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Michael J. Astrue
Commissioner of Social Security
Social Security Administration
P.O. Box 17703
Baltimore, MD 21235-7703

Re: Docket # SSA-2007-0044, "Proposed Rule on Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels," 72 Fed. Reg. 61218 (Oct. 29, 2007) ("NPRM")

Dear Commissioner Astrue:

For 35 years since its founding in 1972 the National Senior Citizens Law Center (NSCLC) has focused on issues affecting the well-being of low-income elders and people with disabilities. Since the Social Security and/or Supplemental Security Income (SSI) programs are the primary income source for a majority of America's elders and people with disabilities, NSCLC has always had a strong interest in the success of these programs. This includes the disability determination process in which NSCLC played a significant role in responding to major changes that were proposed in the 1980s.

Increased Importance of Disability Programs for Baby Boomers - We are particularly concerned about the growing number of individuals of advanced age who are not able to continue working until full retirement age as a result of their impairments combined with a limited education and a lack of transferrable skills. Just as the leading edge of the baby boomer generation has reached the age of eligibility for early retirement, the age of full retirement has increased (to age 66 in the year 2008 and to age 67 thereafter). This, of course, makes it more difficult for individuals who meet this profile to continue working until full retirement age. At the same time, early retirement becomes a less realistic option as the lifetime

decrease in benefits has gone from 15% a few years ago to 20% in 2008, and is scheduled to rise to 25% as the age of full retirement continues to increase. For this group, Social Security Disability Insurance (SSDI) may be the only way to avoid the prospect of spending their old age in poverty. Thus, a fundamentally fair process for determining eligibility for disability benefits is more important than ever. The administrative appeals process is especially important in this regard since most appeals at the Administrative Law Judge (ALJ) stage and beyond concern issues of disability.

Historically, the Social Security Administration (SSA) has had a fundamentally fair appeals process, one that Congress and SSA designed in a consumer friendly fashion with the unrepresented claimant in mind. The new regulations proposed in this NPRM would change that process in ways that would make it significantly less fair and would have their greatest prejudicial impact on those claimants who are most in need of benefits, *i.e.*, those who have limited education, have not had regular ongoing access to health care and those who have been low-income wage earners for most of their lives. The $2 billion dollars in projected savings would come, not by denying benefits to those who are ineligible, but rather from denying benefits to those who meet the statutory and regulatory standards for disability but have been unable to navigate the complex maze of time limits and other procedural requirements created by these proposed rules. We urge you to reconsider these rules and to withdraw them.

Analogy to Federal Courts - The Summary published in the NPRM states that the intention to change "the final level of the administrative review process to make proceedings at that level more like those used by a Federal appellate court when it reviews the decision of a district court." 72 Fed. Reg. at 61219. This analogy demonstrates a fundamental flaw, not just in the proposed rules that would govern the new Review Board, but in the entire process. The Federal appellate courts exist in an adversary system governed by formal rules of evidence where there is ample opportunity for discovery in the district court and where it is expected that each of the parties will ordinarily be represented by an attorney from the date the complaint is filed. Thus the parties are mindful of the procedures and standards for appellate review at the time litigation is commenced and will be able to preserve issues for appeal.

This stands in stark contrast to the typical Social Security claim in which the claimant is almost invariably unrepresented when the claim is filed and is usually

unrepresented at the first level of appeal as well. Although most claimants with disability claims are represented at the ALJ hearing, a substantial number are not and of those who are represented it is not uncommon for them to hire an attorney or other representative just before the hearing or after it has been adjourned for that purpose. For the most part, they are unaware of what is required to establish eligibility under the Social Security Regulations and for that reason have not gathered the evidence necessary to establish their claim.

Congress intended an informal process that is fully accessible to claimants unrepresented by an attorney. This is apparent in the requirement that the Commissioner's decisions involving a determination of disability be written in "understandable language," 42 U.S.C. § 405(b)(1), as well as the provision for admission of evidence "even though inadmissible under rules of evidence applicable to court procedure." *Id.* This is also reflected in current SSA regulations, 20 C.F.R. §§ 901(b) & 1401(b). The Supreme Court, in a decision pertinent to the current proposal, had occasion to consider the nature of Social Security ALJ hearings in *Richardson v. Perales*, 402 U.S. 389 (1971). The Court concluded "it is apparent that ... strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent." 402 U.S. at 400. Justice Blackmun, writing for the court, went on to note, "There emerges an emphasis on the informal rather than the formal. This, we think, is as it should be, for this administrative procedure, and these hearings, should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair." 402 U.S. at 400-01.

Congress also recognized the fundamental difference between litigation in the federal courts and proceedings before the Social Security Administration when it explicitly authorized the representation of claimants by non-attorneys at all stages of SSA's administrative process. 42 U.S.C. § 406 (a)(1). This was most recently reaffirmed in the Social Security Protection Act of 2004, in which Congress established a nationwide demonstration project for payment of fees to non-attorney representatives for representation at all stages of SSA's administrative process through and including the final level of the administrative review process. Pub. L. 108-203 § 303. Such a provision cannot be reconciled with the proposal to make proceedings before the Review Board more like those of Federal appellate courts. 72 Fed. Reg. at 61219.

ALJ HEARINGS

Time Limits for Submission of Evidence - The proposed time limits on submission of evidence may appear reasonable on the surface to some who are unfamiliar with the disability determination process and are unaware of the difficulties routinely encountered in gathering evidence. However, these time limits are contrary to the statute and in the real world in which Social Security claimants live they are unrealistic. They will result in countless claimants not receiving benefits to which they are entitled.

The proposed rules (§§ 404.935(b) & (c) & 416.1435 (b) & (c)) require that all evidence be submitted at least 5 business days prior to the hearing unless 1) SSA misled the individual, 2) the individual had a physical, mental, educational or linguistic limitation that prevented earlier submission, or 3) some other unusual, unexpected or unavoidable circumstance beyond the individual's control prevented earlier submission. In order to submit evidence after the hearing but before the hearing decision the claimant must meet the additional burden of demonstrating a reasonable possibility that the evidence would affect the outcome. §§ 404.935(c)(2) & 416.1435(c)(2).

These time limits simply ignore the daily reality faced by claimants and their representatives. In all probability, the claimant was unrepresented at the initial determination and reconsideration stages and has no idea of what evidence is required to support the claim. In addition, the claimant may be going through a very difficult period adjusting to the recent onset of disability and the myriad of changes in a person's life that may entail. Also, in disability claims, a key reason for denial of the claim is often the failure of the state agency responsible for disability determinations (DDS) to obtain necessary medical records in the first place whether because of a lack of cooperation from the provider or the time pressures within the DDS itself. On top of this, the claimant may have no health insurance, have not had ongoing access to medical care and thus additional medical examinations must be arranged before the necessary evidence can be obtained. In addition, individuals without health insurance often rely on public health care systems whose overburdened bureaucracies can be notoriously slow in responding to repeated requests for medical records. These are just some of the reasons why a claimant who is clearly entitled to benefits may not be able to comply with these time limits, even though represented by a highly skilled and experienced attorney. For additional reasons commonly encountered by attorneys for claimants, we refer

you to the useful examples provided in the comments which have been filed by the National Organization of Social Security Claimants Representatives (NOSSCR). For the claimant without representation it will be nearly impossible.

It should also be noted that the harm caused by these time limits will fall disproportionately on those who are less well off and who are most in need of benefits, *i.e.*, claimants with limited education and are thus less likely to understand the appeal process and those who have not had regular ongoing access to health care and will need time to develop the evidence to support their claim. Not only will they be denied the important Social Security and SSI benefits, but they may also be denied associated Medicare and Medicaid benefits. This is also a group that is much less likely to have alternative means of financial support.

The proposed time limits on submission of evidence are not only unwise on policy grounds, but are also contrary to the statutory requirement of a hearing decision "on the basis of evidence adduced at the hearing," 42 U.S.C. § 405(b)(1), and inconsistent with the nationwide case law imposing an obligation on the ALJ to "fully and fairly develop the record." Even if SSA is of the view that these time limits would be compatible with the Social Security Act, the agency needs to think carefully about the wisdom of enacting these time limits, not only for the policy reasons mentioned above, but also because of the onslaught of litigation that is sure to follow. Such litigation has the potential for leaving the SSA appeals process in a period of uncertainty and chaos while the litigation proceeds. It could also undermine the agency's efforts to reduce the current backlog in ALJ appeals if the agency is obliged to rehear thousands of appeals.

While the rules do provide limited exceptions to the five day rule for submission of evidence, those exceptions are not adequate to meet the requirements of the Social Security Act, not only because the exceptions are limited to the three specified circumstances, but also because the burden is shifted to the claimant to establish that the evidence can be submitted under one of those three exceptions. Also, in light of the imprecise and discretionary nature of these exceptions, their interpretation will vary widely from one ALJ to another.

Finally, it should be noted that this is another extremely difficult technical hurdle for the unrepresented claimant. While the best course would be to eliminate these provisions altogether, at the very least, there should be broader exceptions and some special accommodation for the unrepresented claimant.

Other Time Limits - The one positive change in time limits is the proposed requirement (§§ 404.936(a), 404.938(a), 416.1436(a) § 416.1438(a)) that the ALJ notify the individual of the date and place of the hearing at least 75 days in advance of the hearing unless shorter notice is agreed to.

Other proposed time limits for the ALJ stage serve no useful purpose and only make the process less consumer friendly and establish potential pitfalls for unrepresented claimants. None of them have provision for good cause or hardship exceptions. These include:

- a new requirement that the claimant acknowledge receipt of the hearing notice within 5 days of receiving it (404.938(c) & 416.1438(c));
- a requirement that any objection to the time or place of the hearing be made within 30 days of receipt of the hearing notice instead of the current more flexible rule to make the objection "at the earliest possible opportunity." 404.939(a)(1) & 416.1439(a)(1).
- a requirement that objections to the issues in the hearing notice be made at least 5 business days in advance of the hearing instead of the current requirement that objection be made "at the earliest possible opportunity." 404.939(b) & 416.1439(b).
- a requirement that a request for a subpoena be made at least 20 days in advance of the hearing instead of the current rule allowing a request for a subpoena to be made within 5 days of a hearing. 404.935(d) & 416.1435(d). This provision, when considered in conjunction with the requirement for submission of evidence at least 5 business days before the hearing is likely to result in ALJs being deluged with numerous subpoena requests from attorneys who are concerned that necessary evidence might not otherwise be received on time.

Taken together, these time limits establish a series of nearly insurmountable technical hurdles for the unrepresented claimant. While it is perfectly understandable that SSA might prefer to deal with claimants who are represented by an attorney, Congress clearly intended that the choice was for the claimant to make. It is essential that any changes to the regulations not unduly prejudice the claimant for choosing not to be represented.

Hearing Request - The current rule simply requires that the hearing request state "the reasons" for disagreeing with the previous determination. 20 CFR §§ 404.933(a)(2) & 416.1433(a)(2). The proposed rules require "the specific reasons" for disagreeing. §§ 404.933(a)(3) & 416.1433(a)(3). No explanation is provided

for the change. It is difficult to see what this change is meant to accomplish except to make the process sound more formal and intimidating. Most claimants are able to state the reasons for disagreeing with the previous determination but are not able to articulate those reasons with great specificity. They should not be penalized for their inability to do so. SSA needs to eliminate this requirement. At the very least, SSA needs to explain what it intended to accomplish with this proposed change.

In a similar vein, the new rules would require, in cases where disability is an issue, that the claimant provide "a statement of the medically determinable impairment(s) that you believe prevents you from working." §§ 404.933(a)(4) & 416.1433(a)(4). It is difficult to see how this requirement can serve a useful purpose. It is not uncommon for claimants with mental impairments to be extremely uncomfortable in stating that they are seeking benefits because of their mental impairments. In other cases an individual may have applied for benefits as the result of a new impairment that was the final straw that prevented them from working. However, the individual may be disabled on the basis of a combination of that new impairment with a couple of other long standing impairments which the individual will not think of putting down as the basis of disability.

A major concern is that the requirement to state the "medically determinable impairment" could serve as a basis for limiting the issues to be considered at the hearing or as a factor in determining the claimant's credibility. Either use of the statement would be illegitimate. It would also raise questions of compliance with the requirement that the hearing decision be based on "evidence adduced at the hearing." In short there is no discernible benefit from this provision and much potential for mischief. It should be deleted.

Prehearing Statements - The proposed rules contain an explicit provision for prehearing statements either at the request of the claimant or at the request of the ALJ. §§ 404.961(b) & 416.1461(b). This rule needs to be revised to make it clear that an ALJ cannot require a prehearing statement from an unrepresented claimant.

Prehearing and Posthearing Conferences - The proposed rules continue to have provision for prehearing and posthearing conferences, which will normally be held by telephone. §§ 404.961 & 416.1461. While prehearing and posthearing conferences can be useful, there are two changes in the new rules which, especially when taken together, create cause for concern. The new rules would eliminate the 7 day advance notice requirement of the current rules and replace it with

"reasonable notice." At the same time a provision is added for dismissal of the hearing request if the claimant fails to appear at the conference without good reason.

The 7 day advance notice requirement should be restored in all cases unless a shorter time is agreed to. Also, the penalty of dismissal for failure to appear should be eliminated. It is especially inappropriate for unrepresented claimants who may not have reliable telephone service or may not have long distance service and may lack a fixed address.

Telephone Hearings - The proposed rules authorize telephone hearings in "certain extraordinary circumstances" when "appearance in person is not possible" and "video teleconference is not available." §§ 404.936(c) & 416.1436(c)

There may be situations where a telephone hearing may be necessary as in the example provided in the proposed regulation of an individual who is incarcerated in a facility that will not allow a hearing to be held at the facility and video teleconference is not available. However, it must be made clear that this is an absolute last resort as a telephone hearing is clearly inferior from the standpoint of the claimant and also potentially from the standpoint of program integrity.

In particular, it must be made clear that the language "appearance in person is not possible" is not meant to apply to a person who is unable to leave home or is unable to travel to a video teleconference or other hearing location and that such a person would continue to be entitled to a home hearing. In addition, there needs to be provision for objecting to a telephone hearing. For example, the incarcerated individual referred to above should be able to object if release is imminent or incarceration is of relatively short duration. The absence of a mechanism for objecting to a telephone hearing would raise a serious due process concern.

NEW AND MATERIAL EVIDENCE AS GOOD CAUSE FOR REOPENING A PRIOR CLAIM

Current regulations permit the reopening of prior claims on the basis of "new and material evidence" within 2 years of the initial determination for SSI claims (20 CFR §§ 416.88(b) & 416.1489(a)(1)) and 4 years for Title II claims. 20 CFR §§ 404.988(b) & 404.989(a)(1). This liberal reopening rule is an important safeguard for claimants who, because of a lack of access to regular ongoing

medical care or a lack of representation at the first hearing, are unable to establish the severity or duration of their impairments by the time the prior claim is adjudicated as well as for claimants with difficult to diagnose diseases. However, under the proposed rules "new and material evidence" would no longer be a ground for reopening a prior disability claim if the prior determination was made by an ALJ or the Review Board. Under the proposed rule, even if the claimant subsequently furnished dispositive evidence of disability dating back to the time of the prior claim, no benefits could be paid for the period covered by the earlier claim. It would also mean the loss of associated Medicare and/or Medicaid benefits at a time when health care needs are likely to be high and financial resources scarce.

For some, it would mean no benefits whatsoever if the individual no longer meets the disability insured status requirement for SSDI at the time of the second application. Thus justice denied initially would become justice denied forever. The elimination of this remedial provision can serve no legitimate purpose. Its only purpose would appear to be to reduce the amount of benefits paid to eligible individuals. It is critical that the existing right to reopen a prior claim based on "new and material evidence" be preserved if the SSA appeals process is to retain its fundamental fairness

REVIEW BOARD

We strongly support the Commissioner's determination to retain a claimant's right to an administrative appeal of an ALJ decision. This is important in order to protect the rights of claimants who are most often unable to pursue an appeal in district court. It is also important for the purpose of shielding the courts from an unnecessary increase in the volume of district court appeals. It is also important to retain the claimant's right to administrative appeal so that SSA does not have to divert precious resources to responding in federal court in cases which the agency has no interest in contesting. However, while we are in agreement with the determination to retain the claimant's right to an administrative appeal of an ALJ decision, we believe this function is better served by the existing regulations governing the Appeals Council than by the proposed rules governing the Review Board.

Submission of Evidence - Current regulations require the Appeals Council to consider <u>any</u> new and material evidence relating to the period before the ALJ

decision. 20 CFR §§ 404.970(b), 404.976(b), 416.1470(b) & 416.1476(b). The proposed rules are far more restrictive and require the claimant to meet all the requirements for late submission of evidence at the ALJ hearing and demonstrate a reasonable probability that the evidence would change the outcome. §§ 404.973(b) & 416.1473(b). In addition, the claimant is required to submit a statement explaining why she meets the criteria for submission of evidence. §§ 404.973(b)(4) & 416.1473(b)(4). This is another provision which is likely to result in claimants with clear evidence of disability being unable to receive benefits.

This provision also appears to be contrary to the Social Security Act which authorizes a district court judge upon appeal from a final decision of the Commissioner to order the taking of additional new and material evidence upon a showing of good cause for failure to incorporate such evidence in the record in a prior proceeding. 42 U.S.C. § 405(g). This provision has been interpreted liberally to apply a standard which is far less stringent than the standard the Commissioner proposes for the Review Board. *See, e.g., Jones v. Sullivan,* 949 F.2d 57, 60 (2nd Cir. 1991) (reasonable possibility that new evidence would have influenced Secretary to decide differently); *Johnson v. Schweiker,* 656 F.2d 424, 426 (9th Cir. 1981) (evidence that would be probative); *Cagle v. Califano,* 638 F.2d 219, 221 (10th Cir. 1981) (decision might reasonably have been different).

Surely Congress could not have intended that a stricter standard would apply for admission of evidence at the agency than the standard it mandated for use upon appeal to district court. Under the Commissioner's proposal, the Review Board would routinely refuse to accept evidence on the ground that the claimant had not established a reasonable probability that it would change the result and, on appeal, the district courts would regularly apply a more liberal standard and order the Commissioner to take the evidence on the basis that, under sentence six of 42 U.S.C. § 405(g), there is a reasonable possibility it might affect the outcome. Even if the Commissioner's proposed rule were found to be lawful, the result would be harmful to the interests of claimants, the courts and the agency. It would be harmful to claimants who would be obliged to appeal to federal court to have evidence admitted and to the even larger number of claimants whose claims would be denied because they would be unable to afford to appeal to the district court. It would be harmful to the courts which would have to deal with the increased volume of appeals and it would be contrary to the interests of the agency itself because of the additional workload created by the federal court remands.

Additional Evidence Obtained by Appeal Board - The proposed rules authorize the Review Board to obtain additional evidence it decides it needs "unless to do so would adversely affect your rights." §§ 404.974(d) & 416.1474(d). The problem with this provision is that it does not contain any criteria for when it would be appropriate for the Review Board to obtain new evidence and has no provision for sending the evidence to the claimant and has no provision allowing the claimant to rebut the new evidence. The absence of these elements creates serious due process concerns.

Notice of Appeal - The Commissioner's proposal introduces for the first time new technical requirements for what must be included in a Notice of Appeal. §§ 404.969 & 416.1469. It requires a written statement identifying any errors the ALJ may have made and an explanation of why those errors require reversal or modification of the ALJ decision or dismissal "under the standards of review described in § 404.971. It must also cite applicable law and specific facts in the administrative record. These requirements should prevent almost all unrepresented claimants from proceeding any further. The current Appeals Council regulation which prescribes no specific content in an appeal notice should be retained.

Imposition of Costs on Claimants - The new regulations require the claimant to pay for copies of the evidence including a copy of the recording of the hearing "unless there is a good reason why you should not pay." §§ 404.974(a) & 416.1474(a). There are no criteria for determining what constitutes a "good reason."In any event requesting payment for copies of evidence is entirely inappropriate and potentially intimidating for a population that has already lost its income from employment and is likely to be under considerable economic stress. It may also be in violation of the Privacy Act.

Review Board Brief or Written Statement - The proposed rules require that any brief or written statement be filed no later than 10 days after filing the notice of appeal with no provision for an extension. §§ 404.974(b) & 416.1474(b). The current Appeals Council rules allow a "reasonable opportunity" to file. The new 10 day time period is unrealistic, especially for unrepresented claimants and for representatives who did not represent the claimant at the hearing. A longer time period should be provided and there should be provision for a good cause extension, *e.g.*, to allow the representative to obtain and review the hearing record and evidence.

"Harmless Error" Rule - The Commissioner's proposal establishes what is misleadingly referred to as a "harmless error" rule for Review Board review of ALJ decisions. §§ 404.971(c) & 416.1471(c). Under this rule, no error would require the Review Board to vacate, modify, or reverse an otherwise appropriate ruling or decision "unless, in the opinion of the Review Board, there is a reasonable probability that the error ... changed the outcome of the decision." (emphasis added). Thus, under this proposed rule, even if there is a reasonable possibility that the error changed the outcome of the decision, the decision can stand. The Review Board would, on the basis of "harmless error," thus be authorized to affirm a decision denying a claim in a case where a federal court, on the basis of the same error, would conclude that the error was not harmless because there was a reasonable possibility that the error changed the outcome. While this rule, which might be better described as the "harmful error" rule, will reduce allowances since most claimants will not be able to appeal to federal court, it will also have a tendency to increase the number of federal court appeals and remands. It is highly unusual and defies common sense to have a more restrictive standard of review at the administrative level than will apply in an ultimate appeal to federal court. This provision should be withdrawn.

Significant Errors of Law - Several provisions hinge on the existence or non-existence of "significant errors of law." §§ 404.975(a) & 416.1475(a). Yet there is no definition or explanation of what is meant by that term. Does it mean that the legal issue must be a significant one or does it mean that its impact must be significant for the individual? There is a need for clarification on this issue.

Review Board Initiated Review - The proposal provides for selecting some cases for review on the basis of random and selective sampling but that cases will not be selected on the basis of the identity of the decisionmaker. §§ 404.970(b)(1) & 416.1470(b)(1). In this respect it is consistent with the current rules regarding cases where the Appeals Council initiates review. 20 CFR §§ 404.969(b)(1) & 416.1469(b)(1). However, the provision of the current rules providing that cases will not be selected on the basis of the office issuing the decision is conspicuously absent from the proposed new rules. This important provision needs to be retained if the integrity of the review process and the independence of ALJs is to be maintained. Selection of cases on the basis of the office issuing the decision is likely to introduce bias into the whole appeal process, with the potential, for example, for cases to be selected on the basis of the allowance rate of the office issuing the decision. At the very least, selection of cases on the basis of the office

issuing the decision will erode public confidence in the legitimacy of the appeal process.

TIME-LIMITED SCOPE OF REMAND

The proposed rules contain a provision which, in a radical departure from current regulations, would limit the time period covered by any Review Board or federal court remand only to the period up to the date of the first hearing decision in the case. §§ 404.972 & 416.1472. This means that, in the case of a claimant who complained about shortness of breath at the first hearing, the ALJ is precluded from taking into account the fact that the claimant is now on oxygen at the time of the hearing on remand. Under the current regulations, the ALJ in a hearing on remand receives new evidence and considers any changes in the claimant's condition. On the basis of the earlier evidence and any new evidence, the ALJ will then determine whether the claimant is disabled and, if so, will determine the date of onset. This process has been both efficient and fair.

Under the proposed process, the claimant will be advised to file a new application immediately upon receipt of an ALJ decision upholding a denial of benefits, even though that denial is being appealed to the Review Board or to federal court. Thus it will be routine for claimants to be pursuing two appeals simultaneously. This will obviously result in considerable inconvenience for the claimant as well as inefficiency for SSA which now must simultaneously process two separate claims for the same individual. It also means decisions based on only a portion of the evidence.

The most disgraceful result of this bifurcation of appeals is that claimants with solid documentation of disability can be denied SSDI and SSI benefits on the first claim, along with associated Medicare and Medicaid benefits because of an arbitrary ban on probative evidence from after the first hearing decision. In some cases the prejudice to claimants will be even more severe. If they no longer meet the recency of work requirement for disability insured status, then they will be permanently deprived of SSDI and related Medicare benefits. This is the very antithesis of the informal, consumer friendly appeal process with which SSA has been associated.

In the case of remands from federal court, there is a serious question of whether the proposed regulation is consistent with the power granted to the federal

courts under 42 U.S.C. § 405(g).

Some organizations have read the limitation on the period covered by the remand to mean that a claimant who ultimately prevails on the first claim would only be entitled to a closed period of benefits and would be required to pursue appeals on subsequent claims in order to be assured of continued benefits. We do not believe this is the proper reading of the proposed regulations, but it certainly is a plausible one. The proposed rule needs to be reworded to make crystal clear that no such result is intended.

If the intent was to create a closed period of benefits, it would be contrary to the statute insofar as it would provide for a termination of disability benefits without a showing of medical improvement. If the proposal is construed as providing for only a closed period on the first claim, we would oppose it for all the reasons stated in the comments submitted by the National Organization of Social Security Claimants Representatives (NOSSCR).

It is clear that the only rationale for the limitation on the scope of remand is to reduce the amount of benefits paid. This provision is hostile to the spirit of the Social Security Act and needs to be withdrawn.

NON-DISABILITY APPEALS

These comments have focused overwhelmingly on disability claims for the simple reason that appeals at the ALJ and Appeals Council levels overwhelmingly involve disability claims. However, we are strongly opposed to the implementation of this NPRM for non-disability claims as well. In fact, the harm in non-disability claims, including post-eligibility claims, may be even greater since claimants with non-disability claims are far less likely to be represented at a hearing since attorneys fees are less likely to be available.

CONCLUSION

Taken as a whole, these proposed rules are contrary to the spirit of the Social Security Act and its emphasis on informality and fundamental fairness. Several of the proposals are contrary to specific statutory provisions. If implemented, they would create unnecessary hardship and deprivation for thousands of claimants with documented disabilities, the very individuals the statute was designed to protect.

The fact that these regulations are estimated to result in $2 billion dollars less in benefits to eligible individuals is a shocking indictment. The proposed regulations need to be withdrawn.

Very truly yours,

Gerald A. McIntyre
Directing Attorney