



# Proposed Regulations to Change the SSA Appeals Process: Are They Fair to Claimants?

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Claimants' Representatives (NOSSCR)



# File Comments!

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- NPRM: 72 Fed. Reg. 61218 (Oct. 29, 2007)
  - [www.gpoaccess.gov/fr](http://www.gpoaccess.gov/fr)
- To submit: Use one of the following methods. You must refer to Docket No. SSA-2007-0044:
  1. **Federal eRulemaking Portal:** [www.regulations.gov](http://www.regulations.gov). (preferred method). 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.

# NPRM: General comments



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- Applies to both disability and nondisability claims
- Replaces Appeals Council with new entity: Review Board
- Assumes retention of reconsideration level



## NPRM: Pros

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- Retains *de novo* ALJ hearing
- 75-day hearing notice
- Retains claimant's right to request administrative review of unfavorable ALJ decision

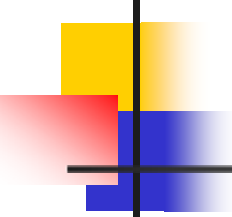


# Why is the NPRM unfair to people with disabilities?

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- Record closes 5 business days before hearing
  - Restrictions on submission of evidence
  - Limits scope of review on remand
  - Result: Savings of \$1.5 billion over next 10 years through reduced allowances
- Forces claimants to file multiple applications, possibly to their detriment
- Limits ability to reopen prior applications
- Other proposed changes make process too formal and unfair

# Record closes 5 business days before hearing



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Exceptions for “late” evidence:

- Within 5 business days or at hearing:
  - (1) SSA’s action misled claimant; (2) claimant has limitation that prevented earlier submission; or (3) some other “unusual, unexpected, or unavoidable circumstances beyond claimant’s control” prevented earlier filing;
- After hearing but before hearing decision:
  - One of three exceptions AND “reasonable possibility” that evidence would “affect” outcome of claim
- Before Review Board:
  - One of three exceptions AND “reasonable probability” that evidence would “change” outcome of claim



# 1. Why evidence submission restrictions are unfair:

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- Violate right to hearing based on evidence “adduced” at a hearing per Act
- Eliminate ALJ’s duty to fully and fairly develop the record
- Give ALJ discretion to ignore any evidence submitted within 5 business days of hearing
- Forces claimants to appeal to court to have improperly rejected evidence considered



# Why evidence submission restrictions are unfair:

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- Inconsistent with realities of obtaining representation
  - Often shortly before or at time of hearing
- Inconsistent with realities of obtaining medical evidence
  - No requirement that providers respond, HIPAA
- Inconsistent with realities of impairments
  - Medical conditions not static; diagnoses change; some take longer to diagnose; difficult to explain



## 2. Limits on the right to review of erroneous ALJ decisions

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- If Review Board or court finds ALJ decision wrong and remands, NPRM limits remand hearing to evidence of impairment(s) on or before date of original ALJ decision.
  - Even if original impairment worsens, claimant cannot submit new evidence of this change



# Limits on right to review: How claimants are harmed

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SSA says: Change will not “unduly disadvantage claimants” if condition worsens between 1<sup>st</sup> ALJ decision and remand. But it will:

- Filing a new application is not a viable option
  - Lost benefits; 5-month T II and 24-month Medicare waiting periods; insured status expires
- Ambiguous language: Time-limited benefits ending no later than date of 1<sup>st</sup> ALJ decision?
- Limits federal court authority to remedy legal errors



### 3. Forcing claimants to file multiple applications is not fair or efficient

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- Onerous burden on claimants
- \$1.5 billion savings due to “reduced allowances”
  - Does this assume claimants will be confused and discouraged and not file new apps?
  - Do “savings” include claimants who lose benefits from first app or are permanently foreclosed from eligibility?



# Forcing claimants to file multiple applications is not fair or efficient

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- Claimants may jeopardize or foreclose eligibility by reapplying
  - Lost benefits from date of 1<sup>st</sup> app
  - T II benefits delayed – 5-month waiting period
  - Medicare delayed – 24-month waiting period
  - Insured status expired before 1<sup>st</sup> ALJ decision – foreclosed forever!



# Forcing claimants to file multiple applications is not fair or efficient

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- Inconsistent with Congressional intent
  - Act requires SSA to include clear language in notices re reapplying vs. appealing
- Administratively inefficient and will increase SSA's workload



## 4. Claimants limited in ability to reopen prior applications

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- NPRM eliminates ALJ or RB discretion to reopen prior ALJ/RB decisions where “new and material evidence” shows earlier disability
- Reopening does not happen often but remedy for compelling facts
- Why the change to limit reopening?
  - NPRM: Assure that claimants cannot “circumvent” evidence submission restrictions
  - Exacerbates strict rules for submission of evidence



# Claimants limited in ability to reopen prior applications

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- Why is reopening important?
  - Cs unable to clearly articulate allegations in 1<sup>st</sup> app
  - Case poorly developed in 1<sup>st</sup> app
  - Cs unable to obtain evidence in 1<sup>st</sup> app
  - Cs have difficult-to-diagnose impairment
  - Unrepresented Cs with mental impairments
    - Limit in ability to cooperate with development of claim
    - Reapply instead of appeal



# Other changes make process too formal and unfair

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- New time limits: No “good cause” extension
  - Object to time or place of hearing
    - Current: earliest possible opportunity
    - NPRM: 30 days after receiving hearing notice
  - Object to issues in hearing notice
    - Current: earliest possible opportunity
    - NPRM: 5 business days before hearing



# Other changes make process too formal and unfair

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- New time limits (cont'd)
  - Request subpoenas for missing records from ALJ
    - Current: 5 days before hearing
    - NPRM: 20 days before hearing
  - Brief to Review Board
    - Current: reasonable opportunity (policy: 40 days after appeal)
    - NPRM: 10 days after appeal



# Other changes make process too formal and unfair

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- Possible limits on issues before ALJ
  - Appeal must include list of impairments that prevent work
  - Objections to issues in notice within 5 business days of hearing
    - What if representation obtained within 5 days of hearing? Is rep precluded from raising?
- Rescheduling hearings for good cause
  - Current criteria eliminated – nearly total ALJ discretion
  - More dismissals??



# Other changes make process too formal and unfair

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- Inability to object to telephone hearings
  - First time telephone hearings authorized for “extraordinary circumstance” where VTC not available
  - ALJ discretion to schedule??
- Dismissal for failure to appear at prehearing conference
  - No advance notice time limit
  - Extreme penalty – should not be in ALJ’s discretion



# Other changes make process too formal and unfair

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- Contents of appeal to Review Board
  - “Should” include: statement of ALJ errors; reasons for reversal or modification; cite law and specific facts in record
  - Formal and legal requirements; assume experienced legal representation
  - Will failure to raise issues waive right to RB consideration?



# Other changes make process too formal and unfair

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- Payment required for copy of record at RB
  - Must pay for recording/evidence unless “good reason” not to pay
  - Violation of Privacy Act? Right to access
  - Current policy: Appeals Council does not charge



# Other changes make process too formal and unfair

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- Submitting evidence to Review Board
  - Far stricter limits than current regulations
    - Current: new and material
  - Claimant “must” submit statement explaining why new evidence meets strict new criteria
    - Trap for unrepresented claimants?
    - Will RB refuse consideration if no statement?



# Other changes make process too formal and unfair

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- Standard of review by Review Board
  - New “harmless error” rule: RB will not change error unless, in RB’s opinion, “reasonable probability” that error changed outcome of decision
    - Too discretionary
    - Stricter than standard used by federal courts? Will this increase federal court appeals?
  - RB will only act on “significant” errors of law
    - No clarification
    - What is “significant”?



# To summarize

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- Proposed changes are not fair to people with disabilities and other claimants because:
  - The record closes 5 business days before hearing, with limited discretionary exceptions
  - Individuals who appeal erroneous ALJ decisions will be limited in new evidence they can submit on remand from federal court or Review Board
  - Forcing claimants to file multiple applications is neither fair nor efficient
  - Individuals will be limited in ability to reopen prior applications, even though they were disabled
  - Many other proposed changes make process too formal and unfair



# Please file comments by December 28<sup>th</sup>!

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