

August 23, 2013

Office of Regulations and Reports Clearance
Social Security Administration
107 Altmeyer Building
6401 Security Boulevard
Baltimore, Maryland 21235-6401

Submitted on www.regulations.gov

Re: Docket No. SSA-2011-0056, Comments on Changes to Scheduling and Appearing at Hearings

Dear Social Security Administration:

These comments are submitted by the co-chairs of the Consortium for Citizens with Disabilities (CCD) Social Security Task Force in response to the Notice of proposed rulemaking (NPRM) published at 78 Fed. Reg. 38610 (June 27, 2013), regarding proposed revisions to the scheduling and appearing at hearings before administrative law judges (ALJs).

CCD is a working coalition of national consumer, advocacy, provider, and professional organizations working together with and on behalf of the 57 million children and adults with disabilities and their families living in the United States. 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.

CCD has been generally supportive of the use of video hearings so long as the rights of claimants are protected. As recently as June 2012, the Social Security Task Force reiterated this support in testimony before the House Ways and Means Social Security Subcommittee.¹ Video hearings allow ALJs to conduct hearings without being at the same geographical site as the claimant and representative and have the potential to reduce processing times and increase productivity.

We support the use of video hearings so long as the right to a full and fair hearing is adequately protected; the quality of video hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations² and SSA policy.

¹ Testimony of Ethel Zelenske, Hearing on the Social Security Disability Appeals Process, June 27, 2013, http://waysandmeans.house.gov/uploadedfiles/ethelzelenske_ss_6_27_12.pdf.

² 20 C.F.R. §§ 404.936 and 416.1436.

The claimant makes the ultimate decision whether to accept the video hearing. In general, representatives report that video hearings are usually accepted, primarily because they lead to faster adjudication. However, there are a number of reasons why a claimant may decline and choose to exercise the right to an in-person hearing, e.g., the claimant's demeanor is critical (e.g., respiratory impairments, fatigue caused by impairment); the claimant has a mental impairment with symptoms of paranoia; the claimant has a hearing impairment.

While we are generally supportive of the use of video hearings so long as claimants' rights are protected, we do have concerns with the proposed rules and our comments are discussed below.

1. SSA should not revise the regulations to abridge a claimant's right to an in-person hearing if he or she moves.

The current rule, in effect since the inception of SSA's use of video hearings in the early 2000s, gives the claimant the right to opt out of a video hearing and to choose an in-person hearing. However, we have concerns about the "limited exception" in the NPRM to the general rule if the claimant moves while the request for hearing is pending. In that case, "we [SSA] will determine whether a claimant will appear in person or by [video]." The preface states:

This limited exception to the rule would allow us to protect the integrity of our programs while providing us with the flexibility to transfer cases when there is a legitimate change in residence and such a transfer would allow us to process the case more efficiently.

78 Fed. Reg. 38612. According to the preface, the "integrity" of the programs needs to be protected for the following reason:

Similarly, a change in residence could result in a reassignment to a different ALJ. We have become concerned that some claimants or their representatives may be using the ability to decline to appear by video teleconferencing or to request a case transfer due to a change in residence to undermine the random assignment of cases to our ALJs.

78 Fed. Reg. 38611. Proposed 20 C.F.R. §§ 404.936(d) and 416.1436(d) provide:

However, notwithstanding any objections you may have to appearing by video teleconferencing, if you change your residence while your request for hearing is pending, we may determine how you will appear, including by video teleconferencing, as provided in paragraph (c)(1) of this section. For us to consider your change of residence when we schedule your hearing, you must submit evidence verifying your new residence.

The preface explains that after the evidence is received regarding the new residence, “we will decide how the claimant’s appearance will be made.”

Currently, there is no requirement in regulations or in the HALLEX that a claimant submit evidence verifying a new residence. If a claimant moves while a hearing is pending, the SSA website in a “Frequently Asked Question” tells the claimant to contact the servicing hearing office.³ Likewise, section 1.04 of the “Best Practices for Claimants’ Representatives,” published by the SSA Office of Disability Adjudication and Review,⁴ advises claimants’ representatives to:

Timely alert the hearing office of any change of address or phone number for either yourself or the claimant.

After several years of significant improvement, hearing processing times are unfortunately increasing again. The circumstances faced by claimants demonstrate in human terms the terrible impact of the delays and the crises facing claimants every day: Behind the numbers are individuals with disabilities whose lives have unraveled while waiting for hearings and ALJ decisions – families are torn apart; homes are lost; medical conditions deteriorate; once stable financial security crumbles; and many individuals die.

In this environment, claimants move for many legitimate reasons while a claim is pending, given their precarious financial situations. As they exhaust their own resources, they may be evicted or they may lose their homes due to foreclosure. Moving from family member to family member or friend to friend, in temporary living situations, may be the only options available to them. Many become homeless.

The NPRM would give ALJs the authority – and seemingly unlimited discretion – to delve into their personal situations for reasons unrelated to the substantive claim for benefits. Since this determination regarding the choice to have an in-person hearing would need to be made as a preliminary matter, what process would be used by the ALJ to obtain evidence and make the finding? What evidence would be required? Would the claimant have the right to object to the finding? What limits would be placed on the ALJ’s discretion? Would this provision create more inefficiencies and workload for ALJs and hearing office staff?

We urge the agency not to adopt this proposed change.

2. Include “good cause” extensions for objecting to the video hearing and the time or place of the hearing.

³ See http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/1158/kw/change%20of%20address/related/1.

⁴ Available at www.socialsecurity.gov/appeals/best_practices.html.

The NPRM would provide a new pre-hearing notice to notify the claimant, prior to scheduling a hearing, that the hearing may be held by video, rather than in-person. The claimant would have 30 days from the date this notice is received to object to the VTC hearing. Under the proposed change, if the claimant does not object within the 30-day time period after receiving the new notice of a video hearing, “we will not consider an objection based solely on appearing at the hearing by video teleconferencing.” 78 Fed. Reg. 38612.

We support the continuation of the claimant’s right to opt out of a video hearing and to choose an in-person hearing so long as the objection is “timely.” We believe that the 30-day time period will, in most cases, be sufficient to submit the objection. However, we are concerned that there is no “good cause” provision for extending the 30 days to object to the VTC hearing.

Likewise, the NPRM provides no “good cause” provision for extending new time limits to object to the time and/or place of the hearing. The current regulations require that the objection be made “at the earliest possible opportunity before the time set for the hearing.”⁵ Under the NPRM, the claimant must notify SSA “at the earliest possible opportunity” but no later than 5 days before the hearing date or, if earlier, within 30 days after receipt of the official notice of hearing. The ALJ will then decide if “good cause” applies to reschedule.

Other time limits in SSA’s regulations, including important deadlines for filing appeals at all administrative levels and even for filing a civil action in federal court, provide the opportunity to extend the stated time limit upon a showing of “good cause.” The standard for “good cause” to extend the time limit for these deadlines is explained in 20 C.F.R. §§ 404.911 and 416.1411. These regulations give the claimant the opportunity to describe the circumstances that kept him or her from filing the appeal on time. Examples include: serious illness; death or serious illness in the family; destruction of important records by fire or other accidental causes; non-receipt of the notice of determination or decision.

We recommend that SSA provide a “good cause” provision for extending the 30-day time limit to object to this new notice that a VTC hearing will be held in the claimant’s case.

3. Retain living closer to another hearing site as a “good cause” factor for changing the place of the hearing.

Under current regulations, “good cause” for changing the time or place *must* be found in two circumstances: (1) If the claimant or representative is unable to attend or travel to the scheduled hearing because of a serious physical or mental condition, incapacitating injury, or death in the family; or (2) Severe weather

⁵ 20 C.F.R. §§ 404.936(d) and 416.1436(d).

conditions make it impossible to travel to the hearing.⁶ In other circumstances, the ALJ will look at the reasons given, including a nonexhaustive list of factors. These “good cause” factors to reschedule are retained in the NPRM except for removal of the example that the claimant lives closer to another hearing site.⁷

We recommend that the current provision be retained. The proposed revision represents a change from long-standing SSA policy. In addition to the current regulations, HALLEX I-2-3-10, § A states:

When an ALJ sets the time and place for a hearing, the ALJ will consider ... the proximity of the hearing site to the claimant’s residence... To the extent possible, the location of the hearing site will be within 75 miles of the claimant's residence....

A claimant should not be required to travel a significant distance to the hearing office (HO) or another hearing site if a closer hearing site exists and there are no other circumstances that prevent an ALJ from conducting the hearing at the closer hearing site.

Even though the list in the regulation is nonexhaustive, removal of this factor from the list could prove to be a problem for many claimants with limited transportation options. Since the closing of most temporary remote hearing sites, we have received reports from our members regarding difficulties that their clients face in attending hearings. In some situations, the cases have been transferred because the geographic hearing office has a backlog. On other situations, ALJs in the servicing hearing office will not travel to permanent remote hearing sites. Public transportation is often very limited, if nonexistent. Many claimants do not have the financial ability to pay for public transportation, let alone private transportation like a taxi or other service.

4. More limits on the use of telephone hearings are needed.

Under the NPRM, the ALJ would be able to schedule a telephone hearing when (1) an in-person appearance is not possible, e.g., the claimant is incarcerated and VTC is not available at the facility; or (2) the ALJ determines, on his own or at the claimant’s request, that “extraordinary circumstances” prevent the claimant from appearing in person or by VTC.

⁶ 20 C.F.R. §§ 404.936(e)(1) and 416.1436(e)(1).

⁷ 20 C.F.R. §§ 404.936(f)(6) and 416.1436(f)(6).

The preface to the NPRM seems to focus on hearings at correctional facilities as “extraordinary circumstances,” 78 Fed. Reg. at 38612. The problem is that the actual proposed regulation⁸ presents a potentially broader application:

The administrative law judge determines, either on his own, or at your request or the request of any other party to the hearing, that extraordinary circumstances prevent you or another party to the hearing from appearing at the hearing in person or by video conferencing.

Proposed 20 C.F.R. §§ 404.936(c)(1)(ii) and 416.1436(c)(1)(ii). We are concerned that without the opportunity to object, the proposed rule is subject to abuse. For example, the proposed rule could allow an ALJ to determine that “extraordinary circumstances” exist and require that the hearing be held by telephone.

How would a claimant or representative with a hearing impairment be able to object to a telephone hearing? For claimants and representatives in this situation, reasonable accommodations are not addressed by the NPRM. The failure to include the opportunity to object violates the claimant’s rights to a full and fair hearing.

While we believe that a telephone hearing provides a less than optimal hearing situation, there may be certain “extraordinary circumstances” where it is the only way to proceed. However, if the telephone hearing provision is retained, the regulation must include an opportunity for the claimant to object.

Conclusion

We generally support the use of video hearings so long as the right to a full and fair hearing is adequately protected; the quality of video hearings is assured; and the claimant retains the absolute right to have an in-person hearing as provided under current regulations and SSA policy. We urge the agency to make the recommended changes described above. Thank you for considering for considering our comments.

Sincerely,

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⁸ Proposed 20 C.F.R. §§ 404.936(c)(1)(ii) and 416.1436(c)(1)(ii).

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