SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404, 405 and 416

[Docket No. SSA-2014-0052]

RIN 0960-AH71

Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process

AGENCY: Social Security Administration

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to revise our rules so that more of our procedures at the administrative law judge (ALJ) and Appeals Council levels of our administrative review process are consistent nationwide. We anticipate that these nationally consistent procedures will enable us to administer our disability programs more efficiently and better serve the public.

DATES: To ensure that your comments are considered, we must receive them no later than (INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER).

ADDRESSES: You may submit comments by any one of three methods—Internet, fax, or mail. Do not submit the same comments multiple times or by more than one method. Regardless of which method you choose, please state that your comments refer to Docket No. SSA-2014-0052 so that we may associate your comments with the correct rule.

Caution: You should be careful to include in your comments only information that you wish to make publicly available. We strongly urge you not to include in your comments any personal information, such as Social Security numbers or medical information.

1. Internet: We strongly recommend that you submit your comments via the Internet. Please visit the Federal eRulemaking portal at http://www.regulations.gov. Use the "Search" function to find docket number SSA-2014-0052. The system will issue a tracking number to confirm your submission. You will not be able to view your comment immediately because we must post each comment manually. It may take up to a week for your comment to be viewable.

2. Fax: Fax comments to (410) 966–2830.

3. Mail: Mail your comments to the Office of Regulations and Reports Clearance, Social Security Administration, 3100 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401.

Comments are available for public viewing on the Federal eRulemaking portal at http://www.regulations.gov or in person, during regular business hours, by arranging with the contact person identified below.

FOR FURTHER INFORMATION CONTACT: Maren Weight, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605-7100. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-

1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at http://www.socialsecurity.gov.

SUPPLEMENTARY INFORMATION: We propose revisions to:

1) the time-frame for notifying claimants of a hearing date;

2) the information in our hearing notices;

3) the period when we require claimants to inform us about or submit written evidence, written statements, objections to the issues, and subpoena requests;

4) what constitutes the official record; and

5) the manner in which the Appeals Council considers additional evidence.

Background

Over the last few years, we have revised many of our regulations to bolster program integrity and clarify our policy, procedures, and expectations. For example, on June 25, 2014, we made changes to when a claimant must object to appearing at a hearing by video teleconferencing.[1] As another example, we published a final rule on March 20, 2015, that clarified a claimant's duty to inform us about or submit all evidence that relates to whether or not he or she is blind or disabled, subject to two exceptions for privileged communications.[2] We made these and other changes specifically to strengthen the integrity of our programs.

[1] 79 FR 35926.
[2] See 80 FR 14828, 20 CFR 404.1512, 416.912.

As we explained in the final rule on March 20, 2015, "we believe program integrity requires us to obtain complete medical evidence (favorable or unfavorable) in disability claims."[3] Although that statement refers to medical evidence, we reiterate in this proposed rule that a complete evidentiary record is necessary for us to make an informed and accurate disability determination or decision, and bolsters program integrity by improving consistency in the adjudication of claims at all levels of the administrative review process. As we look ahead, we continue to evaluate our regulatory and sub-regulatory policies to assess where we can make changes to improve accuracy and efficiency in our administrative review processes. To that end, we are now proposing the changes outlined below.

As we discuss in detail below, we have now had time to implement helpful systems changes and review a study performed by the Administrative Conference of the United States (ACUS), in which ACUS evaluated available data and considered various internal and external stakeholder opinions about the impact of our Part 405 rules.[4] We are also facing an unprecedented challenge in the workloads pending at our Office of Disability Adjudication and Review (ODAR). With more than a million people currently waiting for a hearing decision, we cannot afford to continue postponing hearing proceedings because the record is not complete at the time of the hearing. Facing this unprecedented workload challenge requires that we consider all options to ensure we have a complete evidentiary record, provide timely and accurate service,

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[3] 80 FR at 14833.

[4] See Report from Office of the Chairman of the Administrative Conference of the United States, SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region 1 Pilot Program (Dec. 23, 2013) ("ACUS Report"), available at http://acus.gov/sites/default/files/documents/Assessing%20Impact%20of%20Region%20I%20Pilot%20Program%20Report_12_23_13_final.pdf. For the specific data reviewed and opinions collected by ACUS, see Appendix to SSA Disability Benefits Adjudication Process: Assessing the Impact of the Region I Pilot Program (Dec. 23, 2013) ("ACUS Report Appendix"), available at https://www.acus.gov/sites/default/files/documents/Appendix%20to%20Assessing%20Impact%20of%20Region%20I%20Pilot%20Program%20Report_12_23_13_final.pdf.

and improve how we perform all administrative tasks. We expect these proposed changes will help us accomplish all three objectives.

More specifically, in the last decade, we have made significant progress in modernizing our business processes for hearings-level cases and enhancing our use of technology. For example, we now process most disability claims electronically, which allows us to transfer workloads around the country more easily. In addition, we have established five National Hearing Centers (NHC) that process only electronic cases and conduct all hearings via video teleconferencing. The NHCs assist hearing offices that have larger workloads and longer wait times for hearings. Our ability to transfer cases electronically out of a region to an NHC, or to another hearing office with a smaller workload, allows us to serve claimants more efficiently.

As we have increased our use of electronic case files, we also had an opportunity to re-evaluate how we receive and process evidence. Previously, claimants and representatives would mail, fax, or hand-deliver evidence to us, and we would enter the evidence into the case file manually. While these options remain available, improvements in technology now permit claimants and representatives to submit evidence through our Electronic Records Express (ERE) system, which uploads evidence directly into the claimant's electronic case file. Many representatives have also registered to use the Appointed Representative Suite of Services (ARS), which allows them to remotely view the claimant's electronic case file online and verify in real time that we received evidence. Representatives who access the case file through ARS can also view all of the other evidence in the file to verify that the record is complete.[5]

[5] Effective August 16, 2016, representatives who request direct payment of a fee in a case are generally required to access a case file through ARS. See 81 FR 22697 (2016).

We are also improving how we receive electronic evidence from medical providers. Our Health Information Technology (HIT) program allows us to request and receive a claimant's medical records through an electronic submission. Although we currently use HIT in only a small number of cases, we anticipate that we will expand the HIT program and make use of other technological advances that will make it easier and faster for us to obtain medical records. We expect these enhancements in how we receive evidence will improve our efficiency and ensure consistency in processing claims at the hearings and Appeals Council levels of our administrative review process.

Our progress in the areas discussed above can be undermined if our rules are not nationally consistent. At the beginning of 2006, the hearings and Appeals Council levels of our administrative review process generally operated under nationally consistent rules, set forth in 20 CFR Parts 404 and 416. However, on March 31, 2006, we published a final rule that implemented a number of changes to our disability determination process.[6] These changes, which we referred to collectively as the Disability Service Improvement (DSI) process, were primarily set forth in Part 405 of our regulations. As we explained in the preamble to our final rule, we selected Boston[7] as the first region to implement the DSI process. Over the last decade, we have revised or rescinded many portions of the Part 405 regulations.[8] However, certain aspects of DSI processing remain at the hearings and Appeals Council levels.

[6] See 71 FR 16424.
[7] The Boston region consists of the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.
[8] See 73 FR 2411, corrected at 73 FR 10381, and 76 FR 24802.

For example, our current Part 405 rules require us to provide claimants with notice of their hearings at least 75 days in advance of the hearing.[9] By contrast, our current Part 404 and Part 416 rules require us to provide claimants with notice of their hearings at least 20 days in advance of the hearing.[10] In addition, under Part 405, claimants are required to submit any written evidence no later than 5 business days before the date of the scheduled hearing, with a few exceptions.[11] Conversely, under Parts 404 and 416, claimants can submit evidence up to and on the date of the hearing, or even after a hearing.[12] Additionally, Part 405 contains other processing differences, including the time limit of at least 10 days prior to the hearing to submit subpoena requests versus Parts 404 and 416, which contains a time limit of 5 days prior to the hearing to submit subpoena requests. Lastly, Part 405 requires the submission of objections to the issues at the hearing 5 days prior to the hearing versus Parts 404 and 416, which requires the submission of objections at the earliest possible opportunity. [13]

There is also a difference in claims processing at the Appeals Council level due to the Part 405 rules, especially those that address when the Appeals Council considers additional evidence. Under Parts 404 and 416, the Appeals Council will consider new and material evidence only when it relates to the period on or before the date of the ALJ hearing decision. The Appeals Council will evaluate the entire record, including any new and material evidence

[9] 20 CFR 405.315(a).
[10] 20 CFR 404.938(a), 416.1438(a)
[11] 20 CFR 405.331(a).
[12] Our regulations provide that "[y]ou should submit information or evidence . . . or any summary of the evidence to the administrative law judge with the request for hearing or within 10 days after filing the request, if possible." 20 CFR 404.935, 416.1335. However, as noted in our subregulatory instructions, we accept additional evidence that a claimant submits at or after a hearing, until we issue a hearing decision. See, e.g., Hearings, Appeals, and Litigation Law manual (HALLEX) I-2-6-58 (available at https://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-58.html) and I-2-7-20 (available at https://www.ssa.gov/OP_Home/hallex/I-02/I-2-7-20.html). The circumstances in which the Appeals Council will consider additional evidence are set forth in 20 CFR 404.976(b) and 416.1476(b).
[13] Cf. 20 CFR 404.950(d)(2), 416.1450(d)(2) with 20 CFR 405.332 (subpoenas); 20 CFR 404.939, 416.1439 with 20 CFR 405.317(c) (objections to the issues).

that relates to the period on or before the date of the ALJ hearing decision. It will then review the case if it finds that the ALJ's action, findings, or conclusion is contrary to the weight of the evidence currently of record.[14]

However, under Part 405, the Appeals Council will consider additional evidence only where it relates to the period on or before the date of the ALJ hearing decision, and only if the claimant shows that there is a reasonable probability that the evidence, alone or when considered with other evidence of record, would change the outcome of the decision; and: (1) our action misled the claimant; (2) he or she had a physical, mental, educational, or linguistic limitation(s) that prevented him or her from submitting the evidence earlier; or (3) some other unusual, unexpected, or unavoidable circumstance beyond his or her control prevented him or her from submitting the evidence earlier.[15]

We have always intended to implement nationally consistent rules after we had sufficient time to evaluate the effectiveness of DSI processing. To assist us in evaluating these issues, we asked ACUS to review the impact of our Part 405 regulations at the hearings and Appeals Council levels. Ultimately, in its final report, ACUS deferred to us regarding whether to implement the Part 405 regulations nationwide.[16] However, ACUS suggested a variety of guiding principles and other observations for us to consider in making a decision regarding national uniformity. For example, ACUS suggested that we: (1) strive to attain an appropriate balance between claimant and agency interests as we pursue our goal of making the right disability decision as early in the process as possible; (2) strive for consistency in the administration of a national program; (3) collect and assess more data about the DSI program;

[14] 20 CFR 404.970(b), 416.1470(b).
[15] 20 CFR 405.401(c).
[16] See ACUS Report at 91.

and (4) if pursued, clarify the guidance to ALJs and claimants about application of the DSI program. ACUS also observed that if we pursued regulatory changes similar to DSI, it would be important to retain appropriate good cause exceptions for the late submission of evidence.

After considering ACUS's suggestions, we first provided additional training to ODAR adjudicators and staff regarding the application of our Part 405 rules. We also incorporated instructions for processing cases originating in the Boston region into our training materials for all staff, including addressing Part 405 issues in several of our quarterly Videos-On-Demand series that focus on new or problematic areas of adjudication. We continue to update sub-regulatory policy to include references and instructions on how to process cases under Part 405. As recommended by ACUS, we made these changes to promote consistent adjudication of Part 405 in the Boston region.

We then carefully considered ACUS's findings on how we receive evidence under Part 405. In its report, ACUS explained that it performed a comparative empirical analysis of data that we provided,[17] and its findings, while not definitive, appeared to show that the Part 405 rules made modest strides towards achieving our goal of improving the efficiency, accuracy, and timeliness of our disability adjudication process. While declining to draw definitive conclusions from its data analysis, ACUS highlighted several findings, including the following: (1) under Part 405, there was less likelihood that adjudicators would determine the record needed additional evidence and request a consultative examination; (2) there were lower average processing times in the Boston region than other comparable regions, and the Boston region's average processing times did not exhibit the same comparative decline in average processing

[17] For specific information about the data reviewed by ACUS, see ACUS Report Appendix.

times found in other regions; and (3) the Boston region had the lowest pending disposition ratio, which suggests enhanced case efficiencies.

We note that several of ACUS's findings, based on the available data through 2012, are consistent with our experience. For example, ACUS stated that the "average time intervals between issuance of hearing notices and hearings have been rising steadily at both regional and national levels in recent years."[18] While Parts 404 and 416 require that we provide notice to a claimant of a scheduled hearing at least 20 days before the hearing,[19] and Part 405 requires that we provide notice to a claimant of a scheduled hearing at least 75 days before the hearing,[20] it has been our experience that for several years nationwide, most claimants received more advance notice of a hearing than the regulations require. Specifically, the Boston region appears to be scheduling hearings and notifying claimants approximately 90 days before the hearing while other regions are providing notice more than 60 days before the hearing.[21] Additionally, we have also observed that, nationally, cases in which we sent notices approximately 60 days prior to the date of the hearing seem to have a reduced or the same likelihood of a postponed hearing as those scheduled with less notice of the hearing.[22] In addition to our experience, we also

[18] See ACUS Report at 30.
[19] 20 CFR 404.938(a), 416.1438(a).
[20] 20 CFR 405.316(a).
[21] At the hearing level, we use the Case Processing and Management System (CPMS) to manage our workloads. From the information available in CPMS, we reviewed the number days between the date of the notice of hearing and the date of a scheduled hearing to assess whether these trends appear to continue. In the Boston region, CPMS shows the mean number of days between these dates to be 79.7 (2013), 88.5 (2014), and 90.3 (2015). The median number of days was 82.0 (2013), 89.0 (2014), and 90.0 (2015). Nationwide, CPMS shows the mean number of days was 64.3 (2013), 64.8 (2014), and 69.9 (2015). The median number of days was 60.0 (2013), 62.0 (2014), and 68.0 (2015). Though not yet complete, the numbers in 2016 appear to be consistent with these trends.
[22] After reviewing the information available in CPMS, we observed the following: In 2013, we postponed 26.1% of cases scheduled 25-49 days in advance, 26.4% of cases scheduled 50-74 days in advance, and 29.2% of cases scheduled 75-99 days in advance. In 2014, we postponed 28.3% of cases scheduled 25-49 days in advance, 27.3% of cases scheduled 50-74 days in advance, and 29.3% of cases scheduled 75-99 days in advance. In 2015, we postponed 28.1% of cases scheduled 25-49 days in advance, 26.8% of cases scheduled 50-74 days in advance, and 28.0% of cases scheduled 75-99 days in advance. We also note that our analysis showed that cases scheduled less than 25 days in advance had the highest rate of postponement.

considered ACUS's finding that there was strong support from stakeholders, both inside and outside of the agency, for increasing the amount of advance notice a claimant receives before a hearing.

We considered proposing to adopt a 75-day advance notice requirement nationwide. However, the information available to us indicates that there may be a higher incidence of postponements when we give claimants 75 days or more advance notice of a hearing due to the unavailability of the appointed representative or adjudicator on the date of the scheduled hearing.[23] In contrast, we have observed that most hearing offices already schedule hearings 60 days in advance, and a 60-day advance notice period appears to have the same or a reduced incidence of postponements when compared to notice periods less than 60 days.[24] Therefore, based on the available data, we propose a 60-day notice requirement as the most administratively efficient. Further, because we are already scheduling most hearings nationwide at least 60 days in advance, we do not expect that adopting this requirement would have an adverse impact on the public or on our operations. As noted by ACUS, the public seems to support increasing the number of days for advance notice of a hearing because, among other reasons, it will provide more time to obtain updated medical records before the date of the hearing. Therefore, we propose to require that, nationwide, we notify claimants of a scheduled hearing at least 60 days prior to the date of the hearing.

[23] After reviewing the information available in CPMS for 2014-2016, we observed the following: In 2014 in the Boston region, hearings with at least one postponement were postponed 5.36% of the time due to a representative's unavailability and 8.07% of the time due to the unavailability of the decision maker. Nationally, the postponement rate for a representative's unavailability was 4.17% and a decision maker's unavailability was 5.91%. In 2015, the postponement rate in Boston for a representative's unavailability was 6.00% and a decision maker's unavailability was 8.02%. Nationally, the postponement rate for a representative's unavailability was 3.92% and a decision maker's unavailability was 6.76%. These trends appear to continue in 2016.

[24] See information in footnote 22.

The highlights of ACUS's empirical analysis and our own experience also support adopting nationwide rules similar to the existing Part 405 rules that govern how we receive evidence in the Boston region. For example, our experience is that under Parts 404 and 416, some hearings are postponed or require supplemental proceedings due to late submission of evidence. We anticipate that our final rule on the "Submission of Evidence in Disability Claims,"[25] discussed earlier, will decrease the number of Appeals Council remands based on additional evidence. However, our experience has shown, and we expect to continue to see, that the Appeals Council will need to remand some cases due to new evidence. The need to postpone and reschedule cases, along with Appeals Council remands based on new evidence that was available at the time of the hearing decision, costs us valuable resources and delays the adjudication of all claims at the hearings and Appeals Council levels.

In its report, ACUS also identified several concerns raised by stakeholders both inside and outside the agency with implementing Part 405 nationwide. For example, ACUS explained that both ALJs and claimants' representative groups agree that two of the most challenging obstacles to timely submission of evidence are: (1) delays in receipt of evidence from medical providers, and (2) delays in receipt of evidence from the claimant. As previously discussed, we propose changing our rules so that we provide claimants with additional time to inform us about or to obtain and submit written evidence. In doing so, we will also change our notices to ensure claimants are advised of the additional time. To address concerns about delays in receiving evidence from medical providers, we propose to retain the current good cause exceptions used in Part 405. We also propose to add examples, including that we will accept evidence submitted

[25] 80 FR 14828.

less than 5 business days prior to the hearing if a claimant shows that he or she actively and diligently sought to obtain the evidence promptly, but could not do so.

Based in part on ACUS's evaluation of the good cause exceptions to the Part 405 rule that requires claimants to submit evidence at least 5 business days before a hearing, we propose to clarify when other unusual, unexpected, or unavoidable circumstances beyond the claimant's control prevent earlier identification of or submission of evidence. To accomplish this, we have added examples to illustrate when a claimant meets a good cause exception, such as when a claimant is seriously ill or when evidence is not received until less than 5 business days before the hearing, despite the claimant's active and diligent efforts to obtain the evidence earlier. These examples are not intended to be exhaustive or to illustrate every possible situation, but to illustrate the sorts of situations most likely to arise.

In addition to adding examples regarding the good cause requirements, we also explain that, when reviewing claims that are not based on an application for benefits, the requirement to submit evidence at least 5 business days before a hearing does not apply if our other regulations permit the submission of evidence after the date of an ALJ decision. For example, under current section 416.1476(b)(2) (proposed section 416.1470(b)), in reviewing decisions other than those based on an application for benefits, the Appeals Council will consider evidence in the hearing record and any additional evidence it believes is material to an issue being considered. Supplemental Security Income (SSI) cases under title XVI of the Act that are not based on an application for benefits are excepted from the general rules that limit the Appeals Council's consideration of additional evidence based on the individual's right to reestablish his or her eligibility for title XVI payments during the course of an appeal without filing a new

application.[26] Therefore, we added an exception to address this and similar situations where other regulations may permit the submission of evidence in claims that are not based on an application for benefits.

To ensure national consistency in our policy and procedures, we also propose requiring claimants to file written statements about the case, or any objections to the issues, at least 5 business days prior to a scheduled hearing. We further propose to require a claimant to submit subpoena requests at least 10 business days prior to a scheduled hearing. For consistency with these proposed changes, we also propose changes to our regulations to explain what constitutes the official record.

Our proposal that generally requires claimants to submit written evidence at least 5 business days before a hearing also requires that we propose revisions to how the Appeals Council will handle additional evidence it receives on appeal. Under the proposed rule, the Appeals Council would generally consider additional evidence only if it is new and material and relates to the period on or before the date of the hearing decision, and only if the claimant shows that he or she did not submit the evidence at the hearing level because: (1) our action misled him or her; (2) he or she had a physical, mental, educational, or linguistic limitation(s) that prevented him or her from informing us about or submitting the evidence earlier; or (3) some other unusual, unexpected, or unavoidable circumstance beyond his or her control prevented him or her from informing us about or submitting the evidence earlier. If these requirements are satisfied, the Appeals Council would grant review if there is a reasonable probability that the evidence, alone or considered with the evidence of record, would change the outcome of the hearing level

[26] See 20 CFR 416.305(b)(5) (providing that an individual need not file a new SSI application if he or she is notified that his or her payments will be stopped because he or she is no longer eligible and he or she again meets the requirements for eligibility before his or her appeal rights are exhausted).

decision. For additional evidence that does not relate to the period on or before the ALJ decision, the Appeals Council would continue to notify the claimant that because of the new evidence, if he or she files a new application within a specified timeframe, the date of the claimant's request for review would constitute a written statement indicating an intent to claim benefits. This means that we would use the date of the claimant's request for Appeals Council review as the filing date for the new application, which we call a protective filing date. In addition to retaining this current practice, the Appeals Council would also provide a claimant with a protective filing date when it finds he or she did not have good cause for not submitting the evidence at the hearing level at least 5 business days before the hearing. Additionally, we also propose to clarify that the Appeals Council may conduct hearing proceedings to obtain additional evidence when needed.

In addition to creating greater uniformity in our procedures, we expect these changes will improve our ability to manage our workloads. Most importantly, we expect these changes to allow us to adjudicate cases and process workloads more efficiently and consistently, leading to better public service overall.

Because these proposed changes would bring the vast majority of Part 405 procedures in line with the procedures in Parts 404 and 416, we also propose to remove Part 405 in its entirety. In doing so, we acknowledge there are several sections in Part 405 that include minor language or substantive variances from Part 404 and Part 416 that we did not address above. For example, the requirements for showing good cause to extend a filing deadline are different under Part 405 from the ones we propose here. We intend that, other than the changes we propose in this NPRM, we are not proposing to adopt any of the other variances currently in Part 405.

Clarity of These Proposed Rules

Executive Order 12866, as supplemented by Executive Order 13563, requires each agency to write all rules in plain language. In addition to your substantive comments on this proposed rule, we invite your comments on how to make it easier to understand.

For example:

- Would more, but shorter, sections be better?
- Are the requirements in the rule clearly stated?
- Have we organized the material to suit your needs?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format make the rule easier to understand, e.g., grouping and order of sections, use of headings, paragraphing?

REGULATORY PROCEDURES

Executive Order 12866, as supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this proposed rule meets the criteria for a significant regulatory action under Executive Order 12866, as supplemented by Executive Order 13563. Therefore, OMB reviewed it.

Regulatory Flexibility Act

We certify that this proposed rule would not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

These proposed rules contain reporting requirements in the regulation sections §§ 404.929, 404.935, 404.939, 404.949, 404.950(2), 404.968, 416.1429, 416.1435, 416.1439, 416.1449, 416.1450 and 416.1468 that require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). For sections 404.929, 404.949, 404.950(2), 416.1429, 416.1449, 416.1450(2) of these rules, we previously accounted for the public reporting burdens in the Information Collection Requests for OMB Numbers 0960-0269 and 0960-0710, which the public use to submit the information to SSA. Consequently, we are not reporting these sections. SSA will solicit public comment and will submit separate information collection requests to OMB in the future for regulations sections §§ 404.935, 404.939, 404.968, 416.1435, 416.1439, and 416.1468 as they require OMB clearance under the Paperwork Reduction Act of 1995 (PRA). We will not collect the information referenced in these burden sections until we receive OMB approval.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security – Disability Insurance; 96.002, Social Security – Retirement Insurance; 96.004, Social Security – Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Reporting and recordkeeping requirements; Social Security.

20 CFR Part 405

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Public assistance programs; Reporting and recordkeeping requirements; Social Security; Supplemental Security Income (SSI).

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits, Public assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Dated: May 31, 2016.

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Carolyn W. Colvin,

Acting Commissioner of Social Security.

For the reasons set out in the preamble, we propose to amend 20 CFR chapter III parts 404, 405, and 416 as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950-)

Subpart J – [Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

2. In § 404.900, revise the second sentence of paragraph (b) to read as follows:

§404.900 Introduction.

* * * * *

(b) * * * Subject to the limitations on Appeals Council consideration of additional evidence (see §404.970(b)), we will consider at each step of the review process any information you present as well as all the information in our records.* * *

3. In § 404.929, revise the fifth sentence to read as follows:

§ 404.929 <u>Hearing before an administrative law judge-general.</u>

***Subject to the provisions of § 404.935, you may submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses. ***

4. Revise § 404.935 to read as follows:

§ 404.935 Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 404.1512 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence, as required in § 404.1512, no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider or obtain the evidence unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 404.1512 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you show that you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. For example, the administrative law judge will accept the evidence if you show that:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and, through no fault of your own, the evidence was not received or was received less than 5 business days prior to the hearing.

5. In §404.938, revise paragraphs (a) and (b) to read as follows:

§ 404.938 Notice of a hearing before an administrative law judge.

(a) Issuing the notice. After we set the time and place of the hearing, we will mail notice of the hearing to you at your last known address, or give the notice to you by personal service, unless you have indicated in writing that you do not wish to receive this notice. We will mail or serve the notice at least 60 days before the date of the hearing.

(b) Notice information. The notice of hearing will tell you:

(1) The specific issues to be decided in your case;

(2) That you may designate a person to represent you during the proceedings;

(3) How to request that we change the time or place of your hearing;

(4) That your hearing may be dismissed if neither you nor the person you designate to act as your representative appears at your scheduled hearing without good reason under § 404.957;

(5) Whether your appearance or that of any other party or witness is scheduled to be made in person, by video teleconferencing, or by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

(6) That you must make every effort to inform us about or submit all written evidence that is not already in the record no later than 5 business days before the date of the scheduled hearing, unless you show that your circumstances meet the conditions described in § 404.935(b); and

(7) Any other information about the scheduling and conduct of your hearing.

* * * * *

6. Revise § 404.939 to read as follows:

§ 404.939 Objections to the issues.

If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing. You must state the reason(s) for your objection(s). The administrative law judge will make a decision on your objection(s) either at the hearing or in writing before the hearing.

7. Revise § 404.944 to read as follows:

§ 404.944 Administrative law judge hearing procedures - general.

(a) A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and, subject to the provisions of § 404.935:

(1) Accepts as evidence any documents that are material to the issues;

(2) May stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing; and

(3) May reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence.

(b) The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

8. Revise § 404.949 to read as follows:

§ 404.949 Presenting written statements and oral arguments.

You or a person you designate to act as your representative may appear before the administrative law judge to state your case, present a written summary of your case, or enter written statements about the facts and law material to your case in the record. You must provide a copy of your written statements for each party no later than 5 business days before the date set for the hearing.

9. In § 404.950, revise paragraphs (c) and (d) to read as follows:

§ 404.950 Presenting evidence at a hearing before an administrative law judge.

* * * * *

(c) Admissible evidence. Subject to the provisions of § 404.935, the administrative law judge may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence used by the court.

(d) Subpoenas. (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 10 business days before the hearing date. The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

* * * * *

10. Revise § 404.951 to read as follows:

§ 404.951 Official record.

(a) Hearing recording. All hearings will be recorded. The hearing recording will be prepared as a typed copy of the proceedings if—

(1) The case is sent to the Appeals Council without a decision or with a recommended decision by the administrative law judge;

(2) You seek judicial review of your case by filing an action in a Federal district court within the stated time period, unless we request the court to remand the case; or

(3) An administrative law judge or the Appeals Council asks for a written record of the proceedings.

(b) Contents of the official record. All evidence upon which the administrative law judge relies for the decision must be contained in the record, either directly or by appropriate reference. The official record will include the applications, written statements, certificates, reports, affidavits, medical records, and other documents that were used in making the decision under review and any additional evidence or written statements that the administrative law judge admits into the record under §§ 404.929 and 404.935. All exhibits introduced as evidence must be marked for identification and incorporated into the record. The official record of your claim will contain all of the marked exhibits and a verbatim recording of all testimony offered at the hearing; it also will include any prior initial determinations or decisions on your claim.

11. In § 404.968, revise the second sentence of paragraph (a) introductory text to read as follows:

§ 404.968 How to request Appeals Council review.

(a) *** You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 404.970(b). ***

* * * * *

12. Revise § 404.970 to read as follows:

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) The Appeals Council receives additional evidence that meets the requirements in paragraph (b) of this section, and there is a reasonable probability that the additional evidence, alone or considered with the evidence of record, would change the outcome of the decision.

(b) Under paragraph (a)(5) of this section, the Appeals Council will only consider additional evidence if you show that it is new and material and relates to the period on or before the date of the hearing decision, and you did not inform us about or submit the evidence by the deadline described in § 404.935 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples of circumstances that, if documented, the Appeals Council may consider accepting the evidence include, but are not limited to, the following:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and, through no fault of your own, the evidence was not received or was received less than 5 business days prior to the hearing.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (b) of this section, or the Appeals Council does not find you had good cause for missing the deadline to submit the evidence in § 404.935, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of your right to file a new application. The notice will also advise you that if you file a new application within 6 months after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under § 404.630. If you file a new application within 6 months of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

(d) If the Appeals Council needs additional evidence, it may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights. In some cases, the Appeals Council may obtain this evidence by conducting additional hearing proceedings.

13. Revise § 404.976 to read as follows:

§ 404.976 Procedures before the Appeals Council on review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Oral argument. You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

PART 405 – [REMOVED AND RESERVED]

14. Under the authority of sections 205(a), 702(a)(5), and 1631(d)(1) of the Social Security Act,, part 405 is removed and reserved.

PART 416 – SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N - Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

15. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108-203, 118 Stat. 509 (42 U.S.C. 902 note).

16. In § 416.1400, revise the second sentence of paragraph (b) to read as follows:

§416.1400 Introduction.

* * * * *

(b) * * * Subject to the limitations on Appeals Council consideration of additional evidence (see §416.1470(b)), we will consider at each step of the review process any information you present as well as all the information in our records.* * *

17. In § 416.1429, revise the fifth sentence to read as follows:

§ 416.1429 Hearing before an administrative law judge-general.

***Subject to the limitations in § 416.1435, you may submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses. ***

18. Revise §416.1435 to read as follows:

§ 416.1435 Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 416.912 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence, and you must inform us about or submit any written evidence, as required in § 416.912, no later than 5 business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider or obtain the evidence unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 416.912 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you show that you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. For example, the administrative law judge will accept the evidence if you show that:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and, through no fault of your own, the evidence was not received or was received less than 5 business days prior to the hearing.

(c) Notwithstanding the requirements in paragraphs (a) and (b) of this section, for claims that are not based on an application for benefits, the evidentiary requirement to inform us about or submit evidence no later than 5 business days before the date of the scheduled hearing will not apply if our other regulations allow you to submit evidence after the date of an administrative law judge decision.

19. In § 416.1438, revise paragraphs (a) and (b) to read as follows:

§ 416.1438 Notice of a hearing before an administrative law judge.

(a) Issuing the notice. After we set the time and place of the hearing, we will mail notice of the hearing to you at your last known address, or give the notice to you by personal service, unless you have indicated in writing that you do not wish to receive this notice. We will mail or serve the notice at least 60 days before the hearing.

(b) Notice information. The notice of hearing will tell you:

(1) The specific issues to be decided in your case;

(2) That you may designate a person to represent you during the proceedings;

(3) How to request that we change the time or place of your hearing;

(4) That your hearing may be dismissed if neither you nor the person you designate to act as your representativeappears at your scheduled hearing without good reason under § 416.1457;

(5) Whether your appearance or that of any other party or witness is scheduled to be made in person, by video teleconferencing, or by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing;

(6) That you must make every effort to inform us about or submit all written evidence that is not already in the record no later than 5 business days before the date of the scheduled hearing, unless you show that your circumstances meet the conditions described in § 416.1435(b); and

(7) Any other information about the scheduling and conduct of your hearing.

* * * * *

20. Revise § 416.1439 to read as follows:

§ 416.1439 Objections to the issues.

If you object to the issues to be decided at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity, but no later than 5 business days before the date set for the hearing. You must state the reason(s) for your objection(s). The administrative law judge will make a decision on your objection(s) either at the hearing or in writing before the hearing.

21. Revise § 416.1444 to read as follows:

§ 416.1444 Administrative law judge hearing procedures - general.

(a) A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing, the administrative law judge looks fully into the issues, questions you and the other witnesses, and, subject to the provisions of § 416.1435:

(1) Accepts as evidence any documents that are material to the issues;

(2) May stop the hearing temporarily and continue it at a later date if he or she finds that there is material evidence missing at the hearing; and

(3) May reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence.

(b) The administrative law judge may decide when the evidence will be presented and when the issues will be discussed.

22. Revise § 416.1449 to read as follows:

§ 416.1449 Presenting written statements and oral arguments.

You or a person you designate to act as your representative may appear before the administrative law judge to state your case, present a written summary of your case, or enter written statements about the facts and law material to your case in the record. You must provide a copy of your written statements for each party no later than 5 business days before the date set for the hearing.

23. In § 416.1450, revise paragraphs (c) and (d) to read as follows:

§ 416.1450 Presenting evidence at a hearing before an administrative law judge.

* * * * *

(c) Admissible evidence. Subject to the provisions of § 416.1435, the administrative law judge may receive any evidence at the hearing that he or she believes is material to the issues, even though the evidence would not be admissible in court under the rules of evidence used by the court.

(d) Subpoenas. (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing.

(2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 10 business days before the hearing date. The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena.

(3) We will pay the cost of issuing the subpoena.

(4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court.

* * * * *

24. Revise § 416.1451 to read as follows:

§ 416.1451 Official record.

(a) Hearing recording. All hearings will be recorded. The hearing recording will be prepared as a typed copy of the proceedings if—

(1) The case is sent to the Appeals Council without a decision or with a recommended decision by the administrative law judge;

(2) You seek judicial review of your case by filing an action in a Federal district court within the stated time period, unless we request the court to remand the case; or

(3) An administrative law judge or the Appeals Council asks for a written record of the proceedings.

(b) Contents of the official record. All evidence upon which the administrative law judge relies for the decision must be contained in the record, either directly or by appropriate reference. The official record will include the applications, written statements, certificates, reports, affidavits, medical records, and other documents that were used in making the decision under review and any additional evidence or written statements that the administrative law judge admits into the record under §§ 416.1429 and 416.1435. All exhibits introduced as evidence

must be marked for identification and incorporated into the record. The official record of your claim will contain all of the marked exhibits and a verbatim recording of all testimony offered at the hearing; it also will include any prior initial determinations or decisions on your claim.

25. In § 416.1468, revise the second sentence of paragraph (a) to read as follows:

§ 416.1468 How to request Appeals Council review.

(a) *** You should submit any evidence you wish to have considered by the Appeals Council with your request for review, and the Appeals Council will consider the evidence in accordance with § 416.1470(b). ***

26. Revise § 416.1470 to read as follows:

§ 416.1470 Cases the Appeals Council will review.

(a) The Appeals Council will review a case if—

(1) There appears to be an abuse of discretion by the administrative law judge;

(2) There is an error of law;

(3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) The Appeals Council receives additional evidence that meets the requirements in paragraph (b) of this section, and there is a reasonable probability that the additional evidence, alone or considered with the evidence of record, would change the outcome of the decision.

(b) In reviewing decisions other than those based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any additional evidence it believes is material to an issue being considered. However, in reviewing decisions based on an application for benefits, under paragraph (a)(5) of this section, the Appeals Council will only consider additional evidence if you show that it is new and material and relates to the period on or before the date of the hearing decision, and you did not inform us about or submit the evidence by the deadline described in § 416.1435 because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples of circumstances that, if documented, the Appeals Council may consider accepting the evidence include, but are not limited to, the following:

(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;

(ii) There was a death or serious illness in your immediate family;

(iii) Important records were destroyed or damaged by fire or other accidental cause; or

(iv) You actively and diligently sought evidence from a source and, through no fault of your own, the evidence was not received or was received less than 5 business days prior to the hearing.

(c) If you submit additional evidence that does not relate to the period on or before the date of the administrative law judge hearing decision as required in paragraph (b) of this section, or the Appeals Council does not find you had good cause for missing the deadline to submit the evidence in § 416.1435, the Appeals Council will send you a notice that explains why it did not accept the additional evidence and advises you of your right to file a new application. The notice will also advise you that if you file a new application within 60 days after the date of the Appeals Council's notice, your request for review will constitute a written statement indicating an intent to claim benefits under § 416.340. If you file a new application within 60 days of the Appeals Council's notice, we will use the date you requested Appeals Council review as the filing date for your new application.

(d) If the Appeals Council needs additional evidence, it may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so, unless it will adversely affect your rights. In some cases, the Appeals Council may obtain this evidence by conducting additional hearing proceedings.

25. Revise § 416.1476 to read as follows:

§ 416.1476 Procedures before the Appeals Council on review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Oral argument. You may request to appear before the Appeals Council to present oral argument. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance, or the appearance of any other person relevant to the proceeding, will be in person, by video teleconferencing, or by telephone.

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