

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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Executive Director
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January 6, 2020

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

Submitted via www.regulations.gov

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 the National Organization of Social Security Claimants' Representatives (NOSSCR).

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudication process and in federal court. Founded in 1979, NOSSCR is a national organization with a current membership of more than 3,000 members from the private and nonprofit sectors and is committed to the highest quality representation for claimants and beneficiaries. NOSSCR's mission is to advocate for improvements in Social Security disability programs and to ensure that individuals with disabilities applying for SSDI and SSI benefits have access to highly qualified representation and receive fair decisions.

NOSSCR understands that Continuing Disability Reviews (CDR) are an integral part of 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(emphasis added). Congress also understood that some impairments are likely to be permanent and explicitly gave the Commissioner of Social Security authority to determine

¹ 42 USC 421(i)(1)

how often to complete the reviews on individuals receiving Social Security disability benefits with such impairments.

Although the Social Security Act gives the Commissioner of Social Security authority to create CDR categories that schedule reviews at shorter or longer intervals than those 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 classifying an impairment into a particular category when proposing new regulations or regulatory changes.

Unfortunately, in this Notice of Proposed Rulemaking (NPRM), the Social Security Administration fails to include the criteria the agency used to identify the impairments it proposes to include in the newly created Medical Improvement Likely (MIL) CDR category. Nor does the proposed rule share the data, evidence, or studies, 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. The failure to provide the public with all but the most rudimentary information about its 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.

The failure to share the criteria used and the data the agency relied on in its decision-making process are fatal flaws requiring SSA to rescind this proposed rule. As the U.S. Supreme Court reasoned in *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29 (1983), although the arbitrary and capricious standard under the APA is narrow, the agency must examine the relevant data and articulate a satisfactory explanation for its action. In reviewing that explanation, a court must consider whether the decision was based on a consideration of the relevant factors.² When reviewing proposed rules, the Court has required the agency to show it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" ³ SSA fails to meet even this elementary burden required of agencies under arbitrary and capricious review of agency action in this proposed rule.

Although SSA might argue it did provide access to the data in the docket and supplementary material, those documents fail to provide adequate information on which to evaluate the agency's rationale or connect those facts to the choices it made, as described *infra*. SSA should rescind this proposed rule; should the agency propose changes to CDR categories and timing in the

² 463 U. S. 29, 40-44

³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962)); see also *Overton Park*, 401 U.S. at 415-16, 91 S.Ct. at 823-24; *Kitchens*, 535 F.2d at 1200.

future, it must conform to the APA and provide the information that would be required for meaningful notice and comment.

I. 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 been determined by SSA to 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,⁴ poorer,⁵ and sicker than the general population.

Even beneficiaries who SSA learned during the process of awarding disability benefits have unstable housing situations, intellectual disabilities, limited educations, inability to leave their homes, difficulty reading or writing, or other barriers to receiving, completing, and mailing back CDR documents must do so. If they do not, they will become part of an increasing number and percentage of CDR recipients⁶ 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 some beneficiaries far longer; many are unable to complete the form without significant assistance. The form is 15 pages long and on a grade 7.4 Flesch-Kincaid reading level according to readabler.com. It 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”) she must write an explanation. The form is so long that even printed double-sided, it is too heavy to mail with a single first-class stamp.

CDRs are also costly to beneficiaries. To effectively document that benefits should continue, beneficiaries often must pay for existing medical records; make additional medical appointments so their providers can complete paperwork or perform additional testing; and potentially hire a representative to assist them in completing CDR paperwork, attending Disability Hearing Officer and Administrative Law Judge hearings, and appealing to the Appeals Council and federal courts. 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

⁴ 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

⁵ 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>

⁶ According to SSA’s annual CDR reports to Congress, in 2013 there were 2,256 failure to cooperate (FTC) terminations, reflecting less than 2% of all terminations after CDRs. By 2016, these had increased to 9,956 FTC terminations, 5.1% of all CDR terminations.

promptly elect continuation of benefits⁷ during the CDR process and any subsequent appeals 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.

SSA should not force beneficiaries to experience these burdens more frequently, especially without evidence that doing so will improve program integrity and outcomes for beneficiaries and conform to the Social Security Act.

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

Congress made it very clear after the CDR debacle of the early 1980s that Social Security disability benefits could only be terminated 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 (and NOSSCR supports SSA's decision not to alter that standard), it bases the creation of a new CDR diary category, 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 the public cannot evaluate them. Holding a forum to discuss which impairments are likely to improve AFTER the proposal of this rule makes a mockery of the requirement to provide the public with the opportunity to evaluate the rationale and the data underlying agency decision making. The alternative—that SSA did not rely on any data or have a justification for the changes it proposes—is even worse.

A. The proposed rule was released before SSA gathered evidence on the topic.

On December 3, 2019, SSA held a National Disability Forum (NDF) on “What Impairments Have a Likelihood to Improve?”⁹ SSA should have taken the information gathered at this event into consideration before developing a regulatory proposal. Additionally, materials on the NDF website provide a list of “Impairments Which May Warrant a Review Earlier than 3 Years.”¹⁰ It looks similar to the supplementary document on impairments in the MIE and MIL diary categories provided in the NPRM, but includes a shorter list of impairments and does not divide them into MIE and MIL. SSA has not provided an evidentiary basis for placing any of the impairments on either list, as part of the NPRM, at the NDF, or anywhere else.

⁷ 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.

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.

⁹ https://www.ssa.gov/ndf/ndf_outreach.htm#ht=0

¹⁰ <https://www.ssa.gov/ndf/documents/Impairment%20Placement%20in%20CDR%20Categories%20-%20Page%203.pdf>

At the NDF, moderator Dr. Howard Goldman noted that SSA is currently funding studies by the National Academy of Sciences' Standing Committee of Medical and Vocational Experts for the Social Security Administration's Disability Programs (which Dr. Goldman chairs) on medical improvement in adults and children. SSA should rescind the proposed rule at least until the committee's work on this topic is complete.

B. 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 MIE timeframe and the MIP timeframe for reviews. What is unclear, however, is whether any of those CDRs actually occurred at the time they were supposed to occur. Were those results consistent over time (as only one year of data is provided)? What data or evidence is SSA relying on to show that any of the impairments (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 wishful 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, as Dr. Nicole L. Stout explained at the NDF, 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 Dr. Stout noted that they are "not the standard of care" anywhere. Dr. Robert E. Drake explained at the NDF that fewer than 2% of people with serious mental illness received the Individual Placement and Support intervention he described, and even when they did, they generally could not perform substantial gainful activity.

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 said criteria. The failure to specify the criteria the agency used makes it impossible to comment on the proposed classifications in a meaningful way.

C. 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 fn 38 of the NPRM) only provides one year of data, without explaining why FY16 was selected for an NPRM released in FY20. The document does not show the number of CDRs performed in each category, nor does it show whether it includes all CDRs or just 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. 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 and the latter has a higher cessation rate for those placed in the MIP diary. It is not possible to determine if the difference is statistically significant, there is not 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.

D. 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 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.

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 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. At the NDF, Dr. Stout noted that age-related factors affect people’s function after cancer treatment, but not a single cancer is among the 17 impairments where SSA proposes to consider age when placing people in the MINE diary category. Dr. Kashif Munir noted similar findings with diabetes, stating that the longer a person has diabetes (which is correlated with age), “the higher the disease burden.” Dr. Clinton Wright said that “age is a major determinant of the degree of recovery after stroke.” Yet diabetes and stroke are also not on the list of impairments where age could place a person in the MINE category.

E. *The agency provides no evidence that more frequent CDRs will be effective in identifying improvement.*

There is no evidence presented that reviewing cases as often as every 6 months will be effective. It takes time for people to make medical appointments, receive treatment, and have their providers determine if the treatment is correct or if other treatment is necessary. Given that Medicare does not start for 29 months after the onset of disability, the NPRM’s assumption that the “MIL diary category will allow us to assess MI after some beneficiaries benefit from access to health care through Medicare or Medicaid to determine if they continue to be eligible for benefits” seems more like wishful thinking than evidence-based policymaking.

F. *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 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 ministerial 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.¹¹ 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 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 proves 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.

G. 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. Many presenters at the NDF discussed this issue, including Dr. Stout on chemotherapy-related heart failure in certain cancer survivors, Dr. Munir on diabetes-related depression and anxiety, and Dr. Wright on comorbidities such as cognitive disorders affecting the chance and degree of recovery after stroke. 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.¹² 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.¹³ 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.

¹¹ 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)

¹² See Walker and Roessel, *infra* at fns. 22 and 23.

¹³ 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)

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

Termination for medical improvement is rare: in Fiscal Year 2018, SSA initiated over 1.3 million periodic CDRs for disabled workers,¹⁴ 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 reached full retirement age.¹⁵ SSA has not released data about what CDR diary 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.¹⁶ This indicates that if SSA increases the number and frequency of CDRs, the agency will impoverish more people who will ultimately demonstrate their benefits should have continued.

SSA itself states in the NPRM that the agency cannot quantify the effects of more frequent CDRs on workforce participation. The proposed rule relies on mere guesses or wishes to justify a change that evidence shows to be harmful. This is not just arbitrary and capricious, but callous and malicious. Research by SSA staff shows that people whose benefits are terminated for medical improvement are unlikely to be able to perform substantial gainful activity, even with every financial incentive to do so. While 70% of those whose disabled worker benefits were terminated for medical improvement had some earnings in the five years after cessation, 63% had at least one year with no earnings at all, and only 20% earned more than the substantial gainful activity threshold in all five years.¹⁷ Overall, the effects of the termination were financially harmful to beneficiaries. The SSA researchers note that the T.J. Moore article cited in the NPRM

“analyzed SSA’s elimination of drug abuse and alcoholism as a qualifying disability in the mid-1990s and found a large employment effect just after the termination of individuals with these diagnoses, but the effect declined over time. Moore’s findings result from a unique change in policy—removing a specific disability category—and may not reflect the general population of disability beneficiaries.”¹⁸

Even Moore’s findings—which are inapplicable to the population affected by the NPRM—are discouraging, showing that nearly 4 out of 5 people who lost their benefits

¹⁴ Periodic CDR Cases Processed dataset, <https://www.ssa.gov/open/data/Periodic-Continuing-Disability-Reviews.html>

¹⁵ https://www.ssa.gov/policy/docs/statcomps/di_asr/2018/sect03f.html.

¹⁶ <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.

¹⁷ Hemmeter, J., Bailey, M.S. Earnings after DI: evidence from full medical continuing disability reviews. *IZA J Labor Policy* 5, 11 (2016) doi:10.1186/s40173-016-0066-9 <https://izajolp.springeropen.com/articles/10.1186/s40173-016-0066-9>

¹⁸ *Id.*

spent the entire three-year study period with earnings below the SGA level. And, as Hemmeter and Bailey note, employment *worsened* after that! There is simply no evidence that terminating people’s benefits makes them financially better off, that they return to the workforce in any significant numbers, or that they have any significant level of earnings.

Similarly, SSA uses specious and ill-fitting data to suggest that terminating benefits faster has a positive effect on returning to work. SSA’s analysis looks at people who left the workforce for any reason (childrearing, layoffs, starting their own businesses, winning the lottery, etc.) which is a totally different population than those whose severe and long-lasting or terminal impairments made them unable to perform substantial gainful activity. Even the NPRM acknowledges the correlation between time out of the workforce and return to SGA-level work is “modest,” and admits that there is no evidence of causation. None of SSA’s demonstration programs over the past 25 years have succeeded in returning a significant number of beneficiaries to substantial gainful activity.¹⁹

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 who are bureaucratically disenfranchised in such a way 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 than it otherwise might be.

III. 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—that alone is inscrutable—but paragraph (b) says the agency will start a CDR if the beneficiary has been scheduled for any of the CDR diary types. It is not possible to provide adequate comments on these sections because they are nonsensical.

¹⁹ <https://www.cbpp.org/research/social-security/demonstrations-to-promote-work-among-disability-beneficiaries-likely-to>

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.²⁰ Many of them, including several among the 19 most common impairments in disability claims (diabetes, essential hypertension, personality disorders, osteoarthritis 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 seven years, or somewhere 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 selected, it could be possible for people to receive CDRs 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 solely for the pre-hearing case review stage,²¹ let alone the additional 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. 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 categories. Most disability claimants have multiple impairments,²² but SSA's systems allow a maximum of two impairments to be recorded and the choices of which impairments are selected and which is labeled as primary are haphazard at best.²³ The proposed rule also does not

²⁰ <https://www.ssa.gov/policy/docs/workingpapers/wp113.html>.

²¹ <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-18-50391.pdf>

²² Elisa Walker and Emily Roessel, "Social Security Disability Insurance and Supplemental Security Income Beneficiaries with Multiple Impairments" Social Security Bulletin, <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").

²³ *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

explain whether or how beneficiaries will be moved to different CDR categories as their ages change or if they develop new conditions, though the former circumstance is inevitable and the latter is likely.

D. *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 (and what "time outside of the workforce" means—if it is annual earnings above \$1000 as in the supplementary document referenced in the NPRM, that would be a significant work disincentive), and how these three criteria will be considered together. Placement in the MINE category is important not just for CDR scheduling, but also as 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 subregulatory 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, 2019.²⁴ CDR diary policy binds 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.

IV. The proposed rule goes against Congressional intent.

In addition to violating the APAt, the proposed rule goes against Congressional intent in at least three ways.

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 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

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.")

²⁴ <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/>.

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.”²⁵ 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.

Finally, the NPRM’s prefatory matter notes that although the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 required CDRs at age 1 for children with low birth weight (LBW) as a contributing factor to the award of SSI, the “Balanced Budget Act of 1997 modified the requirement for a CDR at age 1 to allow the Commissioner to schedule the CDR at a later date if the child’s impairment is not expected to improve by age 1 and to revise our definition of a permanent impairment for title XVI child recipients.” This indicates Congressional intent that some cases awarded on the basis of LBW should be reviewed less frequently than others. However, the agency proposes to use the MIE diary category “for allowances based on an infant’s low birth weight” regardless of whether other factors indicate that improvement by age 1 is improbable. This is a clear deviation from the more tailored assessment Congress directed SSA to do in 1997.

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

SSA has had extensive difficulty adhering to its current CDR scheduling policy. The agency eliminated its longstanding CDR backlog in FY 2002,²⁶ then began building up another backlog that was not eliminated until the end of FY 2018.²⁷ By October 2019, there were 15,792 pending CDRs at state agencies²⁸ 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

²⁵ 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>

²⁶ <https://www.ssa.gov/legislation/FY%202015%20CDR%20Report.pdf>

²⁷ Periodic CDR—Backlog Dataset <https://www.ssa.gov/open/data/Periodic-Continuing-Disability-Reviews.html>

²⁸ SSA Monthly Disability Workload Data, <http://www.socialsecurity.gov/disability/data/SSA-SA-MOWL.xls>.

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.

As noted in another comment you received on this NPRM,²⁹ 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 report³⁰ 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.

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 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 you noted in your 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.”³¹ 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

²⁹ <https://www.regulations.gov/document?D=SSA-2018-0026-0007>

³⁰ <https://oig.ssa.gov/sites/default/files/audit/full/pdf/A-07-18-50391.pdf>

³¹ <https://www.ssa.gov/agency/coss-message.html>

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.

VI. 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;³² 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 benefits. This is especially true given the proposal's disproportionate effect on recipients of SSI, who by definition have extremely low 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.

VII. Conclusion

Continuing disability reviews are an important part of ensuring that only people who meet the statutory eligibility requirements for Social Security disability benefits 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

³² Hemmeter J, Stegman M (2013) 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 73(2):1-38.

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. NOSSCR urges 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.

Thank you for the opportunity to comment on these proposed regulations.

Respectfully submitted,

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