Via Email: regulations@ssa.gov

The Honorable Jo Anne Barnhart
Commissioner
Social Security Administration
P.O. Box 17703
Baltimore, MD 21235-7703.


Dear Commissioner Barnhart:

Below are comments of the Section of Administrative Law and Regulatory Practice of the American Bar Association on the above-referenced Social Security Administration (SSA) proposed rule. You have received comments on behalf of the ABA in a September 27, 2005 letter from ABA President Michael Greco. Our Section supports the comments of ABA President Greco, and would like to offer some additional views based on the expertise within the membership ranks of our Section. The views expressed herein are presented on behalf of the ABA Section of Administrative Law and Regulatory Practice. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The ABA Section of Administrative Law and Regulatory Practice generally applauds the SSA’s proposals for innovation and has the following specific comments (and a few caveats) with respect to the major reforms. We applaud the Commissioner for her endeavor to return the emphasis to increasing efficiency while trying to provide claimants with a fair and impartial process for the administration of applications and would urge the continued strengthening of the due process hearing before an Administrative Law Judge (ALJ).

1. The rule would establish a Quick Disability Determination process through which state agencies will expedite initial determinations for claimants who are clearly disabled.

This is an excellent concept. The Section applauds this initiative.

2. The rule would create a Federal Expert Unit to augment and strengthen medical and vocational expertise for disability adjudicators at all levels of the disability determination process.

We support the concept of providing state officials and ALJs with highly qualified experts to assist
them in making sound decisions. While it makes sense to provide a pool of qualified impartial medical and vocational experts to assist the adjudicators due to the limited number of experts available throughout the country, we are concerned that the proposed creation of the Federal Expert Unit (FEU) could limit the discretion of ALJs by requiring them to call experts or even to call certain experts. However, we are also concerned that the proposed creation of the Federal Expert Unit (FEU) would limit the discretion of the ALJs to call other experts in their hearings.

There is also a potential for such “official” experts to function less as impartial experts than as government experts who might see their role as being tied to the government’s position, particularly if they are trained and paid by the agency. Should you determine to go forward with the proposed unit, we believe the following questions need to be addressed:

a. **Qualifications**—The NPRM does not specify how the FEU members’ qualifications will be established, the procedures for certification, or the body that will do the certification. These important details should be the subject of public comment.

b. **Membership selection**—The proposed rule specifies that all experts will have to have certain qualifications, but does not address whether the FEU will have a limited membership or whether it will be open to any willing, and qualified provider. All the requirements for selection (and for evaluation and retention) of experts should be clearly identified at the earliest possible date.

c. **Selection of an expert for a particular case**—The proposed rule does not address how impartial medical and vocational experts will be selected for a particular case.

It would be appropriate for a claimant to be able to object to the assignment of a particular expert because of bias or other potentially disqualifying factors.

d. **Opportunity for additional expert testimony**—The claimant should retain the right to present lay or other witnesses. The admission and weight given to any testimony should be left for the determination of the adjudicator.

e. **Relationship with the Decision Review Board (DRB)**—The proposed regulations do not specify how the management review functions of the newly created DRB will interact with the selection and assignment of the members of the FEU. We recognize that it is appropriate to improve the quality of the decision-making, but SSA should ensure that the relationship between the DRB & the FEU should not lead to any limitations on the medical opinions and expertise available to the Reviewing Official and ALJ. We want to emphasize that there should be no relationship between the DRB and the FEU that interferes with the independence and impartiality of the hearing process and the ALJ.

f. **Compensation**—We believe that the low fees that experts currently are paid has contributed to the reduction in the number of available qualified experts. We hope the agency will give attention to this issue in the future.

3. **The rule would eliminate the State agency reconsideration step in the appeals process.**

This is in keeping with a more speedy process and we support it.
4. The rule would establish federal “Reviewing Officials” to review State agency initial determinations upon the request of claimants.

We understand that the rationale for eliminating reconsideration at the state level and substituting a review by a federal Reviewing Official (RO) is to provide more accurate and consistent decisions. We agree that attorneys are more suited to this position as proposed.

We agree with the testimony by Professor Frank Bloch at the September 27, 2005 House Hearings that what is needed at this pre-hearing stage is someone who could review the initial decision and the record on which it was based, and assume active responsibility for preparing the claim for the administrative hearing and decision by an independent ALJ. As Professor Bloch testified, “[t]his would include evaluating the initial decision and the medical evidence in the record, obtaining additional evidence if needed, and, in appropriate cases, proposing to the ALJ that the claim be granted on the record without a hearing.”

Instead, the proposed rules seem to envision the RO as a sort of intermediate decision-maker—in effect a substitute for the abandoned reconsideration stage. It would be better, we think, to have the RO be assigned the task of making sure the issues are properly framed for the ALJ and making sure that the file is complete. The “Counselor” position, as proposed by Frank S. Bloch, Jeffrey S. Lubbers and Paul R. Verkuil in an article in the Cardozo Law Review is closer to the mark. The function of the Counselor is to gather evidence, narrow issues, and, where appropriate, recommend an allowance to the ALJ. The Counselor is not an advocate nor an advisor to the claimant, nor is the Counselor an advocate for the agency.

Of course these officers, whatever they are called, should be given the resources and authority necessary to develop records and move claims quickly, especially in those cases where benefits could be granted without a full due process hearing.

We also note that the RO is required to have a qualified expert from the FEU evaluate the evidence if the RO disagrees with the state agency’s determination of disability. We are concerned about the method of selection of such experts and whether it will be done solely on the basis of qualifications, or on rotation. We would be especially concerned with the fairness of the procedure if the reviewing official could select or request a particular expert.

5. The rule would preserve the right of claimants to obtain a de novo hearing conducted by an ALJ, but requires in addition that the ALJ address the RO’s rationale.

We strongly support preserving the de novo hearings provided by ALJs as an essential part of a fair

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1 Commissioner of Social Security’s Proposed Improvements to the Disability Determination Process: Joint Hearing before the Subcomm. on Social Security and Subcomm. on Human Resources of the House Comm. on Ways and Means, 108th Cong. (Sept. 27, 2005) (Hereinafter “Hearings”) (Testimony of Prof. Frank S. Bloch, Professor, Vanderbilt University Law School).

2 Id. at 4.

administrative procedure. However, we have reservations about the requirement that the ALJ provide “an explanation as to why the administrative law judge agrees or disagrees with the rationale articulated in the reviewing official’s decision.”

Our first concern about requiring that the ALJ respond to the specific rationale of the RO is grounded in the nature of a de novo hearing and the efficient use of judicial time. We expect that any ALJ decision issued pursuant to this section necessarily would contain a cogent rationale and an evaluation of the evidence. The reasons for the ALJ’s decision ordinarily would explain any differences with the RO. Any requirement that the ALJ go beyond the judicial role of evaluating the available evidence to specifically respond in detail to the RO’s decision shifts the role of the ALJ from conducting an independent evaluation of the evidence to one in the nature of appellate review in which the decisive issue is the validity of the RO’s findings of fact and rationale. (This unwelcome effect may be enhanced by the activities of the DRB, because a likely factor in selecting cases for review would be to explore the reasons for any disagreement between the reviewing official and the ALJ.)

Second, the most likely explanation for the differences in result will be the additional information available to the ALJ that was not presented to the RO. To require the ALJ to devote additional time to identifying and cataloguing the differences in evidence, particularly when the administrative record has not been carefully constructed, is an unnecessary burden. Such a burden runs counter to SSA’s goal of providing a speedier adjudication.

Moreover, we would expect that one purpose of this requirement might be to assist the agency in evaluating the competency, efficiency and effectiveness of the RO. To the extent that the ALJ’s specific review of that official’s work is also expected to provide quality management or similar information, it is inconsistent with the role of ALJ in deciding cases.

However, if the requirement that an ALJ must address the RO’s decision is maintained, we urge that the final rule also state that an ALJ is not required to defer to an RO’s decision in any way, and also that an ALJ’s explanation of why he or she agrees or disagrees with an RO’s decision rationale is not a necessary component for a legally sufficient ALJ decision.

6. The rule would close the record after the ALJ issues a decision, but allow for the consideration of new and material evidence under certain limited circumstances.

In general, this is a good principle, particularly if the earlier procedures are functioning in a way that marshals available evidence in an expeditious manner. However, the proposed rules contain some extremely complex requirements concerning the submission of evidence and closing of the record at the ALJ hearing. For example, evidence must be submitted at least 20 days before the hearing—with limited exceptions left to the discretion of the ALJ. Submission of evidence after the hearing is also left to the discretion of the ALJ, but any evidence obtained after the hearing, even if it relates to an unforeseen change in medical condition that occurred after the hearing, must be submitted within 10 days of the decision, with no “good cause” exception. And there is also a strict 10-day rule for objecting to the time and place of the hearing and the issues to be decided on appeal.

We are concerned that these rules mark a departure from the current rules and practice that accept into

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4 Proposed Regulation 405.370(a), 70 Fed. Reg. 43,615.
the record any and all evidence offered at the hearing, and we agree with the concern expressed that in practice they may provide a “potential[ly] devastating trap for claimants.”5 This could especially be the case for unrepresented claimants. We thus believe that claimants should not be restricted from submitting any relevant evidence at the hearing—or after the hearing if the ALJ determines to keep the record open for a time. Of course we would also like to see the RO (or “Counselor”) assist the ALJ in making sure that the record is complete at that stage. We support maintaining the discretion of the ALJ to determine whether prior applications should be reopened and revised, as provided in current regulations. Further, the acceptance of evidence into the record and the determination of when the record should be closed should remain within the discretion of the ALJ. This preserves the issue for appeal.6

7. The rule would gradually shift certain Appeals Council functions to a newly established Decision Review Board.

We have strong concerns about the proposed elimination of the Appeals Council and creation of a Decision Review Board. It is not at all clear whether the DRB is intended to function as an appellate review panel that implements its decisions by developing case law, or whether the review, and case decisions, are intended primarily for identifying principles that will be implemented through administrative changes or directives.

Given the management aspects of the DRB, there is also a potential concern about the relationship between those responsibilities and its adjudicative function. We understand that for quality control purposes it may be necessary to focus limited resources on error-prone categories of cases, or problematic policies; however, there is a risk that cases will be identified and selected based on the personnel involved (Expert, RO, or ALJ), and this may undermine the independent role of the adjudicator. We support limiting the scope of any review of ALJ decisions to clear errors of law or lack of substantial evidence. We also believe that it is essential that the process is not to be used to target individual ALJs.

In addition, we are very concerned about the elimination of the process by which claimants can request agency review of an ALJ decision prior to filing in federal district court. Even though there is provision for requests to review a dismissal of a request for a hearing, this, along with the method by which the cases are selected and the limiting of issues, is discretionary with the DRB. This change may impose hardships on some beneficiaries, particularly those who are unrepresented, by limiting their options for seeking review of any decisions with which they disagree to an appeal to federal district court. This would also place a large added burden on the federal courts and may lead to additional pressures to create a Social Security Court in place of district court review.7 The Judicial Conference’s testimony at the September 27, 2005, House Hearings emphasized its concern about the “significant caseload ramifications for the federal courts” of the proposed changes.8 We are very

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5 Testimony of Prof. Frank Bloch, supra note 1, at 7.

6 We also object to the requirement in proposed § 405.333 that the claimant and/or attorney or representative must transcribe medical records, etc. to the”...fullest extent practicable” and “...must use type face no smaller than 12 point font” in any submission. This is not only an impracticable and costly task, but opens the door for possible “misinterpretation” or “errors” of the original facts or comments of those records.

7 ABA policy opposes the creation of an Article I Social Security Court.

8 Hearings, supra note 1 (Statement of Hon. Howard D. McKibben, Chair, Judicial Conference Committee on Federal-State
concerned about the potential for overloading the federal court system as well as increasing the burdens of claimants to have their cases heard on appeal.

We agree that elimination of the Appeals Council has the potential to lead to better use of SSA resources and greater efficiency in the process. At a minimum it should allow some claimants to seek federal court review sooner. This may be helpful to some since the federal court reversal/remand rate is significantly higher than that of the Appeals Council. However, to avoid the problem of having the DRB function as a possible appellate forum for SSA but not for claimants, we suggest consideration of the approach outlined by SSA Judge Robin Arzt in her October 4, 2005, letter to the House Subcommittee as a sensible alternative. Judge Arzt suggests that claimants be given a right to appeal an adverse ALJ decision to the DRB, and that such an appeal be a prerequisite to judicial review. Further she suggests that the Board be reconstituted to expedite such appeals by modeling its structure on the apparently quite successful regional Bankruptcy Court Appellate Panels, with three-member panels consisting of two SSA ALJs and one Administrative Appeals Judge. This would afford claimants as well as SSA the opportunity to seek review, while also preventing a flood of cases into the district courts.

8. The proposed rule would strengthen in-line and end-of-line quality review mechanisms at the State agency, RO, ALJ, and DRB levels of the disability determination process.

We applaud the emphasis on quality review in this proposed rule. However, we are concerned about the proposed process for the quality review of ALJ decisions. We appreciate that the process is not to be used to target individual ALJs, and commend this provision. However, we are concerned that an unintended consequence of the DRB process could be to compromise the status of the ALJ as an independent decision-maker. The ABA supports having a system for receiving and evaluating complaints or allegations of misconduct by ALJs, but this should be a separate process, under the jurisdiction of the Merit Systems Protection Board (MSPB). Likewise, ABA policy supports having a system for receiving and evaluating allegations of unlawful agency infringement on ALJ independence through complaints to MSPB of constructive removal.

Thank you for the opportunity to comment on these proposed regulations.

Sincerely,

Eleanor D. Kinney, Chair
ABA Section of Administrative Law and Regulatory Practice

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9 Letter from SSA Judge Robin Arzt to the Subcomm. on Social Security of the House Comm. on Ways and Means (Oct. 4, 2005).

10 Id. at 9-10.