Advocacy Before the Appeals Council

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A. The Appeals Council Provides More Relief Than Federal Courts

In the vast majority of cases, a claimant must request Appeals Council review to exhaust his or her administrative remedies. See 20 C.F.R. § 404.955 (2008). Each year, the Appeals Council acts on about 85,000 requests for review in initial claims.[1] In Fiscal Year (FY) 2007, the Appeals Council (in initial claims) denied or dismissed 71%, remanded 26%, and allowed 3% of requests for review. Thus, the Appeals Council provided relief to about 24,000 claimants in FY 2007.

Relief from the Appeals Council dwarfs relief from federal courts. In FY 2007, federal courts disposed of approximately 12,000 cases and granted plaintiffs relief in about 6,000 cases. Thus, the Appeals Council provides relief in four times as many cases per year as do the federal courts.

B. The Appeals Council Grants Relief in a Substantial Percentage of Cases

Some attorneys denigrate the importance of the Appeals Council by reference to its purported low rate of relief, criticizing the Appeals Council for granting relief in only 25-30% of requests for review. But obtaining relief in 25-30% of requests for review is a significant rate of success. Moreover, an attorney with some expertise in Social Security law should be able to obtain relief from the Appeals Council in more than 25-30% of requests for review.

Remember that the Appeals Council provides relief in one of four requests for review, including all the requests for review filed by pro se claimants and filed by attorneys with weak

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[1] National Organization of Social Security Claimants' Representatives, Social Security Forum (Apr. 2008), at 11 (publishing statistics from the Office of Disability Programs, Social Security Admin. (Dec. 2007)).)

cases. (Some attorneys seek Appeals Council review of all or nearly all of unfavorable or partially favorable ALJ decisions regardless of the merit of the claims.) Thus, the pool from which the Appeals Council grants relief includes many meritless cases.

C. The Appeals Council is Often a Claimant's Best or Only Hope

There are other reasons why the Appeals Council is a claimant's friend. Many federal courts and individual district court judges and magistrate judges are unsympathetic to plaintiffs seeking disability benefits or to specific kinds of plaintiffs, e.g., those with poor work records, a history of substance abuse, etc. Thus, to correct an ALJ's error, the Appeals Council may be a claimant's only option.

As a related matter, the Appeals Council may enforce certain internal agency rules that a federal court either will not or cannot. There are many examples of this. Courts seldom find jurisdiction to review ALJ dismissals, in contrast to ALJ decisions. See, e.g., Brandyburg v. Sullivan, 959 F.2d 555 (5th Cir. 1992). If an ALJ dismisses a request for hearing as untimely, the Appeals Council is a claimant's only real hope to obtain a decision on the merits of the dismissed claim. The Appeals Council is the end of the road.

By regulation, Social Security Rulings (SSRs) are binding on all agency adjudicators, including ALJs and the Appeals Council. 20 C.F.R. § 402.35 (2008). Many SSRs require an ALJ to address expressly certain kinds of evidence such as opinions from a non-examining state-agency physician. See, e.g., SSR 96-6p. The Appeals Council may enforce such an articulation requirement, while some federal courts will not.

The same may hold true for compliance with the HALLEX, the manual of procedure for ALJs and the Appeals Council.[2] Courts may refuse to enforce a provision of the HALLEX. See, e.g., Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) ("As HALLEX does not have the force and effect of law, it is not binding on the Commissioner and we will not review allegations of noncompliance with the manual."). In contrast, the Appeals Council routinely—but not always—enforces the HALLEX.

Additionally, the Appeals Council sometimes enforces its own remand orders when a federal court would not. For example, if the Appeals Council ordered an ALJ to obtain a consultative examination and the ALJ did not obtain such evidence, the Appeals Council might grant a request for review and remand with a second instruction to obtain that evidence. In contrast, a federal court may reasonably and properly give no weight to the fact that the Appeals Council once ordered a consultative examination when determining whether an ALJ developed an adequate record.

D. Obtaining Relief From the Appeals Council is Efficient

If all of this were not enough to take the Appeals Council seriously, obtaining relief from the Appeals Council is efficient. Even accounting for any delay at the Appeals Council, obtaining relief from the Appeals Council is almost always much more efficient than litigation. It takes on average two to seven hours to prepare a thorough letter to the Appeals Council, i.e., about as much time as it takes to draft a federal court reply brief. An attorney can obtain relief from the Appeals Council at a fraction of the cost it takes to litigate a claim in federal court.

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[2] Available at http://www.ssa.gov/OP_Home/hallex/hallex.html.

E. A Federal Court Will Likely Only Remand Anyway

Saving arguments for federal court is unwarranted and ill-advised for the reason that the Appeals Council will likely provide the same relief that the federal court will provide: remand for a new administrative hearing. In FY 2007, courts remanded (either under sentence four or sentence six of 42 U.S.C. § 405(g)) 46% of claims. In only 5% of dispositions that FY did the court hold itself that the claimant was entitled to benefits. In the vast majority of cases, a claimant will not obtain broader relief from a court than from the Appeals Council.

II. Evaluate the Merits Prior to Requesting Appeals Council Review

Many attorneys automatically request Appeals Council review when an ALJ renders an unfavorable or partially-favorable decision. This may have the advantage of establishing a routine by which requests for review are timely filed, but many requests for review should not be filed.

Many unfavorable or partially-favorable ALJs decisions are correct. ALJs are correct most of the time. After all, ALJs found claimants disabled in 62% of claims in FY 2007. If an ALJ's unfavorable or partially-favorable decision is correct, consider not requesting Appeals Council review. It may be that the claimant should put all of his or her efforts into proving disability based on a new application. Or, the claimant might have returned to work at the substantial gainful activity level, showing that in fact he or she is not disabled.

Additionally, an attorney should exercise caution when requesting Appeals Council review of a partially-favorable ALJ decision with ongoing benefits at stake. If the ALJ's finding of disability is dubious or questionable, a claimant might reasonably decide not to request Appeals Council review to minimize the chance that the Appeals Council will ask an ALJ to

reconsider whether the claimant was disabled at any time.

III. Make Precise Procedural Requests

When requesting Appeals Council review, an attorney should make precise procedural requests. In every case, the attorney should consider whether to request:

- the ALJ's decision and/or notice of decision,
- select exhibits or all exhibits, including exhibits from a prior claim,
- the list of exhibits,
- a recording of a hearing,
- a transcript of a hearing,
- an extension of time to submit additional evidence, and
- an extension of time to submit arguments after compliance with a procedural request.

The request for review should list each of these individually if desired. An attorney should also ask the Appeals Council for an extension of time after it complies with a procedural request for the attorney to submit additional arguments and/or evidence. Although the Appeals Council automatically considers a procedural request an implicit request for an extension of time to submit additional arguments and/or evidence (after the Appeals Council complies with the procedural request), an attorney should request expressly the extension.

Ideally, an attorney will not make any procedural request to the Appeals Council. Instead, within the time limit for requesting Appeals Council review, the attorney will provide to the Appeals Council all arguments and additional evidence in support of the request. This is possible in the majority of claims today because an attorney ordinarily will already have all of the exhibits and may obtain directly from the Office of Disability Adjudication and Review Hearing Office a recording (CD) of a recent hearing.

IV. Track Compliance With Procedural Requests

Tracking compliance with a procedural request is vital. Sometimes the Appeals Council denies review a request for review before satisfying a procedural request, e.g., prior to sending the claimant a recording of a hearing. In other words, the Appeals Council may deny a request for review before an attorney has presented all of his or her arguments and any additional evidence to the Appeals Council. If the Appeals Council denies review before complying with a procedural request, the attorney should decide immediately whether to ask the Appeals Council to vacate its denial of review and comply with the request, or simply to initiate a civil action.

V. Work as Though Appeals Council Issue Exhaustion Were Required

Issue exhaustion is the doctrine requiring a non-government party to raise to an agency a particular issue in order to preserve that issue for later judicial review. See Sims v. Apfel, 530 U.S. 103, 106-108 (2000). In Sims, the Supreme Court ruled that a federal court may not impose issue exhaustion at the level of the Appeals Council. Claimants' attorneys should work as though the Supreme Court had reached the opposite conclusion in Sims. In other words, attorneys should raise issues to the Appeals Council as though the Supreme Court required Appeals Council issue exhaustion.

Representing claimants as though Appeals Council issue exhaustion were required will improve the chance of obtaining relief from the Appeals Council. The Appeals Council is much more likely to grant a request for review when an attorney sets forth cogent arguments explaining why it should.

Moreover, although after Sims federal courts cannot require Appeals Council issue exhaustion, the Agency can require Appeals Council issue exhaustion by amending its

regulations. There is nothing to prevent the Agency from requiring attorneys to raise specific issues to the Appeals Council as a precondition for later judicial review of those issues.[3]

And, even though Appeals Council issue exhaustion is not required today, a federal court may reasonably take less seriously any argument that was not presented to the Appeals Council. If the issue were so important that it requires judicial relief, the attorney should have raised the issue to the Appeals Council. Why, a federal court may wonder, is the attorney asking the court to correct an error the attorney did not ask the Appeals Council to correct? By raising issues to the Appeals Council, an attorney shows proper respect for the judiciary. The attorney asks for a federal court's valuable time only after the attorney did his or her best to convince the Agency to fix its own mistakes.

VI. Organize Your Arguments Using an Outline and Headings

Present arguments to the Appeals Council using an outline with descriptive headers. Someone reading an attorney's letter to the Appeals Council should be able to identify within several minutes why the attorney contends that the Appeals Council should grant the request for review. Merely by skimming the argument headings, the Appeals Council should know whether

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[3] On October 29, 2007, the Agency proposed a rule addressing Appeals Council issue exhaustion. 72 Fed. Reg. 61,234 (Oct. 29, 2007). Proposed regulation 404.969(c) concerns the "[c]ontents of the appeal" to the Review Board, the successor to the Appeals Council. Id. It states that a represented and unrepresented claimant alike

> should include with your notice of appeal a written statement that identifies any errors you believe the [ALJ] made, explains why those alleged errors require reversal or modification of the [ALJ's] hearing decision or dismissal under the standards of review described in § 404.971, and cites applicable law and specific facts in the administrative record to support your contentions.

Id. In the Supplementary Information accompanying the proposed regulations, the Agency states that the written statement in (c) is "encourage[d]" but not "require[d]." 72 Fed. Reg. 61,221.

the main argument relates, e.g., to a treating physician's opinion, the vocational expert's testimony, or a mental impairment.

VII. Write at Most a Very Concise Statement of the Facts

Many letters to the Appeals Council are little more than lengthy statements of the facts with arguments hidden among the facts. Such letters are ineffective if not self-defeating. Success at the Appeals Council should not depend on the generosity of the Appeals Council to extract arguments from an attorney's factual summary.

A lengthy statement of the facts is with few exceptions unnecessary. An attorney must have a special reason to justify a lengthy statement of the facts. A lengthy statement will likely be unread — and should be unread. It is waste of time for the Appeals Council to read such a statement. Instead, the Appeals Council will rely on the ALJ's factual summary.

There is no reason for the attorney to offer another, allegedly improved statement of the facts. Rather, an attorney is responsible for identifying material errors and omissions in the ALJ's statement of the facts. For example, if the ALJ neglected an important opinion from a treating physician, the attorney should argue that, contrary to law, the ALJ neither acknowledged nor evaluated the treating physician's opinion. See 20 C.F.R. § 404.1527(d)(2) (2008) (requiring an ALJ to provide "good reasons" for the weight accorded a treating physician's opinions); see also Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight").

VIII. Be Brief Yet Thorough

There are different philosophies about presenting arguments to the Appeals Council. At one extreme, attorneys advocate drafting short, one- or two-page letters focusing on only the very

strongest arguments. At the other extreme, attorneys advocate submitting essentially full-blown federal court briefs. In the ordinary case, neither extreme is appropriate. If a request for review is truly meritorious, an attorney should be able to identify more than one or two pages of errors. Even if an ALJ made myriad errors, there is no need for a full-blown federal court brief, and there is usually no advantage to such a brief. Avoiding both extremes, an attorney with expertise in Social Security law should ordinarily spend about two to seven hours preparing a three-to-seven-page, single-spaced letter to the Appeals Council.

IX. Do the Work of the Appeals Council

When drafting a letter to the Appeals Council, an attorney should do as much work for the Appeals Council as possible.

A. Identify the Precise Exhibit and Page

An attorney should identify the exact exhibit and page of any evidence upon which the attorney relies. If the evidence is important enough to mention, it is important enough to locate for the Appeals Council. Because an attorney should cite the exact exhibit and page, the attorney needs to have planned ahead. When an attorney leaves the ALJ hearing and returns to the office, he or she should have a complete paginated exhibit file either on a CD or paper. (An attorney may always ask the Appeals Council for the exhibit file.)

B. Identify the Exact Date and Time of Key Testimony

All ALJ hearings are now recorded digitally, and CDs are provided to claimants of the digital recordings. The Agency uses ForTheRecord (FTR) recording and playback software.[4] The software allows an attorney to identify the date and time (to the second) of specific testimony.

[4] Available at http://www.fortherecord.com/.

Prior to FTR, an attorney had several ways to cite specific testimony: (1) have the entire audiotape transcribed; (2) transcribe only key parts of the testimony; (3) obtain a transcript from the Agency; and (4) describe carefully where the testimony occurs, e.g., "At the beginning of the representative's cross-examination . . . ." The best practice was probably (1). The most common practice was (4).

Now with FTR, an attorney should cite hearing testimony with precision.

Example 1:

When responding to the ALJ's hypothetical question that did not reference a limitation with respect to interacting with the public, the vocational expert stated that she identified jobs that did not involve "public contact." (June 1, 2006 Hearing, 11:44 a.m.) Under cross-examination, she stated that to accommodate the restriction on no public contact, she eliminated only those jobs with face-to-face contact with the public. (June 1, 2006 Hearing, 11:49 a.m.)

Example 2:

The ALJ then lost his composure, chastising [claimant's name] attorney, "How dare you!" (Mar. 24, 2006 Hearing, 3:44 p.m.) He also warned [claimant's name] attorney against any additional objection, "Be careful!" (Mar. 24, 2006 Hearing, 3:45 p.m.) Later, near the close of the hearing, the ALJ ranted once more against [claimant's name] attorney, characterizing as "crazy" the idea that he was unfair. (Mar. 24, 2006 Hearing, 4:02 p.m.)

With such citation, the Appeals Council can easily verify an attorney's assertion about who said what.

X. Rely Primarily on Internal Agency Authority Instead of Case Law

The Appeals Council is concerned primarily with compliance with the Agency's regulations, SSRs, Acquiescence Rulings, and the HALLEX. Consequently, case law should be cited in addition to the regulations, rulings, and the HALLEX, not instead of those internal Agency rules.

Further, if an attorney relies heavily on a case, he or she should explain the case in relative detail. Above all, an attorney should not misstate or exaggerate the holding of a case such as stating that a case requires an ALJ in all circumstances to give a treating physician's opinion more weight than that of a non-treating source.

XI. Make Credibility Arguments Based on SSR 96-7p

The Appeals Council generally does not grant a request for review based in large part or based solely on a disagreement with the ALJ about the claimant's credibility. The Appeals Council is deferential—even very deferential—to ALJ credibility findings.

It is not improper for the ALJ to identify inconsistencies when making a credibility finding. The Appeals Council wants ALJs to find (material) inconsistencies in claimant testimony. See SSR 96-7p. Thus the Appeals Council will be very reluctant to rule that the inconsistencies identified by an ALJ are immaterial or otherwise an inadequate basis for the ALJ's credibility finding.

However, if the Appeals Council finds that an ALJ's credibility finding is defective, the Appeals Council will likely base its determination on SSR 96-7p. Therefore, an attorney should focus credibility arguments on compliance with that Ruling.

Even though the Appeals Council generally does not countenance a direct attack on an ALJ's credibility finding, consider including such an attack in a letter to the Appeals Council for two reasons. First, the Appeals Council may feel more sympathetic to a claimant if the ALJ's credibility finding is arguably flawed. Second, even though a claimant is not required to raise an issue to the Appeals Council to preserve that issue for later judicial review, see Sims, 530 U.S. at 111-14, an attorney should challenge the ALJ's credibility finding in the proceedings before the Appeals Council if the attorney plans to dispute that finding later on judicial review. An attorney does not want a court to question why the attorney did not raise credibility as an issue to the Appeals Council if the attorney believes that the issue warrants judicial relief.

The weakest arguments attorneys generally make to the Appeals Council involve credibility. Below are (with some exaggeration) real-world examples of unconvincing arguments presented to the Appeals Council:

- I have represented claimants for twenty years, and I know that this claimant is telling the truth. (The Appeals Council gives no weight to an attorney's vouching for the claimant.)
- Everyone knows that this ALJ finds all claimants not credible. Therefore, the ALJ is biased. (The Appeals Council knows that this is both false and illogical.)
- The ALJ relied in part on his personal observation. (SSR 96-7p permits reliance on personal observation. The ruling is valid. An attorney must offer a specific reason why given the particular facts of a case the ALJ relied too heavily or unreasonably on his or her specific personal observation.)

• The claimant is credible. The ALJ found that the claimant was not credible. Therefore, the ALJ is biased. (The Appeals Council does not consider an adverse credibility finding proof of ALJ bias.)

• So what if the claimant rode a horse, jogged one mile, or flew a helicopter? These activities do not prove that the claimant could do sedentary work. Therefore, the ALJ's credibility finding based on the claimant's minimal activities is not supported by substantial evidence. (The claimant is probably not disabled. There are some facts that support a claim of disability and some that do not. An attorney should appreciate that probably at least part of an ALJ's credibility finding is reasonable. Just because the ALJ said it does not make it wrong. But an attorney does not need to defeat every single element of the ALJ's credibility finding.)

• The ALJ erroneously found the claimant not credible, in part, based on the claimant's criminal history involving welfare fraud. (The Appeals Council will not penalize an ALJ for noting as part of a credibility finding that a claimant has a criminal history.)

XII. Use a Professional Respectful Tone

Too many letters to the Appeals Council are disrespectful to the ALJ and/or Appeals Council if not unprofessional. Do not flame, disparage, or ridicule the ALJ. Keep in mind that the Appeals Council will deny review in three out of four cases. The ALJ will receive the benefit of the doubt.

Remember that the claimant wants something from the Appeals Council: that his or her request for review be granted. Insulting or ranting against the Appeals Council will not make it more likely that the Appeals Council will grant a request for review. Nor will using sarcasm.

Further, keep in mind that if the Appeals Council provides relief, the Appeals Council will likely remand the case to an ALJ for further administrative proceedings. Since the Appeals Council allows an ALJ two bites at the apple, see HALLEX, § I-2-1-55,[5] ordinarily the case will be heard again by the ALJ who originally decided the case. The exhibit file sent to the ALJ will include arguments submitted to the Appeals Council.

XIII. Allege ALJ "Bias" Only With Great Care

An ALJ is not "biased" because he or she found the claimant not credible, ignored a treating physician's opinion, misstated the law, or snapped at the claimant or the claimant's attorney. Nor is an ALJ "biased" because he or she found inconsistencies in the claimant's statements. The Appeals Council requires ALJs to search the record for (material) inconsistencies. See SSR 96-7p.

Almost all arguments alleging that an ALJ was "biased" are merely run-of-the-mill arguments about whether substantial evidence supports the ALJ's decision or whether the ALJ made a legal error. Characterizing such arguments in terms of ALJ "bias" does not make them more persuasive, but less so. Such arguments have nothing to do with adjudicator "bias" in its technical definition. See Liteky v. United States, 510 U.S. 540 (1994); Keith v. Barnhart, 473 F.3d 782, 787-90 (7th Cir. 2007). The Appeals Council will not be persuaded that an ALJ was improperly "biased" merely because the ALJ found the claimant not credible, ignored a treating

[5] Available at http://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-55.html.

physician's opinion, misstated the law, or snapped at the claimant or the claimant's attorney. Consequently, an attorney should allege ALJ "bias" only in a rare case where ALJ "bias" in its technical definition can be established.

XIV. Consider Faxing Arguments to the Appeals Council

A request for Appeals Council review, arguments, and/or evidence can be submitted directly to the Appeals Council via United States mail, commercial delivery service, or fax. If a document is faxed to the Appeals Council, it should be faxed to the relevant Branch of the Appeals Council. See HALLEX, § I-4-3-104[6] (Appeals Council Branch contact information). Be sure that you can prove timely submission of any document.

XV. There Are Many Audiences for Every Appeals Council Letter

A letter to the Appeals Council may be read not only by an Appeals Council Administrative Appeals Judge with the power to grant a request for review. The letter has many other possible audiences, including an Appeals Council Appeals Officer, an Appeals Council analyst, an Appeals Council assistant or technician, the same ALJ who rendered the decision for which review has been requested, another ALJ deciding the same or a subsequent claim, a federal court judge or magistrate judge, the claimant him- or herself, the attorney and the attorney's firm, and the attorney's malpractice carrier.

[6] Available at http://www.ssa.gov/OP_Home/hallex/I-04/I-4-3-104.html.