

and confront the expert with documentary evidence.

The ALJs who commented based on their experience in the Iowa test strongly emphasized the practical problems that allowing claimants to veto VTC appearances by experts would cause. These ALJs stated that using VTC to take the testimony of VEs is necessary to utilize these experts effectively because the cost of a VE's appearance can be reduced if, as is possible using VTC procedures, a docket of multiple appearances can be arranged for the expert. They also emphasized the value of VTC in reducing the problems involved in scheduling hearings, citing the example of how much easier it is to make arrangements for one VE to appear by VTC in four hearings occurring on a given day at four different sites than it is to arrange for four VEs to make in-person appearances, at odd times in their workdays, at four sites.

The ALJs who participated in the Iowa test also emphasized that the practical problems in not using VTC to take VE testimony are greatly compounded when it comes to securing the testimony of MEs. They reported that it is only through use of VTC that they are able to provide ME testimony for hearings being held in remote sites, and that MEs will not travel to remote sites when it is technically possible to testify in hearings being held at such sites via VTC. These ALJs also reported that it was their experience that it is almost impossible to get MEs to testify in the larger urban areas where the hearing offices are located, and that it is sometimes necessary to rely on MEs testifying from the medical centers in Ames and Iowa City even in cases being heard in the West Des Moines area.

In explaining our response to these comments (*i.e.*, the decision we made in the final rules with request for comment to deny claimants veto authority over whether hearings will be conducted with a witness or witnesses appearing by VTC), we said—

The claimant may state objections to a witness appearing by VTC, just as they may state objections to any aspect of the hearing, and they may object to a witness on the basis of perceived bias or lack of expertise. However, a claimant's objection to a witness appearing by VTC will not prevent use of VTC for the appearance, unless the ALJ determines that the claimant's objection is based on a circumstance that warrants having the witness appear in person.

The analysis of the commenting ALJs concerning the impracticalities of giving claimants veto power over the medium whereby expert witnesses make their appearance has caused us to reevaluate our proposal in that regard. We believe these commenters are correct in indicating that

giving claimants that power would undermine one of the primary practical benefits of using VTC procedures and adversely impact our ability to use those procedures effectively to improve the hearings process. The commenters also effectively emphasize the significance of the positive practical benefits that can flow from relying on VTC procedures in scheduling and conducting the appearances of expert witnesses.

An important point made in this comment is that implementation of VTC procedures reduces the readiness of experts to travel to remote sites. This is a result that might be expected logically, we believe, and the experience of the ALJs in the Iowa test bears out its occurrence.

Unless we ensure ALJ authority to use VTC to take expert testimony by not empowering claimants to veto its use for that purpose, the reduced readiness of expert witnesses to travel when VTC appearances are technologically possible will adversely affect our ability to preserve a reasonable opportunity for claimants to appear in person if they choose to opt out of scheduled appearances by VTC. If the authority of ALJs to secure expert testimony by VTC is not ensured, the reduced willingness of experts to travel when VTC technology is available could also reduce the efficiency with which we are able to schedule the appearances of experts at the hearings of individuals who live near hearing offices in urban areas and appear in person in those offices for their hearings.

MEs and VEs testify as impartial witnesses. They testify based on the evidence entered into the record and not based on any examination or personal evaluation of the claimant. Where they testify by VTC and their testimony is adverse to a party's claim, the party and his or her representative, if any, will have a complete opportunity to confront and examine the witness regarding the matters that are important with respect to expert testimony—*i.e.*, the expertise of the witness and the accuracy of his or her testimony.

Affording claimants the power to veto the appearance of expert witnesses by VTC would be inconsistent with our existing practices and instructions regarding use of interrogatories to secure the testimony of expert witnesses. While emphasizing the preferability of securing live testimony where feasible, and requiring the ALJ to consider and rule on any claimant objection to the use of interrogatories, our instructions do not mandate non-use of interrogatories merely because a claimant objects to their use. See Hearings, Appeals, and Litigation Law Manual (HALLEX), sections I-2-5-30, I-2-5-42, and I-2-5-57, at <http://www.ssa.gov/OP-Home/hallex/hallex.html>. Thus, allowing claimants to veto the live testimony that experts can give by VTC would invest claimants with an authority that they do not currently have with respect to interrogatories.

Under these final rules, ALJs have discretion to determine that the appearance of any individual must be conducted in person. Thus, to the extent that circumstances could arise in which it would be advisable to schedule an in-person

appearance by an expert witness even though a VTC appearance would be possible technologically, the ALJ may schedule such an appearance. That action could be appropriate, for example, where the claimant alleges personal bias or dishonesty on the part of the expert and the ALJ determines that the claimant should have the opportunity to cross-examine the witness in person because of the greater immediacy of an in-person confrontation.⁴

Use of VTC

At present, 15 of our 138 hearing offices and 1 regional office use VTC to conduct hearings. Appearances by VTC are occurring from 12 different remote sites and 2 state networks.

We plan to gradually roll out use of VTC nationally. We will begin to use VTC facilities in the servicing area of a hearing office when the Associate Commissioner for Hearings and Appeals determines that appearances at hearings conducted in the area can be conducted more efficiently by VTC than in person.

We foresee initially scheduling VTC appearances where absent use of VTC:

- We would need to accrue a docket for a remote hearing site.
- An ALJ would need to travel to assist another hearing office.
- An expert witness(es) or appropriate medical specialist(s) would not be available for a hearing site. (In such a case, all participants could be at different locations; for example, the ALJ at a hearing office, the individual at a remote hearing site or another hearing office, and the expert witness(es) at a third location.)

Initially, we plan to locate most remote sites for using VTC to conduct appearances either in space where we have a long-term lease or in another federal building. We are investigating sharing VTC facilities with other federal agencies and states, and, if we can ensure privacy, we may eventually rent commercial space to expand use of VTC as a service delivery option. Calling into SSA's VTC network from private facilities, such as facilities owned by a law firm, may also be possible. Regardless of the type of facility, we will make certain that:

- The individual has the same access to the hearing record when appearing by VTC as he or she would have if appearing in person before the ALJ.
- There is a means of transmitting and receiving additional evidence between all locations and all participants.
- An assistant is present at the VTC site to operate the equipment and provide other help, as required.

⁴ 68 FR 5215-5216 (2003).