



COMMUNITY LEGAL AID SOCIETY, INC.

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January 30, 2020

Submitted via regulations.gov

Commissioner Andrew Saul
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21325-6401

RE: Notice of Proposed Rulemaking on Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 36588 (November 18, 2019), Docket No. SSA-2018-0026

Dear Commissioner Saul:

Community Legal Aid Society, Inc. of Delaware (CLASI) and the Delaware State Council for Persons with Disabilities (SCPD) appreciate the opportunity to comment on SSA's proposed rules regarding the frequency of Continuing Disability Reviews (CDRs). CLASI is a statewide, nonprofit law firm whose mission is to combat injustice through creative and persistent advocacy on behalf of vulnerable and underserved Delawareans. CLASI is also Delaware's designated Protection and Advocacy agency for individuals with disabilities. As a legal aid and P&A program, CLASI works directly with adults and children who qualify for Social Security Disability (SSD) and Supplemental Security Income (SSI) benefits. The SCPD's mission is to unite disability advocates and state agency policy makers to ensure that persons with disabilities are empowered to become fully integrated in the community. To fulfill its mission, SCPD is charged with the responsibility of proposing and promoting state and federal laws, regulations, programs and policies to improve the well-being of individuals with disabilities. The Council reviews, on a continuing basis, policies, plans, programs and activities concerning persons with in order to determine whether such policies, programs, plans and activities effectively meet the needs of persons with disabilities.

CLASI and SCPD strongly oppose the proposed rule, which fails to comply with the Administrative Procedure Act, would impose additional administrative burdens on disabled beneficiaries, would result in the improper termination of benefits for thousands of disabled individuals, and would cause untold economic devastation to disabled members of our society who already struggle to meet their basic needs. The proposed rule should be withdrawn in its entirety.



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The Proposed Rule Violates the Administrative Procedure Act.

We are fully aware that the Social Security statute requires the Commissioner to conduct CDRs to ensure that disabled individual remain eligible for benefits. While the statute authorizes the Commissioner to create CDR categories and establish appropriate criteria for determining the frequency of review, that discretion is not unlimited and cannot be exercised in an arbitrary and capricious manner. Any standards established by the Commissioner must be transparent and have a reasonable evidence based rationale. The proposed regulations do not come close to meeting this standard. They provide no information regarding how the Social Security Administration has determined impairments slated for inclusion in the new Medical Improvement Likely (MIL) category. For example, no reasoning is given for the inclusion of those awarded at step 5 of the sequential evaluation process. Without a proper explanation of why this group was selected in this category, it is impossible to evaluate whether such inclusion was proper. The inclusion of all step five allowances in the likely to improve category subject to the most frequent reviews is especially problematic since it will frequently include individuals over the age of 55 whose disabling conditions are highly unlikely to improve. We and other advocates have represented thousands of older individuals who have been allowed at step five based upon debilitating physical impairments. The notion that these individuals are likely to improve in any significant manner is simply preposterous. Likewise, SSA has offered no rationale for including children turning 6 or 12 years old in this category.

The proposed rules are internally inconsistent. In the proposed rules, SSA acknowledges that the current system of scheduling MIE reviews at 18 months is too early and such reviews should be delayed. It then predicts a more than 20 per cent increase in such MIE reviews. This discrepancy is nowhere explained or reconciled.

The proposed rule argues that "shortening the time a person spends out of the labor force may improve work outcomes." To justify this conclusion, SSA looks at data about working-age people in the general population. SSA however, has offered no explanation why this data has any relevance. The general population is an inappropriate comparison to the population that has been already found disabled under SSA's stringent standards. SSA cannot legitimately extrapolate employment outcomes for people terminated through a CDR based on a data set about working-age people in the general population. SSA has shown no link between these two groups.

Failure to set forth an appropriate rationale for this action makes meaningful comment impossible and thus violates the requirements of the Administrative Procedures Act. Because the SSA has failed to provide data that supports its actions and has failed to provide any meaningful rationale to justify its decisions, the proposed rule is arbitrary and capricious and violates the APA. It should be withdrawn in its entirety.



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The Current CDR Process is Deeply Flawed and Places Unreasonable Burdens on Disabled Recipients.

The misguided assumption underlying the proposed rule is that the CDR process accurately assesses medical improvement and that the individuals who are terminated from benefits are those who are no longer disabled. In reality, the CDR process itself is rife with problems, and the very disabilities that render people eligible for benefits make them vulnerable to losing benefits during a CDR.

Individuals undergoing CDRs suffer from disabilities that seriously impair their abilities to comply with the already onerous CDR requirements. Forms that must be completed are many pages long and written at a relatively high reading level. The questions delve into highly detailed and complicated areas of a recipient's life such as 22 different activities, hobbies, interests, all medical sources and treatment. The estimate that it will take a mere 60 minutes to complete this form grossly understates the burden on recipients who have already been determined disabled under a very rigorous standard. In addition, recipients with cognitive or other mental impairments face significant additional hurdles in providing the required information. Our experience over many decades of representing individuals in CDR claims is that they cannot complete the forms without significant assistance from friends, family or advocates. Indeed, we have seen many partially completed and inaccurately submitted forms precisely because of their complexity and burdensome nature. Furthermore, representation in CDRs is incredibly difficult to secure. Many private attorneys and representatives, including those practice is primarily representing SSA applicant will not undertake representation in CDRs because of the uncertainty regarding getting paid. Thus claimants are left unrepresented and dependent upon the ability of legal aid programs and other no-cost alternatives. The result of this problem is that the vast majority of individuals undergoing CDRs are unrepresented in any way.

The proposal to dramatically increase the number of CDRs will only exacerbate the current shortcoming. Under the CDR process, SSA is required to properly develop the record so that an accurate determination can be made. SSA routinely fails to meet its obligation to develop the record even where individuals are represented by counsel. We have frequently represented recipients at the hearing level where SSA has failed to obtain the required records. Indeed, this failure is the norm. In addition, especially at the initial and reconsideration levels, including the decisions made by the Disability Hearing Officer, reviews are conducted hastily and without adequate consideration. Records are routinely missing. Sources are not contacted. Evidence is ignored. Largely unrepresented individuals are in no position to hold SSA to its legal obligations and duty to fully develop the record in order to allow a fair and accurate decision to be made. The proposed rules will only exacerbate this problem.



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The current CDR process is extraordinarily burdensome to navigate. Lengthy and complicated forms go uncompleted. Low income disabled recipients often have to pay to obtain medical records or to get assistance from their providers in giving relevant information to the Social Security Administration. These costs are especially difficult and often insurmountable for SSI recipients whose income (\$771) is barely 75% of the poverty level.

Our clients are amongst the most vulnerable. They include individuals who are limited English proficient, those who have multiple impairments, and those with severe mental health issues. It is common that these vulnerable clients are unable to comply with the burdensome CDR process and lose their benefits, not because they have somehow medically improved, but because they have "failed to cooperate" with the CDR process. This failure to cooperate suspension has, in our lengthy experience, been routinely used where clients are simply unable to comply because of the very impairments that made them disabled and eligible for benefits in the first place.

The True Purpose of the Proposed Regulations Is Simply to Terminate Benefits Regardless of the The Cost.

The proposed rules estimate that it will increase SSA administrative costs by \$1.8 billion over ten years. That is likely a significant underestimation of the actual costs. For example, if a family loses SSI or Social Security benefits, it is likely that other needs based benefits such as food benefits under the Supplemental Nutrition Assistance Program (SNAP) will increase. The proposed rule does not take into account any of these expenses. Moreover, the proposed rule projects a saving of \$2 billion in Title II funds and \$0.6 billion in Title XVI funds over the same period, for net savings of less than \$1 billion. Notably, the proposed rule fails to indicate how many additional people will be terminated from benefits of the projected additional 2.6 million reviews.

Given SSA's failure to set forth any meaningful data to support its proposal, its failure to explain how certain disabilities of profiles were selected for increased review, and any relationship between that selection and actual anticipated medical improvement, these proposed rules can only be seen as an attempt to impose hardship and cruelty on vulnerable individuals who have already been found disabled under SSA's strict criteria. The current DCR process leads to the termination of benefits, not because these individuals have in fact become less disabled, but because they cannot navigate SSA's complex and burdensome regime. This proposal seems deliberately designed to worsen that problem, with the simple goal of reducing the number of individuals receiving benefits without regard to their actual disability.



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We join with more than one hundred thousand other commenters including members of Congress, United States Senators, individuals and well-known and respected organizations, and call upon the Social Security Administration to withdraw this ill thought out rule in its entirety. Just like the 1980s proposal to increase burdensome reviews that was the subsequently withdrawn after intense public criticism and extended litigation, the Social Security Administration claims that its proposal will allow the disability program to be administered more efficiently ensuring that only eligible individuals continue to receive benefits. With no ascertainable link between that policy goal and the actual changes being implemented, the proposed rule can only be seen as a crude attempt to remove individuals from benefits even though they likely remain eligible. We urge Social Security Administration to with this proposed rule in its entirety.

Sincerely,

A handwritten signature in blue ink, appearing to read "John S. Whitelaw", with a long horizontal flourish extending to the right.

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Submitted on behalf of
Delaware State Council for Persons with Disabilities
and
Community Legal Aid Society, Inc. Delaware