

Attachment C

Summary of Legal Authority for Agency Augmentation Strategy

As one strategy to reduce the overall number of pending hearing requests, the Social Security Administration (SSA) plans to have administrative appeals judges (AAJ) on the Appeals Council conduct hearings and issue decisions in two categories of cases: (1) non-disability cases when a request for hearing is pending before an administrative law judge (ALJ); and (2) cases that are pending before the Appeals Council on a request for review, on own motion review, or on remand from Federal court that require a supplemental hearing. This plan comports with the Social Security Act (Act), the agency's existing regulations, and due process.

Sections 205(b)(1) and 1631(c)(1)(A) of the Act define SSA's administrative hearing process. These sections of the Act require the agency to give an individual "reasonable notice and opportunity for a hearing." Section 205(b)(1) also broadly authorizes the Commissioner "to hold such hearings . . . and other proceedings as the Commissioner may deem necessary or proper for the administration of this title." Section 1631(c)(1)(A) contains substantially the same language. The Supreme Court has long recognized that the Act grants the agency "the power by regulation to establish hearing procedures . . . so long as the procedures are fundamentally fair."¹

Since the beginning of SSA's hearings process in 1940, SSA's regulations have authorized members of the Appeals Council to hold hearings and issue decisions.² This authority predates the Administrative Procedure Act, which was enacted in 1946 and is modeled on the Social Security Act.³ The regulations that authorize the Appeals Council to remove a pending hearing request from an ALJ, hold the hearing, and issue the decision, 20 C.F.R. §§ 404.956, 416.1456, do not limit the type or the total number of cases that the Appeals Council can hear and decide, nor has the agency limited the Appeals Council's authority on the issue in any other way. Consequently, the Appeals Council has authority under the existing regulations to remove *any* hearing request that is pending before an ALJ, hold the hearing, and issue the decision.⁴

Sections 404.956 and 416.1456 do not directly apply when the Appeals Council conducts a supplemental hearing in a case that is pending before it on a request for review, on own motion review, or on remand from Federal Court. Nevertheless, sections 404.956 and 416.1456 express the agency's longstanding view that members of the Appeals Council are suitable presiding officials at administrative hearings, and that it is beneficial for Appeals Council members to hear and decide some cases.

When a case is before the Appeals Council because the claimant requested review or the Appeals Council decided to exercise own motion review, neither the Act nor the regulations prohibit the Appeals Council from holding a supplemental hearing. Similarly, when a case is pending before the Appeals Council on remand from a Federal court, the regulations provide that

¹ *Richardson v. Perales*, 402 U.S. 389, 400–01 (1971).

² 5 *Fed. Reg.* 4169, 4172 (codified at 20 C.F.R. § 403.709(d) (1938-1943 Cum. Supp.)).

³ *Richardson v. Perales*, *supra*, at 409.

⁴ *Mullen v. Bowen*, 800 F.2d 535, 540 n.5 (6th Cir. 1986) (noting that, "under both the APA and [SSA's] regulations, the agency itself, or the Appeals Council, may decide to assume the responsibility for conducting a hearing.").

the Appeals Council “may make a decision, or it may remand the case to an administrative law judge with instructions to take action and issue a decision or return the case to the Appeals Council with a recommended decision.”⁵ If the Appeals Council decides to make a decision under the authority in these regulations, nothing in the regulations prohibits the Appeals Council from holding a supplemental hearing.

When a claimant requests Appeals Council review, the regulations permit the Appeals Council to deny or dismiss the request, or grant the request and either issue a decision or remand the case to an ALJ.⁶ Once a case is before the Appeals Council on review, the claimant may ask to appear before the Appeals Council and present oral argument.⁷ If the claimant does not request to appear and present oral argument, the regulations do not preclude the Appeals Council from scheduling an oral argument or another hearing proceeding on its own initiative.⁸

The regulations that govern decisions by the Appeals Council also do not prohibit the Appeals Council from conducting hearing proceedings. These regulations provide only that the Appeals Council may issue a decision after reviewing all the evidence in the ALJ hearing record and any additional evidence received, subject to the limitations on the Appeals Council’s consideration of additional evidence.⁹ And, 20 C.F.R. § 404.976 specifically states that if additional evidence is needed, the Appeals Council may remand the case to an administrative law judge to receive evidence and issue a new decision. However, if the Appeals Council decides that it can obtain the evidence more quickly, it may do so. This allowable activity will reduce the wait times for claimants.

The proposal to have administrative appeals judges on the Appeals Council hold hearings and issue decisions in certain cases also comports with due process. There is no due process violation inherent in a hearing system that relies on adjudicators other than ALJs.¹⁰ With respect to the issue of who may be a decisionmaker in an adjudicatory proceeding, the fundamental requirement of due process is that the decisionmaker be fair and impartial.¹¹ Because the members of the Appeals Council will function as neutral decisionmakers and follow the same rules as ALJs, allowing members of the Appeals Council to conduct supplemental hearings in certain categories of cases would comport with due process.

⁵ 20 C.F.R. §§ 404.983, 416.1483.

⁶ 20 C.F.R. §§ 404.967, 416.1467.

⁷ 20 C.F.R. §§ 404.976(c), 416.1476(c)..

⁸ 20 C.F.R. §§ 404.976(b)(2), 416.1476(b)(3) (providing that, on review, if the Appeals Council needs additional evidence and can obtain the evidence more quickly than an ALJ, it may do so, unless it will adversely affect the claimant’s rights.)

⁹ 20 C.F.R. §§ 404.970(b), 404.976(b), 416.1470(b), 416.1476(b), 404.979, 416.1479.

¹⁰ See, e.g., *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); Jerry L. Mashaw, et al., *Final Report: Study of the Social Security Administration Hearing System* 66 (1977).

¹¹ See, e.g., *Schweiker v. McClure*, *supra*, at 195; Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. Pa. L. Rev. 1267, 1279-80 (1975).