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Recommendations for Reorganization of the Adjudicatory Process

There have been 1.1 million people waiting for hearings and decisions on their claims for disability benefits or supplemental security income benefits for well over a year. Wait times can reach two years. For someone who cannot work and may not have any income, this is an intolerable situation.

In response to the backlog crisis, in 2016, the Social Security Administration developed the CARES plan. The CARES (Compassionate and Responsive Service) plan has done little, if anything, to reduce the backlog as it makes no significant changes in the way that the adjudicatory system operates.

If the adjudicatory system were to be organized in such a way that case processing could be improved, more cases could be heard, more claimants served, and more decisions issued in a timely fashion. Below are some simple solutions to enhance the ability of Administrative Law Judges to hear and decide more cases.

1. Streamline the hearing office management structure - The current management structure in each of the 168 hearing offices provides for a Hearing Office Chief Administrative Law Judge, a Hearing Office Director and several group supervisors who oversee the clerks and writers in that office. The position of group supervisor should be eliminated and those employees deployed to case-handling activities; many are former decision writers and, with a backlog of 50,000 cases in writing, their skills will better serve the Agency in that capacity.

   In addition to the Hearing Office Chief Administrative Law Judge, offices can operate efficiently with a Hearing Office manager, a deputy hearing office manager in large offices, and a supervising attorney for the writers. Reminders with regard to untimely work can be automated.

2. Provide dedicated clerical and writing staff to each Judge (see narrative below).

3. Eliminate Regional Offices and centralize administrative work. Regional Offices are expensive in terms of real estate, located, as they are, in cities such as Boston, New York,

Chicago, San Francisco, Seattle, and Atlanta, and most administrative work does not need to be duplicated in ten regional offices.

4. The Agency must enact rules of practice by regulation that, among other things, would require representatives to:
    - provide evidence substantially prior to the hearing – 30 days in advance will allow for the Judge to get records (by subpoena) if the representative cannot get them; a new regulation, which will go into effect in May 2017, only allows for a 5-day submission period prior to the hearing.
    - submit documents in chronological order;
    - restrict exhibits to those documents which are related to the claimant's disability;
    - remove duplicate documents;
    - submit a memo 25 days in advance of the hearing outlining all severe and non-severe impairments, specifying the limitations arising from each, citing the exhibit number and page which supports these assertions, and outlining all opinion evidence in the record; neither the claimant nor the representative may add impairments after the memo is submitted.
    - set forth a specific alleged onset date well in advance of the day of the hearing, so the ALJ does not have to spend time studying records in the file that are no longer relevant to the time period in issue;
    - stop re-opening and re-litigating prior closed and non-appealed prior decisions; the same periods of time can be re-litigated multiple times under current rules.
    - And, absent extraordinary circumstances, the record should be closed as of the day of the hearing.

5. Make changes to the Hearings, Appeals, and Litigation Law Manual (HALLEX). SSA's HALLEX) is a voluminous and complex manual of rules and policies which must be followed by, inter alia, ALJs in the adjudicatory process. The often unwieldy and over-complicated HALLEX requirements demand ALJ time and attention in every case and must be streamlined. We have offered common-sense suggestions with an eye toward improving the efficiency of the hearing process; some of our suggested HALLEX changes are found at the end of this document.

6. Establish an SSA Medical Expert Corps. SSA ALJs are often required to adjudicate cases based on complex medical evidence without the timely benefit of medical experts. Currently, hearings are delayed because there are not sufficient numbers of specialists who will agree to serve as medical experts; much staff time is spent on trying to find expert witnesses for hearings. Undoubtedly, the fact that fees have not been increased for over thirty years is a factor. A large corps of medical experts will provide Judges with unbiased expert opinions that form the basis of disability determinations in a timely manner, resulting in medically and legally supported adjudications.

7. Currently, much time and energy is spent on drafting fully favorable decisions; this not only takes up the time of the decision writer, it causes the judge to spend time reading the decision. Fully favorable decisions should be streamlined and include only the following

information: whether or not the claimant is earning substantial gainful activity wages, the severe impairment that is causing the disability (and not every severe and non-severe impairment), and whether or not the claimant's condition meets or equals a Listed Impairment, with only a citation to the exhibit numbers that contain the medical evidence. If the claimant's condition does not meet a Listing, the decision should specify what the claimant can still do given his/her impairment (residual functional capacity), cite only to the exhibit numbers that contain this medical evidence, and state whether the claimant can perform his/her past relevant work or any work in the economy. There is no need to go into detail about the evidence or the medical opinions. If the case is chosen for quality review, the whole record will need to be reviewed in any event. Since about 40% of our cases are favorable, this change will save a lot of time.

8. Have the Appeals Council stop remanding cases for reasons that do not impact the outcome of the case. Most courts apply the concept of "harmless error," that is, a mistake has been made but the result would not change even if the error had not occurred. The Appeals Council needs to adopt this concept so as to reduce the re-adjudication of cases.

Inefficient Operation

A normal adjudicatory system is organized so as to provide support to the Judge, as it is the Judge who is the point of production. However, ODAR operates for the benefit and convenience of the clerks and representatives and requires Judges to perform clerical and other non-judicial acts. Only Judges can hear and decide cases. They should not be encumbered with other duties and assignments if the Agency's primary goal is to have them issue decisions and reduce the backlog.

Every ALJ needs dedicated clerical and attorney support in order to be productive. In many hearing offices, management has stripped the ALJs of their assigned clerical support, causing them to have to spend time and energy following up on case-handling directives and searching for a staff member to provide needed assistance with matters such as equipment malfunctions, missing documents, phone numbers of experts who will be testifying at the hearing, etc. Moreover, management has reduced the number of attorneys and decision writers assigned to the hearing offices and placed this support in centralized locations. As a result, ALJs do not know who is drafting their decisions, have little to no contact with them, and must spend hours, at times, editing poorly crafted decisions.

The lack of rules of practice (see number four above) impedes the smooth operation of the adjudicatory process. SSA holds more adjudicatory hearings than any other court system, yet has no rules of procedure for those who practice before it. The submission of evidence in a timely fashion to permit the Judge and expert witnesses proper time to review the evidence and the closure of the record are two critical measures that are

missing. The 5-day rule will not make a significant difference, and, in any event, it permits representatives to rather easily slide out from under its restrictions.

In addition, representatives should not be permitted to submit duplicative documents or exhibits that are not organized in chronological order. Sometimes as much as twenty percent of the medical evidence consists of duplicate documents. Because medical evidence in a case may consist of thousands of pages, duplicates bulk up the record and lengthen the ALJ's review. Representatives are paid for their work; they should assist the claimants and the adjudicatory process by making it easier for the ALJ to quickly review the record.

HALLEX REFORMS

1. Reinstitute HALLEX I-2-812 on expedited fully favorable (FF) decisions that only requires explanation at the step disability was found and addresses conflicts in the evidence. That HALLEX said nothing about addressing impairments that do not have any impact on the outcome.

2. Replace the HALLEX on ALJ instructions with the much shorter list of requirements contained in the recent OCALJ memo on instructions

3. Remove from HALLEX the requirement to rule on objections when the decision is FF or the objection is not relevant in a denial decision. Under the current HALLEX, the ALJ has to rule on an objection to the VE's qualifications at the hearing, in some other writing, or in the decision even though the claimant meets a listing, is disabled at step five under the grids or based on the VE's testimony, the claimant is not disabled at step 2, the claimant can do PRW as actually performed, or the claimant is not disabled under direct application of the grids.

4. Remove from HALLEX the requirement to discuss why evidence not submitted within 5 days of the hearing or post-hearing evidence was not admitted into the record when the decision is FF. The issue is moot because all material issues have been resolved in the claimant's favor. This only applies to region one but will soon apply everywhere.

5. Revise HALLEX to make it clear citing to specific exhibits is not necessary when the decision is FF. The evidence is in the file and can be located by in line quality review and the AC when conducting on motion review. The RFC is what will be used for any continuing disability review, so there is no need to cite the specific exhibits.

6. Eliminate from HALLEX the requirement at the closing of the hearing that the ALJ must ask the claimant and the representative if they are aware of any additional evidence that relates to whether the claimant is disabled. The ALJ already asks this at the beginning of the hearing.

7. Revise HALLEX to allow the ALJ to proceed with the hearing if the claimant has not reviewed the evidence prior to the hearing and rule on any objections to the evidence and requests for a supplemental hearing after proffering the file post-hearing. The are many delays in hearings to allow for this review because claimants say they didn't get the CD or the office staff did not show it to them on the day of the hearing. There are also numerous postponed phone hearings because the claimant says she/he did not get or could not open the CD.

8. Revise HALLEX to make it clear the ALJ can require any proposed oral argument by a representative to be submitted in writing after the hearing. Such arguments can add significant time to the hearing and are not necessary because they can be reduced to writing.

9. Revise HALLEX to make it clear the ALJ can stop any questioning that merely restates the ALJ's questions or otherwise does not bring out "new information" from the witness.

10. Revise HALLEX to make it clear that a withdrawal of the request for hearing will be presumed to be made voluntarily and with knowledge of the consequences of withdrawal (I.e., dismissal of the request for hearing and the prior determination remaining in effect) absent a showing that the requirements of SSR 91-5 regarding mental incompetence are met. The current HALLEX requirement of the ALJ ensuring the claimant knows the consequences leads to unnecessary remands and excess staff resources attempting to get the claimant to send a better letter or otherwise trying to get the claimant to acknowledge understanding of the consequences over the phone.

11. Revise the HALLEX on writing the decision to make it clear that all decisions must contain the level of analysis required to be legally sufficient, which must include the reasons for the ALJs conclusions with citation to the evidence as well as resolving any conflicts in the evidence, they should not contain a summary of the evidence. This change will refocus those writers who still just summarize the medical evidence and say "Accordingly, the allegations are not consistent" instead of just explaining why the allegations are not consistent. This in turn creates two time consuming burdens for the ALJ: reading through the mind numbing summary and then either fixing the draft or writing a memo to management on what needs to be fixed in the draft.

12. Revise HALLEX to not allow the claimant to postpone the hearing for a representative if he or she does not have good cause for not trying to obtain one earlier.

13. Remove from HALLEX and POMs the good cause reason of relying on the representative for untimely filing as this favors represented claimants over unrepresented claimants.

14. Revise HALLEX to prohibit an incarcerated claimant from declining a phone hearing.

15. Eliminate the HALLEX provision that requires an NTSC be sent if the rep withdraws at or within about a week before the hearing.

16. Change HALLEX to create an affirmative duty for all claimants to notify the HO of any change in address.

17. Change the whereabouts unknown HALLEX to only require running the PUPs and other queries to locate the claimant.

18. Eliminate the HALLEX that requires the ALJ to tell the claimant the VHR is a government contractor.

19. Vastly simplify the HALLEX provisions allowing the claimant or representative to request administrative review of the amount approved under a fee agreement.

20. Revise HALLEX to allow good cause to be developed after the time of the hearing if the claimant requests a postponement within five days of the hearing. In many cases, the claimant calls a few minutes or hours before the hearing, doesn't show, and the ALJ can't dismiss because she/he was unable to get back to the claimant before the time of the hearing with the good cause ruling. HALLEX currently requires the ALJ to get back to the claimant with the lack of good cause finding before the hearing.

21. Because it is redundant, eliminate the HALLEX provision that requires sending form 1178 with the fee authorization when the representative files a fee petition.

22. Eliminate the HALLEX requirement that the ALJ must request administrative review of the amount authorized under a fee agreement within 15 days of the Notice of Award. Allow the ALJ to request it afterward for up to 6 months after the decision is issued and then also allow the ALJ to object to the fee amount in the decision granting benefits to the claimant.

23. HALLEX I-2-4-25 D: We should not be issuing a decision when the representative appears and the claimant fails to appear (absent good cause, of course). I find that I really need to question the claimant whenever I schedule a hearing (otherwise, I would just issue an OTR). If the claimant doesn't appear, I can't complete the record. I should be able to dismiss the case rather than jump through hoops, take testimony from expert witnesses, and go to the trouble of writing a decision. When the claimant gets interested in the case again, he/she can file a new application.

    Same with I-2-4-25 F – Claimants should not be permitted to waive the right to a hearing and thus avoid questioning, if the ALJ needs to question them.

24. I-2-5-29 and I-2-7-1: In April, these provisions were changed to require proffers of interrogatories **pre-hearing.**

For 22 years, I have been sending pre-hearing interrogatories to treating physicians who send me ridiculous MSSs or to clear up other inconsistencies in the record. This ensures that, when I get to the hearing, the record is complete – the TP has explained his/her MSS (usually stating it is based on the claimant's subjective complaints) or failed to explain the MSS by not answering. The representative can see the interrogatory in the record, so nothing is being hidden from him/her, and can respond/object by letter prior to the hearing if deemed necessary. Other judges send pre-hearing interrogatories to MEs and VEs and can thus expedite favorable decisions through an OTR. Now, the time of the judge and clerk is being taken up with unnecessary proffers and reviewing representative comments.

25. Revise the HALLEX I-2-52C that requires the ALJ, when the claimant postpones for a representative, to go on the record and go over the rights to representation, to provide a list of reps to the claimant, to inform the claimant normally only one postponement will be granted for this reason, to inform the claimant that another postponement for this reason will only be granted for good cause, to tell the claimant to call the office if a rep is obtained, and then to have the claimant sign the Acknowledgment of Postponement for a Rep form to - just signing the form and giving a list of rep