

TIME LIMITS, SUBMISSION OF EVIDENCE, SCOPE OF REVIEW
CURRENT PROCESS vs. NPRM RE ALJ AND APPEALS LEVELS
72 Fed. Reg. 61218 (Oct. 29, 2007)

*Ethel Zelenske, NOSSCR
November 19, 2007*

CURRENT REGULATIONS (non-DSI)	DSI FINAL REGULATIONS	10/29/07 NPRM (proposed regulation §)
<p><u>Administrative Law Judge</u> Hearing notice:</p> <ul style="list-style-type: none"> • Sent 20 days before hearing 20 C.F.R. § 404.938 • Object to time or place of hearing “at the earliest possible opportunity” 20 C.F.R. § 404.936. • Object to issues in hearing notice “at the earliest possible opportunity.” 20 C.F.R. § 404.939. <p>Submitting new evidence:</p> <ul style="list-style-type: none"> • 42 U.S.C. § 405(b)(1): Right to hearing with decision based on “evidence adduced at the hearing.” • “At the hearing” you may submit new evidence. § 404.929. • “If possible” submit 10 days after filing Request for Hearing. Party “shall make every effort” to be sure that all material evidence is received by the ALJ or is available at the time of the hearing. § 404.935. 	<p><u>Administrative Law Judge</u> Hearing notice:</p> <ul style="list-style-type: none"> • Sent 75 days before hearing • Object to time or place: 30 days after receipt of Notice. § 405.317(a). • Object to issues in Notice: 5 business days before hearing. § 405.317(b). <p>Submitting new evidence:</p> <ul style="list-style-type: none"> • Before hearing: Per § 405.331(a), must submit new evidence 5 business days before hearing • Within 5 business days of hearing or at hearing: Per § 405.331(b), ALJ <u>will</u> accept if: <ul style="list-style-type: none"> (1) SSA’s action misled claimant (2) Claimant has a physical, educational, or linguistic limitation that prevented the claimant from submitting the evidence earlier ; or (3) Some other “unusual, unexpected, or 	<p><u>Administrative Law Judge</u> Hearing notice:</p> <ul style="list-style-type: none"> • Sent 75 days before hearing. § 404.936. • Object to time or place: 30 days after receipt of Notice. § 404.939(a). <ul style="list-style-type: none"> • Can object to video hearing but cannot object to telephone hearing • Deletes criteria in current § 404.936(e) and (f) re circumstances when ALJ <u>will</u> change time/place or factors to consider. More discretion with ALJ per § 404.939(a). • Object to issues in Notice: 5 business days before hearing. § 404.939(b). <p>Submitting new evidence:</p> <ul style="list-style-type: none"> • Before hearing: Per § 404.935(b), must submit new evidence 5 business days before hearing • Within 5 business days of hearing or at hearing: This is considered “late submission of evidence.” Per § 404.935(c)(1), ALJ <u>will</u> accept if: <ul style="list-style-type: none"> (i) SSA’s action misled claimant (ii) Claimant has a physical, educational, or linguistic limitation that prevented the claimant from submitting the evidence earlier ; or

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<p>the Hearing” (the HALLEX is subregulatory policy manual governing procedure at the ALJ and Appeals Council levels)</p> <ul style="list-style-type: none"> • After hearing decision: can submit to Appeals Council subject to limits in regulation (see below) • Dismissals. Request ALJ to vacate hearing dismissal: 60 days (or appeal to Appeals Council). 20 C.F.R. § 404.960. <ul style="list-style-type: none"> • Case cannot be dismissed for missing pre- or post-hearing conference. And, ALJ must give 7 days notice. § 404.961. 	<p>would <u>affect</u> the outcome of the claim.</p> <ul style="list-style-type: none"> • In addition, the ALJ “may” keep the record open for a set time to submit additional evidence. • After hearing decision (and no DRB review): Per § 405.373, the ALJ <u>will</u> consider new evidence if: <ol style="list-style-type: none"> (1) one of the three exceptions above is met; and (2) there is a <u>reasonable probability</u> that the new evidence, alone or with other evidence, would <u>change</u> the outcome of the claim; and (3) the request is filed within 30 days of receiving the ALJ decision. • Dismissals. Request ALJ to vacate hearing dismissal: 30 days after receiving dismissal order. § 405.382(b). 	<p>evidence, would <u>affect</u> the outcome of the claim.</p> <ul style="list-style-type: none"> • The ALJ “may” stop hearing and continue later if “evidence is missing from the record that must be obtained before the hearing can continue.” § 404.944(b). Claimant “should” notify ALJ of additional medical evaluation scheduled after hearing “for any impairment that forms the basis of the case.” ALJ has discretion to keep record open (or not). • After hearing decision: RECORD CLOSES. § 404.951(a). [unless RB takes evidence – see below] • Dismissals. Request ALJ to vacate hearing dismissal: 60 days (or appeal to Review Board). § 404.960. <ul style="list-style-type: none"> • For first time, case can be dismissed if neither claimant nor repr. appears at pre- or post-hearing conference unless “good reason” for missing. ALJ required only to give “reasonable notice” – no criteria provided. § 404.961(a).

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60 days to appeal to Appeals Council	60 days to appeal to DRB - dismissals only. § 405.427(a) 60 days to appeal to federal court if no DRB review or if DRB review 90-day time limit expires	60 days to appeal all unfavorable ALJ decisions to Review Board (RB)
<p><u>Appeals Council</u></p> <ul style="list-style-type: none"> • Initiating Appeals Council own motion review: Within 60 days after ALJ decision. § 404.969. <ul style="list-style-type: none"> ▪ Note: 42 U.S.C. § 423(h) and 20 C.F.R. § 404.969 require payment of interim benefits if “final decision” not issued within 110 days after favorable ALJ decision. • Contents of appeal: In writing. No other requirements. 20 C.F.R. §§ 404.968. <ul style="list-style-type: none"> • Any documents or evidence “should be submitted” with request for review. In practice, can submit evidence before AC decision. • To file brief or written statement: 	<p><u>Decision Review Board</u></p> <ul style="list-style-type: none"> • Claimants cannot appeal unfavorable ALJ decisions (except for dismissals) • Written statement: 10 days after DRB 	<p><u>Review Board</u></p> <ul style="list-style-type: none"> • Claimants can appeal all unfavorable ALJ decisions to RB. RB also can do own motion review and new role as “advisory function.” Comments requested. Own motion review similar to current regulation - § 404.970. Includes payment of interim benefits. § 404.970(e). • Contents of appeal: “Must be in writing and must clearly indicate that you are appealing a specific unfavorable” ALJ hearing decision or dismissal. <ul style="list-style-type: none"> • Any documents or evidence “should be submitted” with notice of appeal • “Should” also include: written statement that IDs any errors the ALJ made, explains why alleged errors require reversal or modification of ALJ’s hearing decision or dismissal under standards of review in § 404.971, and cites applicable law and specific facts in record to support contentions. • Briefs: Should be filed with appeal or

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<p>“Upon request, claimant given a “reasonable opportunity.” No page limit. 20 C.F.R. § 404.975.</p> <p>• Submitting new evidence to AC: “Shall” consider all new and material evidence submitted which relates to the period on or before the ALJ decision. 20 C.F.R. §§ 404.970(b) and 404.976(b).</p> <p>60 days to appeal to federal court</p>	<p>Notice (no good cause). § 405.425(b). Statement must be filed with appeal (if dismissal). § 405.427(c). DRB written statements limited to 2000 words. <i>Id.</i></p> <p>• Submitting new evidence to DRB: Can submit new evidence using same rules as ALJ post-decision rule; can be read to require submission within 30 days of DRB review notice, but this time limit is not clear. § 405.373(b) and (d). May submit dismissal-relevant evidence to DRB. § 405.427(b).</p> <p>60 days to appeal to federal court (from SSA “final decision”) . Claimant has 60 days after 90-day DRB time limit expires; ALJ decision becomes “binding.” § 405.450(b).</p>	<p>within 10 days. § 404.974(b).</p> <p>• Submitting new evidence to RB: Per § 404.973(b), the RB <u>will</u> consider new evidence if:</p> <p>(1) one of the three exceptions above is met; and</p> <p>(2) there is a <u>reasonable probability</u> that the new evidence, alone or with other evidence, would <u>change</u> (vs. “affect”) the outcome of the claim; and</p> <p>(3) additional evidence is submitted with the appeal; and</p> <p>(4) evidence relates to period on or before date of first ALJ decision</p> <p>Other points about new evidence at RB:</p> <ul style="list-style-type: none"> • If evidence does not satisfy criteria above, it will be returned to claimant who can file a new application. § 404.973(c). • RB can obtain new evidence either by remand to ALJ or RB obtains it if quicker and does not “adversely affect” claimant’s rights. § 404.974(d). <p>60 days to appeal to federal court after RB completes review</p>

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<p><u>Federal court</u></p>	<p><u>Federal Court</u></p>	<p><u>Federal court</u></p> <p>New limits on “Scope of review – period of time adjudicated.” § 404.972. If the hearing decision is set aside by the federal court (or the RB) and remanded to an ALJ for a new hearing, “the proceedings on remand will consider your case only with regard to the period ending on the date of the original [ALJ] decision in your case.”</p> <p>What does this mean? See 72 Fed. Reg. 61222.</p>