August 9, 2016

SUBMITTED VIA REGULATIONS.GOV

Office of Regulations and Reports Clearance
3100 West High Rise Building
6401 Security Blvd.
Baltimore, MD 21235

RE: Docket No. SSA-2016-0015, Evidence From Statutorily Excluded Medical Sources

To Whom It May Concern:

The undersigned members of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force are pleased to submit the following comments regarding the Notice of Proposed Rulemaking (NPRM) published on June 10, 2016 (81 Fed. Reg. 37557, Docket No. SSA-2016-0015).

CCD is a working coalition of national disability organizations working together to advocate for national public policy that ensures the self-determination, independence, empowerment, integration and inclusion of children and adults with disabilities in all aspects of society. The CCD Social Security Task Force focuses on disability policy issues in the Title II disability programs and the Title XVI Supplemental Security Income (SSI) program.

This NPRM was issued to comply with Section 812 of the Bipartisan Budget Act of 2015, which requires the Social Security Administration (SSA) to exclude evidence furnished by certain individuals or entities, “except for good cause as determined by the Commissioner.” The NPRM explains the situations in which SSA could find good cause to include evidence furnished by individuals or entities that would otherwise be excluded under Section 812. For the purposes of these comments, such individuals or entities are described as “excluded providers” and the evidence they furnish as “excluded evidence.”

We recognize the importance of relying on credible medical evidence from trustworthy medical providers when determining whether an individual meets the definition of disability. We are pleased that SSA also recognizes that not all evidence that is provided by excluded providers is unreliable and is proposing good cause exceptions to permit consideration of otherwise excluded evidence.

Good Cause Situations

The proposed rule provides five exceptions to the general rule that evidence from an excluded provider may not be considered:

- The evidence from the medical source consists of evidence of treatment that occurred before the date the source was convicted of a felony under section 208 or under section 1632 of the Act;
- The evidence from the medical source consists of evidence of treatment that occurred during a period in which the source was not excluded from participation in any Federal health care program under section 1128 of the Act;
- The evidence from the medical source consists of evidence of treatment that occurred before the date the source received a final decision imposing a Civil Monetary Penalty (CMP), assessment, or both, for submitting false evidence under section 1129 of the Act;
- The sole basis for the medical source's exclusion under section 223(d)(5)(C) of the Act is that the source cannot participate in any Federal health care program under section 1128 of the Act, but the Office of Inspector General of the Department of Health and Human Services granted a waiver of the section 1128 exclusion; (aligns SSA's rules with those of HHS and provides a consistent approach regarding evidence from affected medical sources) or
- The evidence is a laboratory finding about a physical impairment and there is no indication that the finding is unreliable.

We support the first three exceptions, which would allow SSA to consider evidence from treatment that occurred before the date on which the provider met one of the criteria for becoming an excluded provider. This sensible policy should be included in the final rule. Disability determinations are most accurate when SSA can consider, and give appropriate weight to, as much evidence as possible. Evidence should be considered if it describes treatment that occurs before a provider became an excluded provider. The treatment may have occurred months, years, or even decades before the provider was excluded. In addition, it may not be possible to generate replacement evidence at a later date. Many disability determinations are made when only older evidence is available. For example, disability must be established before the date last insured in disabled worker claims, age 22 in disabled adult child claims, and age 50 for disabled survivor claims. Many of SSA's listings of impairments also require evidence from before a certain age or over a certain time span.

We interpret the second exception to also allow SSA to consider evidence from treatment that occurred after a provider has been removed from exclusion from participation in any Federal health care program under section 1128 of the Act. We support this interpretation. For example, SSA should consider evidence from a medical provider who has been removed from the List of Excluded Individuals/Entities after curing a default on a health education loan.

We support SSA's position that evidence can be considered if a waiver from HHS OIG has been granted and commend SSA from seeking ways to keep such programs consistent.

We support the concept of allowing good cause exceptions for objective medical evidence, but are concerned that the fifth exception in the proposed rule is too limited.

We recommend that SSA give good cause exemptions from the exclusion of evidence to all objective medical evidence, including medical signs, and not limit consideration of objective medical evidence to physical impairments.

SSA defines "objective medical evidence" in 20 C.F.R. § 404.1529 as "medical signs and laboratory findings as defined in § 404.1528 (b) and (c)." Objective medical evidence is likely to be accurate. If excluded, it cannot be replaced by subsequent treatment or opinions. Unfortunately, the proposed rule would only allow a "laboratory finding" to be considered, and only if the laboratory finding is "about a physical impairment." Both of these shortcomings should be remedied in the final rule.

The final rule should allow SSA to consider evidence of both medical signs and laboratory findings. The definitions at 20 C.F.R. § 404.1528 are similar: medical signs are "anatomical, physiological, or psychological abnormalities which can be observed, apart from your statements (symptoms). Signs must be shown by medically acceptable clinical diagnostic techniques." Laboratory findings are "anatomical, physiological, or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques." Medical signs are just as objective, and just as important to disability determination, as laboratory findings. Allowing good cause for laboratory findings and not medical signs will create confusion, as the distinction between the two types of evidence is not always clear. For example, it is not readily apparent whether evidence generated by blood pressure readings, height and weight measurements, vision exams, and pulmonary function tests are medical signs or laboratory findings.

The final rule should also not limit consideration of objective medical evidence to physical impairments. As described above, the date on which objective medical evidence of a mental impairment can be critical to disability determination. Listing 12.05, for example, requires evidence of the onset of intellectual disability before age 22. Exclusion of evidence from before that age, even if SSA considers psychological testing performed when the claimant is older, may change whether a claimant's impairment meets a listing.. There is also no reason to distinguish between physical and mental impairments when the evidence submitted may be exactly the same. Under the proposed rule, a CT scan showing a brain tumor could be considered to determine whether a claimant met Listing 13.13 for nervous system cancers. It would not be allowed, however, to "demonstrate the presence of a specific organic factor judged to be etiologically related to the abnormal mental state and loss of previously acquired functional abilities" under Listing 12.02 for organic mental disorders.

We recommend that the final rule provide that claimants do not have the responsibility to request good cause; good cause should be granted automatically by SSA when circumstances dictate.

Claimants face physical, cognitive, linguistic, and financial obstacles to requesting good cause exceptions. If SSA grants automatic good cause exemptions, it will avoid the need to create forms, deadlines, and workflow practices for handling claimants' requests for good cause exemptions. Furthermore, automatic good cause exemptions will help SSA consider the maximum amount of evidence possible, in keeping with the agency's existing policies about the submission of evidence (*see* 80 Fed. Reg. 14828) and its goal of making accurate decisions. SSA is also in the best position to know which evidence is submitted by excluded providers—claimants may never see their medical records or the Section 812 declaration if providers submit these directly to SSA.

However, the final rule should explain how SSA should notify claimants and their representatives if evidence is excluded, and offer the opportunity to contest the exclusion. Such a practice will reduce the number of situations in which good cause exemptions are appropriate but not granted, increase the evidence available to SSA for disability determinations, and provide due process to SSI and Social Security disability claimants.

Identifying Excluded Providers

The proposed rule places the onus for identifying excluded providers on the providers themselves, who are required to "inform [SSA] in writing of their BBA section 812 exclusion(s) each time they submit evidence to [SSA] that relates to a claim for Social Security disability benefits or payments." This is the best practice while SSA works to establish its "long-term solution to the administration of BBA section 812" which is "to implement automated evidence matching within our case processing system(s) to identify excludable evidence." Excluded providers are in the best position to know if they have been excluded, the reason for their exclusion, and the date and other factors relating to their exclusion. A self-reporting requirement is minimally burdensome to SSA and excluded providers, and not burdensome at all to claimants, representatives, and non-excluded providers.

We recommend that the final rule make clear that claimants and representatives are to be held harmless if they submit evidence that was provided to them without a Section 812 declaration, even if it is later determined that the provider should have included such a declaration.

Claimants and representatives often have no way of knowing whether an individual or entity is an excluded provider. They may submit evidence they received from a provider before the provider was excluded, or they may submit evidence they obtained for purposes other than a disability claim. For example, discharge summaries provided when a claimant leaves the hospital, medical records provided so the claimant can seek a second opinion, or a claimant's file obtained when a provider closes her practice, would not generally include Section 812 declarations.

We recommend that SSA work towards creating a publicly-available list of excluded providers and the treatment dates for which good cause exemptions will be granted. This will be of assistance to claimants who are deciding which

providers to use or attempting to assess the viability of their claims. However, SSA should not impose any obligation on claimants or representatives to check such a list.

Submitted on behalf of the undersigned members of the CCD Social Security Task Force:

Bazelon Center for Mental Health Law
Community Legal Services of Philadelphia
Easterseals
Justice in Aging
Mental Health America
National Alliance on Mental Illness
National Association of Disability Representatives
National Committee to Preserve Social Security and Medicare
National Disability Institute
National Disability Rights Network
National Organization of Social Security Claimants' Representatives (NOSSCR)
The Arc of the United States
The Jewish Federations of North America
United Spinal Association