NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)

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Committee on Adjudication
Administrative Conference of the United States
1120 20th St., NW Suite 706 South
Washington, DC 20036

Dear ACUS Committee on Adjudication:

These comments are submitted to the Committee on Adjudication (Committee) of the Administrative Conference of the United States (ACUS) as public comments on the March 3, 2013 Draft Report *Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms* (hereinafter *Consistency Report*) and March 3, 2013 (Revised) Draft *SSA Disability Benefits Programs: Assessing the Efficacy of the Treating Physician Rule* (hereinafter *Treating Physician Report*).

These comments are the joint comments of the ACUS Disability Adjudication Project Working Group members Professor of Law Jon Dubin, Nancy Shor, Esq., and Ethel Zelenske, Esq., and NOSSCR member, Eric Schnaufer, Esq. All of the undersigned are affiliated with organizations that regularly work with Social Security and Supplemental Security Income (SSI) disability claimants. Professor Dubin and Eric Schnaufer are members of NOSSCR.

Although, as Working Group members, NOSSCR and Professor Dubin supplied separate comments on the Project's charge in July 2012, we are supplying joint comments now due to the very short time period between release of the Draft Reports and Draft Recommendations and their consideration by the Committee at a meeting scheduled on March 12, 2013. Given the short period of time to review the Draft Reports and Draft Recommendations, our comments are selective and abbreviated.

ACUS Disability Adjudication Project Working Group members Nancy Shor and Ethel Zelenske are the Executive Director and Director of Government Affairs, respectively, of the National Organization of Social Security Claimants' Representatives (NOSSCR). Founded in 1979, NOSSCR is a professional association of attorneys and other advocates who represent individuals seeking Social Security disability and Supplemental Security Income (SSI) disability benefits. NOSSCR members represent these individuals with disabilities in proceedings at all SSA administrative levels, but primarily at the hearing level, and also in federal court. NOSSCR is a national organization with a current membership of more than 4,000 members from the

private and public sectors and is committed to the highest quality legal representation for claimants.

Eric Schnaufer, Esq., brings the perspective of a long-time claimants' attorney who also previously worked as an Assistant Regional Counsel for the Department of Health and Human Services defending in federal court hundreds of denials of Social Security and SSI disability benefits.

Professor Jon Dubin is the Associate Dean of Clinical Program at Rutgers School of Law, Newark, NJ, and the Alfred C. Clapp Public Service Scholar. Professor Dubin is the author of several articles on the SSA s disability adjudication process and judicial review including: *Overcoming Gridlock: Campbell after a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration-s Disability Programs,* 62 ADMIN. L. REV. 937 (2010), and *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings*, 97 COLUM. L. REV. 1289 (1997). He is also the co-author of a major treatise, *Social Security Disability Law and Procedure in Federal Court* (Thompson/Reuters/West Pub. 2013) (Co-authored with Carolyn Kubitschek).

The Clinical Program of the Rutgers School of Law - Newark is a professional law office dedicated to teaching law students the practice of law and the skills and values of the legal profession while providing pro bono representation to unrepresented and underserved individuals and groups. The Rutgers Urban Legal Clinic and Rutgers Child Advocacy Clinic are the constituent components of the program that provide representation and assistance, respectively, to indigent adults with disabilities seeking Social Security and SSI benefits and children with disabilities seeking SSI benefits.

I. *Introduction*

For the reasons discussed below, the undersigned believe that several of the Project's proposed draft recommendations would create significant and unnecessary hardships and unfairness to disability claimants, are predicated on some misperceptions about the nature of the SSA adjudication process and the courts' judicial review function in Social Security and SSI disability benefits cases, and would result in additional and further inefficiencies in those processes without corresponding increases in consistency or accuracy in decision-making.

Caution regarding the search for efficiencies. While we generally support the goal of achieving increased efficiency throughout the adjudicatory process, we caution that limits must be placed on the goal of administrative efficiency for efficiency's sake alone. 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 adjudicators, the critical measure for assessing initiatives for achieving administrative efficiencies must be how they affect the very claimants and beneficiaries for whom the system exists.

NOSSCR has at least five main concerns with the draft reports:

1. The recommendation to prohibit a claimant, including a claimant who does not have a representative, from submitting evidence to an ALJ at hearing and post-hearing violates a claimant's procedural due process right to rebut evidence an ALJ obtains at hearing or post-hearing. It also violates the Social Security Act, 42 U.S.C. § 405(g), which provides that a claimant has the right to a hearing with a decision based on "evidence adduced at the hearing." Our position is that the recommendation to close the record conflicts with the statute. *Consistency Report* at 41.

2. The recommendation to eliminate a claimant's right to request Appeals Council review of an unfavorable or partially favorable ALJ decision would likely lead to thousands, even tens of thousands more civil actions per year when (i) the federal courts are already overburdened, (ii) the Agency has an obligation to correct its own errors, and (iii) in comparison to Appeals Council review, litigation is a grossly inefficient mechanism to correct ALJ errors. *Consistency Report* at 72.

   Administrative review of ALJ decisions is important to claimants: (i) Appeals Council review is the most efficient way for claimants to correct errors in ALJ decisions finding them not disabled; (ii) Claimants can request review of improper ALJ dismissals and denials of reopening requests; (iii) The Appeals Council reviews allegations that a claimant's right to a full and fair hearing has been violated; (iv) The Appeals Council reviews nondisability issues, which are often a part of a disability claim; and (v) Claimants can submit new and material evidence that relates to the period before the ALJ decision.

3. The recommendation to review ALJ decisions for statistical consistency must respect the decisional independence of ALJs and be implemented in a neutral manner. *Consistency Report* at 63-72.

4. The recommendation to amend the Social Security Act (Act) to establish "term" disability has no plausible connection to the consistency of adjudication and would greatly increase the administrative burdens on the Agency. *Consistency Report* at 81-89.

5. The recommendation to eliminate the "controlling weight" element of the regulatory treating physician rule is based on a misunderstanding of that rule and court cases involving that rule. *Treating Physician Report* at 54-59.

II. *Consistency Report*

The *Consistency Report* made fourteen recommendations in the six sections. *Consistency Report* at 29-89.[1] NOSSCR comments on the recommendations seriatim.

[1] We note that the recommendations in the ACUS Memorandum, "Draft Recommendations," dated February 27, 2013, do not correspond with the recommendations in the *Consistency Report*.

A. Impact of Increased Caseload on ALJ Allowance Rates

NOSSCR agrees that the Office of Disability Adjudication and Review (ODAR) should not increase ALJ productivity goals. *Consistency Report* at 34 (Recommendation 1).

B. Case Management

The *Consistency Report* suggests that:

> SSA require claimants to furnish all relevant medical information and to summarize justification for their eligibility in a pre-hearing brief, after which no new information could be submitted. Altering the case management system as sketched above (e.g., pre-hearing briefs) would reflect a modest change that could benefit claimants, while saving ALJs time and resources by reducing the demand on ALJs appreciably.

Consistency Report at 41 (Recommendation 2). The recommendation to prohibit the introduction of "new information" after a represented or unrepresented claimant submits a pre-hearing brief is not a "modest" change, but a radical and even unconstitutional change inconsistent with the non-adversarial nature of administrative proceedings for Social Security benefits. *See* 20 C.F.R. § 404.900(b) (2012) ("we conduct the administrative review process in an informal, nonadversary manner").[2] In addition, it is inconsistent with the Social Security Act, 42 U.S.C. § 405(b).

1. Closing the Record at the Time of a Pre-Hearing Brief

To understand why the *Consistency Report*'s recommendation represents a radical change, it is essential to understand hearing-level and Appeals Council procedure. The *Consistency Report* does not reflect an understanding of that procedure.

Under the Act, an ALJ bases a decision on evidence "adduced at hearing." 42 U.S.C. § 405(b). Under the regulations, when an ALJ adjudicates a disability claim, an ALJ bases his or her decision "on the preponderance of the evidence offered at the hearing or otherwise included in the record." 20 C.F.R. § 404.953 (2012). An ALJ also has a duty to develop the record, and that duty does not end prior to the hearing. 20 C.F.R. § 404.944 (2012) ("At the hearing, the [ALJ] looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues. The [ALJ] may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. The [ALJ] may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence.").

Thus, the Agency and the claimant may submit evidence prior to a hearing, at the hearing itself, and post-hearing but prior to the rendering of a decision.[3] An ALJ has the reviewable discretion to close the record at hearing or at some time prior to the date a decision is issued. *HALLEX*, § I-2-6-78 ("Closing the Hearing"). In a typical case, an ALJ adjudicates whether a claimant is disabled not only at the time a pre-hearing brief is submitted, but through the date of the ALJ's

[2] Regulatory citations refer to the Title II regulations, 20 C.F.R., Part 404 (2012). The regulations governing Supplemental Security Income benefits, 20 C.F.R., Part 416 (2012), have identical provisions.
[3] *See Flatford v. Chater*, 93 F.3d 1296, 1302-03 (6th Cir. 1996) (discussing post-hearing, pre-decision evidence).

decision. Under the regulations, a claimant may submit additional evidence to the Appeals Council in conjunction with a request for review of an ALJ's decision. *See* 20 C.F.R. § 404.970(b) (2012).

The *Consistency Report*'s recommendation to prohibit represented and unrepresented claimants from submitting "new information" at the hearing is deeply flawed, as well as unconstitutional and in violation of the Act. A claimant has a right to submit evidence in support of his or her disability claim and a right to rebut *with evidence* any evidence the Agency introduces. 20 C.F.R. § 404.1512(a) (2012) (general right to submit evidence); 20 C.F.R. § 404.950(a) (2012) (specific right to present evidence at an ALJ hearing); *Townley v. Heckler*, 748 F.2d 109, 114 (2d Cir. 1984) (collecting cases holding that a claimant has a procedural due process right to submit rebuttal evidence). In the majority of hearings, the Agency (through the ALJ) introduces new evidence *at hearing*. Mar. 2, 2013 Draft, *Statistical Appendix to Report on Achieving Greater Consistency in Social Security Disability Adjudication: An Empirical Study and Suggested Reforms*, at 46 ("A vocational expert was recorded as present in 76% of hearings."); *id.* at 45 ("A medical expert was recorded as present in 14% of hearings.").

The *Consistency Report* recommendation unconstitutionally prohibits a claimant from submitting any evidence either at hearing or post-hearing (but pre-decision) to rebut the Agency's new evidence. Because the Agency does not provide a claimant with pre-hearing notice of what an Agency expert will say at hearing but only that such an expert may testify, the claimant cannot rebut pre-hearing testimony not yet presented. Likewise, it is ordinary and routine for an ALJ to obtain the report of a post-hearing consultative examination. Because a claimant is not provided with such a post-hearing report prior to the submission of a pre-hearing brief, the *Consistency Report*'s recommendation to prohibit a claimant from submitting any "new information" after the pre-hearing brief deprives a claimant of his or her right to rebut with evidence such a post-hearing report. *See HALLEX*, § I-2-7-30(B) ("The proffer letter [providing the claimant with post-hearing evidence] must: Give the claimant a time limit to object to, comment on or refute the evidence").

Further, the *Consistency Report*'s recommendation to prohibit even an unrepresented claimant from submitting "new information" at hearing or post-hearing is unfair. Consider that an unrepresented claimant may be mentally ill, have no or little resources to marshal evidence, lack any understanding of what evidence is relevant, lack any understanding of Social Security law, and even be illiterate. Closing the record at the time an unrepresented claimant submits a pre-hearing brief is inconsistent with the realities of claimants obtaining representation. Many claimants seek and obtain representation shortly before, or even after, the ALJ hearing date. Many claimants do not understand the complexity of the rules or the importance of being represented until just before their hearing date. Many are overwhelmed by other demands and priorities in their lives and by their chronic illnesses. As a practical matter, when claimants obtain representation shortly before the hearing, the task of obtaining medical evidence is even more difficult.

The *Consistency Report* unreasonably and improperly prohibits a claimant from submitting evidence after a pre-hearing brief is filed even if such new evidence is crucial to understanding whether the claimant is disabled. Consider if a claimant on the day after a pre-hearing brief is submitted sustains a major permanent injury or undergoes surgery restoring functional capacity.

Even though the Act requires an ALJ to consider such a major permanent injury when the ALJ adjudicates the claimant's disability claim through the date of the ALJ's decision, the claimant would be barred from submitting any evidence documenting that permanent injury. Even though the Act requires the ALJ to consider whether the claimant's medical condition improved, e.g., through restorative surgery, the claimant would be similarly barred from submitting such evidence. While the *Consistency Report* purports to enlist the claimant's representative in developing the evidentiary record, the *Consistency Report* requires the ALJ to undertake any record development after a pre-hearing brief is submitted. Thus, under the *Consistency Report*, an ALJ may not properly ask a claimant to submit evidence of a major permanent injury or restorative surgery created after the claimant's pre-hearing brief is filed. In other words, the *Consistency Report* cannot be reconciled with procedural due process, the fact that a claimant's medical condition may change after the date a pre-hearing brief is submitted, or the fact that a claimant may undergo a new and relevant medical evaluation and treatment after the date a pre-hearing brief is filed.

To justify its recommendation, the *Consistency Report* states that "SSA has not prescribed the records that the claimants' representative must furnish to the ALJs . . . ." *Consistency Report* at 35. To the contrary, the regulations require a claimant and his or her representative to submit evidence. *See* 20 C.F.R. § 404.1512(a) (2012) ("This means that you must furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s) and, if material to the determination of whether you are disabled, its effect on your ability to work on a sustained basis. We will consider only impairment(s) you say you have or about which we receive evidence.").

Under current regulations, a claimant is required to disclose material facts in his or her claim for benefits and to prove disability.[4] This duty extends to the representative under SSA's "Rules of conduct and standards of responsibility for representatives."[5] 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. 20 C.F.R. § 404.1740(b)(1)-(2) (2012) (representative's "affirmative duties" to submit evidence with "reasonable promptness" pertaining to issues related to disability).

According to the *Consistency Report*, closing the record prior to the ALJ hearing is needed because the Appeals Council remands about five percent of ALJ decisions in part based on additional evidence. *Consistency Report* at 39-40 & n.214. The *Consistency Report* even cites case law pertaining to evidence submitted to the Appeals Council in the first instance. *Consistency Report* at 40 & n.215. The *Consistency Report* conflates two distinct issues: whether a claimant should be allowed to submit additional evidence *to the Appeals Council* in conjunction with a request for review of an ALJ's decision[6] and whether a claimant should be allowed to submit evidence after a pre-hearing brief is filed, but before an ALJ renders a decision.

[4] 20 C.F.R. §§ 404.1512(a) (2012).
[5] 20 C.F.R. §§ 404.1740(b)(1) (2012).
[6] At the Appeals Council level, new evidence will be considered, but *only* if it relates to the period before the ALJ decision and is "new and material." 20 C.F.R. §§ 404.970(b) (2012). While the Appeals Council remands slightly less than 20 percent of the appeals filed by claimants, it is important to note that a major basis for remand is not the submission of new evidence, but rather legal errors committed by the ALJ, including the failure to consider existing evidence according to SSA regulations and policy and the failure to apply the correct legal standards.

Statistics pertaining to Appeals Council remands based on additional evidence concern evidence submitted *for the first time to the Appeals Council* do not concern evidence submitted by a claimant *at hearing or post-hearing but pre-decision.* Further, the Appeals Council's minuscule grant rate based on additional evidence never submitted to ALJs prior to their decisions could not rationally justify depriving claimants of their right to submit evidence at hearing and post-hearing but pre-decision. The *Consistency Report* gives no perceptible weight in this regard to the Agency's duty to render correct disability determinations. The *Consistency Report* cites no evidence that arbitrarily closing the record on the date a pre-hearing brief is submitted would lead to more accurate or more consistent adjudication in terms of outcomes.

Closing the record pre-hearing is also inconsistent with the realities of obtaining medical evidence. NOSSCR strongly supports the submission of evidence as early as possible, since it means that a correct decision can be made at the earliest point possible. However, representatives sometimes have great difficulty obtaining necessary medical records due to circumstances beyond their control. There are many legitimate reasons why the evidence is not provided earlier. There is no requirement that medical providers turn over records within a set time period. In addition, cost or access restrictions may prevent the ability to obtain evidence in a timely way.

2. Requirement for Exhaustive Pre-Hearing Brief

NOSSCR opposes the *Consistency Report*'s recommendation to require in all cases a representative to submit an exhaustive pre-hearing brief. *Consistency Report* at 36-41. That one-size-fits-all approach is inefficient and not based on any cogent analysis of current ODAR practice or any statistical analysis of the use of pre-hearing briefs today.

First, it is ordinary and routine for individual ALJs to request pre-hearing briefs and for representatives to submit, without prompting, such briefs of varying length and complexity depending on the facts of a particular case and the preference of an assigned ALJ. The *Consistency Report* does not present any evidence that ODAR's current practice is flawed or inefficient. Indeed, ODAR Best Practices for Claimants' Representatives include submitting a "concise" pre-hearing brief "whenever possible,"[7] but not submitting an exhaustive brief in every case as the *Consistency Report* recommends.

Second, the *Consistency Report* would require representatives to expend resources inefficiently. Many ALJs do not review carefully or even consider at all a representative's written submissions, and few ALJs and decisionwriters rely on representatives' factual summaries even if provided. The *Consistency Report*'s suggestion or implication that ALJs and decisionwriters should rely on a claimant's factual summary in a pre-hearing brief to draft a written decision assumes without foundation that ALJs and decisionwriters would actually rely on a such a summary or that relying on such a summary would result in any cost savings to the Agency. ALJs and decisionwriters review independently the record regardless of any pre-hearing brief.

Third, the *Consistency Report* improperly uses the "litigation" model for its suggested pre-hearing procedures. *Consistency Report* at 36, 38. The longstanding view of the Supreme Court,[8]

[7] https://www.socialsecurity.gov/appeals/best_practices.html.
[8] *See, e.g., Sims v. Apfel*, 530 U.S. 103, 110 (2000); *Richardson v. Perales*, 402 U.S. 389, 400-401 (1971).

Congress, and the Agency[9] is that the Social Security claims process is informal and non-adversarial, with SSA's underlying role to be one of determining disability and paying benefits.

3. Pre-Hearing "Settlement"

The *Consistency Report* suggests that ODAR should facilitate the "settlement" of claims pre-hearing using non-ALJ attorney advisors when the only issue is the onset and/or duration of disability. *Consistency Report* at 38-39. The *Consistency Report* does not reflect the current practice in ODAR hearing offices. The *Report* implies that ODAR personnel do not currently communicate with claimants and their representatives pre-hearing to facilitate the issuance of fully favorable decisions after an onset date is amended or the period of alleged disability is changed. Given ODAR's current practice to facilitate the issuance of pre-hearing fully favorable on-the-record decisions after an amendment of onset date and/or duration, the *Consistency Report*'s projected costs savings from its suggestion are unsupported.

C. Use of Video Hearings

The *Consistency Report* recommends expansion of the use of video hearings. *Consistency Report* at 44-50 (Recommendation 3). NOSSCR supports the use of video hearings so long as the right to a full and fair hearing is adequately protected; the quality of video hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations and SSA policy.[10]

D. Assessing the Appeals Process

1. Publication of Appeals Council Decisions

The *Consistency Report* recommends publishing "all or at least a significant portion" of the more than twenty thousand "decisions" the Appeals Council issues each year. *Consistency Report* at 61. (The *Consistency Report* apparently refers to the Appeals Council's remand orders following the grant of a claimant's request for review or after taking own-motion review.) We do not oppose the publication of those remand orders. However, the vast majority of Appeals Council remand orders are fact specific and perfunctory, thus having little heuristic value. The orders generally identify a well-established legal principle(s), one or more pertinent facts, and the ALJ's failure to apply that principle(s) to those facts. If the remand orders are published, any personal identifying information or any information from which the identity of a claimant could be discerned must be removed.

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[9] *See* 20 C.F.R. § 404.900(b) (2012).

[10] The *Consistency Report* recommends expansion of video hearings based in part on only the "modest" (three percent) lower allowance rate for such hearings. *Consistency Report* at 47. The *Consistency Report* correctly did not suggest that the lower allowance rate for video hearings reflects more accurate determinations, but implied that the lower allowance rate was a justifiable cost for the purported increased flexibility of such hearings. For those three percent of claimants who would not have been denied had they received in-person hearings, the impact of video hearings was not modest. As justification for the use of video hearings, the *Consistency Report* stated demeanor-based credibility findings have limited utility. *Consistency Report* at 48. However, the *Consistency Report* did not grapple with the fact that ALJs who conduct video hearings routinely rely upon such findings.

2. Distribution of SSA Office of General Counsel Memoranda

NOSSCR believes that the *Consistency Report*'s recommendation that ALJs and decisionwriters receive Office of General Counsel memoranda recommending that the Appeals Council agree to grant plaintiffs judicial relief is unnecessary. *Consistency Report* at 62 (Recommendation 7). It is readily apparent from a court's written disposition of a civil action by agreement of the Commissioner and the plaintiff why the Commissioner agreed that the plaintiff was entitled to judicial relief. More important, an ALJ on court remand should focus on the terms of the court order, not on what such a memorandum states. In any case, a claimant should receive any guidance the ALJ receives related to the proceedings on court remand.

3. ALJ Drafting of Decisions on Remand from Federal Courts

NOSSCR objects to the recommendation that ALJs, "where possible, be assigned to write decisions upon remand from federal court." *Consistency Report* at 62 (Recommendation 8). First, the recommendation is not based on any analysis of current Agency policy regarding assignment of court-remand cases. Second, the recommendation implies that a case should be assigned to the same ALJ on court remand even if under existing Agency policy the ALJ who previously decided the case would not be assigned to decide the case again, e.g., because the ALJ moved to a different hearing office. Third, the recommendation will lead to incorrect and unfair outcomes in cases where a particular ALJ refuses to adjudicate properly or fairly a particular claim.

4. Expansion of Own Motion Review by the Appeals Council

The *Consistency Report* recommends that the Commissioner expand its own-motion review. *Consistency Report* at 63-70 (Recommendations 9-10). Any such expansion must respect the decisional independence of ALJs and be implemented in a neutral manner.

5. Expansion of SSA's Statistical Quality Assurance Programs

NOSSCR agrees that the Agency should study why ALJs reach different outcomes. *Consistency Report* 70-72 (Recommendation 11). Among other things, the Agency should investigate whether particular ALJs discriminate against claimants based on the claimants' race, sex, gender, age, and medical conditions. The *Consistency Report* disavowed any knowledge of the fundamental question why ALJs render markedly disparate decisions.

6. Adoption of Appeals Council Audit Function

NOSSCR strongly objects to the *Consistency Report*'s recommendation to eliminate a claimant's right to request Appeals Council of an ALJ's unfavorable or partially favorable decision. *Consistency Report* at 72-79 (Recommendation 12). For the reasons discussed below, the claimant's right to request review by the Appeals Council is a highly efficient means to correct material errors in ALJ decisions.

a. Administrative review of ALJ decisions is important to claimants.

Claimants benefit from the right to request review by the Appeals Council for a variety of reasons, including:

- Appeals Council review is the most efficient way for claimants to correct errors in ALJ decisions finding them not disabled.
- Claimants can request review of improper ALJ dismissals and denials of reopening requests.
- The Appeals Council reviews allegations that a claimant's right to a full and fair hearing has been violated. If the allegation is supported, the Appeals Council will either reverse the denial of benefits or remand the case to a different ALJ for a new hearing.
- The Appeals Council reviews cases that do not involve a claim for disability benefits. Also, many disability claims have related nondisability issues, e.g., overpayments due to earnings and income/resource issues in SSI cases.
- Claimants can submit new and material evidence that relates to the period before the ALJ decision.

b. Unrepresented claimants would be especially disadvantaged by elimination of a right to request Appeals Council review.

While proceedings before the Appeals Council are nonadversarial, federal litigation is adversarial. In addition, the procedure to request review is relatively simple. SSA has a one-page form that can be completed and filed in any Social Security office, sent by mail or faxed. In contrast, the procedure for filing an appeal to federal district court is much more complicated and, unless waived, there is a $350 filing fee, which may be cost-prohibitive for a claimant. *Pro se* claimants are intimidated by the process.

c. Improve the Appeals Council's review function

The *Consistency Report* unreasonably maintains that because the Appeals Council does not grant a claimant's request for review in many cases in which the Appeals Council should have granted such review, a claimant should not have any right to request Appeals Council review. *Consistency Report* at 73-74. If the Appeals Council is not performing its review function optimally, the solution is to improve the Appeals Council's performance of that function.

d. The Appeals Council's role to correct ALJ errors

By eliminating the claimant's right to request review by the Appeals Council, the *Consistency Report* in essence recommends that the Agency shirk in large part its obligation to correct its own errors. In comparison to the Appeals Council, the federal courts are a grossly inefficient mechanism to correct ALJ errors. While the Appeals Council spends on average about four hours acting on the merits of a single request for review, federal court personnel, including judges and their clerks, spend much more time to resolve a matter. It makes little sense to require a federal judge to issue a twenty-page order in a case when the Appeals Council would have resolved the matter with a two-page remand order. As a related matter, while a representative may typically spend three to seven hours persuading the Appeals Council to grant a claimant's request for review, an attorney typically spends fifteen to forty-five hours persuading a federal court to grant

a plaintiff's prayer for relief. The significantly increased cost of litigation in contrast to proceeding before the Appeals Council would likely prevent many claimants with meritorious claims from retaining attorneys to initiate civil actions.

e. Impact on the federal courts

The *Consistency Report* would likely lead to thousands, even tens of thousands more civil actions per year. The *Consistency Report* would simply transfer the "administrative costs" from the Agency to the already-overburdened federal courts and flood the courts with new cases. In fact, recent experience with eliminating the right to request review in SSA Region I states as part of "Disability Service Improvement" in the mid-2000's, seems to show that these concerns are justified. *See generally Petitions for Judicial Review v. Astrue,* 789 F. Supp.2d 252 (D.Mass. 2011).

E. DDS Reconsideration Level

NOSSCR agrees that the Agency should "hesitate" before reinstituting the reconsideration level in the prototype states. *Consistency Report* at 81 (Recommendation 13). The *Consistency Report* correctly states that the reconsideration level is an inefficient mechanism to correct erroneous initial determinations and that the reconsideration level may dissuade claimants entitled to benefits from appealing incorrect denials of those benefits. *Consistency Report* at 79-81. NOSSCR supports the general elimination of the reconsideration level and providing more time and effort to better develop disability claims at the initial level.

F. Continuing Disability Reviews

NOSSCR strongly disagrees with the *Consistency Report*'s recommendation to amend the Act to include "term" disabilities for claimants. *Consistency Report* at 81-89 (Recommendation 14). As the *Report* states, this Recommendation is outside the scope of the original study mandate and should not be a part of the Committee's deliberations.

Placing arbitrary time limits on benefits would likely be counterproductive and actually exacerbate claimants' physical or mental health problems. It is impossible to predict who might be able to work at a self-sustaining level as the course a disability or illness may take is unpredictable and definitely not known ahead of time. For those who are not able to attain a significant level of employment, or not able to do so within the prescribed time frames, a time-limited program would greatly increase the need for repeated applications and adjudications, causing great stress for beneficiaries as well as increased administrative costs for the Agency.

The current process of conducting continuing disability reviews (CDRs) avoids these problems and additional costs, while ensuring that individuals who no longer qualify for the program have their benefits terminated. It is very likely that establishing term disability with a reapplication process would lead to both significantly increased administrative record costs and significant hardship for the disabled.

NOSSCR strongly supports SSA's efforts to conduct program integrity work; however, Congress has not provided the Agency with adequate budget resources to keep up with scheduled reviews.

If the real issue is to ensure that claimants continue to meet the disability criteria, then SSA should be fully funded to conduct CDRs, rather than create a new process that is both unfair to claimants and inefficient for the Agency.

III. *Treating Physician Report*

NOSSCR strongly supports the existing regulatory treating physician rule found in 20 C.F.R. § 404.1527(c) (2012) and strongly opposes the *Treating Physician Report*'s recommendation to amend that regulation to remove the provision pertaining to accordance of "controlling weight" to a treating physician's opinion. *See* 20 C.F.R. § 404.1527(c)(2) (2012) ("If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight."). *Treating Physician Report* at 54-59.

First, the *Treating Physician Report* maintains that it is too difficult for an ALJ not to accord "controlling weight" to a treating physician's opinion, when, in actuality, the requirements for according such weight is stringent. *See* 20 C.F.R. § 404.1527(c)(2) (2012). The opinion must be both "well-supported" by objective medical evidence and not inconsistent with "other substantial evidence in your case record." *Id.* "Substantial evidence" is more than a scintilla and less than a preponderance of the evidence. Social Security Ruling 96-2p. For example, a claimant's spouse's statements that a claimant is not as limited as his or her treating physician suggests are such substantial evidence. *Id.*

Second, the *Treating Physician Report* unreasonably recommends revising the treating physician rule because claimants are less likely today to have a treating physician. Just because claimants are less likely to have a treating physician, in some cases today, does not mean that the treating physician rule should be amended. At any rate, the current regulations provide a way for adjudicators to consider the "length of the treatment relationship," the "frequency of examination," and the "nature and extent of the treatment relationship." 20 C.F.R. § 404.1527(d)(2) (2012).

Third, the *Treating Physician Report* is based on basic misunderstanding of judicial review of disability determinations. According to the *Treating Physician Report*, "district courts review only ALJ decisions that discredit as opposed to credit treating source opinion." *Treating Physician Report* at 18. It is ordinary and routine for courts to review cases in which an ALJ agrees with a treating physician's opinion and the plaintiff disagrees with that opinion. It is ordinary and routine for courts to review cases in which an ALJ agrees with a treating physician's opinion, but the consequences of such agreement for disability are in dispute.

Fourth, NOSSCR strongly disagrees that federal courts misunderstand, misapply, or ignore the regulatory treating physician rule. Federal courts grant plaintiffs relief for violations of the treating physician rule because ALJs violate that rule. The problem is not the rule, but the lack of ALJ compliance with it.

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Thank you for considering our comments.

Very truly yours,

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