

To: Terri Gruber, Deputy Commissioner, Office of Disability Adjudication and Review  
Patrick Nagle, Chief Administrative Law Judge

From: Barbara Silverstone, Executive Director, National Organization of Social Security Claimants' Representatives (NOSSCR)

Date: August 24, 2017

RE: Request for immediate action regarding Program Uniformity regulation implementation

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This memorandum is to request that the Office of Disability Adjudication and Review (ODAR) take immediate action to ensure policy compliance by Administrative Law Judges (ALJ) with the program uniformity rule, specifically the part of the rule colloquially referred to as the "5-day rule" (20 CFR §404.935 and §416.1435). NOSSCR members have reported that ALJs are refusing to recognize the plain language in the regulation that informing the ALJ of evidence means that claimant or representative has complied with the regulation and that the evidence should be considered part of the record and exhibited as such for consideration by the ALJ when making his or her decision. As outlined in a separate memorandum, NOSSCR members are reporting that ALJs are in some instances refusing to consider such evidence and in other cases requiring a good cause exception to the 5-day requirement apply (contained in 20 CFR §404.935(b) and §416.1435(b)) before the evidence is considered.

In addition, ALJs are creating rigid rules (e.g. a certain number of attempts to obtain the evidence within a certain time period) when interpreting the meaning of the good cause exception contained in §404.935(b)(3)(iv) and 416.1435(b)(3)(iv), requiring the claimant or representative to have "actively and diligently sought evidence from a source," in order for it to be considered when submitted after the 5-day deadline. ALJs are creating rules that do not take into account the individual's circumstances resulting in the improper exclusion of evidence. In addition, these rules vary from ALJ to ALJ making the application of the "program uniformity" rule anything but uniform.

NOSSCR respectively requests that you take immediate steps to ensure that ALJs are complying with the plain language of the regulation. Improper exclusion of evidence will result in additional appeals to the Appeals Council and federal court, which is unjust for claimants and a poor use of SSA's resources. We recommend:

1. **Provide Memo to ALJs regarding "inform" provision:** Provide NOSSCR with a copy of the memo NOSSCR requested (both through a FOIA request and a request to Chief Judge Nagle) to ALJs dated on or about July 20, 2017 regarding how to handle cases in which the ALJ was informed about evidence prior to the 5-day deadline.
2. **Distribute an Emergency Message to ALJs re: Inform:** Send an emergency message to ALJs regarding the obligation to consider evidence he or she has been informed about as in compliance with 20 CFR §404.935 (or §416.1435 in SSI or concurrent cases). The message should be placed on SSA's website so that it is publicly available. We request that the EM make the following points and consider including language from the preamble to either the proposed or final regulation regarding why SSA included inform as part of the regulatory language such as:

- a. Reiterate that the purpose of this rule is to ensure that the evidentiary record is as complete as possible when the ALJ writes his or her decision and should NOT be used as a reason to exclude evidence:

Potential language to include from regulation to support this point:

"a complete evidentiary record is necessary for us to make an informed and accurate disability determination or decision," 81 FR 45079

- b. Clarify that a claimant can satisfy the submission requirements in §404.935 by submitting or informing the ALJ of its existence and state in no uncertain terms that an ALJ cannot exclude evidence about which he or she has been informed more than 5 days before the hearing:

Preamble language that could be used to support this point:

"if a claimant informs an ALJ about evidence 5 or more days before the hearing, there would be no need for the ALJ to find that an exception applies, because the claimant notified us prior to the deadline." 81 FR 90991

"we propose changing our rules so that we provide claimants with additional time to inform us about or to obtain and submit written evidence." 81 FR 45082

- c. Clarify that the ALJ has a duty to obtain the evidence about which they are informed at least 5 days prior to the hearing and does not have an opportunity to simply exclude it. ,

An ALJ must ensure that they are adjudicating the claim based on as a complete evidentiary record as possible (i.e. to develop the record):

“On April 20, 2015, we implemented a final rule that requires a claimant to inform us about or submit all evidence known to you that relates to whether you are blind or disabled.” 81 FR 14828. As we stated in the preamble to that proposed rule, we specifically added this option because we did not intend to shift our burden to develop the record to claimants. In the proposed rule, as in this final rule, we recognize that some individuals, many of whom do not have appointed representatives, require our assistance in obtaining medical evidence needed to adjudicate their claims. Claimants who are unable to obtain evidence necessary to adjudicate their claims may inform us of this difficulty and we will continue to seek out evidence on their behalf to develop the record for their hearing. By adopting this final rule, we have not changed our longstanding policy of assisting claimants in developing the record.” 81 FR 90989

- d. Ensure that ALJs know that the decision about whether a good cause exception applies, particularly whether the individual actively and diligently attempted to obtain the medical evidence, should be made based on an individualized determination given the individual’s circumstances (including, for example, how recently a representative was hired):

“Because circumstances vary, we determine whether a claimant qualifies for an exception on a case-by-case basis.” 81 FR 90988

3. **Update Training:** Update training modules and training materials to include the points outlined in number 2 above.
4. **Add Appeals Council Prioritization:** In early 2016, the Appeals Council developed a list of 21 “priority processing” categories. Each week, a group of employees screens cases with where new evidence was submitted to see if they fall into any of the priority categories: they include attaining age 55; indication or report of the claimant’s death; VA disability rating of 70% or more; and several categories relating to diagnosis, treatment, or symptoms of various impairments. The Appeals Council should add a priority processing category for cases where evidence submitted less than five business days before the hearing was excluded by an Administrative Law Judge. This would help claimants obtain prompt remands or Appeals Council decisions and would allow SSA to identify situations where specific ALJs demonstrate a need for additional training about the program uniformity rule.
5. **Factor for focused reviews or retraining:** ODAR should implement ways to include the repeated inappropriate exclusion of evidence pursuant to the 5-day rule (e.g. by ignoring the fact that the

claimant/representative informed them about the evidence or because of inappropriate denial of good cause exceptions) as reasons to conduct focused reviews of an ALJ, require retraining regarding the 5-day rule, and/or take disciplinary action against ALJs who repeatedly violate the regulations and issue policy-noncompliant decisions.