

**NATIONAL ORGANIZATION OF  
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES  
(NOSSCR)**

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***Executive Director***  
**Barbara Silverstone**

February 3, 2020

Commissioner Andrew Saul  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235-6401

**Submitted via [www.regulations.gov](http://www.regulations.gov)**

**Re: Notice of Proposed Rulemaking on Hearings Held by Administrative Appeals Judges,  
84 Fed. Reg. 70080 (December 20, 2019), Docket No. SSA-2017-0073**

Dear Commissioner Saul:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). The National Organization of Social Security Claimants' Representatives (NOSSCR) is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudication process and in federal court. Founded in 1979, NOSSCR is a national organization with a current membership of more than 3,000 members from the private and nonprofit sectors and is committed to the highest quality representation for claimants and beneficiaries. NOSSCR's mission is to advocate for improvements in Social Security disability programs and to ensure that individuals with disabilities applying for SSDI and SSI benefits have access to highly qualified representation and receive fair decisions.

**Introduction:**

Claimants challenging a denial of Social Security disability benefits (SSDI and SSI) have a right to a fair hearing before an impartial arbiter of fact, like all other Americans requesting review of any administrative agency decision. Congress recognized that fact when it passed the Administrative Procedure Act (APA) in 1946 and required the use of Administrative Law Judges (ALJ) to adjudicate appeals of agency administrative decisions in all but a very limited set of circumstances.<sup>1</sup> Concerned that regular agency employees who are subject to routine agency performance plans and disciplinary policies, and who are reliant on politically appointed administrators for promotions and bonuses, might be biased toward upholding the agency

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<sup>1</sup> Pub.L. 79-404, 60 Stat. 237, 5 U.S.C. §§ 551 - 559

decision, Congress incorporated a variety of protections for ALJs to ensure the impartiality of those adjudicators.<sup>2</sup> The qualified judicial independence of ALJs is essential to ensuring that Social Security disability claimants receive a fair hearing from an impartial adjudicator and the right to a hearing before an ALJ in disability appeals must be maintained. NOSSCR strongly opposes the changes outlined in the Notice of Proposed Rulemaking (NPRM) for this and several additional reasons and urges SSA to rescind this proposed rule.

The Social Security Administration is statutorily prohibited from using non-APA protected adjudicators to hold hearings for disability claims. Despite the significant authority granted to the Commissioner of the Social Security Administration regarding Social Security disability appeal hearings by the Social Security Act, the APA and statements of Congressional intent regarding the interaction of the APA and the Social Security Act, as well as dicta in Court decisions, strongly support the contention that the APA applies to Social Security disability appeals and ALJs are required in Social Security disability appeal hearings.

Furthermore, the Social Security Administration's proposed changes in this NPRM fail to clarify the circumstances under which the authority for Administrative Appeals Judges (AAJs) to hold hearings and decide claims will be exercised. Although the purported reason for this NPRM is to provide clarification of when the authority SSA already had under its existing regulations will be exercised, it is so vague as to provide no clarification whatsoever. In fact, it is so vague that it is impossible for the public to provide meaningful comment on the proposal and fails to meet the basic requirements of rulemaking under the APA as a result.

Moreover, SSA fails to make the case that there is a need for this change. Aside from clarification of its existing regulations, SSA indicates that the proposed changes are needed for additional adjudicative flexibility in the event of a large increase in the number of hearing requests in the future. SSA already has a great deal of adjudicative flexibility that renders these proposed changes unnecessary. The data regarding the current number of pending hearing requests and wait time for hearings do not justify the proposed changes, particularly as the backlog on wait times has been reduced without the need for non-APA protected adjudicators to hold hearings. SSA should therefore rescind this proposal as unnecessary.

Additionally, SSA makes assertions in the NPRM that lack supporting data or evidence making it impossible to meaningfully comment. For example, the NPRM asserts that AAJs are as qualified as ALJs but does not include any information to support that assertion, making it impossible for the public to know what the qualifications for the jobs are and whether they are equivalent. SSA should either reissue this NPRM providing enough information for the public to meaningfully comment, or preferably, rescind this proposed rule.

Finally, the proposed regulation is incomplete and leaves many practical questions unanswered. The lack of detail regarding what is being proposed makes it impossible for the public to meaningfully comment on the proposed rule. For example, who will preside over a claim remanded from federal court if it was heard by an AAJ? Does it go back to the AAJ that heard

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<sup>2</sup> See e.g. 5 U.S.C. §7521 which permits negative personnel actions against ALJs "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."

the claim originally, like it generally does with hearings performed by ALJs? It is impossible to understand how these proposed changes will work and therefore impossible to comment meaningfully about the proposed changes.

## **I. The Social Security Administration Must Use Administrative Law Judges to Preside Over Social Security Disability Hearings**

The right of an American to an impartial and fair adjudication of an appeal of a denial of Social Security benefits as envisioned by Congress under both the APA and the Social Security Act is significantly more important than vague concerns about administrative flexibility that might possibly be needed in the future to address some potential increase in hearing requests. Although SSA makes it clear that AAJs will follow the same process and be subject to the same regulations that ALJs are throughout the rule, AAJs are still regular employees of the Social Security Administration whose decisions might be less than impartial because of that fact, as discussed *infra*.

SSA asserts in the preamble to these proposed changes that, “[t]he Appeals Council already has the authority to hold hearings and issue decisions under our existing statute and regulations but we have not exercised that authority or explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision.”<sup>3</sup> The discussion that follows indicates that this authority has long existed under SSA’s regulations. However, just because a regulation has existed for a long time doesn’t mean that the regulation is statutorily permissible. There is no discussion of the statutory provisions on which SSA bases its authority to have AAJs routinely hold hearings and issue decisions within the NPRM. There has never been a reason for the public to challenge SSA’s authority to have any adjudicator other than an ALJ hold hearings and issue decisions on behalf of the agency because no party has been affected by the regulation to date.

As discussed in the introduction, Congress passed the APA in part to ensure that the public had a right to a neutral and impartial arbiter of facts to adjudicate appeals of agency decisions. Although it is true that the Social Security Act does not explicitly require the use of ALJs or require “on the record” decisions as defined by the APA, the APA use of ALJs and required procedures was based on the model SSA used at the time of the APA’s passage.<sup>4</sup> It is hard to dispute that the Social Security Administration is an “agency” covered by the requirements of the APA.<sup>5</sup> Decisions issued by the Social Security Administration are “orders” as defined under the APA.<sup>6</sup> The APA requires the use of ALJs as presiding officers in administrative appeals in virtually all circumstances, the exceptions to which do not apply in the Social Security context.<sup>7</sup>

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3 84 Fed. Reg. 70080, 70080

4 Richardson v. Perales, 402 U.S. 389, 409 (1971).

5 Administrative Procedure Act, 5 U.S.C. §551(1); *see also* Robin J. Arzt, Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act, 22 J. Nat’l Ass’n Admin. L. Judges. (2002), pp 284-289 available at <http://digitalcommons.pepperdine.edu/naalj/vol22/iss2/1>

6 Administrative Procedure Act, 5 U.S.C. §551(7); “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;”

7 5 U.S.C. §556(b) “There shall preside at the taking of evidence- (1) the agency; (2) one or more members of the

SSA does not even attempt to make the case that these exceptions apply to its adjudications, it just asserts that they do.

Although Congress has never explicitly included the requirement to use ALJs in the Social Security Act, it has made clear in legislative history (supported by Court dicta) that Social Security disability adjudications are covered by the provisions of the APA.

In the 1970s, there was confusion regarding the applicability of the APA to adjudications of claims arising from the programs added to the Act after the APA was enacted. In 1971, the Supreme Court stated in *Richardson v. Perales*, that it need not rule whether the APA applies to the Title II disability program adjudication procedure because the APA and Act procedures were identical and met the constitutional requirements of due process. Some incorrectly interpreted the Perales decision as holding that the APA did not apply to Title II disability program adjudications. After the SSI program was enacted in 1972, the Civil Service Commission, which was OPM's predecessor agency, publicly took the position that the APA did not apply to SSI program adjudications.

In 1976, Congress ended the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law No. 94-202, which is entitled An Act To Amend the Social Security Act to Expedite the Holding of Hearings Under Titles II, XVI and XVIII by Establishing Uniform Review Procedures Under Such Titles, and for Other Purposes. Among other things, the provisions of Public Law Number 94-202 "clearly placed all social security cases (OASDI, SSI, and Medicare) under the APA." Thus, Congress reiterated its intention that the APA applies to Old Age and Survivors Insurance Benefits program adjudications.<sup>8</sup> (internal citations omitted)

In fact, the legislative history of Social Security Act amendments during the 1970s and the creation of the SSI program are replete with Congressional statements that all Social Security disability adjudications are subject to the provisions of the APA.<sup>9</sup>

The legislative history, which includes unequivocal statements of Congress' intent that the APA apply to all Social Security disability determinations, makes this regulation impermissible. AAJs are not ALJs and are therefore not permitted to hold hearings under the APA. As such, SSA should rescind this proposed rule and reissue a new rule which removes the authority of AAJs to hold hearings, as it is a violation of the APA to have any SSA official besides an ALJ hold a disability appeal hearing.

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body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title."

<sup>8</sup> *Arzt*, *supra* note 5, at 292

<sup>9</sup> *See id.*, p, 294 (Congress stated that the use of the phrase reasonable notice and opportunity for a hearing evidenced its intent to place the SSI program under the requirements of the APA); p. 302-304 (Noting that when agency argued that SSI was not covered under the APA it did not reflect the will of Congress).

## II. The Proposed Rule Is So Vague That Meaningful Public Comment Is Impossible and Violates the APA as a Result

In the preamble to its proposed rule, SSA proposes “...to revise our rules to clarify when and how administrative appeals judges (AAJ) on our Appeals Council may hold hearings and issue decisions.”<sup>10</sup> Although the rule does provide some clarification of how AAJs will hold hearings, it actually provides no clarification whatsoever on when AAJs will hold hearings. The proposed rule is so vague, providing no clarification regarding the circumstances under which an AAJ will be assigned a claim, hold a hearing, and issue a decision, that it is impossible to meaningfully comment on the changes proposed in this NPRM.

SSA also indicates in the preamble to the proposed changes that “these proposed changes will increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reached the hearing level.”<sup>11</sup> Aside from that statement in the preamble, SSA provides no details about when it will exercise the authority. As proposed, there are no parameters for when AAJs will hear cases included in the regulatory language whatsoever. The public has no better idea of what circumstances would need to exist for a case to be assigned to an AAJ after reading the NPRM than it does under the existing regulatory scheme. For example, the NPRM fails to clarify:

- Is there a threshold for the number of pending hearing requests above which SSA would exercise this authority? If so, what is that threshold and how did SSA arrive at that number?
- How many hearings does SSA anticipate will be held by AAJs vs ALJs should the authority be exercised? How will SSA make that decision?
- Will SSA also consider the number of claims pending before the Appeals Council and how long claimants wait for Appeals Council review before assigning claims to AAJs?
- What percentage of cases will be sent to AAJs if the authority is exercised?
- How would SSA decide which claims go to AAJs vs ALJs? What criteria would be used?
- Will SSA continue its practices of “first in, first out” and exceptions for critical cases if using both ALJs and AAJs?
- Will SSA maintain random assignment of adjudicators if both ALJs and AAJs are used, and if so, how?

As the above questions point out, the proposed changes fail to accomplish their stated purpose of clarifying when AAJs would decide cases and hold hearings. In addition, SSA provides no information about SSA’s rationale or criteria on how it will decide which type of adjudicator will hear which claims, should the SSA Commissioner elect to exercise this authority in the future. Based on what is in the NPRM, it is possible that AAJs would start hearing cases tomorrow or it is possible that SSA would never exercise this authority. Given the lack of details regarding what the proposed changes would mean if finalized, it is impossible to meaningfully comment on the proposal and SSA should rescind it as a result.

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10 84 Fed. Reg. 70080, 70080

11 *Id.*

In addition, SSA indicates in the preamble that “The proposed clarifications will ensure the Appeals Council is not limited in the types of claims for which it holds hearings.”<sup>12</sup> Nowhere in the rule does SSA outline which type of claims the Appeals Council will exercise jurisdiction over or how the Commissioner will determine which type of claims, making it impossible to respond to the NPRM in a meaningful way. Nor does SSA provide any studies or data analysis of the types of claims pending for historically high wait times during the recent unprecedented hearing backlog with more than one million claimants waiting for a hearing to provide justification for applying the proposed regulatory changes to all types of claims.

When SSA proposed to exercise the existing regulatory authority for the AAJs to hold hearings in 2016 as part of its Compassionate and Responsive Services backlog reduction plan, SSA proposed to exercise its authority for AAJs to hold hearings in appeals including only “non-disability” cases rather than in any type of claim.<sup>13</sup> SSA indicated that it came to this decision because, “the cases targeted for the augmentation strategy represent only 3.6 percent of our hearings pending and the non-disability cases **often involve issues that ALJs do not typically encounter**. A small number of AAJs and staff will specialize in adjudicating the non-disability issues, thus freeing up critical ALJ resources to handle disability hearings. (emphasis added).”<sup>14</sup> The rationale presented here completely undercuts the assertion that AAJs and ALJs have the same experience and skills (see section IV *infra*), as well as the rationale that AAJs should have jurisdiction over any type of claim. What changed between the agency’s thinking in 2016 and now? What data, studies, or evidence did SSA rely on in making this determination when crafting these proposed changes that led it to this different conclusion? SSA must provide the public with whatever evidence led it to change its proposal and allow the public to examine and comment on that information. Anything short of doing so is a fatal procedural error under the rulemaking requirements of the APA because the public cannot understand and meaningfully comment on the proposed changes.

### **III. The Social Security Administration Fails to Provide Any Data or Evidence to Justify Proposed Changes**

The proposed changes contained in this NPRM are unsupported by evidence that this authority is necessary and therefore are not justified under the APA. The Commissioner provides no rationale for needing additional adjudicative flexibility besides the difference in hearing wait times. Although it is unacceptable for claimants to experience such disparities in the wait time based on geographic location in a national program, SSA currently has enough flexibility to address such disparities at the ALJ level of the adjudication process (e.g. national first in first out policy, transfers of workloads between hearing offices, use of video hearings). SSA failed to use any of those strategies in a timely way when disability applications spiked in 2010. SSA should use its existing flexibility to balance the workload within the hearing level of appeal with ALJs to address any future surge in hearing requests rather than potentially subjecting claimants to an adjudicator that lacks judicial independence.

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<sup>12</sup> *Id.*

<sup>13</sup> See Statement for the Record, Theresa Gruber, Statement for the Record, Hearing Examining Due Process in Administrative Hearings, Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, United States Senate, May 12, 2016, pp 5-7

<sup>14</sup> *Id.*, p.5-6

In addition to the fact that SSA doesn't need to enact these changes to have the flexibility it needs to address changes in the number of hearing requests, there is no need to enact this proposal now. The number of pending claims at the hearing level has been cut in half from a high of 1.122 million in Fiscal Year 2016<sup>15</sup> to 540,537 in November 2019.<sup>16</sup> The average processing time has also fallen from a high of 605 days in Fiscal Year 2016 to a still unacceptable 414 days as of November 2019. SSA was able to accomplish this without exercising the authority it argues it has always had to hold hearings before non-APA compliant adjudicators. SSA did so with additional resources from Congress and without fully exercising the extensive flexibility it already has to respond to workload changes without running afoul of the APA. SSA has failed to demonstrate the need for this proposed change and therefore should rescind this proposed rule.

Importantly, the Appeals Council has only approximately 53 AAJs available to hear appeals of ALJ denials.<sup>17</sup> Unsurprisingly, backlogs and increases in processing time at the Appeals Council increase significantly when requests for hearings increase, such as during the recent historically large backlog in disability hearings that began in 2010. For example, the average processing time to receive an Appeals Council decision increased by nearly a third between 2009 and 2010, going from 261 to 345 days. The processing time peaked at 395 days in 2012 but has remained at a historically high level in the mid to upper 300 days since that time.<sup>18</sup> Having a particular AAJ adjudicate claims at the hearing step necessarily means that AAJ is not available to review ALJ decisions in her actual role at the Appeals Council. The likely result of the exercise of the authority proposed in this NPRM would be to simply shift longer wait times and increases in pending claims from the hearing stage of the appeals process to the Appeals Council review stage. Claimants waiting for an Appeals Council decision deserve timely review of and decisions on their claims just like claimants awaiting an ALJ decision. Shifting the delays and people waiting later in the appeals process doesn't prevent a backlog in the disability adjudication process. It doesn't actually solve any problem and SSA should rescind this regulatory proposal.

#### **IV. Assertions Made By SSA Are Unsupported, Violating the APA and Making It Impossible to Meaningfully Comment on the Proposed Changes**

Social Security disability claimants are entitled to administrative review by an impartial arbiter of fact who has the skills and experience required to make the complex determinations of fact and applications of law and policy that such adjudications require. SSA asserts that AAJs are as qualified and experienced and receive the same training as ALJs. Just because SSA asserts this does not make it true and the Commissioner fails to provide any evidence or information to allow the public to evaluate that statement. The failure to provide any supporting information also

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15 Social Security Administration, FY 2020 Congressional Justification, p. 14 accessed at [https://www.ssa.gov/budget/FY20Files/FY20-JEAC\\_2.pdf](https://www.ssa.gov/budget/FY20Files/FY20-JEAC_2.pdf).

16 Social Security Administration, Caseload Analysis Report November 2019, on file with author received through Freedom of Information Act request.

17 [https://www.ssa.gov/appeals/about\\_ac.html](https://www.ssa.gov/appeals/about_ac.html), accessed 2/2/2020.

18 <https://www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html>, accessed 2/2/2020.

makes it impossible to evaluate what the cost of this proposal might be (will additional training be required, for example), another reason why SSA should rescind this NPRM.

In the preamble to proposed rule, SSA alleges that “[e]ach AAJ possesses the same skills and experience as the skills and experience of our ALJs.”<sup>19</sup> SSA provides no information (such as position descriptions or training curricula) to support this assertion. All current SSA ALJs were hired through the competitive service hiring process overseen by the Office of Personnel Management (OPM).<sup>20</sup> The OPM screening process was extensive including an “exam to evaluate the competencies/knowledge, skills, and abilities (KSAs) essential to performing the work of an Administrative Law Judge,”<sup>21</sup> as well as a rigorous interview process. Did AAJs take an examination prior to being hired as an AAJ, and were they evaluated for the same competencies, skills, and abilities prior to being hired? SSA provides no evidence that AAJs have been evaluated for or possess the same skills that ALJs do and the NPRM should be rescinded as a result.

Candidates for ALJ positions at SSA also had to have significant experience prior to being hired through the OPM screening process. Do AAJs possess this same experience? The most important experience among these is participation in actual hearings or similar proceedings. The ability to assess the credibility of claimants and other witnesses, effectively questioning claimants and other witnesses to establish facts and to prove or disprove assertions of claimants, and overseeing a hearing proceeding in a fair, respectful, and impartial manner are extremely important skills for an adjudicator holding Social Security disability hearings. Applicants for ALJ positions hired through the OPM screening process were required to “... have a full seven (7) years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level.”<sup>22</sup> As SSA stated throughout the NPRM, it has never exercised the authority for AAJs to hold hearings. Do any of the 53 AAJs currently comprising the Appeals Council have any experience holding or participating in hearings? If so, how long has it been since any of the AAJs have done so? And how long will it have been since any AAJ will have presided over or participated in a hearing at some undefined point in the future when the Commissioner elects to exercise this proposed authority?

Presiding over a hearing requires skills and abilities distinct and separate from knowledge about the Social Security disability programs regulations and policy. It requires the ability to question witnesses, evaluate credibility, and apply the knowledge of Social Security law and policies to formulate those questions to inform the ultimate decision. It strains any credulity to assert that an

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19 84 Fed. Reg. 70080, 70081.

20 The Office of Personnel Management oversaw the hiring process for ALJs government-wide until July 10, 2018 when the Trump Administration issued an Executive Order Excepting Administrative Law Judges from the Competitive Service. As of the writing of these comments, SSA has not hired any ALJs through the excepted service so all currently serving ALJs were hired through the OPM process. Executive Order available at <https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service/>.

21 <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/>.

22 <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/>.



AAJ who has never presided over a hearing has the same experience as a sitting ALJ who presides over hundreds of hearings a year. While it is true that some ALJs might not have been overseeing hearings prior to being hired as an ALJ, once a person becomes an ALJ holding hearings is a regular, routine, ongoing duty. As discussed in Section II *supra*, it is impossible to tell how often AAJs would be called upon to hold hearings but AAJs would only be called on to do so periodically. This would especially be the case when SSA first opts to exercise this authority. Can any reader of this NPRM actually believe that an AAJ holding her first hearing under this newly exercised authority at some undefined point in the future will be as skilled and experienced at questioning a vocational expert or medical expert as an ALJ who has undergone specialized training and who does so routinely and regularly as part of her duties? Given that the only honest answer to that question is no, it cannot be said that that AAJs are equally skilled and experienced when it comes to holding disability hearings and issuing disability determinations.

If SSA believes that there is no difference between the skills and experience of ALJs and AAJs, one must ask why SSA even has two different positions to begin with? Does SSA seek to eventually eliminate the position of ALJs, or AAJs, entirely? Is this the first step toward combining the ALJ and Appeals Council levels of review? SSA has yet to release a new position description for ALJs now that it is responsible for its own ALJ hiring post the issuance of E.O. 13891. Will the ALJ KSAs and other qualifications be identical to the AAJ requirements? SSA's failure to provide the public with the information necessary to evaluate whether AAJs possess the same experience and knowledge as ALJs, such as position descriptions, makes it impossible for the public to evaluate a basic assertion on which these proposed changes are based.

#### **V. The NPRM Raises More Practical Questions Than It Answers Making It Impossible to Evaluate the Proposed Changes**

There are a number of practical questions raised by the proposed changes but not addressed by the proposed changes that make it difficult for the public to evaluate this proposal. These questions include:

- Will AAJs be subject to quality reviews in the same manner as ALJs?
- Will AAJs have access to the same quality tools that ALJs have like HowMI Doing?
- Does SSA envision hiring more AAJs when it decides to exercise its authority for AAJs to hold hearings? Or will the backlog at the Appeals Council just increase?
- Will all AAJ hearings be held by video? If so, what additional video technology need to be purchased for the Appeals Council and what would the cost be? Or will AAJs travel to hold hearings? If so, what will the travel costs be? Will AAJs be placed in local hearing offices?
- What additional training will AAJs receive to ensure they have the skills needed to conduct hearings? What is the cost of that additional training? When would the training be received? How long would it take to get AAJs trained in the event the authority would be exercised?

## **VI. Proposed Changes to Appeals Council Standards for Granting Review**

NOSSCR applauds SSA for recognizing the importance of continuing the Appeals Council business process that ensures that evidence submitted to the Appeals Council that is not exhibited and made part of the official record is included in the transcript provided to Federal courts when the claimant requests court review. NOSSCR encourages SSA to add the requirement to include evidence submitted to the Appeals Council but not included in the official record in the transcript to the regulatory text at 20 CFR §404.970(a)(5) making that a requirement of the regulation rather than just a business process subject to the whims of the next Commissioner.

NOSSCR has concerns, however, regarding other changes SSA proposes regarding the standard under which the Appeals Council evaluates whether it will review an ALJ decision. Specifically, the NPRM adds (d) to 20 C.F.R. §404.970, which reads, “The Appeals Council will not review a case based on an error or abuse of discretion in the admission or exclusion of evidence or based on an error, defect, or omission in any ruling or decision unless the Appeals Council finds there is a reasonable probability that the error, abuse of discretion, defect, or omission, either alone or when considered with other aspects of the case, changed the outcome of the case or the amount of benefits owed to any party.” This change in standard is potentially problematic.

The determination that there is a reasonable probability that an error, defect, or omission in an ALJ's decision seems to require almost as complete evaluation of the file and evidence as an actual Appeals Council review. Did SSA consider the additional time this would take and factor in the cost of doing this more thorough review of every request for review submitted to the Appeals Council? That information is necessary to meaningfully comment on what these changes would mean to a claimant seeking review.

In fact, making that determination is precisely what the Appeals Council review is supposed to accomplish. What does a reasonable probability mean? Due process protections and the property rights implicated in Social Security disability claims justify an Appeals Council review when any error of law or abuse of discretion is found in an ALJ decision. This change in standard could virtually eliminate Appeals Council review in all but extremely limited circumstances, making the Appeals Council a meaningless step in the adjudication process. NOSSCR urges SSA to rescind this proposal.

### **Conclusion**

All claimants for Social Security benefits have the right to a hearing before a fair, neutral, and impartial adjudicator in Social Security claims. The Administrative Procedure Act requires the use of ALJs in appeals of administrative decisions to ensure that the individual adjudicating that appeal is independent of the agency political appointees and is not subject to undue influence regarding the outcome of the appeal. The Social Security Administration and the Social Security disability programs are under the jurisdiction of the APA and this rule is impermissible as a result. In addition, SSA fails to justify the need for this rule and the rule is so vague as to make it impossible to comment meaningfully on the proposal. SSA should rescind this proposed rule and

use the extensive flexibility it already has in the hearing process to adjust workloads should the need arise in the future.

Thank you for the opportunity to respond to this proposed rule.

Sincerely,

Barbara Silverstone  
Executive Director