

**Congress of the United States**  
**Washington, DC 20515**

January 31, 2019

Ms. Nancy A. Berryhill  
Acting Commissioner of Social Security  
Social Security Administration  
6401 Security Boulevard  
Baltimore, MD 21235

**Re: Setting the Manner for the Appearance of Parties and Witnesses at a Hearing, 83 Fed. Reg. 57368 (proposed Nov. 15, 2018) (to be codified at 20 C.F.R. Parts 404 and 416).**

Dear Acting Commissioner Berryhill:

We write today to express our strong opposition to the Social Security Administration's (SSA) Notice of Proposed Rulemaking, "Setting the Manner for the Appearance of Parties and Witnesses at a Hearing." In it, SSA proposes to eliminate an individual's right to an in-person hearing before an SSA Administrative Law Judge (ALJ), substituting an inferior video hearing about which we have received extensive complaints. This change would deprive millions of Americans of their constitutional right to due process and result in hearings which are less fair and less efficient. In a video hearing, the ALJ may be limited in their ability to thoroughly evaluate the impact that an individual's impairments have on their ability to work, and disabled individuals may not be able to fully and effectively present their case. This proposal is harmful and not justified. We request that SSA withdraw this proposed rule.

Evaluating whether an individual with a severe disability is no longer able to work is an inherently complex process which necessitates extensive development and evaluation of voluminous medical and vocational evidence. As a result, Congress and the courts have required a robust appeals process to ensure that individuals receive due process and that SSA conducts a full, impartial, and individualized consideration of their case. Prior denials are frequently overturned once a case receives a more in-depth evaluation, based on a more complete evidentiary record.

The stakes are high for individuals who are eligible for benefits and for the Trust Fund. Social Security benefits are a lifeline to those suffering a career-ending disability. Average benefits are only about \$1,200 a month, but without Social Security, almost half of disabled workers would live in poverty. At the same time, SSA must be a careful steward of the Trust Fund, making sure only individuals who meet the eligibility criteria established in the law are awarded benefits, which can total several hundred thousand dollars over the course of an individual's lifetime.

The *de novo* hearing before an ALJ is essential to due process. It is the first time an individual who has applied for benefits is able to meet face to face with someone who decides whether they are eligible for benefits. Individuals who request a hearing before an ALJ currently wait two to three years, or longer, from the time they first file their application to receiving a hearing decision. To deny them the opportunity for a face-to-face hearing, when so much is on the line and they have endured so many months without income and in ill health, is inappropriate. With this proposal, SSA is moving government service in the wrong direction.

Video hearings are inferior to in-person hearings in many instances and for a wide range of reasons:

- Video hearings do not permit an assessment of an individual's gait or posture as they enter a room, their ability to lower themselves into a chair or to stand up again, or if they use a cane or wear an orthopedic boot – since the screen focuses only on the individual's face, or, at best, from the waist up, with the rest of the body obscured by a table.
- Video hearings can provoke anxiety for someone with an anxiety disorder and may not seem real to someone with an intellectual disability or certain severe mental disorders. They may also be impossible for an individual suffering from claustrophobia, and the screen may trigger a seizure in persons with seizure disorders such as epilepsy.
- Video obscures fine or subtle details, such as a diabetic skin lesion which will not heal, poor circulation revealed by skin tone, affect, fatigue, tremor, etc.
- Video hearings do not show whether a person is malodorous, whether as a symptom of illness or as a result of an inability to perform basic hygiene – a necessary activity of daily living – due to a mental condition.
- It is extremely challenging to incorporate testimony from vocational or medical experts (whom SSA proposes elsewhere in the rule to provide testimony only by telephone): the audio from the phone line must be captured by the video camera's microphone, resulting in poor audio quality; cross-examination is nearly impossible due to poor audio quality and the nature of phone technology; the expert cannot view the individual with a disability or the evidence that comes up at the hearing; and it is difficult to assess whether the expert is paying attention to the testimony or has the same evidence in front of them that the individual and the ALJ have. Representatives have reported numerous hearings where the expert on the phone appeared to be testifying from the airport, while caring for children and dogs, while driving, while seeing another patient, and even while in a public SSA corridor waiting to testify at another hearing.
- Language or auditory interpretation is also nearly impossible with a video hearing, since the interpreter typically is providing interpretation from a remote location and none of the parties can easily hear each other.
- ALJs conducting hearings from remote locations are disadvantaged by not knowing the local medical practitioners (such as those with licensure issues or suspected of submitting boilerplate medical evidence); being unfamiliar with the types of injuries arising from

local industries; being unable to assess the availability of free medical care in a community or whether there is access to specialists; and not using specialized questioning that can reveal ability to function (for example, ability to use public transit in New York City, or whether an individual can chop firewood or haul water in a remote Alaskan village).

- Moreover, we have received from constituents, ALJs, and claimant representatives reports from across the country of extensive of technological problems with the agency's video hearing rooms and equipment, including too-small screens, poor audio and visual quality, tiny "hearing rooms" converted from closets that do not accommodate the individuals participating in the hearing along with their notes and equipment, poorly-positioned cameras that restrict views of the claimant and the representative, non-existent sound proofing that compromises the privacy of the individual, difficulty submitting evidence at the hearing, and so forth. Many video hearing locations also lack space for claimants and their representative to speak privately.

We are also alarmed that SSA misleadingly presented a recommendation of the Administrative Conference of the United States (ACUS) in an attempt to justify SSA's proposal to eliminate an individual's right to an in-person hearing before an ALJ. Contrary to the assertion presented in the proposed rule, ACUS's 2011 and 2014 recommendations regarding video hearings advises agencies to use them "on a **voluntary** basis and allow a party to have an in-person hearing or proceeding if the party chooses to do so" [emphasis added]. ACUS also established best practices regarding the infrastructure of video hearings – such as the adequacy of the audio and visual technology, appropriate room set up, effective soundproofing, etc. – which numerous commenters on the proposed rule have shown is not consistently employed for SSA video hearings.

Finally, there is simply no demonstrated need for this change to SSA's existing policy regarding video hearings, unless SSA's ultimate goal is to close down local, in-person hearing offices and replace them solely with video hearings. Under current regulations, individuals have a limited right to opt-out of a video hearing. While many waive their right to an in-person hearing, SSA still conducts video hearings in only a percentage of these cases. Thus, SSA could schedule many additional video hearings without changing its rules to remove the right to an in-person hearing.

Even with the best technology, consistently available across the nation, it is the individual with a disability –not unnamed SSA employees –who is in the best position to know whether to accept a video hearing in lieu of an in-person hearing. Video hearings should be chosen by the individual because it is the better way to receive service, not because SSA mandates it.

The proposed rule also contains two other problematic policies. The first would require that medical and vocational expert witnesses provide testimony only by phone. The problems with that policy have been described above. The second is an untested and radical deviation from

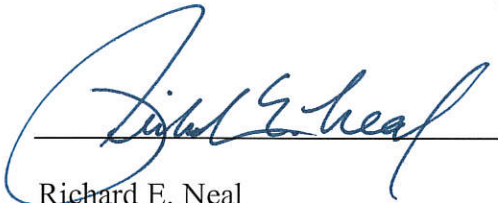


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long-established rules in which the ALJ who hears the case determines whether it is ready for a hearing, when the hearing should be scheduled, and in what form. Instead, the proposed rule would remove these decisions from ALJs and provide other, unspecified SSA employees with the authority to make them. Furthermore, the proposed rule does not identify any criteria for making these scheduling decisions. These changes would lead to hearings for which the record may not be fully developed or would need to be continued to obtain additional expert testimony. Both policies would reduce the fairness and efficiency of the hearing process.

We urge you to withdraw this proposed rule. We look forward to working with SSA to improve the disability determination and appeals process with changes that will receive broad support.


Sincerely,



Richard E. Neal  
Chairman  
Committee on Ways and Means  
U.S. House of Representatives



John B. Larson  
Chairman  
Subcommittee on Social Security  
Committee on Ways and Means  
U.S. House of Representatives



Danny K. Davis  
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Ron Wyden  
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Sherrod Brown  
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Committee on Finance  
U.S. Senate