

Notes from the February 7, 2008 Meeting between the Social Security Administration,
the National Organization of Social Security Claimants' Representatives,
and the Consortium for Citizens with Disabilities

The parties met to discuss the October 29, 2007 Notice of Proposed Rulemaking (NPRM) that addressed proposed changes to SSA's hearings and appeals processes. The parties reviewed a number of provisions in the NPRM that SSA had categorized as noncontroversial, including:

- §§404.901, 416.1401 Definitions
- §§404.924, 416.1424 When the expedited appeals process may be used
- §§404.925, 416.1425 How to request expedited appeals process
- §§404.928, 416.1428 Expedited appeals process request that does not result in agreement
- §§404.940, 416.1440 Disqualification of the ALJ
- §§404.943, 416.1443 Responsibilities of the adjudication officer (removed)
- §§404.948, 416.1448 Deciding a case without a hearing before an ALJ
- §§404.949, 416.1449 Presenting written statements and oral arguments (removed)
- §§404.956, 416.1456 Removal of a hearing request from an ALJ to the RB
- §§404.958, 416.1458 Notice of dismissal of a request for hearing before an ALJ
- §§404.959, 416.1459 Effect of dismissal of a request for hearing before an ALJ
- §§404.960, 416.1460 Vacating a dismissal of a request for hearing before an ALJ
- §§404.966, 416.1466 Testing elimination of the request for Appeals Council review (removed)
- §§404.967, 416.1467 The Review Board
- §§404.968, 416.1468 Appeal to the Review Board—general
- §§404.982, 416.1482 Review of final decisions in Federal district court
- §§404.983, 416.1483 Case remanded by a Federal court (except the references to §§404.977 and 416.1477, which are in the category below)
- §§404.992, 416.1492 Notice of revised determination or decision
- §§404.993, 416.1493 Effect of revised determination or decision
- §§404.999c, 416.1498 What travel expenses are reimbursable
- Part 405: Subpart A -- Introduction, General Description, and Definitions;
Subpart D -- Administrative Law Judge Hearings;
Subpart E -- Decision Review Board;
Subpart F -- Judicial Review;
Subpart G -- Reopening and Revising Determinations and Decisions;
Subpart H -- Expedited Appeals Process for Constitutional Issues
- §405.230 Effect of the Federal reviewing official's decision

Neither NOSSCR nor CCD raised any comments regarding these provisions and agreed that each was noncontroversial. The parties then discussed provisions in the NPRM that generated comments from both NOSSCR and CCD:

Proposed §§404.929, 416.1429 (Hearing before an ALJ—general)

NOSSCR noted that the regulation must make clear that any evidence obtained by an ALJ under this provision must be proffered to claimants. NOSSCR also noted that similar evidentiary language was included in provisions concerning the Review Board proceedings. They suggested that SSA retain the evidentiary language in current regulations. The Commissioner indicated that he understood NOSSCR's concerns, but would not make an immediate decision on their proposal.

Proposed §§404.955, 416.1455 (effect of the ALJ's decision)

NOSSCR proposed adding an additional section to the regulation that included language concerning cases remanded or reversed by a federal court. The Commissioner stated that those cases were intended to be covered by the regulation. NOSSCR also raised closure of the administrative record, but agreed to raise the issue when the parties discussed the relevant provision in the NPRM.

The Commissioner stated that he had spoken with representatives from the American Hospital Association (AHA) and the American Medical Association (AMA) concerning difficulties in obtaining medical records in a timely manner. The AMA was unaware there were problems obtaining medical records and believed its members were complying with all Health Insurance Portability and Accountability Act of 1996 (HIPAA) requirements. They indicated, however, that they were willing to conduct outreach sessions with members to reinforce their obligations under HIPAA. NOSSCR, CCD and SSA agreed that obtaining medical evidence as early in the process as possible was a benefit to all parties. The Commissioner stated that another method for enforcing HIPAA requirements was through the use of subpoenas. NOSSCR noted that hospitals generally complied with HIPAA and provided records, although not always as quickly as they would like. The Commissioner asked to revisit this issue later in the meeting and to consider what could be added to the administrative record to bolster any HIPAA and timeliness arguments.

NOSSCR referenced the letter to Representative McNulty, which stated SSA would issue an NPRM terminating the remainder of the DSI and issue a second NPRM on evidence-related issues. The Commissioner noted that SSA will attempt issue a final rule on the noncontroversial issues in the near future. He also noted that SSA may have to issue a new NPRM on the more controversial issues if the proposals developed by SSA are not within the scope of the current proposed regulation.

Proposed §§404.900 and 416.1400—Introduction

All parties agreed to return to this provision after determining the issues that would be revisited by SSA.

Proposed §§404.911 and 416.1411—Good cause for missing the deadline to request review.

NOSSCR asked whether good cause applies to all levels of adjudication or only to appellate determinations. The Commissioner responded that the issue is discussed in provisions distinguishing between obligations of claimants and representatives.

Proposed §§404.933 and 416.1433—How to request a hearing before an ALJ.

SSA agreed not to make a final decision on adding e-requests until appropriate SSA systems are in place. NOSSCR referenced language in paragraph (a)(4) where the NPRM states that an impairment "prevents you from working." The Commissioner said that SSA would look at this language again and that we may go back to language currently in Part 404. NOSSCR also noted that there was a reference to the Philippines in paragraph (c)—SSA agreed to examine whether the reference was still relevant.

Proposed §§404.935(d) and 416.1435(d) (subpoenas)

The Commissioner explained that the Agency is considering something substantially different than what the NPRM proposed and that would require another NPRM. He asked what NOSSCR would think of a proposal imposing no time limits on subpoena requests but requiring representatives to electronically file a brief statement of facts regarding attempts to obtain records and an allegation of frustration in those attempts either under HIPAA or state law. The Agency would either automatically, or on a case-by-case basis, refer such statements to the Department of Health and Human Services (DHHS) and/or to the Joint Commission (an organization that accredits and certifies health care organizations and programs in the United States). A NOSSCR representative indicated that no time limits on subpoena requests would be ideal. He explained that individual medical providers present more of a problem for obtaining medical records than hospitals. Hospitals eventually send the requested records. He also noted that the proposal would not help claimants to obtain psychotherapy notes, which are excepted from the HIPAA requirements. The Commissioner asked NOSSCR to provide him with information on the barriers they experience in obtaining medical records. He stated that the Agency would go back to the current rules for requesting subpoenas pending further consideration of the issue and development of an electronic subpoena request system.

Proposed §§404.936(a) and 416.1436(a)—Time and place for a hearing before an ALJ

NOSSCR questioned whether SSA would consider obtaining the claimant's consent before scheduling a hearing. SSA noted that it would consider NOSSCR's proposal. NOSSCR also raised the issue of reasonable notice—SSA again indicated they would consider this issue and asked that the parties return to it later in the meeting while discussing the more controversial provisions. The Commissioner also noted that SSA was evaluating docketing and scheduling issues and he indicated SSA would hold off on any decisions until additional proposals were in place. In relation to the 5-day rule, the Commissioner noted that SSA was not ready to discuss docketing and queuing techniques that may achieve what is currently in the NPRM.

Issues include the possibility of claimants jumping the hearing queue if ready to proceed, the ability of SSA to manage the hearing docket, properly utilizing the capacity of hearing offices, and the ability of claimants to obtain a faster hearing date if they are ready to proceed on short notice.

CCD noted that electronic files are helping claimants and SSA to get cases ready for hearing more quickly and claimants should be allowed to electronically contact hearing offices when they are ready to proceed with a hearing. SSA responded that systems are not yet in place to handle those types of electronic requests, but we welcomed other similar suggestions on this issue from NOSSCR and CCD.

NOSSCR noted that the more serious cases in the hearing queue—people losing homes or physically suffering—should be able to be prioritized. SSA agreed that the advocates and SSA need to work together to address this issue. One NOSSCR representative suggested that the Model Code of Judicial Conduct, as adopted by the American Bar Association, should be used by and applied to ALJs.

Proposed §§404.935 and 416.1435 (5-day rule)

The Commissioner expressed surprise at the strong reaction to this proposal, particularly since the 5-day rule was already operating in the Boston region, there had been no complaints raised about it, Congress wanted the Commissioner to roll out the DSI process (which includes the 5-day rule) faster nationwide, in the October 29, 2007 NPRM, and the proposed 5-day rule was combined with the proposal to restore a claimant's right to administrative review of the ALJ decision. He invited discussion of alternatives for improving faster submission of evidence.

One NOSSCR representative stated that he has had to submit records at the last minute at the hearing simply because the records he sent earlier had not been associated with the file. In his experience, representatives send the evidence as soon as they receive it, but that evidence is often not in the file at the time of the hearing. The Commissioner acknowledged that ALJs have noted this problem, as well. Another NOSSCR representative raised an example from the Boston region where an ALJ would not accept late evidence, even though the physician had just provided it, unless the representative had submitted a subpoena request 2 to 4 weeks before the hearing. The NOSSCR representatives identified three categories for the late evidence problem:

1. The representative sent it timely but ODAR didn't associate it with the file;
2. The representative had the evidence but did not submit it timely;
3. The evidence was not available earlier for good reason (e.g., the physician provided it at the last minute and it finally identifies a disabling impairment that has been the claimant's problem all along).

One NOSSCR representative suggested waiting to see if the 75-day notice will take care of the late evidence problem. Another indicated that the Agency should sanction representatives who do not submit timely evidence that is available to them. He suggested that the Agency cut that representative's fees by half. The Agency has representative sanctions provisions in the regulations, but they are not often used.

NOSSCR also proposed allowing representatives to postpone a case for development without hearing offices delaying the case for a significant period of time.

The Commissioner indicated that SSA will hold off on implementing the 5-day rule pending further consideration of the issue. With regard to the 75-day rule, the Commissioner noted that he was inclined to adopt that provision but would withhold judgment on the postponement issue.

He also noted that the root cause for the 5-day rule was that medical records were not being produced timely, leading to inefficient hearings. There was no intent to be punitive, nor was there any effort to limit claimants' rights. NOSSCR acknowledged the Commissioner's concerns, noting that the ALJs need the full record when holding a hearing and representatives need some flexibility concerning when and how to complete the record.

With regard to subsection (d), *Subpoenas*, issues were raised concerning the enforceability of subpoenas, the creation of a new workload for ALJs and representatives, and the release of psychotherapy records (HIPAA issues). One suggestion from NOSSCR was to eliminate the time-limited nature of the subpoenas. The Commissioner suggested that representatives file subpoena requests electronically, including a statement of facts, so the SSA can forward the subpoena to the DHHS and to the Joint Commission for enforcement if necessary. NOSSCR noted that most difficulties in obtaining evidence arise with individual doctors rather than hospitals or other medical organizations. The Commissioner responded that referring instances of noncompliance by individual doctors to the Joint Commission was still an effective enforcement mechanism because of the increasing consolidation of the health care industry.

The Commissioner stated that SSA will work on its electronic systems for receipt of subpoena requests, but in the near term, SSA would maintain the same procedures for issuance of subpoenas.

Proposed §§404.936(c) and 416.1436(c) (telephone hearings)

The Commissioner explained that the Agency would use telephone hearings only in two situations: (1) prisoners who cannot have an in-person hearing because the facility will not allow it and (2) claimants whose physical or mental impairment(s) makes it difficult for them to attend an in-person hearing. Claimants in the second category would have the option of having an in-person hearing or a telephone hearing. The NOSSCR representatives indicated agreement with this provision.

Proposed §§404.938 and 416.1438 (notice of a hearing before an ALJ)

There was no disagreement on this proposal.

Proposed §§404.939 and 416.1439 (objections)

We agreed to return to the current rules on objecting to the time and place of the hearing and to issues to be considered at the hearing, pending further consideration.

Proposed §§404.944(a) and 416.1444(a) (who can attend the hearing)

The public comments raised concerns about the ALJ excluding family members and others from the hearings. The Commissioner explained that he does not have any conceptual concern with family members being at the hearing for the claimant's support, but he does not want the hearings to be open to the public. The spaces are very small. One of the NOSSCR representatives noted that some claimants may not have family members but may want caregivers, attendants, or others who are not family at the hearing for support. Another NOSSCR representative raised a concern about segregating witnesses at the hearing. The Commissioner stated that the Agency would come up with some language to allow certain people to attend the hearing to support the claimant but also provide for witness segregation.

Proposed §§404.946(c) and 416.1446(c)—Collateral estoppel—issues previously decided.

Several questions were raised by NOSSCR and CCD regarding the proposed language. The Commissioner said that since we are not proposing changes, stick to the status quo for the time being. We will welcome any proposed alternative language.

Proposed §§404.951(a) and 416.1451(a)—Official Record.

NOSSCR posed questions regarding what should be included in the "official record". We agreed to revisit the language.

Proposed §§404.952 and 416.1452—Consolidated hearing before an ALJ.

The issues concerning holding a consolidated hearing contained in paragraphs (a)(1)(ii) and (a)(2) should be resolved if closing the record issue is resolved.

Proposed §§404.953 and 416.1453—Decision by the ALJ.

Questions were raised by NOSSCR and CCD about the definition of "key data" in paragraph (b). We agreed to redraft the language to allay their concerns.

Proposed §§404.957(b) and 416.1457(b) (dismissal of hearing request for failure to appear at prehearing conference)

The Commissioner noted that dismissal may be too harsh for unrepresented claimants. He asked for NOSSCR's reaction to returning to the 7 days notice for a prehearing conference, instead of "reasonable" notice, as proposed. He also asked about tracking what the Federal courts do for parties who fail to appear for prehearing conferences. A NOSSCR representative indicated that the Federal courts do not have a standard approach. NOSSCR wished to further discuss this proposed provision after the meeting. The Commissioner agreed to take another look at the issue.

Proposed §§404.961(b) and 416.1461(b) (prehearing statements)

NOSSCR's concern was that an ALJ might penalize a claimant who failed to address one of the matters specified in proposed §§404.961(b)(2) and 416.1461(b)(2). Representatives from ODAR explained that the provision was really meant to address appeals for which it was fairly certain that the claimant would not appear at the hearing. The Commissioner indicated that the Agency would rewrite the provision to clarify that there will be no penalty for failing to include all of the elements. He agreed to change §§404.961(b)(2) and 416.1461(b)(2) to say "If a prehearing statement is requested, a prehearing statement should discuss briefly the following matters:".

Proposed §§404.969 and 416.1469—How to appeal to the Review Board.

NOSSCR asked SSA to define "representatives." Is a representative someone who receives payment for services? Are they certified? Can the system distinguish among different kinds of representatives? The Commissioner agreed to go back and discuss this issue.

Proposed §§404.970 and 416.1470—Review Board initiates review.

The proposed language will stay and the Commissioner agreed to accept any comments from NOSSCR/CCD.

Proposed §§404.971 and 416.1471 (standard of review)

The Commissioner stated that he was not interested in revisiting the substantial evidence standard and the Agency will drop the harmless error standard. The NOSSCR representatives indicated that they had no comment about the abuse of discretion standard.

Proposed §§404.972 and 416.1472 (scope of review—period of time adjudicated)

The NOSSCR representatives said they will get back to the Commissioner if they have any issues with this provision.

Proposed §§404.973(d) and 416.1473(d) (scope of review—evidentiary record before the RB)

The public comments suggested that the regulation affirmatively state that the claimant can review and rebut new evidence obtained by the RB within 30 days. The Commissioner agreed that we can do that. The Acting Deputy Chief of Staff explained that this provision was meant to cover the situation where the RB thinks it can allow a case if it gets a certain piece of evidence quickly. It works in conjunction with proposed §§404.974(d) and 416.1474(d), which says "unless to do so would adversely affect your rights."

Proposed §§404.974 and 416.1474 (obtaining copies of evidence/filing briefs)

The Commissioner stated that we will drop the provision requiring payment for copies of evidence. There was discussion of extending the time period for filing briefs, possibly to 30 days from the date the compact disc of the record is received. The Agency will continue to discuss internally.

Proposed §§404.975 and 416.1475—Actions that the Review Board may take.

NOSSCR and CCD representatives raised issues about what the definition of "substantial evidence" means. Different people will interpret the phrase differently. The Commissioner agreed to go back to the current law/regulations.

Proposed §§404.976 and 416.1476—Dismissal by Review Board.

The Commissioner suggested that SSA work this out internally.

Proposed §§404.977 and 416.1477 (limitation of scope of review on remand)

One NOSSCR representative asked how this provision benefits the Agency, the ALJ or the claimant. Another NOSSCR representative said the ALJ should just adjust the onset date on remand as appropriate. The Acting Deputy Chief of Staff explained that it is very expensive and burdensome for ODAR to develop the evidence for the periods of time between the ALJ decision and the remand. That development is better handled at the DDS. The provision does not preclude the claimant on remand from providing evidence after that date of the first ALJ decision if it relates to the period before the first ALJ decision. A NOSSCR representative expressed strenuous objection to the requirement to file a new application. The Commissioner stated that we will step back from the proposal and consider possible alternative ways to approach the issue.

Proposed §§404.989 and 416.1489 (good cause for reopening)

The Commissioner indicated that we will reconsider this provision because it works in concert with the 5-day rule.

Actuarial figures

The Commissioner explained that the Actuary scored the NPRM after the Agency developed it. The Commissioner thought the proposals would cost money, but, under actuarial principles, the Actuary had to use the full roll-out of DSI to compare against, which resulted in a savings. The Commissioner was disappointed that people thought the Agency was trying to save money by cutting benefits.

Wrap-up

The NOSSCR representatives agreed to provide any further comments on the issues discussed to the Acting Director of the Office of Regulations.