

Oral Testimony of Thomas D. Sutton, President, NOSSCR, 9/27/2005

Chairman McCreery, Chairman Herger, Reps. Levin and McDermott, and members of the Subcommittees, thank you for the opportunity to testify regarding the Commissioner's proposed regulations for the disability adjudication process. I am the president of NOSSCR, the members of which represent claimants in this process and are intimately familiar with its problems. While we are supportive of the Commissioner's effort to streamline the process, including the electronic folder, we are concerned that some aspects of her proposal will do great harm to the rights of our disabled clients. In fact, under these proposed rules, we believe that a significant number of claimants who are disabled will be denied benefits simply because they were unable to produce all of their medical records in time to meet the deadlines, and the records which prove their disability will never be considered on appeal. I wish to highlight three particular problems with the proposed regulations.

First, under the proposed rules, claimants would have the right to submit evidence only until 20 days before the hearing; after that, ALJs would consider evidence only if they found "good cause" for its late submission. This is an unprecedented change which we believe is inconsistent with the Social Security Act, which provides that decisions are to be made based on "evidence adduced at the hearing." We also believe that compliance with this regulation will prove to be extremely difficult in many cases. In my own small law firm, we employ people full-time just to gather medical records for our clients; even with significant resources devoted to this work, however, we are often unable to submit records prior to the hearing because medical providers are slow to respond. When clients retain our services with little time remaining before

the hearing, the task of obtaining medical records becomes even more arduous. And for those claimants who never find counsel and attempt to represent themselves, obtaining complete medical records is virtually impossible due to lack of knowledge and inadequate funds to pay copying services. Under these rules, claimants will have less than 25 days after receiving notice of a hearing date to submit all updated medical records. But nothing requires medical providers to turn over records this quickly, so claimants will be at the mercy of ALJs to find good cause. Some will do so, but others may rigidly enforce the new 20-day deadline, leading to the following nightmare scenario: the claimant hires an attorney when she receives a notice 45 days before the scheduled hearing; the attorney locates recent medical records which show that what was previously unexplained fatigue is actually caused by multiple sclerosis, but the records are only received in time to submit them to the ALJ ten days before the hearing rather than 20 days before; the ALJ rules that the claimant should have obtained the records herself or retained counsel earlier and refuses to consider the updated medical evidence at the hearing, instead issuing a decision denying benefits based on an incomplete medical record. This is not an outcome which anyone should welcome, but it can definitely happen under these proposed rules because claimants must depend on the discretion of the ALJs to look at evidence which was obtained less than 20 days before the hearing. And if that discretion is abused, the claimant will not be able to appeal to anyone at the agency, but will have to file suit in the federal district court, where a judge will be asked to decide not whether the evidence proves disability, but whether the ALJ was wrong to refuse to consider the evidence. All of this will happen because of impractical and unworkable deadlines which will result in decisions based on incomplete

records which cannot be repaired, and which will lead to litigation which should not have been necessary in the first place. We submit that such results are not only unfair to the claimants, but are also extremely inefficient and thus do not advance the Commissioner's goals.

Second, the new rules would prohibit an ALJ from reopening a prior decision based on new and material evidence showing that it was wrong. Under existing regulations, such reopening has never been required and has happened only in certain cases, but it has been used by ALJs to right obvious wrongs. For example, one of our clients, Mrs. O, had back surgery with initial improvement, which the state agency used to deny her claim just after her insured status expired. Fusion was attempted in a second operation only months later, but the state agency refused to consider her new application. Finally, because new evidence showed the fusion failed and a third surgery was required, an ALJ reopened the earlier denial and awarded Mrs. O her benefits. The proposed rules would have barred the ALJ from reopening the earlier determination, and Mrs. O. would have been forever barred from reapplying for the DIB to which she was clearly entitled under the statute. This kind of harsh result is unthinkable under the rules which have been in place for decades, but it would be inevitable under the new rules because the ALJ would have no choice in the matter: the prior decision could never be reopened no matter what new evidence was obtained.

Finally, the proposed rules take away a claimant's right to appeal an ALJ decision to another component of the Social Security Administration. Under current regulations, the Appeals Council decides nearly 100,000 cases a year. Those 100,000 claimants will have no recourse other than filing civil actions in the district courts. Some will never find experienced counsel to

file suit and will lose their right to appeal, but those who retain counsel could exponentially increase the number of Social Security cases filed in the courts. Such a docket explosion would be unacceptable to the district courts, but it is virtually certain to happen under the new rules. Indeed, since many of the new filers would have been expected to obtain relief from the Appeals Council under the current regulations, it is highly likely that they will obtain favorable decisions in the courts, leading to mountains of remanded cases at the ALJ level. In other words, while the Commissioner may believe she is reducing processing times by exporting a backlog of cases to the courts, she may ultimately be forced to re-import that backlog through court orders, thus defeating her original purpose.

As laudable as the Commissioner's goals are, they will not be well served by these aspects of the proposed regulations. We urge the Commissioner to make significant changes in the proposed rules which will protect claimants' rights to decisions which are not just fast, but are based on all the evidence and thus fair to claimants. Nothing less should be acceptable to Congress or the Commissioner. Thank you.