

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

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Executive Director
Barbara Silverstone

January 29, 2020

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

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking on Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 36588 (November 18, 2019), Docket No. SSA-2018-0026

Dear Commissioner Saul:

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). They are in addition to the comments submitted on January 9 and should not be considered to replace those comments or to remove SSA's obligations to respond to those comments.

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.

NOSSCR understands that Continuing Disability Reviews (CDR) are necessary to carry out Congress' direction to review disability beneficiaries. However, as our previous comments indicated, we have serious concerns that SSA's proposed rule would increase the burden on beneficiaries, their families, medical providers, schools, and other organizations. Furthermore, this additional burden is not justified by evidence; the proposed rule is arbitrary, capricious, and impermissibly vague, precluding meaningful comment; and the cost-benefit analysis is severely flawed. We therefore reiterate our recommendation that the proposed rule be rescinded.

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To our previous comments, we add two additional points:

1. The proposed rule is untimely.

Our previous comments referenced the National Disability Forum on “Which Impairments are Likely to Improve?,” which occurred after the NPRM was developed and released, and the National Academy of Sciences’ Standing Committee of Medical and Vocational Experts for the Social Security Administration’s Disability Programs, which is still completing studies on medical improvement in adults and children. We believe that SSA should rescind the proposed rule at least until the committee’s work on this topic is complete.

Furthermore, you testified before the Senate Special Committee on Aging on January 29, 2020¹ in response to a question about this proposed rule that SSA had hired Johns Hopkins University’s Applied Physics Department to study SSA’s “whole disability process from beginning to end.” This proposed rule therefore did not consider any information that might be gleaned from Johns Hopkins’ report, which you said you expected “within the next two weeks.” This is another reason that the proposed rule should be rescinded. It should only be re-issued once the Johns Hopkins study has been received by SSA, made publicly available, and used to inform the agency. Additionally, to re-issue the proposed rule, SSA must include all of the information that the public requires regarding the criteria and data on which SSA based its proposal. Without this information, the agency has not complied with the Administrative Procedure Act, and the public is deprived of its opportunity to meaningfully comment. We outlined this NPRM’s challenges in this regard in NOSSCR’s January 9 comments and reiterate those concerns here.

2. The proposed rule should not re-define “permanent impairment.”

The NPRM says:

For impairments that do not meet or equal a listing, we propose to retain consideration of the interaction of a person's age, functional limitations resulting from the impairment(s), and the time since the person last engaged in SGA when we decide if the person's impairment(s) is permanent and, thus, subject to a MINE diary. For example, we would consider a person's schizophrenia to be a permanent impairment and subject to a MINE diary if the person was age 46 1/2 at the time of review and the onset was at least five years before the determination.

We are concerned that, rather than retaining the current method of deciding whether a person has one or more permanent impairments, SSA is proposing to delete references to factors that are currently in the definition of “permanent impairment.” The current definition is:

Permanent impairment—medical improvement not expected—refers to a case in which any medical improvement in the person's impairment(s) is not expected. This means an extremely severe condition determined on the basis of our experience in administering the disability programs to be at least static, but more likely to be progressively disabling either by itself or by reason of impairment complications, and unlikely to improve so as to permit the individual to engage in substantial gainful activity. The interaction of the individual's age, impairment consequences and lack of recent attachment to the labor market may

¹ <https://www.aging.senate.gov/press-releases/senate-aging-committee-to-examine-social-security-impersonation-scam-the-1-scam-in-the-country>

also be considered in determining whether an impairment is permanent. Improvement which is considered temporary under § 404.1579(c)(4) or § 404.1594(c)(3)(iv), as appropriate, will not be considered in deciding if an impairment is permanent. Examples of permanent impairments taken from the list contained in our other written guidelines which are available for public review are as follows and are not intended to be all inclusive:

- (1) Parkinsonian Syndrome which has reached the level of severity necessary to meet the Listing in appendix 1.
- (2) Amyotrophic Lateral Sclerosis which has reached the level of severity necessary to meet the Listing in appendix 1.
- (3) Diffuse pulmonary fibrosis in an individual age 55 or over which has reached the level of severity necessary to meet the Listing in appendix 1.
- (4) Amputation of leg at hip.²

Proposed 20 CFR §§404. 1590 (c) and 416.990(c) would say:

Permanent impairment means an impairment for which we do not expect medical improvement. A permanent impairment is an extremely severe condition determined on the basis of our experience in administering the disability programs to be at least static, but more likely to be progressively disabling, either by itself or by reason of impairment complications, and unlikely to improve so as to permit you to engage in substantial gainful activity. Improvement which is considered temporary under § 404.1594(c)(3)(iv) of this subpart will not be considered in deciding if an impairment is permanent. We assign cases with permanent impairments to the MINE diary category.

The proposed definition omits the guidance that “The interaction of the individual's age, impairment consequences and lack of recent attachment to the labor market may also be considered in determining whether an impairment is permanent.” Instead, the proposed rule only gives 10 conditions where age and functional limitations would be considered, and seven more where age, functional limitations, and time out of the workforce would be considered. SSA provides no evidentiary basis for this change. There are doubtless more than 17 impairments or combinations of impairments where age and time outside of the workforce should be considered in determining whether a person has a permanent impairment, and some impairments that are permanent regardless of the beneficiary's age or time outside of the workforce but the NPRM provides no information about how or whether SSA will identify impairments or combinations of impairments other than the 17 included in the NPRM as permanent. Reducing the number of impairments considered permanent, or the number of beneficiaries determined to have permanent impairments, is a significant change and one that should only be done with the utmost transparency and a rationale based on publicly-available evidence. The NPRM's proposed change to the definition of “permanent impairment” does not meet this standard.

Conclusion

CDRs are burdensome and can be harmful to beneficiaries. SSA must make a reasoned case supported by facts and evidence that there is a need to subject beneficiaries to more frequent reviews than required by the Social Security Act. As described in the preceding comments, the agency fails to do so. The lack of rationale and evidence supporting the proposed changes makes it impossible to meaningfully comment on the proposal and violates the APA. For the reasons in this comment and our previous one, NOSSCR urges the agency to rescind this proposal.

² 20 CFR §§404. 1590 (c) and 416.990(c)

Thank you for the opportunity to comment on these proposed regulations. Please consider these comments in addition to the ones submitted on January 9.

Respectfully submitted,

Barbara Silverstone
Executive Director