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Submitted online through www.regulations.gov

Ms. Carolyn W. Colvin
Acting Commissioner
Social Security Administration
c/o Office of Regulations and Reports Clearance
3100 West High Rise Building,
6401 Security Blvd.
Baltimore, MD 21235-6401

Re: Social Security Administration (SSA) Docket SSA-2014-0052, Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process

Dear Acting Commissioner Colvin:

Thank you for the opportunity to comment on the Social Security Administration (SSA) Notice of Proposed Rulemaking (NPRM) addressed by this docket. This letter is provided in response to the SSA's NPRM, Docket No. SSA-2014-0052, as published in the Federal Register.[1]

People With Disabilities Foundation (PWDF) is a § 501(c)(3) nonprofit agency with expertise in medical (psychiatric and/or developmental)-legal issues and bases these comments on its 16-year history of providing legal representation for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) issues for people with psychiatric and/or developmental disabilities. In addition to being PWDF's Legal Director, I am also a former Senior Attorney for the SSA.

PWDF recognizes that the SSA needs to make adjudications efficient and timely, both for the benefit of the SSA and for claimants. While it is commendable that the SSA is making efforts to improve efficiency, it is important to ensure that this does not come at the expense of ascertaining the truth and complying with Constitutional Due Process requirements. For this reason, PWDF's comments focus on providing safeguards for

[1] 81 Fed. Reg. 45079 (Jul. 12, 2016).

claimants, with suggestions for alternative methods of increasing efficiency and timeliness.

Improving the Efficiency, Accuracy and Timeliness of the Adjudication Process

As the SSA stated in the "Background" section of the NPRM, it is critical to have a complete evidentiary record in order to make informed disability determinations and improve consistency in the adjudication of claims. The SSA is also looking to improve the accuracy of its administrative review processes.[2] According to the NPRM, an analysis of SSA data performed by the Office of the Chairman of the Administrative Conference of the United States ("ACUS Report") "appeared to show that the Part 405 rules made *modest strides* towards . . . improving the efficiency, accuracy, and timeliness" of the adjudication process.[3]

PWDF objects in principle to making changes that will only result in "modest strides" towards these goals while making it more difficult for claimants to have evidence considered. Instead, the best way to clear up SSA's backlog is to eliminate duplicative functions performed through the multi-tiered disability determination process; i.e., the SSA should eliminate the Request for Reconsideration nationwide and/or eliminate the appellate function of the Appeals Council (AC).

The Request for Reconsideration is duplicative in that medically related reconsiderations are performed by the same state agencies (Disability Determination Services) that perform the initial disability determinations. The AC's function as an appellate body is duplicative in that it is part of the same SSA unit (Office of Disability Adjudication and Review) as the administrative law judges (ALJs), therefore the AC review is performed by the same SSA unit that is making the decisions that are being reviewed. The AC decisions tend to be a "rubberstamp" of the ALJ decisions[4] while causing additional delay for claimants to receive their final disability determinations.[5] In addition, as noted herein relating to proposed 20 CFR §§ 404.970 and 416.1470, the AC may be too politically-driven to be neutral. (*See infra* p. 6.)

Eliminating either or both of these reviews would be substantially more efficacious in improving the efficiency and timeliness of the adjudication process than

[2] 81 Fed. Reg. 45079 (Jul. 12, 2016).
[3] 81 Fed. Reg. 45079, 45081 (Jul. 12, 2016) (emphasis added).
[4] The AC leaves ALJ decisions standing in 87% of claimant requests for review, either by dismissing the request for review (4% of the requests) or denying the claimant's appeal for benefits (83% of requests). Social Security Administration, *Budget Estimates and Related Information, FY 2017, Technical Materials, February 2016, Limitation on Administrative Expenses*, Table 3.34, "FY 2015 Workload Data Disability Appeals" (Feb. 2016) available at https://www.ssa.gov/budget/FY17Files/2017LAE.pdf (last visited Aug. 19, 2016).
[5] The average processing time for requests for AC review was 374 days in FY 2014. Social Security Administration, Hearings and Appeals, Information About Requesting Review of an Administrative Law Judge's Hearing Decision, Appeals Council Request for Review Statistics, available at https://www.ssa.gov/appeals/appeals_process.html (last visited Aug. 19, 2016).

cutting off evidence 5 business days before the ALJ hearing. Having these administrative appeals available to claimants may give them another opportunity to win their cases, however, this benefit must be balanced with the detriment to claimants of the additional delay before they can file their appeals in District Court. Requiring claimants to go through AC review before filing in District Court just delays them an average of 374 days longer[6] before their cases are heard.

Eliminating the Request for Reconsideration and/or the appellate function of the AC would eliminate the need for claimants to wait through so many appeals—the reconsideration request, the request for an ALJ hearing, and the AC—before they can go to court, where the Appellate Standard (legal error based on substantial evidence) is followed. Eliminating reconsideration and AC reviews have been discussed for decades; it is time for the SSA to eliminate these reconsidered determinations and AC reviews so that claims can be processed more quickly and efficiently without duplication.

<u>Proposed 20 CFR §§ 404.935, 416.1435 – Submitting written evidence to an administrative law judge</u>

General

Relevant evidence should never be rejected. If the claimant and/or the claimant's representative intentionally did not submit relevant evidence, then that person should be sanctioned, but the evidence related to the disability should still be accepted. If the evidence is relevant to the disability, it should be considered so that the truth can be ascertained.

Limitation of Evidence to 5 Business Days Before ALJ Hearing

Other claimant attorneys and advocates are submitting comments as to why the proposed rule that evidence must be submitted or disclosed at least 5 business days before the ALJ hearing should not be adopted. For the sake of expediency, we decline to reiterate most of these reasons, although we agree with many of them, and will address only a couple reasons here.

Legal Duty to Develop the Record

Both the ALJ and claimant's representative have a legal duty to develop the record. If it becomes known at any time before the ALJ decision is signed that more medical evidence is available that needs to be considered, then this evidence should be accepted without the need for explanation. For example, if a claimant states at the hearing that his/her doctor ordered relevant tests the prior week, then this evidence should be accepted. The regulations should expressly allow evidence from ongoing evaluation and treatment that is known before the ALJ signs the decision to be deemed as a good cause exception.

[6] *Id*.

Changes to Claimants' Health

It is not unusual for someone's disability, e.g., cancer, to get worse as time goes on and for the individual to receive more diagnostic or other medical evidence during that time. Unless good cause is broadly construed to cover evidence of an impairment becoming more debilitating, cutting off all evidence from the period 5 business days before the ALJ hearing may leave out very important and substantial evidence.

Any time a patient goes to the doctor, whether for diagnostic evaluation or continuing treatment, it is likely that relevant and material evidence will result. For example, after the ALJ decision but before the AC decision, one of our clients was admitted to a psychiatric ward for approximately 3 weeks, which was material evidence related to the disability determination. As another example, serious side effects from some medications may not become apparent until after the ALJ hearing. E.g., side effects from tamoxifen, a medication for breast cancer, may occur months or years after the medication is used.[7]

"Where a claimant's condition is progressively deteriorating, the most recent medical report is the most probative."[8] This is especially pertinent given the lengthy delay for ALJ decisions to be rendered. At a minimum, the SSA should allow claimants to submit evidence at least through the date of the ALJ decision, so long as it is probative.

It is counterproductive to the whole process to tell a disabled individual whose disability changes, i.e., not static, that they cannot show that the disability is becoming more severe or is improving. The average processing time for ALJ hearing decisions is about 16 months, with the SSA expecting this to increase to 18 months in the near future.[9] For this reason, it is not useful at the hearing level to rely on "stale" evidence, since disabilities usually continue, with more current evidence being available as time goes on. This rule does not seem to be well thought out in terms of getting the best evidence of disabilities.

If the SSA believes it can get reduce its backlog faster by eliminating evidence regardless of importance, then it is not adequately balancing the need to reduce backlog with the requirement to make an impartial judicial finding[10] by not considering the most recent evidence through the date of the decision. Fortunately or unfortunately, people's impairments do change before the hearing, sometimes after the hearing, and sometimes by the time of the AC stage of the proceedings. Therefore, we recommend the SSA

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[7] Mayo Clinic, *Drugs and Supplements, Tamoxifen (Oral Route), Side Effects*, available at http://www.mayoclinic.org/drugs-supplements/tamoxifen-oral-route/side-effects/drg-20066208 (last visited Aug. 9, 2016).
[8] *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1986) (citing *Stone v. Heckler*, 761 F.2d 530, 532 (9th Cir. 1985)).
[9] Social Security Administration, *Annual Performance Report 2015-2017*, p. 26, *available at* https://www.ssa.gov/agency/performance/2016/FINAL_2015_2017_APR_508_compliant.pdf (last visited Aug. 22, 2016).
[10] As required under 5 USC § 556(b) (2016).

accept evidence at least until the AC review ends because, at that point, the evidence will be before the SSA and therefore before the District Court upon appeal.

Proposed 20 CFR §§ 404.938(b), 416.1438(b) – Notice of a hearing before an administrative law judge; Notice information

The notice of hearing should say that claimant may object to having the hearing by video teleconferencing, with clear instructions about how to object. (The proposed regulations are silent as to this point.)

Proposed 20 CFR §§ 404.970, 416.1470 – Cases the Appeals Council will review

Background – Proposed Factors that Determine Whether the AC Will Review a Case Because of Additional Evidence

It is important to note the various factors in the two-prong test the SSA will consider when deciding whether the AC will review a case because the SSA receives additional evidence: 1) whether the claimant or representative had a good reason for waiting to inform the SSA about or submit new and material evidence and 2) whether there is a reasonable probability that the additional evidence would change the outcome of the decision. The primary factor as to whether the AC should review a case based on additional evidence should be whether the evidence is important in ascertaining the truth.[11]

Good Cause should be Liberally Construed

Whether a claimant has a good cause for missing the deadline to submit evidence should be liberally construed, i.e., the AC should consider evidence that was not submitted before the ALJ hearing deadline for any reason, not just those listed in 20 CFR §§ 404.970(b) and 416.1470(b). The AC should consider all relevant evidence, whether it relates to the period before or after the ALJ decision date.

As noted above in our comments on proposed regulation sections 20 CFR §§ 404.935 and 416.1435 "Submitting written evidence to an administrative law judge," there may be many reasons why the evidence was not submitted 5 business days before the ALJ hearing, including evidence of changes to claimants' health that occurred after the ALJ hearing, but before the ALJ decision.

If the claimant and/or the claimant's representative intentionally did not submit relevant evidence, then that person should be sanctioned, but the evidence related to the disability should still be accepted. The punitive action should not be to reject medical evidence, thereby affecting the disability decision and consequently harming the disabled

[11] USCS Fed. Rules Evid. R. 102 (2016) ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

person. The SSA already has regulations governing the conduct of claimants and their representatives, outside of finding that the claimant is not disabled.

Requiring New Evidence to have a "Reasonable Probability of Changing the Outcome" Creates Risk of Abuse

If the AC does not review a case because it decides that the evidence would not make any difference to the outcome, it is arguing a "harmless error rule." Since the SSA could soon be a party to a lawsuit based on this decision, i.e., a defendant in a District Court review of the SSA's final decision under the Social Security Act,[12] this type of rule is subject to too much political and other abuse for one side (the SSA) unilaterally to determine that the evidence is not important enough to alter the decision.

To require that the additional evidence have a reasonable probability of changing the outcome of the decision in order for the claimant's case to qualify for an AC review is premature, in that whether the evidence would change the outcome may not be known before the case is in District Court.

The AC may be too politically-driven to be neutral, in that it is made of up judges who, more often than not, act as SSA employees who follow the advice of SSA attorneys from the Office of General Counsel (OGC).[13] The attorneys from OGC represent the SSA when the SSA is the defendant in cases that the AC reviewed and subsequently get appealed to District Court. Thus, the AC may not be neutral, to the extent it follows the SSA attorneys' advice. Having the same group of attorneys (OGC) provide advice to the AC and represent the SSA as defendant at the next step (District Court) can create a real or perceived conflict of interest.

For example, our client "CB" received an unfavorable decision by the ALJ, denying CB's claim at step 4 of the disability analysis. After we requested AC review, the AC issued a Notice of Appeals Council Action in which it stated its intention to issue an unfavorable decision (at step 5) before it considered additional evidence. The AC's Notice stated that it based its decision on the written record before the ALJ and the testimony at the hearing. It offered CB the opportunity to submit more evidence or to request an appearance for oral argument, however, the AC had already made its decision. It is hard to imagine how the AC is neutral if it is making decisions before allowing claimants to provide additional evidence and receiving it or to make an appearance for oral argument. We will provide this AC letter if requested.

[12] 42 USC § 405(g) (2016).

[13] Unlike the ALJs, the AC judges are not necessarily independent and neutral arbiters; this is why Congress gave disabled individuals the right to appeal to District Court, i.e., outside of the executive branch, under the Social Security Act.

The SSA is Making it More Difficult for Evidence to be Part of the Administrative Record when Cases are Appealed to District Court

With the proposed rules, the SSA is trying to make it difficult for new evidence that later comes to light to be accepted before the claimant files an appeal in District Court. Currently, in most federal Circuits, the District Courts will consider evidence if it was before the Administration, i.e., in most cases they will only consider evidence that was before the AC.

Allowing the AC to accept additional evidence that was not before the ALJ will help unclog the District Courts and reduce the number of claims that go through the hearing process, AC, and District Courts multiple times. It will also help lead to the truth. It is likely that nearly all additional evidence submitted to the AC would be related to a disability and therefore important to ascertaining the truth.

Unfortunately, the proposed rule appears to be a mechanism[14] to affect the concepts of fairness as guaranteed by the Due Process Clause of the Fifth Amendment for cases appealed to District Court and then, if necessary, to the Circuit Courts of Appeal. One of the reasons the District Courts remand cases to the SSA is because the evidence was before the SSA and therefore the SSA should have taken it into account.[15] The proposed regulation could prevent evidence from being before the ALJ and therefore part of the Administrative Record.

In order to prevent a violation of the Due Process clause, it is important to preserve claimants' right to appeal without the other side (the SSA) objecting on the grounds that the "new" evidence was not before the Administration. This is especially important for impairments that are progressive, e.g., cancer, psychiatric, neurological, etc., as discussed above, because the SSA requires that disabilities be determined longitudinally, i.e., backwards and forwards in time, not a snapshot in time.

Conclusion Regarding Comments about AC Review Based on New Evidence

The proposed factors that would determine whether the AC will hear a case due to additional evidence are confusing and may be subject to abuse. The AC should never reject relevant evidence. If the evidence is related to the disability, it should be considered so that the truth can be ascertained before the case gets into the federal courts.

It would be a terrible waste of time, not to mention decrease SSA's efficiency, to have more cases remanded by District Courts due to lack of available evidence. More importantly, more remands mean more disabled claimants will be further delayed from

[14] Some people would call it a ruse.

[15] *See, e.g., Smolen v. Chater*, 80 F.3d 1273, 1282 (9th Cir. 1996) ("[It is] legal error where ALJ's findings completely ignore medical evidence without giving specific, legitimate reasons for doing so.") (quoting Cotton v. Bowen, 799 F.2d 1403, 1405 (9th Cir. 1986)). *See also Tackett v. Apfel*, 180 F.3d 1094, 1097-98 (9th Cir. 1999) ("This court may set aside the Commissioner's denial of disability insurance benefits when the ALJ's findings are . . . . not supported by substantial evidence in the record as a whole.)

receiving disability benefits. Barring some kind of fraud by the claimant, the revisions to the rules as to whether the AC will hear a case due to additional evidence should be consistent with concepts of fairness and due process such that evidence of disability is not withheld.

Proposed 20 CFR § 416.1470(b) - Cases the Appeals Council will review, reviewing decisions other than those based on an application for benefits

It is recommended to replace the word "material" with the word "relevant" in the following sentence as indicated because "material" is more restrictive than "relevant."

> In reviewing decisions other than those based on an application benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any additional evidence it believes is ~~material~~ *relevant* to an issue being considered.

Proposed 20 CFR §§ 404.970(d), 416.1470(d) – Cases the Appeals Council will review; If the Appeals Council needs additional evidence

If the AC is allowed to conduct re-hearings to obtain additional evidence, then claimants should have the right to opt-out of these additional hearings and, instead, move their cases directly to District Court. By the time a claimant's case reaches the AC, the claimant has already been waiting a substantial length of time; claimants should have the right to opt-out of a re-hearing if it will further delay them from appealing their cases to District Court. This is especially important because claimants may have a better chance of having their cases heard by an independent, neutral judge in the judicial branch rather than by SSA employees in the executive branch (the AC) since the SSA will be the defendant in District Court for appeals of cases that had been reviewed by its AC. Thus, claimants should have the right to opt-out of AC re-hearings so that they can move their appeals forward without additional delay.

Proposed 20 CFR §§ 404.976(b), 416.1476(b) – Procedures before the Appeals Council on review; Oral argument

Because claimants who appear before the AC to present oral argument have already been waiting a long time for their cases to be concluded, the SSA should default to the process that will result in the least delay and then allow claimants to opt-out of the selected method, if they choose.

Thank you for considering our comments and recommendations.

Sincerely,

Steven Bruce, Esq.
Legal Director
People With Disabilities Foundation