



**CONSORTIUM FOR CITIZENS  
WITH DISABILITIES**

April 21, 2014

Office of Regulations and Reports Clearance  
Social Security Administration  
3100 West High Rise Building  
6401 Security Boulevard  
Baltimore, MD 21235-6401

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

**RE: Docket No. SSA-2012-0068, Submission of Evidence in Disability Claims**

Dear Sir or Madam:

These comments are submitted on behalf of the undersigned members of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force in response to the Social Security Administration (SSA) Notice of Proposed Rulemaking (NPRM) regarding “Submission of Evidence in Disability Claims. 79 Fed. Reg. 9663 (Feb. 20, 2014).

CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 57 million children and adults with disabilities and their families living in the United States. CCD’s Social Security Task Force (“CCD Task Force”) focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

As the CCD Task Force has previously stated in comments to the Commissioner and in testimony before the United States Congress, we believe that the current statutory and regulatory scheme provides adequate procedures and tools for the Social Security Administration (SSA) to address submission of evidence issues. However, if the Agency believes it is necessary to adopt a rule requiring submission of all evidence, favorable and unfavorable, we urge SSA not to implement this NPRM in its current form, unless significant changes are made to limit the scope of the proposed revisions in order to protect the rights and interests of claimants and to avoid significant inefficiencies and uncertainties for the Agency. The proposed changes are overly broad in scope, lack specificity, and could lead to unbridled discretion in adjudicators. In addition, they could add a formality to a process which is intended to be informal and nonadversarial.

**Caution regarding the impact of changes on people with disabilities.** We are particularly concerned about the impact of the NPRM changes on people with disabilities, especially

those with mental and cognitive impairments. The purposes of the Social Security and SSI programs are to provide cash benefits to those who need them and have earned them and who meet the eligibility criteria. While there may be ways to improve the decision-making process from the perspective of the Agency, the critical measure for assessing changes must be how they affect the very claimants and beneficiaries for whom the system exists.

For decades, Congress, the United States Supreme Court, and SSA have recognized that the informality of SSA's process is a critical aspect of the program. Creating unreasonable procedural barriers to eligibility is inconsistent with Congress' intent to keep the process informal and nonadversarial, and with the intent of the program itself, which is to correctly determine eligibility for claimants, awarding benefits if a person meets the statutory requirements.

For people with disabilities, it is important that SSA improve its process for making disability determinations. We strongly support efforts to reduce unnecessary delays for claimants and to make the process more efficient, so long as the steps proposed do not affect the fairness of the process to determine a claimant's entitlement to benefits. Any changes to the process must be measured against the extent to which they ensure fairness and protect the rights of people with disabilities.

### **An informal and nonadversarial process**

The NPRM would impose a formal, court-like process on the SSA disability determination process, which is informal and nonadversarial. It is important to keep in mind that the proposed rules would apply at all levels: initial and reconsideration, the Administrative Law Judge (ALJ) hearing, and the Appeals Council. The new rules would impose a new formality on a process which was not designed to be judicial in nature. Their reliance on formal rules of discovery used in federal court civil litigation and applying exceptions based on formal State Bar ethics rules, i.e., the attorney-client privilege and the work product doctrine, are simply not meant to be applied in an informal, nonadversarial proceeding.

The longstanding view of Congress, the United States Supreme Court, and SSA is that the Social Security disability claims process is informal and nonadversarial, with SSA's underlying role to be one of determining disability and paying benefits. "In making a determination or decision in your case, we [SSA] conduct the administrative review process in an informal, nonadversary manner."<sup>1</sup> SSA's interpretation is consistent with United States Supreme Court decisions over the last thirty years that discuss Congressional intent regarding the SSA hearings process. Most recently in 2000, the Supreme Court stated:

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 decision-making, the SSA is perhaps the best example of an agency that is not ... 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....<sup>2</sup>

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<sup>1</sup> 20 C.F.R. § 404.900(b), 416.1400(b).

<sup>2</sup> *Sims v. Apfel*, 530 U.S. 103, 110 (2000)(citations omitted).

The Supreme Court relied on another decision that was then nearly 30 years old, emphasizing Congress' intent to keep the process informal and nonadversarial:

There emerges an emphasis upon the informal rather than the formal. This, we think, is as it should be, for this administrative procedure and these hearings should be understandable to the layman claimant, should not necessarily be stiff and comfortable only for the trained attorney, and should be liberal and not strict in tone and operation. This is the obvious intent of Congress so long as the procedures are fundamentally fair.<sup>3</sup>

The value of keeping the process informal should not be underestimated. It encourages individuals to supply information, often regarding the most private aspects of their lives. The emphasis on informality also has kept the process understandable to the layperson and not strict in tone or operation.

### **Current requirements provide procedures and tools for SSA to address submission of evidence issues**

Under current regulations, a claimant is required to disclose material facts in his or her claim for benefits and to prove disability.<sup>4</sup> This duty extends to the representative under SSA's "Rules of conduct and standards of responsibility for representatives."<sup>5</sup> We believe that the current regulations regarding the duty of claimants and representatives to submit evidence work well, especially when combined with the duty to inform SSA of all treatment received.

A claimant has the burden of proving that he or she is disabled. "Therefore, you must bring to our attention, everything that shows that you are blind or disabled." This means that you must furnish medical or other evidence that we can use to reach conclusions about your medical impairment(s) ...<sup>6</sup>

"Evidence" is "anything you or anyone else submits to us or that we obtain that relates to your claim." The regulation goes on to list a broad range of types of "evidence," which includes but is not limited to: medical evidence; evidence from medical sources or "other sources"; decisions by governmental or nongovernmental agencies regarding disability; and "[s]tatements you or others make about your impairment(s), your restrictions, your daily activities, your efforts to work, or any other relevant<sup>7</sup> statements you make to medical sources during the course of examination or treatment ...."<sup>8</sup>

Under the proposed § 404.1512(a), the claimant "must inform us [SSA] about or submit all evidence known to you that relates to whether or not you are blind or disabled." The types of "evidence" in § 404.1512(b) are generally unchanged from the current regulation, except for (1) deletion, without explanation, of the word "relevant" in section 404.1512(b)(3) regarding

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<sup>3</sup> *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971).

<sup>4</sup> 20 C.F.R. §§ 404.1512(a) and 416.912(a).

<sup>5</sup> 20 C.F.R. §§ 404.1740(b)(1) and 416.1540(b)(1).

<sup>6</sup> 20 C.F.R. § 404.1512(a). In our comments, we refer to current regulations and proposed regulations in 20 C.F.R., Part 404 (Title II benefits). While not cited, there are equivalent current regulations and proposed regulations in 20 C.F.R., Part 416 (Title XVI).

<sup>7</sup> As discussed below, the NPRM deletes "relevant" without explanation in the preface.

<sup>8</sup> *Id.* § 404.1512(b).

statements that must be submitted (discussed below); and (2) the exclusion of evidence covered by the attorney-client privilege or work product doctrine.

It is one thing to provide a list that “includes, but is not limited to” an extensive and essentially unlimited list of evidence when the purpose of the regulation is to guide the claimant in submitting the evidence needed to prove his or her disability. It is quite another when the purpose of the regulation is to require the claimant to submit evidence that may prove disability but also that evidence which disproves disability.

The NPRM does not provide the level of specificity necessary to guide claimants, their representatives, and SSA adjudicators. Given the current regulations, the NPRM changes cannot be overlaid on the existing process for submitting “evidence.” Rather than removing “subjectivity,” the NPRM instead provides no limit in the scope or relevance of evidence that must be submitted. It will allow unlimited discretion in adjudicators, for example inappropriately prying into claimants’ private lives, and will undoubtedly be subject to disparate application. And the lack of specific guidance will lead to confusion and potential “traps” for claimants and their representatives, inefficiencies for all parties, and significant workload increases for SSA staff.

Proposed section § 404.1512(a) requires the claimant to submit all evidence **“known to you”** that **“relates to whether or not you are blind or disabled.”** How can an adjudicator, for example an ALJ, determine what the claimant does or does not “know”? And what guidance is provided for the claimant to determine whether the evidence “relates” to whether or not the claimant is disabled? “Evidence” is defined as broadly as possible as “anything you or anyone else submits to us ...” It includes, but is not limited to, not only medical evidence but also “statements you or others make about your impairment(s), your restrictions, your daily activities, your efforts to work ....”<sup>9</sup> The vague terms in the NPRM, which do not limit the scope of evidence that could be considered to “relate” to whether the claimant is disabled, open the door to far-ranging breadth in the types of evidence that could be considered by an ALJ to “relate” to the determination of disability.

Under the NPRM, if the claimant “knows” something that “relates” in any way to the disability claim, he or she is obligated to disclose the information to SSA, without being asked. There is literally no limit on what must be submitted, especially if an adjudicator thinks that a claimant should “know” but has not submitted the evidence. Like much of the NPRM, this seems like a serious potential trap for claimants with many types of impairments, particularly mental and cognitive impairments. For example:

- The claimant has a cyclical or long-term degenerative disease, e.g., multiple sclerosis or lupus. She is unsure whether the symptoms she experienced several years prior to receiving a diagnosis, e.g., fatigue, cognitive limitations, and/or physical limitations, “relates to” her impairment.
- The claimant has a recurring cancer who has received courses of treatment for many years or decades. How far back does she need to go to obtain evidence?
- The claimant has muscular dystrophy and applies for SSI or SSDI as an adult. Does he need to obtain old school Individual Education Plans?

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<sup>9</sup> *Id.* § 404.1512(b)(3).

- A veteran is seeking VA treatment for PTSD or VA mental health services related to military sexual trauma and is now filing for SSDI benefits. Is she required to turn those records over to SSA, even if the mental health issues under VA treatment are not the basis for her SSDI claim, which is based on a back injury incurred during military action?

For instance, what is the limit on the scope of “statements” that must be submitted? We are very concerned that the NPRM deletes the word “relevant” from section 404.1512(b)(3). Why has this potentially significant change been made? There is no explanation in the preface. Does the agency now intend that all statements made must be submitted, whether relevant or not? Whether this proposed change is intentional or unintentional is unknown since there is no explanation in the preface. The potential breadth of this change and lack of limits is striking.

Must statements not only to doctors or other medical providers be memorialized and submitted, but also statements to family members, neighbors, co-workers, and/or clergy? A requirement that the claimant must reveal anything that he/she has ever said to anyone about his or her medical condition or any other factor related to the disability claim is simply too broad. It would be impossible to comply with this. The covered situations limitless, but some examples include:

- Claimant alleges disability due to depression. Claimant was sexually abused as a child. She has not revealed this fact even to her psychiatrist.
- On some days the claimant feels like he could work but most of the time he feels like he cannot.
- The claimant is diagnosed with bipolar disorder. Sometimes he goes out to eat with his father and mother.
- The claimant visits his sick mother on a regular basis. He helps with some of her housework.
- The claimant went bowling once since becoming disabled.
- The claimant contacted vocational rehabilitation to see if that agency could help with obtaining a job.
- The claimant tried to work for her brother but did not make it for more than three days.
- The claimant went on vacation to Disneyworld.
- The claimant changed the oil in their car.
- The claimant took a 2 hour car ride.

Under the NPRM, whether the claimant and his/her representative believe these situations should be revealed is irrelevant. If an adjudicator, like an ALJ, thinks they are relevant, the claimant is at risk of being penalized for failing to reveal these situations.

### **Requirement to submit evidence in its “entirety” and duty to obtain evidence**

Proposed 20 C.F.R. § 404.1512(c) would require the claimant to submit evidence “in its entirety.” The NPRM preface explains:

For example, if you obtain your patient file from one of your medical sources, we would require you to submit *all* of the medical records in that file.”

79 Fed. Reg. 9666 (emphasis in original). We support the concept that records should not be “redacted,” as required by the current § 404.1512(c). However, the proposed requirement to submit evidence “in its entirety” must be considered in the context of the complete proposed regulations. As discussed above, the proposed regulations provide no specificity or guidance and require, with a seemingly unlimited scope, the claimant to submit hundreds and perhaps thousands of pages of records. For example, a single hospitalization may easily consist of 1000 or more pages. Is the agency, especially at the hearing level, prepared to review of hundreds if not thousands of pages of medical records, when perhaps only 20 pages may be relevant?

Given that the NPRM would require records to be submitted in their “entirety,”<sup>10</sup> it is likely that thousands of pages of medical records would need to be obtained and submitted. While the NPRM infers that it would be sufficient to “inform” SSA about the evidence, the reality of who will obtain and pay for the evidence is not so clear, as claimants and their representatives are generally required, at least at the hearing level, to obtain and pay for the evidence. There is nothing that prevents the ALJ from obtaining information. This was the process some years ago, but at some point in the 1980s, the burden shifted to the representative. Notably, ALJs continue to supplement the record by sending claimants to consultative examinations but they generally do not request or obtain other information.

Who pays for records? As long ago as 1998, in response to comments regarding who must pay to obtain medical records, SSA stated that it would “continue to pay for the medical records that we need to adjudicate claims pursuant to our existing regulations.”<sup>11</sup> However, the reality is quite different. For many years, hearing offices have not developed the evidence in claims and instead rely on claimants’ representatives to obtain and submit evidence needed to prove that the claimant is disabled. Some states do allow for records to be obtained at no cost for Social Security and SSI disability claims, but many more states require some payment, often at a cost per page. Not all states have a law, in which case there is no limit to the cost for obtaining records. Records for a single hospitalization of 1000 pages could easily cost hundreds of dollars.

Most providers require pre-payment before delivery of the records. What if claimants and/or their representatives cannot pay the costs? Will unrepresented claimants withdraw their requests for records because they cannot afford to pay the costs? And if the adjudicator finds that the claimant has violated his/her duty to obtain the records, will the claimant be potentially subject to sanctions, as discussed below?

Oftentimes, within medical providers’ records, they will have copies of other providers’ records and even copies of copies of other providers’ records. It is well recognized that duplicate records are not to be submitted yet what parameters are available to provide guidance in the redaction of duplicate records?

### **What happens if the claimant fails to obtain records?**

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<sup>10</sup> Proposed 20 C.F.R. § 404.1512(c).

<sup>11</sup> 63 Fed. Reg. 41413 (Aug. 4, 1998), final rule on “Rules of conduct and standards of responsibility for representatives.”

The lack of limits and specificity in the proposed rules leave open the very real question of what happens if an adjudicator, e.g., an ALJ, decides that a claimant should have known that a particular piece of evidence relates to his or her claim. What about unrepresented claimants in the new, more formal process? Would a claimant be penalized if the adjudicator decides that there was noncompliance? Could the claimant be referred to the Office of the Inspector General for imposition of penalties? Does the requirement place an undue burden on claimants with mental or cognitive impairments who could be particularly vulnerable to the unlimited discretion of an ALJ?

Other considerations for possible sanctions apply to claimants' representatives who are attorneys. A requirement as proposed in the NPRM to provide evidence may conflict with State Bar ethics rules which limit the submission of evidence that could be considered adverse to a client. In every state, attorney representatives are currently bound by State Bar rules that forbid an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation. SSA's Rules of Conduct for all representatives impose similar prohibited actions.<sup>12</sup>

The explanation for the proposed inclusion of the new attorney-client privilege and work product doctrine exceptions to the disclosure obligation do not answer all the worrisome situations that could arise and lead to possible sanctions by a State Bar. Situations will undoubtedly arise that place an attorney in an untenable situation vis-à-vis the ethical responsibilities to his or her client to maintain client confidences and to zealously advocate on behalf of the client.

The claimant is required to disclose material facts in his or her claim for benefits. However, the proposed regulation could very well set a trap for unsuspecting claimants. Who makes the decision that evidence is "known" to the claimant or "relates" to whether or not the claimant is disabled? Would a claimant be penalized if an adjudicator decided that there was noncompliance? Does this requirement place an undue burden on claimants with mental or cognitive impairments?

Another concern is that this proposed requirement could open the process to manipulation by those who have a personal grudge against the claimant or interests adverse to the claimant, e.g., former spouses, creditors, insurance companies. Would these statements be required to be submitted?

### **There should be a single approach for all representatives**

We support the NPRM's approach to apply the rules to all claimants' representatives. The current Rules of Conduct and the statutory process for imposing civil monetary penalties apply to all representatives and do not distinguish between attorneys and non-attorneys. We believe that this is the appropriate approach.

There is no basis to make a distinction in the obligations of attorneys who represent claimants and non-attorneys who represent claimants. Both types of representatives have

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<sup>12</sup> SSA previously proposed adding a requirement 20 C.F.R. §§ 404.1512(a) and 416.912(a) that the claimant submit all evidence "available to you." 70 Fed. Reg. 43590 (July 27, 2005). This proposed change was rejected when the final rule was published. 71 Fed. Reg. 16424 (Mar. 31, 2006).

identical responsibilities to their clients and to the Social Security Administration. The current rules and regulations appropriately apply to each.

The groups do differ in that attorneys are also subject to the rules of the State Bars to which they are admitted. This fact, however, does not support the concept of SSA's setting out different obligations to the two groups.

In addition, having two separate sets of administrative procedures will be onerous and confusing for claimants and is likely to make the process less efficient from the Agency's perspective.

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### **Conclusion**

For people with disabilities, it is critical that the Social Security Administration address and significantly improve the process for determining disability and the process for appeals. We strongly support efforts to reduce unnecessary delays for claimants and to make the process more efficient, so long as they do not affect the fairness of the process to determine a claimant's entitlement to benefits.

If the Agency believes it is necessary to adopt a rule requiring submission of all evidence, favorable and unfavorable, we urge SSA not to implement this NPRM in its current form, unless significant changes are made to limit the scope of the proposed revisions in order to protect the rights and interests of claimants and to avoid significant inefficiencies and uncertainties for the Agency. The proposed changes are overly broad in scope, lack specificity, and could lead to unbridled discretion in adjudicators.

Sincerely,

### **On behalf of the undersigned members of the Social Security Task Force of the Consortium for Citizens with Disabilities:**

Association of University Centers on Disabilities  
Autistic Self Advocacy Network  
Bazelon Center for Mental Health Law  
Community Legal Services of Philadelphia  
Corporation for Supportive Housing (CSH)  
Epilepsy Foundation  
Family Voices  
Health and Disability Advocates  
Lupus Foundation of America  
National Alliance on Mental Illness (NAMI)  
National Association of Disability Representatives  
National Disability Rights Network  
National Multiple Sclerosis Society  
National Organization of Social Security Claimants' Representatives  
National Senior Citizens Law Center

Paralyzed Veterans of America  
Special Needs Alliance  
The Arc of the United States  
United Spinal Association