

**DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD**

CIVIL REMEDIES DIVISION PROCEDURES

EFFECTIVE JANUARY 1, 2015

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1. SCOPE

Parties must follow the Civil Remedies Division Procedures (CRDP) in presenting cases in the Civil Remedies Division (CRD). Except to the extent superseded by an order of the administrative law judge (ALJ) in an individual case, the CRDP have the same force and effect as if ordered by the ALJ.

The CRDP do not supersede the regulations promulgated by the Secretary of Health and Human Services (Secretary) and should be construed consistently with the regulations in a particular case.

2. REQUESTING A HEARING

- a. **General requirements.** All hearing requests must comply with specific content and deadline requirements. The regulations applicable to the type of case for which a party is requesting a hearing provide these requirements. The party requesting a hearing should refer to the notification of adverse action to determine which regulations apply to its case.
- b. **Filing Electronically.** All hearing requests must be filed electronically using the Departmental Appeals Board Electronic Filing System (DAB E-File). *See* CRDP § 6 below for further instructions.
- c. **Signature and notification of adverse action.** All hearing requests *must* be signed by the party requesting a hearing or its authorized representative. All hearing requests *must* be accompanied by a copy of the notification of adverse action a party believes triggers the right to a hearing. **Do not send the statement of deficiencies.** An ALJ may dismiss a hearing request if it is not signed or a copy of the notice of adverse action is not submitted. A hearing request signed by a non-attorney representative must be accompanied by a document appointing the non-attorney representative, signed by the party for whom the hearing is requested in accordance with CRDP § 3(b).
- d. **Docketing.** Cases are docketed upon receipt of a request for an ALJ hearing. Letters or other notices that do not request a hearing may be returned to the sender or forwarded without being docketed.

3. REPRESENTATION

Parties may be heard with or without representation.

- a. **Attorney representation.** Attorney representatives must file a written notice of appearance. The notice of appearance must be signed and must include the following contact information: mailing address, telephone number, and e-mail address. A request for hearing filed by an attorney representative will suffice for a notice of appearance, so long as it includes the required contact information.

b. *Non-attorney representation.*

- i. Non-attorney representation is **not** authorized in certain cases, including those governed by 42 C.F.R. Part 1005 (Department of Health and Human Services Office of the Inspector General, Appeals of Exclusions, Civil Money Penalties and Assessments) or 20 C.F.R. Part 498 (Social Security Administration, Civil Monetary Penalties, Assessments and Recommended Exclusions). A party must refer to the regulations applicable to its case to determine whether it may have non-attorney representation.
 - ii. If the applicable regulations authorize non-attorney representation, a non-attorney representative must file a written appointment of representation. The appointment of representation must be signed by the non-attorney representative **and** the individual with authority to appoint the non-attorney representative, such as the affected party himself or herself or the affected party's authorized official (e.g., president or chief executive officer). The notice of appearance must include the following contact information: mailing address, telephone number, and e-mail address of the non-attorney representative.
- c. *Unrepresented parties.*** An unrepresented party must include his or her mailing address, telephone number, and e-mail address with the hearing request.

4. CONTACT WITH THE ALJ

- a. ***Ex parte communications.*** Direct communication with the ALJ is prohibited unless all parties or party representatives are present. All party contact with an ALJ is through the staff attorney assigned to assist the ALJ with a particular case. The name, telephone number, facsimile number, and e-mail address of the staff attorney will be provided to the parties with the CRD acknowledgment of a party's hearing request. When sending an e-mail to the assigned staff attorney, you must copy ("CC") the opposing party on the e-mail. Parties may also contact CRD staff by calling the CRD at (202) 565-9462.
- b. ***Sanctions.*** An ALJ may impose sanctions against a party for engaging in *ex parte* communication, that is, any written or oral communication directly with an ALJ or with the assigned staff attorney assisting the ALJ about any issue other than a general procedural question in which the opposing party is not present or copied.

5. PREHEARING CONFERENCES

At any time before the hearing, the ALJ may call a prehearing conference. In addition to any matter deemed appropriate by the ALJ or required by regulation, a prehearing conference will generally be used to clarify the issues in controversy and to discuss how the case should proceed (*e.g.*, via an oral hearing, motion for summary judgment, or submission of the case for decision on the written record). Specific issues that the ALJ might address include:

- the scheduling of a hearing (*i.e.*, its estimated length, location, and date);
- discovery, if appropriate, and a schedule for completing it;
- admissions and stipulations;
- a date for the submission of written lists of proposed witnesses (with a synopsis of expected testimony), proposed exhibits (including written statements in lieu of testimony), and prior written statements of proposed witnesses;
- what exhibits and witnesses are contemplated;
- whether the parties intend to request subpoenas for witnesses;
- the necessity for and extent of expert testimony;
- the use of charts, work papers, or other unusual exhibits;
- the use of written statements in lieu of direct testimony;
- a schedule for prehearing briefs; and
- marking exhibits, numbering pages of exhibits, and introducing and having exhibits submitted into evidence.

The agreements and stipulations entered into at the prehearing conference are binding on all parties.

6. FILING AND SERVICE OF WRITTEN MATERIAL

All documents and other materials submitted become part of the record and subject to public disclosure.

a. *Filing Electronically.* The CRD uses the DAB E-File for all of the cases that an ALJ may hear and decide.

i. *Electronic filing required.* All parties **must** use DAB E-File to file all of its submissions with CRD and the ALJ.

1. *Waiver.* To obtain a waiver from the requirement of using DAB E-File, a party must call or e-mail the CRD attorney assigned to case, whose name and contact information will be

provided in the ALJ's Acknowledgement and Prehearing Order or in an acknowledgment letter from CRD. The CRD Director or her designee will confirm the waiver in writing.

2. *Voluminous submissions.* The DAB E-File can accommodate files up to 10 megabytes (MB). If a party's submission is larger than 10 MB, it must divide the submission into smaller files and upload each part separately, using a clear system of labeling (*e.g.*, P. Ex. 1, Part 1; P. Ex. 1, Part 2). An ALJ will not grant a waiver to the electronic filing requirement simply because a party expects to make voluminous submissions.
 3. *Filing additional copies with CRD.* An ALJ may order that the parties file an additional paper copy of their submissions with CRD. If required, parties should mail the paper copy to the address listed in paragraph (b) of this section. The additional paper copy must be identical to the parties' submission filed electronically on DAB E-File, or if a waiver is granted, the original paper submission. Parties should refer to the ALJ's Acknowledgment and Prehearing Order to determine whether this requirement applies to a particular case.
- ii. *DAB E-File site.* DAB E-File is accessible at <https://dab.efile.hhs.gov/>.
 - iii. *Registration.* A party or a party's representative must become a registered user of DAB E-File. If a party has more than one representative, each representative must register separately to use DAB E-File on the party's behalf. To register as a user of DAB E-File, go to <https://dab.efile.hhs.gov/>, click on "Register," enter the required information on the Register New Account form, then click "Register Account" at the bottom of the form. Parties are encouraged to use an e-mail account they frequently access when registering as all case notifications will be e-mailed to the parties.
 - iv. *Electronic service of documents.* Parties using DAB E-File must accept electronic service of all case-related documents, including those from opposing parties as well as the ALJ. DAB E-File will automatically e-mail the parties a notification when a document or group of documents has been uploaded in the case. The notification will include a link to access the newly uploaded documents. Parties

are responsible for ensuring that automatic e-mail notices from DAB E-File are not blocked by spam or other filters.

- v. *Ongoing duty to serve opposing party.* Use of DAB E-File does not relieve the filing party of its obligation to serve the electronically-filed document on other parties if the opposing party received a waiver from e-filing. Paragraph 6(c) of this section provides instructions for the proper service of documents.
- vi. *Date of filing.* A document is considered filed on a given day if it is uploaded to DAB E-File at or prior to **11:59 p.m. Eastern Time** of that day.
- vii. *Filing a request for hearing.* To file a new request for hearing, the requesting party should logon to DAB E-File (after registering following the procedures in subparagraph (iii), above), click on “File New Appeal” and select “Civil Remedies Division” when prompted. The requesting party must then complete the requested information and upload any required documents. The requesting party should not submit exhibits or evidence with requests for hearing, except the notification of adverse action as specified in CRDP § 2.
- viii. *Filing a brief, exhibits, response, or other documents.* When an ALJ directs a party to file a brief, exhibits, or other documents, the party or representative registered with DAB E-File should logon to DAB E-File and complete the following:
 - 1. *Access the case.* Find the case information and document list by first clicking “Manage Existing Appeals” on the left side of the screen, then entering the docket number or non-federal party name where prompted and clicking “Search.” If the correct case appears in the search result, click on the docket number to access the case information and document list.
 - 2. *Request access to the case.* If your case does not appear in the search result under “Manage Existing Appeals,” you must request access to the case. Access to cases on the DAB E-File system is limited to the parties and their authorized representatives. If a party has more than one authorized representative, each representative must separately request access. Click “Request Access to Case” on the left side of the screen, enter the docket number and check the box certifying that the requestor is a party or a party’s representative in the

requested case. If the party or party's representative has not noticed its appearance in the case, it must also upload a notice of appearance. To do so, click "Choose File," then find and select the appropriate file to upload to DAB E-File. Click "Continue," then click on the document file name to preview the notice of appearance that will become part of the official record. If the requestor needs to make changes, it may do so by clicking "Edit Request." Once satisfied, click "Submit Request." Requests for access will be granted or denied within two business days. The division will contact you if it has any questions about the request. The requestor will receive an e-mail notification when access is granted or denied.

3. *Upload a document.* Click "Upload New Document," which appears directly below the case information and above the list of case documents. Select the appropriate document type (brief, response, exhibit, etc.), provide a brief description or title of the specific document being uploaded (Petitioner's Brief, Motion, P. Ex. 1, etc.), click on "Choose File," then find and select the appropriate file to be uploaded to DAB E-File. Once the file is selected, click "Continue," then click on the document file name to preview the document that will become part of the official record. Once satisfied, click "Upload." The document will then be filed and become part of the electronic record.
 - a. DAB E-File accepts standard document types, including, but not limited to Adobe PDF, Microsoft Word, and JPEG image files. **CRD prefers searchable PDFs.**
4. *Uploading multiple documents.* To upload multiple documents, following the instructions in subparagraph (3), but do **not** select "Continue." Instead, select "Upload Additional Document," which appears to the bottom left of the information fields. Continue to use "Upload Additional Document" until all documents have been uploaded to DAB E-File, then click "Continue" to preview all of the documents. Once satisfied that all documents have been selected, click "Upload," and all of the documents will be filed at one time and become part of the electronic record.

5. *Clicking “Upload” is required.* All parties must click “Upload” in order to file a document. Simply selecting the document from your computer and clicking “Continue” is not enough to file that document. All parties, including the party filing a document, will receive an automatic e-mail notification once the document has been successfully filed. Parties should verify that they have received that e-mail notification and review the contents of that e-mail to ensure they properly filed a document.
- ix. *Electronic Signatures.* Use of DAB E-File to file a document fulfills any signature requirement applicable to the party or representative who made the filing. The electronic copy of a document authored by a person other than the party’s representative — for example, a witness affidavit or declaration — must be in an electronic format (*e.g.*, PDF) that captures the actual physical signature.
- x. *E-mailing documents is prohibited.* Filing documents by e-mail outside of DAB E-File is prohibited. Sending a courtesy copy by e-mail to the assigned staff attorney is not required for any document filed through DAB E-File.
- xi. *Troubleshooting.* If you experience technical problems when using DAB E-File, please contact DAB E-File support personnel by phone at (202) 565-0146 or by e-mail at OSDABImmediateOffice@hhs.gov. Requests for assistance made after 4:00 p.m. Eastern Time will not be addressed until the following business day.
- xii. *Extensions of time for technical issues.* An ALJ will **not** automatically grant an extension of time to file a required submission if a party experiences problems while using DAB E-File. Parties must demonstrate good cause for an extension of time due to such problems. A party’s inability to navigate through the properly-functioning DAB E-File system or individual problems uploading documents will generally not be a sufficient showing of good cause to extend a filing deadline. Parties must become familiar with DAB E-File well before their submissions are due.
- b. *Filing by mail or private delivery service if granted a waiver.* Only upon receiving a written waiver from the electronic filing requirement may submissions be made by U.S. mail or an express delivery service. Courier or messenger deliveries will not be accepted. Filing documents by

facsimile is not acceptable unless authorized by the ALJ in advance. Filing documents by e-mail outside of DAB E-File is prohibited.

The address for filing documents and any correspondence with CRD related to a case is:

Departmental Appeals Board
Civil Remedies Division, MS 6132
330 Independence Avenue, SW
Cohen Building, Room G-644
Washington, D.C. 20201

Written material is considered filed when placed in the U.S. mail or with an express delivery service, such as FedEx.

- c. ***Service of written material.*** A party filing a document with CRD must, at the time of filing, serve a copy on all other parties to the case according to the following requirements:
 - i. If all parties are using DAB E-File, service upon the other parties is effectuated by uploading the submission to DAB E-File. Parties using DAB E-File consent to service through DAB E-File. Each party will receive an automatic e-mail notification when a new submission has been uploaded in the case.
 - ii. If a party has received a waiver from using DAB E-File, then:
 - 1. an opposing party must mail the party exempt from electronic filing a copy of any submissions and include a certificate of service with its submissions; and
 - 2. when filing a submission, the party exempt from electronically filing must mail a written copy of its submission to CRD and the opposing party.

7. GENERAL FORMATTING FOR PLEADINGS

- a. ***Caption.*** Every pleading and paper filed in the proceeding must contain a caption setting forth the title of the action and the case number.
- b. ***Title or designation.*** Every pleading must include a title or designation of the paper, such as “Motion to Quash Subpoena.”

- c. ***Signature.*** Every pleading and paper must be signed by and must contain the address, telephone number, and e-mail address of the party or the person on whose behalf the paper was filed, or his or her representative. See CRDP § 6(a)(ix) for the signature requirements of electronically-filed pleadings and other documents.

8. MOTIONS GENERALLY

- a. ***Writing requirement.*** Except for motions made during a prehearing conference or at a hearing, all motions must be in writing and signed by a party or party representative. The ALJ may require that oral motions be reduced to writing.
- b. ***Opportunity to respond.*** A party may file a response to the opposing party's motion, either at the time fixed by regulation or by the ALJ. Unless otherwise ordered by the ALJ, the time within which a party may file such a response is governed by pertinent regulations (*e.g.*, 42 C.F.R. § 498.17 or 42 C.F.R. § 1005.13(c)).

9. MOTION FOR AN EXTENSION, CONTINUANCE, OR STAY

- a. ***Filing appropriate motion.*** In CRD cases, an extension of time refers to resetting the date on which a submission is due; a continuance refers to resetting the date or time on which an event, such as a hearing or a prehearing conference, is to take place; and a stay (of proceedings) refers to the suspension of all due dates for submissions or events. A party desiring an extension of time, a continuance, or a stay, must file a motion (a joint motion may be filed), in proper format, that:
 - i. states good cause,
 - ii. indicates that the movant has contacted opposing counsel, or the unrepresented party, and
 - iii. states whether the opposing party consents, does not oppose, or objects to the motion.
- b. ***Formal motion required.*** A party (or parties) requesting an extension, continuance, or stay must file a motion in writing. Unless permitted by the ALJ in a specific case, informal requests for an extension or a stay made by phone or e-mail to the staff attorney are not permitted and will not be granted.

- c. ***No automatic extensions, continuances, or stays.*** Filing a motion, including a joint motion or an unopposed motion, does not automatically extend any deadlines or stay any action that has been previously scheduled.
- d. ***Established deadline controls if no ALJ order.*** If no order is issued granting an extension, continuance, or stay prior to a deadline or scheduled date, the party or parties must comply with the established deadline. The assigned staff attorney may communicate an ALJ's order to the parties. If a party fails to obtain an extension of time to meet a requirement before the time expires, then the party must file a motion for leave to complete the action "out-of-time," stating good cause for having failed to timely comply.

10. RESPONSES TO MOTIONS OR OTHER REQUESTS

- a. ***Response or opposition to a motion or request filed separately from a party's prehearing exchange.*** Unless the applicable regulations state otherwise, an opposing party will have 20 days from the date of filing to submit any statement or additional evidence in response to a motion. An opposing party will have 30 days to respond to a motion for summary judgment (CRDP § 19(a)), unless the ALJ orders otherwise. Parties should be aware that certain regulations require a response be filed within 10 days from the date a motion or request is filed. The parties are responsible for knowing the regulations applicable to their case and cannot cite this section of the CRDP as a basis for not complying with the deadlines that those applicable regulations may establish.
- b. ***Response or opposition to a motion or request filed with a party's prehearing exchange.*** If a party files a motion, request, or objection simultaneously with its prehearing exchange, then the non-moving party's response will be due at the same time its prehearing exchange or reply is due, as set forth in the ALJ's prehearing order or other scheduling order.

11. COMPUTATION OF TIME

- a. ***General rule.*** In computing any period of time under these procedures, the time begins with the day following the act and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the federal government, in which case the period of time includes the next business day. If an ALJ directs that a party files its submissions on a date certain, but that date falls on a weekend or legal holiday, the due date will automatically be the following business day.

- b. *If time allowed is less than seven days.* When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the federal government will be excluded from the computation.
- c. *Additional time if original document was served by mail.* In some cases, where a document requiring a response has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response. This will not apply to requests for hearing. A party may not add additional time if a document has been served electronically by DAB E-File. The applicable procedural regulations and/or ALJ order in a case should be consulted concerning adding five days.

12. DISCOVERY

- a. *Limited discovery.* Discovery in cases before the CRD is limited, and available only in some cases where provided by regulation. Parties should refer to the specific regulation governing their case for guidance in making a discovery request.
- b. *Motions to compel.* A party may move to compel the production of documents as authorized by law. The moving party must follow the instructions established by the ALJ and attach relevant documentation supporting the motion.
- c. *Subpoena duces tecum.* A party may request the ALJ to issue a subpoena for the production of certain documents (a “subpoena duces tecum”) and the ALJ may issue such subpoenas as authorized by law. An ALJ will issue a subpoena if the requesting party has met all applicable regulatory requirements.
- d. *Sanctions.* Upon request of a party or on his or her own motion, the ALJ may sanction a party for not complying with any discovery-related order, including the failure to respond to a discovery request by a certain deadline. Sanctions will be proportionate to the violation and can range from drawing a negative factual inference against the noncompliant party to the dismissal of a noncompliant party’s hearing request.
- e. *Motion for a protective order.* If available under the applicable regulations, a party may move the ALJ to issue a protective order that limits the production or disclosure of certain requested documents by an opposing party. An ALJ will issue a protective order if the requesting party has met all applicable regulatory requirements.

- f. ***Response to discovery-related motions.*** If a party moves the ALJ to issue a discovery-related order or sanction, an opposing party will have an opportunity to respond to that motion within the time permitted by the applicable regulations, which may be 10 or 20 days from the date the request has been filed.

13. PREHEARING SUBMISSIONS AND REQUIREMENTS

- a. ***General requirements.*** Unless an ALJ directs otherwise, a prehearing exchange includes:
- i. lists of proposed exhibits and proposed witnesses (note that any party offering expert testimony must include in the exchange a statement of the expert's qualification, a summary of the expert's opinion, and the basis for the opinion);
 - ii. copies of proposed documentary exhibits labeled in accordance with CDRP § 14;
 - iii. written statements (in the form of sworn affidavits or statements made under penalty of perjury) of all proposed witnesses, offered in lieu of direct testimony;
 - iv. any prior statements of proposed witnesses other than those offered in subparagraph (iii) that relate to issues which might be raised at hearing; and
 - v. a prehearing brief that provides a party's written argument about all matters of law and fact at issue in the case.
- b. ***Case-specific requirements.*** The ALJ may order prehearing submissions in addition to those stated in paragraph (a) or may not require that all of them be submitted prior to hearing. Parties should refer to the ALJ's Acknowledgment and Prehearing Order or other scheduling order to determine the prehearing submission requirements for a specific case. In a complex case, the ALJ may order two exchanges of proposed exhibits and lists of exhibits and witnesses.
- c. ***Entire submission must be filed at one time.*** A party must file all of its prehearing submissions at one time even if it files its submissions prior to the deadline that the ALJ has established. A party may not file its submissions piecemeal or supplement its earlier submission unless the party

requests, in writing, an opportunity to supplement its earlier submission and the ALJ grants the party leave to do so.

- d. ***Untimely submissions are prohibited.*** A party may not call a witness at an oral hearing who was not listed on that party's witness list or offer an exhibit not listed or timely furnished to the opposing party. If the opposing party objects, the offering party must persuade the ALJ why the testimony should be allowed or the exhibit admitted, inasmuch as the party did not comply with prehearing requirements for providing the ALJ and the opposing party with the name of the witness or a copy of the proposed exhibits.

14. EXHIBITS

In a case in which the ALJ has either scheduled an oral hearing or ordered that a decision will be upon the written record, the ALJ will order a variety of documents be filed.

- a. ***Documents to be offered as exhibits.*** Documents that are intended to prove facts as alleged by a party must be offered as exhibits. Documents that are merely illustrative examples of a matter discussed in a brief, or that are being provided as a convenience (such as copies of court decisions), should not be offered as exhibits, but should be made attachments to a brief or other submission. Parties should not file as exhibits any documents that are already in the record (such as the hearing request), and should not file as an exhibit a document already filed as an exhibit by the opposing party.
- b. ***Exhibit list.*** A party must file a list of its proposed exhibits that provides the exhibit number, a brief title or description of the exhibit, and the total number of pages the exhibit contains. A party's exhibit list should identify which exhibit contains the written direct testimony of a witness, if such testimony is offered.
- c. ***Format for proposed exhibits.*** Proposed exhibits must be legible in all relevant parts and comply with the following requirements:
 - i. ***Docket number.*** Each exhibit must be marked with the docket number of the case in which they are offered.
 - ii. ***Party identification.*** Each exhibit must be marked with an abbreviated designation for the party offering the exhibit (followed by the abbreviation "Ex." for exhibit). Non-federal parties should use their position in the case, not their name, for proper exhibit identification. For example, the designation "P" for Petitioner or

“R” for Respondent is generally used for non-federal parties. Federal parties should use the standard acronym of the agency for proper exhibit identification. For example, “CMS” is used for the Centers for Medicare & Medicaid Services; “I.G.” is used for the Inspector General of HHS; and “SSA” is used for the Social Security Administration.

- iii. *Exhibit number.* The party designation must be followed by a whole number representing the exhibit number (one not used previously by the offering party), not a letter, not a mixture of numbers and letters, and not a number with a decimal point.
- iv. *Page numbers.* Each page of each exhibit must be numbered so that the page can be located easily when the exhibit is being discussed in a brief, at a hearing, or in the decision. The parties should number the pages of each exhibit in a separate sequence for the exhibit. An example of how these designations should look is:

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P. Ex. 1

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- v. *Labeled in lower right corner.* The identifying markings stated in subparagraphs (i) through (iv) must be placed on the lower right corner of the exhibit itself. The identifying markings should not obscure any relevant part of the exhibit. If not practical to label an exhibit in the lower right corner, then the offering party should place the label in an area so that the label can be easily found and read.
 - vi. *No binders or holes punched.* Proposed exhibits filed in paper copy should be attached so as to be secure, but should stand alone and should not be bound together with other exhibits. Holes should not be punched through the content of documents.
- d. *Rejection of proposed exhibits.*** The ALJ may reject proposed exhibits not prepared in the manner indicated in paragraph (c) of this section and direct that the party resubmit its proposed exhibits to comply with the stated requirements. This may cause delay in preparation for the hearing. In a case which is proceeding without an oral hearing, it may delay the decision. An ALJ may sanction a party that does not comply with the requirements of this section by not admitting or not considering the noncompliant exhibits.

- e. ***Objections to proposed exhibits.*** If a party objects to the admission of a proposed exhibit of the opposing party, the party must object in writing within the deadline established by the ALJ. An ALJ may admit exhibits during a prehearing conference, at an oral hearing, or in a decision if no oral hearing is held. Where a case is to be decided without an oral hearing, the ALJ will give a party the opportunity to object to the admission of documentary evidence offered as an exhibit by the opposing party. Such exhibits generally accompany a party's brief and the opposition to the exhibit is incorporated in the opposing party's response brief.

15. USE OF RULE 1006 SUMMARIES FOR VOLUMINOUS RECORDS

- a. ***Use of chart or summary exhibit.*** Using Rule 1006 of the Federal Rules of Evidence as a guideline, and unless permitted by the ALJ to do otherwise, a party that wants the ALJ to consider the contents of voluminous records should offer that evidence as an exhibit in the form of a chart or summary.
- b. ***Filing and service of summary exhibit and supporting documents.*** The chart or summary offered as an exhibit, like other proposed exhibits, must be furnished to the ALJ and staff attorney and served on the opposing party at the time of the exchange. In addition, the offering party must supply the opposing party at that time with copies of all supporting documents on which the summaries are based. The ALJ may order also that the voluminous records be produced at the hearing.

16. WITNESSES

- a. ***Witness list.*** A party must file, as part of its prehearing exchange, a list of its proposed witnesses that includes the last known address of each witness, sufficient information to identify the relationship of the witness to the case, and a brief summary of the testimony that the party anticipates the witness will provide. If the ALJ directed each party to file written direct testimony of its proposed witnesses, the witness list should identify which proposed exhibit contains the written direct testimony of each proposed witness.
- b. ***Direct and cross-examination.*** The direct and cross-examinations of a witness will generally occur during an oral hearing. An ALJ may order that the written direct examination of a proposed witness be filed as a proposed exhibit with the party's prehearing exchange. A party will then be afforded an opportunity to cross-examine a witness during an oral hearing. An ALJ may order that parties affirmatively state in writing their intent to cross-examine a specific witness. Parties must refer to the ALJ's Prehearing

Order or other scheduling order to determine whether written direct testimony and/or a written request to cross-examine a witness are required in a case.

- c. ***Untimely identification of a witness is prohibited.*** A party must identify all of its proposed witnesses with its prehearing exchange or at another time the ALJ directs. The ALJ might not permit the testimony of a witness and might reject written direct testimony if the offering party has not timely served and submitted a relevant testimony.

17. SUMMONING WITNESSES

- a. ***Notices to Appear.*** Parties must serve their witnesses notices to appear that provide the location of the hearing and the date.
- b. ***Subpoenas.*** Parties may move for issuance of a subpoena requiring a witness to appear and testify, as provided by regulation (*e.g.*, 42 C.F.R. § 498.58 or 42 C.F.R. § 1005.9). The moving party is to ascertain in advance, and indicate in the motion requesting a subpoena, whether or not the opposing party objects. The party requesting the subpoena is responsible for serving the witness.

18. HEARING

- a. ***Video teleconference (VTC).*** If an ALJ convenes an oral hearing to receive witness testimony or other evidence, it will be conducted by video teleconference (VTC). The CRD staff will assist the parties in attempting to locate an appropriate VTC site or sites that are compatible with the CRD equipment and will notify the parties of the VTC location(s) as soon as a specific location has been confirmed. Non-federal parties are encouraged to locate any possible VTC locations near them in an effort to minimize traveling time and distance to a more remote VTC location.
 - i. ***Telephone alternative.*** If no appropriate site can be located, an ALJ may direct that testimony be received by telephone.
 - ii. ***Future modifications to hearing procedures.*** The CRD may determine that it is necessary or appropriate to modify the technology used to conduct a hearing, and the ALJ may direct the parties to appear using that technology.
- b. ***Witnesses.*** The federal party will call its proposed witnesses first, followed by the non-federal party calling its witnesses. The ALJ may, in the interest

of time, permit a non-federal witness to provide testimony between federal witnesses being called. The ALJ will determine whether or not to apply Rule 615 of the Federal Rules of Evidence (sequestering witnesses) if a party requests sequestration and may permit certain consultant witnesses to remain present during the testimony of other witnesses.

- c. *Transcript.*** A court reporter service will prepare a written transcript of the hearing. A transcript becomes part of the record that the ALJ uses to decide the case, but is not uploaded to DAB E-File until after the case is decided. Federal parties obtain their transcripts via interagency agreement. Non-federal parties can order transcripts from the court reporting service. Non-federal parties will be provided with information prior to the hearing about how to order a transcript or they may contact the Civil Remedies Division at 202-565-9462. Video recordings are not prepared and are not available.

19. ALTERNATIVES TO AN ORAL HEARING

An oral hearing (*i.e.*, a hearing at which witnesses are called and testify) is not the only procedure that the ALJ may use to hear and decide a case.

a. *Summary judgment.*

- i. Any party to a case may file a motion for summary judgment at any time prior to the scheduling of a hearing, or as directed by the ALJ.
- ii. Unless otherwise stated in the applicable regulations or ALJ order, the non-moving party may respond to a motion for summary judgment no later than 30 days following the date the motion for summary judgment was filed. If a party moves for summary judgment simultaneously with its prehearing exchange, then the non-moving party's response will be due at the same time its prehearing exchange or reply is due, as set forth in the ALJ's prehearing order.
- iii. Matters presented to the ALJ for summary judgment will follow Rule 56 of the Federal Rules of Civil Procedure and federal case law related thereto or they will proceed in accordance with an ALJ order.

- b. *Written direct testimony.*** An ALJ may direct the parties to submit the written direct testimony of proposed witnesses in lieu of holding an oral hearing to obtain that direct testimony. Any written direct testimony must be in the form of a sworn affidavit or declaration under penalty of perjury. Written direct testimony must be submitted and properly labeled as a proposed exhibit with a party's prehearing exchange. If the ALJ orders

written direct testimony, then an oral hearing would be convened only for the purposes of permitting cross-examination and re-direct testimony of the witnesses.

- c. ***Waiver of Oral Hearing.*** Parties may waive oral hearing, subject to the approval of the ALJ, and have the case decided on the written record.
- d. ***Decision on written submissions.*** The ALJ may determine that an oral hearing is unnecessary and not in the overall interest of judicial economy if the parties do not identify any proposed witnesses, do not offer the written direct testimony of any witnesses when ordered to do so, or do not request an opportunity to cross-examine a witness whose written direct testimony has been offered. Under these circumstances, the ALJ may decide the case based on the written record.

20. EVIDENCE

The ALJ determines the admissibility of evidence. The ALJ is not bound by the Federal Rules of Evidence; however, the ALJ may apply the Federal Rules of Evidence where appropriate, for example, to exclude unreliable evidence.

21. POST-HEARING BRIEFS

The ALJ will set a deadline for the parties to file post-hearing briefs and post-hearing reply briefs, as appropriate.

22. DISPOSITION OF A CASE

- a. ***Decision.*** The parties' briefs, exhibits, and, if applicable, the transcript of the hearing testimony, serve as the basis for the decision or other disposition of the case. The ALJ issues a decision, based on the record that contains findings of fact and conclusions of law. Depending on the relevant regulation, the ALJ may affirm, increase, or reduce the penalties imposed by the Secretary.
- b. ***Remand.*** As authorized by law, an ALJ may remand a case to the agency that issued the determination for further consideration or to issue a new determination. Upon remand, a party's hearing request may be dismissed without prejudice, meaning the party may maintain its right to request a hearing following the consideration on remand.
- c. ***Dismissal.*** Under certain circumstances described in the applicable regulations, an ALJ must dismiss a hearing request or may exercise his or

her discretion to dismiss a hearing request. A party may withdraw its hearing request or request a dismissal of its hearing request, at which point the ALJ may dismiss a hearing request without further notice to the parties. If a party has not consented to the dismissal of its hearing request, an ALJ will warn a party that its hearing request is subject to dismissal prior to dismissing it and provide an opportunity to explain why the hearing request should not be dismissed. Unless re-opened upon request, dismissals are presumed to be the final resolution of a party's request for a hearing before an ALJ.

- d. *Request for review of decision or dismissal.*** Request for review by the Departmental Appeals Board, Appellate Division, is based upon the applicable regulations. A transmittal letter notifying the parties of an ALJ's decision or dismissal, or the decision, ruling, or dismissal itself will notify the parties of the applicable regulations and procedures for requesting review by the Board.

23. SANCTIONS

The ALJ may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action, or for other misconduct that interferes with the speedy, orderly or fair conduct of the hearing.

24. ALTERNATIVE DISPUTE RESOLUTION

An alternative dispute resolution (ADR) process is available at the Departmental Appeals Board. If parties wish to pursue ADR they may contact the coordinator at (202) 565-0118. For further information about ADR, see:

<http://www.hhs.gov/dab/divisions/adr/index.html>. A case is not automatically stayed pending the parties' agreement to attempt resolution by use of ADR. The two processes can go forward at the same time.

25. DECISION DATABASE

An internet-accessible database of CRD's ALJ decisions and decisions of the Departmental Appeals Board is available. See:

<http://www.hhs.gov/dab/decisions/index.html>.

26. CITATIONS

- a. *Citing prior decisions.*** Parties should use the following formats to cite prior decisions that may be relevant to a particular issue:

- i. *Federal or state court decisions.* Citation to court decisions should include the parties' names (using appropriate abbreviations), reporter, a specific page citation, and, in parenthesis, the deciding court and the year of the decision. For example: *Morgan v. Sebelius*, 694 F.3d 535, 539 (4th Cir. 2012).
 - ii. *Departmental Appeals Board.* Citation to a decision by an appellate panel of the Departmental Appeals Board (DAB) should include only the non-federal party's name (using appropriate abbreviations), the decision number, a specific page citation, and, in parentheses, the year of the decision. For example: *Honey Grove Nursing Ctr.*, DAB No. 2570, at 3 (2014).
 - iii. Citation to a ruling by an appellate panel of the DAB should include only the non-federal party's name (using appropriate abbreviations), the ruling number, a specific page citation, and, in parentheses, the year of the decision. For example: *Mark B. Kabins, M.D.*, DAB Ruling No. 2012-1, at 2 (2011).
 - iv. *Prior ALJ Decisions.* Citation to a prior decision by an ALJ within DAB should include the same information as stated in subparagraph (ii). The ALJ decision number must include "CR" with the decision number immediately following. Parties should be clear which type of case they cite. For example, "*Honey Grove Nursing Ctr.*, **DAB No. 2570**, at 3 (2014)" cites a prior decision of an appellate panel of DAB, while "*Honey Grove Nursing Ctr.*, **DAB CR3039** (2013)" cites a prior decision of an ALJ within DAB. (**Emphasis added**).
 - v. *Prior ALJ Rulings.* Citation to a prior ruling by an ALJ within DAB should include the same information as stated in subparagraph (ii). The ruling number must include "ALJ" with the ruling number immediately following. For example: *Better Living/Better Health, LLC.*, ALJ Ruling No. 2014-36, at 2 (HHS CRD July 11, 2014).
- b. *Citing to subscription services.* Parties are discouraged from only citing to a subscription service or reporter, *e.g.*, Westlaw or LexisNexis, especially if the opposing party is not represented by an attorney. Parties also should cite to a published reporter or other database that is easily accessed to the public online without a subscription or charge.
 - c. *Citing these procedures.* These procedures may be cited by the abbreviation CRDP and the appropriate section number, *e.g.*, CRDP § 26.