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(NOSSCR)

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TALKING POINTS

**Proposed Regulations to Change the ALJ and Appeals Process:
SSA Elevates Administrative Efficiency Over Fairness**

The Social Security Administration (SSA) published a Notice of Proposed Rulemaking on October 29, 2007 (NPRM) that proposes to make significant changes at the Administrative Law Judge (ALJ) and appeals levels. 72 Fed. Reg. 61218 (Oct. 29, 2007). This is a **proposed** rule. There is a 60-day comment period and **comments must be submitted no later than *December 28, 2007***. Keep in mind that these proposed changes, which apply to both disability **and** nondisability claims, are all regulatory. While we believe that some statutory questions are raised by the NPRM, no legislative amendments to the statute are needed for the process to change.

SSA says that the proposal will make the hearings and appeals process “more efficient.” But at what cost? While the proposal could improve processing times for disability adjudications, claimants will be denied their rights to due process and to rights guaranteed by the Social Security Act. Although there are some improvements from a claimant’s perspective, e.g., a 75-day hearing notice and retaining the right to administrative review of an unfavorable ALJ decision, there are significant proposed changes that will be extremely detrimental to claimants. Under the proposal, claimants will receive, in many instances, a very unfair shake in what is a nonadversarial, informal process.

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. The NPRM 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.

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

While we support efforts to move cases quicker and to reduce the disability claims backlog, we do not support efforts that elevate speed of adjudication above accuracy of decision-making. The two most significant changes in the NPRM would: (1) Restrict 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) Limit the scope of review for claimants who appeal an erroneous ALJ decision after a federal court or Review Board remand. To exacerbate the adverse effect of these changes, claimants would be advised to file new applications, potentially with detrimental consequences, and restricted in their ability to reopen prior claims.

We believe that the proposal is neither efficient nor fair. And, is the real purpose of these proposed changes that there would be fewer 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 completely unacceptable.

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

One of the most significant changes would restrict the submission of new evidence to the administrative law judge (ALJ) and the new Review Board (RB). All new evidence must be filed five (5) business days before the hearing date. Evidence submitted after that date is considered "late" and is subject to new rules¹:

- **Within five business days of the hearing or at the hearing:** The ALJ will 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 will 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 will 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.

Major Concerns

- **The proposed changes to restrict the submission of evidence violate the Social Security Act.** Under current law, the claimant has a right to a hearing with a decision based on "**evidence adduced² at the hearing.**" 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."³

¹ The ALJ also has the discretion, at the hearing, to hold the record open if there is outstanding evidence or the claimant is to undergo additional medical evaluation.

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 20 C.F.R. §§ 404.929 and 416.1429.

Our interpretation of the statute is supported by other important entities. An October 25, 2005 letter⁴ from 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, states: “[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 2005, the Congressional Research Service also found a “possible conflict” for similar proposed restrictions.⁵ Even SSA previously abandoned a proposal for a pre-hearing due date for new evidence because it appeared to close the record in contravention of the statute.⁶

- **The proposed changes eliminate the ALJ’s obligation to fully and fairly develop the record.** The United States Supreme Court has held that ALJs have a “duty of inquiry” based on a claimant’s constitutional and statutory rights to due process.⁷ Restrictions on the submission of evidence are inconsistent with the well-established case law in all federal courts of appeal that ALJs have a duty to develop the record, which exists whether or not the claimant is represented. However, the duty is especially heightened where the claimant is unrepresented. This duty would be vitiated by the time limits for submitting evidence.
- **The proposed changes give ALJs the discretion to violate claimants’ rights under the Act.** The proposed limits do not provide a mechanism to ensure that an ALJ who refuses to accept evidence within 5 days of the hearing or later does not violate a claimant’s statutory right. 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 will have limited recourse for review within the agency.
- **The proposed changes will lead to more court filings.** 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 (“sentence 6 remands”). 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: Claimants will be forced to file appeals just to have SSA consider evidence that was improperly excluded earlier in the process. 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, 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 time limits will lead to unnecessary litigation.

⁴ This letter was sent in response to the July 27, 2005 Disability Service Improvement NPRM.

⁵ *The Proposed Changes to the Social Security Disability Determination and Appeals Process* (CRS, Sept. 21, 2005), p. CRS-2.

⁶ 63 Fed. Reg. 41411-12 (Aug. 4, 1998)(final rule on “Rules of Conduct and standards of responsibility for representatives,” codified at 20 C.F.R. §§ 404.1740 and 416.1540).

⁷ See *Heckler v. Campbell*, 461 U.S. 458, 471 n.1 (1983).

In contrast, the current rules are consistent with the Act and generally allow for consideration of relevant evidence. At the ALJ level, claimants can submit evidence “at the hearing.”⁸ The Appeals Council limits provide that new evidence will be considered if it is “new and material” and relates to the period before the ALJ decision.⁹

- **There are practical and fairness reasons why the record should not be closed before the hearing.** While we support the submission of evidence as early in the process as possible, to the extent that important and relevant evidence becomes available at a later point in the claim, the claimant should not be foreclosed from submitting it, since this is not an adversarial process but a “truth-seeking” process. The limits in the NPRM are not consistent with such a process.

1. The proposed changes are inconsistent with the realities of claimants obtaining representation. Many claimants seek and obtain representation shortly before, or even after, the ALJ hearing date. Based on the experience of representatives, this is not an uncommon occurrence since the ALJ hearing is the claimant’s first in-person contact with a disability adjudicator. They do not understand the complexity of the rules or importance of obtaining representation. Many are overwhelmed by other demands in their lives, such as chronic illnesses and economic hardships. Even a 75-day notice will not be sufficient if a claimant seeks representation shortly before the hearing. What will happen if a claimant seeks representation within five business days of the hearing? Will an ALJ be able to exclude the admission of relevant evidence? Under the proposed restrictions, the answer is “yes.”

2. The proposed changes are inconsistent with the realities of obtaining medical evidence. While we strongly support early submission of evidence, representatives have great difficulty obtaining necessary medical records due to circumstances beyond their control. There are many legitimate reasons why the evidence is not provided earlier. 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. In addition, cost or access restrictions, e.g., HIPAA requirements, may prevent the ability to obtain evidence in a timely way.

3. 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.

II. The Proposal Significantly Limits the Claimant’s Right to Review of Erroneous ALJ Decisions.

The NPRM restores the claimant’s right to request administrative review of an unfavorable ALJ decision (eliminated under the Disability Service Improvement process), a change that we strongly

⁸ 20 C.F.R. §§ 404.929 and 416.1429.

⁹ 20 C.F.R. §§ 404.970(b) and 416.1470(b).

support. However, that right is severely curtailed by new and significant limits on review by the Review Board (RB) and by the federal courts.

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. If the original ALJ decision is 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.”¹⁰

Under current procedures, the first ALJ decision is reversed and vacated when the court remands for a legal error. As a result, there is no “final decision of the Commissioner” in place 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.

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.”¹¹ 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 nonadversarial and truth-seeking process.

The agency goes on to state in the preface that “this proposed closing of the record will not unduly disadvantage claimants.” But 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 decision and the review proceedings.¹² 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 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 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.

Major Concerns

- **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, will be limited to establishing onset of disability no later than the

¹⁰ Proposed 20 C.F.R. §§ 404.972 and 416.1472.

¹¹ 72 Fed. Reg. 61222.

¹² *Id.*

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.¹³

- **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.

- **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, 42 U.S.C. § 405(g) 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

¹³ 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).

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. Further, from a practical perspective, this approach is the most efficient for ALJs, since 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 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 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?

Is the real impetus for these changes a reduction in allowances? 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. Workers who are eligible for Title II disability benefits are particularly harmed. Medicare benefits could be delayed because of the 24-month Medicare waiting period. And because of the recency of work test, the worker's insured status may have expired during the pendency of the first application and the worker may never be eligible when a new application is filed. If the issue of the disability onset date in the new claim 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.
- **Urging claimants to reapply is inconsistent with Congressional intent.** 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. Congress responded and legislation enacted in 1990 requires SSA to include clear and specific language in notices describing the adverse consequences of reapplying.¹⁴ Congress has previously corrected this problem and 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.

¹⁴ 42 U.S.C. §§ 405(b)(3) and 1383(c)(1).

- **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. There would be more administrative costs for SSA by developing new applications. Many individuals, who are unable to avail themselves of the online application process, will require the personal involvement of an SSA claims representative. This is particularly problematic at a time when the agency is faced with its lowest staffing level in more than 30 years.

IV. New Restrictions on Reopening 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.

Under current law, reopening for "good cause" may occur within two years (SSI) or four years (Title II) of the initial determination if there is "new and material evidence."¹⁵ Reopening is discretionary and cannot be required, but it can be used to right obvious wrongs.

This 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"¹⁶ 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 RB.¹⁷ 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 who are unable to provide records. The proposal also could result in a total loss of eligibility if Title II disability insured status previously expired.

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

The NPRM proposes to establish many new time limits and other requirements that make the process overly complicated and legalistic. These changes may well become procedural traps for claimants, especially those who are unrepresented.

¹⁵ 20 C.F.R. §§ 404.989 and 416.1489.

¹⁶ See 72 Fed. Reg. 61222.

¹⁷ The NPRM does not affect the reopening of initial or reconsideration level decisions.

1. **New time limits.**

Additional new time limits, beyond normal appeal deadlines, have no “good cause” exception. However, even “good cause” exceptions will not solve the problems of unfairness, since, even if requested, they are discretionary and essentially unreviewable. New time limits with no “good cause” exceptions include:

- Object to the time or place of the hearing: 30 days after receiving the hearing notice
- Acknowledge receipt of hearing notice: 5 days after receipt
- Object to issues in hearing notice: 5 business days before the hearing
- Subpoenas: Must be requested 20 days before the hearing
- Brief to Review Board: File with appeal or within 10 days of filing the appeal

2. **Possible limits on issues before the ALJ.**

There is a new requirement that the request for hearing must include a statement that lists the “medically determinable impairments” preventing work. Does this limit the impairments considered by the ALJ? Will some ALJs 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.

The claimant also must object to issues in the hearing notice within 5 business days of the hearing, with no opportunity to extend the time limit. The current regulation provides flexibility, stating that objections should be raised “at the earliest possible opportunity.”¹⁸ 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.

3. 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.¹⁹ These “good cause” factors for rescheduling have been severely curtailed, placing nearly total discretion in the ALJ. Without these criteria, will more hearings be dismissed inappropriately because the claimant is unable to attend?

4. 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” 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. There is no provision in the proposed rule to object to a hearing scheduled to be held by telephone.²⁰ Could an ALJ determine that “extraordinary circumstances” exist and hold a hearing by telephone without allowing the claimant an opportunity to object?

5. Dismissal 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. There is only a “reasonable notice” requirement, with no specific advance notice time limit (under current regulations, it is 7 days). Could an ALJ find that a very short

¹⁸ 20 C.F.R. §§ 404.939 and 416.1439.

¹⁹ 20 C.F.R. §§ 404.936(e), (f) and 416.1436(e), (f).

²⁰ The proposed rule retains the claimant’s right to opt out of appearing by video teleconference, in which case the hearing will be re-scheduled to allow appearance in person.

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.

6. 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. 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?

7. Payment required for a copy of the record. For an appeal to the Review Board, the claimant must pay for copies of the record or the hearing recording, if requested, unless there is a “good reason” not to pay. Does this NPRM violate the Privacy Act which grants an individual the right of access to his or her own records? The current procedure is consistent with the Privacy Act since the Appeals Council does not charge for a duplicate hearing recording or a copy of the claims file.²¹

8. 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.

9. Standard of review. The NPRM includes 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.” Further, the RB will only act on “significant” errors of law. 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 filings in federal court?

²¹ HALLEX I-3-0-84 C.1.