The system is extremely complex and does not appear to accurately assess an applicant's ability to function at home, work or in the community on a day-to-day basis. It utilizes letter grades between A and G with each grade corresponding to six different variables, such as the type and level of assistance needed, the impact of the impairments on the applicant's lifestyle, and whether the impairments present safety concerns. Because each letter grade has a number of different meanings depending on the variable considered, an applicant could conceivably get multiple grades for any one question. In addition, like the Intellectual and Emotional Wellness Scale discussed above, the ADL form's scale is disconnected from the definition of disability in the legislation: "substantial restriction" is nowhere to be found. As the form provides minimal space for elaboration on the ratings given, it is very difficult to overcome these limitations.

The ADL form's grading system is extremely complex and does not appear to accurately assess an applicant's ability to function at home, work or in the community.

¹⁸ ODSPA, Section 4(1).

The questions in the ADL form are also problematic. In particular, there is an imbalance in the attention given to different activities of daily living. While there is an abundance of questions relating to basic personal care and minimal physical functioning, there are no questions that explicitly deal with an applicant's ability to function in the workplace. This problem is compounded by the fact that the phrase "activities of daily living" appears to have a more limited meaning in the medical profession than in the ODSP legislation. Health practitioners may assume that it primarily refers to activities related to basic personal care and, thus, underreport restrictions to other areas of functioning. The questions also fail to adequately address mental health and tend to assume that conditions are stable from day-to-day, ignoring the fact that for many individuals, there may be significant fluctuations.¹⁹

The ADL form requires a depth of knowledge about the applicant that few of the "approved" health practitioners will possess.

Finally, advocates for people with disabilities consistently comment that the ADL form requires a depth of knowledge about the applicant that few of the "approved" health practitioners will possess, or, given the minimal payment provided for completing the form, will take the time to develop. Many have suggested that social workers be permitted to complete the form. These workers generally have a more detailed understanding of their clients' conditions and the impacts these conditions have on their lives. Unfortunately, the Ministry has to date, refused to expand the list of qualified practitioners to include social workers. Ultimately, the ADL form creates a situation where an applicant whose disability results in substantial restrictions to his/her activities of daily living may actually appear "on paper" to be reasonably high functioning. The form and its grading scale do not provide a valid or reliable measurement of these restrictions.

The Self Report

The optional Self Report is the one form in the DDP which gives applicants a chance to describe their disabling conditions in their own words. However, as the Province provides no supports to applicants completing the form, those with literacy problems, whose first language is not English or French, or who have cognitive impairments are often effectively shut out. There are also concerns that the Self Report is given little, if any, consideration in the disability adjudication process.

A new Disability Determination Package?

For the past few years, the ODSP branch of the Ministry has been redrafting the forms in the DDP. In late 2000, the Ministry held consultations with community and consumer groups, legal clinic workers, and the Ontario Medical Association to get feedback on a new ADL form. While many groups provided detailed

¹⁹ Income Protection Working Group, *Report of the Income Protection Working Group* (Toronto, June 9, 2000).

recommendations, the revised ADL form seems to have been abandoned. Subsequently, the Ministry redrafted the HSR and the ADL forms, combining them into a single form. It is also in the process of revising the Self Report. The Ministry indicated that it met with the Ontario Medical Association to discuss the redesign of the HSR and ADL, and it has received suggestions from legal clinic workers on the new SR.²⁰ However, consultations appear to have been much more limited this time around.

This new DDP is tentatively scheduled for release in early 2003. Preliminary indications are that the combined HSR and ADL form is unlikely to adequately address the problems with the old forms. Significantly, the Ministry has done nothing to address the critical lack of supports available to help applicants complete the DDP. This section of the report will be revised when the new forms become publicly available.

Recommendations for the ODSP application process:²¹

1. Change the call centre (ISU) process so ODSP applicants can easily bypass telephone screening and have their application taken in person by ODSP staff.
2. Simplify and shorten DDP forms. Make the revised forms public and allow for community consultation.
3. Link questions on the DDP forms to the legislated definition of disability, and instruct health practitioners to include their clients' medical/test reports.
4. Provide clear language information and training on the application process for applicants, community agencies and health practitioners.
5. Provide support workers to assist applicants in getting through the process. This would include providing ODSP liaison workers in OW offices and funding trained community workers to outreach to disabled individuals in the community, including those living on the street.

²⁰ Meeting between the Steering Committee on Social Assistance, and the Director and other representatives of the ODSP Branch, January 14, 2002.

²¹ The recommendations presented in this report are a slightly modified version of recommendations produced by the ODSP Action Coalition, a province-wide coalition of community and legal clinic advocates working to reform ODSP. The Coalition developed these recommendations on the basis of extensive community consultation.

5. DISABILITY DETERMINATION

“The Tribunal wonders if the Disability Adjudication Unit actually read the application. To read this report and then see the Disability Adjudication Unit say the Appellant does not have a substantial mental impairment is disturbing.” – Social Benefits Tribunal in its reasons for overturning a decision of the Disability Adjudication Unit to deny benefits to an ODSP applicant.²²

A) THE DISABILITY ADJUDICATION UNIT

Some of the most glaring injustices with the ODSP eligibility process are associated with the Disability Adjudication Unit, the centralized body established to make determinations of disability under the ODSPA. The DAU is located in Toronto and is composed of 22.5 full-time adjudicators who have backgrounds in various health professions including general practice, occupational therapy, nursing, physiotherapy, kinesiology and neurology. Completed application packages are reviewed by individual adjudicators who, with the aid of the Ministry-developed *Disability Determination Manual*, make a decision as to whether an applicant is a “person with a disability” and therefore eligible for ODSP. After a decision is made, the DAU electronically sends a notice to the local ODSP office (and the OW office if the person did not directly apply for ODSP), advising it of the decision. It also sends a letter to the applicant notifying him/her of the decision and, where there has been a determination of *ineligibility*, the right to request an Internal Review. In 2000/2001, 37,000 cases were referred to the DAU for adjudication.²³

The DAU has proven to be a major barrier for disabled individuals attempting to access ODSP supports.

While ostensibly an attempt to bring more thorough analysis and greater consistency to the disability adjudication process, the DAU has proven to be a major barrier for disabled individuals attempting to access ODSP supports. The thrust of its decisions over the past four years have been in the direction of proving *ineligibility*, rather than fairly and objectively determining whether an applicant meets the definition of disability under the ODSPA. Approximately 50% of applicants who submitted a DDP have been denied by the DAU since the ODSPA was proclaimed in 1998.²⁴ If we take into consideration those applicants who were referred to the DAU, but who did not ultimately submit an application package, the “effective” denial-rate jumps to 65%.²⁵ As will be discussed later, the large volume of DAU denials that are successfully challenged on appeal to the Social Benefits Tribunal speaks clearly to the problems associated with the DAU’s decision-making process.

²² Ontario Social Benefits Tribunal, Tribunal File No. 9811-01198 (1999). This SBT decision and the decisions to follow have been taken from appeals handled through the community legal clinic system.

²³ ODSP branch statistics, 2002.

²⁴ Based on ODSP branch statistics, 2002.

²⁵ *Ibid.*

B) THE ADJUDICATION PROCESS

The following section of the report documents some of the most commonly reported problems with the DAU's adjudication process. To illustrate these problems, we will make extensive reference to appeal decisions of the Social Benefits Tribunal overturning DAU determinations of ineligibility.

Interpreting the definition of disability

Under the ODSPA, a person is held to be disabled and potentially eligible for benefits if,

- i) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
- ii) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in the workplace, results in a substantial restriction in one or more of these activities of daily living; and
- iii) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.²⁶

A recent decision by the Ontario Court of Appeal in *Gray v. Director of ODSP* held that this definition of disability is actually broader than the definition under the previous Family Benefits legislation and that ODSP is designed to assist individuals whose disabilities are significant, but not necessarily "severe". It also held that applicants must be considered in the context of their specific situations and not as merely a set of abstract medical conditions, that the ODSPA should be interpreted broadly and liberally, and that any ambiguities in interpretation should be resolved in favour of the applicant.²⁷

In practice, however, it appears that the DAU only rarely applies the legislated definition of disability in the manner suggested in *Gray*. All too often, DAU adjudicators fail to consider the "whole person" when determining whether an individual is disabled under the ODSPA. Rather than considering the cumulative impact of an applicant's various physical and mental conditions, skills, education, literacy level, etc., adjudicators tend to merely see a set of individual medical diagnoses. Often the test appears to be whether *any* person with these particular conditions is substantially restricted in his/her activities of daily living, rather than whether *this* person (with his or her particular life circumstances) is substantially

²⁶ ODSPA, Section 4(1).

²⁷ *Gray v. Director of the Ontario Disability Support Program* (April 25, 2002), Docket No. C37008 (C.A.).

restricted. In addition, contrary to the interpretation suggested in *Gray*, the DAU often sets a very high threshold for a determination of disability, frequently requiring applicants to have a “severe” disability or be “extremely” impaired.²⁸

Adjudication as a “paper process”

Adjudicators never meet with applicants in person to discuss their conditions.

The tendency to treat applicants as a set of abstract conditions is related to the nature of the adjudication itself: it is a “paper” process. The DAU makes decisions about complex conditions purely on the basis of the Disability Determination Package and supporting medical reports. Adjudicators never meet with applicants in person to discuss their conditions and how these conditions effect their lives. Reports, alone, can rarely communicate the true extent of a person’s disability. The forms contained in the DDP, with their poor design, lack of clarity, and focus on principal conditions, have made matters significantly worse. It is not unusual for the SBT, in overturning a decision of the DAU, to explain its decision in part by commenting that, unlike the DAU, it had the benefit of seeing the applicant in person and hearing his/her story.²⁹

Making the diagnosis

Applicants’ personal health practitioners, with their extensive knowledge of individual applicants and their conditions, can partially offset this problem with the process. They have the potential to communicate an applicant’s “reality” to the DAU. Under the previous Family Benefits legislation, medical consultants hired to make recommendations as to whether or not an applicant was disabled tended to give significant weight to the opinions of the applicant’s doctor, psychiatrist, physiotherapist, etc. This is no longer the case. DAU adjudicators regularly ignore or over-rule the opinions of these practitioners. For example, in one case where the SBT overturned a decision of the DAU to deny ODSP benefits, the Tribunal commented that it could “only conclude after reviewing the DAU adjudication summary...that the report of Doctor R [the applicant’s psychotherapist]...was given no more than a superficial review...”³⁰

In another case, the SBT commented:

In their final summary the Disability Adjudication Unit stated that the doctor had simply written a letter to the legal clinic which outlined the same information as was reflected in the original application. The Tribunal respectfully disagrees with this assertion... The doctor is a person with the

²⁸ SBT, Tribunal File No. 9907-04950 (November 2, 1999).

²⁹ In a recent SBT decision rescinding a DAU verdict of “not disabled” (Tribunal File No. 0111-09327F (June 18, 2002)), the Tribunal criticized the DAU’s original decision as “a “paper decision” based only on written evidence”.

³⁰ SBT, Tribunal File No. 0008-08680 (August 31, 2001).

*prescribed qualifications who in his final correspondence outlined in detail the history of the Appellant's impairments, the history and nature of chronic fatigue syndrome and finally the Appellant's current impairments and the substantial nature of the restrictions. This is more than a minor elaboration of the application contents.*³¹

Rather than be guided by practitioners with relevant expertise who have a close knowledge of the applicant and his/her condition, adjudicators at the DAU frequently offer their own medical assessment, suggesting treatment regimes and presenting medical theories. Considering the limited professional qualifications of many DAU adjudicators, “diagnoses” by adjudicators are particularly troubling.

In one appeal before the SBT, the DAU held the view that an applicant experiencing severe recurrent seizures was not a person with a disability under the ODSPA because he had not reached the “therapeutic level of medication to control the seizures” and “no electrophysical abnormalities were found in keeping with an Epilepsy”. The SBT overturned the DAU’s original decision, commenting that there was no evidence of the adjudicator’s qualifications or expertise to assert these independent medical opinions.³²

The DAU has also tended to hold to its own conservative views about less understood medical conditions such as fibromyalgia, chronic pain syndrome, and environmental sensitivity, to name a few. While there is apparently no official policy of refusing to recognize these disorders, advocates have found that the DAU rarely grants ODSP benefits in these cases. In fact, as recently as 2001, the DAU has held the position that fibromyalgia could not be considered a substantial impairment because “this debatable condition is benign, non-deforming and [does not progress] into total disability.”³³

“Cherry-picking” evidence

Particularly disturbing is the tendency of DAU adjudicators to selectively highlight evidence, seizing on those parts of the DDP and medical reports that suggest that the applicant is not substantially impaired, while ignoring the parts that suggest otherwise. In its appeal decisions, the SBT has expressed concern over this apparent “cherry-picking” of evidence. The quotation presented above as an example of the DAU discounting evidence and opinions provided by an applicant’s doctor can also be seen as an illustration of this selectivity. In one case, an applicant’s doctor had written, “I do not have any other therapies to offer

The Social Benefits Tribunal has expressed concern over the DAU's apparent “cherry-picking” of evidence.

³¹ SBT, Tribunal File No. 0107-05576 (July 9, 2002).

³² SBT, Tribunal File No. 9909-06099 (May 30, 2000). In another recent SBT decision, the Tribunal took exception to the DAU’s comment that the ODSP applicant, a person who suffered from depression, anxiety disorder, and other mental conditions, could benefit from hospitalization. In its decision to overturn the DAU’s determination of ineligibility, the Tribunal commented that the DAU is “not charged with providing suggestions regarding treatment.” (SBT, Tribunal File No. 0108-06861 (July 4, 2002)).

³³ SBT, Tribunal File No. 000606653 (February 21, 2001).

him, but hopefully in the next year or so, there will be alternative treatments available.” In deciding that the applicant was not disabled, the DAU chose to quote, “...in the next year or so, there will be alternative treatments available.”³⁴ In another case, the DAU had found an applicant ineligible despite the fact that she had a very high disability rating on her HSR and ADL forms. As part of her appeal of the decision, the applicant submitted a letter from her doctor that stated:

*The letter [from the DAU summarizing its decision] is simply a selection of misinformation compiled to reject the claim. The quotations are hand picked out of context and the statements are untrue. It would be a crime to disallow a claim like this by administrative manipulation of reports and out of context quotes or other weak evidence.*³⁵

The Tribunal highlighted this evidence in its decision to overturn the DAU’s original verdict of “not disabled” and grant benefits to the applicant.

Failing to provide feedback on the DDP

Rather than contact the applicant's doctor or specialist when a critical piece of information is missing, the DAU will, more often than not, merely reject the application.

Even if an ODSP applicant can get beyond the DAU’s medical “opinions” and fondness for cherry-picking evidence, the adjudication process involves numerous additional obstacles. One of the most substantial is the persistent failure of the DAU to provide feedback on the completeness of an applicant’s DDP or request additional information if it is necessary. Although the regulations associated with the ODSPA require the DAU to seek additional disability information where necessary, the DAU takes the view that it is the applicant’s obligation to provide what is needed. Only in cases where something is “staring them in the face” will the DAU request the information.³⁶ Many advocates would argue, and indeed many appeal decisions would suggest, that even where it is glaringly obvious, the DAU will not necessarily request the additional information. Rather than contact the applicant’s doctor or a specialist when a critical piece of information is missing, the DAU will, more often than not, merely reject the application.

In one case, the DAU rejected the application of a woman who suffered from, among other things, depression and back problems. The HSR and ADL forms submitted by her family physician only briefly mentioned these conditions, though her Self Report discussed them in detail. The Self Report also listed her

³⁴ SBT, Tribunal File No. 9911-08606 (July 5, 2000). In another recent case, the DAU’s adjudication summary completely distorts the meaning of a letter submitted by an orthopaedic surgeon on behalf of an applicant with severe back problems. The summary quotes the surgeon as saying the applicant “has no evidence of any significant neural compression”, while ignoring the letter’s repeated references to the applicant’s “multiple level degenerative disc disease” which includes his entire lumbar spine, and the surgeon’s conclusion that, because of the multiple levels, the applicant is not a candidate for any surgical treatment.

³⁵ SBT, Tribunal File No. 9910-06967 (March 17, 2000).

³⁶ Meeting between the Steering Committee on Social Assistance, and the Director and other representatives of the OSDP Branch, January 14, 2002.

psychiatrist and orthopaedic specialist as people the DAU could contact for further information. These two practitioners could have easily supplied any additional information needed, but the DAU failed to contact them. In deciding to adjourn the appeal and give the appellant an opportunity to get legal representation and collect the necessary additional medical evidence, the SBT commented that the appellant “was justified in thinking more information would be submitted for her or would be sought by the Disability Adjudication Unit.”³⁷ Thus, the applicant was subjected to the substantial extra delay and stress of having to appeal the DAU’s decision, and the public was subjected to huge extra expense, because the DAU did not recognize, or wilfully blinded itself to missing information that should have been “staring it in the face.”

Requiring excessive and unnecessary medical documentation

The DAU also appears to have a bias toward denying claims that do not provide extensive and often unnecessary specialist reports to supplement those of the primary care physician. These reports create an additional level of complexity for applicants and, in many cases, are of questionable value. They can also be extremely costly, potentially running into the hundreds or even thousands of dollars, putting them out of reach of most unrepresented applicants. Many applicants live in parts of the province where they cannot even access a specialist to complete the reports.

Significantly, the ODSP legislation does not require supplementary specialists’ reports. Recently, the SBT had to remind the DAU of this fact, stating in an appeal decision that the adjudication process “does not call for any additional reports to be mandated other than the three [DDP] forms ...and the Tribunal notes that an applicant should be able to be granted their application on the basis of those forms alone.”³⁸ Regardless, people are routinely denied ODSP for failing to submit supplementary documentation, such as an applicant in Ottawa who was deemed to be 87% disabled, but did not supply a specialist’s report to support the HSR and ADL forms completed by the physician.³⁹

Delays and more delays

Administrative errors at the DAU can unnecessarily prolong an already long and drawn-out process. Applicants and advocates regularly report delays, often stemming from mistakes such as the DAU losing medical information and requiring it to be re-submitted. While the time frame for the adjudication process has decreased significantly from the early years of the ODSPA, it can still take

³⁷ SBT, Tribunal File No. 9911-07810 (April 13, 2000).

³⁸ SBT, Tribunal File No. 0107-06248 (May 15, 2002).

³⁹ Social Planning Council of Ottawa, *The Experience of People with Disabilities in Ottawa and the Ontario Disability Support Program: Report of the Public Forum Held November 29, 2000.*

three to four months for the DAU to make a decision on a file. For an applicant who is determined by the DAU to be a “person with a disability”, the time lag between first applying for ODSP and actually receiving benefits can be as long as nine months.⁴⁰ In the meantime, that person is forced to survive on meagre OW benefits, or no income at all.

Accountability

For most people, the DAU’s adjudication process is a mystery. Applicants and their advocates are not certain what information the DAU requires, on what basis adjudicators make their decisions, or why they deny applicants who clearly have a significant disability. Advocates know that DAU adjudicators are supposed to utilize the *Disability Determination Manual* as an “aid” to adjudication, but it not clear how they use it. In fact, appeal decisions at the SBT have revealed that some DAU adjudicators clearly misinterpret the manual. Significantly, no adjudication criteria are publicly available, so it is very difficult to know what the DAU is actually looking for when it reviews an application. Since letters of denial from the DAU merely quote the legislation (i.e. “you do not have a substantial impairment”) to justify the decision, it is only through appealing to the Social Benefits Tribunal that applicants and advocates can gain any insight into the decision-making process. There is also a disturbing degree of inconsistency among DAU decisions, and it is impossible to pinpoint biases among individual adjudicators, as they are not identified.. We are currently unaware of any formal procedure established to evaluate DAU decision-making.

For the almost 11,000 people held ineligible for ODSP benefits by the DAU in 2000/2001, accountability and transparency are major concerns. At a recent forum on the Ontario Disability Support Program held in Ottawa, participants questioned why, for example, was a person with Multiple Sclerosis and deemed 73% disabled denied benefits? Why was a person deemed 81% disabled denied?⁴¹ The Province has designed an adjudication process that is impenetrable, denying applicants and the public the “checks and balances” that should be expected of any government program.

⁴⁰ Social Planning Council of Ottawa, *The Experience of People with Disabilities in Ottawa and the Ontario Disability Support Program: Report of the Public Forum Held November 29, 2000.*

⁴¹ Ibid.

Recommendations for the disability determination process:

1. The DAU decision making process must be made more transparent and accountable. This would include:
 - Explaining the rating system used by adjudicators
 - Ensuring that adjudicators understand and implement Court interpretations of the definition of disability
 - Giving more weight to the opinions of applicants' health practitioners
 - Guaranteeing that decisions are made within 60 days of submitting complete applications
2. Shorten the time it takes for applicants found eligible to begin receiving benefits.

6. THE APPEAL PROCESS

A) INTERNAL REVIEW

If an applicant is determined to be ineligible for ODSP benefits, he/she can request an Internal Review of the decision. Between June 1, 1998 and March 31, 2001, almost 25,000 Internal Reviews of DAU decisions were requested.⁴² Like virtually everything in the ODSP application and adjudication process, this is a paper process: denial of benefits is communicated by letter and the request for an Internal Review must be made in writing. In addition, the applicant must request the review within ten days of receiving the decision, an impossibly short time frame for many applicants. People who are visually or cognitively impaired, who have literacy problems, whose first language is not English or French, or who just happen to be absent when the letter is delivered will have great difficulty completing a request for Internal Review. While applicants can request an extension of time, granting the extension is discretionary and a denial cannot be appealed. Failure to request an Internal Review will close off the option of a further appeal.

Essentially, the Internal Review is a meaningless “extra step” forced upon applicants who have been held ineligible. No new medical evidence can be submitted at this stage and the original decisions of the DAU are rarely overturned. Since the ODSPA came into force in 1998, an average of only 11% of Internal Reviews have resulted in the original DAU decision being changed.⁴³

Since the ODSPA came into force in 1998, an average of only 11% of Internal Reviews resulted in the original DAU decision being changed.

⁴² ODSP branch statistics, 2002.

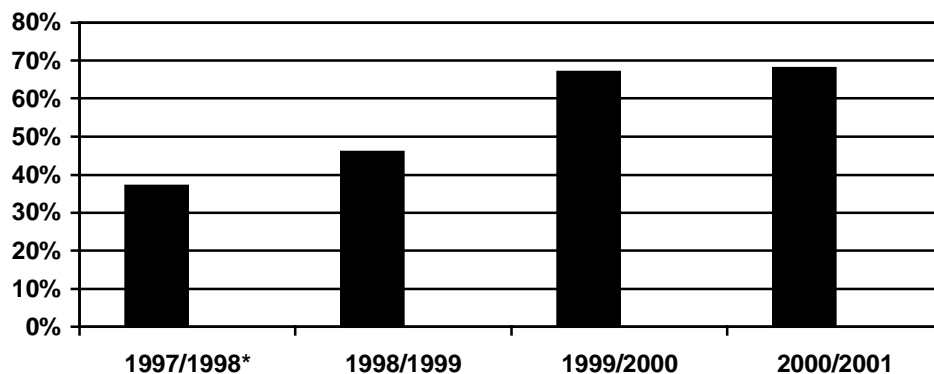
⁴³ Based on ODSP branch statistics, 2002.

What the process does do, however, is place most applicants who request the review in the position of being held ineligible twice. Not surprisingly, many unrepresented applicants leave the Internal Review process feeling that any further appeals would be futile.

B) APPEALS TO THE SOCIAL BENEFITS TRIBUNAL

Applicants who have requested an Internal Review and had the original DAU decision upheld can apply in writing to the SBT for a further appeal. They have 30 days following the Internal Review decision to file the appeal. Since 1998, almost 50% of applicants who had been denied ODSP by the DAU appealed to the SBT.⁴⁴ In the 2000/2001 fiscal year, the SBT received 8,249 appeals of DAU decisions, representing 67% of all appeals received. Notably, in the last year of the previous FBA system, appeals of decisions regarding disability status made up only 37% of all appeals to the Social Assistance Review Board (please see Figure 4).⁴⁵ The SBT has effectively become a *Disability* Benefits Tribunal.

Figure 4: Percentage of appeals received by the SBT that are related to disability status (1997 to 2001)



* the 1997/1998 statistic refers to appeals to the Social Assistance Review Board (SARB)
Source: Social Benefits Tribunal, 2002.

Because of the large number of appeals received by the SBT, the process can be extremely lengthy, with one year usually passing between the date the Tribunal receives the appeal and the date it releases its decision. Frequent scheduling problems and cancellations of hearings mean that many appeals can actually take substantially longer. Scheduling appears to be particularly problematic outside of Toronto. In Sault Ste. Marie, for example, no SBT hearings were scheduled for

⁴⁴ Based on statistics provided by the Social Benefits Tribunal, 2002.

⁴⁵ Ibid.

late 2001 or early 2002. Instead, over 80 were scheduled for June 2002.⁴⁶ Inadequate French language hearing services can result in further delays.

In many cases, new medical evidence that would easily justify a reversal of the DAU's original decision is submitted for consideration well before the hearing date. However, the DAU policy is to ignore new reports until 20 days before the hearing. At this point, in theory, the DAU would review the material and either reverse its earlier decision, or confirm it and make supplementary submissions to the SBT. While this policy, on its own, would create unnecessary delays for many appellants, it has been reported that in fact the DAU rarely reviews new medical reports more than a few days before the hearing. As a result, even where it is abundantly clear that the appellant meets the definition of "a person with a disability" under the ODSPA, he/she will likely have to wait out the entire appeal process.

The SBT appeals process is also far from accessible with complex rules and strict deadlines for submitting evidence. In order to prove that he/she is disabled, an appellant will likely need to produce additional medical reports and evidence, and, in many cases, will need to present sophisticated arguments to the Tribunal. Often, the DAU is late with its submissions to the Tribunal, compounding the difficulties appellants face understanding and proving their case. It is a challenging system to navigate without assistance and, not surprisingly, in 2000/2001, unrepresented appellants were successful in less than 30% of decided appeals.⁴⁷ Significantly, having representation at an SBT hearing appears to double an appellant's chances of success. Almost 60% of decided appeals in 2000/2001 where the appellant was represented resulted in the original DAU decision being overturned.⁴⁸

Improving service, creating efficiency and "putting customers first"?

Overall, in the 2000/2001 fiscal year, close to 50% of decided appeals of DAU decisions resulted in the original denial being overturned.⁴⁹ This raises a critical point with respect to the quality of decision-making at the DAU: through its decisions, the SBT is registering a strong vote of "non-confidence" with the DAU. For a government so publicly concerned with efficient and effective public services, the high rate at which DAU decisions are overturned on appeal should be a matter of grave concern. The ODSP adjudication process is not producing "good value for the money". Rather, it is resulting in a phenomenal waste of personal and public resources, and causing emotional and physical distress for those in need of benefits.

In 2000/2001, close to 50% of decided appeals of DAU decisions resulted in the original denial being overturned.

⁴⁶ Minutes of the Steering Committee on Social Assistance, November 16, 2001.

⁴⁷ Based on Social Benefits Tribunal statistics, 2002.

⁴⁸ Ibid.

⁴⁹ Ibid.

Recommendations for the appeal process:

1. Eliminate the *mandatory* Internal Review step. Internal Reviews should be completed upon the request of the applicant, should allow new medical reports to be submitted, and should be reviewed promptly by the DAU.
2. Provide more resources to the Social Benefits Tribunal for faster hearings and decisions.

7. PERIODIC REVIEWS OF ELIGIBILITY

Applicants held to be disabled under the ODSPA either by the DAU or the SBT on appeal, are not out of the woods. Regulations associated with the Act require that the Director of ODSP (or the SBT) set a date for a review of the disability determination unless satisfied that “the person’s impairment is not likely to improve.”⁵⁰ Review dates can vary, but generally they appear to be set two years after the original date of the determination.

Considering that the point of the review is to determine if an ODSP recipient’s condition has improved, not to completely reassess the person, one might think that the process would be quite simple. On the contrary, reviews of a disability determination require the recipient to resubmit an entire updated Disability Determination Package to the DAU complete with specialists’ reports as needed. It is as if the recipient is applying for ODSP all over again, and potentially raises all of the problems associated with the application and adjudication process discussed earlier. Because of the unnecessary burden this procedure places on recipients, advocates have requested that the Ministry develop a simplified questionnaire for reviews, one that focuses on whether a recipient’s condition has improved. Another suggestion is to have a simple “no improvement” form for doctors to complete if the recipient’s condition remained constant, or deteriorated. Citing concerns with consistency and the comparability of information, the Ministry has refused to modify its approach.⁵¹

Because of delays and the fact that the ODSPA only came into effect in June 1998, review decisions did not start appearing until the fall of 2001. Where a recipient is held to be “not disabled” after the review, the Ministry’s stated procedure is to provide three months notice before the person’s benefits are

⁵⁰ Ontario Regulation 222/98, Section 5(1).

⁵¹ Meeting between the Steering Committee on Social Assistance, and the Director and other representatives of the OSDP Branch, January 14, 2002.

cancelled. Advocates have noted, however, that in many cases their clients are getting far less notice. While there is nothing in the legislation or regulations that requires the Ministry to provide the three months advance notice, ODSP recipients cannot do without it. They are facing the potential loss of their income and need as much time as possible to consider and act on their limited options.

Recommendation for periodic reviews:

1. Reviews of medical status should have simplified forms geared to whether there has been an improvement in the medical conditions, not a complete re-assessment of them.

8. THE IMPACT OF THE ODSP APPLICATION AND ADJUDICATION PROCESS

A) THE IMPACT ON INDIVIDUAL APPLICANTS AND THEIR FAMILIES

The application and adjudication process undoubtedly has significant impacts on applicants' quality of life. Lower benefit and asset levels to which many applicants are subject while navigating the system, as well as the inherent nature of the adjudication process with its complexity and delays can have extremely negative consequences for the health and well-being of individuals and their families.

Disabled applicants who are not granted ODSP or who are awaiting determination, must often struggle with extremely inadequate incomes. As discussed earlier, a significant proportion of ODSP applicants apply for benefits through the Ontario Works program. During the months in which these applicants are proceeding through the disability determination process, their income is derived from OW. If they are not granted ODSP benefits, they may be forced to remain on OW. A single person in receipt of OW receives a maximum monthly allowance of \$520, only 56% of the \$930 he/she would receive on ODSP. A family of four receives between \$1178 and \$1250 of assistance per month under OW, but could receive between \$1770 and \$2130 under ODSP.⁵² While ODSP benefits are by no means adequate, the OW rates on which many disabled individuals must rely are appalling.

Disabled applicants who are not granted ODSP, or who are awaiting determination, must often struggle with extremely inadequate incomes.

⁵² See Ontario Regulation 134/98, sections 41 & 42, and Ontario Regulation 222/98, sections 30 & 31. The actual amount of benefits for households depends on the number of persons in the household, whether there is a spouse, the ages of any dependents and, in the case of ODSP, whether the spouse is disabled.

The lower OW rates may have serious implications for every aspect of an applicant's life from the ability to purchase goods and services to accommodate the disability, to the ability to find and maintain suitable housing, and the ability to provide the basic necessities for themselves and their families. Particularly vulnerable are single applicants who must find housing, provide the basic necessities, and treat their disability on the meagre \$520 monthly allowance as well individuals or families residing in areas where rents are particularly high.

During the disability adjudication period, expenses associated with the disability are not taken into account. As the determination of disability is pending, no benefits for devices or treatment are payable. ODSP applicants must be aware of the procedure by which assistive devices may be purchased for reimbursement by the Ministry if the application is ultimately successful. The applicant must apply for funding through the Assistive Devices Program which funds a portion of the cost of many assistive devices. The applicant is required to pay a portion of the cost which may in whole or in part be reimbursed by the Ministry if the disability is recognized. If the ODSP application is ultimately denied, applicants eligible for OW will have to apply for discretionary benefits to pay for the device.⁵³

The receipt of lower benefits under OW often results in households resorting to inadequate and substandard housing (which may also not be properly accessible for a person with a disability). A survey of food bank recipients conducted by the Daily Bread Food Bank in Toronto found that one-fifth of households containing three or more persons and headed by a disabled person not receiving ODSP could afford to live only in a one bedroom or a bachelor apartment. Moreover, 53% of these families rated at least one aspect of their housing as poor (i.e., heating, kitchen, bathroom, roof/ceiling, walls, or appliances), and 41% rated at least two aspects as poor.⁵⁴ The housing, while inadequate, will also likely be expensive as rents across Ontario have risen dramatically in recent years. People receiving OW are regularly forced to pay a huge proportion of their income on rent. It is not unusual for these households to devote over 70% of their income to rent.⁵⁵

Once shelter costs have been covered, there is very little money left for food. The study by the Daily Bread Food Bank demonstrated that disabled food bank users who were not in receipt of ODSP benefits had only about \$18.30 per week per person to purchase *all* other basic necessities. 47% of these users reported going hungry at least once a week; 37% reported that their children go hungry at least once a week; 50% reported they needed more food than provided by the food

⁵³ Note that the purchase of devices requiring a client co-payment that is not fully reimbursed results in an increased burden to the OW recipient, due to the fact of the lower benefit levels under OW and the greater cost to be borne.

⁵⁴ Daily Bread Food Bank, *Disabled Benefits* (Toronto, August 2001). The same study noted that substantial numbers of ODSP recipients were also experiencing significant difficulties in relation to securing appropriate and affordable housing.

⁵⁵ Income Security Legal Clinic, *Submission to the Standing Committee on Finance and Economic Affairs* (Toronto, February 2002).

bank most of the time. A significant number of those surveyed relied on loans and gifts each month to help meet their needs.⁵⁶

The OW rules regarding permissible assets and asset levels can also be very problematic for ODSP applicants. Applicants who apply for ODSP through OW are permitted to retain assets up to the ODSP maximums and are subject to the ODSP asset exemptions until the application and adjudication process is completed and all appeals are exhausted. ODSP maximum asset levels and asset exemptions are much more generous than those associated with the OW program.⁵⁷

While the application of ODSP asset levels can make it easier for some applicants to access immediate financial assistance through OW, this is a once-in-a-lifetime exemption and unsuccessful applicants will have to adhere to the OW asset limits when applying for ODSP in future. More immediately, however, unsuccessful ODSP applicants who have retained assets greater than those permitted by OW will consequently have their OW benefits cancelled. An overpayment owing to OW will also result due to the determination of ineligibility for ODSP and the disqualification to the higher asset levels under that program. These unsuccessful ODSP applicants are then faced with the reality of finding a way to re-pay OW and collection proceedings where they do not. Ultimately, disabled individuals who cannot access ODSP and must rely on OW for financial assistance are bound by the OW program's extremely restrictive asset rules.

During the time that ODSP applicants are awaiting determination of their applications and receiving OW benefits, their participation in mandatory OW employment activities may be suspended. However, if the decision is made that an applicant is *not* entitled to ODSP, the participation requirements for employment activities for continued receipt of OW are triggered and inappropriate participation may result. Recipients are then forced to expend further efforts to obtain additional medical evidence in order to vary participation requirements. Individuals who are forced to remain on OW will also be unable to benefit from more intensive and appropriate employment supports provided under ODSP.

B) BROADER IMPACTS

Besides inflicting untold suffering upon disabled individuals in need of assistance, the ODSP application and adjudication process has serious implications for the broader community. It represents everything Ontario's provincial government so vocally reviles. The process is ineffective, inefficient and wasteful, and it is eating up all of the public resources in its path.

⁵⁶ Daily Bread Food Bank, *Disabled Benefits*. Again, the report indicates that significant numbers of ODSP recipients were also experiencing difficulties providing food and other necessities.

⁵⁷ Please see footnote 4 earlier in this report.

Community organizations

Because the Province has created a complex and time consuming system while providing no supports to those needing to navigate it, community organizations have been forced to fill the gap.

Because the Province has created a complex and time consuming system while providing no supports to those needing to navigate it, community organizations have been forced to fill the gap. Staff and volunteers at local organizations are increasingly being called upon to assist applicants with their DDP's, get the specialists reports, follow-up with doctors, make sure that timelines are met and assist with appeals at a time when funding for these organizations is becoming more and more constrained. As stated in the recent report by Toronto's Commissioner of Community and Neighbourhood Services, "the function of supporting [ODSP] clients has been shifted onto the community-based service sector. This is a new and unrecognized responsibility that agencies have taken on out of necessity."⁵⁸

Community legal clinics across Ontario have been particularly hard hit. In 2001, disability-related cases represented one third of all new cases, up from only 14% in 1997 prior to the enactment of the ODSPA.⁵⁹ These cases currently represent the single largest area of clinic law practice. Clinic legal disbursements, the bulk of which appear to be for medical expenses associated with ODSP applications, totalled \$937,000 in the 2001/2002 fiscal year.⁶⁰ While it is difficult to precisely determine the financial costs of disability casework to the provincial legal clinic system, it is certainly in the tens of millions of dollars every year. As legal clinics are community-based non-profit organizations funded almost entirely from the provincial government through legal aid, the Province is one way or another paying for the inadequacies of the ODSP system.

The financial costs, however, pale in comparison with service implications. The legal clinic system cannot meet Ontarians' need for free legal services. There is too much demand and, as a result, people requiring assistance are frequently being turned away. Clinic staff and Directors are very concerned about the inordinate amount of resources being devoted to ODSP applications and appeals – resources that are being used to ensure that people with disabilities can access a program that was ostensibly designed specifically for them.

Over the past year, community agencies and legal clinics from across the province have held forums to discuss the problems with the ODSP system. Forums have been held in many communities including Hamilton, Windsor, Thunder Bay, Toronto, London, Kitchener and Sarnia. The response has been impressive. Agency workers and legal clinic staff have been participating in large numbers to get advice and strategize on how deal with the system and better assist their clients. A forum in Toronto in early 2002 attracted 125 participants from 87 local organizations and legal clinics. The ODSP forum held in Windsor was attended

⁵⁸ Commissioner of Community and Neighbourhood Services, *Report to the Community Services Committee on Ontario Disability Support Program Impacts*, at p. 4.

⁵⁹ Based on statistics provided by Legal Aid Ontario, 2002.

⁶⁰ Ibid.

by approximately 70 community members, and the forum in Hamilton included 57 participants from over 30 community agencies. Community organizations are clearly desperate to find a way to make the ODSP system work.

Health professionals

Most health practitioners will say that the minimal reimbursement provided by the Province to complete the HSR and ADL forms does not approach the actual cost of completing the forms. Those practitioners who are willing to complete them properly without charging an extra fee are effectively being asked by the Province to personally subsidize the ODSP application process. They are also giving up precious patient time to struggle through the excessively complex forms. Whether this problem will be adequately addressed with the new DDP has yet to be seen.

Municipal social service providers

Because of difficulties accessing ODSP, increasing numbers of people with disabilities are being forced to rely on Ontario Works for income support. In Toronto, individuals relying on OW who are “ill or who have a disability that constitutes a substantial employment barrier” make up approximately 16% of the caseload and the numbers are growing.⁶¹ This is proving to be very problematic for local OW service providers. OW is based on a “shortest route to employment” model and is designed to get people off assistance as quickly as possible. It is not designed for people with significant barriers to employment who will require assistance for long periods, as is the case with many disabled recipients, and does not provide the necessary supports. Local OW service providers are being forced to compensate for these inadequacies.⁶²

Municipal social service departments are also struggling with the growing crisis of homelessness in Ontario. As noted earlier, it is likely that many disabled people who cannot access ODSP assistance fall into homelessness. The financial costs of homelessness are staggering. Many of homeless people are forced to utilize the shelter system, costing municipalities and the provincial government thousands of dollars per month per person. In Toronto, the cost of housing a single individual in a shelter for one night is \$47, or almost \$1,500 per month. A family of two costs almost \$3,000 per month.⁶³

⁶¹ Commissioner of Community and Neighbourhood Services, *Report to the Community Services Committee on Ontario Disability Support Program Impacts*, at p. 6.

⁶² *Ibid.*

⁶³ Correspondence with Toronto Social Services, January 2002.

The Social Benefits Tribunal

We estimate that, in 2000/2001, almost \$2 million of the Social Benefits Tribunal's \$5.5 million in expenditures was lost to appeals of bad DAU decisions.

Finally, we cannot forget the impacts on the provincial Social Benefits Tribunal. The vast majority of appeals heard by the Tribunal are related to decisions of the Disability Adjudication Unit, and almost half of these appeals are successful. A large proportion of the SBT's resources is being eaten up by arguably unnecessary appeals. We estimate that, in 2000/2001, almost \$2 million of the Social Benefits Tribunal's \$5.5 million in expenditures was lost to appeals of bad DAU decisions.⁶⁴ This, of course, does not take into account the unnecessary and substantial suffering forced upon the appellants or the administrative costs to the Ministry of defending badly decided cases before the SBT. This is clearly not "efficient and effective" government service.

9. CONCLUSION

The Minister of Community and Social Services' June 1998 claim that the government had kept "yet another promise" to the electorate is far from borne out when the discouraging experiences of low-income, disabled Ontarians is examined. The ODSP program imposes arduous and unrealistic barriers on the very people it purports to be helping. The application process is entirely insensitive to the very challenges faced by persons with many disabilities and leaves those who are eligible for supports without assistance for lengthy periods or all together because of a poorly designed and administered eligibility process. In addition to the personal hardship to those individuals who are unfairly denied benefits, the poor design of the system wastes costly resources, be they community supports, publicly funded legal services or the adjudication services of the Social Benefits Tribunal. Until the issues identified in this report and through the province-wide community forums examining the ODSP program are addressed, the Province's promise to disabled Ontarians will not be met.

⁶⁴ Ontario Ministry of Finance, *Public Accounts of Ontario 2000-2001*, Vol. 1 (Toronto, 2001) at p. 4-83; Social Benefits Tribunal statistics, 2002.

APPENDIX

RECOMMENDATIONS

A) RECOMMENDATIONS FOR THE ODSP APPLICATION PROCESS:

1. Change the call centre (ISU) process so ODSP applicants can easily by-pass telephone screening and have their application taken in person by ODSP staff.
2. Simplify and shorten DDP forms. Make the revised forms public and allow for community consultation.
3. Link questions on the DDP forms to the legislated definition of disability, and instruct health practitioners to include their clients' medical/test reports.
4. Provide clear language information and training on the application process for applicants, community agencies and health practitioners.
5. Provide support workers to assist applicants in getting through the process. This would include providing ODSP liaison workers in OW offices and funding trained community workers to outreach to disabled individuals in the community, including those living on the street.

B) RECOMMENDATIONS FOR THE DISABILITY DETERMINATION PROCESS:

1. The DAU decision making process must be made more transparent and accountable. This would include:
 - Explaining the rating system used by adjudicators
 - Ensuring that adjudicators understand and implement Court interpretations of the definition of disability
 - Giving more weight to the opinions of applicants' health practitioners
 - Guaranteeing that decisions are made within 60 days of submitting complete applications
2. Shorten the time it takes for applicants found eligible to begin receiving benefits.

C) RECOMMENDATIONS FOR THE APPEAL PROCESS:

1. Eliminate the *mandatory* Internal Review step. Internal Reviews should be completed upon the request of the applicant, should allow new medical reports to be submitted, and should be reviewed promptly by the DAU.
2. Provide more resources to the Social Benefits Tribunal for faster hearings and decisions.

D) RECOMMENDATION FOR PERIODIC REVIEWS:

1. Reviews of medical status should have simplified forms geared to whether there has been an improvement in the medical conditions, not a complete re-assessment of them.