May 29, 2020

Andrew M. Saul, Commissioner
Social Security Administration
6401 Security Blvd.
Baltimore, MD 21235

VIA EMAIL

Dear Commissioner Saul,

We are writing to express our concern over the treatment of non-disability hearings for SSI recipients and applicants before an Administrative Law Judge during the COVID-19 pandemic. As we understand the agency's position, no such hearings are being scheduled, and no date has been announced when non-disability hearings will resume. It is our legal opinion that the refusal to hold hearings is in violation of the Social Security Act, and is extremely harmful to low income individuals and families. Unlike other kinds of Social Security hearings, the Act specifically mandates that such cases must be adjudicated with 90 days and the Commissioner's regulations reflect that statutory command. Specifically the statute says that such hearings are to be decided very promptly:

> Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1614(a)(3)), shall be made **within ninety days after the individual requests the hearing** as provided in paragraph (1).

42 U.S.C. 1383(c)(B)(ii)(2)(emphasis added). Unlike other parts of the statute that call for hearings but do not set a specific time requirement (see *Heckler v. Day*,467 U.S. 104 (1984)), the statute reflects the importance of promptness in deciding whether an individual will be eligible for the benefits guaranteed by the SSI program. In fact, SSA's defense and the Supreme Court's decision in *Heckler v. Day* were based on the imposition of a deadline by Congress in the Act for

non-disability cases and the lack of such of a statutory deadline in disability cases. No doubt this is specific legislative recognition of the brutal need that many individuals face when they are denied the SSI benefits to which they are entitled. Nothing in that statutory proscription suggests that the Commissioner has the discretion to delay his decision beyond the mandatory deadline.

That having been said, we understand that these are difficult times for all Americans and for the Social Security Administration. However, the blanket refusal to hold such hearings under any circumstances is not acceptable both as a matter of law and policy.

We therefore suggest two steps be taken.

- First, all such non-disability hearing requests should be immediately identified and the cases evaluated for resolution. In so doing, an attempt would be made to determine whether the dispute is subject to negotiation between a representative of SSA and the claimant and, if they are represented, with their advocate. As part of that communication, the SSA staff and the claimant could attempt to reach agreement and evidence could be exchanged that might facilitate a resolution.
- Second, in the event that a resolution cannot be reached, or if the 90 day limit has already been passed, SSI benefits be authorized until such time that a resolution can be reached or a decision can be issued after a hearing is conducted.

It is our hope that if cases were promptly identified and subject to resolution, most of the cases would be resolved and would not require a hearing. In the event that the case could not be resolved, the only way to address the Congressional command would be to reinstate or grant the requested benefits beginning on day 91 and continued until such time as a decision can be issued.

A similar approach has been implemented in the state of New York, pre-COVID-19, as a result of *Sharpe v. Sullivan*, 79 Civ. 1977 (S.D.N.Y.). The non-disability policies implemented as a result of *Sharpe*, including the payment of interim benefits after 90 days, can be found in more detail in HALLEX I-5-4-48.

We understand that the agency has been working diligently to put in place procedures at FO and OHO levels in New York to streamline processing of non-disability hearings and to implement payment of interim benefits where necessary under the final order in that case. The agency could look to the procedures already implemented in New York pre-COVID as a blueprint to be used nationally.

Ultimately, we would expect that the grant of interim benefits would provide a strong inducement to resolve such disputes and to spur the hearing offices to hold hearings and make decisions promptly, as the statute commands.

We look forward to discussing these concerns in the very near future. Please contact Richard Weishaupt at rweishaupt@clsphila.org or Kate Lang at klang@justiceinaging.org to discuss how we may address this important matter.

Very truly yours,

Richard Weishaupt
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Community Legal Services of Philadelphia

Kate Lang
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Stacy Cloyd
Director of Policy and Administration Advocacy
NOSSCR

Cc: Stephanie Hall, Chief of Staff

Theresa Gruber, Deputy Commissioner, Disability Adjudication and Review

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