



4191-02U

SOCIAL SECURITY ADMINISTRATION

[Docket No. SSA 2007-0044]

20 CFR Parts 404, 405, and 416

RIN 0960-AH40

Rules on Determining Hearing Appearances

AGENCY: Social Security Administration.

ACTION: Final rule.

SUMMARY: This final rule is another step in our continual efforts to handle workloads more effectively and efficiently. We are publishing final rules for portions of the rules we proposed in October 2007 that relate to persons, other than the claimant or any other party to the hearing, appearing by telephone. We are also clarifying that the administrative law judge (ALJ) will allow the claimant or any other party to a hearing to appear by telephone under certain circumstances when the claimant or other party requests to make his or her appearance in that manner. We expect that these final rules will make the hearings process more efficient and help us continue to reduce the hearings backlog. In addition, we made some minor editorial changes to our regulations that do not have any effect on the rights of claimants or any other parties.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Brent Hillman, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041-3260, (703) 605-8280 for information about this notice. For information on eligibility or filing for benefits, call our national toll-free number, 1-800-772-1213 or TTY 1-800-325-0778, or visit our Internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION:

Background

As part of our ongoing commitment to improve the way we process claims for benefits under the old age, survivors, and disability insurance programs under title II of the Social Security Act (Act) and the supplemental security income (SSI) program under title XVI of the Act, we are revising some of the procedures we follow at the ALJ hearing level. To address recent court cases, we are making final the rules that allow the ALJ to determine that a person other than the claimant or any other party to the hearing may appear at the hearing by telephone. In a recent Federal case, a District Court Judge held that we could not take a medical expert's testimony by telephone without prior notice to the claimant, and over the claimant's objections, unless we amended our regulations to allow witnesses to appear by telephone. *Edwards v. Astrue*, No. 3:10cv1017, 2011 WL 3490024 (D. Conn. Aug. 10, 2011). Other courts have made similar rulings. These final rules address concerns raised in *Edwards* and other cases.

We proposed these changes in a notice of proposed rulemaking (NPRM) we published in the Federal Register on October 29, 2007 (72 FR 61218). The preamble to the NPRM discussed the changes from the current rules and our reasons for proposing those changes.¹ We also have made changes to these final rules to make them consistent with final rules we published in the Federal Register on December 18, 2008 (73 FR 76940)² and July 8, 2010 (75 FR 39154).³

Appearing at the ALJ hearing by telephone

Our final rules provide that the ALJ will determine how any person other than the claimant or any other party to the hearing will appear at the hearing, whether in person, by video teleconferencing, or by telephone. If the ALJ determines that any person will appear at the hearing by telephone, the ALJ will notify the claimant and any other party to the hearing in advance of the hearing. If the claimant or any other party to the hearing objects to any other person appearing by video teleconferencing or by telephone, the ALJ will decide how that person will appear. Our final rules also clarify that the claimant or any other party to the hearing may request to appear at the hearing by telephone. The ALJ will allow the claimant or other party to appear by telephone if the ALJ determines that extraordinary circumstances exist which prevent the claimant or other party from appearing in person or by video teleconferencing.

¹ The NPRM is available at: <http://www.gpo.gov/fdsys/pkg/FR-2007-10-29/pdf/E7-20690.pdf>

² The final rules are available at: <http://www.gpo.gov/fdsys/pkg/FR-2008-12-18/pdf/E8-30056.pdf>

³ The final rules are available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-07-08/pdf/2010-16549.pdf>

Other provisions from the NPRM

At this time, we are not proceeding with the other proposed rules in the October 2007 NPRM.

Public Comments on the NPRM

On October 29, 2007, we published an NPRM in the Federal Register at 72 FR 61218 and provided a 60-day comment period, which ended on December 28, 2007. We received 111 public comments on telephone testimony. Nine of the comments related to testimony provided by telephone by someone other than the claimant or any other party to the hearing.

Comment: Several commenters suggested that telephone appearances by witnesses would impede the claimant's ability to adequately examine, observe and be observed by, or question experts and other witnesses. Regarding expert witnesses, one commenter believed that an expert testifying via telephone would need to provide the underlying documentation for his or her testimony at the hearing, and suggested that, if requested, the expert witnesses could be obligated to fax such documentation to the claimant or representative. Other commenters expressed concern that it would be difficult for claimants or representatives to verify the qualifications or investigate disciplinary problems relating to expert witnesses testifying via telephone. Another commenter said that an appearance of bias is introduced when experts from one area of the country testify

via telephone in cases located in another area of the country. With respect to lay witnesses, one commenter believed the proposed rule needed additional clarity to convey that ALJs could not use it to prevent the claimant from calling other witnesses to testify on his or her behalf.

Response: We disagree with the concerns raised in this comment. Under these final rules, the claimant can object to a witness appearing by telephone, and the ALJ has discretion to determine that the appearance of any witness be conducted in person. Thus, to the extent that circumstances could arise in which it would be advisable to schedule an in-person appearance by a witness even though a telephonic appearance would be possible, the ALJ may schedule such an appearance.

All claimants or representatives are entitled to conduct questioning and cross-examination as needed to inquire fully into the matters at issue. If witnesses appear by telephone, we will continue to provide the claimant and any other party to the hearing the same right to question and cross-examine witnesses, as well as access to the hearing record.

In addition, the final rules do not change the standard procedures we use when medical experts (MEs) and vocational experts (VEs) testify. Before MEs and VEs testify as impartial witnesses at the hearing, ALJs must “qualify” them by eliciting information including, but not limited to, impartiality, expertise, and professional qualifications. Furthermore, MEs and VEs will continue to submit their professional qualifications into

the written record. The claimant and any other party to the hearing will have the same access to this information if the ME or VE is appearing in person, by video teleconferencing, or by telephone. ME and VE testimony is based on the evidence entered into the record and not on any examination or personal evaluation of the claimant. Thus, a claimant or representative will have a complete opportunity to confront and examine an expert witness on qualifications or adverse testimony regarding the matters that are important with respect to expert testimony -- i.e., the expertise of the witness and the accuracy of his or her testimony. In addition, the claimant and any other party to the hearing retain the right to object to a witness based on bias or qualifications.

REGULATORY PROCEDURES

Executive Order 12866 as supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that these final rules meet the requirements for a significant regulatory action under Executive Order 12866 as supplemented by Executive Order 13563. Thus, OMB reviewed these final rules.

Regulatory Flexibility Act

We certify that these final rules will not have a significant economic impact on a substantial number of small entities because they only affect individuals. Accordingly, a

regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These final rules contain public reporting requirements in the regulation sections listed below, which we did not previously clear through an existing Information Collection Request.

Regulation Section	Description of Public Reporting Requirement	Number of Respondents (annually)	Frequency of Response	Average Burden Per Response (minutes)	Estimated Annual Burden (hours)
404.936(c)(1); 404.938(b); 405.315(c)(1); 416.1436(c)(1); 416.1438(b)	You or any other party may request to appear at the hearing by telephone; ALJ will allow telephone hearing when extraordinary circumstances prevent appearance in person or by video teleconference	1,000	1	30	500

SSA submitted an Information Collection Request for clearance to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize the burden on respondents, including the use of automated techniques or other forms of information technology. If you would like to submit comments, please send them to the following locations:

Office of Management and Budget
Attn: Desk Officer for SSA
Fax Number: 202-395-6974

E-mail address: OIRA_Submission@omb.eop.gov

Social Security Administration
Attn: Reports Clearance Officer
1333 Annex
6401 Security Blvd
Baltimore, MD 21235-0001
Fax Number: 410-965-6400
E-mail: OR.Reports.Clearance@ssa.gov

You can submit comments until **(INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER)**, which is 30 days after the publication of this notice. To receive a copy of the OMB clearance package, contact the SSA Reports Clearance Officer using any of the above contact methods. We prefer to receive comments by email or fax.

(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; and 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 405

Administrative practice and procedure; Blind; Disability benefits; Old-Age, Survivors, and Disability Insurance; Public assistance programs; Reporting and recordkeeping requirements; Social Security; Supplemental Security Income (SSI).

20 CFR Part 416

Administrative practice and procedure; Aged, Blind, Disability benefits, Public Assistance programs; Reporting and recordkeeping requirements; Supplemental Security Income (SSI).

Dated: May 9, 2013.

Carolyn W. Colvin,
Acting Commissioner of Social Security.

For the reasons set out in the preamble, we are amending 20 CFR chapter III parts 404, 405, and part 416 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).

2. In §404.936, revise the reference to “paragraph (c)” in the first sentence of paragraph (h) to “paragraph (c)(1)” and revise paragraph (c) to read as follows:

§404.936 Time and place for a hearing before an administrative law judge.

* * * * *

(c) Determining how appearances will be made. In setting the time and place of the hearing, we will consider the following:

(1) We will consult with the administrative law judge to determine the status of case preparation and to determine whether your appearance, or the appearance of any other party to the hearing, will be made in person or by video teleconferencing. The administrative law judge will determine that your appearance, or the appearance of any other party to the hearing, be conducted by video teleconferencing if video teleconferencing equipment is available to conduct the appearance, use of video teleconferencing to conduct the appearance would be more efficient than conducting the appearance in person, and the administrative law judge determines that there is no circumstance in the particular case that prevents the use of video teleconferencing to conduct the appearance. You or any other party to the hearing may request to appear at the hearing by telephone. The administrative law judge will allow you or any other party to the hearing to appear by telephone if the administrative law judge determines that extraordinary circumstances prevent you or the other party who makes the request from appearing at the hearing in person or by video teleconferencing.

(2) The administrative law judge will determine whether any person other than you or any other party to the hearing, including a medical expert or a vocational expert, will appear at the hearing in person, by video teleconferencing, or by telephone. If you or any other party to the hearing objects to any other person appearing by video teleconferencing or by telephone, the administrative law judge will decide, either in writing or at the hearing, whether to have that person appear in person, by video teleconferencing, or by telephone. The administrative law judge will direct a person, other than you or any other party to the hearing if we are notified as provided in paragraph (e) of this section that you or any other party to the hearing objects to

appearing by video teleconferencing, to appear by video teleconferencing or telephone when the administrative law judge determines:

- (i) Video teleconferencing or telephone equipment is available;
- (ii) Use of video teleconferencing or telephone equipment would be more efficient than conducting an examination of a witness in person, and;
- (iii) The ALJ determines there is no other reason why video teleconferencing or telephone should not be used.

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3. In §404.938, revise paragraph (b) to read as follows:

§404.938 Notice of a hearing before an administrative law judge.

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(b) Notice information. The notice of hearing will contain a statement of the specific issues to be decided and tell you that you may designate a person to represent you during the proceedings. The notice will also contain an explanation of the procedures for requesting a change in the time or place of your hearing, a reminder that if you fail to appear at your scheduled hearing without good cause the administrative law judge may dismiss your hearing request, and other information about the scheduling and conduct of your hearing. You will also be told if your appearance or that of any other person is scheduled to be made in person, by video teleconferencing, or, for a person other than you or any other party to the hearing, by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you that the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing. The notice will also tell you

how you may let us know if you do not want to appear by video teleconferencing and want, instead, to have your hearing at a time and place where you may appear in person before the administrative law judge. The notice will also tell you that you may ask us if you want to appear by telephone, and that the administrative law judge will grant your request if he or she determines that extraordinary circumstances prevent you from appearing in person or by video teleconferencing.

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4. In §404.950, revise paragraphs (a) and (e) to read as follows:

§404.950 Presenting evidence at a hearing before an administrative law judge

(a) The right to appear and present evidence. Any party to a hearing has a right to appear before the administrative law judge, either in person, or, when the conditions in §404.936(c)(1) exist, by video teleconferencing or telephone, to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative, who may make the appearance in person, or, when the conditions in §404.936(c)(1) exist, by video teleconferencing or telephone.

* * * * *

(e) Witnesses at a hearing. Witnesses may appear at a hearing in person or, when the conditions in §404.936(c)(2) exist, by video teleconferencing or telephone. They will testify under oath or affirmation unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witness any questions material to the issues and will allow the parties or their designated representatives to do so.

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Part 405 – ADMINISTRATIVE REVIEW PROCESS FOR ADJUDICATING INITIAL
DISABILITY CLAIMS

5. The authority citation for part 405 continues to read as follows:

Authority: Secs. 201(j), 205(a)-(b), (d)-(h), and (s), 221, 223(a)-(b), 702(a)(5), 1601, 1602, 1631, and 1633 of the Social Security Act (42 U.S.C. 401(j), 405(a)-(b), (d)-(h), and (s), 421, 423(a)-(b), 902(a)(5), 1381, 1381a, 1383, and 1383b).

6. In §405.315, revise paragraph (c) to read as follows:

§ 405.315 Time and place for a hearing before an administrative law judge.

* * * * *

(c) Determining how appearances will be made. In setting the time and place of the hearing, we will consider the following:

(1) The administrative law judge will determine whether your appearance will be made in person or by video teleconferencing. The administrative law judge will determine that your appearance be conducted by video teleconferencing if video teleconferencing equipment is available to conduct the appearance, use of video teleconferencing to conduct the appearance would be more efficient than conducting the appearance in person, and the administrative law judge determines that there is no circumstance in the particular case that prevents the use of video teleconferencing to conduct the appearance. If you object to appearing personally by video teleconferencing, we will re-schedule the hearing to a time and place at which you may appear in person before the administrative law judge. You may request to appear at the hearing by telephone. The administrative law judge will allow you to appear by telephone if the

administrative law judge determines that extraordinary circumstances prevent you from appearing at the hearing in person or by video teleconferencing.

(2) The administrative law judge will determine whether any person other than you, including a medical expert or a vocational expert, will appear at the hearing in person, by video teleconferencing, or by telephone. If you object to any other person appearing by video teleconferencing or telephone, the administrative law judge will decide, either in writing or at the hearing, whether to have that person appear in person, by video teleconferencing, or by telephone. The administrative law judge will direct a person, other than you if you object to your appearing by video teleconferencing as provided in paragraph (c)(1) of this section, to appear by video teleconferencing or telephone when the administrative law judge determines:

- (i) Video teleconferencing or telephone equipment is available,
- (ii) Use of video teleconferencing or telephone equipment would be more efficient than conducting an examination of a witness in person, and
- (iii) The administrative law judge determines that there is no other reason why video teleconferencing or telephone should not be used.

Part 416 – SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N - [Amended]

7. The authority citation for subpart N of part 416 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).

8. In §416.1436, revise the reference in paragraph (h) from the “first sentence of paragraph (c)” to the “first sentence of paragraph (c)(1)” and revise paragraph (c) to read as follows:

§416.1436 Time and place for a hearing before an administrative law judge.

* * * * *

(c) Determination how appearances will be made. In setting the time and place of the hearing, we will consider the following:

(1) We will consult with the administrative law judge to determine the status of case preparation and to determine whether your appearance, or the appearance of any other party to the hearing, will be made in person or by video teleconferencing. The administrative law judge will determine that your appearance, or the appearance of any other party to the hearing, be conducted by video teleconferencing if video teleconferencing equipment is available to conduct the appearance, use of video teleconferencing to conduct the appearance would be more efficient than conducting the appearance in person, and the administrative law judge determines there is no circumstance in the particular case that prevents the use of video teleconferencing to conduct the appearance. You or any other party to the hearing may request to appear at the hearing by telephone. The administrative law judge will allow you or any other party to the hearing to appear by telephone if the administrative law judge determines that extraordinary circumstances prevent you or the other party who makes the request from appearing at your hearing in person or by video teleconferencing.

(2) The administrative law judge will determine whether any person, other than you or any other party to the hearing, including a medical expert or a vocational expert,

will appear at the hearing in person, by video teleconferencing, or by telephone. If you or any other party to the hearing objects to any other person appearing by video teleconferencing or by telephone, the administrative law judge will decide, either in writing or at the hearing, whether to have that person appear in person, by video teleconferencing, or by telephone. The administrative law judge will direct a person, other than you or any other party to the hearing if we are notified as provided in paragraph (e) of this section that you or any other party to the hearing objects to appearing by video teleconferencing, to appear by video teleconferencing or telephone when the administrative law judge determines:

- (i) Video teleconferencing or telephone equipment is available,
- (ii) Use of video teleconferencing or telephone equipment would be more efficient than conducting an examination of a witness in person, and
- (iii) The administrative law judge determines there is no other reason why video teleconferencing or telephone should not be used.

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9. In §416.1438, revise paragraph (b) to read as follows:

§416.1438 Notice of a hearing before an administrative law judge.

* * * * *

(b) Notice information. The notice of hearing will contain a statement of the specific issues to be decided and tell you that you may designate a person to represent you during the proceedings. The notice will also contain an explanation of the procedures for requesting a change in the time or place of your hearing, a reminder that if you fail to appear at your scheduled hearing without good cause the administrative law

judge may dismiss your hearing request, and other information about the scheduling and conduct of your hearing. You will also be told if your appearance or that of any other person is scheduled to be made in person, by video teleconferencing, or, for a person other than you or any other party to the hearing, by telephone. If we have scheduled you to appear at the hearing by video teleconferencing, the notice of hearing will tell you the scheduled place for the hearing is a video teleconferencing site and explain what it means to appear at your hearing by video teleconferencing. The notice will also tell you how you may let us know if you do not want to appear by video teleconferencing and want, instead, to have your hearing at a time and place where you may appear in person before the administrative law judge. The notice will also tell you that you may ask us if you want to appear by telephone, and that the administrative law judge will grant your request if he or she determines that extraordinary circumstances prevent you from appearing in person or by video teleconferencing.

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10. In §416.1450, revise paragraphs (a) and (e) to read as follows:

§416.1450 Presenting evidence at a hearing before an administrative law judge

(a) The right to appear and present evidence. Any party to a hearing has a right to appear before the administrative law judge, either in person, or, when the conditions in §416.1436(c)(1) exist, by video teleconferencing or telephone, to present evidence and to state his or her position. A party may also make his or her appearance by means of a designated representative, who may make the appearance in person, or, when the conditions in §416.1436(c)(1) exist, by video teleconferencing or telephone.

* * * * *

(e) Witnesses at a hearing. Witnesses may appear at a hearing in person or, when the conditions in §416.1436(c)(2) exist, by video teleconferencing or telephone. They will testify under oath or affirmation unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witness any questions material to the issues and will allow the parties or their designated representatives to do so.

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