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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-2012-0035, Revisions to Rules Regarding the Evaluation of Medical Evidence

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-2012-0035, 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. I am the Legal Director of PWDF and base these comments on my 29-year experience of providing legal representation on 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 and former private practitioner.

The SSA has proposed several important changes in the medical source and opinion evidence regulations. It is important to ensure that evidence of claimants' impairments is properly considered and weighed, especially when the evidence derives from multiple sources or is inconsistent. For this reason, while we briefly acknowledge several proposed changes with which we agree, we focus our comments on those that are necessary in providing safeguards for claimants. We are particularly concerned about the SSA's attempt to circumvent the "treating source rule" by proposing that evidence from

[1] 81 Fed. Reg. 62559 (Sept. 9, 2016).

chart readers (Disability Determination Services (DDS) doctors and analysts) who have never seen the patient be given equal or controlling weight over that of claimants' treating medical sources, who know their patients over longer periods of time and are therefore in a position to give the most accurate evidence. This is particularly critical for people with mental impairments, for whom the treating source relationship is likely to be more important than that for people with physical disabilities. Many of the proposed regulations appear to be attempts by the SSA to circumvent federal court rulings that provide such protections to claimants.

Given this context, we have the following specific comments on the proposed regulations. When commenting on Title II we may not always include the Title XVI equivalent regulation section since it is usually the same.

Proposed 20 CFR §§ 404.906(b)(2) – Testing modifications to the disability determination procedures

The proposed regulation section states that when evidence indicates that the claimant has a mental impairment, the SSA needs to make every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and applicable residual functional capacity (RFC) assessment before there is an initial determination. This is critical in ensuring that claimants who have mental impairments receive equal access to SSA disability programs by having their cases reviewed by medical sources with proper expertise. We are glad to see that SSA is conforming the regulations (and therefore the POMS) with case law, which requires this type of medical specialization before an initial determination.

Proposed 20 CFR §§ 404.1502(a) & (d), 416.902(a) & (i) Definitions for this subpart, Acceptable medical source & Medical source

The proposed expansion of the definition of "medical sources" and "acceptable medical sources," as well as the proposal to accept medical opinions from medical sources that are not acceptable medical sources, are overdue, and the SSA should be commended for these proposals. Nurse practitioners (NPs) in particular have been the primary care providers for many people in some of the largest health care plans for many years now, especially in rural areas and it is simply not possible to adequately adjudicate the medical conditions of many people without considering the assessments and diagnoses of NPs.

The same is true for physicians' assistants (PAs). For this reason, the SSA regulations should give special deference to both NPs and PAs because of their familiarity and experience with the patient; they may be supported by doctors who may be remote. Many patients, especially in rural areas, may only have access to PAs, therefore, the PAs' observations, diagnoses, and treatments should be given significant weight. The PA often clearly knows the patient best, and better than a doctor who has

never examined the patient. Whether or not the PA is supported by a doctor should not override the weight that should be accorded to their observations.

For psychological impairments, the SSA should also consider adding Licensed Clinical Social Workers (LCSWs) and Marriage and Family Therapists (MFTs) as acceptable medical sources under 20 CFR §§ 404.1502(a) and 416.902(a). In California at least, LCSWs and MFTs are often the primary providers of psychological diagnosis and therapy for psychological impairments, with medical doctors focusing on the prescription of medication. As the Administrative Conference of the United States report, "SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule,"[2] that the SSA partially relied upon as the basis for proposing some of these changes,[3] states, "LCSWs represent the largest segment of the mental health care workforce (45%), followed by psychologists (36%) and psychiatrists (19%). Some studies estimate that LCSWs provide up to 65% of all mental health services. . . . LCSWs are thus providing the bulk of frontline mental health services, and are expected to continue doing so in future years."[4]

See *Jaffee v. Redmond*, 518 U.S. 1 (U.S. 1996), where psychotherapist-patient privilege applies to LCSWs and MFTs as the court recognized that, in modern times, the majority of the population cannot afford psychiatrists and instead relies on psychotherapists.

Thus, it is especially important for LCSWs and MFTs to be included as acceptable medical sources because only opinions from acceptable medical sources are given significant weight in proposed 20 CFR §§ 404.1520c(b) and 416.920c(b), "How we consider and articulate medical opinions and prior administrative medical findings, Articulation procedure." Their opinions should not be disregarded as unacceptable medical sources, which is the current situation in actual practice. The more recent division of labor between therapists and medical doctors makes it particularly important for people with mental impairments to have the opinions of therapists considered under the proposed new rules.

Proposed 20 CFR §§ 404.1512(b)(2), 416.912(b)(2) – Responsibility for evidence; Our responsibility; Obtaining a consultative examination

PWDF agrees with the SSA's proposal to generally not request a consultative examination until it has made every reasonable effort to obtain evidence from claimants' own treating sources because they know the patient better. We note that while this has been SSA's policy over the years, it is usually not followed.

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[2] Administrative Conference of the United States, *SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule* (April 3, 2013), *available at* https://www.acus.gov/sites/default/files/documents/Treating_Physician_Rule_Final_Report_4-3-2013_0.pdf

[3] 81 Fed. Reg. 62559, 62561 (Sept. 9, 2016).

[4] Administrative Conference of the United States, *supra* note 2, at 33 (internal citations omitted).

Proposed 20 CFR §§ 404.1513(a)(3), 416.913(a)(3) – Categories of Evidence; Other medical evidence

The meaning of medical evidence that is not objective or not a medical opinion is too unclear to be useful.

Proposed 20 CFR §§ 404.1513(a)(5), 416.913(a)(5) – Categories of Evidence; Prior administrative medical findings

There is well established law relating to administrative *res judicata* related to prior administrative findings, as with the "treating source rule" and given the context of a "*de novo*" ALJ hearing, the SSA clearly does not have jurisdiction to override the U.S. Courts of Appeals. These proposed regulations on which we comment are reminiscent of the "Non-Acquiescent Rulings" of the US DHHS in the 1980s, where the Secretary refused to follow the U.S. Courts of Appeal under HHS's (now SSA's) policy of "national uniformity." We hope this time around it will not lead to a Constitutional crisis headed to the U.S. Supreme Court and as before be resolved by Congress. That was a terrible waste of time and resources. Moreover, it created conflicts for those adjudicators who took an oath to uphold the U.S. Constitution, by attempting to get them to follow departmental policy, rather than the Constitution, which of course created a conflict among U.S. ALJs, who were asked not to follow the Constitution, but were asked to follow the Secretary's (i.e., Commissioner's) policy of Non-Acquiescence, rather than follow the federal judiciary.

Proposed 20 CFR §§ 404.1513a(b) - (c), 416.913a(b)-(c) – Evidence from our Federal or State agency medical or psychological consultants

This proposed rule requires the ALJs and the Appeals Council (AC) to consider findings from federal or state agency medical or psychological consultants because they are "highly qualified experts." This proposed rule is dangerous because the ALJ is supposed to be independent and hear the case *de novo;* in addition, these "experts" are often chart readers who have never seen the patient, which conflicts with the "treating source rule," which is required according to the U.S. Courts of Appeal interpreting the Social Security Act (the "Act"). By requiring the ALJs to consider conclusions from the same medical sources that were used for the initial and reconsidered decisions, the proposed regulation weakens (at best) or precludes (at worst) the ability for claims to be heard *de novo*. This disregards the intent and requirements of the Act. In other words, it would require the ALJs and AC to consider evidence from medical sources who have never seen the patient, and may weaken judicial independence in determining to what extent this evidence should be considered. By necessity and design, there is an inherent tension between the need for the ALJs to consider all medical evidence that relates to claimants' disabilities and the need for judicial independence in making independent findings. This proposed regulation tips this balance away from both judicial

independence and from the use of more valuable medical evidence; i.e., that from medical sources who have actually seen and treated the patient.

Proposed 20 CFR §§ 404.1519i(b), 416.919i(b) – Other sources for consultative examinations

This proposed rule violates the "treating source rule" because it says that the SSA will get a consultative examiner if the SSA decides that there is a conflict in the evidence, whereas the treating source is required to be the primary source of medical evidence unless specific and legitimate reasons are articulated as to why the "treating source rule" should not apply. The SSA must first attempt to resolve the conflict or inconsistency by asking a treating source. Then, the adjudicator can resolve the issue by seeking an opinion of a board-certified doctor in the same areas of specialization, e.g., a psychiatrist, neurologist, or rheumatologist, as long as the consultative examiner has the entire medical evidence of record. See also comments on proposed 20 CFR §§ 404.1520b(b), 416.920b(b), 404.1520b(c), and 416.920b(c), "How we consider evidence; Incomplete or inconsistent evidence" and "How we consider evidence; Evidence that is neither valuable nor persuasive" below, as well as section "SSA's Proposal to Eliminate the 'Treating Source Rule,' as a Whole," *infra* p.6.

Proposed 20 CFR §§ 404.1520b(b), 416.920b(b) – How we consider evidence; Incomplete or inconsistent evidence

The definition of "inconsistent" allows the SSA to hire someone who has not seen the patient in lieu of deferring to the treating source, as is required by law. The SSA must first attempt to resolve the incomplete or inconsistent information by asking a treating source unless there is an articulation of specific and legitimate reasons to do otherwise. Then, the adjudicator can resolve the issue by seeking an opinion of a board-certified doctor in the same areas of specialization, e.g., a psychiatrist, neurologist, or rheumatologist, as long as the consultative examiner has the entire medical evidence of record. See also comment on proposed 20 CFR §§ 404.1519i(b) and 416.919i(b), "Other sources for consultative examinations" above, as well as proposed 20 CFR §§ 404.1520b(c) and 416.920b(c), "How we consider evidence; Evidence that is neither valuable nor persuasive" below, as well as section "SSA's Proposal to Eliminate the 'Treating Source Rule,' as a Whole," *infra* p. 6.

Proposed 20 CFR §§ 404.1520b(c), 416.920b(c) – How we consider evidence; Evidence that is neither valuable nor persuasive

The proposed regulation says that the SSA will not use "inconsistent" evidence because it is "neither valuable nor persuasive," but it is not clear what is "neither valuable nor persuasive" and it is too vague and subjective. This omission leads to an appearance that the SSA is trying to circumvent requirements regarding the "treating source rule" as imposed by the U.S. courts.

Taking these regulation sections[5] in combination, the SSA effectively would be able to disregard treating source evidence at will, and replace that evidence with new evidence from another source of its own choosing and who is under contract to the SSA, as opposed to applying the "treating source rule."

SSA's Proposal to Eliminate the "Treating Source Rule," as a Whole

Regrettably, the SSA has initiated a campaign to override the federal judiciary in trying to eliminate the "treating source rule" and has found one professor from one law school to write in support of this position.[6] This is bias, in fact. The "treating source rule" provides for not using a treating source if the decisionmaker can articulate specific and legitimate reasons for rejecting the treating source.

The proposal to stop giving controlling weight to the opinion of a treating source that is well-supported and consistent with other evidence in the record is simply a political move designed to allow the SSA to make an end-run around the US Courts of Appeals rulings that the SSA believes have been insufficiently deferential to the SSA when they want to substitute the opinion of one of their paid chart readers for the opinion of a doctor who knows and treats the claimant. In 81 FR 62559 (Sept. 9, 2016), the SSA does not even bother to hide this goal, stating, "these courts, in reviewing final agency decisions, are reweighing evidence instead of applying the substantial evidence standard of review, which is intended to be highly deferential standard to us."[7] Later, the SSA mentions the Ninth Circuit's credit-as-true rule as another court decision it wants to overturn simply because they disagree with it: "Application of the credit-as-true rule prevents us from reconsidering the evidence in the record as a whole and correcting any errors that may exist, effectively supplanting the judgment of our decision makers."[8] As in the 1980s with the SSA Non-Acquiescence Rulings to the U.S. Courts of Appeals, which led to a Constitutional crisis resolved by Congress, the SSA is now attempting to repeat history.

The SSA's institutional bias against treating doctors is revealed when they quote a 7th Circuit case that, "a treating physician may want to do a favor for a friend and client and so may too quickly find disability and might also lack appreciation of how one case compares with other related cases, whereas a consulting physician may bring both impartiality and expertise." What this statement misses is the possibility that a consulting physician may not find disability quickly enough when they are paid by a government agency that has an incentive to deny cases, so as to continue to be contracted by the government. And before the SSA balks at how such an insinuation impugns the integrity of their paid consultants, they might want to reconsider how statements such as they

[5] Proposed 20 CFR §§ 404.1519i(b), 404.1520b(b), 404.1520b(c), 416.919i(b), 416.920b(b), 416.920b(c).
[6] RICHARD J. PIERCE, JR., PETITION FOR RULEMAKING BEFORE THE SOCIAL SECURITY ADMINISTRATION, *available at* https://www.regulations.gov/document?D=SSA-2012-0035-0002 (last visited Nov. 8, 2016).
[7] 81 Fed. Reg. 62559, 62572 (Sept. 9, 2016) (internal citations omitted).
[8] 81 Fed. Reg. 62559, 62573 (Sept. 9, 2016).

quoted impugn the integrity of the physicians who treat the people that the SSA is charged to serve.

The SSA now proposes to make the medical source's relationship with the claimant just one factor to consider when evaluating a medical opinion, and make it less important than the opinion's supportability and consistency with the medical record. While supportability and consistency with the record are important, this brings up a crucial reason for the "treating source rule" that the SSA did not discuss: Medical records are imperfect. Doctors often do not write down patient's statements that are irrelevant to healing them but critical to evaluating their daily functioning. Wording can be vague or apparently inconsistent. Handwritten notes can be difficult to read. A treating doctor will know and understand what they included and did not include in the notes and why. Even a doctor who only treated the claimant once or twice will have a better understanding than other doctors of their own hospital's or clinic's practices related to medical records.

Another problem with elevating supportability and consistency with the medical record above the claimant's relationship with the medical source is that the SSA has shown itself not to be institutionally competent at the task of evaluating supportability and consistency with the medical record. In 81 FR 62559 (Sept. 9, 2016), the SSA states, "These two factors are also the factors we evaluate when assigning controlling weight under our current rules. If a medical opinion or prior administrative medical finding is both well-supported and consistent with the other evidence in the case record, we typically find that it is persuasive." This is generally not true. If it were true, there would be far fewer cases remanded to the SSA from the federal courts because they failed to give controlling weight to a treating physician's opinion that is both well-supported and consistent with the other evidence in the case record.

<u>Proposed 20 CFR §§ 404.1520b(c)(3), 416.920b(c)(3) – How we consider evidence; Evidence that is neither valuable nor persuasive; Statements on issues reserved to the Commissioner</u>

This proposed regulation section says that statements regarding whether or not a person is disabled, whether the impairment meets the duration requirement or meets or equals a listing, claimants' residual functional capacity, and whether claimants' disability continues or ends is reserved to the Commissioner. These statements are medical, therefore, they are reserved for the ALJ, not the Commissioner.

<u>Proposed 20 CFR §§ 404.1520c(b)(2), 416.920c(b)(2) – How we consider and articulate medical opinions and prior administrative medical findings, Articulation procedure, Most important factors</u>

As noted above in comments related to proposed 20 CFR §§ 404.1502(a) & (d) and 416.902(a) & (i), "Definitions for this subpart, Acceptable medical source & Medical source," it is especially important for LCSWs, MFTs and PAs to be included as

acceptable medical sources because only opinions from acceptable medical sources are given significant weight in proposed 20 CFR §§ 404.1520c(b) and 416.920c(b). Their opinions should not be disregarded as unacceptable medical sources, which is the current situation in actual practice.

Proposed 20 CFR §§ 404.1520c(b)(3), 416.920c(b)(3) – How we consider and articulate medical opinions and prior administrative medical findings, Articulation Procedure, Equally persuasive medical opinions or prior administrative medical findings about the same issue from acceptable medical sources

We agree with the proposed regulations that state that when two or more acceptable medical sources or prior administrative findings about the same issue are equally well-supported and consistent with the record, but not exactly the same, then the SSA will articulate how it considered other most persuasive factors.

Proposed 20 CFR §§ 404.1520c(c), 416.920c(c) – How we consider and articulate medical opinions and prior administrative medical findings, Factors for consideration

We agree with the SSA where the proposed regulations state that a medical source who examines a claimant as a patient may have a better understanding than one who solely reviews the claimant's file.[9] We also agree with the SSA that the length of a treating relationship, frequency, and extent may help demonstrate a medical source's longitudinal understanding of claimant's impairments.[10] Section 404.1520c(c)(3) (and 416.920c(c)(3)) is the "treating source rule." The reasons the SSA gives here are in fact the reasons the US Courts of Appeal give for using the "treating source rule." Query: Why does the SSA only want to use the "treating source rule" here, but otherwise delete it?

While we agree with most factors for consideration in 20 CFR §§ 404.1520c(c) and 416.920c(c), we believe that the requirements for specialization should be amended to ensure that highly specialized doctors can be relied on without regard to other areas in the chart. (Reference proposed 20 CFR §§ 404.1520c(c)(4)-(5), 416.920c(c)(4)-(5).)

The proposed regulations would give more weight to evidence from a medical opinion or prior administrative finding from a source that understands SSA policy, programs, and evidentiary requirements.[11] This rule will create an institutional bias against evidence from treating sources, who know the patient best, in favor of findings from chart readers who have never seen the patient. In addition, this rule appears to contradict the SSA's stated intention to disregard evidence that is neither valuable nor persuasive.

[9] *See* proposed 20 CFR §§ 404.1520c(c)(3)(i), 416.920c(c)(3)(i).
[10] *See* proposed 20 CFR §§ 404.1520c(c)(3)(ii)-(iii),(v); 416.920c(c)(3)(ii)-(iii),(v).
[11] *See* proposed 20 CFR §§ 404.1520c(c)(6), 416.920c(c)(6).

Proposed 20 CFR §§ 404.1520c(c)(6) [and 416.920c(c)(6)] by itself will allow the SSA to use administrative findings to override opinions from claimants' own treating medical sources, and as such is very dangerous and in direct contradiction of the letter and intent of the "treating source rule," not to mention common sense. It also is contradictory to the intent of the disability adjudication process, which should give highest weight to ascertaining the truth of disability, not to whether the medical source understands Social Security programs.

Proposed 20 CFR §§ 404.1522, 416.922 – What we mean by an impairment(s) that is not severe [in an adult]

Controlling law on the statutory interpretation of "severe" is that it should have the "minimalist effect" on the activities of daily living.

Proposed 20 CFR §§ 404.1523, 416.923 – Multiple impairments

There appears to be unnecessary confusion in subsections (a), (b), and (c). If an individual, based on any combination of impairments, cannot engage in substantial gainful activity (SGA), s/he is "disabled," so long as the Act's duration requirement is met. Splitting up the impairments defeats the purpose of the Act, which states that all impairments, whether physical or mental, must be considered in combination.

Proposed 20 CFR §§ 404.1527, 416.927 – Evaluating opinion evidence

The phrase "typical of your condition" must include the population of indigent individuals who cannot afford psychotherapy as frequently as those who can afford to pay for more frequent sessions.

Proposed 20 CFR §§ 404.1529, 416.929 – How we evaluate symptoms, including pain

We agree with this proposed regulation, so long as the Acceptable Medical Source question is clarified (see comment on proposed 20 CFR §§ 404.1502(a) & (d) and 416.902(a) & (i), "Definitions for this subpart, Acceptable medical source & Medical source," *supra* p. 2). The current law, that subjective complaints of pain must be consistent with the clinical record, would be an easier, more straightforward restatement, rather than including multiple factors, because the latter can potentially be subject to abuse.

Proposed 20 CFR §§ 404.1616(b), 416.1016(b) – Medical consultants and psychological consultants, What is a psychological consultant?

The proposed regulation states that when the SSA is unable to obtain the services of a qualified psychiatrist or psychologist to complete the case review for a claimant who has a mental impairment, despite making reasonable efforts, the SSA will use a "medical consultant" who is not a psychiatrist or psychologist to evaluate the mental impairment.

This begs the question: When can the SSA not obtain a qualified psychiatrist or psychologist? This rule appears to disadvantage claimants who have mental impairments over those who have physical impairments.

The SSA must look to a treating source, and an MFT or LCSW, which currently are not acceptable medical sources. To look to a doctor who does not know the patient or who has never examined the patient should always be the last option. In addition, unlike with physical impairments, patients are probably less likely to freely discuss their mental impairments with a medical source who is a stranger than with their treating source. For example, a new consultant can look at an MRI, and a patient does not need to see the same orthopedist to get additional information. But this circumstance is not the same for mental impairments, which is more dependent on relationships with the patients' treating sources. The treating sources' knowledge of their patients matters much more in the context of mental impairments. Thus, the state agency doctors (i.e., non-treating and non-examining) should not be used for this purpose.

Thank you for considering our comments and recommendations.

Sincerely,

/s/
Steven Bruce, Esq.
Legal Director
People With Disabilities Foundation