AALJ COMMENT TO NOTICE OF PROPOSED RULE MAKING FOR RE-NAMING ATTORNEY-EXAMINERS FROM THE APPEALS COUNCIL AS ADMINISTRATIVE APPEALS JUDGES AND ALLOWING THEM TO CONDUCT INITIAL DISABILITY HEARINGS

This public comment is being provided pursuant to the Administrative Procedure Act, 5 U.S.C. Sec. 553 (c) which allows for and encourages public comments to be offered to the government whenever an agency is proposing new rules or changes in their rules which affect the public. The within comment is offered on behalf of the Association of Administrative Law Judges (AALJ). Founded in 1991, the AALJ was initially a professional association of the Administrative Law Judges who are employed by the Social Security Administration, and later, became a Union. We recognize that an Administrative Law Judge must uphold the integrity and independence of the administrative judiciary. An independent and honorable administrative judiciary is indispensable to justice in our society. Administrative Law Judges have the duty and authority to conduct constitutional due process hearings under the process provided by the Administrative Procedure Act. We participate in establishing, maintaining, enforcing, and observing high standards of conduct, so that the integrity and independence of the administrative judiciary may be preserved.

The Agency's stated purpose for the rule is as follows: "We propose to revise our rules to clarify when and how administrative appeals judges (AAJ) on our Appeals Council may hold hearings and issue decisions. The Appeals Council already has the authority to hold hearings and issue decisions under our existing statute and regulations, but we have not exercised this authority or explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision. The proposed clarifications will ensure the Appeals Council is not limited in the type of claims for which it may hold hearings. We expect that these proposed rules will increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearings level. Our ability to utilize our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to continue to issue accurate, timely, high-quality decisions."

The case law and statutory authority cited below clearly support that this is not the purpose of the rule.

The Appeals Council was never intended to conduct initial hearings and make decisions on whether to grant benefits.

- This is the primary reason why the Agency has never had Attorney-Examiners from the Appeals Council conduct hearings to determine whether a person is entitled to benefits. Instead, it was

created to "oversee the hearings and appeals process, promote national consistency in hearing decisions made by…administrative law judges….and make sure that the Social Security Board's (now Commissioner's) records were adequate for judicial review." The Appeals Council is "comprised of 44 *appeals officers* and several hundred support personnel" and reviewed 144,000 cases that were appealed to it for review - after having a hearing before an Administrative Law Judge (https://www.ssa.gov/appeals/about_ac.html).

- Appeals Officers in the Appeals Council are not judges. This rule creates a new position for the work that Attorney-Examiners/Appeals Officers had been doing. SSA sought a new position description from OPM to give these employees the title of Administrative Appeals Judges.
- SSA is ignoring the negative impact this rule change will have on due process and increasing the likelihood of claimants being forced to appeal decisions directly to the federal district courts based on the recent unanimous decision of the United States Supreme Court in *Smith v. Berryhill 2019 U.S. LEXIS 3555, decided May 28, 2019.*
- There is a four-step process before obtaining review by the federal courts. Steps one and two are the initial and reconsideration reviews by the State Agency. If denied at those levels, then a person requests a de novo hearing before an Administrative Law Judge (ALJ); this is Step 3. If denied by an ALJ, then one proceeds to Step 4, which is to request review of the ALJ decision by the Appeals Council. 20 CFR sections 404.900 and 416.1400. The Appeals Council has always been the last step of administrative review before a person can file an appeal to the federal courts. 20 CFR Sections 404.900 and 416.1481 see also 20 CFR Sections 404.967 and 416.1467.
- By giving Attorney-Examiners/Appeals Officers the ability to conduct initial hearings, SSA would be merging Step 3 and Step 4 of the administrative review process.
- **This merger would effectively subject the entire administrative adjudicative process under performance appraisal control by the Agency.**
- Regardless of whether additional steps are created, the claimant is denied a truly independent review within the Agency and is left only with an appeal to the courts for such a review.
- In ***Smith v Berryhill****, 2019* ***U.S. LEXIS 3555***, decided May 28, 2019, the United States Supreme Court, by unanimous opinion, held that 42 U.S.C. section 405 (g) provides for judicial review of any final decision made after a hearing. **"We note as well that the 'hearing' referred to in Section 405 (g) cannot be a hearing before the Appeals Council. Congress provided for a hearing in section 405 (b) and for judicial review 'after a hearing' in section 405 (g) before the Appeals Council even existed." Id, at footnote 10**. "...a primary application for benefits may not be denied without an ALJ hearing. Section 405. (b) (1). Moreover, the claimant's access to this first bite at the apple is indeed a matter of legislative right rather than agency grace." *Id*. The Court also noted that "Congress wanted more oversight by the courts in this context rather than less…and the statute as a whole is one that 'Congress designed to be unusually protective of claimants.'" *Id*. Citing City *of New York, 476 US at 480, 106 S. Ct. 2022, 90 L. Ed. 2d 462.* "If a claimant has proceeded through all four steps on the merits, all agree, section 405 (g) entitles him to judicial review in federal district court." *Id*.
- Congress did not likely intend for SSA to be the unreviewable arbiter of whether claimants have a right to judicial review. Congress gave the Agency power to make rules and regulations, to make findings of fact and to issue decisions after giving people an "opportunity for a hearing with respect such decisions" and "most centrally, Congress provided for judicial review of 'any final decision of the [agency] made after a hearing.'" Section 405 (a), 405 (b) (1) and 405 (g).

"At the same time Congress made clear that review would be available only 'as herein provided' that is only under the terms of section 405 (g) and 405 (h); see *Heckler v Ringer 466 U.S. 602, 614-615, 104 S.Ct. 2013 80 L. Ed. 2d 622 (1984)"*

The current ALJ corps, comprised of 1357 Administrative Law Judges, reduced the pending number of cases to its lowest point in 15 years at the end of FY 2019 and virtually eliminated the backlog.

- **1357 ALJs refuted the representations of Theresa Gruber, Deputy Commissioner (DC) overseeing the adjudicative process of SSA, to Congress when she said SSA needed to have the Attorney-Examiners/Appeals Officers conduct hearings in order to reduce the backlog.** (See, statements and submissions of Theresa Gruber, Deputy Commissioner, Social Security Administration Office of Hearing Operations, to the Senate Subcommittee on Regulatory Affairs and Federal Management of the Committee on Homeland Security and Government Affairs on May 12, 2016, at pages 37-38. Hereinafter referred to as Senate Subcommittee Record. [http:/www.fdsys.gov]
- **Information provided by SSA in the proposed rule at footnotes 4 and 5 confirm the significant reduction and elimination of 793,863 cases.**
- **In a November 2019 internal memo, Theresa Gruber, DC confirmed that at the of October 2019, there were only 561,616 cases pending -which was the lowest number "than any time in the last 15 years."**
- The number 1357 represents ALJs who are fully available to conduct hearings as of November 30, 2019. They are not management judges who do not conduct a normal case load.
- This is 149 fewer judges than were available in May of 2016, when Ms. Gruber, told the Senate Subcommittee that "there are far more hearing requests pending than our ALJ corps can currently handle … We currently have 1506 full time permanent ALJs on duty, but we lose 100 or more ALJs each year…" The Agency plan was to hire 225 more judges in FY 2016 and bring the total number of ALJs to 1900 by 2018. (See, Senate Subcommittee Record, at pages 37-38. [http:/www.fdsys.gov]
- The Agency never hired the number of ALJs referenced by Ms. Gruber, and yet, the existing 1357 ALJs virtually eliminated the backlog as of the end of FY 2019.
- **Theresa Gruber's estimates were wrong.** She told Congress in May 2016, that the Agency planned on eliminating the backlog by the end of fiscal year 2020, provided there was "adequate and sustained funding as well as OPM's ability to provide enough qualified ALJs timely." See Subcommittee Record at page 46. [http:/www.fdsys.gov.]
- **1357 ALJs are hardworking, dedicated professionals who donated over 40,000 hours of uncompensated time for three years in order to provide excellent, unparalleled public service. The Agency refuses to provide the number of hours forfeited by ALJs to the AALJ for fiscal year 2019.**
- According to internal Agency data, the average hearing request to hearing held in days across the nation is currently 366 days which translates to 12 months (http://oho.ba.ssa.gov/mi-

reports /average-wait-time-until-hearing-held-report/) In Footnote #1 of the proposed rule the Agency references a website for public access that contains information regarding average processing time. The average processing time is 400 days.

SSA failed to provide any technical studies or data to explain or support this fundamental change of the adjudicative process. Particularly, when the current ALJ corps reduced the backlog and is keeping pace with the number of cases being filed.

- For almost 80 years, the Appeals Council has been the final step in the administrative adjudicative process. Now, the Agency wants to expand the Appeals Council role to include holding hearings, at any level and for any type of claim.
- **Congress never intended the Appeals Council to regularly conduct hearings.**
- The Agency failed to comply with the rulemaking provisions of the APA, because it did not provide any technical studies or data to explain or support the necessity of this fundamental change. 5 U.S.C. Sec. 553. There is an abundance of case law that requires an agency to provide such information in exactly this type of situation.
- **In *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009),** the U.S. Supreme Court held that a policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides *"good reasons"* for the new policy, which, *if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy*." *Id.* at 515-516. (emphasis added).

- "[I]t is not consonant with the purpose of a rule-making procedure to promulgate rules on the basis of inadequate data, or on data that, [to a] critical degree, is known only to the agency." *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393, 158 U.S. App. D.C. 308 (D.C. Cir. 1973).
- "[T]he Commission can point to no authority allowing it to rely on the studies in rulemaking but hide from the public parts of the studies that may contain contrary evidence, inconvenient qualifications, or relevant explanations of the methodology employed... ." *American Radio Relay Inc., v. F.C.C.* 524 F. 3d 227, 390 U.S. App. D.C. 34 (D.C. Cir. 2008).

- **SSA has never properly conducted any studies or published data to the public that analyzes the both the need for or the effectiveness of this rule change.**
- **In fact, in May 2016, when Congress asked the Social Security Administration how it arrived at the legal conclusion that Attorney-Examiners/Appeals Officers could conduct limited hearings, which Senator Lankford said he thought "was a fair question;" the Agency's response was: " That is attorney -client privilege, and we cannot tell you how we came up with this decision."** (Senate Hearing Record, pg. 17)
- **Two GAO studies confirm the Agency's failure to properly and accurately maintain and study the effectiveness of its policy decisions. The first in December 2017 at https://www.gao.gov/products/GAO-18-37 and the second in July 2018**

https://www.gao.gov/assets/700/693288.pdf. This is extremely important because while SSA states their goals, they repeatedly fail to assess the efficacy of their policies and have failed to provide any reliable technical studies or data to assess the likelihood of success from their strategies.

- The Agency has arbitrarily selected 270 days as the new goal for average processing time and the new goal for determining elimination of the "backlog." Yet, the SSA has never conducted any type of an analysis to determine whether this arbitrarily selected number is realistic, given the complexities of the SSA administrative review process and evaluating the human needs of the claimants. **(**Theresa Gruber, DC, statement to Congress, Senate Hearing Record at pg. 46)
- The Agency uses data analytics to assess a large variety of information but has failed to use this to test the efficacy, cost or likelihood of success of this fundamental rule change or any other of its strategies.

SSA misrepresented to Congress its intentions regarding its plan for Attorney-Examiners/ Appeals Officers to conduct hearings. The real reason is to exercise total control over its decision makers.

- The Agency's stated purpose for the rule creating a new class of employee judges was to clarify when and under what circumstances the Attorney-Examiners who work in the Appeals Council may conduct hearings to "ensure the Appeals Council is not limited in the type of claims for which it may hold hearings." Also, to "increase our adjudicative capacity when needed allowing us to adjust more quickly to fluctuating short term workloads…."

- It was pretext when the Agency made a similar proposal in May 2016, stating that the reason for Attorney-Examiners to conduct hearings was to "allow for greater flexibility to adjust to increased case load demands."
- Theresa Gruber, DC of OHO, insisted that OPM could not provide a sufficient number of ALJ candidates and that is why the Agency needed to change the rules and give Attorney-Examiners/Appeals Officers the ability to conduct hearings in a certain group of cases.
- **Senator Heidi Heitkamp asked Theresa Gruber whether SSA "would consider transferring any other types of cases away from ALJs to AEs (attorney examiners)? How would SSA determine what other sort of cases would be transferred to AEs? "**

  Answer: "We have no plan to refer additional cases to the AC. We prudently selected non-disability cases for the reasons discussed above…We want to stress again that the only objective for this plan is to help people who deserve timely decisions from our agency. The goal of the augmentation strategy… is to reduce wait times to an acceptable level of 270 days and eliminate the backlog of cases. In addition, the CARES plan envisions that SSA will have more ALJs than ever before, provided we have adequate funding and the necessary candidates."
  See Senate Subcommittee Record at pg. 100.

- Now a mere three years later, the Agency is moving to expand the role of the Attorney Examiner to an Administrative Appeals Judge and have them conduct all types of initial hearings. Actually,

their plan was put into motion last year because SSA had to seek approval from OPM to establish a new position description.

- In ***Salling v. Bowen, 641 F. Supp. 1046 (1986)***, the Court held the Social Security Administration's SSA Representative Project (SSARP) was improperly implemented. Although initially advertised in the Federal Register [49 FR 13872], SSA violated the APA "by unadvertised internal decision, radically chang[ing] the SSARP …. by internal rules … ." *Id*. at pg. 1068. The Agency failed to publish the changes that would affect the rights and obligations of the Agency and the public. " [T]he entire concept, as it has been implemented in both the SSARP and the AIP, is in violation of the fundamental principles of procedural due process as prescribed by the Fifth Amendment and as determined by the courts to be applicable in social security cases." Id.

- *See also* ***City of New York v. Heckler 578 F. Supp. 1109 (1984).*** Affirmed on appeal to the United States Supreme Court, *Bowen v. New York, 476 U.S. 467 (1986)*. Based on a "covert" policy, physicians and psychologists were coerced into issuing medical findings and conclusions that were contrary to both their own professional opinions and SSA's regulations. The "tainted" RFCs deprived the class plaintiffs of an individualized assessment. The policies were enforced through internal memoranda, personnel reviews and program review critiques, which meant that "affected SSD or SSI applicants, as well as counsel, social workers and advisors, for a long time were unaware of its existence." Id. at pg. 115.

The new Administrative Appeals Judges have never been nor will they be independent from the Agency as represented by the Social Security Administration because they have been and will remain employees subject to Agency control and influence through performance appraisal, salary and bonuses, and simply, to keep their jobs.

- Administrative Appeals Judges are influenced to perform a certain way, for example, through performance awards. In fiscal year 2015, each Appeals Officer in the Appeals Council received $1,200 for a performance "award." [See Statement of Theresa Gruber, DC, responding to question #3, dated August 4, 2016 at pg. 92 of the Senate Subcommittee hearing record, *supra*.]
- ALJs are appointed under the Administrative Procedure Act (APA) with the specific purpose of making them independent fact finders who are free from political influence and pressure from their hiring agency. (*Daniel T. Shedd, Administrative Law Judges: An Overview*. RL34607. Congressional Research Service. (Washington, D.C.: Apr. 13, 2010)).
- Congress enacted 5 U.S.C. 3105 and 7521 to protect ALJs appointed under the APA so they could make decisions objectively, independently and fairly without fear of interference and influence from an agency. For example, the agency is not allowed to have ex parte communications with the ALJ during and around their hearings; they can only be terminated from their position after a separate panel, the Merit Systems Protection Board, decides there is sufficient evidence and good cause; and they are not subject to performance evaluations nor can they receive bonuses.
- Congress enacted these laws to maintain an ALJs impartiality and "to maintain the present system of providing for protection for Administrative Law Judges." See 5 CFR 930.211 (1993) and 5 CFR 930.203 (a) (b).

- Because ALJs are not subject to performance evaluations, agencies are prevented from putting pressure on ALJs to decide a certain way in order to receive a good evaluation or to receive a bonus or simply, to keep their job rather than be fired because he/she did not decide a certain way or a certain number of cases.
- The proposed AAJs do not have these same protections to guarantee their independence. This proposed rule does not give them the same protections as given to the ALJs by the Administrative Procedure Act.
- Despite vague promises in the proposed rulemaking to allow AAJ independence in decision-making to be equivalent to ALJs, the two positions can never be equivalent if one decisionmaker is subject to agency-imposed performance standards, while the other is not. Nor can the two be reconciled when one is appointed under the APA and afforded its protections, while the other is not.

Recent decisions from the United States Supreme Court support the assertion that there are legitimate due process concerns about the alleged impartiality of Attorney-Examiners/Appeals Officers because Social Security retains the ability to control the decision making, therefore, there remains the appearance of partiality.

- Agency control over Attorney-Examiners/Appeals Officers creates the appearance of partiality under the due process clause.
- It's the "perception of partiality" that is at issue. *Caperton v. A.T. Massey Coal Co.* 556 U.S. 868 (2009). It did not matter if Justice Benjamin said that he was not biased, the appearance of partiality was so strong, he should have recused himself from deciding the case.
- Decisions issued by Attorney-Examiners/Appeals Officers who are not impartial will be held invalid, and these cases could usher in class action lawsuits in light of ***Lucia v. SEC 138 S.Ct. 2044 (2018)*.**
- ALJs increase the likelihood of deferential judicial review and absolute official immunity for Agency adjudicators. ***Butz v. Economou, 438 U.S. 478, 513, 98 S. Ct. 2894, 57 L.Ed. 2d 895 (1978).***
- ***Recall, each Attorney Examiner/Appeals Officer received a $1,200 performance award in 2015. [***See Statement of Theresa Gruber, Deputy Commissioner, responding to question #3, dated August 4, 2016 at pg. 92 of the Senate Subcommittee hearing record, *supra*.]

It is not accurate for the Agency to state that "Each AAJ possesses the same skills and experience as the skills and experience of our ALJs. "

- ALJs have gone through a lengthy competitive examination process which involves a preliminary assessment of skills and qualifications, a written examination and then multiple interviews before being hired.
- ALJs have experience in conducting hearings and interacting with claimants and attorneys. Attorney-Examiners/Appeals officers do not conduct hearings; instead, they merely review the written record and make a decision on the documents submitted. Therefore, they do not have the same experience, and they have not developed the same skill as ALJs for conducting a hearing or questioning witnesses.

- ALJs have the skill of independently reviewing copious amounts of medical records and conducting their own independent analysis of the evidence when performing their work. Medical records are frequently 1000 pages or more.
- ALJs have developed the skill of working alone and independently.
- Attorney-Examiners/Appeals Officers have other SSA employees, known as analysts, who do the bulk of the work for them. The analysts are not vetted, as ALJs are and more importantly, they are also subject to performance evaluations, i.e., Attorney-Examiners / Appeals Officers. [See, submission dated August 4, 2016, from Theresa Gruber, Deputy Commissioner, Social Security Administration Office of Hearing Operations, to question #3, from the Senate Subcommittee Record, *supra*, at page 92, http:/www.fdsys.gov].

Due Process and Quality will be sacrificed in the name of speed.

- The proposed rule change, in conjunction with other proposed changes, focuses on one goal: issuing decisions faster.
- A GAO study conducted in December 2017 documented that "timeliness" is the only measure that SSA uses as an assessment tool. The Agency stopped using its ALJ peer review panel in 2009, and it reported that it "had no plans to add new performance measures related to the accuracy and consistency of hearings decisions." See GAO Study of December 2017 at page 30, https://www.gao.gov/products/GAO-18-37.
- The Agency has not provided any meaningful explanation or data to support how due process and quality, two critical items in an administrative adjudicative process will be preserved. Presumably, this is because it provides a quantifiable to justify management bonuses.
- Due Process cannot be mechanized and/or standardized. As stated above, the Agency has a history of attempting to do this and this proposed rule is the latest attempt.
- This production line mentality, of issuing decisions faster and faster, strips due process of its humanity and dignity as envisioned by Congress.
- If this Rule becomes final, disability cases could now be appealed to hearing before an employee who answers to the Agency, and whose continued employment is within the complete control of the Agency.
- There is no reason for this Rule other than increasing Agency control while sacrificing due process by eliminating one level of appeal. Social Security's goal appears to be hiring more employees to work in the Appeals Council division, which is now under the Office of Analytics, Review, and Oversight(rather than the Office of Hearings Operations), and effectively and eventually eliminate the appeal or request for review, de novo, by an Administrative Law Judge (ALJ).
- Couple this with the Final Rule to now allow the bureaucrat to initially decide how a person will participate in a hearing, AND the Proposed Rule which provides for a two year review of all those awarded benefits for "possible medical improvement"[1], it then becomes abundantly clear, SSA management/leadership want to control disability eligibility determinations. That is clearly not good for the American public and undermines fairness and due process.

[1] Rules Regarding the Frequency and Notice of Continuing Disability Reviews (RIN 0960-A127).