NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

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Amber Williams
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Administrative Conference of the United States
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Re: Comments on the ACUS study assessing the impact of the DSI pilot program in Region I

Dear Ms. Williams:

Thank you for the opportunity to submit comments on the ACUS study assessing the impact of the current Disability Service Improvement (DSI) program in SSA Region I states. While most aspects of DSI as implemented in 2006 have been eliminated, e.g., the Federal Reviewing Official and the Decision Review Board, two hearing level provisions remain: (1) rules that essentially close the record 5 days before the hearing; and (2) providing 75-day notice of the hearing date.

To provide background about our organization, NOSSCR was founded in 1979 and is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals at all Social Security Administration (SSA) administrative levels and in federal court. We are a national organization with a current membership of more than 4,000 members from the private and public sectors and are committed to the highest quality legal representation for claimants.

When former Commissioner Barnhart initially proposed the DSI changes in July 2005,[1] NOSSCR submitted extensive comments, in addition to Congressional testimony at a House of Representatives hearing on the notice of proposed

[1] 70 Fed. Reg. 43590 (July 27, 2005).

rulemaking (NPRM). In October 2007, former Commissioner Astrue proposed a broad range of procedural changes to the disability determination process, including nationwide implementation of the DSI provisions to close the record 5 days before the hearing.[2] NOSSCR also submitted extensive, detailed comments to the October 2007 NPRM. If you would like to review these comments, we would be happy to share them with you.

In preparation of these comments, we polled NOSSCR members in Region I states to assess their experiences with DSI. Their responses were generally consistent with the long-standing positions taken by NOSSCR: (1) The 75-day hearing notice provision has generally been well-received; and (2) The limits on submitting evidence prior to the hearing have had a detrimental impact on claimants.

Our comments are discussed in two parts. Part I provides a general overview of NOSSCR's positions on these two provisions. Part II (beginning on page 10) includes further statements of NOSSCR's positions and comments from NOSSCR members in Region I in response to the specific questions you posed in your request for comments.

I. NOSSCR POSITIONS

A. 75-day Hearing Notice

NOSSCR has consistently recommended that the time for providing advance notice of the hearing date be increased from the current 20 days[3] to 75 days. We believe that this increase will allow more time to obtain medical evidence before the hearing and make it far more likely that the record will be complete when the ALJ reviews the file before the hearing. The 75-day time period has been in effect in SSA's Region I states since August 2006[4] and, based on reports from our members (see below in response to Question 2), has worked well.

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

The DSI regulations create strict limits and procedures for submission of new and material evidence. For many claimants who meet the statutory definition of disability, the result could well be a denial based on an incomplete record, which is inconsistent with the goal of the disability determination process to ensure that adjudicators have a complete record when deciding a claim.

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[2] 72 Fed. Reg. 61218 (Oct. 29, 2007).
[3] 20 C.F.R. §§ 404.938(a) and 416.1438(a).
[4] 20 C.F.R. § 405.315(a).

Under the DSI regulations, the record essentially closes five business days before the hearing. Evidence submitted after that date is considered "late" and is subject to the following rules:

- Within five business days of the hearing or at the hearing: The ALJ may 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 may 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 Appeals Council (a carry-over after the elimination of the Decision Review Board): The proposed rule is even stricter for submitting evidence to the Appeals Council. The Appeals Council may 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.

The DSI regulations fail to recognize that there are many legitimate reasons, often beyond the claimant's or representative's control, why evidence is not submitted earlier and thus why closing the record or creating unreasonable procedural hurdles is not beneficial to claimants. We have many concerns – both legal and practical – regarding the impact of the restrictions on claimants with disabilities.

1. Restrictions on the submission of evidence prior to the hearing Social Security Act

The Act provides the claimant with the right to a hearing with a decision based on "evidence adduced at the hearing."[5] 42 U.S.C. § 405(b)(1). Our position is that the DSI regulations conflict with the statute. Current regulations that apply to the rest of the country comply with the statute by providing that "at the hearing" the claimant "may submit new evidence." 20 C.F.R. §§ 404.929.

Concerns noted by the Congressional Research Service (CRS) support our position. Following publication of the July 27, 2005 NPRM on the Disability Service

[5] 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.

Improvement (DSI) process,[6] the House Ways and Means Subcommittee on Social Security asked CRS for information regarding the changes proposed in the NPRM. In its September 21, 2005 memorandum, CRS discussed "a possible conflict between the new [sic] rules and the Social Security Act." *The Proposed Changes to the Social Security Disability Determination and Appeals Process* (CRS, Sept. 21, 2005), p. CRS-2. The CRS memorandum notes that proposed 20 C.F.R. § 405.311 "may be in conflict with Section 205(b)(1) of the Social Security Act." p. CRS-6. More specifically, the CRS memorandum states:

> The legal issue here is whether the requirement that evidence be submitted 20 days before the ALJ hearing [the time limit in the proposed version of 20 C.F.R. § 405.311] is consistent with the requirement that the Commissioner (or an ALJ delegated by the Commissioner) make a decision "on the basis of evidence adduced at the hearing."

p. CRS-6.

The DSI regulation also is inconsistent with Congressional intent regarding 42 U.S.C. § 405(b)(1). A bipartisan October 25, 2005 letter was sent in response to the July 2005 DSI NPRM, by 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. The letter discussed several issues that were raised at the Subcommittee's oversight hearing on September 27, 2005, "which we believe may negatively impact claimants' rights, may result in further processing delays, and could lead to unfair outcomes." One of these issues was the "new procedural requirements and deadlines for introducing evidence." In commenting on testimony presented at the hearing, Rep. McCrery and Rep. Levin noted that:

> [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 addition, Congressional concern was expressed previously in 1988 regarding restrictions on submission of evidence. A draft NPRM in 1988 included a number of procedural changes, including restrictions on submission of evidence similar to those in the DSI regulations. The House Ways and Means Committee leadership at the time, the former Committee Chairman Dan Rostenkowski and the former Social Security Subcommittee Chairman Andy Jacobs, Jr., sent a letter dated November 21, 1988, to the Secretary of Health and Human Services at the time, Otis R. Bowen, expressing their concerns regarding the 1988 draft NPRM. Referring to the provisions in 42 U.S.C. § 405(b)(1), they stated that the proposed regulations

[6] 70 Fed. Reg. 43590 (July 27, 2005).

restricting submission of evidence "ignore these explicit provisions of the law." The Committee then held a hearing on the draft NPRM on December 5, 1988. Following this Congressional criticism, the draft NPRM was not published.

SSA itself has previously recognized that setting a pre-hearing due date for submission of evidence was abandoned by SSA because it appeared to close the record in contravention of the statute. *See* 63 Fed. Reg. 41404, 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).

2. The proposed changes eliminate the ALJ's duty to fully and fairly develop the record.

The United States Supreme Court has recognized that ALJs have a "duty of inquiry" based on a claimant's constitutional and statutory rights to due process. *See generally Heckler v. Campbell*, 461 U.S. 458, 471 n.1; *Richardson v. Perales*, 402 U.S. 389, 400 (1971).

All circuit courts of appeals have well-established case law that ALJs have a duty to develop the record, which includes both obtaining sufficient medical evidence and conducting sufficiently detailed questioning at the hearing. The ALJ's failure to fully develop the record may result in a court remand to obtain the missing information or to consider information that was not considered previously. *See, e.g., Pratts v. Chater*, 94 F.3d 34 (2nd Cir. 1996); *Delorme v. Sullivan*, 924 F.2d 841 (9th Cir. 1991); *Baker v. Bowen*, 886 F.2d 289 (10th Cir. 1989). Because the Social Security appeals process is not adversarial, this duty exists whether a claimant is unrepresented, or is represented by either an attorney or a non-attorney representative. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144 (9th Cir. 2001); *Shaw v. Chater*, 221 F.3d 126 (2nd Cir. 2000); *Henrie v. Dept of HHS*, 13 F.3d 359 (10th Cir. 1993); *Thompson v. Sullivan*, 987 F.2d 1432 (10th Cir. 1993); *Smith v. Bowen*, 792 F.2d 1547 (11th Cir. 1986); *Bishop v. Sullivan*, 900 F.2d 1259 (8th Cir. 1990).

This duty is vitiated by the time limit for submitting evidence before the hearing since it is not possible for the ALJ to meet this important responsibility if the requirement/presumption is that all (or virtually all) evidence must be submitted 5 days before the hearing.

3. The DSI regulations give ALJs the discretion to violate claimants' rights under the Act.

Under the DSI regulations, the ALJ has the discretion to ignore any evidence submitted less than five business days before the hearing. The exceptions are within the discretion of the ALJ and if the ALJ finds that the exceptions are not met, claimants will have no recourse to have the evidence considered other than to

file an appeal to the Appeals Council and to federal court from the agency's "final decision" or to abandon their claims. Such a result conflicts with the goal of ensuring that there is a complete record, especially since there is no claim in the DSI regulations that this evidence is somehow less valuable or probative in determining disability.

The limits do not provide a mechanism to ensure that an ALJ who refuses to accept evidence within 5 business days of the hearing or later does not violate a claimant's right to a full and fair hearing. The requirements in the DSI regulations 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 is forced to appeal first to the Appeals Council and possibly to federal court simply to have the evidence considered. Our members provided a number of examples, provided below, of exactly these types of occurrences.

The preface to the 2007 NPRM describes another exception that allows the ALJ to hold the record open, but this basis also is completely within the ALJ's discretion: (1) The claimant is "aware" of any additional evidence that could not be timely obtained and submitted before or at the hearing; or (2) the claimant is scheduled to undergo additional medical evaluation after the hearing for any impairment that forms the basis of the disability claim. The claimant "should inform the ALJ of the circumstances during the hearing." But as far as keeping the record open if a request is made for one of these circumstances, there is no requirement that the ALJ do so: "[T]he ALJ could exercise discretion and choose to keep the record open for a defined period of time …."[7] This exception has not been adopted and, at any rate, was not included in the DSI regulations.

Even in this situation, the ALJ's discretion could be exercised unfairly to claimants. For example, an ALJ could deny a claimant's request to keep the record open but then decide to keep the record for his or her own purposes in order to obtain a consultative examination. This exact situation was previously reported by a NOSSCR member in Region I under the DSI regulations.

4. The DSI regulations are inconsistent with the realities of claimants obtaining representation

[7] 72 Fed. Reg. 61220.

Many claimants seek and obtain representation shortly before the hearing or after receiving the hearing notice, frequently fewer than 20 days before the hearing. In fact, a large number of claimants seek representation only after receiving an unfavorable ALJ decision. Based on the experience of our members, this is a not an uncommon occurrence since the ALJ hearing is the claimant's first in-person contact with an adjudicator. Under SSA's own policies, before a waiver of the right to counsel is considered valid, the ALJ must both send a letter to the claimant in advance explaining that right and confirm on the record at the hearing that the ALJ again told the claimant about the right to counsel and determined that the claimant was competent to understand. HALLEX I-2-6-52A. If the claimant wishes to obtain representation, the ALJ should postpone the hearing. *Id.*

Many claimants do not understand the complexity of the rules or the importance of being represented until just before their hearing date. Many are overwhelmed by other demands and priorities in their lives and by their chronic illnesses. As a practical matter, when claimants obtain representation shortly before the hearing, the task of obtaining medical evidence is even more difficult. Even a 75-day hearing notice, a change that we strongly support, will not be sufficient if the claimant seeks representation shortly before the hearing. How do the evidence submission restrictions affect an individual who obtains representation within 5 business days of the hearing? Under the DSI regulations, the ALJ would have the discretion to exclude new and relevant evidence.

5. The proposed changes are inconsistent with the realities of obtaining medical evidence

We very strongly support early submission of evidence. However, our members frequently have great difficulty obtaining necessary medical records due to circumstances outside their control. There are many legitimate reasons why the evidence is not provided earlier. [8] 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.

While a five-day requirement is imposed on claimants in the DSI regulations, nothing requires medical providers to turn over records quickly. A claimant would

[8] If an ALJ believes that a representative has acted contrary to the interests of the client/claimant, remedies other than closing the record exist to address the representative's actions. SSA's current Rules of Conduct already require representatives to submit evidence "as soon as practicable" and to act with "reasonable diligence and promptness" and establish a procedure for handling complaints. 20 C.F.R. §§ 404.1740 and 416.1540. If a representative withholds evidence, waiting to file it later, we believe that it is rare and unjustifiable. But SSA already has the tools to penalize a representative for this behavior without doing irreparable harm to claimants. However, this NPRM would punish the claimant rather than the representative.

be at the mercy of an ALJ to find that an exception to "late" submission of evidence has been met. Some ALJs do so. But, as discussed below, some ALJs rigidly enforce the five-day deadline and refuse to consider any medical evidence submitted within that time limit and even deny the claim based on an incomplete medical record. And, if the ALJ abuses his or her discretion – which happens – the claimant will have limited recourse within the agency, and in many cases will need to file suit in federal court where a district court judge will be asked to decide not whether the evidence proves disability, but whether the ALJ was wrong to refuse to consider the evidence. As a result, the five-day time limit results in decisions based on incomplete records, which lead to unnecessary litigation. These results are not only unfair to claimants but also are administratively inefficient and thus do not advance the Agency's goals.

Some of our members employ staff who work full-time doing nothing but sending out requests for records, following up by phone call and fax, and reviewing responses for completeness. Nevertheless, they face numerous obstacles and lengthy delays in a significant number of cases. And for claimants who seek representation *after* the ALJ decision, having tried to proceed without representation, the problems with developing a complete evidentiary record are even worse.

Problems with developing complete evidentiary files are many and varied, and include the following:

- Physicians who are understaffed, have copying and/or fax machines which are reportedly broken, and/or clearly do not see fulfilling record requests from attorneys as a high priority;
- Physicians who do not want to provide any records until a past-due bill for medical services is paid by the claimant;
- Physicians who will provide only their handwritten and marginally legible treatment notes, but will not take the time to write a letter or complete a form regarding their patients' impairments and functional limitations, regardless of whether a fee is offered for their services;
- Hospitals often give requests low priority. They have reduced their medical records staff, which delays responding to requests.
- Hospitals which have either closed or changed ownership, which often results in records being transferred to other sites with no notice to former patients;
- Hospitals which, for good reason, will not release records of inpatient hospitalizations until the attending physician signs the chart, which may take weeks or even months after discharge;
- Hospitals which cannot locate Emergency Room treatment records unless they are given a specific date of treatment, which claimants often cannot remember;
- Hospitals which insist on receiving their own form releases, even when a general HIPAA-compliant form has already been executed by the claimant. We have

heard from representatives that medical providers have different interpretations of HIPAA requirements and as a result require use of their own forms for authorization to disclose information. This can lead to delays since repeated requests for medical information must be submitted, including delays caused by the need to obtain the claimant's signature on various versions of release forms. Frequently, if the medical records staff finds a problem with the request for information, e.g., it is not detailed enough or a different release form is required, the new request goes to the end of the queue when it is resubmitted.

- Mental health outpatient treatment centers which erroneously claim that HIPAA prohibits them from releasing psychotherapy notes;
- Claimants who, because of mental impairments, are unable to recall all of their treatment sources (e.g., a claimant with a hearing scheduled who, despite repeated questioning, cannot remember what hospital he was psychiatrically admitted to for a period of several weeks);
- Claimants who have used different names in the past, making location of their records difficult if not impossible.

In addition to this nonexhaustive list of problems, it should be noted that virtually all providers expect pre-payment for copies of records. While some states have statutes which limit the charges that can be imposed by providers, many do not. Moreover, while private attorneys have the resources to advance costs for their clients, many legal services organizations do not, and unrepresented claimants may withdraw their requests for records in the face of what are, for them, significant bills which they cannot afford to pay. Finally, although ALJs have the nominal power to issue subpoenas at 20 C.F.R. §§ 404.1450 and 416.950, they do not have the power to enforce subpoenas with which providers fail to voluntarily comply, and the United States Attorneys' offices which have such power do not have the resources to devote to such activities.

6. The proposed changes are inconsistent with the realities of claimants' medical conditions.

Claimants' medical conditions may worsen over time and/or diagnoses may change. Claimants undergo new treatment, are hospitalized, or are referred to different doctors. Some conditions, such as multiple sclerosis, autoimmune disorders or certain mental impairments, may take longer to diagnose definitively. The severity of an impairment and the limitations it causes may change due to a worsening of the medical condition, e.g., what is considered a minor cardiac problem may be understood to be far more serious after a heart attack is suffered. It also may take time to fully understand and document the combined effects of multiple impairments. Further, some claimants may be unable to accurately articulate their own impairments and limitations, either because they are in denial, lack judgment, simply do not understand their disability, or because their impairment(s), by

definition, makes this a very difficult task. By their nature, these claims are not static and a finite set of medical evidence does not exist.

Also, as with some claimants who seek representation late in the process, their disabling impairments make it difficult to deal with the procedural aspects of their claims. Claimants may have difficulty submitting evidence in a timely manner because they are too ill, or are experiencing an exacerbation, or are simply overwhelmed by the demands of chronic illness, including the time and logistical demands of a caregiver or advocate to help submit evidence.

II. RESPONSES FROM NOSSCR MEMBERS IN REGION I

1. What is NOSSCR's view of the current pilot program in Region I?

The general view is that the 75-day notice rule should be implemented nationwide. However, the 5-day rule needs to be either eliminated or modified, as discussed below in response to Question 4.

- **From an attorney in Massachusetts:** "In practice, it's '14 judges, 14 interpretations' of these rules … I have to say that my view is that application of the program is not uniform, and for reasons that have to do with idiosyncrasies or practice patterns of individual judges. Another question is exactly what the DSI program applies to: individual initial disability appeals or everything else as well, such as overpayments, living arrangements, continuing disability reviews, Appeals Council remands. The practice seems to be to send out notice of the 5 day rule on every case scheduled for a hearing, and I'm not sure that DSI applies in all instances."

2. What does NOSSCR think are the benefits, if any, of the current pilot program in Region I for claimants and/or their representatives?

NOSSCR members in Region I generally support the 75-day notice in advance of the hearing.

- **From an attorney in Connecticut:** "I like the 75 day notice that gives a useful timeframe for acquiring missing records. Hospitals I deal with represent that they get documents out in 2 weeks, or even a month, but experience is commonly 6 weeks or more."

- **From an attorney in Connecticut:** "The 75 day notice is good as it provides a timeframe for case development and an early heads-up to the attorney and client."

- **From an attorney in Connecticut: "**I practice in Connecticut and am very pleased with the 75 day notice of hearings. It gives sufficient time to 'gear up' to get the latest opinions and medical records to the ALJs. However, in the Hartford ODAR, we are not called prior to scheduling hearings. At times this results in having hardly any hearings in one month and a lot of hearings in other months. This particular practice, of having no input as to when the hearing is scheduled or to spacing of hearings can be detrimental to the quality of representation (when too many hearings are scheduled closely) …."

- **From an attorney in Maine: "**Having 75 days' notice of a hearing enhances the ability to be adequately prepared, both with regard to medical/vocational evidence, and testimonial. It lessens the likelihood of having to ask for a continuance due to scheduling. It is orderly and civilized and of benefit to everyone.

- **From an attorney in Maine:** "The 75-day notice has been great. It makes it much more possible to update medical records, gather medical source statements and be well-prepared for the hearing."

- **From an attorney in Maine:** "The 75 day notice rule is a wonderful improvement for everyone. I doubt if the ODAR staff will have anything negative to say about it. If the goal is to get everything ready by the time of the hearing, the extra advance notice works well for this purpose. I expect it makes scheduling easier for them and it is better for my firm because we have five attorneys who are doing hearings. In short it has been a win-win."

- **From an attorney in Maine:** "The 75 day notice provision allows representatives to prepare for hearings in a reasonable, timely manner."

- **From an attorney in Massachusetts:** "The seventy five day rule has generally enabled diligent advocates to get most evidence in well before the five day deadline."

- **From an attorney in Massachusetts:** "The 75 day advance notice of hearing is something that should be extended nationally. If an advocate has at least 75 days advance notice, the experience is that it's much more likely that the record will be fully developed for hearing. It would be even better if SSA would allow advocates to say when the record is ready for hearing – perhaps within a reasonable time frame."

- **From an attorney in New Hampshire:** The year long delay (more or less, but lately the time is more) between the request for hearing and the date of the hearing, is the problem. Over that period of time, a lot happens, and the record needs to be updated. Generally, it is helpful to know that the claimant will have 75 days time to update the medical record, as sometimes it takes that long.

The ALJ is required to make a disability determination as of the date of the hearing, so updating the records is critical. We cannot update medical records piecemeal, as it costs a minimum of $15.00 per record request [in New Hampshire], even if it is a few pages. We have to have some way to know when to order medical records to minimize the cost to the claimant."

3. What does NOSSCR think are the drawbacks, if any, of the current pilot program in Region I for claimants and/or their representatives?

The general consensus was that the 5-day rule for submitting evidence before the hearing is detrimental to claimants. As demonstrated by the examples below, there is much variation in how the rule is applied by ALJs, with very inconsistent results. As one attorney in Massachusetts said (see response to Question 1 above): "14 judges, 14 interpretations of these rules … I have to say that my view is that application of the program is not uniform, and for reasons that have to do with idiosyncrasies or practice patterns of individual judges."

- **From an attorney in Connecticut:** "My position is that the five day rule is a disaster. The [medical] clinics don't do five day rule and we have just a couple of ALJs who use it as a club to beat up the lawyer and/or client, exposing us to clients who feel their lawyers have failed them. We filed a complaint against the worst of those ALJs."

- **From an attorney in Connecticut: "**As to the 5 day rule, I have had very little problem with it. In the majority of my cases, because of the 75 day notice, I have been able to gather and submit the evidence prior to the 5 day limit. At times where this has not been possible, I just include a cover letter asking for permission to submit it late. At times I notify the judge that I am anticipating not receiving specific evidence prior to the hearing and ask for permission to submit it late if necessary. So far, no judge has refused my requests."

- **From an attorney in Connecticut:** "The 5-day rule essentially states that an ALJ's duty to develop the record stops as of the day of the hearing. It is impossible to square this with the claimant's right to a fully developed record. Closing of the record – which for practical purposes is the effect of the 5 day rule – in many cases denies the claimant a full and fair adjudication of his or her claim.

Perhaps worse, we deal with ODAR hearing offices that are overworked and understaffed. Actual application of the five day rule will increase the administrative burdens and further strain ODAR staff resources, to no discernible benefit. In the case of a particular ALJ known for rigid adherence to the five day rule, claimant's counsel requests medical records 40 days before the hearing. With

no response on day 31 after the request, counsel requests that the ALJ issue subpoenas to compel the production of the records. Should ODAR staff drop what they are otherwise doing to issue the subpoenas?

The answer is not necessarily to ask for the records when the 75-days notice is received. There are ALJs who will berate counsel for failing to provide up to the minute medical records. If records are requested 75 days before the hearing and are provided quickly by the medical provider, the records will not cover the 60 days or so immediately before the hearing. This scenario has caused at least one ALJ in Connecticut to lace into counsel with barely restrained fury."

- **From an attorney in Maine:** "The 5 day rule is entirely different [from the 75-day hearing notice rule]. Some ALJ's will honor it inconsistently -- they will find exceptions to allow in adverse evidence, and ban positive evidence. I am told one ALJ has counted the 5 days to the minute to exclude evidence. Five business days is a week, any way it is sliced. It does not lead to efficient and fair adjudication. Relevant and probative evidence is excluded. This is not 'world class service' in a program that is by statute meant to be forgiving to claimants, who are mentally, physically, and financially impaired, in a process that easily takes more than a year to get to the hearing stage.

I have a recent example. I inherited a case in which a psychologist authored a report 2 months before the hearing, then left on vacation. She did not sign her report. Four days before the hearing, she electronically signed her report. Attempts by a colleague to submit the report were denied. The ALJ found conditions not to exist that the psychologist, with more testing than in any consultative examination, documented to exist. The ALJ denied the claim. We now represent the claimant on a re-application. How in the world this is good, for claimants, DDSs, and SSA escapes me. It increases the backlog, beyond being manifestly unfair.

Example 2: In this era of merger, some hospital groups own all the formerly individual practices. Medical records can no longer be obtained from the practice, but through 'central office,' at times out of state. We need the full 75 days to get records, because we can count on it taking at least 60 days under the present circumstances of medical record consolidation.

It is one thing to exclude a large parcel of remote evidence that could have been acquired within 75 days, and not made available to the ALJ or a medical expert until the day of the hearing. It is another thing entirely to exclude evidence that is not lengthy, or where there is no medical expert, or which did not exist until shortly before the hearing.

- **From an attorney in Maine:** "The five-day rule is also reasonable, but I feel it is sometimes abused by certain ALJs and needs clarification. One ALJ calculates the five days to the hour. Some have excluded evidence that did not exist until a few days prior to the hearing. To this day, I do not have a real understanding if a brief is covered by the rule. It seems to me that the rule should address these matters and should also allow for the late submission of very small exhibits that would not be too burdensome to review. Dumping hundreds of pages on the ALJ at the last minute is unfair to the Administration, but the gamesmanship employed by some judges as the rule currently exists is equally unfair to my clients and does not serve the larger purpose and spirit of the Social Security Act."

- **From a representative in Maine:** "The five day rule is treacherous and not claimant friendly. Fair minded and reasonable judges apply it fairly and reasonably. Other judges apply it arbitrarily and capriciously. In Region I, I have heard horror stories about at least one judge who has counted 'hours' under the 5 day rule in order to keep evidence out.

In my own experience I had a judge interpret the five day rule as having to have the evidence in by the end of the 6th business day before the hearing. The work up person called me and told me she had been told to 'unexhibit' my evidence after first assuring me she had it and it was timely and had been exhibited. I filed a motion stating that I had been misled by ODAR ('our actions misled you' – one of the criteria for good cause) based upon the actions of the other ALJs who applied the rule otherwise (as had that very judge in the past). The ALJ wound up issuing an on-the-record decision without mentioning the timely submitted supportive evidence or attaching an exhibits list to the decision. So I could not tell whether the evidence was exhibited, so the issue is a 'hanging chad' I may face in the future with this judge.

I have had cases where mentally and physically impaired clients have unintentionally neglected to make me aware of crucial evidence that is often quite dated and could be determinative in cases (multiple childhood psychiatric hospitalizations in multiple hospitals during foster care, childhood surgeries, etc.). Representatives can often find mention of such evidence buried deep within a file during a final review. Of course we should all do our best to comprehensively develop a record but nothing is foolproof and the claimant suffers under the 5 day rule.

On another occasion, a cognitively impaired client told me days before her hearing she had been electrocuted in a work-related accident in the 1970s. I did a superlative job digging up the evidence by going through a one-foot thick, decades old workers compensation file and found the emergency room record, a neurologist's exam and a psychological evaluation – a total of perhaps 7-8 pages that would have taken an extra 5-10 minutes for the very experienced and capable

medical expert to review. That judge postponed my client's hearing for another 3 months rather than take the evidence late under the 5 day rule.

Then there are other factors over which we have no control, such as medical opinions rolling in at the last minute from busy doctors, despite the fact the request for opinion evidence went out weeks before the hearing. Some judges will accept an opinion if it is dated after the 5 days, which is reasonable to base it on the date the evidence was generated. How can you submit it before it exists? But other ALJs won't accept it. Representatives may deal with perpetually non-responsive doctors' offices that we have to keep after and drag medical evidence out of.

But the 5 day rule can keep evidence out that has been hard fought for, and make claimants wait 1 and 1/2 years for the Appeals Council to send the case back with instructions to review the evidence. This recently happened as the AC actually wrote an order stating it was remanding and giving the claimant the opportunity for a new hearing, so the opinion letter was not late anymore! This is a formidable burden placed upon the claimant caught between the representative and the judge. I would rather revert to the 20 days notice and no 5 day rule. Although the 75 day notice without the 5 day evidence deadline would be the most consistent, in my opinion, with this 'beneficent' program …."

- **From an attorney in Maine:** "The 5 day rule has been badly abused by some ALJs … Some ALJs exercise reasonable judgment when administering the rule, but clients have clearly been hurt by the arbitrary way some ALJs apply the rule.

Before DSI, the obligation of the adjudicators to develop the record was clear. With the adoption of the 5 day rule, ALJs have been permitted to ignore this obligation. 'Late' opinion evidence can be excluded very easily by the ALJ who wants to deny a claim."

- **From an attorney in Maine:** "The 5 day evidence submission requirement eliminates the ALJ's duty to develop the record, leads to adversarial hearings, and unfairly results in exclusion of relevant evidence.

As an example of problematic results, I have seen a case where the ALJ requested at the hearing that the representative submit records, received them shortly after the hearing, then declined to admit them under the 5 day rule (apparently because they were favorable to the claimant).

I have seen a case where an inexperienced representative submitted several hundred pages of mental health records less than 5 days before the hearing. These were rejected, resulting in the case being heard with no medical evidence of mental health treatment in the record from the preceding year.

I have seen a case where the claimant had undergone one day of neuropsychological testing prior to the hearing, and was scheduled again for more testing the second day after the hearing. The representative was not involved in arranging or scheduling the testing. The ALJ refused to accept the testing even though it was directly relevant to the disability claim.

In addition, the standards for good cause, as well as the precise meaning of "5 business days before," are unclear and are interpreted inconsistently."

- **From an attorney in Massachusetts:** "The five day rule is ridiculous! We do our best to cultivate the evidence in a timely manner but we are at the mercy of the providers much of the time. There is no reason to penalize the claimant because their doctor is on vacation, etc."

- **From an attorney in Massachusetts:** "There are two types of evidence which we have trouble with. First, obviously, very recent evidence. Second, functional evaluations are getting harder to obtain and sometimes come in around or even, in rare cases, after the five day limit. In both instances, ALJs take the evidence.

Most of the ALJs in this area are fairly flexible with the five day rule, so long as they see representatives are complying with it generally. I have never had evidence excluded. However, there are a certain few ALJs who relish their role, and the potential it affords them for humiliation [of claimants]. I have heard from other advocates that they use the 5 day rule as a tool for their amusement.

But, by and large, the two rules together [the 75-day notice rule and the 5-day rule] have, in my experience, generally improved practice … One obvious due process objection is that the ALJ is adjudicating a claim through the date of his decision. An inflexible application of the five day rule would deny a claimant the ability to submit evidence regarding his condition during that same period of time. However, that has not appeared to have occurred in my experience.

The rules are generally good ones. However, they have the potential to be used to hurt claimants … in really bad ODAR offices, such as exist in places outside this region. On balance, the 75-day notice rule works very well and the 5 day rule generally acts as a good way to guide representatives …."

- **From an attorney in Massachusetts:** "I cannot say that closing the record 5 business days prior to hearing has been a huge problem in Massachusetts. I think that, combined with at least 75 days advance notice of hearing, many advocates have found that they can develop the record in time. However, I also think that misapplication of the rule is a risk factor for claimants. Here are my concerns and examples of ALJs misconstruing the rule in Region I.

○ I have heard of a few cases where ALJs refused to accept evidence prior to hearing but after 5 business days prior to hearing. In one case, it was allegedly the definitive IQ evidence that had not previously been supplied by the provider. Some ALJs have considered a memorandum of facts and law to be covered by the rule and so have not accepted a pre- or post-hearing memorandum.

○ Some ALJs have applied the 5 day rule to nondisability cases like SSI financial eligibility appeals.

○ Some ALJs have considered the medication list to be covered by the 5 day rule.

○ At least one ALJ has said he has no discretion but to close the record 5 business days prior to the scheduled hearing.

○ A couple of ALJs have miscounted the 5 days.

Clearly, ALJs need better instruction or reminders or both on the 5 day rule to prevent overly restrictive application if it is going to be kept and/or expanded. The "good cause" rules for submitting new evidence after 5 business days prior to hearing are too restrictive (I refer to them as progressive discipline). Legal services advocates tend to take cases at the ALJ level of appeal and our clients often do not find their way to us in time to have at least 75 days advance notice of hearing. In addition, many medical providers, social service providers, and schools have reduced staff and time to respond to requests for documents, opinion and residual functional capacity information, especially those serving the poorest claimants and those least able to cope."

- **From an attorney in Massachusetts:** "We have judges who: (1) count Saturday and Sunday as part of the 5 days [i.e., not counting business days only] ; (2) end the 5 days on the day of the hearing, or end the five days the day before the hearing; (3) count holidays or don't count holidays as part of 5 days; (4) review the time evidence is filed, and if filed after the office has closed for the day, don't count that day; (5) include the representative's brief and claimant's medication sheets as subject to the five day rule (the latter can result in it being read at the hearing); (6) never apply an exception to five day rule (I had results of an MRI taken 3 days before the hearing, relevant to case, which the ALJ refused to accept); and (7) will always accept records within the 5 days, finding them relevant.

If access to the electronic folder is not working properly, and evidence does not show up when sent, that can create problems with the 5 day rule as well. In short, just about any permutation of this rule that can happen, will happen."

- **From an attorney in New Hampshire:** "This rule may be 'logical' to have, but it often creates great injustices for claimants who are the most disabled/impaired. When working with individuals with disabilities, the 5 day policy should be an aspirational goal, and not a limiting rule, as it is now.

If evidence is not submitted within the five day rule, critical evidence may be kept out of the administrative record, or the ALJ hearing may be postponed months into the future. Either way, the claimant is harmed. I have many examples of cases where the 5 day rule could not be met. Some examples:

○ Claimants sometimes choose medical service providers who are exceedingly slow to send out medical records; sometimes it takes them several months. Some never send them out and subpoenas are necessary, or at least threats of subpoenas are necessary. When time is running out, I will ask claimants to pick up and deliver records, but these claimants need to have the mental and physical capacity to do this, and the most cannot do this. We can't control when medical records actually become available.

○ Some medical providers do not create a 'record' for many days or even weeks. We cannot order the medical record if it has not been created yet.

○ When the medical record is ordered, it often does not contain the latest information because there is delay in the creation of the record, or there is a delay in the medical record becoming part of the medical records 'department.' In other words, some medical facilities have record 'departments' and all record requests have to be submitted there. Actual treatment notes, lab results, etc., are not promptly transferred to the 'records' department.

○ People with organic brain injury, borderline intellectual functioning, mental illness, or other impairments which affect memory frequently 'forget' to tell the appointed representative critical information, or they do not know that certain information is critical. Sometimes I will learn new information at the last minute.

○ Sometimes claimants have hospitalizations, medical emergencies, or other unexpected events that occur within a month or two of the hearing. They are busy taking care of their emergencies or are otherwise too sick to convey information to me and there is insufficient time to order records for arrival before the hearing date.

○ I am representing a person who lives about 1.5 hours from my office. Her main disability is based upon organic brain injury. Her ODAR hearing is scheduled for May 20, 2013. Per usual procedure, I requested updated medical records from Exeter Hospital, near where the claimant lives, on April 8, 2013. I sent a medical authorization for these records, which is accepted by most providers. On April 26, 2013, I received a letter from the Hospital stating that the medical authorization was not good enough, and that I had to use "their form." I now have to send the form to the client to sign, she has to send it back to me, and I have to resend the request for records to the hospital. This will cause a minimum of 6-7 days delay, if my client immediately signs the form and returns them to me. **But**,

as my client is brain injured, and she may not do it promptly, or she may not do it all.

○ This problem is an important one to share. When I order medical records on behalf of my client, I have to pay a minimum of $15.00 per request, which covers the first 30 pages, and then I can be charged 50 cents per page thereafter. Consequently, when the record consists of just 5 pages, I still have to pay a minimum of $15.00. This is statutorily allowed by New Hampshire law. My clients are required to reimburse this cost to me. On the other hand, if the claimant requests a copy of his/her records, the provider will often give them a copy for free, as a courtesy. When the medical record is extensive, the cost of medical records can be in the hundreds of dollars, and disability applicants do not have the money to pay. Some claimants will insist on trying to collect their medical records themselves to save these costs. More frequently than not, they fail to accomplish this. This is understandable because of their impairments. When I am allowed by the claimant to take back the responsibility of collecting records, sometimes there is not enough time before the hearing.

○ I have experienced some ALJs who use the 5 day rule in an abusive way. For example, sometimes I will obtain last minute evidence which is simply a few pages of updated information, such as treatment notes that do not materially change the overall analysis. It should not take the ALJ more than 5 minutes to review the new evidence, but the ALJ will insist on the claimant choosing between (1) postponing the case so the ALJ has time to review the new evidence; or (2) going forward with the hearing but leaving the evidence out."

- **From an attorney in Vermont:** "I, for one, hate the 5 day rule. I don't mind a request to submit evidence 5 days before the hearing (which is at least 7 days, since it is 5 business days); that much makes sense. But often our clients are still undergoing treatment up to the date of the hearing, and evidence may come in just before, or even after the hearing date. Some ALJs are rigid about the 5 day rule; others will allow additional evidence to be submitted if one explains why it was not available in time for the 5 day rule. We have often discussed the 5 day rule on our informal Vermont listserv, and I believe we are unanimous in the position that it should not be mandatory.

4. What suggestion(s) does NOSSCR have, if any, for improving the current regulations, policies, and/or practices regarding the current pilot program in Region I?

a. <u>NOSSCR recommendations</u>

We offer the following recommendations for the submission of new evidence:

- **No time limit to submit evidence before the hearing.** This is consistent with the claimant's statutory right that a decision be based on evidence "adduced at a hearing." The current rule in effect in non-Region I states allows evidence to be submitted until the hearing. It should be retained nationwide.
- **More notice of the hearing.** We support expanding the 75-day hearing notice nationwide. A 75-day notice requirement would significantly improve the ability to obtain and timely submit evidence.
- **Submission of post-hearing evidence.** If the record is closed after the hearing, there should be a good cause exception that allows a claimant to submit new and material evidence after the hearing. While it benefits claimants to submit evidence as soon as possible, there are many reasons, as discussed earlier, why they are unable to do so and for which they are not at fault. It the record is closed, there should be a simple good cause exception that allows a claimant to submit new and material evidence after the ALJ decision is issued.

  The construct used in the federal courts could be adapted. It is important that the regulations do not include an exhaustive list of reasons since each case turns on the facts presented. The "good cause" exception for district court "sentence six" remands for new and material evidence is well-developed. A review of published court decisions shows a wide variety of reasons why evidence was not submitted prior to the court level, including:

  - Medical evidence was not available at the time of the hearing.
  - The claimant was unrepresented at the hearing and the ALJ did not obtain the evidence.
  - Medical evidence was requested but the medical provider delayed or refused to submit evidence earlier.
  - The claimant underwent new treatment, hospitalization, or evaluation.
  - The impairment was finally and definitively diagnosed.
  - The claimant's medical condition deteriorated.
  - Evidence was thought to be lost and then was found.
  - The claimant's limited mental capacity prevented him from being able to determine which evidence was relevant to his claim.
  - The existence of the evidence was discovered after the proceedings.
  - The claimant was unrepresented at the hearing and lacked the funds to obtain the evidence.

  There are many permutations, depending on the circumstances in each case.

b. <u>Additional recommendations from Region I NOSSCR members</u>

- **Recommendations from an attorney in Maine:**

The 5 day rule should be modified to include the following:

- 5 "calendar" days, not business days.
- The default position is always to admit the evidence. There needs to be generous admissibility, not a gauntlet. Certainly, it should not be applied to evidence that did not exist 5 days before the hearing.
- To exclude, there needs to be willful malfeasance on the part of the claimant's representative; I do not see how malfeasance should ever be imputed to a *pro se* claimant. That is, some showing that the proffered evidence could have been acquired before but was not. It should be a sufficient response that it was duly requested before or within a week of receipt of the Hearing Notice, but not received through no fault of the claimant or the representative. Extracting evidence, especially opinion evidence, from medical providers, is a lengthy chore, and the delay by medical providers should not be held against claimants.
- Late evidence that is from an "acceptable medical source" that the record otherwise lacks should be admitted. By definition, it relates back to the time in question [dated before the hearing], and could go to the Appeals Council after an unfavorable ALJ decision. If ALJs are going to flout the intent of the medical source Social Security Ruling [SSR 06-03p – evidence from treating medical sources who are not "acceptable medical sources"] in order to deny claims, when the world is turning toward the increasing use of such sources and decreasing use of doctors and psychologists, then such evidence should always be considered if it exists. Having that black and white is easier than requiring that it be adjudicated that the case turns on whether there is sufficient evidence from an acceptable medical source on which the case turns.
- Finally, to exclude evidence, the ALJ needs to give reasons in the decision that are particularized rather than relying on the 5-day rule. Articulating a specific reason other than "the evidence is late ... no exceptions to exclusion are found" would seem to be a minimum requirement of due process. Indeed, requiring the ALJ to articulate the reason would establish most of the time that exclusion is arbitrary and capricious and manifestly unjust.

- **Recommendations from an attorney in Maine:**

If the idea of expanding the 5 day rule nationwide cannot be eliminated, then we need much clearer direction as to what is and what is not good cause for missing the deadline.

For example, if the document in question did not, in fact, exist before 5 days before the hearing, it should not be considered late. I once received a letter from a client's employer that was dated less than 5 days before the hearing. It contained relevant information concerning the details of the employment. It was excluded. We have had many situations where it was the providers who caused delays that caused the

missed deadline and their opinion evidence was excluded even though they were acceptable medical sources and the ALJ would otherwise be required to give their opinions special consideration.

In its current form the 5 day rule is too easily abused and the claimants have no effective remedy when evidence is unreasonably excluded even when it is highly probative.

- **From a representative in Maine:**

ALJs already have the discretion to postpone hearings if representatives come in with huge piles of medical evidence at the last minute. In the final analysis, if the five day rule is retained and expanded, "five business days" needs to be defined more succinctly. For instance, if the hearing office closes at 3:30 or 4:00 or 4:30 p.m., (as office hour changes occur based upon budgetary concerns), but we file evidence by at least 5 p.m., what does that mean, especially if a judge is counting the hours? For example, if we file appeals of Social Security determinations with the federal district court, we have until midnight to meet deadlines. At the very least, if the five day rule is retained and expanded, the "fifth business day" deadline before the hearing means the fifth day before the hearing and ends at midnight.

- **From an attorney in Massachusetts:**

Clarify the counting of the 5 day rule; expand the list of reasons to waive it; and issue some instruction that the rule is to be applied to ensure that all relevant evidence comes in, to protect the claimant's right to a *de novo* hearing.

- **From an attorney in Maine:** Eliminate the 5 day evidence submission requirement and revert to provisions in effect in all other Regions.

5. Does NOSSCR think the current pilot program in Region I should be continued, discontinued, or expanded to other regions? Why or why not? Please explain.

NOSSCR's positions are discussed in response to Question 4 and in detail in Part I, *supra.*. In general, NOSSCR supports (1) Nationwide expansion of the 75-day advance notice of hearing; and (2) Elimination of the rule requiring submission of evidence five days before the hearing. If the five day rule is retained, it must be clarified and more policy guidelines issued, prior to expansion beyond Region I, to prevent arbitrary and inconsistent application of the rule by some ALJs.

* * *

Thank you for considering our comments and recommendations. We look forwarding to discussing our comments in more detail and answering any questions you have.

Very truly yours,

Nancy G. Shor
Executive Director

Ethel Zelenske
Director of Government Affairs