

**Comments of the  
Association of Administrative Law Judges  
International Federation of Professional  
And Technical Engineers,  
AFL-CIO (Judicial Council 1)**

**Regarding Social Security Administration  
Notice of Proposed Rulemaking  
[Docket No. SSA 2007-0044]**

**20 CFR Parts 404, 405 and 416**

RIN 0960-AG52

**Amendments to the Administrative Law Judge,  
Appeals Council, and Decision Review Board Appeals Levels**

**(Federal Register / Vol. 72, No. 208, Oct. 29, 2007)**

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The Association of Administrative Law Judges (“AALJ”), IFPTE, AFL-CIO (Judicial Council 1) submits the following comments in response to the Social Security Administration’s Notice of Proposed Rule Making for Amendments to the Administrative Law Judge, Appeals Council, and Decision Review Board Appeals Levels.

Commissioner Astrue:

The following comments to the proposed rule making by the Social Security Administration are made on behalf of the Association of Administrative Law Judges (AALJ). Our organization represents the administrative law judges employed at the Social Security Administration and the Department of Health and Human Services. One of the stated purposes of the AALJ is to promote and preserve full due process hearings in compliance with the Administrative Procedure Act for those individuals who seek adjudication of program entitlement disputes within the SSA and HHS. The AALJ represents about 1100 of the approximately 1400 administrative law judges in the entire Federal government.

We welcome the opportunity to file comments to the agency’s Notice of Proposed Rule Making. As the agency’s stated goal, the purpose of the rules is to make the hearings process more efficient and to help reduce the hearing backlog. We are in support of many of the changes in the proposed ruling making. In fact, some of the changes are consistent with past recommendations that we have made to the agency.<sup>1</sup>

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<sup>1</sup> See, *inter alia*, AALJ’s Comments on the Notice of Interim Final Rule, Amendment to the Attorney Advisor Program, filed October 9, 2007; February 14, 2007 Statement on Behalf of the AALJ by Ronald Bernoski submitted to the Subcommittee on Social Security, Committee on Ways and Means; AALJ’s Comments to the July 27, 2005 NPRM on the proposed Administrative Review Process for Adjudicating Initial Disability Claims, filed October 25, 2005; and AALJ’s Comments on the March 4, 2005 NPRM for Medicare Part D Subsidies, Determinations and the Administrative Review Process, filed May 3, 2005.

While AALJ broadly endorses the proposed rules, we nonetheless believe that some of the rules are flawed and/or of dubious legality and should be reconsidered, revised or eliminated. Also we believe that the agency has failed to consider implementing workable alternatives to dealing with the adjudication process and backlog reduction initiatives.

### **General and Specific Comments on the NPRM**

#### Seventy-Five (75) Day Notice of Hearing

Proposed rules 20 CFR §§ 404.936(a), 416.1436(a) provide that the administrative law judge “will notify you at least 75 days before the date of the hearing, unless you agree to a shorter notice period.”

The proposed rules, apparently, only envision an initial hearing and not subsequent or supplemental hearings. Subsection (a) should be amended by placing the present text into subsection (a)(1) and by the addition of a new subsection (a)(2) which provides: “If, after an initial hearing, the administrative law judge determines that there will be a supplemental hearing, you will be notified of the time and place of such hearing at least 20 days before the date of the hearing”.

#### Closing the Record

Specifically, we endorse closing the hearing record at the time the administrative law judge issues the hearing decision, requiring all evidence that is offered for consideration be submitted no later than 5 business days before the date of the scheduled hearing, and adopting the substantial evidence test and harmless error rule on appellate review. Arguments against closing the record are not well founded and disregard the fact that a significant part of the current backlog of cases is attributable to the fact that the record now remains open up to and after the ALJ hearing as well as at the Appeals Council level. Closing the record has been suggested by leading scholars.<sup>2</sup> It is within the sound discretion afforded the Commissioner to implement rules that balance the needs of the many against the needs of the few to insure that no disabled individual must wait years before they get a hearing and receive benefits.

#### Telephone Hearings

We have strongly opposed the introduction of telephone hearings (proposed rules 20 CFR §§404.936(c), 416.1436(c)). A telephone hearing does not provide for the due process required for a constitutional hearing, the hearing required by the Social Security Act, or the procedure provided for by the Administrative Procedure Act. A telephone hearing adversely affects the ability of the administrative law judge to ascertain the identity of the participants and to determine the credibility of either the claimant or the witnesses because their demeanor cannot be observed by the judge. A telephone hearing adversely affects the opportunity of the claimant to observe the judge and what is actually going on in the hearing, including undermining the claimant’s ability to effectively cross-examine the testimony of expert witnesses. Telephone

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<sup>2</sup> See, Developing A Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications, 25 Cardozo L. Rev. 1 at 33-34 (Nov. 2003)

testimony conveys the impression that the hearing is perfunctory and not an important stage in the Social Security disability process. This type of hearing is contrary to the long standing culture and tradition of the American legal system in general and Social Security disability process in particular. The long standing feature that has distinguished the Social Security disability hearing from other parts of the process is that this is the time in the process where the claimant is given an opportunity to appear in person before a judge and present oral and written evidence which supports his/her claim. A telephone hearing is disrespectful to the claimant and detaches them from the adjudicatory process in such a way that it negatively impacts upon the claim and infringes upon their right to a constitutional due process hearing.

Telephone hearings should be permitted, if at all, only in prison cases and then only when the correction officials will not bring the person to the hearing site, video hearing equipment is not available and the person has dependents who may receive benefits as a result of the hearing. The regulation should specifically state that telephone hearings will only be permitted “under certain extraordinary circumstances such as incarceration of the claimant and where the claimant has dependents who may receive benefits as a result of the hearing”.

### Review Board

In our opinion, replacing the Social Security Appeals Council with the Review Board is more a change in form than in substance. The Social Security Appeals Council has a history of not functioning well. In fact, several years ago The Administrative Conference of the United States (ACUS) recommended that it either be improved or abolished. Since the agency has not improved the quality of the operations and decision making process of the Appeals Council, we recommend that it be abolished as recommended by ACUS. We recommend that the Review Board have limited jurisdiction, such as for appeals taken from an administrative law judge dismissal order, with most appeals from administrative law judge decisions going directly to the Federal district courts.

### Changes, Since *Perales*<sup>3</sup>, in the “Informal, Nonadversarial” Nature of Disability Hearings

Proposed rules 20 CFR §§ 400.900(b) and 416.1400(b) describe the nature of the administrative review process, including the Administrative Law Judge hearing, as consisting of an “informal, nonadversarial” process. At the Administrative Law Judge level of the process, this label is only partially true, as a matter of law, and is being misapplied by SSA in ways that perpetuate systemic contradictions – like colliding tectonic plates – in the process that, if left unchanged, must give any serious observer doubts about the efficacy of the latest plans to eliminate the backlog and prevent its recurrence.<sup>4</sup>

The Supreme Court in *Richardson v Perales*, 402 U.S. 389, at 400, having described in detail SSA’s hearing and adjudication process, remarked that “there emerges an emphasis upon the

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<sup>3</sup> *Richardson v Perales*, 402 U.S. 389 (1971)

<sup>4</sup> *See*, December 18, 2007 *Plan to Eliminate the Hearing Backlog and Prevent Its Recurrence* issued by Lisa de Soto, Deputy Commissioner, ODAR.

informal rather than the formal [which is as it should be] in order that the hearing process is understandable to the layman claimant.”

From this statement in *Perales*<sup>5</sup>, which the Agency embraced<sup>6</sup>, there arose a well-meaning but legally unsound conclusion that SSA’s hearings were “informal.” In the technical sense the term “informal” has come to be used in administrative law to refer to the formulation of an agency order under APA §§ 555 and 558 in all proceedings not subject to APA §§ 554 and 556.

The “informal hearing” label is appropriate and understandable only in the non-technical sense, namely that SSA hearings, by design, lack the formality of an adversarial process where each party coming before the decision maker is represented by an attorney and the proceeding may not be understandable to a layman. SSA hearings are “nonadversarial”<sup>7</sup> and “inquisitorial” in nature. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000). These characteristics, however, are not inconsistent with APA § 554 “formal” adjudications.

By contrast, a stark inconsistency with the APA exists if the contention is made that Social Security hearings are “informal adjudications” (in the technical APA sense) under §§ 555 and 558 of the APA. Federal agencies offering “hearings” and formulating orders for interested parties under §§555 and 558 (1) are not required by law to use an administrative law judge as that term is defined in 5 U.S.C. §3105, (2) do not purport to offer affected individuals a “full measure of due process” and (3) do not need to offer any procedure at all.<sup>8</sup>

Nonetheless, this insistence by the agency that there be no or little “formality” to the Administrative Law Judge hearing is not required by *Perales* (with the unstated but inescapable premise that the Agency’s full measure of process afforded claimants under current practice is gratuitous).

Moreover, this insistence is counterproductive and contradictory to the current realities facing the agency. SSA’s backlog has risen to an all-time high. Presently 700,000 cases are pending hearing and this number will continue to grow absent strong corrective measures.

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<sup>5</sup> Since the Supreme Court did not apply the APA in reaching its decision in *Perales*, its statement about “informal” hearings is *obiter dicta*, i.e., an opinion voiced by a judge that has only incidental bearing on the case in question and is therefore not binding.

<sup>6</sup> At the time of *Perales*, most claimants appeared before the Hearing Examiner without legal representation. Today, by contrast, approximately 70 % of all claimants who go through the four steps of the administrative review process are represented while the percentage of represented claimants at the hearing level step now exceeds 80%. See OCALJ statistics, 2004, showing 72.6% of the cases involved attorney representation and 13.8% involved nonattorney representation. These figures are not cumulative as there is some overlap in cases where there is both attorney and nonattorney involvement.

<sup>7</sup> “[T]he agency operates essentially, and is intended so to do, as an adjudicator and not as an advocate or adversary. This is the congressional plan.” *Richardson v. Perales*, 402 U.S. at 403.

<sup>8</sup> For a review of what is meant under the APA by “informal adjudications”, see Asimow’s *Guide* at § 9.04, p. 151. See also an earlier study of this same subject: P. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976) which notes that virtually no procedural protections are prescribed by the APA for informal adjudication.

1. Expressly Acknowledge Applicability of APA §554 and 556 to the Hearing Process

We strongly believe that the Commissioner should avail himself of the opportunity these proposed rules occasion and in the issuance of the final rules lay to rest past misperceptions maintained by some in the Agency concerning the legal import of the “informal hearing” label, expressly acknowledge the applicability of APA §554 and 556 to the hearing process and to its “formal” character, an acknowledgment that leading scholars in this area of law<sup>9</sup> have already made.

2. Establish Formal Rules of Procedure for the Conduct of Hearings

The proposed regulations are a step forward, but they do not go far enough to provide the changes needed to the adjudication process. The Social Security Administration has not acknowledged the changes that have evolved in its disability hearing system and has not made adjustments to deal with the complexities presented by the present system. Claimants are now represented in approximately 80% of the cases and the agency annually disburses over one billion dollars in attorneys fees,<sup>10</sup> money which is taken from past due claimants’ benefits. Forty years ago when the present hearing system was established, the agency did intend the hearings to be “informal and non-adversarial.” At that time few claimant were represented. That is not the reality today. The system must change to recognize present day realities. The agency should utilize the legal talent that appears in our hearing process and place an affirmative responsibility on the attorneys and nonattorney representatives to develop the record for their clients and establish a *prima facie* claim for disability. The agency needs to formalize its relationship with these representatives and establish mandatory Rules of Practice and Procedure. Such rules will go a long way in making the hearing process more efficient. Also, a revision, as previously proposed by SSA,<sup>11</sup> must be made to 20 CFR §404.1512(c) so that a claimant and his/her representative are put on notice that not only must a claimant prove a claim by shouldering the burden of establishing a *prima facie* case but also that the evidence submitted be “without redaction.” AALJ has advocated Procedural Rules for years. Workable rules have been prepared but lie dormant within the labyrinth of SSA’s bureaucracy.

3. Better Utilize SSA Attorney Advisors Prior to Hearing

The Social Security Administration has the responsibility to manage one of the largest adjudication systems in the world. However, SSA’s Office of Adjudication and Review is administered in a most inefficient, bureaucratic manner. The Social Security administrative hearing system has too many cases going forward to an administrative hearing. As an example, the Federal district court system has about 1% of the cases that are filed proceed to a trial. This is down from about 20% of the cases going to trial in the 1930’s. This must be compared to the Social Security adjudication system, where about 90% or more of the Requests for Hearing

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<sup>9</sup> Asimow’s *Guide*, Preface at xiii: “Today the great majority of “formal adjudications” under the APA consists of disputes about Social Security and other benefit programs.”

<sup>10</sup> Claimants’ representatives consist of attorney and nonattorney representatives.

<sup>11</sup> Federal Register, Vol. 71, No. 62 at 16444 (Mar. 31, 2006).

continue on to a full administrative hearing. Any court system with a case load of this size will reach its breaking point and this is what is happening to the Social Security adjudication system. Social Security must correct this deep flaw in its hearing system and develop a process where the cases are completely developed prior to the administrative law judge hearing and the appropriate cases are concluded by either settlement or awarding benefits without a hearing. AALJ has always been willing to advise and assist the agency in establishing a system to address the backlog in an efficient manner that is consistent with due process and the APA. However, SSA would also be best served by awarding benefits for all deserving claimants at the earliest possible time.

As an example, the reform plan introduced by former Commissioner Barnhart, Disability Service Improvement Plan, attempted to address this problem by eliminating the “Reconsideration” step at the state Disability Determination Service (DDS) level and replacing it with a position known as the Federal Reviewing Official (FEDRO). This position was to be filled with an attorney who had the primary responsibility of developing the record for the administrative law judge hearing or awarding benefits “on the record” where appropriate. The Association of Administrative Law Judges worked cooperatively with Commissioner Barnhart in support of the DSI plan. It appeared that SSA had finally righted itself. DSI was on the correct track. DSI was a long term solution that was fully developed for testing and a phased-in implementation. However, this reform was almost immediately abandoned by her successor without an adequate “pilot” to test its effectiveness. The rejection of DSI is a severe blow to addressing the backlog.

#### 4. SSA Attorney Advisors as Non-Adversarial Government Representatives at Hearing

Another comprehensive model that could be employed would be to use SSA Attorney Advisors as “non-adversarial” government representatives at hearing. The representative would have the authority to develop the medical evidence for the administrative law judge as well as to either settle the case or recommend awarding benefits when appropriate without a hearing. However, in addition to the proposal number 3 above, the government representative could also appear at the administrative law judge hearing, when the claimant is represented by a private attorney, in order to explain any issues that need to be resolved in deciding the claim. In unrepresented cases the government representative would assist/advise the claimant in developing his/her case<sup>12</sup> and appear at hearing in an ombudsman’s role on behalf of the claimant.

#### 5. Assigning Attorney Advisors to the Case Dockets of Particular ALJs

Yet another model provides for current Social Security staff attorneys to be assigned to the case dockets of a particular judge. The staff attorney would have the responsibility to develop the

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<sup>12</sup> Efforts to reduce the backlog and protect an unrepresented claimant’s right to due process are, and will continue to be, impeded by the emergence of the electronic folder as the predominant mode of the assembling and bringing to hearing claimant’s record of evidence. Many, many unrepresented claimants are challenged by English-language literacy issues compounded by computer use illiteracy. No hearing can be fair which is preceded by offering such an individual a computer disc and expecting the individual to review his or her evidence on a computer monitor without assistance, if required. Clerical staff are now utilized in the hearing office to service this need but such staff (1) are not as attuned to the due process question of an “opportunity to review the evidence” in a case as an Attorney Advisor will be and (2) to the extent they must perform this function, staff then are not available, as projected by the agency, to attend to their supportive role in working down the backlog.

medical record in the case for hearing and recommend settlement or award of benefits to the administrative law judge, on the record, in appropriate cases without a hearing. AALJ supports a close working relationship between staff attorneys and individual administrative law judges. Changes, such as these suggested, are needed because the Social Security Administration can no longer afford the luxury of conducting a hearing before an administrative law judge in 90% of its cases. The current Commissioner of Social Security needs to step forward and adopt long term solutions, such as these suggested.

### Conclusion

Thank you for the opportunity for commenting on your proposal. We look forward to working with you and your staff in meeting and overcoming the challenges that lie ahead.

Dated: December 28, 2007

Respectfully Submitted, on behalf of the AALJ  
National Executive Board, by

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