

eliminate some or most of the pending hearings that could go to make up a complete docket for an ALJ trip to the affected remote site.

To ensure claimants in areas of high VTC usage a meaningful option to appear in person, we will make it our practice in those areas to afford claimants who do not want to appear by VTC the opportunity to appear in person either at the hearing office (where hearings are held without need to accumulate ALJ travel dockets), or at any remote site in the hearing office's service area (including, but not limited to, the designated remote site for the claimant's place of residence). We will schedule a hearing where the claimant may appear in person at the earliest possible time based on the filing date of the claimant's request for hearing; election of the option to appear in person will not cause the claimant to lose his or her place in the queue of individuals awaiting entry into the process for scheduling hearings.

In following these practices, we will apply our normal rules for reimbursing the travel expenses that claimants, their representatives, and any unsubpoenaed witnesses incur in traveling to the hearing office or to any remote site in the service area for hearings (*see* §§ 404.999a–404.999d and 416.1495–416.1499). A claimant's decision not to accept a scheduled appearance by VTC will not prevent reimbursement of travel expenses under §§ 404.999c(d)(4) and 416.1498(d)(4).

Comment: An organization commented that choice of hearing sites should be explained at an early, informal conference, and that the choice should be deferred where a claimant wants to appoint a representative. The commenter noted that ensuring that claimants make an informed choice of hearing site would further SSA's goal of reducing the rescheduling of hearings.

Response: In areas in which the Associate Commissioner for Hearings and Appeals has determined that hearings can be conducted more efficiently using VTC than by having appearances made in person, it will be our practice in our pre-hearing activities to provide claimants with information about VTC procedures and an opportunity to ask questions about and to state a preference for or against use of those procedures.

When the ALJ determines that a case is ready to be scheduled for hearing and sets the time and place of the hearing, the ALJ will also decide whether the claimant's appearance should be scheduled to occur by VTC or in person. In doing that, the ALJ will consider any stated preference of the claimant or the

representative for or against appearing by VTC, as well as the availability of VTC technology and any other factors, such as a claimant's loss of visual and auditory capacities, that may affect how the appearance should be conducted.

When we issue a notice of hearing advising a claimant that his or her appearance has been scheduled to be by VTC, the claimant will then have an absolute right to decline to appear by VTC, irrespective of any preference he or she may have previously stated in this regard, and to choose to appear in person, under the practices on rescheduling and use of in-person appearance sites that we have described above. A timely statement by the claimant of any objection to appearing by VTC or of a desire to appear in person will constitute good cause for rescheduling the claimant's appearance to be in person (*see* §§ 404.936(e) and 416.1436(e) as revised in these final rules).

Our policy of giving claimants their option to decline to appear by VTC after issuance of the notice of hearing is designed to promote the effective use of VTC procedures while also maintaining a meaningful option for claimants who want to appear in person. We believe that claimants will carefully consider whether they should exercise this option since doing so could delay the occurrence of their hearings, even under the rescheduling and site-usage practices we have described above for expediting the rescheduling of hearings to allow in-person appearances. We believe this policy will help to ensure that VTC procedures will be frequently used where available and, thus, that these procedures will be effective in improving the overall efficiency of the hearings process, even though some hearings will have to be rescheduled because claimants decide against appearing by VTC. We believe the policy is warranted with respect to the individuals affected because the option of appearing by VTC will allow them to have their hearings before an ALJ in the shortest possible time.

Comment: An ALJ commented that claimants should not be given the option of demanding an in-person hearing instead of a VTC hearing. The commenter's reasoning was that VTC either is or is not in accord with due process and, if it is (as this commenter believes), the claimant has no legal basis for insisting on in-person proceedings. The commenter further contended that giving this option would be based, not on a legal right, but on an attempt to accommodate the claimant's preferences, and that mere preferences should be outweighed by the costs to

the Agency and the public of accommodating those preferences for a hearing in a more costly forum. The commenter reported that it was his impression—based on pre-ALJ experience with use of VTC in criminal proceedings—that the participants in proceedings conducted by VTC paid little attention to the medium once the proceedings began. In this commenter's view, there is no legitimate reason to object to VTC procedures and many less than legitimate reasons for preferences against those procedures, including judge shopping and claimant discomfort at being “on TV.”

Response: We believe that the hearing proceedings we conduct by VTC will be fundamentally fair and that they will fully protect the claimant's right to procedural due process. However, as explained below, there are sound reasons for assuring that all claimants retain an opportunity to appear in person at their hearings. Preserving that opportunity for claimants is also consistent with our general policy, as explained in SSR 96–10p, of using technology to provide claimants an optional way of communicating with us.

That certain procedures will provide due process does not mean that there are no legal issues to consider regarding those procedures. Use of VTC technology in administrative hearings is relatively new. In these final rules, we are interpreting the word “hearing” as used in sections 205(b)(1) and 1631(c)(1)(A) of the Social Security Act (the Act) to include hearings at which the claimant will appear by VTC, a technology that was not available when these statutes were created, as well as hearings at which the claimant appears in person before the ALJ. Our earliest regulations interpreting the hearing provisions of the Act specified that the claimant had a right to request a hearing “before” the decisionmaker (20 CFR 403.707, 1940), and our current regulations specify that claimants may appear “in person” at the hearing (20 CFR 404.929 and 416.1429), and that they have a “right to appear before the administrative law judge, either personally or by means of a designated representative * * *” (20 CFR 404.950(a) and 416.1450(a)). Therefore, we believe it is legally prudent to ensure that all claimants retain the opportunity to appear in person.

Claimant credibility is an important issue in many of our hearings, and some claimants may have strong opinions about whether they can best project their own credibility by appearing in person as opposed to appearing by VTC. Preserving an option for claimants to appear in person should increase their