



**CONSORTIUM FOR CITIZENS
WITH DISABILITIES**

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Subcommittee on Social Security**

**Examining Changes to Social Security's Disability Appeals Process
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**Testimony of Lisa Ekman, Co-Chair
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TESTIMONY OF LISA EKMAN ON BEHALF OF THE SOCIAL SECURITY TASK FORCE, CONSORTIUM FOR CITIZENS WITH DISABILITIES

Chairman Johnson, Ranking Member Larson, and Members of the Subcommittee, thank you for the opportunity to provide testimony for this hearing entitled “Examining Changes to Social Security’s Disability Appeals Process.”

I am the Director of Government Affairs for the National Organization of Social Security Claimants’ Representatives (NOSSCR). I am also a Co-Chair of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force. Today I am testifying on behalf of the Social Security Task Force (Task Force) Co-Chairs. CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The CCD Social Security Task Force focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

I. Social Security Benefits Are Vital to People with Disabilities

This hearing is extremely important to people with disabilities. The Title II and the SSI disability programs provide modest but vital income support to individuals with significant disabilities and their families. Although these benefits average only \$1198 a month for Social Security Disability Insurance (SSDI) and \$577 for SSI as of June 2018, they are often the difference between having a home and being evicted or homeless, or putting food on the table and going hungry, for beneficiaries and their families. More than 1 in 5 working age people with disabilities in the US lives in poverty, nearly twice the poverty rate of their non-disabled peers.¹ That rate would be significantly higher without the modest benefits that the Social Security disability programs provide.

The Task Force is pleased the amount of time claimants must wait from requesting a hearing to disposition of claims has finally begun to decline. The average number of days people waited for a disposition has declined from a high of 633 days in September 2017 to 594 days as of the end of June.² We thank the members of the Subcommittee for your support for adequate administrative funding for SSA and thank Congress for providing additional dedicated funding to SSA in both FY2017 and FY2018 to address the disability hearings backlog. The past two decades demonstrate that when SSA receives consistently adequate funding it can reduce both the number of people waiting for a hearing and the time it takes to receive a determination from an ALJ. When SSA does not receive adequate funding, wait times grow. No search for efficiencies, reprioritization of tasks, or technological improvements can substitute for adequate resources. Although the wait time for a hearing has decreased, it is still unacceptably long and can have devastating consequences for people while they await a decision about whether they meet the statutory definition for eligibility for Social Security disability benefits.³ Left without income while awaiting a decision, some people lose their homes and become homeless, some have to declare bankruptcy, and some people (more than 10,000 during FY2017) die.⁴

The Task Force is also concerned about the significant variation in the average wait times throughout the country. The average wait time ranges from a low of 324 days in Providence, Rhode Island to a high of 780 days in the New York hearing office, a difference of more than 15 months.⁵ The Task Force appreciates that SSA has limited resources and that it is often difficult to predict the geographic location of future applications and to adjust staffing accordingly (particularly in light of Continuing Resolutions and hiring freezes), but notes that there are sometimes large differences between offices in close geographic proximity. For example, claimants wait an average of 780 days for dispositions of their claims in the New York hearing office and 613 days in the New York Varick office, a difference of 167 days.⁶ These offices are located only 1.1 miles apart. The 283-day difference (over nine months) between the average wait times of Houston North and Houston Bissonet is even more glaring.⁷ Given these stark differences and the inequity they create for disability claimants, the Task Force is glad the

Subcommittee is looking more closely at how SSA endeavors to reduce the processing times for Social Security disability claims in ways consistent with the statute while retaining robust due process protections for claimants, including the right to choose an in-person hearing.

The Task Force appreciates the steps that SSA has taken to try to reduce the time people wait for a hearing as outlined in its Compassionate And Responsive Services (CARES) plan. Although the Task Force does not support all of the CARES initiatives, we believe that many are promising and could assist SSA to make more timely decisions on disability claimants' appeals to Administrative Law Judges (ALJ).⁸ Unfortunately, SSA has also made a series of changes to the rules governing the disability adjudication process in recent years, especially since 2014, that have prevented many people with disabilities who meet the statutory requirements for eligibility for Social Security disability benefits from accessing those benefits. In addition, these changes, although often purportedly intended to increase the efficiency of the hearing process and the timeliness of decisions, are likely to have (or have already begun to have) the opposite effect. By increasing the formality and adversarial nature of the hearing process, these combined changes result in denials of people who should be found eligible for benefits because they meet the statutory definition of disability under the Social Security Act. Additionally, some denied claimants choose not to appeal their denials despite being inappropriately denied.

II. An Informal and Non-Adversarial Process

There is a long and broadly-held understanding that the disability adjudication process undertaken by SSA should be informal and non-adversarial and that the role of the disability adjudicator is to fairly determine an individual's eligibility for benefits in a nonbiased manner by applying the applicable statutory and regulatory rules. Many recent changes to the rules and procedure regarding the disability adjudication process at the hearing level formalize disability hearing procedures and make the process more adversarial. The Task Force outlined this concern in 2014 in comments responding to proposed changes about the submission of evidence:

The longstanding view of Congress, the United States Supreme Court, and SSA is that the Social Security disability claims process is informal and nonadversarial, with SSA's underlying role to be one of determining disability and paying benefits. "In making a determination or decision in your case, we [SSA] conduct the administrative review process in an informal, non-adversary manner."⁹ SSA's interpretation is consistent with United States Supreme Court decisions over the last thirty years that discuss Congressional intent regarding the SSA hearings process. Most recently in 2000, the Supreme Court stated:

The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although many agency systems of adjudication are based to a significant extent on the judicial model of decision-making, the SSA is perhaps the best example of an agency that is not ... Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits....¹⁰

The value of keeping the process informal should not be underestimated. It encourages individuals to supply information, often regarding the most private aspects of their lives. The emphasis on informality also has kept the process understandable to the layperson and not strict in tone or operation."¹¹

The process to apply for and appeal a denial of disability benefits has become increasingly difficult for people with disabilities to navigate. Changes that make the process more formal and complicated, add more procedural rules and obligations for claimants, or appear to be inconsistent with one another (for example, requiring the submission of all evidence that relates to an individual's disability but not allowing the evidence to be considered in most circumstances if it is not submitted by a certain date) are nearly impossible for people with disabilities to even know about, let alone understand and comply with. This is especially true for people who have intellectual, cognitive, or mental impairments. Many of these recent changes have also made the process and how the adjudicator arrived at his or her decision more opaque. It can be very difficult to appeal a denial if one doesn't understand the rationale used to deny the claim in the first place.

III. Metrics to Evaluate Regulatory, Staffing, and Procedural Changes Designed to Decrease Wait Times

The Task Force believes that one question should be paramount when changes to the disability adjudication and appeals process are considered: Does the change increase the likelihood that people who meet the definition of disability outlined in the Social Security Act will be found eligible for benefits?¹² The Task Force appreciates that the Subcommittee is examining how SSA determines which backlog-reducing initiatives to pursue and how to allocate its limited resources. The metrics SSA elects to use to determine which new policy to pursue, or how it evaluates competing proposals and chooses one over another, are often unclear. Although improving efficiency and internal accuracy (e.g., making decisions consistent with the regulations and HALLEX) are important and appropriate goals, these must be subordinate to ensuring that SSA's regulations and sub-regulatory policy do not create procedural or other barriers to accessing benefits Congress intended that people who meet the statutory definition of disability be entitled to receive. Unfortunately, many of the changes that SSA has made in recent years in the name of reducing wait times for a decision from an ALJ are inconsistent with this principle.

SSA has also failed to justify many recent changes using one of its stated evaluation metrics: improving efficiency of the disability determination process and timeliness of decisions. Because the average wait time for a hearing is still an unreasonable 594 days, it is important that any changes be fully supported by the evidence and data the agency has available to it. Unfortunately, many changes made by SSA in recent years reverse long-standing SSA policy without providing data or evidence to support the change or explain why the previous policy was wrong or no longer appropriate. This is especially hard to understand when the changes were tested by multi-year pilots or demonstrations that were not comprehensively evaluated and no data from those experiments is made public. This lack of transparency makes it impossible to gauge how the change will affect the average processing time for hearings and the financial costs and benefits of the proposed change. Most importantly, however, SSA fails to use the evidence and data it has available to evaluate the impact of the changes on the ability of individuals to access Social Security disability benefits for which they meet the statutory definition of eligibility.

SSA's recent changes fall broadly into two categories: procedural barriers to being approved for benefits and changes that tilt the scales toward denials in disability adjudications. This testimony will now detail those changes and the impact they have had on the ability of people with disabilities to access Social Security disability benefits.

IV. Procedural Barriers to Accessing Social Security Disability Benefits:

The decision to apply for Social Security disability benefits often occurs at a very difficult time in claimants' lives. Claimants are often facing extreme financial stress, and even destitution, due to loss of income while also experiencing significant physical and/or mental impairments such as debilitating pain, overwhelming fatigue, or inability to concentrate. Every complex and unnecessary procedure, new step in the process, or tilt in the way evidence is evaluated creates a harmful roadblock that makes it more likely claimants will be unable to make it through the application and appeals process and will just give up – including claimants who meet the statutory eligibility requirements.

a. Procedural Barrier: Evidence Submission Rules: The “All Evidence Rule”

Since 2015, claimants must inform SSA about or submit “...all evidence known to you that relates to whether or not you are blind or disabled.”¹³ Although this might seem reasonable on its face, it is a substantial change from the previous regulations and greatly increased the burden on claimants related to the collection and submission of medical evidence. Furthermore, understanding what is required can be difficult, especially as it pertains to what evidence “relates” to a claimant's disability. Prior to this regulatory change, a claimant was only required to submit relevant evidence proving she was blind or disabled according to the statutory eligibility criteria. For the first time, SSA placed a burden on claimants to understand what part of their medical records “relates” to their disability and to collect and submit evidence that might disprove disability.

The regulations provide no scope or limits on what parts of one’s medical, employment, educational, or other records must be submitted. It does not define “relates to” in a way that allows a claimant to easily understand what is expected or to feel confident that she is complying with this requirement. A prudent claimant (and her representative, if she has one) will chose to err on the side of caution and submit her medical records in their entirety, often thousands of pages. Hundreds of those pages might relate to her impairment, but not be in any way relevant to the decision an adjudicator is trying to make: whether she meets the statutory definition to be found blind or disabled under the Social Security Act. In addition, this change in evidence submission duties creates a financial hardship for claimants as it can cost hundreds of dollars to get copies of records, especially for claimants who might have been treated by numerous providers and at numerous facilities.

The Task Force urged SSA¹⁴ not to move forward with finalizing this regulation in 2014 because, among other reasons, the regulation was likely to lead to extremely large evidentiary files including irrelevant information. As the Task Force feared, this new requirement is one reason file size and processing times have increased. SSA provided no evidence that this change has increased the consistency of the decisions with the statutory intent of who should be eligible for benefits.

The Task Force is unaware of any testing SSA performed about the impact this change might have on the disability adjudication process, especially in light of the long wait times and the impact that electronic medical records might have on the amount of evidence submitted pursuant to this new rule. Although the preamble in the Notice of Proposed Rulemaking (NPRM) did lay out the rationales for pursuing these changes,¹⁵ those rationales did not provide an evidentiary basis for making such a drastic change, nor did they include any data or evidence that the existing evidence submission rules resulted in people who did not meet the statutory definition of disability being approved for benefits. The Task Force was disappointed that SSA appeared not to include the potential implications for the ability of people with disabilities to be found eligible for their earned benefits in its metrics for determining whether to move forward with this significant change.

b. Procedural Barrier: Evidence Submission Rules: The “5-Day Rule”

A rule proposed and finalized in 2016,¹⁶entitled “Ensuring Program Uniformity at the Hearings and Appeals Council Levels of the Administrative Review Process” (Program Uniformity), created significant new procedural barriers for disability claimants by creating arbitrary deadlines for the submission of evidence that leads to the exclusion of relevant evidence. The Program Uniformity rule was modeled after the rules that had been piloted in SSA’s Region I (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont) since 2006. The pilot provided more than a decade of data and evidence regarding its effects on people’s ability to access their earned benefits, as well as its impact on timeliness and policy compliance of decisions. However, SSA released no evaluation of that pilot, nor did it rely on data from the pilot to justify the changes in the NPRM or final rule on Program Uniformity. Most importantly, SSA did not assess whether the changes better ensured that people who meet the statutory definition of disability are found eligible. Less importantly but still helpful in determining whether SSA ought to have made this change are efficiency and internal accuracy related questions such as: was there a noticeable difference in processing times or other measurable outcomes? What were the effects on due process for claimants? Were there more appeals to the Appeals Council or Federal Court? Did the rule lead to more complete files and therefore more accurate decisions? SSA might have such data and might even have relied upon it for its internal decision making, but the agency has not released it and did not provide it to the public or discuss it during the rulemaking process.

Some of the Program Uniformity rule’s changes, such as increasing the amount of notice that claimants and representatives receive regarding the date of a hearing from 20 to 75 days,¹⁷ are helpful. However, other changes made in this rule are extremely harmful to claimants because they allow ALJs (at their significant discretion) to exclude evidence that could prove eligibility under the statutory definition of disability, if it is submitted less than five business days before a hearing.¹⁸

The final rule requires claimants and their representatives to inform SSA about or submit all written evidence at least five business days¹⁹ before a hearing for it to be considered (colloquially known as the “5-day rule”). Although the rule contains good cause exceptions that allow an ALJ to consider evidence submitted after that deadline, the rule also appears to contradict a basic premise of the Social Security Act and a stated SSA belief that “a complete evidentiary record is necessary for us to make an informed and accurate disability determination or decision.”²⁰ It is impossible to understand how excluding from consideration evidence that SSA has in its possession is consistent with making a decision based on a complete evidentiary record. It is inefficient to exclude evidence at the ALJ hearing level when doing so could necessitate an appeal of the decision to the Appeals Council or ultimately to Federal court (if this procedural barrier does not cause the individual to abandon the appeal of this claim and file a new application entirely).²¹

This rule can also be quite confusing to claimants who are aware of it. A claimant might ask herself, “Am I required to submit this evidence? I am required to submit all evidence I have that relates to my disability, but this says the judge won’t even consider it, so what am I supposed to do?”

The Task Force believes that these requirements are inconsistent with the provisions of the Social Security Act requiring the Commissioner to make decisions “...on the basis of evidence adduced at the hearing...”²² On its face, any deadline for submission of evidence prior to the hearing appears inconsistent with this requirement in the Social Security Act. When changes to SSA rules creating deadlines for the submission of evidence were considered and rejected previously, members of Congress from both parties urged SSA not to require the submission of evidence prior to the hearing because it conflicted with the statute and ignored explicit provisions in the law.²³

Finally, this prohibition on the consideration of evidence and pre-hearing briefs that are not submitted (or SSA has not been informed about) at least five business days before the hearing is one-sided. SSA has no deadline to exhibit the evidence in the file or add information from its databases. SSA also routinely calls medical and vocational experts to testify at hearings, but claimants and representatives lack prehearing access to the evidence these experts will present.

c. Procedural Barrier: Reinstating Reconsideration in the Disability Prototype States

SSA’s FY2019 Justification to Congress proposed reinstating reconsideration in the ten states that do not currently have that stage of appeal.²⁴ Those states, referred to as prototype states, are Alabama, Alaska, California (Los Angeles North and West branches only), Colorado, Louisiana, Michigan, Missouri, New Hampshire, New York, and Pennsylvania.²⁵ In non-prototype states, reconsideration is the first step in the process of appealing an initial denial of a claim for disability benefits; it involves a different decisionmaker at the same disability determination office completing a review of the claim file.²⁶ Claimants can submit additional evidence for the decisionmaker to consider; however, the reviewing official generally does not make any efforts to obtain additional medical evidence or make any efforts to better develop the case file.²⁷

The Task Force has long supported the nationwide elimination of reconsideration²⁸ and strongly opposes SSA’s current plans to reinstate reconsideration in the prototype states. Many claimants and representatives view reconsideration as a meaningless step, a “rubber stamp,” of the decision of the original denial without any meaningful steps taken to ensure that the decision is made based on a more complete evidentiary record, as is envisioned in the Social Security Act. Although a small but not insignificant percentage of people nationwide are awarded benefits at the reconsideration level (13% in FY 2017),²⁹ this process adds yet another procedural hurdle and an average of 101 days³⁰ to the time the remaining 87% of claimants must wait before requesting a hearing before an ALJ. This procedural hurdle can cause many claimants to abandon their appeals despite the fact that they meet the statutory definition of disability.

Although the percentage of approvals at the reconsideration level nationally was 13% in FY 2017, a few states have noticeably higher approval rates. In Fiscal Year 2017 the reconsideration award rate was 21.3% in Massachusetts and approximately 18% in Wisconsin and Kansas.³¹ Although many factors contributed, in 2010, a claimants' representative made the following observations about Massachusetts' award rate:

I think the main reason for the higher rate of Massachusetts DDS reconsideration allowances is that the Massachusetts DDS is **serious about developing the evidence** necessary to make accurate determinations – at reconsideration, as well as at the initial level. Another reason is that the DDS has long specialized work in two areas that can be difficult to adjudicate – applications involving homeless individuals and HIV/AIDS claims. With specialization, the DDS examiners have developed both familiarity with the relevant treatment and expertise in the issues involved with the relevant medical conditions, providing for greater accuracy in adjudications. **A very experienced DDS examiner helps people at a large homeless shelter with applications and disability forms once a month. The DDS has found that this well-prepared documentation facilitates accurate and timely decision-making in these cases.**³² (emphasis added)

In contrast, our understanding is that SSA has no plans to require better development of the record, claimant interviews, better training and/or specialization for disability examiners to make reconsideration meaningful. SSA's plan will add time to the disability adjudication process for the vast majority of claimants, delaying the hearing stage where ALJs have a duty to develop the record.³³

SSA has completed many pilot projects and demonstrations regarding the initial and reconsideration phases of the disability determination process.³⁴ Contacting claimants early in the application process to inform them how the process works and what evidence can be helpful in proving disability can improve the ability of SSA to more quickly arrive at a statutorily-compliant decision is one common finding from those experiments.³⁵ Providing this assistance, however, would require SSA to either devote more resources to the first two steps of the application process or eliminate reconsideration and dedicate the resources currently used for reconsideration to better development of the evidentiary record at the initial level. The Task Force has consistently supported the latter approach.

SSA has focused its backlog-reduction measures on the ALJ hearings level. This is understandable given the historically long wait times to receive a decision from an ALJ, but another way to reduce hearing-level wait times is to prevent more people from having to appeal state agency denials. The Task Force has many recommendations on this topic, including: improving development of cases at the initial level by telling claimants and medical providers what evidence is useful; improving the quality of consultative exams (CE), including using treating physicians to perform CEs whenever possible and providing adequate resources to states agencies to order CEs when gaps in evidence exists; and performing additional targeted denial reviews (TDR) on initial denials.³⁶

The Task Force also supports SSA resuming issuing on-the-record decisions (OTR), when appropriate. ALJs and attorney adjudicators can issue fully favorable decisions on the record where the evidence in a claimant's file is sufficient for a finding of disability and a hearing is not necessary. Examples of this include when claimants supply evidence that meets one of SSA's more quantitative listings (for example, pulmonary function test results for respiratory listings, blood pressure measurements for claimants with kidney disease, or body mass index measurements documenting weight loss for claimants with diagnosed impairments of the digestive system). OTRs can also be issued for claimants diagnosed with impairments that by definition meet a listing (such as non-mosaic Down Syndrome) or are considered a "compassionate allowance" condition (for example, early-onset Alzheimer's disease). There are also times that a claimant may not meet a listing, but the record clearly indicates that he or she lacks the residual functional capacity to perform substantial gainful activity. After applying the appropriate medical-vocational rules, an ALJ or attorney adjudicator can issue an OTR in such a case.

OTRs have helped reduce the hearing backlog in the past. As recently as Fiscal Year 2010, senior attorney adjudicators issued more than 54,000 OTRs, but this number decreased to 1,000 in Fiscal Year 2016³⁷ and 686 in Fiscal Year 2017. Not a single senior attorney OTR has been issued since July 2017. Attorney adjudicators have instead been assigned to other tasks, including writing decisions in cases where an ALJ hearing has already occurred. Although the Task Force is aware that concerns have been raised regarding issues with the policy compliance of some OTRs, the Task Force is not aware of any publicly available study or data regarding these concerns. It is important to remember that a non-policy compliant decision is not necessarily incorrect (i.e. awarded to someone not eligible based on the statutory definition) and to our knowledge SSA has never used the avenues it possesses to review or reverse decisions they believe to be incorrect. If any OTRs did not comply with policy, SSA should provide the training and oversight necessary to ensure program integrity within these initiatives (as they do with ALJs who issue policy non-compliant decisions) rather than abandoning a successful initiative.

d. Procedural Barrier: Requiring More Information Than Is Required by Regulation for Electronic Appeals

In March 2015, SSA updated its electronic appeals system. The new system involved a “single submission” practice in which appeals were only processed when applicants completed lengthy forms not required by SSA’s regulations. These additional requirements were poorly communicated, leading to more than 61,000 people filing regulatorily compliant appeals that went unprocessed. SSA decided in early 2018, after several years of advocacy from CCD member organizations and other groups, to re-contact these claimants. Over 28,000 of these appeals are now being processed, some of them several years after they should have been, and more will be processed soon. Although we appreciate SSA’s efforts, we remain concerned that the iAppeals system still requires more information than the regulations require and that SSA has no plans to change this. The agency’s position is that because the paper process complies with regulations, it is acceptable to have an electronic process that violates them. This faulty reasoning deprives tens of thousands of claimants of due process.

V. Tilting the Playing Field Toward Denials

SSA has also changed rules governing how it weighs medical evidence, making it harder for a claimant to prove that her impairment meets the statutory requirements to be eligible for Social Security disability benefits.

a. Tilting the Playing Field: Elimination of the Treating Physician Rule: Revisions to Rules Regarding the Evaluation of Medical Evidence

These changes, proposed in 2016 and finalized in 2017,³⁸ contained a number of provisions that made it harder for a disability claimant to be approved for Social Security disability benefits. These changes included:

- Eliminating the long-standing rule that evidence from treating physicians be given more weight than evidence from consultative exams and state agency consultants who never examined the claimant.
- No longer requiring adjudicators to give any consideration to the disability determination of another entity, such as the Veterans Administration or a private disability insurer, and no longer requiring adjudicators to explain what, if any, consideration they gave to such determinations.

These changes upended longstanding SSA policy in ways that are inconsistent with both the Social Security Act and court interpretation of the Act. As Task Force members stated in comments responding to the proposed rules,

As the Supreme Court noted in *Black & Decker v. Nord*, “The treating physician rule at issue here was originally developed by Courts of Appeals...”³⁹ based on the requirements in the Social Security Act itself. SSA would exceed its authority if it eliminated the need to give more weight to treating sources than to non-treating sources through the regulatory process. The Act’s specific requirement that “the Commissioner of Social Security shall make every reasonable effort to obtain from the individual’s treating physician (or other treating health care provider) all medical evidence, including diagnostic tests, necessary in order to properly make such determination, prior to evaluating medical evidence obtained from any other source on

a consultative basis”⁴⁰ indicates that Congress recognized special knowledge that a treating source can provide regarding a claimant’s impairments and the inherent value in this medical evidence...Prior to the 1991 regulatory scheme enacted to codify the treating physician rule, courts certainly interpreted the statute that way. It is likely that courts would invalidate a regulatory change that places treating sources on equal footing with non-treating sources, given their consistent interpretations of the statute to impose a treating professional deference rule before the regulations codified that rule in 1991.⁴¹

The previous rules regarding what weight to give each piece of evidence when a claimants’ file contained evidence from numerous sources required ALJs to give “controlling weight” (the highest weight possible) to evidence from treating physicians, if it was consistent and supported. The new rules allow ALJs to assign weight based on new factors, some of which inherently give more weight to evidence from a doctor who performed a brief consultative exam or even simply a review of the paper file. As the Task Force argued in its comments urging SSA not to adopt this rule change,

SSA fails to provide a compelling rationale that treating source opinions should be placed on an even level with those of someone who completes a consultative examination or a file review, as the proposed rules would do. Even if a treating relationship is short, it is still longer than a consultative examination or a file review...our organizations strongly oppose two factors the NPRM would use to evaluate the persuasiveness of evidence: familiarity with SSA rules and having completed a review of the entire file. These factors tip the scale toward Consultative Examiner (CE) or Medical Consultant (MC) opinions and SSA does not provide a compelling rationale for including these factors. These two factors actually reflect the role of the adjudicator – being familiar with SSA rules and reviewing the entire file – and not the role of a medical source...SSA fails to provide any convincing reasons as to why being able to review the whole file and knowing SSA’s policies should be considered on an equal level to the other factors. To the contrary, the opinion of a specialist who has an ongoing relationship with the claimant, on a condition within the specialist’s area of expertise, is likely to be more accurate than the opinion of a generalist who knows SSA’s policies and reviewed the whole file in regard to that particular impairment.⁴²

The new regulation also changed how disability determinations made by other entities are considered and eliminated the requirement to articulate the weight given to those determinations. This regulation reversed a ruling issued in 2006 that argued exactly the opposite. In our comments on the proposed rule, the Task Force

...oppose[d] the proposal to rescind Social Security Ruling (SSR) 06-3p and change how disability decisions from other governmental agencies and nongovernmental entities (“other agencies”) are considered. SSR 06-3p was correct when it said “These decisions, and the evidence used to make these decisions, may provide insight into the individual's mental and physical impairment(s)” (emphasis added); the decisions themselves, and not just the evidence used to make the decisions, have value. Our organizations recognize that other agencies have different standards for determining disability and agree that SSA need not be bound by other agencies’ determinations, but it is our position that SSA adjudicators should, as SSR 06-3p currently requires, “explain the consideration given to these decisions in the notice of decision for hearing cases and in the case record for initial and reconsideration cases.” This is in keeping with the Social Security Act, which requires the agency to make determinations “on the basis of evidence adduced at the hearing.” Allowing adjudicators to ignore this specific class of evidence does not comport with the Social Security Act.⁴³

By devaluing the evidence that an individual provides from a treating physician and disregarding the findings of other entities that have assessed an individual’s impairment, SSA made it much more difficult (and the Task Force believes much more difficult than Congress intended) for a claimant to prove she meets the statutory definition of disability. SSA did not appear to take this into account when making these regulatory changes.

One explanation for these changes is that the most common reason federal courts remand cases to SSA is inadequate explanations by ALJs of the weight given to treating source opinions.⁴⁴ SSA stated when proposing

the rule that due to voluminous case files (caused in no small part by the previously discussed “All Evidence Rule”), it is not practicable for ALJs to articulate how they considered all the evidence in the file. As the Task Force argued in its comments,

Concerns about “voluminous case files” do not justify reducing adjudicators’ responsibilities. The proposed rule could amount to a denial of a claimant’s right to have his or her case decided on the totality of the evidence and a violation of the adjudicator’s long-standing duty to make a decision based on all of the evidence in the record.... People with long claims files are no less likely to be disabled, and no less deserving of due process, than people with short claims files. ... Instead of removing the articulation requirements, SSA should give adjudicators and their support staff the training and support they need to do their important work properly. Removing adjudicators’ responsibility to “show their work” will not reduce appeals and remands. A federal judiciary that currently remands many cases to the Commissioner due to articulation errors is unlikely to be more deferential to an agency that simply stops articulating at all. In fact, the courts might even find these regulations to be impermissible.⁴⁵

b. Tilting the Playing Field: Politicizing the Hiring of Administrative Law Judges

President Trump issued an *Executive Order (EO) Excepting Administrative Law Judges From The Competitive Service* on July 10.⁴⁶ The EO changed the hiring process for ALJs in agencies governmentwide from a merit-based system to a political one threatening the qualified judicial independence of these judges as is envisioned in the Administrative Procedures Act and potentially undermining the due process rights of people with disabilities and leading to denials of people who meet the statutory definition of disability as a result. Being licensed to practice law is now the only qualification an individual must have to be hired as an ALJ. ALJs hired through a politicized process are likely to be less independent from political pressure. These newly hired ALJs might feel compelled to decide matters before them in a manner preferred by the appointing agency, rather than in a neutral way that best applies the relevant provisions of the Social Security Act. It is our understanding that SSA has not yet created any guidance or policies regarding hiring ALJs under this new authority. We do not know what if any additional qualifications will be required or whether knowledge of the administrative process and litigation/hearing experience will continue to be required for newly hired ALJs under this new hiring authority. The Task Force urges SSA to put in place hiring procedures that protect the independence of ALJs and continue to require newly hired ALJs to have knowledge and experience that qualify them to make these decisions of critical importance to people with disabilities.

VI. A Note of Caution: The Impact of These Changes on Access to Representation

The disability adjudication process has become so challenging to navigate and hard to understand that it is very difficult for claimants, especially those with intellectual, cognitive, or mental impairments, to successfully navigate without the assistance of a professional attorney or non-attorney representative. Representatives provide services to claimants that are vital to the process and that SSA lacks the resources to do effectively. Representatives explain the disability adjudication process, give claimants personalized advice, help them gather and submit medical records and other evidence to SSA, and present their cases to adjudicators. These services are especially valuable to people whose severe health conditions present obstacles to navigating SSA’s policies and procedures: the very people for whom SSI, SSDI, and related health care benefits are so vitally important. The Government Accountability Office (GAO) found that claimants with representatives were allowed benefits at a rate nearly three times higher than those without representatives.⁴⁷ The already long wait times disability claimants experience will worsen if claimants lack the ability to obtain professional representation to serve these functions.

In addition to helping claimants, representatives are also a valuable resource for SSA. Representatives gather evidence that SSA would otherwise need to collect. They explain the complexities of Social Security law and policies to their clients relieving SSA staff of that task. They point out the most critical portions of often lengthy files and identify cases that can be processed in an expedited fashion. These roles help SSA run more smoothly;

indeed, when SSA's Office of the Inspector General studied why certain hearing offices experienced delays in processing disability claims, staff in those offices attributed the long processing times to the additional challenges posed by processing applications from unrepresented claimants.⁴⁸

Yet instead of recognizing the benefit to involving representatives in the disability adjudication process, SSA's new Rules of Conduct and Standards of Responsibility for Appointed Representatives (Rules of Conduct)⁴⁹ treat representatives as untrustworthy adversaries in a process where both the claimant and SSA should be working together to ensure that the correct decision is reached as expeditiously as possible.

The Task Force is particularly concerned that SSA's recent revisions to Rules of Conduct compromise professional representatives' ability to advise a claimant to seek needed medical treatment. Many claimants have no information about available medical clinics or treatment and look to their representatives for guidance. Should that provider become a source of opinion evidence, the new rules require representatives to disclose to SSA that they suggested the claimant seek treatment, likely tainting that evidence in the eyes of the adjudicator. Medical evidence, regardless of who recommended the evaluation, needs to stand on its own and be weighed against the totality of all the evidence in the case. Further, the revised rules create vague, new and unnecessary liability exposure for representatives and undermine the due process rights of claimants who may need or want the assistance of a representative - even a friend or family member - in filing their disability claims. A representative's ability to adequately advocate on behalf of his client is threatened when the representative is unclear whether his actions will lead to unnecessary sanctions.

VII. Conclusion

The cumulative effect of all these new rules - including submission of evidence, how medical opinions are evaluated, consideration of other agencies' determinations, the lack of transparency in ALJ decisions, reinstating reconsideration, requiring a "single submission" appeal, and politicizing the hiring of ALJs, all with no study as to their effectiveness, might threaten the ability of claimants to find professional representation in the future. When the rules SSA creates prevent a person who meets the statutory definition of disability from being found eligible, she might have trouble finding someone to represent her. It also makes it harder to retain and recruit professionals in the field of practice. A lack of professional representatives will make the application and appeal process more difficult for both claimants and SSA, who must now ensure that all evidence is collected and evaluated and will lead to many people losing access to the benefits to which they are statutorily entitled.

Thank you again for the opportunity to testify. CCD looks forward to continuing to work with the Subcommittee to protect this vital program for people with disabilities.

Endnotes

¹ Rehabilitation Research and Training Center on Disability Statistics and Demographics, 2016 Disability Statistics Annual Report, p. 8, https://disabilitycompendium.org/sites/default/files/user-uploads/2016_AnnualReport.pdf.

² Social Security Administration, Monthly Caseload Statistics, received via a Freedom of Information Act Request, on file with author

³ This testimony uses the phrase “Social Security disability programs” to include all benefits for individuals with disabilities under Title II of the Social Security Act (e.g. disabled workers, disabled adult children, survivors with disabilities) and benefits under Title XVI of the Social Security Act (e.g. benefits provided to adults and children provided through the Supplemental Security Income program on the basis of disability).

⁴ See Lisa Ekman, Testimony for Hearing before the House Ways and Means Committee Subcommittee on Social Security Determining Eligibility for Disability Benefits: Challenges Facing the Social Security Administration September 6, 2017, pp. 3-6 for a complete discussion of the human toll of the long wait for disability determinations from ALJs, available at: <http://c-c-d.org/fichiers/Ekman-Testimony-SS-Subcommittee-9-6-17-sign-on-final.pdf>.

⁵ Social Security Administration, Hearing Office Average Processing Time Ranking Report FY 2018 (For Reporting Purposes: 09/30/2017 through 06/29/2018) https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html

⁶ Id.

⁷ Id. Houston North has the fourth fastest average processing time and Houston Bissonet has the 104th fastest processing time out of 164 hearing offices.

⁸ See Ekman testimony, *supra* note 4, for a full discussion of the Task Force’s positions regarding the initiatives contained in the CARES plan.

⁹ 20 C.F.R. § 404.900(b), 416.1400(b). Note: The SSA regulations contain identical procedures for claimants for Supplemental Security Income benefits under Title XVI of the Social Security Act. These endnotes will reference the regulations for Title II claimants only throughout these endnotes for the sake of brevity.

¹⁰ *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).

¹¹ Consortium for Citizens with Disabilities Social Security Task Force, Comments RE: Docket No. SSA-2012-0068, Submission of Evidence in Disability Claims, April 21, 2014, p. 2-3, available at http://c-c-d.org/fichiers/CCD_Comments_evidence_NPRM4-21-2014FINAL.pdf.

¹² See 42 U.S.C. 223 (d)(1) The term “disability” means— (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

¹³ 20 C.F.R. §404.152(a).

¹⁴ See http://c-c-d.org/fichiers/CCD_Comments_evidence_NPRM4-21-2014FINAL.pdf for a full discussion of CCD’s comments to these proposed regulatory changes.

¹⁵ See 79 Fed. Reg. 9664.

¹⁶ Rule proposed in 81 Fed. Reg. 45079 and finalized in 81 Fed. Reg. 90987.

¹⁷ 20 C.F.R. §404.938(a)

¹⁸ 20 C.F.R. §404.935(a).

¹⁹ The final rule also required all pre-hearing briefs and objections to the issues in the hearing notice at least 5 days before the hearing. 20 C.F.R. §404.939. It also created a deadline of 10 business days prior to a hearing for subpoena requests for medical evidence 20 C.F.R §950(d)(2).

²⁰ 81 Fed. Reg. 45079.

²¹ See Consortium for Citizens with Disabilities Social Security Task Force Comments, Notice of Proposed Rulemaking on Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process, 81 Fed. Reg. 45079 (July 12, 2016), Docket No. SSA-2014-0052, available at <http://c-c-d.org/fichiers/CCD-SSTF-Ensuring-Program-Uniformity-comments-final.pdf>. Of additional concern is another policy prohibits a claimant from filing a new claim while pursuing an appeal to the Appeals Council. If a claimant believes that SSA will approve their claim based on evidence excluded pursuant to the 5-day rule they might want to file a new claim to get benefits immediately but cannot do so with their claim pending at the Appeals Council. “...Social Security Ruling 11-1p requires most claimants to choose between appealing to the Appeals Council and filing a new application. Claimants who choose the Appeals Council route, but whose claims are denied, and then file new applications could lose months or years of retroactive benefits even if their new applications are approved. Claimants who reapply instead of requesting Appeals Council review will also lose retroactive benefits, and processing their cases will burden SSA field offices and state agencies.” Id. at p. 4

²² 42 U.S.C. §405(b)(1). That section also specifies that “Evidence may be received at any hearing before the Commissioner of Social Security even though inadmissible under rules of evidence applicable to court procedures,” providing further support for the proposition that Congress envisioned that SSA would allow new evidence to be introduced at any point before the hearing as well as at the hearing.

²³ See CCD’s comments regarding the Program Uniformity NPRM (id. 20, p. 2-3) for a more complete discussion of the statutory conflict and Congressional response to previous attempts to make this type of change.

²⁴ Social Security Administration, FY 19 Congressional Justification, p. 25, <https://www.ssa.gov/budget/FY19Files/2019CJ.pdf>.

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- ²⁵ Social Security Administration, Program Operations Manual (POMS), DI 12015.100 Disability Redesign Prototype Model, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0412015100>.
- ²⁶ 20 C.F.R. §404.913.
- ²⁷ See 20 C.F.R. §404.920.
- ²⁸ See Nancy Shor, Testimony for Joint Hearing on Social Security Disability Claims Backlogs Subcommittee on Income Security and Family Support Subcommittee on Social Security House Committee on Ways & Means, April 27, 2010, http://www.c-c-d.org/fichiers/CCD_House_W&M_Jt_Subcomm4-27-10_FINAL.pdf for a complete history of the Task Force’s opposition to this change; see also <http://c-c-d.org/fichiers/CCD-SSTF-re-SSDI-Program-Improvements9-1-15.pdf>, p. 7.
- ²⁹ Social Security Administration, *supra* n. 24, p. 206.
- ³⁰ Social Security Administration, Annual Data for Disability Reconsideration Average Processing Time (in days), https://www.ssa.gov/open/data/disability_reconsideration_average_processing_time.html.
- ³¹ Social Security Administration, Social Security Disability and Supplemental Security Income (SSI) Disability Claims Allowance Rates1/ Initial and Reconsideration Adjudicative Level Fiscal Year 2017 by Nation, Region and State, <https://www.ssa.gov/foia/FY%202017%20SSDI%20&%20SSI%20Claims%20Allowance%20Rates%20by%20Nation,%20Region%20&%20State.pdf>.
- ³² Nancy Shor, *supra* note 28, p. 15.
- ³³ 20 CFR 404.1512(b) and 416.912(b).
- ³⁴ See William Morton, The Reconsideration Level of the Social Security Administration’s Appeals Process: Overview, Historical Development, and Demonstration Projects, Congressional Research Service (July 17, 2018).
- ³⁵ See, e.g., GAO, Social Security: Demonstration Projects Concerning Interviews with Disability Claimants, HRD-87-35, February 19, 1987, <https://www.gao.gov/products/HRD-87-35>; GAO, Social Security: Observations on Demonstration Interviews With Disability Claimants, HRD-88-22BR, December 3, 1987, <https://www.gao.gov/products/HRD-88-22BR>; GAO, Social Security: Selective Face-to-Face Interviews with Disability Claimants Could Reduce Appeals, HRD-89-22, April 20, 1989, p. 4, <https://www.gao.gov/products/HRD-89-22>.
- ³⁶ See Ekman, *supra* note 4, pp. 8-10 for a full discussion of suggestions for preventing a claimant from needlessly having a hearing when she ought to be approved earlier or without the need for one.
- ³⁷ According to Social Security Administration data, there were 109,428 on the record decisions in FY2010: 55,261 issued by ALJs and 54,186 issued by senior attorneys. On the record decisions constituted 15% of all hearing level dispositions that year. In fiscal year 2016 (through 8/23/16) only 20,113 total on the record decisions were issued, 19,226 by ALJs and 1,187 issued by senior attorneys, constituting only 3% of dispositions. Source: Email correspondence with Social Security Administration Office of Disability Adjudication and Review, August 28, 2017; on file with author.
- ³⁸ 81 Fed. Reg. 62559 (Sept. 9, 2016), 82 Fed. Reg. 5844 (Jan. 18, 2017).
- ³⁹ 538 U.S. 822, 828 (2003).
- ⁴⁰ 42 U.S.C. §223.
- ⁴¹ CCD Social Security Task Force, Comments Re: Notice of Proposed Rulemaking on Revisions to Rules Regarding the Evaluation of Medical Evidence, 81 Fed. Reg. 62559 (September 9, 2016), Docket No. SSA-2012-0035, November 8, 2016, p.7, available at <http://c-c-d.org/fichiers/CCD-SSTF-Treating-Physician-Comments.pdf>. These comments outline all of the CCD Social Security Task Forces concerns about the rules proposed in the NPRM. This testimony only highlights two of them.
- ⁴² *Id.*, pp. 10-11.
- ⁴³ *Id.*, p. 4.
- ⁴⁴ Social Security Administration, Top 10 Remand Reasons Cited by the Court on Remands to SSA, https://www.ssa.gov/appeals/DataSets/AC08_Top_10_CR.html. Treating Source - Opinion Rejected Without Adequate Articulation was the top reason for the remand of cases in Federal Court every year since 2010, accounting for 15-17% of remands in each of those years. Failure to adequately articulate why weight was given to a consultative examiner or non-examining source also resulted in remands. Nearly one-third of remands back to SSA in 2017 were the result of failure to adequately articulate the weight given to medical evidence from a particular source.
- ⁴⁵ Nancy Shor, *supra* note 28, pp. 8-9.
- ⁴⁶ <https://www.whitehouse.gov/presidential-actions/executive-order-excepting-administrative-law-judges-competitive-service>.
- ⁴⁷ <https://www.gao.gov/products/GAO-18-37>.
- ⁴⁸ <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-05-17-50268.pdf>.
- ⁴⁹ 83 Fed. Reg. 30859 (July 2, 2018). The effective date of these rules in August 1, 2018.