

inspection and copying of documents that are relevant and material to the issues before the ALJ. Like the OIG, we are specifically not authorizing other forms of discovery, such as depositions and interrogatories. Prehearing discovery is not provided for under the APA and is rarely available in administrative hearings. Full-scale discovery is inappropriate in administrative hearings, as it would unduly delay the streamlined administrative process. These regulations do, however, provide for exchange of relevant and material documents, as well as the exchange of witness lists, prior witness statements, and exhibits before the hearing, as provided in § 160.540 of the rule.

*Exchange of Witness Lists, Statements, and Exhibits*

Section 160.540 provides for the prehearing exchange of certain documents, including witness lists, copies of prior statements of witnesses, and copies of hearing exhibits.

Paragraph (a) of this section differs slightly from the corresponding paragraph in § 1005.8 of the OIG regulations, in that it provides for the exchange of witness lists, witness statements and exhibits at least 15 days before the hearing, but also allows the ALJ to order an earlier exchange if he or she deems it necessary.

Paragraph (b) provides that the ALJ must exclude witnesses and documents offered by a party that did not provide those materials before the hearing, except where there is good cause for the failure, or where there is not substantial prejudice to the objecting party. As with the OIG regulations, this provision is mandatory and serves to prevent the parties from litigating by surprise and to promote the procedural regularity of the hearing. Paragraph (b)(3) provides that where the witnesses or exhibits are not excluded, the ALJ must recess the hearing for a reasonable time to allow the objecting party the opportunity to prepare and respond to them, unless the objecting party agrees to proceed. This paragraph differs from § 1005.8(b)(3) of the OIG regulations, under which the decision to postpone the hearing is within the ALJ's discretion. This modification is equally beneficial to both parties to a hearing and will reduce the potential for unfair surprise during a hearing. It is preferable to the OIG provision that grants the ALJ discretion, because it provides clear notice to the parties and clear direction to the ALJ in the event witnesses or exhibits are not excluded.

Finally, any documents exchanged before the hearing would be deemed

authentic for purposes of admissibility at the hearing unless a party objected to a particular document before the hearing.

*Subpoenas for Attendance at the Hearing*

Section 160.542 outlines procedures for the ALJ to issue, and for parties and prospective witnesses to contest, subpoenas to appear at the hearing. Subpoenas are authorized by 42 U.S.C. 1320a-7a(j) and may be issued by an ALJ pursuant to 5 U.S.C. 556(c). Either party may request that the ALJ issue a subpoena, if the appearance of a witness and the testimony are reasonably necessary for the party's case. The subpoena procedures here are the same as those at § 1005.9 of the OIG regulations.

*Fees*

Section 160.544 provides for the payment of witness fees by the party requesting a subpoena. This section tracks § 1005.10 of the OIG regulations.

*Form, Filing, and Service of Papers; Computation of Time*

Section 160.546 sets forth requirements for documents filed with the ALJ. Section 160.548 outlines the method for computing time periods under this part. These provisions track, respectively, § 1005.11 and § 1005.12 of the OIG regulations.

*Motions*

The provisions of § 160.550 set forth requirements for the content of motions and the time allowed for responses. This section tracks § 1005.13 of the OIG regulations.

*Sanctions*

Section 160.552 outlines the sanctions an ALJ may impose on parties and their representatives for failing to comply with an order or procedure, failing to defend an action, or other misconduct. These sanctions are specifically provided for by the statutory provision at 42 U.S.C. 1320a-7a(c)(4). This section tracks § 1005.14 of the OIG regulations.

*The Hearing*

Section 160.554 provides for a public hearing on the record. It allows for the admission of rebuttal evidence not exchanged before the hearing.

This section is based upon § 1005.15 of the OIG regulations, which also addresses the burden of proof at the hearing, and provides that the hearing is not limited to the items and information set forth in the notice of proposed determination. We anticipate addressing those issues in the notice-and-comment

rulemaking that we plan for the remainder of the Enforcement Rule.

*Witnesses*

Under § 160.556, the ALJ may allow testimony to be admitted in the form of a written statement or deposition so long as the opposing party has a sufficient opportunity to subpoena the person whose statement is being offered. This section also allows an HHS investigator or other expert to be a witness, in addition to assisting counsel for the Secretary at counsel table during the hearing. These provisions closely track § 1005.16 of the OIG regulations.

*Evidence*

With certain limited exceptions, the Federal Rules of Evidence are not binding on the ALJ. However, the ALJ may apply the Federal Rules of Evidence to exclude unreliable evidence. Section 160.558 is substantially similar to § 1005.17 of the OIG regulations, but does not contain a paragraph corresponding to § 1005.17(j) regarding evidence as to the respondent's willingness and/or ability to enter into a corrective action plan. We anticipate addressing this issue in the notice-and-comment rulemaking that we plan for the remainder of the Enforcement Rule.

*The Record*

Section 160.560 provides for recording and transcription of the hearing, and for the record to be available for inspection and copying by any person. For good cause, the ALJ may order appropriate redactions made to the record. These provisions track § 1005.18 of the OIG regulations.

*Post-Hearing Briefs*

Section 160.562 provides that the ALJ has discretion to order post-hearing briefs, although the parties may file post-hearing briefs in any event if they desire. This section tracks § 1005.19 of the OIG regulations.

*ALJ Decision*

Section 160.564 provides that not later than 60 days after the filing of post-hearing briefs, the ALJ shall serve on the parties a decision making specific findings of fact and conclusions of law. The ALJ's decision is the final decision of the Secretary.

Section 1005.20 of the OIG regulations, upon which this section is based, provides for the ALJ to issue an "initial decision," which is then reviewable by the Departmental Appeals Board if properly appealed. We have not provided for a second level of administrative review in this rule, and