

December 27, 2007

The Honorable Michael J. Astrue
Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-7703

Dear Commissioner Astrue:

We appreciate this opportunity to comment on the proposed rulemaking regarding Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels, published in the Federal Register on October 29, 2007, p. 61218, Docket No. SSA-2007-0044.

On behalf of the American Bar Association (ABA) and its more than 400,000 members nationwide, we appreciate the opportunity to offer comments on the Social Security Administration's proposed amendments to regulations that would make changes at the administrative law judge (ALJ) and appeals level. The proposed regulations, if adopted, would make significant changes to hearing level procedures applicable to both disability and non-disability claims.

The ABA has a long-standing interest in the Social Security Administration's disability benefits decision-making process and we have worked actively for over two decades to promote increased efficiency and fairness in this system. As an umbrella organization representing the legal profession in the United States, the ABA has been able to draw upon the considerable expertise of our diverse membership- claimants' representatives, administrative law judges, academicians and agency staff – to develop a wide-ranging body of recommendations on the disability adjudication process. The Section of Administrative Law, the Judicial Division, the National Conference of Administrative Law Judiciary of the Judicial Division, and the Commission on Law and Aging, have worked to develop our ABA recommendations, the goals of which are to improve the quality of decision-making, increase fairness and efficiency for claimants, help alleviate the backload, encourage clarity in communications with claimants, promote procedural due process protections, and seek the application of appropriate, consistent legal standards at all states of the adjudication process. We offer our comments on the Notice of Proposed Rulemaking (NPRM) from this perspective.

There is much in the new regulations with which the ABA is pleased and we appreciate all the hard work that went into those regulations. We have for many years expressed our support for a quick disability process for those who are obviously disabled. In past years, many eligible individuals have waited and are waiting far too long to receive their benefits--benefits that may be their only source of income and access to medical care. The backlog of SSA cases awaiting an

ALJ decision has grown to over 700,000 cases. Clearly, something needs to be done to improve the operation of the program, alleviate backlogs in the system and reduce the delays that are so detrimental, and sometimes deadly, to the lives of disabled claimants who desperately need the financial benefits. Applicants who by definition are totally disabled and unable to do any kind of work are waiting years before they can get a hearing and begin to receive their benefits.

We understand the proposed changes to the regulations are an attempt to improve the system. However, we are concerned that certain of the proposed rules would have significant potential to adversely impact claimants' receipt of benefits to which the claimants are legitimately entitled.

Our comments to the rules address eight areas of concern:

1. While we support efforts to move cases quickly and to reduce the backlog of disability claims, we encourage more of an effort to issue a correct decision as early in the process as possible. If the quality of intake and the development of evidence is improved at the early stages, it follows that there will be fewer appeals and a reduction in the number of cases awaiting a decision. We are concerned that the proposed rules do not address reducing the number of cases that are subject to the appeals process in the first place. Two out of three people who apply for benefits each year are initially rejected, and, on appeal, more than 60 percent of those claims are approved.¹ These rules do not address that systemic imbalance in the system - the tremendous waste of agency resources in providing an appellate process for claims that should have been approved initially, or the very real impact on the lives of those who are waiting for their hearings and the approval of their benefits.
2. In the summary of the rule amendments, the agency states that limiting the circumstances in which new evidence may be added to the record during the appeals process is "consistent with the change to a more truly appellate process." We believe that moving in the direction of a "more truly appellate process" is inconsistent with, and contrary to, Congress' intent to keep the process informal and of the goals and principles of the Social Security Disability program, which is to correctly determine eligibility for claimants and award benefits if a person meets the statutory requirement. The ABA has long supported an informal and non-adversarial hearing before an ALJ that allows the ALJ to function as a true independent fact-finder who has a duty to develop the record as acknowledged by the United States Supreme Court and we believe this role should continue, rather than moving towards a more "truly appellate" and legalistic process.
3. Our next concern relates to the proposed limitation itself on the provision of new evidence during the appeals process. The NPRM proposes to limit the submission of new evidence to the administrative law judge to five business days before the hearing date. Evidence submitted after that date is considered late and is subject to new rules. 42. U.S.C. § 405 (b)(1) provides that the Commissioner "shall, on the basis of evidence adduced at the hearing, affirm, modify or reverse" a decision. The restriction on the submission of evidence to five days before the hearing seems to directly conflict with the language of the statute and is problematic on its face.

¹ "Disability Cases Last Far Longer as Backlog Rises" (12/10/07) and "Disabled, and Waiting for Justice" (12/11/07), *The New York Times*

4. Although the ABA does not have policy specific to the SSA disability appeals process regarding closing of the record, we have policy, adopted by our House of Delegates in 2003 relating to the Medicare claims adjudication process, that states: "The record should not be closed prior to the hearing. After the ALJ hearing, beneficiaries should be provided the opportunity to reopen the record for good cause." We urge you to proceed with extreme caution on restricting claimants' ability to submit relevant evidence within five days prior to or at the hearing. If the Social Security Administration chooses to adopt a rule that limits the submission of evidence within five days of a hearing, we believe that ALJ's should retain broad discretion to waive the restriction to ensure that the record is complete.

5. The text of the NPRM discusses the estimated impact of the proposed regulations to the program and states: "This acceleration of the closure of the record is estimated to provide significant reductions in cost through reduced allowances over the next 10 years or so." Social Security is a compulsory system, and, with few exceptions, everyone must pay into it. Social Security Disability Insurance is a social security benefit that pays benefits to those who are disabled, who worked the required number of quarters, and who paid social security taxes. We are troubled that the impact of the agency's proposal may be to limit an individual's right to benefits to which they may be legitimately entitled.

6. The NPRM proposes to limit the new evidence that a claimant may submit if the Review Board or the federal court finds the decision of the ALJ legally erroneous and remands the case for a new hearing. The record is basically frozen at the time the ALJ issued a decision. The NPRM states that the remedy for providing new information is to file a new application if the claimant's condition worsens during the time between the ALJ's decision and the review proceeding.

Forcing the claimant to file a new application at that point seems to contravene the intent of the program, which is to correctly determine eligibility for claimants and award benefits if a person meets the statutory requirements. Filing a new application could cause claimants to lose benefits from the effective date of the first application, which could have serious consequences. In addition, forcing a claimant to file a new application will only cause the backlog to worsen and may result in the possibility of differing results on the same claim. This process creates redundancy, harms all the participants, and is a waste of agency resources.

7. The ABA has taken a specific position on providing claimants and legal representatives with the opportunity for a face-to-face interview with initial decision makers but does not have specific policy on face-to-face hearings at the ALJ level. We do, however, have concerns about the inability of a claimant to object to a hearing scheduled to be held by telephone or video teleconferencing, as this inability removes an important procedural due process protection that claimants have, which is the right to object to a telephonic or video teleconference hearing.

8. The NPRM would require claimants to pay for copies of the record or the hearing recording for an appeal to the Review Board. The ABA has not taken a specific position on the question of requiring payment for a copy of a record. However, we have long supported providing

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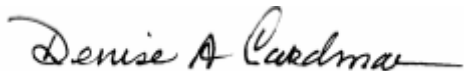
procedural due process protections to claimants and are concerned about changes that may impact these important protections, including the right to access one's own records.

In addition, we would like to suggest that claimants be advised that their claim may be determined more rapidly if they ensure that all of their medical records and work histories are provided in as timely a manner as possible.

In summary, we believe that further consideration should be given to some of the proposed rule changes in light of the overall philosophical shift expressed in the rules. Current and proposed regulations describe the nature of the administrative review process as being conducted in "an informal, non-adversarial manner,"² yet many of the proposed changes would make the administrative review process more formal and more adversarial. In addition, comments to the proposed rules state that the intent of some of the changes "is to make the Review Board's role more analogous to that of an appellate court reviewing the decision of the trial court." We are concerned that this shift in emphasis might decrease fairness for the claimants. We believe that all claimants should be afforded the right to a full due process hearing before an impartial judge appointed under the Administrative Procedure Act ("APA").

We appreciate the opportunity to submit our comments.

Sincerely,

A handwritten signature in cursive script that reads "Denise A. Cardman". The signature is written in black ink and is positioned below the word "Sincerely,".

Denise A. Cardman
Acting Director

² 20 C.F.R. §404.900(b)