

SOCIAL SECURITY ADMINISTRATION**20 CFR Parts 404, 408, 411, 416, and 422**

[Docket No. SSA–2017–0073]

RIN 0960–AI25

Hearings Held by Administrative Appeals Judges of the Appeals Council**AGENCY:** Social Security Administration.
ACTION: Final rule.

SUMMARY: We are revising our rules to clarify when and how administrative appeals judges (AAJ) on our Appeals Council may hold hearings and issue decisions. The Appeals Council already has the authority to hold hearings and issue decisions under our existing regulations, but we have not exercised this authority or explained the circumstances under which it would be appropriate for the Appeals Council to assume responsibility for holding a hearing and issuing a decision. This final rule will ensure the Appeals Council is not limited in the type of claims for which it may hold hearings. We expect that this rule will increase our adjudicative capacity when needed, and allow us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Our ability to use our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to issue accurate, timely, high-quality decisions.

DATES: This final rule will be effective December 16, 2020.

FOR FURTHER INFORMATION CONTACT: Debra Sundberg, Office of Appellate Operations, Social Security Administration, 5107 Leesburg Pike, Falls Church, VA 22041, (703) 605–7100. For information on eligibility or filing for benefits, call our national toll-free number, 1–800–772–1213 or TTY 1–800–325–0778, or visit our internet site, Social Security Online, at <http://www.socialsecurity.gov>.

SUPPLEMENTARY INFORMATION: On December 20, 2019, we published a Notice of Proposed Rulemaking (NPRM), “Hearings Held by Administrative Appeals Judges of the Appeals Council.”¹ In our NPRM, we proposed to clarify that an AAJ from our Appeals Council may hold a hearing and issue a decision on any case pending at the hearings level under titles II, VIII, or XVI of the Social

Security Act (Act). With this final rule, we adopt the proposed changes, with some exceptions.

The final rule differs from our proposed rule in the following ways:

- We are not making the proposed changes to § 402.60 because we are considering the possibility of reorganizing sections within 20 CFR part 402. We will consider revisions to § 402.60 as part of that reorganization.
- We revised §§ 404.929, 416.1429, 404.976, and 416.1476 to conform to the current CFR text, which we recently revised as part of our final rule, “Setting the Manner for the Appearance of Parties and Witnesses at a Hearing,” published on December 18, 2019.²
- We removed proposed paragraph (d) from §§ 404.970 and 416.1470 in response to the public comments we received, which we discuss in more detail below. We also removed the corresponding language in proposed paragraph (a) of the same sections.
- We revised §§ 404.973 and 416.1473 in response to the public comments we received, to clarify that prior notice is not needed where the Appeals Council issues a decision that is favorable in part, and remands the remaining issues for further proceedings. We discuss this in more detail in the response to the public comments below.
- We revised §§ 404.976(b) and 416.1476(b) to clarify that if we file a certified administrative record in Federal court, we will include all additional evidence the Appeals Council received during the administrative review process, including additional evidence that the Appeals Council received but did not exhibit or make part of the official record.
- We revised §§ 404.983 and 416.1483 in response to public comments to clarify when the Appeals Council will hold a hearing after court remand. In these sections, we revised paragraph (b) to pertain only to circumstances when the Appeals Council will issue a decision without holding a hearing after a court remand, and we inserted a new paragraph (c) to clarify when the Appeals Council will hold a hearing after court remand. As such, we redesignated the prior paragraphs (c) and (d) as paragraphs (d) and (e), respectively.
- We revised §§ 404.984 and 416.1484 to clarify that the Appeals Council may assume jurisdiction of a case after an administrative law judge (ALJ) or administrative appeals judge (AAJ) issues a hearing decision in a case

remanded by Federal court. We also revised §§ 404.984 and 416.1484 to clarify that the Appeals Council will not dismiss the request for a hearing in a claim where we are otherwise required by law or a judicial order to file the Commissioner’s additional and modified findings of fact and decision with a court.

- We revised § 422.205(a) to clarify that AAJs issue hearing level decisions and dismissals.

We received 275 comments on the NPRM, 204 of which related to the proposed rule and are available for public viewing at <http://www.regulations.gov>.³ These comments were from:

- Individual citizens and claimant representatives;
- Members of Congress;
- National groups representing claimant representatives, such as the National Organization of Social Security Claimants’ Representatives;
- Groups representing administrative law judges (ALJ), such as the Forum of United States Administrative Law Judges and the Association of Administrative Law Judges; and
- Advocacy groups, such as the Consortium for Citizens with Disabilities and the Disability Law Center.

We carefully considered these comments. We discuss and respond to the significant issues raised by the commenters that were within the scope of the NPRM below.

Comments and Responses*Change Is Overdue and the Proposed Rule Would Allow Us To Use Our Resources Better*

Comment: One commenter, who supported the proposal, said this change is overdue, and will ensure shorter wait times and due process for claimants. Another commenter said the proposed rule would allow us to use resources better.

Response: We acknowledge the commenters’ support for our rule. The goal of this final rule is to use our available resources in the best possible way.

The Administrative Procedure Act (APA) and the Use of ALJs To Hear and Decide Cases

Comment: Several commenters said that Congress passed the APA in part to ensure that the public had a right to a

³ We excluded two comments from employees of the Social Security Administration who submitted the comments in their capacity as agency employees. The other comments we excluded were out of scope or nonresponsive to the proposal.

¹ 84 FR 70080 (Dec. 20, 2019).

² 84 FR 69298 (Dec. 18, 2019).

neutral and impartial arbiter of facts to adjudicate appeals of agency decisions. One commenter said that our proposed rule would upend our longstanding consistency with the APA's requirements, and would deviate from our past practices and Congressional intent. One commenter referred to sections of the APA that state that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,"⁴ the agency, one or more members of the body that comprises the agency, or an ALJ, must "preside at the taking of evidence."⁵ The commenter opined that SSA disability cases are adjudications required by the Act to be determined on the record and that the statute mandates that "if a hearing is held, [the Commissioner] shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision."⁶ According to the commenter, the statute's mandate triggers application of the APA and this is consistent with the APA's definition of "adjudication," which, according to the commenter, was intended to include proceedings such as "claims under Title II (Old Age and Survivors' Insurance) of the Act."⁷

Some commenters acknowledged that Congress has never explicitly included the requirement to use ALJs in the Act, but said that it has made clear in legislative history that our hearing process is covered by the provisions of the APA.⁸ One commenter cited a statement from Congress when it enacted the statute that converted SSA hearing examiners into ALJs under the APA pursuant to 5 U.S.C. 3105 as evidence that Congress intended that we use ALJs.⁹ Similarly, a commenter asserted that because our procedures are nearly identical to those specified by the APA, it is clear that we observe the

APA's procedural and due process protections, which includes requiring ALJs to preside over hearings. According to a commenter, the APA and Act are so similar that the Supreme Court noted that it did not have to distinguish between the two laws because "social security administrative procedure does not vary from that prescribed by the APA."¹⁰ Additionally, commenters stated that Congress has "understood that hearings under the Social Security Act would [continue to] be presided over by APA-qualified hearing examiners."¹¹

According to one commenter, the APA requires the use of ALJs as presiding officers in administrative appeals in virtually all circumstances, the exceptions to which do not apply in the Social Security context.

One commenter referred us to a publication that the commenter said discussed applicable law that invalidates our NPRM.¹²

Response: We disagree with these comments. Congress established our administrative hearings process through the Social Security Act Amendments of 1939.¹³ The original version of section 205(b)(1) of the Act stated:

The [Social Security] Board is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. Whenever requested by such individual . . . who makes a showing in writing that his or her rights may be prejudiced by any decision the Board has rendered, it shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision. . . .

These broad provisions, though slightly modified over the years, generally have remained substantively unchanged since their enactment.¹⁴ Therefore, it has been clear that the head of our agency, initially, the Social Security Board, and currently, the Commissioner, has had the discretion to decide how our hearings process is structured and who may preside over a hearing.¹⁵ From the beginning of our hearings process, the head of our agency has delegated to the Appeals Council

the authority to conduct hearings and issue decisions.¹⁶ Indeed, giving the Appeals Council the authority to hold hearings was part of our original vision for our hearings process, predating and forming the basis for the 1940 regulations that authorized the Appeals Council to hold hearings.¹⁷

Six years after the commencement of our administrative hearings process, and the commencement of the Appeals Council's delegated authority to conduct hearings and issue decisions, Congress enacted the APA.¹⁸ The APA's formal adjudication procedures apply, with limited exceptions, "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹⁹ Significantly, neither the text nor the legislative history of the Act explicitly defines what constitutes a "hearing" under the Act, and nothing in the statute or its legislative history requires us to hold hearings "on the record." While it is true that Congress modeled many of the hearing procedures in the APA on the Act,²⁰ there are significant differences between an informal, non-adversarial Social Security hearing and the type of formal, adversarial adjudication to which the APA applies.

This view of our hearings process as distinct from the type of hearings process to which the APA applies is consistent with the legislative history of the APA, as well as the legislative history of the Act. The legislative history of both statutes highlights the differences between formal, adversarial adjudications by regulatory agencies and informal, non-adversarial proceedings by agencies that administer

⁴ 5 U.S.C. 554(a).

⁵ 5 U.S.C. 556(b)(1)–(3).

⁶ Sections 205(b) and § 1631(c)(1)(A) of the Act (42 U.S.C. 405(b)(1) and 42 U.S.C. 1383(c)(1)(A)).

⁷ The commenter cited the "Attorney General's Manual on the Administrative Procedure Act" 15 (1947), a law review article, Kenneth Culp Davis, *Separation of Functions in Administrative Agencies*, 61 Harv. L. Rev. 612, 636 (1948), and our statement when responding to public comment on hearing procedures under title XVI, 39 FR 37976 (Oct. 25, 1974).

⁸ The commenter quoted material from Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. Nat'l Ass'n Admin. L. Judges (2002), available at: <http://digitalcommons.pepperdine.edu/naalj/vol22/iss2/1>.

⁹ See Social Security Amendments of 1977, Pub. L. 95–216, 91 Stat. 1509 (1977); 5 U.S.C. 3105 (2000); and H.R. Rep. No. 95–617, pt. 2, at 2 (1977).

¹⁰ See *Richardson v. Perales*, 402 U.S. 389, 409 (1971).

¹¹ Paul R. Verkuil, Daniel J. Gifford, Charles H. Koch, Jr., Richard J. Pierce, Jr., and Jeffrey S. Lubbers, *Report for Recommendation 92–7: The Federal Administrative Judiciary*, 1992 Administrative Conference of the United States (ACUS) 769, 820 (1992) (1992 ACUS Report).

¹² Arzt, *supra*, n.8.

¹³ Social Security Act Amendments of 1939, ch. 666, section 201, 53 Stat. 1360, 1362–1369 (1939).

¹⁴ See *Heckler v. Day*, 467 U.S. 104, 125 (1984) (Marshall, J., dissenting). Title XVI of the Act contains substantially the same language as section 205(b)(1). See section 1631(c)(1)(A) of the Act.

¹⁵ See also section 702(a)(4)–(a)(7) of the Act.

¹⁶ 5 FR 4169, 4172 (Oct. 22, 1940) (codified at 20 CFR 403.709(d) (1940 Supp.)). The original regulation governing this issue stated that, "The hearing provided for in this section shall be, except as herein provided, conducted by a referee designated by the Chairman of the Appeals Council. The Chairman may designate a member of the Appeals Council to conduct a hearing. The Territorial Director of the Social Security Board may conduct hearings in the Territories of Alaska and Hawaii. The provisions of this section governing the referee shall be applicable to a member of the Appeals Council or a Territorial Director in conducting a hearing."

¹⁷ *Basic Provisions Adopted by the Social Security Board for the Hearing and Review of Old-Age and Survivors Insurance Claims* 39 (Jan. 1940) (*Basic Provisions*). The *Basic Provisions* are reprinted in *Administrative Procedure in Government Agencies: Monograph of the Attorney General's Committee on Administrative Procedure, Part 3 (Social Security Board)*, S. Doc. No. 77–10, 33–59 (1940).

¹⁸ By its own terms, the APA does not repeal delegations of authority as provided by law. Public Law 79–404, section 2, 60 Stat. 237 (1946).

¹⁹ 5 U.S.C. 554(a).

²⁰ *Richardson v. Perales*, 402 U.S. at 409.

certain Federal benefit programs.²¹ Most notably, under our “inquisitorial” hearings process, an ALJ fulfills a role that requires him or her to act as a neutral decisionmaker and to develop facts for and against a benefit claim. The ALJ’s multiple roles involve, in essence, wearing “three hats”: helping the claimant develop facts and evidence; helping the government investigate the claim; and issuing an independent decision. The APA, on the other hand, specifies that “An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision”²² The APA, therefore, embodies an internal “separation-of-functions” in agency adjudications that are subject to that statute. Indeed, ensuring such an internal separation-of-functions was one of the APA’s fundamental purposes.²³ The internal separation-of-functions required in formal adjudications under the APA is inconsistent with the concept of the “three-hat” role of an adjudicator in a Social Security hearing,

which by its very nature, is an investigatory function.²⁴ Thus, contrary to the restrictions noted in the APA, the SSA adjudicator both performs an investigative function for SSA and participates in the decision.

The ALJ’s three-hat role is consistent with the prevailing view of benefit decision making at the time Congress enacted the APA in 1946. When Congress was considering whether and how to reform the Federal administrative process between the mid-1930s and 1946, it had the benefit of a number of studies on the issue, including the Final Report of Attorney General’s Committee on Administrative Procedure and a series of monographs that the Attorney General’s Committee prepared on numerous Federal agencies, including the Veterans Administration and the Social Security Board. The Final Report of the Attorney General’s Committee recognized a dichotomy between “regulatory” decision making and “benefits” decision making.²⁵ “It did so on the ground that hearings conducted by these agencies merely augmented ex parte investigations which the agencies conducted on the claims before them. This subordinate role played by hearings in the benefit-granting agencies made the Committee’s

general analysis of agency adjudication—including its careful review of separations-of-functions issues—inapplicable to the benefit agencies.”²⁶

The Supreme Court approved the “three-hat” role of our adjudicators in *Richardson v. Perales*, without addressing the APA’s separation-of-functions requirements.²⁷ In *Perales*, the Court was less concerned with the position title of our adjudicators than with ensuring that the hearings process worked fairly and efficiently. The Court declined to consider whether a Social Security hearing was a formal adjudication under the APA because, in the Court’s view, our hearings process, including the “three-hat role” for the adjudicator at the hearing, was fair and worked efficiently to process our tremendous volume of cases.²⁸ The fairness and efficiency of the process, however, did not depend on the fact that an ALJ, as opposed to another type of adjudicator, presided over the hearing.

Consequently, in light of the significant differences between our informal, inquisitorial hearings process and the type of hearings process to which the APA applies, our hearings process is properly viewed as comparable to the APA’s process, but governed only by the requirements of the Act and procedural due process.²⁹

²¹ The legislative history of the Social Security Act Amendments of 1939 states that, “Administrative and judicial review provisions not now provided in the Social Security Act are included, and administrative provisions are included which are similar to those under which the Veterans’ Administration operates. . . . Section 205(b) outlines the general functions of the Board in determining rights to benefits. It requires the Board to offer opportunity for a hearing, upon request, to an individual whose rights are prejudiced by any decision of the Board.” H.R. Rep. No. 728, 76th Cong., 1st Sess. 42 (1939); S. Rep. No. 734, 76th Cong., 1st Sess. 51 (1939). The legislative history of section 205(b) of the Act therefore links the provisions that Congress contemplated for our administrative review process with the process used by the Veterans’ Administration (now the Department of Veterans Affairs), another benefit-granting agency. This linkage to the Department of Veterans Affairs procedures is significant, because “[t]he prevailing pre-World War II view was that benefits decisionmaking was significantly different from regulatory decisionmaking.” 1992 *ACUS Report*, at 815. The Final Report of Attorney General’s Committee on Administrative Procedure, on which Congress relied when it enacted the APA, also highlights the distinction between the regulatory agencies and the benefit granting agencies. S. Doc. No. 77–8, at 55, 69, 263 (1941). “When the Attorney General’s Committee recommended the creation of the office of independent hearing examiner, it was focusing on the operation of regulatory agencies. Benefit adjudication was not a matter of primary concern to the Committee, and there is ground for the belief that the Committee viewed benefit adjudication very differently from regulatory adjudication.” 1992 *ACUS Report*, at 825.

²² 5 U.S.C. 554(d). The APA, 5 U.S.C. 554(d)(2), also provides that the “employee who presides at the reception of evidence” may not “be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.”

²³ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

²⁴ See, e.g., 1992 *ACUS Report*, at 792 n.53 (“Obviously, had the formal hearing requirements of the APA been mandatory, the separation-of-functions requirements would have forbidden the ALJ to assume total control of the process.”); Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on “Ossifying” the Adjudication Process*, 55 Admin. L. Rev. 787, 809–10 (2003) (“[D]isability cases under the Social Security Act—the largest adjudicatory regime to use ALJs as presiding officers—are arguably not even governed by the APA Historically, the Social Security Administration decided to use administrative law judges even though it was not required to do so by any ‘on-the-record’ hearing requirement Moreover, Social Security cases are non-adversarial, the government is not typically represented and, more like the inquisitorial model, the presiding administrative law judge has an affirmative obligation to develop the record even if counsel represents the claimant. Social Security cases have been described as ‘the best example’ of agency adjudication not based on a judicial model. Although Social Security cases are, in numbers at least, the predominant form of ALJ hearing today, they are plainly not the prototypical regulatory hearing of the mid-1940s or the accusatory-style proceeding likely to lead to a finding of culpability or imposition of severe economic sanction whose procedural uniformity appears to be the predicate for an APA-default provision.”); Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 Tulsa L. J. 203, 209 (1996) (“At first glance, this three-hat system may appear to contravene the APA separation-of-functions requirements because the Social Security ALJ is not limited to hearing and deciding. The ALJ also has the task of developing both the claimant’s and the government’s case.”).

²⁵ “Final Report of Attorney General’s Committee on Administrative Procedure,” S. Doc. No. 77–8, at 55, 69, 263 (1941); see 1992 *ACUS Report*, at 815–17.

²⁶ Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 Notre Dame L. Rev. 965, 987 (1991); see also Daniel J. Gifford, *Federal Administrative Law Judges: The Relevance of Past Choices to Future Directions*, 49 Admin. L. Rev. 1, 20–21 (1997) (Gifford, *Past Choices*).

²⁷ 402 U.S. 389, 410 (1971).

²⁸ The *Perales* court relied on statistics showing that the agency received “over 20,000 disability claim hearings annually,” 402 U.S. at 406; see also *id.* at 403 n.7 (citing agency statistics showing that “in fiscal 1968, 515,938 disability claims were processed.”) Those numbers pale in comparison to our more recent workload numbers. In 2019, we received and completed approximately 2.3 million initial disability claims, received more than 510,000 hearing requests, and completed more than 793,000 hearings. “Annual Performance Report, Fiscal Years 2019–2021” at 44, 46 (2020)).

²⁹ See, e.g., 1992 *ACUS Report*, at 791–92 (“The Social Security Administration had long utilized ALJs even though the APA on-the-record hearing requirements may not have required it to do so. . . . By the 1970s the number of disability determinations skyrocketed with the advent of expanded coverage. It became quickly apparent that the number of ALJs making disability determinations would far outstrip those making all formal decisions in government. The remarkable thing about this expanded use of ALJs was that it emerged without APA compulsion because no on-the-record hearing was mandated in the disability context.”); Kent Barnett, *Against Administrative Judges*, 49 U.C. Davis L. Rev. 1643, 1664–65 (2016) (Barnett, *Against Administrative Judges*) (“SSA has chosen to use ALJs in the absence of any ‘on the record’ language.”); Paul R. Verkuil, *Reflections Upon the Federal Administrative Judiciary*, 39 UCLA L. Rev. 1341, 1348–49 (1992); Phyllis E.

We recognize, as some commenters noted, that on two prior occasions, Congress explicitly authorized us, on a temporary basis, to use non-ALJ adjudicators in our hearings process: first, after Congress created the disability program in the 1950s, and again when Congress created the Supplemental Security Income (SSI) program in the 1970s.³⁰ One possible explanation for these temporary authorizations is that they reflect a congressional belief that, without such authorization, the APA would have compelled us to use ALJs in our hearings process. The commenters seemed to proceed from that assumption. However, an equally plausible explanation for Congress's action is a need for expediency: Congress preferred to address the service delivery problems that arose after enactment of the disability and SSI programs through means that were the least disruptive to our existing processes. In this context, "Congress's temporary authorization for non-ALJ

adjudication [after enactment of the disability program] was merely intended to provide relief to the SSA without revising the SSA's decisional format. Under such a view, Congress did not consider the larger question of whether Title II proceedings were or were not governed by the APA or whether they required APA-qualified ALJs as presiding officers."³¹

We also disagree with those commenters who expressed possible due process concerns. It is important to note that there is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs. Indeed, adjudicators other than ALJs significantly outnumber ALJs, and they preside over hundreds of thousands of adjudications in the Federal government each year, including many, such as those conducted by the Department of Veterans Affairs, that involve issues similar to the ones that our adjudicators are required to decide.³² With respect to the issue of who may be a decisionmaker in an adjudicatory proceeding, the fundamental requirement of due process is that the decisionmaker be fair and impartial.³³

As we explained in the preamble of the NPRM, we will not implement these changes in a way that will undermine the independence and integrity of our existing administrative review process. We take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decisionmakers, arrived at through a fair process that provides each claimant with the full measure of due process protections. Since the beginning of our administrative review process in 1940, we have held an unwavering commitment to a full and fair hearings process. This final rule will not alter the fundamental fairness of our longstanding hearings process. Under our current rules, and under sections 404.956(c) and 416.1456(c) of this final

rule, our AAJs will apply the same rules that our ALJs apply when they hold hearings. As they do currently, under the authority prescribed by sections 404.979 and 416.1479, AAJs will independently decide cases based on the facts in each case and in accordance with agency policy set out in regulations, rulings, and other policy statements. They will continue to maintain the same responsibility and independence as ALJs to make fair and accurate decisions, free from agency interference. Because AAJs and ALJs have similar levels of training, will follow the same set of policies, and have equivalent decisional independence, we anticipate that when AAJs are used at the hearing level, they will provide the same level of service and fairness as ALJs do.

Comment: A commenter said that the regulations and policies currently in place, which we cited as support for our NPRM, have only stood because they have not been previously implemented, and thus were never challenged. The commenter opined that the two regulations that give AAJs the authority to hear cases are in conflict with the APA, which requires adjudications on the record to be conducted only by the agency, one of the members of the body that comprise the agency, or an ALJ appointed under 5 U.S.C. 3105.

Response: We disagree. As explained above, in light of the significant differences between our hearings process and the type of hearings process to which the APA applies, we believe our hearings process is properly viewed as comparable to the APA's process, but governed only by the requirements of the Act and procedural due process. For the reasons discussed above, this final rule is consistent with the Act and safeguards the individual's right to procedural due process.

Comment: A commenter stated that it is only by regulations, not statute, that we use the Appeals Council to hear appeals at our agency. The commenter opined that if agencies could promulgate regulations and make anyone a member of the body that comprises the agency, then agencies would never need to use ALJs. The commenter cited the Supreme Court's decision in *Wong Yang Sung v. McGrath*³⁴ as demonstrating that adjudicators authorized to conduct hearings only by regulation must give way to ALJs.

Response: We disagree with this comment. Contrary to the commenter's assumption, we are not providing our

Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administration Justice in an Ever-Expanding Bureaucracy*, 3 Health Matrix 339, 353 n.18 (1993) ("SSA decides large numbers of disability cases informally—that is outside the formal adjudication requirements of the APA—yet it uses ALJs to do so."); cf., ACUS, *Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program*, at 11–12 (2014). (<https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf>) (discussing SSA's use of ALJs and noting that, "The relevant provision of the Social Security Act, however, required only an 'opportunity for hearing,' not a 'hearing on the record.' This language would not ordinarily be read to require observance of formal APA adjudication procedures.").

³⁰ Public Law 85–766, 72 Stat. 864, 878 (1958); Public Law 86–158, 73 Stat. 339, 352 (1959); Public Law 92–603, 86 Stat. 1329, 1475 (1972). Notably, the legislation that authorized us to use non-ALJ adjudicators at the outset of the SSI program may have had an unintended effect. At the outset of the SSI program in 1974, as now, many claimants who applied for SSI payments under title XVI of the Act also applied for benefits under title II of the Act. We needed a feasible way to decide these concurrent claims, and using a different adjudicator to decide each claim would not have been supportable because concurrent claims usually involve common issues. Congress subsequently enacted legislation to address the issue. See Public Law 94–202, 89 Stat. 1135 (1976); H.R. Rep. No. 679, 94th Cong., 1st Sess. 3 (1975); S. Rep. No. 550, 94th Cong., 1st Sess. 3–4 (1975), reprinted in 1975 U.S.C.C.A.N. 2347, 2349–2350 (1975); Public Law 95–216, 371, 91 Stat. 1509, 1559 (1977); H.R. Conf. Rep. No. 837, 95th Cong., 1st Sess. 74 (1977), reprinted in 1977 U.S.C.C.A.N. 4308, 4320. The first law, Public Law 94–202, made the requirements for hearings held under title XVI of the Act consistent with those held under title II, and provided that the hearing examiners who had been hired under the original version of the SSI statute would be considered ALJs on a temporary basis. The second law, Public Law 95–216, made these adjudicators ALJs on a permanent basis.

³¹ 1992 ACUS Report, at 820–21; see also Gifford, *Past Choices*, at 26, n.139.

³² See Kent H. Barnett, *Some Kind of Hearing Officer*, 94 Wash. L. Rev. 515, 541–43 (2019) (recognizing that non-ALJs significantly outnumber ALJs in the Federal government, and noting that, as of approximately June 2019, there were 1,931 ALJs versus at least 10,831 non-ALJs in the Federal government); John H. Frye, III, *Survey of Non-ALJ Hearing Programs in the Federal Government* 59–79 (August 1991) (available at: <https://www.acus.gov/sites/default/files/documents/00000001.pdf>).

³³ See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) (noting that, "due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities" and rejecting a due process challenge to the use of non-ALJ hearing officers who "serve[d] in a quasi-judicial capacity, similar in many respects to that of administrative law judges" in certain Medicare hearings).

³⁴ See *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950).

AAJs with the authority to hold hearings because we consider them members of the body that comprise the agency under the APA. As we explained above, from the beginning of our hearings process, the head of our agency—initially, the Social Security Board, and currently, the Commissioner—has had statutory authority to decide, through rulemaking, how to structure our hearings process and who may preside over a hearing.³⁵ Moreover, from the beginning of our hearings process, the head of our agency has delegated to the Appeals Council the authority to conduct hearings and issue decisions.

We also disagree with the commenter's characterization of the Court's decision in *Wong Yang Sung*. In that case, the Court found that the APA's formal adjudication requirements, which apply in every case of adjudication "required by statute" to be determined on the record after opportunity for a hearing, applied to immigration deportation hearings that were not required by statute, but by the Constitution and procedural due process. The court also held that immigrant inspectors, who held deportation hearings pursuant to regulations, did not fall within the APA's exception for proceedings conducted by "officers specially provided for by or designated pursuant to statute."³⁶ As previously discussed, our hearings process is required under sections 205(b)(1) and 1631(c)(1)(A) of the Act. In light of the significant differences between our hearings process and the type of hearings process to which the APA applies, the proper view of our hearings process is that it is comparable to the APA's process, but governed by the requirements of the Act and procedural due process. Because our hearing process does not fall under the APA's requirements for a formal adjudication, there is no basis to consider whether our AAJs would qualify as "officers specially provided for by or designated pursuant to statute." Consequently, the commenter's reliance on *Wong Yang Sung* is inapposite.

Comment: Several commenters said that our agency has previously made statements indicating that we operate under the APA. For example, in responding to public comments on hearing procedures under title XVI, we said, "The regulations herewith governing full administrative hearing and review are in accordance with the Social Security Act, as amended, and

Administrative Procedure Act (5 U.S.C. 554, 556, and 557) and comply with requirements for administrative due process."³⁷

Response: We disagree with these comments. We recognize that the Department of Health, Education, and Welfare (HEW), our parent agency in the 1970s, and what was then called the Civil Service Commission (CSC) had a dispute over the appointment of ALJs to hear and decide claims under the SSI program after Congress enacted the program in 1972. In that intragovernmental dispute, HEW took the position that an SSI hearing was one to which the APA applied; the CSC took the opposite position, and contended that it had no authority to appoint ALJs for SSI hearings because an SSI hearing was not one to which the APA applied.³⁸ The Department of Justice agreed with CSC's position, and Congress ultimately resolved the dispute.³⁹ Regardless of the position that HEW took on the issue in the 1970s, however, we have long held the view that our hearings process is governed by the requirements of the Act and due process, and is not subject to the formal adjudication requirements of the APA. As explained above, in light of the significant differences between our hearings process and the type of hearings process to which the APA applies, we believe our hearings process is properly viewed as comparable to the APA's process, but governed by the requirements of the Act and procedural due process. For the reasons discussed above, this final rule is consistent with the Act and safeguards the individual's right to procedural due process.

Comment: According to a commenter, the recent U.S. Supreme Court decision *Smith v. Berryhill*⁴⁰ confirms that ALJs must conduct our hearings. The commenter said that the language of this decision indicates that it is not within the agency's discretion to define a "hearing" or appropriate "due process." The commenter said both are reserved for the judicial branch to interpret as a means of further protecting the public from agency over-reaching and ensuring the public receives the protections of the APA as intended by Congress. Another commenter said *Smith v. Berryhill* held that 42 U.S.C. 405(g) provides for judicial review of any final decision made after a hearing before an ALJ, not another group of people. Another commenter said SSA is ignoring the negative impact this rule

change will have on due process and increasing the likelihood that claimants will need to appeal decisions directly to the Federal district courts based on the recent decision of *Smith v. Berryhill*.

Response: We disagree with these comments. The Supreme Court did not decide in *Smith* the type of adjudicator who may preside over our administrative hearings. Rather, *Smith* concerned the narrow issue of "whether a dismissal by the Appeals Council on timeliness grounds after a claimant has received an ALJ hearing on the merits qualifies as a 'final decision . . . made after a hearing' for purposes of allowing judicial review under [section 205(g) of the Act]." ⁴¹

The Court held that "[w]here, . . . a claimant has received a claim-ending timeliness determination from the agency's last-in-line decisionmaker after bringing his claim past the key procedural post (a hearing) mentioned in [section 205(g) of the Act], there has been a 'final decision . . . made after a hearing under [section 205(g)].'" ⁴²

We recognize that the Court noted, in *dicta*, that "the 'hearing' referred to in [section 205(g)] cannot be a hearing before the Appeals Council."⁴³ However, we do not interpret this statement to have any effect on this final rule clarification. The Court made this statement in support of its conclusion that "the fact that there was no Appeals Council hearing . . . does not bar review."⁴⁴ In other words, the Court ruled that the claimant in *Smith* could obtain judicial review of the Appeals Council's dismissal of his request for review even though the Appeals Council did not hold a hearing. The Supreme Court in *Smith* did not decide the type of adjudicator who may preside over our administrative hearings. The Court noted, moreover, that it need not conclusively define "hearing" as used in section 205(g), because the claimant in *Smith* had clearly obtained the type of hearing on the merits contemplated by the statute.⁴⁵

When an AAJ removes a request for a hearing under this final rule, the claimant will still receive the type of merits hearing contemplated by the statute. The AAJ will conduct all proceedings in accordance with the rules that apply to ALJs, and if the claimant is dissatisfied with the hearing decision or dismissal, he or she may ask the Appeals Council to review that action. The AAJ who conducted the

⁴¹ *Id.* at 1771.

⁴² *Id.* at 1777.

⁴³ *Id.* at 1775 n.10.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1775.

³⁷ 39 FR 37976 (Oct. 25, 1974).

³⁸ See Gifford, *Past Choices*, at 16–17.

³⁹ See *supra* note 30.

⁴⁰ 139 S. Ct. 1765 (May 28, 2019).

³⁵ See sections 205(b)(1), 702(a)(4)–(7), 1631(c)(1)(A) of the Act.

³⁶ 339 U.S. at 51–52.

hearing or issued the decision or dismissal will not participate in any action associated with the request for review. In effect, hearings and appeals will remain separate and distinct. The claimant will also retain the right to request judicial review of the agency's final decision.

Because this final rule does not affect a claimant's right to a hearing on the merits as contemplated by the Act, we do not believe the Supreme Court's decision in *Smith* precludes the rule.

Comments About the Congressional Intent Underlying the Act

Comment: According to one commenter, Congressional action makes clear that Congress has long understood that we were required to use ALJs to decide cases. One commenter asserted that, historically, it has only been at the explicit direction of Congress, through the enactment of new law, that we have been empowered to use non-ALJs to decide cases. The commenter said that twice in the 1950s, Congress enacted emergency legislation to permit non-ALJ adjudication, but both times the legislation included a time limit. According to the commenter, the most recent time Congress legislated on our use of ALJs was in 1977, to repeal a provision that permitted us to use non-ALJs to preside over appeals for the recently created SSI program. The commenter opined that these examples demonstrate that Congress understood that we were required to use ALJs and legislation is necessary to permit us to use non-ALJs.

Response: We disagree with these comments. As previously discussed, we recognize that on two prior occasions, Congress explicitly authorized us, on a temporary basis, to use non-ALJ adjudicators in our hearings process: First, after Congress created the disability program in the 1950s and again when Congress created the SSI program in the 1970s.⁴⁶ We have previously explained above that, as the Administrative Conference of the United States has recognized, these congressional actions do not unambiguously indicate that Congress intended us to use ALJs to hear and decide all claims. Moreover, Congress has, in fact, made conflicting statements on this issue. For example, in the Conference Report on H.R. 4277, which became the Social Security Independence and Program Improvements Act of 1994, the conference committee expressed its

understanding of present law as being that our hearings process was not subject to the APA.⁴⁷

Notably, we have previously used non-ALJs to issue decisions without an enactment of new law. Under our current rules, attorney advisors have authority to conduct prehearing proceedings in some cases, and issue fully favorable decisions, as a result of those proceedings.⁴⁸ We adopted our attorney advisor program during the 1990s when we were again confronted with an unprecedented volume of hearing requests. In an effort to process those requests more timely, we published final rules in June 1995 establishing the attorney advisor program for a limited period of two years.⁴⁹ The program's success prompted us to renew it several times until it expired in April 2001.⁵⁰ In August 2007, we published an interim final rule that reinstituted the attorney advisor program,⁵¹ and in March 2008, we issued a final rule without change.⁵² As before, we intended the program to be a temporary modification to our procedures, but with the potential to become a permanent program. Since that time, we periodically extended the sunset date of the program,⁵³ until we decided to make it permanent in August 2018 because it had become an integral tool in providing timely decisions to the

public while maximizing the use of our ALJs.⁵⁴

Comments About the Clarity of Our NPRM

Comment: Several commenters said there are a number of questions that we did not address in our NPRM, which makes it difficult for the public to evaluate the proposal. Some commenters said the proposal was so vague that it is impossible for the public to provide meaningful comment on it and, as a result, the proposal does not meet the basic requirements of rulemaking under the APA.

Among the questions raised, commenters asked when an AAJ would be assigned a claim, hold a hearing, and issue a decision. Others asked when and how often we expect AAJs to exercise the authority to hold hearings (e.g., if there will be a threshold for the number of pending hearing requests above which we would exercise this authority). Some commenters wanted to know if we would give AAJs the same goals as ALJs in terms of case processing. Others asked if we envision hiring more AAJs, if AAJs will hold hearings by video teleconference, and if we would place AAJs in local offices. One commenter asked if a claimant could object to a hearing by an AAJ and ask for an ALJ instead. Some commenters wanted to know if AAJ decisions would be subject to quality reviews and if AAJs who hear cases would continue to hear appeals at the same time.

Response: We continually evaluate our available authority to best handle our work. As discussed above and in the preamble of our NPRM, AAJs have had authority to remove hearing requests, hold hearings, and issue decisions since the beginning of our hearings process in 1940. This final rule merely seeks to clarify the rules that would govern when and how AAJs hold hearings and issue decisions. Furthermore, this rule provides that AAJs will be subject to the same policies and procedures as ALJs, if they remove a request for a hearing. We expect that these revisions will provide us with much-needed flexibility to respond to, and mitigate, the impact of surges in hearing requests and to meet the needs of the public we serve. There may be nationwide caseload surges, regionalized caseload surges, or other circumstances that warrant staffing hearings with new or reallocated AAJ staff. For example, the caseload surge in the wake of the 2008 recession serves as a clear example of a system-wide backlog where, under this rule, new or

⁴⁷ H.R. Conf. Rep. No. 103-670, at 98 (1994), reprinted in 1994 U.S.C.C.A.N. 1553, 1564 (noting that, "Although not required by law, the agency follows the procedures of the Administrative Procedures [sic] Act (APA) with respect to the appointment of ALJs and the conduct of hearings."). See, e.g., Barnett, *Against Administrative Judges*, at 1664-65 ("[I]t is far from clear that the SSA is required to use ALJs or formal adjudication under the APA. After all, legislative history to statutory amendments in 1994 states that although the SSA uses ALJs, the use of ALJs and formal APA proceedings are 'not required by law.'"); *ACUS Final Report on EEOC Adjudication*, at 11-12, n.73 ("There nonetheless remains some dispute over whether Congress intended to require DI and SSI hearings be conducted under the APA.").

⁴⁸ 20 CFR 404.942 and 416.1442.

⁴⁹ 60 FR 34126 (June 30, 1995).

⁵⁰ 62 FR 35073 (June 30, 1997) (extending expiration date to June 30, 1998); 63 FR 35515 (June 30, 1998) (extending expiration date to April 1, 1999); 64 FR 13677 (Mar. 22, 1999) (extending expiration date to April 1, 2000); 64 FR 51892 (Sept. 27, 1999) (extending expiration date to April 2, 2001).

⁵¹ 72 FR 44763 (Aug. 9, 2007).

⁵² 73 FR 11349 (Mar. 3, 2008).

⁵³ 74 FR 33327 (July 13, 2009) (extending expiration date to August 10, 2011); 76 FR 18383 (May 4, 2011) (extending expiration date to August 9, 2013); 78 FR 45459 (July 29, 2013) (extending expiration date to August 7, 2015); 80 FR 31990 (June 5, 2015) (extending expiration date to August 4, 2017); 82 FR 34400 (July 25, 2017) (extending expiration date to February 5, 2018); and 83 FR 711 (Jan. 8, 2018) (extending expiration date to August 3, 2018).

⁴⁶ Public Law 85-766, 72 Stat. 864, 878 (1958); Public Law 86-158, 73 Stat. 339, 352 (1959); Public Law 92-603, 86 Stat. 1329, 1475 (1972).

⁵⁴ 83 FR 40451 (Aug. 15, 2018).

reallocated AAJs could augment the current number of ALJs conducting hearings. Using AAJs can allow the agency to conduct more hearings with less wait time for claimants. This rule is intended to provide flexibility when there is a need for additional support at the hearings level. As another example, in a situation where a regional office unexpectedly needs to re-hear a substantial number of cases, this rule will allow SSA to add additional AAJs to the hearing level review.

We did not specify when we would exercise this authority so that we are able to address unforeseen circumstances. For example, since March 2020, we have had to modify substantially our normal hearings process in light of the national public health emergency resulting from the COVID-19 global pandemic. We closed our hearing offices to the public and began offering claimants the opportunity for a hearing by telephone. Such unforeseen scenarios have the potential to disrupt substantially our normal operations and the availability of all of our adjudicators. We therefore should prepare for this type of unforeseeable circumstance by ensuring that our rules allow us the maximum flexibility to hear and decide claims, in order to provide an appropriate level of public service. This final rule will help us do that. In terms of the other specific questions, we will apply the same rules that apply to ALJs when AAJs hold hearings and issue decisions.

In addition to this rule, we will continue to utilize other flexibilities during surges in hearing requests and during case backlogs, such as shifting cases from hearing offices that are overburdened to hearing offices that have less of a demand or reassigning cases to ALJs or AAJs that have the capacity to take on additional cases, to help reduce the number of pending hearing requests and use all of our adjudicative resources in the most effective manner.

Comments About the Data and Evidence That Justifies the Rule

Comment: Some commenters said that we did not comply with the rulemaking provisions of the APA because we did not provide technical studies or data to explain or support the necessity of this change. One commenter said our NPRM makes conclusory statements that having AAJs conduct hearings will help us process claims faster, with no data or information on how we reached this conclusion. Further, the commenter stated the NPRM does not provide information on how we will track or

monitor the data to see if the rule leads to faster claims processing.

One commenter said that we did not substantiate our assertions related to our need for flexibility and increased capacity to address short-term workloads. According to the commenter, our only rationale for needing additional adjudicative flexibility is the difference in hearing wait times across the country. In the commenter's opinion, we already have enough flexibility to address such disparities. The commenter said that we should use our existing flexibility (*e.g.*, our national first in, first out case assignment policy; our ability to transfer workloads between hearing offices; and our ability to schedule appearances by video teleconferencing) to balance the hearing level workload and address any future surge in hearing requests rather than making the proposed changes final.

Response: We disagree that our NPRM required technical studies or data to support this change. As we explained above, this final rule merely clarifies the existing authority of AAJs to hold hearings and issue decisions, in response to questions raised about our existing authority for AAJs to assume ALJ hearings.

Additionally, the commenter mischaracterized our rationale for using AAJs to hold hearings and issue decisions. We have not asserted that having AAJs hold hearings and issue decisions will result in faster claim processing times. Instead, we believe this final rule will allow us flexibility to prevent an increase in waiting times that would naturally occur, if there were no increase in adjudicatory capacity to respond to a surge in hearing requests. In our experience, expanding our adjudicative capacity allows us to hear and decide more cases. By expanding our adjudicative capacity, we anticipate that if there is a surge in hearing requests, as we have regularly seen over the history of our programs, we can use AAJs to hear and decide cases pending at the hearing level. As such, we anticipate this change will assist in reducing the amount of time a claimant must wait before we hold a hearing on his or her claim for benefits, if there were no increase in adjudicatory capacity.

Currently we have 71 AAJs, which is in alignment with staffing needs relative to the current workload at the Appeals Council. In certain circumstances, we may be able to use existing AAJ staff at the hearing level to supplement hearing level caseload surges, and we may have to use AAJs even when Appeals Council pending cases are average or above average, if there is a relative critical

need at the hearings level. However, to avoid creating a subsequent backlog at the Appeals Council or to provide greater support, we may need to hire additional AAJs to conduct hearings or to assist with pending cases at the Appeals Council. When additional flexibility is needed, the additional AAJs may help to reduce processing wait times and may avoid the development of a backlog at the Appeals Council.

Comments About the Timing and Necessity of the Rule

Comment: One commenter said that we did not give a compelling explanation for (1) why we have not exercised this authority in the past; (2) why we have decided to exercise the authority now; and (3) why the regulation is necessary if the authority already exists.

Response: We acknowledge that although AAJs already have authority under our current regulations to remove a request for a hearing that is pending before an ALJ, hold a hearing, and issue a decision,⁵⁵ we have not exercised this authority in the past. A major reason we had not previously exercised this authority was a lack of regulatory guidance on *how* we would exercise the authority. For this reason, this final rule clarifies that if the Appeals Council assumes responsibility for a hearing request, it must conduct all proceedings in accordance with the rules set forth in sections 404.929 through 404.961 or 416.1429 through 416.1461, as applicable. This final rule also clarifies in section 422.205(a) that Appeals Council decisions and dismissals issued on hearing requests removed under sections 404.956 or 416.1456 require only one AAJ's signature. Additionally, this final rule clarifies that if a claimant is dissatisfied with a hearing level decision issued by an AAJ, he or she may request Appeals Council review. Further, as stated above, we are providing guidance now in preparation of exercising this authority, should the need arise.

Comment: One commenter said that it is now as easy to hire ALJs as it is to hire AAJs, because we (not the Office of Personnel Management (OPM)) now predominantly administer the process. The commenter questioned why we would choose now to assert this regulatory authority, when presumably there is no practical need for us to do so.

Response: We acknowledge that our agency is now predominately responsible for hiring ALJs. However,

⁵⁵ See 20 CFR 404.956 and 416.1456.

we are not pursuing this regulation because of previous hiring practices. The change in the hiring process is not directly relevant to this final rule and our reasons for pursuing this final rule, which we previously explained, still exist.

Comment: Several commenters asserted there are more than sufficient numbers of ALJs to handle the current workload and, therefore, there is no need to revise our rules. A commenter said that our ALJs reduced the pending number of cases to its lowest point in 15 years at the end of Fiscal Year 2019 and virtually eliminated the backlog. According to the commenter, ALJs have met expectations and are keeping pace with the number of cases filed.

Response: Currently there are 1,389 ALJs and 71 AAJs. At the end of May 2020, we had approximately 450,048 applicants for benefits who were waiting for a hearing before an ALJ.⁵⁶ Though our number of current pending cases is not as high as it has been at peak levels, we expect that these revisions will provide us with much-needed flexibility to respond to, and mitigate, the impact of surges in hearing requests as necessary in the future.

Furthermore, we wanted to allow the public the opportunity for public comment, as we prefer not to implement changes on a temporary basis in times of immediate need. Given the length of time that it takes to engage in the notice and comment process required in rulemaking, we are engaging in the rulemaking process now before any potential future surge in hearing receipts. If we delay the start of the rulemaking process, a sudden increase in hearing receipts could potentially overwhelm our limited administrative resources by the time the rulemaking process is complete. We have seen this happen in the past, such as when the sudden rise in claims and hearing requests after the 2008 recession resulted in more than 1.1 million pending hearing requests. In order to be appropriate stewards of the Social Security programs, we need to plan for such inevitable surges, and not merely be reactive to them.

Comments About Our Motives for the Rule

Comment: Multiple commenters opined that we were pursuing this

regulation for reasons other than those we stated. One commenter stated this rule was an attempt to circumvent fair labor laws and intimidate the Association of Administrative Law Judges (AALJ) union into backing off its position during the current labor negotiations. Another commenter opined that AAJs do not have enough work to do and this proposal is an attempt to save AAJ jobs. Multiple commenters said that this proposal was a step toward discontinuing our use of ALJs. Several commenters opined that we want to get rid of ALJs so we may have more control over disability determinations. Another commenter asked if this rule is the first step toward combining the hearing and Appeals Council levels of review.

Response: The commenters' characterizations of and speculations about the purposes behind our rule are incorrect. As we stated in the NPRM, we are pursuing this final rule to increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Our ability to use our limited resources more effectively will help us quickly optimize our hearings capacity, which in turn will allow us to issue accurate, timely, and high-quality decisions. We are not pursuing this regulation to affect labor negotiations, save jobs, discontinue the use of ALJs, or combine the ALJ and Appeals Council levels of review.

Comments About the Decisional Independence of ALJs Versus AAJs

Comment: Commenters said that ALJs are appointed with the specific purpose of ensuring a neutral and impartial factfinder, free from pressure from their hiring agency and political influence, to adjudicate appeals of agency decisions. Measures such as independent proceedings for termination protect ALJs, as they are not subject to performance evaluations and are ineligible for bonuses. The commenter said that ALJs have these protections so they can make decisions objectively, independently, and fairly, without fear of interference or influence from an agency.

Commenters asserted that, in contrast, AAJs receive performance evaluations and potential bonuses, and the Commissioner can more easily remove them from their positions. Commenters said that the ALJ and AAJ positions could never be equivalent, if one is subject to agency-imposed performance standards, while the other is not. Commenters concluded that allowing AAJs to hold hearings would effectively

subject the entire administrative adjudication process to performance appraisal control by our agency.

Response: We disagree with these comments. We take seriously, and always have taken seriously, our responsibility to ensure that claimants receive accurate decisions from an impartial decisionmaker, arrived at through a fair process that provides each claimant with the full measure of due process protections. We have held an unwavering commitment to a full and fair hearings process since the beginning of the Social Security administrative review process in 1940, and we do not intend to alter the fundamental fairness of our longstanding process in this final rule. Under this final rule, our AAJs, like our ALJs, will have the same responsibility that they always have had to make fair and accurate decisions, free from agency interference. As explained in the preamble, any AAJ who holds hearings and issues decisions on any case pending at the hearing level under titles II, VIII, or XVI of the Act, would be required to follow the same rules as ALJs including exercising independent judgment and discretion in individual cases.

Comment: Commenters opined that it is not enough for us to say that non-ALJs presiding over hearings would have qualified decisional independence under agency policy. They said that statement is insufficient because we can easily change this "internal agency policy."

Response: We disagree with this comment. As noted in the response above, when AAJs hold hearings and issue hearing level decisions, they are required to exercise independent judgment and discretion. Furthermore, AAJs currently issue decisions independently under the authority prescribed by sections 404.979 and 416.1479. We do not intend to change this requirement of their position, and disagree that this is just an "internal agency policy" that is easily changed. We would not compromise the integrity and fairness of our programs by infringing upon an AAJ's ability to exercise independent judgment and discretion in individual cases.

Comment: One commenter said using AAJs would create the appearance of partiality that violates the due process clause of the U.S. Constitution. According to the commenter, due process concerns itself with the *appearance* of partiality and not an actual showing of partiality. Another commenter said recent decisions from the Supreme Court support the assertion that there are legitimate due process concerns about the impartiality of AAJs,

⁵⁶ We are making the national Hearing Office Workload from June 2020 available as supporting documentation, at <https://www.regulations.gov>, under "supporting and related material" for this docket, SSA-2017-0073. The national Hearing Office Workload information is also available at https://www.ssa.gov/appeals/DataSets/02_HO_Workload_Data.html.

because we retain the ability to control the decision making and, therefore, there remains the appearance of partiality.⁵⁷ The commenter also said decisions issued by AAJs who are not impartial will be held invalid, and these cases could usher in class action lawsuits in light of *Lucia v. SEC*.⁵⁸ The commenter said that ALJs increase the likelihood of deferential judicial review and absolute official immunity for our adjudicators.⁵⁹ According to another commenter, this proposal could make our system unfair or perceived to be unfair, and for that reason, the courts could overturn more decisions.

Response: We disagree with this comment. As stated previously, there is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs.⁶⁰ We will not implement this final rule in a way that could undermine the independence and integrity of our existing administrative review process. We take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decisionmakers, arrived at through a fair process that provides each claimant with the full measure of due process protections. This revised rule would not alter the fundamental fairness of our longstanding hearings process because it requires AAJs to follow the same rules that apply to ALJs in a process that the Supreme Court has long held is consistent with due process. Additionally, if the Appeals Council denies a request for review of an AAJ decision, parties would have the ability to seek judicial review in Federal district court pursuant to section 205(g) of the Act.

Comment: One commenter said it is best to have a local hearing with an ALJ. The commenter said that in his or her experience, AAJs “rubber stamp” denials or find reasons to remand cases, which prolongs cases unnecessarily and does not ultimately help claimants win. The commenter asserted that AAJs work together in the Washington, DC, area and seem to be “company men and women,” while ALJs are in local communities across the country. The commenter opined that a local ALJ is better than an AAJ because the AAJs do

not know local areas and are concerned more about keeping their employer happy than helping people.

Response: Under this final rule, AAJs would apply the same rules as ALJs when holding hearings. While our AAJs work from several locations near Baltimore, Maryland, and Washington, DC, the physical location of our hearing level adjudicators is not relevant because we administer national programs and apply uniform policies and procedures nationwide to the extent feasible. Additionally, our AAJs will continue to possess the same responsibility and independence they have always had to make fair and accurate decisions, free from agency interference.⁶¹ We also note that the ALJs in the National Hearing Centers adjudicate cases outside of their locality.

Comment: A commenter asserted it would appear unfair for the Appeals Council to act on a request for review of a hearing level decision or dismissal issued by an AAJ. A different AAJ would have to consider the request, but that AAJ would be a colleague of the AAJ who issued the decision or dismissal.

Response: To ensure impartiality, this final rule precludes an AAJ who conducted a hearing, issued the decision in a case, or dismissed a hearing request, from participating in any action associated with a request for Appeals Council review in that case. Similarly, AAJs will also be precluded from participating in quality reviews or own motion reviews of any decisions they issued at the hearing level. An AAJ reviewing a hearings level decision will consider the circumstances of the case in accordance with agency policy set forth in the regulations, rulings, and other policy statements, and will exercise independent judgement, free from agency pressure. We also intend to provide subregulatory guidance on AAJ recusals in requests for hearings, as we do for ALJs in the Hearings, Appeals, and Litigation Law (HALLEX) manual I-2-1-60A.⁶²

In addition, we note that under our current business processes, AAJs

already review the work of other AAJs. The Appeals Council conducts a random sampling of AAJ work product in its in-line quality review process, where an AAJ reviews the work product of another AAJ.

Comments About the Experience and Skills Levels of AAJs and ALJs

Comment: According to one group of commenters, the title, “Administrative Appeals Judge,” in many ways confuses this issue as it does not accurately describe the position and is a misnomer. The commenters said, before the mid-1990s, the Appeals Council was composed of members, not judges. According to the commenter, the title, “member,” aptly described the position: A member of a group that ensures the consistency and uniformity of agency decisions. The commenters also said that the mission of the Appeals Council is to adjudicate cases similarly to ensure that we treat claimants fairly and consistently throughout the nation. The commenters, who formerly served on the Appeals Council, said when they were part of the Appeals Council, they regularly met as a group to debate and decide questions of policy and procedure. They bound themselves according to the policy interpretations to ensure they reviewed cases consistently and uniformly. Conversely, ALJs hear and decide benefit cases *de novo*. Using the Commissioner’s rules and regulations, ALJs render individualized decisions, tailored to the evidence presented on the record. According to the commenter, while both positions require a thorough knowledge of our agency’s rules and regulations, the skill sets for each job are radically different. Further, another commenter questioned why we have two different positions if we believe that there is no difference between the skills and experience of ALJs and AAJs.

Response: We disagree with the commenter’s assertion regarding the description of the duties of AAJs. While part of the position description of an AAJ requires “formulating, determining, or influencing the policies of an agency,” that role is distinct from an AAJ’s other responsibilities of exercising independent judgment and discretion when reviewing decisions of ALJs. Like an ALJ, an AAJ’s responsibilities include that they “may hold hearings or supplemental hearings.”⁶³ In addition, an AAJ may hold an oral argument with a claimant

⁵⁷ One commenter cited *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). According to the commenter, it did not matter if Justice Benjamin said that he was not biased, the appearance of partiality was so strong, he should have recused himself from deciding the case.

⁵⁸ 138 S.Ct. 2044 (2018).

⁵⁹ The commenter cited *Butz v. Economou*, 438 U.S. 478, 513, 98 S. Ct. 2894, 57 L.Ed. 2d 895 (1978).

⁶⁰ See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).

⁶¹ Our ALJs have protections that provide them with qualified decisional independence, which ensures that they conduct impartial hearings. They must decide cases based on the facts in each case and in accordance with agency policy set out in regulations, rulings, and other policy statements. Further, because of their qualified decisional independence, ALJs make their decisions free from agency pressure or pressure by a party to decide a particular case, or a particular percentage of cases, in a particular way. Consistent with our longstanding policy and practice, our AAJs will continue to follow these same principles.

⁶² See https://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-60.html.

⁶³ See USA Jobs announcement number SV-10664781, closed December 6, 2019, available at <https://www.usajobs.gov/GetJob/ViewDetails/552976200>.

or representative to decide issues based on the record.⁶⁴ Therefore, AAJs have additional responsibilities than what the comment asserts.

We also disagree that the skill sets for AAJ and ALJ jobs are radically different. To become an ALJ or AAJ, applicants must have at least 7 years of progressively more responsible experience as a licensed attorney preparing for, participating in, or reviewing formal hearings or trials involving litigation or administrative law at the Federal, State, or local level. An applicant for either position is required to have experience in preparation, presentation, or hearing of formal cases before courts or governmental bodies. Additionally, in April 2001, Congress made the pay scales for AAJs identical to that of ALJs, which further supports similarities in the skill sets required for the two positions.⁶⁵ Moreover, we note that under our current rules, AAJs, like ALJs, issue individualized decisions using the same skill of applying agency policy to the facts of the case.⁶⁶ In the past, we have had ALJs detailed on a temporary basis to serve as AAJs, further demonstrating that the two positions share similar skill sets.

Comment: One commenter questioned if an ALJ's knowledge, skills, and abilities and other qualifications would be identical to an AAJ's requirements when we release a new position description for ALJs now that we are responsible for our own ALJ hiring. According to another commenter, the most recent job announcements for AAJs and ALJs do not support the contention that AAJs and ALJs have the same skills and experience. The commenter said that the AAJ position requires formulating, determining, or influencing the policies of the agency. According to the commenter, AAJs review cases for policy compliance⁶⁷ and may take a variety of actions, including: Dismissing or denying a request for review of an ALJ decision; issuing a decision affirming, modifying or reversing the ALJ decision; and conducting own motion pre-effectuation and other quality reviews. The commenter said, while AAJs engage in a range of activities, their adjudication “. . . mostly involves error

correction.”⁶⁸ In addition, unlike ALJs, AAJs cannot complete some actions on their own. Two AAJs are required to grant a request for review or to initiate a review on own motion, and as a result, about one-fifth of Appeals Council annual actions involve sign-off by two AAJs. According to the commenter, ALJs play a very different role. They do not set policy or perform a quality review function. Instead, ALJs' day-to-day work is holding non-adversarial, on the record, *de novo* hearings. As noted in the position description, ALJs make and issue decisions directly and their decisions “may not be substantively reviewed before issuance.” ALJs must possess “special knowledge and abilities” that are not required for AAJs, outlined in the ALJ position description.

Response: While we have not yet finalized any new ALJ position description, we disagree with any assertion that the position description would have to be identical to the knowledge, skills, and abilities, and other qualifications of an AAJ, because the primary duties of these positions are not identical. Nonetheless, the qualifying knowledge, skills, and abilities will be substantially similar, if not identical to the requirements of the AAJ position.

We also disagree that the most recent job announcements for AAJs and ALJs do not require the same skills and experience. While we acknowledge that the required skills and experience in the recent postings for AAJ and ALJs use different terminology in describing the required experiences, the required underlying skills and experience are the same and can be obtained through at least 7 years of experience preparing for, participating in, or reviewing cases at formal hearings or trials involving administrative law or courts.⁶⁹ In

addition, qualifications for both positions require the applicant to be licensed and authorized to practice law under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the United States Constitution.⁷⁰

This final rule clarifies under section 422.205(a) that Appeals Council decisions and dismissals issued on hearing requests removed under sections 404.956 or 416.1456 require only one AAJ's signature. Two AAJ signatures will continue to be required when the Appeals Council grants a request for review or decides on its own motion to review an action.

Comment: Some commenters offered the fact that we hired our current ALJs through the competitive service hiring process overseen by OPM as evidence that they were more highly qualified than AAJs. The commenters said that the OPM screening process was extensive and included a rigorous interview process as well as an exam to evaluate the competencies, knowledge, skills, and abilities essential to performing the work of an ALJ. Some commenters questioned if AAJs take an exam before we hire them, and, if so, how it compares to the exam ALJs took. They also asked what experience is required to be an AAJ compared to ALJs. Commenters said we did not provide evidence, data, or information to allow the public to evaluate if AAJs possess the same skills and experience as that of our ALJs.

Response: The President issued Executive Order 13843 in July 2018 requiring appointments of ALJs be made under Schedule E of the excepted service.⁷¹ Therefore, the comments regarding ALJs hiring through the OPM and competitive service process are moot. Although AAJs are not required to take an exam before we hire them, we note that the most recent ALJ posting⁷² does not require an exam. Further, as discussed above, the knowledge, skills, and underlying experience required in

law, regulations, court decisions, and other precedents; propose fair and equitable solutions in accordance with applicable law and regulations; and write clear, cogent opinions). Compare ALJ job posting (USA Jobs announcement SV-10423180, closed April 12, 2019, available at <https://www.usajobs.gov/GetJob/ViewDetails/529866200>) with AAJ job posting (USA Jobs announcement number SV-10664781, closed December 6, 2019, available at <https://www.usajobs.gov/GetJob/ViewDetails/552976200>).

⁷⁰ We note that AAJs must remain licensed attorneys throughout their tenure, while incumbent ALJs need not maintain licensure (see 5 CFR 930.204(b); 78 FR 71987 (Dec. 2, 2013) (eliminating the licensure requirement for incumbent ALJs)).

⁷¹ 83 FR 32755 (July 10, 2018).

⁷² See <https://www.usajobs.gov/GetJob/ViewDetails/529866200/>.

⁶⁴ See 20 CFR 404.976 and 416.1476.

⁶⁵ See <https://www.chcoc.gov/content/new-pay-system-administrative-appeals-judges>; 5 U.S.C. 5372 and 5372b.

⁶⁶ See 20 CFR 404.979 and 416.1479.

⁶⁷ The commenter cited the Social Security Administration, “Fiscal Year 2020 Congressional Justification,” 16 (2019), available at https://www.ssa.gov/budget/FY20Files/FY20-JEAC_2.pdf.

⁶⁸ The commenter cited “ACUS, A Study of Social Security Litigation in the Federal Courts” (2016), available at <https://www.acus.gov/report/report-study-social-security-litigation-federal-courts>.

⁶⁹ The ALJ posting indicates that individuals may meet the minimum qualifications for the position through a general description of qualifying experiences (e.g., participate in settlement or plea negotiations in advance of hearing cases or trial; prepare for trial or hearings; prepare opinions; hear cases; participate in or conduct arbitration, mediation, or other alternative dispute resolution approved by the court; or participate in appeals related to the types of cases above). An individual can meet the qualifying experiences for the AAJ position through the same types of tasks listed under the ALJ position description; however, the minimum qualifications use different terminology. For example, instead of using the broad description of “preparing opinions” in the ALJ posting, the AAJ posting lists specific examples of qualifying experiences (e.g., review, analyze, evaluate, and recommend action to be taken; assimilate, analyze, and evaluate complex facts; interpret and apply

the job postings for AAJ and ALJ are very similar, if not the same.

Comment: Some commenters asked what type of training AAJs receive and how it is different from the training ALJs undergo. One commenter asked what additional training AAJs would receive to ensure they have the skills needed to conduct hearings at the ALJ level. These commenters questioned the cost of additional training, asked when AAJs would receive the training, and inquired how long it would take to get AAJs trained if we exercise the authority.

Response: When we exercise this authority, we will ensure that the AAJs possess the knowledge, skills, and training required to conduct hearings. We would use existing ALJ training materials, as applicable, to train our AAJs. Because any AAJs who may have to use this authority will have experience with our programs due to their work as Appeals Council members, we do not anticipate the training to take as long as for someone unfamiliar with our programs. While newly-hired ALJs receive four weeks of in-person training, only about one of those four weeks focuses on conducting hearings. The remaining three weeks focus on training ALJs on our programs and other internal procedures related to our disability adjudication process. So, we do not anticipate that AAJs will need more than a week or two of training in order to exercise this authority. In addition, AAJs currently have access, and will continue to have access, to the Office of Hearings Operations' Continuing Education Program, so continuing education will be available to AAJs as well.

Comment: Commenters said that candidates for ALJ positions must have significant experience prior to being hired through the OPM screening process and they questioned if AAJs possess the same experience. According to the commenter, the most important experience requirement is participation in hearings or similar proceedings. The commenter said that the ability to assess the credibility of claimants and other witnesses, to effectively question claimants and other witnesses to establish facts and prove or disprove assertions of claimants, and to oversee a hearing proceeding in a fair, respectful, and impartial manner are extremely important skills for an adjudicator holding hearings. Commenters noted that applicants for ALJ positions hired through the OPM screening process were required to demonstrate 7 years of experience as a licensed attorney preparing for, participating in, or reviewing formal

hearings or trials involving litigation or administrative law. The commenter questioned if any of the current AAJs comprising the Appeals Council have experience holding or participating in hearings, and if so, the amount of time that may have elapsed since AAJs last participated in hearings. According to the commenter, hearings experience between an AAJ and an ALJ would not be equivalent because an ALJ holds hearings as a regular, routine, ongoing duty, and we would be asking AAJs to hold hearings only periodically.

Another commenter said that ALJs regularly exercise the skill of independently reviewing copious amounts of medical records and conducting their own independent analysis of the evidence when performing their work. In contrast, the commenter asserted, AAJs do not.

Response: As discussed in our responses above, AAJs and ALJs have similar hiring requirements and skills, and we will ensure that AAJs receive the proper initial and continuing training in order to conduct hearings.

We disagree that AAJs do not possess the skill to review and analyze medical records. Currently, in acting on requests for review and performing own motion review of ALJ decisions, AAJs review the same record that was before the ALJ in order to assess the sufficiency of the ALJ's decision.

Comment: One commenter said that AAJs use other SSA employees, known as analysts, who do the bulk of the work for them. The commenter said that the analysts are not vetted as ALJs are, and more importantly, they are subject to performance evaluations.

Response: We disagree that analysts do the bulk of the work for AAJs. In any event, ALJs also receive support from non-adjudicator employees, known as "decision writers," who are subject to performance evaluations. Decision writers assist ALJs in preparing for hearings and drafting decisions, and the ALJ/decision writer relationship is analogous to the AAJ/analyst relationship.

Comment: One commenter asserted the Appeals Council was never intended to conduct initial hearings and make decisions on whether to grant benefits. Instead, the Appeals Council was created to "oversee the hearings and appeals process, promote national consistency in hearing decisions made by . . . administrative law judges . . . and make sure that the Social Security Board's (now Commissioner's) records were adequate for judicial review."⁷³ The

⁷³ The commenter cited https://www.ssa.gov/appeals/about_ac.html.

commenter also said that appeals officers in the Appeals Council are not judges and this rule creates a new position for the work that Attorney-Examiners/appeals officers had been doing. The commenter further asserted that we sought a new position description from OPM to give these employees the title of administrative appeals judges.

Response: We disagree. Our proposal to clarify when AAJs may conduct hearings and issue decisions under the same rules that apply to ALJs is supported by our existing regulations (see sections 404.956 and 416.1456), which have authorized this option since the beginning of our hearings and appeals process in 1940.⁷⁴ Indeed, as we noted previously, the original vision for our hearings and appeals process, the *Basic Provisions*, which predated our 1940 regulations,⁷⁵ expressly contemplated that the Appeals Council would hold hearings on occasion. Under section 205(b) of the Act, the authority to hold hearings rests with the Commissioner. In accordance with section 205(l) of the Act, the Commissioner's predecessor, the Social Security Board, delegated the authority to hold hearings and issue decisions to the Appeals Council and to the agency's referees (now ALJs) when the Board established the Appeals Council in 1940.⁷⁶ The Appeals Council has continued to retain that authority from 1940 to the present.

Comments About the Perceived Effectiveness and Consequences of the Rule

Comment: Several commenters assumed that we would spend more money to employ AAJs to act in lieu of ALJs, since ALJs are not eligible for bonuses, whereas AAJs are. Thus, the proposal is not cost effective.

Response: We are revising our regulations to increase our adjudicative capacity so that we will be better prepared to address challenges that may arise in the future, including spikes in requests for hearings and hiring freezes. We disagree that having AAJs hold hearings would necessarily be more costly than employing ALJs. For example, during a hiring freeze, we may be prohibited from hiring new ALJs, and therefore, if there were a need to increase adjudicative capacity, we could use our existing AAJs to conduct hearings and issue decisions during that

⁷⁴ 5 FR 4169, 4172 (Oct. 22, 1940) (codified at 20 CFR 403.709(d) (1940 Supp.)).

⁷⁵ See supra note 17.

⁷⁶ 11 FR 177A-567 (Sept. 11, 1946) (codified at 20 CFR 421.6(a) (1946 Supp.)).

time. As such, we see this flexibility as being cost effective.

Comment: Another commenter stated that the Appeals Council has only approximately 53 AAJs available to perform the Appeals Council's review function. Several commenters stated that backlogs and processing time at the Appeals Council increase significantly when requests for hearings increase, such as during the recent historically large backlog in disability hearings that began in 2010. Having a particular AAJ adjudicate claims at the hearings level necessarily means that the AAJ is not available to review ALJ decisions in his or her role at the Appeals Council. According to the commenters, it is likely that if we use AAJs to hold hearings and issue hearing level decisions, we will shift backlogs and increased processing times from the hearings level to the Appeals Council level.

Response: We acknowledge the commenters' concerns about how having AAJs hold hearings and issue hearing level decisions could affect the workloads and processing times associated with existing Appeals Council review. We would consider these implications after assessing all relevant factors at the time we implement this rule. We are publishing this final rule now to clarify the Appeals Council's authority to hold hearings and issue decisions so that the authority will be available for us to use when we need it.

Comment: Commenters opined that these changes could substantially alter workflows within the agency and create significant complications in the appeals process for claimants and agency employees alike.

Response: We disagree with this comment. Our intention is to use the Appeals Council's authority to hold hearings and issue hearing level decisions to assist with our workflow as needed, including addressing any hearings backlog and helping to reduce case processing time by increasing our adjudicative capacity. Other than substituting AAJs for ALJs in some cases, our hearings level process will remain the same. Furthermore, regardless of whether an ALJ or AAJ issues a hearing decision, our ordinary request for review procedures will apply, except that if an AAJ issued the hearing decision, he or she will not participate in any action associated with the request for Appeals Council review. As we explained in the preamble of our NPRM, regardless of whether an ALJ or AAJ holds a hearing, the claimant will receive all the same due process protections. Thus, we do not expect that

this final rule will complicate the process for claimants or agency employees.

Comment: According to a commenter, the constitutional litigation in *Hart v. Colvin* and *Lucia v. SEC*⁷⁷ resulted in uncertainty as to whether adequate due process was provided in individual claims, a disruption and delay of ongoing claims and appeals, and a diversion of agency attention toward administering agency-wide relief. The commenter said that the due process and APA concerns arising from this final rule could very well lead to the same experience for claimants who have their hearings presided over by an AAJ, and may require the agency to expend resources to remediate the final rule. Another commenter said any hearing held and decision issued by an AAJ would be subject to remand and rehearing, as is presently happening across the country with decisions issued by non-Commissioner appointed ALJs in the aftermath of the *Lucia* decision. The commenter said that decisions issued by AAJs who are "not impartial" would be held invalid, and these cases could usher in class action lawsuits in light of *Lucia*. Another commenter stated that this rule change would have a negative impact on due process and increase the likelihood of claimants appealing decisions directly to the Federal district courts.

Response: We disagree with these comments. There is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs. With respect to the issue of who may be a decisionmaker in an adjudicatory proceeding, the fundamental requirement of due process is that the decisionmaker be fair and impartial.

As we explained above and in the preamble of our NPRM, we will not implement this final rule in a way that could undermine the decisional independence of our adjudicators or the integrity of our existing administrative review process. We take seriously our responsibility to ensure that claimants receive accurate decisions from impartial decisionmakers, arrived at through a fair process that provides each claimant with the full measure of due process protections. Since the beginning of our administrative review process in 1940, we have held an unwavering commitment to a full and fair hearings process. This final rule will not alter the fundamental fairness of our longstanding hearings process. Our AAJs will continue to possess the same responsibility and independence they

have always had to make fair and accurate decisions, free from agency interference.

Further, in response to the commenter who suggested that an AAJ hearing level decision would be subject to remand based on the Supreme Court's decision in *Lucia v. SEC*,⁷⁸ we note that the Acting Commissioner of Social Security ratified the appointment of our AAJs in July 2018.⁷⁹

Comment: According to one commenter, the lack of clarity in the NPRM, and the likelihood that our implementation would result in different claimants facing different processes, will create confusion and inconsistency in the appeals process to the detriment of our agency and claimants alike.

Response: When we implement this final rule, we will use uniform procedures and processes for all claimants. Regardless of whether an ALJ or an AAJ hears a claimant's case, we are required to apply the same rules and procedures to all cases.

Comments About Our 2016 Proposal To Use AAJs To Hear and Decide Cases

Comment: Many commenters alleged that since we did not pursue an earlier proposal to use AAJs to hear and decide cases in 2016 (as part of our Compassionate and Responsive Services (CARES) backlog reduction plan), we should not pursue it now.

Response: In January 2016, we recommended that AAJs hold hearings in certain cases as part of our adjudication augmentation strategy under the CARES backlog reduction plan.⁸⁰ We ultimately decided against implementing the adjudication augmentation strategy due to resource constraints.⁸¹ We then decided to address the issue through changes to our regulation, adopted in accordance with the APA's notice and comment rulemaking procedures.

⁷⁸ 138 S. Ct. 2044 (2018).

⁷⁹ See Social Security Ruling 19–1p, *Titles II and XVI: Effect of the Decision in Lucia v. Securities and Exchange Commission (SEC) On Cases Pending at the Appeals Council*, 84 FR 9582, 9583 (Mar. 15, 2019).

⁸⁰ The adjudication augmentation strategy was part of our 2016 Plan for Compassionate and Responsive Service (CARES), available at https://www.ssa.gov/appeals/documents/cares_plan_2016.pdf. Under the strategy, we would have expanded (on a temporary basis) the number of cases in which AAJs on the Appeals Council could hold hearings under the authority of the regulations.

⁸¹ See letter from Theresa Gruber, then Deputy Commissioner for Disability Adjudication and Review, to The Honorable James Lankford, dated August 4, 2016, available at page 89 of <https://www.govinfo.gov/content/pkg/CHRG-114shrg21182/pdf/CHRG-114shrg21182.pdf>.

⁷⁷ 138 S.Ct. 2044 (2018).

Comment: One commenter, referring to our proposal for AAJs to hold hearings in 2016 as part of our CARES backlog reduction plan, asked why we changed the types of cases we would have AAJs hear. The commenter said when we proposed to exercise our existing regulatory authority for AAJs to hold hearings in 2016 as part of the CARES backlog reduction plan, we proposed to have AAJs hold hearings in “nondisability” cases specifically. According to the commenter, we indicated that we made this decision because, “the cases targeted for the augmentation strategy represent only 3.6 percent of our hearings pending and the non-disability cases often involve issues that ALJs do not typically encounter. A small number of AAJs and staff will specialize in adjudicating the non-disability issues, thus freeing up critical ALJ resources to handle disability hearings.”⁸² The commenter asserted that the rationale we presented for using AAJs to hold hearings and issue decisions in 2016 undercuts our assertions that AAJs and ALJs have the same experience and skills and that AAJs should be able to obtain jurisdiction over any type of claim. The commenter questioned what changed between our rationale in 2016 and now, and what data, studies, or evidence we relied on in making this determination. The commenter said that we must provide the public with whatever evidence led us to change our proposal and allow the public to examine and comment on that information. According to the commenter, not doing so is a procedural error under the rulemaking requirements of the APA because the public cannot understand and meaningfully comment on the NPRM.

Response: When we proposed our adjudication augmentation strategy under the CARES backlog reduction plan in 2016, we intended for AAJs to hold hearings and issue decisions in non-disability cases. Our proposal attracted significant public and congressional interest,⁸³ and we ultimately decided to pursue clarifying

changes to our regulations instead of pursuing the adjudication augmentation strategy. Although we decided to have AAJs hold hearing and issue decisions in non-disability cases as part of our backlog reduction plan in 2016, we do not believe it would be prudent to specify in our regulations that AAJs are always limited to non-disability cases when they hold hearings and issue decisions. As previously stated, we are clarifying our regulations in order to be better prepared to address unforeseen challenges that may arise in the future.

Furthermore, the fact that we thought it would be best for AAJs to hold hearing and issue decisions in non-disability cases as part of our 2016 backlog reduction plan does not signify that AAJs and ALJs have different experience and skills. Indeed, in our CARES plan,⁸⁴ we also emphasized that AAJs and ALJs have the same experience and skills. Our position on that issue has not changed in promulgating this final rule.

Comments About Notices of Appeals Council Review

Comment: In the NPRM, we proposed to add a statement to sections 404.973 and 416.1473 that says, “However, when the Appeals Council plans to issue a decision that is fully favorable to all parties or plans to remand the case for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.” Some commenters disagreed with this proposed language.

According to one commenter, under our current process, when the Appeals Council reviews a fully or partially favorable case on its own motion and the Appeals Council intends to remand the case, we must give notice to the claimant. The commenter noted that the Appeals Council mails an interim notice that outlines the proposed action, and gives the claimant 30 days to respond to the Appeals Council with arguments or evidence that may cause the Appeals Council to take a different action. The Appeals Council then issues an order that outlines the Appeals Council’s final action. According to the commenter, responses from claimants frequently do not change the Appeals Council’s decision to remand the case, but the current process gives the claimant the opportunity to change the Appeals Council’s mind before it remands the case to the hearing level. The commenter also opined that it would be a violation of due process to allow the Appeals Council to exercise own motion

review of a favorable hearing level decision and remand the case to the hearing level without giving the claimant any opportunity to weigh in or correct the deficiencies identified by the Appeals Council.

The commenter also said that if the Appeals Council is too slow in taking its final action, claimants could continue to receive interim benefits while the Appeals Council has jurisdiction over the matter. According to the commenter, remanding the case without giving the claimant an opportunity to respond would result in the termination of benefits without due process. The commenter said to allow the Appeals Council to remand a case to the hearing level without allowing the claimant to respond is in direct conflict with the requirements of due process, and is more problematic given the length of time that a claimant would have to wait before appearing at another hearing. The commenter proposed that we remove “or plans to remand the case for further proceedings” from the proposed sections.

Response: We disagree with the commenters’ assertions that the proposed language would violate due process. In terms of fully favorable Appeals Council decisions, we revised our rules for administrative efficiency and to codify our longstanding practice.⁸⁵ By sending the notice with the fully favorable decision, the claimant does not have to wait for a separate notice.

In terms of removing the notice requirement for Appeals Council remands, we are revising our rules for administrative efficiency. As the commenter aptly points out, responses to our notices rarely change the Appeals Council’s proposed action to remand a case. We expect that this final rule will result in claimants receiving final decisions on their claim(s) faster and will help to streamline our business processes. Moreover, if the Appeals Council decides to remand a case to the hearing level, the claimant will have an opportunity to be heard before the agency issues its final decision.

We disagree with the commenter’s statement that remanding a fully favorable or partially favorable case on own motion review would result in a termination of benefits without due process. Section 1631(a)(8) of the Act requires us to pay prospective monthly benefits (“interim benefits”) to the

⁸² The commenter cited “Theresa Gruber, Statement for the Record, Hearing Examining Due Process in Administrative Hearings,” Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, United States Senate, May 12, 2016. See <https://www.hsgac.senate.gov/imo/media/doc/Gruber%20Statement.pdf>.

⁸³ “Examining Due Process in Administrative Hearings,” Committee on Homeland Security and Governmental Affairs, Subcommittee on Regulatory Affairs and Federal Management, United States Senate, May 12, 2016, available at <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg21182/pdf/CHRG-114shrg21182.pdf>.

⁸⁴ https://www.ssa.gov/appeals/documents/cares_plan_2016.pdf.

⁸⁵ See HALLEX I-3-6-20 A, available at https://www.ssa.gov/OP_Home/hallex/I-03/I-3-6-20.html, which includes a note that, “[w]hen the [Appeals Council] exercises its own motion review authority and issues a fully favorable decision, notice is not required.”

claimant if we have not made a final decision within 110 calendar days after the date of the ALJ decision. Those interim benefits do not end until the month in which we make a final decision. Therefore, the claimant would continue to receive benefits until there is a final agency decision.

We also note that there are situations where a claimant is not in pay status, following the issuance of favorable decision, because an effectuating component cannot process payments. If, for example, the decision is contrary to the Act, regulations or a published ruling, or the decision is vague, ambiguous, internally inconsistent, or otherwise does not resolve the issues under dispute, the effectuating component may refer the cases to the Appeals Council to consider taking own motion review or reopening and revising the decision.⁸⁶ In these cases, the claimant would not receive benefits until 110 days after the favorable hearing level decision. If the Appeals Council were unable to correct the deficiency and issue a fully favorable decision, the Appeals Council's ability to remand the case to correct the deficiency without prior notice would expedite the claimant receiving a final decision on his or her case.

Comment: One commenter suggested that in sections 404.973 and 416.1473, we clarify that if the Appeals Council plans to issue a combined partially favorable decision (finding, for example, that the claimant became disabled after his or her alleged onset date) and a remand order (ordering further proceedings regarding the period the claimant alleged to be disabled to the date the claimant was found to be disabled), it may send the notice of Appeals Council review to all parties with the combined decision and remand order (without sending a prior notice of review).

Response: We agree with this suggestion. We further revised sections 404.973 and 416.1473 to clarify that when the Appeals Council plans to issue a decision that is favorable in part and remand the remaining issues for further proceedings, we may send the notice of Appeals Council review to all parties with the decision or remand order.

Adding a "Reasonable Probability" Standard to Sections 404.970 and 416.1470

Comment: We received many comments relating to our proposed inclusion of paragraph (d) to sections

404.970 and 416.1470.⁸⁷ We proposed to revise paragraph (d) of these sections to state that the Appeals Council would not review a case based on an error or abuse of discretion in the admission or exclusion of evidence or based on an error, defect, or omission in any ruling or decision unless the Appeals Council found a reasonable probability that the error, abuse of discretion, defect, or omission, either alone or when considered with other aspects of the case, changed the outcome of the case or the amount of benefits owed to any party. Commenters expressed perceived due process concerns, stating that the proposed rule would limit the Appeals Council's ability to review an ALJ's decision, and that the changed standard of review could virtually eliminate Appeals Council review in all but extremely limited circumstances, making the Appeals Council a meaningless step in the adjudication process. Commenters expressed that we would no longer know of the errors in an ALJ's decision if we do not remand these cases to the ALJ to correct the error. Commenters also expressed concerns that there would be no cost savings associated with the proposed change, as the Appeals Council would have to evaluate the entire record, which would increase the time to review a case. Additionally, commenters expressed concerns that the proposal would increase the number of claimants who appeal to Federal court, potentially straining court resources and increasing the time that individuals must wait to receive final decisions.

Some commenters also misconstrued the proposed standard of review at the Appeals Council level of review with the "preponderance of the evidence" standard that applies when an adjudicator issues a determination or decision.⁸⁸ Other commenters expressed alternative language for paragraph (d) or suggested ways to clarify how the reasonable probability standard would apply to the substantial evidence standard.

Response: Upon consideration of the comments regarding our proposal to add a reasonable probability standard in paragraph (d) of sections 404.970 and 416.1470, we have decided not to proceed with that proposal. Because we are not finalizing proposed paragraph (d) of sections 404.970 and 416.1470, we are not finalizing the corresponding language that we proposed to add to the beginning of paragraph (a) of the same sections, "Subject to paragraph (d) of

this section," Additionally, we will not respond to the individual comments regarding our proposal to add a reasonable probability standard in paragraph (d) of sections 404.970 and 416.1470, because they are no longer relevant.

Comments Regarding Federal Court Cases

Comment: One commenter suggested changes to proposed sections 404.984 and 416.1484, which provide that when a Federal court remands a case and the Appeals Council remands the case to an ALJ, the ALJ's decision will become the Commissioner's final decision unless the Appeals Council assumes jurisdiction using the standard set forth in section 404.970 or 416.1470, as applicable. The commenter said it is imprudent for the Appeals Council to use a reasonable probability standard when deciding whether to assume jurisdiction of a case that was previously remanded by Federal court. The commenter stated that the Appeals Council must grant review of a case that is remanded from the Federal court. The commenter opined that failure to grant review because of the "reasonable probability" standard would be viewed unfavorably by the court if the claimant requested judicial review once again. The commenter stated that any action by the Appeals Council must be consistent with the court's remand. If the court orders a remand, the Appeals Council must remand the case (unless it can issue a fully favorable decision).

Response: Appeals Council review of court remands under sections 404.983 and 416.1483 should not be confused with its review of hearing decisions issued after a court remand under sections 404.984 and 416.1484. If a Federal court remands a case, the Appeals Council may issue a decision pursuant to sections 404.983(b) and 416.1484(b), hold a hearing and issue a decision pursuant to sections 404.983(c) and 416.1484(c), or remand the case to an ALJ with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. However, this situation is distinct from when the Appeals Council decides whether to assume jurisdiction after an ALJ, or AAJ, issues a hearing decision in a case remanded by Federal court. In that situation, the Appeals Council may assume jurisdiction based on written exceptions to the hearing decision filed by the claimant or based on its authority pursuant to paragraph (c) of sections 404.984 and 416.1484. However, we do not currently have a regulatory standard to govern how the Appeals Council will

⁸⁶ See generally 20 CFR 404.969, 416.1469, 404.987, and 416.1487.

⁸⁷ See 84 FR 70085, 70087.

⁸⁸ The commenter cited 20 CFR 404.953, 404.979, 416.1453, and 416.1479.

decide whether to assume jurisdiction after an ALJ, or AAJ, issues a hearing decision in a case remanded by Federal court. The revisions to sections 404.984 and 416.1484 make clear that the standard for assuming jurisdiction after an ALJ, or AAJ, issues a hearing decision in a case remanded by Federal court is the same as the standard that applies when the Appeals Council decides whether to review a hearing decision or dismissal under sections 404.970 and 416.1470. We will not respond to any comments relating to our proposal to add a reasonable probability standard in paragraph (d) of sections 404.970 and 416.1470 because, as previously explained, we are not proceeding with that proposal.

Comments About Additional Evidence at the Appeals Council Level of Review

Comment: A commenter stated that our proposal to revise sections 404.976(b) and 416.1476(b) to clarify that the Appeals Council will consider all evidence it receives, but will exhibit that evidence only if it meets the requirements of sections 404.970(a)(5) and (b) and 416.1470(a)(5) and (b) would be unhelpful and superfluous. The commenter said there were three possible options. First, if the evidence were sufficient to warrant review and the Appeals Council issues a decision, it would be exhibited in the record. Second, if the evidence were sufficient to warrant review and a remand to the hearing level, it would not be exhibited. Rather, it would be returned to the hearing office for the ALJ's consideration. Lastly, if the evidence did not warrant review, there would be an open question of when it could be used to provide a protective filing date for a subsequent application (Social Security Ruling 11–1p).⁸⁹ The commenter questioned the purpose of this additional reasonable probability standard.

Response: We disagree that the revisions to sections 404.976(b) and 416.1476(b) are unhelpful and superfluous. As we explained in the preamble of our NPRM, the revisions to sections 404.976(b) and 416.1476(b) clarify when the Appeals Council will mark additional evidence as an exhibit and make it part of the official record. Additionally, we already provide the claimant a protective filing date for a new application whenever a claimant submits additional evidence to the

Appeals Council that does not relate to the period on or before the date of the hearing decision, or whenever the Appeals Council finds that the claimant did not have good cause for missing the deadline to submit written evidence.⁹⁰

Comment: Regarding our proposed revisions to sections 404.976(b) and 416.1476(b), one commenter suggested that we should: (1) Eliminate paragraph (b) altogether; (2) if the paragraph stays, add a sentence stating that any evidence that meets the “reasonable probability standard” in sections 404.970(a)(5) and 416.1470(a)(5) automatically meets the “good cause” standard in sections 404.970(b) and 416.1470(b); or (3) create a truly clarifying and time-saving policy that the Appeals Council, when it grants review to issue a decision, will evaluate and mark as exhibit(s) all relevant evidence.

Response: We disagree with these suggestions. As explained above, regarding (1), we are revising sections 404.976(b) and 416.1476(b) to clarify when the Appeals Council marks additional evidence as an exhibit and makes it part of the official administrative record. Regarding (2), we disagree that good cause for missing the deadline to submit evidence under sections 404.970(b) and 416.1470(b) would always exist whenever the Appeals Council finds, under sections 404.970(a)(5) and 416.1470(a)(5), that there is a reasonable probability that additional evidence would change the outcome of the hearing decision. The good cause requirement in sections 404.970(b) and 416.1470(b) is based on the 5-day rule set forth in sections 404.935(a) and 416.1435(a). Under the 5-day rule, a claimant generally must inform us about or submit written evidence at least 5 business days before the date of his or her scheduled hearing. We adopted the 5-day rule, in part, to ensure that the evidentiary record is more complete when ALJs hold hearings.⁹¹ The commenter's suggestion that we revise our regulations to state that any evidence that meets the “reasonable probability standard” in sections 404.970(a)(5) and 416.1470(a)(5) automatically meets the “good cause” standard in sections 404.970(b) and 416.1470(b) would be inconsistent with the intent of the 5-day rule. Finally, regarding the third suggestion, it is altogether unclear to us how revising our regulations as the commenter proposed would result in greater clarity and save time.

Comment: One commenter agreed with the Appeals Council's current

practice of including in a certified administrative record filed in Federal court any additional evidence that the Appeals Council receives, regardless of whether the Appeals Council marks the evidence as an exhibit and makes it part of the official record. The commenter suggested that we memorialize this practice in the regulatory text at section 404.970(a)(5).

Response: We decline to add language about including additional evidence in certified administrative records to be filed in Federal court in sections 404.970(a)(5) and 416.1470(a)(5), because those rules regard when the Appeals Council will review a case. However, we agree that it would be helpful to clarify in our regulations that additional evidence the Appeals Council received during the administrative review process, including additional evidence that the Appeals Council received but did not exhibit or make part of the official record, would be included in the certified administrative record filed in Federal court. We have added that clarifying language to sections 404.976(b) and 416.1476(b) in this final rule.

Comments About the Wording of Our Paperwork Reduction Act (PRA) Information in the NPRM

Comment: One commenter referred to the PRA section of the NPRM, in which we proposed to update forms to reflect the new regulatory language stating that “Judges” will review the cases, hold hearings, and issue decisions. Currently, our forms use the narrow, specific designation, “Administrative Law Judges.” In the NPRM, we stated that once we published the final rule, we would obtain approval from the Office of Management and Budget for this revision through non-substantive change requests for these information collections, which does not require public notice and comment under the PRA. The commenter disagreed with our statement that this is a “non-substantive change” that does not require public comment.

The commenter said ALJs and AAJs do completely different jobs and treating them the same is either a misunderstanding of the system or a breach of public trust. The commenter said that the public should know what kind of judge they have in a case, and that we should not hide this from the public by changing the title.

Response: The PRA statement in our NPRM focused on the significance of the changes we were planning to make to information collections associated with the regulation. In the NPRM, we

⁸⁹ The commenter refers to Social Security Ruling 11–1p: *Titles II and XVI: Procedures for Handling Requests to File Subsequent Applications for Disability Benefits*, available here: https://www.ssa.gov/OP_Home/rulings/di/01/SSR2011-01-di-01.html.

⁹⁰ 20 CFR 404.970(c) and 416.1470(c).

⁹¹ 81 FR 90987, 90989 (Dec. 16, 2016).

indicated plans to change “Administrative Law Judges” to “judges” to reflect that if the rule were finalized, there would be a possibility that a claimant’s case could be heard and decided by an AAJ from the Appeals Council. In that case, the “Administrative Law Judge” appellation would not be accurate. However, to the commenter’s point about whether this change is significant, we note that the change will not occur at the forms/PRA level. We are merely proposing a language change to reflect our revised regulations. The appropriate time for interested parties to express comments about our proposed rule was during the notice-and-comment period, not in the PRA/forms arena. We note that many interested parties did submit public comments on this issue, and we addressed those comments in this preamble to the final rule. To the commenter’s assertion that the public should know what kind of judge they have in a case, we note that this is a policy issue outside the realm of the PRA, as addressed in the final rule. We have transparently conveyed our proposed change in the NPRM. For these reasons, we will not be changing the PRA statement.

Comments That Suggested Alternate Proposals

Comment: One commenter suggested assigning ALJs to the Appeals Council, and eliminating the position of AAJs. According to the commenter, ALJs on the Appeals Council would bolster the independence of disability hearings at all levels within the agency.

Response: We acknowledge the commenter’s suggestion. However, the goal of this final rule is to increase our adjudicative capacity when needed, allowing us to adjust more quickly to fluctuating short-term workloads, such as when an influx of cases reaches the hearing level. Eliminating current positions would be at odds with this goal.

Comment: One commenter said that we should change our rule so the only people who can be AAJs are retired and rehired ALJs or ALJs sent to the Appeals Council on special detail. The commenter said that would allow for flexibility and would eliminate the issue of claimants having inexperienced and agency-controlled AAJs conduct their hearings. Further, according to the commenter, it would improve the quality of the appellate decisions. Another commenter suggested having interested AAJs apply for long-term details as ALJs.

Response: We disagree that the commenter’s proposal to use rehired

ALJs to act as AAJs would create more flexibility, because the rehired ALJs would have to be retrained in current policies and procedures. We also disagree with the suggestion to have currently serving ALJs apply for details to the Appeals Council, as that would defeat the purpose of the revised rule, which is to increase our adjudicative capacity. We seek to use AAJs to assist with hearing level workloads, so taking ALJs away from those workloads would be counter-productive. Lastly, we believe that detailing AAJs to serve as ALJs may be a feasible option, depending on the circumstances surrounding the need; however, as we do not know all the circumstances that may arise in the future, we want to be prepared and have options available to us to best address all potential situations. Our goal is to clarify the Appeals Council’s existing authority to hold hearings and issue decisions.

Comment: Some commenters said we should keep the hearings and appeals level adjudications separate and distinct, as they have been traditionally. They recommended that if the AAJs wish to have a more significant role in the adjudication process, that they hold oral arguments to address important broad policy or procedural issues that affect the general public interest. According to the commenter, this would be in keeping with the AAJs’ primary role to ensure our decisions are uniform and consistent.

Response: We understand the concerns of keeping hearings and appeals level adjudications separate and distinct. In effect, the hearings and appeals will remain separate and distinct. As discussed above, under this final rule, the claimant will still have the opportunity to appear at a hearing, receive a hearing decision, and request Appeals Council review. The only change is that, in some cases, the hearing and decision may be by an AAJ. Furthermore, this final rule specifies that if an AAJ conducts a hearing, issues a hearing decision, or dismisses a hearing request, he or she will not participate in any action associated with a request for Appeals Council review of that case. In addition, as discussed above, AAJs are expected to recuse themselves from a case if they have any interest in the case, as ALJs would. We will be vigilant in ensuring that the hearings and Appeals Council review levels of administrative review remain separate and distinct, and that claimants are afforded fair and impartial hearing decisions and reviews of those hearing decisions, as we always have.

We also disagree about the “primary role” of the Appeals Council, as the

Appeals Council’s role has evolved over the years to address current needs. For example, we created the Appeals Council’s Division of Quality to exercise quality review responsibilities to oversee and help improve the accuracy and policy compliance of ALJ decisions. Moreover, we are not expanding the role of AAJs. AAJs have long had the authority to conduct hearings, but we have not exercised this authority.

Comment: One commenter said we should provide additional information related to our statement that we would remove the regulations at sections 404.966 and 416.1466, which authorize us to test the elimination of the request for Appeals Council review. The commenter said that the NPRM does not state the conclusions reached by the test or the Appeals Council’s fate.

Response: As we explained in the preamble to our proposed rule, given our experience over the last 21 years, we no longer intend to test the elimination of the request for Appeals Council review. We amended our rules to establish authority to test request for review elimination (RRE) in September 1997.⁹² Our goal in testing elimination of the request for Appeals Council review was to assess the effects of that change in conjunction with other modifications in the disability claim process under the full process model (FPM), established in April 1997.⁹³ In July 1998, we provided notice of limited extended testing of the FPM with two additional features designed to maximize the resources of a Federal processing center.⁹⁴ Thereafter, in June 2000, we published a notice announcing a new test of the elimination of the request for Appeals Council review in conjunction with our disability prototype test.⁹⁵ At that time, we explained that before making any decision on the merits of eliminating the request for review, we would obtain valid and reliable data about the effects

⁹² 62 FR 49598 (Sept. 23, 1997).

⁹³ Id. at 49598–99. Under the FPM, also known as the integrated model, we originally tested four modifications to the disability claim process: the use of a single decisionmaker, conducting predecisional interviews in certain cases, eliminating the reconsideration step in the administrative review process, and use of an adjudication officer to conduct prehearing proceedings and, if appropriate, issue fully favorable decisions. See 62 FR 16210 (Apr. 4, 1997); see also 63 FR 58444 (noting case selection for testing ended in January 1998). Testing elimination of the request for Appeals Council review was the fifth modification to the FPM. See 62 FR 49598 (Sept. 23, 1997); see also 63 FR 40946 (July 31, 1998).

⁹⁴ See 63 FR 40946 (July 31, 1998). We announced the beginning of additional testing in October 1998, but that testing did not include RRE. See 63 FR 58444 (Oct. 30, 1998).

⁹⁵ See 65 FR 36210 (June 7, 2000).

of such elimination.⁹⁶ Our testing results showed that the number of cases that would be appealed to the courts would likely increase substantially.⁹⁷ Additionally, other attempts to remove the Appeals Council level of review have not been successful.⁹⁸ As such, we no longer intend to test eliminating the request for Appeals Council review, and we are removing that authority in sections 404.966 and 416.1466.

Comment: One commenter recommended adding the sentence, “The Appeals Council comprises the AAJs, the Appeals Officers, and the Deputy Chair of the Appeals Council” to sections 404.2(b)(2), 416.120(b)(2), and 408.110(b)(2). The commenter said that this expanded definition may be useful when considering section 422.205(c).

Response: We disagree with this recommendation. Currently, sections 404.2(b)(2), 416.120(b)(2), and 408.110(b)(2) indicate that the Appeals Council includes the member or members thereof as may be designated by the Chair of the Appeals Council. We do not intend to adopt the commenter’s suggestion because we seek to remain flexible in our staffing.

Comment: One commenter suggested that we clarify what the commenter perceived as an inconsistency in sections 404.976(c) and 416.1476(c). This rule provides, “If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date.” The

commenter said that in the summary, we indicate the Appeals Council would be required to follow the rules that govern ALJ hearings, which include mailing a notice of hearing at least 75 days before the date of the hearing.

Response: The commenter conflates a request to appear before the Appeals Council to present oral argument with a request for a hearing. Paragraph (c) of final sections 404.976 and 416.1476 regard a claimant’s ability to request to appear before the Appeals Council to present oral argument, which the Appeals Council will grant if it decides that the case raises an important question of law or policy, or that oral argument would help to reach a proper decision. However, if the Appeals Council assumes responsibility for a hearing request under section 404.956 or 416.1456, we would mail a notice of hearing pursuant to the relevant section(s) 404.938(a) or 416.1438(a), which generally require that we mail a notice of a hearing at least 75 days before the date of the hearing.

Comment: One commenter made suggestions for editing sections 404.984 and 416.1484. According to the commenter, these sections require that, if the Appeals Council assumes jurisdiction of an ALJ decision after remand, the Appeals Council will “either make a new, independent decision based on the preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss a claim(s), or remand the case to an administrative law judge for further proceedings, including a new decision.” First, the commenter recommended changing the phrase “dismiss a claim(s)” to “dismiss the request for a hearing or request for review, consistent with the Federal court’s remand.” Second, the commenter recommended that the Appeals Council never dismiss a request for a hearing or a request for review after the case has been considered and remanded by the court, including a sentence four remand.⁹⁹

Response: We partially adopted the commenter’s first suggestion and revised paragraph (a) of sections 404.984 and 416.1484 to use the more specific phrase “dismiss the request for a hearing.” However, we did not adopt the suggestion to include “dismiss a

request for review.” When the Appeals Council assumes jurisdiction after an ALJ or AAJ has issued a hearing decision in a case remanded by a Federal court, the request for review is no longer at issue. The Appeals Council may assume jurisdiction of the case based on written exceptions filed by the claimant or based on its authority pursuant to paragraph (c) of section 404.984 or section 416.1484.

We also partially adopted the commenter’s second recommendation. Since the Federal court retains jurisdiction for remands under sentence six of section 205(g) of the Act (42 U.S.C. 405(g)), we added language to clarify that the Appeals Council will not dismiss the request for a hearing in these cases. We disagree that the Appeals Council cannot dismiss a request for a hearing in cases remanded under sentence four of section 205(g) of the Act. Once a Federal court has remanded a case under sentence four, jurisdiction returns to the Appeals Council to take appropriate action, which may include dismissing a request for a hearing.

Comment: One commenter questioned the reason for changing the procedure in section 422.205(a). The commenter noted that proposed section 422.205(a) provides that an Appeals Council decision on a case removed under sections 404.956 or 416.1456 may be signed by one Appeals Council member. The commenter further noted that currently two AAJs sign Appeals Council decisions, and that appeals officers are also members of the Appeals Council, but, currently, they have no authority to sign decisions or dismissals. The commenter questioned whether we sought to change this authority deliberately, or if it was an oversight. The commenter also questioned if this proposed change would alter current policy permitting AAJs only to sign Appeals Council decisions and dismissals, as well as Appeals Council denials of review of ALJ dismissals.

Response: We acknowledge that it would be helpful to clarify in section 422.205(a) who has authority to sign hearings level decisions and dismissals. We do not intend for appeals officers to sign hearings level decisions or dismissals. As such, we revised the language in section 422.205(a) to clarify the requirement of one AAJ to sign decisions and dismissals on requests for hearings removed under sections 404.956 or 416.1456 for consistency with the signature requirement for ALJs. One signature by an appeals officer, or by such member of the Appeals Council as may be designated by the Chair or

⁹⁶ 65 FR 36210.

⁹⁷ See the January 2001 report from the Social Security Advisory Board (SSAB), “Charting the Future of Social Security’s Disability Programs: The Need for Fundamental Change,” available at <https://www.ssab.gov/research/charting-the-future-of-social-securitys-disability-programs-the-need-for-fundamental-change/>. See also the June 28, 2001 testimony of Hon. Ronald G. Bernoski, at the Hearing Before Subcommittee on Social Security of the Committee on Ways and Means House of Representative, where he noted “the SSAB Report also correctly points out the impracticality of this step [to eliminate the Appeals Council level of review], since the SSA has shown by testing that this would result in a large increase in court appeals.” Our initial RRE testing failed to produce sufficient data. See 65 FR 36210 (June 7, 2000).

⁹⁸ For example, we tested the elimination of the Appeals Council, under a different authority, the Disability Service Improvement (DSI) Process, by creation of the Disability Review Board (DRB). Under the DSI Process, an ALJ’s decision became final unless the claim was referred to the DRB. If the DRB reviewed a claim and issued a decision, that decision was our final decision, and if a claimant was dissatisfied with it, he or she could seek judicial review in Federal court. The Appeals Council had no involvement with the DRB, which we established with the intent to phase out the Appeals Council. See 71 FR 16424 (Mar. 31, 2006); and correction 71 FR 17990 (Aug. 10, 2006). Ultimately, we eliminated the DRB because it did not function as intended and did not provide efficiencies in reducing the hearings backlog. See 76 FR 24802 (May 3, 2011).

⁹⁹ Under sentence four of section 205(g) of the Act, a court may remand a case in conjunction with a judgment affirming, modifying, or reversing the decision of the Commissioner. The judgment of the court ends the court’s jurisdiction over the case, but either the claimant or agency may appeal the district court’s action to a court of appeals. See HALLEX I-4-6-1 available here: https://www.ssa.gov/OP_Home/hallex/I-04/I-4-6-1.html.

Deputy Chair, continues to be the requirement for denials of requests for reviews as set forth in section 422.205(c). Furthermore, the signatures of at least two AAJs will continue to be required for decisions issued on requests for review or own motion review when the claimant does not appear before the Appeals Council to present oral argument, but that requirement now appears in section 422.205(d). Therefore, we are not changing the signature requirements for Appeals Council actions on requests for review or own motion reviews of hearing level decisions or dismissals.

Comment: One commenter said section 422.205(c) contains a redundancy because it provides that a request for review may be denied by an appeal officer, appeals officers, or members of the Appeals Council, as designated. The commenter noted that appeals officers are members of the Appeals Council. According to the commenter, appeals officers need not be listed separately from the Appeals Council, and it might be clearer to state that the request for review may be denied by an AAJ, an appeals officer, or any member of the Appeals Council, as designated.

Response: We disagree that the language, which appears in current section 422.205(c), is redundant. This final rule merely adds a title to paragraph (c), and does not revise the rest of the section including who may deny a request for review.

Comment: One commenter suggested that a statement of when judicial review is available after an Appeals Council dismissal might prove useful for section 422.210(a). The commenter noted that that regulation does not provide that judicial review is available when the Appeals Council dismisses the request for review or the request for a hearing.

Response: We are considering whether and how to change our regulations based on the Supreme Court's holding in *Smith v. Berryhill*.¹⁰⁰ Therefore, we are not revising section 422.210(a) to clarify when a claimant may seek judicial review following an Appeals Council dismissal as part of this final rule. We will propose any changes we plan to make based on the Supreme Court's decision in *Smith* as part of a separate rulemaking proceeding.

Regulatory Procedures

Executive Order 12866, as Supplemented by Executive Order 13563

We consulted with the Office of Management and Budget (OMB) and determined that this final rule meets the criteria for a significant regulatory action under Executive Order 12866 and is subject to OMB review. Details about the impacts of our rule follow.

Anticipated Benefits

We expect this final rule will benefit us by providing additional flexibility and by allowing us to increase our hearing capacity without incurring permanent new costs. Having AAJs hold hearings and issue decisions will create flexibility for us to shift resources when there is an increase in pending cases at the hearings level. Before using AAJs to hold hearings and issue decisions, we will determine whether it makes sense to do so, considering the Appeals Council's workload relative to the hearing level workload. If necessary, we will hire additional AAJs to augment the current number of ALJs conducting hearings. Additionally, the numbers of new AAJs could be increased or decreased based on the demand of the workload.

Anticipated Costs

We anticipate that this final rule would result in minimal, if any, quantified costs when implemented. Before implementing, we would provide appropriate training to our AAJs, make minor systems updates, and perhaps obtain additional equipment. As discussed above, when we exercise this authority, we would ensure that the AAJs possess the knowledge, skills, and training required to conduct hearings. However, we expect that the cost of training AAJs would be minimal because the AAJs would already have experience with our programs, and we could use existing ALJ training materials, as applicable. We expect that we would need to train our AAJs and other Appeals Council personnel, in particular, on the procedural and technical issues involved in conducting hearings. For example, AAJs would need to be trained on how to (1) prepare for a hearing (e.g., handle specific development issues such as requesting medical records, if necessary; scheduling consultative examinations; issuing subpoenas; and ensuring proper notices are sent), and (2) conduct a hearing (e.g., handle technical matters regarding the hearing recording; ensure that unrepresented claimants receive proper notice of the right to

representation; and work with interpreters, witnesses, and experts). Because we believe AAJs holding a hearing will be equivalently trained to ALJs and will be following the same set of hearing policies as ALJs, we do not believe, as suggested by some commenters, that AAJ determinations are more likely to increase the volume of claimants who choose to appeal a decision that is not fully favorable to the Appeals Council level.

In addition, we would need to train our Appeals Council personnel how to use the hearings systems. We expect this would be a minimal cost as such systems are similar to systems our Appeals Council personnel already use. Lastly, we would need to equip our Appeals Council offices to hold hearings. For example, we would need to provide computers for video teleconference hearings and recording equipment. We may be able to utilize existing internal resources to meet these needs.

Qualitatively, we acknowledge that some commenters have suggested that the use of AAJs at the hearing level could create a perception of lessened impartiality than a hearing held by an ALJ. This is largely a qualitative cost related to the perception of received due process, although claimants who believe they did not receive a fair hearing may be more likely to pursue a review at the Appeals Council and in a Federal district court. However, for the reasons outlined above as well as reasons discussed previously in the preamble, we do not believe there will be different outcomes in adjudications between hearings held by AAJs and ALJs, and as such do not believe this is, in fact, either a qualitative or quantitative cost.

Executive Order 13132 (Federalism)

We analyzed this final rule in accordance with the principles and criteria established by Executive Order 13132, and determined that the rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. We also determined that this rule would not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions.

Executive Order 13771

This final rule is not subject to the requirements of Executive Order 13771 because it is administrative in nature and will result in no more than de minimis costs.

¹⁰⁰ 139 S. Ct. 1765 (2019).

Regulatory Flexibility Act

We certify that this final rule will not have a significant economic impact on a substantial number of small entities, because it affects individuals only. Therefore, a regulatory flexibility analysis is not required under the Regulatory Flexibility Act, as amended.

Paperwork Reduction Act

SSA already has existing OMB PRA-approved information collection tools relating to this final rule: The Request for Review of ALJ Decision or Dismissal (Form HA-520, OMB No. 0960-0277); the Waiver of Your Right to Personal Appearance Before an Administrative Law Judge (Form HA-4608, OMB No. 0960-0284); the Request to Withdraw a Hearing Request (Form HA-85, OMB No. 0960-0710); the Acknowledgement of Receipt of Notice of Hearing (Form HA-504, OMB No. 0960-0671); the Request to Show Case for Failure to Appear (Form HA-L90, OMB No. 0960-0794); and the Request for Hearing by Administrative Law Judge (Form HA-501, OMB No. 0960-0269). Because this final rule will allow for both Administrative Appeals Judges and Administrative Law Judges to hold hearings and issue decisions, we will update the content of these forms to reflect the new language stating that “Judges” will review the cases, hold hearings, and issue decisions; however, we will not change the titles of these forms. Currently these forms use the narrow, specific designation, “Administrative Law Judges.” Once we publish this final rule, we will obtain OMB approval for this revision through non-substantive change requests for these information collections, which does not require public notice and comment under the PRA. Thus, this final rule does not create or significantly alter any existing information collections under the PRA.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security—Disability Insurance; 96.002, Social Security—Retirement Insurance; 96.004, Social Security—Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects*20 CFR Part 404*

Administrative practice and procedure, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Social security.

20 CFR Part 408

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security,

Supplemental Security Income (SSI), Veterans.

20 CFR Part 411

Administrative practice and procedure, Blind, Disability benefits, Public assistance programs, Reporting and recordkeeping requirements, Vocational rehabilitation.

20 CFR Part 416

Administrative practice and procedure, Reporting and recordkeeping requirements, Supplemental Security Income (SSI).

20 CFR Part 422

Administrative practice and procedure, Reporting and recordkeeping requirements, Social security.

The Commissioner of the Social Security Administration, Andrew Saul, having reviewed and approved this document, is delegating the authority to electronically sign this document to Faye I. Lipsky, who is the primary Federal Register Liaison for SSA, for purposes of publication in the **Federal Register**.

Faye I. Lipsky,

Federal Register Liaison, Office of Legislation and Congressional Affairs, Social Security Administration.

For the reasons set out in the preamble, we amend 20 CFR chapter III, parts 404, 408, 411, 416 and 422, as set forth below:

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

Subpart A—Introduction, General Provisions and Definitions

■ 1. The authority citation for subpart A of part 404 continues to read as follows:

Authority: Secs. 203, 205(a), 216(j), and 702(a)(5) of the Social Security Act (42 U.S.C. 403, 405(a), 416(j), and 902(a)(5)) and 48 U.S.C. 1801.

■ 2. Amend § 404.2 by revising paragraph (b) to read as follows:

§ 404.2 General definitions and use of terms.

* * * * *

(b) *Commissioner; Appeals Council; Administrative Law Judge; Administrative Appeals Judge defined—*(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

(4) *Administrative Appeals Judge* means an Administrative Appeals Judge serving as a member of the Appeals Council.

* * * * *

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

■ 3. The authority citation for subpart J of part 404 continues to read as follows:

Authority: Secs. 201(j), 204(f), 205(a)–(b), (d)–(h), and (j), 221, 223(i), 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 401(j), 404(f), 405(a)–(b), (d)–(h), and (j), 421, 423(i), 425, and 902(a)(5)); sec. 5, Pub. L. 97–455, 96 Stat. 2500 (42 U.S.C. 405 note); secs. 5, 6(c)–(e), and 15, Pub. L. 98–460, 98 Stat. 1802 (42 U.S.C. 421 note); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

■ 4. Revise § 404.929 to read as follows:

§ 404.929 Hearing before an administrative law judge—general.

If you are dissatisfied with one of the determinations or decisions listed in § 404.930, you may request a hearing. Subject to § 404.956, the Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 404.936(c)(1)(i) through (iii), and in the limited circumstances described in § 404.936(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 404.935), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 404.935, any new evidence that may have been submitted for consideration.

■ 5. Amend § 404.955 by revising the section heading, redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

§ 404.955 The effect of a hearing decision.

* * * * *

(c) The Appeals Council decides on its own motion to review the decision under the procedures in § 404.969;

* * * * *

■ 6. Revise § 404.956 to read as follows:

§ 404.956 Removal of a hearing request(s) to the Appeals Council.

(a) *Removal.* The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.

(b) *Notice.* We will mail a notice to all parties at their last known address telling them that the Appeals Council has assumed responsibility for the case(s).

(c) *Procedures applied.* If the Appeals Council assumes responsibility for a hearing request(s), it shall conduct all proceedings in accordance with the rules set forth in §§ 404.929 through 404.961, as applicable.

(d) *Appeals Council review.* If the Appeals Council assumes responsibility for your hearing request under this section and you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action following the procedures in §§ 404.967 through 404.982. The Appeals Council may also decide on its own motion to review the action that was taken in your case under § 404.969. The administrative appeals judge who conducted a hearing, issued a hearing decision in your case, or dismissed your hearing request will not participate in any action associated with your request for Appeals Council review of that case.

(e) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 404 shall apply to authorize a member of the Appeals Council to exercise the functions performed by an administrative law judge under subpart J of part 404.

§ 404.966 [Removed and Reserved]

■ 7. Section 404.966 is removed and reserved.

■ 8. Amend § 404.970 by revising paragraph (a) to read as follows:

§ 404.970 Cases the Appeals Council will review.

(a) The Appeals Council will review a case at a party's request or on its own motion if—

(1) There appears to be an abuse of discretion by the administrative law judge or administrative appeals judge who heard the case;

(2) There is an error of law;

(3) The action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

* * * * *

■ 9. Revise § 404.973 to read as follows:

§ 404.973 Notice of Appeals Council review.

When the Appeals Council decides to review a case, it shall mail a prior notice to all parties at their last known address stating the reasons for the review and the issues to be considered. However, when the Appeals Council plans to issue a decision that is fully favorable to all parties, plans to remand the case for further proceedings, or plans to issue a decision that is favorable in part and remand the remaining issues for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.

■ 10. Amend § 404.976 by revising the section heading, revising paragraph (b), and adding paragraph (c) to read as follows:

§ 404.976 Procedures before the Appeals Council.

* * * * *

(b) *Evidence the Appeals Council will exhibit.* The Appeals Council will evaluate all additional evidence it receives, but will only mark as an exhibit and make part of the official record additional evidence that it determines meets the requirements of § 404.970(a)(5) and (b). If we need to file a certified administrative record in Federal court, we will include in that record all additional evidence the Appeals Council received during the administrative review process, including additional evidence that the Appeals Council received but did not exhibit or make part of the official record.

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument in support of your request for review. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance will be by video teleconferencing or in person, or, when the circumstances described in § 404.936(c)(2) exist, the Appeals Council may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 404.936(c)(4).

■ 11. Revise § 404.983 to read as follows:

§ 404.983 Case remanded by a Federal court.

(a) *General rule.* When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision following the provisions in paragraph (b) or (c) of this section, dismiss the proceedings, except as provided in paragraph (d) of this section, or remand the case to an administrative law judge following the provisions in paragraph (e) of this section with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. Any issues relating to the claim(s) may be considered by the Appeals Council or administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in the case.

(b) *Appeals Council decision without a hearing.* If the Appeals Council assumes responsibility under paragraph (a) of this section for issuing a decision without a hearing, it will follow the procedures explained in §§ 404.973 and 404.979.

(c) *Administrative appeals judge decision after holding a hearing.* If the Appeals Council assumes responsibility for issuing a decision and a hearing is necessary to complete adjudication of the claim(s), an administrative appeals judge will hold a hearing using the procedures set forth in §§ 404.929 through 404.961, as applicable.

(d) *Appeals Council dismissal.* After a Federal court remands a case to the

Commissioner for further consideration, the Appeals Council may dismiss the proceedings before it for any reason that an administrative law judge may dismiss a request for a hearing under § 404.957. The Appeals Council will not dismiss the proceedings in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(e) *Appeals Council remand.* If the Appeals Council remands a case under paragraph (a) of this section, it will follow the procedures explained in § 404.977.

■ 12. Revise § 404.984 to read as follows:

§ 404.984 Appeals Council review of hearing decision in a case remanded by a Federal court.

(a) *General.* In accordance with § 404.983, when a case is remanded by a Federal court for further consideration and the Appeals Council remands the case to an administrative law judge, or an administrative appeals judge issues a decision pursuant to § 404.983(c), the decision of the administrative law judge or administrative appeals judge will become the final decision of the Commissioner after remand on your case unless the Appeals Council assumes jurisdiction of the case. The Appeals Council may assume jurisdiction, using the standard set forth in § 404.970, based on written exceptions to the decision which you file with the Appeals Council or based on its authority pursuant to paragraph (c) of this section. If the Appeals Council assumes jurisdiction of the case, it will not dismiss the request for a hearing where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(b) *You file exceptions disagreeing with the hearing decision.* (1) If you disagree with the hearing decision, in whole or in part, you may file exceptions to the decision with the Appeals Council. Exceptions may be filed by submitting a written statement to the Appeals Council setting forth your reasons for disagreeing with the decision of the administrative law judge or administrative appeals judge. The exceptions must be filed within 30 days of the date you receive the hearing decision or an extension of time in which to submit exceptions must be requested in writing within the 30-day period. A timely request for a 30-day extension will be granted by the Appeals Council. A request for an

extension of more than 30 days should include a statement of reasons as to why you need the additional time.

(2) If written exceptions are timely filed, the Appeals Council will consider your reasons for disagreeing with the hearing decision and all the issues presented by your case. If the Appeals Council concludes that there is no reason to change the hearing decision, it will issue a notice to you addressing your exceptions and explaining why no change in the hearing decision is warranted. In this instance, the hearing decision is the final decision of the Commissioner after remand.

(3) When you file written exceptions to the hearing decision, the Appeals Council may assume jurisdiction at any time, even after the 60-day time period which applies when you do not file exceptions. If the Appeals Council assumes jurisdiction of your case, any issues relating to your claim may be considered by the Appeals Council whether or not they were raised in the administrative proceedings leading to the final decision in your case or subsequently considered by the administrative law judge or administrative appeals judge in the administrative proceedings following the court's remand order. The Appeals Council will either make a new, independent decision pursuant to § 404.983(b) or § 404.983(c), based on a preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an administrative law judge for further proceedings, including a new decision.

(c) *Appeals Council assumes jurisdiction without exceptions being filed.* Any time within 60 days after the date of the hearing decision, the Appeals Council may decide to assume jurisdiction of your case even though no written exceptions have been filed. Notice of this action will be mailed to all parties at their last known address. You will be provided with the opportunity to file briefs or other written statements with the Appeals Council about the facts and law relevant to your case. After the Appeals Council receives the briefs or other written statements, or the time allowed (usually 30 days) for submitting them has expired, the Appeals Council will either make a new, independent decision pursuant to § 404.983(b) or § 404.983(c), based on a preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an

administrative law judge for further proceedings, including a new decision.

(d) *Exceptions are not filed and the Appeals Council does not otherwise assume jurisdiction.* If no exceptions are filed and the Appeals Council does not assume jurisdiction of your case, the decision of the administrative law judge or administrative appeals judge becomes the final decision of the Commissioner after remand.

■ 13. Amend § 404.999c by revising paragraph (d)(3)(i)(C) to read as follows:

§ 404.999c What travel expenses are reimbursable.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(C) The designated geographic service area of the Office of Hearings Operations hearing office having responsibility for providing the hearing.

* * * * *

PART 408—SPECIAL BENEFITS FOR CERTAIN WORLD WAR II VETERANS

Subpart A—Introduction, General Provision and Definitions

■ 14. The authority citation for subpart A of part 408 continues to read as follows:

Authority: Secs. 702(a)(5) and 801–813 of the Social Security Act (42 U.S.C. 902(a)(5) and 1001–1013).

■ 15. Amend § 408.110 by revising paragraph (b) to read as follows:

§ 408.110 General definitions and use of terms.

* * * * *

(b) *Commissioner; Appeals Council; Administrative Law Judge defined*—(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

* * * * *

PART 411—THE TICKET TO WORK AND SELF-SUFFICIENCY PROGRAM

■ 16. The authority citation for part 411 continues to read as follows:

Authority: Secs. 702(a)(5) and 1148 of the Social Security Act (42 U.S.C. 902(a)(5) and 1320b–19); sec. 101(b)–(e), Public Law 106–

170, 113 Stat. 1860, 1873 (42 U.S.C. 1320b–19 note).

Subpart C—Suspension of Continuing Disability Reviews for Beneficiaries Who Are Using a Ticket

- 17. Amend § 411.175 by revising paragraph (a) to read as follows:

§ 411.175 What if a continuing disability review is begun before my ticket is in use?

(a) If we begin a continuing disability review before the date on which your ticket is in use, you may still assign the ticket and receive services from an employment network or a State vocational rehabilitation agency acting as an employment network under the Ticket to Work program, or you may still receive services from a State vocational rehabilitation agency that elects the vocational rehabilitation cost reimbursement option. However, we will complete the continuing disability review. If in this review we determine that you are no longer disabled, in most cases you will no longer be eligible to receive benefit payments. However, if your ticket was in use before we determined that you are no longer disabled, in certain circumstances you may continue to receive benefit payments (see §§ 404.316(c), 404.337(c), 404.352(d), and 416.1338 of this chapter). If you appeal the decision that you are no longer disabled, you may also choose to have your benefits continued pending reconsideration or a hearing before a judge on the cessation determination (see §§ 404.1597a and 416.996 of this chapter).

* * * * *

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

Subpart A—Introduction, General Provisions and Definitions

- 18. The authority citation for subpart A of part 416 continues to read as follows:

Authority: Secs. 702(a)(5) and 1601–1635 of the Social Security Act (42 U.S.C. 902(a)(5) and 1381–1383d); sec. 212, Pub. L. 93–66, 87 Stat. 155 (42 U.S.C. 1382 note); sec. 502(a), Pub. L. 94–241, 90 Stat. 268 (48 U.S.C. 1681 note).

- 19. Amend § 416.120 by revising paragraph (b) to read as follows:

§ 416.120 General definitions and use of terms.

* * * * *

(b) *Commissioner; Appeals Council; Administrative Law Judge; Administrative Appeals Judge defined—*

(1) *Commissioner* means the Commissioner of Social Security.

(2) *Appeals Council* means the Appeals Council of the Office of Analytics, Review, and Oversight in the Social Security Administration or such member or members thereof as may be designated by the Chair of the Appeals Council.

(3) *Administrative Law Judge* means an Administrative Law Judge in the Office of Hearings Operations in the Social Security Administration.

(4) *Administrative Appeals Judge* means an Administrative Appeals Judge serving as a member of the Appeals Council.

* * * * *

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

- 20. The authority citation for subpart N of part 416 continues to read as follows:

Authority: Secs. 702(a)(5), 1631, and 1633 of the Social Security Act (42 U.S.C. 902(a)(5), 1383, and 1383b); sec. 202, Pub. L. 108–203, 118 Stat. 509 (42 U.S.C. 902 note).

- 21. Revise § 416.1429 to read as follows:

§ 416.1429 Hearing before an administrative law judge—general.

If you are dissatisfied with one of the determinations or decisions listed in § 416.1430, you may request a hearing. Subject to § 416.1456, the Deputy Commissioner for Hearings Operations, or his or her delegate, will appoint an administrative law judge to conduct the hearing. If circumstances warrant, the Deputy Commissioner for Hearings Operations, or his or her delegate, may assign your case to another administrative law judge. In general, we will schedule you to appear by video teleconferencing or in person. When we determine whether you will appear by video teleconferencing or in person, we consider the factors described in § 416.1436 (c)(1)(i) through (iii), and in the limited circumstances described in § 416.1436(c)(2), we will schedule you to appear by telephone. You may submit new evidence (subject to the provisions of § 416.1435), examine the evidence used in making the determination or decision under review, and present and question witnesses. The administrative law judge who conducts the hearing may ask you questions. He or she will issue a decision based on the preponderance of the evidence in the hearing record. If you waive your right to appear at the hearing, the administrative law judge will make a

decision based on the preponderance of the evidence that is in the file and, subject to the provisions of § 416.1435, any new evidence that may have been submitted for consideration.

- 22. Amend § 416.1455 by revising the section heading, redesignating paragraphs (c) through (f) as paragraphs (d) through (g), and adding new paragraph (c) to read as follows:

§ 416.1455 The effect of a hearing decision.

* * * * *

(c) The Appeals Council decides on its own motion to review the decision under the procedures in § 416.1469;

* * * * *

- 23. Revise § 416.1456 to read as follows:

§ 416.1456 Removal of a hearing request(s) to the Appeals Council.

(a) *Removal.* The Appeals Council may assume responsibility for a hearing request(s) pending at the hearing level of the administrative review process.

(b) *Notice.* We will mail a notice to all parties at their last known address telling them that the Appeals Council has assumed responsibility for the case(s).

(c) *Procedures applied.* If the Appeals Council assumes responsibility for a hearing request(s), it shall conduct all proceedings in accordance with the rules set forth in §§ 416.1429 through 416.1461, as applicable.

(d) *Appeals Council review.* If the Appeals Council assumes responsibility for your hearing request under this section and you or any other party is dissatisfied with the hearing decision or with the dismissal of a hearing request, you may request that the Appeals Council review that action following the procedures in §§ 416.1467 through 416.1482. The Appeals Council may also decide on its own motion to review the action that was taken in your case under § 416.1469. The administrative appeals judge who conducted a hearing, issued a hearing decision in your case, or dismissed your hearing request will not participate in any action associated with your request for Appeals Council review of that case.

(e) *Ancillary provisions.* For the purposes of the procedures authorized by this section, the regulations of part 416 shall apply to authorize a member of the Appeals Council to exercise the functions performed by an administrative law judge under subpart N of part 416.

§ 416.1466 [Removed and Reserved]

- 24. Section 416.1466 is removed and reserved.

■ 25. Amend § 416.1470 by revising paragraph (a) to read as follows:

§ 416.1470 Cases the Appeals Council will review.

(a) The Appeals Council will review a case at a party's request or on its own motion if—

(1) There appears to be an abuse of discretion by the administrative law judge or administrative appeals judge who heard the case;

(2) There is an error of law;

(3) The action, findings or conclusions in the hearing decision or dismissal order are not supported by substantial evidence;

(4) There is a broad policy or procedural issue that may affect the general public interest; or

(5) Subject to paragraph (b) of this section, the Appeals Council receives additional evidence that is new, material, and relates to the period on or before the date of the hearing decision, and there is a reasonable probability that the additional evidence would change the outcome of the decision.

* * * * *

■ 26. Revise § 416.1473 to read as follows:

§ 416.1473 Notice of Appeals Council review.

When the Appeals Council decides to review a case, it shall mail a prior notice to all parties at their last known address stating the reasons for the review and the issues to be considered. However, when the Appeals Council plans to issue a decision that is fully favorable to all parties, plans to remand the case for further proceedings, or plans to issue a decision that is favorable in part and remand the remaining issues for further proceedings, it may send the notice of Appeals Council review to all parties with the decision or remand order.

■ 27. Amend § 416.1476 by revising the section heading, revising paragraph (b), and adding paragraph (c) to read as follows:

§ 416.1476 Procedures before the Appeals Council.

* * * * *

(b) *Evidence the Appeals Council will exhibit.* The Appeals Council will evaluate all additional evidence it receives, but will only mark as an exhibit and make part of the official record additional evidence that it determines meets the requirements of § 416.1470(a)(5) and (b). If we need to file a certified administrative record in Federal court, we will include in that record all additional evidence the Appeals Council received during the administrative review process,

including additional evidence that the Appeals Council received but did not exhibit or make part of the official record.

(c) *Oral argument.* You may request to appear before the Appeals Council to present oral argument in support of your request for review. The Appeals Council will grant your request if it decides that your case raises an important question of law or policy or that oral argument would help to reach a proper decision. If your request to appear is granted, the Appeals Council will tell you the time and place of the oral argument at least 10 business days before the scheduled date. The Appeals Council will determine whether your appearance will be by video teleconferencing or in person, or, when the circumstances described in § 416.1436(c)(2) exist, the Appeals Council may schedule you to appear by telephone. The Appeals Council will determine whether any other person relevant to the proceeding will appear by video teleconferencing, telephone, or in person as based on the circumstances described in § 416.1436(c)(4).

■ 28. Revise § 416.1483 to read as follows:

§ 416.1483 Case remanded by a Federal court.

(a) *General rule.* When a Federal court remands a case to the Commissioner for further consideration, the Appeals Council, acting on behalf of the Commissioner, may make a decision following the provisions in paragraph (b) or (c) of this section, dismiss the proceedings, except as provided in paragraph (d) of this section, or remand the case to an administrative law judge following the provisions in paragraph (e) of this section with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision. Any issues relating to the claim(s) may be considered by the Appeals Council or administrative law judge whether or not they were raised in the administrative proceedings leading to the final decision in the case.

(b) *Appeals Council decision without a hearing.* If the Appeals Council assumes responsibility under paragraph (a) of this section for issuing a decision without a hearing, it will follow the procedures explained in §§ 416.1473 and 416.1479.

(c) *Administrative appeals judge decision after holding a hearing.* If the Appeals Council assumes responsibility for issuing a decision and a hearing is necessary to complete adjudication of the claim(s), an administrative appeals judge will hold a hearing using the

procedures set forth in §§ 416.1429 through 416.1461, as applicable.

(d) *Appeals Council dismissal.* After a Federal court remands a case to the Commissioner for further consideration, the Appeals Council may dismiss the proceedings before it for any reason that an administrative law judge may dismiss a request for a hearing under § 416.1457. The Appeals Council will not dismiss the proceedings in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(e) *Appeals Council remand.* If the Appeals Council remands a case under paragraph (a) of this section, it will follow the procedures explained in § 416.1477.

■ 29. Revise § 416.1484 to read as follows:

§ 416.1484 Appeals Council review of hearing decision in a case remanded by a Federal court.

(a) *General.* In accordance with § 416.1483, when a case is remanded by a Federal court for further consideration and the Appeals Council remands the case to an administrative law judge, or an administrative appeals judge issues a decision pursuant to § 416.1483(c), the decision of the administrative law judge or administrative appeals judge will become the final decision of the Commissioner after remand on your case unless the Appeals Council assumes jurisdiction of the case. The Appeals Council may assume jurisdiction, using the standard set forth in § 416.1470, based on written exceptions to the decision which you file with the Appeals Council or based on its authority pursuant to paragraph (c) of this section. If the Appeals Council assumes jurisdiction of the case, it will not dismiss the request for a hearing in a claim where we are otherwise required by law or a judicial order to file the Commissioner's additional and modified findings of fact and decision with a court.

(b) *You file exceptions disagreeing with the hearing decision.* (1) If you disagree with the hearing decision, in whole or in part, you may file exceptions to the decision with the Appeals Council. Exceptions may be filed by submitting a written statement to the Appeals Council setting forth your reasons for disagreeing with the decision of the administrative law judge or administrative appeals judge. The exceptions must be filed within 30 days of the date you receive the hearing decision or an extension of time in which to submit exceptions must be

requested in writing within the 30-day period. A timely request for a 30-day extension will be granted by the Appeals Council. A request for an extension of more than 30 days should include a statement of reasons as to why you need the additional time.

(2) If written exceptions are timely filed, the Appeals Council will consider your reasons for disagreeing with the hearing decision and all the issues presented by your case. If the Appeals Council concludes that there is no reason to change the hearing decision, it will issue a notice to you addressing your exceptions and explaining why no change in the hearing decision is warranted. In this instance, the hearing decision is the final decision of the Commissioner after remand.

(3) When you file written exceptions to the hearing decision, the Appeals Council may assume jurisdiction at any time, even after the 60-day time period which applies when you do not file exceptions. If the Appeals Council assumes jurisdiction of your case, any issues relating to your claim may be considered by the Appeals Council whether or not they were raised in the administrative proceedings leading to the final decision in your case or subsequently considered by the administrative law judge or administrative appeals judge in the administrative proceedings following the court's remand order. The Appeals Council will either make a new, independent decision pursuant to § 416.1483(b) or § 416.1483(c), based on a preponderance of the evidence in the record that will be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an administrative law judge for further proceedings, including a new decision.

(c) *Appeals Council assumes jurisdiction without exceptions being filed.* Any time within 60 days after the date of the hearing decision, the Appeals Council may decide to assume jurisdiction of your case even though no written exceptions have been filed. Notice of this action will be mailed to all parties at their last known address. You will be provided with the opportunity to file briefs or other written statements with the Appeals Council about the facts and law relevant to your case. After the Appeals Council receives the briefs or other written statements, or the time allowed (usually 30 days) for submitting them has expired, the Appeals Council will either make a new, independent decision pursuant to § 416.1483(b) or § 416.1483(c), based on a preponderance of the evidence in the record that will

be the final decision of the Commissioner after remand, dismiss the request for a hearing, or remand the case to an administrative law judge for further proceedings, including a new decision.

(d) *Exceptions are not filed and the Appeals Council does not otherwise assume jurisdiction.* If no exceptions are filed and the Appeals Council does not assume jurisdiction of your case, the decision of the administrative law judge or administrative appeals judge becomes the final decision of the Commissioner after remand.

■ 30. Amend § 416.1498 by revising paragraph (d)(3)(i)(C) to read as follows:

§ 416.1498 What travel expenses are reimbursable.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(C) The designated geographic service area of the Office of Hearings Operations hearing office having responsibility for providing the hearing.

* * * * *

PART 422—ORGANIZATION AND PROCEDURES

■ 31. Revise the heading for subpart C to read as follows:

Subpart C—Hearings, Appeals Council Review, and Judicial Review Procedures

■ 32. The authority citation for subpart C of part 422 continues to read as follows:

Authority: Secs. 205, 221, and 702(a)(5) of the Social Security Act (42 U.S.C. 405, 421, and 902(a)(5)); 30 U.S.C. 923(b).

■ 33. Amend § 422.201 by revising the introductory text to read as follows:

§ 422.201 Material included in this subpart.

This subpart describes in general the procedures relating to hearings, review by the Appeals Council of the hearing decision or dismissal, and court review in cases decided under the procedures in parts 404, 408, 410, and 416 of this chapter. It also describes the procedures for requesting a hearing or Appeals Council review, and for instituting a civil action for court review of cases decided under these parts. For detailed provisions relating to hearings, review by the Appeals Council, and court review, see the following references as appropriate to the matter involved:

* * * * *

■ 34. Amend § 422.203 by revising paragraphs (b) and (c) to read as follows:

§ 422.203 Hearings.

* * * * *

(b) *Request for a hearing.* (1) A request for a hearing under paragraph (a) of this section may be made using the form(s) we designate for this purpose, or by any other writing requesting a hearing. The request shall be filed either electronically in the manner we prescribe or at an office of the Social Security Administration, usually a district office or a branch office, or at the Veterans' Administration Regional Office in the Philippines (except in title XVI cases), or at a hearing office of the Office of Hearings Operations, or with the Appeals Council. A qualified railroad retirement beneficiary may choose to file a request for a hearing under part A of title XVIII with the Railroad Retirement Board.

(2) Unless an extension of time has been granted for good cause shown, a request for a hearing must be filed within 60 days after the receipt of the notice of the reconsidered or revised determination, or after an initial determination described in 42 CFR 498.3(b) and (c) (see §§ 404.933, 410.631, and 416.1433 of this chapter and 42 CFR 405.722, 498.40, and 417.260.)

(c) *Hearing decision or other action.* Generally, the administrative law judge, or an administrative appeals judge under § 404.956 or § 416.1456 of this chapter, will either decide the case after hearing (unless hearing is waived) or, if appropriate, dismiss the request for a hearing. With respect to a hearing on a determination under paragraph (a)(1) of this section, the administrative law judge may certify the case with a recommended decision to the Appeals Council for decision. The administrative law judge, or an attorney advisor under § 404.942 or § 416.1442 of this chapter, or an administrative appeals judge under § 404.956 or § 416.1456 of this chapter, must base the hearing decision on the preponderance of the evidence offered at the hearing or otherwise included in the record.

■ 35. Revise § 422.205 to read as follows:

§ 422.205 Proceedings before the Appeals Council.

(a) *Administrative Appeals Judge hearing decisions.* Administrative Appeals Judge decisions and dismissals issued on hearing requests removed under §§ 404.956 and 416.1456 of this chapter and decisions and dismissals described in § 422.203(c) require the signature of one Administrative Appeals Judge. Requests for review of hearing decisions issued by an Administrative Appeals Judge may be filed pursuant to

§§ 404.968 and 416.1468 of this chapter and paragraph (b) of this section.

(b) *Appeals Council review.* Any party to a hearing decision or dismissal may request a review of such action by the Appeals Council. This request may be made on Form HA-520, Request for Review of Hearing Decision/Order, or by any other writing specifically requesting review. Form HA-520 may be obtained from any Social Security district office or branch office, or at any other office where a request for a hearing may be filed. (For time and place of filing, see §§ 404.968 and 416.1468 of this chapter.)

(c) *Review of a hearing decision, dismissal, or denial.* The denial of a request for review of a hearing decision concerning a determination under § 422.203(a)(1) shall be by such appeals officer or appeals officers or by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair. The denial of a request for review of a hearing dismissal, the dismissal of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair.

(d) *Appeals Council review panel.* Whenever the Appeals Council reviews a hearing decision under §§ 404.967, 404.969, 416.1467, or 416.1469 of this chapter and the claimant does not appear personally or through representation before the Appeals Council to present oral argument, such review will be conducted by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chair or

Deputy Chair of the Appeals Council. In the event of disagreement between a panel composed of only two members, the Chair or Deputy Chair, or his or her delegate, who must be a member of the Appeals Council, shall participate as a third member of the panel. When the claimant appears in person or through representation before the Appeals Council in the location designated by the Appeals Council, the review will be conducted by a panel of not less than three members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair. Concurrence of a majority of a panel shall constitute the decision of the Appeals Council unless the case is considered as provided under paragraph (e) of this section.

(e) *Appeals Council meetings.* On call of the Chair, the Appeals Council may meet en banc or a representative body of Appeals Council members may be convened to consider any case arising under paragraph (c) or (d) of this section. Such representative body shall be comprised of a panel of not less than five members designated by the Chair as deemed appropriate for the matter to be considered. The Chair or Deputy Chair shall preside, or in his or her absence, the Chair shall designate a member of the Appeals Council to preside. A majority vote of the designated panel, or of the members present and voting, shall constitute the decision of the Appeals Council.

(f) *Temporary assignments of ALJs.* The Chair may designate an administrative law judge to serve as a member of the Appeals Council for temporary assignments. An administrative law judge shall not be designated to serve as a member on any panel where such panel is conducting review on a case in which such individual has been previously involved.

■ 36. Amend § 422.210 by revising paragraph (a) and adding paragraph (e) to read as follows:

§ 422.210 Judicial review.

(a) *General.* A claimant may obtain judicial review of a decision by an administrative law judge or administrative appeals judge if the Appeals Council has denied the claimant's request for review, or of a decision by the Appeals Council when that is the final decision of the Commissioner. A claimant may also obtain judicial review of a reconsidered determination, or of a decision of an administrative law judge or an administrative appeals judge, where, under the expedited appeals procedure, further administrative review is waived by agreement under § 404.926 or § 416.1426 of this chapter or as appropriate. There are no amount-in-controversy limitations on these rights of appeal.

* * * * *

(e) *Appeals Council review panel after Federal court remand.* When the Appeals Council holds a hearing under § 404.983 or § 416.1483 of this chapter, such hearing will be conducted and a decision will be issued by a panel of not less than two members of the Appeals Council designated in the manner prescribed by the Chair or Deputy Chair of the Appeals Council. When the Appeals Council issues a decision under §§ 404.983 and 416.1483 of this chapter without holding a hearing, a decision will be issued by a panel of not less than two members of the Council designated in the same manner prescribed by the Chair or Deputy Chair of the Council. In the event of disagreement between a panel composed of only two members, the Chair or Deputy Chair, or his or her delegate, who must be a member of the Council, shall participate as a third member of the panel.

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