indeed certain fundamentals are always followed by prudent investors.[1]

The financial marketplace offers investors many different strategies. Some of these strategies would satisfy the prudent investor standard; others would not. Neither we nor the Commission can anticipate each possible strategy or investment option and decide whether it is prudent. But, a failure to invest in accordance with widely-held and time-honored practices may be irresponsible, if not imprudent. In that regard, we believe implementation of the following two strategies is, in broad terms, required of all investment management fiduciaries.

First, as the time nears when fund assets will be spent on decommissioning work, assets should be phased out of equity investments and into less volatile and more conservative investments. Many commenters endorsed this principle.[2] Similarly, Maine Yankee Atomic Company attached to its comments a financial advisor's report recommending a five-year phase out of equity investments just before the fund assets would be spent on decommissioning work. Today's order acknowledges the validity of this principle.[3] While nuclear plant owners may choose different decommissioning strategies and thus have different timelines for spending fund assets, an appropriately-timed equity phase-out would always appear to be prudent.

Second, just as a prudent investor would invest little or no part of its portfolio in penny stocks and junk bonds, a prudent investor would limit the extent of its investments in derivatives. Derivatives may serve a useful role in offsetting the risk of other investments. For example, if a portfolio contains government or corporate bonds, perhaps the sensitivity of these bonds to interest rate fluctuations could be offset by hedging in derivatives. A prudent investor would, in our view, limit investments in derivatives, if any, solely to such risk-reducing uses.

With these additional thoughts, we concur in today's order.

James J. Hoecker,

Commissioner.

William L. Massey,

Commissioner.

[FR Doc. 95–15303 Filed 6–29–95; 8:45 am]

BILLING CODE 6717–01–P

[1] *See, e.g.*, Order, slip op. at 65 n.175 and accompanying text.

[2] *See Id.*, at 65 n.177.

[3] *Id.*, at 66.

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

RIN 0960–AE10

Administrative Review Process, Prehearing Proceedings and Decisions by Attorney Advisors

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are adding new rules which modify, on a temporary basis, the prehearing procedures we follow in claims for Social Security or Supplemental Security Income (SSI) benefits based on disability. Under the final rules, attorney advisors in our Office of Hearings and Appeals (OHA) have the authority to conduct certain prehearing proceedings, and where the documentary record developed as a result of these proceedings warrants, to issue decisions that are wholly favorable to the parties to the hearing. Because requests for an administrative law judge (ALJ) hearing have increased dramatically in recent years, and cases pending in our hearing offices have reached unprecedented levels, we have taken a number of actions designed to help us decide these cases more efficiently. These final rules are an important part of our efforts in this regard.

EFFECTIVE DATE: June 30, 1995.

FOR FURTHER INFORMATION CONTACT: Harry J. Short, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Social Security Boulevard, Baltimore, Maryland 21235, (410) 965–6243.

SUPPLEMENTARY INFORMATION:

Background

The Social Security Administration (SSA) decides claims for Social Security benefits under title II of the Social Security Act (the Act) and for SSI benefits under title XVI of the Act in an administrative review process that generally consists of four steps. Claimants who are not satisfied with the initial determination we make on a claim may request reconsideration. Claimants who are not satisfied with our reconsidered determination may request a hearing before an ALJ, and claimants who are dissatisfied with an ALJ's decision may request review by the Appeals Council. Claimants who have completed these steps, and who are not satisfied with our final decision, may request judicial review of the decision in the Federal courts.

Generally, when a claim is filed for Social Security or SSI benefits based on disability, a State agency makes the initial and reconsideration disability determination for us. A hearing conducted after we have made a reconsideration determination is held by an ALJ in one of the 132 hearing offices we have nationwide.

Applications for Social Security and SSI benefits based on disability have risen dramatically in recent years. The number of new disability claims SSA received in Fiscal Year (FY) 1994—3.56 million—represented a 40 percent increase over the number received in FY 1990. Requests for an ALJ hearing also have increased dramatically. In FY 1994, our hearing offices had almost 540,000 hearing receipts and the overwhelming majority of these were related to requests for a hearing filed by persons claiming disability benefits. In that year, the number of hearing receipts we received exceeded the number of receipts we received in FY 1990 by more than 70 percent. We expect hearing receipts to increase to more than 590,000 in FY 1995.

Despite management initiatives that resulted in a record increase in ALJ productivity in FY 1994, and the hiring of more than 200 new ALJs and more than 650 new support staff in that year, the number of cases pending in our hearing offices has reached unprecedented levels—more than 480,000 at the end of FY 1994 and more than 540,000 at the end of May 1995.

On September 19, 1994, the Commissioner of Social Security published a *Plan for a New Disability Claim Process* in the **Federal Register** (59 FR 47887). That document sets forth our long term plans for redesigning and fundamentally improving the overall disability claim process. On a separate track from that longer term plan, we have developed a number of short term initiatives to process cases more efficiently and, therefore, to reduce the number of cases pending in our hearing offices. As part of our short term disability process improvements, we are issuing these final regulations that make a temporary change in our administrative review procedures.

Under these final rules, attorney advisors will conduct certain prehearing proceedings and, where appropriate, issue decisions that are wholly favorable to the claimant and any other party to the hearing. These procedures will remain in effect for a period of time not to exceed two years from the effective date of these final rules unless they are extended by the Commissioner of Social Security by publication of a final rule in the **Federal Register**.

Regulatory Provisions

We have added new §§ 404.942 and 416.1442 to our regulations to authorize attorney advisors in OHA to conduct certain prehearing proceedings and, where appropriate, make decisions based on the documentary record that are wholly favorable to the parties to the hearing. Our purpose in issuing these rules is to expedite the processing of cases pending at OHA without infringing on a claimant's right to a hearing before an ALJ.

The authority of an attorney advisor to conduct prehearing proceedings and to make wholly favorable decisions under these final rules is temporary, and applies only in the limited circumstances described below. Also, the attorney advisor's conduct of certain prehearing proceedings will not delay the scheduling of a hearing before an ALJ. If the prehearing proceedings are not concluded before the hearing date, the case will be sent to the ALJ unless a decision wholly favorable to the claimant and all other parties is in process, or the claimant and all other parties to the hearing agree in writing to delay the hearing until the prehearing proceedings are completed.

Prehearing proceedings may be conducted by the attorney advisor under this rule if new and material evidence is submitted; there is an indication that additional evidence is available; there is a change in the law or regulations; or there is an error in the file or some other indication that a wholly favorable decision may be issued. A decision by an attorney advisor will be mailed to all parties. The notice of decision will state the basis for the decision and advise the parties that an ALJ will dismiss the hearing request unless a request to proceed with the hearing is made by a party within 30 days after the date the notice of the decision is mailed.

We believe that these temporary procedures will enable us to manage our pending hearing requests in a more timely manner. They also may provide information that can help us better identify cases that can be decided without a hearing before an ALJ and improve our ability to narrow the issues that must be resolved before a decision can be made.

The attorney advisor's functions are not designed to change in any significant way the overall rate at which we allow claims for benefits when an individual requests a hearing before an ALJ. In order to assure that no unacceptable change in the overall allowance rate occurs, the Commissioner of Social Security will review management and quality assurance information on an ongoing basis. If there is evidence that the overall allowance rate increases or decreases unacceptably, the Commissioner will curtail use of, or make appropriate adjustments to the attorney advisor procedures, consistent with this regulatory authority.

We find good cause for dispensing in this case with the 30-day delay in the effective date of a substantive rule, provided for by 5 U.S.C. 553(d). As explained above, and in the notice of proposed rulemaking (NPRM), the number of hearing requests pending at OHA has reached unprecedented levels. In light of the record number of pending hearing requests, the importance we place on ensuring that we adjudicate claims timely and accurately, and the beneficial effect we expect these final rules to have on our ability to provide better service to claimants, we find that it is in the public interest to make these final rules effective upon publication.

Public Comments

These regulatory provisions were published in the **Federal Register** as an NPRM on April 14, 1995 (60 FR 19008). We provided interested parties with a 30 day comment period. We received 82 letters representing the views of over 125 individuals. Most of the comments we received were from individuals employed either as attorney advisors or ALJs in OHA. However, we also received comments from a variety of other sources, including private citizens, claimant representatives, State agencies which make disability determinations for us, and union representatives. After carefully considering the comments received, we have decided to adopt the proposed rule essentially without change.

In general, the comments either strongly supported or strongly opposed adoption of the proposed rule. Only a few of the comments were in any way equivocal, and even these can be properly categorized as either basically supporting or opposing the proposed rule.

Almost all of the comments supporting adoption of the proposed rule did so without recommending changes. While the comments which recommended against adoption of the proposed rule more frequently suggested changes, the changes suggested were generally so substantive that they effectively constituted expressions of disagreement with the concept of the rule as proposed, rather than proposals to change the rule to make it function more effectively. Some of the comments we received were outside the scope of the proposed rule, and therefore have not been addressed. The substantive comments made by the commenters and our responses are summarized below. Because some of the comments were detailed, we had to condense, summarize or paraphrase them. We have, however, tried to summarize the commenters views accurately and to respond to all of the significant issues raise by the commenters.

The comments from individuals employed as attorney advisors unanimously supported adoption of the proposed rule; all but one of the comments from individuals employed as ALJs recommended against adoption of the proposed rule. Most of the remaining comments, including most of those received from private citizens, claimant representatives, and union representatives, supported adoption of the proposed rule.

The comments supporting the adoption of the proposed rule generally did so based on the view that the contemplated changes would result in quicker, more cost-effective service to the public. We agree with these comments; our intent in these final rules is to enhance our ability to decide cases more quickly during the period in which these rules will be effective and, therefore, to improve the level of service we provide to claimants.

The comments from individuals who supported adoption of the proposed rule also stressed the serious detrimental effects the number of pending claims has on both claimants and our hearing offices. These comments also stressed that making fuller use of the experience and expertise of the attorney advisors in OHA constitutes the most effective way that SSA can promptly apply existing resources to process the number of cases pending at OHA in the most expeditious manner. We also agree with these comments.

A number of the commenters who supported adoption of the proposed rule also indicated that the procedures described in the proposed rule should be viewed as a logical and natural extension of the prehearing conference program OHA has already successfully conducted under existing regulatory authority. Many of these comments stressed the importance of the procedures contained in these final rules in preserving the time and skill of the ALJs for use in cases that cannot be decided without a hearing. These comments further noted that the proposed rule would provide the ALJ with the benefit of a better developed record in cases in which an ALJ held a hearing. We concur in these comments.

The comments received from individuals who opposed adoption of the proposed rule also reflected a number of common themes and views. These comments recommended against adoption of the proposed rule on five principal bases: (1) that the proposed rule violated the Administrative Procedure Act (APA) or the Act; (2) that it denied claimants their constitutional rights of due process and equal protection; (3) that it was impractical; (4) that it is unnecessary because of the availability of preferable alternatives; and (5) that it would result in decisions which inappropriately found that claimants were disabled and therefore would result in increased program costs. Our responses to these comments, and to the other comments we received regarding the substance of the rule, are set out in detail below.

Comment: A number of comments received, primarily from individuals employed as ALJs, expressed the view that, for a number of reasons, the proposed rule violated either the APA or the Act and improperly delegated decision making authority to individuals who are not appointed as ALJs. Another commenter expressed the view, however, that the proposed rule was fully consistent with the Act and the APA.

Response: We do not agree that these final rules violate either the APA or the Act. The Act directs the Commissioner of Social Security to make decisions as to the rights of any individuals applying for disability benefits. The Act also provides that the Commissioner shall provide an individual who makes a showing in writing that his or her rights may be prejudiced by any decision that the Commissioner has rendered, with an opportunity for a ''hearing'' regarding his or her right to benefits. Currently, by regulation, the Commissioner has provided that such a ''hearing'' shall be before an ALJ who shall issue the hearing decision.

These final rules augment this process by authorizing attorney advisors to make fully favorable decisions in claims for disability benefits when there is no need for a hearing. No provision of the Act requires the Commissioner to utilize an ALJ when issuing a decision, nor does the APA require an agency to hold an ALJ hearing when there are no material facts in dispute, and the agency has decided that it is appropriate to issue a fully favorable decision with respect to a specific claim. The Act only requires that the Commissioner provide an individual with the opportunity for a hearing when the individual makes the requisite showing that his or her rights may be prejudiced by any decision that the Commissioner has rendered. That process is not being changed; the final rules explicitly preserve the individual's right to a hearing which will be conducted by an ALJ if the individual is dissatisfied with the decision made by the attorney advisor. Under SSA's regulations as amended by these final rules, either an attorney advisor or an ALJ may issue a fully favorable decision without a hearing in a claim for disability benefits, but if a hearing is to be held, the ALJ will conduct that hearing and issue a decision. This process is fully in accord with the Act and in no way violates the APA.

Comment: One commenter stated the view that the proposed rule violated the settlement agreement between the parties in the 1979 case, *Bono, et al.* v. *United States of America Social Security Administration, et al.*, Civil Action No. 77–0819–CV–W–4 (W.D. Mo.), regarding the rotational assignment of cases to ALJs. Another commenter, however, expressed the opinion that the proposed rule did not violate the *Bono* settlement agreement.

Response: We disagree that these final rules violate the settlement agreement in *Bono*. Without conceding that any particular aspect of the *Bono* settlement is applicable here, under the *Bono* settlement agreement, OHA reserved the right to modify or change the agreed-upon policies after appropriate consultation with the ALJs. The *Bono* agreement also specified that the Agency could consider the number of cases pending before an ALJ in determining the extent to which the rotational assignment of cases to an ALJ immediately upon their receipt in the hearing office was practicable. Under our existing procedures, cases remain on the master docket of the hearing office until several prehearing procedures have been completed. The prehearing procedures we are adopting in these final rules represent further modifications to our procedures undertaken and proposed with appropriate consultation with our ALJs.

Comment: Two of the commenters thought the proposed rule would violate a claimant's right to due process and equal protection under the Constitution. However, several other commenters stated that the proposed rule protected a claimant's right to due process under the Constitution.

Response: We do not agree that these rules violate a claimant's right to due process or equal protection under the Constitution in any way. These final rules do not impair or interfere with a claimant's right to a hearing before an ALJ. Rather, the claimant's right to a hearing conducted by an ALJ is explicitly preserved if the individual is dissatisfied with the decision made by an attorney advisor. The preservation of the claimant's right to an ALJ hearing fully comports with due process and equal protection under the Constitution.

Comment: Some of the commenters stated that the proposed rule was impractical and would not work because the effect of the rule would be to divert needed resources away from ALJs.

Response: Our intent is to identify those cases meeting the statutory definition of disability as early in the administrative review process as possible. By promptly identifying these cases—preferably before a hearing is held—SSA can avoid the costs, in terms of staff resources and time, of scheduling and holding unnecessary hearings.

Some of the procedures we are implementing under these rules are based on prehearing conference and screening procedures we fully tested based on existing regulatory authority during a pilot study completed in 1993. The results of that study, which collected data from more than 40,000 cases, showed that hearing offices could significantly reduce average case processing time by more effectively identifying and processing claims in which a hearing decision could be issued ''on-the-record'' under our current regulations (i.e., without holding an oral hearing).

The data analysis also showed that, in addition to avoiding unnecessary hearings, the procedures tested did not increase the time needed to process claims that required a hearing. The results of the pilot study also demonstrated that the prehearing conference and screening procedures did not lower hearing office productivity. Further, we found that the considerable savings realized in ALJ and staff time by avoiding unnecessary hearings more than offset the time spent in prehearing analysis and development.

Although under these final rules some attorney advisors may draft fewer hearing decisions in cases in which a hearing before an ALJ is held, and provide less professional assistance to ALJs, there are a number of initiatives already underway that are designed to provide hearing offices with additional case preparation and decision writing support during the course of this initiative. In addition, not all attorney advisors assigned to hearing offices will be authorized to conduct prehearing proceedings and issue fully favorable decisions in appropriate cases under the

authority contained in these final rules. Many attorney advisors, as well as our paralegal specialists, will be available to provide ALJs with research and decision drafting support.

Comment: As an alternative to authorizing attorney advisors to conduct certain prehearing proceedings and issue wholly favorable decisions in appropriate cases, several commenters suggested that the proposed rule should be modified to allow OHA attorney advisors to conduct prehearing proceedings under the direction of an ALJ and make recommended decisions that the ALJ could approve or disapprove. One commenter suggested several specific modifications to the text of the proposed rule to address this issue.

Response: We have not adopted this comment. Under current procedures conducted under existing regulatory authority, ALJs may authorize attorney advisors to review cases pending before the ALJ before a hearing is scheduled in order to conduct certain prehearing proceedings and recommend wholly favorable decisions or the scheduling of a hearing, as appropriate. Our experience under the 1993 pilot study was that ALJs agreed with and accepted the recommendations made by attorney advisors with very few exceptions. The procedures we are implementing under these final rules will allow us to process cases more efficiently by authorizing the attorney advisors, during the period in which these rules will be effective, to issue decisions which are wholly favorable to the claimant and any other party to the hearing in appropriate cases, obviating the need for duplicative review by an ALJ. These final rules take full advantage of the experience and expertise of the attorney advisor and will allow ALJs to better focus upon the complex cases that require their skills.

Comment: One commenter suggested that the proposed rule be modified to authorize other individuals, such as adjudicators who make disability determinations for us in the State agencies at the initial and reconsideration steps of the administrative review process, to make revised determinations on the same basis as these final rules authorize attorney advisors to make decisions.

Response: We have not adopted this comment. The provisions we are establishing in these final rules complement, but do not supersede, the provisions of §§ 404.941 and 416.1441 of our regulations. These provisions allow us to refer a case after a hearing is requested, but before it is held, to the component that issued the determination being reviewed (including a State agency) so that it may conduct a prehearing case review to determine if a wholly or partially favorable revised determination should be made. The conditions for conducting prehearing case reviews are essentially identical to those under which attorney advisors may conduct prehearing proceedings under these final rules. We would not expect, however, that a case would be subject to both prehearing proceedings by an attorney advisor and a prehearing case review by the component that issued the determination being reviewed. The establishment of temporary procedures authorizing attorney advisors to conduct such proceedings does not limit our authority to refer cases for a prehearing case review under §§ 404.941 and 416.1441.

Furthermore, on June 9, 1995, we published an NPRM proposing to establish the authority to test implementation of the position of an adjudication officer who, under the disability redesign plan, would be the focal point for all prehearing activities when a request for hearing before an ALJ is filed (60 FR 30482). Under the tests proposed in the NPRM, the adjudication officer would be authorized to take a number of actions, including issuing a wholly favorable decision when warranted by the evidence in the record. The rule as proposed for testing permits the adjudication officer to be a qualified employee of SSA or a State agency that makes disability determinations for us. Consequently, we believe that the more appropriate course of action would be to address the concerns raised by this commenter in the context of our adjudication officer rulemaking initiative.

Comment: A few commenters suggested other alternatives to the proposed rule to address the increasing number of claims pending at OHA, including providing ALJs with more support, hiring more ALJs and increasing the role of the claimant's representative in the administrative review process.

Response: As discussed above in our response to the comment concerning the practicality of the proposed rule, we are devoting appropriate, additional resources to provide staff support to the ALJs in connection with our short term initiatives to reduce the time required to process the cases awaiting a hearing.

We have no current plans to increase the number of ALJs we employ in any substantial way. However, we expect to hire enough additional ALJs so that the number on duty should, with allowances for expected attrition, increase slightly during this fiscal year (from 1,045 at the end of October 1994 to about 1,050 at the end of FY 95).

One of our short term initiatives to process cases awaiting an ALJ hearing more efficiently is to encourage claimants and representatives to submit proposed decisional language. Under that initiative, OHA currently advises claimants and representatives early in the hearing process of the opportunity to submit arguments in the form of a recommended decision.

Comment: A few commenters expressed the view that the proposed rule should be modified to provide adequate quality assurance review procedures, as an alternative to or in addition to review by the Appeals Council, as provided for in the proposed rule.

Response: No change in these final rules or in other regulations is required to allow us to subject the decisions made by attorney advisors to quality assurance review procedures, in addition to the reviews the final rules authorize the Appeals Council to conduct on its own motion. We are establishing an intensive quality assurance review program that will supplement own motion reviews by the Appeals Council in assuring the accuracy of the decisions made by the attorney advisors.

Comment: A number of commenters expressed concern that the proposed rule would encourage adjudicators to allow claims, and therefore would increase the allowance rate for cases decided at the hearing step of the administrative review process and increase program costs.

Response: The attorney advisor's functions are not designed to increase (or decrease) in a significant way the overall rates at which we allow claims for benefits when an individual requests a hearing before an ALJ. Based on our experience with the 1993 pilot study, we anticipate no significant change in overall allowance rates in claims in which a hearing has been requested. However, we will monitor the impact of these final rules on overall allowance rates and decisional accuracy and will curtail use of, or make appropriate adjustments to the attorney advisor procedures consistent with this regulatory authority, if we determine that there is evidence of any unacceptable change in the rates at which we allow claims for benefits when an individual requests a hearing before an ALJ.

Other Comments

Other comments involved suggestions for changing the rule in specific ways.

Comment: One commenter recommended that SSA should adopt procedures to ensure that the ALJ does not know if review by an attorney advisor has occurred.

Response: We have not adopted this comment. We do not believe such procedures could be devised or that they are required. ALJs are typically aware that another adjudicator has not made a wholly favorable determination or decision in a specific case. It has not been our experience that such knowledge compromises the ability of ALJs to hold hearings and decide cases in a fair, impartial manner. We believe that the attorney advisor's performance of the functions authorized by these final rules does not materially affect the ability of our ALJs to hold hearings and make decisions fairly and impartially.

Comment: One commenter suggested that part 422 of 20 C.F.R. may need to be amended to give the attorney advisors decisionmaking authority.

Response: We disagree with this comment. We do not believe that giving attorney advisors the temporary decisionmaking authority provided in new §§ 404.942 and 416.1442 of our regulations requires amendment of part 422. The applicable regulations in part 422, §§ 422.130 and 422.203, generally describe either our overall claims adjudication process (§ 422.130) or procedures followed by OHA (§ 422.203). However, § 422.201 explicitly refers to the regulations in §§ 404.929 through 404.983 of this chapter and §§ 416.1429 through 416.1483 of this chapter for ''detailed provisions related to'' the hearings process. The regulations in part 422, therefore, are intended only to describe in general terms the overall procedures followed by OHA. They are not intended to describe each provision contained in the applicable regulations of subpart J of part 404 of this chapter or subpart N of part 416 of this chapter. Consequently, we do not believe that we need to amend any provision of part 422 of this chapter to refer specifically to the provisions of these final rules.

Comment: One commenter stated that the proposed rule should be clarified to establish that attorney advisors would be able to make fully favorable decisions in claims involving drug addiction and alcoholism where the claimant agrees that drug addiction and/or alcoholism is a contributing factor material to the finding of disability.

Response: The final rules give attorney advisors authority to make decisions which are wholly favorable to the claimant and all other parties in cases in which a claimant has filed a claim for benefits based on disability under title II and/or title XVI. For the purposes of new §§ 404.942 and 416.1442, a ''wholly favorable'' decision is intended to have the same definition as it is under the current regulations that authorize ALJs to make such a decision, §§ 404.948 and 416.1448. A wholly favorable decision is a decision that makes a finding in favor of the claimant and all the parties on every issue. Criteria for determining if any particular decision is wholly favorable would not be appropriately included in §§ 404.942 and 416.1442. However, we expect that this issue will be addressed in the instructions we plan to issue to implement these final rules.

Comment: Two commenters suggested extending the provisions of the proposed rule to include other categories of claims, including claims arising under the Old Age and Survivors program under title II of the Act and claims adjudicated by OHA on behalf of the Health Care Financing Administration under Parts A and B of the Medicare program under title XVIII of the Act.

Response: The overwhelming majority of cases pending at OHA involve claims for benefits based on disability. For the purposes of this short term initiative, we decided that it would be best to focus these final rules on increasing the efficiency with which we can process the largest group of pending cases. Cases involving other types of claims, however, will benefit from the general increase in efficiency at OHA resulting from implementation of these rules.

Comment: One comment expressed the view that §§ 404.957 and 416.1457 of subparts J and N of parts 404 and 416 of our regulations should be amended to specify that a claimant's agreement to postpone a hearing will constitute good cause for a failure to appear at a scheduled hearing.

Response: This comment assumes that a case will have been assigned to an ALJ before an attorney advisor conducts prehearing proceedings under the authority contained in these rules. As discussed above, however, that is not our intent. The prehearing proceedings conducted under these provisions will not delay the scheduling of a hearing because those proceedings will be conducted before the case would be scheduled for a hearing, considering the number of cases awaiting hearings and our general practice of scheduling hearings according to the request for hearing date. The provisions concerning claimant agreement to delay the hearing would apply if the prehearing proceedings can not be completed before the case is ready to be scheduled for a hearing.

Comment: Two commenters also recommended that §§ 404.957 and 416.1457 of our regulations be revised to clarify that an ALJ may dismiss a request for hearing when an attorney advisor issues a wholly favorable decision under §§ 404.942 or 416.1442.

Response: An ALJ's authority to dismiss a request for hearing under the circumstances set forth under §§ 404.942 and 416.1442 is sufficiently well established by the provisions of these final rules. For many years, ALJs have exercised the authority to dismiss requests for hearing when revised determinations are made under the prehearing case review regulations found at §§ 404.941 and 416.1441, even though such authority is not expressly set forth in the provisions of §§ 404.957 and 416.1457. The same principles apply with respect to the similar, but temporary, provisions being established in these final rules.

Comment: One commenter suggested that the proposed rule should be clarified to state whether the ALJ's dismissal of the request for hearing is required or only permitted after the attorney advisor issues a decision, and no party requests that the hearing continue.

Response: We have not adopted this comment. An ALJ is required to dismiss a hearing request when the attorney advisor issues a wholly favorable decision and no party makes a written request to proceed with the hearing within 30 days of the date the notice of the decision of the attorney advisor is mailed. Under these rules, the attorney advisor's notice of decision will advise the claimant that the ALJ ''will'' dismiss the request for hearing under those circumstances.

Comment: Several commenters also suggested that the proposed rule should be amended to provide that issuance of a wholly favorable decision by an attorney advisor would result in immediate dismissal of the request for a hearing.

Response: We have not adopted this comment. For the purposes of this temporary procedure, we believe it is more appropriate to make dismissal of the request for hearing contingent on the failure of any party to request to proceed with the hearing within 30 days after the date the notice of the attorney advisor's decision is mailed. That requirement clearly establishes that our intent in these temporary provisions is to expedite the processing of cases without infringing on a claimant's right to a hearing before an ALJ.

Comment: Several comments stated that the criteria in the proposed rule under which attorney advisors in OHA

could conduct prehearing proceedings were too broad. One commenter suggested that the criteria in the proposed rule under which attorney advisors could conduct prehearing proceedings if new and material evidence was submitted was vague and should be clarified.

Response: We have not adopted these comments. Restricting the criteria under which an attorney advisor can conduct prehearing proceedings would, in our judgment, unnecessarily preclude the most prompt action possible on some cases. Moreover, in our experience, there has been no confusion over nor excessive use of the regulations found at §§ 404.941 and 416.1441, which allow prehearing case reviews under conditions substantially the same as those set forth in new §§ 404.942 and 416.1442.

Comment: One commenter suggested changes to the proposed rules to clarify in several places in the regulations that attorney advisors may only issue fully favorable decisions.

Response: We believe the regulations clearly limit the attorney advisors to making only wholly favorable decisions, and do not require further clarification, as suggested by the commenter.

Comment: Two commenters suggested that the proposed rule be revised to clarify whether the attorney advisor can request vocational evidence, in addition to medical evidence, as part of the prehearing proceedings.

Response: The final rules state that the attorney advisor may ''[r]equest additional evidence that may be relevant to the claim, including medical evidence. * * *'' That language is sufficiently broad to allow the attorney advisor to request vocational evidence in appropriate cases. It should be noted, however, that the attorney advisor's ability to request additional evidence must be exercised in accordance with the purpose of §§ 404.942 and 416.1442 to facilitate the identification and prompt processing of cases in which a wholly favorable decision may be made without the need for an ALJ hearing.

Regulatory Procedures

Executive Order No. 12866

We have consulted with the Office of Management and Budget (OMB) and determined that this rule does not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, the rule is not subject to OMB review.

Regulatory Flexibility Act

We certify that these regulations will not have a significant economic impact on a substantial number of small entities because they affect only individuals. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act, is not required.

Paperwork Reduction Act

These regulations impose no new reporting or recordkeeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.006, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Death benefits, Disability benefits, Old-Age, Survivors and disability insurance, Reporting and recordkeeping requirements, Social Security.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disability benefits, Public assistance programs, Supplemental Security Income (SSI), Reporting and recordkeeping requirements.

Dated: June 26, 1995.

Shirley S. Chater,

Commissioner of Social Security.

For the reasons set out in the preamble, subpart J of part 404 and subpart N of part 416 of chapter III of title 20 of the Code of Federal Regulations are amended as set forth below.

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

Subpart J—[Amended]

1. The authority citation for subpart J of part 404 is revised to read as follows:

Authority: Secs. 201(j), 205(a), (b), and (d)–(h), 221(d), 225 and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 405(a), (b), and (d)–(h), 421(d), 425 and 902(a)(5)); 31 U.S.C. 3720A.

2. New § 404.942 is added under the undesignated center heading ''Hearing Before an Administrative Law Judge'' to read as follows:

§ 404.942 Prehearing proceedings and decisions by attorney advisors.

(a) *General.* After a hearing is requested but before it is held, an attorney advisor in our Office of Hearings and Appeals may conduct prehearing proceedings as set out in paragraph (c) of this section. If upon the completion of these proceedings, a decision that is wholly favorable to you and all other parties may be made, an attorney advisor, instead of an administrative law judge, may issue such a decision. The conduct of the prehearing proceedings by the attorney advisor will not delay the scheduling of a hearing. If the prehearing proceedings are not completed before the date of the hearing, the case will be sent to the administrative law judge unless a wholly favorable decision is in process or you and all other parties to the hearing agree in writing to delay the hearing until the proceedings are completed.

(b) *When prehearing proceedings may be conducted by an attorney advisor.* An attorney advisor may conduct prehearing proceedings if you have filed a claim for benefits based on disability and—

(1) New and material evidence is submitted;

(2) There is an indication that additional evidence is available;

(3) There is a change in the law or regulations; or

(4) There is an error in the file or some other indication that a wholly favorable decision may be issued.

(c) *Nature of the prehearing proceedings that may be conducted by an attorney advisor.* As part of the prehearing proceedings, the attorney advisor, in addition to reviewing the existing record, may—

(1) Request additional evidence that may be relevant to the claim, including medical evidence; and

(2) If necessary to clarify the record for the purpose of determining if a wholly favorable decision is warranted, schedule a conference with the parties.

(d) *Notice of a decision by an attorney advisor.* If the attorney advisor issues a wholly favorable decision under this section, we shall mail a written notice of the decision to all parties at their last known address. We shall state the basis for the decision and advise all parties that an administrative law judge will dismiss the hearing request unless a party requests that the hearing proceed. A request to proceed with the hearing must be made in writing within 30 days after the date the notice of the decision of the attorney advisor is mailed.

(e) *Effect of actions under this section.* If under this section, an administrative law judge dismisses a request for a hearing, the dismissal is binding in accordance with § 404.959 unless it is vacated by an administrative law judge or the Appeals Council pursuant to § 404.960. A decision made by an attorney advisor under this section is binding unless—

(1) A party files a request to proceed with the hearing pursuant to paragraph (d) of this section and an administrative law judge makes a decision;

(2) The Appeals Council reviews the decision on its own motion pursuant to § 404.969 as explained in paragraph (f)(3) of this section; or

(3) The decision of the attorney advisor is revised under the procedures explained in § 404.987.

(f) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of Part 404 shall apply to—

(1) Authorize an attorney advisor to exercise the functions performed by an administrative law judge under §§ 404.1520a and 404.1546;

(2) Define the term ''decision'' to include a decision made by an attorney advisor, as well as the decisions identified in § 404.901; and

(3) Make the decision of an attorney advisor subject to review by the Appeals Council under § 404.969 if an administrative law judge dismisses the request for a hearing following issuance of the decision, and the Appeals Council decides to review the decision of the attorney advisor anytime within 60 days after the date of the dismissal.

(g) *Sunset provision.* The provisions of this section will no longer be effective on June 30, 1997 unless they are extended by the Commissioner of Social Security by publication of a final rule in the **Federal Register**.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Subpart N—[Amended]

1. The authority citation for subpart N of part 416 is revised to read as follows:

Authority: Sec. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b).

2. New § 416.1442 is added under the undesignated center heading ''Hearing Before an Administrative Law Judge'' to read as follows:

§ 416.1442 Prehearing proceedings and decisions by attorney advisors.

(a) *General.* After a hearing is requested but before it is held, an attorney advisor in our Office of Hearings and Appeals may conduct prehearing proceedings as set out in paragraph (c) of this section. If upon the completion of these proceedings, a decision that is wholly favorable to you and all other parties may be made, an attorney advisor, instead of an administrative law judge, may issue such a decision. The conduct of the prehearing proceedings by the attorney advisor will not delay the scheduling of a hearing. If the prehearing proceedings are not completed before the date of the hearing, the case will be sent to the administrative law judge unless a wholly favorable decision is in process or you and all other parties to the hearing agree in writing to delay the hearing until the proceedings are completed.

(b) *When prehearing proceedings may be conducted by an attorney advisor.* An attorney advisor may conduct prehearing proceedings if you have filed a claim for SSI benefits based on disability and—

(1) New and material evidence is submitted;

(2) There is an indication that additional evidence is available;

(3) There is a change in the law or regulations; or

(4) There is an error in the file or some other indication that a wholly favorable decision may be issued.

(c) *Nature of the prehearing proceedings that may be conducted by an attorney advisor.* As part of the prehearing proceedings, the attorney advisor, in addition to reviewing the existing record, may—

(1) Request additional evidence that may be relevant to the claim, including medical evidence; and

(2) If necessary to clarify the record for the purpose of determining if a wholly favorable decision is warranted, schedule a conference with the parties.

(d) *Notice of a decision by an attorney advisor.* If the attorney advisor issues a wholly favorable decision under this section, we shall mail a written notice of the decision to all parties at their last known address. We shall state the basis for the decision and advise all parties that an administrative law judge will dismiss the hearing request unless a party requests that the hearing proceed. A request to proceed with the hearing must be made in writing within 30 days after the date the notice of the decision of the attorney advisor is mailed.

(e) *Effect of actions under this section.* If under this section, an administrative law judge dismisses a request for a hearing, the dismissal is binding in accordance with § 416.1459 unless it is vacated by an administrative law judge or the Appeals Council pursuant to § 416.1460. A decision made by an attorney advisor under this section is binding unless—

(1) A party files a request to proceed with the hearing pursuant to paragraph (d) of this section and an administrative law judge makes a decision;

(2) The Appeals Council reviews the decision on its own motion pursuant to § 416.1469 as explained in paragraph (f)(3) of this section; or

(3) The decision of the attorney advisor is revised under the procedures explained in § 416.1487.

(f) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 416 shall apply to—

(1) Authorize an attorney advisor to exercise the functions performed by an administrative law judge under §§ 416.920a, 416.924d(b), and 416.946;

(2) Define the term ''decision'' to include a decision made by an attorney advisor, as well as the decisions identified in § 416.1401; and

(3) Make the decision of an attorney advisor subject to review by the Appeals Council under § 416.1469 if an administrative law judge dismisses the request for a hearing following issuance of the decision, and the Appeals Council decides to review the decision of the attorney advisor anytime within 60 days after the date of the dismissal.

(g) *Sunset provision.* The provisions of this section will no longer be effective on June 30, 1997 unless they are extended by the Commissioner of Social Security by publication of a final rule in the **Federal Register**.

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DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

Wage and Hour Division

29 CFR Part 508

RIN 1205–AA88 and RIN 1215–AA68

Attestations by Employers for Off-Campus Work Authorization for Foreign Students (F–1 Nonimmigrants)

AGENCIES: Employment and Training Administration, Labor; and Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Joint interim final rule.

SUMMARY: The Department of Labor (DOL) amends regulations relating to attestations by employers seeking to use nonimmigrant foreign (F–1) students in off-campus work. DOL continues to review comments submitted by the public on the interim final rule and expects to publish a final rule shortly. However, existing attestations expire at the close of June 1995. For that reason, this rule extends the period of