



4191-02U

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Docket No. SSA-2018-0033]

RIN 0960-AI23

Making Permanent the Attorney Advisor Program

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: We are making permanent the attorney advisor program, which has proved to be an integral tool in providing timely decisions to the public while maximizing the use of our administrative law judges (ALJs). The attorney advisor initiative permits some attorney advisors to develop claims, including holding prehearing conferences, and, in cases in which the documentary record clearly establishes that a fully favorable decision is warranted, issue fully favorable decisions before a hearing is conducted. We expect that by making the attorney advisor program permanent, we will be able to continue to reduce the number of pending claims at the hearing level of our administrative review process and provide more timely service to claimants.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Susan Swansiger, Office of Hearings Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA

22041, (703) 605-8500. For information on eligibility or filing for benefits, call our national toll-free number, 800-772-1213 or TTY 800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION:

Background of the Attorney Advisor Program

Under the attorney advisor program, certain attorney advisors may develop claims and, in appropriate cases, issue fully favorable decisions before a hearing.

We first created the attorney advisor program in 1995 through notice and comment rulemaking for a limited period of two years.¹ The program's success prompted us to renew it several times until it expired in April 2001.² On August 9, 2007, we published an interim final rule that reinstated the attorney advisor program in order to provide more timely service to the increasing number of applicants for Social Security disability benefits and Supplemental Security Income payments based on disability.³ We considered the public comments we received on the interim final rule, and on March 3, 2008, we issued a final rule without change.⁴

¹60 FR 34126 (June 30, 1995).

²62 FR 35073 (extending expiration date to June 30, 1998); 63 FR 35515 (extending expiration date to April 1, 1999); 64 FR 13677 (extending expiration date to April 1, 2000), 64 FR 51892 (extending expiration date to April 2, 2001).

³72 FR 44763.

⁴73 FR 11349.

As before, we intended the attorney advisor program to be a temporary modification to our procedures, but with the potential to become a permanent program. Therefore, we included in sections 404.942(g) and 416.1442(g) of the interim final rule a provision that the program would end on August 10, 2009, unless we decided to either terminate the rule earlier or extend it beyond that date by publication of a final rule in the Federal Register. Since that time, we have periodically extended the sunset date.⁵ The current sunset date for the program is August 2, 2019.⁶

We explained in the 2008 final rule that the number of requests for hearings had increased significantly in recent years. From 2008 to the present, the number of pending hearing requests has continued to remain high, and we anticipate that we will receive several hundred thousand hearing requests in fiscal year 2018 and in fiscal year 2019.⁷ To preserve the maximum degree of flexibility and manage our hearings-level workloads effectively, we have decided to make the attorney advisor rule permanent.

Time Savings and Other Benefits of Making the Program Permanent

Under the attorney advisor program, attorney advisors conduct certain prehearing proceedings and, when the record clearly establishes that a fully favorable decision is warranted, may issue a fully favorable decision before an ALJ holds a hearing. Thus, the attorney advisor program allows us to issue fully favorable decisions more quickly in

⁵ 74 FR 33327 (extending the expiration date to August 10, 2011); 76 FR 18383 (extending the expiration date to August 9, 2013); 78 FR 45459 (extending the expiration date to August 7, 2015); 80 FR 31990 (extending the expiration date to August 4, 2017); 82 FR 34400 (extending the expiration date to February 5, 2018); and 83 FR 711 (extending the expiration date to August 3, 2018).

⁶ 83 FR 28992 (extending the expiration date to August 2, 2019).

⁷ Our budget estimates indicate that we expect to receive approximately 582,000 hearing requests in fiscal year 2018 and 578,000 in fiscal year 2019 (available at: <https://www.ssa.gov/budget/FY19Files/2019CJ.pdf>).

appropriate cases, which, in turn, allows claimants to receive disability benefits under title II or disability payments under title XVI months, or perhaps even a year, earlier than if they had to wait for a hearing before an ALJ. As well, since attorney advisors may issue fully favorable decisions in cases that would otherwise require an ALJ to hold a hearing and issue a decision, the program allows ALJs to spend their time adjudicating more complex cases.

As an added benefit of the program, even if an attorney advisor cannot issue a fully favorable decision after conducting prehearing proceedings, the summary the attorney advisor drafts during his or her review can be valuable to the ALJ, helping to expedite the hearing process. Moreover, prehearing proceedings by an attorney advisor do not delay the scheduling of a hearing unless a fully favorable decision is in process. Thus, if the attorney advisor is unable to issue a fully favorable decision after conducting prehearing proceedings, the case returns to its original place in line and continues under our standard hearing process, with no delays caused by the attorney advisor's review. For these reasons, making the attorney advisor program permanent benefits claimants by giving them a chance to receive a fully favorable decision more quickly and by expediting the overall hearings process, and it benefits ALJs and their support staff by allowing them to receive helpful case summaries from attorney advisors who assist with developing the record in cases that are selected for prehearing proceedings but that still require a hearing before an ALJ.

REGULATORY PROCEDURES

Justification for Issuing a Final Rule Without Notice and Comment

We follow the Administrative Procedure Act (APA) rulemaking procedures specified in 5 U.S.C. 553 when we develop regulations. Generally, the APA requires that an agency provide prior notice and opportunity for public comment before issuing a final rule. The APA provides exceptions to its notice and public comment procedures when an agency finds there is good cause for dispensing with such procedures because they are impracticable, unnecessary, or contrary to the public interest.

We find that there is good cause under 5 U.S.C. 553(b)(B) to issue this regulatory change as a final rule without prior public comment. We find that prior public comment is unnecessary because this final rule merely removes the sunset provision of 20 C.F.R. §§ 404.942 and 416.1442 and does not make any substantive changes to the attorney advisor program. Importantly, we developed the attorney advisor program through notice and comment rulemaking in 1995, and we requested public comments again when we reinstated the program, without change, in 2007. We received only three public comments in response to our 2007 interim final rule, and two of them supported the rule. The current rules expressly provide that we may extend the program beyond the current expiration date by notice of a final rule in the Federal Register. Accordingly, in light of the technical nature of the rule, and because we requested and addressed public comments on the attorney advisor program on two prior occasions, we find there is good cause to issue this final rule without prior public comment.

In addition, because we are not making any substantive changes to the attorney advisor program, we find that there is good cause for dispensing with the 30-day delay in the effective date of a substantive rule provided by 5 U.S.C. 553(d)(3). To ensure that we have uninterrupted authority to use attorney advisors to address the number of pending cases at the hearing level, we find that it is in the public interest to make this final rule effective on the date of publication.

Executive Order 12866 as supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the requirements for a significant regulatory action under Executive Order (E.O.) 12866, as supplemented by E.O. 13563. Therefore, OMB has reviewed this final rule.

Executive Order 13771

This rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature and results in no more than de minimis costs.

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities because it affects individuals only. Therefore, the

Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

Paperwork Reduction Act

These rules do not create any new or affect any existing collections and, therefore, do not require Office of Management and Budget approval under the Paperwork Reduction Act.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security--Disability Insurance; 96.002, Social Security--Retirement Insurance; 96.004, Social Security--Survivors Insurance; 96.006, Supplemental Security Income.)

List of Subjects

20 CFR Part 404

Administrative practice and procedure; Blind; Disability benefits; Old-age, Survivors and Disability Insurance; Reporting and recordkeeping requirements; Social security.

20 CFR Part 416

Administrative practice and procedure; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Nancy A. Berryhill,
Acting Commissioner of Social Security.

For the reasons stated in the preamble, we are amending subpart J of part 404 and subpart N of part 416 of Chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE
(1950—)

Subpart J — [Amended]

1. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

§404.942 [Amended]

2. In §404.942, remove paragraph (g).

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND,
AND DISABLED

Subpart N—[Amended]

3. The authority citation for subpart N continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

§416.1442 [Amended]

4. In §416.1442, remove paragraph (g).

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