Defending Liberty
Pursuing Justice

Michael S. Greco
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

September 27, 2005

The Honorable Jo Anne Barnhart
Commissioner, Social Security Administration
6401 Security Boulevard
P.O. Box 17703
Baltimore, MD 21235-7703

Re: Comments on Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43591 (July 27, 2005).

Dear Commissioner Barnhart:

I write on behalf of the American Bar Association (ABA) to express appreciation for your efforts to improve the accuracy, consistency, and timeliness of the Social Security Administration's administrative review process and to advance communications among all participants throughout the process. With this letter, we are responding to your request for comments on the published proposals for restructuring that process. Some of our ABA entities are in the process of considering the impact of the proposed regulations; they may send you additional comments before the comment period expires.

As representative of the legal profession in the United States, the ABA strives to promote the rule of law and to ensure the fairness and integrity of our justice system, particularly as it affects those who are least able to advocate for themselves. We have provided decades of stewardship in the legal ethics and professional responsibility arena by adopting professional standards that serve as models for the legal profession, and by issuing opinions on particular questions of professional and judicial conduct. Over the years we also have drawn upon the expertise of our membership to develop a substantial body of recommendations addressing the disability determination process. Most recently, we have carefully considered your plans for the future of this process and have shared with you our views on several of its components. We look forward to continuing this dialogue.

Initial Determinations

There is little doubt that the quality of medical and vocational evidence in disability cases must be improved. We had hoped to see a stronger focus in your proposal on affirmative steps to develop the evidence at the initial stages. We have recommended for many years that SSA educate the medical community about the eligibility criteria used in the disability program and the nature of the medical evidence needed to decide claims. We have urged SSA to consult

claimants' treating sources, compensate them adequately for providing relevant medical information, and give special weight to reports from treating physicians. This evidence should be considered along with evidence concerning claimants' symptoms and functional limitations, which in turn should include information from non-medical sources such as social workers, family members, previous co-workers, and others who have maintained regular contact with claimants. We have also called upon SSA to improve the quality of the decision-making process by vesting initial decision-making authority in two-member teams consisting of a disability examiner and a medical or psychological professional, and by holding all professionals to the highest standards in their communications, examinations, and diagnoses of claimants, and in their reports.

Communication is essential to the promotion of early, accurate, decision making. Over the years, we have encouraged SSA to communicate with claimants at each level of the determination process and to provide them with the information they need to understand the process and their responsibilities, and to help them learn of available legal representation. We are pleased to see that you would require state agencies to document and explain the basis for the determination in every claim. We suggest that when a claim is denied, the notice include a clear statement explaining the reasons for denial, the opportunity to appeal, the availability of legal representation, and the consequences of failure to appeal (including the preclusive effect on future claims).

Many eligible individuals wait far too long to receive their benefits --- benefits that may be their only source of income and access to medical care. We support the concept of a quick disability determination (QDD) process to identify, expedite, and resolve the claims of those who clearly are disabled. We look forward to learning more about the proposed "predictive model screening software tool" to identify those claims. One of our long-standing recommendations has been to provide claimants a face-to-face interview with a decision-maker before the claim is denied, to explain why they were not found disabled and to provide them an opportunity to submit further evidence. We encourage you to provide such interviews for individuals whose claims are not resolved by the QDD unit.

The Reviewing Official

The ABA supports the elimination of reconsideration and the direct appeal to an administrative law judge, so we concur with your plan to eliminate that stage of the process. Reconsideration has not contributed to high-quality decision making and has been a significant cause of delay in the system. An individual whose claim has been denied at the initial level could be well-served by replacing reconsideration with review by a Reviewing Official (RO) whose job is to develop the evidence, consult with the Federal Expert Unit under certain circumstances, assemble the file, prepare a report on the claim, and issue allowances when claims are clear. We agree that requiring the reviewing official to provide specific reasons for agreeing or disagreeing with the initial decision could help to ensure that the review is substantive.

We have questions about the management and administration of this stage of the process, including where reviewing officials will be located and by whom they will be supervised. We assume that they will be situated apart from the Disability Determination Services and the Office of Hearings and Appeals, although that is not clear from the Proposed Rules. While the ABA has not taken a position on the issue of location and management as it pertains specifically to reviewing officials, we have made recommendations regarding similarly situated and authorized personnel. We have called for federal adjudication officers who, immediately following the initial denial, would develop the evidence and be authorized to allow a claim. In making that recommendation, we have urged SSA to assure the integrity of the fact-finding function of administrative law judges by locating these adjudication officers and their assistants somewhere other than the Office of Hearings and Appeals. We suggest a similar arrangement as it applies to the proposed reviewing officials.

We do not support requiring claimants to file a separate request for a hearing before an administrative law judge if the reviewing official disallows the claim. This is akin to simply replacing reconsideration with another level of appeal. It is likely to discourage some claimants from pursuing legitimate claims and to delay the scheduling of hearings for those who do appeal. Rather, we suggest that claims disallowed by the reviewing official be automatically set for a hearing before an administrative law judge unless the claimant specifically waives the right to a hearing.

The Administrative Law Judge Hearing

The ABA endorses the goal of ensuring that claims are considered in a fair and impartial manner, and we are pleased that the non-adversarial nature of the hearing before an administrative law judge will be preserved. The decision to retain the claimant's right to a *de novo* hearing is also to be commended. Administrative law judges in these cases are fact finders, and they should continue to assert authority for developing the record and to maintain close contact with the claimant. Longstanding ABA policy also calls for due process, on-the-record hearings, presided over by administrative law judges appointed pursuant to §3105 of the Administrative Procedure Act, Title 5 U.S.C., and applying standards consistent with the law and with published regulations.

Submitting and Presenting Evidence

The ABA has not spoken specifically to the issue of closing the record in Social Security and Supplemental Security Income appeals. However, we recently adopted policy against closing the record prior to the hearing when the appeal is for Medicare benefits. We recommended that Medicare beneficiaries continue to be provided the opportunity to reopen the record after the hearing for good cause. We are also on record opposing rule changes to the Black Lung compensation program that would prevent an administrative law judge from reopening the record or admitting additional evidence at the hearing level for good cause shown.

In adopting our policy on Medicare, we considered that beneficiaries may find it difficult to gather the information necessary to support the claim before the hearing because they lack mental, physical, educational, linguistic, legal, and/or financial resources. They may have illnesses that are progressive, complex, and difficult to diagnose within a discrete time period, particularly if they do not have access to quality, consistent, or specialized health care. Because these concerns apply similarly to Social Security appeals, we suggest that your proposal to close the record twenty days before the hearing merits further consideration.

Lawyers' Professional Responsibility

As noted above, the ABA provides leadership in the legal ethics and professional responsibility arena by adopting professional standards that serve as models for the legal profession, and by issuing opinions on particular questions of professional and judicial conduct. The majority of states have adopted the *ABA Model Rules of Professional Conduct* with some modifications; others base their ethical rules on its precursor, the *ABA Model Code of Professional Responsibility.* In addition, many of a lawyer's professional responsibilities are prescribed by substantive and procedural law. Whatever rules guide them, lawyers in all jurisdictions are ethically bound to be competent; to exercise diligence on behalf of their clients; to be honest in their dealings with their clients, the opposing party and the court; and to respect the dignity of the tribunal. Each state has procedures for disciplining lawyers who fail to comply with these rules.

In 1995 and again in 1997, we objected to Proposed Standards of Conduct for Claimant Representatives that required representatives to comply promptly with all requests from the Social Security Administration for information and evidence that "pertained" to the claim. We argued that the rules were far too broad and that they could be used to require lawyers and their clients to supply evidence about irrelevant matters, or matters that clients chose not to disclose and that lawyers would be ethically bound not to reveal. The final standards addressed our concerns by eliminating the language in question and requiring instead that representatives "act with reasonable promptness to obtain the information and evidence that the claimant wants to submit in support of his or her claim, and forward same to us for consideration as soon as practicable... to assist the claimant in bringing to our attention everything that shows the claimant is disabled or blind..." 20 C.F.R. §404.1740 (a) (1).

Unlike the 1995 and 1997 proposed standards, which were aimed at lawyers, the current proposals are directed to claimants and appear designed to circumvent the issue of ethical conflicts for lawyers. However, because lawyers step into the shoes of their clients, the proposed rules would continue to present the same ethical dilemmas for duly licensed lawyers and the legal assistants who work under their supervision. Proposed §405.331 states: "You must submit with your request for hearing any evidence that you have available to you." Proposed §404.1512 (c) and §416.912 (c) would require a claimant to submit "... evidence that you consider to be unfavorable to your claim...." The preface makes clear that claimants would be required to submit all available evidence that supports the claim, as well as all available evidence that might

undermine or appear contrary to the claim. 70 Fed.Reg. 43602. Like the proposals of 1995 and 1997, this requirement has the potential for causing significant conflicts for lawyers torn between following an agency rule and complying with their professional responsibilities towards their clients. Moreover, enforcement of these provisions would place the Social Security Administration in the position of attempting to override a lawyer's sworn duty to obey the professional rules of the jurisdiction in which the lawyer is licensed to practice.

No matter what the tribunal, lawyers have the ethical obligation to advocate zealously on their clients' behalf and to advise them on possible courses of action and the potential consequences of those actions. They are prohibited by ABA Model Rule 1.6 from disclosing privileged and confidential client information, except with consent from the client and under some very limited circumstances. Indeed, to reveal client confidences would expose them to disciplinary action. Lawyers' rules of professional conduct already protect the truthfulness and integrity of the claimant's offerings in evidence: the lawyer is strictly prohibited from advancing that which he or she knows is false, fraudulent, or deliberately misleading. These ethical obligations serve the purpose of protecting the integrity of the information that is submitted in evidence for the administrative hearing. The current regulations on this issue well serve the agency, the claimant, and the claimant's legal counsel, and we urge that they be retained.

Decision Review Board

The proposed regulations would eliminate the existing Appeals Council and replace it with the Decision Review Board (DRB), an oversight panel composed of administrative law judges and administrative appeals judges appointed by the Commissioner to serve staggered terms on a rotational basis. The DRB would select favorable and unfavorable administrative law judge decisions on which to perform a quality assurance review. Claimants would no longer have the right to administrative appeal of an administrative law judge's decision; they would be required to seek judicial review in federal court.

The ABA has not taken a specific position on whether to retain or eliminate the Appeals Council, or whether to replace it with another form of review panel. We have over the years expressed concern about serious delays at this level, and also have cautioned against using own-motion review by the Appeals Council to control the rates at which administrative law judges allow claims (e.g., the Bellmon Reviews). While most of those concerns have been alleviated in recent years, we continue to urge that the proposed system be administered so as not to cause delays and not to compromise the independence and impartiality of administrative law judges. We have called for administrative law judges to be held to the highest ethical standards based on the ABA Model Code of Judicial Conduct, for a system for improving administrative law judge performance pursuant to the ABA Guidelines for the Evaluation of Judicial Performance, and for a fair and effective method for receiving and evaluating complaints or allegations of misconduct and for disciplining an administrative law judge for misconduct of neglect of duty.

The proposed rules call for the DRB to use a substantial evidence standard in reviewing the administrative hearing decision. We support the use of substantial evidence but suggest also continuing the use of clear error of law as a standard for review. As you consider other standards for DRB reviews, we offer the following recommendations: the judge's findings as to witness credibility ordinarily should not be subject to review; any overturning of factual determinations by administrative law judges should cite specific reasons; and administrative law judge findings of fact should not be reversed without review of the electronic hearing record.

Judicial Review and Acquiescence

You explain in the proposed regulations that you will adopt rules governing requests for extension of time for filing a civil action and procedures for cases remanded by the federal court. We look forward to having the opportunity to review those rules. You also propose to apply current rules on acquiescence in circuit court case law to future cases. The ABA has a longstanding interest in the Social Security Administration's acquiescence policies and practices, and in years past we have criticized the adverse effects of nonacquiescence on the bar, the courts, and claimants. SSA's acquiescence rate has significantly improved during the past decade, and we hope that acknowledgement of this important issue in the proposed rules underscores your commitment to following federal court precedent in the future as well.

The ABA commends you on your efforts to tackle these important issues and to foster open discussion as you have developed your plans. We appreciate the opportunities you have given our members to meet with you, Deputy Commissioner Gerry, and other members of your staff in the past. Please contact Lillian Gaskin, ABA Senior Legislative Counsel, if you or your staff have any questions. Ms. Gaskin can be reached at (202) 662-1768. Her email address is gaskinl@staff.abanet.org.

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

Sincerely,

Michael S. Greco

cc. Martin Gerry