

claimants should or should not be empowered to veto use of VTC to take the testimony of expert witnesses.<sup>1</sup>

*Our Reasons for Proposing Rules Authorizing Use of VTC<sup>2</sup>*

We receive more than 500,000 requests for hearings before ALJs each year. To accommodate the hearing requests of individuals who do not live near a hearing office, we hold approximately 40% of hearings at remote sites, which are generally at least 75 miles from the hearing office.

To make travel to remote hearing sites as cost effective as possible, hearing offices wait until they have a sufficient number of requests for hearing to schedule a full day or, if travel to a remote hearing site requires an overnight stay, several days of hearings. Because of the need to accrue a docket, ALJs travel to some remote hearing sites infrequently. Because many remote hearing sites are in less-populous areas, it can be difficult to find a needed medical and/or vocational expert witness(es) to travel to these sites, and this difficulty may further delay scheduling a hearing. ALJs also travel from their assigned hearing offices to assist other hearing offices when the need arises.

We proposed rules to authorize use of VTC in conducting hearings based on testing conducted in the State of Iowa beginning in 1996 that demonstrated that VTC procedures can be effectively used where large scale, high quality VTC networks exist and claimants want to participate in VTC procedures because doing so reduces the distances they must travel to their hearings. In a survey of participants in the Iowa test, a large percentage of the respondents rated hearings using VTC procedures as "convenient" or "very convenient," and overall service as either "good" or "very good." Test data showed that processing time for these hearings was substantially less than for hearings conducted in person at remote sites during the same time period, and that the ratio of hearings held to hearings scheduled was significantly higher for hearings using VTC procedures than for hearings

conducted in person. Being able to hold hearings as scheduled increases our efficiency because we do not have to recontact the individual to determine why he or she did not appear at a scheduled hearing nor reschedule the hearing (which can be time consuming, especially when an expert witness(es) has been scheduled to testify). Further, an ALJ does not spend time waiting for someone who does not appear, as would be the case in a hearing conducted in person at a remote site.

Based on all these factors—claimant satisfaction, ability to provide more timely hearings, savings in ALJ travel time, faster case processing, and higher ratio of hearings held to hearings scheduled—we decided that conducting hearings by VTC would be an efficient service delivery alternative. We also decided that scheduling a hearing for use of VTC, rather than asking someone to elect a hearing using VTC, as we did in our testing of VTC, would improve hearing office efficiency and would permit us to provide faster access to a hearing for some individuals.

*Final Rules With Request for Comment*

In the final rules with request for comment published February 3, 2003, we revised several sections of our regulations. We revised §§ 404.929 and 416.1429 to state that you may appear at your hearing in person or by VTC. We revised §§ 404.936 and 416.1436 to state that we may schedule your appearance or that of any individual appearing at the hearing to be by VTC and that, if we schedule you to appear by VTC and you tell us that you want to appear in person, we will schedule a hearing at which you may appear in person. We revised §§ 404.938 and 416.1438 to state that if we schedule you or anyone to appear at your hearing by VTC, the notice of hearing will tell you that and provide information about VTC appearances and about how you can tell us that you do not want to appear by VTC. Finally, we revised §§ 404.950(a) and (e) and 416.1450(a) and (e) to state that a party or a witness may appear at a hearing in person or by VTC.

The final rules with request for comment included a number of changes we made in response to the public comments we received on the NPRM, including changes to §§ 404.936 and 416.1436 to clearly reflect the authority of the ALJ to determine how hearings are conducted with respect to the use of VTC to conduct appearances.<sup>3</sup> The final

rules with request for comment also set forth, in §§ 404.936(c) and 416.1436(c), specific policies that direct how that authority is to be exercised. Those sections specify that—

"In setting the time and place of the hearing, the administrative law judge determines whether your appearance or that of any other individual who is to appear at the hearing will be made in person or by video teleconferencing. The administrative law judge will direct that the appearance of an individual be conducted by video teleconferencing if video teleconferencing technology is available to conduct the appearance, use of video teleconferencing to conduct the appearance would be more efficient than conducting the appearance in person, and the administrative law judge does not determine that there is a circumstance in the particular case preventing use of video teleconferencing to conduct the appearance."

As previously noted, the final rules with request for comment also made changes in the rules proposed in the NPRM relative to the issue of whether claimants should have veto authority over the use of VTC for the appearances of VEs and MEs. We made these changes in response to the comments of ALJs who commented on the NPRM, all but one of whom strongly opposed the proposal to allow claimants to veto the use of VTC to conduct the appearances of expert witnesses. (The comments of the remaining ALJ dealt with matters that were not within the scope of the NPRM.) The ALJs who opposed this provision included five ALJs who conducted hearings in the Iowa test and the Association of Administrative Law Judges.

The commenters opposed the proposal to allow claimants to veto VTC appearances by expert witnesses for several reasons. One was that it would defeat the purpose of using VTC as a way to obtain expert testimony when it is impractical for the expert to appear in person, and that it could force ALJs to forgo needed testimony or to take testimony through the time consuming and unwieldy method of written interrogatories. The commenters also expressed concern that the right to veto the appearance of an expert by VTC could be used to prevent the taking of expert testimony that might be adverse to the claimant and to facilitate "expert shopping." It was pointed out that claimants can already object to witnesses based on bias or qualifications. The view was also expressed that due process is fully accorded to the claimant if the claimant can see and cross-examine the expert

<sup>1</sup> The final rules published on February 3, 2003, were designated as "[f]inal rules with request for comment." This current preamble deals with three sets of rules: (1) The proposed rules published in the NPRM of January 5, 2001; (2) the final rules were requested for comment published February 3, 2002, and (3) these current final rules that adopt the final rules with request for comment without change.

<sup>2</sup> We are summarizing our reasons for proposing rules to authorize use of VTC. For a more detailed review of the history of the development of these rules, see the preamble to the NPRM of January 5, 2001 (66 FR 1059–1062).

<sup>3</sup> For a detailed review of the comments on the NPRM, and of all the changes that the final rules with request for comment made in the proposed rules, see the preamble to the final rules with