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THE SOCIAL SECURITY ADMINISTRATION'S NEW DISABILITY ADJUDICATION RULES: A SIGNIFICANT AND PROMISING REFORM

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INTRODUCTION

On March 31, 2006, the Social Security Administration (SSA) promulgated regulations implementing a new Disability Service Improvement (DSI) process for making disability decisions in the Disability Insurance and Supplemental Security Income programs.[1] In general, the DSI process adopts the approach SSA outlined in proposed rules eight months earlier,[2] with some important improvements over the originally proposed process. The key elements of the new process are the introduction of Quick Disability Determinations (QDDs) for certain types of claims where an initial finding of disability can be made within twenty days; the creation of a Medical and Vocational Expert System (MVES), designed to improve the quality and availability of medical and vocational expertise throughout the administrative process; the elimination of the reconsideration level of review following an initial denial of disability benefits; the addition of a Federal Reviewing Official (FRO), who will review appealed initial deci-

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1 Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422). DSI is part of a broader SSA initiative to improve the disability determination process that includes introducing an electronic disability file system (eDib), improving quality control, enhancing management information, updating medical and vocational policy, and implementing various work opportunity initiatives. *See id.* at 16,424–27.

2 Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590 (proposed July 27, 2005) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

sions before such decisions are scheduled for an administrative hearing; the modification of rules on submitting evidence at administrative hearings; and the replacement of the final-appeal-level Appeals Council with a new Decision Review Board (DRB) charged with broader responsibility for identifying and correcting systemic decision errors.[3] Although questions remain about certain details of the new procedure, SSA and Commissioner Jo Anne Barnhart have undertaken a much-needed, comprehensive reform of the SSA disability adjudication process.[4]

The need to reform the disability determination process has been clear for many years. It is difficult enough to decide whether any individual is, as set forth in the Social Security Act disability standard, unable to engage in "substantial gainful activity" in light of not only his or her physical and mental impairments, but also any effects of his or her age, level of education, and work experience.[5] Making disability determinations fairly and accurately for millions of claims—and in hundreds of thousands of appeals—is a daunting task. Moreover, stresses on the existing system have increased over the last two decades, as the background section of the new rules indicates.[6] During this period, the number of beneficiaries receiving disability benefits has doubled, while the number receiving need-based Supplemental Security Income has increased 130%,[7] putting pressure on the entire adjudication system. The 500,000 hearings that SSA Administrative Law Judges (ALJs) processed in fiscal year 2005[8] are daunting by any measure.

The key procedural problems that the new rules seek to address are the amount of time taken to reach final disability decisions and a lack of confidence in the accuracy and consistency of the decisions themselves.[9] In a report prepared for the Social Security Advisory Board (SSAB) in 2003,[10] we pointed out a problem that lies at the root

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3 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,427–28, 16,433.

4 Efforts to introduce fundamental changes to SSA's disability determination process have proven difficult, as evidenced by the long record of failed reform proposals over the past twenty-five years. For a discussion of some of these past efforts, see Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 4–16 (2003).

5 42 U.S.C. §§ 423(d)(1)–(2)(A), 1382c(a)(3)(A)–(D) (2000).

6 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,424 ("The number of disability beneficiaries in our programs has grown significantly over the years.").

7 *See id.*

8 *See id.*

9 *See id.*

10 FRANK BLOCH, JEFFREY LUBBERS & PAUL VERKUIL, INTRODUCING NONADVERSARIAL GOVERNMENT REPRESENTATIVES TO IMPROVE THE RECORD FOR DECISION IN SOCIAL SECURITY

of these concerns: Throughout the process, decision makers, including ALJs following a full administrative hearing, often make disability determinations based on incomplete evidentiary records.[11] Any effort to reform the disability determination process must target the prompt development of a full and complete record. Unless that critical part of the process is fixed, decision makers—no matter what they are called or under what new set of rules they operate—will be unable to do their jobs properly.

Our SSAB study was commissioned to examine the possibility of introducing government representation at Social Security hearings and to address the question of when and how to close the administrative record.[12] During the course of the study, we interviewed the full range of interested parties, including front-line SSA and state Disability Determination Service (DDS) personnel, ALJs, and claimant advocates.[13] To frame the issues, we asked supporters of government representation to explain what they thought a government representative, or someone in a similar role, would add to the process from a functional perspective.[14] Virtually all of them highlighted the need for better development of the evidentiary record.[15] Moreover, differing views about closing the record among the people we interviewed depended to a large extent on the person's confidence about the record development process: The more confident someone was about the quality of the record at the time of decision, the more likely he or she was to support closing the record at, or even before, the hearing.[16]

In reality, there are two distinct aspects of the incomplete record problem. The first pertains to the length of the current process and the nature of the claimant population. Medical conditions may change during the many years it often takes claimants to wend their way through the various stages of the current process (initial decision, reconsiderations, ALJ hearing, and Appeals Council review). Therefore, even evidentiary records that are accurate at the outset may look different at later stages of the process. The second aspect results from

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DISABILITY ADJUDICATIONS (2003), *available at* http://www.ssab.gov/documents/Bloch-Lubbers-Verkuil.pdf; *see also* Bloch, Lubbers & Verkuil, *supra* note 4, at 1 n.* (reporting on the study).

11 *See* BLOCH, LUBBERS & VERKUIL, *supra* note 10, at 66.

12 *See id.* at 1.

13 *See id.* app. 1, at 79.

14 *See id.* at 67.

15 *See id.*

16 *See id.* at 67–68. Thus, "[t]hose who were the most confident about the record development process were more likely to suggest a 'bright line' cut-off." *Id.* at 68. On the other hand, "those more concerned about the quality of the record . . . were more likely to suggest some sort of safety valve, such as a 'good cause' requirement for submitting additional evidence along the lines of the requirement for submitting additional evidence at the district court." *Id.*

deficiencies in the design and implementation of the process itself. Staff charged with processing disability claims—particularly at the state DDS, but also at the Office of Hearings and Appeals (OHA)—are neither properly trained nor given sufficient resources to compile the detailed medical information necessary to determine disability under SSA rules and regulations.[17] We concluded that while the disability adjudication process needed active monitoring, government representation was not the answer.[18] Thus, we suggested appointing nonadversarial "Counselors," whose main responsibility would be to ensure that ALJs have a fully developed evidentiary record when they make their decisions.[19]

I
SOME SIGNIFICANT IMPROVEMENTS

Many aspects of the new SSA rules will help improve the quality of evidentiary records used to decide disability claims. Thus, we agree with the Commissioner's plan to eliminate the reconsideration level of review. Simply shortening the process will reduce the "moving target" problem of claimants' changing medical conditions. More fundamentally, bypassing this intermediate step will help to focus resources and energy for disability determination at the two critical decision points in the process: the initial administrative decision and the ALJ hearing. The current model dissipates limited resources and energy for disability determination by spreading the process over four administrative levels, particularly so with the essentially repetitive initial decision and reconsideration levels.

The addition of QDDs at the initial decision level for selected types of claims—those where the information needed to decide disability can be obtained quickly and easily—is also a positive and practical approach to case management. Setting apart claims for which the evidentiary record may be compiled with little difficulty will allow SSA to direct much-needed resources to more difficult claims. The effort to improve the quality and uniformity of medical-expert input through an MVES is another welcome innovation. The details of this reform will not be developed until SSA receives the results of a study it commissioned from the Institute of Medicine (IOM).[20] However, decision makers will likely use these experts to help obtain the medical and vocational information needed to reach a decision according to

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17 *See id.* at 15–16.

18 *See id.* at 71.

19 *See id.* at 72.

20 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,431–32 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

the relevant regulations.[21] An interim report by IOM suggests that SSA adopt internal procedures and orient training along these lines.[22]

The replacement of the Appeals Council with the DRB is more complicated, as it removes the possibility of administrative review of many ALJ decisions. This change may result in unnecessary appeals to federal district court, or more distressingly, may lead to many ALJ decisions not being reviewed at all where the claimant lacks the means to proceed to court. As with the elimination of reconsideration, however, the change does have the advantage of focusing the disability determination process on initial decisions and ALJ hearings and of advancing the administrative side of the process. The change also introduces a potentially effective mechanism for quality control. We recognize that some commentators, notably the Judicial Conference, have expressed concern about the potentially "significant caseload ramifications for the federal courts" of removing the Appeals Council and the opportunity (and requirement) for claimants to appeal ALJ decisions administratively before going to court.[23] For that reason, SSA's plan to phase out the Appeals Council slowly while assessing the implementation of the rest of the reform seems wise.[24] We also approve of the final rules' addition of provisions allowing claimants to file a two-thousand-word statement with the DRB,[25] removing the provision concerning DRB consultation with the MVES in individual

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21 *See id.* at 16,431.

22 COMM. ON IMPROVING THE DISABILITY DECISION PROCESS: SSA'S LISTING OF IMPAIRMENTS AND AGENCY ACCESS TO MED. EXPERTISE, INST. OF MED. OF THE NAT'L ACADS., IMPROVING THE SOCIAL SECURITY DISABILITY DECISION PROCESS: INTERIM REPORT 5–11 (2006).

23 *See Commissioner of Social Security's Proposed Improvements to the Disability Determination Process: Joint Hearing Before the Subcomm. on Human Resources and the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Hon. Howard D. McKibben, Chair, Judicial Conf. Comm.), *available at* 2005 WL 2376204 (Westlaw).

24 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,441. The SSA rule does not detail the DRB's structure and internal procedures. The comment of the American Bar Association's Section of Administrative Law and Regulatory Practice, however, suggested that perhaps the Board's structures and procedures could be modeled on that of the Bankruptcy Court Appellate Panels. *See* Letter from Eleanor D. Kinney, Chair, Am. Bar Ass'n Section of Admin. Law & Regulatory Practice, to Jo Anne Barnhart, Comm'r, Soc. Sec. Admin. (Oct. 24, 2005), http://www.abanet.org/jd/ncalj/pdf/ekinney_ssa.pdf. Two of us also promoted this approach in a report to the SSAB. *See* Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731, 747–48 (2003). That report also recommended renewed consideration of an Article I Social Security Court to deal with Article III court caseload concerns. *See id.* at 778–82. Others have argued against such a court. *See, e.g.*, Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1 (1987).

25 *See* 20 C.F.R. § 405.425(b) (2006).

cases,[26] preventing the review from being based on the identity of the ALJ,[27] and adding a ninety-day time limit on the review process.[28]

II
SOME REMAINING CONCERNS

Two aspects of the proposed rules were especially problematic: the role set out for the FRO and a set of new deadlines for submitting evidence and closing the record at ALJ hearings. This Part discusses the final rules' improvements on these aspects of the process, as well as some remaining concerns.

A. The Role of the Federal Reviewing Official

Our study for the SSAB concluded that something more than a mere second try by a different DDS team—SSA's practice at the reconsideration level of appeal—was needed between the initial decision by the DDS and the ALJ hearing.[29] Thus, we suggested a full review of the file by a nonadversarial Counselor who could assess the initial decision and the evidentiary record on which it was based and prepare the claim for the next step in the process: a full-fledged administrative hearing and decision by an independent ALJ.[30] The Counselor's responsibilities would include evaluating the initial decision and the medical evidence in the record, obtaining additional evidence if needed, and, where appropriate, proposing to the ALJ that the claim be granted on the record without a hearing.

Instead, the new rules create the position of FRO, to be filled by lawyers with the authority to make a new decision on the claim. In effect, the FRO will act much like a preliminary judge; however, the new rules give claimants and their representatives no more access to the FRO than they now have to the DDS reconsideration team. Moreover, it appears that FRO decisions will have all the trappings of a formal decision including being written by a lawyer, presumably in a lawyerly style. Even though ALJs are not formally bound by the FRO decision, they might be more inclined to defer to these lawyer-written decisions than they were to a second administrative decision after reconsideration review.

We believe that the interests of both claimants and SSA would be better served by charging the new FRO primarily with assuring the development of a timely, full, and fair record, much like the

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26 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,439.

27 *See id.*

28 *See* 20 C.F.R. § 405.420(a)(2) (2006).

29 *See generally* BLOCH, LUBBERS & VERKUIL, *supra* note 10.

30 *See id.* at 75.

nonadversarial Counselor proposed in our SSAB report.[31] Other tasks envisioned for the FRO under the new rules would be fully appropriate for the FRO under this model as well. Indeed, most of the all-important record development work on a Social Security disability claim—obtaining existing medical and vocational records, measuring existing information against alleged impairments and applicable eligibility criteria, and ordering additional medical and vocational evaluations—are essentially neutral tasks best performed outside an adjudicative setting. A Counselor-like FRO would stand in an ideal position to frame the issues on appeal, seek out specific additional medical or vocational information necessary to evaluate the claim under applicable rules and regulations, and grant claims on the record. All the while, the process could remain focused on the two primary decision points in the adjudication process: the initial decision and the ALJ hearing.

In addition to our SSAB report, a number of proposals have been advanced over the years to address the problem of record development in the disability determination process. Some have focused on existing administrative practices and procedures, while others have suggested deployment of personnel with an eye to improving SSA's performance in developing the record for decision. One proposal in particular, SSA's Senior Attorney Project, introduced a position within the OHA that was charged with a role similar to the one outlined above for the new FRO. Sixteen years ago, the Administrative Conference of the United States (ACUS) recommended greater use of prehearing conferences to frame the issues involved in the ALJ hearing, identify matters in dispute, determine the necessity of subpoenas, consider whether witnesses might be called, and decide appropriate cases favorably without hearings.[32] The FRO could orchestrate all of these functions in advance of the ALJ hearing with the cooperation of the DDS and, where appropriate, the ALJ. We incorporated many of these ideas into the nonadversarial "Counselor" position that we suggested in the following recommendation in our SSAB report:

> SSA should consider creating a new administrative position, called a "Counselor," with the express mandate of overseeing and facilitating the development of the evidentiary record for decision. As part of this process, the Counselor position should have the following characteristics and responsibilities:

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31 *See id.*

32 *See* Social Security Disability Program Appeals Process: Supplementary Recommendation (Recommendation 90-4), 55 Fed. Reg. 34,213, 34,215 (Aug. 22, 1990); Frank S. Bloch, *Report for Recommendation 90-4: Report and Recommendations on the Social Security Administration's Administrative Appeals Process, in* RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 307, 385 (1990).

- It should be charged with developing a full and complete record as quickly as possible, in cooperation with claimants (and their representatives), DDS, OHA, and other SSA personnel.
- It should have direct access to key DDS personnel in order to question and clarify the DDS's rationale for its disability decisions.
- It should have independent authority to obtain information for the record, including access to any available funds and enforcement mechanisms.
- It should have a formal role, either independently or in cooperation with ALJs and other OHA staff, to narrow and resolve particular issues and, when appropriate, to recommend to an ALJ a fully favorable, on-the-record decision.
- It should be designated nonadversarial, even if attorneys fill some of the positions.[33]

The key to our recommendation was that SSA should concentrate its efforts on improving the record for decision at ALJ hearings.[34] We believed that the best way to achieve this goal would be to introduce a nonadversarial Counselor into the disability adjudication process. The Counselor's central roles would be to monitor the process of developing the evidentiary record and to work closely with all the key actors—the claimant (and the claimant's representative, if applicable), the ALJ, and SSA (most likely through DDS)—to identify any gaps in the record and to fill them as quickly and efficiently as possible.[35] These Counselors would remove much of the development work from the ALJs, including the second- and third-hat roles of assuring that the claimant's and SSA's (or DDS's) positions remain fully supported, and would serve as much-needed administrative liaisons between the DDS and OHA.[36] We also recommended that the Counselors be given the resources and authority necessary to develop records and process claims quickly, especially in those cases where benefits could be granted without full administrative hearings.[37]

In its final rule, SSA did not adjust the role of the FRO to be more of a counselor than a decision maker, but it did make some significant improvements. Most importantly, it provided two mechanisms that will aid in the record development for cases that proceed to the ALJ stage. First, the final rule provides that in making a decision, the FRO may consult evidence submitted by the claimant, even if not submitted with a request for review.[38] Second, the final rule autho-

33 BLOCH, LUBBERS & VERKUIL, *supra* note 10, at 76–77 (Recommendation 3).

34 *See id.* at 75.

35 *See id.*

36 *See id.*

37 *See id.*

38 *See* 20 C.F.R. § 405.215(b) (2006).

rizes the FRO to issue subpoenas to obtain additional evidence when necessary.[39] SSA enacted these changes to reinforce a record-development role for the FRO.[40] Moreover, although the rule provides that the FRO could still issue "decisions" subject to an appeal before an ALJ, SSA did not grant the FROs the proposed power to dismiss or remand cases to the state agency.[41] The final rule also clarifies that FRO decisions are not to be considered evidence in an ALJ proceeding; however, the requirement that ALJs must furnish a rationale for agreeing or disagreeing with the FRO decision remains in place.[42]

These changes go a long way toward enabling the FRO to develop a full and complete record in preparation for the ALJ stage of the case, while allowing the FRO to grant benefits in clear-cut cases. The concern remains, however, that authorizing the FRO to issue a decision to deny benefits will excessively formalize this stage of the process, canceling out the streamlining provided by eliminating the reconsideration stage.

B. Rules for Submitting Evidence at the ALJ Hearing and Closing the Record

The concept of "closing" an administrative record arises in two very different contexts: preparing a record for decision and preserving the record of a decision for further administrative or judicial review.[43] The process of preparing a record for decision typically continues until the decision is reached; the record is closed when (or just before) the decision is made.[44] This is the procedure during the initial-decision and reconsideration stages in the current process and will continue at the initial-decision and FRO stages under the new rules.[45] The DDS is charged with developing the record such that a competent initial-disability decision can be made. Once the evidentiary record is complete, the DDS makes its decision based on the record. Presumably, the FRO would proceed in a similar fashion,

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39 *See id.* § 405.217(a).

40 Thus, in explaining its response to public comments calling for a greater record-development role, SSA stated in the preface to the new rules: "We are committed to giving the [FRO] both the responsibility and the resources to assure [sic] that a claimant's [evidentiary] record is adequately developed." Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,433 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

41 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 70 Fed. Reg. 43,590, 43,595 (proposed July 27, 2005) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

42 Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,453.

43 *See* BLOCH, LUBBERS & VERKUIL, *supra* note 10, at 40.

44 *See id.*

45 *See id.*

supplementing the record as necessary before making a final evaluation of the evidence and rendering a decision. Closing the record would thus not become an issue until the ALJ hearing.[46]

ALJs and OHA staff currently develop the record as necessary to prepare the case for hearing and decision. In addition, the claimant-appellant may submit supplemental evidence both before and during the hearing. Although claimants are expected to identify additional evidence to be submitted at the time they request a hearing,[47] regulations also expressly provide that any party may submit evidence at the hearing as well.[48] This is necessarily so, as the administrative hearing is a de novo review of the claim[49] and the only point in the administrative decision and appeals process where witnesses may testify before a decision maker.[50] Moreover, the Social Security Act guarantees as much: "[T]he Commissioner shall give [claimants] . . . reasonable notice and opportunity for a hearing with respect to [an adverse] decision, and, if a hearing is held, shall, *on the basis of evidence adduced at the hearing*, affirm, modify, or reverse the Commissioner's findings of fact and such decision."[51] In addition, the ALJ has an affirmative duty to verify that the record contains all the information necessary to decide the case.[52] Thus, Social Security regulations provide that "[a]t the hearing, the administrative law judge looks fully into the issues, questions [the claimant] and the other witnesses, and accepts as evidence any documents that are material to the issues."[53]

Under current practice, it is also possible for the record to stay open or be reopened after the hearing. If the claimant requests additional time to obtain evidence, the ALJ may hold the record open for

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46 *See id.*

47 *See* 20 C.F.R. § 404.933(a)(3) (2006).

48 *See id.* § 404.950(c); *see also id.* § 404.950(a) ("Any party to a hearing has a right to appear before the administrative law judge, either in person [or by means of a designated representative,] to present evidence and to state his or her position.").

49 *See* BLOCH, LUBBERS & VERKUIL, *supra* note 10, at 41.

50 There is one limited exception under current procedures for reconsideration that remains despite the elimination of reconsideration for new claims: A hearing officer conducts a "disability hearing" in cases in which a recipient appeals from a decision to terminate benefits on the ground that he or she is no longer disabled. *See* 42 U.S.C.A. § 405(b)(2) (West Supp. 2006); 20 C.F.R. §§ 404.914, 416.1414 (2006). Of course, there is also no live testimony during judicial review.

51 42 U.S.C. § 405(b)(1) (2000) (emphasis added); *see also* 20 C.F.R. §§ 404.953(a), 416.1453(a) (2006) (directing ALJs specifically to decide the claim "based on evidence offered at the hearing or otherwise included in the record").

52 *See, e.g.*, Washington v. Shalala, 37 F.3d 1437, 1442 (10th Cir. 1994) ("Even when a claimant is represented by counsel, an 'ALJ has a basic obligation in every social security case to ensure that an adequate record is developed during the disability hearing consistent with the issues raised.'" (quoting Henrie v. U.S. Dep't of Health & Human Servs., 13 F.3d 359, 361 (10th Cir. 1993))).

53 20 C.F.R. § 404.944 (2006).

a set number of days after the conclusion of the hearing.[54] The ALJ may also decide to continue the hearing at a later date pending receipt of additional evidence, or may reopen the hearing if additional evidence becomes available before the decision is issued.[55]

In a significant shift from past practice, the proposed rules for submitting evidence and closing the record at the ALJ hearing would have required parties to submit evidence at least twenty days before the hearing, with limited exceptions at the discretion of the ALJ.[56] This strict limit, operating together with a rule that required hearings to be scheduled with forty-five days' notice,[57] would have left only twenty-five days after notice of the hearing date to submit evidence. In addition, the ALJ would have had the discretion to allow the parties to submit evidence after the hearing. Parties would have been required to submit evidence that could be obtained only after the hearing, such as proof of an unforeseen change in medical condition, within ten days of the decision.[58] An additional rule would have imposed on claimants a strict ten-day limit for objecting to the time and place of the hearing and the issues to be decided on appeal.[59]

The time limits of the proposed rules were widely criticized as creating a potential trap for claimants, especially those without representation.[60] Moreover, they would have contradicted their intended purpose—to provide the ALJ with the record needed to make a prompt and accurate decision—and would have cut short the all-im-

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54 *See* BLOCH, LUBBERS & VERKUIL, *supra* note 10, at 41.

55 *See* 20 C.F.R. §§ 404.944, 416.1444 (2006) ("The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. The administrative law judge may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence."); *see also* OFFICE OF DISABILITY ADJUDICATION & REVIEW, SOC. SEC. ADMIN., HALLEX: HEARINGS, APPEALS AND LITIGATION LAW MANUAL § I-2-6-80 (2005), http://ssa.gov/OP_Home/hallex/ ("Circumstances may require an ALJ to adjourn a hearing in progress and continue it at a later date, conduct a supplemental hearing, or reopen the record to receive additional evidence.").

56 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. 16,424, 16,428 (Mar. 31, 2006) (to be codified at 20 C.F.R. pts. 404, 405, 416 & 422).

57 *See id.*

58 *See id.* at 16,437.

59 *See id.* at 16,436.

60 This was a common theme among many of the witnesses who testified about the proposed rules at a joint hearing of the Subcommittee on Social Security and the Subcommittee on Human Resources of the House Committee on Ways and Means on September 27, 2005. *See, e.g., Commissioner of Social Security's Proposed Improvements to the Disability Determination Process: Joint Hearing Before the Subcomm. on Human Resources and the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Frank S. Bloch, Ph.D., Professor of Law, Vanderbilt University School of Law), *available at* 2005 WL 2376210 (Westlaw); *id.* (statement of Marty Ford, Co-chair, Social Security Task Force, Consortium for Citizens with Disabilities), *available at* 2005 WL 2376205 (Westlaw); *id.* (statement of Thomas D. Sutton, President, National Organization of Social Security Claimants' Representatives), *available at* 2005 WL 2376209 (Westlaw).

portant record development function.[61] With respect to closing the record, the goal should be to reform record development to the point where closing the record becomes an uncontroversial matter.

Thankfully, SSA took heed of this criticism and markedly improved the final rules on closing the record. SSA changed the time limit on notice of the hearing date from the proposed forty-five days to seventy-five days, and changed the requirement that claimants file their evidence with the ALJ at least twenty days before the hearing to at least five business days (with a good cause exception for filing even later).[62] By extending the advance-notice period for the hearing and shortening the deadline for submitting evidence, the time between notice and the filing deadline has been increased to approximately seventy days from the proposed twenty-five days. Similarly, the final rules extend the time limit for objecting to the time and place of the hearing from ten days after receipt of notice to thirty days and allow claimants to object to the issues contained in the hearing notice within five business days of the hearing.[63] Thus, the new rules retain the policy of closing the record after the ALJ stage while allowing the ALJ sufficient discretion—with somewhat more liberal guidelines than the proposed rules—to hold the record open at the time of the hearing or to reopen it after the hearing.[64] This approach is consistent with the idea that the new process leading up to the ALJ's decision will have already produced, to the extent that can be reasonably expected, a full and complete record.

CONCLUSION

SSA should be applauded for its responsiveness to the comments and concerns expressed by the affected community during the rulemaking process.[65] SSA's actions have resulted in a reasonable set of new rules on submitting evidence at the ALJ level. Over the years, some commentators have suggested that Social Security appeals

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61 *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,424 ("The purpose of the rule is to improve the accuracy, consistency, and fairness of our disability determination process and to make the right decision as early in the process as possible.").

62 *See id.* at 16,428.

63 *See id.* at 16,434.

64 ACUS presented similar ideas in a 1990 supplementary recommendation, which addressed the need to have the evidentiary record be as complete as possible and as early in the process as possible. ACUS proposed that the record before the ALJ should be closed at a set time after the hearing and then set forth a specific recommendation similar to SSA's final rule. *See* Social Security Disability Program Appeals Process: Supplementary Recommendation (Recommendation 90-4), 55 Fed. Reg. 34,213, 34,215 (Aug. 22, 1990).

65 SSA received nearly nine hundred written comments during the ninety-day comment period on the proposed rules. *See* Administrative Review Process of Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,427 ("The comments we received were detailed and insightful, and they have been extremely helpful to our deliberations.").

should shift to an adversarial process.[66] The new rules reject that idea, however, stating that the administrative review process is to be conducted "in a non-adversarial manner."[67] A successful nonadversarial process is very difficult to achieve. Nevertheless, if the shared goal of making "the right decision as early in the process as possible"[68] is taken to heart across the board—by the claimants' representatives, in making every effort to comply with the deadlines, and by the ALJs, in responsibly exercising their discretion to waive requirements—it stands a much better chance of being achieved. Similarly, these new rules could lead to a more effective and productive administrative hearing process if the parties involved (the claimants and their advocates, the ALJs and their staff, and the FROs in their role as reviewers of not only decisions but also the completeness of the evidentiary record) act in a truly nonadversarial manner.[69]

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66 *See Social Security Administration's Management of the Office of Hearings and Appeals: Hearing Before the Subcomm. on Social Security of the H. Comm. on Ways and Means*, 108th Cong. (2003) (testimony of Hon. Ronald G. Bernoski, President, Association of Administrative Law Judges) ("Such representatives would be responsible to defend the position of the agency at the hearing, recommend favorable cases, exercise settlement authority, and assist unrepresented claimants."), http://waysandmeans.house.gov/hearings.asp?formmode=view&id=766.

67 The new rules state for the first time in regulations that the process is nonadversarial. *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,447 ("In making a determination or decision on your claim, we conduct the administrative review process in a non-adversarial manner."). Previously, the nonadversarial nature of the administrative review process was mentioned only in the context of the rules of conduct and standards of responsibility for claimant representatives. *See* 20 C.F.R. §§ 404.1740(a)(2), 416.1540(a)(2) (2006).

68 This oft-repeated mantra was expressed in the first paragraph of the introduction to the new rules. *See* Administrative Review Process for Adjudicating Initial Disability Claims, 71 Fed. Reg. at 16,424.

69 *See* BLOCH, LUBBERS & VERKUIL, *supra* note 10, at 72.