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1-31-2020

Letter to Commissioner Andrew Saul Re: Notice of Proposed Rulemaking on Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588 (November 18, 2019)

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Recommended Citation

Dixon, Tyler and Cheung, Tiffany, "Letter to Commissioner Andrew Saul Re: Notice of Proposed Rulemaking on Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588 (November 18, 2019)" (2020). *Writings from the Bet Tzedek Clinic*. 2.
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January 31, 2020

Commissioner Andrew Saul
Social Security Administration
6401 Security Boulevard Baltimore, MD
21235-6401

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking on Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588 (November 18, 2019), Docket No. SSA-2018-0026.

Dear Commissioner Saul:

These comments are submitted on behalf of the Bet Tzedek Civil Litigation Clinic at Benjamin N. Cardozo School of Law.

The Bet Tzedek Civil Litigation Clinic (“Bet Tzedek”) is a pro bono clinic, staffed in large part by law students, which serves older people and people with disabilities seeking health, disability, and housing benefits that they could not get without Clinic assistance. By the virtue of our extensive experience representing clients in Social Security Administration (“SSA”) matters—including hearings, appeals, and federal court review—we write to comment on the proposed rule changes, which we believe will harm our clients and further hamper the administration of Social Security benefits.

We have two main concerns with the proposed regulation.¹ First, against the backdrop of an already overburdened agency with massive hearing backlogs and long wait times for benefits, the proposed changes will divert scarce resources toward more and more frequent continuing disability reviews (CDRs). Second, older adults nearing retirement age will face increased challenges due to more frequent, unnecessary reviews when it is highly unlikely that that they can return to work.

¹ On those issues not addressed by this comment directly, we agree largely with the January 6, 2020 comments of the National Organization of Social Security Claimants’ Representatives (NOSSCR).

I. Hearing Backlog and Wait Times for Benefits

While CDRs function only as a piece of SSA's operation, they lead to a not insignificant number of hearings, and the proposed changes will necessarily negatively contribute to the backlog that already harms hundreds of thousands of claimants. The Administration predicts that there will be "a net increase of roughly 2.6 million additional CDRs over the period from FY 2020-2029."² This serious increase in the number of CDRs will not only add to the backlog and wait times for hearings, but also further strain claimants, attorneys, translators, and limited Administration staff.

The proposed rule change comes against the backdrop of a system that already makes deserving claimants wait years for the award of benefits, especially in the New York City metropolitan area.³ Despite a stated SSA goal to reduce the backlog for applicants awaiting determinations and hearings,⁴ the average wait time for disposition of a hearing request in each of the NYC metropolitan area offices is well over a year.⁵ In Queens, for example, an average request for a hearing takes 460 days until disposition.⁶ Even the time from requesting a hearing to the hearing being held is also over a year in most New York offices.⁷ In Queens, for example, a claimant on average waits 13 months to have a hearing after they request it.⁸ These delays are also prevalent around the country; by the end of FY 2018, over 858,000 claimants nationally had requested hearings and not received them.⁹ After receiving a hearing, there is additional wait—around 810,000 more claimants were awaiting an ALJ decision at the end of 2018.¹⁰ Those who must appeal to the Appeals Council also face long delays and there are currently over 120,000 individuals who have not received the Appeals Council review of an ALJ decision that they

² Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63596 (November 18, 2019) ("We estimate, based on the best available data, that this proposed rule... would result in a net increase of roughly 2.6 million additional CDRs over the period from FY 2020-2021—1.2 million (an 18.4 percent increase) additional FMRs and 1.5 additional CDR mailer reviews.").

³ Social Security Administration, Hearing Office Average Processing Time Ranking Report, Fiscal Year 2019, https://www.ssa.gov/appeals/DataSets/archive/05_FY2019/05_September_Average_Processing_Time_Report.html.

⁴ Social Security Administration, Information About Social Security's Hearings and Appeals Process, <https://www.ssa.gov/appeals> ("[E]liminating the hearings backlog and reducing the wait time to 270 days remains one of our agency's most critical priorities."); United States Government Accountability Office, *Testimony Before the Subcommittee on Social Security, Committee on Ways and Means*, House of Representatives, GAO-18-432T at 4 (March 7, 2018), <https://www.gao.gov/assets/700/690509.pdf>.

⁵ Social Security Administration, Hearing Office Average Processing Time Ranking Report, Fiscal Year 2020, https://www.ssa.gov/appeals/DataSets/05_Average_Processing_Time_Report.html. (Queens: 460 days, New York: 456 days, Bronx: 447 days, New York Varick: 448 days, Jersey City: 397 days, Newark: 467 days, Long Island: 554 days).

⁶ *Id.* See also, Hearing Office Average Processing Time Ranking Report, Fiscal Year 2019, https://www.ssa.gov/appeals/DataSets/archive/05_FY2019/05_September_Average_Processing_Time_Report.html

⁷ Social Security Administration, Average Wait Times Until Hearing Held Report, December 2019, https://www.ssa.gov/appeals/DataSets/01_NetStat_Report.html ("Average time (in months) from the hearing request date until a hearing was held for cases closed" by hearing office. Queens: 13 months, New York: 14 months, Bronx: 11 months, New York Varick: 14.5 months, Jersey City: 11 months, Newark: 14 months, Long Island: 17 months, White Plains: 11 months.)

⁸ *Id.*

⁹ Social Security Administration, Compassionate and Responsive Service Plan: 2018-2019 Update, at 2, https://www.ssa.gov/appeals/documents/2018-2019_CARES_Plan-Disability_Hearings_Backlog.pdf.

¹⁰ *Id.* at 1. ("As of December 17, 2018, there are under 810,000 people waiting for a hearing decision.").

requested.¹¹ For the upwards of 20,000 individuals a year who appeal to the federal court level,¹² it has become normal to litigate for many years before a final determination, a frankly upsetting reality. As Social Security offices have closed throughout the nation,¹³ we further worry that individuals who need to engage with any aspect of your Administration are increasingly unable to do so within any reasonable amount of time.

Efficacy of CDRs

Inasmuch as the CDR process is designed to rightfully flag recipients who have become ineligible, CDRs actually are also forcing a significant quantity of eligible individuals to spend time, stress, energy, and money to contest wrongful initial cessation determinations. SSA's most recent accounting on CDRs, using FY 2015 statistics, reports that SSA completed full medical reviews on over 799,000 claimants and made initial cessation of benefits decisions on over 201,000 of those claimants; but that over 68,000 of those initial termination cases did not result in an ultimate termination of benefits after appeals.¹⁴ Further, 70.4% percent of initial termination decisions that reached the reconsideration level led to continuation of benefits.¹⁵ Of the 5,705 terminations at the reconsideration level, upwards of 60% percent are appealed beyond reconsideration.¹⁶ Of those appealed beyond reconsideration, an additional 32% percent still result in continuations.¹⁷ The dismal accuracy rate reflected in these stats seem to contradict the stated goal of the Administration's periodic CDR warrant to "ensure that only those beneficiaries who remain disabled continue to receive monthly benefits."¹⁸

The proposed rule changes clearly will increase the number of CDRs which SSA completes on a yearly basis and the frequency at which SSA will do some CDRs.¹⁹ In spite of the workload increase, the Administration's proposed rules neglect to craft a solution that lowers the over 34% rate of incorrect initial cessation determinations for the full medical reviews it already does.²⁰ This high rate of incorrect initial determinations based on a CDR has a more

¹¹ Social Security Administration, Appeals Council Requests for Review, Fiscal Year 2020, https://www.ssa.gov/appeals/DataSets/07_AC_Requests_For_Review.html.

¹² Social Security Administration, Federal Court Review Process (Last Accessed Jan. 30, 2020), https://www.ssa.gov/appeals/court_process.html ("We received 17,192 new court cases during fiscal year 2019.").

¹³ See Mark Miller, *Have a Social Security Question? Please Hold*, NY TIMES., Nov. 21, 2018, <https://www.nytimes.com/2018/11/21/business/social-security-service-backlog-delays.html>.

¹⁴ Social Security Administration, Annual Report on Medical Continuing Disability Reviews, Fiscal Year 2015 (2019), <https://www.ssa.gov/legislation/FY%202015%20CDR%20Report.pdf> (FY 2015 figure calculated by subtracting the 132,867 'Estimated Ultimate Cessations' from the 201,304 initial cessations). An additional 4,328 terminations were made for failure to cooperate. *Id.*

¹⁵ *Id.* at page B-5.

¹⁶ 3,248 appeals beyond reconsideration of 5,705 cessations at the reconsideration level, or approximately 57%. *Id.*

¹⁷ Note the percentage of continuation at this level has never been below 32.2 percent for a FY since 1993. *Id.*

¹⁸ *Id.* at 2.

¹⁹ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63594 (November 18, 2019) ("We propose to revise the timeframes for the frequency...to ensure that we continue to identify [Medical Improvement] at its earliest point...").

²⁰ An estimated 72,075 initial determinations to cease benefits out of 209,270 total initial determination were expected to not result in an ultimate cessation of benefits. Social Security Administration, *Annual Report on Medical Continuing Disability Reviews, Fiscal Year 2015*, at 1, 6 (2019), <https://www.ssa.gov/legislation/FY%202015%20CDR%20Report.pdf>.

significant detrimental effect on the hearing backlog, the well-being of recipients, and the goals of the Social Security Act than does the supposed infrequency of CDRs. In this regard, the aim of the proposed changes is misguided, in that it spends significant resources in doing more reviews without attempting to increase the accuracy of the reviews it does.²¹

Contributing to Hearing Backlog and Delays

Any increase in the number and frequency of CDRs negatively affects the remainder of Social Security Disability benefit applicants by increasing the need for hearings at a time when the Administration is overburdened. In general, this hearing backlog has two significant effects on claimants. First, it makes the hearings more difficult.²² Secondly, this backlog has huge negative individual,²³ social, and economic effects on recipients and applicants.

From our experience representing clients in Social Security hearings, a delay on a hearing makes preparation harder for all parties involved. As time goes on, individuals with long-term impairments often visit numerous facilities and specialists to address their issues. Facilities close, misplace records, or hire companies that can take significant time to locate and replicate copies. The unavoidable effects of time are multiplied over years. If a federal court appeal leads to a remand for failure to develop the record, it may be hard or impossible for the ALJ or client to find such old records. One reason that so many of initial determinations result in successful appeals is because of the practical difficulties in obtaining and presenting medical evidence without advocates; and almost all recipients do not obtain advocates until the hearing level.²⁴ Without an advocate to establish rapport and persistence in obtaining records and scheduling hearings, potential recipients and appellants are often unable to navigate the extremely complicated system, and many, especially seniors who do not have access to the internet, end up sitting on the phone with SSA for hours.²⁵ Because the proposed rule will result in more initial determinations of cessation, more recipients will need to seek legal help, call SSA, request hearings, and fight to not lose their benefits.

²¹ Initial determinations of a cessation of benefits which do not ultimately result in a final determination of cessation of benefits still result in the sort of overwhelming anxiety, stress, cost, and waste further detailed *infra* Section II.

²² Inspector General, Workload Review of the Office of Hearings Operations' Atlanta and New York Regions, at 3 (May 2018), <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-12-18-50285.pdf> (“The hearing offices in both regions with high average processing times (APT) had below-average staffing levels, low morale, and issues with telework, claimant representatives, and the quality of the support staff’s work”).

²³ Stephen Ohlemacher, *Disability Backlog tops 1 million; Thousands Die on Waitlist*, AP NEWS, Sep. 18. 2017, <https://apnews.com/fe671a2369194c8e9882a2e281f65357> (noting that thousands die while waiting for Social Security Disability benefits).

²⁴ A New York Regional Office employee survey ranked “Unrepresented Claimants- a lot of them” as the single biggest issue that negatively affected “processing time and productivity.” Inspector General, Workload Review of the Office of Hearings Operations' Atlanta and New York Regions, at 44 (May 2018). For a more in-depth summary of why representation in Administrative appeal hearings is so important, see Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 59–60, 79–85 (2010) (discussing the ways in which Social Security Hearings are especially difficult without legal representation).

²⁵ See Mark Miller, *Have a Social Security Question? Please Hold*, NY. TIMES., Nov. 21, 2018, <https://www.nytimes.com/2018/11/21/business/social-security-service-backlog-delays.html>.

Secondly, we note that our clients are severely negatively affected when they must engage in protracted processes to either obtain or retain their benefits. The Administration should be limiting the frequency at which thousands of recipients will have to engage with the serious stress, anxiety, and even financial instability which accompanies hearings. In order to go to a Social Security office many of our clients, who are immobile or have mental disabilities, or who do not drive and/or struggle to use public transportation, must have family members or friends miss work to drive them to the Social Security office. Even more detrimental, those individuals waiting for hearings spend their wait time in flux: waiting for the benefits that will determine whether they can keep their house, apartment, car, medical treatment, and other serious life expenses which they cannot afford without work.

II. Proposed Changes For Older Adults Nearing Retirement Age

In addition, we have substantial concerns about the mechanics by which your proposed regulation proposes to sort different recipients for review, especially older adults nearing retirement age, who comprise a significant number of our Clinic's clients.²⁶ Currently, older adults who would be 54 ½ years old when their CDR diary is due, are automatically placed in the Medical Improvement Not Expected (MINE) category.²⁷ This reflects the sensible assumption that it is highly unlikely that someone who has qualified for benefits and reached this age to suddenly be able to return to their workforce.

Based on the proposed changes, a large number of people who are 54 ½ years old and older will be significantly affected. Specifically, older adults in this group who went through the arduous process to get benefits through the 5-step sequential evaluation process²⁸, and were determined disabled at step 5,²⁹ will be subject to more frequent medical reviews because they will not be automatically subject to the MINE diary based on their age. Instead, depending on which impairment(s) they have, these individuals will have their impairment(s) considered in conjunction with their age and functional limitations, and for some, the time since they last engaged in substantial gainful activity (SGA), or none of the above.³⁰ The proposed changes include a table that lists 10 specific impairments for which the Administration will consider age and functional limitations, and 7 specific impairments for which age, functional limitations, and time out of the workforce will be considered.³¹ However, nowhere in the proposed changes is an

²⁶ We note, as a parallel, that other organizations have raised substantial concerns about this regulation's specific effect on children recipients. See, e.g., *Comment Opposing CDR Changes*, Children's HealthWatch (submitted January 27, 2020) https://childrenshealthwatch.org/wp-content/uploads/SSA-CDR-Comments_Childrens-HealthWatch.pdf.

²⁷ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63590 (November 18, 2019) ("Based on our analysis of case outcomes for CDRs on older beneficiaries, we also use [the MINE] category for cases in which the person would be age 54 ½ or older when a CDR diary would be due.").

²⁸ 20 C.F.R. § 404.1520(4).

²⁹ 20 C.F.R. § 404.1520(4)(v).

³⁰ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63593 (November 18, 2019) ("For the impairments that do not meet or equal a listing, we propose to retain consideration of the interaction of a person's age, functional limitations resulting from the impairment(s), and the time since the person last engaged in SGA when we decide if the person's impairment(s) is permanent and, thus, subject to a MINE diary.").

³¹ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63594 (November 18, 2019).

explanation provided of how and why these 17 impairments were chosen; why other impairments were not chosen; how these 10 impairments were chosen for age and functional limitations consideration; how these 7 impairments were chosen for age, functional limitations, and time out of the workforce consideration; and, why age, functional limitations, and time out of the workforce are the only relevant factors for consideration. Further, the proposed regulations do not address how SSA will assess or classify claimants with multiple impairments. Essentially, these changes will subject many older adults to more frequent reviews than they currently would receive without a justification.

Many of these claimants in New York have already waded through a frustrating and difficult backlog in order obtain their benefits in the first place. And since they did not have impairments that met or equaled a listing at step 3,³² SSA has already made a determination that they could not do return to their prior work or adjust to other work in the national economy.³³ This step 5 analysis³⁴ is hugely fact-intensive, as SSA considers residual functional capacity, age, education and vocational factors.³⁵ These older adults, who succeeded in navigating an incredibly time intensive process to prove their disability may now be subject to more frequent review under a MIE, MIL, or MIP diary when there is no compelling reason to do so. This more frequent review is especially burdensome to older adults with mental health conditions because the stress of the process will cause strain to their existing disabilities.

In addition, the proposed changes are unclear and arbitrary in various aspects as to the older adults that are not automatically subject to a MINE diary solely based on their age. First, the proposed changes do not specifically outline what threshold of an older adult's functional limitation and/or the time since an older adult last engaged in SGA that needs to be met to be subject to a MINE diary. Without this information, the public cannot adequately comment on the proposed change. Second, the proposed changes do not specifically outline what happens when an older adult is found not to be subject to a MINE diary. Third, the proposed changes do not specifically outline whether an older adult, without one of the listed 17 impairments in the table,³⁶ will be subject to a MINE diary at any point. These gaps in the proposed new classification system underscore that there does not appear to be a clear evidence-based rationale for the proposed change.

Effect of the change in frequency of MINE diary reviews

The proposed changes will change the frequency of MINE CDR reviews from 5-7 years to 6 years for all individuals who are subject to the MINE diary.³⁷ However, the Administration does not provide any persuasive medical studies or scientific data to explain why the frequency of review should be changed from 5-7 years to 6 years. The only provided reason for this change

³² 20 C.F.R. § 404.1520(4)(iii).

³³ 20 C.F.R. § 404.1520(4)(v).

³⁴ 20 C.F.R. § 404.1520(4).

³⁵ 20 C.F.R. § 404.1520(4)(v).

³⁶ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63594 (November 18, 2019).

³⁷ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63594 (November 18, 2019) (“we propose to set the review period for permanent impairments, that is, the MINE diary, at 6 years...”).

in frequency is that “[the Administration has] not identified any permanent impairments for which a 5-year review period is medically appropriate.”³⁸ This change in frequency will harm everyone subject to the MINE diary, not only older adults nearing retirement.

The already existing hurdles that burden older adults will only be exacerbated by the proposed changes which seek more frequent reviews. The previous challenges faced due to lack of understanding of the process, struggle to arrange transportation to the SSA offices, challenges to acquire medical records, troubles filling out forms, challenges to talk to doctors’ offices and hospitals, and challenges contacting lawyers and translators will still be present, but be more frequent – every 6 years. In addition, older adults who have symptoms of stress, anxiety, depression, panic, lack of concentrating, and lack of following directions will only be further frustrated, confused, and overwhelmed with the changed review process.

III. Conclusion

In conclusion, we have serious concerns about the ways in which the proposed regulation will affect the demographics that our Clinic was founded to protect. As Senator William Cohen once noted, SSA’s decisions “have profound effects on people's lives, and in many cases, represent the difference between a dignified standard of living and abject poverty for a disabled worker.”³⁹ We urge your Administration to attempt to address these concerns before going forward with this proposed rule change that would further exacerbate these problems.

Respectfully submitted,

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Legal Interns

³⁸ Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 63588, 63594 (November 18, 2019).

³⁹ *Hearing Before the Subcomm. on Oversight of Government Management of the S. Comm. on Governmental Affairs*, 98th Cong. 2 (1983) (statement of Sen. William S. Cohen, Chairman, S. Subcomm. on Oversight of Government Management).