JUSTICE IN AGING
FIGHTING SENIOR POVERTY THROUGH LAW

January 31, 2020

VIA ELECTRONIC SUBMISSION

Commissioner Andrew Saul
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

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

Dear Commissioner Saul:

These comments are submitted on behalf of Justice in Aging. Justice in Aging is a national nonprofit legal advocacy organization that fights senior poverty through law. We are committed to ensuring access to social safety net programs on which older populations rely, such as Medicare, Medicaid, Social Security, and Supplemental Security Income (SSI). Our work focuses especially on older adult populations that have been marginalized and excluded from justice, such as women, people of color, LGBTQ individuals, and people with limited English proficiency. We regularly work to highlight and address the needs of low-income older adults.

The current policy of conducting Continuing Disability Reviews (CDRs) ensures that individuals who no longer qualify for Social Security Disability Insurance (SSDI) and SSI disability benefits have those payments terminated. CDRs are an integral part of the Social Security Administration (SSA) carrying out Congress' direction that "[i]n any case where an individual is or has been determined to be under a disability, the case shall be reviewed by the applicable State agency or the Commissioner of Social Security (as may be appropriate), for purposes of continuing eligibility, at least once every 3 years."[1] Congress also understood that some impairments are likely to be permanent, and explicitly gave the Commissioner authority to determine how often to complete CDRs on individuals receiving disability benefits with such impairments.

Although the Social Security Act gives the Commissioner the authority to create CDR categories that schedule reviews at shorter or longer intervals than the 3 years explicitly listed in the statute, and to create the criteria for placing an individual in a particular category, notice and comment rulemaking required by the Administrative Procedure Act (APA) also requires the Commissioner to provide a publicly-available rationale for those timeframes and any data, evidence, or studies that the Commissioner relied on in creating those categories and for

[1] 42 USC 421(i)(1)

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classifying an impairment into a particular category when proposing new regulations or regulatory changes.

Unfortunately, in this Notice of Proposed Rulemaking (NPRM), SSA fails to include the criteria the agency used to identify those disability beneficiaries who would be included in the newly created Medical Improvement Likely (MIL) CDR category. Nor does the proposed rule share the data, evidence, or studies which the agency relied on in selecting the impairment or beneficiary types (e.g. those awarded benefits at step 5 of the sequential disability evaluation process, children turning 6 or 12 years old) it opted to place in the new category.

The proposed rule fails to state the CDR categories that would be used for many of the most common impairments, making it impossible to determine what changes would occur, what the rationale is for them, and what the effect would be on disability beneficiaries and others. Providing the public with only minimal information about the agency's rationale or process creates an impermissible procedural error under the APA, making it impossible for the public to make meaningful comments regarding the time frames proposed in the NPRM or the classification of impairments into CDR categories.

SSA has failed to provide adequate information on which to evaluate the agency's rationale or connect those facts to the choices it has made, as described below. We are particularly concerned that the proposed rule would disproportionately harm older adults nearing retirement age, as well as other groups, without any evidence to support these changes. Therefore, we ask that SSA rescind this proposed rule. Should the agency propose changes to CDR categories and scheduling in the future, it must conform to the APA and provide the information that would be required for meaningful notice and comment.

SSA must provide its rationale and justification because CDRs are a burden on and can be harmful to disability beneficiaries.

Everyone who receives a CDR has already been awarded disability benefits by SSA, meaning they have at least one severe and medically determinable impairment expected to last at least 12 months or to be fatal. While a requirement to complete paperwork and submit documentation at the risk of losing monetary benefits and health care would be challenging for anyone, it is likely more difficult, stressful, and time-consuming for disability beneficiaries, who as a group are older,[2] poorer,[3] and sicker than the general population.

Even when SSA has learned during the process of awarding disability benefits that individuals have unstable housing situations, intellectual disabilities, cognitive impairments, limited educations, inability to leave their homes, difficulty reading or writing, or other barriers to receiving, completing, and mailing back CDR documents, those going through the CDR process

[2] More than 75% of SSDI beneficiaries are age 50 or older, over 35% are age 60 or older, and nearly 6% are age 65. https://www.ssa.gov/OACT/ProgData/benefits/da_age201612.html

[3] 71% of Title II disability beneficiaries have household income below 300% of the poverty level; 20% were in poverty. Among SSI recipients, the poverty rate was 34% for children and 43% for adults aged 18-64. https://www.ssa.gov/policy/docs/rsnotes/rsn2015-02.html

still must do so without any additional assistance or accommodations from SSA. If they do not, they will become part of an increasing number and percentage of CDR recipients[4] whose disability benefits are terminated for "failure to cooperate" with the CDR process.

Although the NPRM estimates it will take beneficiaries 60 minutes to complete the full medical CDR form (SSA-454-BK), it is likely to take most beneficiaries far longer; many are unable to complete the form without significant assistance. The form is 15 pages long and requires short essays about the beneficiary's use of assistive devices, daily activities, and hobbies or interests. It requires a list of all medical providers with their contact information, the dates of the first and most recent appointments, and any treatments provided. All medications and tests, education, and vocational rehabilitation must be listed as well. If the beneficiary indicates problems with any of 22 different activities (including "using hands or fingers," "remembering," or "completing tasks"), they must write an explanation of what those problems are. The form is so long that even printed double-sided, it is too heavy to mail back to SSA with a single first-class stamp.

CDRs are also costly to beneficiaries. To effectively document that benefits should continue, beneficiaries often must pay for copies of existing medical records to submit to SSA; make additional medical appointments so their providers can complete paperwork or perform additional testing; and potentially hire a representative to assist them. Although SSA does not mandate these expenditures, the high likelihood of benefit termination without them makes that a distinction without a difference. Beneficiaries who do not promptly elect continuation of benefits[5] during the CDR process can be without income for months or years. Those who do opt to have their income continue may be faced with overpayments withheld from future Social Security benefits, tax refunds, or other sources.

In addition, going through the CDR process can be extremely stressful for the person receiving disability benefits. The letters and forms from SSA can bring up memories of the long application, denial, and appeal process, along with the fear of being cut off of the benefits which provides their financial support and access to vital health care. Even if they are confident that their medical conditions have not improved and their benefits should continue, having to go through the process of demonstrating that their symptoms continue and they are unable to work can be difficult and nerve-wracking. "…[A]s experiences with the state become stressful, they may further undercut an individual's human capital and their ability to negotiate the administrative processes that give rise to those stresses in the first place."[6]

Most individuals going through the CDR process do so on their own, without representation. SSA data shows that less than 5% of beneficiaries have appointed a representative at the first level of appeal, and less than 20% have appointed a representative at the second level of appeal

[4] According to SSA's data, benefit cessations for "failure to cooperate" at the state disability determination services, at the first level of appeal, more than tripled over ten years, going from 13,515 in FY 2010, to 43,589 in FY 2019, after reaching a high point of 48,613 in FY 2017. *See also* https://www.ssa.gov/open/data/Periodic-Continuing-Disability-Reviews.html

[5] Beneficiaries have only 10 days to request continuation of benefits, a difficult threshold for many people with disabilities to meet. *See* 20 CFR 404.1597a and 416.996.

[6] Pamela Herd and Donald Moynihan. (2018). *Administrative Burden: Policymaking by Other Means.* New York, NY: Russell Sage Foundation. p. 31.

at a hearing before an Administrative Law Judge, with this percentage having declined by ten points over the past ten years. Individuals have difficulty finding a representative for a CDR, because those representing individuals before SSA generally focus their practice on people applying for disability benefits. These representatives can collect fees from the retroactive benefits awarded to those who are successful in their applications. Since there is no prospect of getting fees from the retroactive benefits of someone going through a CDR, even if they continue receiving benefits, most private attorneys do not provide representation in these cases. For the limited number of disability beneficiaries who are able find representation, it is either done pro bono or the beneficiary must pay the representative's fees out of pocket.

SSA should not force beneficiaries to experience these compliance and psychological costs[7] more frequently, especially without evidence that doing so will improve program integrity, result in better outcomes for beneficiaries, and conform to the Social Security Act.

Failure to provide information regarding how SSA determined that medical improvement occurs in certain beneficiaries or impairments to justify the creation of the Medical Improvement Likely category makes this proposed rule impermissible.

Congress made it very clear after the CDR debacle of the early 1980s that SSA could only terminate disability benefits during reviews if the impairment (or combination of impairments) for which the beneficiary had initially been found eligible for benefits had medically improved.[8] Although the proposed rule does not seek to alter the Medical Improvement Review Standard required by the Social Security Act, it bases the creation of a new CDR diary category, Medical Improvement Likely (MIL), on the supposition that some impairments and categories of beneficiaries are more likely to improve than others. However, SSA fails to provide any data or evidence that supports these reclassifications, so we cannot evaluate them.

A. *The proposal to create a new CDR category and reclassify certain impairments lacks an evidentiary basis and is arbitrary and capricious.*

The history of backlogged CDRs means that it is not possible to determine the effects of the current CDR policy were it to have been accurately and consistently applied, or to estimate or measure changes that could come from a different policy. For example, the NPRM references the chart outlining CDR outcomes by primary impairment from 2016 at footnote 38. The chart shows the differences in cessation rates between CDRs on certain impairments when done at the Medical Improvement Expected (MIE) timeframe and the Medical Improvement Possible (MIP) timeframe for reviews.

What is unclear, however, is whether any of those CDRs actually occurred at the time they were supposed to occur. It is impossible to determine if those results were consistent over time, as only one year of data is provided. What data or evidence is SSA relying on to show

[7] *Id*. at pp. 24 – 25.

[8] Pub. L. No. 98-460, 98 Stat. 1794 (1984); 42 U.S.C. 423(f). The law creates exceptions allowing termination without improvement in circumstances including if the decision was in error, if there were advances in technology, or if the beneficiary does vocational training, and is now able to perform substantial gainful activity.

that any of the impairments listed in the NPRM, or people awarded benefits at step 5, or children turning 6 or 12 years old, are likely to improve during a review two years after award, simply because some improved after three years? Did SSA study what the medical evidence in the files of those terminated at three years would have shown if reviewed one year sooner, or perform any research that would support increasing the frequency of CDRs in those categories of impairments it included in the chart? The NPRM and supporting material fail to provide any evidence regarding impairments that are likely to improve during the proposed timeframe for review and instead make arbitrary and unsupported declarations.

The NPRM alludes to advances in medical treatment, but does not cite evidence of any particular tests, treatments, or other medical advances SSA believes justify this proposal. This may be because there are no widely-available advances that increase the chance of medical improvement as it is defined by SSA. Even if the survival rate for certain disorders has increased, the functional limitations imposed by the disorder and its treatments generally remain disabling. Mechanisms to reduce some of these side effects, persistent effects, and late effects of disease and treatment exist, but these are not the generally available standard of care anywhere in the country.

The lack of evidence provided in the NRPM regarding the likelihood of medical improvement of the specific impairments or categories of beneficiaries the agency proposes to review more frequently makes it even more important that the criteria the agency used to designate those impairments the agency proposes to review more frequently be made public and that the public is given an opportunity to evaluate these criteria. The failure to specify the criteria the agency used makes it impossible to comment on the proposed classifications in a meaningful way.

B. *The agency fails to provide a rationale or evidence and data to support the creation of the MIL category and classification of impairments into the MIE, MIL, and MIP categories.*

Proposed changes for the MIE, MIL, and MIP categories are unclear and without justification. The supplementary document entitled "Cessation Rates by Diary Category" (cited at footnote 38 of the NPRM) only provides one year of data, without explaining why data from FY 2016 was selected for an NPRM released in FY 2020. The document does not show the number of CDRs performed in each category, nor does it show whether it includes all CDRs or just full medical reviews (FMRs). It does not explain if the cessations all came from medical improvement, or if some of the people in each category were terminated for the much more common occurrences of death or reaching full retirement age, or for some other reason. There is no indication of whether any of the people in each impairment and CDR category had other impairments, either at or after the award of benefits.

The document only lists 17 impairments, while there were 36 impairments listed in the supplemental document on "Assumptions for the MIE and MIL Diary Categories." There is no explanation for the difference. There is no evidence about the MIE versus MIP cessation rates for many impairments proposed for the MIE and MIL categories, including hearing loss treated with cochlear implantation, skeletal cancers treated with multimodal therapy, heart transplant, gastrointestinal hemorrhaging, chronic liver disease, liver transplantation, chronic kidney disease with transplant, low birth weight, pediatric genitourinary disorders, bone marrow or stem cell

transplants, cancer of the testes, eating disorders, or HIV, among others. Furthermore, the document does not explain whether these cases were awarded at Step 3 or Step 5 of the sequential evaluation process.

The supporting documents and the NPRM do not explain how some conditions were chosen for MIE and others for MIL. The assignment seems arbitrary: for example, anxiety disorders and leukemias are both proposed to be scheduled in the MIL category, even though the former's cessation rate is 24.2% and the latter's is 63.7%; the former has a higher cessation rate for people currently placed in the MIE diary category and the latter has a higher cessation rate for those placed in the MIP diary category. It is not possible to determine if the difference is statistically significant, as there is no data from other impairments to compare with the 17 impairments in the document, and there is only a single year of data provided—which is now more than three years old. The supplementary material completely fails to explain or support SSA's rationale or criteria for placing a particular category of beneficiaries or particular impairment in a particular CDR category.

C. *Like the other three proposed CDR diary categories, the NPRM presents no standardized process or impairment-specific evidence for assigning conditions to the MINE category.*

The NPRM lists ten conditions where a beneficiary's age will lead to placement in Medical Improvement Not Expected (MINE) instead of a different CDR category. Similarly, in seven other conditions, the beneficiary's age and time outside of the workforce will both be considered. SSA does not explain how or why these 17 conditions were chosen, how they were assigned to the age-only or age and time outside of the workforce subcategories, why age and time outside of the workforce are the only relevant factors, or what the thresholds will be for assigning a MINE diary category.

Age and time outside of the workforce are important not just for the 17 impairments listed in the NPRM but for all impairments. The NPRM explains that current policy, based on "our analysis of case outcomes for CDRs on older beneficiaries," is to use the MINE diary category "for cases in which the person would be age 54 1/2 or older when a CDR diary would be due."

The NPRM does not provide any rationale for ending this presumably evidence-based policy and instead placing the older individuals awarded at Step 5 of the sequential evaluation process into the MIL category. SSA's evidence in the docket shows that in the general population, the older people are when they leave the workforce, the less likely they are to return—even without impairments that lead to an award of disability benefits. This supports the idea included in the Social Security Act that age is a relevant vocational factor across all types of disabilities. Older people have more difficulty making transitions back into the workforce (especially if they have been determined to be disabled, true of everyone who will receive a CDR, and if they have been determined to be unable return to their past relevant work, true of all adults awarded at Step 5). It makes no sense to disregard this and review them more frequently.

D. *There is no evidence nor rationale provided for including awards made at step 5 of the sequential evaluation process in the MIL category.*

Assigning cases awarded at Step 5 of the sequential evaluation process to MIL diaries is not supported by any evidence. By law, meeting a listing at Step 3 or having a combination of medical and vocational factors that preclude work at Step 5 are equivalent for demonstrating disability. Adjudicators are currently free to make, and claimants free to accept, awards of benefits on either basis with no difference in how the awards are treated and no incentive to appeal for an award at a different step. The proposal would treat beneficiaries—including those with precisely the same impairments—differently because of a purely administrative decision that is irrelevant to function or likelihood of recovery. The NPRM provides no data on the rate of medical improvement or the future earnings capacity of those awarded benefits at Step 3 versus Step 5 of the sequential evaluation process.

Many people awarded benefits at step 5 are older and hence more likely to have age-related impairments that worsen over time. Studies have shown that older people are slower to heal and less likely to improve than younger people with a variety of impairments.[9] The Commissioner fails to include any rationale or evidence for including people awarded benefits at step 5 of the process in the MIL category: for example, not a single data point is included in the NPRM or supporting materials which even purports to support the notion that people awarded at step 5 with a particular impairment are more likely to improve than someone who met or equaled a listing for that same impairment and was awarded at step 3.

This proposal appears to reflect the capricious belief held by some at the agency that people awarded at step 5 are somehow "less" disabled than someone awarded benefits at step 3 without any data, evidence, or rationale provided to support that assertion. If the agency has data it believes demonstrates that people awarded benefits at step 5 (irrespective of the impairment, or in many cases combination of impairments, for which benefits were awarded) are more likely to improve, it must provide the public with that information and allow the public an opportunity to evaluate it through another NPRM with an additional notice and comment period. The failure to do so makes this proposal completely arbitrary and in violation of the APA.

E. *There is no evidence nor rationale provided for including those who had their benefits continued at step 8 in a previous CDR in the MIL category.*

In another example, the supplementary document "Impairment Placements in CDR Categories" states that beneficiaries who had their benefits continued at the final step of SSA's 8-step medical CDR process would be scheduled for a review in two years, but this change is neither mentioned nor explained in the NPRM itself.

[9] *See e.g.* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2600417/ (Traumatic Brain Injury); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4363803/ (rotator cuff injury); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4804630/ (bone healing); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4582412/ (wound healing)

F. *The proposal fails to consider the impact of multiple impairments on the possibility of improvement.*

The proposed rule does not consider how a combination of impairments could change the likelihood of recovery. It is illogical and not evidence-based to assign people to CDR categories based solely on a single impairment when they may have multiple impairments and selection of one as primary is often done for arbitrary reasons.[10] In addition, this proposal ignores the plethora of research that has found that healing and functional improvement in people with a variety of impairments is negatively influenced by comorbidities.[11] SSA fails to even discuss the fact that an individual might have multiple impairments and the effect that might have on the likelihood of improvement (and therefore which CDR category the individual should be placed in). The failure to consider this is an additional example of the failure of SSA to consider or share all of the relevant data when proposing this rule.

G. *There is no evidentiary basis for the idea that more frequent CDRs will increase workforce participation.*

Termination for medical improvement is rare: in FY 2018, SSA initiated over 1.1 million CDRs for disabled workers,[12] but in calendar year 2018, only 45,285 terminations of disabled workers for medical improvement occurred; in comparison, more than five times as many disabled workers died that year and more than ten times as many transitioned from disability benefits to retirement benefits because they had reached full retirement age.[13] SSA has not released data about what CDR diary category the workers found to have medically improved were placed in, what their impairments were, how CDR outcomes differ for people who receive SSI instead of or concurrently with SSDI, or whether CDRs occurred as scheduled.

Even when medical improvement was initially found, it is frequently overturned on appeal. According to SSA's annual report to Congress, 71.6% of initial cessations of disabled worker benefits in FY 2015 that were appealed were overturned at reconsideration, with additional cases overturned after ALJ hearings, Appeals Council review, or federal court appeals.[14] This indicates that if SSA increases the number and frequency of CDRs, the agency will cease benefits for more people who will ultimately demonstrate their benefits should have continued.

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[10] See Elisa Bull and Emily Roessel, "Social Security Disability Insurance and Supplemental Security Income Beneficiaries with Multiple Impairments" Social Security Bulletin, Vol. 79 No. 3, 2019, https://www.ssa.gov/policy/docs/ssb/v79n3/v79n3p21.html.

[11] See e.g. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4495737/ (wound healing); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3928389/ (fractures); https://www.ncbi.nlm.nih.gov/pubmed/30675569 (surgical recovery); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1871747/ (comorbidities lead to worse outcomes)

[12] Periodic CDR Cases Processed dataset, https://www.ssa.gov/open/data/Periodic-Continuing-Disability-Reviews.html

[13] https://www.ssa.gov/policy/docs/statcomps/di_asr/2018/sect03f.html.

[14] https://www.ssa.gov/legislation/FY%202015%20CDR%20Report.pdf Table B2. Most FY15 cases had not completed ALJ review by the time the report was published in 2019. However, in years where a majority of ALJ hearings had been completed, approximately one-third to one-half resulted in continuation of benefits.

To the extent that CDRs remove people from the disability rolls, this is often because their impairments make it difficult for them to understand and comply with the CDR process, not because their impairments have improved in a way that dictates cessation. The people whose benefits are cut off because they cannot comply with bureaucratic requirements are unlikely to join the workforce after cessation: the same barriers (literacy, memory, executive function, etc.) to participating in the CDR process, which were often the grounds for award of disability benefits in the first place, will remain barriers to employment even after termination. If anything, termination of financial and health-care benefits may lead to crises such as eviction, homelessness, hospitalization, bankruptcy, incarceration, declining health, and extreme poverty—all of which make locating and maintaining employment more challenging, not less.

The proposed rule is so vague it is impossible to evaluate how it will actually operate.

A. *The agency proposes to give itself so much flexibility it is impossible to tell when a particular individual might have a CDR.*

Proposed sections 404.1590(e) and 416.990(e) are so vague as to be meaningless. They indicate that people found eligible for an award or continuation of benefits by an ALJ, the Appeals Council, or a federal court will not have CDRs earlier than three years after that decision, unless the case "should be scheduled for a MIE, MIL, or vocational reexamination diary review" or "a question of continuing disability is raised under paragraph (b) of this section." It is bad enough to say the review will be scheduled for three years unless it should be scheduled for a shorter amount of time, but paragraph (b) says the agency will start a CDR if the beneficiary has been scheduled for any of the CDR diary categories. It is not possible to provide adequate comments on these sections because there is not enough information given to understand the changes proposed.

Furthermore, the NPRM does not explain the CDR category that will be used for many common conditions. This would not be an overly burdensome task for the agency: although there are a large number of impairment codes that can be listed on SSA documents, the top 100 codes cover more than 96% of claims.[15] Many of them, including several among the 19 most common impairments in disability claims (diabetes, essential hypertension, personality disorders, osteoarthrosis and allied disorders, chronic pulmonary insufficiency, chronic ischemic heart disease, etc.) are not mentioned at all in the NPRM or supporting documentation. It is therefore impossible to know if SSA plans to review people with these impairments every six months, every six years, or at some point in between.

B. *It is unclear when the initial CDR diary begins and when subsequent CDRs will be scheduled.*

The proposed rule does not explain the start date for each CDR diary. It is unclear whether, for example, people placed in the MIE category will face their first CDRs 6-18 months from application, onset, award, effectuation, or another event. Depending on which start date is

[15] https://www.ssa.gov/policy/docs/workingpapers/wp113.html.

selected, it could be possible for people to be put into the CDR process before they ever receive any benefits.

The proposed rule also does not explain how subsequent CDRs will be scheduled. Given that more than 23% of CDRs in calendar years 2014 through 2016 took more than six months just for the pre-hearing case review stage,[16] let alone the additional months and years required for appeals, it is likely that many people—especially but not exclusively those in the MIE category—may be due for new CDRs while previous ones are still pending. This will be confusing and inefficient for beneficiaries and SSA, and places people at grave risk of having their benefits suspended if they fail to properly elect benefit continuation or are terminated for failure to cooperate.

C. *SSA's own data indicates that many more beneficiaries would be placed in the MIL category than the NPRM states*

SSA likely underestimates the number of additional CDRs it would schedule if this rule were implemented. The NPRM says that Step 5 allowances would be placed in the MIL category and scheduled for CDRs every two years unless the beneficiary has one of 17 impairments and has the appropriate age, functional limitations, and (for seven impairments) time outside of the workforce. "Time outside of the workforce" is not defined by the proposed rule, and how it will fit with an unspecified age threshold and functional limitations is also unclear.

SSA's 2018 Annual Statistical Report on the SSDI Program (Table 64) shows that 34.4% of Title II disability awards from 1999 to 2017 were at Step 5.[17] The 2018 SSI Annual Statistical Report (Table 73) shows that from 1992 to 2017, 30.8% of SSI awards were at Step 5 (including adults for whom medical-vocational factors were considered and children found to have functionally equaled a listing).[18] Of the awardees who continue to receive disability benefits, the vast majority would be placed in the MIL diary category and scheduled for CDRs every two years. Given this potentially enormous increase in the number of beneficiaries placed in the MIL diary category, SSA may have severely underestimated the number of CDRs it will need to perform each year in order to stay current. The agency will likely experience higher than estimated administrative costs to perform these CDRs and/or very large CDR backlogs.

Potentially more concerning is the fact that SSA does not know whether many claims were granted at Step 3 or Step 5, and there is no mention in the NPRM of how such cases will be handled. In the aforementioned tables in SSA's annual statistical reports, there is a category labeled "other" for cases where the agency has no records of the step in the sequential evaluation process at which benefits were granted. In the past four years, more than 70% of disabled widow/er and disabled adult child awards have been coded as "other."

But the problem is much longer-standing, and much wider-spread, than that. Between 1999 and 2017, SSA made more than 5.8 million Title II disability awards that are coded as "other." Between 1992 and 2017, the agency made more than 6.6 million such SSI disability awards. The

[16] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-18-50391.pdf
[17] https://www.ssa.gov/policy/docs/statcomps/di_asr/2018/sect04.html#table64
[18] https://www.ssa.gov/policy/docs/statcomps/ssi_asr/2018/sect10.html#table73

NPRM does not explain how SSA will determine the appropriate CDR category for the millions of such current beneficiaries if the agency does not know whether the beneficiary was awarded at step 5 or not. Given the lack of more detail and supporting evidence from SSA in the NPRM, we are left to project from the agency's own data that the result of the proposed change could be a substantial deviation from SSA's estimates in the NPRM of the number of people placed in each CDR diary category, the resulting administrative costs, and the burdens placed on people with disabilities.

D. The proposed rule fails to explain how CDR diaries will be determined for people with multiple impairments.

The proposed rule does not explain how people with multiple impairments will be placed into CDR diary categories. Most disability claimants have multiple impairments,[19] but SSA's systems allow only two impairments to be recorded and the choices of which impairments are selected and which is labeled as primary are haphazard at best.[20] The proposed rule also does not explain whether or how beneficiaries will be moved to different CDR diary categories as they age or if they develop new conditions, though the former circumstance is inevitable and the latter is likely.

E. The proposed rule is unclear about how determinations regarding the MINE category will be made.

The proposed rule does not provide any detail of how a beneficiary's age, functional limitations, and time outside of the workforce will be considered for placement in the MINE category. For example, what is the age that qualifies for such placement? Is it the same age for each of the 17 listed disorders? What functional limitations are considered in the decision? How much time outside of the workforce is qualifying? What does "time outside of the workforce" mean? Is it annual earnings above $1000, as in the supplementary document referenced in the NPRM, which would be a significant work disincentive? And how will these three criteria be considered together? Placement in the MINE category is important not just for CDR scheduling, but also as

[19] Elisa Walker and Emily Roessel, "Social Security Disability Insurance and Supplemental Security Income Beneficiaries with Multiple Impairments" Social Security Bulletin, Vol. 79 No. 3, 2019, https://www.ssa.gov/policy/docs/ssb/v79n3/v79n3p21.html ("71 percent of applicants filing an initial DI claim in 2009 had a secondary impairment, an increase from 56 percent in 1997. Since at least 2007, periodic studies using NBS data have consistently found that more than 60 percent of beneficiaries report two or more limiting health conditions; the rate for 2015 was 67 percent (SSA 2018). The General Accounting Office (2003) studied administrative law judge (ALJ) award decisions during 1997–2000 and found that 36 percent of claimants had one or two impairments, 39 percent had three or four impairments, and 25 percent had five or more impairments. Further, 13 percent of claimants were found to have three or more "severe" impairments").

[20] *Id.* ("The primary impairment recorded in the administrative data may be the one that is easiest to document as a condition that meets or equals medical criteria in SSA's Listing of Impairments—and the lack of a secondary diagnosis in the administrative data does not necessarily mean that the claimant had no other conditions. Particularly in a time of constrained agency resources, it may not be realistic to expect examiners to document additional limitations when one is sufficient to justify disability benefits. In addition, the coding of impairments as primary and secondary depends in part on the judgment of the individual disability examiner….Finally, disabled adult children typically did not have diagnoses recorded in the administrative data until 1984.")

a method of qualifying for Total and Permanent Disability discharges of federal student loans. The level of detail provided in the proposed rule is wholly inadequate.

Given these enormous gaps in how the proposed rule will actually work, it is not possible to provide detailed comments on them. Using the POMS or other sub-regulatory guidance documents to clarify these issues is a complete subversion of the APA's notice and comment policies and the two Executive Orders signed on October 9, 2019.[21] CDR policy is binding on the public: it forces millions of people each year to take action (completing and submitting paperwork, gathering evidence, attending hearings, choosing whether to elect benefit continuation, etc.) at the risk of losing crucial financial and health-care benefits. Leaving key details of the policy out of the public eye without opportunity for public input is a repudiation of both Congress and the President.

The proposed rule goes against Congressional intent.

In addition to violating the APA, the proposed rule goes against Congressional intent. Sections 223(d)(2)(A) and 1614(a)(3)(B) of the Social Security Act, as amended, make no distinction between disability determined with or without vocational factors, but the proposed rule causes beneficiaries whose disability awards involved vocational factors at step 5 of the disability determination process to be subjected to the higher burden of more frequent CDRs.

The preamble to the proposed rule also justifies changes to CDR scheduling based on an unsupported and irrelevant belief that terminating children's SSI benefits will decrease SSI and SSDI applications from other household members. As SSA Issue Paper 2015-01 notes, "Having established retirement benefits 'as a right rather than as public charity, and in amounts which will insure not merely subsistence but some of the comforts of life' (House Ways and Means Committee 1935), Congress extended this same purpose to disabled-worker benefits in 1956."[22] Terminating the SSI benefits of disabled children with the goal of deterring their family members from applying for the Title II benefits for which they are insured goes against decades of Congressional intent. SSA's regulations should serve the goal of promptly and accurately determining whether claimants meet the statutory definition of disability, not try to discourage those who may qualify for disability benefits from claiming them at all.

The proposed rule will increase SSA's existing problems with CDRs and other workloads.

SSA has had long-standing difficulties adhering to its current CDR scheduling policy. The agency eliminated its longstanding CDR backlog in FY 2002,[23] then began building up another backlog

[21] https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-transparency-fairness-civil-administrative-enforcement-adjudication/ and https://www.whitehouse.gov/presidential-actions/executive-order-promoting-rule-law-improved-agency-guidance-documents/.
[22] Paul O'Leary, Elisa Walker, and Emily Roessel, "Social Security Disability Insurance at Age 60: Does It Still Reflect Congress' Original Intent?" https://www.ssa.gov/policy/docs/issuepapers/ip2015-01.html
[23] https://www.ssa.gov/legislation/FY%202015%20CDR%20Report.pdf

that was not eliminated until the end of FY 2018.[24] By October 2019, there were 15,792 pending CDRs at state agencies[25] and an unknown number of cases that were sent to state agencies later than the CDR diary would dictate or that have not been sent to state agencies yet. Scheduling CDRs more frequently may lead to additional backlogs.

Shifting staff to hiring and training new SSA and state agency employees, or to performing additional CDRs, can be expected to increase other backlogs, such as processing of initial claims and reconsiderations in disability claims, effectuating favorable decisions, and processing changes reported by beneficiaries and others.

Given that this proposed rule is likely to increase backlogs for every stage of the CDR process, from state agency review to federal court appeals, implementation of the proposed rule would make the stakes even higher for beneficiaries deciding whether to request statutory continuation of benefits during CDR appeals. Those who do request continuation will be faced with higher overpayments if their benefits are ultimately ceased, though they did nothing to cause the greater delays. Those who do not elect benefit continuation will go longer without income. Receiving retroactive benefits once appeals are completed is not an adequate remedy for many beneficiaries: for example, if a beneficiary loses his home to foreclosure after falling behind on the mortgage during a CDR, the underpayment will generally be insufficient to re-purchase the home. Evictions, bankruptcies, or reduced credit scores remain on a person's record for years, even if a lump-sum underpayment is eventually provided.

SSA already has serious challenges performing CDRs and hearings before Disability Hearing Officers (DHOs). It is difficult for beneficiaries and their representatives to view files and submit new evidence. Files are not available through SSA's existing channels for electronic records access; CDs must be burned and mailed. New evidence—when it is accepted—is handled only through mail or fax with limited ability to track its receipt. DHO hearings are scheduled with far less than the 75 days' notice required for ALJ hearings, despite the equal importance and complexity of both types of hearings. These difficulties make it harder for beneficiaries to appeal the termination of their benefits, less likely that DHOs will reach accurate decisions, and more likely that costly (in terms of administrative costs and time without benefits) ALJ hearings will be necessary.

An August 2018 Office of the Inspector General report[26] found six major reasons for delays in CDR processing: "CDR appeals were awaiting assignment to disability examiners, examiners had periods of no work activity on the appeals, employees made errors in processing the appeals, field offices did not transfer appeals to the disability determination services (DDS) timely, employees prolonged processing determinations, and DDSs were waiting to receive paper folders" (internal numbering omitted). Although SSA agreed with OIG's suggestions to remedy some of these problems, there is no indication that the agency has made any improvements. These problems will only be multiplied if SSA expands its CDR process in the way it has proposed.

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[24] Periodic CDR—Backlog Dataset https://www.ssa.gov/open/data/Periodic-Continuing-Disability-Reviews.html
[25] SSA Monthly Disability Workload Data, http://www.socialsecurity.gov/disability/data/SSA-SA-MOWL.xls.
[26] https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-18-50391.pdf

SSA already has difficulty obtaining medical evidence in CDR cases. The agency was not even able to state in the NPRM how often they request such evidence, let alone how often their policy of sending two written requests 15 days apart results in the evidence being submitted.

For years, advocates have highlighted SSA's ongoing and widespread inability to locate and associate comparison point decisions and related medical records when performing CDRs. SSA has made no significant progress in addressing this issue.

SSA is frequently unable to send CDR paperwork to the beneficiary's current address. As the Commissioner noted in a November 4, 2019 letter to the public, "Did you know we store a beneficiary's address in something close to 20 different systems? If you move, we can change your address in one place but that may not change it in the others."[27] When beneficiaries report address changes and CDR forms are nonetheless mailed to previous or incorrect addresses, they are at grave risk of losing their Social Security and Medicare benefits for "failure to cooperate" despite the only failure being SSA's. The proposed rule would ensnare more people with disabilities in this broken system.

Instead of spending nearly $2 billion on additional CDRs, the agency should focus its efforts on fixing these well-known and longstanding problems.

The proposed rule may not be cost effective.

The proposed rule estimates that program integrity expenditures would increase by $1.8 billion over 10 years, but does not include an estimate of expenditures for which program integrity funding cannot be used. For example, SSA will have to process additional disability, early retirement, and survivors' claims for people who are undergoing CDRs or whose benefits have been ceased. Approximately 20% of disabled workers and 30% of SSI recipients whose benefits were terminated for medical improvement received benefits again within 8 years;[28] obviously all of them reapplied, as did others whose new claims were denied. In addition, when a worker's benefits are ceased, his or her auxiliary beneficiaries are likely to apply for Title II benefits on their own records, and/or for SSI.

The estimates also fail to incorporate the decreased savings that will result if SSA grants state-by-state waivers as described in proposed 20 CFR §§404.1590(f) and 416.990(f). Given that SSA experiences frequent CDR backlogs and has other significant backlogs in its DDSs, field offices, Program Service Centers, and other components, it is likely that waivers will be granted during the 10-year forecast period and that many states will be unable to adhere to the proposed CDR timeframes.

When people lose their disability benefits, in many cases they will become eligible for needs-based benefits or qualify for larger amounts of those benefits. This is especially true given the proposal's disproportionate effect on recipients of SSI, who by definition have extremely low

[27] https://www.ssa.gov/agency/coss-message.html

[28] Jeffrey Hemmeter and Michelle Stegman, "Subsequent Program Participation of Former Social Security Disability Insurance Beneficiaries and Supplemental Security Income Recipients Whose Eligibility Ceased Because of Medical Improvement." Social Security Bulletin Vol. 73 No. 2, 2013.

income and assets. This proposal therefore should consider the offsetting programmatic and administrative costs to federally-funded programs such as SNAP, housing and homelessness assistance, TANF, WIC, LIHEAP, etc. as well as to state and local programs that serve low-income individuals and households.

The combined effects of additional administrative costs at SSA and additional costs to other programs may well completely obviate the proposal's estimated savings, which are themselves inaccurately high. That is yet another reason to rescind it.

Conclusion

Continuing disability reviews are an important part of ensuring that only people who meet the statutory eligibility requirements for disability benefits from SSA continue to receive them. Because CDRs are burdensome and can be harmful to beneficiaries, the agency must make a reasoned case supported by facts and evidence that there is a need to subject beneficiaries to more frequent reviews than required by the Social Security Act. As described in the preceding comments, the agency fails to do so. The lack of rationale and evidence supporting the proposed changes makes it impossible to meaningfully comment on the proposal and violates the APA.

We are particularly concerned that the proposed rule would disproportionately harm older adults nearing retirement age, as well as other groups, and urge the agency to rescind this proposal. Should SSA decide to move forward with a new proposed rule, it should comply with the APA to ensure a meaningful opportunity for notice and comment.

We have cited research demonstrating the harms of these proposals and we respectfully request that SSA review each of the sources cited and made available to the agency through active hyperlinks. We further request that the full text of each of the sources cited, along with the full text of our comments, be considered part of the administrative record in this matter for purposes of the Administrative Procedure Act.

Thank you for the opportunity to comment on these proposed regulations. If there are questions concerning this submission, please contact Tracey Gronniger, at tgronniger@justiceinaging.org.

Respectfully submitted,

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