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Commissioner of Social Security  
Office of Regulations  
Social Security Administration  
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re: Document ID SSA-2007-0044-0001  
Document Title Amendments to the Administrative Law Judge, Appeals  
Council, and Decision Review Board Appeals Levels

- 20 C.F.R. §§ 404.972, 416.1472 — Scope of review – period of time adjudicated
- Administrative Issue Preclusion
- Continuing Disability Reviews and Closed Periods
- Treatment of Subsequent Applications

Dear Commissioner:

I. Introduction

These are comments about the October 29, 2007 proposed regulations 20 C.F.R. §§ 404.972 and 416.1472 captioned “Scope of review – period of time adjudicated” and related issues. I refer below to only § 404.972 as § 416.1472 is identical to it.

II. The Proposed Regulations Do Not Address the  
Fundamental Issue of Administrative Issue Preclusion.

Section 404.972 and the proposed regulations generally are inadequate because they do not address the fundamental issue of administrative issue preclusion.

A. Administrative Issue Preclusion Concerns the Finality of  
of an Issue Addressed in Administrative Proceedings.

There are two types of res judicata: claim preclusion and issue preclusion. See Baker v. General Motors Corp., 522 U.S. 222, 233 n.5 (1998) (distinguishing between claim and issue preclusion). Administrative issue preclusion refers to the doctrine giving finality to an

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administrative determination of an issue, e.g., the assessment of a claimant's residual functional capacity. If an ALJ determines that a claimant can do "light" work through a certain date and if the ALJ's decision is administratively final, the doctrine of administrative issue preclusion could in theory require an Agency adjudicator addressing a subsequent period to rule similarly that the claimant can do "light" work unless there are new facts justifying a different residual functional capacity.

B. The Agency Currently Denies That Administrative Issue Preclusion Applies to Proceedings for Disability Benefits.

Under the regulations in effect today, the Agency denies that administrative issue preclusion applies to proceedings for disability benefits. Rather, Agency policy dictates that an Agency adjudicator must render a de novo determination concerning a factual issue regardless whether a prior adjudicator addressed that issue. The Agency makes an exception to this policy only via Acquiescence Rulings. See AR 97-4(9); AR 98-3(6); AR 98-4(6); AR 00-1(4). Therefore, except in the Fourth, Sixth, and Ninth Circuits, an adjudicator who considers a period subsequent to an adjudicated period gives no weight to the prior adjudicator's specific factual conclusions, e.g., that the claimant can perform "light" work.

C. Given the Proliferation of New Adjudications Under the Proposed Regulations, the Agency Should Clarify Its Policy Regarding Administrative Issue Preclusion.

Doubtless one of the main consequences of § 404.972 will be the proliferation of discrete administrative determinations. Under § 404.972, ALJs adjudicating benefit claims on Review Board and court remand will address only the period of time the first ALJ adjudicated. Consequently, § 404.972 will result in a proliferation or cascade of ALJ decisions. Given this likely consequence, the Agency should state expressly whether its current policy against application of administrative issue preclusion, e.g., to the determination of a claimant's residual functional capacity, applies under the proposed regulations.

Further, if the Agency indeed believes that administrative issue preclusion is inappropriate for the regime under the proposed rules, it should consider rescinding the ARs concerning administrative issue preclusion.

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D. Administrative Issue Preclusion May Be Inappropriate Since the Proposed Regulations Emphasize Procedural Streamlining Over Truth Finding.

There is one central theme of the proposed regulations: the exclusion of evidence not submitted before the ALJ renders his or her first decision. Certainly there are exceptions, but they are so narrow that they cannot be reasonably understood to mitigate the procedural streamlining under the proposed rules. Thus, the truth of the matter whether a claimant is indeed disabled is subordinated to the need to close the record. It should not be controversial to say that the proposed rules will result in more incorrect benefit denials than under the existing rules. In fact, the Agency concedes expressly that fewer benefits will be awarded under the proposed rules precisely because under the proposed rules much additional evidence available today to ALJs will be excluded in the future. Because there will be more incorrect benefit denials under the proposed rules, the Agency should not apply administrative issue preclusion under the proposed rules. Application of that doctrine would compound the erroneous denial of benefits.

III. The Proposed Rules Conflict With the Method for Determining Continuing Disability and Closed Periods of Disability.

The proposed rules, including § 404.972, conflict with the current method for determining continuing disability and closed periods of disability. See 20 C.F.R. § 404.1594 (2007). Under the current rules, an adjudicator may determine that a disability ceases only after a finding of medical improvement. 20 C.F.R. § 404.1594 (2007) (interpreting, *inter alia*, 42 U.S.C. § 423(f)). Under current rules, an adjudicator may not find that a claimant's disability ceases unless the claimant is no longer disabled. Under the proposed rules, an ALJ on Review Board or court remand must find that a claimant's disability ceases no later than the date of the ALJ's prior decision.

IV. The Proposed Rules Are Unreviewable Without Specification of the Complex Rules for Subsequent Applications.

Under the proposed rules, necessarily there will be a proliferation of new applications: a claimant's application adjudicated by an ALJ will not "float" forward on Review Board or court remand. Rather, on Review Board and court remand, the ALJ will address only the prior period adjudicated. The Agency currently has complex rules (developed over a period of many years) for handling subsequent applications. See HALLEX, § I-5-3-17.<sup>1</sup> Without knowing how

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<sup>1</sup> Available at [http://www.ssa.gov/OP\\_Home/hallex/I-05/I-5-3-17.html](http://www.ssa.gov/OP_Home/hallex/I-05/I-5-3-17.html).

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subsequent applications will be handled under the proposed rules — and the issues addressed in HALLEX, § I-5-3-17 explained — those proposed rules are unreviewable.

V. Conclusion

The proposed regulations, including § 404.972, have multiple deficiencies with respect to the period adjudicated.

Respectfully submitted,

/s/ Eric Schnauffer  
Eric Schnauffer

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