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December 21, 2007

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

Dear Commissioner Astrue:

AARP is writing to comment on the Notice of Proposed Rulemaking (NPRM) published in the Federal Register on October 29, 2007, p. 61218, Docket No. SSA-2007-0044. This NPRM seeks to modify the appeals process for all claimants. The disability appeals process is often lengthy and backlogged, but the proposed reform of the entire appeals process is far reaching and will work to the detriment of individuals seeking appeals. Modifying the entire appeals process in a manner that implements a formal, adversarial system that reduces the claimant's ability to introduce evidence denies full and fair consideration. These proposed changes will further complicate a process that is already quite difficult to navigate and deny claimants the opportunity to fully present their evidence. If enacted, SSA's proposed changes would produce a particularly harsh result for those who cannot afford adequate representation and especially burden those claimants whose conditions deteriorate further over time.

AARP is a nonprofit, nonpartisan membership organization that assists individuals over the age of 50 to have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. We produce AARP The Magazine, AARP Bulletin, AARP Segunda Juventud, NRTA Live and Learn, and provide information via our website, www.aarp.org. AARP publications reach more households then any other publication in the United States.

AARP advocates for policies that enhance and protect the economic security of individuals as they move from work to retirement. Through its research, publications, advocacy, and training programs, AARP seeks to eliminate ageist stereotypes; encourage employers to hire and to retain older workers; and help older workers overcome obstacles in the workplace. Approximately 45 percent of AARP's more than 39 million members are working.

AARP believes that if these proposed changes are enacted, the rights of claimants will be curtailed in **three** crucial areas.

- First, an informal and non-adversarial process will be transformed into a rigid appellate system that denies full and fair consideration. The NPRM imposes strict time limits without good cause exceptions, expands Administrative Law Judge

(ALJ) authority without guidance or oversight, and creates requirements that hold individuals seeking appeals to unreasonably high standards.

- Second, restrictions on the submission of evidence will be imposed with narrow exceptions, which will cause premature closure of the evidentiary record.
- Third, by limiting judicial and administrative review, many individuals will be forced to reapply or file multiple applications.

The goal of a revised appeal process should not be simply to expedite the application and appeals process; it should ensure that claimants receive timely and accurate decisions.

I. A Formal and Adversarial Process Denies Adequate Consideration

The current claims and appeals process is informal and non-adversarial and affords essential flexibility to individuals filing applications and pursuing appeals, particularly for those individuals who lack the means or knowledge to adequately present their claims for benefits and, more importantly, to appeal agency decisions. SSA's proposed changes seek to establish an appeals process that in its own words is "more analogous to that of an appellate court reviewing the decision of a trial court." The changes proposed in the NPRM seek to impose time limits and other requirements which would create a highly complex and adversarial claims process.

Strict Time Limits during the Appeals Process. Under the NPRM, new time limits will be imposed at the appeals level without "good cause exceptions," which means that unless claimants seeking appeals respond within a certain timeframe they forfeit their rights. Time limits without good cause exceptions would be imposed in five important areas: (1) objection to the time or place of the hearing must be made 30 days after receiving the hearing notice; (2) acknowledgement of the receipt of the hearing notice must be made five days after receipt; (3) objection to issues in the hearing notice must be made five days before the hearing[1]; (4) a claimant subpoena must be requested within 20 days before the hearing; and (5) the claimant's brief to the Review Board must be filed either with the appeal or within 10 days of filing the appeal.

Many claimants do not possess sufficient knowledge or the capacity to meet these deadlines. Additionally, many are unrepresented and are trying to cope with the very disability for which they seek benefits. The imposition of time limits without good cause exceptions will prevent claimants from receiving full consideration for their appeals and penalizes people whose disabilities may prevent them from complying with the strict deadlines. Most often, missed deadlines under the current appeals process are due to disabilities or lack of understanding. Fortunately, many ALJs have either postponed or extended time periods for claimants to provide a response. It is unclear whether ALJs will continue to have this authority. Absent good cause exceptions, the flexibility that claimants are afforded currently to accommodate special circumstances will be eliminated.

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[1] Under the current regulations, claimants may raise objections at the earliest possible opportunity. See 20 C.F.R. §§ 404.939 and 416.1439.

Expanded ALJ Authority. In addition to the strict time limits suggested in the NPRM, other proposed changes would help create a highly legalistic and formal process. ALJs would have broader discretion during the appeals process, but the rules do not provide guidance on how to execute this expanded authority to ensure that the ALJs do not abuse their discretion. As proposed, the process will be difficult and unfair to unrepresented claimants.

There are four areas under the proposed rules that give rise to these concerns: (1) a claimant's request for a hearing must include a statement that lists "medically determinable impairments" that prevent the claimant from returning to work, but the NPRM does not elaborate on whether ALJs can consider impairments not mentioned or known at the time of appeal or additional impairments, including functional impairments, that limit an individual's ability to respond in a timely manner; (2) ALJs will have broad authority to change the time or place of the hearing with limited exceptions; (3) claimants will be required to appear by telephone if, in the ALJ's opinion, extraordinary circumstances exist, and it is unknown whether the claimant will have an opportunity to object. The NPRM does not state whether claimants can object to telephone hearings. A telephone hearing should not be imposed unless there are disability-related reasons and a telephone hearing is designed to accommodate the claimant. (4) ALJs will have the discretion to dismiss the appeal with reasonable notice if the claimant fails to appear at a prehearing or posthearing conference, but the exact time limit for providing notice of the dismissal is not listed.[2] Dismissals for failure to appear at pre-hearing conferences will only increase the number of complaints before the Review Board and Federal District courts.

Review Board level requirements are too strict. Under the NPRM, the process becomes even more legalistic and formalized at the Review Board level, which replaces the Appeals Council. If individuals disagree with an ALJ's decision, they can appeal to the Review Board. At the Review Board stage, individuals are presented with requirements that are especially difficult to satisfy without legal counsel. Non-disability claimants are more likely to go through the entire process without legal representation as they must pay their own attorney fees, whereas attorney fees for disability cases are paid directly out of any awarded benefits. The proposed rules create **four** problematic areas at the Review Board level that are especially troublesome for any unrepresented claimant pursuing an appeal.

1.) The appeal submitted by the claimant must be in the form of a written statement that identifies the errors committed by the ALJ (factual or legal), explains why the decision should be reversed or modified, and cites applicable law and specific facts in the record that support the claimant's argument. Essentially, the NPRM is requiring ordinary individuals to prepare a legal brief. Absent adequate knowledge or the assistance of legal counsel, it is highly unlikely that a claimant will be able to meet these standards.

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[2] Under the current regulations, the advance notice time limit is seven days, and there is no sanction if the claimant or representative does not appear at the pre-hearing conference.

2.) For the Review Board to consider additional evidence, the NPRM requires claimants to submit a statement accompanying the additional evidence that explains the reasons for this new material and whether the qualifying criteria under the NPRM for the evidence has been satisfied. Here too, claimants will be required to complete the difficult task of drafting what, in essence, is a legal memorandum that would establish reasons for the consideration of additional evidence. The Review Board may obtain additional evidence either by remanding the claim to the ALJ or by obtaining it on its own. However, the NPRM is silent on whether the Review Board is required to share the additional evidence with the claimant before issuing a decision.

3.) The NPRM proposes to revise the standard of review at the Review Board level. **AARP maintains that a de novo standard should be used to evaluate a claim at each level of the appeals process.** De novo review at each level of the process ensures that benefits are awarded based on all the evidence provided to date, rather than the claimant's ability to obtain representation and/or obtain evidence at prior stages. A de novo standard at each stage ensures that any newly-obtained evidence regarding the claimant's condition can be considered. This standard of review is especially useful for claimants whose condition has deteriorated while awaiting a decision. This allows decision makers to consider new information regarding the disability if it becomes available. The standard of review proposed at the Review Board level is the "harmless error" standard. Under the harmless error standard of review, the Review Board will not change factual or legal errors unless the Review Board finds there is a "reasonable probability that the error, alone or when considered with other aspects of the case, changed the outcome of the decision." Accordingly, the Review Board will take action upon a finding of significant errors of law. However, the NPRM does not define what constitutes a significant error. Nor does the NPRM elaborate on whether the harmless error standard is intended to be more or less lenient than the standards used by federal courts. This could create a serious inconsistency.

4.) The NPRM suggests charging claimants fees for obtaining a copy of the record or the hearing recording unless claimants can establish a "good reason" why they should not pay. Currently, the Appeals Council does not charge a fee for any of those services. Further, the NPRM does not explain what constitutes a good reason for claimants not to pay for those services. If a fee is imposed, then it is also necessary to provide opportunity for claimants to proceed *in forma pauperis*. The imposition of fees to obtain copies of the record or the hearing recording will hinder some claimants' ability to adequately prepare and present their appeal before the Review Board. The agency should not impose a fee that would limit access to this system.

II. Restrictions on the Admission of Evidence Unduly Limit the Process

Perhaps the most troubling of the proposed changes listed in the NPRM involve the restrictions on the submission of evidence to the ALJ and the Review Board. Under the NPRM, significant time constraints are placed on an applicant's ability to introduce evidence to support a claim. Claimants will be required to submit all evidence five business days prior to a hearing. Evidence submitted after this deadline will be considered late, and the ALJ will only accept the evidence if the claimant can satisfy one of the following exceptions: (1) SSA's action misled the claimant; (2) the claimant has a

physical, mental, educational, or linguistic limitation that prevented the claimant from submitting the evidence timely; or (3) some other unusual, unexpected, or unavoidable circumstance beyond the claimant's control. The NPRM is silent on what recourse claimants have if ALJs abuse their discretion and disqualify evidence that does not, in their opinion, meet any of the three exceptions. This change could lead to additional review and delay the receipt of benefits for eligible individuals.

Following the hearing, but before the ALJ issues a decision, new evidence will be accepted if one of the previously mentioned three exceptions is met **and** if there is a reasonable possibility that the nature of the evidence is such that, when considered alone or in conjunction with the existing record, would affect the outcome of the claim. The strictest of the proposed evidentiary restrictions is imposed at the Review Board level. A claimant may introduce new evidence for Review Board consideration only if SSA's action misled the claimant, the claimant has a physical, mental, educational, or linguistic limitation that prevented the claimant from a timely submission of evidence, **and** there is a reasonable probability that the nature of the evidence is such that, when considered alone or in conjunction with the existing record, would change the outcome of the claim.

Current Federal law requires that claimants receive a decision based on the evidence adduced at the hearing level.[3] Discovery and examination of evidence obtained through the course of the hearing process is essential for full consideration of the claim. The NPRM reverses federal law by closing the evidentiary record based strictly on time. As a result of closing the evidentiary record prematurely, the individual's condition is frozen in time. Even if the condition further deteriorates as the process moves forward, the ALJ will be limited to reviewing evidence as of the closing date of the record. AARP believes that premature closing of the evidentiary record is unreasonable and unfair to the claimant.[4]

Although the proposed rules provide claimants notice 75 days prior to the hearing, which is a tremendous improvement to the 20 days currently provided, it is not always enough time to obtain evidence, especially medical records. The ability to physically possess records in a timely fashion often is not always within the control of the claimant. Although non-disability claimants do not need to obtain medical evidence, the type of evidence they need varies and may not be readily available. Unrepresented individuals bear the responsibility of obtaining evidence to corroborate their claims, but are less likely to have the means necessary to procure the required evidence. Hospitals, medical professionals, and insurance companies take significant time in handling requests for medical records. Requests for medical records are not, nor are they expected to be, prioritized by the health care provider. Further, privacy measures under the Health Insurance Portability and Accountability Act impose restrictions on the disclosure of medical records that delay a claimant's ability to retrieve records within the time prescribed by the NPRM.

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[3] 42 U.S.C. § 405(b) (1).

[4] Under the current process, most claimants are approved at the ALJ level because their condition has worsened or new evidence has emerged to substantiate their claim.

Additionally, most claimants are not aware that if they are experiencing difficulties obtaining their records that they can request an ALJ to subpoena their records. Under the NPRM, claimants will be restricted to requesting subpoenas up to 20 days prior to the hearing. Previously, claimants were able to request subpoenas as close as five days prior to the hearing. It is common for claimants to either obtain representation a few days prior to the hearing or arrive at the hearing without evidence and without legal representation because they are unfamiliar with the procedural aspects of the appeals process. In these instances, usually ALJs will reschedule the hearing and instruct the claimant to seek representation. According to the NPRM, it is unclear what the consequences would be to a claimant who obtains representation after the hearing and whether evidence obtained by this representative after the ALJ hearing would be admissible.

Although the NPRM states its goals is to make the claims and appeals process more efficient, the evidentiary restrictions proposed will only exacerbate the number of federal court filings. As a consequence of disallowing evidence based strictly on time, claimants will turn to Federal District courts expressly to present evidence that was disallowed by the ALJ. This will increase the Federal court system's caseload, create confusion, and further the inefficiencies inherent in the appeals process.

III. Limited Review Forces Claimants to File Multiple Applications

Under the NPRM, a claimant who is dissatisfied with the ALJ's decision may appeal to the newly created Review Board. If the claimant is further dissatisfied with the Review Board's decision, the claimant may appeal to a Federal District court. However, if the ALJ's decision is remanded from either the Federal District court or the Review Board, the ALJ hearing the case on remand is limited to considering the case "only with regard to the period ending on the date of the original decision." The current procedures permit claimants to submit additional evidence with respect to deteriorating conditions or when a claimant has not received a final diagnosis. By limiting the scope of review upon remand to the claimant's eligibility on or before the date of the first ALJ decision, new claims will be filed because the current condition is barred from consideration. Consequently, the number of initial claims filed will increase, and claimants will be denied the opportunity to receive benefits from the initial filing date. This poses serious problems for those who are unable to work or who otherwise lack the resources to meet their ongoing living expenses. It also fails to consider the progressive nature of many medical conditions that become increasingly disabling over time.

If these proposed changes were to be enacted, it is unreasonable to require claimants who have endured a lengthy claims and appeals process and who would otherwise be awarded benefits under the current rules to wait five more months after they are awarded benefits upon reapplication. AARP believes the five month waiting period should be waived for those claimants awarded benefits in this type of re-application.

The NPRM also restricts the ALJ's discretionary authority to reopen prior ALJ or Review Board decisions. Although the reopening of prior decisions does not occur frequently, a decision will be reopened if compelling reasons exist for a claimant who did not understand the necessity of appealing an unfavorable decision. Currently, if "good

cause" exists, decisions may be reopened within two to four years depending upon the type of claim. The proposed rules eliminate an ALJ's discretionary authority to revisit an earlier decision in light of new and material evidence. Not only does the NPRM eliminate the ALJ's discretionary authority to reopen a claim, but it also eliminates the "new and material" evidentiary standard as grounds for reopening a decision by an ALJ or the Review Board. Consequently, for new evidence to be considered, claimants will have to file a new claim immediately after receiving an unfavorable ALJ decision even if they are pursuing an appeal. If claimants are forced to file multiple applications for benefits arising out of the same issue or condition, there will be confusion and inconsistency as the NPRM requires the administrative record remain open for some purposes and closed for others.

IV. Consequences of the Proposed Changes

Closing the evidentiary record prematurely and limiting the scope of review on remand not only places onerous requirements on claimants that are hard to understand, but filing an entirely new claim could cause claimants to lose benefits. By filing a new claim to address a condition that has deteriorated since the filing of the original claim, claimants will lose benefits because they will only be eligible for benefits beginning on the effective date of the most recent claim. Under the NPRM, there is no adequate recourse available to individuals who are denied the opportunity to establish their condition at the time of their initial application. As time passes and their condition deteriorates further, claimants should not be denied the opportunity to introduce evidence to substantiate their disability.

Under the proposed rules, claimants will also be required to file new claims if there has been a change in their status following the date of the ALJ's final decision even if the condition is related to the original claim for benefits. Yet, Congress has mandated SSA inform claimants of the negative consequences of re-submitting claims for benefits instead of exhausting the appeals process.[5]

The disability appeals process has been informal and non-adversarial, in part, to reflect the medical, mental, and physical limitations of some applicants. The individuals examining these claims evaluate and balance medical, mental, and physical issues to determine whether a claimant is so disabled that he or she can no longer work. These examiners have to take into account the nature of the claimant's job, education level and job skills, and whether the claimant's condition bars him or her from working a particular job or all jobs. The examiners and ALJs who evaluate these claims must decipher medical reports, identify relevant information, and reconcile conflicting medical opinions on the same condition. Formalizing the process and closing the evidentiary record prematurely would make their tasks even more difficult. A more informal process, than that proposed in the NPRM would provide the flexibility to address all of these concerns and give every claimant full and fair consideration.

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[5] 42 U.S.C. §§ 405(b) (3) and 1381(c) (1).

V. Alternatives to Reforming the Claims and Appeals Process

There are ways to tackle the appeals backlog without shortchanging the right of individuals to a fair and full hearing on the merits of their case. SSA should consider expanding current disability initiatives and exploring alternatives to address the backlog, such as collaborating with legal services or other non-profit entities to assist claimants with the application process. Under the proposal, the backlog the NPRM seeks to address actually could increase because there will be additional and unnecessary applications that will increase administrative costs and add a new element of confusion. The backlog of claims awaiting hearings or decisions is attributable to a lack of resources and adequate staffing for SSA, which can be addressed though adequate funding for the agency.

Last year, 2.5 million Americans applied for benefits, and this figure is expected to grow by 90,000 each year for the next five years.[6] By the end of 2007, the backlog of initial claims is expected to reach 577,000 and the number of cases pending an appeals hearing could rise to over 750,000.[7] The changes proposed in the NPRM not only impose difficulties for claimants, but also create challenges for SSA and its staff as well as for the federal court system. Workloads will increase due to the filing of multiple applications by denied individuals, and claimants will visit SSA district offices in increasingly large numbers because they do not understand the changes.

These proposed changes are based in large part on a pilot program that was in operation for little over a year. In the NPRM, SSA admits that their experience with the pilot project in Boston found some aspects of the new procedures beneficial "while others have not worked as well as [SSA] anticipated." Before implementing these procedures nationwide, SSA should continue to monitor the pilot program for a longer period of time and evaluate whether the claims process as administered under the pilot program is productive.

Prior initiatives, particularly the Quick Disability Determination (QDD) process, have yielded great success for claimants suffering from severe impairments. Under the QDD process, applications from individuals with certain diagnoses are reviewed under an expedited process. This program should be expanded so more conditions qualify for expedited review. Some claimants suffer from such severe disabling conditions and diseases that it is highly likely that they will be awarded benefits. Currently, SSA is considering awarding compassionate allowances to certain individuals who are likely to receive benefits as their application moves through the claims process. The list of conditions that qualify an individual for a compassionate allowance should be expanded to include more diseases, conditions, and disabilities.

The disability application form does not allow claimants, legal representatives, and doctors adequate opportunities to fully explain the diagnosis. The initial application form needs to be more specific and more easily understandable by claimants. Those filing for benefits should be informed at the earliest stage in the claims process about the elements necessary to file a complete application for disability benefits. As more individuals

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[6] http://www.ssa.gov/pressoffice/index.htm
[7] http://www.ssa.gov/pressoffice/index.htm

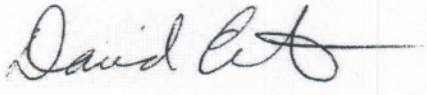
become aware of what threshold requirements need to be met to obtain disability benefits, SSA will be able to reduce processing times for some benefits and concentrate its energy on the more difficult cases. If claimants are provided an opportunity at the earliest stage in the process to adequately explain their condition, it could expedite claims processing and even reduce appeals.

VI. Conclusion

AARP applauds SSA for its administrative efforts to reduce the backlog by addressing those claims that have been waiting the longest, 1000 days or more. In doing so, SSA has been able to reduce long wait cases from 63,000 in 2006 to 108 by the end of September 2007.[8] Given the continued backlog and the shortage of agency resources, AARP understands the agency's interest in making other changes. However, AARP cannot support changes to the claims and appeals process that come at the expense of claimants. Reforms to the claims and appeals process must maintain flexibility and the de novo standard of review. The agency can best reduce the backlog by receiving adequate funding.

AARP appreciates the opportunity to provide comments on the proposed amendments to SSA's claims and appeals process. If you have any questions or need further assistance, please do not hesitate to contact Evelyn Morton of the Federal Affairs staff at (202) 434-3760.

Sincerely,



David Certner
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[8] Social Security News Release, October 9, 2007 at http://www.ssa.gov/pressoffice/pr/disability-backlog-pr.htm