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Office of Regulations
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• 20 C.F.R. §§ 404.971(c), 416.1471(c), Harmless error

Dear Commissioner:

I. Introduction

These are comments about the October 29, 2007 proposed regulations 20 C.F.R. §§ 404.971(c) and 416.1471(c), captioned "Harmless error." I refer below only to § 404.971(c) and not the identical provisions in § 416.1471(c).

II. The Proposed Regulations Include an Improper Test for Harmless Error.

The proposed regulations purport to establish the Review Board as a true appellate tribunal. To this end, the proposed regulations include a test for harmless error:

> No error in either the admission or exclusion of evidence, and no error, defect, or omission in any ruling or decision of the [ALJ], shall require the Review Board to vacate, modify, or reverse an otherwise appropriate ruling or decision of the [ALJ] unless, in the opinion of the Review Board, there is a reasonable probability that the error, alone or when considered with other aspects of the case, changed the outcome of the decision.

20 C.F.R. § 404.971(c) (2007). This is not the test for harmless error appellate courts apply. Rather, it is a conflation of the test for a remand under part two of sentence six of 42 U.S.C. § 405(g) with the proper test for harmless error.

The proper test for harmless error does not include determining whether "there is a reasonable probability that the error, alone or when considered with other aspects of the case, changed the outcome of the decision." 20 C.F.R. § 404.971(c). Instead, the test is whether a reasonable fact-finder could have reached a different outcome if that fact-finder had not made the error identified. See Allord v. Barnhart, 455 F.3d 818, 821-22 (7th Cir. 2006) ("So only if no reasonable trier of fact could have believed Chappell-White's testimony (for example, if she'd testified that she had first met Allord before she was born), or if the administrative law judge had said that even if Chappell-White had acted on her observations of Allord's mental condition, had not referred him for work to other people, and had not been a friend, he would have disbelieved her for sufficient other reasons, would the errors that we have identified have been harmless"); Stout v. Commissioner, Soc. Sec. Admin., 454 F.3d 1050, 1056 (9th Cir. 2006) ("In light of these cases, we hold that where the ALJ's error lies in a failure to properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully crediting the testimony, could have reached a different disability determination")

III. Conclusion

While the Review Board should apply a harmless error test, it should apply the actual test that appellate tribunals apply.

Respectfully submitted,

/s/ Eric Schnaufer
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