Report for Recommendation 90-4

Report and Recommendations on the Social Security Administration's Administrative Appeals Process

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This report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the members of the Conference or its committees except where formal Recommendations of the Conference are cited.

I. INTRODUCTION

During the past year, the Social Security Administration has devoted a great deal of its resources to considering possible reforms for its administrative appeals process. Because the vast majority of contested Social Security and Supplemental Security Income benefits claims involve disability-based benefits, the focus of the Administration's efforts in this area has been on disability adjudications.[1] In 1988, the Social Security Administration prepared a staff draft of changes in its administrative appeals process for possible publication as proposed rules.[2] In response to concerns raised about some of the proposals in Congress and elsewhere, the Administration decided to undertake further study of the need for administrative appeals reform before formally publishing proposed rules. As part of this process, the Social Security Administration asked the Administrative Conference of the United States to prepare this report.[3]

The Social Security Administration requested that this report include three substantive topics: a comparative analysis of the administrative appeals process used in a group of federal disability programs, a synthesis of prior recommendations of the Administrative Conference relating to Social Security administrative appeals, and a legal analysis of the provisions of the Administrative Procedure Act and the Social Security Act applicable to Social Security disability appeals. Parts II, III and IV, respectively, of this report cover these three topics. Part V includes a summary of this material and a set of recommendations.

Although the topic of this report is the administrative appeals process, some attention must be paid to procedures used in making initial decisions. Obviously, the quality of initial decisions, including the quality of the evidentiary record developed to support initial decisions, has an important effect on the procedures in place for appealing from initial decisions. In the simplest sense, one can assume that higher quality initial decisions would result in fewer appeals and therefore less pressure on an appellate system that

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[1]Congress has also concentrated its concern with the Social Security program on disability adjudications. *See, e.g.*, Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

[2]*See* Department of Health and Human Services, Social Security Administration, draft proposed rules (undated) [hereinafter Social Security Administration Draft Proposed Rules].

[3]The Social Security Administration has also requested the assistance of two other bodies: the Disability Advisory Committee, made up of the former Disability Advisory Council, which has been charged with holding hearings and preparing a report and recommendations; and a panel of experts in the field which will work with the Administration in formulating its recommendations.

might function quite differently with a significantly reduced caseload. There is also little doubt that poor development of evidentiary records at the initial stages of the process will affect the nature of a subsequent appeal. Thus, it has been found that by far the most important work of lawyers representing Social Security claimants is the compilation and submission of evidence to supplement the limited record typically compiled at the initial decision level.[4] Even if the initial decision process is functioning quite well, the appeals process can be adversely affected by a failure to communicate effectively to claimants the basis for decisions and the underlying facts considered in making that decision. For these reasons, some material relating to the initial decision process is included in this report and addressed in the recommendations.

II. COMPARATIVE ANALYSIS OF ADMINISTRATIVE APPEALS PROCESS FOR FEDERAL DISABILITY PROGRAMS

In most federal disability programs there are three distinct levels of administrative appeal from an original determination. Although the specific procedures used and the level of formality may differ, a claimant dissatisfied with an original determination can usually seek a review or reconsideration of the original decision still within the agency, followed by an administrative hearing before a hearing officer, administrative law judge or referee, and then a final post-hearing review by a central administrative appeal board. Generally, a claimant must pass through each administrative appeal level as a precondition to the next level of review and must exhaust all levels of administrative appeal in order to seek judicial review, although there are exceptions to this rule in some programs.

The administrative appeals process in place for each of the programs included in this study will be described and analyzed in relation to each other with respect to each of these levels of appeal. Although the appeal process begins only with the filing of an appeal from an agency decision, the process

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[4] *See generally* Popkin, *The Effect of Representation in NonAdversary Proceedings - A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1027 (1977). *See also* Dixon, *The Welfare State and Mass Justice: A Warning From the Social Security Disability Program*, 1972 Duke L. J. 681. The percentage of Social Security claimants represented by lawyers has increased dramatically during the past twenty years, particularly at the administrative hearing level. Thus, in 1970, lawyers participated in 20 percent of all hearings; in 1980 lawyers participated in 41 percent; in 1987, they participated in 66 percent. Department of Health and Human Services, Social Security Administration, Report to the Lawyers on Attorney Fees Under Title II of the Social Security Act 13 (1988).

leading to the agency decision and the transmittal of that decision to the claimant can have a significant impact on how the appeals process works. Accordingly, a brief discussion of the process for reaching agency decisions in disability claims precedes the discussion of the three levels of administrative review.

Because this report covers only procedural issues, the comparative material in this section is limited to the administrative appeals process used in various federal disability programs, as opposed to the substantive disability standards that are applied. Although procedure and substance can be separated successfully for most of the purposes of this report, a brief statement of each of the disability standards used in the disability programs discussed in this section will help put the comparative analysis of administrative appeal procedures in context. The key operative element of the Social Security disability standard is the "inability to engage in any substantial gainful activity."[5] The ability to engage in substantial gainful activity is determined in light of the claimant's age, education and prior work experience.[6] Most Railroad Retirement disability claims are governed by a disability standard that is effectively the same as the Social Security standard.[7] Employees, however, are entitled to disability benefits under the Civil Service Retirement Program when they can no longer perform their regular job effectively and cannot be transferred into a vacant comparable position.[8] Veterans disability benefits are awarded under the "compensation" program for total or partial disability caused or aggravated while in active service, based on the effect of the impairment on earning capacity;[9] and under the "pension" program to low-

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[5]42 U.S.C. §423(d)(1)(A) (1982).This standard applies to Disability Insurance Benefits claims; a substantially identical standard is used for Supplemental Security Income claims. *See id.* §1382c(a)(3)(A).More restricted standards are used for disabled spouses under the Survivors Insurance Program and for children under the Supplemental Security Income program. *See id.* §§423(d)(2), 1382c(a)(3)(A).There are separate, identical regulations for Disability Insurance Benefits and Supplemental Security Income; however, in this report only the Disability Insurance Benefits regulations are cited.

[6]*Id.* §§423(d)(2)(A), 1382c(a)(3)(B).These vocational factors are not included in the disability standard for spouse's Survivors Insurance Benefits or child's Supplemental Security Income.

[7]Although the statutory standard for total disability is phrased somewhat differently, *see* 45 U.S.C. §231a(a)(1)(v), it has been interpreted consistently as identical to the Social Security standard. *See, e.g.*, Estes v. Railroad Retirement Board, 776 F.2d 1436, 1438 (9th Cir. 1985); Duncan v. Railroad Retirement Board, 375 F.2d 915, 917 (4th Cir. 1967). Some claims are decided under a different "occupational disability" standard which is based on the claimant's ability to perform his or her regular, railroad-related occupation. *See* 45 U.S.C. §231a(a)(1)(iv).

[8]*See* 5 U.S.C. §8337(a).

[9]*See* 38 U.S.C. §355.

income veterans who are "permanently and totally disabled."[10] Finally, Black Lung disability benefits are provided to miners only if they are totally disabled due to black lung disease caused by coal mine employment.[11]

A few comments about the relative number of disability claims adjudicated in each program are also relevant. At most levels of adjudication, the Social Security and Veterans programs must be separated from the others as involving a much higher number of claims. Thus, there are over 1,000,000 claims per year at the initial decision level in the Social Security and Veterans programs, and less than 10,000 in the Railroad Retirement, Black Lung and Civil Service programs; at the administrative hearing and post-hearing administrative review levels, there are similar order-of-magnitude differences, with over 250,000 Social Security administrative hearings each year and over 50,000 cases at the Appeals Council and Board of Veterans Appeals, compared with, for example, less than 1,000 hearings and less than 100 post-hearing reviews in the Railroad Retirement and Civil Service programs. There are, however, some deviations from this general pattern. Thus, there are considerably less hearings in the Veterans programs compared to the Social Security program, probably because Veterans hearings are optional. Also, there are a relatively high number of hearings and post-hearing reviews in the Black Lung program compared to the number of initial applications--approximately 7,000 hearings and 4,000 cases at the Benefits Review Board each year--because many Black Lung cases are appealed over a long period of time.[12]

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[10] *Id.* §521(a).

[11] *See* 30 U.S.C. §901(a).

[12] This data was compiled from the following (?)Staff of House Comm. on Ways and Means, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, 1989 Edition (1989); U.S. Department of Labor, Black Lung Benefits Act, Annual Report on Administration of the Act During Calendar Year 1986 (1989); U.S. Merit Systems Protection Board, A Study of Cases Decided by the U.S. Merit Systems Protection Board in Fiscal Year 1987 (1988); Veterans Benefits Administration Hearings Conducted by Hearing Officers--Cumulative Report for FY 1989 (Oct-Mar) (May 1989); Board of Veterans Appeals, Appeals Statistical Data--Board of Veterans Appeals (May 1989); Letter from Leroy Blommaert, Office of Information Resources Management, Railroad Retirement Board (July 3, 1989); Letter from Bonner H. Day, Public Affairs Specialist, Office of Public Affairs, Veterans Administration (June 12, 1989); Letter from Robert H. Kravetz, Director of Administration and Management, Benefits Review Board (July 10, 1989); Internal Memorandum from Dan Peed to Randy Berholtz, U.S. Department of Labor, Division of Coal Mine Workers Compensation (May 4, 1989); telephone interview with Chris Brown, Office of Personnel Management (May 23, 1989).

A. Initial Determination of Disability

Initial disability determinations are made by agency level examiners and, to one degree or another, agency medical staff. A claims file is developed to include relevant medical evidence; claimants are expected to participate in developing relevant evidence and, in many instances, are required to submit to special examinations. Then, an eligibility decision is made by applying the evidence compiled to the applicable disability standard. Claimants are notified of the decision in writing, with some form of explanation of the basis for the decision.

1. Social Security Initial Determination

Initial decisions on Social Security disability claims are made by the Social Security Administration together with state agencies known as Disability Determination Services.[13] The Social Security Administration processes all aspects of the claim unrelated to disability and transmits the formal notice of decision to the claimant. The actual determination of disability is delegated to the Disability Determination Service in the state.[14] The Disability Determination Service is responsible for compiling and developing all medical evidence, evaluating that evidence and reaching a decision as to whether the claimant meets the applicable disability standard.

Disability determinations are made by a disability examiner together with a member of the Service's medical staff, known as a medical consultant. They also decide whether additional evidence is needed and will, in many cases, order a special examination of the claimant by a physician on contract with the agency. A special form, known as a disability transmittal form, is used by the Service to record the disability determination. A brief rationale for the decision, including a statement of the medical evidence relied upon in making the determination, is included as part of that form. The statement of rationale and evidence relied upon is then incorporated in the formal notice of decision issued by the Social Security Administration to the claimant.

2. Initial Determination in Other Programs

Initial decisions in other federal disability programs are made by agency staff, without the use of an outside agency. The Railroad Retirement Board's Bureau of Retirement Claims in Chicago, for example, operates much like a

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[13] *See generally* 42 U.S.C. §421(a) (Supp. IV 1986); 20 CFR §§404.1601 - .1694 (1988).

[14] The Social Security Administration has the authority to remove this function from a state if the state agency is not performing up to standards. *See* 42 U.S.C. §421(b)(1).

national Disability Determination Service, applying essentially the same criteria as the Social Security Administration.[15] The only difference is that medical consultants participate in the process at the option of the examiner. Similarly, Civil Service disability retirement claims are processed entirely by the Office of Personnel Management.[16] All initial disability determinations are made at the central office in Washington. Claims are evaluated initially by a medical consultant, usually on the basis of evidence supplied by the claimant. The agency can order a medical examination of the claimant, if necessary;[17] however, this authority is used infrequently. The actual disability decision is made by a disability claims examiner, who uses the medical consultant's recommendation and the examiner's own evaluation of the evidence in the file. A written initial decision is then issued by the Office of Personnel Management, which must include findings of fact and relevant conclusions.[18]

A more elaborate process is used in reaching a final initial determination of eligibility in Black Lung cases than in other programs. Claims are processed by the Division of Coal Mine Workers Compensation of the Department of Labor's Office of Workers Compensation Programs.[19] Disability determinations are made by a deputy commissioner of the Division of Coal Mine Workers Compensation at regional offices throughout the country.[20] The deputy commissioner makes the decision on the basis of evidence supplied by the claimant and the results of a medical examination by an outside medical consultant which is ordered routinely.

The deputy commissioner first makes an "initial finding of eligibility," which, if unfavorable to the claimant, must include a statement of the reasons for the finding and a statement of the additional evidence necessary to establish eligibility.[21] If the deputy commissioner finds that the claimant is eligible for benefits, the process shifts into an adversarial mode in which a "responsible coal mine operator" is identified and given the opportunity to participate in the

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[15]For most purposes, the Railroad Retirement disability standard is identical to the Social Security standard. *See* note 7, *supra*, and accompanying text.

[16]*See generally* 5 U.S.C. §8337 (1982); 5 CFR §831.501 (1988). Prior to January, 1979, the program was administered by the Civil Service Commission. Claims are processed first at a central facility for purposes of evaluating eligibility criteria unrelated to disability. *See id.* §§831.102, .104, .501(c).

[17]*See id.* §831.502(b).

[18]*See* 5 CFR §831.1205(b).

[19] *See generally* 30 U.S.C. §§901-950 (1982 and Supp. IV 1986); 20 CFR §725.304(b) (1988).

[20]*Id.*

[21]20 CFR §725.410(c) (1988).

proceedings.[22] If there is no responsible coal mine operator, then the deputy commissioner will issue a "proposed decision and order" with findings of fact and conclusions of law.[23] If there is a responsible coal mine operator, the operator can participate fully in the proceedings; if the operator is identified only after initial findings are made, the operator can submit its own evidence and request another examination of the claimant before a proposed decision and order is issued.[24] The proposed decision and order is the final determination by the deputy commissioner unless objected to or unless the claim is submitted by the deputy commissioner for a hearing before issuing a proposed decision and order.[25] The deputy commissioner can also hold a conference with all the parties and attempt to resolve or limit issues before issuing a proposed decision and order.[26]

Veterans disability benefits are processed initially at local offices of the Department of Veterans Affairs by the Compensation and Pension Service in the Veterans Benefits Administration.[27] Preliminary evaluation of a claim, particularly with respect to issues unrelated to disability, is done by an "authorization unit." The responsibility for determining disability, including most of the responsibility for developing medical evidence, lies with the Rating Board, a panel of three people, one of whom is a medical doctor.[28] The Board can request additional medical information and order special examinations, usually from medical staff at Veterans Administration medical facilities.

Rating decisions are prepared by the members of the Board, and signed by all three members before they are returned to the authorization unit for implementation. There are specific guidelines for Rating Board decisions, which must include a listing of any combat disabilities, a finding of employability, if relevant to the determination, and a "narrative."[29] The

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[22] *Id.* §§725.410(b), (c) (2). A responsible coal mine operator, which may or may not exist with respect to a particular claim, is a coal mine operator given responsibility for payment of the claimant's benefits by virtue of the claimant having worked at the operator's coal mine under circumstances outlined in the Black Lung Benefits Act. *See* 30 U.S.C. §802(d) (1982); 20 CFR §725.492, .493 (1988).

[23] *See* 20 CFR §725.418.

[24] *See id.* §725.414.

[25] *See id.* §725.415. Objections to a proposed decision and order are discussed at text accompanying notes 51-53, *infra*. Direct referrals for hearing by the deputy commissioner are rare.

[26] *Id.* §§725.416-.417.

[27] *See* 38 CFR §3.100 (1988).

[28] *See* Veterans Administration Manual M21-1 §45.01(b).

[29] *Id.* §§49.11, .12, .17.

narrative must include a statement of the issues involved in the claim, a recitation of all facts relevant to the determination of the claim, and a discussion of the reasons for the conclusion reached.[30] The claimant is notified of the decision by the authorization unit through a Notice of Decision which states the reason for the decision, including the rating decision if one was made.[31]

B. Administrative Review Prior to Hearing

All programs provide claimants with an opportunity to request a review of an initial determination on a disability claim at the agency level, before requesting an administrative hearing. In some programs a request for an agency review of the determination is a precondition to a request for an administrative hearing. In other programs, a second administrative review is available at the option of the claimant.

1. Social Security Reconsideration

The Social Security Administration's reconsideration procedure is a good example of a formal administrative review which a claimant must pursue prior to requesting a hearing.[32] A request for reconsideration, which must be filed within 60 days of receipt of notice of a decision,[33] triggers a reexamination of all of the evidence in the file as well as additional information submitted by the claimant with the request. As with initial decisions, a reconsideration request is reviewed initially at the local Social Security Administration office, and then forwarded to the Disability Determination Service when the contested issue is disability.

The reconsideration process begins with an effort to include in the reconsideration file all current medical information and an explanation of why the claimant disagrees with the initial determination. Then, if it appears that the medical record is insufficient or contains conflicting evidence, new medical information is obtained either from existing sources or by ordering new

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[30] *Id.* §49.17(g). As stated in the Manual, "[t]his discussion and reasoning is what the Board adds to the evidence. Whatever is necessary to justify the conclusions should be cited." *Id.*

[31] *See* 38 CFR §3.103.

[32] There is no "reconsideration" of a decision granting benefits; however, there are separate internal quality control procedures for monitoring and reviewing decisions generally.

[33] *See* 20 CFR §404.909(a) (1988). There are rules for extension of the period within which reconsideration can be requested upon a showing of "good cause." *Id.* §404.911.

consultative examinations.[34] A reconsideration decision is then made by a disability examiner and a medical consultant who were not involved in the initial determination. The same standards are used as those that apply to the initial determination, and the notification process following reconsideration is the same as with an initial decision.

A modified reconsideration procedure is used when the "initial decision" is to terminate benefits following a "continuing disability review" in which the Social Security Administration found, on the basis of medical evidence, that the claimant's disability ceased.[35] As the result of controversy surrounding the procedures used to effectuate continuing disability reviews in the early 1980s, Congress required the Social Security Administration to provide for some form of hearing as part of the reconsideration process in those cases.[36] Reconsiderations in continuing disability review cases are conducted by special "CDR examiners" according to essentially the same procedures as regular reconsiderations.[37] However, if the termination is upheld, the claimant is given the opportunity to request a "disability hearing" before the reconsideration decision is final.[38] These hearings are held at the Disability Determination Services by special hearing officers, who reevaluate the claim based on the evidence in the record and any testimony presented at the hearing. Claimants can be represented, and can present their own testimony as well as testimony of witnesses.[39] The hearing officer then makes a determination on disability, which becomes the final reconsideration decision on the claim.[40]

2. Reconsideration or Agency Review in Other Programs

Reconsideration procedures for Railroad Retirement disability claims are the same as those used for Social Security claims, except that there are no continuing disability reviews in that program and therefore there are no special disability termination hearings.[41] A similar but more limited procedure is

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[34] *See generally* POMS §DI3201.B; 20 CFR §404.913(a).

[35] *See* 20 CFR §404.913(b). A finding that a claimant is no longer disabled can be based on nonmedical factors, such as a return to work. *See id.* §404.1594(f)(1).

[36] *See* Social Security Amendments of 1983, Pub. L. No. 97-455, 96 Stat. 2498 (1983). *See also* 48 Fed. Reg. 36,831 (1983); 20 CFR §§404.913(b), .914-.918.

[37] "CDR examiners" are experienced disability examiners trained specially to review continuing disability review claims.

[38] *See* 20 CFR §404.913(b).

[39] *See id.* §§404.916(b).

[40] *Id.* §404.917(d).

[41] As with Social Security claims, reconsideration is a precondition to requesting an administrative hearing. *See* 20 CFR §404.930.

used for reconsideration of initial decisions by the Office of Personnel Management in Civil Service disability claims. A claimant must request reconsideration in writing within 30 days after receipt of the initial decision.[42] An appeal to the Merit Systems Protection Board for a hearing can be made only following a final decision on reconsideration.[43] The main difference is that reconsideration review is based only on the record compiled on the initial application; there are no provisions for developing further evidence at this stage in the process. There must be a written decision on reconsideration which includes a full statement of relevant findings and conclusions.[44]

A request for reconsideration in a Veterans disability claim is processed much like a Social Security reconsideration request, except that the review is less formal and claimants have the option to seek agency level review of an initial decision or to proceed directly to a hearing.[45] A claimant is expected to furnish additional evidence, if relevant, and indicate errors of fact or law in the original notice of decision. This material is reviewed by the authorization unit, and then referred to the Rating Board "[i]f there is any question as to the probative value of medical evidence or whether consideration by the Rating Board is warranted."[46] Otherwise, the reconsideration is completed by the authorization unit. If the claim is referred to the Rating Board, it proceeds with the reconsideration decision in the same manner as an initial decision; if referral to the Rating Board is considered unnecessary, the reconsideration request is denied by the authorization unit. If reconsideration is denied, the notice is to include a full explanation of the reasons.[47] A decision denying reconsideration can then be appealed in the same manner as an initial decision.[48]

Veterans Benefits Administration procedures also allow claimants to request that their claims be reopened after the time to appeal has expired. In effect, this allows claims to be refiled on the same basis as an earlier

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[42]5 CFR §831.109(d) (1988). The time limit may be extended under limited circumstances. See id. §831.109(e)(2).

[43]*Id.* §831.110.

[44]*Id.* §831.109(f).

[45]In both programs a request for reconsideration can be made up to the time for requesting an appeal. For Veterans Disability Benefits the period is one year, 38 CFR §19.129 (1988); for Black Lung Benefits the time period is 60 days, 20 CFR §725.410(c)(2) (1988).

[46]*See* Veterans Benefits Administration Manual M21-1 §27.02(a).

[47]*Id.* §27.04. The actual quality of many notices is, however, quite poor. The U.S. General Accounting Office is conducting a study which includes the quality of Veterans Benefits Administration disability notices.

[48]*Id. See also* 38 CFR §3.103.

application but supported with new facts.[49] When new facts are alleged supporting an earlier claim it is adjudicated without regard to the prior decision on the issue of disability. Even if the claim is reopened on the basis of the same facts, benefits can be awarded if there has been a change in the law or, under limited circumstances, as an "equitable entitlement."[50]

The reconsideration procedures discussed so far are, in effect, opportunities for an appeal from a final, initial decision. The decision process at the agency level is thus broken into two distinct parts: The initial decision following procedures for developing and evaluating relevant evidence, and a reassessment of the initial decision followed by a review of that decision and promulgation of a new decision. In the Civil Service program, the review is based on the existing record; in other programs, the existing record is evaluated for completeness and, if necessary, supplemented.

An entirely different approach to administrative review prior to hearing is followed in the Black Lung program. Rather than provide for an intermediate, limited agency-level appeal, the process in the Black Lung program is more like an optional extension of the initial decision process. The notice of an initial decision in a Black Lung claim includes a statement of additional evidence that would be necessary to establish eligibility.[51] The claimant then has 60 days within which new evidence can be submitted or a hearing can be requested.[52] If the claimant does not want to submit new evidence to the deputy commissioner, then there is no further review at that level; the only option then is to request a hearing. If new evidence is submitted, a new decision is made by the deputy commissioner on the basis of the entire record, including the new evidence.[53] As with initial decisions, if a new finding is made that the claimant is eligible and if a responsible coal mine operator is identified, the operator is given the opportunity to submit its own evidence, request a new medical examination and request a new decision on eligibility.[54] When a responsible operator is involved, the deputy commissioner can schedule a conference with the parties in order to resolve or limit the issues before issuing a proposed decision.[55]

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[49] *See generally id.* §3.160(e).

[50] *See* 38 U.S.C. §210(c)(2), (3)(A) (Supp. IV 1986). Equitable entitlement is authorized only when the denial was due to administrative error or if the claimant relied on an improper grant and suffered a loss on that basis without knowing the original grant was improper. *Id.*

[51] 20 CFR §725.410(c) (1988). *See also* text accompanying note 21, *supra.*

[52] *Id.*

[53] If the claim is denied again, a request for a hearing can still be filed within 60 days following the second denial. 20 CFR §725.410(c)(2).

[54] *See id.* §725.414.

[55] *Id.* §725.415.

The deputy commissioner then issues a proposed decision and order which contains findings of fact and conclusions of law.[56] The parties may then respond by requesting a revision of the decision or by requesting a hearing within 30 days. A request for a revision must "specify the findings and conclusions with which the responding party disagrees."[57] The deputy commissioner, in acting on a request to revise a proposed decision and order, may simply deny the request, amend the decision and order, or "take such other action as is appropriate," including the development of additional evidence.[58] The deputy commissioner's revised decision and order or the refusal of the deputy commissioner to revise the proposed decision and order may be appealed through a request for a hearing.[59]

C. Administrative Hearings

The administrative hearing is the most important element of the administrative appeals process for all the programs included in this study. The general model is to set the hearing level apart as a separate opportunity for a *de novo* review of prior agency action on an application for benefits. Thus, at the Social Security Administration, the Railroad Retirement Board and the Department of Labor, claims are transferred to separate offices--the Social Security Administration's Office of Hearing and Appeals, the Railroad Retirement Board's Bureau of Hearings and Appeals, and the Department of Labor's Office of Administrative Law Judges--for hearing, and Civil Service disability retirement claims are transferred for hearing from the Office of Personnel Management to the Merit Systems Protection Board. The Veterans Benefits Administration handles appeals somewhat differently, although recently it also has moved toward separating the administrative hearing procedure from the rest of the agency-level decisionmaking process.

1. Social Security Hearings

Social Security claimants may request a hearing before an administrative law judge within 60 days following receipt of a decision on a request for reconsideration. The hearing request is submitted on a standard form which

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[56] *Id.* §725.418(b).

[57] *Id.* §725.419(a), (b).

[58] *Id.* §725.419(c).

[59] *Id.*

requires only a general statement of the basis for the appeal.[60] The entire record is transferred from the local district office to the local office of the Office of Hearings and Appeals. Cases are then usually assigned to a particular administrative law judge. At this point the file is reviewed by a hearing assistant who selects essential documents for inclusion in the appeals file[61] and assesses the evidence in order to determine whether additional factual development is needed. Development of additional evidence relating to disability includes obtaining existing records from treating sources or hospitals, soliciting written reports from treating sources with respect to the claimants' disabilities, and ordering special medical examinations by consulting physicians chosen from a panel provided by the Disability Determination Services. The extent and nature of factual development at the Office of Hearings and Appeals varies widely from office to office and from judge to judge. Claimants are also notified that they may submit additional medical evidence on their own.[62]

The general pattern is for the administrative law judge and his or her staff to review and develop evidence independently, without communicating or coordinating with the claimant and the claimant's representative. Social Security Administration regulations provide that the administrative law judge may hold a prehearing conference in order to focus the issues to be considered at the hearing and to identify necessary factual development.[63] In addition, administrative law judges have the authority to subpoena witnesses, either on their own or on behalf of a claimant.[64] In practice, however, the prehearing procedures and the subpoena power are used rarely.

Social Security administrative hearings are nonadversarial and the Social Security Administration is not represented.[65] The administrative law judge engages in a *de novo* review of the claim based on all of the evidence in the

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[60]The form currently in use, Form HA-501-U5, states on behalf of the claimant that he or she disagrees with the determination, and then provides two blank lines following the statement, "My reasons for disagreement are:"

[61]Material from the original file not included in the appeal file is kept in a separate file known as a "junk" file.

[62]Thus, the form on which a hearing is requested includes a box to check if additional evidence will be submitted, as well as a box to check if the claimant has no additional evidence to submit.

[63]*See* 20 CFR §404.961 (1988).

[64]Claimants must request a subpoena from the judge in advance. *See id.* §404.950(d).

[65]*See id.* §404.900(b); Ware v. Schweiker, 651 F.2d 408, 413 (5th Cir. 1981), *cert. denied*, 455 U.S. 912 (1982). The Administration ran a demonstration project in the mid-1980s known as the "Government Representative Experiment" in which it was represented at hearings where the claimant was represented, but it was not implemented systemwide. *See* 47 Fed. Reg. 36,117 (1982).

record, including testimony presented at the hearing.[66] The administrative law judge is required to examine all of the issues raised by the claimant fully and to receive into evidence all relevant documents and testimony.[67] Moreover, the judge is charged with the responsibility for assuring that all evidence necessary to resolve the claim is included in the record, particularly when the claimant is unrepresented.[68] The judge has an affirmative responsibility in this regard; he or she "acts as an examiner charged with developing the facts."[69] The nonadversarial nature of the proceeding places a basic duty of inquiry on the administrative law judge "to inform himself about facts relevant to his decision and to learn the claimant's own version of those facts."[70]

The administrative hearing itself is extremely important to claimants, for it is the one opportunity they have to appear personally to present their claim before a decisionmaker who has access to the complete record in the case. Although claimants are entitled to appear and testify at the hearing,[71] an administrative law judge may issue a decision wholly favorable to the claimant without a hearing.[72] The administrative law judge's responsibility to develop issues fully includes the responsibility to assure that witnesses are questioned properly. Problems occur in this regard most frequently with vocational experts; the administrative law judge must make sure that hypothetical

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[66] *See* 20 CFR §404.953(a). The process is informal; however, witnesses testify under oath and a full transcript of the hearing is made. *Id.* §§404.950(e), .951.

[67] *Id.* §404.944.

[68] *See generally* Bloch, *Representation and Advocacy at Nonadversary Hearings: The Need for Nonadversary Representatives at Social Security Disability Hearings*, 59 Wash. U. L. Q. 349 (1981). *See also* Smith v. Bowen, 687 F.Supp. 902, 906 (S.D. N.Y. 1988) ("The administrative law judge's duty to develop the comprehensive record . . . is greatest when claimant is unrepresented; but the duty still exists when the plaintiff is represented").

[69] Richardson v. Perales, 402 U.S. 389, 410 (1971). *See also* Echevarria v. Secretary, 685 F.2d 751, 755 (2d Cir. 1982) ("the ALJ, unlike a judge in a trial, must himself affirmatively develop the record"); Poulin v. Bolin, 817 F.2d 865, 870-71 (D.C. Cir. 1987) ("administrative law judge has affirmative duty to . . . develop the comprehensive record requisite for a fair determination of disability)".

[70] Dixon v. Heckler, 811 F.2d 506, 510 (10th Cir. 1987), *citing* Heckler v. Campbell, 461 U.S. 458, 471 n.1 (1983) (Brennan, J., concurring).

[71] 20 CFR §404.929. Claimants can waive this right, but the waiver must be made knowingly and intelligently. *See, e.g.*, Thomas v. Schweiker, 557 F.Supp. 580, 582 (S.D. Ohio, 1983). "However, a personal appearance is considered to be of sufficient importance that an administrative law judge can insist upon a claimant being present even when there has been a prior valid waiver." Stoner v. Secretary of Health and Human Services, 837 F.2d 759, 761 (6th Cir. 1988) (citing 20 CFR §404.950(b)). Further, counsel cannot waive the right to appearance unless given the authority by the claimant. *Id.*

[72] 20 CFR §404.948(a).

questions based on all of the claimant's medical conditions have been asked and that opinions are not given based on facts unsupported by the record.[73]

Administrative law judges also have the authority to call a medical expert, often referred to as a "medical advisor," at the hearing.[74] Some judges do this frequently, others infrequently, and many not at all. When medical advisors are called to testify, they are to do so as neutral experts subject to cross examination.[75] Similarly, administrative law judges must assure that other witnesses, including the claimant, are questioned so that their testimony is presented effectively.[76]

Consistent with the informal nature of the Social Security Administration's administrative hearing procedures, "[i]n making a decision [the Administration] will consider all information [it] gets from [the claimant] and others about [the claimant's] impairments."[77] There are no formal requirements for the presentation of evidence and the formal rules of evidence do not apply.[78] Thus, written reports from witnesses, including medical experts, are accepted into the record without technical objection.[79] Documentary evidence is accepted from the claimant at the hearing and, at the option of the administrative law judge, after the hearing within a limited period of time set by the judge. In some instances the administrative law judge will order additional medical evidence after the hearing; if this is done, the claimant must be given the opportunity to rebut or respond to that evidence before the record is closed for decision.[80]

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[73]*See, e.g.*, Embrey v. Bowen, 849 F.2d 418 (9th Cir. 1988) (hypothetical that is not supported by the record and is flatly contradicted by claimant and claimant's physician "has no evidentiary value and cannot support the [administrative law judge's] decision"). *See also* Brenem v. Harris, 621 F.2d 688, 689-90 (5th Cir. 1980).

[74]*See* Pugh v. Bowen, 870 F.2d 1271, 1278 n.9 (7th Cir. 1989) ("In cases where it is not possible to infer [the proper determination from] . . . the medical evidence . . . the administrative law judge should call on the services of a medical advisor").

[75]*See, e.g.*, 870 F.2d 742, 744 (1st Cir. 1989) (medical advisor's testimony accepted because, among other reasons, he was subject to a cross-examination).

[76]*See, e.g.*, Quiles v. Califano, 460 F.Supp. 110, 112 (E.D. Wis. 1978).

[77]20 CFR §404.1512(a).

[78]*See id* §404.950(c). *See also* Sherill v. Bowen, 835 F.2d 166, 169 (8th Cir. 1987) (as long as the evidence is material to the issues in question, it may be considered by the administrative law judge, even if inadmissible under the rules of evidence in a court of law).

[79]*See* Richardson v. Perales, 402 U.S. at 402 (1971).

[80]Thus, an administrative law judge cannot rely on a medical report received after the hearing without giving the claimant an opportunity to rebut that evidence. *See, e.g.*, Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983). *See also* Wallace v. Bowen, 855 F.2d 101, 108 (3d Cir. 1988) (When the administrative law judge chooses to allow evidence after the hearing, he or she must "afford the claimant not only an opportunity to comment and present evidence but

Following the closing of the record, the administrative law judge makes his or her decision on the merits. The decision must be communicated to the claimant in writing with a full statement of findings of fact and reasons for the decision.[81] Judges are required to include specific findings on weight given to conflicting evidence and on the credibility of witnesses.[82] The decision "must let the parties and the reviewing courts know, in some intelligible fashion, where they stand on the pivotal issues of fact posed by the applications they adjudicate."[83]

2. Hearings in Other Programs

Procedures for initiating an administrative hearing tend to be more extensive in other programs. Although the role of the administrative hearing in the administrative appeals process is essentially the same in all programs, except, to some extent, in the Veterans program, there are significant differences in the manner in which hearings are held. In the Civil Service and Black Lung Programs, where, as in the Social Security program, administrative hearings are *de novo* reviews of final agency decisions, the process is somewhat more formal. In both of these programs this could result from the fact that administrative hearing decisions are subject to significant further administrative review.[84] In the case of the Black Lung program, the hearing process is a great deal more complex in part because hearings are adversarial.[85] Veterans hearings can serve slightly different functions from those in other programs, and are also subject to a more comprehensive final

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also an opportunity to cross-examine the authors of any post-hearing reports, and must reopen the hearing for that purpose if requested").

[81]20 CFR §404.953(a). *See also* Burnett v. Bowen, 830 F.2d 731, 736 (7th Cir. 1987) ("[the administrative law judge's] failure to comment on the appellant's evidence leaves this court with a record insufficient for a meaningful appellate review . . . [To] ensure meaningful review at least a minimum level of articulation of the [administrative law judge's] assessment of the evidence is required").

[82]Making credibility determinations "is a difficult job, and . . . errors are obviously difficult for the reviewing court to detect . . [thus a reviewing court] will not normally substitute [its] impressions on the veracity of a witness for those of the trier of fact." Gooch v. Secretary, 833 F.2d 589, 592 (6th Cir. 1987).

[83]Chiappa v. Secretary, 497 F.Supp. 356, 358 (S.D.N.Y. 1980). Although the administrative law judge decides the claim, the decision itself is usually written by staff attorneys rather than the judge.

[84]*See* text accompanying notes 183-241, *infra*.

[85]Civil Service disability hearings can be described as somewhat adversarial. *See* text accompanying notes 102-104, *infra*.

administrative review procedure.[86] The Railroad Retirement program, on the other hand, follows essentially the same procedures used in Social Security hearings, except that referees are used rather than administrative law judges and they never call medical experts to testify.[87]

The process begins in Civil Service disability retirement claims with a filing of a petition for appeal with the Merit Systems Protection Board.[88] The claimant has the option of requesting a hearing as part of the appeal; if a hearing is not requested the appeal will be decided solely on the documentary evidence in the record.[89] Although the Board's regulations require that a claimant include a statement of the basis of the appeal, under most circumstances failure to do so can be remedied later in the proceedings.[90]

Unlike with Social Security appeals, the Office of Personnel Management is required to respond to a petition for appeal.[91] The Office's response must include "[a] specific response admitting, denying or explaining, in whole or in part, each allegation of the appellant's petition" as well as copies of all documents in the record.[92] In practice, the Office's responses are often minimal. Thus, the Office was found to have "substantially complied" with Board regulations when it submitted a case file and copy of the reconsideration decision as a response to a petition for appeal.[93] The Office may request a hearing in its response; however, it is not entitled to a hearing as a matter of right and therefore must provide a statement of reasons for the request.[94]

Appeals are held before administrative judges who conduct a *de novo* review of the record.[95] New and supplemental evidence may be submitted at

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[86]Some Veterans benefits hearings are held before a final agency level decision is made. *See* text accompanying notes 142-44, *infra*.

[87]*See generally* 20 CFR §§260.5 (1988).

[88]5 CFR §1201.22(a) (1988). The appeal must be filed within 20 days after the date of the Office's final decision. *Id.* §1201.22(b).

[89]*Id.* §1201.24(e). *See* Sweat v. Office of Personnel Management, 40 M.S.P.R. 84, 89 (1989) ("Applicant's right to a hearing on appeal may only be waived by implication if there is a clear, unequivocal and decisive act showing such a purpose"). *See also* Beaudette v. Department of the Navy, 5 M.S.P.R. 394 (1981).

[90]*See* 5 CFR §1201.24(b) ("[f]ailure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties or substantially delay the proceedings").

[91]*Id.* §1201.22(b). The Board serves a copy of the petition on the Office; and the Office has 15 days to respond. *Id.* §1201.26(c).

[92]*Id.* §1201.25(a)(3), .25(a)(4).

[93]*See* Miller v. Office of Personnel Management, 7 M.S.P.R. 469, 473 (1981).

[94]5 CFR §1201.25(b).

[95]*See* Cook v. Office of Personnel Management, 31 M.S.P.R. 683, 686 (1986) ("In adjudicating disability retirement appeal, the Board is not limited to review of record before [the

the hearing; however, the judge will not consider proof of an entirely new basis for disability.[96] If evidence of a new condition is presented, the proper disposition is to deny the claim and await the filing of a new application based on the new condition.[97] Board procedures are designed to cover the full range of personnel issues it considers in addition to claims for retirement benefits. Thus, its procedures on fact development are similar to those available in general civil litigation.[98] Although most disability retirement cases do not require extensive use of these rules, the Office has been ordered to respond to interrogatories requesting a statement of the standards used to deny a claimant's application for benefits.[99] The Board also has authority to issue subpoenas based on a general showing of relevance and materiality, and the reasonableness of the scope of the request.[100] The technical rules of evidence do not apply; however, objections can be made on the grounds of relevance and materiality.[101]

Board procedures also contemplate that hearings before administrative judges will be adversarial. As noted earlier, the Office is expected to file its response to a claimant's petition for appeal. In addition, the Office must designate a representative to sign its response;[102] however, in most cases the Office is not represented at the hearing itself. Indeed, the Office has been criticized for its limited participation in defense of its disability retirement decisions before the Board.[103] Although the Office often does not appear at

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Office of Personnel Management], but is mandated to conduct a hearing if requested by appellant and to consider *de novo* all relevant evidence presented by both parties.") *See also* French v. Office of Personnel Management, 30 M.S.P.R. 503, 505 (1986).

[96]*See* Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 413, n.14 (1981) ("we do not consider . . . evidence relating to a totally different or additional medical condition which was never the subject of an appellant's application to OPM"). Thus, in Bilancia v. Office of Personnel Management, 8 M.S.P.R. 77, 78-79 (1981), the Board refused to consider a disability claim based on anxiety and depression when initially only physical grounds were presented as a basis for the application.

[97]Nulph v. Office of Personnel Management, 29 M.S.P.R. 79, 80-81 (1985).

[98]For example, the Board has a set of discovery rules based on the Federal Rules of Civil Procedure. *See generally*, 5 CFR §§1201.71-.75. These discovery provisions are construed liberally by the Board. *See, e.g.*, Johnson v. Dept. of the Treasury, 8 M.S.P.R. 170, 174 (1981) (all evidence that "assists in planning a case" is discoverable).

[99]*See* Julson v. Office of Personnel Management, 8 M.S.P.R. 178, 182-83 (1981).

[100]*See generally* 5 CFR §§1201.81-.85. Subpoena requests are ruled upon by the administrative judge. *Id.* §1201.81(c).

[101]*See generally*, 5 CFR §1201.62.

[102]*Id.* §1201.25(a)(5).

[103]*See* U.S. General Accounting Office, Most Civil Service Disability Retirement Claims Are Decided Fairly, But Improvements Can Be Made (1983).

hearings, it will appear when an administrative judge holds a prehearing conference. In the past few years, administrative judges have been making greater use of the prehearing conference in order to limit the issues on the appeal and, in some cases, to resolve the matter without a hearing.[104]

Hearings are held at various sites throughout the country.[105] The administrative judge must consider all evidence that is relevant and material, unless "unduly repetitious."[106] Thus, disability retirement decisions "must be based on the probative value of all the evidence, taking into account objective clinical findings, diagnoses and expert medical opinions, subjective evidence of pain and disability, and all evidence relating to the effect of the applicant's condition on his or her ability to perform in the grade or class of position last occupied."[107] The judge's role at the hearing is more limited than that of the administrative law judge at Social Security hearings. Thus, although the administrative judge is under a similar duty to decide all issues presented by the parties and not to dismiss an appeal because there is insufficient proof, the judge's obligation is to request the party to submit additional necessary evidence.[108] The parties are given time to file written arguments and to submit additional evidence identified at the hearing.[109] The administrative judge must then issue a written initial decision within 25 days after closing the record, which must include the disposition of the claim and specific findings of fact and conclusions, as well as reasons and bases for those findings and

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[104]*See generally* 5 CFR §1201.41(b)(12), .41(c)(1). *See also* D'Iorio v. Department of Housing and Urban Development, 34 M.S.P.R. 351, 354 (1987) ("The administrative judge acted fully within her authority in directing the parties to stipulate to facts not in dispute. [She] has the authority to 'hold prehearing conferences for the settlement and simplification of issues' . . . similar to the power a federal judge has . . . to order a pretrial conference").

[105]There is a list of 109 sites for hearings in the Board's 11 regions; in addition, a hearing can be held elsewhere "if good and sufficient reason is shown." *See* 5 CFR §1201.4(e), Appendix II and III to part 1201.

[106]5 CFR §1201.62(a). *See* Bommer v. Department of Navy, 34 M.S.P.R. 543, 551 (1987) ("If all of the proffered evidence and testimony concerns only undisputed or otherwise immaterial matters, the administrative judge has the authority to exclude all of it").

[107]Livingstone v. Office of Personnel Management, 30 M.S.P.R. 335, 338 (1986) (*quoting* Chavez v. Office of Personnel Management, 6 M.S.P.R. 404, 423 (1981)).

[108]*See* 5 CFR §1201.41(b)(10). *See* Juve v. Office of Personnel Management, 33 M.S.P.R. 17, 20 (1987) ("the administrative judge should have directed [the Office of Personnel Management] to provide explanatory material to enable him to make the required finding of fact"). *See also* Mascol v. Dept. of Navy, 7 M.S.P.R. 565, 567 (1981). The judge has a similar obligation in cases submitted without a hearing. Rosenberg v. Commodity Futures Trading Commission, 7 M.S.P.R. 664, 666 (1981).

[109]5 CFR §1201.57. A closing date is set by the administrative judge also if no hearing is held. *Id.* §1201.58(b).

conclusions with respect to all material issues of fact and law presented by the record.[110] This requirement has been construed strictly by the Board in order to provide it with the information necessary to review the administrative judge's decision effectively.[111]

Administrative hearings in Black Lung disability cases are fully adversarial.[112] They are held either upon direct referral by the deputy commissioner adjudicating the claim or, following a decision by the deputy commissioner, upon request by any party to the claim.[113] A hearing request must be made in writing, and must include the contested issue of fact or law.[114] When a claim has been filed, all relevant material from the claims file is forwarded to the Department of Labor's Office of Administrative Law Judges.[115] Although there is a set of general rules of practice and procedure for administrative hearings conducted by the Office of Administrative Law Judges,[116] there are separate regulations applicable only to Black Lung hearings which govern most procedures in Black Lung appeals.[117]

Administrative law judges conduct a *de novo* review of the record in Black Lung cases.[118] The administrative law judge is under no affirmative duty to seek out, or even receive, all relevant and material evidence.[119] The formal

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[110] *Id.* §1201.111.

[111] Thus, the Board has held that "an initial decision must identify all material issues of fact, summarize the evidence on each issue sufficiently to disclose the evidentiary basis for the presiding official's findings of fact, set forth those findings clearly and explain how any issues of credibility were resolved and why, describe the application of burdens of proof, and address all material legal issues in a fashion that reveals the [administrative judge's] conclusions of law, legal reasoning and the authorities on which that reasoning rests." Maimone v. Dept. of the Navy, 7 M.S.P.R. 406, 407 (1981), *quoting* Spithaler v. Office of Personnel Management, 1 M.S.P.R. 587 (1980).

[112] A party at the hearing is entitled to be represented and advised by counsel, and must be given a reasonable opportunity to secure that right. A denial of this right is a violation of due process. *See* Johnson v. Director, 9 BLR 1-218, 1-220 (1986).

[113] 20 CFR §725.450 (1988). Parties include, in addition to the claimant, the Department of Labor and, if applicable, the responsible coal mine operator, the operator's insurer and other potential prior and successor operators. *Id.* §725.360.

[114] *See id.* §725.451.

[115] *Id.* §725.421.

[116] *See* 29 CFR §§18.1-.59 (1988).

[117] *See* 20 CFR §§725.450-483.

[118] *See generally id.* §725.455(b).

[119] McFarland v. Peabody Coal Company, 8 BLR 1-163, 1-165 (1985) (administrative law judge acted within his discretion in not allowing important blood test to be admitted when it was improperly obtained).

rules of evidence and procedure do not apply.[120] Documents and witness testimony are admitted freely, and hearsay evidence is admissible so long as it is reasonably reliable and probative.[121] Relevancy is the critical issue regarding the admissibility of evidence, including written medical reports.[122] Any party, including the Department of Labor, can be represented at the hearing, and although any party can waive its right to appear, the hearing can proceed even if all parties fail to appear if the administrative law judge still wishes to hear testimony.[123]

There are special rules concerning the admission of medical reports due to the technical nature of medical evidence in Black Lung cases. Thus, medical reports cannot be submitted at a hearing unless sent to all parties at least twenty days before the hearing.[124] This twenty-day rule can be waived, however, if no objection to the evidence is made at the hearing.[125] Moreover, the judge can waive the rule upon a showing of "good cause" so long as the record is kept open at least thirty days after the hearing to allow for submission of rebuttal evidence.[126] When late evidence is admitted, the ordering of a related post-hearing examination of the claimant may be appropriate as well.[127] Parties are free to submit any new evidence developed subsequent to

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[120]Thus, the Federal Rules of Evidence "are not intended to apply to administrative hearings such as those held under the Black Lung Benefits Act." American Coal Co. v. Benefits Review Board, 738 F.2d 387, 390 (10th Cir. 1984). Separate Rules of Evidence have been proposed for Department of Labor administrative law judges, but they would not apply to Black Lung claims. *See* 54 Fed. Reg. 2,310 (1989).

[121]20 CFR §725.456. *See generally* Republic Steel Corp. v. Leonard, 635 F.2d 206, 208-09 (3rd Cir. 1980). As the Board stated in its decision in *Leonard*, "any evidence which has probative force and tends to prove or disprove a material fact is generally admissible in hearings." Leonard v. Republic Steel Corp., 2 BLR 1-571, 1-577 (1979). *See also* 29 CFR §18.44(b).

[122]Peabody Coal Co. v. Helms, 859 F.2d 486, 489 (7th Cir. 1988). Thus, in Evosevich v. Consolidation Coal Company, 789 F.2d 1021, 1025 (3d Cir. 1986), the court considered the issue of whether the report of a nonexamining physician represented inadmissible hearsay and concluded that such hearsay evidence is admissible "up to the point of relevancy" in administrative proceedings.

[123]*See* 20 CFR §725.461.

[124]*Id.* §725.456(b)(1) (1988). The exchange of documentary evidence twenty days prior to a hearing is required only among parties to the claim, and not to the administrative law judge. Luketich v. Director, 8 BLR 1-477, 1-479 (1986).

[125]*See* Hoffman v. Peabody Coal Company, 4 BLR 1-52, 1-58 (1981).

[126]20 CFR §725.456(b)(2). *See* Buttermore v. DuQuesne Light Co., 8 BLR 1-36 (1985). The Board has declined to require an administrative law judge to make a specific finding that good cause did not exist to apply the twenty day rule as written. *See* Jennings v. Brown Badgett, Inc., 9 BLR 1-94, 1-96 (1986).

[127]*See* Horn v. Jewell Ridge Coal Corp., 6 BLR 1-933, 1-936-37 (1984).

the adjudication of the claim by the deputy commissioner; however, generally evidence will not be allowed to be submitted at a hearing if it was available but not submitted while the claim was pending before the deputy commissioner unless "extraordinary circumstances" would warrant admission of the evidence at the hearing.[128] Witnesses can be summoned to hearings and, if summoned, are entitled to witness fees.[129] Written notice of the intention to present an expert witness must be provided at least ten days before the hearing.[130]

The issues at the hearing are limited to those set forth by the deputy commissioner, and any other issue raised in writing at the time the claim was pending before the deputy commissioner.[131] The only exceptions are issues "not reasonably ascertainable" when the claim was being adjudicated by the deputy commissioner.[132] If a new issue is presented at the hearing and accepted by the administrative law judge as appropriate, the judge can either remand the claim for determination of the new issue by the deputy commissioner or resolve the new issue at the hearing.[133] With respect to issues properly presented, the administrative law judge is under a duty "to develop fairly all sources of evidence," particularly when a claimant is unrepresented and does not have the capacity to handle the case adequately.[134] This duty is similar to that established for administrative law judges in Social Security adjudications; however, unlike with Social Security cases, the administrative law judge in Black Lung cases cannot order new medical examinations.[135]

The administrative law judge may allow parties to present oral argument and written memoranda.[136] The judge may also allow additional evidence to be submitted after the hearing, but is under no obligation to do so if the

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[128]20 CFR §725.456(d).

[129]*Id.* §725.459(a). These fees must be paid by the party requesting the witness; however, these fees can be recovered from a responsible coal mine operator if the claimant is found eligible for benefits. *Id.*

[130]*Id.* §725.457(a). This requirement can be waived only by consent of all of the parties. *Id.*

[131]*Id.* §725.463(a).

[132]*Id.* §725.463(b). This rule is applied equally to claimants and the Department. Thus, in a recent case the Board reversed a decision of an administrative law judge who allowed the Department to litigate matters that were raised "at the last possible moment" without the Department presenting an "excuse for [its] inaction." Thornton v. Director, 8 BLR 1-277, 1-279 (1985).

[133]20 CFR §725.463(b).

[134]*See* Laughlin v. Director, 1 BLR 1-488, 1-493 (1978). *See also* York v. Director, 5 BLR 1-833, 1-838 (1983).

[135]*See* York v. Director, 5 BLR at 1-839-840.

[136]20 CFR §725.459A.

evidence could have been presented at the hearing.[137] The record is considered closed when all evidence has been compiled, including a written transcript of the hearing, and all memoranda have been filed.[138] The administrative law judge then issues a written decision and order based on the evidence in the record, including findings of fact and conclusions of law.[139] The Benefits Review Board has held that the administrative hearings decision must be sufficiently detailed to allow for effective review.[140] A party may seek reconsideration of a hearing decision within the time period for filing an appeal with the Benefits Review Board.[141]

The procedures for a hearing at the Veterans Benefits Administration are unusual in that a veteran may request a hearing either before or after an initial determination on eligibility for benefits is made.[142] This first opportunity for a hearing is really part of the initial decisionmaking process. Until recently, the Rating Board held hearings itself, whether requested before or after an initial determination was made; however, beginning in late 1988, hearings requested following an adverse initial determination by the Ratings Board are heard by a separate hearing officer.[143] Hearings before the Rating Board prior to the issuance of an initial determination or by a hearing officer following a Rating Board determination are both optional. A claimant may, therefore, appeal an adverse Rating Board decision directly to the Board of Veterans Appeals without first requesting a hearing.[144]

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[137] *See* Hoffman v. Peabody Coal Company, 4 BLR 1-52, 1-54-59 (1981). In *Hoffman*, the Board indicated that evidence known at the hearing but unavailable should be admitted. *Id.* at 1-54-55.

[138] 20 CFR §725.475.

[139] *Id.* §725.477. The decision and order is to be filed within twenty days after the last evidence is received. *Id.* §725.476.

[140] *See, e.g.*, Kendrick v. Kentland-Elkhorn Coal Corp., 5 BLR 1-730, 1-731 (1983) (A decision is acceptable if it is "from context or otherwise, . . . possible to discern the reasoning of the administrative law judge and to determine the existence of substantial evidence to support that reasoning"). *See also* Peabody Coal Co. v. Hale, 771 F.2d 246, 249 (7th Cir. 1985) ("if this Court is to perform its function of review . . . more than unexplained conclusions and findings [by the administrative law judge] are necessary, where, as here, the case involves significant conflicting evidence").

[141] 20 CFR §§725.479(b), .481. If reconsideration is requested, a notice of appeal can be filed with the Benefits Review Board within thirty days of disposition of the reconsideration request. *Id.* §725.479(c).

[142] *See* 38 CFR §3.103(c) (1988) (A hearing can be requested "at any time on any issue").

[143] *See* Department of Veterans Affairs, Veterans Benefits Administration DVB Circular 20-89-11 (March 23, 1989) [hereinafter DVB Circular 20-89-11].

[144] Although the Board of Veterans Appeals may in such cases be seen as a first level administrative hearing, it operates more like a final administrative review panel and therefore is

Most hearings at the Veterans Benefits Administration are requested by claimants following an initial determination rather than prior to the Rating Board's initial decision.[145] As noted earlier, the initial decision is transmitted to the claimant through a Notice of Decision. Most post-decision requests for hearings are filed with an appeal from an adverse Notice of Decision, which is initiated by filing a "Notice of Disagreement."[146] The claimant is expected to set out disagreements with the conclusions of law or fact contained in the Notice of Decision; however, the Notice of Disagreement "need not contain specific allegations of error, of fact or law" and must be processed even if "the claimant's contentions may appear to have no merit."[147] A Notice of Disagreement will be effective so long as it "can be reasonably construed as a desire for review."[148]

The Veterans Benefits Administration can respond to a Notice of Disagreement in one of three ways. It may develop the record further and, on the basis of the more fully developed record, review its initial decision; it may review its decision without further development; or, it may decide that no further development or review is necessary.[149] If the Administration decides to affirm the initial decision, with or without further development and review, it must issue a new justification of the decision in the form of a "Statement of the Case."[150] The Statement of the Case is the last action taken by the Administration before an appeal can be filed with the Board of Veterans Appeals, unless a hearing is requested. Its purpose is to give the claimant sufficient information to understand the basis for the decision and to allow the claimant to prepare for an effective appeal.[151] Specifically, a Statement of the Case must include a summary of the evidence relevant to the issues in dispute, a summary of the law and regulations applicable to the case, including appropriate citations, and a statement of the reasons for the decision reached

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discussed together with similar panels in other programs at text accompanying notes 160-275, *infra*.

[145]When hearings are held before the Rating Board makes its initial decision, the hearing is more in the nature of a face-to-face interview and therefore not really part of the appeals process.

[146]38 CFR §§19.127, 19.118. The Notice of Disagreement must be filed within one year after the date on which the Notice of Decision was mailed to the claimant. *Id.* §19.129. If a Notice of Disagreement is not filed within a year, the initial decision becomes final. *Id.*

[147]Veterans Administration Manual M21-1 §18.03(a).

[148]38 CFR §19.118. Moreover, it "need not be expressed in any special wording." *Id.*

[149]*See id.* §19.119.

[150]*Id.* §19.119(b).

[151]Veterans Benefits Administration Manual M21-1 §18.07(a). *See also* 38 CFR §19.120(a) (Statement of the Case "should be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans Appeals").

on each issue raised in the case.[152] If a hearing request was filed with the Notice of Disagreement, the Statement of the Case is written to frame issues for the hearing; otherwise, it is written to frame issues for an appeal to the Board of Veterans Appeals.

A hearing requested following the issuance of an adverse Notice of Decision is held by a hearing officer for the purpose of supplementing the evidentiary record compiled and considered by the Rating Board. The hearing officer's duties include reviewing the existing record and evaluating the need for additional evidence, holding an evidentiary hearing, and issuing a decision on the hearing record.[153] The hearing officer has the authority to order additional evidence, including a medical examination at a Department of Veterans Affairs medical facility.[154] The hearing is to cover only issues raised in the Notice of Disagreement; new issues are to be referred back to the Rating Board for evaluation.[155] The hearing officer may request that adjudication staff, including a medical member of the Rating Board, be present at the hearing.[156] Following the hearing, the hearing officer prepares a decision which includes a revised statement of reasons for the determination based on the supplemented record.[157] The claimant is then notified of the decision by the authorization unit in a separate document.[158] If a hearing was held prior to the filing of a Notice of Disagreement, then the claimant can file a Notice of Disagreement from the hearing decision. The Administration will then prepare a Statement of the Case. If a Notice of Disagreement was filed and a Statement of the Case was prepared before the hearing, then a Supplemental Statement of the Case is prepared on the basis of the hearing decision.[159]

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[152] *Id.* §19.120(b). Under certain circumstances, a supplemental statement may be filed. *Id.* §19.122.

[153] *See* DVB Circular 20-89-11, *supra* note 143.

[154] *Id.*

[155] *Id.*

[156] *Id.* The final decision, however, is left entirely to the hearing officer. *Id.*

[157] The decision must follow a prescribed form. *See id.*

[158] *Id.* The authorization must, however, implement the decision of the hearing officer, unless the Regional Office Adjudication Officer initiates an Administrative Appeal. This happens only rarely. *See generally* 38 CFR §§19.138-.142.

[159] DVB Circular 20-89-11, *supra* note 143. It is also possible that the claimant will initiate an appeal to the Board of Veterans Appeals during this period, in which case the hearing officer acts under slightly restricted authority as an agent of the Board. DVB Circular 20-89-11, Change 1 (April 10, 1989).

D. Post-Hearing Administrative Review

All of the programs included in this study provide for a final administrative appeal after an administrative hearing. In all programs a claimant must pursue the final administrative review process as a precondition to judicial review. There are significant differences, however, in the role established for the final administrative review process in the various programs. The most important areas of difference include the treatment of additional evidence and the scope of review.

1. Social Security Appeals Council

The Social Security Administration's Appeals Council reviews decisions of administrative law judges either upon the request of a claimant or on its own motion.[160] A request for review may be filed at one of the Social Security Administration offices within sixty days of receipt of the hearing decision.[161] A request for review is made on a standard form, which includes space for a statement of the reasons for the request.[162] The Appeals Council may dismiss a request for review under limited circumstances;[163] otherwise, the Council must either grant or deny the request for review and then, if it grants the request for review, either issue a decision or remand the case for further administrative action.[164]

The Appeals Council acts as an appellate body over the administrative law judges, and therefore does not hear claims *de novo*.[165] The Council will grant a request for review on one of four bases: if there was an abuse of discretion by the administrative law judge, an error of law in the hearing decision, a lack

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[160] *See* 20 CFR §§404.968, .969 (1988). At one point decisions of administrative law judges with unusually high numbers of favorable decisions or low levels of productivity were "targeted" for review by the Appeals Council on its own motion. This practice, which was subject to much criticism has been abandoned; currently, most cases reviewed on the Council's own motion are selected at random. *See* Ass'n of Administrative Law Judges v. Heckler, 594 F.Supp. 1132 (D.D.C. 1984).

[161] 20 CFR §§404.968(a). The time limit can be extended for good cause. *Id.* §404.968(b).

[162] Thus, the current form, HA-520-U6, includes the same statements as the form requesting an administrative hearing. *See* note 60, *supra*.

[163] For example, a request can be dismissed because it was filed too late. 20 CFR §404.971.

[164] *See id.* §404.967.

[165] Thus, if the Appeals Council makes a finding that is contrary to a credibility finding of the administrative law judge, the Appeals Council must fully articulate its reasons for disagreement and those reasons must be supported by substantial evidence in the record. Smith v. Bowen, 849 F.2d 1222, 1226 (9th Cir. 1988). The Council can assess objective medical evidence more independently. *See* Dupuis v. Secretary, 869 F.2d 622, 623-24 (1st Cir. 1989).

of substantial evidence supporting the decision, or if the decision presents "broad policy or procedural issues that may affect the general public interest."[166]

There is a split among the courts of appeals on the requirement of notice by the Appeals Council if it intends to review the entire record in a disability case, even though the claimant only requested review of one aspect of the administrative law judge's decision. The Third Circuit has held that review initiated by the Appeals Council requires the same notice as a request for review by a claimant, which means that it must notify the claimant of its intention to review the claim within sixty days of hearing decision or dismissal.[167] The Eleventh Circuit agrees with the Third Circuit on the requirement of notice; however, it has not addressed the question of whether the notice must be given within the sixty-day time period.[168] Two circuits disagree with the requirement of notice altogether. The Sixth and Seventh Circuits hold that the additional requirement of notice by the Appeals Council is a pointless redundancy for two reasons: first, the claimant initiated the appeal; and, second, partially successful claimants cannot foreclose review of their cases by simply refusing to appeal.[169]

Ordinarily, new evidence cannot be submitted to the Appeals Council unless it is material.[170] The evidence must relate to the period on or before the date of the administrative hearing decision.[171] In practice, however, the

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[166]20 CFR §404.970(a). The authority of the Appeals Council to review is plenary; several courts have ruled that the Appeals Council may review an administrative law judge's decision regardless of whether regulatory grounds for review were met. *See e.g.*, Fierro v. Bowen, 798 F.2d 1351, 1354 (10th Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); Duda v. Secretary, 834 F.2d 554, 556 (6th Cir. 1987) ("[regulations] do not limit Appeals Council's power to review . . . but rather set out the situations where the Appeals Council *must* review the [administrative law judge's] decision").

[167]*See* Kennedy v. Bowen, 814 F.2d 1523, 1527 (11th Cir. 1987).

[168]*See* Powell v. Heckler, 789 F.2d 176, 180 (3d Cir. 1986).

[169]*See* Delong v. Heckler, 771 F.2d 266, 268 (7th Cir. 1985); Gronda v. Secretary, 856 F.2d 36, 38 (6th Cir. 1988).

[170]*See* 20 CFR §404.970(b).

[171]*Id.* §404.976(b). A specific showing of good cause for presenting new evidence at the Appeals Council level is not required. Cummings v. Bowen, 677 F.Supp. 975, 979 (N.D. Ill. 1988). The Social Security Administration proposed in 1983 that the Appeals Council would not be able to consider any evidence submitted after the issuance of a hearing by an administrative law judge. *See* 48 Fed. Reg. 21,967 (1983). This was in response to Pub. L. No. 96-265 §306, which foreclosed the introduction of evidence that occurred after the decision of the administrative law judge. The Administration received many comments supporting the submission of evidence for good cause at the Appeals Council level. 52 Fed. Reg. 4003 (1987). In response, it promulgated the rule allowing evidence to be submitted to the Appeals Council if it is material and if it relates to the period before the decision of the administrative law judge. *Id.*

Council has been quite lenient in considering new evidence submitted by claimants.[172] The Council will consider this evidence, as well as other evidence that was overlooked by the agency or the administrative law judge, in deciding whether to remand a claim for further factual development.[173] If the new evidence relates to a condition that arose only after the administrative hearing record was closed, or to a deterioration of a condition that occurred only after the record was closed, the Appeals Council cannot consider that evidence.[174] Recognizing that often it is difficult to categorize a piece of medical evidence as relating solely to a new condition or post-hearing deterioration, the Council has tended to consider evidence that arguably covers the relevant time period; however, if the new evidence clearly falls outside that period, it is returned to the claimant with instructions to file a new application.[175]

In practice, the Appeals Council rarely grants a request for review. Although the Council may hear oral arguments in cases which raise important issues of law or policy, when it does grant review it usually issues a new decision or remand order at the same time. The Appeals Council has been criticized recently in a recent Administrative Conference study as an ineffective appellate tribunal.[176]

A decision by the Appeals Council dismissing a request for review, denying a request or, following the granting of a request for review, to affirm, modify or reverse the hearing decision is a final decision by the Social Security Administration subject to judicial review.[177] If the Council remands the claim an administrative law judge will make a new decision which itself will be appealable back to the Appeals Council.

2. Final Administrative Review in Other Programs

Final administrative review of disability adjudications tends to be more extensive and thorough in other programs than in the Social Security program. This is true in part because the numbers of cases appealed to the final

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[172] *See* Koch and Koplow, A Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council 108-10 (Administrative Conference of the U.S. 1987).

[173] *See* 20 CFR §404.977.

[174] This requirement was included in 1980 amendments to the Social Security Act and implemented by regulation for claims filed after May, 1986. *See* 42 U.S.C. §402(j)(2) (1982); 52 Fed. Reg. 4004 (1987).

[175] *See* Koch & Koplow, *supra* note 172, at 109-10; 20 CFR §404.976(b).

[176] The study and the Conference's recommendations following the study are discussed in detail at text accompanying notes 329-42, *infra*.

[177] *See* 20 CFR §404.981.

administrative level are substantially less, except at the Board of Veterans Appeals which also hears more than 40,000 cases per year.[178] Another reason is that judicial review, when available, is only to the United States courts of appeals, as opposed to the district courts in the Social Security program.[179] Also, the decision of two final administrative appeal boards, the Merit Systems Protection Board and the Benefits Review Board, are published and given full precedential effect.

As in the case with other levels of administrative appeal, the final administrative appeal procedure in the Railroad Retirement program is most like that of the Social Security Appeals Council. This function is performed by the Railroad Retirement Board.[180] Although the Board may consider new evidence, it rarely does so; instead, it will usually rely on the record developed by the referee at the hearing. The Board has authority to affirm or reverse the decision, and to remand the claim to the referee or Bureau of Retirement Claims for appropriate action.[181] A decision by the Board is a precondition for judicial review in the federal courts of appeals.[182]

Appeals from administrative hearing decisions in Civil Service Disability Retirement cases are heard by the Merit Systems Protection Board.[183] There are three members of the Board, including a chair and a vice chair.[184] As noted earlier, the Board also has the formal responsibility for providing administrative hearings which are held by administrative judges.[185] The Board hears appeals from all types of cases decided by administrative judges; indeed, the majority of the Board's case load involves federal personnel issues rather than claims for disability retirement benefits.

The Merit Systems Protection Board reviews administrative judge decisions in a manner similar to that of the Appeals Council, except that the grounds for review are somewhat more limited. A petition for review must be filed within

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[178] *See* Appeals Statistical Data--Board of Veterans Appeals (May 1989).

[179] Currently, there is no judicial review from decisions of the Board of Veterans Appeals; however, effective in Fall 1989, judicial review will be available in a new Article I Court of Veterans Appeals. *See* text accompanying note 245, *infra*.

[180] *See* 20 CFR §260.9 (1988).

[181] *Id.* §260.9(e).

[182] Appeals are heard in the United States courts of appeals for the Seventh Circuit, the District of Columbia Circuit or the circuit where the claimant lives. *See* 45 U.S.C. §§231g, 355f (1982, Supp. IV 1986).

[183] 5 U.S.C. §§7701, 8347(d) (1988); 5 CFR §1201.3(a).

[184] *Id.* §1200.1, .2. Members are appointed by the President and serve for a period of seven years. *Id.* §1200.1.

[185] *See* text accompanying notes 142-44, *supra*.

thirty-five days after the administrative hearing decision was issued.[186] In addition, the Board has broad authority to reopen an administrative judge's decision even after it has become final; however, this power is exercised rarely and only under extraordinary circumstances.[187] Thus, the Board reopened a case to decide whether a Court of Appeals decision overruling the basis for the previous decision should be applied retroactively.[188] As is the case with Social Security disability appeals, a claimant for Civil Service disability retirement benefits must petition the Board for review of the administrative judge's decision as a precondition of judicial review.[189] Judicial review is available in the federal Court of Appeals for the Federal Circuit.[190]

There are two grounds for reviewing a hearing decision in Civil Service disability benefits cases: when "[n]ew and material evidence is available that, despite due diligence, was not available when the record was closed," and when "[t]he decision of the presiding official is based on an erroneous interpretation of statute or regulation."[191] A petition for review must set forth objections to the hearing decision "supported by references to applicable law or regulations, and with specific reference to the record."[192] Although the Board does not always adhere strictly to this requirement of specificity,[193] it does require some statement as to why the administrative judge erred in rejecting the claimant's arguments at the hearing.[194]

The Board has construed the "new and material" evidence ground for review to cover only information not available before the record was closed at the administrative hearing.[195] Thus, a claimant cannot cure on a petition for

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[186]5 CFR §1201.114(d).

[187]*See id.* §1201.117; Dawson v. Merit Systems Protection Board, 712 F.2d 264, 266-67 (7th Cir. 1983).

[188]*See* Stephens v. Office of Personnel Management, 30 M.S.P.R. 680, 681-82 (1988).

[189]*See* 5 CFR §1201.116(b), 118, .119.

[190]*See* 5 U.S.C. §7703(a)(1), (b)(1) (1982); Lindahl v. Office of Personnel Management, 470 U.S. 768 (1985).

[191]5 CFR §1201.115.

[192]*Id.* §1201.115.

[193]*See, e.g.*, Voseipka v. Office of Personnel Management, 7 M.S.P.R. 177, 178 (1981).

[194]*See* Rasheed v. Department of the Air Force, 6 M.S.P.R. 524, 526 (1981).

[195]Stalliviere v. Office of Personnel Management, 31 M.S.P.R. 647, 648 n.2 (1986) ("The Board will not consider [evidence] raised for the first time in [a] petition for review absent a showing that such arguments are based on new and material evidence that, despite due diligence was not available prior to closing of record"). Thus, documentation of a diagnosis that could have been made at the time of the hearing is not a basis for review. Frazier v. Office of Personnel Management, 7 M.S.P.R. 428, 430 (1981). *See also* Nathan v. Office of Personnel Management, 15 M.S.P.R. 359, 361 (1983) (Subjective evidence of pain that was not presented at the hearing not a basis for review).

review a claim that was documented poorly at the hearing. Likewise, a claimant may not submit information on a medical condition that a physician failed or refused to provide during the hearing.[196] On the other hand, medical evidence of a deterioration in the claimant's condition or the emergence of a new symptom only after the record was closed can be a basis for review.[197] The rule has been relaxed somewhat to allow the submission of evidence not generally available at the time of the hearing, or which was not introduced because the claimant had reason to believe that it was or would be included in the record.[198] Even if the evidence is new, it must "be of sufficient weight to warrant a finding different from that in the initial decision."[199]

The "erroneous interpretation of statute or regulation" ground for review is intended to cover cases where the administrative judge applied an incorrect legal standard.[200] On the other hand, the Board will refuse to review cases challenging the administrative judge's "findings of fact, credibility determinations and interpretation of the evidence."[201] The Board defers to the administrative judge's credibility determinations only when the administrative judge fully sets forth the reasons for his or her findings.[202] The Board does consider a petition alleging that the administrative judge applied an improper standard of proof to amount to the application of an incorrect legal

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[196]*See* Pecukonis v. Office of Personnel Management, 34 M.S.P.R. 411, 415 (1987).

[197]*See, e.g.*, Paolera v. Office of Personnel Management, 7 M.S.P.R. 581 (1981) (Report of infarction which occurred after record closed considered new evidence); Robinson v. Office of Personnel Management, 21 M.S.P.R. 744 (1984) ("new evidence" requirement met where doctor was incapacitated at the time of the hearing and therefore was unable to prepare a report).

[198]*See, e.g.*, Waite v. Office of Personnel Management, 9 M.S.P.R. 533 (1982) (Claimant relied on Office of Personnel Management to submit a portion of the file after ordered to do so, but material not submitted).

[199]Janke v. Office of Personnel Management, 7 M.S.P.R. 140, 141 (1981). Thus, in Treptow v. Office of Personnel Management, 32 M.S.P.R. 387 (1987), even if a CT Scan could not have been done before an administrative judge's decision was issued, the fact that the claimant failed to show that report warranted a different outcome in the case precluded review of the case. *See also* Robinson v. Office of Personnel Management, 21 M.S.P.R. 744, 746 (1984) (doctor's report shown to easily meet the "new" requirement but not qualify as material because it only further documented the same information about claimant's medical condition).

[200]*See, e.g.*, Forde v. Office of Personnel Management, 7 M.S.P.R. 559, 560 (1981). (Reliance on case that had been overruled.)

[201]Godfrey v. Defense Mapping Agency, 7 M.S.P.R. 338, 339 (1981). *See also* Cook v. Office of Personnel Management, 31 M.S.P.R. 683, 686 (1986). ("Special deference must be given to administrative judge's findings on credibility of witnesses.")

[202]Addison v. Department of Treasury, 30 M.S.P.R. 615, 618 (1986). *See also* Macijaukas v. Department of the Army, 34 M.S.P.R. 564 (1987) ("[the] administrative judge's failure to state basis for finding the witness to be credible . . . warrants the Board's review").

standard.[203] Thus, it has reviewed disability retirement cases if in its view the evidence was sufficient to establish disability according to the requisite standard of proof.[204] Review will be denied, however, if the Board finds that errors were, in effect, harmless.[205]

When the Board decides to review a hearing decision, it may decide the case on the merits or remand the case for a further hearing or for further development by the Office of Personnel Management.[206] The Board reviews all of the evidence in the record, including admissible new evidence; however, the Board is likely to remand a case when new evidence indicates that other factual development may be necessary.[207] When it does undertake to review a decision, the Board considers itself "free to substitute its own determinations of fact for those of the [administrative judge], giving the [administrative judge's] findings only so much weight as may be warranted by the record and by the strength of the [administrative judge's] reasoning."[208] However, with respect to credibility determinations by the administrative judge, the Board will find otherwise only if the reasoning on which the administrative judge made the finding is considered erroneous.[209] The Board issues a written decision, which is a final decision subject to judicial review.[210]

The Board's decisions have been published since 1985 in the U.S. Merit Systems Protection Board Reporter.[211] Board decisions have precedential effect and are binding on the administrative judges who conduct administrative

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[203] *See, e.g.*, Cope v. Department of the Navy, 7 M.S.P.R. 546, 548 (1981). ("A misapplication of the proper standard of proof [is] sufficient to warrant a review of the [administrative judge's] fact finding.")

[204] *See, e.g.*, Wommack v. Office of Personnel Management, 7 M.S.P.R. 218 (1981).

[205] *See* Sears v. Office of Personnel Management, 33 M.S.P.R. 595, 598 (1987) ("administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights"). *See also* Dooley v. Office of Personnel Management, 22 M.S.P.R. 577 (1984).

[206] 5 CFR §1201.116.

[207] *See, e.g.*, Paolera v. Office of Personnel Management, 7 M.S.P.R. 581, 582 (1981) (New evidence of heart condition insufficient to show extent of damage); Jolly v. Office of Personnel Management, 7 M.S.P.R. 507, 509 (1981).

[208] Chisolm v. United States Postal Service, 7 M.S.P.R. 116, 118 (1981).

[209] *See, e.g.*, Miller v. United States Air Force, 8 M.S.P.R. 204, 207 (1981). *Cf.* Payne v. Department of Health and Human Services, 6 M.S.P.R. 217, 220 (1981). ("The board must give due deference to the credibility assessments of the [administrative judge] who was present to hear and observe the demeanor of the three witnesses.")

[210] 5 CFR §§1201.116(b), .118.

[211] The Board published its decisions itself until 1985. The U.S. Merit Systems Protection Board Reporter, published by West Publishing Company, includes all pre1985 decisions of the Board as well.

hearings on behalf of the Board. The Board has recognized, however, that its authority "is subordinate to that of [the] judicial system," and therefore it is bound by applicable federal court decisions.[212]

Administrative law judge decisions in the Black Lung program are reviewed in a similar manner by the Benefits Review Board.[213] Until 1984, the Board consisted of three members, including a chair and two associate members; in 1984, the membership was increased to five permanent members, together with authority for the appointment of up to four additional temporary members.[214] The Board is operating currently with five permanent and four temporary members. Cases are still decided, however, by panels of three members; in limited circumstances, the Board will rehear cases *en banc*.[215]

The process of initiating an appeal to the Benefits Review Board is somewhat more complicated and elaborate than with other programs, in part because of the number of different parties involved and the adversarial nature of the process. An appeal to the Board is commenced with the filing of a written notice of appeal.[216] The notice may be in any form so long as it "reasonably permits identification of the decision from which an appeal is sought."[217] The notice is served on all parties affected by the decision; the petitioner must then identify the substantive issues involved in the appeal by filing a petition for review within thirty days of receipt of acknowledgement of the notice of appeal.[218] The petition for review must include "a statement which specifically states the issues to be considered by the Board," and must be accompanied by a brief, memorandum of law, or other supporting

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[212]*See* McAnallen v. Office of Personnel Management, 7 M.S.P.R. 616, 618 (1981). The Board has held that an unpublished Federal Circuit decision does not have precedential value in its proceedings. Averill v. Department of Navy, 30 M.S.P.R. 327, 330-31 (1986).

[213]*See* 30 U.S.C. §932(a) (1982). The Benefits Review Board was established originally to hear appeals involving claims under the Longshore and Harbor Compensation Act; its authority to hear appeals in Black Lung cases is derived from a general incorporation of Longshore and Harbor Worker's Compensation Act procedures into the Black Lung Benefits Act.

[214]*See* Longshore and Harbor Workers Compensation Act amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639 (1984).

[215]*See* Borgeson v. Kaiser Steel Corp., 8 BLR 1-312 (1985).

[216]The notice must be filed at the Board's office in Washington within thirty days of the issuance of the decision, or the issuance of a decision disposing of a timely request for reconsideration. 20 CFR §§802.205, .206 (1988). In a recent case the Board ruled that the standard upheld in the Third Circuit would be applied to all circuits, which dictates that the 30-day period begins to run on the date that the administrative law judge's decision is actually filed with the deputy commissioner's office. Harris v. Nacco Mining Company, 12 BLR 1-115, 1-116 (1989).

[217]20 CFR §802.208(b). The parties affected must also be identified. *Id.*

[218]*Id.* §802.211(a).

statement.[219] The petition is served on all of the parties to the appeal, who then have thirty days to file a response.[220] An appellant may raise any issue; however, the Board will not consider new issues raised in responsive pleadings unless a prevailing party, in response to a petition, raises a new issue in support of the hearing decision.[221] The Board can refuse to consider an issue raised in a petition for review if it is not briefed adequately by the party raising the issue.[222] The Board will relax its formal procedures in this regard, however, when a petitioner is unrepresented[223] or when the issue involved "is basic to the proper administration of the act or to the rendering of justice in the individual case."[224]

The Benefits Review Board is an appellate tribunal; it does not hear cases *de novo*.[225] The Board reviews findings of fact by administrative law judges according to a substantial evidence standard, using the traditional formulation of "more than a mere scintilla," or "evidence which 'a reasonable mind might accept as adequate to support a conclusion.'"[226] Thus, "[i]t is the administrative law judge's duty to weigh the evidence and make findings of fact. That the . . . [Board] might draw different inferences from the evidence is of no significance."[227] The evaluation of medical evidence is, for these

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[219]*Id.* §§802.211(a), (b).

[220]*Id.* §802.212. Any party receiving a response to a petition can then file a reply to the response within twenty days. Id. §802.213.

[221]Pokorny v. U.S. Steel Corp., 6 BLR 1-67, 1-69 n.2 (1983). *See also* King v. Tennessee Consolidation Coal Company, 6 BLR 1-87, 1-90-91 (1983).

[222]*See* Wetherill v. Green Construction Company, 5 BLR 1-248, 1-251 (1982).

[223]*See generally* 20 CFR §802.220 ("The Board may prescribe an informal procedure . . . to be followed by . . . [an unrepresented] party"). *See also* Hurd v. Director, 5 BLR 1-106, 1-107 (1982).

[224]*Hurd*, 5 BLR at 107.

[225]*See* Parker v. Director, 590 F.2d 748, 749 (8th Cir. 1979) ("The [Board] does not have the authority to undertake a *de novo* review of the evidence . . . or to substitute its views for the administrative law judge"). As the Board stated in McCluskey v. Zeigler Coal Company, 2 BLR 1-1248, 1-1251 (1981), it is "an independent judicial tribunal with exclusive jurisdiction to consider and decide appeals raising substantial questions of law or fact under the Black Lung Benefits Act."

[226]Taranto v. Barnes and Tucker Company, 4 BLR 1-308, 1-310 (1981) (quoting Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938)). The Board's scope of review is defined by statute. Hoskins v. Shamrock Coal Company, 12 BLR 1-117, 1-118 (1989) (quoting O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965)).

[227]Hamilton v. The New River Company, 4 BLR 1-190, 1-195 (1981). *See also* Clark v. Director, 838 F.2d 197, 200 (6th Cir. 1988). ("The finding of an [administrative law judge] in a black lung case may not be set aside if it is based on substantial evidence viewing the record as a whole, even if we would have taken a different view of the evidence were we the trier of facts.")

purposes, a question of fact; it is the administrative law judge's responsibility to evaluate the credibility of medical evidence and the Board will defer to the administrative law judge's findings.[228] However, the administrative law judge must determine the credibility and consider the underlying basis of the evidence upon which he or she relies in the decision, and not just accept it at face value.[229] The Board will not receive new evidence. If the basis for an appeal is that the administrative law judge refused to consider certain evidence, the Board's usual practice is to remand the case for proper evaluation.[230] Indeed, the Board has been reversed for evaluating the sufficiency of a medical report ignored by the administrative law judge rather than remanding the case.[231]

The Board also will review a hearing decision in order to assure that the decision is consistent with applicable law.[232] Although the Board gives deference to the Department of Labor's interpretation of its regulations, the Board takes the position that it may base its decision on its reading of both the

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[228]*See* Micheletto v. Peabody Coal Company, 4 BLR 1-758, 1-759 (1982) (The administrative law judge "has great discretion" in evaluating the credibility of medical evidence).

[229]Addison v. Director, 11 BLR 1-68, 1-70 (1988). *See also* Ware v. Director, 814 F.2d 514, 516 (1987) (administrative law judge must view medical opinion "in light of studies conducted and the objective indications upon which the medical opinion or conclusion is based").

[230]*See, e.g.*, Swinney v. Director, 5 BLR 1-233, 1-234 (1983) ("If there were any evidence to support an award of benefits which the administrative law judge failed to consider, the Board normally would remand"). *See also* Defore v. Alabama By-Products Corporation, 12 BLR 1-27, 1-28 (1988) ("The regulatory criteria at [20 CFR] §718.204(c) require that the administrative law judge weigh all relevant probative evidence. [T]hus, on remand, the administrative law judge should consider . . . the other . . . evidence of record").

[231]*See* Director v. Rowe, 710 F.2d 251, 255 (6th Cir. 1983). ("The determination as to whether . . . [the medical] report was sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the fact finder to decide.")

[232]*See, e.g.*, Edwards v. Director, 6 BLR 1-265, 1-266 (1983). *See also* 33 U.S.C. §921(b)(3) (1982); 20 CFR §802.301 The Board can set aside findings of fact and conclusions of law "only if they are not . . . supported by substantial evidence in the record considered as a whole or in accordance with law"). The Board will be reversed when it fails to limit its review to a finding of substantial evidence and instead attempts to substitute its own judgment on weight and sufficiency of evidence. *See* Zbosnik v. Badger Coal Co., 759 F.2d 1187, 1190 (4th Cir. 1985).

constitution and the Black Lung Benefits Act.[233] The Board will respect decisions of the courts of appeals; however it considers itself bound only by the rulings of the circuit in which the case being decided was filed.[234] However, the Board may, in the interest of fairness and efficiency, rule that a standard used in one circuit be used in all circuits.[235]

The Board hears most cases without oral argument.[236] Although the Board may issue a summary decision where prior decisions of the Board or the administrative law judge's decision address all issues raised on the appeal, in most cases the Board must issue "a full, written decision discussing the issues and applicable law."[237] The Board may affirm, reverse, or otherwise modify the administrative law judge's decision, or may remand the case for further administrative proceedings.[238] A party may seek reconsideration of the Board's decision; however, a request for reconsideration is not required to exhaust administrative remedies and may be granted or denied at the discretion of the Board.[239] Generally, the Board will not consider new issues on reconsideration.[240] Decisions of the Benefits Review Board in Black Lung cases are published in the Black Lung Reporter.[241]

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[233]*See* McCluskey v. Zeigler Coal Company, 2 BLR 1-1248, 1-1250 (1981) (constitutional interpretation); Jones v. The New River Company, 3 BLR 1-199, 1-208-209 (1981) (statutory interpretation). *See also* Kovalchick v. Rochester and Pittsburgh Coal Company, 5 BLR 1-670, 1-673 (1983) (The Board is "not free to ignore the language of the statute"). The Board's authority to invalidate regulations on the basis of the act has been upheld by courts of appeal. *See, e.g.*, Gibas v. Saginaw Mining Company, 748 F.2d 1112, 1117-18 (6th Cir. 1984); Carozza v. United States Steel Corp., 727 F.2d 74, 77 (3rd Cir. 1984). At least one court has held otherwise on the question of constitutional rulings. *See* American Stevedores, Inc. v. Salzano, 538 F.2d 933, 936 (2nd Cir. 1976). The Board expressly disagreed with *American Stevedores* in McCluskey v. Zeigler Coal Company, 2 BLR at 1-1254-62.

[234]*See* Kuhar v. Bethlehem Mines Corp., 5 BLR 1-765, 1-769 n.2 (1983); Cooley v. Alabama By-products, 5 BLR 1-816, 1-820 n.5 (1983).

[235]*See* Harris v. Nacco Mining Company, 12 BLR 1-115, 1-116 (1989).

[236]Oral argument can be requested under special circumstances, such as when the appeal presents novel issues, involves a substantial question of law on which there is a conflict among the administrative law judges, or if to do so will serve "the interest of justice." 20 CFR §802.304.

[237]*See* 20 CFR §§802.404(b), (c).

[238]*Id.* §802.404(a). The case can be remanded to the administrative law judge or to the deputy commissioner. Following the remand, the new decision is submitted to the Board and the parties are given an opportunity to respond. *See id.* §802.405(a).

[239]*See id.* §§802.407(b), .409.

[240]*See* Micheletto v. Peabody Coal Company, 4 BLR 1-758, 1-759 (1982) (Citing 20 CFR §802.409).

[241]The Black Lung Reporter, published by Matthew Bender, also includes selected administrative law judge decisions.

Appeals from adverse decision in Veterans disability benefits claims based on a Rating Board determination or, if a hearing was held after a Rating Board determination, on a hearing officer's decision, are heard by the Board of Veterans Appeals.[242] The Board is made up of approximately sixty members, including a chair.[243] The Board operates quite differently from the Social Security Administration's Appeals Council on the one hand, and the Merit Systems Protection Board and Benefits Review Board on the other hand. In a sense, it incorporates both the informality of the Appeals Council and the more significant authority exercised by the Merit Systems Protection Board and the Benefits Review Board. It is uniquely different, however, because it operates, at least in the area of disability appeals, free from judicial review.[244] The overall result is an autonomous appellate board that operates without significant external control, a fact which led in part to legislation in 1988 to establish judicial review from Board of Veterans Appeals benefit decisions beginning in the Fall 1989.[245]

An appeal to the Board of Veterans Appeals is initiated by filing a Substantive Appeal from a Statement of the Case issued following an adverse decision by the Rating Board, or from an adverse decision issued following an administrative hearing held by a hearing officer.[246] There are extensive specific requirements for a Substantive Appeal, which must be submitted on a prescribed form or by letter containing all information included on the form.[247] A Substantive Appeal must identify all legal and factual arguments for the appeal and must relate those arguments whenever possible to the reasoning included in the explanation of the original decision included in the

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[242] *See generally* 38 U.S.C. §§4001-4006; 38 CFR §§19.1-19.2.

[243] The chair is appointed by the President; other members are appointed by the Administrator from recommendations by the chair, subject to approval by the President. Veterans' Judicial Review Act, tit. II, §201, 102 stat. 4105, 4109 (to be codified at 38 U.S.C. §4001). The chair serves for six years; other members serve for nine years. *Id.* Previously, all members of the Board were selected by the Administrator with the approval of the President. *See* 38 U.S.C. §4001 (Supp. IV 1986).

[244] Constitutional issues can be reviewed. *See* Johnson v. Robinson, 415 U.S. 361 (1974).

[245] Appeal will be to a new Article I Court of Veterans Appeals. *See* Veterans Judicial Reform Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

[246] A Statement of the Case is prepared following an adverse decision for veterans benefits, with or without an administrative hearing. If an administrative hearing is requested after a Rating Board decision, the Statement of the Case is prepared for the hearing. *See generally* text accompanying notes 149-59, *supra*. The Substantive Appeal must be filed within sixty days of the mailing of the statement of the case or within one year of the date of the original notice of decision, whichever is later. 38 CFR §19.129(b).

[247] *See id.* §19.123(a) (Appeal on VA Form 1-9 or on "correspondence containing the necessary information").

Statement of the Case.[248] Although the Board is to construe arguments set out in a Substantive Appeal "in a liberal manner for purposes of determining whether they raise issues on appeal,"[249] it presumes that there is no objection to any statement of fact included in the Statement of the Case unless objected to specifically.[250]

The Substantive Appeal is filed at the office that originally decided the claim.[251] Before the Board assumes jurisdiction over the appeal, the regional office files a formal Certification of Appeal in which it identifies the issues raised in the appeal and certifies that all necessary procedural steps have been met.[252] The office has the option, if appropriate, to retain the case for further development or to advise the claimant that the statement of legal and factual errors included in the Substantive Appeal are deficient and to allow necessary amendments.[253] When new evidence is submitted before the record has been transferred to the Board, the evidence will be considered at the local office which can then issue a supplemental Statement of the Case.[254] A Substantive Appeal without allegations of specific errors of fact or law may be dismissed.[255]

Usually appeals are heard by the Board in panels of three members, referred to as Board Sections.[256] Sections have general areas of jurisdiction, including certain general areas of medical disability. One member of each section is a physician; the other two members are lawyers. Physician members of the Board are not expected to be specialists in the medical areas involved in an appeal; indeed, the Board has rejected suggestions that psychiatrists be used in mental disability cases noting that expert medical advice is available when needed.[257]

Unlike the Appeals Council, Merit Systems Protection Board and Benefits Review Board, the Board of Veterans Appeals holds actual hearings in many appeals. Most hearings are held at the offices of the Board in Washington, although hearings can be held by traveling sections of the Board or by

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[248] *Id.* §19.123(a). The substantive appeal must also identify clearly the benefits sought on the appeal.

[249] *Id.* §19.123(a).

[250] *Id.* §19.121(b).

[251] *Id.* §19.127.

[252] *Id.* §19.123(b).

[253] *See* Veterans Administration Manual M21-1 §18.13.

[254] 38 CFR §19.173.

[255] *Id.* §19.126.

[256] *See id.* §19.161.

[257] *See* 48 Fed. Reg. 6963 (1983).

Veterans Benefits Administration personnel at regional offices.[258] The primary purpose of Board hearings is to allow for oral argument; however, additional documentary evidence may be presented at Board hearings and witnesses can testify.[259] When evidence is submitted to the Board, the Board has the option of referring the matter back to a local office for reconsideration.[260] The Board will not compel the appearance of witnesses.[261]

Board hearings are nonadversary.[262] The formal rules of evidence do not apply, and formal cross examination is specifically precluded; however, "follow up questions" are allowed.[263] The Board may request an expert medical opinion from the chief medical director or from an independent expert. A similar request may be made by an appellant as well.[264] If an expert opinion is obtained by the Board, a copy of the report will be sent to the appellant who then has sixty days to respond.[265] The Board also has the option to remand a case for further development.[266]

The Board must issue a written decision disposing of each issue raised by the appeal, including separate findings of fact and conclusions of law, and reasons for the decision.[267] Board decisions must be "based on a review of the entire record."[268] The Board considers itself bound only by Department of Veterans Affairs regulations, other instructions to the Board issued by the Veterans Benefits Administration and opinions of the Department's general counsel.[269] The Board does not consider itself bound by Veterans Benefits Administration manuals.[270] Most importantly, the Board does not consider itself bound by its own prior decisions. As stated in Board regulations,

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[258]When hearings are held at regional offices, the final decision is made by members of the Board based on the record compiled at the hearing. *See* 38 CFR §19.160(c).

[259]*See* Veterans Administration Manual MBVA-1 §5.02. *See also* 38 CFR §19.157(b).

[260]*See id.* §19.174.

[261]*Id.* §19.165(a). The Board has stated that it lacks authority to subpoena administration personnel. *See* 48 Fed. Reg. 6966 (1983).

[262]38 CFR §19.157(c).

[263]*Id. See also* Veterans Administration Manual MBVA-1 §5.11.

[264]*See* 38 CFR §§19.176-178. An appellant's request "will be granted upon a showing of good cause, such as where complex or controversial medical issues are involved in the appeal." *Id.* §19.178.

[265]*Id.* §19.179. Under certain circumstances, the opinions are made available only to the appellant's attorney or representative. *See* 38 U.S.C. §3301.

[266]*See* 38 CFR §19.182(a).

[267]*Id.* §19.180(b), (c).

[268]*Id.* §19.180(a).

[269]*See* 38 U.S.C. §4004(c); 30 CFR §19.103(a).

[270]*Id.* §19.103(b).

"[p]reviously issued Board decisions will be considered binding only with regard to the specific case decided; prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case."[271] Moreover, Board decisions are not published or easily available; the only index is on microfiche and individual decisions must be obtained by mail.

An appellant may seek reconsideration of a Board decision, and the Board can reconsider its decision on its own motion. This can be done at any time on the basis of an "obvious error of fact or law" or when "new and material evidence" is obtained from service department records.[272] The Chair may deny a request for reconsideration; if a request for reconsideration is granted, it is heard by the section that heard the case originally supplemented by an equal number of additional Board members.[273] Once the Board issues its decision or its decision on reconsideration, the decision is binding and subject only to limited judicial review.[274] There is, however, a relatively liberal policy allowing claims to be reopened based on new evidence.[275]

III. ADMINISTRATIVE CONFERENCE RECOMMENDATIONS RELATING TO SOCIAL SECURITY ADMINISTRATIVE APPEALS

The Administrative Conference has published three sets of recommendations concerning the administration of Social Security disability claims. The first set of recommendations was published in 1978, and dealt primarily with administrative hearing procedures.[276] These recommendations were based largely on the findings of a major study commissioned by the National Center for Administrative Justice.[277] The other two sets of

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[271] *Id.* §19.197. The Board has rejected suggestions that it consider its prior decisions as precedent. *See* 48 Fed. Reg. 6968 (1983).

[272] 30 CFR §19.185.

[273] *Id.* §19.189(b).

[274] There is provision for certain limited constitutional challenges under present law. More general judicial review will be available in late 1989. *See* text accompanying notes 244-45, *supra*.

[275] *See* 38 CFR §3.114. Reopening is discussed generally at text accompanying notes 49-50, *supra*.

[276] *See* Recommendation No. 78-2, 1 CFR §305.78-2 (1988) [hereinafter Recommendation 78-2].

[277] For a published version of that study, *see* J. Mashaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil, M. Carrow, Social Security Hearings and Appeals (1978). Professor Mashaw prepared a separate report for the Administrative Conference drawing from the earlier study. *See* J. Mashaw, Report to the Grants and Benefits Committee on the Social Security

recommendations were published in 1987, based on reports prepared for the Administrative Conference. One set of recommendations dealt with state agency disability determinations, with a special emphasis on the value of face-to-face procedures for initial and reconsidered disability determinations.[278] The other set of recommendations were directed at the Appeals Council.[279]

The 1978 recommendations were the most comprehensive, in that they sought to deal with a broad range of concerns about the efficiency and competence of the Social Security Administration's administrative appeals process. The study which led to the Conference's 1978 recommendations identified three main concerns about Social Security administrative hearings: delays in processing appeals at the administrative hearing level and a resulting backlog of cases awaiting hearing, high reversal rates of state agency decisions by administrative law judges, and substantial variances in reversal rates among the administrative law judges.[280] These concerns, which raised serious questions of speed, accuracy and consistency in the process, together with related concerns about claimant satisfaction and administrative costs, were found, however, to be manageable within a modestly revised system for administrative appeals.[281] As a result, the Administrative Conference specifically declined to endorse any radical changes. As stated in the introduction to its formal recommendations, "more dramatic proposals for reform of the [Social Security disability appeals] system are inadvisable . . . [T]he difficulties are not so overwhelming that the proposal of a markedly different system is required. Hence the recommendations that follow are for the most part interstitial and conservative. Their purpose is to prescribe

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Hearings and Appeals Process, in Administrative Conference of the United States, Recommendations and Reports (1978) [hereinafter 1978 Report].

[278] *See* Recommendation No. 87-6, 1 CFR §305.87-6 [hereinafter Recommendation 87-6]. *See generally* A. Schoenberger, State Disability Services' Procedures for Determining and Redetermining Social Security Claims for the Social Security Administration, (Administrative Conference 1987) [hereinafter 1987 State Agency Report].

[279] *See* Recommendation No. 87-7, 1 CFR §305.87-7 [hereinafter Recommendation 87-7]. *See generally* C. Koch and D. Koplow, A Fourth Bite at the Apple: A Study of the Social Security Administration's Appeals Council (Administrative Conference 1987) [hereinafter 1987 Appeals Council Report].

[280] 1978 Report, *supra* note 277, at 83-85. The report, drawing on congressional material, notes that the processing time for hearings had risen from 118 days in 1971 to 217 days in 1975, and that in June 1977, nearly 3,000 more hearing requests were filed than the number of appeals completed. The report also notes that the reversal rate for administrative law judges was almost fifty percent, but less than half of the judges had a reversal rate within a ten percent variance of that average. *Id.*

[281] *Id.*, at 86.

improvements while reinforcing sound practice."[282] The 1987 recommendations on state agency determinations were limited by the fact that the Social Security Administration was in the process of running demonstration projects to assess the viability of holding evidentiary hearings and personal interviews as part of a one-step initial determination process in place of the present separate initial decision and reconsideration procedures.[283] Although certain preliminary conclusions supporting the use of face-to-face procedures were presented, most of the recommendations were of a contingent nature depending on the final results of the demonstration projects.[284]

The 1987 recommendations on the Appeals Council offered the most radical suggestions for change of all three sets of recommendations. The report accompanying the recommendations concluded that the Appeals Council is simply unable to provide meaningful review of the tremendous volume of cases submitted to the Council each year.[285] In Fiscal Year 1988, the Council handled more than 100,000 cases, including approximately 80,000 reviews of individual claims.[286] Laboring under an unmanageable caseload also resulted in a failure to identify and pursue appropriate goals.[287] Accordingly, the Conference recommended that the Appeals Council reduce drastically the number of individual claims it reviews and shift its orientation toward policy making.[288]

Although each of the three sets of recommendations concentrated on one level of the administrative appeals process, each set has implications for the

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[282] 1 CFR §305.78-2(b). *See also* 1978 Report, *supra* note 277, at 86.

[283] The demonstration projects were mandated by Congress in the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460 §6, 98 Stat. 1794 (1984). The year before Congress had responded to criticism of existing procedures for terminating disability benefits--in particular the Social Security Administration's system for continuing disability reviews--by requiring states to give claimants the option of an evidentiary hearing as part of the reconsideration procedures used in all continuing review cases. *See* Social Security Amendments of 1983, Pub. L. No. 97-455, 96 Stat. 2498 (1983). These procedures are discussed at text accompanying notes 35-40, *supra*.

[284] *See* 1 CFR §305.87-6.

[285] *See* 1987 Appeals Council Report, *supra* note 279, at 5. ("The magnitude of the current caseload, and the Appeals Council's efforts to dispatch it with diligence and compassion, defy effective management.")

[286] *Id.*, at 90, n.220. The remaining cases were cases pending in federal district court, which must be reviewed and processed by the Appeals Council, and remands ordered by a federal court.

[287] As stated in the report, "the Appeals Council as an institution fails to achieve the goals identified for it, and fails any more to contribute very much to their pursuit by other bureaucratic units." *Id.*, at 209.

[288] *See* 1 CFR §305.87-7.

appeals process as a whole. Similarly, procedures in place at one level of the appeals process have an impact on recommendations for change elsewhere in the process. It was recognized in the state agency study, for example, that adding a face-to-face interview at the initial decision level could not be considered a substitute for administrative hearings without considering major additional changes in the process.[289] Similarly, one of the arguments presented in the 1978 report against "radical" reform of the administrative hearings system was that this could be done only after careful evaluation and analysis of state agency procedures.[290] Nonetheless, taken together, the individual recommendations offer suggestions for reform from reconsideration through the Appeals Council with relatively little conflict or overlap.

Rather than discuss each set of recommendations separately, the significant recommendations included in all three sets of recommendations will be presented together below by matching specific recommendations to the three levels of the current administrative appeals process. Thus, recommendations relating to reconsideration from the 1987 state agency study will be presented first. These will be followed by recommendations on administrative hearing procedures from the 1978 study and the 1987 state agency study. This material is broken down further into three subcategories: prehearing procedures, hearings procedures, and post-hearing procedures. Then, recommendations on the Appeals Council from the 1978 and 1987 Appeals Council studies will be discussed. Finally, the major recommendations from all three sets of recommendations will be compiled together and presented as a model for reform of the Social Security administrative appeals process.

A. Pending Recommendations

Although most of the Administrative Conference's specific recommendations address particular aspects of the Social Security Administration's administrative appeals process, a few general recommendations directed at the process as a whole were made as well. Thus, the Conference recommended in 1978 that the Social Security Administration "devote more attention to the development and dissemination of precedent materials."[291] It was suggested, as examples, that the Administration codify "settled or established policies" by regulation, follow a policy of "reasoned acquiescence or nonacquiescence" in judicial decisions, and publish "fact-based

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[289] *See* 1987 State Agency Report, *supra* note 278, at 55.

[290] *See* 1978 Report, *supra* note 277, at 86.

[291] Recommendation 78-2, *supra* note 276, at (C)(2).

precedent decisions."[292] Although not directed at a particular level in the administrative appeals process, this recommendation was intended for decisionmakers and administrators with authority over decisionmakers.[293] An even more broadly stated general recommendation in 1978 supported the continuation of "an aggressive quality assurance program to identify errors, determine their causes and prevent their recurrence."[294]

1. Reconsideration

The Administrative Conference supported the implementation of demonstration projects on the use of personal interviews with claimants at both the initial decision level and on reconsideration.[295] As part of this process, the Conference recommended in 1987 that the Social Security Administration evaluate the current use of evidentiary hearings in continuing disability review cases as well as the results of the demonstration projects in making its report to Congress.[296] The recommendations themselves take no position on the use of face-to-face procedures at the state agency level; however, the report accompanying the recommendation states that the procedures "appear quite promising."[297] Recognizing that budgetary constraints may make full implementation of face-to-face procedures for all disability claims impossible, the Conference did suggest that it might be appropriate to hold interviews only in selected cases based on guidelines that consider the evidence in the record, the medical condition involved in the claim, and the opinion of the examiner processing the case whether a personal interview "would be of significant assistance to the ultimate determination."[298]

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[292] *Id.* *See also* 1978 Report, *supra* note 277, at 110-12. Specific recommendations for publication of precedent decisions by the Appeals Council were made in 1987. *See* text accompanying note 333, *infra*.

[293] Thus, as part of the same recommendation it was suggested that periodic conferences be held with administrative law judges to discuss "new legal developments or recurrent problems." Recommendation 78-2, *supra* note 276, at (c)(2). Similar suggestions were made in the Conference's 1987 recommendations directed specifically at the Appeals Council. *See* Recommendation 87-7, *supra* note 279, at (1)(f).

[294] Recommendation 78-2, *supra* note 276, at (C)(3).

[295] *See* text accompanying notes 278, 283-84 , *supra*.

[296] Recommendation 87-6, *supra* note 278, at (1). The Conference also recommended delaying full implementation of any reforms in the use of evidentiary hearings or personal interviews at the initial or reconsideration stages until the publication of a final report on the demonstration projects by the Department of Health and Human Services. *Id.*, at (2).

[297] 1987 State Agency Report, *supra* note 278, at 54.

[298] Recommendation 87-6, *supra* note 278, at (3).

The Administrative Conference has not recommended that the reconsideration stage be abolished. Instead, it has recommended that a cautious approach be followed once the report is made on the pending demonstration projects: "[c]lose scrutiny should be given to any legislative or other proposals to completely eliminate the reconsideration stage, taking into account the impact of that step on overall processing costs, and on the caseload at the ALJ stage."[299] To the extent that any proposals are considered which would combine the initial and reconsideration stages into a single initial decision procedure, the Conference recommended that the Social Security Administration consider the need for including a face-to-face procedure along the lines authorized in the demonstration projects.[300]

2. Administrative Hearing

The Administrative Conference has made a large number of recommendations relating to the conduct of administrative hearings, most of which form the core of the 1978 recommendations. A few of these recommendations apply generally to the administrative hearing process; others are directed to prehearing procedures, the conduct of the administrative hearing itself, or post-hearing procedures.

The first recommendation from the 1978 study was that the Social Security Administration continue to use administrative law judges to decide disability appeals, and that administrative law judges hearing those appeals continue to be appointed in conformity with the Administrative Procedure Act.[301] It was found that the major criticisms of using administrative law judges in disability hearings--that hearings become too formal, the process becomes too costly, and a sufficient number of qualified administrative law judges cannot be recruited--were unfounded. Rather, the use of independent administrative law judges was found to be more important than had been the case earlier in the program's history: "As the Social Security system comes under increasing fiscal pressure, and the pressures of a rising caseload, a less clearly independent corps of deciders would have greater difficulty resisting the 'institutional imperatives' to reduce both the effort expended on individual cases and the number of awards."[302]

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[299] *Id.*, at (7).

[300] *Id.*

[301] Recommendation 78-2, *supra* note 276, at (A)(1). The Administrative Procedure Act and its application to Social Security disability appeals are discussed at text accompanying notes 352-57, *infra*.

[302] 1978 Report, *supra* note 277, at 89.

The Administrative Conference supported administrative law judge independence despite the recognition that it results in some loss of agency control. An evaluation of current practice in the report accompanying the 1978 recommendations revealed that a proper balance had been struck at the Social Security Administration between honoring the independence of its administrative law judges and asserting appropriate control over policy and productivity.[303] Accordingly, along with its recommendation supporting continued use of independent administrative law judges, the Conference also recommended that the Office of Hearings and Appeals should, "consistent with the administrative law judge's decisional independence, . . . prescribe procedures and techniques for the accurate and expeditious disposition of . . . claims."[304]

a. Prehearing Procedures

The Administrative Conference made a number of recommendations in 1978 aimed at improving the process for developing evidence at the administrative hearing level. In the study leading to the recommendations, it was found that hearings are extremely important for the development of evidence relating to claimants' functional limitations and residual capacities for work, and that it would be helpful to compile as much evidence as possible before the hearing to make the most effective use of the hearing to complete the development of the record.[305] Without precluding post-hearing development, the Conference therefore recommended that administrative law judges develop the record at the prehearing stage of the process "whenever sound discretion suggests that such development is feasible and useful."[306] It was noted in the report accompanying the recommendation that post-hearing development was common, and that proper questioning at the hearing was

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[303]Thus, the report concluded that "[o]n balance the current tension between individualized determination by independent ALJs, and management's desires to expedite the process and hold down costs seems healthy." *Id.*, at 89. With respect to policy, the report notes that the agency can require judges to follow rules and regulations designed to produce the types of substantive decisions it would itself hope to produce, and that "none of [the Bureau of Hearings and Appeals'] current actions interferes with decisional independence properly understood." *Id.*, at 91.

[304]Recommendation 78-2, *supra* note 276, at (A)(2). The recommendation goes on to note that "[m]aintaining the administrative law judge's decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies underlying the Social Security Administration's fulfillment of statutory duties." *Id.*

[305]*See* 1978 Report, *supra* note 277, at 92-93.

[306]Recommendation 78-2, *supra* note 276, at (B)(1).

often limited due to a lack of necessary background medical evidence in the file. As a result, the hearing becomes a less effective means for the development of a full and complete record.[307] The recommendation itself notes, along similar lines, that although sometimes evidence can be obtained only after the hearing has been held, "prehearing development often may be necessary for an informed and pertinent exchange at the hearing."[308]

A second aspect of fact development addressed in the Administrative Conference's 1978 recommendation was the use of medical evidence supplied by claimants' treating physicians, both as independent sources and as supplemental sources when evidence is supplied by consulting physicians. The Social Security Administration's practice at the time was found to favor the use of consulting physicians over treating physicians, despite advantages of getting information from the physician with a regular relationship with the claimant, based at least in part on the perception of administrative law judges that treating physicians' reports tend to be biased in favor of claimants.[309] Notwithstanding these concerns and other concerns expressed about the quality of treating physician reports, the Conference recommended more effective use of treating physicians as sources of medical evidence, including the use of standard questionnaires to obtain necessary information from treating physicians.[310] Recognizing that information obtained from a treating physician may conflict with other medical evidence in the record, particularly reports from consulting physicians, the recommendation goes on to suggest that claimants be given the opportunity to have their treating physician respond in writing to any conflicting evidence.[311]

The Conference also recommended that better use be made of claimants as sources of relevant information. It was found that claimants were rarely relied upon to assist in the development of medical evidence, at least in part because they were usually not given sufficient information about the issues in dispute to be of much help.[312] Therefore, it was recommended that claimants be

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[307] *See* 1978 Report, *supra* note 277, at 94.

[308] Recommendation 78-2, *supra* note 276, at (B)(1).

[309] *See* 1978 Report, *supra* note 277, at 94. ("ALJs rather consistently believe that consulting physicians are less biased and more expert than treating physicians, although the latter have a decidedly better opportunity to observe the claimant")

[310] Recommendation 78-2, *supra* note 276, at (B)(3).

[311] *Id.* *See also* 1978 Report, *supra* note 277, at 95. (Treating physician "is in a much better position to evaluate the consultative examiner's report and, in light of those findings, to supplement or explain his prior statements, than anyone else in the system.")

[312] *See id.*, at 96.

provided notice of the reasons given by the state agency for denying benefits, and notice of the "critical issues" that will be addressed at the hearing.[313]

Finally, the Conference recommended the experimental use of prehearing interviews on a more regular basis, citing two main purposes to be served by such procedures. First, prehearing interviews would improve the development of necessary evidence. Second, they would increase the likelihood of granting benefits in appropriate cases without a full hearing.[314] The recommendation went on, however, to note that "[d]ue regard should be paid to the convenience of the claimants and to the need for a suitable record for such interviews."[315] The actual gathering of evidence could be done by a hearing assistant or staff attorney, rather than the administrative law judge.[316]

b. Hearing Procedures

The Administrative Conference made only one specific recommendation in 1978 directed at the actual conduct of administrative hearings: that administrative law judges engage in "careful and detailed questioning of the claimant at the hearing."[317] As stated in the accompanying report, judges vary considerably in the amount and quality of their questioning, but should "tend toward the more intensive end of the spectrum of [administrative law judge] practice."[318] As part of its 1987 recommendations concerning the use of personal interviews in state agency determinations, the Conference offered some support for the current role of the administrative hearing in the Social Security Administration's administrative appeals process. Thus, it was noted that the Administration "should proceed with caution" on the issue of whether the opportunity for an interview or a hearing at the state agency level should supplant the adjudicatory hearing before an administrative law judge. The Conference's position was that any such modifications to the initial and reconsideration process instead "should be seen as a possible way of reducing

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[313] Recommendation 78-2, *supra* note 276, at (B)(4).

[314] *See id.*, at (B)(2). *See also* 1978 Report, at 94.

[315] Recommendation 78-2, *supra* note 277, at (B)(2). Concern about the use of preliminary interviews to develop evidence was also expressed in the report: "this information could be elicited briefly and informally in advance of the hearing, although to avoid subsequent controversy, a suitable record should be kept of what transpires at the prehearing interview." 1978 Report, *supra* note 277, at 93.

[316] *See id.*

[317] Recommendation 78-2, *supra* note 276, at (B)(4). There were also a number of recommendations directed at the use of official notice and the questioning of vocational experts. *See id.*, at (B)(5), (B)(6). Most of the concerns raised have been addressed with the promulgation of the Medical-Vocational Guidelines in 1978. *See* 1978 Report, *supra* note 277, at 99-107.

[318] *Id.*, at 97.

the number of appeals to the later stages of the process."[319] As part of the same set of recommendations, the Conference recommended that the evidentiary record should not be closed until the administrative hearing process has been completed, noting that the administrative hearing stage is the point at which claimants are most likely to be represented.[320]

c. Post-Hearing Procedures

The Administrative Conference addressed two issues relating to post-hearing development of evidence as part of its 1978 recommendations. First, the Conference recommended that any new evidence obtained after the administrative hearing record is closed be offered to the administrative law judge as a request to reopen the record.[321] Second, recognizing that in some cases evidence will have to be developed after the hearing, the Conference recommended that claimants should not be requested to waive their rights to examine evidence submitted after the hearing.[322] Although claimants rarely comment on post-hearing evidence, the report accompanying the recommendation found the practice of requesting a waiver, followed by some administrative law judges, to be "highly objectionable."[323]

3. Appeals Council

The Administrative Conference issued a set of comprehensive recommendations addressed at the Appeals Council in 1987. Only one of its earlier recommendations touched on Appeals Council procedure. Thus, the

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[319]Recommendation 87-6, *supra* note 278, at (6).

[320]*Id.*, at (9). *See also* 1987 State Agency Report, *supra* note 278, at 56. ("The record should not be closed at any point before a hearing stage at which claimants are likely to be represented by attorneys. At the moment, this is the ALJ level.") The report goes on to note that a shift to a single due process hearing at the state agency level, as opposed to a full administrative hearing before an administrative law judge, would present serious problems unless attorneys would represent claimants at the Disability Determination Services; in order to avoid "a significant tilt in the system against claimants," efforts would have to be made to encourage representation at the Disability Determination Services "such as transfer of hearings to be close to attorney offices, increased file availability to attorneys, routine photocopying of files, or something even more radical such as an entirely different manner of representing claimants at the DDS level." *Id.*

[321]Recommendation 78-2, *supra* note 276, at (C)(1). In 1987, the Conference recommended that evidence submitted improperly to the Appeals Council be presented to the administrative law judge in a petition to reopen. *See* notes 327-28, *infra*. Apparently this was also the intention in the 1978 recommendation. *See* 1978 Report, *supra* note 277, at 110.

[322]Recommendation 78-2, *supra* note 276, at (B)(7).

[323]1978 Report, *supra* note 277, at 108.

Conference recommended in 1978 that Appeals Council review should be limited to the record developed by the administrative law judge; new evidence offered at the Appeals Council level should be accepted into the record on appeal "only if a refusal to do so would result in substantial injustice or unreasonable delay."[324] As stated in the accompanying report, "the Appeals Council should, save in exceptional circumstances, limit itself to the correction of errors of law and, in that effort, to the enunciation of principles to guide subsequent cases."[325] Since that recommendation was published, Congress and the Social Security Administration have imposed greater restrictions on the introduction of new evidence at the Appeals Council level.[326] In a footnote to its 1987 Appeals Council recommendations, the Conference stated that the Council should receive new evidence only upon a showing of good cause; otherwise, cases with new evidence should be remanded to the administrative law judge, and cited the 1978 recommendation.[327] The purpose behind this recommendation was to encourage complete fact development at the administrative hearing stage and to return the issue of new evidence back to the administrative law judge whenever possible, thereby limiting Appeals Council review to closed records.[328]

The central recommendation of the Administrative Conference's 1987 study of the Appeals Council was to shift the Council's emphasis from reviewing all appeals from administrative hearing decisions to performing a more effective policy-making role in the adjudication of disability claims.[329] As stated in the accompanying report, "the Appeals Council would function principally in a 'systems reform' capacity, attempting to discover, elaborate, and implement changes in the entire disability adjudication system that could lead to better,

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[324] *See* Recommendation 78-2, *supra* note 276, at (C)(1). As part of the same recommendation, it was recommended that evidence submitted after the hearing should be submitted to the administrative law judge as a request to reopen the decision. *See* text accompanying note 321, *supra*. The recommendation does not address the difference between having evidence admitted by the Appeals Council to review an administrative law judge's failure to reopen following a request made to the administrative law judge, and including evidence as part of a substantive appeal. In the former circumstance the result would necessarily be a remand by the Appeals Council; if the evidence is part of the substantive appeal presumably the Appeals Council could remand or consider the evidence itself.

[325] 1978 Report, *supra* note 277, at 110.

[326] *See* text accompanying notes 170-75, *supra*.

[327] *See* Recommendation 87-7, *supra* note 279, at (1)(c)(4), n.2.

[328] *See* 1987 Appeals Council Report, *supra* note 279, at 241 (notwithstanding some hardship to claimants who cannot assemble all of the evidence in time for the administrative hearing, "orderly litigation, and a respect for the finality of administrative judgments, suggest the importance of segregating the trial-level and the appellate-level functions more strictly.")

[329] *See* Recommendation 87-7, *supra* note 279, at (1).

earlier decisionmaking."[330] In order to accomplish this goal, the Conference recommended giving the Council discretion to refuse to review most petitions, limiting itself to cases that would allow it to rule on issues of general importance.[331] Three types of cases were suggested in the report as suitable for Appeals Council review: cases involving new and potentially difficult issues, cases involving issues known to be difficult or problematic, and a certain number of cases selected at random.[332] With a reduced caseload, the Appeals Council would concentrate on issuing general interpretations on questions of procedure and "adjudicatory principles" in the form of minutes, and would publish precedential opinions in selected cases. The Appeals Council would have to select from even its reduced caseload to identify opinions suitable for publication as precedential decisions.[333] These minutes and opinions would be indexed, distributed widely at the Social Security Administration, and made available to the public.[334]

Other recommendations were intended to improve the quality of Appeals Council review of those individual cases selected for review, including more collaborative work on cases by members of the Appeals Council and greater participation by claimants representatives in briefing and arguing important issues raised by the appeals.[335] Other specific recommendations on procedures for individual reviews included issuing opinions with better reasoning and

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[330] 1987 Appeals Council Report, *supra* note 279, at 223.

[331] Recommendation 87-7, *supra* note 279, at (1)(b). The idea is to retain review of individual cases as an important, but not dominant, part of the Council's work: "the cases (although far fewer of them) are still the primary input into the operation of the Appeals Council, but the primary output of the organization becomes 'clarification of policies' or 'ideas for change,' rather than simply a mass of correct individual adjudications." 1987 Appeals Council Report, *supra* note 279, at 223-24. A caseload of 5,000 to 10,000 was suggested as appropriate, being both manageable and a sufficiently large number to keep the Council from becoming "just another policy body divorced from the reality of the adjudication process." *Id.*, at 227.

[332] *See id.*, at 228-32.

[333] Thus, while recognizing that most disability cases are too fact-specific to warrant publication, the 1987 report urges that the Appeals Council "seek [forward-looking decisions], and seize the opportunity to promote uniformity by advertising throughout the system any common, successful approaches to the cases." *Id.*, at 233.

[334] Recommendation 87-7, *supra* note 279, at (1)(a)(2). The Conference also recommended that the Council increase its visibility by "seeking publication of precedent by a recognized reporter service." *Id.*, at (1)(f). *See also* 1987 Appeals Council Report, *supra* note 279, at 234 ("the Appeals Council should look for opportunities to make its decisions worthy of publication, and ought to distribute far more of them far more widely.")

[335] *See* Recommendations 87-7, *supra* note 279, at (1)(c)(1), (1)(c)(2). The recommendation also contemplated the possibility of interested parties filing *amicus* briefs. *Id.*, at (1)(c)(2).

legal analysis,[336] and avoiding the substitution by Appeals Council members of their judgment on factual determinations for those of the administrative law judges.[337]

The 1987 recommendations also addressed the workload and staffing of the Appeals Council. Thus, the Conference recommended that efforts be made to reduce the time required to grant or deny review,[338] and, once the time period for review had passed, to allow for the reopening of claims only under existing standards.[339] In order to improve the status of the Appeals Council, the Conference recommended reducing the number of members, improving the selection process, and upgrading salary levels and civil service protection for Appeals Council members.[340] Although not stated in the recommendation, the accompanying report states that Appeals Council members should have the same Administrative Procedure Act guarantees of independence provided to administrative law judges.[341] Finally, the Administrative Conference recommended that if the Appeals Council does not prove to be effective in its

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[336] *Id.*, at (1)(c)(3). *See also* 1987 Appeals Council Report, *supra* note 279, at 238. ("We look forward to the Appeals Council drafting opinions that--even if not rivaling the federal judiciary in length or diversity--are at least clear, responsive, forward-looking and individualized enough to be free of mindless boilerplate.")

[337] Recommendation 87-7, *supra* note 279, *supra* note 279, at (1)(c)(4). Although not addressed directly in the recommendation, the accompanying report notes that the "substantial evidence" standard of review for fact determinations tends to be either ignored or interpreted as a license to reconsider the entire factual record. Accordingly, it is suggested in the report, but not included in the Conference's recommendation, that the Council use an "arbitrary" standard for determinations of fact in place of the "substantial evidence" standard. See 1987 Appeals Council Report, *supra* note 279, at 240.

[338] The report suggests 30 days for deciding whether to grant review, and then another 60 days to decide the case. *Id.*, at 242.

[339] *See* Recommendation 87-7, *supra* note 279, at (1)(c)(5), (1)(c)(6). As stated in the accompanying report, "[t]he Appeals Council should not . . . be empowered to reopen a case merely because it has missed the ordinary deadline for review--only factors such as fraud, clerical error, or obvious mistake should disturb the finality of the decision." 1987 Appeals Council Report, *supra* note 279, at 242-43.

[340] Recommendation 87-7, *supra* note 279, at (1)(d). With respect to salary, the recommendation was to upgrade Appeals Council members' salary level to one level above that of Social Security Administration administrative law judges. *Id.* The report suggests limiting memberships to eleven. 1987 Report, *supra* note 279, at 248.

[341] *Id.*, at 247. The report also suggested that the Council be made a separate component within the Office of the Commissioner, but the Conference did not make this recommendation. *See id.*, at 249.

new role, then the Social Security Administration should consider whether it should be abolished.[342]

B. Model for Administrative Appeals Based on Pending Administrative Conference Recommendations

A model for reform of the Social Security Administration's administrative appeals process can be derived from the pending recommendations of the Administrative Conference. This model would reduce the levels of administrative action to three: initial determinations, administrative hearing and Appeals Council review. There would be significant changes in the initial determination process to compensate for the elimination of the reconsideration level of review, limited changes at the administrative hearing level and a substantial shift in emphasis in the work of the Appeals Council.[343] In addition to specific changes in the administrative appeals process, a model based on the Administrative Conference's recommendations would operate under certain general principles for adjudications, most of which amount to fine tuning of current policies and practices.

Reforms supported by pending Conference recommendations would consist of the following:

1. Add an optional face-to-face interview at the initial decision level and eliminate reconsideration.[344]

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[342]Recommendation 87-7, *supra* note 279, at (2). The option of abolishing the Appeals Council outright was considered in the report accompanying the 1987 recommendations. *See* 1987 Appeals Council Report, *supra* note 279, at 210-15. The report concluded "the Appeals Council can not continue as it is; if the recommended improvements [included in the formal recommendations] are not promptly forthcoming, or if they prove inefficacious, then the Appeals Council ought to be abolished." *Id.*, at 215.

[343]Thus, the Conference's 1978 recommendations concentrating on administrative hearings proposed interstitial and conservative suggestions, whereas the 1987 recommendations on the Appeals Council offered far more radical suggestions for change. *See* text accompanying notes 280-82, 285-88, *supra*.

[344]The Conference has not made a formal recommendation to this effect; however, support for this change in procedures can be found in the Conference's 1987 recommendations on state agency determinations, which were limited by the fact that the Social Security Administration was still conducting demonstration projects on the use of personal interviews as part of the process for initial decisions and reconsideration. *See generally* text accompanying notes 295-302, *supra*.

2. Increase efforts at prehearing development of records, including more effective use of treating physicians and claimants as sources of medical evidence.[345]

3. Encourage greater use of prehearing interviews in order to improve the development of records and identify appropriate cases for granting of benefits without a full hearing.[346]

4. Require that claimants request a reopening of the administrative hearing record if they wish to submit new evidence obtained after the administrative hearing record is closed.[347]

5. Allow claimants to present new evidence to the Appeals Council only for good cause. If good cause cannot be shown, claimants would be required to request a reopening of the administrative hearing record from the administrative law judge.[348]

6. Limit Appeals Council review of individual claims to discretionary review, and concentrate its efforts on a policy-making role through the issuance of generally applicable interpretations of law and procedure and the publication of precedential opinions in selected cases.[349]

IV. SOCIAL SECURITY ACT AND ADMINISTRATIVE PROCEDURE ACT

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[345] *See* text accompanying notes 305-313, *supra*. Although this recommendation was directed at the administrative hearing level, logically the recommendation for greater use of treating physicians and claimants as sources of medical evidence would apply to the initial decision level as well.

[346] *See* text accompanying notes 314-316, *supra*.

[347] *See* text accompanying note 321, *supra*.

[348] *See* text accompanying notes 324-28, *supra*.

[349] *See* text accompanying notes 329-334, *supra*. As part of this recommendation, certain suggestions for improving the quality of review by the Appeals Council of cases selected for review would be included. *Id*.

PROVISIONS RELATING TO ADMINISTRATIVE APPEALS PROCESS

Both the Social Security Act[350] and the Administrative Procedure Act[351] set forth requirements for administrative appeals that apply to Social Security disability adjudications. The Social Security Act contains general rules of procedure applicable to administrative determinations and administrative appeals in disability claims for both Disability Insurance Benefits, including claims by disabled survivors, and Supplemental Security Income.[352] The Administrative Procedure Act itself does not require a hearing on any issue before an agency; it applies only when another substantive statute prescribes a hearing on the record.[353] Therefore, in order for the Administrative Procedure Act's requirements for the conduct of adjudications and the status of administrative law judges to apply to Social Security disability claims, they must do so by virtue of the fact that the Social Security Act requires the determination of disability claims "on the record after opportunity for an agency hearing."[354]

The Supreme Court declined to decide whether the hearing requirements of the Administrative Procedure Act apply to Social Security disability claims when the issue was raised in *Richardson v. Perales*.[355] However, applicability seems clear. Indeed, Social Security disability hearings in which an administrative law judge makes findings of fact and conclusions of law and then decides eligibility for benefits would seem to be the very model of a decision based on a record after a hearing, which triggers application of the

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[350] *See* 42 U.S.C. §§401-433 (Chapter 7, Subchapter II: Federal Old-Age, Survivors, and Disability Insurance Benefits) (1982 & Supp. IV 1986).

[351] *See* 5 U.S.C. §§551-559 (Chapter 5, Subchapter II: Administrative Procedure) (1982 & Supp. V 1987); *id.* §§1305, 3105, 3344, 5372, 7521 (provisions relating to administrative law judges).

[352] 42 U.S.C. §§405, 1383(c).

[353] *See* United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 756-57 (1972); Webster Groves Trust Co. v. Saxon, 370 F.2d 381, 385-86 (8th Cir. 1966).

[354] The Administrative Procedure Act applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," 5 U.S.C. §554(a); the Social Security Act provides that a claimant dissatisfied with an initial decision must be given the opportunity for a hearing and a decision on the basis of evidence presented at the hearing. *See* 42 U.S.C. §§405(b)(1), 1383(c)(1).

[355] 402 U.S. 389 (1971). The Court stated that "[w]e need not decide whether the APA has general applicability to Social Security disability claims, for the Social Security administrative procedure does not vary from that prescribed by the APA." *Id.*, at 409.

Administrative Procedure Act.[356] Courts have assumed applicability in other contexts, such as the independence of administrative law judges and official notice.[357] Other provisions of the Administrative Procedure Act unrelated to administrative appeal procedures, such as those governing rulemaking, also apply to Social Security disability claims.[358]

The relevant provisions of the two acts will be discussed separately below. Although bound by the requirements of both acts, the Social Security Administration has implemented rules and regulations with respect to most of the areas covered by the Administrative Procedure Act that equal or exceed the statutory requirements. It has also implemented the relevant provisions of the Social Security Act. To the extent that the Administration has promulgated rules and regulations which exceed the requirements of the Administrative Procedure Act, it is bound to follow its own, more stringent procedural requirements.[359] Accordingly, presently most of the requirements in the Administrative Procedure Act are not applicable directly to Social Security disability adjudications. However, the Social Security Administration is bound by those requirements in the sense that it cannot rescind or modify its rules and regulations if to do so would establish procedures that conflict with the Administrative Procedure Act.

A. Administrative Procedure Act Requirements

There are provisions in the Administrative Procedure Act which touch upon most aspects of the Social Security Administration's administrative appeals process. Most generally, the Act requires publication of rules of

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[356] *See* IT&T Corp. v. AFL-CIO, 419 U.S. 428, 443-44 (1975). Even without the words "on the record" in the Social Security Act, the Administrative Procedure Act would still apply under current practices. *See* Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977) ("[w]hether the formal adjudicatory hearing provisions of [the Act] apply to specific administrative processes does not rest on the presence or absence of the magical phrase 'on the record,'" but rather on the "substantive character of the proceedings included.")

[357] *See, e.g.*, Nash v. Bowen, 869 F.2d 675, 679 (2d Cir. 1989); Rives v. Schweiker, 684 F.2d 1144, 1154 n.10 (5th Cir. 1982).

[358] *See* 5 U.S.C. §553. This is true notwithstanding the exemption for rules relating to grants and benefits in *id.* §553(a)(2), because the Social Security Administration has waived the applicability of the exemption. *See* Buschmann v. Schweiker, 676 F.2d 352, 356 n.4 (9th Cir. 1982). The Act does not apply, however, to "interpretive" rules issued by the Social Security Administration. *See, e.g.*, Guadamuz v. Bowen, 859 F.2d 762, 771 (9th Cir. 1988).

[359] *See* Morton v. Ruiz, 415 U.S. 199, 235 (1974).

procedure in the Federal Register.[360] Also, the Act authorizes agencies to issue their own rules for compliance with the requirements of the Act.[361] The significant specific requirements for adjudications relevant to Social Security disability claims cover notice, the conduct of administrative hearings, the status of administrative law judges, the decisionmaking process, and post-hearing review.

1. Notice

The Act requires that parties receive notice of hearings which include the time, place and nature of the hearing, the authority under which the hearing is to be held, and a statement of the factual and legal issues that will be addressed.[362] The notice must include all disputed matters of law, and the agency may not change the matters in dispute without giving the parties involved reasonable notice of the change.[363] Moreover, the scope of the hearing and the final decision must be based on the coverage identified in the notice.[364] Parties not given proper notice are not bound by the decision.[365]

2. Conduct of Administrative Hearing

The Administrative Procedure Act includes a number of specific requirements for the conduct of administrative hearings applicable to Social Security disability claims. Although these requirements are substantial, they fall short of requiring all of the procedures applicable to judicial proceedings.[366] Thus, parties are given the right to submit evidence and present arguments supporting their claim for benefits.[367] They can appear by themselves, or with a lawyer or "other duly qualified representative."[368]

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[360] 5 U.S.C. §§552(a)(1)(C), 553(b).

[361] *Id.* §559.

[362] *See id.* §554(b). *See also* Southwest Sunsites, Inc. v. FTC, 785 F.2d 1431, 1435 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986). With respect to the time and place of hearings, the Act specifies that "due regard shall be had for the convenience and necessity of the parties or their representatives." 5 U.S.C. §554(b).

[363] *See* Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968).

[364] 5 U.S.C. §554(c)(2). There is an exception if the matter is resolved otherwise by consent which, in the context of disability benefits, has little meaning except perhaps for an agreement on contested dates of disability.

[365] *See, e.g.*, NLRB v. Tennsco Corp., 339 F.2d 396, 399 (6th Cir. 1964).

[366] *See* Alesi v. Cornell, 250 F.2d 877, 879 (9th Cir. 1958).

[367] 5 U.S.C. §554(c)(1).

[368] *Id.* §555(b).

Any oral and documentary evidence can be submitted, subject only to rules on relevance, materiality and undue repetition.[369] Evidence is not limited to that which would be admissible in a judicial proceeding.[370] In addition to evidence supporting their claim for benefits, claimants are entitled to submit rebuttal evidence and to "conduct such cross examination as may be required for a full and true disclosure of the facts."[371] However, an agency may require that all or part of the evidence supporting a claim for money or benefits be submitted in written form "when a party will not be prejudiced thereby."[372] The Act gives claimants the right, in other words, to present their case and to be heard.[373] The person conducting the hearing cannot consult anyone on a "fact issue" unless notice of the consultation is provided and all parties are given the opportunity to participate.[374] If "official notice" of a fact not in the record is to be considered in making a decision, the parties must be allowed to respond and dispute that fact.[375]

The Act also includes a number of hearing procedures which the person presiding at a hearing is authorized to use, subject to rules published by the appropriate agency. Thus, a Social Security administrative law judge is authorized under the Act to administer oaths, subpoena witnesses, take or authorize the taking of depositions, hold prehearing conferences for purposes of settlement or simplification of the issues, rule on matters of proof and evidence, dispose of procedural requests, control the conduct of the hearing, issue recommended decisions, and take any other action authorized by the Social Security Administration that is also consistent with the Administrative Procedure Act.[376] The Act requires a written explanation of the denial of any written request regarding a procedural matter.[377] The record compiled for the decision, including a transcript of the testimony and copies of all exhibits and other papers filed, must be made available to parties at cost.[378] Also, *ex parte*

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[369] *Id.* §556(d).

[370] *See* McKee v. United States, 500 F.2d 525, 528 (Ct. Cl. 1979) ("In an administrative hearing, 'rank hearsay' not only is admissible, . . . but [it] can constitute substantial evidence if sufficiently convincing to a reasonable mind.")

[371] 5 U.S.C. §556(d).

[372] *Id.* §556(d).

[373] *See* Green Spring Dairy, Inc. v. Commissioner, 208 F.2d 471, 475 (4th Cir. 1953).

[374] *See* 5 U.S.C. §554(d)(1).

[375] *Id.* §556(e).

[376] *Id.* §556(c).

[377] *Id.* §555(e). There is an exception when the decision either affirms a prior denial or is "self explanatory." *Id.*

[378] *Id.* §556(e).

communications between persons outside the agency and the person conducting the hearing are prohibited.[379]

3. Status of Administrative Law Judges

The Administrative Procedure Act requires that hearings be held by either the agency itself, members of the "body which comprises the agency," or an administrative law judge or panel of administrative law judges appointed by the agency under the general congressional grant of authority for the appointment of administrative law judges.[380] If the hearing is conducted by someone other than the agency, such as an administrative law judge, the initial decision must be made by that person unless agency rules require that the entire record be submitted to the agency for the agency to make the decision.[381] In any event, the person conducting the hearing must be the person who decides the claim at that level, whether in the form of an initial decision or a recommended decision to the agency.[382] Also, the person making the decision at the hearing must be independent from anyone in the agency responsible for investigation or prosecution.[383] Therefore, the agency may not "infringe on the decisional independence of [administrative law judges] . . . [so that the] administrative hearing [can] 'be conducted in an impartial manner.'"[384] An administrative law judge is expected to act in an impartial and disinterested manner.[385]

The Act also provides certain protections to maintain the independent status of administrative law judges. Although appointed by the agency,[386] if needed, administrative law judges from one agency can be assigned temporarily to another.[387] Their pay is prescribed by the Office of Personnel Management

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[379] *Id.* §§557(d)(1)(A)-(B). The Act also includes certain remedial steps to be taken if such communications occur. *Id* §§557(d)(1)(C)-(E).

[380] *Id.* §556(b). The purpose of this requirement is "to limit conduct of hearings and reception of evidence to specially qualified persons who are to be an essential part of the administrative adjudicatory process." U.S. Health Club, Inc. v. Major, 292 F.2d 665, 666 (2d Cir. 1961). Authority for the appointment of administrative law judges is at 5 U.S.C. §3105.

[381] *Id.* §557(b).

[382] *Id.* §554(d). There is an exception if the person conducting the hearing is "unavailable." *Id.*

[383] *Id.* §554(d)(2).

[384] Nash v. Bowen, 869 F.2d 675, 680 (2d Cir. 1989) (quoting 5 U.S.C. §556(b).

[385] *See* 5 U.S.C. §556(b); NLRB v. Tamper, Inc., 522 F.2d 781, 789-90 (4th Cir. 1975). *See also* Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) (administrative law judge needs to be impartial to satisfy due process requirements).

[386] *See* note 380, *supra*.

[387] 5 U.S.C. §3344.

under Civil Service rules.[388] Moreover, a personnel action against an administrative law judge can be taken only according to rules prescribed by the Merit Systems Protection Board and after a hearing before the Board.[389] Both the Office of Personnel Management and the Merit Systems Protection Board have been given authority to promulgate regulations in accordance with these responsibilities.[390]

4. Decisionmaking Process

The Administrative Procedure Act states that the proponent of an order has the burden of proof, unless the allocation of burden is provided otherwise by statute.[391] The decision must be based on the whole record and "supported by and in accordance with the reliable, probative, and substantial evidence."[392] The decisionmaker must, of course, weigh the evidence, and the Act has been interpreted as contemplating a preponderance-of-the-evidence standard of proof for administrative hearings.[393] In contrast, the standard of review that an appellate court applies on an appeal from the administrative hearing is the "substantial evidence" test.[394] Substantial evidence means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[395] The record for decision is limited to the testimony at the hearing, exhibits, and all other papers and requests filed

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[388]*Id.* §5372. Thus, "[a]dministrative law judges . . . are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings." *Id.*

[389]*See id.* §7521. ("An action may be taken against an administrative law judge . . . only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.") *See generally* Rosenblum, *Contexts and Contents of "For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. New. Eng. L. Rev. 593 (1984).

[390]5 U.S.C. §1305.

[391]*Id.* §556(d). *See generally* Bosma v. USDA, 754 F.2d 804, 810 (9th Cir. 1984) (burden of proof defined as burden of going forward with evidence).

[392]5 U.S.C. §556(d).

[393]*See* Steadman v. SEC, 450 U.S. 91, 99-100 (1980), *rehearing denied*, 451 U.S. 933 (1981). *See also* Fischer and Porter Co. v. United States International Trade Commission, 831 F.2d 1574, 1580-81 (Fed. Cir. 1987) (applying the *Steadman* case and its standard of proof to patent infringements); Sea Island Broadcasting Corp. of South Carolina v. F.C.C., 627 F.2d 240, 243 (1980). ("The use of the 'preponderance of evidence' standard is the traditional standard in . . . administrative proceedings.")

[394]*Steadman*, 450 U.S. at 100.

[395]Universal Camera Corp. v. NLRB, 340 U.S. 470, 477 (1951). This is the same standard enunciated under the Social Security Act. *See* text accompanying note 434, *infra*.

during the course of the hearing.[396] The Act also requires that an agency confine itself to the record in making adjudicatory determinations.[397] Therefore, an agency may not consider evidence outside the record if that evidence causes "substantial prejudice."[398] However, an agency may allow new evidence to be submitted after the record has been closed so long as the claimant has ample opportunity to cross examine witnesses or otherwise rebut the new evidence.[399] Before a decision is made at the hearing, parties must be given a reasonable opportunity to submit proposed findings and conclusions or exceptions to recommended or tentative agency decisions, together with a statement supporting the proposed findings and conclusions or exceptions. In addition, any proposed findings and conclusions or exceptions, and a ruling on them, must be included in the record.[400]

Hearing decisions must be made a part of the record and must include findings and conclusions on all "material issues of fact, law, or discretion presented on the record," a statement of the reasons and bases for the findings and conclusions, and a statement of the relief awarded or denied.[401] The Act requires agencies to decide cases in light of all the evidence on the record, and to give reasons for their decisions consistent with applicable law.[402] An agency must articulate its findings and the reasons for its decision clearly and

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[396] 5 U.S.C. §556(e).

[397] *Id.*

[398] *See* Marathon Oil Co. v. E.P.A., 564 F.2d 1253, 1265 (9th Cir. 1977) (quoting United States v. Pierce Auto Freight Lines, 327 U.S. 515, 528 (1946). *See also* Dotson v. Peabody Coal Co., 846 F.2d 1134, 1138 (7th Cir. 1988). ("It is unfair and irrational for the trier of fact to rely on evidence outside the record [because] . . . such evidence cannot be challenged by opposing counsel.")

[399] *See* In re Three Mile Island Alert, Inc., 771 F.2d 720, 731 (3d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986). The same requirement has been found in the Social Security Act. *See* note 430 and accompanying text.

[400] 5 U.S.C. §557(c).

[401] *Id.*

[402] *See* United Auto Workers v. NLRB, 459 F.2d 1329 (D.C. Cir. 1972).

precisely.[403] When an initial decision is made by the person presiding at the hearing, that decision must become the final decision of the agency unless there is an appeal from or review of the decision by the appropriate administrative review body within applicable time limits.[404]

5. Post-Hearing Review

The Administrative Procedure Act also includes one provision relating to post-hearing review by the agency. When an appeal from or review of a hearing decision is made, the agency in its review of that decision has all of the powers that it would have had if it made the original decision; however, the agency may limit the issues on appeal or review by notice or by rule.[405] As with hearing decisions, before a decision is made on appeal from or review of a hearing decision, parties must be given the opportunity to submit proposed findings and conclusions or exceptions to recommended or tentative agency decisions.[406]

B. Social Security Act Requirements

Titles II and XVI of the Social Security Act includes provisions governing procedures used to determine eligibility for all of the disability programs covered by the Act.[407] Thus, there are a number of provisions applicable to

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[403] *See* Nader v. NRC, 513 F.2d 1045, 1051 (D.C. Cir. 1975). A recitation of conclusions without a showing of supporting facts is ineffectual. Great Lakes Screw Corp. v. NLRB, 409 F.2d 375, 379 (7th Cir. 1969); Deaton, Inc. v. ICC, 693 F.2d 128, 131 (11th Cir. 1982). In *Deaton*, the court noted that an agency determination could be upheld if the basis for its decision could be discerned from the opinion. 693 F.2d at 131. *See also* Benmar Transport & Leasing Co. v. FCC, 623 F.2d 740, 741 (2d Cir. 1980). ("Despite an agency's failure to include in its decision a statement of findings and conclusions and reasons or basis therefor on all material issues of fact, law or discretion presented on the record, court of appeals is not disposed to overturn a sound administrative decision if the agency's path--although not ideally clear--may reasonably be discerned.")

[404] 5 U.S.C. §557(b). The initial decision for these purposes means "the first decision after evidence has been taken." Kerner v. Celebrezze, 340 F.2d 736 (2d Cir.), *cert. denied*, 382 U.S. 861 (1965).

[405] 5 U.S.C. §557(b).

[406] *Id.* §557(c). Parties can also file a supporting statement, and the proposed findings and conclusions or exceptions must be included in the record together with the agency's ruling. *Id.* *See* text accompanying note 400, *supra*.

[407] Title II of the Act governs the Old Age, Survivors and Disability Insurance Benefits program, which includes the Disability Insurance Benefits program for disabled wage earners, as

administrative appeals which include specific requirements for reconsideration determinations, administrative hearings and Appeals Council review; in addition, certain requirements related to initial determinations and judicial review have an impact on the administrative appeals process. The Act also provides the Secretary with authority to promulgate rules and regulations governing the processing of claims, including the taking and furnishing of evidence to establish eligibility for benefits.[408] This authority has been construed as conferring "exceptionally broad authority to prescribe standards for applying certain section of the [Social Security] Act."[409]

The Act gives the Secretary of the Department of Health and Human Services general authority to decide individual claims for disability benefits.[410] The actual determination of disability, however, is made by state agencies under contract with the Social Security Administration. The authority for state agency determinations of disability is based on a request by the state to assume that responsibility, which all states have chosen to do.[411] State agencies are required to make disability determinations in accordance with relevant regulations and other guidelines promulgated by the Social Security Administration.[412] This authority to regulate state agencies is extensive, and includes the agency's administrative structure, staffing arrangements, performance criteria and fiscal control procedures.[413]

1. Notice

The Secretary's authority to decide, with the assistance of state agencies, individual claims for benefits includes the responsibility for providing certain

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well as programs for disabled widows, widowers and children of wage earners. *See* 42 U.S.C. §§401-433. Title XVI governs the Supplemental Security Income program, including benefits on the basis of disability. *See id.* §§1381-1384.

[408]*See id.* §405(a):The Secretary should have full power and authority to make rules and regulations and to establish procedures . . . which are necessary or appropriate to carry out [the provisions of the Act], and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the methods of taking and furnishing the same in order to establish the right to benefits hereunder.*See also id.* §1383(d)(1).

[409]Heckler v. Campbell, 461 U.S. 458, 466 (1983) (quoting Schweilar v. Gray Panthers, 453 U.S. 34, 43 (1981)).

[410]42 U.S.C. §405(b)(1).

[411]*See id.* §421(a). The Secretary has authority to monitor state agency performance and, if necessary, take over the responsibility from a state following notice and hearing. *Id.* §421(b). The same procedures apply to Supplemental Security Income disability determinations. *See id.* §1383b.

[412]*Id.* §421(a)(2).

[413]*Id.*

notice. Thus, any determination unfavorable to a claimant must include with the decision "a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Secretary's determination and the reason or reasons upon which it is based."[414] A decision must meet these requirements for clarity and specificity in order to have *res judicata* effect.[415]

2. Reconsideration

The Secretary's authority to make initial determinations includes the authority to establish a procedure for reconsidering initial decisions upon request from a claimant.[416] The only detailed requirements in the Act related to reconsideration procedures applies to cases where benefits are terminated based on a finding that the claimant is no longer disabled.[417] In such cases, claimants must be given the opportunity for an evidentiary hearing at the reconsideration level on the issue of disability.[418] The hearing, which must be "reasonably accessible" to the claimant, can be held by the state agency or by the Social Security Administration if the termination decision was made by a state agency; it must be held by the Administration if it made the termination decision itself. If the hearing is held by the state agency, it must be conducted by an adjudicatory unit separate from the unit which made the decision to terminate benefits; if held by the Administration, it must be conducted by someone other than the person who made the termination decision.[419]

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[414] *Id.* §405(b)(1). *See also id.* §1383(c)(1). As stated in Heckler v. Day, 467 U.S. 104, 117 (1984), the Act requires "that every initial determination of ineligibility contain an easily understandable discussion of the evidence and the reasons for the determination."

[415] *See* Rogerson v. Secretary, 872 F.2d 24, 28-29 (3d Cir. 1989).

[416] The Act does not authorize reconsideration as such; authority is found in the regulations. *See* 20 CFR §§404.907-.913. There are, however, extensive requirements authorizing and, under certain circumstances requiring, review of state disability decisions on the Secretary's own motion. *See generally* 42 U.S.C. §421(c).

[417] A finding that a claimant is no longer disabled is to be distinguished from a determination based on eligibility requirements unrelated to disability, such as insured status.

[418] *Id.* §405(b)(2). This provision does not apply to Supplemental Security Income claims; however, the Administration has extended it to that program by regulation. *See* 20 CFR §416.1414-.1422.

[419] 42 U.S.C. §405(b)(2).

3. Administrative Hearing

The Social Security Act entitles claimants to a hearing following an adverse determination on a disability claim.[420] A hearing is required with respect to all issues for which the claimant's individual circumstances are relevant to the determination. On the other hand, a hearing is not required with respect to issues that can be resolved through the application of properly promulgated regulations.[421] Also, a second hearing is not required when a case is remanded for further administrative proceedings, even when the remand is based on a failure to consider certain medical evidence.[422] Hearings are required on an appeal from an adverse decision on eligibility; however, a refusal to reopen a previous application is not a "decision" for these purposes and therefore a hearing is not required.[423]

To a certain extent, the provisions of the Social Security Act applicable to disability appeals track the relevant provisions of the Administrative Procedure Act. The Supreme Court addressed this point in *Richardson v. Perales*,[424] after declining to decide whether the Administrative Procedure Act applies generally to Social Security disability claims:

> We need not decide whether the APA has general application to social security disability claims, for the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social

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[420] *Id.* §§405(b)(1), 1383(c)(1). These two provisions, which apply to Disability Insurance Benefits under Title II and Supplemental Security Income under Title XVI, are "substantially identical." *See* Pulido v. Heckler, 568 F.Supp. 627, 628 (D. Colo. 1983), *rev. on other grounds*, 758 F.2d 503 (10th Cir. 1985). The right to a hearing applies equally to decisions by state agencies and by the Social Security Administration. *See* 42 U.S.C. §421(d) ("any individual dissatisfied with any determination [by a state agency] . . .shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in [42 U.S.C. §405(b)] with respect to decisions of the Secretary.")

[421] Thus, in Heckler v. Campbell, 461 U.S. 458 (1983), the Supreme Court upheld the practice of making eligibility determinations according to the Social Security Administration's Medical-Vocational Guidelines: "It is true that the statutory scheme contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing. . . . [E]ven where an agency's enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration." *Id.*, at 467.

[422] *See* Pagan v. Secretary, 819 F.2d 1, 4 (1st Cir. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 713 (1988) (administrative law judge reconsidered evidence on remand without a hearing and again denied claim).

[423] *See* Califano v. Sanders, 430 U.S. 99, 108-09 (1977).

[424] 402 U.S. 389, 408-09 (1971).

> Security Act. . . . The cited [5 U.S.C.] §556(d) provides that any documentary evidence "may be received" subject to the exclusion of the irrelevant, the immaterial, and the unduly repetitious. It further provides that a "party is entitled to present his case or defense by oral or documentary evidence . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts" and in "determining claims for money or benefits . . . an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."
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> These provisions conform, and are consistent with, rather than differ from or supercede, the authority given the Secretary by [42 U.S.C. §§405(a), (b)] "to establish procedures," and "to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits," and to receive evidence "even though inadmissible under rules of evidence applicable to court procedure." Hearsay, under either Act, is thus admissible up to the point of relevancy.

Nonetheless, these separate provisions of the Social Security Act should be discussed, as well as other provisions with or without counterparts in the Administrative Procedure Act.

Upon request by a claimant, the Social Security Administration must provide to the claimant "reasonable notice" and the opportunity for a hearing.[425] When a hearing is requested and held, the hearing decision must be based on the evidence presented and compiled at the hearing.[426] The Act also requires that a hearing be held within a reasonable period of time.[427] However, in light of the fact that Congress has never imposed specific time limits for processing Social Security disability appeals, the Supreme Court has held that "it would be an unwarranted intrusion into this pervasively regulated

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[425] 42 U.S.C. §§405(b)(1), 1383(c)(1).

[426] *Id.* The hearing must be requested within sixty days after receipt of notice of the adverse determination. *Id.*

[427] *See* White v. Mathews, 559 F.2d 852, 859 (2d Cir.), *cert. denied*, 435 U.S. 908 (1977). In a later case, the Secretary acknowledged this timeliness requirement. *See* Heckler v. Day, 467 U.S. 104, 111 (1984). ("The Secretary does not challenge her the determination [by the lower court] that [42 U.S.C.] §405(b) requires administrative hearings to be held within a reasonable time.")

area for federal courts to issue injunctions imposing deadlines with respect to future disability claims."[428]

The Act confers on the Secretary authority to hold hearings at which the person conducting the hearing can administer oaths, examine witnesses and receive evidence.[429] Claimants must also be given the opportunity to cross-examine adverse witnesses and, if evidence is obtained by the administrative law judge after the hearing, must be allowed not only to review and comment upon that evidence but also to subpoena and cross-examine the source of the evidence.[430]

The formal rules of evidence are not to be applied at these hearings: "Evidence may be received at any hearing . . . even though inadmissible under the rules of evidence applicable to court procedure."[431] Not only can hearsay evidence be admitted, but an adverse determination can be based on hearsay evidence alone, including written medical reports, so long as the claimant has the opportunity to subpoena and cross-examine the source of the evidence.[432] Although the Act states only generally that hearing decisions must be based on the evidence compiled at the hearing, a substantial evidence standard for

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[428]Heckler v. Day, 467 U.S. at 119. *See also* Littlefield v. Heckler, 824 F.2d 242, 246-47 (3d Cir. 1987) (rejecting arguments on delay based on the Social Security Act and the Administrative Procedure Act, citing *Day*. Supplemental Security Income hearing decisions must be made within ninety days, except for claims requiring a determination of disability. 42 U.S.C. §1383(c)(2).

[429]42 U.S.C. §§405(b)(1), 1383(c)(1).

[430]Thus, in Richardson v. Perales, 402 U.S. 389, 402 (1971), the Court upheld the use of written medical reports in Social Security disability hearings, recognizing that claimants have the right to subpoena and cross-examine the physician who authorized the report. *See also* Wallace v. Bowen, 869 F.2d 187, 192 (3d Cir. 1989). ("We construe *Richardson* as holding that an opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled under . . . 42 U.S.C. §405(b).") *Wallace* involved the use of post-hearing evidence, and the court concluded that "it is unmistakable under the statute that the Secretary may not rely on post-hearing reports without giving the claimant an opportunity to cross-examine the authors of such reports, when such cross-examination may be required for a full and true disclosure of the facts." *Id*. *See also* Allison v. Heckler, 711 F.2d 145, 146 (10th Cir. 1983). ("An ALJ's use of a post-hearing medical report constitutes a denial of due process because the applicant is not given the opportunity to cross-examine the physician or rebut the report"); *id*. at 147 ("Moreover, such practice exceeds the Secretary's statutory authority. The Secretary is clearly mandated by statute to determine a claimant's disability 'on the basis of evidence adduced at hearing'") (quoting 42 U.S.C. §405(b)(1)).

[431]42 U.S.C. §§405(b)(1), 1383(c)(1).

[432]*See* Richardson v. Perales, 402 U.S. at 402 ("a written report by a licensed physician . . . may be received as evidence in a disability hearing and, despite its hearsay character . . . may constitute substandard evidence supportive of a finding . . . adverse to the claimant, when the claimant has not exercised his right to subpoena [and cross-examine] the reporting physician.")

hearing decisions is written into the provision authorizing judicial review. Thus, only findings of fact supported by substantial evidence are considered conclusive for purposes of judicial review.[433] This "substantial evidence" standard has been defined by the Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[434] Courts have also required administrative law judges to set forth in their decisions the evidence supporting their decisions, and evidence being discounted.[435] Decisions with insufficient detail have been found to violate the Act's requirement for clear and understandable determinations.[436]

The provisions of the Social Security Act governing judicial review also affect the extent to which records are closed at the administrative hearing level. Thus, the Act provides that additional evidence cannot be submitted in support of a claim on judicial review. If a claimant or the Social Security Administration wants to submit additional evidence to the court, the court can only remand the case for further administrative action.[437] Moreover, the court is authorized to remand a case under such circumstances only if the new evidence is "material" and if there was "good cause" for the claimant or the Administration to have failed to introduce the new evidence at the hearing, or, if appropriate, to the Appeals Council.[438]

4. Appeals Council

The Act does not include separate requirements for Appeals Council review. However, a number of the important requirements relating to proof at the administrative hearing level apply equally in those cases which proceed to

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[433] 42 U.S.C. §405(g). *See also id.* §1383(c)(3) (applying §405(g) to Supplemental Security Income claims).

[434] Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 302 U.S. 197, 229 (1938). The substantial evidence standard of 42 U.S.C. §405(g) has been described as "precisely the same" as the standard of the Administrative Procedure Act. *See* Ginsburg v. Richardson, 436 F.2d 1146, 1148 (2d Cir.), *cert. denied*, 402 U.S. 976 (1971).

[435] *See, e.g.*, Stephens v. Heckler, 766 F.2d 284, 287 (7th Cir. 1985) ("the ALJ must mention and discuss, however briefly, uncontradicted evidence that supports the claim for benefits.") *Cf.* Zalewski v. Heckler, 760 F.2d 160, 166 (7th Cir. 1985) (require only "a minimal level of articulation by the ALJ as to his assessment of the evidence . . . in cases in which considerable evidence is presented by the claimant.")

[436] *See, e.g.*, Vasquez v. Heckler, 736 F.2d 1053, 1054 (5th Cir. 1984) (failure to state basis for a required finding violates 42 U.S.C. §405(b)(1)). *See generally* text accompanying notes 414-15, *supra*.

[437] 42 U.S.C. §405(g).

[438] *Id.*

the Appeals Council. Thus, Appeals Council decisions must be supported by substantial evidence.[439] Similarly, any evidence that could have been submitted to the Appeals Council would be subject to the limitations on submitting additional evidence on judicial review.[440]

V. SUMMARY AND RECOMMENDATIONS

A. SUMMARY

One can see from the material presented in parts II and III of this report that there are a number of alternatives to the structure of the Social Security Administration's administrative appeals process which may be of some use in considering recommendations for reform. There are, of course, reasons for many of the differences in administrative appeals procedures found in other federal disability programs which would counsel against adopting those different procedures for the Social Security Administration.[441] Nonetheless, certain aspects of the administrative appeals process used in other programs do provide some interesting possibilities that could be considered for the Social Security program.

The most significant ways in which the administrative appeals process differs in other federal disability programs from that used by the Social Security Administration can be summarized broadly, together with the major suggestions for change recommended by the Administrative Conference of the United States in previous reports.[442] It will be most helpful to present this summary material according to the different steps of the appeals process found generally in all programs: administrative review prior to hearing, administrative hearing, and final administrative review. This material is also

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[439]The judicial review provision relating to substantial evidence discussed at text accompanying note [old IV 76], *supra*, applies to "[t]he findings of the Secretary," which includes Appeals Council determinations. *See id.*

[440]*See* text accompanying note 437, *supra*.

[441]Most obviously, there are significant differences in the disability standard applied in all of the other programs included in this report, except for the Railroad Retirement program. Thus, procedures beneficial to a determination of the presence of pneumoconiosis in a Black Lung claim, which may also require the participation of a third-party coal mine operator, may have little meaning for adjudicating Social Security disability claims.

[442]The Administrative Conference's recommendations are summarized in a different format in Section IV(B) of this report, *supra*.

presented in the form of charts in appendices to this report. There is a series of charts (Appendix A) showing the flow of the administrative appeals process for each program considered in this report. In addition, a separate chart (Appendix B) shows the major features of the process for all programs in an effort to facilitate comparative analysis.

1. Administrative Review Prior to Hearing

Procedures used in other disability programs to review decisions prior to a hearing are quite similar to those used by the Social Security Administration. One difference is that reconsideration in the Civil Service disability program is limited to the record compiled for the initial application. Another difference, found in the Veterans and Black Lung programs, is to give the claimant the option of seeking reconsideration or proceeding directly to an administrative hearing. A separate reconsideration step is not required by the Administrative Procedure Act or the Social Security Act.[443] The Administrative Conference has made some recommendations that contemplate the elimination of reconsideration in Social Security cases.

In most programs, reconsideration takes place following the completion of a separate process for initial determinations. In the Black Lung program, however, the reconsideration procedure is in effect an optional extension of the initial decision process. Claimants are provided an initial decision which identifies deficiencies in the record and invites the claimant to submit the missing evidence rather than request an administrative hearing. If new evidence is submitted, then a new decision is made much like a reconsideration decision in the Social Security program.

There are also differences in the format in which reconsideration decisions are communicated to claimants.[444] For most programs the notice is similar to that used by the Social Security Administration, in which a brief rationale is included covering any new evidence submitted as part of the reconsideration process. A more elaborate notification procedure is used in the Black Lung program in which a proposed decision and order is submitted to the claimant who may request a revision of particular findings of fact and conclusions of law.

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[443]There is a requirement for a "disability hearing" in the Social Security Act for certain cases which is to take place at the reconsideration level. *See* text accompanying notes 418-19, *supra*.

[444]Generally, the format used for reconsideration-type decisions is the same as used for initial decisions. The initial decision process is discussed in part II of this report. *See* text accompanying notes 14-31, *supra*.

2. Administrative Hearings

The general model for administrative hearings is very similar for all programs included in this report. The Social Security Act and the Administrative Procedure Act clearly require that claimants be given the opportunity for a *de novo* hearing before an independent administrative law judge following an adverse decision on a claim for disability benefits. The most common differences relate to the requirements for initiating the appeal. Thus, a request for a hearing in the Civil Service disability program must include a statement of the basis for the appeal and the Office of Personnel Management must then respond with an admission, denial or explanation of the allegations in the petition. Although Civil Service hearings are *de novo* and new evidence is considered, evidence submitted to prove an entirely new basis for disability can be excluded. Hearing procedures for Veterans claims also utilize a more elaborate procedure for initiating the process. Claimants file a Notice of Disagreement, which is responded to by the filing of a Statement of the Case by the Administration including a summary of the law, regulations and evidence relevant to the claim. As with Civil Service hearings, there are certain limits on the submission of new evidence which was available but not submitted during the initial decision process. Moreover, in Black Lung appeals the issues at the hearings are limited to those identified in the initial decision or raised during the initial decision process, except for issues that could not have been reasonably ascertained at that time.

Hearings at the Veterans Administration are unusual in that they can be requested either during the initial decision process or only after an initial decision has been made. In practice, most hearings are requested only after the initial decision is made. In such cases, the claimant must file a Notice of Disagreement from the Notice of Decision. The content of the Notice of Disagreement need not be specific so long as it indicates the claimant's desire for a review of the decision. The department then responds to the Notice of Disagreement by reviewing the initial decision, and may develop additional evidence as part of this process. Then, if it decides to affirm the initial decision, it must issue a Statement of the Case which includes a justification for the decision in sufficient detail to allow the claimant to prepare an effective appeal.

Another major difference in the Black Lung program is that the administrative hearing is fully adversarial. This explains some of the formality in the procedures used to frame issues on appeal. Civil Service disability claims are also considered adversarial; however, the Office of Personnel Management does not pursue these claims aggressively. Prehearing conferences are used regularly in Civil Service cases to frame issues and, when possible, resolve matters without a hearing. The Administrative Conference

has recommended more extensive use of prehearing conferences and better development of medical evidence prior to hearings by Social Security Administration administrative law judges.

3. Final Administrative Review

The Merit Systems Protection Board and the Benefits Review Board provide significantly more limited review of Civil Service and Black Lung claims than is the case with the Social Security Administration's Appeals Council. Although the rules are softened somewhat in practice, the Merit Systems Protection Board reviews decisions only when new and material evidence is presented that was not available when the hearing record was closed or if there was an error in interpreting applicable law. Similarly, the Benefits Review Board reviews decisions by administrative law judges according to a substantial evidence standard, without receiving any new evidence, or to determine whether the decision is consistent with applicable law. The Administrative Conference has recommended that the Social Security Administration's Appeals Council move in this direction, limiting itself to review on the record of only selected cases raising important and difficult issues.

Hearings before the Board of Veterans Appeals are entirely different. Additional documentary evidence can be presented, and hearings are held at which witnesses are allowed to testify. Moreover, the Board has the authority to request an expert medical opinion from an independent medical expert in order to clarify the record.

Some programs require claimants to follow relatively formal steps to initiate a post-hearing administrative appeal. Thus, appeals to the Benefits Review Board are initiated by filing a written notice of appeal followed by a petition for review which must identify specifically the substantive issues involved in the appeal. The issues raised must be supported by a written memorandum or other statement, and the Board will generally not consider any issue not raised and briefed adequately by the party raising the issue. Appeals to the Board of Veterans Appeals also require the filing of a Substantive Appeal from a Statement of the Case issued following an adverse initial or reconsideration decision. A Substantive Appeal must identify all of the issues which the claimant wishes to raise; however, in practice this requirement is construed liberally.

The Merit Systems Protection Board and the Benefits Review Board publish precedential decisions which are distributed widely. The Administrative Conference has recommended that the Appeals Council do the same. By contrast, decisions of the Board of Veterans Appeals are specifically not precedential, and are available by mail on request.

B. RECOMMENDATIONS

It is apparent from the material presented in this report that certain improvements can be made in the Social Security Administration's administrative appeals process. Obviously, the Administration felt that some significant changes would be valuable when it prepared its extensive revisions draft in 1988.[445] The testimony and other evidence presented to the Disability Advisory Committee has confirmed this view. Presumably, the Disability Advisory Committee will present the Administration with extensive and detailed proposals for revising at least certain aspects of the administrative appeals process.

It is beyond the scope of this report to present comprehensive and detailed recommendations for reform. The Administrative Conference noted in its 1978 Recommendations that radical change in the Social Security Administration's appeals process was not warranted at that time. This remains true to a large extent today, except, perhaps, with respect to the Appeals Council. The present process is an open and informal one, consistent with the beneficient purposes of the Social Security Act. Although some more control may be needed over the flow and quality of appeals, too much structure could prove to be counterproductive, particularly for unrepresented claimants. Indeed, if the process becomes too formal, the participation of nonattorney representatives may have to be restricted or even precluded.[446] However, certain broad and general recommendations can be presented based on the practice in other federal disability programs and the prior reports and recommendations of the Administrative Conference in this area. All of the recommendations which follow are consistent with applicable provisions of the Social Security Act and the Administrative Procedure Act.

Recommendation No. 1: Establish a single initial decision procedure to replace the current two-step process of initial decision and reconsideration.

Although all programs include some process for reconsidering initial decisions prior to an administrative hearing, most invest significantly less time and resources to the reconsideration stage than does the Social Security Administration. In some programs, reconsideration is an optional step; in one program reconsideration is effectively an extension or continuation of the initial decision process. On balance, it seems that a separate, formal

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[445] *See* Social Security Administration Draft Proposed Rules, *supra* note 2.

[446] Nonattorney claims representatives are worried about this in the Veterans program with the advent of the Court of Veterans Appeals and the loosening of attorney fee restrictions in Veterans benefits cases.

reconsideration process as used by the Social Security Administration is unnecessary. Instead, the resources used to implement the reconsideration level of review could be allocated more effectively to improving the initial decision process. It is not sufficient, however, simply to eliminate reconsideration. At a minimum, the types of changes in the initial decision process presented in the next two recommendations should be made in order to justify this change.

> **Recommendation No. 2: Add an optional face-to-face interview with the claimant as part of a revised initial decision process.**

Most programs provide for a face-to-face interview with a decisionmaker only at the administrative appeals level, as does the Social Security Administration. One program does allow claimants to request a hearing as part of the initial decision process, although most claimants choose to wait to have a hearing only after an initial decision is made. Nonetheless, such an interview would be extremely helpful in improving the quality of initial decisions and thereby reducing the number of claims appealed to the administrative hearing level. It is on this basis that the Administrative Conference has supported the implementation of face-to-face procedures in its contingent recommendations on state agency action.

> **Recommendation No. 3: Improve the development of medical and vocational evidence during a revised initial decision process by increasing communication between staff and claimants on the progress of the application, including the face-to-face interview.**

All programs encounter the problem of trying to make a disability determination on the basis of records which all too often are incomplete. Claimants are advised of the reasons for adverse decisions, but only one program provides claimants with notice of a potential adverse determination before the decision becomes final. Claimants should be informed when an adverse decision is likely and should be told specifically of any deficiencies in the record that led to the preliminary adverse determination. This could be done either in writing or in conjunction with a face-to-face interview. When it appears that a claim is likely to be denied on the basis of insufficient medical information, every effort should be made to complete the medical record before a final decision is reached. Medical staff should participate directly in this process of communication by seeking supplemental medical evidence and clarification of existing evidence from claimants and, when possible, from appropriate medical sources.

Recommendation No. 4: Improve the quality of formal initial decisions.

A formal written decision including a statement of reasons and facts supporting the decision is required in all programs. However, the quality and detail of notices is, all too often, less than optimal; most notices are far less clear and informative than they can and should be. Every effort should be made to include as much relevant information as possible in the initial decision in order to allow the claimant to make an intelligent decision whether to appeal and, if the claimant decides to appeal, to be able to prosecute the appeal.

Recommendation No. 5: Improve the process for development of supplemental evidence at the administrative hearing level, including routine collection of updated medical reports from relevant medical sources.

All programs allow and encourage the submission of additional evidence during the administrative hearing level of appeal. The only significant limitations relate to the submission of technical evidence in the Black Lung program. Since gathering of additional evidence is such an important part of the administrative hearing process, the Social Security Administration should increase its efforts to obtain supplemental evidence obviously relevant to the appeal such as current progress reports from known medical sources. Special efforts should be made to obtain current information from the claimant's treating physician. In cases where the medical evidence appears to be particularly voluminous or complex, administrative law judges should be allowed to use medical experts to assist in deciding whether further medical development is needed.

Recommendation No. 6: Increase the use of prehearing conferences to frame the issues involved in the hearing, stipulate matters not in dispute, and decide appropriate cases without hearings.

Prehearing conferences are not used regularly in most programs; however, when they are used they are found to be very effective. Depending on the agenda for the conference, staff attorneys could be used instead of administrative law judges. Any matters of substance discussed at the prehearing conference should be included in the record. Although use of prehearing conferences should be encouraged, they should not be mandatory. Judges and claimants should be given the option to implement the goals of a prehearing conference by letter or telephone, when appropriate. If prehearing conferences are to be used more regularly, the Administration must provide additional funding and staff to support this activity which, in turn, could result in lower expenditures later in the process.

Recommendation No. 7: Improve the effectiveness of administrative law judges' subpoena power.

Although most judges conducting administrative hearings are authorized to issue subpoenas, they are generally hesitant to do so. Social Security Administration administrative law judges should be encouraged to issue and enforce subpoenas, and their authority to do so should be strengthened. In addition, administrative law judges should be required to issue subpoenas in certain situations, such as where important medical evidence cannot be located or obtained from a known medical source. Also, subpoenas should be issued whenever needed to obtain evidence to fill in gaps in the record identified at a prehearing conference.

Recommendation No. 8: Close the administrative hearing record at a set time after the evidentiary hearing.

All programs allow for unrestricted submission of evidence at a hearing and, in most instances, the opportunity to submit evidence after the hearing for a limited period of time. Although claimants should be encouraged, through the use of prehearing conferences and otherwise, to submit as much evidence as possible prior to or at the hearing, the evidentiary record should not be closed until claimants are given the opportunity to obtain and submit additional relevant evidence. Similarly, administrative law judges should be allowed to request additional evidence to be submitted after the hearing. Once the record is closed, however, additional evidence should be allowed into the record only under limited circumstances and upon request to the administrative law judge.

Recommendation No. 9: Improve the quality of hearing decisions.

Administrative hearing decisions should be written in a manner that communicates fully and effectively the basis for the decision, so that the claimant can make an informed choice as to whether to appeal. In some programs, claimants are required to specify the issues they wish to raise on an appeal from an administrative hearing decision. However, this type of requirement is enforced only in programs where the process is fully or partially adversarial. Even with improved administrative hearing decisions, requiring claimants to specify issues to be raised on appeal would be inappropriate for the Social Security program. Unrepresented claimants would be put at a severe disadvantage, and claimants' lawyers would be encouraged to file a comprehensive, and often overly comprehensive, list of objections in order to avoid problems of waiver.

Recommendation No. 10: Establish a procedure for petitioning administrative law judges to reopen or amend administrative hearing decisions within one year when there is new and material evidence available that relates to the period covered by the prior hearing.

Although the record should be closed within a period of time set after the hearing, claimants should be given the opportunity to present new and material evidence obtained after the hearing record is closed, at least for a reasonable period of time such as one year. Claimants could be required to provide a reason why the evidence was not submitted earlier, in order to assure that evidence actually available at the time of the hearing was not withheld intentionally. The evidence would have to relate to the period covered by the original hearing record; otherwise, a new application should be filed.

It is preferable to have this evidence submitted to the administrative law judge who could determine if the evidence satisfies the new and material standard, rather than allow this evidence to be submitted at a subsequent level of administrative review. This "new and material evidence" standard should be construed liberally, so that claimants who make an effort to obtain and submit new evidence relevant to their claim will have the opportunity to have all relevant evidence considered. Any reasonable explanation as to why the evidence was not submitted earlier should be sufficient to allow reopening or amendment at this level; this requirement should be construed less strictly than the comparable requirement for submitting new and material evidence at the district court. If a claim is reopened or amended, a new decision would be made, with or without another hearing, and a new appeal period would be available to seek review at the Appeals Council.

Recommendation No. 11: Limit Appeals Council review to the record compiled at the administrative hearing level, unless the claimant seeks review of an administrative law judge's refusal to reopen the record for the submission of new and material evidence.

In most programs, the final administrative review process is essentially a limited appellate review of the administrative hearing record and decision. When claimants are given every opportunity to present all relevant evidence at the hearing level and, if necessary, to submit additional evidence on a petition to reopen, there is no reason to require the Appeals Council to consider additional evidence. This recommendation is the logical counterpart to the previous recommendation. However, in addition, the Appeals Council could be given authority in exceptional cases to remand a claim for a hearing on a request to reopen even if the one year period for a petition to the administrative law judge has passed.

Recommendation No. 12: Authorize Appeals Council to use staff or lower level Council members to deny a request for review, and limit the review of cases by the Appeals Council to those raising significant policy issues.

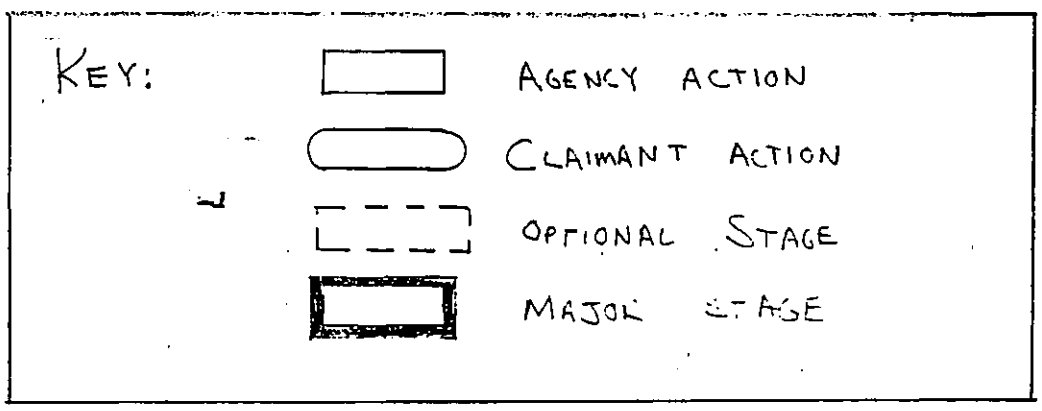
The Appeals Council cannot be expected to assume a meaningful individual review function for all claims that might be presented to the Appeals Council. In most other programs, the number of claims presented to the final administrative review level are significantly fewer, and even then most routine cases are simply denied the opportunity for full review. This recommendation tracks the central recommendations of the 1987 Administrative Conference recommendations on the Appeals Council.

Recommendation No. 13: Require Appeals Council to publish precedential opinions.

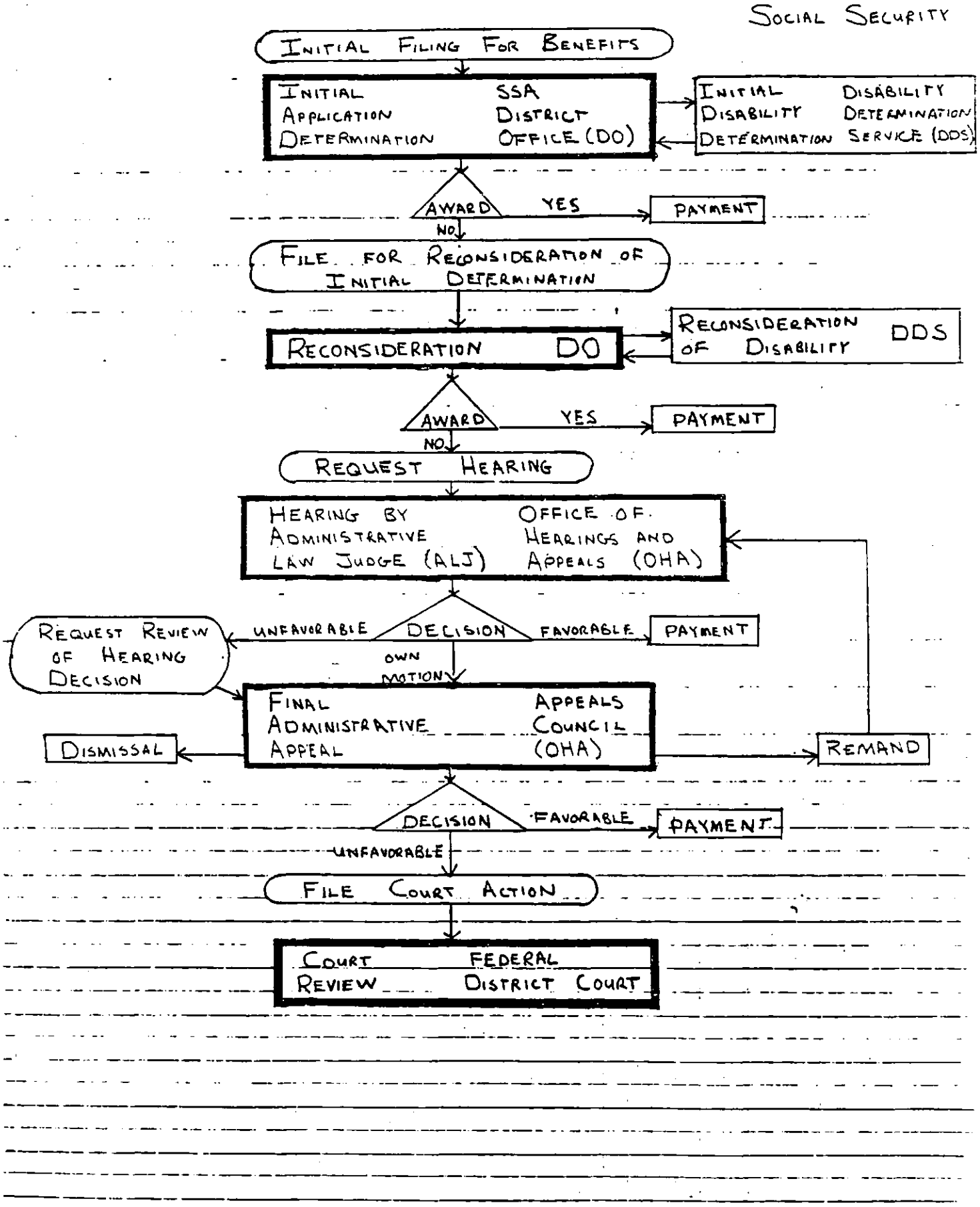
The two most rigorous administrative review bodies involved in disability adjudications, the Merit Systems Protection Board and the Benefits Review Board, both publish widely available precedential opinions. The Appeals Council could do likewise if it limited its review function as suggested in the previous recommendation. This recommendation also tracks the 1987 Administrative Conference recommendation on Appeals Council opinions.

APPENDIX A

FLOW CHARTS OF ADMINISTRATIVE APPEAL PROCESSES



SOCIAL SECURITY



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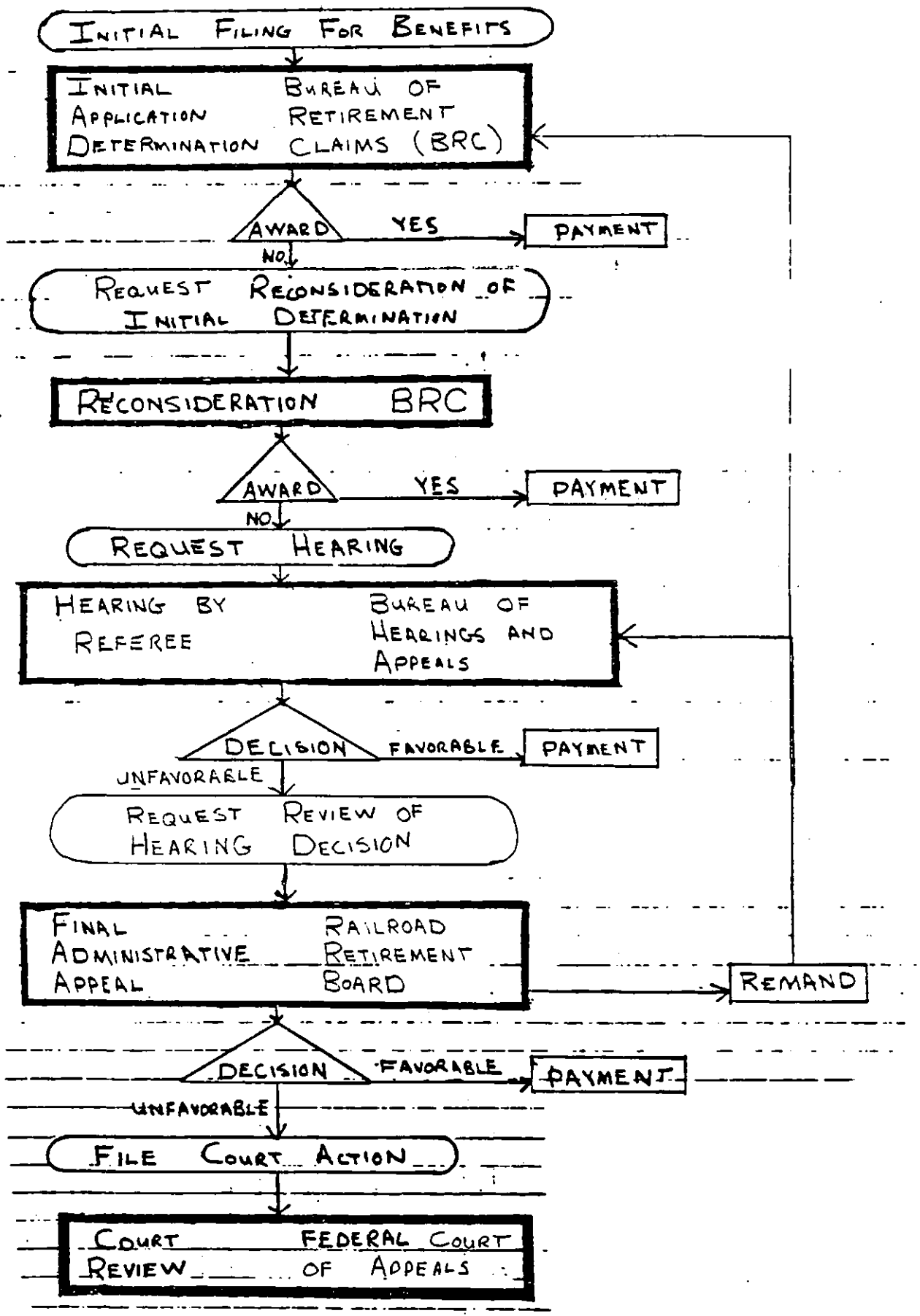
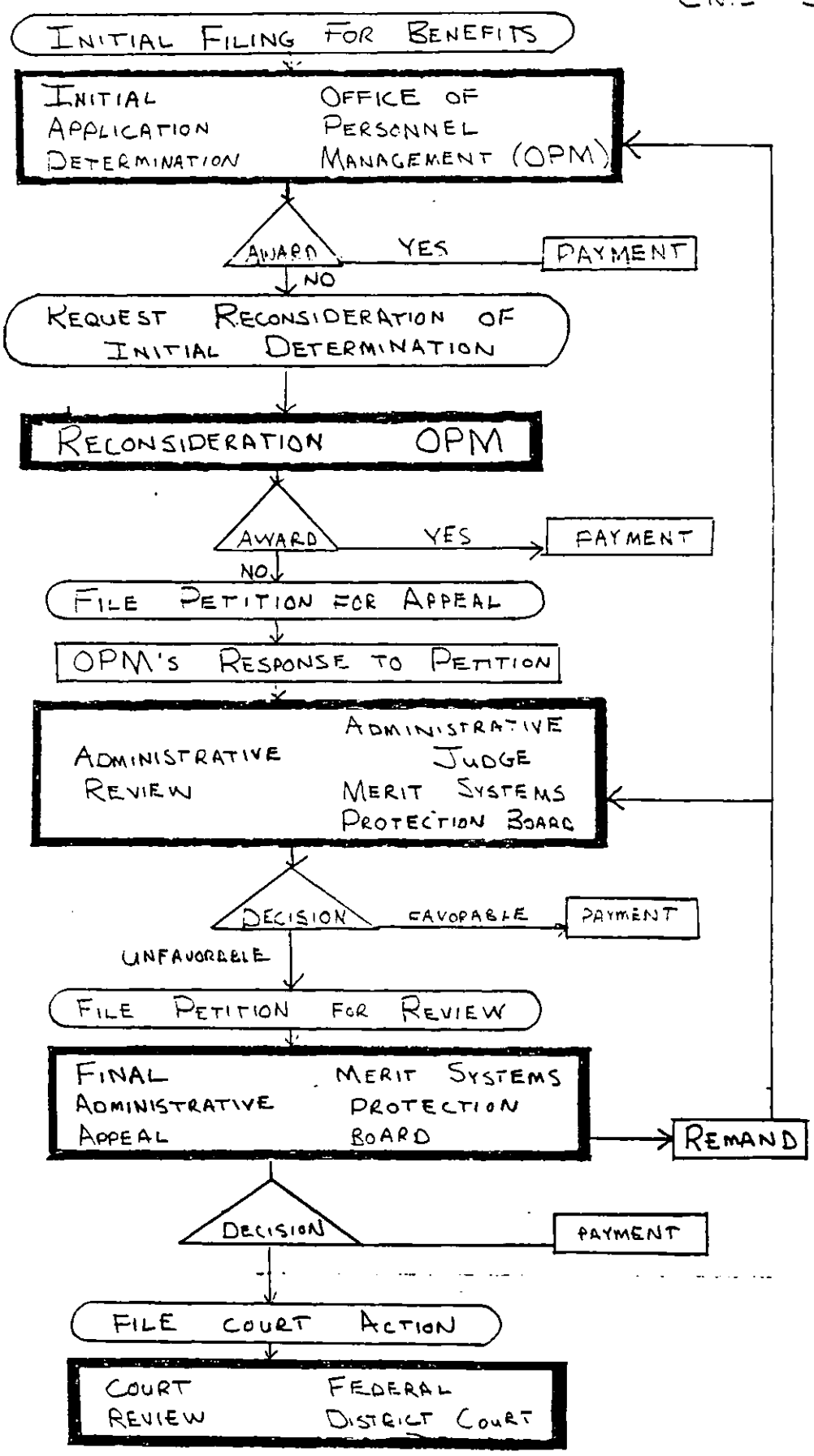
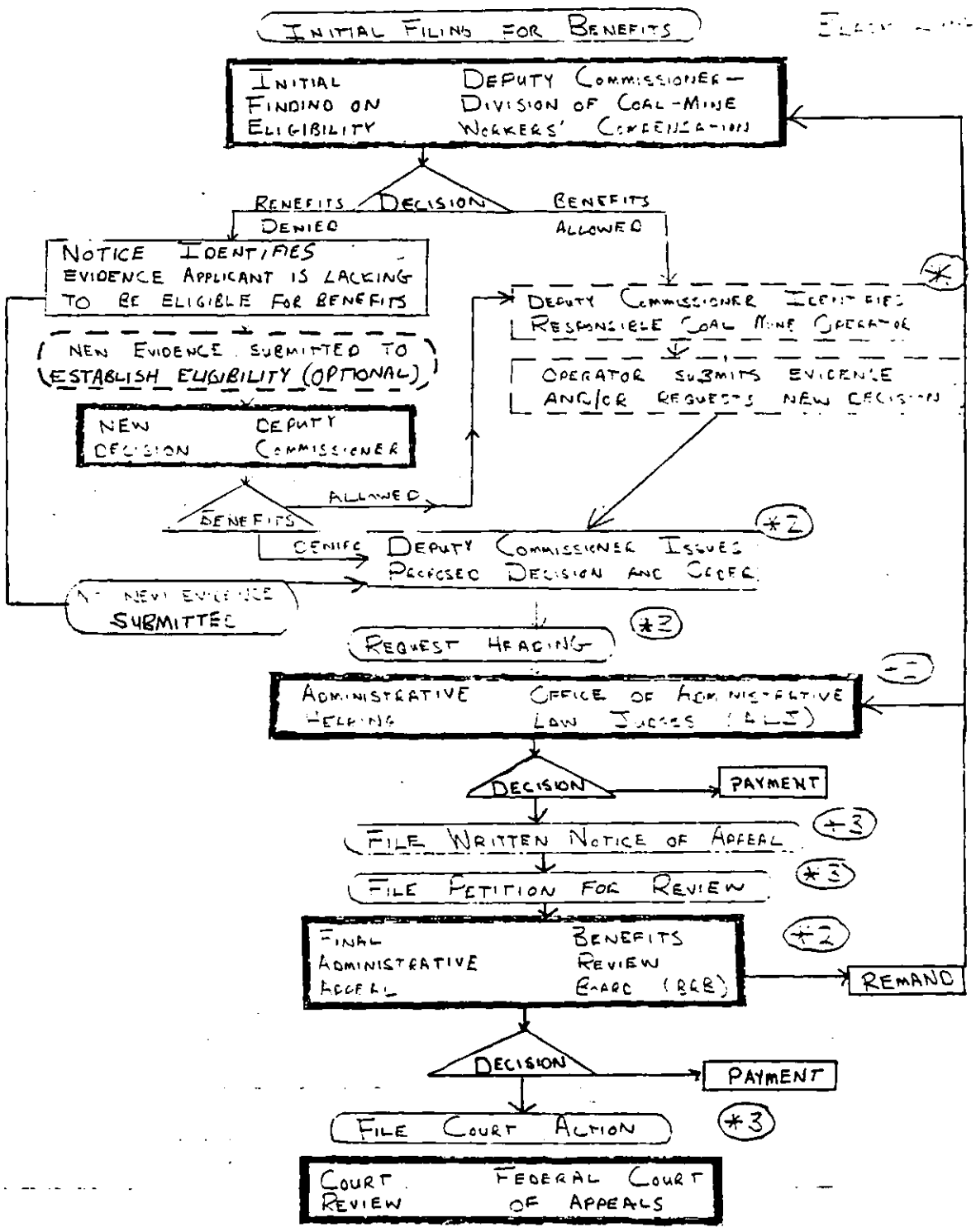


CIVIL SERVICE

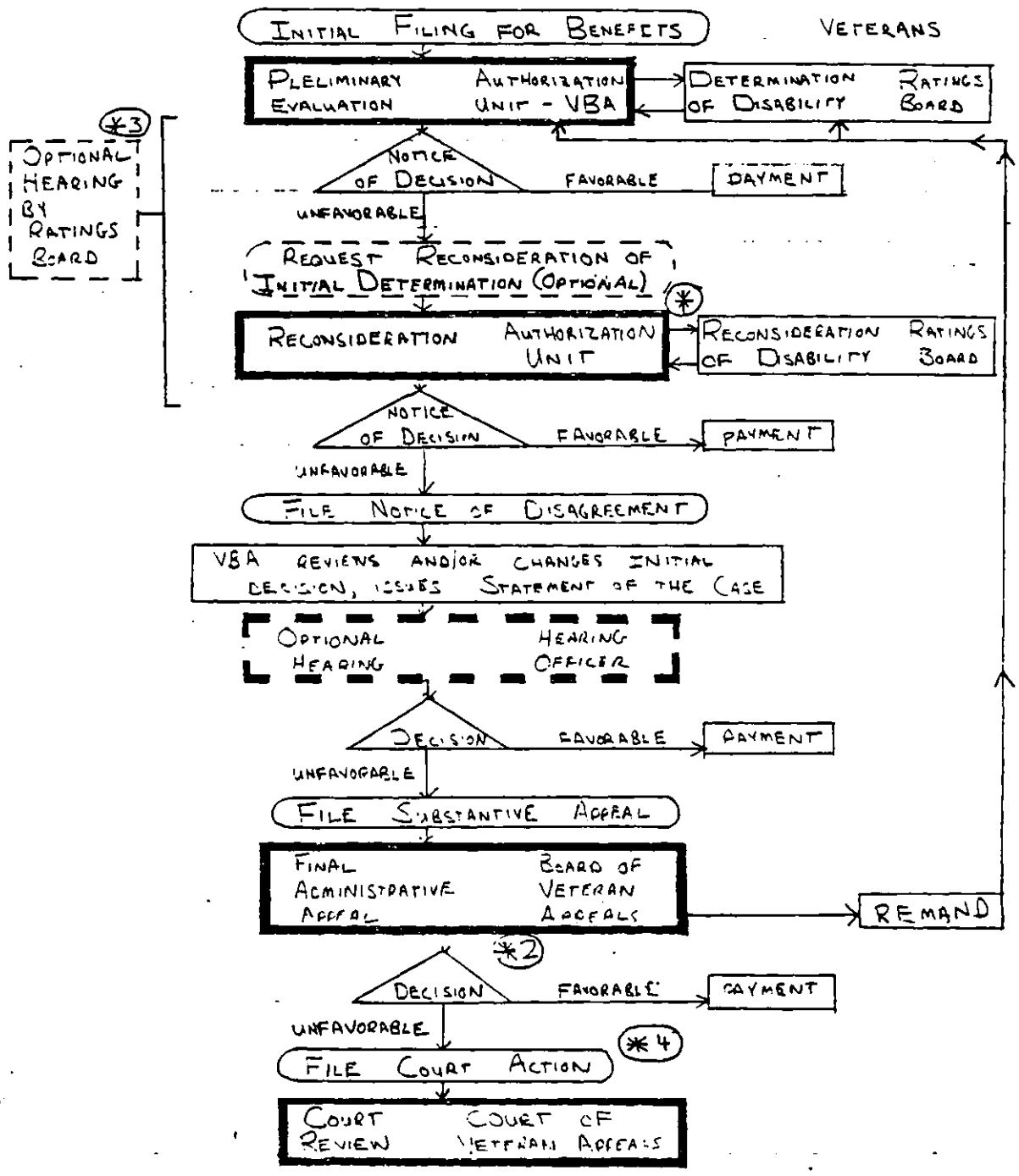




* -- The Deputy Commissioner is not always able to identify a responsible operator. If an operator is not identified, the agency can appeal or request new decisions just as the responsible operator.

*2 -- Limited Reconsideration of the decision is allowed at these stages in the appeals process.

*3 -- Both the claimant and the responsible operator/agency can initiate these actions.



* -- Reconsideration may be denied by the authorization unit. If denied, a Notice of Disagreement may still be filed.

*2 -- There is limited reconsideration available at this stage.

*3 -- A hearing at any time on any issue is allowed by the Ratings Board before a final decision is made at the initial level.

*4 -- Judicial Review available effective November, 1989.

APPENDIX B: TABLE COMPARING STAGES IN ADMINISTRATIVE APPEAL PROCESS

	Initial Decision	Administrative Review Prior to Hearing *	Hearing *	Final Administrative Review *
Social Security	-Social Security Administration district offices (DO) -Disability determination by examiner-doctor team at state Disability Determination Services (DDS)	-Reconsideration by DO and DDS -Additional evidence allowed from claimant; DDS can also obtain additional evidence	-De novo review by ALJ -Additional evidence submitted by claimant; ALJ can also order additional evidence and call expert witnesses -Record closed at or after hearing	-Appeals Council review of hearing decision, requested by claimant or on own motion -New evidence allowed if relates to period covered by hearing record -Substantial evidence standard of review
Railroad Retirement	-Bureau of Retirement Claims central office -Decision by examiner, with optional consultation with physician	-Reconsideration by Bureau of Retirement Claims -Additional evidence allowed from claimant; Bureau can also obtain additional evidence	-De novo review by referee -Additional evidence submitted by claimant; referee can also order additional evidence -Record closed at or after hearing	-Railroad Retirement Board review of hearing decision -Rarely considers new evidence -Substantial evidence standard of review
Black Lung	-Regional office of Division of Coal Mine Workers' Compensation, Department of Labor -Decision made by deputy commissioner	-Optional reconsideration by deputy commissioner following notice of decision and statement of deficiency in record -New evidence required for reconsideration; otherwise proceed directly to hearing	-De novo review by ALJ -Adversarial -Additional evidence submitted by parties -Record closed at or after hearing	-Benefits Review Board review of hearing decision -Will not receive new evidence -Substantial evidence standard of review -Publishes precedential opinions
Civil Service	-Office of Personnel Management (OPM) central office -Decision made by examiner, usually in consultation with physician	-Reconsideration by OPM -No new evidence	-De novo review by ALJ -Partially adversarial -Additional evidence presented by claimant -Record closed at or after hearing	-Merit Systems Protection Board review of hearing decision -Will consider "new and material evidence" if unavailable at hearing -Limited bases for review -Modified substantial evidence standard of review -Publishes precedential decisions
Veterans	-Department of Veterans Affairs regional office -Decision made by Authorization Unit; disability determination made by three-member Rating Board, one of whom is a doctor	-Reconsideration by Authorization Unit or Rating Board -New evidence submitted by claimant	-Optional hearing during initial decision phase by Rating Board or optional de novo review of initial decision by hearing officer -Additional evidence submitted by claimant; hearing officer can order additional evidence	-Board of Veterans Appeals -De novo hearing by three-member panel, one of whom is a doctor -Claimant can submit additional evidence; Board can order additional evidence

* Each of these steps is required to exhaust administrative remedies, unless indicated as optional.