

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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Michael J. Astrue
Commissioner of Social Security
Social Security Administration
P.O. Box 17703
Baltimore, MD 21235-7703

Filed at: www.regulations.gov

Re: Docket No. SSA-2007-0044, Proposed Rule on Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels

Dear Commissioner Astrue:

We submit these comments on behalf the National Organization of Social Security Claimants' Representatives (NOSSCR) to the **Proposed Rule on Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels**, 72 Fed. Reg. 61218 (Oct. 29, 2007) ("NPRM").

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 nearly 3,900 members from the private and public sectors and is committed to the highest quality legal representation for claimants. NOSSCR members represent claimants in proceedings at all SSA administrative levels, but primarily at the hearing level and also in federal court.

While we support the new 75-day hearing notice provision and the continuation of a claimant-accessible administrative appellate review board, our position is that the other proposed changes are designed to elevate speed of adjudication over accuracy of decisions and fairness of the process. We cannot support a process that denies benefits to disabled claimants simply because they have become entangled in procedural traps.

We urge you not to implement this NPRM unless significant changes are made to protect the rights and interests of claimants. In addition to the many proposed changes that affect the rights of claimants, there are many open questions as described in our comments below.

We also are concerned that the real purpose of the changes is to reduce allowances. The proposed rule assumes that fewer claims would be allowed, with a more than \$1.5 billion reduction in benefit payments over the next ten years. We believe that this is an improper and unacceptable basis for changes to the appeals process.

The SSA Appeals Process: Informal and Nonadversarial

For decades, Congress, the United States Supreme Court, and SSA have recognized that the informality of SSA's process is a critical aspect of the program. "In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner." 20 C.F.R. § 404.900(b).¹ SSA's interpretation is consistent with United States Supreme Court decisions over the last thirty years that discuss Congressional intent regarding the SSA hearings process, most recently in 2000:

The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking, the SSA is perhaps the best example of an agency that is not ... Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits....

Sims v. Apfel, 530 U.S. 103, 110 (2000)(citations omitted). The Court relied on another decision that was then nearly 30 years old, *Richardson v. Perales*, 402 U.S. 389 (1971). In *Perales*, the Supreme Court rejected a challenge that would have imposed a formal evidentiary rule into Social Security hearings. In *Perales*, SSA argued against adopting such a rule, stressing the need to keep the system informal, rather than becoming a "full blown adversary procedure." Adopting the SSA's arguments and emphasizing Congress' intent to keep the process informal and nonadversarial, the Court stated:

[I]t is apparent that (a) the Congress granted the Secretary the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiner's discretion. *There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.*

402 U.S. at 400-401 (emphasis added).

¹ In our comments, we refer to current regulations and proposed regulations in 20 C.F.R., Part 404 (Title II benefits). While not cited, there are equivalent current regulations and proposed regulations in 20 C.F.R., Part 416 (Title XVI).

Some have argued that it would be appropriate for SSA to adopt an adversarial system because other federal agencies have one. However, countering such arguments, a number of noted law school professors, who have studied the Social Security process, have concluded that an informal and nonadversarial process is the only effective way that the Social Security hearing system can function, thus agreeing with the position taken by SSA in the *Perales* case:

While federal regulatory agencies have largely chosen adversarial adjudicative systems, federal benefactory agencies typically employ inquisitorial models. Professor Jerry Mashaw has observed that “[v]irtually all mass justice systems have decided that they are unable to function effectively without the active-adjudicator investigation, informal rules of evidence and procedure, and presiding officer control of issue definition and development that characterize an inquisitorial or examinational approach.” The SSA, the largest “mass justice” federal benefactory agency, while employing most APA adjudication requirements, fits this pattern.

Jon C. Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 Columbia L. Rev. 1289, 1301-1302 (1997)(footnotes omitted), quoting Jerry L. Mashaw, *Unemployment Compensation: Continuity, Change, and the Prospects for Reform*, 29 U. Mich. J. L. Reform 1, 16 (1996). Professor Dubin’s article was cited with approval by the Supreme Court in the *Sims* case.

The current NPRM to change the SSA appeals process would create a complex, legalistic process and assumes that a claimant has legal representation at all stages. This is inconsistent with Congress’ intent is to keep the process informal and with the intent of the program itself, which is to correctly determine eligibility for claimants, awarding benefits if a person meets the statutory requirements. The value of keeping the process informal should not be underestimated. It encourages individuals to supply information, often regarding the most private aspects of their lives. The emphasis on informality also has kept the process understandable to the layperson, and not strict in tone or operation.

I. Proposed Restrictions on Submission of Evidence Violate the Social Security Act and Are Not Fair to Claimants.

The NPRM 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, which is inconsistent with the goal of the disability determination process to ensure that adjudicators have a complete record when deciding a claim.

Under the NPRM, the record essentially closes five business days before the hearing. Evidence submitted after that date is considered “late” and is subject to new rules:

- **Within five business days of the hearing or at the hearing:** The ALJ may accept the new evidence if the claimant shows that: (1) SSA’s action misled the claimant; (2) the claimant has a physical, mental, educational, or linguistic limitation that prevented the claimant from submitting the evidence earlier; or (3) some other “unusual, unexpected, or unavoidable circumstance beyond the claimant’s control” prevented earlier filing.

- **After the hearing but before the hearing decision:** The ALJ may accept and consider new evidence if (1) one of the three exceptions above is met *and* (2) there is a **“reasonable possibility”** that the evidence, when considered alone or with the other evidence of record, would **“affect”** the outcome of the claim.
- **Before the Review Board:** The proposed rule is even stricter for submitting evidence to the RB. The RB may accept the new evidence only if: (1) SSA’s action misled the claimant; the claimant has a physical, mental, educational, or linguistic limitation; or some other “unusual, unexpected, or unavoidable circumstance beyond the claimant’s control” prevented earlier filing; *and* (2) there is a **“reasonable probability”** that the evidence, when considered alone or with the other evidence of record, would **“change”** the outcome of the claim.

The NPRM fails to recognize that there are many legitimate reasons, often beyond the claimant’s or representative’s control, why evidence is not submitted earlier and thus why closing the record or creating unreasonable procedural hurdles is not beneficial to claimants. We have many concerns – both legal and practical – regarding the impact of the proposed restrictions on claimants with disabilities.

■ **Concerns regarding restrictions on submission of evidence:**

1. The proposed changes to restrict the submission of evidence violate 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.”² 42 U.S.C. § 405(b)(1). Our position is that the proposed changes conflict with the statute. Current regulations comply with the statute by providing that “at the hearing” the claimant “may submit new evidence.” 20 C.F.R. §§ 404.929.

Concerns noted by the Congressional Research Service (CRS) support our position. Following publication of the July 27, 2005 NPRM on the Disability Service Improvement (DSI) process,³ the House Ways and Means Subcommittee on Social Security asked CRS for information regarding the changes proposed in the NPRM. In its September 21, 2005 memorandum, CRS discussed “a possible conflict between the new [sic] rules and the Social Security Act.” *The Proposed Changes to the Social Security Disability Determination and Appeals Process* (CRS, Sept. 21, 2005), p. CRS-2. The CRS memorandum notes that proposed 20 C.F.R. § 405.311 “may be in conflict with Section 205(b)(1) of the Social Security Act.” p. CRS-6. More specifically, the CRS memorandum states:

The legal issue here is whether the requirement that evidence be submitted 20 days before the ALJ hearing [the time limit in the proposed version of 20 C.F.R. § 405.311] is consistent with the requirement that the Commissioner (or an ALJ delegated by the Commissioner) make a decision “on the basis of evidence adduced at the hearing.”

p. CRS-6.

² According to Merriam-Webster Online Dictionary, the definition of “adduce” is: “To offer as example, reason, or proof.” See <http://www.merriam-webster.com/dictionary/adduce>.

³ 70 Fed. Reg. 43590 (July 27, 2005).

The NPRM also is inconsistent with Congressional intent regarding 42 U.S.C. § 405(b)(1). A bipartisan October 25, 2005 letter was sent in response to the July 2005 DSI NPRM, by the former Chairman and the former Ranking Member of the House Ways and Means Subcommittee on Social Security, Rep. Jim McCrery and Rep. Sander M. Levin, respectively. The letter discussed several issues that were raised at the Subcommittee's oversight hearing on September 27, 2005, "which we believe may negatively impact claimants' rights, may result in further processing delays, and could lead to unfair outcomes." One of these issues was the "new procedural requirements and deadlines for introducing evidence." In commenting on testimony presented at the hearing, Rep. McCrery and Rep. Levin noted that:

[I]nstituting strict new limitations on introduction of evidence may, in some instances, conflict with statute [sic], and ignores the well-documented difficulty in obtaining evidence timely that both the SSA and claimant representatives experience.

In addition, Congressional concern was expressed previously in 1988 regarding restrictions on submission of evidence. A draft NPRM in 1988 included a number of procedural changes, including restrictions on submission of evidence similar to those in the current NPRM. The House Ways and Means Committee leadership at the time, the former Committee Chairman Dan Rostenkowski and the former Social Security Subcommittee Chairman Andy Jacobs, Jr., sent a letter dated November 21, 1988, to the Secretary of Health and Human Services at the time, Otis R. Bowen, expressing their concerns regarding the draft NPRM. Referring to the provisions in 42 U.S.C. § 405(b)(1), they stated that the proposed regulations restricting submission of evidence "ignore these explicit provisions of the law." The Committee then held a hearing on the draft NPRM on December 5, 1988. Following this Congressional criticism, the draft NPRM was not published.

SSA itself has previously recognized that setting a pre-hearing due date for submission of evidence was abandoned by SSA because it appeared to close the record in contravention of the statute. *See* 63 Fed. Reg. 41404, 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 and 416.1540).

2. The proposed changes eliminate the ALJ's duty to fully and fairly develop the record.

The United States Supreme Court has recognized that ALJs have a "duty of inquiry" based on a claimant's constitutional and statutory rights to due process. *See generally Heckler v. Campbell*, 461 U.S. 458, 471 n.1; *Richardson v. Perales*, 402 U.S. at 400.

All circuit courts of appeals have well-established case law that ALJs have a duty to develop the record, which includes both obtaining sufficient medical evidence and conducting sufficiently detailed questioning at the hearing. The ALJ's failure to fully develop the record may result in a court remand to obtain the missing information or to consider information that was not considered previously. *See, e.g., Pratts v. Chater*, 94 F.3d 34 (2nd Cir. 1996); *Delorme v. Sullivan*, 924 F.2d 841 (9th Cir. 1991); *Baker v. Bowen*, 886 F.2d 289 (10th Cir. 1989). Because the social security appeals process is not adversarial, this duty exists whether a claimant is unrepresented, or is represented by either an attorney or a non-attorney representative. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144 (9th Cir. 2001); *Shaw v. Chater*, 221 F.3d 126 (2nd Cir. 2000); *Henrie v. Dept of HHS*, 13 F.3d 359 (10th Cir. 1993);

Thompson v. Sullivan, 987 F.2d 1432 (10th Cir. 1993); *Smith v. Bowen*, 792 F.2d 1547 (11th Cir. 1986); *Bishop v. Sullivan*, 900 F.2d 1259 (8th Cir. 1990).

This duty would be vitiated by the time limit for submitting evidence before the hearing since it is not possible for the ALJ to meet this important responsibility if the requirement/presumption is that all (or virtually all) evidence must be submitted 5 business days before the hearing.

3. The proposed changes give ALJs the discretion to violate claimants' rights under the Act.

Under the proposed changes, the ALJ has the discretion to ignore any evidence submitted less than five business days before the hearing. The exceptions are within the discretion of the ALJ and if the ALJ finds that the exceptions are not met, claimants will have no recourse to have the evidence considered other than to file an appeal to the Review Board and to federal court from the agency's "final decision" or to abandon their claims. Such a result conflicts with the goal of ensuring that there is a complete record, especially since there is no claim in the NPRM or the preface that this evidence is somehow less valuable or probative in determining disability.

The proposed limits do not provide a mechanism to ensure that an ALJ who refuses to accept evidence within 5 business days of the hearing or later does not violate a claimant's right to a full and fair hearing. The requirements in the proposed rule for "late" submission are discretionary and there are no criteria to guide ALJ decisions. For example, an ALJ could find that unsuccessful efforts to obtain evidence or other unforeseen circumstances, e.g., hospitalization, do not meet the exceptions to the five-day rule. Under the proposed changes, claimants will be at the mercy of ALJs. Some ALJs may rigidly enforce the 5-day deadline, refuse to consider any evidence after that date, and deny the claim based on an incomplete record. If the ALJ's discretion is abused, a claimant would be forced to appeal first to the Review Board and possibly to federal court simply to have the evidence considered.

The preface describes another exception that allows the ALJ to hold the record open, but this basis also is completely within the ALJ's discretion: (1) The claimant is "aware" of any additional evidence that could not be timely obtained and submitted before or at the hearing or (2) the claimant is scheduled to undergo additional medical evaluation after the hearing for any impairment that forms the basis of the disability claim. The claimant "should inform the ALJ of the circumstances during the hearing." But as far as keeping the record open if a request is made for one of these circumstances, there is no requirement that the ALJ do so: "[T]he ALJ could exercise discretion and choose to keep the record open for a defined period of time" 72 Fed. Reg. 61220. Even in this situation, the ALJ's discretion could be exercised unfairly to claimants. For example, an ALJ could deny a claimant's request to keep the record open but then decide to keep the record for his or her own purposes in order to obtain a consultative examination. This exact situation was recently reported by a NOSSCR member in Region I where the same rules proposed in the NPRM are already in place.

4. Restrictions for submitting evidence to the Review Board.

The proposed standard for submitting evidence to the Review Board under the NPRM is far more stringent than current procedures. Under the NPRM, the RB will consider new evidence only if the

claimant shows that: (1) SSA's action misled the claimant; (2) the claimant has a physical, mental, educational, or linguistic limitation that prevented the claimant from submitting the evidence earlier; or (3) some other "unusual, unexpected, or unavoidable circumstance beyond the claimant's control" prevented earlier filing; *and* (2) there is a "**reasonable probability**" that the evidence, when considered alone or with the other evidence of record, would "**change**" the outcome of the claim. Proposed § 404.973(b). As discussed below, the new evidence must be accompanied by a statement describing how it meets these criteria. Proposed § 404.973(b)(4). Evidence that does not satisfy the criteria will be returned to the claimant. Proposed § 404.973(c).

The current regulations provide that "new and material evidence" can be submitted to the Appeals Council. 20 C.F.R. §§ 404.970(b) and 404.976(b). Under these rules, the new evidence will be considered if it relates to the period before the ALJ decision and is "new and material." These rules should be retained.

As discussed below, the NPRM's proposed standard is more difficult to meet than the standard in the Act for district court remands based on new and material evidence that was not available earlier in the process. However, rather than implementing a standard that is more strict than that used by the federal courts, if SSA decides to change the current regulations, it should consider adopting the "good cause" standard used by the federal courts. Such a standard is more fair than the proposed change and would allow a claimant to submit new and material evidence to the Review Board, ensuring that the disability determination is based on a complete record.

If a "good cause" standard is adopted, it should *not* include an exhaustive list of reasons since each case turns on the facts presented. The "good cause" exception for district court "sentence six" remands under Section 205(g) of the Act for new and material evidence is well-developed and there are many permutations, depending on the circumstances in each case. A review of published court decisions shows a wide variety of reasons why evidence was not submitted prior to the court level, including:

- Medical evidence was not available at the time of the hearing.
- The claimant was unrepresented at the hearing and the ALJ did not obtain the evidence.
- Medical evidence was requested but the medical provider delayed or refused to submit evidence earlier.
- The claimant underwent new treatment, hospitalization, or evaluation.
- The impairment was finally and definitively diagnosed.
- The claimant's medical condition deteriorated.
- Evidence was thought to be lost and then was found.
- The claimant's limited mental capacity prevented him from being able to determine which evidence was relevant to his claim.
- The existence of the evidence was discovered after the proceedings.
- The claimant was unrepresented at the hearing and lacked the funds to obtain the evidence.

5. The proposed changes will force claimants to file more appeals to federal court.

42 U.S.C. § 405(g), allows a federal court to remand a case and require SSA to consider additional evidence if (1) it is “new” and “material”; and (2) there is “good cause” for the failure to submit it earlier. Because the proposed requirements for “late” submission of evidence are more restrictive than the Act, which creates the anomalous situation that federal courts would deal with new evidence that should have been considered administratively.

Both claimants and the courts would be adversely affected by the NPRM: Claimants will be forced to file appeals just to have SSA consider evidence that was improperly excluded earlier in the process. However, we are concerned that many claimants will simply abandon their claims at this point, even though they have meritorious claims, because of the difficulty in appealing to federal court. Even under the current process, there is a large drop-off in appeals from the Appeals Council to federal court for primarily two reasons: (1) the complexity of the process, which intimidates claimants, especially those who are unrepresented; and (2) the cost, which is prohibitive for many individuals.

In addition, the courts could see a dramatic increase in filings. Because some ALJs will reject any evidence that is submitted after the 5-day pre-hearing deadline and the Review Board also may not accept the evidence, claimants will be forced to file suit in federal court. The district court judge will be asked to decide not whether the evidence proves disability but whether the ALJ or RB was wrong to refuse to consider the evidence. As a result, the restrictions will lead to unnecessary litigation.

6. The proposed changes are inconsistent with the realities of claimants obtaining representation.

Many claimants seek and obtain representation shortly before the hearing or after receiving the hearing notice, frequently fewer than 20 days before the hearing. In fact, a large number of claimants seek representation only after receiving an unfavorable ALJ decision. Based on the experience of our members, this is not an uncommon occurrence since the ALJ hearing is the claimant’s first in-person contact with an adjudicator. Under SSA’s own policies, before a waiver of the right to counsel is considered valid, the ALJ must both send a letter to the claimant in advance explaining that right and confirm on the record at the hearing that the ALJ again told the claimant about the right to counsel and determined that the claimant was competent to understand. HALLEX I-2-6-52A. If the claimant wishes to obtain representation, the ALJ should postpone the hearing. *Id.*

Many claimants do not understand the complexity of the rules or the importance of being represented until just before their hearing date. Many are overwhelmed by other demands and priorities in their lives and by their chronic illnesses. As a practical matter, when claimants obtain representation shortly before the hearing, the task of obtaining medical evidence is even more difficult. Even a 75-day hearing notice, a change that we strongly support, will not be sufficient if the claimant seeks representation shortly before the hearing. How will the evidence submission restrictions affect an individual who obtains representation within 5 business days of the hearing? Under the NPRM, the ALJ would have the discretion to exclude new and relevant evidence.

7. The proposed changes are inconsistent with the realities of obtaining medical evidence.

We very strongly support early submission of evidence. However, our members frequently have great difficulty obtaining necessary medical records due to circumstances outside their control. There are many legitimate reasons why the evidence is not provided earlier.⁴ The proposed 75-day hearing notice will be a great help in submitting evidence earlier, but there is no requirement that medical providers turn over records within that time period.⁵ In addition, cost or access restrictions, e.g., HIPAA requirements, may prevent the ability to obtain evidence in a timely way.

While a five-business-day requirement is imposed on claimants under the NPRM, nothing requires medical providers to turn over records this quickly. A claimant would be at the mercy of an ALJ to find that an exception to “late” submission of evidence has been met. Some ALJs will do so. But others may rigidly enforce the new five-business-day deadline and refuse to consider any medical evidence submitted within that time limit and even deny the claim based on an incomplete medical record. And, if the ALJ abuses his or her discretion—which happens—the claimant will have limited recourse within the agency, and in many cases will need to file suit in federal court where a district court judge will be asked to decide not whether the evidence proves disability, but whether the ALJ was wrong to refuse to consider the evidence. As a result, the five-business-day time limit will result in decisions based on incomplete records, which will lead to unnecessary litigation. These results are not only unfair to claimants but also are administratively inefficient and thus do not advance the Commissioner’s goals.

Some of our members employ staff who work full-time doing nothing but sending out requests for records, following up by phone call and fax, and reviewing responses for completeness. Nevertheless, they face numerous obstacles and lengthy delays in a significant number of cases. And for claimants who seek representation *after* the ALJ decision, having tried to proceed without representation, the problems with developing a complete evidentiary record are even worse.

Problems with developing complete evidentiary files are many and varied, and include the following:

- Physicians who are understaffed, have copying and/or fax machines which are reportedly broken, and/or clearly do not see fulfilling record requests from attorneys as a high priority;
- Physicians who do not want to provide any records until a past-due bill for medical services is paid by the claimant;
- Physicians who will provide only their handwritten and marginally legible treatment notes, but will not take the time to write a letter or complete a form regarding their patients’ impairments and functional limitations, regardless of whether a fee is offered for their services;

⁴ If an ALJ believes that a representative has acted contrary to the interests of the client/claimant, remedies other than closing the record exist to address the representative’s actions. SSA’s 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. 20 C.F.R. §§ 404.1740 and 416.1540. If a representative withholds evidence, waiting to file it later, we believe that it is rare and unjustifiable. But SSA already has the tools to penalize a representative for this behavior without doing irreparable harm to claimants. However, this NPRM would punish the claimant rather than the representative.

⁵ While it may appear to be easier to obtain evidence in “quick disability determination” (QDD) cases, these claims cannot be viewed as representative of all claimants’ situations. By definition, these are claims where “allegations will be easily and quickly verified....” 20 C.F.R. § 404.1619.

- Hospitals often give requests low priority. They have reduced their medical records staff, which delays responding to requests.
- Hospitals which have either closed or changed ownership, which often results in records being transferred to other sites with no notice to former patients;
- Hospitals which, for good reason, will not release records of inpatient hospitalizations until the attending physician signs the chart, which may take weeks or even months after discharge;
- Hospitals which cannot locate Emergency Room treatment records unless they are given a specific date of treatment, which claimants often cannot remember;
- Hospitals which insist on receiving their own form releases, even when a general HIPAA-compliant form has already been executed by the claimant. We have heard from representatives that medical providers have different interpretations of HIPAA requirements and as a result require use of their own forms for authorization to disclose information. This can lead to delays since repeated requests for medical information must be submitted, including delays caused by the need to obtain the claimant's signature on various versions of release forms. Frequently, if the medical records staff finds a problem with the request for information, e.g., it is not detailed enough or a different release form is required, the new request goes to the end of the queue when it is resubmitted.
- Mental health outpatient treatment centers which erroneously claim that HIPAA prohibits them from releasing psychotherapy notes;
- Claimants who, because of mental impairments, are unable to recall all of their treatment sources (e.g., a claimant with a hearing scheduled in early November who, despite repeated questioning, cannot remember what hospital he was psychiatrically admitted to for a period of several weeks);
- Claimants who have used different names in the past, making location of their records difficult if not impossible.

In addition to this nonexhaustive list of problems, it should be noted that virtually all providers expect pre-payment for copies of records. While some states have statutes which limit the charges that can be imposed by providers, many do not. Moreover, while private attorneys have the resources to advance costs for their clients, many legal services organizations do not, and unrepresented claimants may withdraw their requests for records in the face of what are, for them, significant bills which they cannot afford to pay. Finally, although ALJs have the nominal power to issue subpoenas at 20 C.F.R. §§ 404.1450 and 416.950, they do not have the power to enforce subpoenas with which providers fail to voluntarily comply, and the United States Attorneys' offices which have such power do not have the resources to devote to such activities.

Medical, legal, and lay witnesses at the recent "Compassionate Allowances Outreach Hearing" held by the Commissioner on December 4 and 5, 2007, confirmed the experiences of our members, testifying that there are many legitimate reasons why the evidence is not provided earlier. For example:

- DDS examiners fail to obtain necessary and relevant evidence. Further, the DDSs do not use questionnaires or forms that are tailored to the specific type of impairment or ask for information that addresses the disability standard as implemented by SSA. Witnesses at the Compassionate Allowances hearing noted this "language" barrier and how it causes delays in obtaining evidence, even from supportive and well-meaning doctors.

- Neither SSA nor the DDS explains to claimants or providers what evidence is important, necessary and relevant for adjudication of the claim.
- Reimbursement rates for providers are inadequate.
- Electronic records, like paper records, need to be adapted to meet the needs of SSA disability determination process. Many providers are submitting evidence electronically but these records are over-inclusive and often do not address the Social Security and SSI disability criteria.

There also are cases in which the evidence has been provided early, but it has been misplaced by the hearing office. Representatives tell us that they often have supplied evidence to SSA before the hearing, only to arrive for the hearing and find that the evidence is not in the file. As a result, some bring another copy of the evidence to submit at the hearing, just in case SSA has not associated it with the file. In fact, some ALJs or hearing office staff ask the representatives to bring paper copies of the evidence to the hearing.

This problem also has occurred with some frequency in cases involving electronic folders. Many representatives have told us that evidence submitted prior to the hearing does not appear on the CD received shortly before the hearing or when they review the electronic file on the day of the hearing. As a result, they must resubmit the missing evidence on the day of the hearing. Presumably, SSA now currently treats these situations as filing evidence on the date of the hearing. How will SSA treat these cases if time limits are implemented?

8. The proposed changes are inconsistent with the realities of claimants' medical conditions.

Claimants' medical conditions may worsen over time and/or diagnoses may change. Claimants undergo new treatment, are hospitalized, or are referred to different doctors. Some conditions, such as multiple sclerosis, autoimmune disorders or certain mental impairments, may take longer to diagnose definitively. The severity of an impairment and the limitations it causes may change due to a worsening of the medical condition, e.g., what is considered a minor cardiac problem may be understood to be far more serious after a heart attack is suffered. It also may take time to fully understand and document the combined effects of multiple impairments. Further, some claimants may be unable to accurately articulate their own impairments and limitations, either because they are in denial, lack judgment, simply do not understand their disability, or because their impairment(s), by definition, makes this a very difficult task. By their nature, these claims are not static and a finite set of medical evidence does not exist.

The testimony of witnesses at the December 2007 Compassionate Allowances Outreach Hearing lend support to our position. Representatives from rare disorders organizations, such as the National MPS Society and the National Organization for Rare Disorders, and from the Access Program testified regarding the length of time it can take to finally diagnose certain impairments. They noted that reaching a final diagnosis often takes years, while individuals see one expert after another.

Also, as with some claimants who seek representation late in the process, their disabling impairments make it difficult to deal with the procedural aspects of their claims. Claimants may have difficulty submitting evidence in a timely manner because they are too ill, or are experiencing

an exacerbation, or are simply overwhelmed by the demands of chronic illness, including the time and logistical demands of a caregiver or advocate to help submit evidence.

II. The Proposal Significantly Limits a Claimant's Right to Review of an Erroneous ALJ Decision.

The NPRM retains a claimant's right to request administrative review of an unfavorable ALJ decision (and restores the right eliminated under the Disability Service Improvement process), a change that we strongly support. However, that right is severely curtailed by new and significant limits on review by the Review Board (RB) and by the federal courts and the ALJ's ability to correct a prior erroneous decision.

If the RB or federal court finds the ALJ decision legally erroneous and remands the case for a new hearing, the NPRM limits the scope of review in the remand proceedings. Even though the original ALJ decision would be vacated either by the RB or the federal court and is remanded for a new hearing, "the proceedings on remand will consider your case only with regard to the period ending on the date of the original [ALJ] decision in your case." Proposed 20 C.F.R. § 404.972.

Under current procedures, the first ALJ decision is reversed and vacated when the court (or the Appeals Council) remands for a legal error. As a result, there is no "final decision of the Commissioner" in place per section 205(g) of the Social Security Act and claimants are able to submit new evidence regarding any changes in the severity of their impairment(s). During the subsequent proceedings on remand, the ALJ may decide, based on the new evidence and by correcting the prior legal errors, that the claimant is now disabled. The ALJ also may adjust the onset date according to the new (and old) evidence of disability.

In the preface to the NPRM, SSA explains that the current process must be changed because a disability decision can be based (1) on evidence "submitted well after the evidentiary record should have closed," (2) on evidence that relates to a period of time after the first ALJ decision, or (3) based on new impairments. SSA believes that "[t]his open-ended approach is administratively very inefficient, as we often are reviewing ALJ decisions based on evidence not presented to the ALJ."⁶ There is no allegation by SSA that this approach leads to inaccurate disability determinations. Indeed, the current approach is consistent with the intent of a non-adversarial and truth-seeking process.

The agency states in the preface that "this proposed closing of the record will not unduly disadvantage claimants." But it most certainly will. As an alternative under the NPRM, SSA would urge a claimant to file new application if his or her condition worsens during the time between the ALJ's decision and the review proceedings.⁷ However, a new application, in many cases, is a poor and even disadvantageous substitute for an appeal. For all claimants, benefits could be lost from the effective date of the first application. Title II claimants would be particularly harmed as cash benefits would be delayed by the 5-month waiting period and Medicare benefits could be delayed because of the 24-month Medicare waiting period. Many Title II workers could be permanently

⁶ 72 Fed. Reg. 61222.

⁷ *Id.*

foreclosed from eligibility for benefits if their insured status had expired. Our concerns regarding the filing of multiple applications are described in the next section of our comments.

The NPRM represents a significant change from current policy regarding the scope of review on federal court and Appeals Council remands. It raises preservation of the original ALJ decision to higher importance than determining whether the individual is disabled and entitled to benefits under the Act. If implemented, this new and untested proposed change will not only have a detrimental impact on individuals with disabilities, but also will adversely affect SSA and the federal courts: Claimants will lose valuable rights and face a much more complex process; SSA will face increased workloads due to the filing of multiple applications; and the federal courts will encounter limits on the scope of their review that are not statutorily mandated.

The proposal to limit the ability of claimants who appeal to correct erroneous ALJ decisions has never been tested. It was not proposed or included in the March 2006 final regulations governing the Disability Service Improvement process now in place in SSA Region I states. Nor has it ever been tested for the impact of this change on claimants or the administrative process.

This proposal was included in the unpublished 1988 draft NPRM that was the subject of the December 1988 House Ways and Means hearing. A November 16, 1988 New York Times article on the draft NPRM succinctly described the impact of this provision on disabled claimants by noting that it would preclude submission of new evidence of an impairment or new impairments in the appeals process. The situation is analogous to the current NPRM. The article presents the compelling example of a claimant who is disabled by a tumor that later is determined to be cancerous. Under the 1988 draft NPRM and under the current NPRM, this claimant would *not* be able to provide evidence of the cancer diagnosis without filing a new application. How can this be fair to people with disabilities? We do not believe that this situation is consistent with Congressional intent for the disability claims process.

■ **Concerns regarding limits on a claimant's right to review of an erroneous ALJ decision:**

1. The proposed change can be interpreted as establishing time-limited benefits.

The language of the proposed regulation is ambiguous. On remand, the ALJ would not be able to consider an increase in severity of the original impairment(s) or the development of a new impairment. At best, it means that a claimant, on remand, would be limited to establishing onset of disability no later than the date of the first (and now vacated) ALJ decision. But at worst, the regulation can be interpreted to mean that the claimant could be found eligible for a time-limited period, ending no later than the date of the original ALJ decision. Under either scenario, the claimant would be forced to file a new application for *any* change in his or her condition that occurs after the date of the original ALJ decision, even if related to the original impairment(s) considered by the ALJ.

Both interpretations of the regulation will have a negative impact on claimants with disabilities. However, if the proposed change leads to a process where the claimant on remand will be limited to a time-limited period of benefits, there will be very severe, adverse repercussions:

- **Claimants who appeal to court would be punished.** A claimant who has the misfortune of receiving an erroneous ALJ decision and who must appeal to federal court will be placed in a worse situation than a similarly situated claimant who receives a legally correct ALJ decision and is found eligible for ongoing benefits.
- **Claimants would not be protected by use of the medical improvement standard.** The individual will not be eligible for the protection of the medical improvement standard – benefits will end, even though the medical condition has worsened. This result may be legally inconsistent with the statutory provisions on medical improvement.⁸
- **Individuals with disabilities will lose access to critical health care benefits.** SSI and Title II eligibility are the links to Medicaid and Medicare, which along with the cash benefits are the means of survival for millions of persons with disabilities. If found eligible for a time-limited period, individuals will not be automatically eligible for Medicaid and will have limited ability to comply with the 24-month Medicare waiting period.
- **Individuals with disabilities will lose access to important work incentives.** Eligibility for time-limited benefits means that these individuals would not have access to most of the Title II and SSI work incentive provisions, which are available only if the individual remains medically disabled. SSI claimants would lose their connection to the 1619(a) and (b) programs, which offer smooth transition for people with severe, chronic disabilities that are subject to periods of remission and allow them to seamlessly go between SSI cash benefits and Medicaid, when they can work and without filing new applications. Title II claimants would not be eligible for the trial work period, the extended period of eligibility, extended Medicare coverage, and expedited reinstatement. Both SSI and Title II claimants would not be eligible to participate in the Ticket to Work program.

2. The proposed change is inconsistent with the Social Security Act and limits the ability of courts to order remedies for the agency’s legal errors.

The proposed regulation raises serious questions regarding how federal court remands will be effectuated and whether it is consistent with the statute. Before filing an appeal to the federal court, Section 205(g) of the Act requires a “final decision of the Commissioner of Social Security made after a hearing.” Federal courts are statutorily authorized to “affirm, modify, or reverse” the agency’s decision, with or without remanding the case, due to legal errors committed by the ALJ. In a remand situation, the court reverses the underlying “final decision” of the Commissioner, usually the ALJ decision (if the Appeals Council denies review). Since there no longer is a “final decision,” the claim remains open until there is a new “final decision.”

From a legal perspective, the court has the authority to order that the agency, on remand, correct the previous errors and consider the claimant’s current eligibility for benefits. Given the fact that the claim remains open, the ALJ has the authority to make a new decision based on new evidence regarding any worsening of the claimant’s impairments since the last ALJ decision.

From a practical perspective, the current approach is the most efficient for ALJs because the NPRM raises many thorny implementation questions including: What happens if the court remands for consideration of “new and material evidence” that was not available in the prior administrative

⁸ The medical improvement standard provides that a disability beneficiary may be determined no longer entitled to benefits only if there is a finding of medical improvement and he or she is now able to engage in substantial gainful activity. 42 U.S.C. §§ 423(f) and 1382c(a)(4).

proceedings? What if it relates to a worsening of the impairment(s) which formed the basis of the original claim but is dated after the first ALJ decision? What if the court reverses and specifically states in its remand order that the agency must consider new evidence? Does the proposed change attempt to limit the court's authority by restricting the scope of review it can order for remand proceedings?

III. Forcing Claimants to File Multiple Applications Is Neither Fair Nor Efficient.

By closing the record to new evidence and limiting the period that can be considered to determine eligibility, claimants would unnecessarily be forced to file multiple applications. A claimant would be required to file a new application for consideration of any change in disability after the date of the original ALJ decision, even if the change is related to the impairment(s) considered in the prior application. This is an onerous burden to place on claimants. Why would the agency force an individual to file additional applications when the claim for disability could be resolved by making the decision based on a complete record?

We are concerned that the real impetus for this NPRM is to reduce allowances, resulting in a \$1.5 billion reduction in benefit payments over the next ten years.⁹ Does this mean that SSA assumes that claimants will be confused and discouraged and will not file new applications? Do the "savings" include those claimants who file new applications and lose benefits from the effective date of the first application or are permanently foreclosed from eligibility? If so, this is a particularly inappropriate and harmful change.

In the preface to the proposed regulations, SSA states that it intends to encourage claimants whose claims are denied by ALJs to file new applications if their conditions worsen or they experience new impairments. To that end, SSA intends to modify its notices to "ensure that claimants are aware that they can file new applications" and "welcome[s] comments from the public" regarding how the agency can best "ensure that claimants understand their right to file new applications...."¹⁰ As discussed below, we oppose a change in denial notices that encourages individuals to file new applications rather than pursue appeals.

1. Claimants may jeopardize eligibility by reapplying.

Requiring claimants to file new applications simply to submit new evidence relevant to their impairments may severely jeopardize, if not foreclose, eligibility for benefits. Benefits could be lost from the effective date of the first application. Workers who are eligible for Title II disability benefits are particularly harmed. Cash benefits could be delayed further because of the Title II 5-month waiting period and Medicare benefits could be delayed because of the 24-month Medicare waiting period.

By reapplying rather than pursuing an appeal, eligibility may be foreclosed forever because of the Title II recency of work test. Under this test, to be eligible for disability insurance benefits, the worker must have worked 20 of the last 40 quarters to be insured. This means that onset of disability must

⁹ 72 Fed. Reg. 61225-26.

¹⁰ 72 Fed. Reg. 61222.

occur during the insured status period, which usually ends 5 years (20 quarters) after work stops. If the worker's insured status expired before the first ALJ's decision, the worker will not be eligible when a new application is filed. And if the issue of the disability onset date in the subsequent application is the same as in the first, the doctrine of *res judicata* will bar consideration of the subsequent application, regardless of the condition worsening or the existence of new impairments.

Under current procedures, if the claimant appeals to federal court and asks for a remand based on new and material evidence that was not available earlier, the court has the authority to remand the case to have SSA consider the new evidence. On remand, the ALJ is able to find that the later evidence shows that her original impairment was more serious and that the claimant in fact was disabled before his or her insured status expired. Under the NPRM, the ALJ would be precluded from considering the new evidence and, if a new application is filed, it likely would be denied.

2. Urging claimants to reapply is inconsistent with Congressional intent and due process.

For many years, primarily before 1991, SSA's denial notices informed claimants that they could either appeal or reapply, and misled claimants regarding the consequences of reapplying in lieu of appealing an adverse decision. The issue was litigated, with courts holding that SSA's notices at the time violated due process and that the constitutional violation required reopening of the earlier application. *See, e.g., Gonzales v. Sullivan*, 914 F.2d 1197 (9th Cir. 1990); *Christopher v. Sec. of HHS*, 702 F. Supp. 41 (N.D.N.Y. 1989); *Butland v. Bowen*, 673 F. Supp. 638 (D.Mass. 1987); *Dealy v. Heckler*, 616 F. Supp. 880 (W.D.Mo. 1984). *See also* Social Security Acquiescence Ruling 92-7(9) regarding the *Gonzales* case.

In *Gonzales*, the notice informed the claimant that if he did not appeal, "you still have the right to file another application at any time." Mr. Gonzales reapplied, with the same alleged onset date as in the first application. The ALJ, on the appeal of the second application, found that the issue of disability was *res judicata* through the date of the initial denial in the first claim. The Ninth Circuit, agreeing with the district courts in the *Christopher*, *Butland*, and *Dealy* cases, held that this notice violated a claimant's constitutional right to procedural due process. The court found that:

[T]he form of the notice used here is sufficiently misleading that it introduces a high risk of error into the disability decisionmaking process....The notice given in this case does not clearly indicate that if no request for reconsideration is made, the determination is final. We concluded that the notice violates appellant's fifth amendment [sic] right to due process.

914 F.2d at 1203.

Congress responded to the use of these notices and legislation enacted in 1990 (applying to notices issued on or after July 1, 1991) requires SSA to include clear and specific language in notices describing the adverse consequences of reapplying. 42 U.S.C. §§ 405(b)(3) and 1383(c)(1). Since Congress has previously corrected this problem, it is inappropriate for SSA to now suggest reapplication for claimants who receive decisions that may well have been decided based on incomplete records. More than 15 years after Congress acted on this problem, it is troubling that the concept is still imbedded in SSA's thinking and used as a justification for preventing the consideration of all evidence relevant to the claim.

3. Requiring new applications is administratively inefficient and will increase SSA's workload.

The proposed change is administratively inefficient because it would require SSA to handle even more applications at a time when it otherwise expects an increase in filings and would cause further congestion in the front end of the process. Many individuals, who are unable to avail themselves of the online application process, will require the personal involvement of SSA claims representatives. This is particularly problematic at a time when the agency is faced with its lowest staffing level in more than 35 years.

IV. New Restrictions on Reopening Prior Applications.

The NPRM imposes new limits on a claimant's right to reopen prior applications, thus exacerbating the problems raised by the NPRM proposals to close the record by restricting the submission of new evidence before the ALJ and the scope of review on cases that are remanded.

Reopening a prior application can be very important for people with disabilities who clearly meet the disability standard but were unable to adequately articulate their claim in the first application, were unable to obtain critical evidence, or have an impairment that is difficult to diagnose, such as multiple sclerosis or certain mental impairments. Reopening situations currently do not arise frequently, but when they do, they usually have compelling fact patterns involving claimants who did not understand the importance of appealing an unfavorable decision, often claimants with mental impairments who repeatedly file new applications instead of appealing. When they finally obtain representation on a subsequent claim, new and material evidence is submitted that may establish disability as of the earlier application.

Under current law, a claimant may request reopening for any reason within one year of the date of the initial determination. 20 C.F.R. §§ 404.988 and 416.1488. Reopening for good cause may occur within two years (SSI) or four years (Title II) of the initial determination. Good cause includes the availability of new and material evidence. 20 C.F.R. §§ 404.989 and 416.1489. Reopening is discretionary and cannot be required but it can be used to right obvious wrongs.

The NPRM eliminates the ability of the ALJ or Review Board to reopen earlier an ALJ or Review Board decision based on new and material evidence, even if it establishes that the claimant was disabled at an earlier time. Proposed § 404.989. According to the NPRM, the reason for this change is so that claimants cannot "circumvent"¹¹ the strict new limits for submitting evidence after the record is closed.

The result of the proposed change 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

¹¹ 72 Fed. Reg. 61222. The NPRM does not affect the reopening of initial or reconsideration level decisions.

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.

Reopening a prior application can be very important for people with disabilities who clearly meet the disability standard but were unable to adequately articulate their claim in the first application, were unable to obtain evidence, or have an impairment that is difficult to diagnose, such as multiple sclerosis or certain mental impairments. Unrepresented claimants with mental impairments frequently reapply instead of appealing and eventually their representatives, on a subsequent claim, will obtain new and material evidence that established disability as of the earlier application. For the same reasons discussed above, reapplying is not a viable option.

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

V. Other Proposed Changes Make the Process Too Formal and Unfair to Claimants.

The NPRM includes some provisions that benefit claimants including retaining the *de novo* hearing before an administrative law judge (ALJ). Also, the time for providing notice of the hearing date is increased from 20 to 75 days. This increase in time will allow more time to obtain medical evidence before the hearing. However, as described above, it will not completely resolve this problem, which will be exacerbated by essentially closing the record five business days before the hearing.

Regarding the Review Board, we strongly support the retention of claimant-initiated administrative review of unfavorable ALJ decisions. However, while we believe that the current process of appeal to the Appeals Council is fair and efficient, we are concerned that the NPRM severely curtails a claimant's right to administrative review of erroneous ALJ decisions.

As described below, we have a number of concerns regarding other proposed changes at the ALJ and Review Board levels. From a claimant's perspective, the proposed process is far more complicated and formal than the current process at the ALJ and Appeals Council levels.

▪ Time limits.

There are many new time limits, beyond normal appeal deadlines, with limited or no exceptions, which make the process overly complicated and legalistic. These time limits may well become procedural traps for unrepresented claimants, or those who obtain representation late in the process, especially since many of the time limits have no "good cause" exception:

- 30 days after receiving the hearing notice to object to time or place of hearing [Proposed § 404.939(a)].
Current rule: "at the earliest possible opportunity" per 20 C.F.R. § 404.936.
- 5 days after receiving hearing notice to acknowledge receipt [Proposed 20 C.F.R. § 404.938(c)].
Current rule: no provision.

- 5 business days before hearing to object to issues in the hearing notice [Proposed § 404.939(b)]. Current rule: “at the earliest possible opportunity” per 20 C.F.R. § 404.939.
- 20 days before hearing to request subpoenas for production of documents or witnesses [Proposed § 404.935(d)]. Current rule: 5 days before hearing per 20 C.F.R. § 404.950(d).
- Brief to Review Board should be filed with appeal or within 10 days of appeal [Proposed § 404.974(b)]. Current: “reasonable opportunity” per 20 C.F.R. § 404.975.

While we believe that these time limits are too formal and should be eliminated, at a minimum, there should be a good cause exception for all time limits. However, we must emphasize that simply inserting good cause exceptions in these rules will not solve the problems of unfairness and traps for the unwary that the various rules will create. Good cause decisions are completely within the discretion of the adjudicator for which the claimant generally has no recourse.¹²

Some of the specific time limits will be discussed below as they impact on specific NPRM provisions.

▪ **Issues to be decided by the ALJ.**

The NPRM has a new requirement that the claimant should include a statement of “the medically determinable impairment(s) that you believe prevents you from working” in the written request for a hearing before an ALJ. Proposed § 404.933(a)(4). Does this limit the impairments that the ALJ will consider? Will some ALJs improperly use this requirement to limit impairments that can be considered? Will some ALJs use the failure to list all impairments against the claimant, e.g., finding the claimant is not credible because the impairment was not listed?

Claimants should not be limited only to those impairments listed at the time of their appeal. Impairments often emerge or become clearer as the hearing process evolves, for instance, as additional evidence is obtained and submitted or when representation is obtained. In addition, this requirement would be extremely problematic for unrepresented claimants who might not understand the exact nature of their impairments, cannot articulate the nature of their impairments, or are in denial about their diagnoses. 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 impairments?

If this provision is included, there should be a clear statement claimants will not be penalized if all medical impairments that prevent work are not listed in a statement with the request for hearing.

▪ **Objecting to issues in hearing notice.**

The NPRM requires that the claimant object to issues in the hearing notice within 5 business days of the hearing. Proposed § 404.939(b). There is no opportunity to extend this time limit. The current regulations provide flexibility, stating that the objections should be raised “at the earliest possible

¹² Not all actions by SSA give the individual the right to administrative and judicial review. See 20 C.F.R. §§ 404.902 and 416.1402.

opportunity.” 20 C.F.R. §§ 404.939 and 416.1439. As discussed earlier, what happens if the claimant obtains legal representation within 5 days of the hearing? Is the representative precluded from raising issues? This is inconsistent with due process.

We urge retention of the current regulations that encourage claimants to object to issues in the hearing notice “at the earliest possible opportunity.”

- **Objections to time and/or place of hearings.**

Claimants’ unforeseeable circumstances may require a change in the time and/or place of the hearing. Current regulations recognize this reality and provide criteria when an ALJ is required to change the hearing time/place and when an ALJ may change the time/place for “good cause.” 20 C.F.R. § 404.936(e) and (f). For example, the ALJ “will” find “good cause” to change the hearing time/place if the claimant or representative is unable to attend due to a serious physical or mental condition, incapacitating injury, or death in the family, or if severe weather conditions make travel impossible. If these circumstances do not exist, the ALJ “will” consider a list of factors that include, but are not limit to: (1) additional time needed to obtain representation; (2) the representative was appointed within 30 days of the hearing and needs additional time to prepare; (3) the representative has a prior commitment in court or in another hearing on the same date; (4) transportation is not readily available; and (5) the claimant is unrepresented and is unable to respond to the hearing notice because of any physical, mental, educational, or linguistic limitations.

According to our members, the most frequent reasons that postponements are requested include (1) the claimant obtained representation shortly before the hearing and additional time is needed to fully develop the record; and (2) the claimant is ill or hospitalized. The current regulations provide that the ALJ to consider these circumstances, with the latter reason requiring a postponement.

Under the NPRM, there is no requirement that the ALJ consider these factors or change the date of the hearing. The NPRM completely removes the current claimant-oriented criteria and instead focuses on SSA-efficiency criteria. The NPRM deletes subsections (e) and (f) in current 20 C.F.R. § 404.936(e). New proposed §§ 404.939(a) and 416.1439(a) merely say that the ALJ “will consider your reason(s)” for requesting the change but adds “and the impact of the proposed change on the efficient administration of the hearing process.” The factors the ALJ would consider are not focused at all on the claimant’s circumstances but only on agency efficiency: “the effect on the processing of other scheduled hearings, delays which might occur in rescheduling your hearing, and whether we previously granted to you any changes in the time or place of your hearing.”

The proposed change places nearly total discretion in the ALJ. It allows an ALJ to deny a request to change the time/place of the hearing for virtually any reason and without regard to the claimant’s circumstances. A claimant who is hospitalized or undergoing medical treatment, e.g., chemotherapy, could find that the ALJ denies the request to postpone the hearing. We believe that this change will certainly result in more denials of valid requests to change the time/place of the hearing and will lead to more inappropriate dismissals of hearings because the claimant is unable to attend.

In addition, the NPRM requires the claimant to object to the time or place of the hearing within 30 days after receiving the notice of hearing. Current regulations provide notifying the ALJ “at the earliest possible opportunity.” As we have said earlier, we support the proposal to provide a 75-day

notice of the hearing. However, given the fragile medical conditions of many claimants, unforeseen circumstances will arise. What happens if a claimant finds out 20 days before the hearing that she is scheduled to undergo chemotherapy or surgery on that date? Under the NPRM, there is no provision to object to the time of the hearing. This is compounded by the wide discretion placed in the ALJ to reschedule.

- **Video and telephone hearings.**

The NPRM provides that the claimant will be informed in the hearing notice if the hearing is to be held by video teleconference or by telephone. The proposed rule retains the claimant's right to object to appearing by video teleconference, in which case the hearing will be re-scheduled to allow appearance in person. Proposed § 404.936(c)(1). We support retaining the claimant's absolute right to have an in-person hearing.

However, for the first time, the NPRM authorizes the ALJ to direct the claimant to appear by telephone "under certain extraordinary circumstances" where (1) appearance in person is not possible, e.g., the claimant is incarcerated and the facility will not allow a hearing to be held at the facility; and (2) video teleconference is not available. Proposed § 404.936(c)(1)(i) and (ii). Unlike the right to object to a video hearing, there is no provision in the proposed rule that allows a claimant to object to a hearing scheduled to be held by telephone. We are concerned that without the opportunity to object, the proposed rule is subject to abuse. For example, the proposed rule could allow an ALJ to determine that "extraordinary circumstances" exist and require that the hearing be held by telephone.

How would a claimant or representative with a hearing impairment be able to object to a telephone hearing? A NOSSCR member with a hearing impairment has commented that the hearing loss prohibits adequate hearing of both video and telephone hearings. For claimants and representatives in this situation, reasonable accommodations are not addressed by the NPRM. The failure to include the opportunity to object violates the claimant's rights to a full and fair hearing.

While we believe that a telephone hearing provides a less than optimal hearing situation, there may be certain "extraordinary circumstances" where it is the only way to proceed. However, if the telephone hearing provision is retained, the regulation **must** include an opportunity for the claimant to object.

- **Pre-hearing statements.**

The proposed regulation regarding pre-hearing statements, proposed § 404.961(b), is generally acceptable so long as it is not subject to abuse by ALJs. Currently, our members have raised concerns about pre-hearing "orders" issued by certain ALJs, which include requirements that are not consistent with the statute, regulations, or HALLEX.

The proposed section says that "you may submit" or the ALJ "may order you to submit" a prehearing statement. Subsection (b)(2) says that the statement "should discuss" the five items listed in that subsection. We recommend clarification that the statement is not subject to rejection if it excludes one or more of the items listed.

- **Dismissal for failure to appear at pre- or post-hearing conferences.**

If neither the claimant nor the representative appears at a pre-hearing or post-hearing conference, the ALJ would have the discretion to dismiss the appeal. Proposed § 404.961(a). There is only a “reasonable notice” requirement, with no specific advance notice time limit. Under current regulations, the ALJ must provide 7-day notice. 20 C.F.R. § 404.961.

Could an ALJ find that a very short notice is “reasonable,” resulting in neither the claimant nor the representative being able to appear, and then dismissing the hearing request? This is an extreme penalty that should be reserved only for missing the actual hearing without good cause. Dismissal on this basis should not be left to the ALJ’s discretion.

- **Subpoenas.**

The current regulation allows a subpoena to be requested 5 days before the hearing. 20 C.F.R. § 404.950(d). The NPRM would increase that time limit to 20 days. Proposed § 404.935(d). There is no explanation in the NPRM preface for the increase in the time limit. While subpoenas may be a useful tool where a medical provider fails to respond to requests, our members report that ALJs rarely issue subpoenas or submit those that are issued for enforcement.

However, given the proposed change restricting the submission of evidence to five business days before the hearing, it is possible that representatives will be forced to request more subpoenas for any requested medical evidence that has not been received 20 days before the hearing. Thus, it will be more burdensome **not only for claimants and representatives but also for ALJs**. If all necessary evidence has not been received at least 20 days before the hearing, it may be necessary to ask the ALJ to issue a subpoena. Since it is extremely unlikely that **all** evidence will be obtained more than 20 days before the hearing, requesting that subpoenas be issued may become a routine matter at hearings. The ALJ will need to address these issues, leading to more litigation over these tangential, yet crucial, matters and ultimately leading to longer hearings.

- **Oral bench decisions.**

We generally support proposed § 404.953 regarding oral bench decisions as they will expedite processing of favorable decisions.

- **The contents of the appeal to the Review Board.**

The appeal to the RB must be in writing “and must clearly indicate that you are appealing a specific unfavorable [ALJ] hearing decision or dismissal.” Proposed § 404.969(c). In addition, the NPRM lists what “should” be included: a written statement that identifies the ALJ’s errors, explains why it should be reversed or modified, and cites applicable law and specific facts in the record. These requirements are very formal and legalistic, and assume that the claimant is represented by an experienced legal representative. In contrast, the current regulation requires only that a request for review by the Appeals Council be in writing. 20 C.F.R. § 404.968.

Under the NPRM, will the failure to raise issues in the appeal statement waive the right to have them considered by the RB? Will the RB pay less attention to appeals that do not include a statement meeting these requirements?

- **Briefs or written statements to the Review Board.**

Under the NPRM, a brief or written statement “should” be submitted with the appeal to the Review Board or within 10 days. Proposed § 404.974(b). There is no provision for extending the 10-day time limit for “good cause.” In contrast, the current regulation provides that the claimant be given a “reasonable opportunity” to submit a written statement. 20 C.F.R. § 404.975. The Appeals Council’s operating procedures “routinely allow” 40 days to submit evidence and arguments. HALLEX I-3-0-85A.

Further, previously unrepresented claimants would be at a disadvantage since new representatives would need to obtain a copy of the hearing record before submitting arguments.

The NPRM should provide a longer period of time or extension for “good cause” to allow for unforeseen circumstances.

- **Payment required for a copy of the record.**

For an appeal to the Review Board, the claimant would be required to pay for copies of the record or the hearing recording, if requested, unless there is a “good reason” not to pay. The NPRM may violate the Privacy Act which grants an individual the right of access to his or her own records.

The current procedure, HALLEX I-3-0-84 C.1, complies with the Privacy Act since the Appeals Council does not charge for a duplicate hearing recording or a copy of the claims file. The current procedure should be retained.

- **Statement to the Review Board explaining additional evidence.**

In addition to the strict limits for submitting new evidence to the RB, the NPRM states that the claimant “must submit” a statement with the additional evidence explaining why he or she believes the strict criteria are met. Proposed § 404.973(b)(4). This is another overly complicated and legalistic requirement. Will this turn into a trap for unrepresented claimants? Will the RB refuse to consider the additional evidence if such a statement is not submitted?

In addition, there is no explanation or clarification for the claimant if the ALJ refuses to admit evidence at the hearing level. Does the claimant appeal the ALJ’s denial of the evidence and explain why the ALJ-level criteria for submission of evidence were met? Or is the claimant required to meet the even more stringent criteria for submission of new evidence to the Review Board? Or both?

- **New evidence obtained by the Review Board.**

Under the NPRM, the claimant must meet strict limits for submitting new evidence under the NPRM, must submit a statement explaining how the limits are met, and must submit a brief within 10 days of filing the appeal. However, the RB is free to obtain new evidence on its own if it can be

done “more quickly” than remanding to an ALJ and would not “adversely affect” the claimant’s rights. Proposed § 404.974(d). There is no further explanation and there is no requirement that the RB send the new evidence to the claimant or permit the claimant to respond with additional evidence or to present a rebuttal. This is not consistent with due process.

- **Standard of review and actions by the Review Board.**

The NPRM includes a stricter standard of review and provides the RB with less authority than the Appeals Council currently has for administrative appeals of unfavorable ALJ decisions. For example, the NPRM has a new “harmless error” rule under which the RB would not change factual or legal errors unless, in the RB’s opinion, there is a “reasonable probability that the error, alone or when considered with other aspects of the case, changed the outcome of the decision.” Proposed § 404.971(c). Further, the RB will only act on “significant” errors of law. Proposed § 404.975(a). There is no further clarification or guidance. What is a “significant” error? Is the RB “harmless error” standard more strict than that used by the federal courts? Will these standards lead to more appeals to federal court?

- **Judicial review of dismissals.**

Section 404.976(b) states that the Review Board’s dismissal of an appeal is binding and not subject to further review. This statement is not accurate. While these decisions, like other discretionary decisions, ordinarily are not subject to judicial review, there is an exception where a “colorable constitutional claim” is presented. *See Califano v. Sanders*, 430 U.S. 99 (1977). The federal courts have permitted review under this standard, for instance, where a claimant’s mental impairment prevented him or her from understanding the importance of appealing a decision or the procedures for appealing.

CONCLUSION

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, many 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 Commissioner not to implement the NPRM unless significant changes are made to protect the rights and interests of claimants. Our measure is whether the process will be fair and whether the person will receive a full and fair decision based on a complete evidentiary record. We believe that these proposals, as individually identified here but also as a package if not

improved, will result in more decisions that are not based on full and complete records and, thus, are not fair.

Thank you for considering our comments and recommendations.

Very truly yours,

Nancy G. Shor
Executive Director

Ethel Zelenske
Director of Government Affairs