

e. Decryption functions specially designed to allow the execution of copy-protected "software", provided the decryption functions are not user-accessible;

f. Access control equipment, such as automatic teller machines, self-service statement printers or point of sale terminals, that protects password or personal identification numbers (PIN) or similar data to prevent unauthorized access to facilities but does not allow for encryption of files or text, except as directly related to the password or PIN protection;

g. Data authentication equipment that calculates a Message Authentication Code (MAC) or similar result to ensure no alteration of text has taken place, or to authenticate users, but does not allow for encryption of data, text or other media other than that needed for the authentication;

h. Cryptographic equipment specially designed and limited for use in machines for banking or money transactions, such as automatic teller machines, self-service statement printers or point of sale terminals.

* * * * *

5D002 Information Security Software

License Requirements

Reason for Control: NS, AT

Control(s)	Country chart
NS applies to entire entry ..	NS Column 1.
AT applies to entire entry ..	AT Column 1.

Note: Key escrow encryption software controlled under 5D002.c.1. remains subject to the EAR even when made publicly available in accordance with § 734.7 of the EAR, and it is not eligible for mass market treatment under License Exception TSU for mass market software. See § 742.15(b)(1) of the EAR.

License Exceptions

GBS: N/A

CIV: N/A

List of Items Controlled

Unit: \$ value

Related Controls: NA

Related Definitions: N/A

Items:

a. "software" specially designed or modified for the "development", "production" or "use" of equipment or "software" controlled by 5A002, 5B002 or 5D002.

b. "Software" specially designed or modified to support "technology" controlled by 5E002.

c. Specific "software" as follows:

c.1. "Software" having the characteristics, or performing or simulating the functions of the equipment controlled by 5A002 or 5B002;

Note: 5D002.c.1 includes controls key escrow encryption software transferred from the U.S. Munitions List following a case-by-case determination by the Department of

State through the commodity jurisdiction procedure. See § 742.15 of the EAR.

c.2. "Software" to certify "software" controlled by 5D002.c.1;

c.3. "Software" designed or modified to protect against malicious computer damage, e.g., viruses;

Note: 5D002 does not control:

a. "Software" required" for the "use" of equipment excluded from control under the Note to 5A002.

b. "Software" providing any of the functions of equipment excluded from control under the Note to 5A002.

13. Supplement No. 2 to Part 774 is amended by revising the 2. General Software Note to read as follows:

Supplement No. 2 to Part 774—General Technology and Software Notes

* * * * *

2. *General Software Note.* License Exception TSU (mass market software) is available to all destinations, except Cuba, Iran, Libya, North Korea, Sudan, and Syria, for release of software that is generally available to the public by being:

a. Sold from stock at retail selling points, without restriction, by means of:

1. Over the counter transactions;
2. Mail order transactions; or
3. Telephone call transactions; and

b. Designed for installation by the user without further substantial support by the supplier.

Note: License Exception TSU for mass market software does not apply to key escrow encryption software controlled under ECCN 5D002.c.1. that has been transferred from the U.S. Munitions list following a commodity jurisdiction determination by the Department of State.

Dated: December 6, 1996.

Sue E. Eckert,

Assistant secretary for Export Administration.
[FR Doc. 96-31583 Filed 12-12-96; 8:45 am]

BILLING CODE 3510-33-M

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 498

RIN 0960-AE41

Hearings and Appeals for Civil Monetary Penalty Cases

AGENCY: Social Security Administration (SSA).

ACTION: Final rule.

SUMMARY: We are adding new rules that establish hearing procedures for the Social Security Administration's civil monetary penalty cases. These rules implement the provisions of section 1129 and section 1140 of the Social Security Act which require an opportunity to be heard on the record before a determination to impose penalties or assessments becomes final.

EFFECTIVE DATE: These rules are effective January 13, 1997.

FOR FURTHER INFORMATION CONTACT:

Henry D. Lerner, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Security Blvd., Baltimore, MD 21235, (410) 965-1762 for information about these rules. For information on eligibility or claiming benefits, call our national toll-free number, 1-800-772-1213.

SUPPLEMENTARY INFORMATION:

Background

The Social Security Administration (SSA) was established as an independent agency effective March 31, 1995, under Public Law 103-296, the Social Security Independence and Program Improvements Act of 1994 (SSIIPIA). The SSIIPIA also created an independent Office of the Inspector General (OIG), to which the Commissioner of Social Security (Commissioner) delegated certain authority under the civil monetary penalty (CMP) provisions on June 28, 1995. However, the Commissioner retained the authority to conduct initial hearings and review initial hearing decisions related to the imposition of CMPs and assessments.

On November 27, 1995, the OIG published a final rule at 60 FR 58225 establishing a new part 498 in title 20 of the *Code of Federal Regulations*. This new part serves as a repository for the SSA's existing CMP regulations which implemented section 1140 of the Social Security Act (the Act). These regulations were previously located at 42 CFR part 1003.

In addition, the OIG published a final rule on April 24, 1996, at 61 FR 18078 to implement SSA's new CMP authority provided under section 206(b) of the SSIIPIA, which added section 1129 to the Act, effective October 1, 1994. This authority allows for the imposition of penalties and assessments against any individual, organization, agency, or other entity that makes or causes to be made a false or misleading statement or representation of a material fact for use in determining initial or continuing rights to Old-Age, Survivors, and Disability Insurance or supplemental security income benefit payments if the person knew or should have known that such statement or representation is false, misleading, or omits a material fact.

These hearing regulations complete the final phase of the implementation process for the provisions of section 1129 and section 1140 of the Act which require that a person be given an

opportunity to be heard on the record prior to a final determination to impose penalties or assessments.

Hearing Process

The Commissioner has decided to retain the Departmental Appeals Board (DAB) of the Department of Health and Human Services (HHS) on an interim basis to conduct hearings and appeals, and to issue recommended decisions in SSA's CMP cases. SSA has entered into a reimbursable agreement with the DAB under the Economy Act, 31 U.S.C. 1535(a).

The Commissioner's decision was based on a number of criteria, including the DAB's expertise in handling CMP cases and its reputation for rendering decisions in an efficient and timely manner. Moreover, in light of the fact that the authority under section 1129 is new, this will give SSA the opportunity to assess the volume of CMP cases and projected resource requirements prior to establishing its own internal hearing mechanism.

These rules require adherence to various deadlines to ensure the expeditious conduct of proceedings and prompt resolution of CMP cases. In accordance with § 498.109, these hearing regulations provide a person, upon whom the OIG seeks to impose penalties and assessments, as applicable, the right to request an initial hearing within 60 days of notification by the OIG. As described in § 498.202 of these rules, the person's request for a hearing must be in writing and contain a statement of the specific issues and conclusions of law with which the person disagrees. These rules also provide that a hearing request must be dismissed if not filed in a timely manner unless, upon a showing of good cause, an extension is granted to the respondent.

Initial hearings in CMP cases will be conducted by an administrative law judge. At the hearing, a person will be entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses.

These hearing regulations have been modeled on the HHS's hearing regulations which govern CMP cases for which the DAB also conducts hearings and appeals on behalf of the Secretary of the HHS. As indicated in the final rule published on April 24, 1996, we have reserved the issue of recommended exclusions of physicians and medical providers from the Medicare program at this time.

Comments on Notice of Proposed Rulemaking

These regulations were published in the Federal Register (61 FR 39921) as a notice of proposed rulemaking (NPRM) on July 31, 1996. Interested parties were given 60 days to submit comments. No public comments were received. We are, therefore, publishing the final rules with no substantive changes from the proposed rules.

Regulatory Procedures

Executive Order 12866

We have consulted with the Office of Management and Budget (OMB) and have determined that these rules do not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, they are not subject to OMB review.

Paperwork Reduction Act

These regulations impose no new reporting or recordkeeping requirements requiring OMB clearance.

Regulatory Flexibility Act

We have determined that no regulatory impact analysis is required for these regulations. Based on our determination, the Commissioner certifies that these regulations will not have a significant economic impact on a number of small business entities. Therefore, we have not prepared a regulatory flexibility analysis.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; 96.006, Supplemental Security Income Program)

List of Subjects in 20 CFR Part 498

Administrative practice and procedure, Fraud, Penalties.

Approved: December 5, 1996.

Shirley S. Chater,

Commissioner of Social Security.

For reasons set forth in the preamble, part 498 of chapter III of the Code of Federal Regulations is amended as follows:

PART 498—HEARINGS AND APPEALS FOR CIVIL MONETARY PENALTY CASES

1. The authority citation for part 498 continues to read as follows:

Authority: Secs. 205(a), 205(b), 702(a)(5), 1129, and 1140 of the Social Security Act (42 U.S.C. 405(a), 405(b), 902(a)(5), 1320a-8, and 1320b-10).

2. The table of contents is amended by adding §§ 498.201 through 498.224 to read as follows:

Sec.

*	*	*	*	*
498.201	Definitions.			
498.202	Hearing before an administrative law judge.			
498.203	Rights of parties.			
498.204	Authority of the administrative law judge.			
498.205	Ex parte contacts.			
498.206	Prehearing conferences.			
498.207	Discovery.			
498.208	Exchange of witness lists, witness statements and exhibits.			
498.209	Subpoenas for attendance at hearing.			
498.210	Fees.			
498.211	Form, filing and service of papers.			
498.212	Computation of time.			
498.213	Motions.			
498.214	Sanctions.			
498.215	The hearing and burden of proof.			
498.216	Witnesses.			
498.217	Evidence.			
498.218	The record.			
498.219	Post-hearing briefs.			
498.220	Initial decision.			
498.221	Appeal to DAB.			
498.222	Final decision of the Commissioner.			
498.223	Stay of initial decision.			
498.224	Harmless error.			

3. New §§ 498.201 through 498.224 are added to read as follows:

§ 498.201 Definitions.

As used in this part—
ALJ refers to an Administrative Law Judge of the Departmental Appeals Board.

Civil monetary penalty cases refer to all proceedings arising under any of the statutory bases for which the Inspector General, Social Security Administration has been delegated authority to impose civil monetary penalties.

DAB refers to the Departmental Appeals Board of the U.S. Department of Health and Human Services.

§ 498.202 Hearing before an administrative law judge.

(a) A party sanctioned under any criteria specified in §§ 498.100 through 498.132 may request a hearing before an ALJ.

(b) In civil monetary penalty cases, the parties to a hearing will consist of the respondent and the Inspector General.

(c) The request for a hearing must be:
(1) In writing and signed by the respondent or by the respondent's attorney; and

(2) Filed within 60 days after the notice, provided in accordance with § 498.109, is received by the respondent or upon a showing of good cause, the time permitted by an ALJ.

(d) The request for a hearing shall contain a statement as to the:

(1) Specific issues or findings of fact and conclusions of law in the notice

letter with which the respondent disagrees; and

(2) Basis for the respondent's contention that the specific issues or findings and conclusions were incorrect.

(e) For purposes of this section, the date of receipt of the notice letter will be presumed to be five days after the date of such notice, unless there is a reasonable showing to the contrary.

(f) The ALJ shall dismiss a hearing request where:

(1) The respondent's hearing request is not filed in a timely manner and the respondent fails to demonstrate good cause for such failure;

(2) The respondent withdraws or abandons respondent's request for a hearing; or

(3) The respondent's hearing request fails to raise any issue which may properly be addressed in a hearing under this part.

§ 498.203 Rights of parties.

(a) Except as otherwise limited by this part, all parties may:

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery of documents as permitted by this part;

(4) Agree to stipulations of fact or law which will be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(b) Fees for any services performed on behalf of a party by an attorney are not subject to the provisions of section 206 of title II of the Social Security Act, which authorizes the Commissioner to specify or limit these fees.

§ 498.204 Authority of the administrative law judge.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order and assure that a record of the proceeding is made.

(b) The ALJ has the authority to:

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of documentary discovery as permitted by this part;

(8) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(9) Examine witnesses;

(10) Receive, exclude, or limit evidence;

(11) Take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact; and

(13) Conduct any conference or argument in person, or by telephone upon agreement of the parties.

(c) The ALJ does not have the authority to:

(1) Find invalid or refuse to follow Federal statutes or regulations, or delegations of authority from the Commissioner;

(2) Enter an order in the nature of a directed verdict;

(3) Compel settlement negotiations;

(4) Enjoin any act of the Commissioner or the Inspector General; or

(5) Review the exercise of discretion by the Office of the Inspector General to seek to impose a civil monetary penalty or assessment under §§ 498.100 through 498.132.

§ 498.205 Ex parte contacts.

No party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 498.206 Prehearing conferences.

(a) The ALJ will schedule at least one prehearing conference, and may schedule additional prehearing conferences as appropriate, upon reasonable notice to the parties.

(b) The ALJ may use prehearing conferences to address the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact as to the contents and authenticity of documents and deadlines for

challenges, if any, to the authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at a hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) The time and place for the hearing and dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery of documents as permitted by this part;

(9) Such other matters as may tend to encourage the fair, just, and expeditious disposition of the proceedings; and

(10) Potential settlement of the case.

(c) The ALJ shall issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 498.207 Discovery.

(a) For the purpose of inspection and copying, a party may make a request to another party for production of documents which are relevant and material to the issues before the ALJ.

(b) Any form of discovery other than that permitted under paragraph (a) of this section, such as requests for admissions, written interrogatories and depositions, is not authorized.

(c) For the purpose of this section, the term documents includes information, reports, answers, records, accounts, papers, memos, notes and other data and documentary evidence. Nothing contained in this section will be interpreted to require the creation of a document, except that requested data stored in an electronic data storage system will be produced in a form accessible to the requesting party.

(d)(1) A party who has been served with a request for production of documents may file a motion for a protective order. The motion for protective order shall describe the document or class of documents to be protected, specify which of the grounds in § 498.207(d)(2) are being asserted, and explain how those grounds apply.

(2) The ALJ may grant a motion for a protective order if he or she finds that the discovery sought:

(i) Is unduly costly or burdensome;

(ii) Will unduly delay the proceeding; or

(iii) Seeks privileged information.

(3) The burden of showing that discovery should be allowed is on the party seeking discovery.

§ 498.208 Exchange of witness lists, witness statements and exhibits.

(a) At least 15 days before the hearing, the parties shall exchange:

- (1) Witness lists;
- (2) Copies of prior written statements of proposed witnesses; and
- (3) Copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 498.216.

(b)(1) Failure to comply with the requirements of paragraph (a) of this section may result in the exclusion of evidence or testimony upon the objection of the opposing party.

(2) When an objection is entered, the ALJ shall determine whether good cause justified the failure to timely exchange the information listed under paragraph (a) of this section. If good cause is not found, the ALJ shall exclude from the party's case-in-chief:

(i) The testimony of any witness whose name does not appear on the witness list; and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that good cause exists, the ALJ shall determine whether the admission of such evidence would cause substantial prejudice to the objecting party due to the failure to comply with paragraph (a) of this section. If the ALJ finds no substantial prejudice, the evidence may be admitted. If the ALJ finds substantial prejudice, the ALJ may exclude the evidence, or at his or her discretion, may postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence.

(c) Unless a party objects by the deadline set by the ALJ's prehearing order pursuant to § 498.206 (b)(3) and (c), documents exchanged in accordance with paragraph (a) of this section will be deemed authentic for the purpose of admissibility at the hearing.

§ 498.209 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual, whose appearance and testimony are relevant and material to the presentation of a party's case at a hearing, may make a motion requesting the ALJ to issue a subpoena.

(b) A subpoena requiring the attendance of an individual (whether or not the individual is a party) to produce evidence at the hearing in accordance with § 498.207.

(c) A party seeking a subpoena will file a written motion not less than 30

days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. Such request will:

- (1) Specify any evidence to be produced;
- (2) Designate the witness(es); and
- (3) Describe the address and location with sufficient particularity to permit such witness(es) to be found.

(d) Within 20 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.

(e) If the motion requesting issuance of a subpoena is granted, the party seeking the subpoena will serve the subpoena by delivery to the individual named, or by certified mail addressed to such individual at his or her last dwelling place or principal place of business.

(f) The subpoena will specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(g) The individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service.

(h) When a subpoena is served by a respondent on a particular individual or particular office of the Office of the Inspector General, the OIG may comply by designating any of its representatives to appear and testify.

(i) In the case of contumacy by, or refusal to obey a subpoena duly served upon any person, the exclusive remedy is specified in section 205(e) of the Social Security Act (42 U.S.C. 405(e)).

§ 498.210 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the Inspector General, a check for witness fees and mileage need not accompany the subpoena.

§ 498.211 Form, filing and service of papers.

(a) *Form.* (1) Unless the ALJ directs the parties to do otherwise, documents filed with the ALJ will include an original and two copies.

(2) Every document filed in the proceeding will contain a caption setting forth the title of the action, the case number, and a designation of the pleading or paper.

(3) Every document will be signed by, and will contain the address and

telephone number of the party or the person on whose behalf the document was filed, or his or her representative.

(4) Documents are considered filed when they are mailed.

(b) *Service.* A party filing a document with the ALJ will, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document will be made by delivering a copy, or placing a copy of the document in the United States mail, postage prepaid and addressed, or with a private delivery service, to the party's last known address. When a party is represented by an attorney, service will be made upon such attorney. Proof of service should accompany any document filed with the ALJ.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, will be proof of service.

§ 498.212 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event or default, and includes the last day of the period unless it is a Saturday, Sunday or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response. This paragraph does not apply to requests for hearing under § 498.202.

§ 498.213 Motions.

(a) An application to the ALJ for an order or ruling will be by motion.

Motions will:

(1) State the relief sought, the authority relied upon and the facts alleged; and

(2) Be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at a hearing, all motions will be in writing.

(c) Within 10 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant or deny a written motion before the time for filing responses has expired, except upon consent of the parties or following a hearing on the motion.

(e) The ALJ will make a reasonable effort to dispose of all outstanding

motions prior to the beginning of the hearing.

(f) There is no right to appeal to the DAB any interlocutory ruling by the ALJ.

§ 498.214 Sanctions.

(a) The ALJ may sanction a person, including any party or attorney, for:

(1) Failing to comply with an order or procedure;

(2) Failing to defend an action; or

(3) Misconduct that interferes with the speedy, orderly or fair conduct of the hearing.

(b) Such sanctions will reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include—

(1) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established;

(2) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(3) Striking pleadings, in whole or in part;

(4) Staying the proceedings;

(5) Dismissal of the action; or

(6) Entering a decision by default.

(c) In addition to the sanctions listed in paragraph (b) of this section, the ALJ may:

(1) Order the party or attorney to pay attorney's fees and other costs caused by the failure or misconduct; or

(2) Refuse to consider any motion or other action that is not filed in a timely manner.

§ 498.215 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the respondent should be found liable under this part.

(b) In civil monetary penalty cases under §§ 498.100 through 498.132:

(1) The respondent has the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and

(2) The Inspector General has the burden of going forward and the burden of persuasion with respect to all other issues.

(c) The burden of persuasion will be judged by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause.

(e)(1) A hearing under this part is not limited to specific items and

information set forth in the notice letter to the respondent. Subject to the 15-day requirement under § 498.208, additional items or information may be introduced by either party during its case-in-chief, unless such information or items are inadmissible under § 498.217.

(2) After both parties have presented their cases, evidence may be admitted on rebuttal as to those issues presented in the case-in-chief, even if not previously exchanged in accordance with § 498.208.

§ 498.216 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony (other than expert testimony) may be admitted in the form of a written statement. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing will be exchanged as provided in § 498.208.

(c) The ALJ will exercise reasonable control over the mode and order of witness direct and cross examination and evidence presentation so as to:

(1) Make the examination and presentation effective for the ascertainment of the truth;

(2) Avoid repetition or needless waste of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ may order witnesses excluded so that they cannot hear the testimony of other witnesses. This does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated as the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual engaged in assisting the attorney for the Inspector General.

§ 498.217 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence, but may be guided by them in ruling on the admissibility of evidence.

(c) Although relevant, evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(d) Although relevant, evidence must be excluded if it is privileged under Federal law, unless the privilege is waived by a party.

(e) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(f)(1) Evidence of crimes, wrongs or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme.

(2) Such evidence is admissible regardless of whether the crimes, wrongs or acts occurred during the statute of limitations period applicable to the acts which constitute the basis for liability in the case, and regardless of whether they were referenced in the IG's notice sent in accordance with § 498.109.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence as to those issues raised in the parties' case-in-chief.

(h) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ for good cause.

§ 498.218 The record.

(a) The hearing shall be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by any person, unless otherwise ordered by the ALJ for good cause.

§ 498.219 Post-hearing briefs.

(a) Any party may file a post-hearing brief.

(b) The ALJ may require the parties to file post-hearing briefs and may permit the parties to file reply briefs.

(c) The ALJ will fix the time for filing briefs, which is not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record.

(d) The parties' briefs may be accompanied by proposed findings of fact and conclusions of law.

§ 498.220 Initial decision.

(a) The ALJ will issue an initial decision, based only on the record, which will contain findings of fact and conclusions of law.

(b) The ALJ may affirm, deny, increase, or reduce the penalties or assessments proposed by the Inspector General.

(c) The ALJ will issue the initial decision to all parties within 60 days after the time for submission of post-hearing briefs or reply briefs, if permitted, has expired. The decision will be accompanied by a statement describing the right of any party to file a notice of appeal with the DAB and instructions for how to file such appeal. If the ALJ cannot issue an initial decision within the 60 days, the ALJ will notify the parties of the reason for the delay and will set a new deadline.

(d) Unless an appeal or request for extension pursuant to § 498.221(a) is filed with the DAB, the initial decision of the ALJ becomes final and binding on the parties 30 days after the ALJ serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

§ 498.221 Appeal to DAB.

(a) Any party may appeal the decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30-day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30-day period and shows good cause.

(b) If a party files a timely notice of appeal with the DAB, the ALJ will forward the record of the proceeding to the DAB.

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions, and identifying which finding of fact and conclusions of law the party is taking exception to. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.

(d) There is no right to appear personally before the DAB, or to appeal to the DAB any interlocutory ruling by the ALJ.

(e) No party or person (except employees of the DAB) will communicate in any way with members of the DAB on any matter at issue in a

case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

(f) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been, but was not, raised before the ALJ.

(g) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

(h) The DAB may remand a case to an ALJ for further proceedings, or may issue a recommended decision to decline review or affirm, increase, reduce, or reverse any penalty or assessment determined by the ALJ.

(i) When the DAB reviews a case, it will limit its review to whether the ALJ's initial decision is supported by substantial evidence on the whole record or contained error of law.

(j) Within 60 days after the time for submission of briefs or, if permitted, reply briefs has expired, the DAB will issue to each party to the appeal and to the Commissioner a copy of the DAB's recommended decision and a statement describing the right of any respondent who is found liable to seek judicial review upon a final decision.

§ 498.222 Final decision of the Commissioner.

(a) Except with respect to any penalty or assessment remanded to the ALJ, the DAB's recommended decision, including a recommended decision to decline review of the initial decision, shall become the final decision of the Commissioner 60 days after the date on which the DAB serves the parties to the appeal and the Commissioner with a copy of the recommended decision, unless the Commissioner reverses or modifies the DAB's recommended decision within that 60-day period. If the Commissioner reverses or modifies the DAB's recommended decision, the Commissioner's decision is final and binding on the parties. In either event, a copy of the final decision will be served on the parties. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

(b) There shall be no right to personally appear before or submit additional evidence, pleadings or briefs to the Commissioner.

(c)(1) Any petition for judicial review must be filed within 60 days after the parties are served with a copy of the final decision. If service is by mail, the date of service will be deemed to be five days from the date of mailing.

(2) In compliance with 28 U.S.C. 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging a final action of the Commissioner will be sent by certified mail, return receipt requested, to the SSA General Counsel. The petition copy will be time-stamped by the clerk of the court when the original is filed with the court.

(3) If the SSA General Counsel receives two or more petitions within 10 days after the final decision is issued, the General Counsel will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period.

§ 498.223 Stay of initial decision.

(a) The filing of a respondent's request for review by the DAB will automatically stay the effective date of the ALJ's decision.

(b)(1) After issuance of the final decision, pending judicial review, the respondent may file a request for stay of the effective date of any penalty or assessment with the ALJ. The request must be accompanied by a copy of the notice of appeal filed with the Federal court. The filing of such a request will automatically act to stay the effective date of the penalty or assessment until such time as the ALJ rules upon the request.

(2) The ALJ may not grant a respondent's request for stay of any penalty or assessment unless the respondent posts a bond or provides other adequate security.

(3) The ALJ will rule upon a respondent's request for stay within 10 days of receipt.

§ 498.224 Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the ALJ or by any of the parties is ground for vacating, modifying or otherwise disturbing an otherwise appropriate ruling or order or act, unless refusal to take such action appears to the ALJ or the DAB to be inconsistent with substantial justice. The ALJ and the DAB at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

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