ALJ Supplemental Training (Phase IV) -- August 2018

Table of Contents

Administrative Law Judge (ALJ) Online Resources

	Resource & Link	What this resource covers
1	**ALJ Dashboard**	Homepage for ALJs in Case Processing Management System (CPMS).
2	**Office of the Chief Administrative Law Judge (OCALJ) - Homepage**	Site contains useful resources including mission statement, regional website access, staff listings, Adjudications Tips, employee information, transfer information and benchmarks for case processing.
3	**Adjudications Tips** ***- within OCALJ home page above***	Site contains adjudication tips that have not been affected by recent regulatory and policy changes.
4	**ALJ Digital Library**	Library contains helpful medical and legal resources for ALJs, including a medical encyclopedia, access to Lexis* and Westlaw, and vocational hyperlinks, including OccuBrowse, Job Browser Pro and O*Net. The broader SSA Digital Library provides an A-Z list of research databases on a wide variety of topics.
5	**Body Mass Index (BMI) Calculator***	Calculator is available on the ALJ CPMS Homepage. Allows you to quickly calculate BMI after entering height and weight.
6	**Chief Judge Resources**	Quick reference to resources listed by topic, including Bi-Weekly Hearing Level Policy Updates, Fee Petition and Fee Agreement training, a library of OCALJ Memoranda, OHO Continuing Education Program (OCEP)* information with links to prior broadcasts, and recent policy changes.
7	***HALLEX****	The Hearings, Appeals and Litigation Law Manual (HALLEX) provides official guidance on interpreting and applying Social Security policy.
8	**Hearings and Decisions Reference Library**	(Presently under revision) Arranged alphabetically by topic, this resource provides a comprehensive library of reference materials on topics related to holding hearings and issuing decisions.
9	**Job Browser Pro**	Tool provides the ability to search jobs by the Dictionary of Occupational Titles (DOT) number and name. It gives a detailed description of the job from the DOT and tabs within the listing provide additional information on DOT job characteristics (e.g. education requirements, physical demands, aptitudes and temperaments).

	Resource & Link	What this resource covers
10	**Policy Net**	Database that allows you to access a broad range of valuable online policy resources, including the POMS* and SSRs.
11	**OHO Continuing Education Program (OCEP)** ***- within OCALJ page above***	Quarterly IVT broadcasts that discuss and clarify Hearing Level issues.
12	**Office of Disability Policy A-Z Disability Index**	Site contains hyperlinks to a wide variety of disability policy training materials, including Videos on Demand (VODs), PowerPoint presentations, electronic desk guides, and case studies. All materials are arranged alphabetically by topic for ease of use.
13	**Online Code of Federal Regulation (CFR)*** - **The Grids*** - **The Adult and Childhood Listings***	Site provides online access to the most recently published Code of Federal Regulations, Title 20, Chapter III, Parts 400-499 (the Social Security Regulations). A.K.A. the Medical-Vocational Guidelines (Appendix 2 to Subpart P of 20 CFR Part 404.). Electronic version of the most current Listing of Adult and Childhood Impairments.
14	**SGA***	An up to date table of SGA amounts for approximately the last 30 years.
15	**TWP Amounts**	An up to date table of earnings that constitute "service months" in evaluation of Trial Work Periods.
16	**Work History Assistant Tool (WHAT)**	Tool retrieves Detail Earnings Query (DEQY) data and displays it in an easy to read format. It also allows you to run an up to date NDNH query.

**Link currently available on the ALJ CPMS Homepage.*

ERE (Electronic Records Express)

What is ERE?

ERE allows online access to the claimant's electronic folder of certain individuals. Use of ERE eliminates the need to burn multiple CDs for the representative and experts associated with a claim. Documents submitted by ERE are automatically associated with a claimant's disability claim folder.

Who may use ERE?

Only registered users may use ERE. Registered users may include:

- **Appointed Representatives** - Appointed representatives have access to all parts of the eFile except for the Private Section. Appointed representatives can also upload evidence to the eFile, track evidence submissions and send messages to OHO.

- **Vocational Experts (VEs)** - VEs have access only to the parts of the eFile relevant to their testimony (A, E and F sections only). They may also upload documents to the file and view or download the Hearing Office Status Report. The Hearing Office Status Report provides experts the key information for assigned cases. This information includes the full SSN of claimant's, hearing office scheduled information and interrogatory due dates.

- **Medical Experts (MEs)** - MEs have access to only the parts of the eFile relevant to their testimony (A, E and F sections only). They may also upload documents to the file and view or download the Hearing Office Status Report.

- **Consultative Examinations (CE) Providers** – CE providers may use ERE to submit CE reports and other documents. CE providers may also use ERE to submit invoices for payment.

- **Claimants, Medical Providers and Teachers** - Claimants, medical providers and teachers can use ERE to submit requested evidence. Providers may also use ERE to submit invoices for payment.

Interested in how ERE works? Visit the ERE Demo Page.

Updates Since New ALJ Training

Policy References -- General

New Regulations (Code of Federal Regulations (CFR))

- **Evaluation of Medical Evidence – Overview** (Resources – Evaluation of Medical Evidence and Medical Evidence Regulation Inquiry Session – Questions and Answers)
    - 20 CFR 404.1502 and 20 CFR 416.902
    - 3/27/17 and after application date
    - **Training Day – Day 2**

- **Program Uniformity – Overview** (Resources – Ensuring Program Uniformity)
    - 20 CFR 404.935 and 20 CFR 416.1435; Hearings, Appeals, and Litigation Law Manual (HALLEX) I-2-5-13
    - **Training Day – Day 1**

- **Mental Disorders – Overview** (Mental Disorders Listings Training and Resources)
    - Regulations effective 1/17/17
    - Revisions to listing titles/paragraphs. A diagnostic criteria based on Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)
    - Revisions to "Paragraph B" categories/definitions for 5 pt. rating scale and "Paragraph C"
    - 12.05 reorganized and simplified
    - Additional listings – Neurodevelopmental Disorders (12.11/112.11); Eating Disorders (12.13/112.13); Trauma and Stressor-Related Disorders (12.15/112.15); Infant/Toddler Developmental Disorders (112.14)
    - Removed listing – 12.09
    - **Training Day – Throughout training**

- **Rules of Conduct and Standards of Responsibility for Appointed Representatives** (Rules of Conduct and Standards of Responsibility for Appointed Representatives)
    - Regulation effective 8/1/18
    - Outlines representative responsibilities to client and agency
    - Establishes that withdrawal of representation may only occur at a time and manner that does not disrupt processing or adjudication of claim, allows the claimant adequate time to find a replacement representative, and should not occur after the time and place of the hearing is set, absent extraordinary circumstances

Listings (20 CFR Part 404, Subpart P, Appendix 1 - Listing of Impairments)

- Listings and Status Information

- Revised since November 2016
    - Mental Disorders 12.00
        - Office of Disability Policy (ODP) Mental Disorders

        - Summary of Major Changes
    - Immune System Disorders 14.00
        - Side by Side prior/current listings 14.00 – Adult and Child
        - HIV Summary of Changes

New Social Security Rulings (SSRs) and Acquiescence Rulings (ARs)

- **SSR 17-1p:** Titles II and XVI: Reopening Based on Error on the Face of the Evidence — Effect of a Decision By the Supreme Court of the United States Finding a Law That We Applied to Be Unconstitutional.

- **SSR 17-2p:** Titles II and XVI: Evidence Needed by Adjudicators at the Hearings and Appeals Council Levels of the Administrative Review Process to Make Findings about Medical Equivalence.

- **SSR 17-3p:** Titles II and XVI: Evaluating Cases Involving Sickle Cell Disease (SCD).

- **SSR 17-4p:** Titles II and XVI: Responsibility for Developing Written Evidence.

Rescinded SSRs and ARs

- SSR 93-2p (Rescission effective 3/15/2017). See 82 FR 13914 **SSR 93-2p Rescission of Social Security Ruling (SSR) 93-2p: Policy Interpretation Ruling; Titles II and XVI: Evaluation of Human Immunodeficiency Virus (HIV) Infection -** When originally published, SSR 93-2p, medical outcomes for individuals infected with HIV were sufficiently unfavorable. Due to medical advances and the resulting updates to the criteria in the listings, this is no longer a proper assumption for us to make.

- SSR 87-6 (Rescission effective 3/03/2017). See 82 FR 12485 **SSR 87-6; Rescission of SSR 87-6: Policy Interpretation Ruling; Titles II and XVI: The Role of Prescribed Treatment in the Evaluation of Epilepsy. Revised Medical Criteria for Evaluating Neurological Disorders -** Incorporated portions of SSR 87-6 that continue to be relevant to the treatment of epilepsy.

- SSR 91-3p (Rescission effective 5/30/17). See 82 FR 24769 **Rescission of Social Security Ruling (SSR) 91-3p: Policy Interpretation Ruling Title II: Determining Entitlement to Disability Benefits for Months Prior to January 1991 for Widows, Widowers and Surviving Divorced Spouses Claims** - Gives notice of rescission as obsolete.

- SSR 96-3p (Rescission effective 6/14/18). See 83 FR 27816 **Rescission of Social Security Ruling (SSR) 96-3p and 96-4p; Policy Interpretation Ruling; Titles II and XVI: Considering Allegations of Pain and Other Symptoms in Determining Whether a Medically Determinable Impairment Is Severe**.

- **SSR 96-4p** (Rescission effective 6/14/18). See 83 FR 27816 **Rescission of Social Security Ruling (SSR) 96-3p and 96-4p; Policy Interpretation Ruling; Titles II and XVI: Symptoms, Medically Determinable Physical and Mental Impairments, and Exertional and Nonexertional Limitations**.

- **SSR 16-3p** (announced 11/01/17; republished 10/25/17; effective 3/28/16). **Titles II and XVI: Evaluation of Symptoms in Disability Claims** - Republishes SSR 16-3p and provides a revision changing terminology from "effective date" to "applicable date" based on guidance from the Office of the Federal Register. See 82 Federal Register (FR) 49462.

- **SSR 05-2** (Rescission effective 5/14/18). See 83 FR 22308 **Rescission of Social Security Ruling 05-02; Titles II and CVI: Determination of Substantial Gainful Activity if Substantial Work Activity Is Discontinued or Reduced – Unsuccessful Work Attempt.**

HALLEX -- Check HALLEX Transmittals for list of updates/changes, notably:

- **HALLEX I-2-8-30** (issued 8/04/17) **Issuing a Disability Decision When a Claim is Appealed on a Non-Disability Issue** - Updates information and adds processing instructions for cases when a claim is appealed on a non-disability issue to the hearing level and the ALJ denies the claim based on a non-disability factor.

Other Policy Guidance/Updates

- **CJB 13-01 REV** (July 6, 2017) Modifications to Unfavorable Title II Medical Cessation Decisions.
- **09-026 REV 2** (posted 9/21/17) Questions and Answers (Q&A) **What acceptable electronic occupational resources are currently available for use?** - Explains three acceptable electronic resources, including SkillTRAN and Job Browser Pro, as well as updates and expands the information regarding OccuBrowse.
- **ARCHIVED: CALJ Memo dated 7/12/12 –** CALJ Bice on **Proper Procedures for Exhibiting Queries – Reminder**. See Section 3.2 (L) of the Electronic Business Process (eBP) for Updated Instructions.

Tools/Technology

- Decision Writer Instructions (DWI)/Hearing and Appeals Case Processing System (HACPS) – Overview
    - DWI Instructions User Guide
    - DWI Enhancements and HACPS Frequently Asked Questions
    - HACPS One Pager

- Fully Favorable (FF) Template
    - Differences Between Regular and Updated FF – Chart
    - SAMPLE Updated FF Decision
    - FF Training Presentation
- **Training Day – Day 2**

Dismissals Desk Guide

A quick reference guide to the three most common types of dismissals.

OAO – Appeals Council Training 2017

Dismissal Due to Failure to Appear

(HALLEX I-2-4-25)

The ALJ may dismiss a request for hearing if neither the claimant nor the appointed representative, if any, appears at the time and place of a scheduled hearing, and neither shows good cause for the absence. The ALJ will determine whether good cause exists for the failure to appear and provide rationale for any finding that good cause is not established. All attempts by the hearing office to develop good cause, and any responses received, must be associated with the B section of the claim(s) folder.

Regardless of a failure to appear, if the evidence of record supports a fully favorable decision, the ALJ will consider whether it is appropriate to issue a fully favorable decision instead of dismissing the request for hearing (HALLEX I-2-4-25 C.1.a.).

Dismissal NOT Appropriate	
• **Representative appears without the claimant**	• If the representative appears at the scheduled hearing without the claimant and continues to represent the claimant during the hearing, dismissal is never appropriate. The ALJ may continue with the hearing, including taking testimony from any expert witness. The ALJ may determine that the claimant has constructively waived his/her right to appear under the procedures in HALLEX I-2-4-25 D.2.a., and then issue a decision. If the ALJ finds the claimant has not constructively waived the right to appear, the ALJ may choose to proceed with the hearing, but will also attempt to develop good cause for the claimant's failure to appear. If the claimant establishes good cause for failure to appear, the ALJ will offer the claimant a supplemental hearing.
• **Claimant waived right to oral hearing**	• The request for hearing may not be dismissed for failure to appear if the claimant waives the right to appear and a hearing is still scheduled. The ALJ must decide the case based on the evidence of record.
• **Incarceration**	• A request for hearing may not be dismissed due to a claimant's incarceration. A hearing may be held at the incarceration site or via teleconference. If the claimant presents a knowing and valid waiver of a right to oral hearing, then an on-the-record decision may be issued (20 CFR 404.948, 416.1488).
• **Sentence 6**	• An ALJ may not issue a dismissal for any reason after a sentence six court remand (HALLEX I-2-4-37).
• **Failure to attend a consultative examination**	• Failure to attend a CE is a different issue than failure to attend a scheduled hearing. Failure to appear or refusal to take part in a CE is not a regulatory basis to dismiss a request for hearing (20

(CE)	CFR 404.957, 416.1457). If no good reason for such failure or refusal exists, an unfavorable decision may result (20 CFR 404.1518, 416.918).

Good Cause

"Good cause" refers to a reasonable explanation for failing to comply with a requirement. The ALJ must consider any physical, mental, educational, or linguistic limitations that may have prevented the claimant from appearing at the hearing (20 CFR 404.911, 416.1411, and SSR 91-5p). All attempts by the hearing office to develop good cause, and any responses received, must be associated with the B section of the claim(s) folder (HALLEX I-2-4-25 A.).

• **Circumstances that generally establish good cause**	• There are no set criteria for determining what constitutes good cause; however, good cause generally exists in one of the following three circumstances (HALLEX I-2-4-25 C.): 1. No proper notification of the scheduled hearing (20 CFR 404.938, 416.1438; HALLEX I-2-3-20); 2. Unforeseeable event prevented the claimant from requesting a postponement; or 3. Withdrawal of representation without sufficient notice.
• **Proper notification procedures**	• If the acknowledgement form was not returned and there is no evidence it was received by the claimant or representative: o The record must contain documentation of an attempt to contact the claimant and his/her representative prior to the date of the hearing. Contact may be by letter or phone call. All attempts to contact the claimant and/or representative must be in the record (HALLEX I-2-3-20 B.). o Automated courtesy calls or leaving messages on an answering machine or with anyone other than the claimant or representative do not satisfy the regulatory contact requirements. o A show cause order cannot be used as an alternative to establishing receipt of the notice of hearing or attempting to contact the claimant.
• **Procedures to develop good cause**	• To develop good cause, the hearing office will send a Request to Show Cause for Failure to Appear (Form HA-L90) to the claimant and appointed representative, if any, and allow 15 days for a response (HALLEX I-2-4-25 C.2.).

• **Developing good cause is <u>not</u> necessary**	• If neither the claimant nor the appointed representative appears at the scheduled hearing, the ALJ may dismiss the request for hearing without developing good cause in the following circumstances: o Record shows the claimant received the Notice of Hearing and the claimant does not have a physical, mental, educational, or linguistic limitation that may affect his/her ability to understand the Notice; or o The claimant did not return the acknowledgement form sent with the Notice of Hearing, contact procedures were followed (20 CFR 404.938, 416.1438), and there is no indication of good cause for failure to appear; or o The claimant's whereabouts are unknown, and the necessary steps were taken to locate him or her, with the search documented in the record (HALLEX I-2-4-25 C.3.c.).
• **Request for new time or place**	• If the claimant requests a new time or place for hearing, the ALJ will determine whether good cause exists for the request. If there is good cause, the request should be granted. If there is not good cause, the ALJ will notify the claimant and any representative of his/her finding. If, after proper notification of the rescheduled hearing, neither the claimant nor representative appears at the rescheduled hearing, the ALJ may issue a dismissal of the request for hearing (HALLEX I-2-4-25 E.).
• **Tardiness**	• If an unrepresented claimant, or the claimant and his/her representative fail to appear on time for a scheduled hearing, the ALJ may dismiss the request for hearing; however, the ALJ must first develop whether there is good cause for the tardiness (HALLEX I-2-4-25 A.2.).

Dismissal at the Claimant's Request

(HALLEX I-2-4-20)

A request for hearing may be dismissed at the request of the claimant who filed the request for hearing, provided that the necessary elements are present. All written documents, phone calls, or other evidence related the claimant's request to withdraw must be documented in the claim(s) file.	
• **Documentation of request**	An ALJ may dismiss a request for hearing at the claimant's request if all of the following requirements are met: • The claimant or representative must submit a written request to withdraw the request for hearing, or make the request orally on the record at the hearing (20 CFR 404.957(a), 416.1457(a)).

• **Knowing**	• The record must show the claimant understands the effects of withdrawal, including possible loss of benefits and res judicata implications.
• **Other parties**	• No other claimant who may be adversely affected by the dismissal objects to the request after the ALJ provides notice of the request to withdraw (HALLEX I-2-1-45, I-2-4-20 B.).
• **Not sentence six court remand**	• Under a sentence six court remand, the ALJ may not dismiss a request for hearing, even if the claimant expressly states that he/she wants to withdraw the request for hearing. The ALJ must issue a decision, specifically addressing the particular issue that would normally be the basis for the dismissal action (HALLEX I-2-4-37 C.).
• **Appropriate**	• The ALJ determines that dismissal is appropriate.

Hearing Request Not Timely Filed

(HALLEX I-2-4-15)

If a hearing office receives an untimely filed request for hearing, an administrative law judge must determine whether the claimant had good cause for the untimely filing. If the ALJ decides that the claimant did not have good cause, the ALJ must dismiss the request for hearing.

Factors to be considered in determining whether good cause exists include (20 CFR 404.911, 416.1411; SSR 91-5p; HALLEX I-2-0-60):

- All circumstances that delayed the request;
- Whether SSA's action misled the claimant;
- Whether the claimant understood the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions;
- Whether the claimant had any physical, mental, educational, or linguistic limitations that prevented a timely request;
- Whether the claimant relied on a representative to file the request, and the representative failed to do so; or
- Other circumstances, including but not limited to the following: illness; death or serious illness in the claimant's family; records destroyed; attempts to find information to support claim; requested explanation or determination being appealed; SSA gave incorrect/incomplete information; non-receipt of determination; good faith submission to another agency; unusual or unavoidable circumstances; or evidence that the claimant did not know of the need to file timely.

• **Development**	• Where there is insufficient evidence to rule on the issue of good cause, the ALJ may develop the necessary evidence or information needed to make a determination or elect to obtain evidence on the issue of good cause at a hearing.
• **Documentation**	• All documents used to make the good cause determination must be included in the claim file. Such documents may include the envelope used by the claimant or his/her representative to mail the request for hearing, letters, and medical records.
• **Rationale**	• The dismissal order must include a complete rationale explaining why the ALJ has found the claimant has not shown good cause. The rationale must include more than a statement that the claimant's good cause explanation was considered. For example, if the claimant alleges good cause for missing the hearing due to illness, but fails to provide medical documentation to support the allegation, the ALJ should note this in the rationale.

Dismissals Due to No Right to Hearing and Res Judicata

Dismissal Due to No Right to a Hearing

An Administrative Law Judge (ALJ) may dismiss a request for hearing if the claimant has no right to a hearing (20 CFR § 404.930 and § 416.1430). Generally, a claimant has a right to file a request for hearing if he or she received an unfavorable initial determination followed by an unfavorable consideration determination.

- Regulations at 20 CFR § 404.902 and § 416.1402 identify those administrative actions that are considered initial determinations and when revised determinations have the same effect as a reconsideration determination (i.e., entitlement or continuing entitlement to benefits, the amount of those benefits, and overpayments).

- Regulations at 20 CFR § 404.903 and § 416.1403 identify those administrative actions that are not initial determinations and, therefore, are not subject to administrative review (e.g., denial of a request to be made for a representative payee).

- Examples of cases where a claimant can file request for hearing after only one prior adverse disability determination include a determination that a claimant's disability has ceased, and where disability is determined in Prototype States where there is no reconsideration determination after an initial determination by Disability Determination Services (DDS).

Dismissal Due to Res Judicata

An ALJ may dismiss a request for hearing when SSA has previously issued a determination or decision which has become final by either administrative or judicial action and which involves the rights of the **same parties** under the **same law** on the **same facts** and the **same issues** (20 CFR § 404.957(c)(1) and § 416.1457(c)(1)).

The issue of res judicata arises when a claimant files a subsequent application alleging a date of disability onset that is within a period previously adjudicated. When all the requisite conditions for application of res judicata are met, the ALJ should dismiss the request for hearing (HALLEX I-2-4-40).

If all other requirements are met, a request for hearing on a Title II application may be dismissed in its entirety when the prior unfavorable determination or decision was issued after the claimant's date last insured (DLI). If the prior determination or decision was issued before the DLI or if there is a Title XVI application involved, there will be an adjudicated period after the prior determination or decision which must be addressed by a decision on the merits.

If there still is a period after the prior denial determination or decision during which the claimant continues to meet the insured status requirements, or if there is a Title XVI application involved, the

ALJ must still address the adjudicated period in a decision on the merits. The ALJ also cannot dismiss that part of the request for hearing.

Adjudicators must ensure that no aspect of the previous determination of disability has changed since the prior determination or decision and that the facts and issues remain the same.

- **Same Facts**: If new evidence is submitted with the subsequent claim, a dismissal order must set forth a description of new evidence and a rationale explaining why any new evidence is not material (i.e., the new evidence is duplicative, cumulative or refers to an impairment that did not exist in the relevant time period) (HALLEX I-2-4-40).

  Also, if the hearing office is not able to obtain the prior claim file or a copy of the prior determination or decision, or if the information available is not sufficient to determine the applicability of res judicata, the ALJ should offer the claimant the opportunity for a hearing and a new decision.

- **Same Issues**: Issues may change because of a change in a statute, regulation, ruling, legal precedent or policy interpretation, which the ALJ applied in reaching the final determination or decision of the prior application (HALLEX I-2-4-40 (F)). You can find a list of changes in adjudicatory standard that preclude the application of res judicata at HALLEX I-3-3-9 and POMS DI 27516.010)). An example of such a change is the revision of the musculoskeletal listings effective February 19, 2002.

Exceptions to the Application of Res Judicata

Mental Incapacity:

When there is prima facie evidence that a claimant, who was unrepresented when the prior application was adjudicated, lacked the mental capacity to pursue an administrative appeal, the ALJ must determine whether there was good cause for the failure to file a timely request for administrative review before issuing a res judicata dismissal (SSR 91-5p).

Note: See also AR 90-4(4): Culbertson v. Secretary of Health and Human Services, 859 F.2d 319 (4th Cir. 1988); Young v. Bowen, 858 F.2d 951 (4th Cir. 1988) for cases in the Fourth Circuit (Maryland, North Carolina, South Carolina, Virginia, and West Virginia).

Misleading Information:

Where the claimant received an initial or reconsideration notice dated prior to July 1, 1991, which did not state that filing a new application instead of requesting administrative review could result in the loss of benefits, the ALJ can find good cause for late filing of a request for review if the claimant demonstrates he or she did not appeal as a result of the notice (SSR 95-1p).

Regarding determinations made on or after July 1, 1991, the Act has been amended to provide that failure to timely request review of an adverse initial or reconsideration determination shall not serve as a basis for denying a subsequent application, if the claimant acted in good faith reliance upon incorrect, incomplete or misleading information provided by SSA or DDS relating to the consequences of reapplying for benefits in lieu of seeking administrative review (Sections § 205(b)(3)(A) and §1631(c)(1)(B)(i) of the Act).

Processing Dismissals: *Withdrawal of Request for Hearing*

(b) (7)(E)

[redacted]

20 CFR §§ 404.957(a) and 416.1457(a)

HALLEX I-2-4-20

- **20 CFR §§ 404.936 and 404.938**

Processing Dismissals: *Failure to Appear*

(b) (7)(E)

Processing Dismissals: Untimely Filing

- **20 CFR §§ 404.901, 404.911, 404.933, and**

(b) (7)(E)

[redacted]

- **20 CFR §§ 404.503 and 404.957(c)(4)**

Processing Dismissals: Death of Claimant

(b) (7)(E)

[redacted]

Last Revised: July 2018

Earnings Refresher

Substantial Gainful Activity (SGA)

Policies/Guidance: Code of Federal Regulations (CFR), Social Security Rulings (SSRs), and Program Operations Manual System (POMS)

- **CFR 404.1571 – 404.1576 and 416.971 – 416.976** – Addresses SGA, work performed under special conditions, calculation of earnings, self- employment earnings, and impairment related work expenses (IRWEs)
- **SSR 83-33** – Determining SGA (See **SGA Chart**)
- **SSR 83-35** – Seasonal Work
- **SSR 82-52** – SGA in the Sequential Evaluation Process
- **SSR 82-62** – Evaluation of Sporadic Work
- **POMS DI 25005.020C** – Evaluating work in a foreign country
- **Adjudication Tip #11** – Determining SGA
- **Adjudication Tip #20** – Consideration of Part-Time Work
- **OHO Continuing Education Program (OCEP) Broadcast** – 10/21/15 on Work Activity
- **OHO Continuing Education Program (OCEP) Broadcast** – 7/18/18 Trial Work Period and Period of Eligibility

Reminders:

- SGA for employees is based primarily on countable monthly earnings (gross earnings minus **IRWEs and subsidies**) – See also **POMS DI 10505.010**.
- Some payments, which may appear to be wages made by employers to employees, are **not** considered wages under the Social Security Act (e.g. investments, gifts, inheritances, unemployment compensation, retirement benefits, workers' compensation payments, short-term and long-term disability payments, and payout of accrued sick leave).
- SGA is considered in the sequential evaluation process at Step 1 and, as part of the determination of past relevant work at Step 4.
- Part time work may be SGA (work on a regular and continuing basis (i.e. 8 hours per day, 5 days per week) not required at steps 1 and 4 of the Sequential Evaluation Process) (see **SSR 96-8p)**.
- Illegal work can be SGA at Step 1 , but not at Step 4 (see **SSR 94-1c**).

Where to Find Evidence of SGA:

- In the D section (exhibited queries) and in the unexhibited queries section of the electronic file (see ***Useful Queries*** section below).
- In the E section of the electronic file which may contain development related to earnings (pay stubs, wage verification from employers) and claimant's self-reports of work history and earning after onset.

Chief Administrative Law Judge (CALJ) Memo 8/28/15 – CALJ Bice – Earned Income Tax Credit (EITC) Fraud- Revised Information – Discusses how to handle suspected Earned Income Tax Credit fraud discovered in reviewing earnings information.

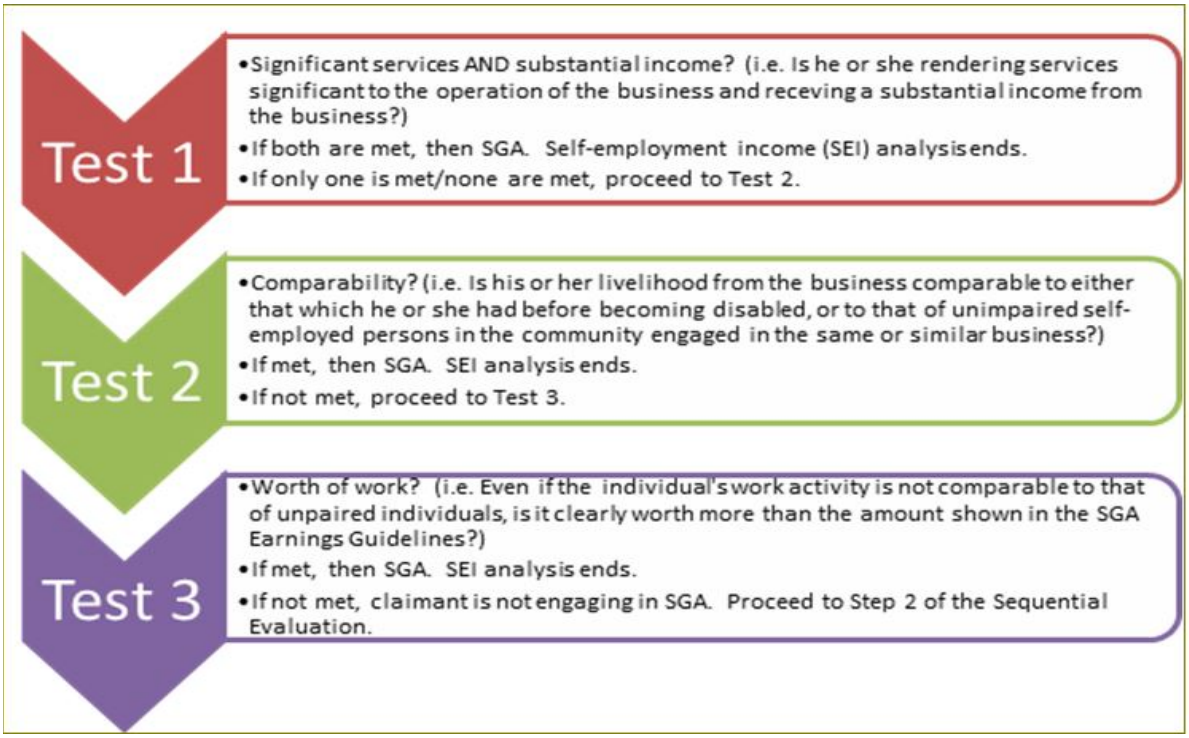
Self-Employment

Policies/Guidance:

- **SSR 83-34** – Used when determining if self-employment is SGA
- **POMS** DI 10510.010 – SGA Criteria in Self-Employment
- **POMS** DI 10510.015 – Test One of General Evaluation Criteria: Significant Services and Substantial Income
- **POMS** DI 10510.020 – Tests Two and Three of General Evaluation Criteria: Comparability of Work and Worth of Work Test
- **Adjudication Tip #63** – Self-Employment Income as SGA – Addresses the three tests for determining if Self-Employment Income is SGA

Self Employment Income (SEI) Decision Tree:

http://sharepoint.ba.ssa.gov/dco/at/ado/NFL/Pages/SEIDecisionTree/SEITree.aspx – Designed to assist field offices in determining the appropriate action to take in self-employment determinations concerning significant service and substantial income.



(Chart adapted from the October 2015 OCEP on Work Activity's QuickNotes Answers.)

Past Relevant Work (PRW)

Policies:

- 20 CFR 404.1520 and 20 CFR 416.920 – (Evaluation of Disability)
- 20 CFR 404.1560 and 416.960 – (Evaluation of PRW)
- 20 CFR 404.1565(a) and 416.965(a) – (Work Experience as a Vocational Factor)
- 20 CFR 404.1568 and 416.968 – (Skill Requirements of Jobs)
- 20 CFR 404.1566(c) and 416.966(c) – (Inability to Find Work is Not Relevant)
- SSR 82-61 and SSR 82-62 – (Capacity to Do PRW; Composite Jobs)
- SSR 96-8p – (Work on a Regular and Continuing Basis Defined)
- SSR 82-40 – (Vocational Relevance of Past Work in a Foreign Country)
- POMS DI 25005.015 and DI 25005.001 – (Evaluating Capacity to Perform Past Relevant Work)
- POMS DI 25005.020 – (Determining if Claimant Can Do PRW as Actually Performed)

Guidance:

- **Adjudication Tip #30** – Work after the AOD is generally not considered PRW
- **Adjudication Tips #9** – Discussing calculation of the 15 year relevant period
- **Adjudication Tip #10** – Discussing SVP level and duration
- **Adjudication Tip #49** – Discussing composite job as PRW
- **Adjudication Tip #62** – Discussing PRW after the AOD
- **Adjudication Tip #12** – Discussing PRW

PRW requires a review of three factors:

- SGA
- Recency (15 year period)
- Duration (Specific Vocational Preparation (SVP) is met)

An ALJ must do a **function-by-function comparison** between PRW and the Residual Functional Capacity (RFC) and look at the jobs as actually and generally performed.

Special Considerations:

- Composite jobs
- Did the claimant perform the job despite current impairments?
- An unsuccessful work attempt (UWA) cannot be PRW at Step 4
- Work with no counterpart in the Dictionary of Occupational Titles (DOT)
- Whether job exists in significant numbers is not relevant at Step 4

Work After Onset

- **CALJ Memo dated 9/1/17** – CALJ Nagle on SGA issues in Favorable Decisions – Stressing the importance of evaluating earnings in determining the proper disability onset date.

- **Average Earnings:** **SSR 83-35** and **SSR 85-5c** (Averaging Earnings)

- **Lag Earnings:** Lag Earnings are earnings that are paid in the "lag period" and that are not yet posted. The lag period is the period for which earnings may not yet be posted on the earnings record (ER) because wage reports are not due yet or have not yet processed. Use questioning at hearing to determine if Lag Earnings are an issue.

Unsuccessful Work Attempt (UWA)

Policies:

- **20 CFR 404.1573(c)** – Addresses work under special conditions
- **20 CFR 404.1574(c)** and **404.1575(d)** and **20 CFR 416.974(c)** and **416.975(d)** – Addresses UWAs, comparability, and worth of work
- **20 CFR 404.1575(d)** – Evaluating self-employment performed after disability onset
- **POMS DI 24005.001D**
    - A UWA is work that was discontinued or reduced to the non-SGA level after a short time (6 months or less) due to the person's impairment or the removal of special conditions related to the impairment that were essential to performance of the work.
    - The ALJ cannot treat PRW as a UWA.

Trial Work Period (TWP) and Extended Period of Eligibility (EPE)

A TWP allows Title II beneficiaries to test the ability to work without losing benefits. It ends with the completion of nine service months within a rolling sixty consecutive month period. TWP is not relevant to Title XVI claims.

The EPE is a 36-month re-entitlement period for Title II beneficiaries who complete the TWP and remain disabled.

Training:

- **OHO Continuing Education Program (OCEP) Broadcast** – 7/18/18 Trial Work Period and Period of Eligibility
    - Four Keys TWP and EPE
    - TWP Service Month Tracking Chart

TWP Policies:

- **20 CFR 404.1592** – Defines a TWP
- **20 CFR 416.2209** and **416.2210** – Discusses rules for TWPs for Social Security Insurance (SSI) recipients
- **POMS DI 13010.060** – Discusses the evaluation of TWP service months

EPE Policies:

- **CFR 404.1592a**
- **POMS DI 13010.210**

The concepts of trial work period (TWP) and extended period of Eligibility (EPE) apply only to Title 2 disability claims.

- In Title 2 claims, the ALJ should evaluate whether post-AOD earnings are indicative of medical improvement or whether the claimant is simply testing the ability to work under the TWP and EPE provisions.
- The TWP and EPE work incentive does not apply to Title 16 claims. Thus, in Title 16 claims, issues of income post-filing date must be addressed under substantial gainful activity (SGA) provisions.
- In a concurrent Title 2 and Title 16 claim, the TWP and EPE cannot apply to the Title 16 claim.

A TWP is normally determined by analyzing whether a claimant has engaged in services *AND* has actual earnings over the yearly TWP threshold for nine months during a rolling but consecutive 60-month period.

- The term of art, "services," is based on actual earnings or work where we would expect the claimant to be paid.
- If the claimant performs SGA within the first 12 months disability is established, the claimant is NOT eligible for a TWP.
- Unsuccessful work attempts (UWAs) and impairment related work expenses (IRWEs) do not apply to the TWP.

The first 36 months following the TWP is a special portion of the EPE called the re-entitlement period.

- During this re-entitlement period, be aware of the "grace period" in which the claimant can be paid for the first month he or she engaged in SGA and two additional months.
- If the claimant ceases to engage in SGA prior to the completion of the re-entitlement period, benefits continue.

***AFTER* the 36-month re-entitlement period, the EPE ends if any one of these three conditions occur:**

- The claimant engages in SGA
- Medical improvement is found
- A non-disability terminating event occurs, such as death or attainment of full retirement age.

Useful Queries

(b) (7)(E)

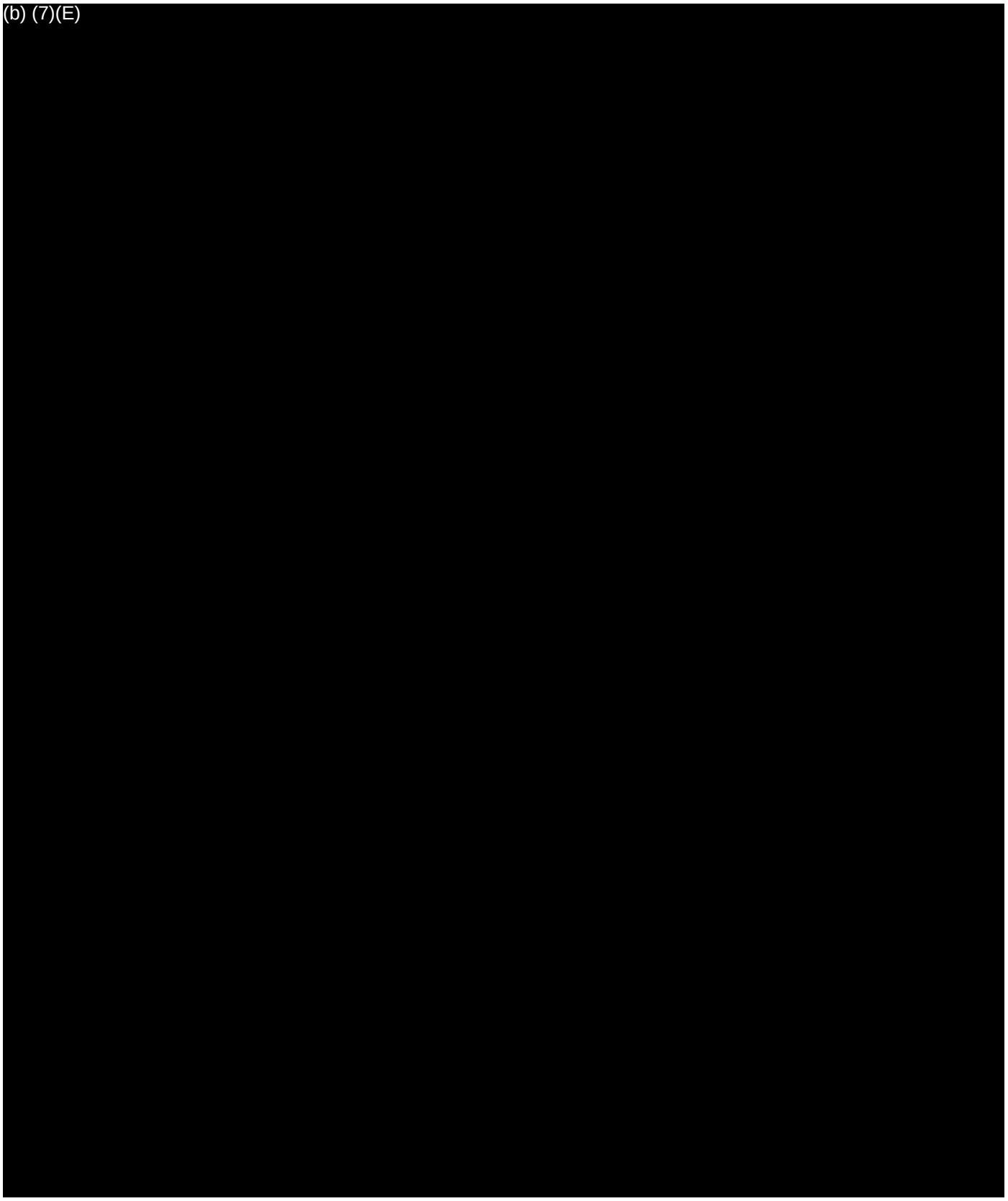
Closed Periods of Disability

Policies: 20 CFR 404.1594, 404.1591, 416.994, 416.994a, and 416.991

- A closed period of disability generally requires a change in medical condition such that the claimant is able to engage in SGA following a period of disability.
- Findings of a closed period of disability may be the result of a request by the claimant or as directed based on the facts of the case.
- To evaluate the cessation of the period of disability, use the same sequential evaluation process as is used for Continuing Disability Reviews (CDRs).
- Even if a claimant stipulates to a closed period, a finding of Medical improvement must be made unless the claimant is working at SGA and a TWP does not apply.

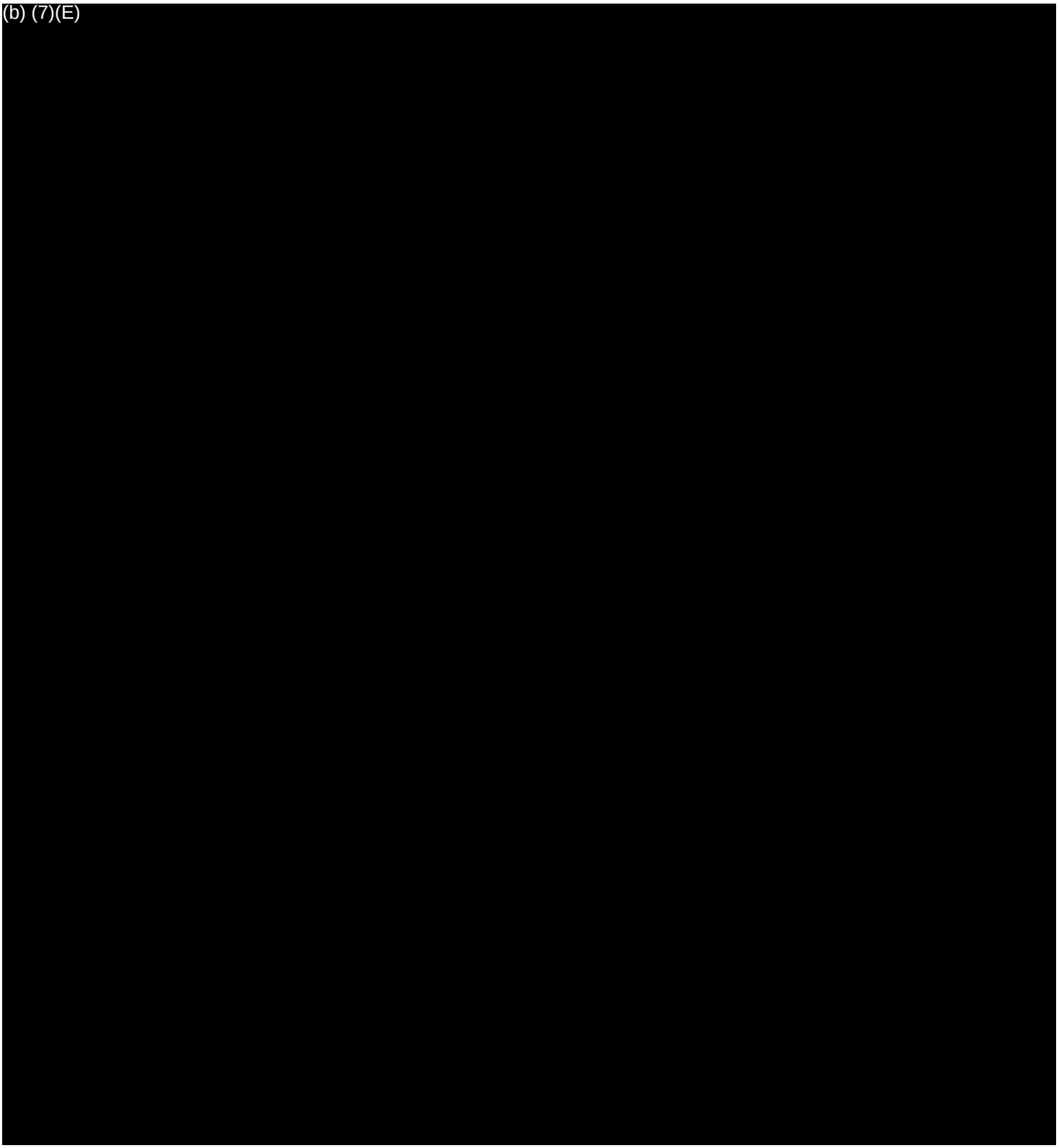
Income/Earnings Exercise

(b) (7)(E)



Last Revised: July 2018

(b) (7)(E)



File Review and File Review Efficiencies

Resources

- File Review Resources Guide: Currently on the Student Virtual Training (VT) site
- Prior Files: Hearings, Appeals and Litigation Law Manual (HALLEX) I-2-1-13 and Adjudication Tip #58

Preparing for the Hearing

- **Case Preparation Efficiencies:**
  - How far ahead; Approach to case preparation
  - Use of Standing Orders:
    - Use and office differences
    - **Standing Order Sample from Electronic Business Process Materials**

- **Preparing Residual Functional Capacity (RFC) Pre Hearing**
  - **Resouces for legally sufficient RFC language on Supplemental ALJ VT Materials site:**
    - **VE RFC/Hypo Chart**
    - **Legally Sufficient Lanauage for RFCs + Quick Reference Chart**
  - **Other resources for development of RFC:**
    - **Citing a Social Security Ruling (SSR) at Step 5**
    - **Limitations that do not Significantly Erode Occupational Base**
    - **Rulings and Acquiescence Rulings (ARs) Medical Vocational Policy**
    - **SkillTran Pocket Guide**
    - **Judge's Guide to Dictionary of Occupational Titles (DOT)**
    - **The Revised Handbook for Analyzing Jobs**

Decision Writing Intructions (DWI) and Hearings and Appeals Case Processing System (HACPS) for file review -- Resources for use of DWI/HACPS during file review in Supplemental ALJ VT Materials site:

- **DW Instructions Users Guide**
- **DWI FAQs**
- **DWI Enhancement FAQs**
- **HACPS One Page Guide**

I-2-5-85.Use of Prehearing Questionnaires (HALLEX Transmittal I-2-162)

An administrative law judge (ALJ) may find a prehearing questionnaire useful to develop the record prior to conducting a hearing or to resolve issues that may result in issuing a favorable decision without the need for a hearing. An ALJ may use a prehearing questionnaire to narrow the issues that he or she will decide at the hearing. In limited circumstances, a prehearing questionnaire may be useful to obtain information needed to schedule and conduct a hearing.

When an ALJ uses a prehearing questionnaire, he or she will ensure that a copy of the questionnaire and any response is associated with the claim(s) file. When the questionnaire (and associated response) is material to the issues in a case, the ALJ will exhibit the document(s). See HALLEX I-2-1-15.

NOTE: In some instances, an ALJ may find a prehearing questionnaire useful in conjunction with a prehearing conference (see HALLEX I-2-1-75).

The following are examples of when an ALJ may want to use a prehearing questionnaire:

- The ALJ wants to obtain evidence, including information from the claimant or an appointed representative, that may help determine whether the claimant's impairment(s) meets or equals a listing in 20 CFR Part 404, Subpart P, Appendix 1;
- The ALJ needs to clarify an issue(s) that would result in a favorable decision or might require development before the hearing (e.g., to obtain an explanation of earnings);
- The claimant's application includes a significant number of impairments, and it would be helpful for the ALJ to know which impairment(s) the claimant alleges meets the criteria for a severe impairment, meets or medically equals a listing, or results in functional limitations (NOTE: While collecting this information may help an ALJ focus on the issue(s) at hearing, the ALJ may not limit the claimant's testimony at hearing based on the claimant's response to this type of question in a prehearing questionnaire);
- The ALJ needs to obtain a list of witnesses from the claimant to determine the subject and scope of testimony (see HALLEX I-2-6-60) and to schedule the hearing with sufficient time; and
- The ALJ needs to obtain a stipulation.

An ALJ may not impose penalties, threaten sanctions, reduce an appointed representative's fee, suggest the request for hearing may be dismissed, or otherwise indicate the ALJ may take an adverse action if the claimant or appointed representative fail to complete and submit responses to the prehearing questionnaire.

(b) (2) [redacted]

Setting and Preparing for the Hearing

Dockets: Discussion - schedule by day; length; number of hearings

- See 20 CFR 404.936 and 416.1436 on scheduling
- See Hearings, Appeals and Litigation Law Manual (HALLEX) I-2-3-10
- Use of Pre hearing questionnaires - HALLEX I-2-5-85

Case Preparation Efficiencies:

- How far ahead; Approach to case preparation

- Use of Standing Orders:
  - Uses and office differences
  - **Standing Order Sample from Electronic Business Process Materials**

- Use of Scripts and Checklists (**New Administrative Law Judge (ALJ) Sample Script**)

- Preparing RFCs Pre Hearing: (**VE Hypo Chart**)

Use of Interpreters:

- **Use of Foreign Language Interpreters - Chief Judge Memo (March 5, 2014)**

- **Foreign Language Interpreters - HALLEX I-2-1-70**

- **Hearing Procedures Foreign Language Interpreters - HALLEX 1-2-6-10**

SOCIAL SECURITY

MEMORANDUM

Date: March 5, 2014 Refer To: ACL 14-238

To: All Administrative Law Judges

From: Debra Bice */s/ John R. Allen* for
Chief Administrative Law Judge

Subject: Use of Foreign Language Interpreters – INFORMATION AND REMINDER

This memorandum is a reminder of prior guidance provided in the August 7, 2009 Memorandum, "Consideration of a Claimants Ability to Communicate in English – Information and Reminder," that you must comply with agency policy with respect to the use of foreign language interpreters during hearings. Specifically, HALLEX I-2-6-10 provides, in part, that "SSA will provide an interpreter **free of charge**, to any individual requesting language assistance, or when it is evident that such assistance is necessary to ensure that the individual is not disadvantaged" (emphasis in original). Thus, when a claimant affirmatively requests an interpreter, the agency must provide one.

There also may be situations when SSA must provide an interpreter although the claimant has not specifically requested language assistance. HALLEX I-2-6-10 also provides, in part that "[i]f a claimant has difficulty understanding or communicating in English, the ALJ will ensure that an interpreter, fluent in both English and a language in which the claimant is proficient, is present throughout the hearing." HALLEX I-2-1-70 similarly

instructs hearing office staff, at the direction of the ALJ, to arrange for a qualified interpreter to assist the claimant and the ALJ at the hearing "[w]hen a claimant has limited proficiency in English."

HALLEX I-2-1-70.A. indicates that a review of CPMS, and specific forms in the claimant's case file (such as Form HA-501, Request for Hearing, and SSA-3368, Disability Report), can help determine whether an interpreter is needed. Reports of contact or other statements in the claimant's case file also may indicate the need for an interpreter.

Therefore, if a claimant requests language assistance, or when it is evident that such assistance is necessary to ensure that the claimant is not disadvantaged, the ALJ must ensure that an interpreter is present throughout the hearing. HALLEX I-2-6-10. The use of an interpreter serves to assist both the claimant and the ALJ at the hearing, and can safeguard the claimant's due process rights in the processing of his or her claim(s).

Please share this information with your hearing offices. The staff contact for regional inquiries is (b) (6), Attorney Advisor, who can be reached at (b) (6)

Claimant's Symptoms

Law: Code of Federal Regulations (CFRs)

20 CFR 404.1529 and 416.929 - How we evaluate symptoms, including pain

- Factors at (c)(3) in each section
- Objective medical evidence determines medically determinable impairment (MDI)
- Affect on basic work activities
- Consideration of other evidence and longitudinal history
- Has a Listing been met? Possibility of Equals - need a medical expert (ME)? Residual Functional Capacity (RFC) limitations for each impairment?

Policies: Social Security Rulings (SSRs)

SSR 16-3p - Titles II and XVI: Evaluation of Symptoms in Disability Claims

- Supersedes SSR 96-7p
- Effective March 28, 2016
- Eliminates credibility assessment

Training:

- New ALJ Training Module 4 - Severity
- New ALJ Training Module 6 - Mental Impairments
- New ALJ Training Module 9 - Developing Subjective Complaints/SSR 16-3p
- Mental Disorder Videos on Demand (VODs): Effective date January 17, 2017- Five Keys to each of the four VODs
- Judicial Training 2013:
    - Training Materials tab
    - PowerPoint on Functional Limiting Effects of Pain

Guidance:

- Evaluating Symptoms Desk Guide
- Adjudication Tips – Chief Judge Resources
    - Adjudication Tip #52 - Evaluating the Functional Limitations of Pain
    - Adjudication Tip #57 - Credibility No More – Focus on consistency and use of SSR 16-3p
- Subjective Complaints Worksheet
- **Program Operations Manual System (POMS)**
    - DI 24501.020 - Establishing a Medically Determinable Impairment
    - DI 24505.005 - Evaluation of Medical Impairments that are Not Severe
    - DI 24501.021 - Evaluating Symptoms

Subjective Complaints Worksheet

(b) (7)(E)

National Uniformity

On December 16, 2016, the Agency published a Final Rule in the Federal Register titled "Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process." The National Uniformity regulations became effective on January 17, 2017, and compliance began May 1, 2017. *Federal Register* at 81 FR 90987. See also the "Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process" page posted under Chief Judge Resources on the Office of the Chief Administrative Law Judge website, which includes training materials, Office of Hearings (OHO) Continuing Education Program (OCEP) and National Uniformity Frequently Asked Questions (FAQs).

Overview of the National Uniformity Procedures

- We must provide notice of hearing 75 days in advance, unless the claimant or representative submits a written waiver of advanced notice. Code of Federal Regulations (CFRs) - 20 CFR 404.938 and 416.1438; Hearings, Appeal, and Litigation Law Manual (HALLEX) I-2-3-25

- Claimants and representatives must inform us about or submit all written evidence, objections to issues, and pre-hearing written statements no later than 5 business days before the hearing and must submit subpoena requests no later than 10 business days prior to the hearing. 20 CFR 404.935 and 416.1435; 20 CFR 404.939 and 416.1439; 20 CFR 404.949 and 416.1449; 20 CFR 404.950 and 416.1450; HALLEX I-2-5-1.

- The Administrative Law Judge (ALJ) may decline to obtain or consider late submissions of evidence, objections, written statements or subpoena requests unless the claimant meets one of the circumstances in 20 CFR 404.935(b) and 416.1435(b).

    - Some action by the Agency misled the claimant;
    - The claimant had a physical, mental, education, or linguistic limitation that prevented him or her from informing the Agency about or submitting the evidence earlier; or
    - Some other unusual, unexpected, or unavoidable circumstance beyond the claimant's control prevented him or her from informing the Agency about or submitting the evidence earlier. Examples include, but are not limited to: 1) a serious illness that prevented the claimant from contacting the Agency in writing, in person or through another person; 2) a death or serious illness in the claimant's immediate family; 3) a showing that the claimant or his or her representative "actively and diligently sought evidence from a source and the evidence was not received or was received less than five business days prior to the hearing."

- The ALJ will articulate in the decision if the information or evidence is excluded. For objections to the issues, the ALJ will make a decision on the objections either at the hearing or in writing prior to the hearing.

- The 5-day requirement does not apply to Title XVI continuing disability reviews (CDRs) and Age 18 redeterminations, and it does not apply to concurrent claims where the Title XVI portion is one of these two types of claims (20 CFR 416.1435(c)).

- The Appeals Council (AC) will only review a case based on additional evidence if it is new, material, related to the period on or before the hearing decision, and there is a reasonable probability the evidence would change the outcome of the decision. 20 CFR 404.970 and 416.1470. The AC will only consider such evidence if the claimant shows good cause for not informing us about or submitting the evidence at least 5 business days before the date of the hearing. This is the same standard used by the ALJ for any late submission of evidence (20 CFR 404.970(b) and 416.1470(b)).

Admitting Evidence Submitted At least Five Business Days Before the Hearing

HALLEX I-2-6-58 -- Admitting Evidence Submitted At Least Five Business Days Before the Hearing

- Subject to the limitations for accepting evidence in 20 CFR 404.935 and 416.1435, an ALJ will generally admit any evidence into the record that he or she determines is material to the issues in the case. Evidence is material if it is relevant, i.e., involves or is directly related to issues being adjudicated.

- When the claimant or appointed representative submits evidence, hearing office (HO) staff will place the evidence in the claim(s) file. While HO staff initially marks and lists proposed exhibits (see HALLEX I-2-1-15 and I-2-1-20), the ALJ makes the final decision on the information admitted into the record. The ALJ may admit information into the record, even if it would not be admissible in court under the rules of evidence.

- In Title XVI cases, other than those based on an application for benefits (e.g., age 18 redeterminations, continuing disability reviews, and terminations), an ALJ will accept any evidence submitted on or before the date of the hearing decision. See 20 CFR 416.1435(c). For all other Title XVI cases, an ALJ will use the procedures referenced in this section to admit evidence into the record.

- If there was a prior ALJ decision, the ALJ must associate the prior ALJ decision with the current claim(s) file. For information about how an ALJ determines what evidence to include from a prior file and whether to exhibit the information. See HALLEX I-2-1-13.

- Subject to the limitations for accepting evidence in 20 CFR 404.935 and 416.1435, an ALJ will generally admit into the record any information that he or she determines is material to the issues in the case.

- Before taking testimony, the ALJ will make the proposed exhibits a part of the record by:
  - Asking the claimant (or appointed representative, if any) whether he or she had an opportunity to examine the proposed exhibits;
  - Asking the claimant (or appointed representative, if any) if there are any objections to admitting the proposed exhibits into the record; and
  - Ruling on any objections to the proposed exhibits. See HALLEX I-2-6-34.

Admitting Evidence Submitted Less Than Five Days Before the Hearing

HALLEX I-2-6-59 -- Admitting Evidence Submitted Less Than Five Business Days Before the Hearing or At or After the Hearing

- Subject to 20 CFR 404.935(b) and 416.1435(b), an ALJ may admit additional evidence into the record during the hearing. However, before admitting any proposed exhibit into the record, the ALJ will identify the proposed exhibit and offer the claimant the opportunity to inspect the proposed exhibit and offer any objections or comments.

- Subject to 20 CFR 404.935(b) and 416.1435(b), an ALJ may also admit additional evidence into the record after the hearing. If the ALJ plans to admit additional evidence into the record after the hearing, see generally the instructions regarding proffer in HALLEX I-2-7.

- Generally, if a claimant informs the Agency about or submits evidence less than five business days before the date of the scheduled hearing, at, or after the hearing, the ALJ may decline to obtain or consider the evidence, unless the circumstances in 20 CFR 404.935(b) and 416.1435(b) apply.

- If the claimant submits evidence after the ALJ issues a hearing decision and the claimant requests review of the decision, the ALJ will forward the information to the AC for review of the decision. If the claimant has not requested review by the AC, the ALJ may either consider revising his or her decision using the appropriate procedures in HALLEX I-2-9; or return the evidence to the claimant, noting in writing that the record is closed, but the claimant may request review by the AC.

Additional Program Uniformity Resources

- **Chief ALJ (CALJ) Memo December 30, 2016**
- **OCEP Broadcast - 4/2017 - Keys to Program Uniformity**
- **National Uniformity FAQs Part I and Part II**
- **Adjudication Tip #50 - Submission of Evidence**
- **OCEP Broadcast - 4/22/2015 - Submission of Evidence** - Video, Script, and FAQs
- **Bi-Weekly Hearing Level Policy Updates 5/17/17 (**Denotes many HALLEX changes related to the Uniformity Rules)
- **Five-Day Business Calculator for Determining Five-day Submission Compliance**

Development of Evidence - Responsibility and Procedures

Social Security Ruling (SSR) 17-4p (Effective 10/04/17) Titles II and XVI: Responsibility for Developing Written Evidence - Clarifies our responsibilities and the responsibilities of the claimant and representative to develop evidence and other information in disability and blindness claims. See also, Federal Register (FR) notice, 82 FR 46339 (Published 10/04/2017).

20 C.F.R. §§ 404.1512(b)(1) and 416.912(b)(1) -- "Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary, or unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports."

HALLEX I-2-5-1 -- Evidence — General (Last Update: 5/1/17)

- A claimant must inform the Social Security Administration (SSA) about or submit to SSA all evidence, in its entirety, known to him or her that relates to whether or not he or she is blind or disabled. See 20 CFR 404.1512 and 416.912. For represented claimants, the representative must help the claimant obtain information or evidence that the claimant must submit. See 20 CFR 404.1740(b)(1) and 416.1540(b)(1). We will assist claimants in developing the record when appropriate. See 20 CFR 404.1512(b) and 416.912(b).

- Evidence generally does not include a representative's analysis of the claim or oral or written communications between a claimant and his or her representative that are subject to the attorney-client privilege, or that would be subject to the attorney-client privilege if a non-attorney representative was an attorney. 20 CFR 404.1513(b) and 416.913(b).

- If a representative has a pattern of not submitting evidence that relates to the claim, or if the claimants of a particular representative develop a pattern of not submitting evidence or not informing us about evidence, an ALJ will consider whether circumstances warrant a referral to the Office of the General Counsel (OGC) as a possible violation of our rules. See HALLEX I-1-1-50 for instructions on making referrals to OGC.

- An ALJ may also decide that he or she needs additional medical or non-medical evidence to make a proper decision in a case. In this circumstance, the ALJ will make reasonable attempts to fully and fairly develop the record. The ALJ or Hearing Office (HO) staff will add to the record and exhibit documentation of all attempts to obtain evidence.

- In addition, an ALJ may decide that witnesses are needed to fully and fairly evaluate the issues in a case. The ALJ or HO staff will schedule appropriate witnesses for the hearing or solicit interrogatories from sources, experts, or other relevant persons. The ALJ may issue a subpoena if a witness indicates he or she will not appear voluntarily or if the witness refuses to produce requested evidence, and the witness's testimony or evidence is reasonably necessary for the full presentation of the case. See 20 CFR 404.950(d) and 416.1450(d). See also HALLEX I-2-5-78 and I-2-5-80.

HALLEX I-2-5-13 -- Claimant Informs Hearing Office of Additional Evidence

- A representative may inform SSA about evidence that relates to whether or not the claimant is blind or disabled (20 CFR 404.935 and 416.1435). However, a representative also has an affirmative duty to act with reasonable promptness to help obtain information or evidence that the claimant must submit under the regulations, and forward the information or evidence to SSA for consideration as soon as practicable (20 CFR 404.1740(b)(1) and 416.1540(b)(1)). If a representative has a pattern of informing SSA about evidence that relates to the claim instead of acting with reasonable promptness to help obtain and forward the evidence to SSA, an ALJ will consider whether circumstances warrant a referral to the Office of the General Counsel (OGC) as a possible violation of our rules. See HALLEX I-1-1-50 for instructions on making OGC referrals.

- If after the hearing a claimant or representative requests additional time to submit evidence, the ALJ will evaluate the request using procedures in HALLEX I-2-7-20.

- When a claimant informs an ALJ or HO staff about additional evidence but does not submit the evidence, the ALJ or HO staff will make every reasonable effort to obtain the evidence using the appropriate procedures if the claimant informed SSA about the evidence no later than five business days before the date of the scheduled hearing; the ALJ finds that the claimant missed the five-day deadline but the circumstances in 20 CFR 404.935(b) and 416.1435(b) apply (see HALLEX I-2-6-58 and I-2-6-59); or the case involves a Title XVI claim that is not based on an application for benefits (e.g., age 18 redeterminations, continuing disability reviews, and terminations).

- To make every reasonable effort to obtain evidence, the ALJ or HO staff will request that the claimant or representative submit the evidence. If necessary, the ALJ or HO staff will provide the claimant or representative with form SSA-827, Authorization To Disclose Information To The SSA, to facilitate obtaining the evidence. See HALLEX I-2-5-14 A.

HALLEX I-2-5-28 -- Action Following Receipt of Requested Evidence

- If the requested evidence is material (See HALLEX I-2-6-58), relevant to the issues of the case, complete, and responsive, hearing office (HO) staff will mark the new evidence as a proposed exhibit (see HALLEX I-2-1-15); prepare and mark the professional qualifications of each source as an exhibit (see HALLEX I-2-1-30); and review the total record for sufficiency of the evidence and any material conflicts.

- When HO staff requested the evidence through a State agency and the evidence is incomplete or unresponsive, HO staff will follow the procedures in HALLEX I-2-5-14 D.3. When staff requested the evidence directly from a treating or other source and the evidence is incomplete or unresponsive, staff will contact the source again to determine if additional evidence is available. HO staff can contact the source directly or contact the source through the claimant or the representative, if any. HO staff may request assistance from the State agency if necessary, using the procedures in HALLEX I-2-5-14 D.

- If the new evidence contains information that may be detrimental to the claimant's health (such as a serious illness of which the claimant and the treating source may not be aware), the ALJ will exercise appropriate discretion to avoid adversely affecting the claimant's medical situation, while proceeding with the actions necessary to protect the claimant's right to due process. See generally HALLEX I-2-7-30 B.

- If an ALJ receives new evidence after the hearing from a source other than the claimant or representative, if any, and the ALJ proposes to enter the evidence into the record as an exhibit, the ALJ will follow the proffer procedures in HALLEX I-2-7-1, I-2-7-30 and I-2-7-35. See also HALLEX I-2-5-91, I-2-5-92, and I-2-6-99.

Other Development of Evidence Resources

- **OCEP Broadcast - 4/22/15 - Submission of Evidence in Disability Claims**
- **2014 CALJ Memorandum - "Making 'Every Reasonable Effort' to Obtain All Evidence and Documenting Those Efforts – REMINDER"**
- **Adjudication Tip #50 - Submission of Evidence** (under "Evidence Issues")

Prehearing Proffer of Evidence

HALLEX I-2-5-29 -- Prehearing Proffer of Evidence

- In the context of evidence development, "proffer" means to provide an opportunity for a claimant (and appointed representative, if any) to review additional evidence that he

or she has not previously seen and that an adjudicator proposes to make part of the record. Proffering evidence allows a claimant to comment on, object to, or refute the evidence by submitting other evidence; or, if required for a full and true disclosure of the facts, cross-examine the author(s) of the evidence.

- Under most circumstances, proffer is not necessary when an ALJ receives additional evidence before the hearing from a source other than the claimant or representative, if any. Proffer is not usually required because other hearing procedures require that an ALJ provide the claimant or representative an opportunity to review any information in the claim(s) file before the hearing. HALLEX I-2-1-35.

- However, if an ALJ agrees to take certain actions during a prehearing conference, the ALJ must summarize the actions to be taken in writing and proffer the writing to the claimant and representative. HALLEX I-2-1-75 E. Additionally, if the ALJ (or assisting staff) requested interrogatories from a medical or vocational expert, and the received responses would not result in a fully favorable decision, the ALJ (or assisting staff) is required to proffer the evidence to the claimant and appointed representative, if any.

- When proffering the evidence, the ALJ will use the same general procedures for proffering post-hearing evidence, as set forth in HALLEX I-2-7-30.

Use of Subpoenas

20 CFR 404.950(d) and 416.1450(d) - When it is reasonably necessary for the full presentation of a case, an administrative law judge (ALJ) may issue a subpoena on his or her own initiative or at the request of a claimant or appointed representative.

HALLEX I-2-5-78 -- Use of Subpoenas - General

- An ALJ may issue a subpoena for the appearance and testimony of a witness(es), and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing. (In the Fifth Circuit, if a claimant requests a subpoena to cross-examine an examining physician and makes the request prior to the closing of the record, the ALJ must issue the subpoena. See Acquiescence Ruling 91-1(5), *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990) – Right to Subpoena an Examining Physician for Cross-examination Purposes – Titles II and XVI of the Social Security Act).

- Claimants have a right to request that an ALJ issue a subpoena, but they must make the request in writing at least 10 business days before the hearing date. See 20 CFR 404.950(d)(2) and 416.1450(d)(2). If a claimant does not submit the request at least 10 business days before the hearing date, the ALJ may deny the request at his or her discretion, unless the circumstances in 20 CFR 404.935(b) and 416.1435(b) apply (see

HALLEX I-2-6-58 and I-2-6-59). An ALJ will follow the procedures in HALLEX I-2-6-59 B to determine whether the circumstances are met.

- A claimant's request for a subpoena must give the name(s) of the witness(es) or document(s) to be produced; describe the address or location of the witness(es) or document(s) with sufficient detail to find them; state the important fact(s) that the witness(es) or document(s) is expected to prove; and indicate why the fact(s) could not be proven without issuing a subpoena.

- If a claimant submits a subpoena request at least ten business days before the hearing date or an ALJ finds that the circumstances in 20 CFR 404.935(b) and 416.1435(b) apply, the ALJ will evaluate the request. When all other means of obtaining the information or testimony have been exhausted, an ALJ will issue a subpoena if: the claimant or ALJ cannot obtain the information or testimony without the subpoena; and the evidence or testimony is reasonably necessary for the full presentation of the case.

- If an ALJ denies a claimant's request for a subpoena, the ALJ must notify the claimant of the denial, either in writing or on the record at the hearing. In either situation, the ALJ will enter the request into the record as an exhibit. If the denial is in writing, the ALJ will also enter the denial notice into the record as an exhibit. Whether on the record or in writing, the ALJ will explain why the ALJ declined to issue a subpoena.

From: (b) (2)
Sent: Friday, December 30, 2016 10:27 AM
Subject: Impact of the National Uniformity Regulations on the Hearing Operation

E-MAIL TO ALL HEARING OFFICE PERSONNEL

Subject:

Impact of the National Uniformity Regulations on the Hearing Operation

ACL 17-200

On December 16, 2016, the Agency published a Final rule in the Federal Register entitled "Ensuring Program Uniformity at the Hearing and Appeals Council Levels of the Administrative Review Process." The final rule revises and finalizes changes to regulations in 20 CFR Chapter III, parts 404, 405, and 416. These changes were first proposed in a Notice of Proposed Rulemaking published on July 12, 2016. The revisions will affect hearing level procedures in several areas. The most significant changes will affect the timeframe for notifying claimants of a hearing date; the information we provide in our hearing notices; and the period in which we require claimants to inform us about or submit written evidence, statements, objections to the issues, and subpoena requests.

While the final rule will be effective on January 17, 2017, compliance will not be required until May 1, 2017, based upon direction of the Office of Management and Budget. Additionally, systems updates scheduled for April 29, 2017 are required to bring our notices into compliance. We will provide further guidance on scheduling hearings to ensure that we are in compliance with the regulatory requirements as of May 1.

The most significant changes affecting the hearing operation are the timeframe in which claimants must inform us about or submit evidence, statements, objections, or subpoena requests and the timeframe in which we provide claimants with notice of the hearing.

The revised regulations will require the claimant to inform us about or submit any written evidence no later than five business days before the date of the scheduled hearing, in contrast to the current regulations, which allow claimants to submit evidence up to and on the date of the hearing, or after a hearing. Under the revised regulations, administrative law judges (ALJs) may decline to consider or obtain the additional evidence if the claimant does not adhere to this timeline unless certain good cause exceptions apply, which are enumerated in the revised regulations.

Additionally, the claimant must notify the ALJ about any objections to the issues and submit any pre-hearing written statements no later than five business days prior to the hearing, subject to the same good cause exceptions for additional evidence. This differs from the current regulations, which specify that the claimant must submit objections at "the earliest possible opportunity."

PLEASE NOTE: The provisions of the new regulation regarding submission of evidence should not be utilized until notification is received from OCALJ. Until then, claimants may continue to submit evidence under the current process (up to and on the date of the hearing, or after a hearing).

Another significant change is that the revised regulations will require us to provide claimants with a Notice of Hearing at least 75 days in advance, in contrast to the current regulations, which require us to provide notice at least 20 days in advance. The Notice of Hearing will also inform claimants and representatives about the five-day requirement to inform us about or submit evidence.

Finally, the revised regulations will affect the timeframe for submitting a subpoena request. Parties to the hearing must now file a written request for issuance of a subpoena with the ALJ at least 10 business days prior to the hearing, subject to the same regulatory good cause exceptions. Conversely, the current regulations contain a time limit of five days prior to the hearing for submission of subpoena requests. Again, continue with the current process until you receive notification from OCALJ to apply the provisions of the new regulation.

Additional revisions affect the manner in which the Appeals Council considers additional evidence but do not directly affect hearing level case processing.

The final rule will incorporate into 20 CFR parts 404 and 416 the majority of the case processing variances that have existed in Region I since 2006 under the part 405 regulations, ensuring nationwide consistency in our administrative review process. Therefore, 20 CFR part 405 will be removed in its entirety upon implementation of this final rule.

Please refer any questions through your hearing office and regional management chains. The staff contact for regional inquiries is (b) (6), who may be reached at (b) (6).

/s/

Debra Bice

Chief Administrative Law Judge

Cc: Regional Office Management Teams

Hearing Office Managers

Frequently Asked Questions Regarding the "National Uniformity" Final Rule

Question 1: Are we going to be able to dismiss cases where the claimant fails to appear but did not receive 75-day notice?

(b) (5)

[redacted]

Question 2: With the change in the rules for subpoenas, is Acquiescence Ruling 91-1(5) still valid? Is there still the absolute right to have a subpoena issued for an examining physician with no obligation to provide any reasons?

(b) (5)

[redacted]

Question 3: How is an ALJ to handle a request to reopen a prior decision when the representative submits evidence with the new application that was not timely submitted with the prior application? Example: The representative did not timely submit evidence, and the ALJ keeps it out. The ALJ issues a decision of "not disabled." No request is filed with the Appeals Council. A new application is filed, and this evidence is timely

submitted. The representative now wants the ALJ to reopen the prior decision. "New and material" as defined in HALLEX I-2-9-40 would direct that the ALJ must consider this.

(b) (5)

Question 4: Will OCALJ be providing additional guidance on the rollout of the revised regulations?

(b) (5)

Question 5: What are the consequences if an HO fails to provide written notice of hearing within 75 days? Does this mean the record "closes" after the full 75 days or does it mean that the ALJ cannot enforce the uniformity rules at all (in order to "close the record")?

(b) (5)

Question 6: If a waiver is required for a case to be scheduled under 75 days, must the scheduler have a signed waiver form from the Document Generation System (DGS)? Can we obtain permission to waive advance notice verbally over the phone when calling to schedule a hearing less than 75 days in advance?

(b) (5)

(b) (5)

Question 7: Will DGS be updated so we can click a box to include the waiver of advanced notice form with the Notice of Hearing? This will allow us to central print that waiver form and thus save time.

(b) (5)

Question 8: Does the new policy regarding the 75-day notice period apply to supplemental hearings in addition to initial hearings?

(b) (5)

Frequently Asked Questions Regarding the "National Uniformity" Final Rule-PART II[1]

Question 9: If a claimant or representative submits a letter "informing" us about additional evidence close to or on the 5-day deadline, may we require a showing of "good cause" regarding why we were not informed of the evidence earlier prior to admitting it?

(b) (5)

[redacted]

Question 10: Are waivers of advance notice of hearing specifically authorized under the national uniformity regulations? If so, may hearing office (HO) management seek waiver on behalf of an ALJ and may ALJs establish guidelines regarding waivers of advance notice in standing orders?

(b) (5)

[redacted]

[1] These FAQs supplement the original FAQs issued on March 24, 2017.

(b) (5)

[redacted]

Question 11: If the claimant or representative agrees in writing to waive advance notice of hearing, do we need to comply with the other provisions of the national uniformity regulations, such as the 5-day requirement to inform us about or submit evidence?

(b) (5)

[redacted]

Question 12: If it becomes necessary to change the time or place of the hearing after we have already sent a notice of hearing, are we required to send an amended notice at least 75 days in advance?

(b) (5)

[redacted]

(b) (5)

Question 13: What about situations where the time or place of the hearing does not change, but it becomes necessary to schedule an expert witness, change the manner of appearance at the hearing, or update the names of witnesses or the assigned ALJ after the notice has already been sent out?

(b) (5)

Question 14: Can a waiver of the 75-day advance notice of hearing be obtained on the day of the hearing with a claimant who is appearing remotely (i.e. via VTC or telephonically), particularly for an incarcerated claimant?

(b) (5)

Question 15: Do the national uniformity regulations preclude claimants or representatives from submitting post-hearing written statements absent a showing that they have satisfied one of the conditions described in 20 CFR 404.935(b) and 416.1435(b)?

(b) (5)

(b) (5)

[redacted]

Question 16: 20 CFR 404.935(a) and 416.1435(a) provide that claimants and representatives must inform us about or submit any written evidence "no later than 5 business days before the date of the scheduled hearing." How do we calculate the 5 business day period for purposes of applying this rule? If a claimant or representative submits evidence after normal business hours on the 5th day prior to the hearing, is it considered timely?

(b) (5)

[redacted]

Efficient Hearing Techniques

Opening Statement (Hearings and Appeals Litigation Law Manual (HALLEX) I-2-6-52 Opening Statement)

- The administrative law judge (ALJ) will open the hearing with a brief statement explaining how he or she will conduct the hearing, the procedural history of the case, and the issues involved. In supplemental hearings, the ALJ need only identify the case, state the purpose of the supplemental hearing, and describe the issue(s) to be decided.
- If the claimant is unrepresented, the ALJ will ensure on the record that the claimant has been properly advised of the right to representation and that the claimant is capable of making an informed choice about representation.
- If the claimant asks to postpone the hearing to obtain a representative and it is the first request, the ALJ will typically grant the requested postponement.
- The ALJ will rule on the record regarding any prehearing requests or motions of the claimant or representative (*i.e.*, requests for postponement (Code of Federal Regulations (CFR) - 20 CFR 404.936 and 416.1436), disqualification of the ALJ (20 CFR 404.940 and 416.1440), subpoenas (20 CFR 404.950(d) and 416.1450(d)), and evidence submitted less than five days before the hearing 20 CFR 404.935(b) and 416.1435(b)).

Testimony of Claimants and Witnesses (HALLEX I-2-6-60; Testimony of Claimants and Witnesses)

- The ALJ determines the subject and scope of testimony from a claimant and any witness(es), as well as how and when the person testifies at the hearing.
- If a claimant or witness requests to testify in a particular way, or asks to testify at a particular time during the hearing, the ALJ will consider whether there is a good reason for the request. Additionally, if a claimant or witness objects to the presence of any other individual during his or her testimony, the ALJ will consider whether there is a good reason for the objection.
- The claimant and an appointed representative, if any, have the right to question witnesses to inquire fully into the matters at issue. Generally, the ALJ will provide a claimant or representative broad latitude in questioning witnesses. However, the ALJ is not required to permit testimony that is repetitive or cumulative, or allow questioning that has the effect of intimidating, harassing, or embarrassing the witness.
- The ALJ determines when the claimant or representative may question a witness. The ALJ will usually provide a claimant or representative the opportunity to question a witness after the ALJ completes his or her initial questioning of the witness. If necessary, the ALJ may recall a witness for further questioning.

- An ALJ may choose to exclude a witness from the hearing while others are testifying.
- The claimant and appointed representative, if any, generally have the right to be present during the entire hearing. However, the ALJ may excuse the claimant from the hearing in circumstances such as the following:

    - The claimant requests that the ALJ proceed without his or her attendance, the ALJ has fully advised the claimant of the right to be present and participate in the hearing, and the record demonstrates that the claimant understands the right to be present and the consequences if he or she is not present.
    - The appointed representative asks that the claimant is excused for the remainder of the hearing, the claimant agrees to be excused on the record, and the representative will be present throughout the remainder of the hearing.
    - The claimant is a minor, the claimant's attendance is no longer needed, a guardian or appointed representative will be present through the remainder of the hearing, and a responsible person who is not an agency employee can wait with the minor while the hearing continues.

- If the claimant is disruptive during the hearing, and continues the behavior after the ALJ fully advises the claimant on the record that the conduct is disrupting the proceedings, the ALJ will take one of the following actions:

    - If the claimant is represented and the representative is unable to address the behavior (either during the proceedings or after a short recess), the ALJ will discuss with the representative whether to proceed with the hearing only in the presence of the representative. If the representative agrees to continue without the claimant present, the ALJ may proceed with the hearing, allowing the representative to question any witness(es). If the ALJ reschedules the hearing and the claimant is again disruptive at the supplemental hearing, the ALJ will excuse the claimant and inform the representative that the hearing will proceed only in the presence of the representative.
    - If the claimant is not represented, the ALJ will take a short recess to provide the claimant time to compose himself or herself. When the ALJ goes back on the record, the ALJ will explain what behavior is disruptive. The ALJ will also explain that the claimant has the right to be present throughout the remainder of the hearing and to question witness(es), but that if the disruptive behavior continues, the claimant will be indicating that he or she waives the right to be present during the hearing and the ALJ will issue a decision on the record. If the disruptive behavior continues, the ALJ will adjourn the hearing and issue a decision on the record.

- If the disruptive behavior is threatening, alternative service policies may apply. 20 CFR 404.937, 416.1437, and 422.901 *et seq*. See applicable procedures in HALLEX I-1-9.

- If an appointed representative causes a disruption before or during hearing proceedings that significantly impacts the ALJ's ability to effectively conduct the hearing, there may be circumstances when it is appropriate for the ALJ to excuse or exclude the representative from the hearing. If the disruption occurs during the hearing, the ALJ will only excuse the representative after fully advising the representative, on the record, that the conduct is disrupting the proceedings.
- If the ALJ removes or excludes an appointed representative from the hearing, the ALJ may not question or continue to question the claimant or any other witness(es). Rather, the ALJ will explain to the claimant, on the record: the reasons the representative was removed or excluded from the hearing; note the hearing cannot continue at this time; and that the hearing will be rescheduled.
- When there is more than one party to a hearing, the ALJ will obtain testimony from all parties at one hearing whenever possible. For more information on who is a party to the hearing and what notice is required, see HALLEX I-2-1-45. See also HALLEX I-2-3-10 for issues relating to determining the manner of appearance at a hearing and handling a claimant's objections to how another person will appear at a hearing.

Four Keys to Effective Questioning and Effective Writing (OCEP 10/17/12)

PREPARE: Review the File and Identify the Issues to Be Developed at the Hearing

- Effective file review leads to a comprehensive hearing and decision.
- There are many ways to review a file but any review should focus on understanding the evidence and identifying ambiguities or inconsistencies.

LISTEN: Do Not Question By Rote from a Hearing Script

- An effective file review prepares you to recognize testimony that is ambiguous or inconsistent with documentary evidence.
- Be alert to ambiguities and inconsistencies in answers given. Fully developing these issues leads to a more complete decision.

FOLLOW-UP: Follow Where The Answers Lead. Ask Questions to Clarify New, Ambiguous or Inconsistent Evidence

- Be aware of tone; use open-ended questions; use the 5-Ws (who, what, when, where, and why) to frame questions; use techniques such as polite interruption to redirect or focus the claimant.
- Remember the authority governing hearings and decision writing (20 CFR §§404.944, 416.1444, and HALLEX I-2-6-60 to 74).

Best Questioning (OCEP 10/17/12)

"CLAIMANT TESTIMONY GUIDE" FROM NEW ALJ TRAINING MODULE 21

Questioning of Experts

- Ask the representative to stipulate to the expert's qualifications.
- Ask the vocational expert (VE) if his or her testimony is consistent with the information found in the Dictionary of Occupational Titles (DOT).

Residual Functional Capacity (RFC) and Vocational Expert (VE) Hypotheticals

Policies: Code of Federal Regulations (CFR); Social Security Rulings (SSRs); and Hearings, Appeals and Litigation Law Manual (HALLEX)

20 CFR 404.1545

- The RFC is the most you can still do despite your limitations
- All medically determinable impairments (MDIs) considered, including MDIs that are not severe, in assessing RFC; total limiting effects of all MDIs even if not severe, to determine claimant's RFC
- Consider ability to meet the physical, mental, sensory, and other requirements of work
- RFC used at Steps 4 and 5 of Sequential Evaluation Process

SSR 85-15 Titles II and XVI: Capacity to do Other Work – The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments

SSR 85-16 Titles II and XVI: RFC for Mental Impairments

SSR 00-4p Titles II and XVI: Use of Vocational Expert (VE) and Vocational Specialist (VS) Evidence, and Other Reliable Occupational Information in Disability Decisions

Before Relying on VE/VS evidence to support disability determination/decision, administrative law judges (ALJs) must:

- Identify and obtain reasonable explanation for conflicts between occupational evidence by VE/VS and information found in the Dictionary of Occupational Titles (DOT).
- Explain in Decision how the identified conflict has been resolved.

HALLEX I-2-5-48 "The VE's testimony is not binding on the ALJ. The ALJ must consider a VE's testimony along with all other evidence." (20 CFR 404.1560(b)(2), 404.1566(e), 416.960(b)(2), and 416.966(e))

HALLEX I-2-5-55 "When an administrative law judge (ALJ) obtains vocational expert (VE) testimony during a hearing, the ALJ will generally explain why the VEi is present before his or her opening statement."

HALLEX I-2-6-74 "The claimant and the representative have the right to question the VE fully on any pertinent matter within the VE's area of expertise. However, the ALJ will determine when they may exercise this right and whether questions asked or answers given are appropriate."

CALJ Memo 5/31/16 Vocational Expert Testimony – Information and Reminder

- Provides guidance on policy, best practices, and recent court trends regarding vocational expert (VE) evidence.

CALJ Memo 11/3/2017 Use of Electronic Occupational References – Update

Training

Office of Hearings Operations (OHO) Continuing Education Program (OCEP) Broadcast - 1/18/12 - Phrasing the RFC: Five Keys to RFC

OCEP Broadcast - 4/17/13 - Four Keys to Vocational Evidence

OCEP Broadcast - 4/23/14 - Four Keys to Problem RFCs

OCEP Broadcast - 1/21/15 - Four Keys to Advanced Topics in Vocational Expert Evidence

Helpful Resources/Guidance

Limitations That Do Not Significantly Erode the Occupational Base

Citing a Social Security Ruling (SSR) at Step 5

SSRs and Acquiescence Rulings (ARs) Medical Vocational Policy

Quick Reference Chart for RFCs -- See Page 10 (below) in "Legally-Sufficient Language for the Hypothetical to the VE and the RFC" Office of Appellate Operations (OAO) - Appeals Council Training

Chief ALJ Memo - 11/3/2017 - Use of Electronic Occupational References – Update

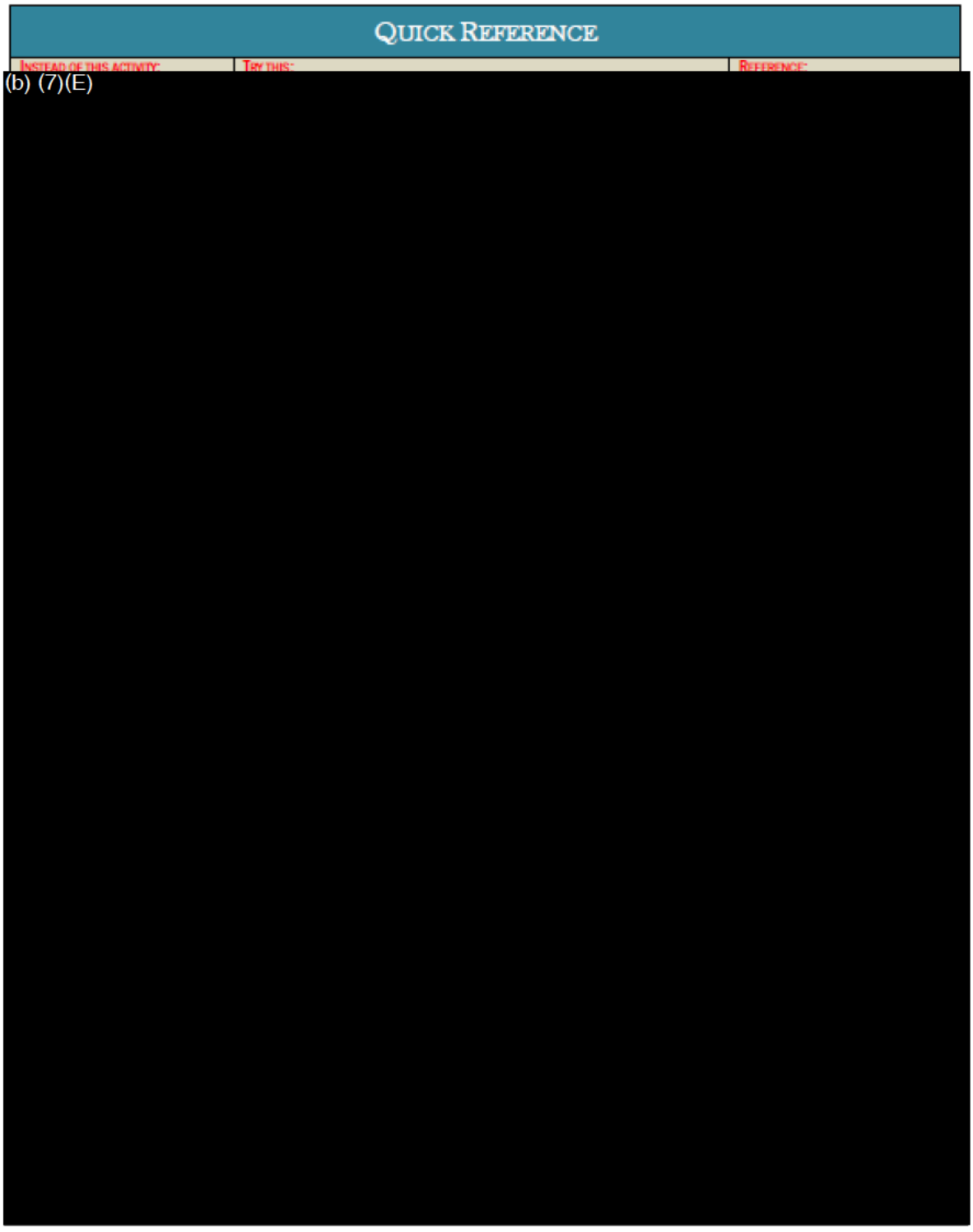
(b) (7)(E)

DOT - Appendices

Selected Characteristics of Occupations – Appendices

VE Sample Interrogatories – See DGS/CE and Evidence Request/Vocational Expert Interrogatories

Quick Reference Chart for RFCs



Transferability of Work Skills

Policies

- CFR 404.1568 and 416.968
- SSR 82-41

Guidance

- "Nine Stages of Transferability of Work Skills Analysis"
- "Transferability of Work Skills - Chart"

Transferability of Skills --Chart

	Younger Individual 18-49	Closely Approaching Advanced Age 50-54	Advanced Age 55-59	Closely Approaching Retirement Age 60-64
Sedentary				
Light				
Medium				
Heavy				

= = Transferability of skills material

= Transferability of skills material, with very little, if any, vocational adjustment

Nine Stages of Transferability of Work Skills Analysis

(CFR 404.1568, 416.968, and SSR 82-41)

STAGE 1	Determine whether transferable work skills are even required (Appendix 2, Subpart P, Regulations No. 4 and SSRs 82-63 and 85-15). If transferable skills are not required for a legally sufficient decision, the transferability of work skills analysis should be ended. If transferable work skills are required, proceed with the following analysis.
STAGE 2	The work activity from which the "skills" were acquired must meet the three-part "past relevant work (PRW)" test (recency, duration and substantial gainful activity) and must be semi-skilled or skilled, **not unskilled.**
STAGE 3	The specific transferable work skills (not aptitudes or traits) and the PRW (i.e., not hobbies, life experiences, etc.) from which the skills were acquired must be identified**.**
STAGE 4	The occupations to which the work skills are transferable must be semi-skilled or skilled, **not unskilled.**
STAGE 5	The specific occupations to which the work skills are transferable must be identified.
STAGE 6	The occupations to which the work skills are transferable must be within the claimant's residual functional capacity (RFC).
STAGE 7	The occupations to which the work skills are transferable must require the transferable work skills, but no additional work skills.
STAGE 8	If the claimant is age 55 or older (advanced age) and limited to sedentary work, or age 60 or older (close to retirement age) and limited to light or sedentary work, for the work skills to be transferable there must be a "very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry" (Sections 201.00(f) & 202.00(f), Appendix 2, Subpart P, Regulations No. 4).
STAGE 9	The decision must include rationale and "Finding" for each stage of the above analysis as appropriate.

Use of Medical and Vocational Experts

- **Medical Experts (MEs) – General:** Hearings, Appeals, and Litigational Law Manual (HALLEX) I-2-5-32
    - MEs are physicians, mental health professionals, and other medical professionals who provide impartial expert opinions at the hearing level on claims under Title II and Title XVI of the Social Security Act (Act).
    - Primary Use: MEs help administrative law judges (ALJs) evaluate medical evidence in a case.

- **Vocational Experts (VEs) – General:** HALLEX I-2-5-48
    - VEs are vocational professionals who provide impartial expert testimony during the hearing process on claims under Title II and Title XVI of the Act.
    - Primary Use: VEs help ALJs evaluate vocational issues at Step 4 and Step 5.

- **Regulatory Authority for Use of MEs and VEs:**
    - 20 CFR 404.936(c)(2) – The ALJ will determine whether a ME or a VE will appear at the hearing.
    - 20 CFR 404.1566(e) - VE – We will decide whether to use a VE or other specialist.

- **Manner of Appearance -** 20 CFR 404.936(c)(2) -- MEs and VEs may appear at the hearing in person, by video teleconferencing, or by telephone.

- **When Use of an ME and/or VE Is Not Necessary:**

  MEs - SSR 17-2p: ME is not needed at Step 3 if a finding of no medical equivalence is made.

  VEs - Step 5: 20 CFR 404.1569 and 20 CFR 404.1569(a)(b) – When the claimant's impairment(s) and related symptoms only impose exertional limitations and his/her specific vocational preparation (SVP) is listed in the Medical-Vocational Guidelines, we will directly apply that rule to decide whether the claimant is disabled.

- **When May You Use an ME and/or VE:**

  MEs:
    - 20 CFR 404.1529(b) and SSR 16-3p Title II and XVI: Evaluation of Symptoms in Disability Claims.
    - Step 2 – The ALJ may ask for and consider opinion of a medical or psychological expert concerning whether the claimant's impairments could reasonably be expected to produce his/her alleged symptoms.

- Step 3 – To assist in determining whether a claimant's impairment(s) meets a listed impairment(s).
- See HALLEX I-2-5-34 for a list of other situations when an ME may be necessary.

VEs

- Step 4: 20 CFR 404.1560
- The ALJ may use the services of a vocational expert to classify the claimant's past relevant work (PRW). (Please note however that only the ALJ can determine which past work constitute PRW.)
- The ALJ may use the services of a VE to assist in determining whether the claimant could perform his/her PRW as actually performed or generally performed in the national economy.

- **When Must/Should You Use an ME and/or VE:**

MEs

- HALLEX I-2-5-34 – ALJ must use ME if ordered by Appeals Council (AC) or court.
- HALLEX I-2-5-34 – ALJ must use an ME when there is a question about accuracy of reported medical test results requiring evaluation of background test data.
- SSR 17-2p Title II and XVI: Evidence Needed by Adjudicators at the Hearings and Appeals Council Levels of Administrative Review Process to Make Findings about Medical Equivalence.
- Step 3: An ME must be used to support a finding of medical equivalence at the hearing level (unless there was as prior administrative medical finding from an MC/PC from the initial or reconsideration adjudication levels supporting the medical equivalence finding, or report from the AC's medical support staff supporting the medical equivalence finding).

VEs

- HALLEX I-2-5-50 -- An ALJ must use a VE when directed by the AC or a court.
- An ALJ must obtain a VE in the Third Circuit and Eighth Circuit under AR 01-1(3) and AR 14-1(8), respectively.
- Step 5: 20 CFR 404.1569 and 20 CFR 404.1569a
- Consider using a VE when claimant has nonexertional limitations (unless, considering only the exertional limitations and vocational profile, the claimant would be considered disabled under GRID rules).
- Transferability at Step 5: 20 CFR 404.1568, 20 CFR 404.1566e, and SSR 82-41: Title II and XVI: Work Skills and Their Transferability -- When an analysis of transferability of skills is required, consider using a vocational expert to assist in determining whether the claimant has any transferable skills from his/her PRW (See Nine Stages of Transferability of Work Skills Analysis).

- **When to Use a ME and VE during the Hearing Process**
  - HALLEX I-2-5-48 – The ALJ may use a VE before, during, or after the hearing.
  - Pre-Hearing – A ME and VE may be used before a hearing to resolve issues that could lead to an on-the-record (OTR) finding of disability.
  - Interrogatories may be sent to MEs or VEs pre-hearing.
  - HALLEX I-2-5-94: Sample Interrogatories to VEs
  - HALLEX I-2-5-29: Pre-hearing proffering may be necessary.

- **Manner of Appearance at a Hearing** (20 CFR 404.936 and HALLEX I-2-5-32) -- In person, by video, or by telephone

- **Resources Relevant the MEs and VEs**
  - HALLEX I-2-6-70: Testimony of a Medical Expert
  - HALLEX I-2-5-93: Sample Questions for the Medical Expert
  - Office of Hearings Operations (OHO) Continuing Education Program (OCEP) Broadcast - (04/17/2013): The Four Keys to Vocational Evidence
  - Examinations of the VE is limited to pertinent questions on material issues; the ALJ should determine the appropriateness of questions asked.
  - The VE's estimate on the number of jobs nationally generally suffices; with rare exceptions, the number of jobs regionally is not necessary.
  - Address conflicts with the Dictionary of Occupational Titles (DOT) (Social Security Ruling (SSR) 00-4p) -- Do not assess transferability of skills unless necessary (usually, transferability of skills is not an issue).
  - OCEP (01/21/2015): The Four Keys to Advanced VE Evidence
  - Do not permit the VE to answer improperly posed questions.
  - VE should be limited to vocationally relevant evidence.
  - ALJs must control the conduct of the hearing and rule on objections and subpoena requests.
  - The ALJ decides whether other work exists in significant numbers.

- **Post-Hearing** – A ME and VE may be used after a hearing.
  - HALLEX I-2-5-42 and HALLEX I-2-5-56 – Post-hearing interrogatories may be sent to MEs and VEs.
  - Reason for need of an ME post-hearing -- Evidence submitted indicates new issues which require assistance from an ME.
  - Reasons for need of a VE post-hearing:
    - Claimant may establish the existence of another severe impairment.
    - Evidence submitted indicates that the claimant's functional limitations differ from the hypothetical questions presented to the VE at the hearing.
  - HALLEX I-2-5-44 – Actions when ALJ receives medical expert's responses to interrogatories

- HALLEX I-2-7-1 – Proffer responses from such interrogatories unless a fully favorable decision can be issued

- **Special Considerations**
  - **SSR 00-4p** Titles II and XVI: Use of Vocational Expert (VE) and Vocational Specialist (VS) Evidence, and Other Reliable Occupational Information in Disability Decisions
  - Before Relying on VE/VS evidence to support disability determination/decision, the ALJs must complete the following tasks:
    - Identify and obtain reasonable explanation for conflicts between occupational evidence by VE and information found in the DOT.
    - Explain in decision how the identified conflict has been resolved.

- **Dealing with Objections to the VEs**
  - Quick Reference Guide - Addressing Objections To VE Testimony
  - HALLEX I-2-6-74 Testimony of a Vocational Expert "The ALJ may address objection(s) on the record during the hearing, in narrative form as a parate exhibit, or in the body of his or her decision"

- **Guidance and Training Resources for MEs and VEs**
  - **Chief ALJ Memo (CALJ) - 5/31/16: VE Testimony – Information and Reminder:** Provides guidance on policy, best practices, and recent court trends regarding vocational expert (VE) evidence.
  - **CALJ Memo - 11/3/2017 - Use of Electronic Occupational References – UPDATE**
  - **OCEP Broadcast - 4/17/13: Four Keys to Vocational Evidence**
  - **OCEP Broadcast - 1/21/15: Four Keys to Advanced Topics in VE Evidence**

Evaluating Medical Evidence – Overview and Relevant Dates

New Approach to Evaluating Medical Evidence:
The Agency revised the rules on evaluation of medical evidence, effective March 27, 2017. The revisions redefined several key terms related to evidence, revised rules about acceptable medical sources (AMS); revised how the Agency considers and articulates consideration of medical opinions and prior administrative medical findings; revised rules about medical consultants (MC) and psychological consultants (PC); revised rules about treating sources; and reorganized the evidence regulations for ease of use.

- The five new categories of evidence are objective medical evidence, medical opinion, other medical evidence, evidence from nonmedical sources, and prior administrative medical finding.

- For claims filed on or after March 27, 2017, a medical opinion for an adult is defined as a statement from a medical source about what an individual can still do despite his or her impairments, whether the individual has one or more impairment-related limitations or restrictions in one or more specified demands of work, and his or her ability to adapt to environmental conditions.

- For claims filed on or after March 27, 2017, AMSs includes advanced practice registered nurses (APRN) for impairments within their licensed scope of practice, including certified nurse midwives, nurse practitioners, certified registered nurse anesthetists, and clinical nurse specialists; physician assistants (PAs); and audiologists.

- Both the prior rules and the revised rules require an adjudicator to consider all evidence in a claim, including decisions by other governmental agencies and nongovernmental entities. See 20 CFR 404.1520b and 416.920b. For claims filed on or after March 27, 2017, though written analysis is not required on decisions by other governmental and nongovernmental entities, we must always consider all of the supporting evidence underlying the other agency or entity's decision that we receive in a claim. The underlying evidence may require a written analysis (See 20 CFR 404.1504 and 416.904 noting that ". . .we will not provide any analysis in our determination or decision about a decision made by any other governmental agency or a nongovernmental entity about whether you are disabled, blind, employable, or entitled to any benefits.").

- In claim(s) filed on or after March 27, 2017, do not defer to or give specific weight to any medical opinion or prior administrative medical finding. Articulate the persuasiveness of the opinions or prior administrative medical findings by considering supportability, consistency, relationship with the claimant, specialization, and other factors. The most important factors are supportability and consistently, and we must provide articulation on these factors for every medical opinion in all decisions.

Topic	"Prior Rule" Citation Regulations that apply to claims filed prior to March 27, 2017	"Current Rule" Citation Regulations that apply to cases filed on or after March 27, 2017.
Acceptable Medical Sources (AMS)	20 CFR 404.1502(a)(1)-(5) and 416.902(a)(1)-(5)	20 CFR 404.1502(a)(1)-(8) and 416.902(a)(1)-(8)
Medical Opinion Definition	20 CFR 404.1527(a)(1) and 416.927(a)(1)	20 CFR 404.1513(a)(2) and 416.913(a)(2)
Other Medical Evidence Definition	20 CFR 404.1513(a)(3) and 416.913(a)(3)	20 CFR 404.1513(a)(3) and 416.913(a)(3)
Consideration and Articulation of Opinion Evidence and Prior Administrative Medical Findings	20 CFR 404.1513a, 404.1527, 416.913a and 416.927	20 CFR 404.1513a, 404.1520c, 416.913a, and 416.920c
Statements on Issues Reserved to the Commissioner	20 CFR 404.1527(d) and 416.927(d)	20 CFR 1520b(c)(3) and 416.920b(c)(3)
Decisions by other Governmental and Nongovernmental Entities	20 CFR 404.1504 and 416.904	20 CFR 404.1504, 404.1520b(c)(1), 416.904, and 416.920b(c)(1)

Resources:

- Chief Judge Resources: Revisions to Rules Regarding the Evaluation of Medical Evidence
- Chief Judge Memo - Revised Rules for Evaluating Medical Evidence
- ALJ/DW Training Course Module 8: Evaluation of Medical Opinion Evidence
- Judicial Training 2017 Session on Evaluation of Medical Evidence

Childhood Disability Claims

Social Security Insurance (SSI) Childhood Disability Three Step Process (20 CFR 416.924):

Step 1: Is the child engaged in substantial gainful activity (SGA)? If so, the child is not disabled.

Step 2: Is there a severe impairment(s)? Severe means the impairment must cause more than minimal functional limitations.

Step 3: Do the impairments satisfy the one-year durational requirement and meet, equal, or functionally equal the Listing of Impairments?

Meeting a Listing and Medical Equivalency (20 CFR 416.925 and 416.926):

- Consider Part B of the listings first. If the Part B criteria do not apply, then you may use Part A, if appropriate.
- Medical Expert evidence is required to find that an impairment equals a listing.

Functional Equivalence and Whole Child Approach (20 CFR 416.926a and SSR 09-01p):

- **Whole Child Approach (SSR 09-01p):**
  First, consider the child's functioning without considering the domains or individual impairments. This assessment includes everything done at home, in school or in the community. Consider how the child functions compared to other children of the same age who do not have impairments. Next, determine which domains are involved in those activities.

- **Functional Domains:**
  - Acquiring and Using Information (SSR 09-03p)
  - Attending and Completing Tasks (SSR 09-04p)
  - Interacting and Relating with Others (SSR 09-05p)
  - Moving About and Manipulating Objects (SSR 09-06p)
  - Caring for Yourself (SSR 09-07p)
  - Health and Physical Well-Being (SSR 09-08p)

Functional Equivalence -- "Marked" limitations in at least two functional domains or an "Extreme" limitation in one functional domain (20 CFR 416.926a(d-e)):

- **Marked Limitation:**
  - Marked means the impairments interfere "seriously" with the ability to independently initiate, sustain, or complete activities.

- Marked also means a limitation that is “more than moderate” but “less than extreme.”
- Marked is the equivalent of functioning that we would expect to find on standardized testing with scores of at least two, but less than three, standard deviations below the mean.

- **Extreme Limitation:**
  - Extreme means the impairments interfere “very seriously” with the ability to independently initiate, sustain, or complete activities.
  - Extreme also means a limitation that is “more than marked.”
  - The equivalent of functioning we would expect to find on standardized test scores of at least three standard deviations below mean.

Five Age Groups for Evaluating Childhood Disability (20 CFR 416.926a(g) through (l)):

- Newborns and Infants (birth to attainment of age 1)
- Older Infants and Toddlers (age 1 to attainment of age 3)
- Preschool Children (age 3 to attainment of age 6)
- School-Age Children (age 6 to attainment of age 12)
- Adolescents (Age 12 to attainment of age 18)

Standardized Tests - Testing Commonly Used in Assessing Child Functioning: Standardized Tests for Evaluating Child Disability chart in Office of Hearings Operations (OHO) Continuing Education Program (OCEP) materials

Resources and Forms:

- Supplemental Administrative Law Judge (ALJ) Training Notebook (page 304)
- OCEP Broadcast on Child Disability from January 2014
- Four Keys to Child Disability
- Adjudication Tip #21
- New ALJ Module 17
- Appeals Council Feedback Training
- Decision Writer Instructions (DWI) for Child Cases
- Childhood Disability Evaluation form SSA-538-F6
- Social Security Insurance (SSI) Child Teacher Questionnaire forms SSA-5665-BK and SSA-5666-BK

Drug Addiction & Alcohol Cases (DAA)

Analyzing DAA Cases:

1. **DAA must be a medically determinable severe impairment for DAA analysis to be relevant**
    a. **Must be diagnosed by an acceptable medial resource** - A reference in the records to drug and/or alcohol use is not enough to establish it as a severe impairment.
    b. **Substance abuse disorder is no longer considered a mental impairment** under the revised mental listings.
    c. **DAA disorder severity** -- Information from "other" sources may be helpful in documenting the severity of DAA because it supplements the medical evidence of record.
        i. Opinions from "other" sources can assist in evaluating whether DAA is material to a finding of disability because it can document how well the claimant performs activities of daily living in the presence of a comorbid impairment.
        ii. Often, evidence from "other" sources may be the most important information in the case record for these documentation issues.

2. **If DAA Disorder diagnosis?** Is the claimant disabled, considering *ALL* impairments?
    a. NO (not disabled) - DAA is not material and no analysis required.
    b. YES (disabled)- DAA may be material, and DAA analysis required.
        i. **Considering *ALL* impairments except DAA disorder -** Apply the sequential evaluation.
            1. Is claimant still disabled?
                a. YES - DAA is not material.
                b. NO - DAA is material.
        ii. **Burden of Proof** - The claimant has the burden of proving disability throughout the DAA materiality analysis.

DA&A Points to Remember:

- **Consider the relevance of DAA** if you find it to be a severe impairment.
- **Cite to specific evidence** in the record to support a finding that DAA is material/not material. If you find DAA material, there must be evidence in the record showing that, if the claimant stopped drinking/taking drugs, his condition would improve to the point that he would not be disabled.
- **For DAA Material finding, your decision must reflect** the following information:
    - The **step in the sequential evaluation** where the claimant is **found disabled**; and
    - The **step in the sequential evaluation** where the claimant is **found not disabled** if the claimant stopped using drugs or alcohol.

- **Specifically, explain "B" Criteria ratings.**
- **DAA analysis** – Focus on if the claimant would be disabled even if the claimant stopped using drugs or alcohol (not whether claimant disabled while using DAA).
- A finding that claimant **is disabled during a period of abstinence is inconsistent** with a finding that DAA is material.
- **If DAA is the only severe impairment and claimant is disabled? DAA is material.**
- **In redetermination cases**, DAA is adjudicated in the same manner as an initial case, since the appeal of the termination is treated as a new application for benefits.

Resources:

- 20 C.F.R. §§ 404.1535 and 416.935
- Social Security Ruling (SSR) 13-2p: *Titles II and XVI: Evaluating Cases Involving Drug Addiction and Alcoholism (DAA)*
- Appeals Council Feedback Training - Drug Addiction and Alcoholism
- New Administrative Law Judge (ALJ)/Decision Writer (DW) Training Module 14 ("DA and A")
- Office of Hearings Operations (OHO) Continuing Education Program (OCEP) 7/16/14: DAA - *Drug Addiction and Alcoholism (DAA) (VOD)*
- *OCEP 4 Keys to DAA*
- Disability Analysis Flow Chart: DA&A Evaluation Process Flow Chart

The Four Keys to DAA

You must determine if DAA is a medically determinable severe impairment.

- Evidence of drug or alcohol use alone does not establish DAA as a medically determinable severe impairment. Evidence from an acceptable medical source is necessary.
- DAA is a "substance use disorder" defined as a "maladaptive pattern of substance use that leads to clinically significant impairment or distress."

If you find the claimant disabled considering all impairments, including DAA, use the six-step evaluation process under SSR 13-2p to determine if DAA is material.

- If the claimant <u>is not</u> disabled considering all impairments, including DAA, your evaluation is finished. DAA materiality is not an issue.
- If the claimant <u>is</u> disabled considering all impairments, including DAA, you must conduct a second sequential evaluation considering all impairments <u>except</u> DAA to determine if DAA is material.
- The claimant has the burden of proving disability throughout the sequential evaluation process.

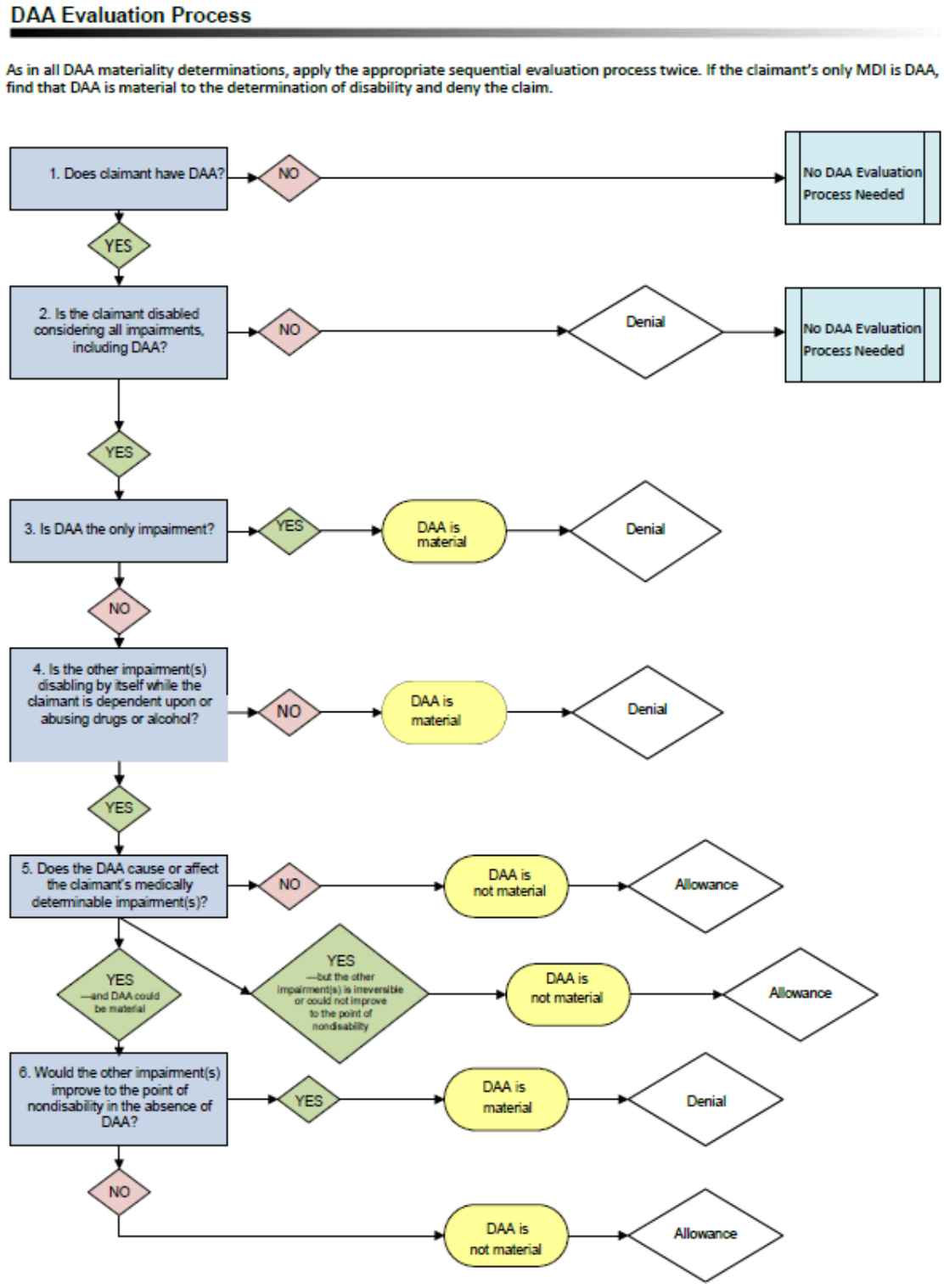
Recognize and avoid common DAA errors.

- Failure to cite specific evidence to support a finding that DAA is material to the finding of disability;
- Failure to explain the "B" criteria findings;
- Finding the claimant disabled only during a period of abstinence; and,
- Failure to evaluate DAA when it is a severe impairment.

Decision instructions and drafts must identify specific evidence showing whether DAA is material.

- A statement in the decision that DAA is, or is not, material to the determination is insufficient. The decision must cite evidence in support of this finding.

DAA Evaluation Process – Flow Chart



Efficient Drafting/Editing Techniques

POST Hearing Draft Instructions -- When and What to Include?

- Instructions to Decision Writers (Hearings, Appeals, and Litigation Law Manual (HALLEX) I-2-8-20)
- Chief Judge Memo: Expectations for Instructions to Decision Writers – Clarification June 7 2016
- Chief Judge Memo: Expectations for Instructions to Decision Writers July 10, 2013
- Using available resources: Decision Writer Instructions (DWI)/Hearing and Appeals Case Process System (HACPS), FIT, FIT Enhanced

Fully Favorable Decisions/Dismissals -- Who writes? What is the Focus?

- Decision Writing Policy Guidance Part I: Fully Favorable Decisions – INFORMATION AND REMINDER
- Regular and Updated Fully Favorable – Comparison Chart
- SAMPLE Updated Fully Favorable Decision
- Fully Favorable Training Presentation

Draft Expectations, Approach to Edit Reviews, Legally Sufficient Decisions

- HALLEX 1-2-8-25: Writing the Decision
- The Good Decision Writing document from Office of Hearings Operations (OHO) Continuing Education Program (OCEP)

Bench Decisions – When and How?

- Bench Decision HALLEX I-2-8-19; 20 CFR 404.953(b) and 416.1453(b)
- FIT Bench Decision form (Document Generation System (DGS))

Reopening Refresher

Administrative Finality:

- An administrative law judge (ALJ) may only reopen a prior determination or decision that is administratively final.
- If the decision in a prior application is pending appeal at the Appeals Council (AC) or federal court, the decision is not administratively final. The ALJ cannot reopen.
- If the AC issued a decision on a prior application, the AC decision becomes the final decision of the Commissioner. The ALJ cannot reopen it. The first possible date of disability on a subsequent application is the day after the AC decision. 20 CFR 404.987 and 416.1487
- A denial of a request for review by the AC is not a final decision of the Commissioner, and "Reopening Timeframes" (below) apply.

Reopening Timeframes:

You may reopen a determination, revised determination, decision, or revised decision:

- Within 12 months of the date of notice of the initial determination, for any reason. Reopening within 12 months is not automatic. There must be a reason.
- Within 2 years of the date of notice of the initial determination in Title XVI and within 4 years of the date of notice of the initial determination in Title II claims, for good cause.
- At any time, for fraud or similar fault, or to correct error on the face of the evidence in a prior unfavorable determination or decision. 20 CFR 404.988 and 416.1488

Exception - Social Security Ruling (SSR) 91-5p: If mental incapacity prevented a timely request for review of the prior adverse determination or decision, you may reopen no matter how much time has passed. Consider these factors, as they existed at the time of the prior administrative action:

- Inability to read or write
- Lack of facility with the English language
- Limited education
- Any mental or physical condition that limits the claimant's ability to do things for himself or herself

Types of Reopening: Implied or Express, and ALJ-Initiated Requests - 20 CFR 404.987, 404.988, 416.1487, and 416.1488; HALLEX I-2-9-10, HALLEX I-2-9-30, HALLEX I-2-9-40, and HALLEX I-2-9-60

- An implied request for reopening usually occurs when a claimant alleges an onset date that falls within the period adjudicated in a prior application; or after the ALJ issues a decision, the claimant sends the ALJ new and material evidence that relates to the earlier period at issue.
- An express request for reopening occurs when a claimant or representative asks the ALJ to reopen a determination or decision issued in a prior application.
- On own initiative, an ALJ may reopen a determination or decision issued in a prior application when the the conditions and timeframes for reopening are met, the ALJ has jurisdiction over the issues, and the facts and evidence of the particular case warrant reopening.

Calculations:
Calculate the time for reopening from the initial notice date of the determination or decision you seek to reopen as follows:

- For implied requests to reopen – to the date of the current application.
- For expressed requests to reopen – to the date of the request to Reopen.
- For ALJ initiated reopening – to the date the ALJ identified the reopening issue. HALLEX I-2-9-20.

Good Cause:
Reopening on the basis of good cause exists if:

- New and material evidence is furnished;
- A clerical error in the computation or re-computation of benefits was made; or
- The evidence considered in making the prior determination or decision clearly shows error on its face. 20 CFR 404.989 and 416.1489. HALLEX I-2-9-40

New and Material:
HALLEX I-2-9-40 provides information about the new and material evidence requirements. In general, "new" means the adjudicator, who made the prior determination, did not consider it. "Material" means the evidence, alone or in combination with other evidence, "would have resulted in a different conclusion as to eligibility, entitlement, or benefit amount…."

- If a claimant has two or more prior applications, an ALJ may not use the most recently denied application as a "stepping stone" to reach and reopen an even earlier application. (No "leap frogging" as it is commonly called.)
- An ALJ may find a claimant to be disabled within a previously adjudicated period without reopening the determination or decision issued in the prior application.

Reopening Exercises

(b) (7)(E)

(b) (7)(E)

Post Hearing Development

Post Hearing Medical Evidence of Record: The Program Uniformity (Five Day) Rule includes direction on the submission and admission of post hearing evidence.

- Code of Federal Regulations (CFR) - 20 CFR 404.935(b) and 416.1435(b).
- Hearings, Appeals, and Litigation Law Manual (HALLEX) I-2-7-20. Claimant Requests Additional Time to Submit Evidence After the Hearing.
- Exceptions - 20 CFR 416.1435(c). (Title XVI – age 18 redeterminations, CDR, terminations)
- Video on Demand (VOD) – Ensuring Program Uniformity.

Expert Interrogatories: HALLEX I-2-5-30 - Medical or Vocational Expert Opinion

Medical Experts:

- HALLEX I-2-5-42. Obtaining Medical Expert Opinion Through Interrogatories.
- HALLEX I-2-5-44. Action When Administrative Law Judge (ALJ) Receives Medical Expert (ME) Responses to Interrogatories. This provision includes the requirement to proffer to the claimant and representative as well as instructions if additional evidence is received after receipt of a response to interrogatories.
- Sample interrogatories (physical) and cover letter.

Vocational Experts:

- HALLEX I-2-5-56. Obtaining Vocational Expert (VE) Testimony After the Hearing. Additional testimony post hearing can be obtained by supplemental hearing or interrogatories.
- HALLEX I-2-5-57. Obtaining VE Testimony Through Interrogatories.
- HALLEX I-2-5-58. Action When ALJ Receives VE Responses to Interrogatories.
- HALLEX I-2-5-60. Action When ALJ Receives New Evidence After a VE Has Provided Testimony.
- Social Security Ruling (SSR) 00-4p Titles II and XVI: Use of VE and Vocational Specialist (VS) Evidence, and Other Reliable Occupational Information in Disability Decisions – Direction to identify or address possible conflicts in the record
- Sample interrogatories and cover letter.

Proffer

- HALLEX I-2-7-1. Posthearing Evidence – When Proffer is Required.
- HALLEX I-2-5-29. Prehearing Proffer of Evidence. An ALJ must always proffer interrogatory responses from either a ME or VE. Therefore, proffer is required even if interrogatory responses are obtained prehearing.
- Sample proffer letter. A supplemental hearing is not required unless the evidence is opinion evidence or has significant impact on the outcome. (Note: Some offices may send an old and incorrect letter.)

Continuing Disability Reviews (CDRs)

Overview – General (20 CFR 404.1594 and 416.994)

- There are two types of CDRs: Adult CDRs and Disabled Child CDRs.
- Most disability insurance or supplemental security income claims are reviewed periodically, anywhere from after 6 months to 7 years, to ensure that a person's disability continues.
- CDR procedure -- After an initial cessation determination, the person has a right to file a Request for Reconsideration and meet in person with a **Disability Hearing Officer** (DHO), who will either reverse or affirm the initial determination.
    - If the DHO affirms the cessation, the person can request a hearing on the affirmation.
    - The DHO's report of the meeting, including the findings and conclusions, will be in the eFolder for review.

Adult CDRs

There are eight steps in the sequential CDR process, all of which may or may not be followed, depending on the case. The first two steps may be dispositive.

- **Step One (Title II only) – Is the individual engaged in substantial gainful activity (SGA)?** (20 CFR 404.1594(f)(1))
    - Step 1 applies only to Title II cases.
    - The first dispositive step in a Title II cessation.
    - If the individual is engaged in SGA, then disability ends.

- **Step Two – At the time of the cessation determination, do the CURRENT impairments meet or medically equal a CURRENT Listing of Impairments?** (20 CFR 404.1594(f)(2), 20 CFR 416.994(b)(5)(i))
    - This step is the second potentially dispositive step in a Title II cessation.
    - This step is the first potentially dispositive step in a Title XVI cessation.
    - If the answer is yes, disability continues.

- **Step Three – Has there been medical improvement since the "Comparison Point Decision (CPD)" or most recent favorable determination/decision?** (20 CFR 404.1594(f)(3), 20 CFR 416.994(b)(5)(ii))
    - If the person's current impairments do not meet or medically equal a current listing, apply the "medical improvement review standard" (MIRS) to determine if the person's condition has "medically improved" since the CPD or the date of the most recent favorable medical determination that the person is disabled.
    - Medical improvement is any decrease in medical severity of an individual's impairment(s) that was present at the time of the most recent favorable medical decision.

- **Step Four** – **Does the medical improvement relate to the person's ability to work? Has there been an increase in the person's ability to do basic work-related function?** (20 CFR 404.1594(f)(4), 20 CFR 416.994(b)(5)(iii))

- **Step Five** – **Does a Group I or Group II exception to medical improvement apply?** (20 CFR 404.1594(f)(5), 20 CFR 416.994(b)(5)(iv)
    - If the person has **NOT** medically improved since the CPD, or the person has medically improved but this improvement is not related to the ability to work, determine whether a Group I or Group II exception applies.
      Group I Exceptions:
        - The person is the beneficiary of advances in medical or vocational therapy or technology, which are related to the ability to work;
        - The person has undergone vocational therapy related to the ability to work;
        - New or improved diagnostic or evaluation techniques show the person's impairments are not disabling as thought at the CPD; and
        - The prior determination or decision was in error.
    - If a Group I exception applies, the sequential disability cessation process will continue at Step 6.
      Group II Exceptions:
        - Fraud;
        - Failure to cooperate;
        - Person cannot be located (whereabouts unknown); and
        - Failure to follow prescribed treatment that would be expected to restore the ability to engage in SGA.
    - If a Group II exception applies, the person's disability will end.
    - If NEITHER exception applies, the person's disability will continue.

- **Step Six** – **Does the claimant have a severe impairment?** Consider **ALL** the claimant's impairments, not just those as of the CPD, to determine whether the person has a severe impairment(s) (20 CFR 404.1594(f)(6), 20 CFR 416.994(b)(5)(v)).

- **Step Seven** – **Can the person perform past relevant work (PRW)?** Determine the person's current residual functional capacity (RFC), and whether the person can perform PRW (20 CFR 404.1594(f)(7), 20 CFR 416.994(b)(5)(vi)).

- **Step Eight** – **Can the person perform other work?** Determine whether the person can perform other work in the national economy (20 CFR 404.1594(f)(8), 20 CFR 416.994(b)(5)(vii)).

Disabled Child CDRs

General – A disabled child CDR is a three-step sequential evaluation process.

- **Step One** – **Has there been medical improvement in any CPD impairment?** (20 CFR 416.994a(b)(1))
    - If there has been no medical improvement in any CPD impairment, consider whether a Group I or Group II exception applies.
    - **Group I Exceptions** (20 CFR 416.994a(e)):
        - New or improved diagnostic or evaluative techniques show the child's impairments are not as disabling as thought at the CPD; and
        - The prior determination or decision was in error.
    - If one of the Group I exceptions applies, use the same evaluation steps in an initial claim for disability to determine whether the child is currently disabled.
    - **Group II Exceptions** (20 CFR 416.994a(f)):
        - Fraud;
        - Failure to cooperate;
        - Person cannot be located (whereabouts unknown); and
        - Failure to follow prescribed treatment that would be expected to restore the ability to engage in SGA.
    - If one of the Group II exceptions applies, disability must end. (20 CFR 416.994a(b)(1)(i), (ii))

- **Step Two** – **Do the CPD impairment(s) CURRENTLY meet, equal, or functionally equal the severity of a CPD listing?** (20 CFR 416.994a(b)(2)(i), (ii))
    - Determine whether the child's CPD impairments **CURRENTLY** meet, medically equal, or functionally equal the severity of the listing that they met, medically equaled, or functionally equaled before.
    - Consider the listing in effect at the time of the CPD, even if that listing has been revised or removed.
    - Use the child's age at the time of your decision.
    - If the child's CPD impairments still meet, medically equal, or functionally equal the CPD listing, consider whether Group I or Group II exceptions apply.
        - If a Group I exception applies, use the same evaluation in an initial claim for disability to determine whether the child is currently disabled.
        - If a Group II exception to medical improvement applies, disability must end.

- **Step Three** – **Is the child currently disabled, considering all the impairments?**
    - Determine whether the child is currently disabled considering all of the impairments and using the same evaluation steps in an initial claim for disability (20 CFR 416.994a(b)(3)(i)-(iii))

- Are the child's current impairments severe?
- Do the child's current impairments meet or medically equal the current Listings?
- Do the child's current impairments functionally equal the Listing?

CDR Challenges

- **Prior file missing** (20 CFR 404.1594(c)(3)(v); 416.994b(2)(iv)(E); HALLEX I-2-1-12)
  - If the person CAN engage in SGA currently, reconstruct those portions of the missing file relevant to the most recent favorable disability decision.
  - There is no need to reconstruct file if the person cannot engage in SGA and no Group II exception applies. Benefits continue in such a situation.

- **Prior file available but RFC finding missing, not completed, or vague/unclear** (20 CFR 404.1594(c)(3)(iii), 416.944b(2)(iv)(C)).
  - If the RFC finding is missing, reconstruct the prior RFC by determining the person's maximum RFC consistent with an allowance.
  - If the RFC is not completed, or it is vague or unclear, use whatever you have in the file, MSS, e.g., or the body of the previous, favorable ALJ decision, to derive the prior RFC.
  - If the prior RFC is still unclear, decide if there is medical improvement in any element of the prior RFC.

- **Disability ended, but claimant is disabled again as of adjudication date** (Social Security Ruling (SSR) 13-3p)
  - SSR 13-3p requires us to address the cessation date and the later disability onset date in the decision.
  - For the later finding of disability, consider the person's request for hearing as the protective filing date of an application, which permits a determination through the date of the decision on appeal.
  - Articulate in your decision information about the disability cessation date, application date, and new disability current date.

Special Considerations

- Streamlining File Review – Review CDR process documents, including the DHO report, to streamline file review.
- Flowchart -- Use a flowchart to stay on track with the analysis.
- Earnings -- Look at earnings reports/other records to see if the person is engaged in SGA (only relevant for termination in Title II cases).
- Listings – Consider whether claimant meets a Listing.
- SSR 13-3p -- Make sure the decision contains SSR 13-3p appropriate language.

Writing Instructions

In your decision writing instructions, remember to identify the following:

- The CPD;
- The basis for the prior finding of disability, whether the person met/equaled a Listing or had a work-preclusive RFC;
- The evidence supporting your finding on medical improvement, whether it is related to the person's ability to work;
- Whether any of the Group I or Group II exceptions apply; and
- Whether disability continues, or, if not, the date that disability ended.

Resources

Office of Hearings (OHO) Continuing Education Program (OCEP) 10/2014 –The Three Keys to CDRs

Continuing Disability Reviews - PowerPoint Presentation

Overpayments

The [Commissioner's] practice is to make an ex parte determination... that an overpayment has been made, to notify the recipient of that determination, and then to shift to the recipient the burden of either (i) seeking reconsideration to contest the accuracy of the determination, or (ii) asking the [Commissioner] to forgive the debt and waive recovery. Califano v. Yamasaki, 442 U.S. 682 (1979).

- An overpayment occurs when a recipient receives more than the correct payment due.

- There are countless ways an overpayment occurs, but the most common overpayments occur in the following situations:
    - Estimated wage cases such as SSI deeming
    - Computation of a workers compensation, or
    - Other benefit offset or if retired, works under full retirement age or concurrent retroactive benefits.

What is the Overpayment Issue?

- **Determine what the claimant is contesting**. Assess if the claimant is:
    - Contesting the underlying overpayment,
    - Requesting waiver of overpayment,
    - or both.

- **Contesting the fact or amount of the overpayment?** Claimant may request a hearing before an administrative law judge (ALJ) for a reconsideration determination. The amount of overpayment must be determined first before waiver can be considered.

- **Requesting waiver of overpayment?** Waiver may be requested at any time, even if the overpayment has been partially or completely recovered.

Waiver of Overpayment -- Basics

An individual seeking waiver of overpayment recovery must be without fault and recovery must defeat the purpose of the Act or be against equity and good conscience.

Was the Claimant At Fault in Receiving the Overpayment?

- Waiver of recovery cannot be granted if the claimant was at fault in causing or accepting the overpayment.

- Consider all pertinent circumstances, including the age, intelligence, and any physical, mental, educational or linguistic limitation of the individual.

Fault is defined at 20 CFR 404.507 and 416.552. Did the overpaid individual:

- Make an incorrect statement which he knew or should have known was incorrect;
- Fail to provide information that he knew or should have known was material; or,
- Accept a payment that he knew or could have been expected to know was incorrect?

For Fault, you must determine whether the claimant caused the Overpayment. Did the claimant:

- Understand what caused the overpayment;
- Understand the reporting requirements;
- Attempt to comply with the reporting requirements;
- Previously receive an overpayment;
- Claim to have received misinformation from the Agency.

If NOT at Fault, you must consider whether recovery would (either):

1) "**Defeat the Purpose**" -- To deprive the individual of ordinary and necessary living expenses. In essence, requires an examination of finances.

   If the individual needs substantially all current income (i.e. government benefits, wages board and pension and investment income), including monthly social security benefits, to meet current ordinary and necessary living expenses, recovery defeats the purpose. Consider living expenses, such as food and clothing, rent, mortgage payments, insurance, taxes, medial, hospital expense. Consider all current household income, resources and expenses in making this determination.

2) **"Be Against Equity and Good Conscience"** – Issue does not involve financial considerations; it invokes principles of equitable estoppel.

This concept generally applies when an individual detrimentally relied upon the payments and spent the money believing that the payments were correct (i.e., A widow uses monthly widow's benefits to enroll her child in a private school. She learns a year later that the payments were incorrect and resulted in an overpayment). The regulations at 20 CFR 404.509 and 416.554 provide additional examples of recovery that are against equity and good conscience.

What Should Overpayment File Contain? The file should contain the following information:

- eNon-Disability Summary Sheet (eNDSS)
- Non-Disability Appeal Report (NDAR), and

- The following exhibits:
    - A completed SSA -632 “Request for Waiver of Overpayment Recovery or Change in Repayment rate” (in waiver cases)
    - A notice of determination following the personal conference (reconsideration determination)
    - Overpayment Tracking Sheet
    - The Request for Hearing

Overpayment Resources

- OCEP - Overpayments (July 2013)
- Development in Hearing Cases by the Field Office
- Overpayments Desk Guide – Supplemental ALJ Training Notebook, pp. 322-323
- Hearing Level Electronic Business Process (eBP) provides instructions for processing non-disability case (eBP section 1.4 (C)(5))
- Forwarding the Form HA-501-U5 (Request for Hearing by Administrative Law Judge) and Folder to the Servicing Hearing Office. POMS GN 03103.080

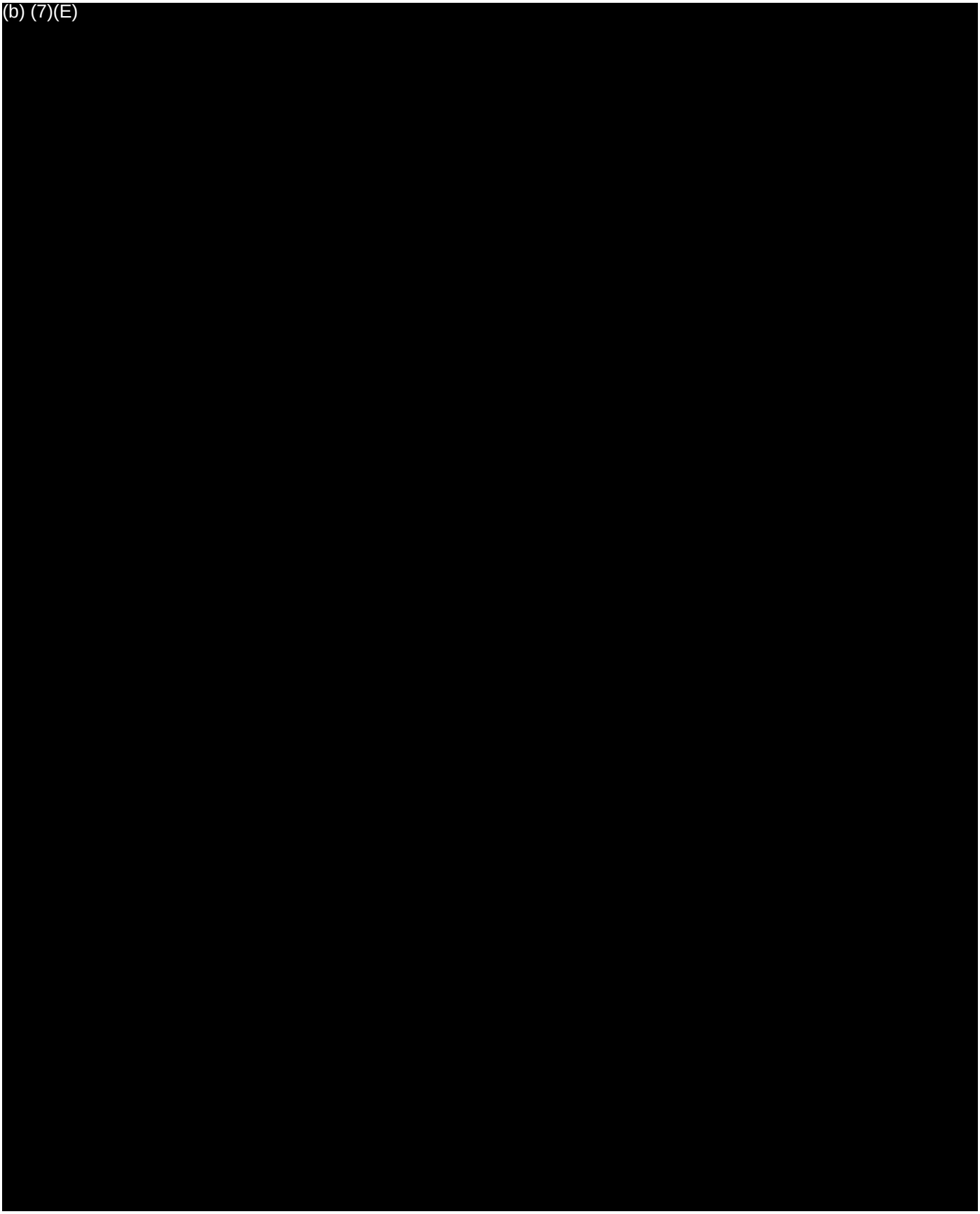
Overpayment/General Direct Examination Script

CLAIMANT NAME _____ SSN: _____

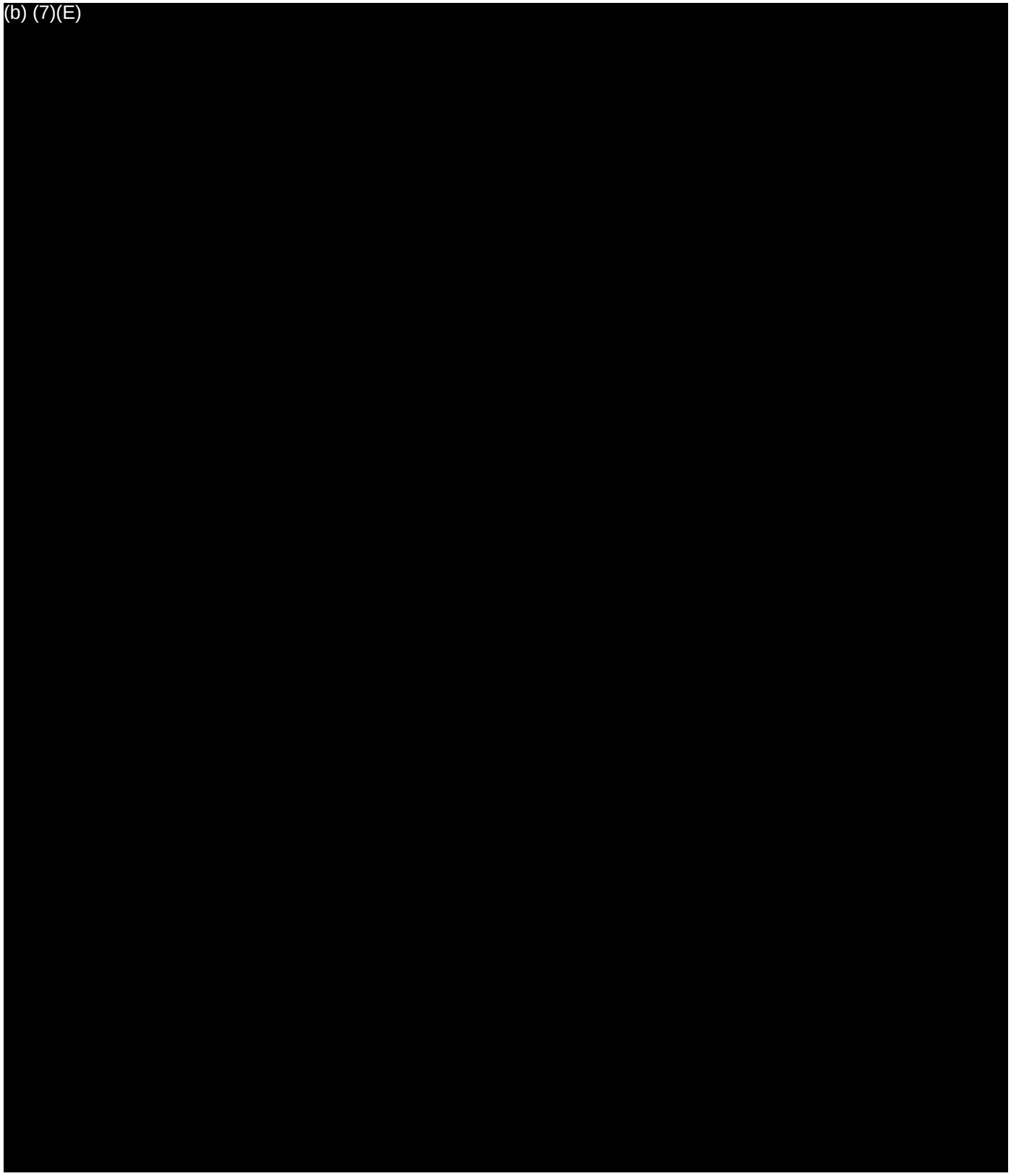
(b) (7)(E)

[redacted]

(b) (7)(E)



(b) (7)(E)



(b) (7)(E)