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These comments are respectfully submitted on behalf of the Association of Administrative Law Judges (AALJ) in response to the Notice of Proposed Rulemaking (NRPM) regarding *Setting The Time And Place for a hearing before an Administrative Law Judge*, 73 Fed. Reg. 66564 (November 10, 2008), Docket No. SSA-2008-0033.

The Social Security Administration (SSA) is proposing an amendment of the current and longstanding regulatory practice that authorizes the administrative law judge to set the time and place for hearing in an attempt to force administrative law judges to hear and decide more cases on an annual basis. SSA estimates that the proposed changes will cost taxpayers \$1.2 billion. The current regulation (20 C.F.R. § 404.936 and §416.1436), reads in pertinent part as follows:

The Administrative Law Judge shall set the time and place of the hearing.

The proposed amendments will change these regulations to allow the SSA to set the time and place for hearings. The introductory sections give various and often conflicting reasons for proposing this regulatory change:

1. To increase "productivity of those judges who are not processing a sufficient number of cases"
2. To use this authority "only when productivity is below what we need to meet our goal"
3. Then, in the very next sentence, SSA apparently contradicts itself: "Further, this proposal would assist in developing the electronic scheduling initiative"
4. If hearings are not being performed as SSA wants, it "will use all available existing authorities to correct that situation" and
5. However, SSA's "current rules do not provide adequate avenues where judges do not schedule enough cases."

In addition, SSA maintains that "some" judges do not always present the scheduling staff with sufficient available hours to process the number of cases needed to reduce the backlog of pending hearing requests. However, it also states that it expects "to exercise this authority [to schedule hearings] in only those situations where a judge is not scheduling the number of hearings that we consider sufficient."

The SSA estimates that the proposed rules, if finalized, would increase program costs by \$1.2 billion through fiscal year 2018 due to increased benefit payments arising from the increases in final dispositions.

While AALJ strongly supports proposals that will reduce the disability case backlog, AALJ opposes the adoption of these regulations for several reasons:

1. The proposed regulations violate the Administrative Procedures Act (APA).
2. The proposed regulation fundamentality changes a longstanding process that has worked well for many years.
3. The proposed regulations do not provide additional staffing positions.

We believe that the proposed changes would also have a negative impact on the claimants who are engaged in the hearing process. We also believe that the changes are unnecessary because the proposed regulation, if implemented only as stated, would impact only a very small number of judges. Furthermore, AALJ asserts that the regulatory language is too vague (*i.e.*, the factors that will trigger the action by the Agency), and the in-coming Administration may have other plans regarding how to tackle the case adjudication backlog at SSA.

The Proposed Regulations Violate The Administrative Procedures Act

Currently, judges are appointed under the APA, which guarantees “decisional independence” from undue agency influence. Prior to the passage of the APA, the impartiality of hearing examiners (now called administrative law judges) was called into serious question. With the passage of the APA, Congress decided “... to make hearing examiners a special class of semi-independent . . . employees by vesting control of their compensation, promotion, and tenure into the Civil Services Commission (now the Office Of Personnel Management) to a much greater extent than in the case of other federal employees”. As such, Congress ensured that the judges would have the decisional independence necessary to impartially hear and decide the cases before them while allowing the Agency to promulgate the rules that guide the exercise of their decisional independence.

In order to ensure “decisional independence” under the APA, the Agency must provide its judges the full opportunity to provide a fair, impartial, and independent adjudication of the claims which our citizens have against the federal government. The scheduling of hearings by a central component or unfamiliar staffer will have a deleterious impact on “decisional independence” and will negatively impact the adjudication process.

Confidence in the legal system has always been a hallmark of America life. Our Nation will be worse off if the citizen’s trust and confidence in the legal system is diminished or fails.

Today, one cannot read a newspaper or listen to a newscast without realizing that our nation’s judges are affecting human life more deeply, and on more matters, than ever before in our history. This fact is abundantly clear today in the Social Security disability

adjudication process. The print and visual media have flooded our airwaves and newspapers with stories concerning the social security backlog and the unmet and pressing needs of America's disabled citizens.

The administrative law judges are the most visible judges in the federal judiciary. It has been stated that if ever an American citizen will appear before a federal judge, it will probably be before an administrative law judge. By hearing social security benefits cases in over 700 cities and towns scattered throughout our nation, the administrative law judges provide the American people an opportunity to fairly petition their government for the redress of grievances.

Over the past several years, SSA's disability claims backlogs have grown to unprecedented levels, with more than 1.3 million Americans currently waiting for a decision regarding their claim. Backlogs are particularly severe for the more than 765,000 Americans who have had their cases denied at an earlier stage of the process and have requested a hearing before an administrative law judge. These individuals now wait an average of 532 days for a decision on their appeal.

In the past six years, these federal administrative law judges have heard and decided over 3.2 million social security cases involving issues of disability, retirement, and eligibility. While the case backlogs are growing steadily throughout this country, the waits for access to these courts are often much shorter than those experienced in either the Article III courts or in many of the other administrative law courts where people seek assistance and benefits.

The approximately 1175 federal administrative law judges hearing social security cases throughout the Nation also provide our citizens with a safe haven against the seemingly random acts of our government. In hearing these cases, judges are often confronted with claimants who have been turned down on multiple occasions by the Social Security Administration. At times, these claimants are facing serious financial and health crises, and many have all but given up hope for relief from the adverse actions of the Agency.

The Commissioner of Social Security has on several recent occasions noted that these judges have achieved "record levels" of increased productivity over recent years despite significantly dwindling support staffs and declining budgetary resources. Several newspapers have noted that the average potential lifetime payout for each social security claim exceeds \$250,000, and that these judges annually adjudicate cases that collectively total billions of dollars.

The Commissioner's statistics for FY 2007 demonstrate that over 87% of these judges issue over 300 decisions per year; that over 71% of these judges issue over 400 decisions per year; and that 79% of these judges issue between 300 and 700 decisions per year. These numbers are truly astonishing!

The new proposed changes are unnecessary due to the high productivity of the judge corps. In addition, this new authority, if approved, could provide the Agency with an

opportunity to thwart the mandates of the APA, and it could be used in improper ways to unfairly impact the hearing process. AALJ is concerned that this new NPRM may be used as an alternative disciplinary tool or as a means to coerce judges to pay more cases to provide more case production for the Agency. It is well-established that production quotas not only violate the APA, but also are inconsistent with 5 USC 4301& 4302. See *Nash v Bowen*, 869 F.2d 675 (2d Cir 1989) which holds that while production goals are a permissible exercise of Agency management, dispositional quotas are not permissible. The NRPM establishes that SSA intends to enforce its scheduling goals with mandates and discipline which converts the goals to quotas which are clearly unlawful under the *Nash* case.

The Proposed Regulations Fundamentality Changes A Longstanding Process That Has Worked Well For Many Years.

For well over 35 years, administrative law judges have had the authority to determine the time and place of hearings. The original drafters of this regulation clearly understood that judges are the ones best suited to determine when a matter is ready to be heard and to determine what other factors need to be considered in order for the hearing to be scheduled. The practice has been largely effective in resolving the massive and unprecedented caseloads over these many years. There is no demonstrated need for a change now.

It is an essential doctrine of Social Security administrative law that the judges have an affirmative duty to assure that the hearing record is developed and legally sufficient to resolve the matters before them. In accomplishing this mandate, the judges have the legal responsibility to determine when a case is ready for hearing. While most cases may follow predictable adjudicative patterns, many cases will fall outside these established norms. Among the things that a judge must always consider when setting the time and place of a hearing are:

- 1) The need for pre-hearing conferences;
- 2) Availability of parties, witnesses, and representatives;
- 3) Motions and discovery issues;
- 4) Subpoenas;
- 5) Types and availability of expert witnesses;
- 6) Issues to resolve;
- 7) Development, admission and suitability of evidence; and
- 8) Conduct of the hearing.

The substitution of a judge's judgment in these matters may deeply impact the fundamental fairness of a hearing. Centralizing scheduling, even by the local hearing office management, can not replace a judge's discretion in considering these matters. The matter becomes much more serious and potentially abusive should the scheduling of hearings be performed by a distant management official, by a hearing clerk, or by a computer. These schedulers often will not know the case's adjudicatory needs, the trial methodology of the witnesses or parties, the difficulties the claimant may have in

traveling at certain times in some places or the scheduling requirements of claimant representatives.

Some may argue that the administrative law judges in other Agencies, such as the FLRA and NLRB, have their cases scheduled by management without any related problems. However, this overlooks the very fundamental differences between those hearings and Social Security disability hearings; their judges are not responsible for evidentiary development of the cases.

In courts and other agencies, trials and adjudications are conducted under the adversarial process. Under this system the case is developed during trial by evidence introduced by opposing counsel. The judge studies and reviews the evidence as the trial progresses. However, in Social Security disability hearings, the adjudications are conducted under the inquisitorial process, it is the duty of the judge to develop the case. Nearly all the evidence is gathered and entered into the record before the hearing begins. After reviewing the evidence, the judge often sees a need for additional evidence which must be obtained. If, at that point, the case has already been scheduled for hearing, then it will have to be rescheduled to allow time to obtain the new evidence. If the judge fails to develop the evidentiary record, as required by law, the case will be remanded on appeal for another hearing to complete the hearing record. The result will be an increase of the Social Security disability case backlog. The difference between these two adjudication systems was discussed by the United States Supreme Court in the case of *Sims v. Apfel*, 530 U.S. 103 (2000). The court stated as follows:

The differences between courts and agencies are nowhere more pronounced than in Social Security proceedings. Although “many agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking.”
..... [T]he SSA is “perhaps the best example of an agency” that is not,
.....(The most important of [the SSA’s modifications of the judicial model] is the replacement of normal adversary procedure by ...the ‘investigatory model’. Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits.

The Proposed Regulations Do Not Provide Additional Staffing Positions

A judge’s productivity is directly impacted by real-world variables such as staff support and appropriate budgetary resources. Over the past several years, support staff ratios which the agency has established at 4.5 to 5.5 per judges have reached all-time lows falling below 3.0 in some offices due to cumulative budgetary shortfalls, which have also prevented the hiring of new judges and providing our court facilities with adequate state-of-the-art equipment.

Currently, the largest single factor restraining increased productivity is a lack of prepared files ready for hearing due to a severe shortage of skilled staff. A review by GAO would disclose that every year, thousands of cases go to hearing without any significant development. Over 60% of the cases in the current backlog are waiting for

development. This NPRM does nothing to relieve the major obstacle necessary to decrease the backlog. Furthermore, the NPRM would almost certainly require the judges to schedule a minimum number of hearings per year without any concomitant requirement for cases to be prepared by senior case technicians or for decisions to be written by decision writers.

Increasing the numbers of hearings without a significant increase in staff to prepare the case files for hearing will mean cases will go to hearing with inadequate preparation, including missing exhibits and insufficient development. The current backlog of cases waiting for decisions to be written will also increase the backlog. Insufficient preparation for the hearing will also result in more hearings being re-scheduled which will act to increase, not decrease the backlog.

Without additional staffing, the backlogs will increase well into the future. However, the change in the proposed regulatory will not diminish the backlog in any appreciable manner.

Conclusion

In conclusion, we restate our objection to these proposed regulatory changes, and we recommend that SSA withdraw this proposed rule.



Ronald G. Bernoski,
President, Association of Administrative Law Judges

The Association of Administrative Law Judges (AALJ) 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. The AALJ represents the majority of the approximately 1400 administrative law judges in the entire Federal government. The AALJ President, Ronald G. Bernoski, may be reached at rbernoski@wi.rr.com.