



Leadership Council of Aging Organizations

December 28, 2007

Sent By FAX: 410-966-2830

Commissioner Michael J Astrue
Social Security Administration
PO Box 17703
Baltimore, Maryland 21235-7703

Re: Docket No SSA 2007-0044

Dear Commissioner Astrue:

On behalf of the Leadership Council of Aging Organizations (LCAO), we, the undersigned organizations are writing to submit our comments to Docket No. SSA-2007-0044, which specifically contemplates proposed regulatory changes to ALJ, Appeals Council, and Decision Review Board appeals levels of the Social Security Administration.

The LCAO applauds the Social Security Administration's (SSA) efforts to reduce processing times for disability adjudications. We are concerned, however, that the application of a majority of the proposed regulations will have the devastating effect of denying benefits to a claimant because the claimant is unable to overcome a procedural hurdle and not because of disability. With the forgoing in mind, the LCAO submits the following comments for your review and consideration:

1) **Submitting Evidence to the ALJ**

The LCAO disagrees with the proposed changes governing the submission of evidence.

a. Limiting the submission of evidence to 5 business days before the hearing

Under the terms of the proposed regulation, a disability claimant will be limited to submitting supporting evidence up to and including the five days before the scheduled hearing date. On its face, this restriction appears fairly innocuous and in accord with the Administration's goal of alleviating the hearings backlog by setting boundaries on the universe of evidence to be considered. This proposal, however, ignores the difficulties many disability claimants encounter when trying to secure relevant medical records from their medical providers. Invariably, requests for medical records are met with resistance from doctors who refuse to produce a patient's records if there is an outstanding balance for services rendered to the claimant. Often a doctor will produce a claimant's record only under the order of a subpoena that has been issued by an ALJ *after* the hearing has occurred.

Without this evidence, a decision on a claimant's eligibility for benefits would be rendered on the basis of an incomplete record, stripping the claimant of due process rights and leaving no other option other than to forfeit the claim or to start the entire claims process over again. Considering that it currently takes over **two years** from the time a claim is filed to the time that a hearing decision is rendered, starting the claims process again from the beginning is not a viable, efficient or just option for most disability claimants.

b. Exceptions to the proposed 5-day rule are vague and will lead to inconsistent rulings

The proposed regulations provide for exceptions that permit the introduction of evidence that would otherwise be time barred. Generally, these exceptions will only apply if a disability claimant can establish that the SSA misled the claimant, that the claimant has a physical, mental, educational or linguistic limitation that prevented the submission of evidence earlier or that something "unusual" or "unexpected" happened beyond the claimant's control that prevented earlier filing. A claimant must surpass a higher burden of proof at each new judicial level to have the new evidence admitted.

The exceptions concern the LCAO because the grounds upon which the exceptions are based are ambiguous. For example, what constitutes an "unusual" or "unexpected" circumstance beyond a claimant's control? A doctor's resistance to producing a file, for instance, is probably neither unusual nor unexpected – but still outside of the claimants control. Without clarification, these exceptions will assuredly be applied in an inconsistent manner. With this in mind, the LCAO asks that you either provide sufficient clarification on the exceptions provisions or (and preferably) that you refrain from implementing the proposed change and instead uphold the current law, which gives a claimant the right to a hearing with a decision based on "evidence adduced at the hearing." 42 U.S.C. § 405(b)(1).

2) Scope of Evidence in Remand Proceeding

Currently, when the Appeals Council or federal court reverses and vacates an ALJ decision on legal error grounds, they are vacating the decision of the ALJ and thus no "final decision of the Commissioner" is in place. Without a final decision in place, claimants are allowed to submit any new or previously unobtainable evidence that supplements their claim(s) and the record at the subsequent remand proceeding. This policy is sound because it acknowledges the reality that a disability claimant may suffer new impairments during the time between the ALJ decision and the Review Board's decision. This approach also serves judicial economy by allowing the court to consider those changes during the proceeding on remand rather than requiring a claimant to start the claims process all over again. Further, this process is suited to the shared goal of appropriate disposition of claims in this non-adversarial process – a full record is best.

Under the proposed regulation, however, the scope of the proceeding on remand is limited to the material introduced and discussed up to the date of the original ALJ decision. This proposal would force the adjudicator to turn a blind eye to the claimant's now-existing condition and would add to the already

growing hearings backlog by leaving a claimant with no other option other than to start the claims process all over again to account for the change in his/her condition. This outcome is neither desired nor efficient.

3) **New and Material Evidence as Good Cause for Reopening**

Under the current rules, good cause will be found to reopen a prior determination whenever “new and material evidence is furnished” within four years (two years for SSI) of the notice of initial determination. This liberal reopening rule is an important safeguard for the many claimants who, because of a lack of access to regular ongoing medical care, are unable to establish evidence as to the severity or duration of their impairments by the time the prior claim is adjudicated. 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 administrative law judge 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. For some, it would mean no benefits whatsoever if the individual no longer meets the disability insured status requirement at the time of the second application.

The combined impact of the limitations on submission of evidence referred to above and the new restrictive reopening rule will result in fewer benefits paid to some of those most in need and should be reconsidered.

The LCAO commends your efforts to improve upon a system that provides much needed benefits to people with disabilities. We appreciate the time you and you staff have spent on this issue and we applaud your attempt to craft a workable solution. Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

AFL-CIO
AFSCME Retiree Program
Alliance for Retired Americans
American Association for International Aging
American Association of Homes and Services for the Aging
American Federation of Teachers Program on Retirement and Retirees
American Postal Workers Union Retirees
American Society of Consultant Pharmacists
American Society on Aging
Association for Gerontology and Human Development in Historically Black Colleges and
Universities
B'nai B'rith International
Gray Panthers
Military Officers Association of America

National Adult Day Services Association
National Association of Foster Grandparent Program Directors
National Association of Professional Geriatric Care Managers
National Association of Retired and Senior Volunteer Program Directors, Inc
National Association of Senior Companion Project Directors
National Association of Social Workers
National Association of State Long-Term Care Ombudsman Programs
NCCNHR
National Committee to Preserve Social Security and Medicare
National Indian Council on Aging
National Senior Citizens Law Center
OWL, The Voice of Midlife and Older Women
Service Employees International Union