Administrative Law Judge

Social Security Administration

RE:

SS#:

Dear

I have been appointed to represent the above claimant in the proceeding now pending in your office on Order of the Appeals Council. The following objections are made to this proceeding pursuant to 20. C.F.R § 404.939. I ask that you make a decision on these objections either in writing or at the hearing, as is required by the regulation.

**1. Objection. No regulations have heretofore been promulgated by which the Commissioner can appropriately exercise statutory authority under 42 U.S.C. §405(u).**

42 U.S.C. § 405(b)(2) Provides that in any case where—

(A) an individual is a recipient of disability insurance benefits. . .

(B) the physical or mental impairment on the basis of which such benefits are payable is found to have ceased, not to have existed, or to no longer be disabling, and

(C) as a consequence of the finding . . ., such individual is determined by the Commissioner of Social Security not to be entitled to such benefits, any reconsideration of the finding . . . shall be made only after opportunity for an evidentiary hearing, with regard to the finding . . . .

42 U.S.C. § 405(a) provides that “the Commissioner of Social Security shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits. . . . .”

Any finding made by the Commissioner pursuant to 42 U.S.C. §405(u) constitutes a finding under 42 U.S.C. § 405(b)(2). Neither the present nor any prior Commissioner has fulfilled this responsibility to adopt reasonable and proper rules and regulations as required by statute for the proper establishment of the claimant’s rights when it is proposed that the provisions of 42 U.S.C. §405(u) be utilized in a benefit entitlement determination. The only governance for this proceeding of any note is HALLEX I-1-3-25, which states that the Social Security Administration will determine when to redetermine cases based on a finding that fraud or similar fault was involved in the application for monthly disability benefits. The due process procedures contained in HALLEX I-1-3-15, which provide guidance in making such a finding in other claims, specifically do not apply to findings made pursuant to 42 U.S.C. §405(u). That leaves no other regulatory regulation, guidance or precedent whatsoever for the present proceeding.

The claimant objects to any proceeding whose outcome may be to deny continuing entitlement to disability benefits because the Commissioner has not complied with 42 U.S.C. § 405(a), and as a result has not ensured that the claimant’s right to due process under the Social Security Act, the Administrative Procedure Act, and the U.S. Constitution are secured.

**2. Objection: This proceeding is an improper reopening of a final decision that determined the claimant is entitled to receive disability benefits.**

20 C.F.R. § 404.955 provides that a decision of the administrative law judge becomes final and is binding on all parties to the hearing unless one of the parties requests a review of the decision by the Appeals Council within the stated time period which is sixty days from the date of the decision. Thereafter a final decision may be reopened pursuant to 20 C.F.R. §404.987 and §404.988 after four years from the date of the decision only if it was obtained by fraud or similar fault.

No finding that the claimant’s prior decision was obtained by fraud or similar fault has been made in any proceeding of which the claimant has had notice or has knowledge, or has had an opportunity to appear and present evidence. There is, therefore, no evidence of record in any appropriate proceeding that supports such a finding.

The May 12, 2015 letter to the Social Security Administration from the Office of the Inspector General does not suffice. HALLEX I-1-3-12 (Referrals From the Office of the Inspector General Regarding Suspected Misconduct and Criminal Violations) states that OIG referrals are merely allegations and do not imply or establish any findings, including findings regarding credibility. Without more in the nature of supporting evidence, these referrals cannot be the sole basis for reopening final decisions in disability claims. Moreover, this letter is not even a referral itself, but only references what is possibly a previous referral.

Furthermore, the Commissioner has indicated that there is no additional evidence concerning fraud or similar fault she intends to present in this proceeding to justify a reopening of the earlier final decision determining that the claimant is entitled to disability benefits.

There is therefore no evidentiary basis and no grounds established in this record for a reopening of the ALJ’s final decision.

**3. Objection: The Commissioner may not act in a manner adverse to the claimant under the authority of 42 U.S.C. §405(u) because her action is not timely.**

It is a matter of public record that the Commissioner has been aware of the underlying allegations of impropriety now being acted on since at least the spring of 2011. See the transcript of the October 7, 2013 hearing before the Committee on Homeland Security and Governmental Affairs of the United States Senate. The title of the hearing transcript is “SOCIAL SECURITY DISABILITY BENEFITS: DID A GROUP OF JUDGES, DOCTORS, AND LAWYERS ABUSE PROGRAMS FOR THE COUNTRY’S MOST VULNERABLE?” This transcript reflects that the Inspector General had commenced his investigation prior to initial contact with potential witnesses no less than two and one half years prior to the 2013 hearing.

The United States Supreme Court has said that statutory limitation periods are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. See Bowen v. New York, 476 U.S. 467 (1986).

While there is not a strictly expressed statute of limitation in terms of days, months or years, 42 U.S.C. § 1320a–8(l) requires that as soon as the Inspector General, Social Security Administration, has reason to believe that fraud was involved in the application of an individual for monthly insurance benefits under title II or for benefits under title VIII or XVI, the Inspector General shall make available to the Commissioner of Social Security information identifying the individual.

42 U.S.C. § 405(u)(1)(A) calls for the Commissioner to immediately redetermine the entitlement of individuals to monthly insurance benefits if there is reason to believe that fraud or similar fault was involved in the application of the individual for such benefits.

HALLEX I-1-3-12 states that, unless otherwise noted in the referral, OIG referrals are merely allegations and do not imply or establish any findings, including findings regarding credibility. It is ODAR's responsibility to promptly investigate the allegation, determine its validity, and pursue the appropriate course of action.

Then there is 20 C.F.R. § 404.991a. While the regulation does not directly apply to reopenings pursuant to 20 C.F.R. § 404.988(c), it does provide significant guidance as to what justification there can be for delayed completion of an investigation that leads to the proposed reopening of an earlier final decision. The regulation states that a reopening will not be considered untimely of the Commissioner has diligently pursued the investigation to its conclusion. “Diligently pursued” means that in light of the facts and circumstances of a particular case, the necessary action was undertaken and carried out as promptly as the circumstances permitted. Diligent pursuit is presumed to have been met only if the Commissioner concludes the investigation and if necessary, revises the determination or decision within 6 months from the date the investigation began.

It is clear that the Commissioner failed to immediately, promptly or diligently pursue the investigation that at this very late date is leading to the present action to redetermine the claimant’s entitlement to disability. One of the accused doctors died in 2010. Another has asserted his right not to testify in investigatory proceedings, as has the attorney who represented the claimant in the earlier proceeding. As a practical matter it is many years too late to secure new medical opinion as to the claimants medical condition as it existed years ago.

**4. Objection: The Notice of Hearing is improper.**

20 C.F.R § 404.946 provides that issues before an administrative law judge include all the issues brought out in the initial, reconsidered or revised determination that were not decided entirely in the claimant’s favor.

The Notice of Hearing is improper in that it precludes consideration of issues appropriate to making findings as to whether or not grounds exist to reopen the final decision of the administrative law judge that the claimant is entitled to disability benefits.

The Notice of Hearing is improper in that it denies review of the Commissioner’s decision to disregard evidence relevant and material to the issue of disability, because there has not been any legally sufficient finding that that the said evidence is in fact the result of fraud or similar fault, and there has been no process for engaging in such finding of fact that comports with the claimant’s due process rights under the Social Security Act, the Administrative Procedure Act, and the U.S. Constitution.

The claimant reserves the right to make additional objections to this proceeding and does not waive additional objection to improprieties that may arise during the course of the present adjudication.

Thank you for your consideration of this case.

Very truly yours,

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Attorney at Law

/jg

Enc.