

Comment: One commenter proposed that we should limit the use of VTC to cases in which the ALJ determines that there is “good cause” to use VTC procedures because the claimant is prevented from traveling by illness or other good reasons. Another commenter expressed the view that use of VTC should be limited to situations in which its use is necessary to allow the appearance of a witnesses who would be unable to appear except by VTC.

Response: Using VTC would not be efficient or cost effective if we limited its use to the relatively small number of cases in which the claimant is unable to travel or there is another factor requiring the use of VTC. The advantages in efficiency and costs savings involved in using VTC accrue where a hearing office is able to use VTC in many of its cases.

We see no basis for making the use of VTC contingent upon the ALJ finding “good cause” to use it in a particular case. As we stated in the preamble to the final rules with request for comment, we believe that the hearing proceedings we conduct using VTC will be fundamentally fair and fully protective of the claimant’s right to procedural due process. Based on that belief, we further believe that the best overall policy is to schedule use of VTC to conduct hearings in all instances in which VTC technology is available and would be an efficient means for conducting the appearance(s) of the claimant and/or a witness or witnesses,⁶ and the ALJ does not determine that there is a circumstance in the particular case preventing use of VTC to conduct an appearance.

Comment: One commenter expressed concern about unspecified provisions of the final rules with request for comment that “prohibit a right to object to the appearance of an expert witness by VTC.”

Response: The final rules with request for comment included no provision prohibiting claimants or their representatives from stating objections on any matter, including the appearance of a witness by VTC. As we noted in the preamble to those rules, claimants may state objections to a witness appearing by VTC, just as they may state objections to any aspect of the hearing.⁷

⁶ Concerning the assessment of the efficiency of using VTC, see our response below to the comment recommending that the ALJ consider certain factors when scheduling VTC appearances.

⁷ HALLEX TI I-5-1-16 has changed our standardized notices of hearing to notify claimants when a witness will appear by VTC and to advise claimants explicitly that they may object not only with respect to issues, but also “to any other aspect of the scheduled hearing.” (TI I-5-1-16, Attachment 3.)

Comment: Noting that it generally supports the use of VTC provided the right to a full and fair hearing is adequately protected and the technical quality of the hearings is assured, an organization of individuals who represent claimants commented that we should provide guidance for circumstances that warrant having a witness appear in person. For that purpose, the commenter suggested that we should include in our rules language from the preamble to the final rules with request for comment in which we specified that a claimant’s objection to a witness appearing by VTC will not prevent the use of VTC “unless the ALJ determines that the claimant’s objection is based on a circumstance that warrants having the witness appear in person.”⁸

Response: We are not adopting this comment because the provisions of the final rules with request for comment encompass the point made in the preamble language cited in the comment. Sections 404.936(c) and 416.1436(c) of our rules require us to schedule a VTC appearance for the claimant or any other individual “if [VTC] technology is available to conduct the appearance, use of [VTC] to conduct the appearance would be more efficient than conducting the appearance in person, and the [ALJ] *does not determine that there is a circumstance in the particular case preventing use of [VTC] to conduct the appearance.*” (Emphasis added.) A “circumstance preventing use of [VTC]” for an appearance necessarily exists where the ALJ “determines that the claimant’s objection is based on a circumstance that warrants having the witness appear in person”; therefore, deciding if there is a circumstance that warrants having a witness appear in person is requisite to deciding if there is a circumstance preventing use of VTC to conduct an appearance.

Comment: This commenter further recommended that our rules should include a requirement that the ALJ consider other factors, such as limitations of the claimant or the representative, that could affect how the hearing is conducted. In this respect, the commenter suggested that we consider including in our rules guidance like that in language from the preamble to the final rules with request for comment indicating that, in deciding whether the claimant’s appearance should be scheduled to occur in person or by VTC, 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 other factors, such as a claimant’s loss of visual and auditory capacities, that may affect how the appearance should be conducted.”⁹ Another commenter, a claimant’s representative who personally has a hearing loss that would interfere with his ability to understand and to question a witness appearing by VTC, made a similar comment.

Response: We are making no change in response to these commenters because our rules already include provisions to require consideration of any factors that would compromise the integrity or fairness of the hearing or make it inappropriate to use VTC for any reason. These provisions are reinforced by provisions that require the ALJ to consider the efficiency of scheduling an appearance to occur by VTC.

In setting the time and place for the hearing, the ALJ is required under §§ 404.936(c) and 416.1436(c) to determine whether the appearance of the claimant or any other individual appearing at the hearing will be made in person or by VTC. To make that determination, the ALJ is required by the provisions of these sections to determine if there is a circumstance preventing use of VTC for the appearance. As the cited preamble language reflects, determining if there is such a circumstance requires the ALJ to consider if there is any factor or factors, such as an auditory loss on the part of one of the participants, that would interfere with using VTC for the appearance. The factors considered will necessarily include any visual or auditory limitations on the part of the claimant’s representative that could compromise the ability of the representative to participate effectively in observing, understanding, and questioning the expert if VTC is used to take the expert’s testimony.¹⁰

Under §§ 404.936(c) and 416.1436(c) of the final rules with request for comment, the efficiency of using VTC for an appearance is one of the factors the ALJ must consider in deciding if an appearance should be scheduled to occur by VTC or in person. As we explained above and in the prior preambles to these rules, we plan to use VTC in the service area of a hearing

⁹ 68 FR 5213 (2003).

¹⁰ Our HALLEX instructions implementing VTC procedures specify that the circumstances that might cause the ALJ to require an in-person appearance include that in which the claimant or the representative has a visual or auditory impairment of a type that could adversely affect his or her ability to appear and participate in the hearing through VTC, either for the purpose of interacting with the ALJ or another participant in the hearing. (TI-I-5-1-16 III.B.)

⁸ 68 FR 5215 (2003).