Chapter Fourteen

Appeals, Hearings, and Administrative Law

1. Introduction. Researching and preparing an administrative law case is a combination of knowing the law and regulations, and developing the facts. In regard to the law, many paragraphs in this chapter have citations to federal regulations at the end. This chapter includes a description of the Social Security Administrative process, which is typical in many regards of administrative law hearings under both federal and state benefit programs.

2. Those who preside over administrative law hearings in Social Security, SSI, and Medicare cases are called Administrative Law Judges. Those who preside over what are referred to as fair hearings in Texas benefit programs are called hearing officers. Whether the matter concerns a federally-administered benefit or a state administered benefit, there are some concepts that are common to administrative law hearings in general. These include: Decisions at all levels (initial determination, redeterminations if there are such under the particular program), administrative law hearings or fair hearings, and decisions at review following the hearing, will all be in writing. Notices of decisions at each stage usually tell the person what the next appeal step is, how much time there is to go to the next step, and how to move forward to the next step. The rules of evidence that would have to be complied with in a court of law do not apply in benefits cases. That means that hearsay – such as written reports or doctors' letters or other documents – can be admitted into the hearing record without the person who wrote and signed the writing being at the hearing. Nonetheless, common sense means that testimony of witnesses and documents used in administrative law hearings should be relevant to the issue(s). Common sense also means that if three or four witnesses have already driven home the same point through their testimony, a fifth or sixth witness saying the same thing may overly tire the presider (the administrative law judge or hearing officer). A difference between federal administrative law judge hearings and state fair hearings is that subpoenas can be used in the federal administrative law judge hearings to compel the attendance of witness and/or the production of documents for use in the hearing. In fair hearings, state hearing officer do not have the authority to issue subpoe-

nas. Even though federal administrative law judges can issue subpoenas, the process is cumbersome, and there is a preference for attempting to obtain the testimony or documents without a subpoena. Sometimes a witness who is told that a subpoena will issue for the attendance of the witness, will instead voluntarily prepare a written statement or produce records (such as medical records) thus avoiding the need for the subpoena. As noted, Texas hearing officers do not have subpoena power in fair hearings. Social Security Administrative Law judges do have the authority to issue subpoenas, but they seldom do, especially if the information being sought can be obtained without the actual issuance of a subpoena.

3. The chapter includes these Appendices: (1) A Chart regarding similarities and differences between Social Security administrative law hearings and Texas Health and Human Services Commission fair hearings, (2) PowerPoints on the Texas Health and Human Services Commission fair hearing process, on Medicare Part A and Part B appeals, on Medicare Prescription drug appeals, and on the SSI adjudicatory process. The final appendix is the Chapter Questions and Answers. The chapter questions include questions based on these paragraphs and also based on the Appendices.

4. The substantive law that applies to administrative law cases is found in federal and state statutes, and federal and state regulations. Of course, actions of governments must also comply with the U.S. Constitution and with the constitution of the state.

5. The federal statutes can be found in the United States Code. This is abbreviated "U.S.C." The federal regulations can be found in the Code of Federal Regulations. This is abbreviated "CFR."

6. In Texas, the state statutes are called "Vernon's Texas Statutes Annotated." Many state statutes have also been placed into codes, such as the Human Resources Code. Texas regulations are found in the Texas Administrative Code. This is abbreviated "TAC."

7. In addition, there are federal and state guidelines (policies). The federal "State Medicaid Manu-

al" published by the Centers for Medicare and Medicaid (CMS), and the Texas "Medicaid for the Elderly and People With Disabilities Handbook" are examples.

8. A useful source of general information on administrative law is: Tex Jur, Volume 2, "Administrative Law" (Bancroft-Whitney). The Fair and Fraud Hearings Handbook of the Texas Health and Human Services Commission is a fundamental reference for hearings involving eligibility for (or terms of receiving) Medicaid, food stamps, and Temporary Assistance for Needy Families.

9. Basic federal statutes and regulations. At the federal level, there are these basic statutes and regulations that apply to public benefits cases: Social Security 42 U.S.C. §§401 et seq.; 20 CFR Part 400; Supplemental Security 42 U.S.C. §1382 20 CFR Part 400 Income; Medicare 42 U.S.C. §1395, 42 CFR Parts 400 - 424, 462 – 498; Medicaid 42 U.S.C. §1396, 42 CFR Parts 430 -456; Veterans Benefits 38 U.S.C. §1 et seq., 38 CFR; Food Stamps 7 U.S.C. §2011 – 2030, 7 CFR Parts 271 – 295; Temporary Assistance for Needy Families (TANF), 42 U.S.C. §§601 et seq., 45 CFR Part 260.

10. Basic Texas statutes and regulations. In the state arena, the following statute sections and regulations are important for administrative law cases: Medicaid, Human Resources Code Chapter 32, 1 TAC Part 15; Food Stamps (also called Supplemental Nutrition Assistance or SNAP). Human Resources Code Chapter 33, 1 TAC Part 15, and Temporary Assistance for Needy Families, Human Resources Code Chapter 31, 1 TAC Part 15. The administrative hearing rules for these programs are also in 1 TAC Part 15.

11. Manuals. As noted, there are also manuals and handbooks of the various agencies that administer benefits programs. These will help the advocate know what the "elements" are that need to be proved, in order to win an administrative hearing for a client. In the Social Security and Supplemental Security Income Program, there are "Program Operations Manual System" (POMS) issuances; the Social Security Handbook, and Social Security Rulings and Acquiescence Rulings. These are available at the POMS area of the Social Security Web site. The Cen-

ters for Medicare and Medicaid Services (CMS) publishes a Provider Reimbursement Manual, and (as noted above) a State Medicaid Manual. The Veterans Administration publishes a handbook entitled "Federal Benefits for Veterans and Dependents." As noted above, the Texas Department of Aging and Disability Services publishes a Medicaid Eligibility for the Elderly and People with Disabilities Handbook. The Texas Department of Aging and Disability Services publishes the Texas Works Handbook which has eligibility criteria for food stamps, Temporary Assistance for Needy Families (TANF), and Medicaid for children and their parents. The Texas Health and Human Services Commission hearing officers who conduct what are called fair hearings, in regard to Medicaid, food stamps, or TANF, use a manual called the Fair and Fraud Hearings Handbook.

12. Handling administrative law cases also requires full knowledge of what is in the client's file at the administrative agency. A general proposition is that, in order to look at a client's file at an agency, the client must give written consent. Social Security and Medicare use an Appointment of Representative Form (SSA-1696-U4). State agencies have accepted a written statement of the client detailing who is authorized to represent the client, the type of matter, the case number (if the agency has already assigned one), and the date of the authorization. However, the Texas Health and Human Services Commission and the Texas Department of Aging and Disability Services usually require use of their Form H1826 before they will release information to an advocate representing and individual.

13. Special Right of Access. Aside from the fact that agencies often will provide an advocate with access to the client's file on the basis of an authorization, the Texas Public Information Act provides for a "special right of access." This special right of access to confidential information is provided for at Texas Government Code Section 552.023. The Legal Hotline for Texans can assist a Benefits Counselor of the Texas Aging Network in helping a client to make use of this special right of access.

14. Early file review is essential. In administrative law cases, the file at the agency should be reviewed as soon as possible. Copies of key documents should be obtained, either from the client

or from the case file. Putting together a client interview and a review of the case file allows the advocate to determine what further information is needed – witnesses, documents, and legal precedents.

15. Cost-free medical records may be obtainable. Sections 161.201 - 204 of the Health and Safety Code authorize a representative of a claimant for benefits based on disability, to obtain cost-free one copy of the medical records in the custody of a health care provider. By virtue of House Bill 670 from the 76th Legislature, this statute now also applies in the case of veterans' benefits. It is discussed in greater detail in the "Summary of Statutes and Regulations" section of this chapter.

16. On a case-by-case basis, the Legal Hotline for Texans is available for consultation to assist Benefits Counselors who are researching and preparing administrative law cases for hearing.

17. One of the best ways to learn how to prepare an administrative law case for hearing is to observe or assist another Benefits Counselor who has a hearing coming up.

18. How an administrative law hearing proceeds. In general an administrative law hearing will start with the hearing officer (called an "administrative law judge" in federal Medicare, Social Security and SSI cases) stating on the record (usually into a microphone for a tape recorder), the name of the case, who the parties are, and what the basic nature of the case is (e.g., application for Medicaid). The hearing officer often will state the issues, and ask if there is objection to the way the issues have been stated. If the client disagrees with how the issues are stated by the hearing officer or the administrative law judge, the advocate or client can state an objection (or objections) on the record at the beginning of the hearing to the framing of the issues. If this is not done, the client will likely be held to have agreed to the fact that the issues are as stated by the hearing officer or administrative law judge.

19. Issue Switching. If the notice of the hearing stated what the issues would be, and the hearing officer or administrative law judge states them differently at the hearing (or conducts the hearing as if it involves issues different from what was stated in the notice of hearing), an objection

can be made on the basis of "issue switching." Blatant issue switching can amount to a violation of due process. It undermines the ability to prepare well for the hearing. (For instance, if the notice of hearing stated that the issue would be whether the client has too much income for a particular benefit, but, at the hearing, the hearing officer also delves into the client's medical condition, and if that was not listed as an issue in the notice of hearing, an objection can be stated to this issue switching.)

20. Once the stating of the issues is finished, the hearing officer may allow opening statements to be made by the parties (or their representatives). The hearing officer will specify who goes first and who goes second. Normally, the party that has the burden of proof gets to go first. Thus, if a nursing facility is seeking to discharge a resident, the nursing facility may get to make the first opening statement, and may get to begin the introduction of evidence (witness statements, documents). The party that does not have the burden of proof will normally be permitted to respond right away to the opening statement of the party that does have the burden.

21. The party with the burden of proof normally gets to put on its witnesses first, and offer its documents into evidence first. After each witness has testified on direct examination, the other party gets to cross-examine those witnesses right then. The party that called the witness can then ask "redirect questions." There can be recross examination and further redirect, but the hearing officer will stop the questioning of a witness if no new information is resulting.

22. After the party with the burden of proof has put on its case in chief, the other party can put on its own case. The party that does not have the burden of proof can call its own witnesses for direct examination, and introduce its own documents into evidence. The party with the burden of proof can cross-examine the other party's witnesses, and object to documents being admitted into evidence. The order of examination – direct, cross, redirect, recross, further redirect – will be the same as in the case in chief of the party with the burden of proof.

23. The party that has the burden of proof then can ask to put on a "rebuttal case," to rebut the case that the other party has just made. There can be direct, cross, redirect, re-cross, and further redi-

rect of the rebuttal witnesses. Rebuttal documents can be put into evidence.

24. After all of this, the parties then usually have the right to offer closing arguments. The party with the burden of proof gets to go first, then the other party, and then the party with the burden of proof has the opportunity to close the argument.

25. If one party or the other wants the record held open for further evidence, or for the filing of written arguments, that should be requested. The hearing officer has the discretion whether to allow that.

26. The hearing officer has the right to alter the order in which witnesses are called, or the order in which the case is conducted. The hearing officer can actively examine the witnesses, or the hearing officer can allow the parties to conduct their own examination of witnesses. In other words, how an administrative law hearing proceeds may vary from case to case.

27. The rules of evidence do not strictly apply. In Social Security, SSI, Medicare, Medicaid, food stamp, and temporary assistance for needy families cases, the rules of evidence as found in court do not strictly apply. Normally, hearing officers try to avoid denying benefits on the basis of hearsay alone. However, an unfavorable doctor's report, that is corroborated by testimony at a hearing, can be the basis for the denial of a disability case.

28. Hearing officers can exclude evidence that is repetitive. Although hearsay will be allowed into the record, often it is not as credible as the live testimony of a witness who is present at the hearing and subject to cross-examination. Witnesses can be kept out of the hearing until they are called. This is called "invoking the rule." It keeps one witness from hearing what another witness says and then being a parrot.

29. Program-specific regulations. The rules that govern Social Security and SSI hearings are at 20 CFR. The specific sections that deal with SSI hearings are at 20 CFR §§416.1400 et seq. (These

and other regulations are summarized in the "Summary of Statutes and Regulations" part of this chapter.) The rules that govern Medicare Part A and B hearings are at 42 CFR §§405.900 – 1208. The rules that govern Medicare Part C hearings are at 42 CFR §§422.560 – 422.6226. The rules that govern Medicare Part D hearings are at 42 CFR §§423.560 – 423.638. The rules that govern Texas Medicaid, food stamp, and Temporary Assistance for Needy Families (TANF) fair hearings are at 1 TAC Chapter 357.

30. It should be kept in mind that there is federal court judicial review of decisions from federal administrative hearings. In Texas, there is now (since 2007) state court judicial review of Medicaid, food stamp, and TANF fair hearings. Whether judicial review will be sought is up to the client, of course. In either level – federal or state – judicial review of agency decisions can only be sought once all administrative steps have been exhausted. In either level – federal or state – judicial review can only be petitioned for by an attorney (unless the client cobbles together and files a petition "*pro se*" (without representation by an attorney). In either level – federal or state – the court reviewing a matter in judicial review will use the record that was created in the administrative process. In other words, new evidence will not be taken at the court level. In the federal judicial review level, there a requirement of an "amount in controversy" before a Medicare case will be decided by a federal district judge. In the federal Social Security and Supplemental Security Income (SSI) programs, there is no amount in controversy requirement. At the state level, there is no amount in controversy in judicial reviews of final administrative decisions of Texas Health and Human Services Commission regarding Medicaid, food stamps, or Temporary Assistance for Needy Families (TANF).

31. The question of "unauthorized practice of law." The program rules for Social Security, SSI, Medicaid, Medicare, and food stamps, all allow the client to designate a non-lawyer to provide representation at the administrative level. This means a non-lawyer can help the client (at the client's request) in completing and submitting an application for benefits, in presenting evidence, and in conducting administrative hearings. This is not considered the unauthorized practice of law. As noted above, a non-lawyer cannot represent a client in such cases at the court level – only an attorney can provide representation at that stage.

32. Even though a non-lawyer can provide representation at the administrative level at the request of the client, Benefits Counselors should not charge a fee for such services. Under the Older Americans Act, activities which are funded in whole or in part by Older Americans Act funds cannot require a fee. Under the Texas Human Resources Code, §12.001, a non-lawyer is prohibited from charging a fee for assistance in obtaining services from the Texas Department of Human Services. Under the Social Security regulations, the Social Security Administration would have to approve any fee charged by a non-lawyer, and they would wonder why a Benefits Counselor would be seeking such a fee, in light of the prohibition in the Older Americans Act against charging a fee.

33. Summary of Statutes and Regulations. The next several paragraphs summarize important statutes and regulations for administrative law cases. This summary is accurate as of December of 2011. Because laws (statutes) and regulations change frequently, a Benefits Counselor should check the current version of any law (statute) or regulation. The paragraphs which follow often give the citation for a statute or regulation. Cost-free medical records. As mentioned earlier, Texas Health and Safety Code §§ 161.201 – 204 provide for cost-free medical records (and mental health records) for certain specified administrative law cases. The statute must be used very carefully. It required a lot of effort to enact it in the 74th Texas Legislature in 1995. It took enormous effort to protect the statute against attacks in the 75th Texas Legislature in 1997.

34. The cost-free medical copy law applies to any Texas "health care provider." This means "a person who is licensed, certified, or otherwise authorized by Texas law to provide or render health care in the ordinary course of business or practice of a profession." Texas Health and Safety Code, § 161.201.

35. The cost-free medical records copy law applies to applications for benefits based on disability (or an appeal relating to a denial of benefits based on disability) under certain specified programs. The specified programs are: Medicaid; Medicare; Supplemental Security Income (SSI); Social Security; Veterans Benefits (Service-connected and non-service-connected); and Temporary Assistance for Needy Families (TANF). No matter which program is involved, the Texas

cost-free medical record statute only applies if the benefit is sought on the basis of disability. Texas Health and Safety Code, § 161.202(a).

36. The request for cost-free medical records or mental health records can be made by a patient, former patient, attorney, or other authorized representative of a patient or former patient. Texas Health and Safety Code, § 161.202(a).

37. A request for a cost-free copy of a medical record must include a statement or document from the department or agency that administers the benefit, confirming the application or appeal. Texas Health and Safety Code, § 161.202(c). Many health care providers will accept as confirmation a copy of the application or denial notice, or the notice of appeal or request for a hearing. In other words, it has not been necessary, usually, to have the administrative agency write to the health care provider to specifically confirm the application or appeal. Usually, documentation from the agency that a reasonable person would read as confirming the application or appeal has been sufficient.

38. A health care provider or health care facility is not required to provide more than one complete record for a patient or former patient requested without charge. If additional material is added to the patient or former patient's record, on request the health care provider or health facility shall supplement the record provided without charge. Texas Health and Safety Code, §161.202(d).

39. A health care provider or health care facility shall provide to the requester medical or mental health records requested under Section 161.202 not later than the 30th day after the date on which the provider or facility receives the request. Texas Health and Safety Code, § 161.203.

40. It is very important to understand this: The Texas cost-free medical record statute does not require a health care provider to provide anything other than already existing medical records or mental health records. Summarizing letters or other information not already in the medical record is not covered by Texas Health and Safety Code, §§ 161.201 – 204. Benefits Counselors

needing information other than raw medical records can ask, and hope for, whatever else is needed. Because Medicare and Social Security and SSI hearings can result in a subpoena to health care providers, health care providers will often provide, cost-free, summarizing letters and/or other information beyond raw medical records.

41. Texas Legal Services Center was very involved in 1995 in obtaining enactment of Texas Health and Safety Code, §§ 161.201 – 204. Texas Legal Services Center spent significant time defending it in 1997. If a Benefits Counselor has any question about using this statute, or any difficulty in obtaining medical records or mental health records under it, the Benefits Counselor can call Texas Legal Services Center's Legal Hotline for Texans for assistance. The toll-free number is 1-800-880-9797.

42. SSI Administrative Appeals. The administrative hearing procedures under SSI are required by 42 U.S.C. § 1383(c) and (d). The regulations of the Social Security Administration for SSI hearings are at 20 CFR Part 416.

43. The SSI regulations allow a client to name either an attorney or a non-attorney as the client's representative. The appointment must be in writing. 20 CFR §§ 416.1500, 416.1507.

44. The authority of the representative. A representative in an SSI claim has these powers and limitations: The representative can (1) Obtain information about the claim to the same extent that the client is able to do; (2) Submit evidence; (3) Make statements about facts and law; and (4) Make any request or give any notice about the proceedings before the Social Security Administration. The representative may not sign an application on behalf of a claimant for rights or benefits under title XVI of the Act (SSI) unless authorized to do so under 20 CFR § 416.315. 20 CFR § 416.1510.

45. Fees for representation. Social Security will not withhold any fee for representation from SSI benefits. 20 CFR § 1520(d)(3). In any event, Benefits Counselors are not allowed to charge for their services. Any fee sought by a representative (who has authorization to charge) would have

to be approved by Social Security. 20 CFR § 416.1520.

46. Rules of Conduct. Social Security has adopted "Rules of conduct and standards of responsibility for representatives." (20 CFR §§ 416.1540 – 416.1599) Any person who intends to represent another person before the Social Security Administration should be thoroughly familiar with these rules of conduct.

47. The rules of conduct require representatives to faithfully execute their duties as fiduciaries of a claimant or appellant. The rules of conduct require representatives to be forthright in dealings with the Social Security Administration. The representative is required to act promptly, competently, and with reasonable diligence.

48. The rules of conduct prohibit false statements, the use of false evidence, and unreasonable delay. The rules of conduct prohibit divulging confidential information without client consent.

49. "Initial determinations" begin the SSI appeals process. The right to appeal a decision affecting SSI arises if the decision is an "initial determination." Initial determinations include determinations about eligibility or the amount of SSI, suspension, reduction, or termination of SSI, whether an overpayment of benefits must be repaid, and whether representative payment will be used. 20 CFR § 416.1402.

50. Benefits can continue (under certain circumstances) pending an appeal. If SSA proposes to suspend, reduce, or terminate benefits, usually SSA gives "advance written notice of intent" to take the adverse action. Although the beneficiary has 60 days in which to request appropriate appellate review, if the appeal is filed within 10 days, benefits will continue, pending the decision on the initial appeal. 20 CFR § 416.1336. Thus, although one has sixty (60) days in which to request reconsideration, the written request needs to be filed within 10 days, if benefits are to continue pending reconsideration.

51. If the appeal is not filed within 10 days of the advance written notice, but <u>is</u> filed within 60 days,

benefits will not continue pending the appeal unless the appellate shows "good cause" for not appealing within 10 days.

52. There are three stages of SSA appellate review. After an initial determination, a dissatisfied SSI claimant or recipient can request "reconsideration." If still dissatisfied after reconsideration, s/he can ask for an "administrative law judge hearing." If still dissatisfied, s/he can ask for review by the Social Security Administration's "Appeals Council." 20 CFR § 1400.

53. Each of the above steps must be sought within 60 days of the previous decision, unless the appellant shows good cause for a late request. In each of the above steps, a non-attorney can provide representation at the request of the client. Beyond the above steps – after Appeals Council action – court review is needed to reverse an adverse decision. A non-attorney cannot provide representation in court.

54. Notices. Social Security notices typically state: (1) What the determination is; (2) The reasons for the determination; and (3) What rights exist for further review. For example, the notice of initial determination must contain all this information. 20 CFR § 416.1404.

55. Reconsideration. Reconsideration is the first step in the administrative review process for a person dissatisfied with the initial SSA determination. If a person is dissatisfied with the reconsideration determination, the person can request a hearing before an administrative law judge. 20 CFR § 416.1407. An appellant requests reconsideration by filing a written request within 60 days after receiving the notice of initial determination. 20 CFR § 416.1409. (Reconsidered determination and reconsideration mean the same.)

56. There are four types of reconsideration. The SSA regulations set forth four types of reconsideration: Case review, informal conference, formal conference, and disability hearing. 20 CFR § 416.1413.

57. Case review is described by SSA as follows: "(a) Case review. We will give you and the other

parties to the reconsideration an opportunity to review the evidence in our files and then to present oral and written evidence to us. We will then make a decision based on all of this evidence. The official who reviews the case will make the reconsidered determination." 20 CFR § 416.1413(a).

58. The informal conference is described by SSA as follows: "(b) Informal conference. In addition to following the procedures of a case review, an informal conference allows you and the other parties to the reconsideration an opportunity to present witnesses. A summary record of this proceeding will become part of the case record. The official who conducts the informal conference will make the reconsidered determination." 20 CFR § 416.1413(b).

59. The formal conference is described by SSA as follows: "(c) Formal conference. In addition to following the procedures of an informal conference, a formal conference allows you and the other parties to a reconsideration an opportunity to request us to subpoena adverse witnesses and relevant documents and to cross-examine adverse witnesses. A summary record of this proceeding will become a part of the case record. The official who conducts the formal conference will make the reconsidered determination." 20 CFR § 416.1413(c).

60. The disability hearing is defined by SSA as follows: " (d) Disability hearing. If you have been receiving supplemental security income benefits because you are blind or disabled and you request reconsideration of an initial or revised determination that, based on medical factors, you are not now blind or disabled, we will give you and the other parties to the reconsideration an opportunity for a disability hearing." 20 CFR § 416.1413(d).

61. SSA has two regulations that govern what type of reconsideration will be used. One regulation deals with reconsiderations of applications and the other regulation deals with reconsiderations of suspensions, reductions, or terminations.

62. SSA's regulation on reconsiderations of applications states: "The method of reconsideration we will use when you appeal an initial determination on your application for benefits depends on

the issue involved in your case. (a) Nonmedical issues. If you challenge our finding on a nonmedical issue, we shall offer you a case review or an informal conference, and will reach our reconsidered determination on the basis of the review you select. (b) Medical issues. If you challenge our finding on a medical issue (even if you received payments because we presumed you were blind or disabled), we shall reach our reconsidered determination on the basis of a case review." 20 CFR § 416.1413a.

63. SSA's regulation on reconsideration of suspensions, reductions, and terminations states: "If you are eligible for supplemental security income benefits and we notify you that we are going to suspend, reduce or terminate your benefits, you can appeal our determination within 60 days of the date you receive our notice. The 60-day period may be extended if you have good cause for an extension of time under the conditions stated in § 416.1411(b). If you appeal a suspension, reduction, or termination of benefits, the method of reconsideration we will use depends on the issue in your case. If the issue in your case is that you are no longer blind or disabled for medical reasons, you will receive an opportunity for a disability hearing. If any other issue is involved, you have the choice of a case review, informal conference or formal conference." 20 CFR § 416.1413b.

64. SSA's regulations further describe the reconsideration-level "disability hearing." Although the reconsideration-level disability hearing is not the administrative law judge hearing, it has some similar aspects.

65. SSA's regulation on the reconsideration-level disability hearing sets forth several procedural rights. The regulation states: "You may request that we assist you in obtaining pertinent evidence for your disability hearing and, if necessary, that we issue a subpoena to compel the production of certain evidence or testimony. We will follow subpoena procedures similar to those described in § 416.1450(d) for the administrative law judge hearing process." 20 CFR § 416.1415(b)(1).

66. The regulation further provides: "You or your representative may review the evidence in your

case file, either on the date of your hearing or at an earlier time at your request, and present additional evidence. You may present witnesses and question any witnesses at the hearing; and you may waive your right to appear at the hearing. If you do not appear at the hearing, the disability hearing officer will prepare and issue a written reconsidered determination based on the information in your case file." 20 CFR § 416.1416(b)(3-5).

67. SSA's regulation on the reconsideration-level disability hearing provides for the agency to arrange medical examinations before the hearing if there is a need for additional medical evidence. 20 CFR § 416.1416(c).

68. Following the reconsideration-level disability hearing, the SSI recipient can ask for up to 15 days to submit additional evidence, if the additional evidence was not available at the time of the hearing. 20 CFR § 416.1416(e).

69. If the disability hearing officer proposes to use evidence obtained after the hearing to deny benefits, the SSI recipient will be notified. S/he will be given 10 days in which to comment on the proposed additional adverse evidence. CFR § 416.1416(f).

70. Reconsideration is conducted by the "disability determination unit [or service]." This is true, whether the reconsideration is a case review, informal conference, formal conference, or disability hearing.

71. The disability determination unit is usually a state agency that has a contract with SSA to do reconsiderations. In Texas, the Texas Department of Assistive and Rehabilitation Services has this contract. Thus, initial determinations are made by SSA. Reconsiderations are decided by the Texas Rehabilitation Commission, albeit in the name of SSA. SSA adopts the reconsideration decision as its own. After reconsideration, a dissatisfied applicant or recipient has the right to request an administrative law judge hearing. This is often referred to as an "ALJ hearing." The ALJ is employed by SSA. After the ALJ hearing, an appellant can request review by SSA's Appeals Council. After that only court action is available.

72. Administrative Law Judge (ALJ) hearings in SSI cases. An SSI applicant or recipient dissatisfied with the reconsidered decision can request a hearing before an Administrative Law Judge (ALJ). The request is due within 60 days of the reconsidered decision. The ALJs are employees of SSA's Office of Hearings and Appeals (OHA). 20 CFR § 416.1429.

73. SSA's regulations on ALJ hearings begin by stating: "At the hearing you may appear in person, submit new evidence, examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she shall issue a decision based on the hearing record. If you waive your right to appear at a hearing, the administrative law judge will make a decision based on the evidence that is in the file and any new evidence that may have been submitted for consideration." 20 CFR § 416.1429.

74. The SSA regulation states this about "how to request a hearing before an administrative law judge:" "Written request. You may request a hearing by filing a written request. You should include in your request – (1) Your name and social security number; (2) The name and social security number of your spouse, if any; (3) The reasons you disagree with the previous determination or decision; (4) A statement of additional evidence to be submitted and the date you will submit it; and (5) The name and address of any designated representative." 20 CFR § 416.1433(a).

75. SSA's regulation states this about the time to request an ALJ hearing: "(b) When and where to file. The request must be filed at one of our offices within 60 days after the date you receive notice of the previous determination or decision (or within the extended time period if we extend the time as provided in paragraph (c) of this section). (c) Extension of time to request a hearing. If you have a right to a hearing but do not request one in time, you may ask for more time to make your request. The request for an extension of time must be in writing and it must give the reasons why the request for a hearing was not filed within the stated time period. You may file your request for an extension of time at one of our offices. If you show that you had good cause for missing the deadline, the time period will be extended. To determine whether good cause

exists, we use the standards explained in § 416.1411." 20 CFR § 416.1433(b) and (c).

76. Good cause for missing deadline to request review. Social Security's regulation on good cause states in part,

(a) In determining whether you have shown that you have good cause for missing a deadline to request review we consider—

(1) What circumstances kept you from making the request on time;

(2) Whether our action misled you;

(3) Whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and

(4) Whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language), which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

75. The regulation gives examples, stating

(b) Examples of circumstances where good cause may exist include, but are not limited to, the following situations:

(1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.

(2) There was a death or serious illness in your immediate family.

(3) Important records were destroyed or damaged by fire or other accidental cause.

(4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.

(5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested reconsideration or a hearing, or within 30 days of receiving the explanation you requested Appeals Council review or filed a civil suit.

(6) We gave you incorrect or incomplete information about when and how to request administrative review or to file a civil suit.

(7) You did not receive notice of the initial determination or decision.

(8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.

(9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known of the need to file timely, or which prevented you from filing timely. Obviously, though, it is best to avoid the need for showing good cause by filing the review request timely.

77. SSA's regulation on submitting evidence prior to a hearing before an ALJ states: "If possible,

the evidence or a summary of evidence you wish to have considered at the hearing should be submitted to the administrative law judge with the request for hearing or within 10 days after filing the request. Each party shall make every effort to be sure that all material evidence is received by the administrative law judge or is available at the time and place set for the hearing." 20 CFR § 416.1435.

78. The SSA regulation on the "notice of a hearing before an administrative law judge" includes these concepts: "After the administrative law judge sets the time and place of the hearing, notice of the hearing will be mailed to the parties at their last known addresses, or given by personal service, unless you have indicated in writing that you do not wish to receive this notice. The notice will be mailed or served at least 20 days before the hearing. The notice of hearing will contain a statement of the specific issues to be decided and tell you that you may designate a person to represent you during the proceedings. The notice will also contain an explanation of the procedures for requesting a change in the time or place of your hearing, a reminder that if you fail to appear at your scheduled hearing without good cause the ALJ may dismiss your hearing request, and other information about the scheduling and conduct of your hearing." 20 CFR § 416.1438.

79. SSA's ALJ hearing regulations state this about "objections to the issues:" "If you object to the issues to be decided upon at the hearing, you must notify the administrative law judge in writing at the earliest possible opportunity before the time set for the hearing. You must state the reasons for your objections. The administrative law judge shall make a decision on your objections either in writing or at the hearing." 20 CFR § 416.1439.

80. SSA's ALJ hearing regulations provide for what is called a "prehearing case review." SSA can conduct prehearing case review after an ALJ hearing is requested but before it is held. A prehearing case review can result in a decision wholly favorable to the appellant, without the appellant having to go through a grueling ALJ hearing. 20 CFR § 416.1441.

81. SSA can also have an attorney advisor in its Office of Hearings and Appeals conduct "prehear-

ing proceedings." These prehearing proceedings can include the taking of additional evidence, and a conference with the claimant. 20 CFR § 416.1442. If the attorney advisor's decision after prehearing proceedings is wholly favorable to the appellant, the request for an ALJ hearing may be dismissed unless the appellant requests that the hearing be held. 20 CFR § 416.1442(d).

82. The Administrative Law Judge hearing procedure. SSA's regulations at 20 CFR §§ 416.1444 – 1461 govern the ALJ hearing.

83. The general procedures for an ALJ hearing are set forth at 20 CFR § 416.1444, which provides: "A hearing is open to the parties and to other persons the administrative law judge considers necessary and proper. At the hearing the administrative law judge looks fully into the issues, questions you and the other witnesses, and accepts as evidence any documents that are material to the issues. The administrative law judge may stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. The administrative law judge may also reopen the hearing at any time before he or she mails a notice of the decision in order to receive new and material evidence. The administrative law judge may decide when the evidence will be presented and when the issues will be discussed. 20 CFR § 416.1444.

84. SSA regulation 20 CFR § 416.1449 governs "presenting written statements and oral arguments." This regulation states: "You or a person you designate to act as your representative may appear before the administrative law judge to state your case, to present a written summary of your case, or to enter written statements about the facts and law material to your case into the record. A copy of your written statements should be filed for each party." 20 CFR § 416.1449.

85. SSA regulation 20 CFR § 416.1450 governs "Presenting evidence at a hearing before an administrative law judge." It has several parts. Part (a) of this regulation gives the appellant the right to participate in ALJ hearing either alone or with a representative. Part (b) allows the appellant to waive the right to appear in person at the hearing (this is seldom used). Part (c) allows the ALJ to accept evidence at the hearing, even though the evidence would not be admissible in a

court of law. 20 CFR § 416.1450(a-c).

86. Subpoenas can be issued by an ALJ (or by the Appeals Council) but the process is very cumbersome. 20 CFR § 416.1450(d) states: "(d) Subpoenas. (1) When it is reasonably necessary for the full presentation of a case, an administrative law judge or a member of the Appeals Council may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for the production of books, records, correspondence, papers, or other documents that are material to an issue at the hearing. (2) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the administrative law judge or at one of our offices at least 5 days before the hearing date. The written request must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove; and indicate why these facts could not be proven without issuing a subpoena. (3) We will pay the cost of issuing the subpoena. (4) We will pay subpoenaed witnesses the same fees and mileage they would receive if they had been subpoenaed by a Federal district court." 20 CFR § 416.1450(d).

87. SSA's regulation states this about "witnesses at a hearing:" " Witnesses may appear at a hearing. They shall testify under oath or affirmation, unless the administrative law judge finds an important reason to excuse them from taking an oath or affirmation. The administrative law judge may ask the witnesses any questions material to the issues and shall allow the parties or their designated representatives to do so." 20 CFR § 416.1450(e).

88. Issue Preclusion. SSA's regulations for ALJ hearings also discuss "collateral estoppel." "Collateral estoppel" is one of three "issue preclusion" rules in the law. Under "collateral estoppel," the same question of fact will not be tried twice between the same parties (unless a higher tribunal orders a retrial). (The other two issue preclusion rules are "res judicata" and "stare decisis." Under "res judicata" the same case will not be retried between the same parties, unless a higher tribunal reverses the lower tribunal and orders a retrial. Under "stare decisis," a legal precedent will not be overturned, unless the validity of it has been called into question by later events.)

89. SSA's regulation on collateral estoppel at ALJ hearings states: "An issue at your hearing may be a fact that has already been decided in one of our previous determinations or decisions in a claim involving the same parties, but arising under a different title of the Act or under the Federal Coal Mine Health and Safety Act. If this happens, the administrative law judge will not consider the issue again, but will accept the factual finding made in the previous determination or decision unless there are reasons to believe that it was wrong." 20 CFR § 416.1450(e).

90. SSA's regulations also govern the making of "a record of a hearing before an administrative law judge." This SSA regulation provides that a complete record of the hearing will be made. The record will be typed if a federal judge agrees to hear a case on judicial review from the Appeals Council. The record will also be typed if the ALJ or the Appeals Council asks for a written record of the proceedings. 20 CFR § 416.1451.

91. SSA has a rather complete regulation that governs the content and timing of the ALJ's decision. The regulation is 20 CFR § 416.1453. It states at paragraph (a): "The administrative law judge shall issue a written decision which gives the findings of fact and the reasons for the decision. The decision must be based on evidence offered at the hearing or otherwise included in the record. The administrative law judge shall mail a copy of the decision to all the parties at their last known address. The Appeals Council may also receive a copy of the decision." 20 CFR § 416.1453(a).

92. This same regulation, in regard to the time for the decision, states: "(1) The administrative law judge must issue the hearing decision no later than 90 days after the request for hearing is filed, unless—(i) The matter to be decided is whether you are disabled; or (ii) There is good cause for extending the time period because of unavoidable circumstances." 20 CFR § 416.1453(b).

93. Appeals Council review of ALJ decisions. The SSA regulations provide for Appeals Council review of ALJ hearing decisions. The Appeals Council is not required to review an ALJ decision. But the Appeals Council may grant the request and either issue a decision or remand the case to an ALJ (for rehearing). 20 CFR § 416.1467.

94. An appellant dissatisfied in whole or in part with an ALJ decision has 60 days from receipt of the decision in which to file a written request for Appeals Council review. The written request should be filed at an SSA office. The appellant should submit any documents or other evidence that the appellant wants the Appeals Council to consider. These should be submitted, if available, with the request for Appeals Council review. 20 CFR § 416.1468(a).

95. The Appeals Council has the authority (seldom used) to review an ALJ decision on its own motion. 20 CFR § 416.1469. No matter how strongly the appellant wants Appeals Council review, it is the Appeals Council that decides whether to grant the request for review.

96. The more typical route to Appeals Council review is that an appellant has requested review, and the Appeals Council has agreed to review the ALJ decision. The SSA regulations describe "cases the Appeals Council will review" thusly: "(a) The Appeals Council will review a case if – (1) There appears to be an abuse of discretion by the administrative law judge; (2) There is an error of law; (3) The action, findings or conclusions of the administrative law judge are not supported by substantial evidence; or (4) There is a broad policy or procedural issue that may affect the general public interest." 20 CFR § 416.1470(a).

97. Only once the Appeals Council stage is exhausted – by a request for review, or by actual review (if the Appeals Council decides to review the matter) can the applicant or recipient request judicial review by the United States District Court. Judicial review will be "on the record" – new evidence will not be taken by the federal district court. If the federal district court decides that the record is incomplete, it can remand the matter – send it back to the administrative agency – for the taking of additional evidence.

98. Administrative law matters before the hearing officers of the Texas Health and Human Services Commission are handled in ways similar to Social Security matters, although Social Security administrative law judges can issues subpoenas, and hearing officers of the Texas Health and Human Services Commission cannot. Subpoenas are rarely issued in Social Security hearings; the threat of a subpoena will likely bring forth the evidence being sought, often in written form

(which is admissible into the record).