re: Social Security Administration NPRM Docket No. 2007-0044

My name is Robert E. Rains. I am a professor of law at the Pennsylvania State University Dickinson School of Law. I am the founder and director of that school's Disability Law Clinic. I also sit on the Board of Directors of the National Organization of Social Security Claimants' Representatives (NOSSCR). These comments are my own and do not speak for either Penn State nor NOSSCR. While I applaud all reasonable efforts to increase the efficiency of the often inefficient system of disability adjudication and review, I have significant concerns about the October 29 NPRM, as follows:

1. Overall Purpose. If the true purpose of the NPRM were, as stated, to "make the hearings process more efficient and help (SSA) reduce the hearings backlog," one would expect the proposal to be revenue neutral in the long run in terms of payment of benefits. While there might be some short term increase in benefits payments due to awards being processed faster, that should disappear in a year or two as cases work through the pipeline. Yet SSA has estimated that it will save over $1,500,000,000 in benefits payments (not savings in administrative costs) over the next ten years if the NPRM goes into effect. Moreover, this savings will be accomplished without *any* substantive change in the rules regarding eligibility for benefits. Nor is there any suggestion in the NPRM that undeserving claimants are currently being erroneously granted benefits because of some flaw in the existing administrative processes. One cannot help but wonder whether the true purpose is to deny benefits to deserving claimants.
2. Submitting Evidence to ALJ. I applaud the proposal for ALJs to give 75 days notice of a hearing and, in theory, to require most evidence to be submitted 5 days in

advance of a hearing. My concern is that your stated grounds for allowing late submission of evidence are incomplete. The rules need to specifically include:

a. Your representative was retained less than 30 days before the hearing,

b. You or your representative have made good faith efforts to obtain the evidence from the records keeper and the records keeper has failed to produce the evidence in a timely fashion, and

c. You obtained diagnosis or treatment less than 30 days before the hearing.

[See Robert E. Rains, "A Response to Bloch, Lubbers & Verkuil's 'The Social Security Administration's New Disability Adjudication Rules': A Cause for Optimism and Concern," 92 Cornell L. Rev. 249, 252, n.14 (2007).] Moreover, the critical issue is what is the appropriate remedy when a claimant or representative presents evidence at the hearing or shortly before it, without good cause. If the aim of the hearing is to try to determine which claimants are eligible to receive benefits, pretending that probative medical evidence of disability doesn't exist hardly fulfills that purpose. Surely a more appropriate sanction than refusal to consider that evidence is to continue the hearing, where necessary, to allow for full consideration of all the evidence. In the event that a representative engages in a pattern of late filing of evidence without good cause, SSA can and should take disciplinary action against the representative per 20 C.F.R. §§ 404.1740(b) and (c)(4), and 404.1745(b).

3. Stating Specific Reasons for Requesting an ALJ Hearing. Your proposed rule 404.933(a)(3) requires a claimant to state, "the specific reasons you disagree with the reconsidered determination." No rationale is given for his requirement, nor does it appear to make much sense. The typical unrepresented claimant is unlikely to be

familiar with the five-step sequential evaluation of disability, the specific requirements of applicable Listings (if any), or the Medical-Vocational Guidelines. How will this statement of specific reasons help to make the adjudicatory process more efficient? Significantly, the NPRM is silent as to the consequences (if any) of a failure to specify reasons for disagreement. Is this yet another effort to impose issue preclusion as SSA has tried unsuccessfully to do in the past? (*See Sims v. Apfel*, 530 U.S. 103 (2000).) Does this proposal mean that ALJ hearings will no longer be *de novo*?

4. Limiting Time Period Covered by the Review Board and On Remands. The NPRM proposes to rigidly limit the period of time covered by review of an ALJ's decision to the time on or before the date of that decision, asserting, "We believe this proposed closing of the record will not unduly disadvantage claimants." This appears to be a recognition that such artificial closing of the record would indeed disadvantage claimants, just not "unduly." Exactly how refusing to consider probative evidence of disability and forcing re-applications will serve either the purpose of truth-seeking or the purpose of efficiency is unclear. One cannot help but being reminded of the perhaps apocryphal engraving on the tombstone, "I told you I was sick." It appears that SSA simply does not want to know how ill claimants actually are. Many claimants are over 50 years old and in deteriorating health. Waiting them out and forcing them to file multiple applications may make good actuarial sense, but it is not good public policy. Title II claimants may lose their insured status. Title XVI claimants may die before a final favorable decision on their new application(s), often without leaving behind any of the few categories of relatives who can receive their

unpaid benefits per 20 C.F.R. § 416.542(b). And, of course, many deserving claimants are likely to give up, having been worn down by the new "efficiencies."

5. Charging for Records on Review: The proposal to charge claimants for their own records on appeal to the Review Board is odious. This new measure applies to SSI claimants, as well as Title II claimants. SSI is a poverty program designed for indigent people who lack an adequate earnings record (i.e., quarters of coverage). It is interesting that the NPRM does not even suggest how these costs will be determined. This will surely discourage claimants from filing valid appeals. It will also hit particularly hard at claimants who attended their hearing without counsel and then seek counsel on appeal to the RB.

6. The Way Forward. There is an active, practicing bar of people who work diligently representing claimants, who see the hardships their clients often undergo caused by the many inefficiencies of the current system. All our interests, and most importantly the interests of justice, would be better served by having officials at SSA establish real working sessions with claimants' groups and representatives, to come up with specific, non-draconian measures to improve the adjudicatory system, rather than imposing from above a revamping of the largely discredited DSI.

Finally, if SSA really believes that its substantive standards for determining who is disabled do not reflect current medical and vocational knowledge, then SSA should forthrightly go through APA rule-making procedures to amend those substantive standards, rather than to try the backdoor method of changing its procedural regulations to disadvantage claimants (even if SSA believes that a loss of over

$1,500,000,000 to disabled persons over ten years will not "unduly" disadvantage them).

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