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National Legal Aid & Defender Association
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Commissioner Andrew Saul
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235

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

The National Legal Aid & Defender Association (NLADA) appreciates the opportunity to submit comments on the proposed rule regarding the frequency and notice of continuing disability reviews. NLADA is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services to those who cannot afford to pay for legal counsel. NLADA has more than 700 program members representing more than 15,000 attorneys and tens of thousands more staff who ensure the fair and efficient delivery of legal services in the 50 states, the District of Columbia, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands.

NLADA strongly opposes this proposed rule, which would increase the frequency of Continuing Disability Reviews (CDRs). NLADA's opposition is in part because this would result in a higher number of inaccurate medical determinations, which could lead to hundreds of thousands of Americans with disabilities wrongfully losing access to the income and healthcare support they require to meet their basic human needs. We are also concerned because the experience of our members shows that the stress and uncertainty caused by the burdensome review process often worsens the very conditions that necessitate their receipt of disability benefits.

If implemented, this rule would also deepen the already existing, but little-discussed, crisis of access to legal assistance in the CDR process. Benefits cessation rates are higher for individuals who do not receive legal help. Currently almost all low-income beneficiaries are forced to navigate the complex CDR process alone. The Social Security Administration (SSA) should withdraw the proposed rule and instead take steps to address some of the serious problems beneficiaries face within the current system, including the access to counsel crisis.

1. The Proposed Rule will Cause Severe Harm to American Families

Social Security Disability (SSDI) and Supplemental Security Income (SSI) exist to protect Americans with disabilities and their families from the severe hardship that they would otherwise experience due to their inability to work. Decades ago, President Ronald Reagan acknowledged that disability benefits maintain "our commitment to treat disabled American citizens fairly and humanely",[1] even after Congress passed

[1] Ronald Reagan, "Statement on Signing the Social Security Disability Benefits Reform Act of 1984", October 9, 1984

bipartisan legislation to expand access to SSDI and SSI amid widespread public outrage about the Reagan administration's efforts to greatly reduce the number of people receiving these benefits using similar changes to the CDR process.

This commitment is no less necessary today. As evidenced by their very qualification for benefits, which requires that beneficiaries' income be significantly lower than the federal poverty level, the 5.8 million current children and working age adults who receive SSI are unable to consistently meet their basic human needs, such as food or shelter security. This is also true of many SSDI recipients: "about one-fifth of all disabled-worker families are poor; without SSDI, nearly half would be."[2]

Preventing poverty for those unable to work not only reduces the serious hardship they would otherwise face, which can include malnutrition, mental and emotional problems, and dangerous living environments; it also creates long-term social and economic benefits. Children living in poverty clearly experience significantly lower educational attainment and reduced earnings later in life. Adults who are or become poor also experience worse physical and mental health outcomes,[3] including greater risk of substance use disorders.[4] SSDI and SSI benefits also provide beneficiaries with access to healthcare, leading to a measurable compounding effect on these positive outcomes. For example, military veterans suffering from post-traumatic stress disorder (PTSD) whose disability benefits claims are approved experience a greater reduction in their PTSD symptoms, higher employment rates, lower levels of homelessness, and a reduced rate of death compared to those whose applications are denied.[5]

2. <u>The Current CDR Process Incorrectly Terminates Qualified Beneficiaries</u>

The NPRM does not provide information about the number of beneficiaries for whom SSA expects benefits would be terminated as a result of the proposed rule. However, the agency's projected reduction of $2.6 billion in benefit payments between FY2020 and FY2029 suggests that SSA believes that this number is in the hundreds of thousands. This would greatly expand a CDR process that terminated benefits for 179,195 SSDI beneficiaries for failing to meet eligibility standards in FY2018.[6]

Many of these terminations were likely processed erroneously. SSA's own data on CDR appeals demonstrates that terminations after medical review are successfully appealed in roughly one-third of the cases.[7] This rate is extraordinarily high and it raises serious concerns that terminations in the large numbers of cases that are not appealed are similarly wrongfully decided, yet never are corrected. This

[2] Center on Budget and Policy Priorities, "Chart Book: Social Security Disability Insurance", September 2019, p. 18
[3] Santiago, C.D.C., Wadsworth, M.E. & Stump, J., "Socioeconomic status, neighborhood disadvantage, and poverty-related stress: Prospective effects on psychological syndromes among diverse low-income families", Journal of Economic Psychology, 32(2), 2011, pp. 218-230
[4] Mulia, N., Schmidt, L., Bond, J., Jacobs, L. and Korcha, R., "Stress, Social Support and Problem Drinking among Women in Poverty", Addiction, 103(8), 2008, pp. 1283–1293.
[5] Murdoch, M., Sayer, N., Spoont, M., Rosenheck, R., Noorbaloochi, S., Griffin, J. M., Arbisi, P. A. and Hagel, E. M., "Long-term Outcomes of Disability Benefits in US Veterans With Posttraumatic Stress Disorder", Archives of General Psychiatry, 68(10), 2011, pp. 1072-1080.
[6] Social Security Administration, "Annual Statistical Report on the Social Security Disability Insurance Program", 2018, p. 139
[7] Social Security Administration, "Annual Report on Medical Continuing Disability Reviews, Fiscal Year 2014", 2016, p. 1. The report states that there were 139,204 decisions to cease benefit payments, most due to medical improvement and the ability to work, but that after appeals, SSA would only cease paying benefits to 92,727 of those individuals and their eligible dependents.

serious error rate can only have been exacerbated by the 2017 decision[8] to no longer require that the opinion of a person's own doctor be given controlling weight in the decision about eligibility on medical grounds, leaving the evaluation of medical evidence in the hands of government administrators without comprehensive knowledge of the patient's medical condition.

More than 7 percent of terminations on the basis of eligibility standards were due to "Failure to Cooperate" (FTC) with the CDR.[9] It is not possible to know how many of these cases were truly willful lack of cooperation, but it is likely that many cessations for this reason are in fact due to the complexity of the process. For many, including the roughly 30 percent of SSDI beneficiaries whose disability is mental or intellectual in nature,[10] navigating the CDR – including accessing and organizing the correct documents and accurately completing the necessary paperwork – can be confusing and presents ample opportunity for mistakes that lead to FTC cessations. This almost certainly affects low-income people disproportionately because of their inability to afford to pay for legal help in completing the process.

3. The Current CDR Frequency Rate is Already Harmful and Expensive

The CDR process itself is highly burdensome and creates instability and hardship for beneficiaries, even when it does not result in cessation of benefits. If benefits are initially terminated after a CDR, those who appeal may choose to defer payment of benefits until after the decision is reversed, which can cause a low-income family to suffer serious negative consequences affecting health, housing, nutrition and other basic human needs. If they instead elect to continue receipt of benefits, they risk overpayment in the event that cessation is affirmed and then are forced to repay a debt they cannot afford. Beneficiaries with mental and emotional disorders in particular are acutely affected by ongoing CDRs because the uncertainty of continued income and access to needed medical care creates a financial stressor that can worsen their underlying condition.[11] Financial stress can also have a deeply negative impact on individuals with physical disabilities.[12]

In addition to these direct negative consequences for people with disabilities, the proposed increase in CDR frequency would harm every American taxpayer. SSA estimates that it would cost $1.8 billion over ten years to implement this increase. Even if its own cost saving projection is accurate, the net saving for the agency would be around $800 million in the same period. This is a highly inefficient use of federal dollars. Roughly the same net benefit could be generated without causing the harms described above by simply investing these funds in the Old-Age, Survivors, and Disability Insurance Trust Funds.[13]

4. These Existing Problems Are Worsened Due to Lack of Access to Legal Assistance

[8] 20 CFR § 416.920c
[9] Social Security Administration, "Annual Statistical Report on the Social Security Disability Insurance Program", 2018, p.139
[10] ibid., p. 16
[11] Dijkstra-Kersten, S.M., Biesheuvel-Leliefeld, K.M., van der Wouden, J.C., Penninx, B.W. and van Marwijk, H.W., "Associations of Financial Strain and Income with Depressive and Anxiety Disorders, Journal of Epidemiology and Community Health, 69, 2015, p. 660-665.
[12] Sharp, L., Carsin., A., and Timmons, A., "Associations Between Cancer-Related Financial Stress and Strain and Psychological Well-Being Among Individuals Living with Cancer. Psycho-Oncology, 22, 2012, pp. 745-755.
[13] Between FY2010 and FY2019, $1.8b billion invested in the OASDI Trust Funds would have generated $720 million. Author's calculation using data available at: Social Security Online: Trust Fund Data, Investment Holdings: accessed on January 29, 2020 at www.ssa.gov/cgi-bin/investseries.cgi

As discussed above, NLADA strongly believes that SSA should not increase the frequency of CDR's. The problems identified are made much worse by the fact that most applicants and beneficiaries are significantly prejudiced by the almost complete lack of access to legal assistance at the application and CDR stages. The Social Security Advisory Board (SSAB) reported in 2012 that only 9.1 percent of SSDI claimants and 0.6 percent of SSI claimants were represented by an attorney in the preceding two years.[14] Assistance at the CDR stage is even less frequent: only around 5 percent are represented when facing CDR termination. Since this measure includes nonprofit and for-profit representation, it is certain that low-income people who cannot afford to pay for counsel are even more severely underrepresented. That same report reveals that unrepresented claimants in SSI cases were approved at a rate of 32-34 percent, while individuals who did have legal assistance were successful 60-64 percent of the time.[15] As recently as 2017, a Government Accountability Office analysis of data from SSA found that claimants who had a representative were found eligible at a rate 2.9 times higher than those without representation.[16]

Earlier analysis of the effect of legal assistance in SSDI appeals has found that representation by an attorney increased the likelihood of success by roughly 20 percent, explainable in large part by the help attorneys provide in "building the documentary case" to demonstrate disability.[17] SSAB specifically describes this critical function of representation in this setting:

> *"Representatives should help claimants complete the necessary forms, either through SSA's online process or via a paper application. More importantly, they should help the claimant explain and describe the nature of the claimant's impairment(s) and the resulting physical, mental, and vocational limitations in order to present a clear and accurate picture to DDS decision makers."* [18]
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> *"[R]epresentation of claimants with the least ability to navigate the complex filing process is more likely to have a greater impact. For instance, claimants who are homeless or have serious mental health problems or intellectual disabilities may not have the ability, knowledge and/or resources to successfully apply for benefits on their own"*[19]

Local data tells a similar story. Low-income claimants represented by the Massachusetts Legal Aid Corporation (MLAC) received a favorable judgement in 82 percent of cases,[20] and in hearings with state disability reviewers in Pennsylvania, represented claimants were successful 67 percent of the time, compared to a success rate of just 21 percent for those who were unrepresented. Beyond its direct effect on case outcomes, access to legal assistance can both reduce the uncertainty and other emotional stressors that CDRs cause to highly vulnerable beneficiaries, and help address problems that arise as a

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[14] Social Security Advisory Board, "Filing for Social Security Disability Benefits: What Impact Does Professional Representation Have on the Process at the Initial Application Level?", September 2012, p. 24

[15] ibid.

[16] U.S. Government Accountability Office, "Social Security Disability: Additional Measures and Evaluation Needed to Enhance Accuracy and Consistency of Hearings Decisions," GAO-18-37, 24, 2017, p.24

[17] Kritzer, H.M., "Legal Advocacy: Lawyers and Nonlawyers at Work", 1998, Ann Arbor, MI, University of Michigan Press, p. 116. See also: Popkin, W. D., "The Effect of Representation in Non-Adversary Proceedings: A Study of Three Disability Programs", Cornell Law Review, 62, (1977).

[18] Social Security Advisory Board, "Filing for Social Security Disability Benefits: What Impact Does Professional Representation Have on the Process at the Initial Application Level?", September 2012, p. 17

[19] Ibid., p. 24

[20] Massachusetts Legal Aid Assistance Corporation, Assessing the Benefits of Provision of Legal Services through the Disability Benefits Project, 2006, p. 6

result of benefits suspension or cessation, including the increased risk of homelessness and accumulation of consumer debt.

5. Recommendation

Current law entitles certain benefits to Americans who have disabilities that prevent them from working. The NPRM claims the proposed rule would ensure that these benefits are more correctly provided to those who are eligible for them. However, as laid out above, it is clear that the opposite is true; increasing the frequency of CDRs is likely to greatly increase wrongful benefits cessation. It is certain to cause deep and widespread harm to a large number of American families.

SSA should withdraw the proposal to change and increase CDR reviews. SSA should instead pursue a course of action that would go a long way to help the agency meet its stated objective of improved accuracy in its decision-making process. The available data suggests that the availability of legal assistance for claimants would greatly improve the existing application and review proceedings, particularly for low-income people facing CDR terminations.

An important first step that SSA should take to facilitate the availability of legal assistance would be to regularly publish data that demonstrates both the scale of the undersupply and the consequences of it. At a minimum, SSA should publish national statistics that show the number of individuals who are assisted or represented by attorneys, whether that representation is nonprofit or for-profit, and the outcomes of those cases, with all data broken down by race, gender, and income of claimant. More broadly, to the fullest extent of its statutory authority, SSA should consider incentivizing or directly providing access to legal assistance to low-income people in CDRs.

Thank you for the opportunity to provide these comments.

Sincerely,

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