# Congress of the United States
## House of Representatives
### Washington, DC 20515

December 20, 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.

We have a strong interest in ensuring that any changes to the hearing and appeals process treat claimants fairly, that all evidence relating to their claims is considered, and that mere administrative efficiency is not given precedence over a full and fair consideration of the claim, in light of the realities of claimants' experiences and abilities.

The proposed regulation would create a substantial and unwarranted reduction of appeal rights for those applying for Social Security and Supplemental Security Income (SSI) benefits, and the Medicare and Medicaid benefits that accompany these programs. The harmful effects of the proposal are made clear by the more than $2.0 billion reduction in benefits paid to people with disabilities, as estimated by the Social Security Actuary, that would result from abandoning the procedures that have been in effect for decades. (Letter from the Chief Actuary, Social Security Administration, December 17, 2007, attached.)

There are several positive elements to the proposal, including the retention of the *de novo* review by an Administrative Law Judge (ALJ), the 75-day notice of the hearing, and the restoration – in the region where the Disability Service Improvement (DSI) regulation is in effect – of the right of a claimant to appeal to an administrative body beyond the ALJ.

However, the remaining elements of the proposed regulation present very serious concerns with regard to the Social Security Administration's (SSA) duty to fairly and effectively adjudicate disability and other claims for benefits. The regulation appears to conflict in a number of ways with long-established statutory requirements and case law regarding the appeals process.

It would have the effect of changing the current hearing process from a non-adversarial process that is deliberately designed to be informal and accessible to the lay person, to a much more formal, legalistic proceeding that could result in meritorious claims being denied on technicalities. Finally, it does not comport with the realities of claimants' experiences and abilities, the nature of disabling impairments, the challenges inherent in obtaining medical evidence, and the representation process as it exists in the real world.

It bears noting that while SSA has stated that this regulation is part of the agency's overall plan to address the substantial and growing backlog of unprocessed requests for hearings, the backlog is the result of chronic underfunding of the administrative expenses of the agency, not a faulty appeals process. It would be very unfair to add to the problems arising from inadequate administrative funding by also sharply limiting claimants' appeals rights, thus further reducing access to benefits for which they may be qualified.

Therefore, with the exception of the positive elements noted above, we strongly urge the withdrawal of this proposed regulation, for the following specific reasons:

- **The proposed rules appear to violate the Social Security Act.**

  Under the Social Security Act, claimants have a right to receive a decision on their claims based on "*evidence adduced at the hearing*" (Section 205(b)(1) of the Act, emphasis added). The proposed rule appears to violate this provision. The rule would restrict claimants from submitting evidence after a period beginning five days before their hearings. Although the rule provides for some "good cause" exceptions to the ban on "late" submission of evidence, which could be exercised at the discretion of the ALJ, these various and complicated exceptions do not cure the fundamental defect of barring the submission of evidence.

  The restrictions would also create a conflict with section 205(g) of the Act, under which federal courts remand cases back to SSA for consideration of additional evidence under certain circumstances. The Act specifically directs the Commissioner under such circumstances to accept and hear such evidence. The regulation, however, would appear to bar consideration of such evidence.

- **The proposed rules fundamentally alter the character of the appeals process, which Congress intended to be informal, non-legalistic, and non-adversarial.**

  In establishing the Social Security programs, Congress intended for SSA to administer its benefits through informal, non-legalistic and truth-seeking administrative proceedings in which the emphasis is on determining whether claimants meet the eligibility requirements for benefits. The Supreme Court underscored this intention in its landmark decision,

*Richardson v. Perales*, in which the Court found that SSA's regulatory procedures "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. 389, 400 (1971). In addition, Congress has explicitly directed SSA to consider evidence that would otherwise be "inadmissible under the rules of evidence applicable to court procedure" (Section 205(b)(1) of the Act).

The proposed rules would change this intentionally informal administrative process into a complex and highly-structured legalistic proceeding, which could easily trip up claimants (particularly unrepresented claimants) and result in denials based not on the merits of the case, but on technicalities. It imposes many new time limits on submission and consideration of evidence, as well as numerous other new and complex procedural requirements with which claimants would be required to comply in order to have all aspects of the claim be fully considered during the appeals process. Taken together, these are fundamentally contrary to Congressional intent and supporting Supreme Court jurisprudence.

Further, under the current, non-adversarial process, the Supreme Court has recognized, and all circuit courts of appeal have well-developed case law establishing, the duty of ALJs to develop a full and fair record so that claimants' cases are equitably adjudicated. *See Heckler v. Campbell*, 461 U.S. 458, 471 (1983). This duty is especially important if claimants are not represented. However, placing limitations on the submission of evidence, as the proposed rules would do, would interfere with the ALJ's obligation to fully develop the record based on all relevant evidence. This threatens the non-adversarial nature of these proceedings.

- **The proposed changes disregard the realities of claimants' abilities to navigate the administrative process, to obtain representation, and to obtain medical evidence.**

By transforming the administrative appeals process into a much more formal, legalistic proceeding, the proposed changes disregard the real-world challenges claimants will face under these new rules, and which all SSA administrative procedures should acknowledge and reflect in order to fairly administer benefits.

Many claimants come to SSA during times of disability and other financial hardship. They are typically sick, have suffered a loss of income, and may be without the ability or resources to navigate a highly-formalized administrative process. Many are in dire financial straits.

Moreover, many claimants are not represented throughout the SSA claims process. Some claimants do not know how to access a representative or fail to perceive the importance of

obtaining representation during the appeals process. Others do not retain representation until after a hearing is scheduled, or even after the first time they meet with the judge.

Additionally, we are concerned that the proposed rules do not reflect claimants' abilities to obtain medical evidence timely, if at all. Medical evidence is difficult to obtain, and claimants cannot control when medical providers submit evidence to SSA or the relevance of these submissions. SSA itself has difficulty in obtaining medical evidence when requested, and attorneys go to great lengths to obtain medical evidence. The proposed rule's many new limits on claimants' ability to submit evidence during the appeals process disregards these realties. It would be a cruel irony if rules were adopted to prohibit late submission of evidence during an appeals process made necessary by SSA's inability to obtain complete evidence at the time of the initial decision on a claim.

- **The proposed changes disregard the nature of many disabling impairments.**

One of the proposed changes would limit all subsequent appeals after an initial ALJ decision, including remands back to the agency from Federal courts, to considering only the claimant's eligibility during the period prior to the initial ALJ decision, even if that decision has been vacated by the Federal court. In other words, the proposed rule would cling to an erroneous ALJ decision even though it had been set aside by a Federal court, creating an inappropriate end-point for consideration of a claimant's impairment. This rigid rule would mean that when considering cases that were remanded to the hearings level or appealed to the Review Board, adjudicators would not be allowed to consider evidence that became available after the first ALJ decision, even if this evidence would demonstrate the claimant's disability.

Both this restriction and the new time limits for submitting medical evidence ignore the nature of many disabling impairments. Many medical conditions can be difficult to diagnose or can worsen over time. Claimants also frequently suffer from multiple impairments that combine to produce the disabling symptoms, and not all of these multiple impairments may have been diagnosed early in the claims process. For these reasons, new evidence may become available that sheds additional light on the severity of the claimant's disability. The proposed rules would in many cases prohibit consideration of such evidence, forcing claimants to file an entirely new application to have full consideration given to the facts in their case. For example, if a tumor that has caused disabling symptoms were later found to be malignant, or a claimant who had filed on the basis of back pain were later diagnosed with multiple sclerosis, the claimants would not be able to offer evidence of these conditions without completely restarting the claims process.

- **The proposed rule would require more claimants to file a new application rather than pursuing an appeal, which is administratively inefficient and could significantly disadvantage claimants.**

  As discussed above, the proposed rule would restrict evidence that could be considered after a remand to only that evidence pertaining to the period of time before the original ALJ decision. The preamble to the proposed rule claims that this requirement would "not unduly disadvantage claimants," since claimants who "experience a worsening of condition or new impairments during the intervening time between the ALJ decision and the Review Board's decision – or while the case is pending on remand – may file a new claim for benefits." (p. 61222) The preamble further notes that SSA would include language in notices of denials or remands making claimants aware of their right to file a new application.

  Filing a new application is not an adequate alternative, however, and in fact could be very harmful to claimants. Filing a new claim rather than continuing an appeal can result in the loss of retroactive benefits and in significant delays in receiving both cash and health care benefits, due to waiting periods. Individuals filing for Social Security disability benefits may even lose their insured status, rendering them completely ineligible for these benefits or for Medicare. Congress has already acted to correct previous agency actions that failed to make clear the adverse consequences of reapplying rather than appealing (Section 205(b)(3) of the Act). Any proposed changes to the appeals process should be consistent with this longstanding Congressional concern, as well as the statutory direction.

  Requiring applicants to file a new application to have all their evidence considered is also administratively inefficient. Not only would this force SSA to re-do its work and increase workloads at the front end of the process, but it could even compound appeals backlogs. It would be more efficient to have the ALJ or the Review Board make a decision based on all available evidence, rather than forcing the claimant to start over in order to have critical evidence considered.

- **The proposal could force more claimants to appeal to Federal court.**

  The proposed limits on evidence submission in the administrative appeals process are more restrictive than the statutory rules on evidence that Federal courts may consider. Because of the disadvantages of reapplying rather than appealing, as noted above, the proposed rule would create the perverse circumstance whereby claimants would need to pursue an appeal to Federal District Court in an attempt to have evidence considered that is directly relevant to their claim, but which was rejected by SSA under the new, stricter

deadlines. The proposed regulations, if adopted, could thus flood the Federal courts with appeals that should properly be handled by an effective and fair administrative process.

The Federal courts could also be burdened by another consequence of the proposal: that of increased litigation challenging the application and interpretation of the many new, formalized procedural requirements that appear to conflict with the Act and long-settled jurisprudence. For example, as noted earlier in this comment, the Act directs SSA to consider new evidence on remand from Federal court, but the regulation as written seems to prohibit such consideration.

- **These dramatic changes are unjustified. The backlog is the result of chronic underfunding of SSA's administrative budget, not faulty appeals procedures.**

The proposed rules would implement major changes in SSA adjudicatory procedures and would affect all claimants seeking benefits from SSA. Yet, despite such wide-reaching effects, the proposed rules are not well-justified. According to the preamble, the procedures appear to be aimed at streamlining the appeals process, which is currently experiencing an unprecedented backlog of cases waiting to be heard. However, little evidence is presented to suggest that the backlog is caused by the regulations that the proposed rule would overturn. To the contrary, the mounting backlog of cases at SSA is primarily the result of chronic inadequate funding for the agency, as SSA has received $1.3 billion less than requested by the Administration – and $4.6 billion less than requested by Commissioner – over the past 10 years. As a result, SSA simply does not have adequate staff to adjudicate the rising number of claims. It would be grossly unfair to compound the problems caused by lack of adequate funding by denying claimants a fair consideration of their appeals.

Moreover, the proposal is based on DSI procedures that were very recently instituted, and only in SSA's smallest region (although the proposal makes additional restrictions beyond those procedures). Only a small number of cases have been processed by SSA under the DSI procedures. Given the magnitude of the changes, and the limited experience with them, it is inappropriate to conclude that these procedures should be imposed nationally.

Finally, we are concerned that the proposed rule might have an unintended consequence of actually worsening the backlog, due to increased appeals that challenge the application and interpretation of these new formalized procedural requirements.

- **A similar attempt to formalize the administrative appeals process was unsuccessful, as it contradicted statute, infringed on claimants' rights, and led to public outcry.**

In 1988, SSA attempted to adopt similar changes to formalize its administrative appeals process. Those rules, like the rules proposed today, attempted to transform the informal

and non-adversarial SSA hearings process into a complex legal proceeding, which most claimants would be unable to navigate without the assistance of experienced counsel. As a result of public and Congressional concerns, the proposed rules were abandoned.

Today, we express equal concern over the rules now being proposed. We urge you to withdraw these harmful proposed changes, and to proceed carefully in developing any other proposals that would change the nature of the hearing process and could directly affect the statutory and constitutional due process rights of claimants seeking benefits under the Social Security Act.

Sincerely,

John D. Dingell
Chairman
Committee on Energy and Commerce

John Conyers
Chairman
Committee on the Judiciary

Charles B. Rangel
Chairman
Committee on Ways and Means

Pete Stark
Chairman
Subcommittee on Health
Committee on Ways and Means

Henry A. Waxman
Committee on Oversight
and Government Reform

Howard L. Berman
Chairman
Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary

John Lewis
Chairman
Subcommittee on Oversight
Committee on Ways and Means

Frank Pallone, Jr.
Chairman
Subcommittee on Health
Committee on Energy and Commerce

Jim McDermott
Chairman
Subcommittee on Income Security
and Family Support
Committee on Ways and Means

Michael R. McNulty
Chairman
Subcommittee on Social Security
Committee on Ways and Means

Linda Sánchez
Chairwoman
Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary

Attachment

# SOCIAL SECURITY

Office of the Chief Actuary

December 17, 2007

The Honorable Charles B. Rangel
Chairman, Committee on Ways and Means
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in response to your letter of December 13, 2007 in which you requested a preliminary estimate of the approximate savings expected from implementing changes specified in a recent notice of proposed rulemaking (NPRM) compared to an alternative baseline. The NPRM proposes changes regarding Administrative Law Judge, Appeals Council, and Decision Review Board appeals levels in the disability adjudication process.

The Federal Register of October 29, 2007 included this NPRM with our estimate that the changes would result in a net reduction in program benefits (for the OASDI and SSI programs) totaling $1.53 billion over the fiscal year period 2008-17, compared to the baseline assumed for the President's FY 2008 Budget. In particular, that baseline reflected the assumption that the Disability Service Improvement (DSI) regulation would be implemented across the country by adding one region each year, starting in 2006. The hypothetical alternative baseline you suggest would assume that DSI would be implemented for no further regions beyond the Boston region, where DSI was implemented in August of 2006. Compared to this hypothetical alternative baseline, we estimate the program savings for the NPRM in question would total somewhat in excess of $2.0 billion over the fiscal year period 2008-17.

Estimated program benefit savings (for OASDI and SSI) for implementation of the NPRM compared to the FY 2008 Budget baseline rise to an annual maximum of $241million for FY 2013 and decline thereafter, reaching $90 million for FY 2017. However, compared to the alternative baseline, program benefit savings would be somewhat higher than $241 million for FY 2013, and would continue rising thereafter, reaching over $300 million per year by FY 2017.

The two principal changes proposed in the NPRM that affect program benefit cost are (1) the closure of the disability case record after the first decision rendered by an administrative law judge (ALJ) and (2) replacement of the subsequent appeal level (currently the Appeals Council, but changing to Decision Review Board under DSI) with the Review Board. Both changes would be made for all regions when the NPRM became a final rule.

Closure of the record after the ALJ decision is already provided for under DSI, but is assumed to be implemented only gradually under the FY 2008 Budget baseline. Thus, program benefit savings for this change under the NPRM are indicated only until the DSI regulation would

otherwise have effected closure of the record. Thus, compared to the FY 2008 Budget baseline, with DSI and closure of the record assumed complete for all initial applications in 2015 and later, program savings for closure of the record are substantial initially but decline toward zero after 2013. Compared to the alternative baseline, which does not assume closure of the record after the first ALJ decision, program savings for closure of the record under the NPRM would be substantial and rising throughout the projection period.

The adjudicative effects of the Review Board (RB) proposed in the NPRM are expected to be similar overall to the Appeals Council (AC) currently in place for all regions but Boston. In particular, both the RB and the AC allow claimants to request an appeal if denied by the ALJ. The Decision Review Board (DRB) specified in the current DSI regulation, and assumed to be implemented gradually under the FY 2008 Budget baseline, would not allow claimants to request an appeal, and is thus assumed to result in a small net decrease in disability allowances. Compared to the current FY 2008 Budget baseline with gradual implementation of the cost-saving DRB), implementation of the RB under the NPRM would result in additional program benefit cost that would increase over time. However, compared to the alternative baseline with the AC kept in place, implementation of the RB under the NPRM would have little effect on benefit cost. Thus, comparing the implementation of the RB to the alternative baseline rather than to the FY 2008 Budget baseline tends to increase the overall savings estimated for the NPRM.

The approximate estimates provided above are indeed preliminary in nature. Altering the baseline considered for this NPRM to reflect no further implementation of the DSI regulation raises complex issues such as interaction with the Federal Reviewing Official (FEDRO) and whether certain demonstration initiatives would remain in place during the period. Please let me know if you will require a full, detailed estimate of program cost savings compared to the alternative baseline. We are hopeful that the information provided above will prove helpful.

Sincerely,

Stephen C. Goss

Stephen C. Goss
Chief Actuary