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Subcommittee on Human Resources
Subcommittee on Social Security
Committee on Ways and Means
United States House of Representatives

re: September 27, 2005, Joint Hearing on Commissioner of Social Security's Proposed Improvements to the Disability Determination Process

70 Fed. Reg. 43,590 (July 27, 2005)

Written Submission

Dear Subcommittees:

I. Introduction

This is a written submission to the Subcommittee on Human Resources and Subcommittee on Social Security of the Committee on Ways and Means regarding the Commissioner of Social Security's July 27, 2005, proposed regulatory changes to the process for adjudicating disability claims under Titles II and XVI of the Social Security Act. See 70 Fed. Reg. 43,590-624 (July 27, 2005) (Administrative Review Process for Adjudicating Initial Disability Claims) (July 2005 NPRM). I am an attorney in private practice who represents claimants for such disability benefits.

II. The Commissioner Should Not Eliminate the Appeals Council For Claimants Dissatisfied With Unfavorable ALJ Decisions

Presently, a claimant who disagrees with an ALJ's decision has a right to seek Appeals Council review of that decision. 20 C.F.R. § 404.955 (2005). This is the last stage of administrative review before federal court. 20 C.F.R. § 422.210 (2005). The July 2005 NPRM proposes to eliminate the Appeals Council for claimants dissatisfied with ALJ decisions. This would be imprudent and inefficient.

A. Eliminating the Appeals Council Will Flood The District Courts With Meritorious Cases

Under the present system, about 100,000 claimants per year request Appeals Council review of ALJ decisions. The Appeals Council grants the requests in about 20-25% of those cases. Each year, about 15,000 claimants whose requests for Appeals Council review have been denied seek judicial review in the district courts under 42 U.S.C. § 405(g). Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics (Mar. 31, 2004). Given that the Appeals Council now finds harmful error in 20,000-25,000 cases per year and corrects those errors primarily through remand to ALJs for new hearings, eliminating the Appeals Council will likely flood the district courts each year with tens of thousands more meritorious civil actions. This is imprudent and unwise. Out of a respect for the federal courts, the Commissioner should not require claimants to use the federal courts to correct tens of thousands of erroneous ALJ decisions currently corrected by the Appeals Council.

The Commissioner states that the Appeals Council presently does not "intercept[] large numbers of claims that do not withstand Federal district court review." 70 Fed. Reg. 43,598 (July 27, 2005). Because the Appeals Council intercepts 20,000-25,000 incorrect ALJ decisions per year according to the Appeals Council, the Commissioner is mistaken.

The Commissioner should take great pride in her increasing ability to intercept incorrect ALJ decisions before they lead to unnecessary civil actions. Certainly, the Appeals Council does not today intercept all claims that would lead to civil actions. There are now 15,000 civil actions per year, about half of which result in judicial relief for the claimant-plaintiff. Social Security Advisory Board, Disability Decision Making: Data and Materials (Jan. 2001), at 86. Just because the Appeals Council does not intercept about 7,000 meritorious cases per year does not mean that it should cease intercepting 20,000-25,000 meritorious cases per year.

B. The Commissioner Has Tested the Elimination of the Appeals Council, But Did Not Discuss the Results

The Commissioner has already tested the effect of eliminating the Appeals Council. But in the July 2005 NPRM, the Commissioner does not discuss the statistical data from that testing. The Commissioner should make public all data from her testing of the elimination of the Appeals Council.

C. The Appeals Council is More Efficient Than the District Courts

Without the Appeals Council, the district courts will provide the appellate function previously performed by the Appeals Council. This will be grossly inefficient. Yearly, the Appeals Council handles with increasing efficiency about 100,000 requests for review. Generally, Appeals Council analysts prepare short memoranda for Appeals Council members or Administrative Appeals Officers dispose of requests for review with a minimum of effort and paperwork. Additionally, a claimant or his or her representative can present fully to the Appeals Council arguments in support of a request for review with several hours of work. In contrast, district court litigation requires at least two times and probably on average five times more resources than Appeals Council review. In district court, the plaintiff must file a complaint; the plaintiff must pay a waivable $250 filing fee; the clerk must open a case; the Commissioner's attorney must answer; the plaintiff and the Commissioner each must file briefs of about ten to twenty-five pages stating their respective positions; and the district court may issue a written decision of about five to thirty pages. And many cases require far more resources such as when a Magistrate Judge renders a report and recommendation to which each party may object. 28 U.S.C. § 636.

If the Appeals Council is eliminated for claimants who disagree with ALJ decisions, the entire administrative process will be shorter. But from an objective perspective, the entire time spent will not be less. The time spent during efficient Appeals Council proceedings will merely be outsourced — with geometric inefficiency — to the federal courts.

D. Eliminating the Appeals Council Will Make The Entire Process More Adversarial

The Commissioner accepts that the administrative adjudicative process should be non-adversarial. But because the July 2005 NPRM substitutes non-adversarial proceedings before the Appeals Council with adversarial proceedings in federal court, the July 2005 NPRM makes the entire process — administrative and judicial — much more adversarial in aggregate. This is unwise and unnecessary.

Because the Appeals Council is today the Commissioner's highest adjudicative body and because the Appeals Council grants 20,000-25,000 requests for review each year, the Commissioner tacitly acknowledges that that many ALJ decisions require readjudication. With an adversarial process in federal court, the Commissioner's attorneys would doubtless ask the district courts to affirm the denial of benefits in large numbers of these decisions that the Appeals Council today agrees should not stand. The Commissioner should not defend the incorrect denial of benefits in cases the Commissioner knows are incorrectly decided.

III. The Commissioner's Proposal is More Complex And Less Efficient Than the Existing System

The Commissioner proposes to make the administrative process for adjudicating disability claims more, not less, complex. While the July 2005 NPRM eliminates the largely formalistic reconsideration level of review, it adds another layer of attorney adjudicator — the Reviewing Official. 70 Fed. Reg. 43,595 (July 27, 2005). Under the current system, attorneys do not adjudicate claims at the initial and reconsideration levels, but attorney ALJs render decisions at the third stage. The July 2005 NPRM is essentially a double-ALJ system. The Reviewing Official does everything an ALJ does except for hold a face-to-face hearing with the claimant. Instead of creating a double-ALJ system, the Commissioner should focus resources on a single attorney ALJ rendering an accurate and defensible decision in each case.

Significantly, in the July 2005 NPRM, the Commissioner has not alleged that the Reviewing Officials will make more accurate decisions than ALJs. In fact, the Commissioner envisions an ongoing process whereby ALJs explain to Reviewing Officials why their decisions were incorrect. Instead of hiring hundreds or perhaps even thousands of Reviewing Officials to literally duplicate the functions of ALJs (except for the holding of face-to-face hearings), the Commissioner should devote the scarce resources of the Social Security Administration to improving ALJ adjudications after the initial denial of benefits.

IV. The Commissioner's Proposed Closing of the Record Includes Unworkable Time Limits

The Commissioner proposes to close the record, imposing strict time limits on the submission of evidence to an ALJ. 70 Fed. Reg. 43,596-597 (July 27, 2005). In the Commissioner's view, a claimant can "easily" submit evidence to an ALJ twenty days before a hearing when the claimant is given a forty-five-day notice via mail about the upcoming hearing. 70 Fed. Reg. 43,597 (July 27, 2005). The Commissioner offers no empirical support for this assertion. Assuming that a claimant receives a notice three days after it is mailed and assuming that the claimant can instantaneously submit evidence to an ALJ, a claimant essentially would have three weeks to obtain updated medical records from all hospitals, clinics, doctors, etc. A large number of medical sources, including hospitals, clinics, and doctors, take far more than three weeks to respond fully to requests for medical records.

V. Summary

The Commissioner's proposed process has significant flaws warranting major revision and thorough testing. The Commissioner should rethink her plan and focus on improving the current system instead of implementing a double-ALJ system without Appeals Council review

for claimants who disagree with ALJ decisions.

Very truly yours,

Eric Schnaufer