HEARING ON THE COMMISSIONER OF SOCIAL SECURITY'S PROPOSED REGULATION TO IMPROVE THE DISABILITY DETERMINATION PROCESS

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SUBCOMMITTEE ON SOCIAL SECURITY
SUBCOMMITTEE ON HUMAN RESOURCES
HOUSE COMMITTEE ON WAYS AND MEANS

STATEMENT OF THOMAS D. SUTTON, PRESIDENT

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Statement of Thomas D. Sutton, President, National Organization of Social Security Claimants' Representatives (NOSSCR)

Chairman McCrery, Chairman Herger, Representative Levin, Representative McDermott, and Members of the Social Security and Human Resources Subcommittees, thank you for inviting NOSSCR to testify at today's hearing on the Commissioner's proposed regulations to improve the disability claims process.

My name is Thomas D. Sutton and I am the president of the National Organization of Social Security Claimants' Representatives (NOSSCR). Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability or Supplemental Security Income (SSI) benefits. NOSSCR members represent these individuals with disabilities in legal proceedings before the Social Security Administration and in federal court. NOSSCR is a national organization with a current membership of more than 3,600 members from the private and public sectors and is committed to the highest quality legal representation for claimants. NOSSCR is a member of the Consortium for Citizens with Disabilities Social Security Task Force and we endorse the testimony presented today by Marty Ford on behalf of the Task Force.

I currently am an attorney in a small law firm in the Philadelphia, PA area. Adding to my experience in legal services programs, I have represented claimants in Social Security and SSI disability claims for the past 19 years. While I represent claimants from the initial application through the Federal court appellate process, the majority of my cases are hearings before Social Security Administrative Law Judges and appeals to the Social Security Administration's Appeals Council. This also is true for most NOSSCR members. In addition, I represent claimants in federal district court and in the circuit courts of appeals.

We agree with the Commissioner that reducing the backlog and processing time must be a high priority and we urge commitment of resources and personnel to reduce delays and to make the process work better for the public. We strongly support changes to the process so long as they do not affect the fairness of the procedures used to determine a claimant's entitlement to benefits. The Commissioner's July 27th notice of proposed rulemaking (NPRM), published at 70 Fed. Reg. 43590, does provide some positive changes. However, our overarching concern is that some aspects of the proposed process elevate speed of adjudication above accuracy of decision-making. From our perspective as advocates for claimants with disabilities, this is problematic and not appropriate for a nonadversarial process.

It is appropriate to deny benefits to an individual who is found not eligible, if that individual has received full and fair due process. It is not appropriate to deny benefits to an eligible individual simply because he or she has been caught in a procedural tangle. Especially vulnerable will be unrepresented claimants. There are serious concerns that claimants will be denied not because they are not disabled, but because they have not had an opportunity to present their case.

NOSSCR will provide detailed comments to the NPRM by the October 25th deadline. My testimony today will highlight our major concerns and provide some alternative approaches.

I. Improving the Process with New Technology and Early Development of the Evidence

Before addressing our specific reactions to the NPRM, I would like to address two issues, which are not part of the NPRM, that could significantly improve the decision-making process and decrease processing times.

First, Commissioner Barnhart has announced major technological initiatives to improve the disability claims process, which NOSSCR generally supports. In several states, SSA has begun to process some disability claims electronically. This initiative has the prospect of significantly reducing delays by eliminating lost files, reducing the time that files spend in transit, and preventing misfiled evidence. Claimants' representatives are able to obtain a single CD that contains all of the evidence in the file. We want to thank the Commissioner for her inclusive process to seek comments about these changes, which will help to ensure that claimants benefit from these important improvements. We have had several very productive meetings and we appreciate this valuable opportunity to provide input.

Second, there should be better development of the record at the beginning of the claim so that the correct decision can be made at the earliest point possible. Claimants should be encouraged to submit evidence as early as possible. The benefit is obvious: the earlier a claim is adequately developed, the sooner it can be approved. However, based on my own experience and that of other NOSSCR members, critical pieces of evidence are missing when claimants first come to me for representation and it is necessary for representatives to obtain this evidence.

Recommendations to improve the development of evidence include: (1) SSA should explain to the claimant in writing, at the beginning of the process, what evidence is important and necessary; (2) DDSs need to obtain necessary and relevant evidence, especially from treating sources, including non-physician sources (therapists, social workers) who see the claimant more frequently than the treating doctor and have a more thorough knowledge of the claimant; (3) Improve provider response rates to requests for records, including more appropriate reimbursement rates for medical records and reports; and (4) Provide better explanations to medical providers, in particular treating sources, about the disability standard and ask for evidence relevant to the standard.

II. Reviewing Official

This is the first administrative appeal in the proposed process. In performing his or her job, the Reviewing Official (RO) is caught between the DDS and the Federal Expert Unit (FEU). In previous testimony, we have supported elimination of the reconsideration appeal level. SSA has tested the elimination of reconsideration in ten "prototype" states for several years, including Pennsylvania where I practice. Our members in those states report that the process works well without a review level between the initial determination and the ALJ level.

If there is a Reviewing Official, we support the use of attorneys to be ROs and who are, as discussed in the NPRM preface, "highly qualified" and "thoroughly trained" in SSA policies and procedures. However, the RO's authority must be clarified. Under the NPRM, the RO must "consult" with the FEU if a claimant submits new and material evidence. If the RO disagrees with the DDS denial, the FEU must "evaluate" the evidence. Is the decision-maker really the RO or the FEU? The final rule must establish that the RO, and not the FEU, is the final arbiter.

Another concern is that under the NPRM, the claimant is only allowed to submit new evidence with the request for review. After that point, only the RO can obtain new evidence and the RO could refuse to consider new evidence.

Recommendation. To ensure fairness and a complete record, we recommend that the claimant be allowed to submit new evidence as it becomes available up to the date that the RO issues the decision.

III. Administrative Law Judge

The NPRM includes some provisions that benefit claimants including retaining the *de novo* hearing before an administrative law judge (ALJ) and, for the first time, setting a goal (but not requirement) that the hearing be held within 90 days after the appeal is filed. Also, the time for providing notice of the hearing date is increased from 20 to 45 days. However, there are a number of procedural changes that are disadvantageous to claimants. The proposed rule creates strict limits and procedures for submission of new and material evidence. For many claimants who meet the statutory definition of disability, the result could well be a denial based on an incomplete record.

Duty to submit evidence twenty days before the hearing. The NPRM requires that a claimant submit evidence at least 20 days before a hearing, with very limited exceptions. It is in the ALJ's discretion to accept or reject evidence submitted less than 20 days before the hearing; no standards are set out for this decision. The preface does not claim that this evidence is somehow less valuable or probative in determining disability; instead it states that "late submission" of evidence "significantly impedes our ability to issue hearing decisions in a timelier manner" and "reduces the efficiency of the hearing process because we often must reschedule…"

Closing the record before the hearing is inconsistent with the Social Security Act. The Act provides the claimant with the right to a hearing with a decision based on "evidence adduced at the hearing." 42 U.S.C. § 405(b)(1). The current regulations reflect the statute, providing that "at the hearing" the claimant may submit new evidence. 20 C.F.R. § 404.929. A previous proposal to set a due date for submission of evidence was abandoned by SSA because it appeared to close the record in contravention if the statute. See 68 Fed. Reg. 41411-12 (Aug. 4, 1998)(final rule on Rules of conduct and standards of responsibility for representatives, codified at 20 C.F.R. § 404.1740).

In addition to this statutory requirement, there are many practical and fairness reasons why the record should not be closed. Are these administrative efficiency goals more important than developing a full and complete record of evidence for the claimant? What about case law in every Circuit holding that ALJs have a duty to develop the evidence? What about a claimant who seeks representation fewer than 20 days before the hearing? Based on my own experience and that of other NOSSCR members, this is a not an uncommon occurrence since the ALJ hearing is the claimant's first in-person contact with an adjudicator (this would not change under the NPRM). The ALJ is required to explain the right to representation and postpone the hearing if an unrepresented claimant wishes to seek a legal representative. Under the NPRM, how would this situation affect the requirement that a claimant submit evidence within 20 days of the hearing, given the fact that representatives play a key role in obtaining evidence?

We strongly support the submission of evidence as early as possible, since it means that a correct decision can be made at the earliest point possible. However, there are many legitimate reasons why evidence is not submitted earlier and thus why closing the record will not help claimants, including: (1) worsening or clarified diagnosis of the medical condition which forms the basis of the claim; (2) factors outside the claimant's control, such as beleaguered or uncooperative medical sources who simply do not respond promptly to requests for records; and (3) the need to keep the process informal.

In the vast majority of cases, there are justifiable reasons why evidence is not submitted earlier in the process. However, we do not support the withholding of evidence by representatives. If an ALJ believes that a representative has acted contrary to the interests of the client/claimant, remedies other than closing the record, which would only penalize the claimant, exist to address the representative's actions. For instance, as discussed below, the current Rules of Conduct already require representatives to submit evidence "as soon as practicable" and to act with "reasonable diligence and promptness" and establish a procedure for handling complaints.[1]

Submission of evidence after the hearing. After the ALJ decision, opportunities to submit new evidence are even more limited under the NPRM, with narrow exceptions and procedural hurdles to overcome. A request to submit must be made within 10 days after receiving the ALJ decision. Unless the claimant can show that there was an unforeseen and material change, the claimant must first ask the ALJ at the hearing to keep the record open. The ALJ is under no obligation to grant the request. If the ALJ does not grant the request, the claimant cannot submit the evidence. Even if the ALJ keeps the record open, the claimant must show good cause for missing the deadline. The ALJ has the discretion to find that there was no good cause.

Under the current process, "new and material evidence" can be submitted with an appeal to the Appeals Council. 20 C.F.R. §§ 404.970(b) and 404.976(b). But since the claimant's right to request review of an unfavorable ALJ decision is eliminated in the NPRM, the opportunity to submit newly obtained evidence after the hearing evaporates.

Contrary to assertions by some that there is an unlimited ability to submit new evidence after the ALJ hearing, the current regulations and statute are very specific in limiting that ability at later levels of appeal. At the Appeals Council level, new evidence will be considered, but ***only*** if it relates to the period before the ALJ decision and is "new and material."[2] At the federal court level, the record is closed and the court will not ***consider*** new evidence. The court does have the authority to remand the case for SSA to consider the additional evidence, but only if the new evidence is (1) "new" and (2) "material" and (3) there is "good cause" for the failure to submit it in the prior administrative proceedings.[3]

Recommendations. We offer the following recommendations for the submission of new evidence:

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[1] 20 C.F.R. §§ 404.1740 and 416.1540. In a 1999 letter report to Rep. E. Clay Shaw, Jr., when he was chairman of the Social Security Subcommittee, and to Rep. Mac Collins, the Government Accountability Office found that SSA does have tools to deter delay, including reducing representatives' fees or use of the Rules of Conduct. *Social* Security: Review of Disability Representatives, GAO/HEHS-99-50R (Mar. 4, 1999).
[2] 20 C.F.R. §§ 404.970(b) and 416.1470(b).
[3] 42 U.S.C. § 405(g).

- **More notice of the hearing.** Any prospect of improvement with the proposed 45-day notice is essentially negated because of the requirement to submit evidence 20 days before the hearing. While a full 45 days (without a 20-day pre-hearing time limit to submit evidence) would be acceptable, a 60-day or even 90-day notice requirement would significantly improve the ability to obtain and timely submit evidence.
- **No time limit to submit evidence before the hearing.** This is consistent with the claimant's statutory right that a decision be based on evidence "adduced at a hearing." The current rule, which allows evidence to be submitted until the hearing, should be retained.
- **Submission of post-hearing evidence.** If the record is closed after the hearing, there should be a good cause exception that allows a claimant to submit new and material evidence after the hearing.
- **Early and easy access to the exhibit file.** This allows the representative to promptly review what is already in the record and to determine what other medical evidence needs to be obtained. We believe that this part of the process will be vastly improved with the implementation of eDIB, the electronic folder.
- **Do not penalize claimants for circumstances outside their control.** While this applies to difficulties in obtaining evidence, it also can apply if representatives act in a way contrary to the interests of the client/claimant. ALJs can use the regulatory rules of conduct for representatives. Claimants should not be penalized.

Duty to submit all "available" evidence, both favorable and unfavorable to the disability claim. The NPRM requires the claimant to submit all evidence "available to you." This includes "evidence that you consider to be unfavorable to your claim." The preface clarifies that this includes adverse evidence, i.e., evidence that "might undermine" or "appear contrary" to the claimant's allegations.

The claimant is required to disclose material facts in his or her claim for benefits. However, the proposed regulation could very well set a trap for unsuspecting claimants. What is meant by "available"? Only that evidence which has been obtained or all evidence that exists, regardless of the cost, time, or effort? What is meant by evidence you "consider" to be unfavorable? Is this too subjective? Who makes the decision that evidence is "available"? Would a claimant be penalized if an adjudicator decided that there was noncompliance? Does this requirement place an undue burden on claimants with mental or cognitive impairments?

Another concern is that this proposed requirement could open the process to manipulation by those who have a personal grudge against the claimant or interests adverse to the claimant, e.g., former spouses, creditors, insurance companies.

For attorney representatives, we have serious concerns that this requirement may conflict with state bar ethics rules which limit the submission of evidence that could be considered adverse to a client. This proposed requirement seems to misunderstand the general duties and obligations of attorneys. In every state, attorney representatives are currently bound by state bar rules that forbid an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. An attorney who violates this rule is subject to disciplinary proceedings and possible sanction by the state bar. Existing bar rules in every state also require an attorney to zealously advocate on behalf of a client. An attorney who violates this rule is also subject to sanction by the state bar.

Recommendation. We recommend that SSA continue to use the current regulations regarding the duty of claimants and representatives to submit evidence. In the experience of our members, these regulations have worked well, especially when combined with the duty to inform SSA of all treatment received.

Other issues at the ALJ hearing level

1. Issues to be decided by the ALJ. The NPRM requires that the claimant "must" state the specific reasons why he or she disagrees with the RO's decision when the hearing request is filed. Proposed § 405.310(a)(3). In contrast, the proposed rule for requesting RO review of the initial denial states that the claimant "should" provide the reasons. Proposed § 405.210(a)(3). Likewise, the current regulation also uses "should" rather than "must" in this context. 20 C.F.R. § 404.933(a)(2).

Issues often emerge or become clearer as the hearing process evolves, for instance, as additional evidence is obtained and submitted or when representation is obtained. Claimants should not be tied down to issues listed at the time of their appeal. In addition, this requirement would be extremely problematic for unrepresented claimants who cannot be expected to know the details of SSA policies and procedures. And what would happen if a claimant who is unrepresented at the time the hearing request is filed obtains legal representation later in the process? Would the representative be precluded by the ALJ from raising additional issues?

Recommendation. Retain the current regulation language that states a claimant "should," but not "must," provide specific areas of disagreement at the time the request for hearing is filed.

2. Objecting to issues in hearing notice. The NPRM requires that the claimant object to issues in the hearing notice within 10 days of receiving the notice. Proposed § 405.317(b). There is no opportunity to extend this time limit. The current regulation provides flexibility, stating that the objections should be raised "at the earliest possible opportunity." 20 C.F.R. § 404.939. As discussed above, what if the claimant obtains legal representation more than 10 days after receiving the hearing notice? Is the representative precluded from raising issues? This would seem to be inconsistent with due process.

Recommendation. Retain the current regulation language that encourages claimants to object to issues in the hearing notice "at the earliest possible opportunity."

IV. Decision Review Board

Under the proposal, claimants will no longer have access to a final administrative appeal step. Their only recourse is to file a complaint in federal district court.

In contrast, the DRB can select any ALJ decision for review. The DRB can affirm, reverse, or modify an ALJ decision, whether favorable or unfavorable, if there is an error of law. But if there is a factual error, the DRB must remand to the ALJ. If the DRB reverses a claimant-favorable ALJ decision, that claimant must proceed to federal court to fight for the benefits awarded by the ALJ. We are concerned that if claimants have no right to request review, the agency may revert to reviewing a significantly higher number of favorable ALJ decisions,

despite the initial well-intended goal of reviewing an equal share of favorable and unfavorable ALJ decisions.

Currently, the Appeals Council provides effective relief to claimants. Over 25% of claimants who request review either receive benefits outright or receive another chance for an ALJ hearing if the case is remanded. The process is much more simple than filing a federal court case and has no cost. The claimant can submit new and material evidence, a critical factor if they were unrepresented at the ALJ hearing level. The Appeals Council also reviews ALJ dismissals and reopening denials; allegations of unfair ALJ hearings; and both disability and nondisability issues that arise in the same case.

Claimants and their representatives have a very limited role at the DRB. If the DRB selects a case, a notice will be included along with the ALJ decision. To submit new evidence to the DRB, the same strict post-ALJ decision submission requirements apply. The DRB may "invite" a brief. Unless the DRB extends this invitation, the claimant must ask permission within ten days of receipt of the Review Notice to submit a brief. And if permission is granted, the brief may not exceed three pages, regardless of the case's complexity. The proposed regulation provides, "If you file a written statement in a claim and the Board has not asked or allowed you to submit one, the Board will not consider the written statement and will return it to you without making it a part of the record." Proposed § 405.425(b)(2). Such strict limitations could be viewed the same as denying the right to present arguments at all.

Selection of cases for DRB review. The ALJs will now be caught between the RO and the DRB. Their decisions must explain why they are not following the denial decision of the RO. And they will be aware that every single decision they issue for every disability claimant will be screened by the DRB, or at least by computer-based predictive screening tools. SSA will develop a profile of decisions that are most likely to be "error prone." It seems possible that ALJs will quickly learn which case characteristics are most likely to trigger DRB review. Will they be the nature of the impairment? The age of the claimant? A residual functional capacity finding of "less than-sedentary"? A credibility finding of fully credible?

The DRB has a 90-day window in which to act on a case selected for review (if a case is there for more than 90-days, an aggrieved claimant may proceed directly into court without a DRB decision). The 90-day time limit runs from the date that the notice of DRB review is received by the claimant. However, after the ALJ issues a decision, there is no time limit for the DRB to screen and select the case for review. The claimant will only receive the ALJ decision after the screening has occurred. This process could present possible conflicts with a provision in the Social Security Act, 42 U.S.C. § 423(h), which requires that interim benefits be paid if the Commissioner's "final decision" is not issued within 110 days after a favorable ALJ decision.

The impact of the DRB on the federal courts. Aware of the concerns that the elimination of the Appeals Council will produce an avalanche of cases descending on the federal district courts, the NPRM has proposed a gradual implementation, beginning with one small region. During this implementation, the agency plans to monitor the number of federal court filings in that region. It is not clear what decision the agency will make, based on the number. If the federal court filings escalate significantly, is the agency prepared to reinstate a final administrative level of review accessible by claimants? Or would the agency seek legislation to create a Social Security Court to provide relief to the federal district courts?

What will federal judges say about new evidence which is submitted to the court but which had not been accepted by the agency adjudicators? Under the Social Security Act, 42 U.S.C. § 405(g), the court may order that SSA take additional evidence if there is a showing that the evidence is new and material and there is good cause for the failure to "incorporate such evidence into the record" in the prior administrative proceeding. As discussed earlier, how will the strict rules on submission of evidence affect the courts? Will claimants be forced to file an appeal in district court to have SSA consider evidence that should have been considered during the administrative process? Will district court appeals increase dramatically simply for this reason?

SSA has previously tested the elimination of claimant-initiated Appeals Council review in the same "prototype" states where it tested the elimination of the reconsideration level. Although requested, we have been unable to obtain information about the results of the Appeals Council prototype testing. Further, we have concerns that the NPRM's gradual implementation of this change with unspecified future changes to meet undefined problems may be inconsistent with the requirements of rulemaking under the Administrative Procedures Act, 5 U.S.C. § 553. Given the potential impact of eliminating claimant-initiated Appeals Council review on the federal courts and on claimants, we recommend that it would be more appropriate to conduct a "test" under the Commissioner's demonstration authority rather than through final regulations.

Claimant appeals of ALJ dismissals. The only claimant-initiated review at the DRB is where the ALJ has dismissed a request for hearing, representing a significant percentage of unfavorable ALJ decisions. Often, these decisions are legally erroneous and currently the Appeals Council is able to review and remand the cases so that the substantive disability issues can be considered. We appreciate the fact that a claimant can appeal an ALJ dismissal to the DRB; however, even this appeal is subject to numerous procedural hurdles: the claimant must first ask the ALJ to vacate the dismissal within 10 days after the ALJ decision is received, with no extension of time (although the ALJ has no time limit to decide the request to vacate); any written statement to the DRB must be filed with the request for DRB review and is limited to 3 pages, regardless of the complexity of the case or additional supportive evidence. The reason that providing DRB review is critical is that hearing dismissals generally cannot be appealed to court.

Recommendations:

- The claimant's right to request administrative review of an unfavorable ALJ decision should be retained.
- Before eliminating the claimant's right to request review by the Appeals Council, SSA should test elimination of administrative review of ALJ decisions under the Commissioner's demonstration authority.
- Reasonable rules for procedures before the DRB should be established:
    - The current rules for submission of new evidence to the Appeals Council should be retained – it must be "new," "material," and relate to the period before the date of the ALJ decision.
    - There should be no page limit for written statements but claimants and representatives should be encouraged to keep them brief and succinct.

  - There should be no requirement that hearing dismissals first be presented to the ALJ. If that requirement is retained, there should be a time limit for the ALJ to decide the request.
- The 90-day time limit should run from the date of the ALJ decision, rather than the date of the DRB's notice.

V. Reopening

Reopening situations currently do not arise that often, but when they do, they usually have compelling fact patterns involving claimants who did not understand the importance of appealing an unfavorable decision. Often they are claimants with mental impairments.

Most reopening determinations currently are discretionary; SSA proposes to take away even that. Reopening within one year for "any reason" is eliminated. New and material evidence is no longer good cause for reopening and is specifically precluded in proposed § 405.605(c)(2). Under the NPRM, reopening is allowed in only two situations: clerical error in computation of benefits or clear error on the face of the evidence. Reopening can happen only within six months of the final action on a claim, but not based on new and material evidence.

The result will be a loss of benefits and perhaps a total loss of eligibility, if the "date last insured" status has expired. This is unfair for claimants in a number of situations, such as: claimants who are not able to get a proper diagnosis for a considerable period of time (multiple sclerosis, for example); claimants whose cases were poorly developed at the DDS and were not appealed and who then filed new applications; claimants with mental impairments that prevent or inhibit their ability to cooperate with development of claims; cases where physicians refuse to provide medical records until unpaid bills are paid; and bankrupt hospitals who are unable to provide records.

According to the NPRM preface, the reason for this change is to improve the timeliness of the administrative review process. However, it is not clear how this dramatic change would improve the process, from a claimant's perspective. In my experience and that of other NOSSCR members, reopening requests have not delayed decisions. The proposed change completely eliminates ALJ discretion to reopen an earlier decision where new and material evidence shows that the claimant was disabled at an earlier time. The proposal also exacerbates the adverse impact of the strict rules for submission of evidence.

Why reapplying is not an option. The NPRM preface states that if the claimant cannot submit new evidence, he or she can file a new application. As noted in Marty Ford's testimony on behalf of the CCD Social Security Task Force, this statement is not accurate and may permanently foreclose eligibility if the claimant's insured status has expired. Congress has previously addressed the problem of SSA informing claimants that they could reapply rather than appeal and failing to inform them of the consequences. In the past, SSA's notices misled claimants regarding the consequences of reapplying for benefits in lieu of appealing an adverse decision and Congress responded by addressing this serious problem. Since legislation enacted in 1990, SSA has been required to include clear and specific language in its notices describing

the possible adverse effect on eligibility to receive payments by choosing to reapply in lieu of requesting review.[4]

Recommendation. The current reopening rules work well and do not affect the timeliness of decisions and they should be retained. It is vitally important that claimants have a fair and reasonable ability to have new and material evidence considered.

CONCLUSION

For people with disabilities, it is critical that the Social Security Administration address and significantly improve the process for determining disability and the process for appeals. We strongly support efforts to reduce unnecessary delays for claimants and to make the process more efficient, so long as they do not affect the fairness of the process to determine a claimant's entitlement to benefits.

Unfortunately, several aspects of the proposed regulations will damage the rights of claimants to have their cases fully considered, and will result in denials of benefits to claimants who meet the statutory definition of disability but who cannot comply with the harsh rules and strict time limits of these rules. We urge the Subcommittees to work with the Commissioner to amend the proposed regulations so that the rights of claimants are fully protected, even as decisions are made in a more efficient and timely manner

Thank you for this opportunity to testify before the Subcommittees on issues of critical importance to claimants. I would be glad to answer any questions that you have.

[4] 42 U.S.C. §§ 405(b)(3) and 1383(c)(1).