

January 9, 2009

Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

RE: Docket No. SSA-2008-0033

To Whom It May Concern:

Advocates for Basic Legal Equality (ABLE) and Legal Aid of Western Ohio, Inc. (LAWO) are non-profit regional law firms that provide high-quality legal assistance in civil matters to help eligible low-income individuals and groups in northwestern and west central Ohio achieve self-reliance, equal justice, and economic opportunity.

ABLE and LAWO submit these comments to the proposed Rules for Setting the Time and Place for a Hearing before an Administrative Law Judge.

While we recognize that SSA-Docket 2008-0033 is an attempt to decrease the backlog of administrative hearings, it is likely to result in negative consequences for claimants. We recommend that the changes we have discussed below be incorporated into the final version of the proposed rules.

General Concern:

Issue: The proposed amendments seek to clarify that the agency itself will be responsible for setting the time and place for a hearing before an administrative law judge (ALJ). (Ex. Sec. 404.936 and 416.1436 paragraphs (a) “We set the time and place for the hearing. We may change the time and place, if it is necessary.)

Concern: The changes as proposed will not ensure greater flexibility in scheduling in person and via video conferencing, or aid in increasing efficiency in the hearing process. Taking the scheduling duties from the hearing office and handing scheduling power over to the Social Security Administration could result in due process violations. The rules have the potential to violate the requirements of *Goldberg v. Kelly*, 397 U.S. 254 (1970), if the proposed scheduling system forces claimants to go forward with hearings without adequate access to the record or adequate opportunity to determine whether additional medical evidence is needed. If cases are not fully developed, hearings may need to be continued to get the necessary medical evidence.

Recommendations:

The proposed changes should establish more accountability for the ALJs to allocate sufficient available hours to process a reasonable number of cases and schedule hearings. This can be accomplished by establishing rules, similar to those applicable to federal court judges, with time guidelines for setting hearings and issuing decisions. For example, Local Rule 7.3 of the U.S.

District Court for the Northern District of Ohio, provides that all motions will be decided within 60 days. There is an established goal that no district judge should have more than twenty motions under advisement for more than six months and there is a motion control program implemented to effectively manage the motions docket. (Northern District of Ohio, Court Rules; Appendix H)

ALJs would need to comply with the guidelines and those who do not comply would have the opportunity to explain why they are not meeting deadlines. Further, all hearing office Chief ALJs should be required to use ODAR's Case Processing and Management Systems to monitor ALJ performance.

An alternative option would be to remand additional cases to Disability Determination Services (DDS). Approximately 51,000 cases were sent to DDS by the end of fiscal year 2008, with the expectation that ten percent would result in fully favorable decisions. Both of these numbers should be significantly increased in fiscal year 2009. (Social Security Administration, ODAR, Fiscal Year Report for 2007)

We also agree with the recommendation given by Patrick P. O'Carroll Jr., Inspector General Social Security Administration to the United States House of Representatives Committee on Ways and Means Subcommittee on Social Security on September 16, 2008 that hearing office staffing deficiencies must be addressed.

Another alternative option would be to hire additional senior attorneys to review cases and assist with issuing early decisions or on-the-record reviews. Senior attorneys could review medical records and contact representatives directly if additional information was necessary.

Increased ALJ Caseload

Issue: Increasing ALJ caseload to a mandatory 500 cases per year

Concern: The proposed rule recommends a caseload of 500 cases per year for each ALJ in order to eliminate the backlog by 2013. This proposed caseload is too high. A mandated caseload of 500 cases would not allow ALJs to allocate sufficient time in their schedule to hold hearings. Claimants' due process rights may be potentially violated if sufficient time is not allotted for the claimant to present his or her case.

Recommendation: Mandate that all ALJs provide the hearing office staff with a calendar offering sufficient available hours to process cases. Require that all ALJs have comparable levels of availability. This would still allow a broader range of available time and dates, and also allow hearing staff who work closely with the ALJs to continue to schedule the hearings.

Untimely hearing decisions

Issue: The proposed changes do not address the problem of untimely hearing decisions.

Concern: Under the proposed rules, a claimant may have a shorter wait between the date a request for hearing is filed and the date a hearing is scheduled. But this does not benefit the claimant and the backlog will not be eliminated if ALJs unreasonably delay issuing a decision after the hearing is completed.

Recommendations: Utilize senior attorneys as previously mentioned to do more case reviews before the hearing. We also recommend that ALJs make timely decisions within a 60 day time frame, and that a system be implemented to hold ALJs accountable for decisions issued beyond that time frame.

Electronic Scheduling Initiative:

Issue: Integration of the schedules of ALJs, experts, claimants, claimant's representatives, hearing recorders, and the availability of the hearing rooms.

Concern: The success of the electronic scheduling initiative would depend on whether the hearing office staff would be the party overseeing the scheduling process. Information that is sent to the local office is not always received by the staff at the hearing office where the ALJs work. The local office is often unaware of the status of the claimant's case once it goes to the hearing level. The hearing office staff is in contact with the ALJ's, experts, claimants, the claimant's file, the claimant's representatives, and hearing recorders. It will be more efficient to continue responsibility for scheduling with the hearing office staff who are best able to coordinate the integration of these multiple calendars.

Recommendation: If the schedules are integrated into an electronic scheduling initiative, place primary responsibility for scheduling with hearing office staff who have access to all parties required or eligible to attend the hearing.

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