

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

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ALERT

**Proposed Changes to the Social Security Appeals Process:
Does Efficiency Replace Fairness for People with Disabilities?**

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On October 29, 2007, the Social Security Administration (SSA) published proposed regulations that make significant changes to the SSA appeals process, including hearings before administrative law judges (ALJs). The Notice of Proposed Rulemaking (NPRM) was published in the Federal Register at 72 Fed. Reg. 61218 (Oct. 29, 2007). **Comments must be submitted on or before December 28, 2007.**

There are some notable potential improvements to the process, for example, a 75-day hearing notice and retaining the claimant's right to administrative review of an unfavorable ALJ decision. However, we have serious concerns, from a claimant's perspective, that many changes and new requirements are unfair and limit the rights of people with disabilities. It is critical that people with disabilities and groups that advocate on their behalf submit comments regarding the impact these proposed changes would have on their claims for Social Security and SSI disability benefits. If you are able to do so, providing specific examples from real cases to demonstrate the negative impact of these proposed changes on people with disabilities will be especially useful.

NOSSCR previously distributed a longer "Talking Points" memorandum to members and will submit comprehensive comments. We hope to have model draft comments posted on the NOSSCR website by Wednesday, December 19, 2007.

This memorandum provides a shorter summary of our concerns that can be shared with your local organizations and with clients. Please feel free to use this document in a way that works for you or for the local organizations, such as focusing on certain provisions that raise the most concerns.

The NPRM provides these instructions to submit comments:

- Comments may be submitted by any of the following methods. Regardless of which method you choose, to ensure that your comments are associated with the correct regulation, **you must state that your comments refer to Docket No. SSA-2007-0044:**
 1. **Federal eRulemaking Portal:** www.regulations.gov. (This is the preferred method for submitting your comments.) In the Search Documents section, select 'Social Security Administration' from the agency drop-down menu, then click 'submit'. In the Docket ID Column, locate SSA-2007-0044 and then click 'Add Comments' to the 'Comments Add/Due By' column.
 2. **Telefax:** (410) 966-2830.
 3. **Letter by mail to:** Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235-7703.

Why Are the Proposed Changes Detrimental for People with Disabilities?

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. Creating unreasonable procedural barriers to eligibility is inconsistent with Congress' intent to keep the process informal and nonadversarial, 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.

While it is appropriate to deny a claim because the evidence establishes that the individual does not meet the statutory definition of disability, it is wrong to deny benefits to an otherwise eligible, disabled individual who falls between procedural "cracks" or who is unable to submit relevant evidence because of procedural limitations.

For people with disabilities, it is important that SSA improve its process for making disability determinations. We strongly support efforts to reduce unnecessary delays for claimants and to make the process more efficient, so long as the steps proposed do not affect the fairness of the process to determine a claimant's entitlement to benefits. Any changes to the process must be measured against the extent to which they ensure fairness and protect the rights of people with disabilities.

The most significant proposed change would close the record to new evidence in two ways by: (1) Restricting the submission of evidence at the ALJ and Review Board (the replacement for the Appeals Council) regardless of its relevance to proving a claimant's disability; and (2) Limiting the scope of review and ability to submit new evidence after a federal court or the Review Board remands a case because of legal errors. Exacerbating the adverse effect of these changes, SSA would advise claimants to file new applications, potentially with detrimental consequences, and restrict their ability to reopen prior claims.

Is there reason to believe 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. From our perspective as advocates for claimants with disabilities, this is not acceptable.

1. The record essentially closes 5 days before the hearing with limited exceptions. All new evidence would need to be filed 5 business days before the ALJ hearing date. Evidence submitted after that date is considered "late." The ALJ would have the discretion to ignore any evidence submitted within 5 days of the hearing or later, regardless of its relevance or importance, or that it was beyond the claimant's control to obtain the evidence. Why is restricting the submission of evidence unfair to people with disabilities?

- **We believe that these proposed restrictions violate a claimant's right under the Social Security Act (the Act).** The Act guarantees the right to a hearing with a decision based on evidence "adduced at the hearing."
- **The proposed changes eliminate the ALJ's duty to fully and fairly develop the record.** This duty is especially heightened for unrepresented claimants.
- **The proposed changes will force individuals to file court cases just to have SSA consider evidence that was improperly rejected earlier in the process.** The NPRM changes are more restrictive than the Act, which allows a federal court to send a case back to SSA where there was a good reason why new and material evidence was not submitted earlier.
- **The proposed changes are inconsistent with the realities of claimants obtaining representation.** Many individuals seek and obtain representation shortly before or even after the ALJ hearing date, since the hearing is the first in-person contact with a disability adjudicator. Under the NPRM, an ALJ would be able to exclude relevant evidence in this situation.

- **The proposed changes are inconsistent with the realities of obtaining medical evidence.** We strongly support early submission of evidence but there are many legitimate reasons why it is not provided earlier. The 75-day hearing notice will be a great help but there is no requirement that medical providers turn over records during that time period. Also, there are cost or access restrictions, such as HIPAA requirements, that prevent the ability to obtain evidence in a timely way.

- **The proposed changes are inconsistent with the realities of claimants' medical conditions.** Medical conditions are not static. They may worsen over time and/or diagnoses may change. Some conditions, e.g., multiple sclerosis, autoimmune disorders, or certain mental impairments, may take longer to diagnose definitively. The severity of the impairment may change, e.g., a seemingly minor cardiac impairment results in a heart attack. It may take more time to fully understand and document the combined effects of multiple impairments. Some claimants may be unable to accurately describe their impairments or limitations either because they are in denial, lack judgment, do not understand their disability, or the impairment by definition makes this a difficult task. The purpose of the disability determination process is to determine whether the claimant is eligible for benefits to which he or she is statutorily entitled. Excluding evidence that is relevant to the determination is inconsistent with the purpose of the process.

2. Individuals who appeal erroneous ALJ decisions will be limited in new evidence they can submit in a "remand" hearing. We support the proposed change that restores the claimant's right to seek administrative review of an unfavorable ALJ decision. But that right is severely curtailed by new and significant limits on review by the Review Board (RB) or the federal courts. If the RB or court finds that the ALJ decision was wrong and remands the case for a new ALJ hearing, the NPRM limits the remand hearing to consideration of the claimant's condition on or before the date of the original ALJ decision. This means that even if the original impairment(s) worsened during the appeal, which could be months or years, the individual could not submit new evidence of this change.

- **Claimants with disabilities will be disadvantaged by this change.** The NPRM states that this change "will not unduly disadvantage claimants" but our position is that it most certainly will. SSA says that a claimant can file a new application if his or her condition worsens during the time between the ALJ's first decision and the remand proceedings. However, a new application, in many cases, is a poor and even disadvantageous substitute for the appeal. For all claimants, benefits could be lost from the effective date of the first application. Title II claimants would be particularly harmed because they would need to complete a five-month waiting period for cash benefits and Medicare benefits could be delayed because of the 24-month Medicare waiting period and many Title II workers could be permanently foreclosed from eligibility for benefits if their insured status had expired.

- **The proposed change can be interpreted as establishing time-limited benefits.** The language of the proposed regulation is ambiguous and can be interpreted to mean that, in a remand proceeding, the individual could only be found eligible for a time-limited period *ending no later* than the date of the first ALJ decision. Under this interpretation, because they would not be found to be disabled on an ongoing basis, claimants with disabilities would: (1) not be protected by use of the medical improvement standard; (2) would lose their automatic access to Medicaid and Medicare; (3) would lose access to most SSI and Title II work incentives. **This interpretation must be rejected by SSA because of the serious repercussions.**

- **The proposed change is inconsistent with the Act and limits the ability of the federal courts to remedy legal errors.** Currently, if a case is appealed to court and is remanded back to SSA, the court reverses and vacates the first ALJ decision. Since there is no longer a final decision by SSA, the claim remains "open" on remand. The proposed change would limit the ALJ's ability on remand to consider new and material evidence, even if the court orders SSA to consider such new evidence. We believe that this attempt to limit the court's authority on appeal to remedy errors in the first ALJ decision is invalid.

3. Forcing Individuals with Disabilities 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 will 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 impairments 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 impetus for these changes is a reduction in allowances since the NPRM makes clear that closing the record is intended to result in a \$1.5 billion reduction in benefit payments over the next ten years. 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.

- **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, which in Title II cases can be as much as 12 months before the application date. Workers who are eligible for Title II disability benefits are particularly harmed. Cash benefits could be delayed because of the Title II 5-month waiting period and Medicare benefits could be delayed because of the 24-month Medicare waiting period.

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 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 may never be eligible when a new application is filed. The following example describes the dilemma faced by individuals under the proposed change.

Example: The claimant files for Title II benefits in January 2007, based on a heart condition. The claimant’s insured status expires December 31, 2007. The first ALJ decision is issued in January 2008, finding that the claimant was not disabled before her insured status expired. One month later, the claimant has a serious heart attack. After recuperating for several months, she files a new application. The new application will be denied because there is a final decision – the ALJ decision – that she was not “disabled” prior to December 31, 2007.

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 she in fact was disabled before 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.

- **Urging claimants to reapply is inconsistent with Congressional intent.** Previously, SSA notices misled claimants regarding the consequences of reapplying instead of appealing. A 1990 law requires SSA to include clear and specific language in notices describing the adverse consequences of reapplying. More than 15 years after Congress acted on this problem, it is troubling that the concept of reapplication is still imbedded in SSA’s thinking and used as a justification for preventing the consideration of all evidence relevant to the claim.

- **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 30 years.

4. Individuals would be limited in their ability to reopen prior applications.

Exacerbating the problems with restrictions on submitting evidence and limits on the period during which eligibility can be determined, the NPRM severely limits the claimant's right to reopen prior applications. 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. Reopening is discretionary and cannot be required, but it can be used to right obvious wrongs.

The proposed change eliminates ALJ discretion to reopen an earlier decision where new and material evidence shows that the claimant was disabled at an earlier time. Under the NPRM, to assure that claimants cannot "circumvent" the strict new limits for submitting evidence after the record is closed, the NPRM eliminates "new and material evidence" as a basis for reopening a decision by the ALJ or the Review Board. 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 who were unrepresented and whose cases were poorly developed; claimants with mental impairments that prevent or inhibit their ability to cooperate with development of claims; cases where physicians refuse to provide medical records until unpaid bills are paid; and bankrupt hospitals that are unable to provide records. The proposal also could result in a total loss of eligibility if Title II disability insured status previously expired.

5. Other Proposed Changes Make the Process Too Formal and Unfair to Individuals.

There are many other proposed changes, including new time limits, that make the process overly complicated and legalistic. These changes may well become procedural traps for claimants, especially those who are unrepresented.

- **New time limits.** Additional new time limits, beyond normal appeal deadlines, would be established with no "good cause" extension including: (1) Objecting to the time or place of the hearing (30 days after receiving the hearing notice); (2) Objecting to the issues in the hearing notice (5 business days before the hearing); (3) Requesting subpoenas for missing records (20 days before the hearing); and (4) Filing brief to Review Board (with appeal or within 10 days of filing).

- **Possible limits on issues before the ALJ.** There is a new requirement that the appeal to the ALJ must include a statement that lists the "medically determinable impairments" preventing work. Does this limit the impairments considered by the ALJ or will some ALJs use this requirement to limit impairments that can be considered? Claimants should not be limited only to those impairments listed on their appeal request because issues often emerge or become clearer as the hearing process evolves, for example as additional evidence is acquired or the claimant obtains representation.

The claimant also must object to issues in the hearing notice within 5 business days of the hearing, with no extension. The current process is flexible and allows raising objections “at the earliest possible opportunity.” 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.

- **Rescheduling hearings for “good cause.”** The NPRM deletes the criteria in current regulations for circumstances when the ALJ **will** change the time and/or place of the hearing and when the ALJ has the discretion to change the time and/or place. The current “good cause” factors, which are claimant oriented, have been deleted and replaced with factors that are SSA-efficiency oriented. Without the current criteria, which focus on claimants’ circumstances, will more hearings be dismissed inappropriately because the claimant is unable to attend?
- **Inability to object to telephone hearings.** The claimant will be informed in the notice if the hearing is to be held in person, by video teleconference or by telephone. For the first time, the ALJ is authorized to direct the claimant to appear by telephone “under certain extraordinary circumstances.” There is no provision in the proposed rule to object to a hearing scheduled to be held by telephone. An ALJ could determine that “extraordinary circumstances” exist and hold a hearing by telephone without allowing the claimant an opportunity to object. Claimants should be given the right to object.
- **Dismissal of appeal for failure to appear at a prehearing or posthearing conference.** If neither the claimant nor the representative appears at a prehearing or posthearing conference, the ALJ would have the discretion to dismiss the appeal. This extreme penalty, which is not in the current regulations, should be reserved for situations where both the claimant and representative miss the actual ALJ hearing without good cause. Dismissal on this basis should not be left to the ALJ’s discretion.
- **The contents of the appeal to the Review Board (RB).** The appeal to the RB must be in writing and 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. We are concerned that the failure to raise issues in the appeal statement will be deemed a waiver of the right to have them considered by the RB or that the RB will give less consideration to appeals that do not include a statement meeting these requirements.
- **Payment required for a copy of the record.** Claimants would be penalized for appealing to the RB by a new requirement to pay for requested copies of the record or the hearing recording, unless there is a “good reason” not to pay. This change may violate the Privacy Act which grants an individual the right of access to his or her own records. The current procedure should be retained which provides that the Appeals Council will not charge for a duplicate hearing recording or a copy of the claims file.
- **Submitting evidence to the Review Board.** In addition to the strict limits for submitting new evidence to the RB, the NPRM requires that the claimant “must submit” a statement with the additional evidence explaining why he or she believes the strict criteria are met. 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, while the claimant must meet strict limits for submitting new evidence under the NPRM, the RB is free to obtain new evidence either by remanding the case to the ALJ or by obtaining it on its own if it can be done “more quickly” and would not “adversely affect” the claimant’s rights. There is no further explanation and there is no requirement that the RB proffer the new evidence to the claimant before issuing a decision.