

	Administrative Law Judge	Member, Board of Veterans' Appeals
Application process	Pass an OPM-administered 4-part exam NOTE: The "4-part exam" consists of (1) the application form; (2) a written test; (3) an interview; and (4) a reference check. See 5 CFR 930.203(c) and (d).	Application; interview; reference check; review of substantive work as attorney (generally as counsel at Board). (VA, non-regulatory requirement)

The similarity of the processes' results is illustrated by the fact that Board members have moved rather easily from the Board to the ALJ ranks. Indeed, a primary impetus for equalization of Board member pay with ALJ pay in 1994 (Pub. L. 103-446) was the loss of Board members to the ALJ ranks. *See, e.g.*, 140 Cong. Rec. H11349, H11350 (daily ed., Oct. 7, 1994) (statement of Rep. Montgomery in connection with passage of H.R. 4386) (pay equity provision for Board members "is intended to insure that Members of the Board not feel compelled to pursue ALJ positions, but rather to remain at the Board, where their expertise is badly needed"); 140 Cong. Rec. H7088, H7092 (daily ed. Aug. 8, 1994) (statement of Rep. Montgomery in connection with passage of H.R. 4088) ("current pay disparity between Board members and Administrative Law Judges is producing a migration of Board members to the Social Security Administration and other federal agencies"); 140 Cong. Rec. S9457, S9458 (daily ed., Jul. 21, 1994) (statement of Sen. Akaka on introduction of S. 2305) ("Since July 1993, nine Board members have been selected to be ALJ's. This figure represents 16 percent of the 55 attorneys who have held Board member positions since last July.").

Accordingly, we make no changes based on these comments.

4. Board Members do not have the same "decisional independence" as ALJs.

Some commenters objected to the rule because Board members do not have the same "decisional independence" as ALJs. Indeed, one commenter went so far as to state that "the BVA simply cannot provide appellants the assurance of impartiality that accompanies judicial status."

Not only are such comments, frankly, insulting to Board members, they are wrong as a matter of law.

In the first place, we believe there is no evidence that Board members are anything but impartial. We are unaware of a single instance in the 70-year history of the Board in which the differences between ALJs and Board members, as articulated by the commenters, resulted in a charge—much less a proven allegation—that any Board member at any time was other than impartial. The commenters, while

referring generally to the administrative control of the Board Chairman over the Board, 38 U.S.C. 7101(a), have not directed us to any such instance. We categorically deny both that VA management has attempted to influence the result of Board members' decisions and that Board members do not provide appellants the assurance of impartiality.

We can, however, point to at least one situation in which a group of ALJs claimed that their agency—which has administrative control over them—was putting pressure on the ALJs to make fewer claimant-friendly decisions. In the early 1980s, the Department of Health and Human Services (HHS) instituted what came to be known as the "Bellmon Review Program," which allegedly put pressure on ALJs within SSA to make fewer reversals of denials of Social Security benefits. Although HHS eventually modified its stance, the ALJs claimed that their independence was threatened, notwithstanding their immunity from performance reviews and the fact that they were selected for ALJ positions by OPM, not HHS. *See generally Ass'n of Admin. Law Judges, Inc. v. Heckler*, 594 F. Supp. 1132 (D.D.C. 1984).

Second, the term "decisional independence" is not a clearly defined concept, and the commenters did not attempt to define the phrase. In *Ass'n of Admin. L. Judges v. Heckler*, *supra*, an action challenging the "Bellmon Review," the court found that ALJs had a "qualified" right to decisional independence. In that case—in which ALJs alleged that their decisional independence was threatened—the court noted that, while ALJs at SSA are exempt from the performance appraisals to which other civil service employees are subject (Board members, who are subject to the statutory performance review provisions of 38 U.S.C. 7101A, are also exempt from performance appraisals) and that they are entitled to rates of pay not set by the agency in which they serve (as are Board members), they are nevertheless subject to performance-related adverse personnel actions (as are Board members) and are entirely subject to their agency's right, under the administrative appeals process, to impose the agency's views on law and policy (as Board members are not). The court concluded that "the ALJ's right to

decisional independence is qualified." 594 F. Supp. at 1141. *See also Goodman v. Svahn*, 614 F. Supp. 726, 728–29 (D.D.C. 1985) (imposition of case production quotas on SSA ALJ did not violate ALJ's rights under the Administrative Procedure Act, the Civil Rights Act of 1861, or the Fifth Amendment); *cf. Sannier v. MSPB*, 931 F.2d 856, 858–59 (Fed. Cir. 1991) (where SSA ALJ did not allege that increased pressure to process more cases affected his decisionmaking, ALJ's claim of constructive removal was properly dismissed by MSPB for lack of subject matter jurisdiction); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir.) (setting of reasonable production goals for SSA ALJs is not an infringement of decisional independence), *cert. denied*, 493 U.S. 813 (1989).

As noted, the court in *Ass'n of Admin. Law Judges, Inc. v. Heckler*, *supra*, found that the power of the agency to alter ALJ decisions contributed to the "qualified" nature of ALJ decisional independence. Of all adjudicators within the Executive Branch, there may be none whose decisions are more independent than those of members of the Board of Veterans' Appeals. Unlike ALJs, Board members make decisions that generally can be altered only by a Federal court. (The exceptions are (1) reconsideration under 38 U.S.C. 7104, which can be ordered by the Board chairman, but results only in the vacation of the decision and reassignment to a panel of members, and (2) reversal on the grounds of clear and unmistakable error under 38 U.S.C. 7111, which can be ordered only by a Board member.) An ALJ decision, on the other hand, generally is not directly appealable to any court. Instead, it is, in effect, a preliminary decision subject to summary reversal by the agency head. *Compare Nash v. Bowen*, 869 F.2d at 680 (ALJs' authority to decide Social Security appeals is delegated by the Secretary and Secretary is ultimately authorized to make the final decision), *with* 38 U.S.C. 7104(a) (decisions on appeals to Secretary are made by the Board of Veterans' Appeals).

Neither ALJs nor Board members are subject to the normal performance reviews applicable to most civil service employees. However, Board members are subject to periodic recertification