How to Succeed at the Administrative Law Judge Hearing

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The Social Security Act, (42 U.S.C.S. § 401, *et seq.*) ("SSA"), requires that a person seeking benefits under the Act be given reasonable notice and the opportunity for a hearing. Although the opportunity for a hearing may be waived under certain circumstances, 20 C.F.R. § 404.934, a claimant who files an application for benefits and is denied at the initial application stage and at reconsideration may apply to present his or her case at a formal hearing before an Administrative Law Judge ("ALJ"). Likewise, a person whose rights may be adversely affected by the decision may request a hearing. Id. at 404.932(a). In either situation, a request for hearing must be made in writing or electronically and must be filed within 60 days of the date of denial of reconsideration, but a person who can show good cause for failure to meet the deadline may request an extension of time to file a request for hearing. 42 U.S.C.S. § 405(b).

The hearing office will review the request for hearing to determine whether venue is proper. Generally the hearing will take place at a hearing office within 75 miles of the claimant's home; therefore, the hearing office may transfer venue to a more appropriate location. Hearings may take place in person or by video-conference; however, both the claimant and his or her representative have a right to be present in person for the hearing.

The hearing office will work up the case by requesting medical and vocational evidence and preparing a claim file and exhibit list. When the claim file has been worked up by the hearing office and an exhibit list has been created, a copy will be provided electronically or mailed on CD to the claimant's representative. Upon receipt of the claim file and exhibit list, the representative should compare his or her own file with the ODAR file – to the point of going to the hearing office and examining the file in person if necessary – and should supplement the evidence in the claim file with records of additional treatment, Treating Physician's Questionnaires from supporting medical

providers, medication lists, tax returns, earnings records or other information that may be material to the decision. Duplicating information already in the claim file should be avoided.

The local hearing office will determine when the hearing will be scheduled based on the date the Request for Hearing was filed and whether the claim is ripe for adjudication and will contact the claimant's representative. The regulations (20 C.F.R. § 404, *et seq.*) require that a Notice of Hearing be provided to the claimant and his or her representative not less than 20 days prior to the hearing, unless the notice of hearing has been waived in writing. 20 C.F.R. § 404.938. The notice of hearing must list the issues to be adjudicated. Any objections to the issues to be adjudicated must be made in writing prior to the hearing. Id. at § 404.939.

The hearing will occur before an Administrative Law Judge. In addition to the ALJ, others likely to be present at the hearing are a court reporter, vocational and/or medical experts and witnesses. The hearing must include any witness the ALJ deems necessary to a fair determination of the claim.

Generally, hearings consist of the following:

1. pre-hearing memo (or opening statement by the representative)
2. an introduction and opening statement by the ALJ
3. adducement of evidence
4. testimony
5. oral argument (or Letter Brief)
6. closing the record

Pre-Hearing Memo

Prior to the hearing and particularly in situations where the claimant's medical issues or treatment is complicated, where complex procedural issues exist (such as when multiple applications have been filed or when there are multiple or prior hearings or a request for reopening), where there are employment, worker's compensation or earnings issues, or where the representative finds it helpful to explain evidence submitted before or

during the hearing, the claimant's representative may wish to take the opportunity to provide the ALJ with a pre-hearing memorandum or brief. In less complicated situations where the representative still believes that some explanation may be helpful in assisting the ALJ's decision, the representative may choose to make an opening statement during the hearing itself in lieu of submitting a brief prior to the hearing. While the representative will not write a pre-hearing memorandum or give an opening statement for each and every hearing, in certain situations one or the other will serve to assist the ALJ in clarifying complex issues and will smooth the hearing and decision-making process. Any opening statement made by the representative will occur after the ALJ's opening statement discussed below.

Introduction/Opening Statement

The ALJ will begin the hearing with an introductory statement in which the ALJ introduces those who are present, explains the purpose of the hearing, and confirms certain preliminary matters such as the claimant's social security number, his or her date of birth, the alleged onset date and whether the record of electronic evidence which was submitted previously is now complete. The ALJ then will make an opening statement for the record which explains to the claimant how the hearing will be conducted, identifies the issues involved and outlines how the hearing itself will progress. At this time, the ALJ may rule on any preliminary motions such as requests for recusal of the ALJ, for postponement of the hearing or to exclude evidence. Exhibits previously prepared by the hearing office staff will be introduced into evidence and will be made a part of the formal record, and objections to the introduction of evidence will be decided. The ALJ may ask if the representative wishes to make an opening statement. Finally, the ALJ will take an oath or affirmation from the first witness (if not from all witnesses at once) and, with preliminary matters concluded, begin adducement of evidence.

Adducement of Evidence

The SSA requires that the decision to approve or deny benefits must be based on evidence "adduced at the hearing" by an administrative law judge. 42 U.S.C.S. § 405(b)(1) and § 1631. This requires the ALJ to fully examine the issues presented, to take testimony from witnesses including the claimant, and to accept as evidence any documents that may be material to the issues. 20 C.F.R. § 404.944, § 416.1444. "Evidence," as defined by 20 C.F.R. §§ 404.1512(b) and 416.912(b), includes evidence which otherwise would be inadmissible in court, 42 U.S.C.S. § 405(b)(1), and the ALJ must record his or her efforts to ensure that the claimant received "adequate opportunity to obtain and submit the needed evidence and that the ALJ otherwise made every reasonable effort to obtain such evidence." The ALJ must accept into evidence any documents that are material, and therefore relevant, to the decision. 20 C.F.R. §§ 404.1527(a), 416.927(a).

The regulations state that evidence provided by "acceptable medical sources," which is defined in the regulation, as well as other sources will be used to determine whether a claimant is impaired. 20 C.F.R. § 404.1513.

HALLEX I-2-6-58 suggests that material evidence, among other things, includes evidence of a claimant's recent prior work activity, evidence of the existence of a severe impairment and evidence of medical treatment that occurred within twelve months of the alleged onset date (for Title II claims) or on or after the application or protective filing date (for Title XVI claims). Evidence that is not material includes "dental work, a mammogram that is negative, daily in-patient hospital or nursing records, emergency room visits or doctor records relating to treatment of colds, flu shot records, toothache, rashes and feet fungus and records of the claimant calling in to the doctor for an appointment or documentation of other injuries that have healed in 12 months and have no residuals on the claimant's functioning…." Id.

The ALJ may, but is not required to, admit into evidence the documents gathered by or submitted to the hearing office; therefore, the documents in the exhibit list prepared by hearing office staff are considered "proposed" exhibits until the ALJ formally admits

them into evidence. Evidence also may be introduced via deposition or affidavit, and the ALJ has the power to issue subpoenas, upon the ALJ's own decision or at the request of the claimant or claimant's representative, commanding the attendance and testimony of witnesses with evidence material to the proceeding.

Evidence may be submitted post-hearing. If the ALJ receives evidence from a source other than the claimant or claimant's representative, the ALJ must "proffer" the evidence, give the representative an opportunity to respond or request a supplemental hearing and address any comments in his or her decision. Post-hearing evidence submitted by the claimant's representative will be added to the claim file if received within the time allotted by the ALJ and will be considered in the decision-making process. Upon hearing oral testimony and examining the record, the ALJ may determine that additional medical or other evidence is necessary in order for the ALJ to make a fully-informed decision. The ALJ may require the claimant to attend a post-hearing medical, psychological, or other exam and may hold the record open at the end of the hearing in order to allow time for the additional evidence to be acquired. Should the representative determine during the course of the hearing that additional evidence exists which may be helpful to the claim, the representative should request that the record be held open in order to have ample opportunity to acquire and submit the evidence. Upon submission of the after-acquired evidence, the representative should notify the ALJ that the record is complete and may be closed.

Testimony

The Social Security Act gives an ALJ the "power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Commissioner of Social Security." 42 U.S.C.S. § 405(d). Subpoenaed witnesses are paid the same time and mileage fees as are witnesses subpoenaed in federal court cases. Id.

Like with any trial, how testimony proceeds will depend in part on the preferences of the ALJ. The ALJ may choose to question the claimant and any lay or expert witnesses

or may allow the claimant to make a statement on his or her own behalf. The ALJ may conduct the bulk of the examination of the claimant and claimant's witnesses or may leave that questioning to the claimant's representative. In either case, the claimant's representative will have an opportunity to question or cross-examine any witnesses to fully flesh out evidence which may be material to the decision.

If in reviewing the claim file the ALJ determines that medical or vocational expert testimony is required to fully address the issues presented, the ALJ will obtain the opinion of an expert either via in-person testimony at the hearing or by way of a written statement or answers to interrogatories.

a. **medical experts** An ALJ may choose to use a medical expert ("ME") to provide testimony concerning matters such as side effects of medication, whether the claimant's failure to receive regular treatment affects his or her impairment, whether substance abuse issues affect his or her impairment and the severity of impairment. The ALJ may seek an opinion regarding etiology of the claimed symptoms and whether those symptoms correlate to the impairment claimed or whether the claimant can expect to improve within twelve months. The ME cannot be one of the claimant's treating physicians or someone who has performed a consultative exam on the claimant. The ME may not decide whether a claimant is disabled but may offer an opinion regarding whether a claimant's impairment or combination of impairments which do not themselves meet a listing is medically equivalent to a listing. 20 C.F.R. 404.152(c) and (d). An ME may also offer assistance in determining the claimant's Residual Functional Capacity; however, an ME may not offer evidence regarding whether a claimant is able to engage in Substantial Gainful Activity as this determination is within the purview of the VE. Testimony of an ME must be on the record. It may be elicited in person, by video-conference or through the use of interrogatories.
b. **vocational experts** As with the ME, the VE must be impartial and must not have had prior contact with the claimant. The VE will address issues

> regarding whether the claimant's impairment affects his or her ability to work, particularly when the claimant has no exertional impairments or when the claimant's ability to lift, sit or stand falls between two exertional levels. Generally the VE will review the evidence presented and testify regarding the number of jobs in the national economy which the claimant should be able to perform given his or her exertional restrictions, level of impairment and vocational qualifications regardless of whether those jobs exist in the claimant's immediate area and whether those employers are hiring. Id. at § 404.1566(b) and (c). The VE may not testify to matters within the purview of an ME, even if qualified to do so. As with ME testimony, VE testimony must be on the record and may be given in person, by video-conference or by written interrogatories.

Medical and Vocational Experts generally are chosen from a roster maintained at the hearing office of experts who have met certain qualifications. If no one on the list of approved experts is available, the ALJ may choose another expert.

Medical opinion evidence provided either by the ME or the claimant's treating physician is considered with all the other evidence submitted. Greater weight may be given for reasons including whether the witness actually treated the claimant, how long the treatment lasted, whether the treatment was consistently provided, and whether the witness is a specialist in the field. Id. at § 404.1527.

The representative of a claimant who is ill or otherwise unable to attend should appear at the hearing on behalf of the claimant if the representative is unable to have the hearing continued. Appearing without the claimant protects the claimant's rights and avoids dismissal of the request for hearing, 20 C.F.R. § 416.1457(b)(i), and allows time for additional evidence to be submitted. The ALJ or representative may then request a supplemental hearing to review additional evidence received after the original hearing and to obtain the claimant's own testimony.

Letter Brief/Oral Argument

As with the pre-hearing memorandum or opening statement, a post-hearing memorandum, sometimes called a "Letter Brief," allows the claimant's representative to focus the ALJ on the law and evidence which the representative feels best supports the claimant's case. The Letter Brief summarizes the testimony and facts in the record and applies the law to those facts. However, in most cases, the representative will choose instead to make an oral argument at the hearing, which will occur at the conclusion of testimony.

Supplemental Hearings

Either the ALJ or the claimant's representative may request the scheduling of a supplemental hearing in certain situations, most often if a large quantity of evidence is introduced during or after the hearing or if the claimant is unable to appear and testify at the original hearing. If a post-hearing consultative examination is scheduled at the behest of the ALJ, the representative or ALJ may request a supplemental hearing to review the examiner's report, especially if additional VE or ME testimony is needed. If a significant period of time has passed after the hearing without a decision, the attorney may request a supplemental hearing to introduce additional evidence and receive testimony from experts, especially if experts were present at the original hearing. The ALJ may request a supplemental hearing if the Social Security Administration has reason to believe that the claimant is no longer disabled.

Should the ALJ determine that a supplemental hearing will aid the decision-making process, a supplemental hearing may be scheduled.

Closing the Record

Once the evidence has been submitted and testimony has been received and the claimant's representative has had an opportunity to present an oral argument summarizing the claimant's case and the applicable law, the ALJ will ask the representative whether the claimant has additional information that has not been

considered and whether the representative has any objection to closing the record. Hearing none, the ALJ will close the record and inform the claimant that a decision will be issued in writing to both the claimant and the representative. However, if the representative chooses to file a Letter Brief in lieu of offering oral argument or if it has been determined that additional evidence not available at the hearing would aid the decision-making process, the ALJ will leave the record open to allow sufficient time for the additional information to be obtained.

Appeals

An Administrative Law Judge's unfavorable decision regarding any aspect of the claimant's case may be appealed by filing a Request for Review within sixty (60) days of the date of the hearing decision. Additional evidence or comments which cite to the record should be submitted by the representative no later than twenty-five (25) days after the Request for Review but preferably concurrent with the Request. The representative also should request that the claim file be forwarded to the Appeals Council at this time.

The Appeals Council will review ALJ decisions for abuse of discretion, errors in applying the law, conclusions "not supported by substantial evidence" and for public policy reasons. 20 C.F.R. § 404.970(a). Material evidence submitted to the Appeals Council after the ALJ's decision will be considered only to the extent that it relates to the time on or before the date of the ALJ's decision. Id. at § 404.970(b).

A claimant who receives an unfavorable decision at the Appeals Council within sixty (60) days of the receipt of the final decision may file a civil action in federal court against the Commissioner of Social Security. "Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business." 42 U.S.C.S. § 405(g). Decisions of the federal courts may be appealed to higher courts in the same manner as any other civil action.

Typical grounds for appeal include:

1. failure of the ALJ to request the presence of a vocational expert or to introduce vocational expert testimony into evidence, particularly where there

are questions regarding the claimant's capacity to perform Substantial Gainful Activity.

2. reliance by the ALJ on a report of a consultative examiner or Disability Determination Services medical examiner (who generally has examined the claimant only once and is not one of the claimant's treating physicians) in lieu of substantial supporting medical evidence provided by the claimant.
3. reliance by the ALJ on the report of a DDS examiner who is not a specialist in the field of medicine best positioned to understand the claimant's impairments.
4. failure of the ALJ to consider all the steps in the decision-making process
5. a mistake by the ALJ in the decision-making process
6. disregard of the claimant's impairments, work history and supporting medical evidence indicating that the client meets a listing
7. reliance by the ALJ on a post-hearing consultative examination in the face of medical evidence proving a disabling impairment.