

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

CIVIL REMEDIES DIVISION PROCEDURES

EFFECTIVE JULY 6, 2009

Parties are to follow these Civil Remedies Division Procedures (CRDP) in presenting cases in the Civil Remedies Division (CRD). Except to the extent superseded by an order of the administrative law judge (ALJ) in an individual case, the CRDP have the same force and effect as if ordered by the ALJ.

The CRDP do not supersede the regulations promulgated by the Secretary of Health and Human Services (Secretary) and should be construed consistently with the regulations in a particular case.

1. DOCKETING

All hearing requests *must* be accompanied by a copy of the notification of adverse action a party believes triggers the right to a hearing. Do not send the statement of deficiencies. Cases are docketed upon receipt of a request for an ALJ hearing.

2. REPRESENTATION

Parties may be heard with or without representation.

Party representatives must file a notice of appearance in writing. The notice of appearance must be signed and must include the following information: mailing address, telephone number, facsimile number, and e-mail address. A request for hearing filed by a representative will suffice for a notice of appearance, so long as this information is included.

An unrepresented party must include his or her mailing address, telephone number, facsimile number, and e-mail address, if available, with the hearing request.

3. CONTACT WITH THE ALJ

Direct communication with the ALJ is prohibited unless all parties are present or represented. All party contact with an ALJ is through the staff attorney assigned to assist the ALJ with a particular case. The name, telephone number, facsimile

number, and e-mail address of the staff attorney will be provided to the parties with the CRD acknowledgment of a party's hearing request. Parties may also contact CRD staff by calling the CRD at (202) 565-9462.

4. PREHEARING CONFERENCES

At any time before the hearing, the ALJ may call a prehearing conference. In addition to any matter deemed appropriate by the ALJ or required by regulation, a prehearing conference will generally be used to delineate the issues in controversy and to discuss how the case should proceed (e.g., via an oral hearing, motion for summary judgment, or submission of the case for decision on the written record). Specific issues that the ALJ might address could include:

- the scheduling of a hearing (i.e., its estimated length, location and date);
- whether there is a need for a party to obtain access to and copy documents in the possession of, or under the control of, the opposing party, a process for meeting that need, and a schedule for completing the process;
- admissions and stipulations;
- a date for the submission of written lists of proposed witnesses (with a synopsis of expected testimony), proposed exhibits (including written statements in lieu of testimony), and prior written statements of witnesses who will testify at the hearing;
- what exhibits and witnesses are contemplated;
- whether the parties intend to request subpoenas for witnesses;
- the necessity for and extent of expert testimony;
- the use of charts, work papers, or other unusual exhibits;
- the use of written statements in lieu of testimony;
- the necessity of and a schedule for prehearing briefs; and
- marking exhibits, numbering pages of exhibits, and introducing and having exhibits submitted into evidence.

The agreements and stipulations entered into at the prehearing conference are binding on all parties.

5. FORM, FILING, AND SERVICE OF WRITTEN MATERIAL

A party filing a document at the CRD must, at the time of filing, serve a copy on all other parties to the case and must include proof of service in the form of a certificate that states the manner of service.

The address for filing documents and any correspondence with CRD related to a case is:

Departmental Appeals Board
MS 6132
Civil Remedies Division
330 Independence Avenue, SW
Cohen Building, Room G-644
Washington, D.C. 20201

Submissions may be made by U.S. mail or an express delivery service, but courier or messenger deliveries will not be accepted. Service by facsimile or e-mail is not acceptable unless authorized by the ALJ in advance. Written material is considered filed when placed in the U.S. mail or with an express delivery service, such as FedEx.

Unless otherwise specified by the ALJ:

- All written material submitted becomes part of the record. Documents (including proposed exhibits) filed must include an original and two copies. If the case goes to an in-person hearing, a fourth copy must be introduced at the hearing for the record. Do not submit exhibits or evidence with requests for hearing, except the notification of adverse action as specified in CRDP § 1.
- Submissions will not be treated as filed until the correct number of copies have been submitted; thus, failure by a party initially to send the correct number of copies may result in rejection of the filing by the ALJ.
- Submission by authorized facsimile or e-mail does not relieve a party of the responsibility of furnishing the required number of copies. **Do not submit courtesy copies of exhibits by fax or email.**
- Opposing party will have 20 days from the date of filing to submit any statement or additional evidence in response.

Every pleading and paper filed in the proceeding must contain a caption setting forth the title of the action, the case number, and a designation of the paper, such as "Motion to Quash Subpoena."

Every pleading and paper must be signed by and must contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

6. COMPUTATION OF TIME

In computing any period of time under these procedures, the time begins with the day following the act and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the federal government, in which case the period of time includes the next business day.

When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the federal government will be excluded from the computation.

In some cases, where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response. This will not apply to requests for hearing. The applicable procedural regulations and/or ALJ order in a case should be consulted concerning adding five days.

7. ALTERNATIVES TO AN ORAL HEARING

An oral hearing (i.e., a hearing at which witnesses are called and testify) is not the only procedure for the ALJ to use to hear and decide a case. Parties may waive oral hearing, subject to the approval of the ALJ, and have the case decided on the written record. Or, where appropriate, a case may be decided by summary judgment. Matters presented to the ALJ for summary judgment will follow FED. R. CIV. P. 56 and federal case law related thereto or they will proceed in accordance with an ALJ order.

8. PRE-HEARING SUBMISSIONS AND REQUIREMENTS

For cases going to an in-person hearing, the pre-hearing submission includes (except as directed otherwise by the ALJ): lists of proposed exhibits and proposed witnesses (note that any party offering expert testimony must include in the exchange a statement of the expert's qualification, a summary of the expert's opinion, and the basis for the opinion); copies of proposed exhibits, including statements in lieu of testimony; and prior statements of proposed witnesses, or of persons whose testimony is to be offered in the form of a statement in lieu of testimony, that relate to issues which might be raised at hearing.

In a complex case, the ALJ may order two exchanges of proposed exhibits and lists of exhibits and witnesses. This gives the ALJ the opportunity to rule on objections in time to permit the parties to substitute rejected exhibits or witnesses and saves time at hearing. The ALJ might also order only the preliminary

exchange of exhibit lists or allow the parties to achieve the same result by an informal arrangement between the parties.

If a party comes to the hearing and attempts to call a witness not listed on that party's witness list or offers an exhibit not listed (and a copy was not furnished timely to the opposing party), the ALJ might not allow the party to elicit the testimony of the witness or introduce the exhibit. If the opposing party objects, the offering party must persuade the ALJ why the testimony should be allowed or the exhibit admitted, inasmuch as the party did not comply with prehearing requirements for providing the ALJ and the opposing party with the name of the witness or a copy of the proposed exhibits.

9. EXHIBITS

In a case in which the ALJ has either scheduled an in-person hearing or ordered that a decision will be upon the written record, either by summary judgment or agreement of the parties, the ALJ will order a variety of documents be filed and exchanged with the opposing party. Documents that are intended to prove facts as alleged by a party must be offered as exhibits. Documents that are merely illustrative examples of a matter discussed in a brief, or that are being provided as a convenience (such as copies of court decisions), should not be offered as exhibits, but should be made attachments to a brief or other submission. Parties should not file as exhibits documents (such as the hearing request) that are already in the record, and should not file as an exhibit a document already filed as an exhibit by the opposing party.

Exhibit lists must identify which of the exhibits are statements in lieu of testimony. A party must provide the last known address of a person whose statement is being submitted in lieu of testimony, so that the opposing party has the opportunity to subpoena that person for the purpose of cross-examination.

Proposed exhibits must be legible in all relevant parts and must bear proper markings identifying the exhibits with the case in which they are being offered. Thus, they must be marked with the docket number of the case. Then, each exhibit must be marked with an abbreviated designation for the party offering the exhibit (followed by the abbreviation "Ex." for exhibit). For example, the designation "P" for Petitioner or "R" for Respondent is generally used for non-federal parties; "HHS" is used for the Department of Health and Human Services as party; "CMS" is used for the Centers for Medicare & Medicaid Services as party; "I.G." is used for the Inspector General of HHS as a party; and "SSA" is used for the Social Security Administration as a party.

- These designations are followed by a whole number (one not used previously by the offering party), not a letter, not a mixture of numbers and letters, and not a number with a decimal point.
- These identifying markings must be placed on the exhibit itself, not only on a tab or divider. The identifying markings should not obscure any relevant part of the exhibit.
- Each page of each exhibit must be numbered so that the page can be located easily when the exhibit is being discussed in a brief, at a hearing, or in the decision. The parties should number the pages of each exhibit in a separate sequence for the exhibit.
- An example of how these designations should look is:

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P. Ex. 1

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- Proposed exhibits should be attached so as to be secure, but should stand alone and should not be bound together with other exhibits. Holes should not be punched through the content of documents.
- Proposed exhibits not prepared in the manner indicated above likely will be returned to the offering party. This may cause delay in preparation for the hearing. In a case which is proceeding without an in-person hearing, it may delay the decision. At the hearing, the ALJ likely will not accept exhibits into evidence or even allow them to be the subject of testimony until they have been properly prepared.

Where a case is to be decided without an in-person hearing, the ALJ will give a party the opportunity to object to the admission of documentary evidence offered as an exhibit by the opposing party. Such exhibits generally accompany a party's brief and the opposition to the exhibit is incorporated in the opposing party's response brief.

10. USE OF RULE 1006 SUMMARIES FOR VOLUMINOUS RECORDS

Using FED. R. EVID. 1006 as a guideline, and unless permitted by the ALJ to do otherwise, a party that wants the ALJ to consider the contents of voluminous records should offer that evidence as an exhibit in the form of a chart or summary. That exhibit, like other proposed exhibits, must be furnished to the ALJ and staff attorney and served on the opposing party at the time of the exchange. In addition, the offering party must supply the opposing party at that time with copies of all

supporting documents on which the summaries are based. The ALJ may order also that the voluminous records be produced at the hearing.

11. WITNESSES

Witness lists must include the last known address of each witness, sufficient information to identify the relationship of the witness to the case, and a brief summary of the testimony that the party anticipates the witness will provide.

Statements in lieu of testimony that are relevant are generally admissible in administrative proceedings, with the authorization of the ALJ.

Parties must serve on each other and submit prior statements both of witnesses whose testimony will be taken in person and of declarants in statements in lieu of testimony. The ALJ might not permit the testimony of a witness and might reject a statement in lieu of testimony if the offering party has not timely served and submitted a relevant prior statement.

12. SUMMONING WITNESSES

Parties must serve their witnesses notices to appear, letting them know the location of the hearing and the date. In addition, parties may move for issuance of a subpoena requiring a witness to appear and testify, as provided by regulation (e.g., 42 C.F.R. § 498.58 or 42 C.F.R. § 1005.9). The moving party is to ascertain in advance, and indicate in the motion requesting a subpoena, whether or not the opposing party objects.

13. DISCOVERY

Discovery in cases before the CRD is limited, and available only in some cases where provided by regulation. Parties should refer to the specific regulation governing their case for guidance in making a discovery request.

14. EVIDENCE

The ALJ determines the admissibility of evidence. The ALJ is not bound by the FEDERAL RULES OF EVIDENCE; however, the All may apply the FEDERAL RULES OF EVIDENCE where appropriate, for example, to exclude unreliable evidence.

15. MOTIONS GENERALLY

Except for motions made during a prehearing conference or at the hearing, all motions must be in writing and signed by a party or party representative. The ALJ may require that oral motions be reduced to writing.

A party may file a response to the opposing party's motion, either at the time fixed by regulation or by the ALL Unless otherwise ordered by the ALJ, the time within which a party may file such a response is governed by pertinent regulations (e.g., 42 C.F.R. § 498.17 or 42 C.F.R. § 1005.13(c)).

16. MOTION FOR AN EXTENSION, CONTINUANCE, OR STAY

In CRD cases, an extension of time refers to resetting the date on which a submission is due; a continuance refers to resetting the date or time on which an event, such as a hearing or a prehearing conference, is to take place; and a stay (of proceedings) refers to the suspension of all due dates for submissions or events. A party desiring an extension of time, a continuance, or a stay, must file a motion (a joint motion may be filed), in proper format, that:

- states good cause,
- indicates that the movant has contacted opposing counsel, or the unrepresented party, and
- states whether the opposing party consents, does not oppose, or objects to the motion.

Filing a motion, including a joint motion, does not toll any time period or stay any action that has been previously scheduled.

If no order is issued granting an extension, continuance, or stay prior to a deadline or scheduled date, the party or parties must comply with the deadline. If a party fails to obtain an extension of time to meet a requirement before the time expires, then the party must file a motion for leave to complete the action "out-of-time," stating good cause for having failed to timely comply.

17. SANCTIONS

The ALJ may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action, or for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing.

18. TRANSCRIPTS

Transcripts may be obtained following an in-person hearing. Federal parties obtain their transcripts via interagency agreement. Non-federal parties can order transcripts from the court reporting service. Please contact the Civil Remedies Division on 202-565-9462 for information about ordering transcripts.

19. POST-HEARING BRIEFS

The ALJ will set a deadline for the parties to file post-hearing briefs and post-hearing reply briefs, as appropriate.

20. ALJ DECISION

The parties' briefs, exhibits, and, if relevant, the transcript of the hearing testimony, serve as the basis for the decision or other disposition of the case.

The ALJ issues a decision, based on the record, that contains findings of fact and conclusions of law. Depending on the relevant regulation, the ALJ may affirm, increase, or reduce the penalties imposed by the Secretary. Appeal is based upon the relevant regulation.

21. ALTERNATIVE DISPUTE RESOLUTION

An alternative dispute resolution (ADR) process is available at the Departmental Appeals Board. If parties wish to pursue ADR they may contact the coordinator at (202) 565-0221. For further information about ADR, see <http://www.hhs.gov/dab/adr>. A case is not automatically stayed pending the parties' agreement to attempt resolution by use of ADR. The two processes can go forward at the same time.

22. DECISION DATABASE

An internet-accessible database of CRD's ALJ decisions and decisions of the Departmental Appeals Board is available. See <http://www.hhs.gov/clab/search.html>.

23. CITING THESE PROCEDURES

These procedures may be cited by the abbreviation CRDP and the appropriate section number, e.g., CRDP § 23.