



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

February 18, 2020

The Honorable Andrew Saul  
Commissioner of Social Security  
6401 Security Boulevard  
Baltimore, MD 21235-6401

**Submitted via [www.regulations.gov](http://www.regulations.gov)**

**Re: Notice of Proposed Rulemaking on Hearings Held by Administrative Appeals Judges, 84 Fed. Reg. 70080 (December 20, 2019), Docket No. SSA-2017-0073**

Dear Commissioner Saul:

These comments are submitted by the undersigned co-chairs of the Social Security Task Force of the Consortium for Citizens with Disabilities (CCD). CCD is the largest coalition of national organizations working together to advocate for federal public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. Since 1973, CCD has advocated on behalf of people of all ages with physical and mental disabilities and their families.

### **Introduction**

The Title II and the SSI disability programs provide modest but vital income support to individuals with significant disabilities and their families. Although these benefits average only \$1257 a month for Social Security Disability Insurance (SSDI) and \$593 for SSI as of December 2019, they are often the difference between having a home and being evicted or homeless or putting food on the table and going hungry, for beneficiaries and their families. More than 1 in 5 working age people with disabilities in the US lives in poverty, nearly twice the poverty rate of their non-disabled peers. That rate would be significantly higher without the modest benefits that the Social Security disability programs provide.

The process of applying for Social Security disability benefits is complicated and time consuming. A person with a disability must navigate that process at a very difficult time in her life. When a person with a disability's application for Social Security disability benefits is denied, and that denial is upheld during reconsideration, the person deserves and is entitled to, a hearing before an impartial adjudicator. This step in the process, the ALJ hearing step, is often the first time that the claimant has the opportunity to make her case about her disability to an actual human being. The importance of receiving a fair hearing in which the adjudicator impartially and

dispassionately applies law and policy to make an accurate and timely decision cannot be understated. Such an adjudicator must be as independent as possible from the agency for which it is making determinations. The due process and property rights impacted by the Social Security disability adjudication process and the resultant determinations demand no less.

Congress recognized the importance of independent adjudicators when passing the Administrative Procedure Act (APA) in 1946 and required the use of Administrative Law Judges (ALJ) to adjudicate appeals of agency administrative decisions in all but a very limited set of circumstances.<sup>1</sup> Concerned that regular agency employees who are subject to routine agency performance plans and disciplinary policies, and who are reliant on politically appointed administrators for promotions and bonuses, might be biased toward upholding the agency decision, Congress incorporated a variety of protections for ALJs to ensure the impartiality of those adjudicators.<sup>2</sup> The qualified judicial independence of ALJs is essential to ensuring that Social Security disability claimants receive a fair hearing from an impartial adjudicator and the right to a hearing before an ALJ in disability appeals must be maintained. The Consortium for Citizens with Disabilities Social Security Task Force strongly opposes the changes outlined in the Notice of Proposed Rulemaking (NPRM) for this and several additional reasons and urges SSA to rescind this proposed rule.

Adjudicative flexibility seems to be the only justification offered by SSA for the need to clarify what it says is existing authority for Administrative Appeals Judges (AAJ) to hold hearings. SSA fails, however, to demonstrate a need for additional flexibility in this NPRM. In addition, the rule is so vague that it is impossible to determine when SSA would exercise this authority or how it would decide to do so. SSA should rescind this proposed rule because it is not demonstrated it is necessary, nor does it meet even the basic requirements of the APA of providing enough detail to allow the public to meaningfully comment on the proposed changes.

It is the Task Force's position that the APA requires the use of ALJs to hold hearings for disability claims. Although the Social Security Act does not explicitly require the use of ALJs, and grants the Commissioner of the Social Security Administration significant authority in this area, Social Security disability determinations do not qualify for any of the exceptions for the use of ALJs outlined in the APA. Furthermore, statements of Congressional intent regarding the interaction of the APA and the Social Security Act, as well as dicta in Court decisions, strongly support the contention that the APA applies to Social Security disability appeals and ALJs are required in Social Security disability appeal hearings as a result.

SSA also fails to provide any data or information to support a central contention in this NPRM – that AAJs are as experienced and qualified as ALJs. No information or supporting documents are included with the NPRM supporting this assertion. Given the different hiring procedures and processes for these positions, it is reasonable to assume that the people filling the positions will have different skills and experience when hired. SSA must provide information to support this assertion and allow the public to do evaluate this assertion in light of the additional information.

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1 Pub.L. 79-404, 60 Stat. 237, 5 U.S.C. §§ 551 - 559

2 See e.g. 5 U.S.C. §7521 which permits negative personnel actions against ALJs “only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”

## The Proposed Rule Is Unjustified and Vague

The proposed changes contained in this NPRM are unsupported by evidence that this authority is necessary and therefore are not justified under the APA. There is no rationale for needing additional adjudicative flexibility besides a difference in hearing wait times presented in the NPRM. One claimant should not have to wait longer than another based on where they live, but SSA has plenty of tools and flexibility at the ALJ level of the adjudication process to rebalance workloads should another spike in hearing requests, like the one that occurred in 2010, occur in the future. Timely application of existing flexibility (such as transfers of workloads between hearing offices, moving to a national first-in first-out policy, video hearings) provide SSA with the needed flexibility without subjecting a claimant to a potentially partial adjudicator. SSA should use its existing flexibility to balance the workload within the hearing level of appeal with ALJs to address any future surge in hearing requests rather than potentially subjecting claimants to an adjudicator that lacks judicial independence.

SSA indicates that a primary purpose of this NPRM is to clarify when it will exercise the authority to have AAJs hold hearings, but completely fails at doing so. It is no clearer what conditions would need to exist for SSA to have AAJs hold hearings after the changes proposed in the NPRM than it is with the current regulatory provision. How many hearing requests would need to be pending or be received before SSA would do so? How many cases would be assigned to AAJs vs. ALJs if the authority was exercised? How would SSA decide? Will AAJs hear all types of claims or just some limited subset of claims (as SSA proposed in the past) and how will SSA decide? Will SSA also consider the number of requests for review pending at the Appeals Council before making these decisions and what will the benchmarks for making that decision be? As these questions demonstrate, there is absolutely no way for the public to comment on this proposal because it has no details about what SSA will do or when. SSA should rescind and not reissue this proposal, but, if it does not, it must issue this proposal again with enough detail for the public to understand what is being proposed and meaningfully comment on the proposed changes.

Importantly, the Appeals Council has only approximately 53 AAJs available to hear appeals of ALJ denials.<sup>3</sup> Unsurprisingly, backlogs and increases in processing time at the Appeals Council increase significantly when requests for hearings increase, such as during the recent historically large backlog in disability hearings that began in 2010. For example, the average processing time to receive an Appeals Council decision increased by nearly a third between 2009 and 2010, going from 261 to 345 days. The processing time peaked at 395 days in 2012 but has remained at a historically high level in the mid to upper 300 days since that time.<sup>4</sup> Having a particular AAJ adjudicate claims at the hearing step necessarily means that AAJ is not available to review ALJ decisions in her actual role at the Appeals Council. The likely result of the exercise of the authority proposed in this NPRM would be to simply shift longer wait times and increases in pending claims from the hearing stage of the appeals process to the Appeals Council review stage. Claimants waiting for an Appeals Council decision deserve timely review of and decisions on their claims just like claimants awaiting an ALJ decision. Shifting the delays and people waiting later in the appeals process doesn't prevent a backlog in the disability adjudication process. It doesn't actually solve any problem and SSA should rescind this regulatory proposal.

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<sup>3</sup> [https://www.ssa.gov/appeals/about\\_ac.html](https://www.ssa.gov/appeals/about_ac.html), accessed 2/2/2020.

<sup>4</sup> <https://www.ssa.gov/open/data/Appeals-Council-Avg-Proc-Time.html>, accessed 2/2/2020.

## **The Social Security Administration Must Use Administrative Law Judges to Preside Over Social Security Disability Hearings**

The right of an American to an impartial and fair adjudication of an appeal of a denial of Social Security benefits as envisioned by Congress under both the APA and the Social Security Act is significantly more important than vague concerns about administrative flexibility that might possibly be needed in the future to address some potential increase in hearing requests. Although SSA makes it clear that AAJs will follow the same process and be subject to the same regulations that ALJs are throughout the rule, AAJs are still regular employees of the Social Security Administration whose decisions might be less than impartial because of that fact, as discussed *infra*.

SSA asserts in the preamble to these proposed changes that, “[t]he Appeals Council already has the authority to hold hearings and issue decisions under our existing statute and regulations but we have not exercised that authority or explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision.”<sup>5</sup> SSA does not provide any support for the assertion that the APA does not apply to the Social Security Act or the Social Security Administration and that AAJs can therefore hold hearings. AAJs have never held a hearing so there has never been a reason for anyone to challenge the rule that has SSA argues already exists in the current regulatory scheme.

As discussed in the introduction, Congress passed the APA in part to ensure that the public had a right to a neutral and impartial arbiter of facts to adjudicate appeals of agency decisions. SSA appears to be an agency under the APA’s definition<sup>6</sup> and decisions issued by SSA meet the definition of orders under the APA.<sup>7</sup> The Court has also indicated that the model of the APA is based on the on the model SSA used at the time of the APA’s passage.<sup>8</sup> The APA requires the use of ALJs as presiding officers in administrative appeal hearings in virtually all circumstances, the exceptions to which do not apply in the Social Security context.<sup>9</sup> SSA does not even attempt to make the case that these exceptions apply to its adjudications, it just asserts that they do.

Although Congress has never explicitly included the requirement to use ALJs in the Social Security Act, it has made clear in legislative history (supported by Court dicta) that Social Security disability adjudications are covered by the provisions of the APA.

In the 1970s, there was confusion regarding the applicability of the APA to adjudications of claims arising from the programs added to the Act after the APA was enacted. In 1971, the Supreme Court stated in *Richardson v. Perales*, that it need not rule whether the APA applies to the Title II disability program adjudication procedure because the APA and Act procedures were identical and met the constitutional

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5 84 Fed. Reg. 70080, 70080

6 Administrative Procedure Act, 5 U.S.C. §551(1); *see also* Robin J. Arzt, Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act, 22 J. Nat’l Ass’n Admin. L. Judges. (2002), pp 284-289 available at <http://digitalcommons.pepperdine.edu/naalj/vol22/iss2/1>

7 Administrative Procedure Act, 5 U.S.C. §551(7); “order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;”

8 *Richardson v. Perales*, 402 U.S. 389, 409 (1971).

9 5 U.S.C. §556(b) “There shall preside at the taking of evidence- (1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title.”

requirements of due process. Some incorrectly interpreted the Perales decision as holding that the APA did not apply to Title II disability program adjudications. After the SSI program was enacted in 1972, the Civil Service Commission, which was OPM's predecessor agency, publicly took the position that the APA did not apply to SSI program adjudications.

In 1976, Congress ended the confusion regarding the applicability of the APA to the Social Security Act by enacting Public Law No. 94-202, which is entitled An Act To Amend the Social Security Act to Expedite the Holding of Hearings Under Titles II, XVI and XVIII by Establishing Uniform Review Procedures Under Such Titles, and for Other Purposes. Among other things, the provisions of Public Law Number 94-202 "clearly placed all social security cases (OASDI, SSI, and Medicare) under the APA." Thus, Congress reiterated its intention that the APA applies to Old Age and Survivors Insurance Benefits program adjudications.<sup>10</sup> (internal citations omitted)

In fact, the legislative history of Social Security Act amendments during the 1970s and the creation of the SSI program are replete with Congressional statements that all Social Security disability adjudications are subject to the provisions of the APA.<sup>11</sup> The undersigned co-chairs urge SSA to rescind this proposal as it is not permitted under the APA.

### **AAJs and ALJs Are Not Equivalent**

Social Security disability claimants are entitled to administrative review by an impartial arbiter of fact who has the skills and experience required to make the complex determinations of fact and applications of law and policy that such adjudications require. In the preamble to proposed rule, SSA alleges that "[e]ach AAJ possesses the same skills and experience as the skills and experience of our ALJs."<sup>12</sup> SSA provides no information to help the public evaluate this assertion in the NPRM. The public cannot evaluate this assertion, and hence this proposal, without answers to the following questions:

- Do AAJs take an exam before being hired? If so, how does it compare to the exam ALJs took during the Office of Personnel Management hiring process?
- Is the AAJ position description the same as the ALJ position description? If not, what are the differences?
- What type of training to AAJs receive when hired and after? Is it the same as an ALJs and, if not, what are the differences?
- What experience is required to be hired as an AAJ? Is it the same as an ALJ? If not, what are the differences?
- Are AAJs required to have presided over or participated in a hearing or similar proceeding before being hired?

Arguably one of the, if not the, most important skills a disability adjudicator at SSA has relates to the questioning and assessment of a variety of witnesses – the claimant and medical and vocational experts for example. The ability to assess the credibility of claimants and other

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<sup>10</sup> Arzt, *supra* note 5, at 292

<sup>11</sup> *See id.*, p, 294 (Congress stated that the use of the phrase reasonable notice and opportunity for a hearing evidenced its intent to place the SSI program under the requirements of the APA); p. 302-304 (Noting that when agency argued that SSI was not covered under the APA it did not reflect the will of Congress).

<sup>12</sup> 84 Fed. Reg. 70080, 70081.

witnesses, effectively questioning claimants and other witnesses to establish facts and to prove or disprove assertions of claimants, and overseeing a hearing proceeding in a fair, respectful, and impartial manner are extremely important skills for an adjudicator holding Social Security disability hearings. Applicants for ALJ positions hired through the OPM screening process were required to "... have a full seven (7) years of experience as a licensed attorney preparing for, participating in, and/or reviewing formal hearings or trials involving litigation and/or administrative law at the Federal, State or local level."<sup>13</sup> As SSA stated throughout the NPRM, it has never exercised the authority for AAJs to hold hearings. Do any of the 53 AAJs currently comprising the Appeals Council have any experience holding or participating in hearings? If so, how long has it been since any of the AAJs have done so? And how long will it have been since any AAJ will have presided over or participated in a hearing at some undefined point in the future when the Commissioner elects to exercise this proposed authority?

Presiding over a hearing requires skills and abilities distinct and separate from knowledge about the Social Security disability programs regulations and policy. It requires the ability to question witnesses, evaluate credibility, and apply the knowledge of Social Security law and policies to formulate those questions to inform the ultimate decision. It strains any credulity to assert that an AAJ who has never presided over a hearing has the same experience as a sitting ALJ who presides over hundreds of hearings a year. While it is true that some ALJs might not have been overseeing hearings prior to being hired as an ALJ, once a person becomes an ALJ holding hearings is a regular, routine, ongoing duty. As discussed in Section II *supra*, it is impossible to tell how often AAJs would be called upon to hold hearings but AAJs would only be called on to do so periodically. This would especially be the case when SSA first opts to exercise this authority. Can any reader of this NPRM actually believe that an AAJ holding her first hearing under this newly exercised authority at some undefined point in the future will be as skilled and experienced at questioning a vocational expert or medical expert as an ALJ who has undergone specialized training and who does so routinely and regularly as part of her duties? Given that the only honest answer to that question is no, it cannot be said that that AAJs are equally skilled and experienced when it comes to holding disability hearings and issuing disability determinations.

If SSA believes that there is no difference between the skills and experience of ALJs and AAJs, one must ask why SSA even has two different positions to begin with? Does SSA seek to eventually eliminate the position of ALJs, or AAJs, entirely? Is this the first step toward combining the ALJ and Appeals Council levels of review? SSA has yet to release a new position description for ALJs now that it is responsible for its own ALJ hiring post the issuance of E.O. 13891. Will the ALJ KSAs and other qualifications be identical to the AAJ requirements? SSA's failure to provide the public with the information necessary to evaluate whether AAJs possess the same experience and knowledge as ALJs, such as position descriptions, makes it impossible for the public to evaluate a basic assertion on which these proposed changes are based.

## **Conclusion**

People appealing a denial of a claim Social Security benefits have the right to a hearing before a fair, neutral, and impartial adjudicator in Social Security claims. The Administrative Procedure Act requires the use of ALJs in appeals of administrative decisions to ensure that the individual adjudicating that appeal is independent of the agency political appointees and is not subject to

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<sup>13</sup> <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/>.

undue influence regarding the outcome of the appeal. The Social Security Administration and the Social Security disability programs are under the jurisdiction of the APA and this rule is impermissible as a result. In addition, SSA fails to justify the need for this rule and the rule is so vague as to make it impossible to comment meaningfully on the proposal. SSA should rescind this proposed rule and use the extensive flexibility it already has in the hearing process to adjust workloads should the need arise in the future.

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

Respectfully submitted,

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