Legal Aid Society
OF THE DISTRICT OF COLUMBIA
MAKING JUSTICE REAL

August 26, 2016

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Carolyn Colvin
Acting Commissioner
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Re: 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

Dear Acting Commissioner Colvin:

We write on behalf of the Legal Aid Society of the District of Columbia. The Legal Aid Society of the District of Columbia was formed in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Over the years, Legal Aid attorneys and volunteers have served tens of thousands of the District's neediest residents. Legal Aid has represented and continues to represent low-income Social Security Disability and Supplemental Security Income claimants before the Social Security Administration (SSA).

We agree with and endorse the comments submitted by the National Coalition of Social Security and Supplemental Security Income Advocates, to which Legal Aid has signed on. We write to supplement those comments with observations from Legal Aid's specific experiences with our Social Security clients.

Legal Aid supports SSA's goal of having consistent and uniform rules across the nation for the submission of evidence and notice for hearings. To that end, we support an increase to the minimum required notice regarding the scheduling of hearings but believe that the period should be 75 days (as opposed to the 60 days in the proposed rule),[1] as is the current practice in Region I under 20 C.F.R. § 405.

We are very concerned about and strongly oppose SSA's proposal to close the record prior to a hearing or one that creates any deadline by which evidence must be submitted in order to be considered by an Administrative Law Judge. While such a rule might make sense if all claimants had competent attorneys, we believe that, in practice, adoption of this rule would result in the exclusion of evidence material to making a determination of disability for many vulnerable individuals including unrepresented parties and those without competent attorneys. Adoption of this rule would have a great detrimental impact on individuals who face barriers in obtaining counsel and complying with SSA's rules, including those with limited or no English proficiency, mental illness, and limited or no literacy.

[1] 81 Fed. Reg. 45,084 (July 12, 2016) (to be codified at 20 C.F.R. pts. 404, 405, 416).

Excluding material evidence may violate the procedural due process rights of claimants. Due process requires that claimants and their representatives have an opportunity to respond to medical or vocational expert testimony subsequent to the hearing or at a supplemental hearing. The proposed rule does not provide an allowance for evidence needed to respond to issues raised at the hearing. Further, the United States Supreme Court has recognized that ALJs have a "duty of inquiry" based on a claimant's constitutional and statutory rights to due process.[2] All circuit courts of appeals have well-established case law that ALJs have a duty to develop the record, which includes obtaining sufficient medical evidence. The ALJ's failure to fully develop the record may result in a court remand to obtain the missing information or to consider information that was not considered previously.[3] This duty is compromised by the time limit for submitting evidence before the hearing since it is not possible for the ALJ to meet this important responsibility if the requirement is that all evidence must be submitted or accounted for five days before the hearing.

The following are examples of real Legal Aid clients (without identifying details) who would have potentially been harmed had the five day rule been in place at the time of their hearings:

1. Clients with limited capacity who do not seek a lawyer until after their first hearing

Under the five day rule, we are much less likely to have the resources to effectively represent clients who come to Legal Aid after getting one continuance. It is our observation that it is often the most vulnerable clients (those who are clearly disabled but may not have the wherewithal to navigate the system to find a lawyer) who have the most difficulty obtaining a lawyer until after they attend their first hearing.

For instance, Legal Aid currently represents a client who has bipolar II disorder with psychosis and a 10th grade education. This client came to Legal Aid after her first hearing date was continued, and her next hearing date was coming up in less than 2 months. Under the current rules, we were able to take this client's case knowing that, if needed, we could ask the ALJ for a reasonable amount of time after the hearing to submit any medical records that we could not procure before the hearing. If the five day rule is adopted, we will have to turn away more vulnerable clients who come to us very late in the process.

2. Non-English speakers and clients with limited or no literacy

Claimants with limited English language proficiency will be at a severe disadvantage if this rule is adopted because they will be unlikely to understand the notices outlining the five day requirement. There are already widespread problems with Social Security failing to give limited English proficient claimants notices in the appropriate language. Further, many Social Security forms are not available in Spanish, let alone other languages that many of our clients use. Thus, claimants with limited English proficiency will be at even greater risk of having their SSI and SSDI appeals denied due to excluded evidence.

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[2] *See generally Heckler v. Campbell*, 461 U.S. 458, 471 n.1; *Richardson v. Perales*, 402 U.S. 389, 400 (1971).

[3] *See, e.g., Pratts v. Chater*, 94 F.3d 34 (2nd Cir. 1996); *Delorme v. Sullivan*, 924 F.2d 841 (9th Cir. 1991); *Baker v. Bowen*, 886 F.2d 289 (10th Cir. 1989). Because the Social Security appeals process is not adversarial, this duty exists whether a claimant is unrepresented, or is represented by either an attorney or a non-attorney representative. *See, e.g., Tonapetyan v. Halter*, 242 F.3d 1144 (9th Cir. 2001); *Shaw v. Chater*, 221 F.3d 126 (2nd Cir. 2000); *Henrie v. Dept of HHS*, 13 F.3d 359 (10th Cir. 1993); *Thompson v. Sullivan*, 987 F.2d 1432 (10th Cir. 1993); *Smith v. Bowen*, 792 F.2d 1547 (11th Cir. 1986); *Bishop v. Sullivan*, 900 F.2d 1259 (8th Cir. 1990).

We recently had a Spanish speaking client who was *pro se* at his ALJ hearing and came to Legal Aid at the Appeals Council stage. Substantially all of the notices this client received prior to his hearing were in English, so this client relied on friends and family who were not legal experts to convey the information in the letters to him. Even with good cause exceptions, clients like him will be in danger of losing their appeals because of an ALJ's discretion to exclude evidence.

3. **Clients with intellectual disabilities whose critical records are especially old and hard to access**

Legal Aid works diligently to find medical records for our clients, but there are often circumstances beyond our control that prevent us from securing records before the hearing. This is a perennial problem for our adult clients with intellectual disabilities who need special education records from years and sometimes decades ago in order to prove their cases.

Legal Aid recently had a client who needed special education records from decades ago to prove that she met the listing for Intellectual Disability, because she had to prove onset as an adolescent. In the District of Columbia, old public school special education records are poorly marked and kept in a warehouse staffed by a single individual who is only there part time. Despite diligent efforts from our legal assistant, the records were not available to submit until shortly after her hearing. If the five day rule had been in place, the records could have been excluded at the ALJ's discretion and the client could have lost her case.

Conclusion

The proposed rule will be most harmful to the most vulnerable—those with the most severe disabilities, those with the most significant limitations, and those with little or no resources or income—more than any other populations. It will also have a severe impact on those who must navigate the appeals process without Legal Aid or other representation.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

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Staff Attorney

Andrew Patterson
Senior Staff Attorney

Jennifer Mezey
Supervising Attorney