

- (1) Simplification of the issues;
  - (2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;
  - (3) Stipulations and admissions of fact or as to the contents and authenticity of documents;
  - (4) Whether the parties can agree to submission of the case on a stipulated record;
  - (5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of the other party) and written argument;
  - (6) Limitation of the number of witnesses;
  - (7) Scheduling dates for the exchange of witness lists and of proposed exhibits;
  - (8) Discovery of documents as permitted by this subpart;
  - (9) The time and place for the hearing;
  - (10) The potential for the settlement of the case by the parties; and
  - (11) Other matters as may tend to encourage the fair, just and expeditious disposition of the proceedings, including the protection of privacy of individually identifiable health information that may be submitted into evidence, if appropriate.
- (c) The ALJ must issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

#### **§ 160.536 Settlement.**

The Secretary has exclusive authority to settle any issue or case without the consent of the ALJ.

#### **§ 160.538 Discovery.**

- (a) A party may make a request to another party for production of documents for inspection and copying that are relevant and material to the issues before the ALJ.
- (b) For the purpose of this section, the term “documents” includes information, reports, answers, records, accounts, papers and other data and documentary evidence. Nothing contained in this section may be interpreted to require the creation of a document, except that requested data stored in an electronic data storage system must be produced in a form accessible to the requesting party.
- (c) Requests for documents, requests for admissions, written interrogatories, depositions and any forms of discovery, other than those permitted under paragraph (a) of this section, are not authorized.
- (d) This section may not be construed to require the disclosure of interview reports or statements obtained by any party, or on behalf of any party, of

persons who will not be called as witnesses by that party, or analyses and summaries prepared in conjunction with the investigation or litigation of the case, or any otherwise privileged documents.

(e)(1) When a request for production of documents has been received, within 30 days the party receiving that request must either fully respond to the request, or state that the request is being objected to and the reasons for that objection. If objection is made to part of an item or category, the part must be specified. Upon receiving any objections, the party seeking production may then, within 30 days or any other time frame set by the ALJ, file a motion for an order compelling discovery. The party receiving a request for production may also file a motion for protective order any time before the date the production is due.

(2) The ALJ may grant a motion for protective order or deny a motion for an order compelling discovery if the ALJ finds that the discovery sought—

- (i) Is irrelevant;
  - (ii) Is unduly costly or burdensome;
  - (iii) Will unduly delay the proceeding; or
  - (iv) Seeks privileged information.
- (3) The ALJ may extend any of the time frames set forth in paragraph (e)(1) of this section.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

#### **§ 160.540 Exchange of witness lists, witness statements, and exhibits.**

(a) The parties must exchange witness lists, copies of prior written statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 160.556, at least 15 days before the hearing, unless the ALJ orders an earlier exchange.

(b) (1) If at any time a party objects to the proposed admission of evidence not exchanged in accordance with paragraph (a) of this section, the ALJ must determine whether the failure to comply with paragraph (a) of this section should result in the exclusion of that evidence.

(2) Unless the ALJ finds that extraordinary circumstances justified the failure timely to exchange the information listed under paragraph (a) of this section, the ALJ must exclude from the party's case-in-chief—

- (i) The testimony of any witness whose name does not appear on the witness list; and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that extraordinary circumstances existed, the ALJ must then determine whether the admission of that evidence would cause substantial prejudice to the objecting party. If the ALJ finds that there is no substantial prejudice, the evidence may be admitted. If the ALJ finds that there is substantial prejudice, the ALJ may exclude the evidence, or, if he or she does not exclude the evidence, must postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence, unless the objecting party waives postponement.

(c) Unless the other party objects within a reasonable period of time before the hearing, documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

#### **§ 160.542 Subpoenas for attendance at hearing.**

(a) A party wishing to procure the appearance and testimony of any person at the hearing may make a motion requesting the ALJ to issue a subpoena if the appearance and testimony are reasonably necessary for the presentation of a party's case.

(b) A subpoena requiring the attendance of a person in accordance with paragraph (a) of this section may also require the person (whether or not the person is a party) to produce relevant and material evidence at or before the hearing.

(c) When a subpoena is served by a respondent on a particular employee or official or particular office of HHS, the Secretary may comply by designating any HHS representative to appear and testify.

(d) A party seeking a subpoena must file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. That motion must—

- (1) Specify any evidence to be produced;
- (2) Designate the witnesses; and
- (3) Describe the address and location with sufficient particularity to permit those witnesses to be found.

(e) The subpoena must specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(f) Within 15 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.