

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

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Executive Director
Nancy G. Shor

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Commissioner Michael J. Astrue
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted on www.regulations.gov

Re: Notice of Proposed Rulemaking on Reestablishing Uniform National Disability Adjudication Provisions, 74 Fed. Reg. 63688 (Dec. 4, 2009); Docket No. SSA-2008-0015

Dear Commissioner Astrue:

These comments are submitted on behalf 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 3,900 members from the private and public sectors and is committed to the highest quality legal representation for claimants. While our members represent claimants from the initial application through the Federal court appellate process, the majority of cases are hearings before Administrative Law Judges and appeals to the Appeals Council.

We generally support the proposed changes in the Notice of Proposed Rulemaking (NPRM) to eliminate the remaining portions of 20 C.F.R., Part 405, and to return to a uniform process throughout the country. Our specific concerns with the NPRM are set forth below.

In our comments to the July 2005 Disability Service Improvement (DSI) NPRM, 70 Fed. Reg. 43590 (July 27, 2005), we expressed our serious concerns and urged that significant changes were necessary to protect the rights and interests of individuals with disabilities. One of our concerns was the use of a dual process, which we opposed since having two separate sets of administrative procedures was onerous and confusing for claimants and made the process less efficient from the agency's perspective. We supported the previous final rule that eliminated the

Federal Reviewing Official (FedRO). The current NPRM, issued on December 4, 2009, will return the entire country to a single system that will generally be beneficial for both claimants and the agency.

Specific comments

- **Advance notice of hearing.** We urge the retention of the DSI regulation that provides for a 75-day hearing notice, 20 C.F.R. § 405.315(a), and applying the 75-day notice to the entire country.

The NPRM would eliminate this advance notice period, and Boston Region hearing offices would revert to the 20-day advance hearing notice period used in the rest of the country. 20 C.F.R. §§ 404.938 and 416.1438. NOSSCR has long supported that, at a minimum, a 75-day advance hearing notice period should be applied nationally. The increase in the notice period allows more time to obtain medical evidence before the hearing and makes it far more likely that the record will be complete when the ALJ reviews the file before the hearing. Based on reports from our members in the Boston Region, the 75-day time period, in effect since August 2006, has worked well, both in terms of their caseload management and making certain that cases are ready for hearing.

- **Senior Attorneys.** When SSA reestablished the Senior Attorney program in 2007, it specifically excluded DSI cases from being decided by Senior Attorneys. 72 Fed. Reg. 44763 (Aug. 9, 2007). Senior Attorneys have been an important factor in SSA's effort to eliminate the hearing-level backlog. In fiscal year 2009, they issued more than 36,000 fully favorable decisions, and their disposition rate continues to increase.

We urge SSA to reinstate the Senior Attorney program in Boston Region cases.

- **Cases pending at the Decision Review Board (DRB).** The preface to the NPRM states:

On the effective date of the final rules, we plan to transfer any cases pending before the DRB to the Appeals Council. We will treat any decisions referred to the DRB for review as if the claimant had requested Appeals Council review of the hearing decision.

74 Fed. Reg. 63690.

This transfer of pending DRB claims to the Appeals Council on the effective date raises concerns. According to our members in Boston Region states, under current DSI practice, partially favorable ALJ decisions and unfavorable ALJ decisions are automatically referred to the DRB. Most of the partially favorable decisions are likely to have revised onset dates, which claimants would accept in many cases. Under DSI regulations, the DRB must act within 90 days. Unlike the rest of the country, effectuation will be delayed until the DRB acts; but, at least, it will be no longer than 90 days.

There is no mention in the proposed rule that the DRB partially favorable decisions would get expedited consideration at the Appeals Council. If these partially favorable claims are

transferred to the Appeals Council, effectuation will be held up until the Appeals Council rules, which could be many months. Unlike the 90-day time limit on DRB action, the Appeals Council has no time limit to act. Although the Appeals Council's average processing time has improved, it is extremely rare that a case is decided within 90 days. Further, outside of Region I, the vast majority of partially favorable ALJ decisions are not appealed to the Appeals Council.

These cases deserve special consideration. We recommend that SSA identify all partially favorable ALJ decisions pending at the DRB on the effective date of the final rules. Claimants should be notified that the favorable part of their decisions will be immediately effectuated. So that they have the same rights as claimants in the rest of the country, DSI claimants should be offered the opportunity to continue before the Appeals Council on the unfavorable part of the ALJ decision or to accept the partially favorable ALJ decision.

There is another option that the agency could consider. As of the effective date in the final rules, no cases would be sent to the DRB. Any ALJ decision dated on or after the effective date would follow the same rules as the rest of the country, i.e., the claimant would request review by the Appeals Council. However, cases pending at the DRB on the effective date would be handled under the existing DSI rules in Part 405 until the DRB pending caseload becomes zero, which would be 90 days after the effective date. Under this option, claimants with partially favorable decisions pending at the DRB on the effective date of the final rule should still be given the rights described in the previous paragraph. Also, all other claimants with such pending claims should be given the option of having their cases transferred to the Appeals Council.

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In conclusion, except for the specific comments above, we support the proposed rules to eliminate the remaining portions of part 405 and to return the country to a single, uniform procedure.

Sincerely,

Nancy G. Shor
Executive Director

Ethel Zelenske
Director of Government Affairs