

(g) *Witnesses at a hearing.* Witnesses may appear at a hearing. They testify under oath or affirmation, unless the ALJ finds an important reason to excuse them from taking an oath or affirmation. The ALJ may ask the witnesses any questions relevant to the issues and allows the parties or their designated representatives to do so.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65336, Dec. 9, 2009]

§ 405.1037 Discovery.

(a) *General rules.* (1) Discovery is permissible only when CMS or its contractor elects to participate in an ALJ hearing as a party.

(2) The ALJ may permit discovery of a matter that is relevant to the specific subject matter of the ALJ hearing, provided the matter is not privileged or otherwise protected from disclosure and the ALJ determines that the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate.

(3) Any discovery initiated by a party must comply with all requirements and limitations of this section, along with any further requirements or limitations ordered by the ALJ.

(b) *Limitations on discovery.* Any discovery before the ALJ is limited.

(1) A party may request of another party the reasonable production of documents for inspection and copying.

(2) A party may not take the deposition, upon oral or written examination, of another party unless the proposed deponent agrees to the deposition or the ALJ finds that the proposed deposition is necessary and appropriate in order to secure the deponent's testimony for an ALJ hearing.

(3) A party may not request admissions or send interrogatories or take any other form of discovery not permitted under this section.

(c) *Time limits.* (1) A party's discovery request is timely if the date of receipt of a request by another party is no later than the date specified by the ALJ.

(2) A party may not conduct discovery any later than the date specified by the ALJ.

(3) Before ruling on a request to extend the time for requesting discovery or for conducting discovery, the ALJ

must give the other parties to the appeal a reasonable period to respond to the extension request.

(4) The ALJ may extend the time in which to request discovery or conduct discovery only if the requesting party establishes that it was not dilatory or otherwise at fault in not meeting the original discovery deadline.

(5) If the ALJ grants the extension request, it must impose a new discovery deadline and, if necessary, reschedule the hearing date so that all discoveries end no later than 45 calendar days before the hearing.

(d) *Motions to compel or for protective order.* (1) Each party is required to make a good faith effort to resolve or narrow any discovery dispute.

(2) A party may submit to the ALJ a motion to compel discovery that is permitted under this section or any ALJ order, and a party may submit a motion for a protective order regarding any discovery request to the ALJ.

(3) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute. The declaration must also be included with any response to a motion to compel or for protective order.

(4) The ALJ must decide any motion in accordance with this section and any prior discovery ruling in the appeal.

(5) The ALJ must issue and mail to each party a discovery ruling that grants or denies the motion to compel or for protective order in whole or in part; if applicable, the discovery ruling must specifically identify any part of the disputed discovery request upheld and any part rejected, and impose any limits on discovery the ALJ finds necessary and appropriate.

(e) *Reviewability of discovery and disclosure rulings—(1) General rule.* An ALJ discovery ruling, or an ALJ disclosure ruling such as one issued at a hearing is not subject to immediate review by the MAC. The ruling may be reviewed solely during the course of the MAC's review specified in § 405.1100, § 405.1102, § 405.1104, or § 405.1110, as applicable.

(2) *Exception.* To the extent a ruling authorizes discovery or disclosure of a matter for which an objection based on

privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the ALJ, the MAC may review that portion of the discovery or disclosure ruling immediately.

(i) Where CMS objects to a discovery ruling, the MAC must take review and the discovery ruling at issue is automatically stayed pending the MAC's order.

(ii) Upon notice to the ALJ that a party intends to seek MAC review of a ruling, the ALJ must stay all proceedings affected by the ruling.

(iii) The ALJ determines the length of the stay under the circumstances of a given case, but in no event must the length of the stay be less than 15 calendar days beginning after the day on which the ALJ received notice of the party or non-party's intent to seek MAC review.

(iv) Where CMS requests the MAC to take review of a discovery ruling or where the MAC grants a request, made by a party other than CMS, to review a discovery ruling, the ruling is stayed until the time the MAC issues a written decision that affirms, reverses, modifies, or remands the ALJ's ruling.

(v) With respect to a request from a party, other than CMS, for review of a discovery ruling, if the MAC does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ruling stands.

(f) *Adjudication time frames.* If a party requests discovery from another party to the ALJ hearing, the ALJ adjudication time frame specified in § 405.1016 is tolled until the discovery dispute is resolved.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37704, June 30, 2005; 74 FR 65336, Dec. 9, 2009]

§ 405.1038 Deciding a case without a hearing before an ALJ.

(a) *Decision wholly favorable.* If the evidence in the hearing record supports a finding in favor of appellant(s) on every issue, the ALJ may issue a hearing decision without giving the parties prior notice and without holding a hearing. The notice of the decision informs the parties that they have the right to a hearing and a right to exam-

ine the evidence on which the decision is based.

(b) *Parties do not wish to appear.* (1) The ALJ may decide a case on the record and not conduct a hearing if—

(i) All the parties indicate in writing that they do not wish to appear before the ALJ at a hearing, including a hearing conducted by telephone or videoteleconferencing, if available; or

(ii) The appellant lives outside the United States and does not inform the ALJ that he or she wants to appear, and there are no other parties who wish to appear.

(2) When a hearing is not held, the decision of the ALJ must refer to the evidence in the record on which the decision was based.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65336, Dec. 9, 2009]

§ 405.1040 Prehearing and posthearing conferences.

(a) The ALJ may decide on his or her own, or at the request of any party to the hearing, to hold a prehearing or posthearing conference to facilitate the hearing or the hearing decision.

(b) The ALJ informs the parties of the time, place, and purpose of the conference at least 7 calendar days before the conference date, unless a party indicates in writing that it does not wish to receive a written notice of the conference.

(c) At the conference, the ALJ may consider matters in addition to those stated in the notice of hearing, if the parties consent in writing. A record of the conference is made.

(d) The ALJ issues an order stating all agreements and actions resulting from the conference. If the parties do not object, the agreements and actions become part of the hearing record and are binding on all parties.

§ 405.1042 The administrative record.

(a) *Creating the record.* (1) The ALJ makes a complete record of the evidence, including the hearing proceedings, if any.

(2) The record will include marked as exhibits, the documents used in making the decision under review, including, but not limited to, claims, medical records, written statements, certificates, reports, affidavits, and any other