contacted and voting, the Board of Governors voted to add to the agenda for the closed session on Monday, January 6, 1986 (see 50 FR 53061, December 27, 1985), the following item:

Discussion of possible rate implications of the shortfall in the FY 1986 revenue forgone appropriations.

The Board determined that pursuant to section 552(c)(10) of title 5, United States Code, and § 7.3(j) of title 39, Code of Federal Regulations, discussion of the matter is exempt from the open meeting requirement of the government in the Sunshine Act because it is likely to specifically concern the participation of the Postal Service in a civil action or proceeding or the litigation of a particular case involving a determination on the record after opportunity for a hearing.

In accordance with section 552b(f)(1) of title 5, United States Code, and § 7.6(a) of title 39, Code of Federal Regulations, the General Counsel of the United States Postal Service has certified that in his opinion the meeting may properly be closed to public observation pursuant to section 552b(c)(10) of title 5, United States Code, and § 7.3(j) of title 39, Code of Federal Regulations.

Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

David F. Harris,

Secretary.

Fred Eggleston,

Alternate Liaison Officer for the U.S. Postal Service.

[FR Doc. 85-30886 Filed 12-31-85; 1:11 pm]

BILLING CODE 7710-12-M

6

SECURITIES AND EXCHANGE COMMISSION

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94-409, that the Securities and Exchange Commission will hold the following meetings during the week of January 6, 1986.

A closed meeting will be held on Tuesday, January 7, 1986, at 2:30 p.m. An open meeting will be held on Thursday, January 9, 1986, at 10:00 a.m., in Room 1C30.

The Commissioners, Counsel to the Commissioners, the Secretary of the Commission, and recording secretaries will attend the closed meeting. Certain staff members who are responsible for the calendared matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(4), (8), (9)(A) and (10) and 17 CFR 200.402(a)(4), (8), (9)(i) and (10), permit consideration of the scheduled matters at a closed meeting.

Commissioner Peters, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, January 7, 1986, at 2:30 p.m., will be:

Formal order of investigation.
Settlement of administrative proceeding of an enforcement nature.
Institution of administrative proceedings of an enforcement nature.
Settlement of injunctive actions.
Institution of injunctive actions.
Litigation matter.
Regulatory matter regarding financial institutions.
Opinions.

The subject matter of the open meeting scheduled for Thursday, January 9, 1986, at 10:00 a.m., will be:

1. Consideration of whether: (1) To authorize publication of a concept release seeking public comment on certain possible responses to large scale open market purchase programs; (2) to adopt amendments to Rules 13e-4 and 14d-10 providing that a tender offer must be open to all holders of the class of securities subject to the tender offer; (3) to propose for comment amendments to (a) Rules 13e-4 and 14d-10 providing that all security holders to whom a tender offer is made must be paid the highest consideration paid to any security holder; (b) Rules 13e-4 and 14e-1(b) providing that a tender offer must remain open for ten business days upon announcement of an increase or decrease in the percentage of securities being sought or consideration offered by the offeror; and (c) Rule 13e-4 and 14d-7 providing that upon announcement of a decrease in the percentage of securities being sought or consideration offered, additional withdrawal rights attach for ten business days; (d) Rule 13e-4 providing that an issuer tender offeror afford security holders withdrawal rights for a minimum period of ten business days upon the commencement of a third-party tender offer only if the issuer receives notice or otherwise has knowledge of the commencement of such tender offer; (4) to adopt amendments to Rule 13e-4 that would conform most of the time periods governing issuer tender offers to those governing third-party tender offers; and (5) to consider whether Commission action with respect to the regulation of certain offensive and defensive takeover tactics is appropriate at this time.

For further information with respect to the concept release and Commission consideration of whether to regulate certain offensive and defensive takeover tactics, please contact Joseph G. Connolly, Jr. or Gregory E. Struxness at (202) 272-3097; regarding adoption of the all-holders rule and proposal of the best-price provision for third-party tender offers, please contact Sarah A. Miller at (202) 272-2589; and information regarding adoption of the all-holders rule and proposal of the best-price provision for issuer tender offers and adoption of amendments to Rule 13e-4 conforming most of the time periods applicable to third-party tender offers to issuer tender offers, please contact Nancy J. Burke at (202) 272-2848 or Deren Manasevit at (202) 272-7494.

2. Consideration of whether to issue a release announcing the adoption of new Rule 0-11 under the Securities Exchange Act of 1934 as well as conforming amendments which would codify the Commission's administrative interpretations concerning fees for business combination transactions. Such fees have been collected since 1983 pursuant to legislative amendments to the Act. For further information, please contact Thomas Sweeney at (202) 272-2589.

3. Consideration of (1) a proposal by the Philadelphia Stock Exchange, Inc. to trade options on the European Currency Unit (File No. SR-Phlx-85-10) and (2) a proposal by the Option Clearing Corporation to issue, clear and settle such options (File No. SR-OCC-85-14). For further information, please contact Alden Adkins at (202) 272-2843.

4. Consideration of whether to issue a release proposing amendments to Rule 31-1 under the Securities Exchange Act of 1934 ("Act") to provide a temporary exemption for transactions in OTC/Exchange-Traded NMS Securities from payment of fees to the Commission under Section 31 of the Act. For further information, please contact Leland H. Goss at (202) 272-2827.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: David Powers at (202) 272-2091.

Dated: December 31, 1985.

John Wheeler,

Secretary.

[FR Doc. 85-30972 Filed 12-31-85; 3:54 pm]

BILLING CODE 8010-01-M

federal register

Friday
January 3, 1986

Part II

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 733

Permanent and Interim Regulatory Programs; Evaluation, Federal Enforcement, and Withdrawing Approval of State Programs; Procedures; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 733

Availability of Petition To Initiate Rulemaking; Surface Coal Mining and Reclamation Operations; Permanent Regulatory Program; Procedures for Evaluating State Programs, Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Notice of availability of petition to initiate rulemaking and request for comment.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) seeks comments regarding a petition submitted by ten citizens' organizations submitted pursuant to the Surface Mining Control and Reclamation Act (the Act), to amend OSMRE's existing regulations concerning procedures for evaluating State programs, substituting Federal enforcement of State programs and withdrawing approval of State programs.

The petitioners maintain that the proposed amendments will bring those provisions of OSMRE's regulations defining OSMRE's non-discretionary oversight duties into conformance with the mandatory duties of the Director and the Secretary under the Surface Mining Act, 30 U.S.C. 1201–1328, and the Administrative Procedure Act, 5 U.S.C. 501–706, and will alter OSMRE's evaluation of State programs to comply with Congressional intent. Specifically, OSMRE is requesting comments on the merits of the petition and the rule changes suggested in the petition. Such comments will assist the Director of OSMRE in making the decision whether to grant or deny the petition.

DATES: OSMRE will accept written comments on the petition until 5:00 p.m. eastern standard time on February 3, 1986.

ADDRESSES: Written comments must be mailed to the Administrative Record, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240 or hand-delivered to the Administrative Record, Office of Surface Mining, U.S. Department of the Interior, Room 5124, 1100 "L" Street, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Arthur W. Abbs, Chief, Division of State Program Assistance, Office of Surface Mining Reclamation and Enforcement, Room 110, 1951 Constitution Avenue, NW., Washington, DC 20240. Telephone: (202) 343–5351.

SUPPLEMENTARY INFORMATION:

I. Public Commenting Procedures

Written Comments

Written comments on the suggested changes should be specific, should be confined to issues pertinent to the petition, and should explain the reasons for the comment. Comments received after the close of the comment period (see "**DATES**") may not necessarily be considered or included in the administrative record on the petition. OSMRE cannot ensure that written comments received or delivered during the comment period to any location other than that specified under "**ADDRESS**" above will be considered and included in the administrative record on this petition.

Availability of Copies

Additional copies of the petition and copies of 30 CFR Part 733 are available for inspection and may be obtained at the location listed under "**ADDRESS**".

Public Meetings

OSMRE will not hold a public hearing on the petition or proposed revisions, but OSMRE personnel will be available to meet with the public during business hours, 8:00 a.m. to 4:00 p.m., during the comment period. In order to arrange such a meeting, call or write to the person listed above under "**FOR FURTHER INFORMATION CONTACT**".

II. Background and Substance of Petition

OSMRE received a letter dated November 13, 1985, from the Honorable Morris K. Udall, Chairman, Committee on Interior and Insular Affairs, U.S. House of Representatives forwarding a petition by the Dakota Resource Council, Environmental Policy Institute, Illinois South Project, Inc., Legal Environmental Assistance Foundation, Northern Plains Resource Council, Powder River Basin Resource Council, Public Lands Institute, Save Our Cumberland Mountains, Western Colorado Congress, and the Western Organization of Resource Councils. The petitioners seek certain amendments to regulations found at 30 CFR 733.12 relating to procedures for evaluating State programs, substituting Federal enforcement of State programs and withdrawing approval of State programs. The text of the petition appears as an appendix to this notice.

Pursuant to section 201(g) of the Act, any person may petition for a change in OSMRE's permanent program rules which appear in 30 CFR Chapter VII. The Act allows for a period of 90 days within which to decide to grant or deny a petition (section 201(g)(4); 30 U.S.C. 1211(g)(4)). Under the applicable regulations for rulemaking petitions, 30 CFR 700.12, this notice seeks public comments on the merits of the petition and on the rule changes suggested in the petition. At the close of the comment period, a decision will be made whether to grant or deny the petition. If the decision is made to grant the petition, rulemaking proceedings will be initiated in which public comment will again be sought before any final rulemaking notice appears. If the decision is made to deny the entire petition, no further rulemaking action will occur pursuant to the petition.

While the petition is pending, OSMRE intends to continue to oversee State programs under existing policies and practices. OSMRE also intends to continue its management planning. While these activities are closely related to the rulemaking petition, the agency will not prejudge the petition, but will fully and fairly consider the merits of the petition.

III. Procedural Matters

Publication of this notice of the receipt of the petition for rulemaking is a preliminary step in the rulemaking process. If a decision is made to grant the petition, a formal rulemaking process will be initiated. Thus, no regulatory flexibility analysis is needed at this stage, nor is a regulatory impact analysis necessary under Executive Order No. 12291.

Publication of this notice does not constitute a major Federal action having a significant effect on the human environment for which an environmental impact statement under the National Environmental Policy Act, 42 U.S.C. 4322(2)(C), is needed.

List of Subjects in 30 CFR Part 733

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: December 26, 1985.

Robert E. Boldt,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

Appendix

The text of the petition date September 3, 1985 is as follows: Petition to initiate rulemaking 30 CFR 700.12.

Petition For Rulemaking

Office of Surface Mining

Submitted by:
Dakota Resource Council
Environmental Policy Institute
Illinois South Project
Legal Environmental Assistance Foundation
Northern Plains Resource Council
Power River Basis Resource Council
Public Lands Institute
Save our Cumberland Mountains
Western Colorado Congress
Western Organization of Resource Councils

I. Summary

Pursuant to the Administrative Procedure Act, 5 U.S.C. 553(e), the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. 1211(c)(2) and (g), and regulations of the Office of Surface Mining (OSM), 30 CFR 700.12, the Dakota Resource Council, Environmental Policy Institute, Illinois South Project, Inc., Legal Environmental Assistance Foundation, Northern Plains Resource Council, Powder River Basin Resource Council, Public Lands Institute, Save Our Cumberland Mountains, Western Colorado Congress, and the Western Organization of Resource Councils (hereinafter, Petitioners) petition the Director, OSM, for certain amendments to regulations found at 30 CFR 733.12 relating to procedures for evaluating State programs, substituting Federal enforcement of state programs and withdrawing approval of state programs. The proposed amendments will bring those provisions of OSM's regulations defining OSM's non-discretionary oversight duties into conformance with the mandatory duties of the Director and the Secretary under the Surface Mining Act, 30 U.S.C. 1201–1328, and the Administrative Procedure Act, 5 U.S.C. 501–706, and will alter OSM's evaluation of state programs to comply with Congressional intent.

II. Description of Petitioners

Petitioner Dakota Resources Council (DRC) is a grass-roots membership organization of farmers, ranchers, and other citizens concerned about the effects of energy development on agriculture. Its membership of 700 families has worked for adequate implementation of the state and federal SMCRA and is particulary concerned with the state public service commission's enforcement practices. Many of DRC's members farm near areas which are or will be affected by surface-mining. Since 1977, the DRC has been actively involved in the reclamation rulemaking process via public hearings and comments.

Petitioner Environmental Policy Institute is a national organization working with citizens concerning the protection of the environment including the effective control and regulation of surface coal mining. EPI spearheaded citizens' efforts to obtain passage of the Surface Mining Act and has actively been involved in promoting adequate implementation of the Act by OSM.

Petitioner Illinois South Project is a non-profit citizen-sponsored organization which has worked on the social, economic and environmental impacts of coal development in Illinois communities since 1974. Since September 1977, the Illinois South Project has had a major role in organizing actions on behalf of a statewide coalition of citizens which monitors and promotes the effective implementation of the Surface Mining Act in Illionis.

Petitioner Legal Environmental Assistance Foundation is a regional public-interest law firm and membership organization providing legal and technical assistance to citizens in the southeast on environmental and health issues. The LEAF organization in Tennessee is especially concerned with the effective control and regulation of coal surface mining and has been actively involved in adequate implementation of SMCRA.

Petitioner Northern Plains Resource Council is a non-profit corporation organized under the laws of the state of Montana. Northern Plains Resource Council was founded to protect its members from the adverse effects of strip mining and has advocated effective surface mining regulation for fourteen years. Northern Plains Resource Council was active in efforts to pass both the federal and the Montana state surface mining laws.

Petitioner Powder River Basin Resource Council is a non-profit, agricultural conservation organization incorporated under the laws of the state of Wyoming. It has over 500 members including ranchers, farmers and other citizens, many of whom reside in Johnson, Sheriden and Campbell counties in Wyoming. The Council is primarily concerned with protecting the viability of the state's agricultural economy and the social and economic structures of communities in the Powder River Basin, other areas of Wyoming, and the West from the adverse effects of energy development.

Petitioner Public Lands Institute is a national non-profit membership organization dedicated to incorporating environmental values in national policies.

Petitioner Save Our Cumberland Mountains, Inc. is a non-profit organization whose membership of some 600 families is composed of residents of the Appalachian area who are vitally concerned about the proper regulation of surface mining. Its members live nearby and use lands and waters damaged by irresponsible, unlawful strip mining activities such as polluted streams, damage from blasting, landslides, unstable soil, flooding and loss of groundwater.

Petitioner Western Colorado Congress (WCC) is a democratically-controlled grass-roots organization composed of approximately 800 members who work on a variety of natural resource and consumer issues affecting Colorado, especially western Colorado. Since 1982, the WCC has been actively involved in and concerned with the effects of the SMCRA on tourism and agriculture in Colorado. Many of WCC's members live in areas that are or will be affected by surface mining.

Petitioner Western Organization of Resource Councils ("WORC") is a non-profit membership organization incorporated under the laws of the state of North Dakota. WORC consists of four organizations, the Dakota Resource Council, the Northern Plains Resource Council, the Powder River Basin Resource Council, and the Western Colorado Congress, representing approximately 3,500 families in the states of North Dakota, Montana, Wyoming, and Colorado. Most of WORC's members are farm and ranch families who reside in areas where local coal mining activities will be and are conducted.

III. The Proposed Amendments

Petitioners request promulgation of the following regulations to govern OSM's oversight evaluation of the states' programs. Specific new language is italicized

1. Amend 30 CFR 733.12(a) by replacing the current text with:

(a) Evaluation Procedures and Criteria. *Annual evaluations of state programs shall be prepared in accordance with uniform evaluation procedures developed by the Director after notice and opportunity for public comment.*

(1) *The Director shall promulgate specific uniform evaluation procedures in accordance with the standards set forth in the Act.* The Director shall:

(i) *Publish in the Federal Register a notice and full text of the proposed evaluation procedures. The notice shall include a date, not less than 30 days after publication of the notice, by which* *members of the public may submit written comments on the procedures and the person to whom comments should be addressed;*

(ii) *Publish in the Federal Register within 90 days thereafter, the full text of the final evaluation procedures and the reasons therefor; and*

(iii) *Adopt and implement the final evaluation procedures for each category listed in paragraph (2) below simultaneously upon the promulgation of this rule.*

(2) *Each annual evaluation of a state program shall, at a minimum, contain statistical information and analysis of that information as necessary to determine with substantial confidence the adequacy of the state's administration regarding the following major categories: inspections and enforcement; and penalty assessments and collections; permitting; performance standards; bonding and bond release; citizen rights; designation of lands unsuitable; reclamation of abandoned mine lands and collection of AML fees; compliance with conditions of state program approval; and sufficiency of funds, training, and the state's legal, technical and administrative personnel to administer the state program.*

(3) *The evaluation procedures adopted and implemented by the Director shall—*

(i) *Assure a comprehensive evaluation of a state program;*

(ii) *Divide the major categories into subcategories as necessary for comprehensive evaluation. Subcategories shall include but not be limited to: the frequency of inspections; the completeness of inspections; effectiveness of alternative enforcement mechanisms; the appropriateness of enforcement actions taken or not taken; timeliness and adequacy of penalty assessment and collection; conflict of interest by state personnel; sufficiency of bonds; grant or denial of permits to operators with uncorrected violations of surface mining or other laws or regulations of any state; adequacy of cumulative hydrologic impact analysis; determinations of probable hydrologic consequences; measures required for alluvial valley floor protection; subsidence monitoring, insurance, and control plans; backfilling and grading; prime farmland restoration plans; soil and overburden analysis; soil suitability determinations; handling of toxic overburden; substitution of lower horizons for topsoil; maintenance and reporting of ground and surface water monitoring; recovery of AML fee delinquencies and denial of new permits of operators with delinquent fees; and review of state decisions in response to citizen complaints and to OSM's annual reports.*

(iii) *Contain detailed, uniform procedures for the evaluation of each of the major categories and the subcategories above; and*

(iv) *Define acceptable performance levels for each subcategory above.*

2. Renumber existing 30 CFR 733.12(a)(2) to 733.12(b).

3. Add new subsections (c)–(e) to 30 CFR 733.12, as follows:

(c) *The Director shall evaluate the administration of each state program at least annually and shall publish in the Federal Register and in newspapers of general circulation in the state a notice indicating that a draft of the evaluation report required under (a) or (b) has been prepared. The notice shall indicate how interested persons may obtain a copy of the report and that the full text is available for review during regular business hours at the OSM state office and at the central office and at each field office of the state agency that was evaluated. It shall also afford interested persons an opportunity to request a hearing and/or submit written comments within a 45-day period beginning upon publicaton of the notice.*

(d) *In preparing the final evaluation report, the Director shall:*

(1) *consider all relevant information, including information obtained from public comments;*

(2) *include in the final report the Director's response to all public comments, prior to the publication of the final evaluation report, and*

(3) *issue written findings on the state's implementation, administration, maintenance and enforcement of all parts of the state program.*

(e) *The Director shall publish in the Federal Register and in a newspaper of general circulation in the State a notice indicating that the final evaluation report has been prepared. The notice shall indicate how interested persons may obtain a copy of the report and that the full text is available for review during regular business hours at the OSM state office and at central office and at each field office of the state agency that was evaluated. The Director shall send a copy of the final report as soon as it is issued to all persons who submitted comments on the draft.*

4. Amend and renumber 30 CFR 733.12(b) to read as follows:

(f) *Whenever OSM or any interested person, as provided in subsection (b) above, identifies any failure of the state to achieve a performance level (as defined previously) in the implementation, administration, maintenance, or enforcement of any part of its approved state program, the Director shall promptly notify the state regulatory authority in writing and allow a reasonable time (as specified in the notice, but not more than 90 days) for the state to correct any and all deficiencies identified. The Director's notice shall*—[return to the original text].

5. Amend and renumber 30 CFR 733.12(b)(3) to read as follows:

(f)(3) *Pending completion of any changes in a state program required by the Director, the states shall act in accordance with the required changes.*

6. Amend and renumber 30 CFR 733.12(c) to 733.12(g) and add the following at the end of the subsection:

The Secretary shall give at least 20 days' written notice, in the Federal Register and in a newspaper of general circulation in the state, to the public of any informal conference and any informal conference shall be open to the public.

7. Amend and renumber 30 CFR 733.12(d) to read as follows:

(h) *Within 30 days after the end of the time period specified by the Director, the Director shall make a written evaluation of whether the State regulatory authority has accomplished the remedial actions and shall give notice to the State and the public of his findings by publication in the Federal Register and in newspapers of general circulation in the state. Copies of the evaluation shall be made available to the state regulatory authority and the public. If the findings show that the State has not fully remedied its failure to implement, administer, maintain, or enforce a part or all of a State program, the Director shall hold a public hearing in the State within 30 days of the publications date.*

8. Amend and renumber 30 CFR 733.12(e) to 30 CFR 733.12(i.) so that the first sentence reads as follows:

(i.) Upon completion of the hearing under subsection (h) above, the Director shall issue findings, based upon all available information, the hearing transcript and written comments, whether the state either (i) has properly and fully implemented, administered, maintained and enforced all parts of its regulatory program; or (ii) has failed to implement, administer, maintain or enforce effectively all or any part of its approved State program. In the event of negative findings, the Director will revoke the Secretary's approval of the state program.

9. Amend and renumber 30 CFR 733.12(g) to 733.12(j) and add new paragraphs (j) (3)–(5), as follows:

(3) *Within 30 days after the date of the Director's decision (i) to issue a*

state program evaluation, (ii) to revoke a state program, or (iii) to return a state program, the state or any person with an interest which is or may be adversely affected and who participated in the process of evaluating a state program under this section may appeal the Director's findings to the Interior Board of Land Appeals, as provided by 43 CFR section 4,1280 et seq.

(4) *If the Director returns a state program in whole or in part, there shall be a public comment period regarding the suitability of returning the program to the state, of not less than 30 days, prior to the Secretary making written findings regarding the return of a state program, in whole or in part, to the state.*

(5) *If the Director revokes a state program in whole or in part, there shall be a public hearing held by the Director, regarding the suitability of revoking the state program, at least 30 days prior to the Secretary making written findings concerning the revocation of a state program, in whole or in part, to the state.*

IV. Reasons why this petition should be granted

A. OSM Oversight Regulations are Required by Law

The Administrative Procedure Act (APA) broadly defines a "rule" as:

> [T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . .

5 U.S.C. 551(4). Any federal agency action which would establish a "rule" as defined above must follow the notice and comment procedures required by APA Section 553, unless otherwise explicitly provided by law.

OSM has promulgated the equivalent of two documents governing its oversight and evaluation of state programs which fall within the APA's definition of rule, but OSM has failed to comply with the APA's requirements for public notice and comment. The OSM documents are: *Plans and Procedures for the Evaluation of the States' Permanent Programs* (March 5, 1982); and the *Sampling Method for Conducting Federal Inspections In States with Approved Surface Mining Regulatory Programs* (Final Draft, March 13, 1981).

While there are certain exceptions to the rulemaking requirements of the APA, the courts have held that they must be narrowly construed. See *Batterton* v. *Marshall*, 648 F.2d 694, 700–01 (D.C. Cir. 1980). None of the exceptions to Section 553 applies either to OSM's "Oversight Plans and Procedures" or the "Oversight Sampling Method." Both of these documents produce significant impacts on private interests and constrict agency discretion. The U.S. Court of Appeals for the District of Columbia Circuit and other courts have held that rulemaking procedures must be followed to implement such agency actions that have substantial impacts on private parties. See, *Batterton* v. *Marshall, supra*, 648 F.2d at 701–708, n. 83; *Pickus* v. *U.S. Board of Parole*, 507 F.2d 1107 (D.C. Cir. 1974); *Natural Resources Defense Council* v. *EPA*, 683 F.2d 752, 765 (3d Cir. 1982); *Texaco Inc.* v. *FPC*, 412 F.2d 740 (3d Cir. 1969); and *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F.Supp 858 (D. Del. 1970).

There can be no question that OSM's oversight documents have a substantial impact on private parties. They directly affect the rights of citizens who live near coal mines, who are harmed by mining, who file complaints about improper mining practices or inadequate state enforcement, and who regularly use and enjoy the environmental resources that are damaged by mines not adequately controlled by states or overseen by OSM. Petitioners' respective members include persons who live near, work on and enjoy recreational and other resources in coal mining areas and who are directly and indirectly affected by the failure of the Secretary and OSM to promulgate rules governing oversight of state programs and to implement state program oversight in a consistent and uniform manner.

As a result of OSM's inadequate and inconsistent oversight requirements, surface coal mining is not properly regulated by the states. This inadequate state enforcement damages petitioners and their members by causing destruction and diminution of the utility of the land for commercial, industrial, agricultural, recreational and forestry purposes due to increased erosion, landslides, subsidence, floods, pollution of water and air, appropriation of scarce water resources, destruction of fish and wildlife habitat, impairment of natural beauty, loss of recreational opportunities, damage to property, creation of hazards to life and property, destruction or impairment of archaeological and historical resources, and degradation of the quality of life in local communities.

OSM's current oversight rules aggravate these problems because they do not require that OSM apply objective standards and consistent methods for evaluating state regulatory programs. Moreover, the current regulations omit any reasonable trigger mechanisms or warning signals to alert OSM, the states and the public when states have failed to enforce critical program elements; and they do not establish uniform criteria for OSM's Field Office Directors to determine when they must take affirmative action to remedy the inadequacies in state program implementation and enforcement.

In addition, OSM's oversight procedures affect the information available to the public about state and federal mining control programs. They also define the information that state regulatory authorities must provide to OSM and the public. As such, they fall within the APA's definition of a rule and should have been published for public notice and comment.

Finally, the OSM Oversight Inspection Sampling Method, much like the Department of Labor statistical sampling method at issue in *Batterton, supra* directly defines how OSM goes about collecting information upon which it will base its actions affecting private rights. The results of the sampling done pursuant to this policy directly affect the duties and rights of state regulatory authorities (see, *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 874–878 (D.C. Cir. 1979); *Gibson Wine Co. v. Snyder*, 194 F.2d 329 (D.C. Cir. 1952)) and are not merely rules of agency organization, procedure or practice (see *Batterton, supra*, at 872–878). Therefore, the Oversight Inspection Sampling Method should have been adopted after full compliance with the APA's notice and comment procedures.

B. OSM has a Statutory Duty to Oversee State Regulatory Programs

Under the Surface Mining Act, OSM is responsible for assuring that each state with an approved surface mining regulatory program actually implements its programs in compliance with federal and state laws and regulations. OSM's process of verifying state compliance is commonly called "oversight." SMCRA is unequivocal about the Secretary's nondiscretionary oversight duties:

1. The Secretary "shall . . . make those investigations and inspections necessary to insure compliance with" SMCRA (Sec. 201(c));
2. The Secretary "shall cause to be made such inspections . . . as are necessary to evaluate the administration of approved state programs" (Sec. 517(a));
3. The Secretary "shall notify the state regulatory authority" if, "on the basis of any information available to him . . . [he] has reason to believe that any person is in violation of any requirement of [SMCRA] . . or any permit required by [SMCRA] [a so-called "Ten Day Notice"] (Sec. 521(a)(1));

4. The Secretary "shall immediately order federal inspection" of a mine for which he has issued a Ten Day Notice if "the State regulatory authority fails within ten days after notification to take appropriate action to cause said violations to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary . . ." (Sec. 521(a)(2));

(5). The Secretary "shall immediately order a cessation of surface coal mining and reclamation operations . . ." where on the basis of any federal inspection, he "determines that any . . . condition, practice or violation . . . creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm . . ." (Sec. 521(a)(2));

6. The Secretary "shall prepare and . . . promulgate and implement a Federal program . . . if such State . . . (3) fails to implement, enforce, or maintain its approved State program as provided for" in SMCRA (Sec. 504(a)(3)); and

7. "Whenever . . . the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, *he shall* . . . hold a hearing thereon in the State . . . If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he *shall give public notice* of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act, the Secretary *shall enforce*" SMCRA (Emphasis added) (Sec. 521(b)).

These provisions were incorporated into SMCRA as a result of Congress' findings that the states were not complying with existing federal and state laws and regulations. See section 101, 30 U.S.C. 1201. The recent failures of the regulatory programs in Oklahoma and Tennessee clearly demonstrate the compelling need for a diligent federal oversight role, so as to insure the continued compliance of state programs with the federal standards as set forth in SMCRA and the federal regulations. Unless OSM properly carries out its mandatory oversight role, other states are also likely to fall short of the SMCRA standards.

C. OSM Must Establish a Systematic Method To Measure and Evaluate the Effectiveness of State Programs

In order to implement the requirements of SMCRA cited above, OSM must establish an objective, systematic method of measuring and evaluating the performance of state regulatory authorities in complying with the federal and state laws and regulations. Such an oversight procedure should include:

1. A reasonable and adequate set of objective criteria by which to measure state compliance, and these criteria should address all elements of SMCRA such as those listed in the proposed amendments to 30 CFR 733.12(a) above;

2. Guidelines to be used by OSM in evaluating the states' performance with respect to those objective criteria established above;

3. A reasonable and objective set of measurements of state's administration of its regulatory program to be used as indicators or warning signals of state program efficacy with respect to each of the guidelines;

4. Standard methods of data collection, preparation, measurement, analysis, and determination of the reliability and comparability of the data for each criterion being measured; and

5. An authenticated sampling methodology to be used for deriving a representative sample of sites within a state for use in evaluating the entire state program.

Without such a systematic approach to oversight, the Secretary is unable to carry out his non-discretionary duties under SMCRA to ensure state compliance and the public loses any assurance that the benefits of the Act will be achieved.

If OSM had previously adopted comprehensive guidelines for evaluating state programs and had fully implemented them, petitioners' concern with the agency's failure to comply with the APA could be quickly remedied by proposing the two existing oversight documents as rules. However, this is not the case. OSM's current oversight documents fail to address many aspects of state regulatory programs including the factors to be evaluated in permit applications, public participation, bonding, fee collection and performance standards, to name a few; and they do not conform to the five criteria described above.

Moreover, OSM's own records and evaluations by non-agency investigators [Staff of House Comm. on Appropriations, 98th Cong., 2d Sess., *Report On The Regulatory Program Of The Office Of Surface Mining*, (Comm. Print 1983, pg. 11); and C. Johnson and E. Hildebrandt, NRDC, *Still Stripping the Law on Coal* (1984, pp. 105, 111] indicate that the agency has not complied with its own Oversight Sampling Method in the following ways:

1. OSM has failed to conduct the minimum number of complete oversight inspections prescribed in its own sampling method;

2. OSM has failed to identify subpopulations of mines in the states;

3. OSM has failed to identify the population being sampled;

4. OSM has failed to assure random sampling;

5. OSM has counted single inspections of one mine (with several permit numbers) as several oversight inspections.

D. OSM Has Substituted Improper Procedures When It Has Identified Failures of a State To Enforce All or Part of Its Program

OSM's current regulations provide that when the Director has reason to believe that a state is not effectively carrying out any part of its approved state program, the Director shall promptly notify the state regulatory authority in writing of the portions not being carried out, the reasons for his belief, and set a time period for the state to remedy the failure. 30 CFR 733.12(b). Informally, OSM has added two intermediate steps before the Director writes a "733" letter to a state. First, the "Plans and Procedures" document (page 12) instructs OSM State Office Directors to:

(2) identify, discuss, and recommend corrective measures and time schedules for any deficiencies noted in the areas of the State's program;

(3) recommend to the Director that a 521(b) proceeding be initiated if the State fails to cooperate with the process in (2) above or fails to accomplish the remedial measures within the agreed time periods.

If a State does not "cooperate" with the State Office Director in step 2 above, however, OSM has adopted an additional step. The Director writes the Governor to request the Governor's cooperation in correcting the deficiencies, although no schedule for correction is given. Apparently, such letters have been sent to Arkansas, Colorado, and New Mexico.

OSM's annual evaluation reports are replete with instances of state failures to implement, administer, maintain, or enforce their programs. However, only three states have received "733" letters from the Director: Kansas, Oklahoma, and Tennessee. Yet, OSM's 1984 evaluation reports on every state described significant failures to enforce their regulatory programs. To illustrate, OSM's 1984 reports for just five states have documented serious failures by states in the following areas:

1. Inspection frequency—Colorado, Kentucky, North Dakota and Ohio;

2. Adequacy of penalties assessments—Illinois, Kentucky and Ohio;

3. Completeness of inspections—Colorado, Kentucky, Ohio and Illinois;

4. Enforcement actions taken on areas observed during inspections (actions not taken or delayed for weeks after inspections)—Colorado, Kentucky, Illinois, and North Dakota;

5. Technical analyses—Colorado, Kentucky, Illinois, North Dakota and Ohio; and

6. Permitting violations with operators receiving permits without demonstrating compliance with one or more permit requirements—Colorado, Kentucky, Illinois, North Dakota and Ohio.

There were no "733" letters sent to any of these states and there is no indication of any substantial improvement in the states' ability to enforce their programs.

The amendments proposed by the petitioners to 30 CFR 733.12 are designed to address the problem of OSM substituting other actions for formal "733" letters and allowing states to delay correction of deficiencies for long periods. The solution is achieved by defining the circumstances under which the Director "has reason to believe" that a state has failed to "enforce . . . any part" of its programs and must issue a "733" letter according to section 521(b) of the Act. The trigger for a 733 letter is when any OSM evaluation report identifies any failure by the state to fully carry out any part of its program. A time-limit of 90 days is established as the maximum period during which a state must correct fully the deficiencies. This 90-day time-limit should provide the states with sufficient time to evaluate the problem adequately and to implement any needed changes in their program administration.

E. SMCRA Requires Public Participation in Enforcement of State Programs

Under SMCRA, the Secretary has a clear duty to ensure that effective procedures are enacted for public participation in the "enforcement of regulations, standards, reclamation plans, or programs" established under SMCRA (Sec. 102(i)).

Congress stated the necessity for citizen participation to achieve effective implementation of SMCRA:

> The success or failure of a national coal surface mining regulatory program will depend, to a significant extent, on the role played by citizens in the regulatory process. . . While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement *in all phases* of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information. (House Report 95–218, Committee on Interior and Insular Affairs, 1977, pp. 88–89) (emphasis added).

As set out under IV–B above, the Secretary's responsibilities to ensure that state regulatory programs are evaluated and enforced are some of his major, non-discretionary duties under SMCRA. However, under OSM's current regulations, the public has no procedure for participating in OSM's evaluations of state programs.

Recently, states have been given the right to participate in the evaluation of their own programs, and are not treated at arms-length, as potential opponents of OSM. This practice is wholly improper and unacceptable in that it grants to the states a privilege not currently available to the public. In addition, due to the potentially immoderate political pressure that could be placed on OSM by individual states, the states should have the relationship with OSM in the evaluation process that an audited company has with its auditors; and the public should be afforded at least equal participation in the process.

The current regulations also fail to fulfill Congress' intent that OSM's decisions be based on full and complete information. The amendments to 30 CFR 733.12 proposed here by petitioners will remedy these deficiencies by requiring that OSM give the public notice of the draft annual state evaluation reports, make copies available, allow for public comments on the draft report, consider the public comments before publishing the final annual evaluation report, and make either favorable or negative findings on a state program after any public hearing.

V. Conclusion

For all of the foregoing reasons, petitioners urge OSM without delay to commence a rulemaking proceeding pursuant to 5 USC 553 to promulgate the amendments to 30 CFR 733.12 as proposed in this petition.

Dated: September 3, 1985.

Respectfully submitted,

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[FR Doc. 86–22 Filed 1–2–86; 8:45 am]

BILLING CODE 4310–05–M

federal register

Friday
January 3, 1986

Part III

Department of Housing and Urban Development

24 CFR Part 905

Indian Housing; Indian Preference; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Public and Indian Housing

[Docket No. R-85-1122; FR-1808]

24 CFR Part 905

Indian Preference

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish comprehensive new requirements governing the methods to be used in providing Indian preference in contracting, employment and training in the HUD-assisted Indian housing program.

DATE: Comments must be received by March 4, 1986.

ADDRESS: Interested persons are invited to submit comments to the Office of the General Counsel, Rules Docket Clerk, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410-5000. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection and copying during regular business hours at the above address.

FOR FURTHER INFORMATION CONTACT: John V. Meyers, Office of Indian Housing, Room 4232, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410, (202) 755-1015. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On March 9, 1976, HUD published a final rule that implemented HUD's responsibilities under the Indian Self-Determination and Education Assistance Act (Act) for the Department's Indian Housing Program. This regulation required, "to the greatest extent feasible," preference in the award of contracts to Indian organizations and economic enterprises, so long as such awards did not result in a higher cost or greater risk of nonperformance. It further required that all contracts and subcontracts include a clause requiring Indian preference in training, employment, and subcontracting.

In order to provide for more effective implementation of Indian preference requirements, in June 1976 HUD waived the above regulation and issued an amendment to the Indian Housing Handbook (#7440.1) relating to Indian preference in the selection of prime contractors. Four methods of providing preference were authorized.

Two of the methods allowed an Indian Housing Authority (IHA) to award contracts to an Indian enterprise so long as its bid was no greater than 110% percent of the lowest responsible bid or acceptable proposal. Two methods allowed and IHA to invite bids or proposals initially only from Indian enterprises.

Experience showed that the concept of open competition between Indian and non-Indian enterprises, with a 10% price differential for Indian preference, was not practicable for many contracts. On large contracts (where a 10% price differential could amount to hundreds of thousands of dollars), the effect was to discourage non-Indian enterprises from participating in the bidding process.

As result, when HUD revised 24 CFR Part 905 (formerly 24 CFR Part 805) on November 6, 1979 (44 FR 64204, Part IV) a portion of the regulation of IHA selection of prime contractors was changed to provide that an IHA could meet its preference obligation by: (1) Inviting bids or proposals solely from Indian enterprises; or (2) where it had been determined that there were no qualified Indian enterprises, by issuing an open invitation for bids or proposals. (The requirement for the section 7(b) clause in all contracts and subcontracts was continued in the revised regulation.) Since its publication, this method has been determined to result in a severe limitation in competition among bidders and was found by the Department not to be appropriate for all IHA contracts (e.g., professional services contracts).

This rule proposes, among other things, to reinstate a permissive bid price differential procedure favoring Indian bidders. The method proposed in this rule contrasts with the old 10% price differential procedure, because it would (1) allow IHA's to use varying levels of price differential in awarding contracts under the invitation for bid (IFB) process when the IFB solicitation does not limit the competition to Indian-owned enterprises and organizations and (2) encourage non-Indian enterprises and organizations to bid on contracts because of the generally reduced price differential given Indian enterprises and organizations. The rule provides for a descending percentage differential, depending upon the size of the contract being bid.

On September 23, 1983, the Department published in the **Federal Register** a Notice of Inquiry soliciting comments on the Indian preference provisions found in the Indian housing regulations. The Notice of Inquiry stated that "HUD is undertaking this inquiry to determine whether revisions to its current Indian preference regulations in connection with contracts, subcontracts, employment and training under the Department's Indian Housing Program would be appropriate." Twenty-seven comments were received by the Department, some of which are summarized below.

A commenter asserted that a complaint process should be included in the rule, in order that parties would have a method to redress their grievances. A complaint procedure has been added to the proposed rule. (See § 905.204(g).)

A commenter inquired whether the rule applies to all types of contracts. The Act, and therefore the proposed rule, applies to all contracts and subcontracts let in connection with both the development and operation of the HUD-assisted Indian Housing Program.

Another commenter suggested that the rule should: (1) require that a business, to qualify for a preference, should demonstrate that it is at least 51% Indian owned and controlled and (2) explain what types of information would be needed to prove that it is qualified. Section 905.204(b)(1) of the proposed rule states that an applicant seeking preference in contracting shall submit proof of Indian ownership, which includes evidence: (1) Of the applicant's status as in Indian, and (2) of the stock ownership, structure, management, control, financing and salary of profit sharing arrangements of the enterprise. Further, § 905.204(b)(3) provides that the applicant shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or contractor that the applicant has the technical, administrative, and financial capability to perform contract work of the size and type involved.

One commenter thought that the rule should provide guidance on what constitutes Indian preference in employment and subcontracting. The proposed rule addresses in detail what methods shall be used in providing preference in subcontracting and employment and, therefore, what constitutes adherence to the requirement for preference to the greatest extent feasible.

Another commenter stated that it would be unreasonable to require an IHA to impose bidding procedures when contracting for legal and other professional services. The proposed rule would provide for a Request for Proposals process that an IHA could use in contracting for legal and other professional services (see

§ 905.204(c)(2)) or other contracts where an IFB process (basing award exclusively on price) is not considered to be appropriate.

One commenter wanted the proposed rule to include a provision that would allow an IHA to request a waiver of HUD's Indian preference regulations in those cases where it is obvious to the IHA and the HUD Office of Indian Programs that there are no qualified Indian-owned enterprises in the area that could provide a particular service or product. This rule would solve that problem in § 905.204(d)(1), which states that where providing a preference is infeasible, an IHA shall document in writing the basis for its determination of infeasibility and maintain the documentation in its files for HUD review.

In light of these public comments, the Department determined that it was appropriate to publish revised proposed Indian preference regulations. As an interim measure, HUD published a Statement of Policy in the **Federal Register** on September 26, 1984 (49 FR 37749) which (a) provided guidance to Indian Housing Authorities and other persons concerned with the implementation of the Department's current Indian preference rules and (b) responded to questions that were raised about the implementation of the Department's Indian preference requirements.

The Statement of Policy provided that methods other than those described in 24 CFR 905.204 would have to be recommended by an IHA for approval by the appropriate HUD Indian Field Office, and submitted to the Assistant Secretary for Public and Indian Housing for review. If no adverse action was taken by the Assistant Secretary within ten (10) working days of receipt, the proposed method was automatically approved and could be implemented.

This rule would expand upon the Indian preference methods provided for in the current rule. The proposed rule provides specific methods that can be used by an IHA, and also permits the use of the alternate method enacted by the tribal governing body where the Assistant Secretary for Public and Indian Housing reviews and approves it in lieu of the methods provided for explicitly in the rule. (See proposed § 905.204(a)(1)(i).)

The proposed rule would (1) consolidate the methods of providing Indian preference in contracting and subcontracting, rather than having one system for contracts and another for subcontracts; (2) provide for varying levels of price differential on invitation-for-bid type contracts, according to the size of the contract in question (to be used when the bid solicitation is not limited to Indian enterprises and organizations); (3) provide a choice of contracting methods that can be used, at the IHA's discretion; (4) increase competition in the award of contracts, including contracts where the bidding is restricted to Indian organizations and enterprises; (5) provide a review procedure for reviewing complaints about the implementation of the methods of Indian preference specified in the rule or about alternate methods approved by HUD.

The proposed rule retains the requirement that both Indian contractors (see proposed § 905.204(b)(3)) and non-Indian contractors (see § 905.211(c)) must submit evidence sufficient to demonstrate to the satisfaction of the IHA that they have the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the proposed contract.

In addition, this rule clarifies that the requirement for providing Indian preference is applicable within and outside the boundaries of the Indian area.

Perference requirements properly imposed by local governing bodies will also be applicable to HUD-assisted projects so long as they do not negate HUD's proposed Indian preference rule or impose requirements which are contrary to HUD's rule. Such local preference requirements may not cause the project or activity to exceed Total Development Costs (TDC) or budget limitations.

Most importantly, the Department's proposal attempts to provide guidance concerning the dimensions of the statutory requirement that Indian preference be provided "to the greatest extent feasible." Accordingly, in the provisions governing price differential for contracts and subcontracts on which bids are invited (§ 905.204(c)(1)(ii), the rule reflects HUD's judgment that so long as the bids are within budgetary limits established for the specific project or activity for which bids are being taken, it is appropriate to incur some additional project expense in an effort to facilitate the provision of preference to Indian contractors and subcontractors. A descending scale of percentages (controlled by maximum dollar amounts in some instances) is provided, reflecting the Department's efforts to (1) control the project costs associated with the provision of the preference; (2) avoid discouraging qualified non-Indian bidders from submitting bids; and (3) provide the maximum possible opportunity to Indian-owned enterprises or organizations to compete for small and medium-sized contracts. (The Department's reasoning includes the expectation that, for major contracts in the upper reaches of the table included as part of § 905.204(c)(1)(ii), Indian-owned enterprises will have the experience, resources and sophistication necessary to match or closely approximate the bids of rival non-Indian enterprises, and accordingly will have less need for preferential treatment.)

Similarly, the proposed rule governing the RFP process (§ 905.204(c)(2)(ii)) have provided for mandatory minimum percentages of available rating points to be earmarked for the provision of Indian preference in evaluating proposals. Latitude is provided to the IHA to set out the criteria to be used in evaluating proposals—including criteria for the evaluation of the responsiveness of the proposals in providing for Indian preference, but consideration of these criteria—in every RFP situation—must lead to the award of no fewer than 15% of all rating points based on consideration of Indian preference in contracting. Another 10% of the rating points must be based on an evaluation of the responsiveness of a proposal's statement regarding the provision of employment and training opportunities and the proposal's predictions concerning the number of percentage of Indians anticipated to be employed and trained. (*See* § 905.204(e)(2)(ii).)

The Department particularly invites comment with reference to these provisions of the proposed rule. The provisions are aimed at meeting the statutory requirement that Indian preference be provided to the maximum extent feasible. Determination of what degree of preference will meet the statutory standard naturally requires balancing the interest of the Department and the IHA in controlling project costs against the need effectively to provide for the statutory preference. While the proposed rule reflects these considerations based on the Department's past experience with the Indian housing program and with contracting practices generally, suggestions for refinements in this process will be given every consideration when the final rule is developed.

Section 106 has been revised to incorporate the applicable statutory definitions of Indian, Indian Tribe, Indian Organization and Indian-owned economic enterprise for purposes of implementing section 7(6) of the Indian Self-Determination and Education Assistance Act. These statutory definitions are included here because they differ from the definition of similiar terms used elsewhere in this Part. For example: The terms "Indian" and "Indian Tribe" are defined differently when considering eligibility for program participation, preference in training and employment, and preference in subcontracting. Accordingly, these definitions must be carefully scrutinized when determining eligibility for program participation or Indian preference. Questions arising concerning applicability for program participation or Indian preference shall be determined by HUD on a case-by-case basis.

Paperwork Reduction Act

Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB control number 2577–0076.

This proposed rule does not constitute a "major rule" as that term is defined in section 1(b) of the Executive Order on Federal Regulation issued by the President on February 17, 1981. Analysis of the proposed rule indicates that it does not (1) have an annual effect on the economy of $100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations in 24 CFR Part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332. The Finding of No Significant Impact is available for public inspection and copying during regular business hours in the Office of the Rules Docket Clerk, Room 10276, 451 Seventh Street SW., Washington, DC 20410.

Under 5 U.S.C. 605(b) (the Regulatory Flexibility Act), the Undersigned hereby certifies that this rule would not have a significant economic impact on a substantial number of small entities. The number of small entities impacted by the rule is not expected to be substantial. Approximately one hundred general construction contracts, large and small, are executed under the Department's Indian housing program each year.

This rule was listed as item number 959 in the Department's Semiannual Agenda of Regulations published on October 29, 1985 (50 FR 44173, 44208) under Executive Order 12291 and the Regulatory Flexibility Act.

List of Subjects in 24 CFR Part 905

Grant programs: Housing and community development, Loan programs: Housing and community development, Low and moderate income housing, Public housing, Homeownership.

Accordingly, the Department proposes to amend 24 CFR Part 905 as follows:

1. The authority citation for 24 CFR Part 905 is revised to read as set forth below, and any authority citation following any section in Part 905 is removed.

Authority: Secs. 3, 4, 5, 6, 9, 11, 12, and 16 of the United States Housing Act of 1937, (42 U.S.C. 1437a, 1437b, 1437c, 1437d, 1437g, 1437i, 1437j, and 1437n); Sec. 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); Sec. 7(d) of the Department of HUD Act (42 U.S.C. 3535(d)).

PART 905—[AMENDED]

2. In 24 CFR 905.106, paragraph (a) would be revised to read as follows:

§ 905.106 Preferences, opportunities, and nondiscrimination in employment and contracting.

(a) *Indian Self-Determination and Education Assistance (preference for Indians).* HUD has determined that Projects under this part are subject to section 7(b) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)). Section 7(b) requires that any contract or subcontract entered into for the benefit of Indians shall require that to the greatest extent feasible—

(1) preferences and opportunities for training and employment in connection with the administration of such contracts shall be given to "Indians", which are defined in that Act to mean persons who are members of an Indian tribe. That Act defines "Indian tribe" to mean any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; and

(2) preference in the award of subcontracts in connection with the administration of such contracts shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (25 U.S.C. 1452. That Act defines: "economic enterprise" to mean any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit: Provided, That such Indian ownership shall constitute not less than 51 per centum of the enterprise; "Indian organization" to mean the governing body of any Indian tribe or entity established or recognized by such governing body; "Indian" to mean any person who is a member of any tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs and any "Native" as defined in the Alaska Native Claims Settlement Act; and Indian "tribe" to mean any Indian tribe, band, group, pueblo, or community including Native villages and Native groups (including corporations organized by Kenai, Jeneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act, which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs.

The language of this paragraph (a) cited above shall be included in all contracts executed by the IHA and all subcontracts arising out of contracts executed by the IHA.

* * * * *

3. Section 905.204 would be revised to read as follows:

§ 905.204 Indian Preference.

(a) *General.* (1)(i) This section outlines specific methods an IHA must follow to provide, to the greatest extent feasible, preference to Indian organizations and Indian-owned economic enterprises in contracting and subcontracting, and to Indians in employment and training. If, however, a tribal governing body enacts an alternate method of providing Indian preference within its jurisdiction and the Assistant Secretary for Public and Indian Housing subsequently approves the alternate method as meeting the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act for use in the HUD-assisted Indian housing program, the IHA under that jurisdiction shall implement the alternate method in lieu of the methods specified in this section. Alternate methods which provide for local tribal preference will not be approved. HUD will, however, consider for approval alternate methods which provide for local resident Indian preference, so long as such preference does not effectively exclude Indian organizations, enterprises, or individuals who are not resident within the Indian governing body's jurisdiction. HUD's review of alternate methods of providing preference will include the extent to which the proposed method promotes competition, insures cost containment, reduces administrative burdens and furthers local priorities and objectives while providing effective Indian preference.

(ii) This section also contains, in paragraph (g), review procedures for complaints alleging inadequate or inappropriate provision of Indian preference. These complaint procedures are applicable to all complaints arising out of any of the methods of providing for Indian preference contained in this section, including alternate methods enacted and approved in the manner described herein.

(b) *Eligibility*.

(1) An applicant seeking to qualify for preference in contracting and subcontracting shall submit proof of Indian ownership to the IHA or contractor. Proof of Indian ownership shall include, but shall not be limited to:

(i) Certification by a tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. IHA's shall accept the certification of a tribe that an individual is a member.

(ii) Evidence relating to the stock ownership, structure, management, control, financing and salary or profit sharing arrangements of the enterprise.

(2) An applicant seeking to qualify for preference in employment and training shall submit, to the IHA or contractor, certification by a tribe or other evidence that the applicant is an Indian and therefore eligible to receive preference. IHA's and contractors shall accept the certification of a tribe that an individual is a member.

(3) An applicant seeking a contract or a subcontract shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or the contractor, as appropriate, that the applicant has the technical, administrative and financial capability to perform contract work of the size and type involved and within the time provided under the proposed contract (*see* also § 905.211). An applicant seeking employment and training shall submit evidence sufficient to demonstrate to the satisfaction of the IHA or the contractor, as appropriate, that the applicant possesses the qualifications required for employment or training.

(4) If an IHA or contractor determines that an applicant is ineligible for Indian preference, the IHA or contractor shall so notify the applicant in writing before the award of the contract or before filling the position or providing the training sought by the applicant.

(c) *Indian preference in the award of contracts and subcontracts*.

(1) Preference in the award of contracts and subcontracts that are let under an Invitation for Bids (IFB) process (e.g., conventional bid construction contracts, material supply contracts) shall be provided as follows:

(i) The IFB may be restricted to qualified Indian-owned enterprises and Indian organizations. The IFB should not be so restricted unless the IHA has a reasonable expectation that the required minimum number of qualified Indian-owned enterprises or organizations are likely to submit responsive bids. If two (or at the IHA's option, a specified larger number) or more qualified Indian enterprises or organizations submit responsive bids, award shall be made to the qualified enterprise or organization with the lowest responsive bid. If fewer than the minimum required number of qualified Indian enterprises or organizations submit responsive bids, the IHA shall reject all bids, and shall readvertise the IFB in accordance with paragraph (c)(1)(ii) of this section.

(ii) If the IHA prefers not to restrict the IFB as described in paragraph (c)(1)(i), above, or if an insufficient number of qualified Indian enterprises or organizations submit responsive bids in response to an IFB under paragraph (c)(1)(i), the IHA or contractor shall advertise for bids inviting responses from non-Indian as well as Indian economic enterprises and from Indian organizations. Award shall be made to the qualified Indian enterprise or organization with the lowest responsive bid if that bid is (A) within budgetary limits established for the specific project or activity for which bids are being taken and (B) no more than "X" higher than the total bid price of the lowest responsive bid from any qualified bidder. "X" is determined as follows:

	X = lesser of—
When the lowest responsive bid is less than $100,000	10 pct of that bid, or $9,000.
When the lowest responsive bid is—	
At least $100,000, but less than $200,000	9 pct of that bid, or $16,000.
At least $200,000, but less than $300,000	8 pct of that bid, or $21,000.
At least $300,000, but less than $400,000	7 pct of that bid, or $24,000.
At least $400,000, but less than $500,000	6 pct of that bid, or $25,000.
At least $500,000, but less than $1 million	5 pct of that bid, or $40,000.
At least $1 million, but less than $2 million	4 pct of that bid, or $60,000.
At least $2 million, but less than $4 million	3 pct of that bid, or $80,000.
At least $4 million, but less than $7 million	2 pct of that bid, or $105,000.
$7 million or more	1 pct of the lowest responsive bid, with no dollar limit.

If no responsive bid by a qualified Indian enterprise or organization is within the stated range of the total bid price of the lowest responsive bid from any qualified enterprise, award shall be made to the bidder with the lowest bid.

(2) Preference in the award of contracts and subcontracts that are let under a Request for Proposals (RFP) process (e.g., for turnkey proposal construction contracts, professional service contracts) shall be provided as follows:

(i) The RFP may be restricted to qualified Indian-owned enterprises and Indian organizations. The RFP should not be so restricted unless the IHA has a reasonable expectation that the required minimum number of qualified Indian-owned enterprises or organizations are likely to submit responsive proposals. If two (or, at the IHA's option, a specified larger number) or more qualified Indian enterprises or organizations submit responsive proposals, award shall be made to the qualified enterprise or organization with the best proposal. If fewer than the minimum required number of qualified Indian enterprises or organizations submit responsive proposals, the IHA shall reject all proposals and shall readvertise the RFP in accordance with paragraph (c)(2)(ii) of this section. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance the IHA places on each evaluation factor and subfactor.

(ii) If the IHA prefers not to restrict the RFP solicitation as described in paragraph (c)(2)(i), above, or if an insufficient number of qualified Indian enterprises or organizations satisfactorily respond under that procedure, the IHA shall develop the particulars concerning the RFP, including a rating system that provides for the assignment of points for the relative merits of submitted proposals. The RFP shall identify all factors, including price or cost, and any significant subfactors that will be considered in awarding the contract, and shall state the relative importance of IHA places on each evaluation factor and subfactor. Notification that Indian preference is applicable to this procurement shall be included in the RFP solicitation.

(A) An IHA shall set aside a minimum of 15% of the total number of available rating points for the provision of Indian preference in the award of contracts and subcontracts. The percentage or number of points set aside for preference and the method for allocating these points shall be specified in the RFP.

(B) IHAs may require that contractors solicit subcontractors by using an RFP based on a point system, and that contractors set aside a minimum of 15% of the available rating points for the provision of preference in subcontracting. The RFP shall explain the criteria to be used by the contractor in evaluating proposals submitted by subcontractors.

(3) Provisions applicable to all contracts.

(i) In all cases, the IHA shall include in the IFB or RFP a description of the contract and subcontract bidding procedures which are to be employed, including a citation to paragraph (c)(1)(i), (c)(1)(ii), (c)(1)(iii), (c)(2)(i) or (c)(2)(ii) of this section, as appropriate. A finding by an IHA either that a subcontract was awarded without using the procedure required by the IHA, or that the contractor falsely represented that subcontracts would be awarded to Indian enterprises or organizations, shall be grounds for termination of the contract between the IHA and its contractor, or for other penalties as appropriate. Grounds for termination of the contract or for the imposition of other penalties shall be set out in the IFB or RFP and shall be included in each contract and subcontract.

(ii) Each IFB and RFP shall state whether the IHA maintains lists of Indian enterprises and organizations by speciality (e.g., plumbing, electrical, foundations), which are available to developers, contractors, and subcontractors to assist them in meeting their responsibility to provide preference in connection with the administration of contracts and subcontracts.

(iii) The IHA shall require a statement from all prospective contractors or developers describing how they will provide Indian preference in the award of subcontracts. Each IHA shall describe in its IFB or RFP (A) what provisions each prospective developer or contractor must include in its statement and (B) the factors that will be used by the IHA in judging the statement's adequacy. Any bid or proposal that fails to include the required statement shall be rejected as nonresponsive. An IHA may require that a comparable statement be provided by subcontractors to their contractors, and may require a contractor to reject any bid or proposal by a subcontractor that fails to include the statement, as specified by the IHA in the IFB or RFP.

(iv) Each contractor or subcontractor shall submit a certification (supported by credible evidence) to the IHA in any instances where the contractor or subcontractor believes it is infeasible to provide Indian preference in subcontracting.

(d) *Preference by an IHA in the contracting, employment and training.*

(1) To the greatest extent feasible IHAs shall adhere to the requirement for preference in contracting. Where the provision of preference is determined to be infeasible, an IHA shall document in writing the basis for its findings and shall maintain the documentation in its files for HUD review.

(2) To the greatest extent feasible, preference shall be given to qualified Indians for employment training for IHA staff positions. Each IHA shall document the method and justification used in selecting individuals for employment or training. A finding by HUD that an IHA has not provided preference to the greatest extent feasible to Indians in selecting individuals for employment or training shall be grounds for HUD to invoke its remedies under this Part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(e) *Preference by contractors and subcontractors in employment and training of Indians.*

(1) IFB Contracts.

(i) For contracts let under an IFB, the IFB shall state that each contractor and subcontractor must include in its bid response (A) a statement detailing its employment and training opportunities and its plans to provide preference to Indians in implementing the contract; and (B) the number or percentage of Indians anticipated to be employed and trained. The IFB shall explain the criteria to be used by the IHA or the contractor in evaluating contractor or subcontractor statements.

(ii) Any bid that fails to include the required statement, or that includes a statement that does not meet minimum standards required by the IHA or contractor (as appropriate) shall be rejected as nonresponsive.

(iii) Failure to comply with the submitted statement shall be a ground for cancellation of the contract or for the assessment of penalties or other remedies. The IFB and the contract shall describe the actions that may be taken by an IHA for noncompliance with the undertakings set out in the contractor's or subcontractor's statement.

(iv) A finding by HUD that an IHA has entered into a contract that failed to include an acceptable statement on preference in employment and training shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(2) RFP Contracts.

(i) For contracts let under an RFP, the RFP shall state that each contractor and subcontractor must include in its proposal response (A) a statement detailing its employment and training opportunities and its plan to provide preference to Indians in implementing the contract; and (B) the number or percentage of Indians anticipated to be employed and trained. The RFP solicitation shall explain the criteria to be used by the IHA or the contractor in evaluating contractor or subcontractor statements.

(ii) For contracts awarded under paragraph (c)(2)(i) of this section, (where a point system is not used to evaluate the relative merits of proposals), any proposal that fails to include the required statement, or that includes a statement that does not meet minimum standards required by the IHA or contractor (as appropriate), shall be rejected as nonresponsive. For contracts awarded under paragraph (c)(2)(ii) of this section (where a point system is used to evaluate the relative merits of proposals) ten percent of the total points available during evaluation of the proposal shall be awarded on the basis of the content of the statement. (These points are in addition to and separate from any points awarded for the provision of Indian preference in contracting or subcontracting in accordance with paragraphs (c)(2)(ii) (A) and (B) of this section.) Proposals that fail to include a statement shall be rejected as nonresponsive.

(iii) Failure to comply with the submitted statement shall be a ground for cancellation of the contract or for the assessment of penalties or other remedies. The RFP and the contract shall describe the actions that may be taken by an IHA for noncompliance with the undertakings set out in the contractor's or subcontractor's statement.

(iv) A finding by HUD that an IHA has entered into a contract that failed to include an acceptable statement in implementing preference in employment and training opportunities shall be grounds for HUD to invoke its remedies under this part or under the ACC, which remedies include, but are not limited to, the denial of future projects.

(3) Provisions on employment or training applicable to all contracts. The IHA shall require contractors and subcontractors to provide preference to the greatest extent feasible by hiring qualified Indians in all positions other than core crew positions, except where the contractor adequately advertises a position and no Indian either qualifies or accepts the terms of employment. The IHA shall indicate what it considers to be adequate advertisement in the IFB or RFP (as appropriate) and in the contract. A core crew employee is an individual who is (i) a bona fide employee of the contractor or subcontractor at the time the bid or proposal is submitted; or (ii) an individual who was not employed by the contractor or subcontractor at the time the bid or proposal was submitted, but who is regularly employed by the contractor or subcontractor in a supervisory or other key skilled position when work is available. Each contractor shall submit a list of all core crew employees with its bid or proposal.

(f) *Other preference provisions applicable to §§ 905.204 (c), (d), and (e).*

(1) When projects are developed or operated with financial assistance from both HUD and from non-Federal sources, the HUD Indian preference regulations shall apply to the HUD-funded portion of the project, if expenditures that are HUD-funded are segregable. If financial assistance from HUD and from non-Federal sources is intermingled, the HUD Indian preference regulations shall apply whenever more than half of the financial assistance for the development or operation of a project is from HUD.

(2) Each IHA shall be responsible for monitoring Indian preference implementation in subcontracting, employment, and training by its contractors and subcontractors. Should incidents of noncompliance be found to exist, the IHA shall take appropriate remedial action. A finding by HUD that the IHA has not provided adequate monitoring or enforcement of Indian preference may result in a determination by HUD that the IHA is in breach of the ACC or that the IHA lacks administrative capability. Such a finding may constitute adequate grounds for HUD to invoke its remedies under this part or under the ACC, which remedies shall include, but are not limited to, the denial of future projects.

(3) Preference in contracting, subcontracting, employment, and training applies not only on-site, on the reservation, or within the IHA's jurisdiction, but also to contracts with firms that operate outside these areas (e.g., employment in modular or manufactured housing construction facilities).

(4) Each IHA should include in the IFB or RFP any applicable local preference requirements properly imposed by the local governing body, or should advise bidders to contact that local governing body to determine any applicable preference requirements.

(g) *Review procedures for complaints alleging inadequate or inappropriate provision of preference.*

(1) Each complaint (including complaints against an IHA) shall be in writing, signed, and filed with the IHA.

(2) A complaint must be filed with the IHA no later than 20 days from the date of the action (or omission) upon which the complaint is based.

(3) Upon receipt of a complaint, the IHA shall promptly acknowledge its receipt and shall investigate, and within 15 days shall either meet with or communicate by mail or telephone with the complaining party in an effort to resolve the matter. In all cases, but especially where the complaint indicates that expeditious action is required to preserve the rights of the complaining party, the IHA shall endeavor to resolve the matter as expeditiously as possible. If noncompliance with Indian preference requirements is found to exist, the IHA shall take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance. If the matter is not resolved to the satisfaction of the complaining party, or if the IHA has failed to communicate with the complaining party in an effort to resolve the complaint within 15 days following the IHA's receipt of a complaint, the complaining party may file a written complaint with the appropriate Indian Field Office of HUD. The address of the Indian Field Office and the name of the appropriate Indian program officer shall be included in the initial communication from the IHA acknowledging receipt of the complaint.

(4) Upon receipt of a written complaint, the HUD Indian Field Office will request that the IHA provide a written report setting forth all relevant facts, including, but not limited to: (A) the date the complaint was filed with the IHA; (B) the name of the complainant; (C) the nature of the complaint, including the manner in which Indian preference was or was not provided; and (D) actions taken by the IHA in addressing or resolving the complaint. The IHA shall provide copies of its report and all relevant documents concerning the complaint to HUD and to the complaining party within ten days after receipt of the HUD request.

(5) Upon receipt of the IHA's report, the HUD Indian Field Office will determine whether the actions taken by the IHA comply with the requirements of section 7(b) of the Indian Self-Determination and Education Assistance Act, and with Indian preference requirements under this part. Notification of the Field Office's determination shall be provided to the IHA and to the complaining party, orally or in writing, no later than 30 days following HUD's receipt of the complaint. If the notice is oral, it shall be promptly confirmed in writing. If the complaining party's alleged injury will occur during this 30-day period, the HUD Indian Field Office will make a good faith effort to make its determination before the occurrence of such injury (e.g., contract award).

(6) Where the HUD Indian Field Office determines on the basis of the facts provided by the IHA and on the basis of other available information that there has been noncompliance with Indian preference requirements, the Field Office shall instruct the IHA to take appropriate steps to remedy the noncompliance and to amend its procedures so as to be in compliance.

(7) The decision of the HUD Indian Field Office may be appealed to the Assistant Secretary for Public and Indian Housing.

(Approved by the Office of Management and Budget under OMB control number 2577–0076)

Dated: December 24, 1985.

James E. Baugh,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 86–105 Filed 1–2–86; 8:45 am]

BILLING CODE 4210-33-M

federal register

Friday
January 3, 1986

Part IV

Department of Health and Human Services

Social Security Administration

20 CFR Parts 404, 416 and 422

Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind and Disablied; Disability Hearings at the Reconsideration Level; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Parts 404, 416 and 422

Federal Old-Age, Survivors, and Disability Insurance and Supplemental Security Income for the Aged, Blind and Disabled; Disability Hearings at the Reconsideration Level

AGENCY: Social Security Administration, HHS.

ACTION: Final rule.

SUMMARY: We are amending the Social Security Administration (SSA) regulations to carry out Sections 4 and 5 of Pub. L. 97–455 (enacted on January 12, 1983). That legislation requires that on or after January 1, 1984, any disability beneficiary under title II of the Social Security Act (the Act) be given an opportunity for a face-to-face evidentiary hearing when he or she requests reconsideration of an initial determination that the physical or mental impairment on the basis of which benefits have been payable has ceased, did not exist, or is no longer disabling.

The rules will also make the new reconsideration procedure available in blindness and disability cessation cases in the Supplemental Security Income (SSI) program under title XVI of the Act after publication of these regulations, pursuant to the Secretary's rulemaking authority in the SSI program. Although Congress has not specifically required that we do so, it is customary to extend legislative changes in the title II disability program to comparable SSI cases, since the medical eligibility requirements in both programs are quite similar. Moreover, the inclusion of SSI blindness and disability cessation cases will promote effective program administration by providing a uniform appeal procedure in the two programs.

These rules were published as a Notice of Proposed Rulemaking on August 15, 1983 (48 FR 36831), with a 60-day period for public comments. We have made a number of substantive changes in the rules in response to the public comments, and technical changes on the basis of our own assessment. The most significant change is that the State Disability Determination Services (DDS) agencies will be permitted to establish their own adjudicatory units for conducting the face-to-face hearings. This and the other comments and changes are discussed in the supplementary information, which follows.

We believe that the new disability hearing procedures will make the reconsideration level more meaningful in blindness and disability cessation cases, that beneficiaries affected by these cessation decisions will be better assured of a fair and accurate determination on their continuing eligibility, and that the overall quality of the decisionmaking process will also be improved. We emphasize that the amended regulations will not affect the availability or scope of a hearing before an adminstrative law judge (ALJ) at the next level of the administrative appeals process.

DATES: *Effective date:* January 3, 1986. *Applicability date:* These rules are applicable with respect to requests for reconsideration filed in the affected title II cases on or after January 1, 1984, and in the affected SSI and concurrent title II—SSI cases on or after January 3, 1986.

FOR FURTHER INFORMATION CONTACT: Anita Dunn, Program and Procedures Branch, Office of Disability Hearings, Social Security Administration, (301) 597–0367.

SUPPLEMENTARY INFORMATION:

General Summary of the Public Comments and Our Responses

We received and gave consideration to nearly 50 written comments on the notice of proposed rulemaking. The majority of these comments were from legal services agencies and attorneys who represent title II and SSI claimants. Several State DDS and social services agencies also submitted comments. In addition, we received comments from the American Federation for the Blind, the American Psychiatric Association, the National Senior Citizens Law Center, the National Association of Retarded Citizens, and an advocacy group for disability beneficiaries known as "Not All is Lost" (NAIL).

In general, the commenters supported the concept of a face-to-face hearing at the reconsideration level but objected to some of the proposed procedures for the hearings. The commenters were especially critical of the rules for postponement of hearings and submittal of evidence after the close of a hearing, and of our interpretation that, as a general rule, a hearing location within 75 miles of an individual's residence is "reasonably accessible". In these and other respects, according to a number of commenters, the disability hearing procedure as proposed would not meet the minimum requirements for a full and fair hearing.

Although we believe the rules as originally proposed provide for a fundamentally fair hearing process that fully protects the due process rights of beneficiaries, we have made numerous changes and clarifications in the final rules in response to the public comments. We have attempted in the rules to balance the need for a full and fair hearing for each beneficiary with the need to process cases expeditiously and avoid delays. To the extent feasible, we have amended the final rules to better meet the needs of beneficiaries. We have also clarified several points which caused some commenters to interpret the proposed rules as more restrictive than we intended. We wish to emphasize, however, that we do not agree with those commenters who suggested that the proposed rules were "deficient" in terms of fairness to the beneficiary.

One aspect of the proposed regulations that was of particular concern to the public was the fact that, as a consequence of having an evidentiary hearing available at the reconsideration level in cases involving medical cessations of disability and blindness, the reconsideration level would now become the pre-termination review stage in SSI and concurrent title II—SSI cases involving these issues. As we pointed out in the preamble to the proposed rules, our existing regulations require SSI and concurrent title II—SSI medical cessation appeals to bypass the reconsideration level, and provide instead that an ALJ hearing is available before benefit payments are terminated. A number of commenters voiced strong opposition to the proposed rules on the grounds that the ALJ hearing, while it will still be available under the amended rules, would now come *after*, rather than before, the termination of benefits in SSI and concurrent title II—SSI cases. Many of the commenters felt that this result was unjustified, since (as we noted in the preamble to the proposed rules) Congress had only recently enacted legislation (Section 2 of Pub. L. 97–455) which temporarily permitted title II disability beneficiaries to continue to receive benefit payments until the issuance of an ALJ hearing decision when they appeal cessation determinations.

This problem was solved by the enactment on October 9, 1984, of Section 7 of Pub. L. 98–460. That section makes continued payment available through the month before the month of an ALJ hearing decision to SSI disability beneficiaries when they appeal cessation determinations made on or after October 9, 1984, or made earlier if the beneficiary filed a timely request for review or for a hearing. This provision for continued payment in SSI cases is permanent. (Section 7 of Pub. L. 98–460 also extends the provisions of Section 2 of Pub. L. 97–455 to title II cessation determinations made before January 1, 1988, and authorizes continued payment in those cases to as late as June 1988.)

We have not amended the final rules to omit SSI cases from the disability hearing process since we believe the reasons why many commenters urged that we do so are no longer relevant. We believe that the application of the disability reconsideration hearing process to SSI cases will promote more efficient and effective administration of the disability programs because it will result in similar treatment of title II and SSI beneficiaries in the appeals process.

Another aspect of the proposed rules which caused significant public comment was the provision for the appointment of federal (i.e., SSA) employees as disability hearing officers. A number of State DDS agency administrators informed us, either in comments on the proposed rules themselves, or in response to a letter we sent advising them of SSA's anticipated need to recruit and hire DDS employees as federal disability hearing officers, that they believed we should give the States the option of setting up their own hearing units to carry out the disability hearings, as permitted by Pub. L. 97–455. As discussed in greater detail below, we found the reasoning of these commenters persuasive, and have therefore amended the final rules to give the State agencies this option. Thus, under the final rules, the State agencies will have the authority to establish disability hearing units for the purpose of conducting disability hearings in accordance with the regulations. As a result, federal disability hearing officers will be appointed to hear only (1) cases where the State agency does not appoint a disability hearing officer, and (2) cases in which SSA (rather than a State agency) made the initial determination being appealed, such as those involving beneficiaries living abroad. We emphasize, however, that the procedures outlined in the regulations for the disability hearing process will apply to *all* disability hearings, regardless of whether the hearing officer is a State or a federal employee.

Finally, we also received a number of comments about the provision in the rules that "reasonably accessible" hearing sites can be at any location within 75 miles of the beneficiary's residence, and that reimbursement for travel expenses is available if the beneficiary travels more than 75 miles to his or her hearing. In response to many of those comments, we have changed the final rules to more clearly state that the beneficiary may request a change in time or place of his or her hearing. This will allow flexibility for claimants who are unable to travel to the assigned hearing site. We have concluded, however, that it would not be practical to change the regulations to require hearing locations closer than 75 miles from the beneficiary's residence, as several commenters suggested. Nevertheless, we wish to emphasize, as discussed further below, that SSA and the State agencies have the flexibility under the rules to establish hearing locations at sites closer than 75 miles from many beneficiaries' residences, and that we intend to do so to the extent feasible.

Background

A. Overview of the Social Security Disability Appeals Process

After an initial determination is made with respect to a claim for Social Security or SSI benefits, the claimant or beneficiary is given an opportunity to appeal. There are, in most cases, three steps in the administrative appeals process: (1) reconsideration; (2) hearing before an ALJ; and (3) Appeals Council review. After exhausting his or her administrative appeals, the claimant or beneficiary can then appeal to a U.S. district court. (The administrative decisionmaking process and the requirements for filing a civil action are described in existing regulations at 20 CFR Part 404, Subpart J (for title II cases) and Part 416, Subpart N (for SSI cases).)

In disability cases under title II, and in disability and blindness cases in the SSI program, one of the factors which must be addressed in the decisionmaking process is whether the claimant or beneficiary meets or continues to meet the medical requirements for disability or blindness. (With the exception of title II benefits for disabled widows, widowers and surviving divorced spouses, and SSI benefits for disabled children and blind individuals, the medical requirements for disability in these programs may include *vocational* considerations which help to determine whether an individual's impairment or combination of impairments makes him or her unable to work. This definition of the term "medical" created some confusion among the commenters on the proposed rules, and is discussed in greater detail below.) Initial determinations regarding medical factors, both in cases involving initial applications for benefits and in cases being reviewed for continuing medical eligibility, are generally made by State DDS agencies on behalf of SSA under the regulations at 20 CFR Part 404, Subpart Q, and Part 416, Subpart J.

When a claimant or beneficiary is dissatisfied with the DDS's initial determination, he or she can request that the determination be reconsidered. (However, in SSI and concurrent title II–SSI medical cessation cases, the DDSs do not conduct reconsiderations under existing regulations; instead, these appeals proceed directly to the ALJ hearing level, as discussed below.) The reconsideration is carried out by DDS personnel who did not participate in the initial determination. Like the initial determination, the reconsideration of a medical determination under existing regulations consists solely of a review of documentary evidence in the case file by DDS physicians and staff; the claimant or beneficiary who appeals an initial determination does not actually meet with a decisionmaker until the ALJ hearing.

B. Problems and Recent Changes in the Periodic Disability Review Process

In title II and SSI cases in which benefits are paid on the basis of blindness or disability, periodic reviews are necessary to ensure that individuals receiving these benefits are in fact blind or disabled under the requirements of the Act. (See 20 CFR Part 404, Subpart P, under the Subheading, "Continuing or Stopping Disability," and Part 416, Subpart I, under the Subheading, "Continuing or Stopping Disability or Blindness," for the pertinent provisions for periodic reviews of title II and SSI cases, respectively.) The Social Security Disability Amendments of 1980 (Pub. L. 96–265) required SSA to conduct, on an ongoing basis, a three-year periodic review for continuing disability in every title II disability case in which a permanent impairment does not exist, and at such times as the Secretary determines to be appropriate in every case involving a permanent impairment. (The legislative history of that provision indicates that Congress intended it to apply to the SSI program as well.) Under this congressional mandate, the number of cases reviewed for continuing eligibility increased substantially in recent years compared with past years.

The expanded review of disability cases confirmed congressional concerns that many individuals were continuing to receive disability benefits even though their impairments are not disabling. However, a number of problems emerged when SSA initially undertook this review, some of which resulted in hardship for beneficiaries and their families. In response to these problems, SSA changed a number of its procedures and the Department supported the enactment of the disability provisions of Pub. L. 97–455 and Pub. L. 98–460 to improve the overall quality of the periodic review process and to ease its impact on beneficiaries.

The changes required by Pub. L. 97–455 improve the periodic review process in several respects. First, the required hearings at the reconsideration level, implemented under these amendments to the regulations, will enable the beneficiary who disagrees with an initial determination that he or she is not disabled or blind to meet face-to-face with a decisionmaker much sooner after the initial determination than under the prior appeals process. A second, temporary provision of Pub. L. 97–455, allowed title II beneficiaries to continue to receive benefit payments pending appeal of the initial determination through the ALJ hearing level through June 1984. However, this continued benefits provision, as extended by Pub. L. 98–118, applied only to cases in which an initial determination was made after enactment of the legislation and before December 7, 1983. Finally, Pub. L. 97–455 eases the requirements of the 1980 amendments by permitting SSA to limit the number of cases reviewed if necessary to prevent excessive workloads and backlogs in the process.

Pub. L. 98–460 requires changes to improve the periodic review process in several further respects. First, as mentioned above, it permanently extends continued payment until the issuance of an ALJ hearing decision to SSI medical cessation cases. It also extends the availability of continued payment in title II cases to cessation determinations made before January 1, 1988, and authorizes continued payment pending appeal in those title II cases to as late as June 1988. Second, it establishes new standards that we must use to determine whether a beneficiary is no longer disabled. Under this provision, we can, with certain exceptions, determine that a beneficiary is no longer disabled only if there has been medical improvement (related to his or her ability to work) and he or she is able to engage in substantial gainful activity. Third, it imposed a moratorium on reviews of all cases of mental impairment disability until we revised our disability criteria for mental impairments. These criteria were published as final regulations in 50 FR 35038 (August 28, 1985). Fourth, it requires us to issue regulations establishing standards for determining the frequency of periodic reviews. These standards were published as proposed regulations on June 18, 1985, at 50 FR 25400. Fifth, it requires us to notify beneficiaries, when we initiate a periodic review, that it could result in termination of benefits and of the beneficiary's right to give us medical evidence. Finally, it requires us to set up demonstration projects in which beneficiaries have the opportunity for a personal appearance before the determination about continuing disability is made instead of the hearing at the reconsideration level provided by these regulations.

The administrative actions taken by the Department to improve the periodic disability review process will complement the legislative changes required by Pub. L. 97–455 and Pub. L. 98–460. For example, we have reevaluated and redefined the criteria for permanent impairments, which are exempt from the three-year periodic review, thus reducing the number of cases subject to these reviews. (The new criteria are in the same regulations mentioned in the previous paragraph.) We adopted the practice of interviewing the beneficiary in person before the review process begins, to ensure that he or she understands the process and has an opportunity to update the medical evidence in his or her case file. In addition, we have instituted a number of changes in DDS procedures and quality assurance standards to enhance the accuracy of decisionmaking in continuing disability review cases.

Disability Hearings

A. General

As required by Sections 4 and 5 of Pub. L. 97–455, the amended regulations provide an opportunity for an evidentiary hearing at the reconsideration level in title II disability medical cessation cases and in comparable SSI cases pursuant to the Secretary's rulemaking authority. The new procedure is available for the reconsideration of an initial or revised determination that, based on medical factors, a beneficiary's impairment has ceased, did not exist, or is no longer disabling.

As a rule, then, a disability hearing will *not* be available in cases involving a new application for benefits. The only exception to this rule will be for those cases, traditionally few in number, in which a beneficiary who has requested reconsideration of a cessation determination also files a new application for benefits, and the new application is combined with the reconsideration request because of common issues. (This exception is discussed in Section (C), below.)

In our proposed rules, we referred to the new reconsideration procedure as a "disability *termination* hearing" (emphasis added), to stress that it would be limited in availability to disability cases in which eligibility based on medical factors is found to have terminated. However, upon reflection, we have decided to eliminate the word "termination" from the title of the new procedure, and instead call it simply a "disability hearing." We have made this change because we felt that "termination," while it adequately described the limited category of disability cases in which the new reconsideration procedure will be available, it did not appropriately describe the outcome of a particular disability hearing as benefits may or may not be terminated as a result of the reconsideration review.

We noted above that the disability hearing will be limited in availability to cases involving a *cessation* of disability, as provided by Pub. L. 97–455, and that it will therefore *not* be available in the reconsideration of initial determinations on new applications for benefits. (This includes cases in which it is determined that the claimant's disability began and ended in a certain period, known as a "closed period" of disability.) Other limitations with regard to non-disability and non-medical issues are discussed in Section D of the preamble, below. The disability hearing will thus have a more limited scope than the ALJ hearing at the next level of appeal, where all issues and all types of claims which are properly presented can be considered. In this context, we wish to emphasize that, as noted in the Conference Committee Report on H.R. 7093, the bill which became Pub. L. 97–455, the new reconsideration procedure "does not supplant or affect in any way the requirement of existing law for a hearing by an Administrative Law Judge." (H.R. Rep. No. 97–285, 97th Cong., 2d Sess., p. 11 (1982).)

We anticipate that the disability hearings will contribute to the overall quality of the process of reviewing cases for continuing medical eligibility. Most importantly, the beneficiary will have a prompt and meaningful opportunity to meet face-to-face with a decisionmaker at the reconsideration level when appealing an initial determination that, based on medical factors, he or she is not blind or disabled. Experience has shown that this type of procedure is most useful in protecting the rights of individuals in cases involving a cessation of eligibility.

In addition, the disability hearing process should encourage the beneficiary to submit all available evidence at the reconsideration level. To the extent that it does so, the new procedure should improve the quality of decisionmaking at this level, which in turn will enhance the quality and speed of adjudication at the subsequent levels of the appeals process. However, we emphasize that the amended regulations will not affect the beneficiary's right to present additional evidence at the ALJ hearing level.

Several commenters on the proposed rules expressed concern that the new disability hearing procedure could prolong the reconsideration stage and thereby contribute to delays in the appeals process. We do not believe that this will occur, for two reasons. First, we expect that the expansion of the reconsideration process to include a face-to-face hearing will not significantly lengthen that appeal stage, since the development phase of the process (which is likely to be the most time-consuming) will consist essentially of the existing reconsideration review, where there is no face-to-face contact and where delay is not a problem. Second, based on our experience in a pilot project in which the new hearing procedure was used, we believe the disability hearing will result in the final resolution of a significantly greater number of appeals at the reconsideration level, and thereby reduce workloads at the subsequent levels of the appeals process.

The pilot project was conducted in New Mexico, several cities in Texas, and in Oakland, California and vicinity. In the project, both federal SSA personnel and State DDS agency personnel were employed as hearing officers. The procedures used were essentially the same as those set out in these final rules. Disability hearings were scheduled in a total of approximately 1100 title II and SSI cases in which a participating DDS had determined that the beneficiary's impairment had ceased, did not exist, or was no longer disabling.

The results of the pilot project were very positive. In the first place, face-to-face hearings were unnecessary in about 18 percent of the pilot project cases because the DDSs favorably reconsidered their initial determinations as a result of their pre-hearing case file development. Of the approximately 800 project cases in which disability hearings were held, nerly 200, or approximately 24 percent, resulted in favorable outcomes for the beneficiaries. Consequently, there were, overall, more than twice the usual number of determinations favorable to the beneficiaries at the reconsideration level. These determinations were reviewed and found to be substantially correct in approximately 96 percent of the cases. Processing times were within normal ranges for reconsideration cases, even where hearings were held. Perhaps most importantly, many beneficiaries and their representatives in the pilot project also reported a high degree of personal satisfaction with the new procedure.

We believe that the success of the pilot project clearly demonstrates that the disability hearing procedure can substantially shorten both the duration and the expense of the appeals process, and that, by allowing earlier face-to-face contact with a decisionmaker, it is a significant improvement in the appeals process from the standpoint of the beneficiary.

B. Inclusion of SSI Cases

1. The Provisions of the New Rules with Regard to SSI. The amended regulations will make the disability hearing procedure available not just in title II disability cases as specifically required by the new statutory provisions, but also in comparable SSI cases. These include SSI blindness and disability cases in which an initial determination is made that the impairment on the basis of which benefits have previously been payable has ceased, did not exist, or is no longer disabling. We believe that the inclusion of SSI cases will promote more efficient and effective administration of the SSI program because it will result in similar treatment of title II and SSI beneficiaries in the appeals process.

Existing regulations, not yet revised to reflect section 7 of Pub. L. 98–460, nonetheless have for several years provided an opportunity for appeal in all SSI cases before benefits are terminated. (See 20 CFR 416.1415, Reconsideration procedures for post-eligibility claims, and § 416.1336, paragraph (b), *Continuation of payment pending an appeal.)* The pre-termination appeal in SSI cases is made available for nondisability issues at the reconsideration level. Benefits are terminated, if the reconsideration affirms the initial determination, although the beneficiary still has the right to appeal to the ALJ hearing level, and then to the Appeals Council, and finally to the U.S. court.

Under the existing regulations, a special post-eligibility procedure is followed in SSI appeals of *medical* (i.e., blindness and disability) issues. In these medical cessation cases, because no face-to-face appeal is presently available at the reconsideration level, the beneficiary is not given the opportunity for reconsideration but must instead proceed directly to the ALJ hearing level when he or she appeals an adverse initial determination. Thus, in this category of cases, the ALJ hearing is presently the first, rather than the second, level of appeal, and was therefore the pre-termination proceeding required under §416.1415. As a result, benefit continuation as provided in § 416.1336(b) is presently available in this group of cases until the issuance of an ALJ hearing decision. Concurrent title II–SSI medical termination appeals are also processed in this manner under existing regulations, since the medical issues are usually the same on both portions of the claim.

Although the above explanation of SSI post-eligibility appeals processing appeared in the preamble to the proposed rules, a number of commenters appeared to assume that the usual post-eligibility process includes the right to an ALJ hearing *before* benefits are terminated. We emphasize, however, that under existing SSI regulations, it is only *medical* cessation cases—i.e., termination cases involving medical disability or blindness issues—that the ALJ hearing is available prior to termination of benefits. In SSI termination cases based on non-medical factors, the ALJ hearing is available only *after* termination of benefits, following an opportunity for a pre-termination conference or, at the beneficiary's option, a case review, at the reconsideration level.

The procedures required by these regulations to provide disability hearings in title II cases under Pub. L. 97–455 will, for the first time, make it administratively feasible for us to provide a face-to-face hearing at the reconsideration level in SSI and concurrent title II-SSI medical cessation cases. Thus, we will no longer have to require that SSI and concurrent title II–SSI beneficiaries wait for an ALJ hearing in order to appeal an initial determination that they are not now blind or disabled. We are therefore revising §§ 404.930 and 416.1430, Availability of a hearing before an administrative law judge, and are making changes to other regulations in Parts 404, 416, and 422, to provide for an opportunity for a disability hearing at the reconsideration level when an SSI or concurrent title II–SSI beneficiary appeals an initial or revised determination that, based on medical factors, he or she is not blind or disabled. As a result, SSI and concurrent title II–SSI medical cessation cases will have the opportunity for reconsideration of an adverse initial determination (which in these medical cessation cases will include an opportunity for a disability hearing) before appealing to the ALJ hearing level.

2. SSI Benefit Continuation. The strongest objections to the proposed rules came from individuals, agencies and advocacy groups who represent SSI claimants and beneficiaries in Social Security proceedings or who act as spokespersons on behalf of SSI claimants and beneficiaries in other contexts. These advocates opposed the inclusion of SSI cases in the disability hearing process if it meant (as it would have before enactment of Section 7 of Pub. L. 98–460) that SSI benefits could no longer be continued through the ALJ hearing level in medical cessation cases. Many of these commenters felt that it was anomalous for SSA to propose this change in the SSI program when Congress (1) had already temporarily permitted benefit continuation through the ALJ level in comparable title II cases, under Section 2 of Pub. L. 97–455, and (2) was considering extending these title II provisions under several bills (two of which, as mentioned above, became law).

As noted above in the general response to the public comments, Pub. L. 98–460 extends to SSI medical cessation cases the statutory provision for continuation of benefits through the month before the month of an ALJ hearing decision, and that extension alleviates the problem because now SSI disability beneficiaries may have both the disability hearing provided under these regulations and an ALJ hearing before their benefits are terminated.

Our primary purpose in promulgating these regulations is to make the disability hearing procedure available to any beneficiary who appeals an initial determination that a medical impairment on the basis of which benefits have been payable has ceased, did not exist, or is no longer disabling, regardless of whether the benefits at issue are title II benefits or SSI benefits. In enacting the statutory provisions requiring this procedure in title II cases, Congress expressed its preference for earlier face-to-face contact between the disability beneficiary and a decisionmaker than the existing regulations permit. We can conceive of no reasonable basis for not extending the new procedure to those SSI cases which present the same type of issues. This is especially true now that continuation of benefits through the ALJ hearing level applies by statute to SSI medical cessation determinations.

The regulations we are publishing today do no more than apply the usual SSI post-eligibility appeal procedure to medical cessation cases, and have no effect on the right to an ALJ hearing at the next level of the appeals process.

C. The Specific Adverse Determinations Subject to the New Reconsideration Procedure

Under Section 4(a) of Pub. L. 97–455, the beneficiary must have an opportunity for an "evidentiary hearing" when "the physical or mental impairment on the basis of which . . . benefits are payable is found to have ceased, not to have existed, or to no longer be disabling." In order to receive a disability hearing, then, the individual who requests reconsideration must be authorized to receive benefits on the basis of blindness or disability at the time the adverse determination is made. Thus, individuals who, having unsuccessfully applied for benefits, request reconsideration of the initial denial, will not be given the opportunity for a disability hearing in connection with the reconsideration of their claims.

Several commenters urged that the disability hearing procedure also be made available in cases involving a new application for benefits and not just in cases involving a cessation of present eligibility. They reasoned that, if the new procedure improves the fairness and effectiveness of the reconsideration level in cessation cases, it could accomplish this same result in new application cases as well. While we agree in principle with these observations, we have concluded that both the statute and legislative intent are clear that this new procedure applies to disability cessation cases in which reconsideration is requested on or after January 1, 1984. For this reason we have not included new application cases in this procedure. (However, we might note here that Section 6(e) of Pub. L. 98–460 requires us to conduct demonstration projects in at least five States in which the opportunity for a personal appearance is provided the new applicant prior to the initial disability determination.)

The above statutory language indicates that a cessation of eligibility for disability benefits can be based on one of several different determinations (i.e., that an impairment has ceased, did not exist, or is no longer disabling). These determinations, in turn, can result from different types of administrative review. The program established under the 1980 Amendments for reviewing cases with no-permanent impairments once every three years accounts for the majority of disability cases subject to review. (Cases of permanent disability are reviewed less often than every three years.) Other cases are scheduled for medical review sooner than three years after eligibility is first established because of an expected short duration of disability. In still other cases, an earlier determination is "reopened" and "revised", usually due either to the availability of new evidence or the discovery of an error in the earlier determination. (See 20 CFR Part 404, Subpart J, and Part 416, Subpart N, both under the Subheading, "Reopening and Revising Determinations and Decisions," for the pertinent regulatory provisions for the latter procedure.)

The amended regulations at §§ 404.914 and 416.1414 make a disability hearing available at the reconsideration level in any case in which it is determined that a disability beneficiary's eligibility has terminated based on medical factors. The specific determination reviewed in the disability hearing could be an *initial* determination resulting from a medical review, or a *revised* initial determination, based on medical factors, made after the reopening of a prior initial determination. In addition, if a prior, favorable *reconsidered* determination, based on medical factors, were reopened for the purpose of being revised, the beneficiary will be given an opportunity for a disability hearing before a revised reconsidered determination is issued. (See the revisions at §§ 404.992 and 416.1492, Notice of revised determination or decision, and §§ 404.993 and 416.1493, Effect of revised determination or decision, for the specific provisions for the *reopened* and *revised* determinations which will be subject to the disability hearing process.)

Occasionally a beneficiary will file a new application for benefits while his or her request for reconsideration of a cessation determination is still pending. This occurs only rarely, and when it does our practice has been to combine the new claim with the reconsideration request and to issue a combined initial/reconsidered determination which applies to the common issues on both claims. The combined determination can then be appealed to the ALJ hearing level, even though technically there may not have been separate initial and reconsidered determinations on the new claim. Although as a rule the scope of the disability hearing will be limited to the issue of medical *cessation* under paragraph (b) of §§ 404.914 and

416.1414, we have added a new paragraph (d), *Combined issues*, in the final rules which explains the treatment of cases in which a new claim is filed while a reconsideration request on a cessation determination is pending, when there are common issues in both claims. We believe that this paragraph, although in practice it will apply to only a very small number of cases, will remove any doubt as to how we process these cases.

D. Exclusion of Non-Medical and Other Ancillary Issues

There are several non-medical factors which, along with an individual's medical condition, can enter into a determination regarding continuing disability. A finding that an individual is engaging in substantial gainful activity is the most common example of a non-medical determination that an individual receiving benefits is not now disabled. Another example of a non-medical disability issue is the question of whether a beneficiary is participating as required in an approved State vocational rehabilitation program or, in certain SSI cases, in a drug addiction or alcoholism treatment program. Under the revised regulations, however, the scope of the disability hearings will be limited to medical issues only, because we believe that Congress did not intend any changes in the procedures presently used to reconsider non-medical initial determinations.

Several commenters suggested the final rules be revised to include non-medical disability issues in the disability hearing process. Medical (i.e., medical-vocational) issues and non-medical issues have traditionally been treated differently at both the initial and reconsideration levels because of the distinct nature of the factual determinations on these two types of issues. The determinations on these issues are made by separate components.

That is, medical issues are generally decided by the DDSs, while non-medical issues are decided by local Social Security office staff and other components within SSA. Moreover, if there is a non-medical basis for finding that a claimant or beneficiary is not eligible, we do not generally go on to develop the medical issues, since an individual who, for example, is engaging in substantial gainful activity, is not disabled under the statute.

Since the statute clearly includes only medical issues in this new procedure, we have decided not to extend the scope of the disability hearing to include non-medical disability issues.

Many of the same commenters also asked for clarification in the final regulations as to the definition of "medical" issues for purposes of the disability hearing process. The rules as proposed were somewhat ambiguous, the commenters suggested, since the existing disability program regulations specifically distinguish "medical considerations" (20 CFR §§ 404.1525–404.1530, and 416.925–416.930) from "vocational consideration" (20 CFR §§ 404.1560–404.1569, and 416.960–416.969). A number of commenters therefore concluded that, by limiting the scope of disability hearings to "medical" issues, we intended to exclude vocational considerations.

We regret that our proposed rules may not have adequately clarified that, for purposes of the disability hearing process, we intend "medical" issues to include issues which the DDS is empowered to decide under existing regulations, including "medical considerations" and "vocational considerations." This same inclusive definition of the term "medical" has been used in Subparts J and N of Parts 404 and 416, respectively, for a number of years, to distinguish those SSI and concurrent title II—SSI cessation cases that proceed directly to the ALJ hearing on appeal from those that proceed through the reconsideration level. We intended, but did not fully explain our decision, to adopt that same definition of the term "medical" in these amendments to Subparts J and N.

Under the amended regulations, the disability hearing also will not address any issues that are not related to blindness or disability, such as whether the beneficiary has received overpayments of benefits or, in SSI cases, how much income or resources can be attributed to the individual in redetermining his or her eligibility and benefit amount. Currently, if these issues happen to arise in a case which is terminated because of a finding that an individual is not now blind or disabled, they are subject to reconsideration by a component of SSA other than the DDS that makes and reconsiders the blindness or disability determination. The individual need not wait for these ancillary issues to be resolved before appealing the disability or blindness determination to the ALJ hearing level; instead, the blindness or disability appeal proceeds independently. Similarly, if, after a disability hearing, a reconsidered determination affirms the initial determination that an individual is not blind or disabled, that reconsidered determination will be immediately appealable to the ALJ hearing level under the amended regulations.

To the extent that non-medical issues do arise in the disability and blindness cessation cases in which the new disability hearing procedure is available, it will most likely be in SSI cases in which a determination on the basis of income and resources is also being contested by the beneficiary. In these cases, if a favorable reconsidered determination is made in the disability hearing process with respect to the blindness or disability issue, we will continue the administrative procedure presently used at the ALJ hearing level of advising the beneficiary that the question of whether he or she is still eligible for benefits now depends on the outcome of his or her appeal on the question of income and resources. Alternatively, if the determination that the individual is not blind or disabled is affirmed, the question of income and resources will generally not receive further consideration unless the blindness or disability determination is later changed, either on appeal or as a result of being reopened and revised.

A number of commenters felt that processing SSI income and resources issues separately from the medical issues at the reconsideration level would be confusing for beneficiaries and should therefore be changed in the final rules. However, as with non-medical disability issues, we have always decided disability and non-disability issues separately in cases under review for continuing eligibility, with no adverse effects on beneficiaries, and will continue to do so under these final rules for the disability hearing process. Thus, if an SSI beneficiary who receives an adverse determination regarding disability or blindness is sent a notice of an adverse determination on the issue of income or resources, our notice will clearly explain the procedure for appealing both determinations. We will continue to permit consolidation of the issues at the ALJ hearing level, as in the past, but for purposes of reconsideration the issues will be treated as separate appeals.

E. Optional State DDS Disability Hearing Units

Section 4 of Pub. L. 97–455 specifically provides that the reconsideration hearings in title II disability cessation cases may be conducted either by federal employees or by a unit in the State agency other than the unit that made the initial determination being appealed. It is the Secretary's responsibility under the statute to designate which approach will be used.

Our proposed rules provided for a joint State-federal approach to the new hearing process. Under this approach, a State DDS employee who had not participated in making the initial determination being appealed would review and update the evidence in the beneficiary's case file and would prepare the case for the disability hearing. The DDS would also have the authority to issue favorable reconsidered determinations on the basis of its review in appropriate cases. The actual face-to-face hearing would then be conducted in a reasonably accessible hearing unit by a disability hearing officer employed by SSA.

A number of Governors, DDS administrators and DDS employees urged that we permit the States the option of setting up hearing units in the State agencies to conduct disability hearings under Pub. L. 97–455. They contended that, contrary to our expectations, many States could provide reasonably accessible hearings to beneficiaries with only minimal disruption of their internal DDS operations. There would, moreover, be certain advantages in not having to transfer case files from a DDS development unit to a federal disability hearing unit in a different location. These commenters urged that the joint State-federal approach, as described in the proposed rules, be used only in those States which elect not to establish their own disability hearing units.

We found these arguments in favor of a State option persuasive, and have revised the final rules accordingly. Under the rules, the State agencies will have the option of deciding whether to establish a separate unit for the purpose of conducting disability hearings. Those State agencies which choose not to do so will carry out only the case preparation function as described in the rules at §§ 404.916(c) and 416.1416(c) (which includes the authority to issue favorable reconsidered determinations). In these States, the face-to-face hearings will be conducted by federal SSA employees. We have advised the Governors and the DDS administrators of our decision to give them this option and are actively working with them to assure that the new hearing procedure is available to beneficiaries who request reconsideration of cessation determinations on or after January 1, 1984, as required by Congress. The majority of the State agencies have chosen to conduct the face-to-face hearings, while some of the remainder will adopt the joint State-federal approach and a few are undecided at the time this is being written.

This change in approach, permitting the State agencies the option of establishing their own disability hearing units, is reflected in the final rules at §§ 404.915 and 416.1415, Disability hearing—Disability hearing officers. Paragraph (a) of these sections explains that the disability hearing will be conducted by a disability hearing officer who was not involved in making the determination being appealed, and that the disability hearing officer may be appointed by a State agency or by the Director of the Office of Disability Hearings or his or her delegate, as provided in paragraphs (b) and (c) of the new sections. Paragraph (a) also requires that the disability hearing officers appointed to conduct disability hearings, whether State or federal, must be experienced disability examiners, as we believe Congress intended based on the relevant legislative history of Pub. L. 97–455 and earlier legislative proposals for face-to-face reconsiderations.

Under paragraph (b), *State agency hearing officers*, in §§ 404.915 and 416.1415, the disability hearing officer may be appointed by a State agency if a State agency made the determination being appealed. If so, this individual must be employed by an adjudicatory unit of the State agency other than the adjudicatory unit which made the determination being appealed, as specifically required by Pub. L. 97–455. The term "State agency" is defined in paragraph (b)(2) as "the adjudicatory component in the State which issues disability determinations." We have chosen this definition to distinguish the DDS from the parent agency of which the DDS may be a part. The definition of the term "State agency" as it is used in paragraph (b)(2) of §§ 404.915 and 416.1415 is thus more specific than the definition of "State agency" used in our existing regulations governing disability determinations by the States (Subpart P of Part 404 and Subpart I of Part 416), which is generally understood to encompass the DDS's parent agency. Thus, under paragraph (b) of §§ 404.915 and 416.1415, only a unit in the State DDS agency, staffed by experienced DDS personnel, will be authorized to conduct disability hearings under the regulations.

Paragraph (c), *Federal hearing officers*, in §§ 404.915 and 416.1415, provides for the appointment of federal SSA employees to conduct disability hearings: (1) in cases where SSA, rather than a State agency, made the determination being appealed, and (2) in cases where the State agency does not appoint a disability hearing officer. The latter provision is intended to apply primarily to those States which elect not to establish disability hearing units, but would also permit the appointment of a federal hearing officer whenever hearings can be more efficiently or timely conducted by federal rather than State personnel. Thus, for example, if a State initially elects to establish a disability hearing unit but needs additional start-up time in order to do so, or has a temporary shortage of trained hearing officers, the regulations give SSA the flexibility to appoint federal hearing officers to conduct hearings. As noted above, the regulatory procedures for the conduct of the disability hearings under §§ 404.916 and 416.1416, Disability hearing—Procedures, will not vary according to whether a State or federal employee conducts the hearing.

F. The Specific Provisions of the Rules Governing Disability Hearings

1. General Provisions. We are adding a new § 404.913, Reconsideration procedures (for title II cases) and a new paragraph (d) in existing § 416.1413, Reconsideration procedures (for SSI cases), to explain that we will give the beneficiary an opportunity for a disability hearing as part of the reconsideration process in disability and blindness cessation cases. At this and at other places in the amended regulations, we use the term "*opportunity for* a disability hearing", to emphasize that although we will automatically schedule such a hearing in response to a reconsideration request in a disability or blindness cessation case (unless the hearing is specifically waived), the beneficiary will have an obligation to exercise his or her right to this hearing by attending or making a timely request for a change in time or place, as discussed below.

We have made a change in paragraph (a), *Case review*, of the new § 404.913, from the language which appeared in the proposed rules. The purpose of this paragraph, as its title suggests, is to describe the reconsideration process in cases in which a disability hearing (described in paragraph (b) of § 404.913) is not applicable. It was not intended to change any aspect of the existing case review reconsideration procedure in title II cases. However, we inadvertently used language in paragraph (a) of § 404.913 in the proposed rules which describes the existing case review process in *SSI* cases. (See 20 CFR 416.1413(a).) The SSI case review process includes an opportunity to review the evidence in our files in addition to the right to present additional evidence. Unlike SSI case reviews, however, the reconsideration process in many title II cases is carried out in a handful of regional processing centers rather than in local Social Security offices, making it impractical to routinely offer access to the file in these cases. We have therefore changed paragraph (a) of § 404.913 in the final rule to be consistent with the existing title II case review reconsideration process. In the hearings process the file is available for review as described in §§ 404.916a(3) and 416.1416a(3).

The regulatory provisions for the disability hearing will be part of the reconsideration regulations and are designated as new §§ 404.914 through 404.918 and §§416.1414 through 416.1418. (Several regulation sections presently in those two numerical series are being redesignated to accommodate the new sections.) The new material is identical for title II cases (the Part 404 series) and for SSI cases (the Part 416 series), except that the SSI regulations refer to blindness as well as disability.

The two series of new regulation sections for the disability hearings begin with §§ 404.914 and 416.1414, Disability hearing—General. Paragraph (a) of these sections, *Availability*, provides that a disability hearing will be available at the reconsideration level after we make an initial or revised determination that an individual presently receiving benefits is not blind or disabled due to medical reasons. Paragraph (b), *Scope*, explains that the disability hearing will be available only to reconsider this medical determination, and that other issues will be reviewable through regular reconsideration procedures under §§ 404.913 and 416.1413.

2. Time and Place of the Disability Hearing. Paragraph (c), *Time and Place*, of §§ 404.914 and 416.1414, provides that either the State agency or the Director of the Office of Disability Hearings or his or her delegate, as appropriate, will set the time and place of the disability hearing, and that the notice of the time and place of the hearing will be mailed or served at least *20 days* before the date of the hearing. This paragraph also explains that individuals may be expected to travel to their disability hearings, and that costs of the beneficiary's, representative's and unsubpoenoed witnesses' travel of more than 75 miles one-way to the hearing location are reimbursable. Finally, paragraph (c) explains that the time or place of the disability hearing will be changed at the beneficiary's request, if there is good cause for the change as illustrated by the examples in existing regulations at 20 CFR 404.936 (c) and (d) and 416.1436 (c) and (d).

(Note.—The latter provisions, permitting the beneficiary to request a change in time or place of the disability hearing, were not contained in paragraph (c) of §§ 404.914 and 416.1414 as it appeared in the proposed rules. Instead, there was in the proposed rules a paragraph entitled *Postponement of your disability hearing* in §§ 404.916 and 416.1416, Disability hearing—Procedures. Upon reflection, we have concluded that all of the provisions pertaining to time and place of disability hearings should be set out in one section, and have amended paragraph (c) accordingly. In addition, we have deleted from §§404.916 and 416.1416 a provision regarding notice of time and place, since it merely repeated the information contained in paragraph (c) of §§ 404.914 and 416.1414.)

As required by Section 4 of Pub. L. 97–455, disability hearings will be available at "reasonably accessible" sites, which we interpret to mean either within 75 miles of the beneficiary's residence, or, if beyond 75 miles from the beneficiary's residence, with reimbursement available for travel expenses. This is the standard presently used for ALJ hearing locations.

(Note.—Section 201(j) of the Social Security Act limits reimbursement to travel within the United States.)

The provision of paragraph (c) requiring that notice of the time and place be sent to the beneficiary at least *20 days* before the date of the disability hearing is a change from the proposed rules, which would have required that the beneficiary receive *10 days'* notice of the time and place. We have made this change in response to a number of commenters who suggested that in some cases 10 days would not constitute adequate notice of the time and place of hearing, and that the final rules should be revised to provide additional notice. We wish to explain that the proposed 10 days' notice was intended as an assurance that the beneficiary would receive *at least* 10 days' notice of the time and place, and that it would not have precluded providing *more* than 10 days' notice. In proposing a minimum of 10 days' notice, we were concerned about the possible adverse effects on processing times at the reconsideration level if more than 10 days' notice were required. On balance, however, we are persuaded that the need of many beneficiaries for more than 10 days' notice of the time and place of their hearings is sufficient to justify a requirement that the notice be mailed or served at least *20 days* before the date of the hearing.

Other commenters on the proposed rules were critical of what they perceived as a lack of specific requirements for the notices concerning the disability hearing process. However, we believe that the regulations (both in paragraph (c) of §§ 404.914 and 416.1414 and in paragraph (b), *Your procedural rights*, in §§ 404.916 and 416.1416, described below) assure that the beneficiary will receive adequate notice not only about the time and place of the disability hearing but also about his or her rights and responsibilities in connection with the entire reconsideration process. We believe, moreover, that many of the comments reflect an imperfect understanding of the extent to which we do attempt to assure adequate notice to beneficiaries about their rights to appeal an adverse determination resulting from a continuing disability review. We offer the following explanation to assure better understanding of our commitment to adequate notice.

It is important to recognize at the outset that the notice of the time and place of the disability hearing referred to in paragraph (c) of §§ 404.914 and 416.1414 is the last of three separate, written explanations the beneficiary receives concerning both the appeals process in general, and the disability hearings process in particular. In addition, the disability beneficiary is given two opportunities to meet with a Social Security claims representative in a local office, where the process is explained person-to-person.

As a first step in any continuing disability review, before the actual review begins, the beneficiary is interviewed in a local Social Security office, where the review process and the right to appeal from an adverse determination are explained. In this pre-review interview, the beneficiary is reminded of the importance of submitting or bringing to our attention any additional medical evidence which, if necessary, we can then procure on the beneficiary's behalf, to update the medical file. The beneficiary, of course, may also ask any questions about the review or the appeals process. If a cessation determination is made as a result of the review, the cessation notice further explains the appeals process and the right to continued benefits pending appeal.

When the beneficiary requests reconsideration of a cessation determination, a Social Security claims representative again meets with the beneficiary at a local office, where the reconsideration process and the disability hearing procedure are explained in detail. The beneficiary is again encouraged to tell the Social Security office about any additional sources of medical evidence which SSA can incorporate into the case file. The beneficiary at the reconsideration request interview will also be given a printed handout which explains the disability hearing process in detail.

It is only after this series of interviews and written notices that the beneficiary, at least 20 days before the disability hearing, will be sent the notice of the time and place of the hearing, to which the new §§ 404.914(c) and 416.1414(c) refer. We believe that these efforts are more than sufficient to assure that the beneficiary understands the importance of the continuing disability review process in general and the disability hearing process in particular.

Many commenters also objected to our proposal that "reasonably accessible" hearing locations could be at any distance within 75 miles of the beneficiary's residence, or at locations beyond that distance when travel expenses were reimbursed. These commenters felt that the 75-mile rule, as they understood it, would be unduly harsh for beneficiaries who are sick or handicapped and who might also lack financial and other resources needed for transportation. They suggested that the final rules be revised to require more accessible hearing locations and to provide reimbursement of all beneficiary travel costs, regardless of distance.

We believe that, depending on such factors as population dispersion, caseloads, and availability of office space, it should be possible to provide the great majority of disability hearings at locations much less than 75 miles from the beneficiary's residence. Our purpose in advising the public of the 75-mile rule in the disability hearing regulations is not to suggest that 75 miles will be the typical or average of travel distance required to attend a disability hearing, but merely to establish the outer limit of what we believe to be a "reasonably accessible" distance for beneficiaries to travel to hearings where reimbursement is not provided. We have not, therefore, revised the final rules to require hearing locations less than 75 miles from every beneficiary's residence, as a number of commenters suggested.

Under paragraph (c) of §§ 404.914 and 416.1414, reimbursement of beneficiaries', representatives', and unsubpoenaed witnesses' travel costs will be available in the disability hearing process, but only when these individuals travel more than 75 miles one-way to the hearing site. This is the longstanding rule applied by SSA with regard to claimant or beneficiary travel to other appeal proceedings, including ALJ hearings. Indeed, in SSI cases, since October 1, 1981, Congress has mandated this rule in HHS appropriation acts which includes SSA. We believe that it represents a reasonable accommodation of the competing concerns of accessibility of our facilities to claimants and beneficiaries, and administrative budget limitations. Therefore, and because disability hearing sites are being selected at locations which are as close as possible to the maximum number of beneficiaries' residences, we have decided not to amend the final rules to permit reimbursement to beneficiaries who travel less than 75 miles to their disability hearings.

Finally, as noted above, paragraph (c) of §§ 404.914 and 416.1414 specifically provides that the beneficiary may request a change in the time or place of his or her disability hearing for good cause. There is thus a degree of flexibility in the rules for accommodating the needs of beneficiaries who cannot attend a disability hearing at the scheduled time and place. In this regard, we note that the final rules do not require the beneficiary to request a change in time or place at least 10 days before the date of the hearing, as the proposed rules would have provided, but instead simply encourage the beneficiary to request such a change "at the earliest possible date." Many commenters felt that the provision in the proposed rules requiring that such requests be made at least 10 days before the hearing was unduly restrictive and likely to result in hardship in some instances.

3. Disability Hearing Procedures. The new **§§ 404.916 and 416.1416**, Disability **hearing—Procedures**, set forth the procedures to be followed in the disability hearing process. Paragraph (a), *General*, describes when and for what purpose the disability hearing is available. Paragraph (b), *Your procedural rights*, provides that we will advise the beneficiary of his or her right to be represented, to review the evidence in his or her case file and to present additional evidence, to appear at the disability hearing, and to bring and to question witnesses at the hearing.

A number of commenters expressed concern about the need for procedures to assure that the beneficiary has a full opportunity to present new evidence and to challenge adverse evidence in connection with the disability hearing process. In response to these concerns, we have added to paragraph (b) of §§ 404.916 and 416.1416 a provision explaining that the beneficiary may request assistance in obtaining evidence and that, if necessary, a subpoena be issued. Although we believe it will rarely be necessary to actually exercise the subpoena power in the disability hearing process, we agree with the suggestion of several commenters that its availability may help to facilitate the production of useful evidence or testimony in some cases.

We have also strengthened the language in paragraph (b) of §§ 404.916 and 416.1416 regarding the right to examine the case file before the disability hearing, in response to a number of commenters who felt that the rules were lacking in this regard. Paragraph (b), as amended, now provides that the case file will be available for inspection at the disability hearing site on the day of the hearing, and that other arrangements for earlier inspection can be made at the request of the beneficiary or his or her representative. (Under the new §§ 404.918 and 416.1418, which are discussed below, there is an additional right to inspect pertinent materials in the case file when the Director of the Office of Disability Hearings or his or her delegate proposes to issue an unfavorable reconsidered determination which changes in some way the reconsidered determination prepared by the disability hearing officer.)

Paragraph (b)(5) of §§ 404.916 and 416.1416 permits the parties to waive the right to appear at the disability hearing, in which case the disability hearing officer will issue a written reconsidered determination based on the evidence in the case file. Under this provision, the disability hearing officer will also issue a written reconsidered determination based on the evidence in the case file if a party fails to appear at the disability hearing without notifying us in advance that he or she will not attend.

In the preamble to our proposed rules, we stated our belief that issuing a reconsidered determination on the basis of the evidence in the case file would be the best way to dispose of cases at this level when the parties fail to appear for a scheduled hearing. Several commenters disagreed and suggested that we instead institute a procedure such as that used at the ALJ hearing level whereby the individual who fails to appear at a scheduled hearing is ordinarily sent a notice requiring him or her to show cause for the non-appearance. In the ALJ procedure, if the individual does not show cause, there is no determination on the merits of the claim; the case is simply dismissed by the ALJ. At the request of the claimant or beneficiary, the ALJ's dismissal may later be vacated by either the ALJ or the Appeals Council, but it is only after the dismissal is vacated that the claimant or beneficiary can receive a new opportunity for a hearing and decision on the merits of his or her claim.

We continue to believe that, at the reconsideration level, the fairest and most expeditious way of treating cases in which the beneficiary fails to appear at a scheduled hearing is for the hearing officer to decide the case on the merits without a hearing rather than instituting show-cause and dismissal procedures. The hearing officer's reconsidered determination might be favorable or unfavorable to the beneficiary, but in any event will be appealable on the merits to the ALJ hearing level, where the beneficiary will have a new opportunity for a hearing.

The provisions describing the preparation of case files in support of the disability hearing process are contained in paragraph (c) of the new §§ 404.916 and 416.1416. Although in most cases this function should be completed before the hearing itself, paragraph (c) will also permit cases to be referred back to the originating component for additional preparation at any time before the reconsidered determination is issued.

Paragraph (d) of §§ 404.916 and 416.1416 permits the issuance of a fully favorable written reconsidered determination without holding a disability hearing in appropriate cases. Both the unit responsible for preparing cases for the disability hearing and the disability hearing officers will have the authority to issue these fully favorable reconsidered determinations without a hearing under paragraph (d). When a case is favorably disposed of in this manner, the beneficiary will be notified that, because of this favorable outcome, a disability hearing will not be held.

Paragraph (e), *Opportunity to submit additional evidence after the hearing*, in §§ 404.916 and 416.1416, will enable the disability hearing officer to keep the case file open for up to 15 days after the end of the hearing at the beneficiary's request for receipt of additional evidence which the disability hearing officer determines to have a direct bearing on the outcome of the hearing. Under paragraph (e)(2), the case file will be held open only when evidence necessary for reaching a reconsidered determination could not have been obtained prior to the hearing.

Numerous commenters wrote that they considered the provisions of paragraph (e) harsh and therefore inconsistent with the underlying intent of Congress to make the reconsideration process fairer and more meaningful for disability beneficiaries. They suggested that, instead of making it easier for the beneficiary to fully present his or her case at the reconsideration level, the restrictions on submittal of evidence after the date of the disability hearing under paragraph (e) would make it more difficult. We believe, however, that our procedures for notifying beneficiaries about the disability hearing process, and the consistent emphasis in our notices and interviews on securing updated medical evidence, make it unnecessary to have a more open-ended period for securing evidence *after* the disability hearing. When understood in this context, we believe that the 15-day limitation on post-hearing submittal of evidence under paragraph (e) is reasonable and unlikely to impose undue hardship on any beneficiary.

In response to the concerns of a number of commenters, we have added to §§ 404.916 and 416.1416 a new paragraph (f), *Opportunity to review and comment on evidence obtained or developed by us after the hearing*. This paragraph provides that the beneficiary will be given 10 days (or additional time, for good cause) to review and comment on any evidence obtained or developed by SSA or a State agency for any reason after the date of the disability hearing, if all evidence taken together would support a reconsidered determination that is unfavorable to the beneficiary. We have added this paragraph to clarify that a reconsidered determination that is unfavorable to the beneficiary with regard to the medical factors of eligibility will not be made until the beneficiary has had an opportunity to review and comment on all of the evidence. While the rules as originally proposed were clear as to the beneficiary's right to a hearing, a number of commenters felt that the proposed rules left a gap in the protections provided to beneficiaries with regard to evidence developed or otherwise obtained *after* the hearing. While no such gap was intended, we agree that the rules should clearly state that the beneficiary has the right to comment on any evidence that might be used to support an unfavorable reconsidered determination with regard to his or her medical eligibility.

We do not expect that additional evidence will be developed in a significant number of cases after the close of the disability hearing, nor do we expect that a supplemental hearing will be necessary in most of those cases where additional evidence is developed. Paragraph (f) does provide, however, that a supplemental face-to-face hearing may be scheduled at the beneficiary's request for the purpose of permitting the beneficiary to comment on any additional evidence. Otherwise, under paragraph (f), the beneficiary will be given the opportunity to submit written comments or, in appropriate cases, telephone comments, on the additional evidence. (We have also amended the final rules to provide for a right to comment, in writing, before an unfavorable reconsidered determination is issued by the Director of the Office of Disability Hearings or his or her delegate under the pre-issuance review process described in §§ 404.918 and 416.1418. Those provisions are discussed below.)

4. The Disability Hearing Officer's Reconsidered Determination. The new §§ 404.917 and 416.1417, Disability hearing—Disability hearing officer's reconsidered determination, contain four paragraphs. Paragraph (a) of these sections, *General*, provides that the disability hearing officer will in most cases have the authority to issue a binding written reconsidered determination. There are three exceptions to this general rule provided in paragraph (a): (1) the case may be returned by the hearing officer to the case development unit for further action, after which that unit issues a favorable reconsidered determination in accordance with paragraph (d) of §§ 404.916 or 416.1416; (2) it may be determined that the beneficiary is engaged in sustantial gainful activity and is therefore not disabled; or (3) the reconsidered determination prepared by the hearing officer may be reviewed under §§ 404.918 or 416.1418 (discussed below). Under paragraph (b), the disability hearing officer's reconsidered determination must be based on the evidence in the case file, including evidence and testimony presented at the disability hearing.

Paragraph (c) *Notice*, in §§ 404.917 and 416.1417, provides that the beneficiary will be notified, in writing, of the reconsidered determination after the disability hearing. We have deleted from these sections the provision contained in the proposed rules which would have required that the beneficiary be notified of the reconsidered determination within 60 days of the date of the disability hearing, or the date of the closing of the case file, if later. We will, of course, strive to assure prompt completion of the post-hearing functions of preparing and, in selected cases, reviewing hearing officer reconsidered determinations. However, we do not believe it would be appropriate or feasible to establish binding regulatory time limits for these activities under present circumstances, since the face-to-face hearing function has never before been carried out in the State agencies on a large-scale, ongoing basis.

Paragraph (d), *Effect*, in §§ 404.917 and 416.1417, explains that the reconsidered determination issued either by the disability hearing officer under paragraph (a) or by the Director of the Office of Disability Hearings or his or her delegate under §§ 404.918 or 416.1418 is binding as provided by existing reconsideration regulations, the redesignated §§ 404.921 and 416.1421, Effect of a reconsidered determination. (The latter sections provide that a reconsidered determination is binding unless it is appealed within 60 days after notice of the reconsidered determination is received, or unless it is later revised.)

5. Review of the Hearing Officer's Reconsidered Determination Before it is Issued. The last of the new regulatory sections, §§ 404.918 and 416.1418, Disability hearing—Review of the disability hearing officer's reconsidered determination before it is issued, give the Director of the Office of Disability Hearings or his or her delegate the authority to review and, if necessary, correct the reconsidered determination prepared by the disability hearing officer before it is issued. This authority will permit a quality assurance review of a sample of hearing officer determinations and will carry out the Congressional directive that the Secretary undertake pre-effectuation review of disability determinations. A comparable review process is presently conducted by SSA with respect to reconsidered determinations prepared by the State agencies.

Paragraph (a), *General*, in §§ 404.918 and 416.1418, explains that this review authority will be used to assure that the disability hearing officer's reconsidered determination is correct. The Director of the Office of Disability Hearings may review a case to determine its correctness on any grounds he or she deems appropriate. Only a sample of cases will be reviewed; most of the reconsidered determinations prepared by the hearing officers will simply be issued by the hearing officers shortly after the conclusion of the hearings and the closing of the case files. Under paragraph (a), if a case is reviewed and no deficiency is found, the reconsidered determination prepared by the disability hearing officer will be dated and issued upon completion of the review.

If a deficiency requiring correction is found as a result of the review, under paragraph (b)(1) of §§ 404.918 and 416.1418, the Director of the Office of Disability Hearings (ODH) or his or her delegate may send the case back either to the disability hearing officer or to the case preparation unit for appropriate further action. Paragraph (c) of §§ 404.918 and 416.1418 provides that, in a case returned by the Director or his or her delegate to the State agency (i.e., to either the unit that prepared the case for the hearing, or to the disability hearing officer), the disability hearing procedures of §§ 404.916(f) and 416.1416(f) would apply.

Under paragraph (b)(1) of §§ 404.918 and 416.1418, cases with deficiencies in the manner or scope of development of the evidence would be returned to the component that prepared the case for hearing. The provisions of paragraph (f) of §§ 404.916 and 416.1416, described above, would assure that the beneficiary has an opportunity to review and comment on any new evidence developed as a result of this action when all evidence considered together would support an unfavorable reconsidered determination. This may include an opportunity for a supplementary hearing. Alternatively, if the deficiency found by the Director or his or her delegate has to do with the manner in which the case was treated by the hearing officer, it would be returned directly to the hearing officer. By its nature, a case returned to the disability hearing officer would generally require the hearing officer to schedule a supplementary hearing with the beneficiary, particular when the hearing officer's original determination is favorable to the beneficiary and the Director's return of the case to the disability hearing officer could result in an unfavorable determination.

Paragraph (b)(2) of §§ 404.918 and 416.1418 gives the Director of ODH the authority to issue his or her own reconsidered determination when the reconsidered determination prepared by the hearing officer contains a deficiency which can be corrected in this manner. This procedure, including the beneficiary's right to comment on the Director's proposed action before it is taken, is described below. However, we wish to clarify that, at least until a considerable amount of experience with the new hearings and the review process is obtained, the Director of ODH will not, as a rule, exercise this authority to change hearing officer decisions, but will instead rely exclusively on the alternative action of sending the case back either to the component that prepared the case for hearing or to the disability hearing officer under paragraph (b)(1), as described above.

If, as permitted by paragraph (b)(2), the Director or his or her delegate proposes to issue a reconsidered determination which corrects a deficiency found in the hearing officer's reconsidered determination, and the Director's reconsidered determination is not fully favorable to the beneficiary on the issue of medical eligibility, paragraph (d) of §§ 404.918 and 416.1418 gives the beneficiary the right to review and submit written comments on the Director's reconsidered determination before it is issued. This paragraph also gives the beneficiary the right to inspect pertinent material in his or her case file before submitting his or her comments. Generally, the pertinent file materials would include any medical evidence relied on by the Director or his or her delegate in the review process as well as any documents prepared after the hearing, such as the reconsidered determination prepared by the disability hearing officer. Under paragraph (d), the beneficiary will be given 10 days from the date he or she receives a copy of the Director's proposed action to submit his or her comments, unless additional time is necessary to provide access to the pertinent file materials or there is good cause for providing more time, as illustrated by the examples in §§ 404.911(b) and 416.1411(b).

Unlike the new paragraph (f) in §§ 404.916 and 416.1416 (discussed above), there is no provision for requesting a supplemental hearing under paragraph (d) of §§ 404.918 and 416.1418. Paragraph (d), *Opportunity to comment before the Director or his or her delegate issues a reconsidered determination that is unfavorable to you*, as the title indicates, applies only to cases in which a deficiency found in the review can be corrected by the Director or his or her delegate without returning the case to the hearing officer or the case preparation unit for appropriate further action. (Cases returned to the hearing officer or to the case preparation unit under paragraph (b)(1) of §§ 404.918 and 416.1418 will come under the rule in §§ 404.916(f) and 416.1416(f), *Opportunity to comment on evidence obtained or developed by us after the hearing*.)

We believe that it adequately protects the rights of the beneficiary to provide an opportunity for only *written* comments before the Director or his or her delegate issues an unfavorable reconsidered determination in a case where the deficiency found by the Director is of the sort which can be corrected under paragraph (b)(2) of §§ 404.918 and 416.1418. (Of course, no opportunity for comment is necessary when the reconsidered determination is favorable to the beneficiary.) We believe that permitting other methods of comment on the materials prepared by the Director or his or her delegate in the review process, such as the right to request a supplemental hearing, is unnecessary in cases where the Director proposes to correct a deficiency by issuing an unfavorable reconsidered determination (rather than sending the case back for correction by the case preparation unit and the hearing officer). The Director will be in a position to take this action only on the basis of the case file that was available to the hearing officer when the hearing officer prepared his or her reconsidered determination, with respect to which the beneficiary has already had an opportunity for a hearing. Cases containing deficiencies requiring additional face-to-face contact with the beneficiary will be sent back to the hearing officer under paragraph (b)(1) of §§ 404.918 and 416.1418, and will not be decided by the Director or his or her delegate under paragraph (b)(2).

We emphasize that under paragraph (a) of §§ 404.918 and 416.1418, both favorable and unfavorable reconsidered determinations prepared by disability hearing officers will be subject to review, since deficiencies may occur in either situation. We believe that these provisions, permitting pre-issuance review and, as necessary, correction of deficiencies found in the reconsidered determinations prepared by disability hearing officers, will help to assure consistent decisional quality in the new disability hearing process. We expect that in most cases this review can be completed in a short time after the date of the disability hearing and the closing of the case file, so that the review will not result in undue delay.

Other Related Changes

The regulations in Subpart P of Part 404 and in Subpart I of Part 416, both entitled, "Determining Disability and Blindness," are not affected by the new reconsideration procedure, with one exception. The existing regulations in both subparts include a section on the responsibility for assessing and determining a disability claimant's residual functional capacity (§ 404.1546 and 416.946). Because the assessment of residual functional capacity is part of the decisionmaking process, these assessments will be the responsibility of the disability hearing officers (both State and federal) in the disability hearing process. We are therefore revising §§ 404.1546 and 416.946 accordingly.

We are also changing a number of the titles in the regulation sections governing ALJ hearings (§§ 404.929 through 404.961 and §§ 416.1429 through 416.1416). The new titles use the expression, "hearing *before an administrative law judge*" (emphasis added), to distinguish between these hearings and the new disability hearings at the reconsideration level.

Finally, we are making several technical conforming revisions in 20 CFR Part 422, Organization and Procedures. Specifically, we are revising § 422.140, Reconsideration of initial determination, and § 422.203, Hearings, to account for the new disability hearing procedure at the reconsideration level.

Authority

The revisions with respect to title II disability cases are required by Section 4 of Pub. L. 97–455, which amends Section 205(b) of the Social Security Act (42 U.S.C. 405(b)), and by Section 5 of Pub. L. 97–455. These revisions are also within the Secretary's rulemaking authority under Sections 205(a) and 1102 of the Social Security Act, as amended (42 U.S.C. 405(a) and 1302). The revisions with respect to title XVI (SSI) cases are made under the Secretary's authority to promulgate rules and regulations necessary for administering the SSI program, under Sections 1102, 1631, and 1633 of the Social Security Act, as amended (42 U.S.C. 1302, 1383 and 1383(b)).

Regulatory Procedures

Executive Order 12291—No significant increase in program costs is anticipated as a result of the disability hearing procedures. In fact, it is expected that as a result of the authorizing legislation and these implementing regulations, there will be some minimal administrative savings since the disability hearing procedure will allow resolution of more appeals at the less costly reconsideration level rather than at the ALJ hearing level and beyond. Therefore, the Secretary has determined that this rule is not a "major rule" under Executive Order 12291, and a regulatory impact analysis not required.

Paperwork Reduction Act—The regulations modify in several respects the reporting/recordkeeping requirements of our existing regulations governing reconsideration cases. We have developed and secured OMB approval of the new forms which will be used in the reconsideration process in the medical cessation cases affected by these final rules. The new forms, the affected regulation sections, and the OMB approval numbers are as follows: Form SSA–789–U4, *Request for Reconsideration—Disability Cessation* (paragraph (b) of § 404.913 and paragraph (d) of § 416.1413 (OMB No. 0960–0349)); form SSA–765, *Response to Notice of Revised Determination* (paragraph (b) of §§ 404.992 and 416.1492 (OMB No. 0960–0347); SSA–773–U4, *Waiver of Right to Appear—Disability Hearing* (paragraph (d) of §§ 404.916 and 416.1416 (OMB No. 960–0352); form SSA–769–U4, *Request for Change in Time/Place of Disability Hearing* (paragraph (c) of §§ 404.914 and 416.1414 (OMB No. 0960–0348)).

Regulatory Flexibility Act—We certify that these regulations will not have a significant economic impact on a substantial number of small entities because the rules will affect only individuals. Therefore, a regulatory flexibility analysis as provided in Pub. L. 96–354, the Regulatory Flexibility Act, is not required.

(Catalog of Federal Domestic Assistance Program Nos. 13.802, Social Security—Disability Insurance; and 13.807, Supplemental Security Income)

List of Subjects

20 CFR Part 404

Administrative practice and procedure, Death benefits, Disabled, Old-age, survivors and disability insurance.

20 CFR Part 416

Administrative practice and procedure, Aged, Blind, Disabled, Public assistance programs, Supplemental security income (SSI).

20 CFR Part 422

Administrative practice and procedure, Freedom of information, Organizations and functions (Government agencies), Social Security.

Dated: May 23, 1985.

Martha A. McSteen,

Acting Commissioner of Social Security.

Approved: July 2, 1985.

Margaret M. Heckler,

Secretary of Health and Human Services.

For the reasons discussed above, 20 CFR Parts 404, 416, and 422 are amended as follows:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

1. The authority citation for Part 404, Subpart J continues to read as follows:

Authority: Secs. 205 and 1102 of the Social Security Act; sec. 5 of Reorganization Plan No. 1 of 1953, 53 Stat. 1368, 49 Stat. 647 (42 U.S.C. 405 and 1302, unless otherwise noted).

2. In part 404, Subpart J, the Table of Contents is amended by revising the entries under the headings "Reconsideration", "Hearings", "Hearing Procedures", and by revising the center headings "Hearings" and

"Hearing Procedures" to read as follows:

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions.

Sec.

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3. In Part 404, Subpart J, § 404.900 paragraphs (a) (2) and (3) are revised to read as follows:

Subpart J—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

Introduction, Definitions, and Initial Determinations

§ 404.900 Introduction.

(a) * * *

(2) *Reconsideration.* If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) *Hearing before an administrative law judge.* If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

* * * * *

4. In Part 404, Subpart J, § 404.904 is revised to read as follows:

§ 404.904 Notice of the initial determination.

We shall mail a written notice of the initial determination to you at your last known address. The reasons for the initial determination and the effect of the initial determination will be stated in the notice. The notice also informs you of the right to a reconsideration. We will not mail a notice if the beneficiary's entitlement to benefits has ended because of his or her death.

5. In Part 404, Subpart J, § 404.905 is revised to read as follows:

§ 404.905 Effect of an initial determination.

An initial determination is binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

6. In Part 404, Subpart J, § 404.907 is revised to read as follows:

Reconsideration

§ 404.907 Reconsideration—general.

Reconsideration is the first step in the administrative review process that we provide if you are dissatisfied with the initial determination. If you are dissatisfied with our reconsidered determination, you may request a hearing before an administrative law judge.

7. In Part 404, Subpart J, a new § 404.913 is added to read as follows:

§ 404.913 Reconsideration procedures.

(a) *Case review.* With the exception of the type of case described in paragraph (b) of this section, the reconsideration process consists of a case review. Under a case review procedure, we will give you and the other parties to the reconsideration an opportunity to present additional evidence to us. The official who reviews your case will then make a reconsidered determination based on all of this evidence.

(b) *Disability hearing.* If you have been receiving benefits based on disability and you request reconsideration of an initial or revised determination that, based on medical factors, you are not now disabled, we will give you and the other parties to the reconsideration an opportunity for a disability hearing. (See §§ 404.914 through 404.918.)

8. In Part 404, Subpart J, a new § 404.914 is added to read as follows:

§ 404.914 Disability hearing—general.

(a) *Availability.* We will provide you with an opportunity for a disability hearing if:

(1) You have been receiving benefits based on a medical impairment that renders you disabled;

(2) We have made an initial or revised determination based on medical factors that you are not now disabled because your impairment:

(i) Has ceased;

(ii) Did not exist; or

(iii) Is no longer disabling; and

(3) You make a timely request for reconsideration of the initial or revised determination.

(b) *Scope.* The disability hearing will address only the initial or revised determination, based on medical factors, that you are not now disabled. Any other issues which arise in connection with your request for reconsideration will be reviewed in accordance with the reconsideration procedures described in § 404.913(a).

(c) *Time and place.*—(1) *General.* Either the State agency or the Director of the Office of Disability Hearings or his or her delegate, as appropriate, will set the time and place of your disability hearing. We will send you a notice of the time and place of your disability hearing at least 20 days before the date of the hearing. You may be expected to travel to your disability hearing. At your request, we will reimburse you for your travel expenses if you travel more than 75 miles one-way to the hearing location. Travel advances may be authorized if you request prepayment and show that the requested advance is reasonable and necessary. Additionally, upon request, we will pay travel expenses of your representative or an unsubpoenaed witness if they travel more than 75 miles one-way to the hearing site.

(2) *Change of time or place.* If you are unable to travel or have some other reason why you cannot attend your disability hearing at the scheduled time or place, you should request at the earliest possible date that the time or place of your hearing be changed. We will change the time or place if there is good cause for doing so under the standards in § 404.936 (c) and (d).

(d) *Combined issues.* If a disability hearing is available to you under paragraph (a) of this section, and you file a new application for benefits while your request for reconsideration is still pending, we may combine the issues on both claims for the purpose of the disability hearing and issue a combined initial/reconsidered determination which is binding with respect to the common issues on both claims.

(e) *Definition.* For purposes of the provisions regarding disability hearings (§§ 404.914 through 404.918) "we", "us" or "our" means the Social Security Administration or the State agency.

9. In Part 404, Subpart J, a new § 404.915 is added to read as follows:

§ 404.915 Disability hearing—disability hearing officers.

(a) *General.* Your disability hearing will be conducted by a disability hearing officer who was not involved in making the determination you are appealing. The disability hearing officer will be an experienced disability examiner, regardless of whether he or she is appointed by a State agency or by the Director of the Office of Disability Hearings or his or her delegate, as described in paragraphs (b) and (c) below.

(b) *State agency hearing officers.*—(1) *Appointment of State agency hearing officers.* If a State agency made the initial or revised determination that you are appealing, the disability hearing officer who conducts your disability hearing may be appointed by a State agency. If the disability hearing officer is appointed by a State agency, that individual will be employed by an adjudicatory unit of the State agency other than the adjudicatory unit which made the determination you are appealing.

(2) *"State agency" defined.* For purposes of this Subpart, "State agency" means the adjudicatory component in the State which issues disability determinations.

(c) *Federal hearing officers.* The disability hearing officer who conducts your disability hearing will be appointed by the Director of the Office of Disability Hearings or his or her delegate if:

(1) A component of our office other than a State agency made the determination you are appealing; or

(2) The State agency does not appoint a disability hearing officer to conduct your disability hearing under paragraph (b) of this section.

10. In Part 404, Subpart J, a new § 404.916 is added to read as follows:

§ 404.916 Disability hearing—procedures.

(a) *General.* The disability hearing will enable you to introduce evidence and present your views to a disability hearing officer if you are dissatisfied with an initial or revised initial determination, based on medical factors, that you are not now disabled as described in § 404.914(a)(2).

(b) *Your procedural rights.* We will advise you that you have the following procedural rights in connection with the disability hearing process:

(1) You may request that we assist you in obtaining pertinent evidence for your disability hearing and, if necessary, that we issue a subpoena to compel the production of certain evidence or testimony. We will follow subpoena procedures similar to those described in § 404.950(d) for the administrative law judge hearing process;

(2) You may have a representative at the hearing appointed under Subpart R of this Part, or you may represent yourself;

(3) You or your representative may review the evidence in you case file, either or the date of you hearing or at an earlier time at your request, and present additional evidence;

(4) You may present witnesses and question any witnesses at the hearing;

(5) You may waive your right to appear at the hearing. If you do not appear at the hearing, the disability hearing officer will prepare and issue a written reconsidered determination based on the information in your case file.

(c) *Case preparation.* After you request reconsideration, your case file will be reviewed and prepared for the hearing. This review will be conducted in the component of our office (including a State agency) that made the initial or revised determination, by personnel who were not involved in making the initial or revised determination. Any new evidence you submit in connection with your request for reconsideration will be included in this review. If necessary, further development of the evidence, inlcuding arrrangements for medical examinations, will be undertaken by this component. After the case file is prepared for the hearing, it will be forwarded by this component to the disability hearing officer for a hearing. If necessary, the case file may be sent back to this component at any time prior to the issuance of the reconsidered determination for additional development. Under paragraph (d) of this section, this component has the authority to issue a favorable reconsidered determination at any time in its development process.

(d) *Favorable reconsideration determination without a hearing.* If all the evidence in your case file supports a finding that you are now disabled, either the component that prepares your case for hearing under paragraph (c) or the disability hearing officer will issue a written favorable reconsideration determination, even if a disability hearing has not yet been held.

(e) *Opportunity to submit additional evidence after the hearing.* At your request, the disability hearing officer may allow up to 15 days after your disability hearing for receipt of evidence which is not available at the hearing, if:

(1) The disability hearing officer determines that the evidence has a direct bearing on the outcome of the hearing; and

(2) The evidence could not have been obtained before the hearing.

(f) *Opportunity to review and comment on evidence obtained or developed by us after the hearing.* If, for any reason, additional evidence is obtained or developed by us after your disability hearing, and all evidence taken together can be used to support a reconsidered determination that is unfavorable to you with regard to the medical factors of eligibility, we will notify you, in writing, and give you an opportunity to review and comment on the additional evidence. You will be given 10 days from the date you receive our notice to submit your comments (in writing or, in appropriate cases, by telephone), unless there is good cause for granting you additional time, as illustrated by the examples in § 404.911(b). Your comments will be considered before a reconsidered determination is issued. If you believe that it is necessary to have further opportunity for a hearing with respect to the additional evidence, a supplementary hearing may be scheduled at your request. Otherwise, we will ask for your written comments on the additional evidence, or, in appropriate cases, for your telephone comments.

§ 404.917 [Redesignated as § 404.919].

11. In Part 404, Subpart J, redesignate existing § 404.917 as § 404.919 and add a new § 404.917 to read as follows:

§ 404.917 Disability hearing—disability hearing officer's reconsidered determination.

(a) *General.* The disability hearing officer who conducts your disability hearing will prepare and will also issue a written reconsidered determination, unless:

(1) The disability hearing officer sends the case back for additional development by the component that prepared the case for the hearing, and that component issues a favorable determination, as permitted by § 404.916(c);

(2) It is determined that you are engaging in substantial gainful activity and that you are therefore not disabled; or

(3) The reconsidered determination prepared by the disability hearing officer is reviewed under § 404.918.

(b) *Content.* The disability hearing officer's reconsidered determination will give the findings of fact and the reasons for the reconsidered determination. The reconsidered determination must be based on evidence offered at the disability hearing or otherwise included in the case file.

(c) *Notice.* We will mail you and the other parties a notice of reconsidered determination in accordance with §404.922.

(d) *Effect.* The disability hearing officer's reconsidered determination, or, if it is changed under § 404.918, the reconsidered determination that is issued by the Director of the Office of Disability Hearings or his or her delegate, is binding in accordance with § 404.921, subject to the exceptions specified in that section.

§§ 409.918, 404.920, and 404.921 [Redesignated as §§ 404.920, 404.921 and 404.922].

12. In Part 404, Subpart J, redesignate existing §§ 404.918, 404.920 and 404.921 as §§ 404.920, 404.921 and 404.922 respectively; and add a new § 404.918 to read as follows:

§ 404.918 Disability hearing—review of the disability hearing officer's reconsidered determination before it is issued.

(a) *General.* The Director of the Office of Disability Hearings or his or her delegate may select a sample of disability hearing officers' reconsidered determinations, before they are issued, and review any such case to determine its correctness on any grounds he or she deems appropriate. The Director or his or her delegate shall review any case within the sample if:

(1) There appears to be an abuse of discretion by the hearing officer;

(2) There is an error of law; or

(3) The action, findings or conclusions of the disability hearing officer are not supported by substantial evidence.

If the review indicates that the reconsidered determination prepared by the disability hearing officer is correct, it will be dated and issued immediately upon completion of the review. If the reconsidered determination prepared by the disability hearing officer is found by the Director or his or her delegate to be deficient, it will be changed as described in paragraph (b) below.

(b) *Methods of correcting deficiencies in the disability hearing officer's reconsidered determination.* If the reconsidered determination prepared by the disability hearing officer is found by the Director or his or her delegate to be deficient, the Director of the Office of Disability Hearings or his or her delegate will take appropriate action to assure that the deficiency is corrected before a reconsidered determination is issued. The action taken by the Director or his or her delegate will take one of two forms:

(1) The Director or his or her delegate may return the case file either to the component responsible for preparing the case for hearing or to the disability hearing officer, for appropriate further action; or

(2) The Director or his or her delegate may issue a written reconsidered determination which corrects the deficiency.

(c) *Further action on your case if it is sent back by the Director or his or her delegate either to the component that prepared your case for hearing or to the disability hearing officer.* If the Director of the Office of Disability Hearings or his or her delegate sends your case back either to the component responsible for preparing the case for hearing or to the disability hearing officer for appropriate further action, as provided in paragraph (b)(1) above, any additional proceedings in your case will be governed by the disability hearing procedures described in § 404.916(f) or if your case is returned to the disability hearing officer and an unfavorable determination is indicated, a supplementary hearing may be scheduled for you before a reconsidered determination is reached in your case.

(d) *Opportunity to comment before the Director or his or her delegate issues a reconsidered determination that is unfavorable to you.* If the Director of the Office of Disability Hearings or his or her delegate proposes to issue a reconsidered determination as described in paragraph (b)(2) above, and that reconsidered determination is unfavorable to you, he or she will send you a copy of the proposed reconsidered determination with an explanation of the reasons for it, and will give you an opportunity to submit written comments before it is issued. At your request, you will also be given an opportunity to inspect the pertinent materials in your case file, including the reconsidered determination prepared by the disability hearing officer, before submitting your comments. You will be given 10 days from the date you receive the Director's notice of proposed action to submit your written comments, unless additional time is necessary to provide access to the pertinent file materials or there is good cause for providing more time, as illustrated by the examples in § 404.911(b). The Director or his or her delegate will consider your comments before taking any further action on your case.

13. In Part 404, Subpart J, newly redesignated § 404.921, is revised to read as follows:

§ 404.921 Effect of a reconsidered determination.

The reconsidered determination is binding unless—

(a) You or any other party to the reconsideration requests a hearing before an administrative law judge within the stated time period and a decision is made;

(b) The expedited appeals process is used; or

(c) The reconsidered determination is revised.

14. In Part 404, Subpart J, the center heading Hearings, and the title of § 404.929 are revised to read as follows:

Hearing Before an Administrative Law Judge

§ 404.929 Hearing before an administrative law judge—general.

15. In Part 404, Subpart J, § 404.930, the title of the section and paragraph (a) are revised to read as follows:

§ 404.930 Availability of a hearing before an administrative law judge.

(a) You or another party may request a hearing before an administrative law judge if we have made—

(1) A reconsidered determination;

(2) A revised determination of an initial determination, unless the revised determination concerns the issue of whether, based on medical factors, you are disabled;

(3) A reconsideration of a revised initial determination concerning the issue of whether, based on medical factors, you are disabled;

(4) A revised reconsidered determination; or

(5) A revised decision based on evidence not included in the record on which the prior decision was based.

* * * * *

16. In Part 404, Subpart J, the title of § 404.932 is revised to read as follows:

§ 404.932 Parties to a hearing before an administrative law judge.

17. In Part 404, Subpart J, the title of § 404.933 is revised to read as follows:

§ 404.933 How to request a hearing before an administrative law judge.

18. In Part 404, Subpart J, the title of § 404.935 is revised to read as follows:

§ 404.935 Submitting evidence prior to a hearing before an administrative law judge.

19. In Part 404, Subpart J, the title of § 404.936 is revised to read as follows:

§ 404.936 Time and place for a hearing before an administrative law judge.

20. In Part 404, Subpart J, the title of § 404.938 is revised to read as follows:

§ 404.938 Notice of a hearing before an administrative law judge.

21. In Part 404, Subpart J, the center heading, Hearing Procedures, and the titles of §§ 404.944, 404.946 and 404.948 are revised to read as follows:

Administrative Law Judge Hearing Procedures

§ 404.944 Administrative law judge hearing procedures—general.

§ 404.946 Issues before an administrative law judge.

§ 404.948 Deciding a case without an oral hearing before an administrative law judge.

22. In Part 404, Subpart J, the title of § 404.950 is revised to read as follows:

§ 404.950 Presenting evidence at a hearing before an administrative law judge.

23. In Part 404, Subpart J, the title of § 404.951 is revised to read as follows:

§ 404.951 When a record of a hearing before an administrative law judge is made.

24. In Part 404, Subpart J, the titles of §§ 404.952, 404.953 and 404.955 are revised to read as follows:

§ 404.952 Consolidated hearing before an administrative law judge.

§ 404.953 The decision of an administrative law judge.

§ 404.955 The effect of an administrative law judge's decision.

25. In Part 404, Subpart J, the title of § 404.956 is revised to read as follows:

§ 404.956 Removal of a hearing from an administrative law judge to the Appeals Council.

26. In Part 404, Subpart J, the title of § 404.957 is revised to read as follows:

§ 404.957 Dismissal of a request for a hearing before an administrative law judge.

27. In Part 404, Subpart J, the title of § 404.958 is revised to read as follows:

§ 404.958 Notice of dismissal of a request for a hearing before an administrative law judge.

28. In Part 404, Subpart J, the title of § 404.959 is revised to read as follows:

§ 404.959 Effect of dismissal of a request for a hearing before an administrative law judge.

29. In Part 404, Subpart J, the title of § 404.960 is revised to read as follows:

§ 404.960 Vacating a dismissal of a request for a hearing before an administrative law judge.

30. In Part 404, Subpart J, § 404.992 is revised to read as follows:

§ 404.992 Notice of revised determination or decision.

(a) When a determination or decision is revised, notice of the revision will be mailed to the parties at their last known address. The notice will state the basis for the revised determination or decision and the effect of the revision. The notice will also inform the parties of the right to further review.

(b) If a reconsidered determination that you are disabled, based on medical factors, is reopened for the purpose of being revised, you will be notified, in writing, of the proposed revision and of your right to request that a disability hearing be held before a revised reconsidered determination is issued. If a revised reconsidered determination is issued, you may request a hearing before an administrative law judge.

(c) If an administrative law judge or the Appeals Council proposes to revise a decision, and the revision would be based on evidence not included in the record on which the prior decision was based, you and any other parties to the decision will be notified, in writing, of the proposed action and of your right to request that a hearing be held before any further action is taken. If a revised decision is issued by an administrative law judge, you and any other party may request that it be reviewed by the Appeals Council, or the Appeals Council may review the decision on its own initiative.

(d) If an administrative law judge or the Appeals Council proposes to revise a decision, and the revision would be based only on evidence included in the record on which the prior decision was based, you and any other parties to the decision will be notified, in writing, of the proposed action. If a revised decision is issued by an administrative law judge, you and any other party may request that it be reviewed by the Appeals Council, or the Appeals Council may review the decision on its own initiative.

31. In Part 404, Subpart J, § 404.993 is revised to read as follows:

§ 404.993 Effect of revised determination or decision.

A revised determination or decision is binding unless—

(a) You or another party to the revised determination file a written request for reconsideration or a hearing before an administrative law judge, as appropriate;

(b) You or another party to the revised decision file, as appropriate, a request for review by the Appeals Council or a hearing before an administrative law judge;

(c) The Appeals Council reviews the revised decision; or

(d) The revised determination or decision is further revised.

Subpart P—Determining Disability and Blindness

32. The authority citation for Part 404, Subpart P continues to read as follows:

Authority: Secs. 202, 205, 216, 221, 222, 223, 225 and 1102 of the Social Security Act, as amended; 49 Stat. 623, as amended, 53 Stat. 1368, as amended, 68 Stat. 1080, 1081 and 1082 as amended, 70 Stat. 815 and 817, as amended, 49 Stat. 647, as amended (42 U.S.C. 402, 405, 416, 421, 422, 423, 425 and 1302); sec. 505 (a) and (c) of Pub. L. 96-265, 94 Stat. 473; sec. 4 of Pub. L. 98-460, 98 Stat. 1800, unless otherwise noted.

33. In Part 404, Subpart P § 404.1546 is revised to read as follows

§ 404.1546 Responsibility for assessing and determining residual functional capacity.

The State agency staff physicians or other physicians designated by the Secretary are responsible for assuring that the agency makes a decision about your residual functional capacity. In cases where the State agency makes the disability determination, a State agency staff physician must assess residual functional capacity where it is required. This assessment is based on all of the medical evidence we have, including any other assessments that may have been provided by treating or examining physicians, consultative physicians, or any other physician designated by the Secretary. (See § 404.1545.) For cases in the disability hearing process, the responsibility for deciding your residual functional capacity rests with either the disability hearing officer or, if the disability hearing officer's reconsidered determination is changed under § 404.918, with the Director of the Office of Disability Hearings or his or her delegate. For cases at the administrative law judge hearing level, this responsibility rests with the administrative law judge. For cases at the Appeals Council level, this responsibility rests with the Appeals Council.

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

34. In Part 416, Subpart N, the Table of Contents entries under the center headings "Reconsideration", "Hearings", and "Hearing Procedures", and the center headings "Hearings" and "Hearing Procedures" are revised to read as follows:

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

Sec.

* * * * *

Reconsideration

* * * * *

Hearing Before an Administrative Law Judge

Administrative Law Judge Hearing Procedures

* * * * *

Subpart I—Determining Disability and Blindness

35. The authority citation for Part 416, Subpart I continues to read as follows:

Authority: Secs. 1102, 1614, and 1631 of the Social Security Act; 49 Stat. 647, as amended, 86 Stat. 1471, as amended by 88 Stat. 52, 86 Stat. 1475; 42 U.S.C. 1302, 1382c, and 1383; sec. 4 of Pub. L. 98–460, 98 Stat. 1800, unless otherwise noted.

36. In Part 416, Subpart I, § 416.946 is revised to read as follows:

§ 416.946 Responsibility for assessing and determining residual functional capacity.

The State agency staff physicians or any other physicians designated by the Secretary are responsible for assuring that the agency makes a decision about your residual functional capacity. In cases where the State agency makes the disability determination, a State agency staff physician must assess residual functional capacity where it is required. This assessment is based on all of the medical evidence we have, including any other assessments that may have been provided by treating or examining physicians, consultative physicians, or any other physician designated by the Secretary. (See § 416.945.) For cases in the disability hearing process, the responsibility for deciding your residual functional capacity rests with either the disability hearing officer, or, if the disability hearing officer's reconsidered determination is changed under § 416.1418, with the Director of the Office of Disability Hearings or his or her delegate. For cases at the administrative law judge hearing level, this responsibility rests with the administrative law judge. For cases at the Appeals Council level, this responsibility rests with the Appeals Council.

Subpart N—Determinations, Administrative Review Process, and Reopening of Determinations and Decisions

37. The authority citation for Part 416, Subpart N continues to read as follows:

Authority: Secs. 1102, and 1631, and 1633 of the Social Security Act, 49 Stat. 647, 86 Stat. 1475 and 1478 (42 U.S.C. 1302, 1383 and 1383b).

38. In Part 416, Subpart N, § 416.1400, paragraphs (a)(2) and (3) are revised to read as follows:

Introduction, Definitions and Initial Determinations

§ 416.1400 Introduction.

(a) * * *

(2) *Reconsideration.* If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) *Hearing before an administrative law judge.* If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

* * * * *

39. In Part 416, Subpart N, § 416.1404, paragraphs (b)(3) and (c) are revised to read as follows:

§ 416.1404 Notice of the initial determination.

* * * * *

(b) The written notice that we send will tell you—

* * * * *

(3) What rights you have to a reconsideration of the determination. (c) If our initial determination is that we must suspend, reduce or terminate your benefits, the notice will also tell you that you have a right to a reconsideration before the determination takes effect (see § 416.1336).

40. In Part 416, Subpart N, § 416.1405 is revised to read as follows:

§ 416.1405 Effect of an initial determination.

An initial determination is binding unless you request a reconsideration within the stated time period, or we revise the initial determination.

41. In Part 416, Subpart N, § 416.1407 is revised to read as follows:

Reconsideration

§ 416.1407 Reconsideration—general.

Reconsideration is the first step in the administrative review process that we provide if you are dissatisfied with the initial determination. If you are dissatisfied with our reconsideration determination, you may request a hearing before an administrative law judge.

42. In Part 416, Subpart N, § 416.1413 is amended by adding a new paragraph (d), to read as follows:

§ 416.1413 Reconsideration procedures.

* * * * *

(d) *Disability hearing.* If you have been receiving supplemental security income benefits because you are blind or disabled and you request reconsideration of an initial or revised determination that, based on medical factors, you are not now blind or disabled, we will give you and the other parties to the reconsideration an opportunity for a disability hearing. (See §§ 416.1414 through 416.1418.)

§ 416.1414 [Redesignated as § 416.1413a].

43. In Part 416, Subpart N, § 416.1414 is redesignated as a new § 416.1413a.

§ 416.1415 [Redesignated as § 416.1413b].

44. In Part 416, Subpart N, § 416.1415 is redesignated as a new § 416.1413b, and is revised to read as follows:

§ 416.1413b Reconsideration procedures for post-eligiblity claims.

If you are eligible for supplemental security income benefits and we notify you that we are going to suspend, reduce or terminate your benefits, you can appeal our determination within 60 days of the date you receive our notice. The 60-day period may be extended if you have good cause for an extension of time under the conditions stated in § 416.1411(b). If you appeal a suspension, reduction, or termination of benefits, the method of reconsideration we will use depends on the issue in your case. If the issue in your case is that you are no longer blind or disabled for medical reasons, you will receive an opportunity for a disability hearing. If any other issue is involved, you have the choice of a case review, informal conference or formal conference.

§ 416.1416 [Redesignated as § 416.1413c].

45. In Part 416, Subpart N, § 416.1416 is redesignated as a new § 416.1413c.

46. In Part 416, Subpart N, a new § 416.1414 is added to read as follows:

§ 416.1414 Disability hearing—general.

(a) *Availability.* We will provide you with an opportunity for a disability hearing if:

(1) You have been receiving supplemental security income benefits based on a medical impairment that renders you blind or disabled; (2) We have made an initial or revised determination based on medical factors that you are not blind or disabled because your impairment:

(i) Has ceased;

(ii) Did not exist; or

(iii) Is no longer disabling; and

(3) You make a timely request for reconsideration of the initial or revised determination.

(b) *Scope.* The disability hearing will address only the initial or revised determination, based on medical factors, that you are not now blind or disabled. Any other issues you raise in connection with your request for reconsideration will be reviewed in accordance with the reconsideration procedures described in § 416.1413 (a) through (c).

(c) *Time and place.*—(1) *General.* Either the State agency or the Director of the Office of Disability Hearings or his or her delegate, as appropriate, will set the time and place of your disability hearing. We will send you a notice of the time and place of your disability hearing at least 20 days before the date of the hearing. You may be expected to travel to your disability hearing. At your request, we will reimburse you for your travel expenses if you travel more than 75 miles one-way to the hearing location. Travel advances may be authorized if you request prepayment and show that the requested advance is reasonable and necessary. Additionally, upon request, we will pay travel expenses of your representative or an unsubpoenaed witness if they travel more than 75 miles one-way to the hearing site.

(2) *Change of time or place.* If you are unable to travel or have some other reason why you cannot attend your disability hearing at the scheduled time or place, you should request at the earliest possible date that the time or place of your hearing be changed. We will change the time or place if there is good cause for doing so under the standards in § 416.1436 (c) and (d).

(d) *Combined issues.* If a disability hearing is available to you under paragraph (a) of this section, and you file a new application for benefits while your request for reconsideration is still pending, we may combine the issues on both claims for the purpose of the disability hearing and issue a combined initial/reconsidered determination which is binding with respect to the common issues on both claims.

(e) *Definition.* For purposes of the provisions regarding disability hearings (§§ 416.1414 through 416.1418) "we", "us", or "our" means the Social Security Administration or the State agency.

47. In Part 416, Subpart N, a new § 416.1415 is added to read as follows:

§ 416.1415 Disability hearing—disability hearing officers.

(a) *General.* Your disability hearing will be conducted by a disability hearing officer who was not involved in making the determination you are appealing. The disability hearing officer will be an experienced disability examiner, regardless of whether he or she is appointed by a State agency or by the Director of the Office of Disability Hearings or his or her delegate, as described in paragraphs (b) and (c) below.

(b) *State agency hearing officers.*—(1) *Appointment of State agency hearing officers.* If a State agency made the initial or revised determination that you are appealing, the disability hearing officer who conducts your disability hearing may be appointed by a State agency. If the disability hearing officer is appointed by a State agency, that individual will be employed by an adjudicatory unit of the State agency other than the adjudicatory unit which made the determination you are appealing.

(2) *"State agency" defined.* For purposes of this Subpart, "State agency" means the adjudicatory component in the State which issues disability determinations.

(c) *Federal hearing officers.* The disability hearing officer who conducts your disability hearing will be appointed by the Director of the Office of Disability Hearings or his or her delegate if:

(1) A component of our office other than a State agency made the determination you are appealing; or

(2) The State agency does not appoint a disability hearing officer to conduct your disability hearing under paragraph (b) of this section.

48. In Part 416, Subpart N, a new § 416.1416 is added to read as follows:

§ 416.1416 Disability hearing—procedures.

(a) *General.* The disability hearing will enable you to introduce evidence and present your views to a disability hearing officer if you are dissatisfied with an initial or revised determination, based on medical factors, that you are not now blind or disabled, as described in § 416.1414(a)(2).

(b) *Your procedural rights.* We will advise you that you have the following procedural rights in connection with the disability hearing process:

(1) You may request that we assist you in obtaining pertinent evidence for your disability hearing and, if necessary, that we issue a subpoena to compel the production of certain evidence or testimony. We will follow subpoena procedures similar to those described in § 416.1450(d) for the administrative law judge hearing process;

(2) You may have a representative at the hearing appointed under Subpart O of this Part, or you may represent yourself;

(3) You or your representative may review the evidence in your case file, either on the date of your hearing or at an earlier time at your request, and present additional evidence;

(4) You may present witnesses and question any witnesses at the hearing;

(5) You may waive your right to appear at the hearing. If you do not appear at the hearing, the disability hearing officer will prepare and issue a written reconsidered determination based on the information in your case file.

(c) *Case preparation.* After you request reconsideration, your case file will be reviewed and prepared for the hearing. This review will be conducted in the component of our office (including a State agency) that made the initial or revised determination, by personnel who were not involved in making the initial or revised determination. Any new evidence you submit in connection with your request for reconsideration will be included in this review. If necessary, further development of evidence, including arrangements for medical examinations, will be undertaken by this component. After the case file is prepared for the hearing, it will be forwarded by this component to the disability hearing officer for a hearing. If necessary, the case file may be sent back to this component at any time prior to the issuance of the reconsidered determination for additional development. Under paragraph (d) of this section, this component has the authority to issue a favorable reconsidered determination at any time in its development process.

(d) *Favorable reconsidered determination without a hearing.* If the evidence in your case file supports a finding that you are now blind or disabled, either the component that prepares your case for hearing under paragraph (c) or the disability hearing officer will issue a written favorable reconsidered determination, even if a disability hearing has not yet been held.

(e) *Opportunity to submit additional evidence after the hearing.* At your request, the disability hearing officer may allow up to 15 days after your disability hearing for receipt of evidence which is not available at the hearing, if:

(1) The disability hearing officer determines that the evidence has a direct bearing on the outcome of the hearing; and

(2) The evidence could not have been obtained before the hearing.

(f) *Opportunity to review and comment on evidence obtained or developed by us after the hearing.* If, for any reason, additional evidence is obtained or developed by us after your disability hearing, and all evidence taken together can be used to support a reconsidered determination that is unfavorable to you with regard to the medical factors of eligibility, we will notify you, in writing, and give you an opportunity to review and comment on the additional evidence. You will be given 10 days from the date you receive our notice to submit your comments (in writing or, in appropriate cases, by telephone), unless there is good cause for granting you additional time, as illustrated by the examples in § 416.1411(b). Your comments will be considered before a reconsidered determination is issued. If you believe that it is necessary to have further opportunity for a hearing with respect to the additional evidence, a supplementary hearing may be scheduled at your request. Otherwise, we will ask for your written comments on the additional evidence, or, in appropriate cases, for your telephone comments.

§ 416.1417 [Redesignated as § 416.1419].

49. In Part 416, Subpart N, redesignate § 416.1417 as a new § 416.1419 and add a new § 416.1417 to read as follows:

§ 416.1417 Disability hearing—disability hearing officer's reconsidered determination.

(a) *General.* The disability hearing officer who conducts your disability hearing will prepare and will issue a written reconsidered determination, unless:

(1) The disability hearing officer sends the case back for additional development by the component that prepared the case for the hearing, and that component issues a favorable determination, as permitted by § 416.1416(c);

(2) It is determined that you are engaging in substantial gainful activity and that you are therefore not disabled; or

(3) The reconsidered determination prepared by the disability hearing officer is reviewed under § 416.1418.

(b) *Content.* The disability hearing officer's reconsidered determination will give the findings of fact and the reasons for the reconsidered determination. The reconsidered determination must be based on evidence offered at the disability hearing or otherwise included in your case file.

(c) *Notice.* We will mail you and the other parties a notice of reconsidered determination in accordance with § 416.1422.

(d) *Effect.* The disability hearing officer's reconsidered determination, or, if it is changed under § 416.1418, the reconsidered determination that is issued by the Director of the Office of Disability Hearings or his or her delegate, is binding in accordance with § 416.1421, subject to the exceptions specified in that section.

§§ 416.1418, 416.1420 and 416.1421 [Redesignated as §§ 416.1420, 416.1421 and 416.1422].

50. In Part 416, Subpart N, redesignate existing §§ 416.1418, 416.1420 and 416.1421 as §§ 416.1420, 416.1421 and

416.1422 respectively, and add a new § 416.1418 to read as follows:

§ 416.1418 Disability hearing—review of the disability hearing officer's reconsidered determination before it is issued.

(a) *General.* The Director of the Office of Disability Hearings or his or her delegate may select a sample of disability hearing officers' reconsidered determinations, before they are issued, and review any such case to determine its correctness on any grounds he or she deems appropriate. The Director or his or her delegate shall review any case within the sample if:

(1) There appears to be an abuse of discretion by the hearing officer;

(2) There is an error of law; or

(3) The action, findings or conclusions of the disability hearing officer are not supported by substantial evidence.

If the review indicates that the reconsidered determination prepared by the disability hearing officer is correct, it will be dated and issued immediately upon completion of the review. If the reconsidered determination prepared by the disability hearing officer is found by the Director or his or her delegate to be deficient, it will be changed as described in paragraph (b) below.

(b) *Methods or correcting deficiencies in the disability hearing officer's reconsidered determination.* If the reconsidered determination prepared by the disability hearing officer is found by the Director or his or her delegate to be deficient, the Director of the Office of Disability Hearings or his or her delegate will take appropriate action to assure that the deficiency is corrected before a reconsidered determination is issued. The action taken by the Director or his or her delegate will take one of two forms:

(1) The Director or his or her delegate may return the case file either to the component responsible for preparing the case for hearing or to the disability hearing officer, for appropriate further action; or

(2) The Director or his or her delegate may issue a written reconsidered determination which corrects the deficiency.

(c) *Further action on your case if it is sent back by the Director or his or her delegate either to the component that prepared your case for hearing or to the disability hearing officer.* If the Director of the Office of Disability Hearings or his or her delegate sends your case back either to the component responsible for preparing the case for hearing or to the disability hearing officer for appropriate further action, as provided in paragraph (b)(1) above, any additional proceedings in your case will be governed by the disability hearing procedures described in § 416.1416(f) or if your case is returned to the disability hearing officer and an unfavorable determination is indicated, a supplementary hearing may be scheduled for you before a reconsidered determination is reached in your case.

(d) *Opportunity to comment before the Director or his or her delegate issues a reconsidered determination that is unfavorable to you.* If the Director of the Office of Disability Hearings or his or her delegate proposes to issue a reconsidered determination as described in paragraph (b)(2) above, and that reconsidered determination is unfavorable to you, her or she will send you a copy of the proposed reconsidered determination with an explanation of the reasons for it, and will give you an opportunity to submit written comments before it is issued. At your request, you will also be given an opportunity to inspect the pertinent materials in your case file, including the reconsidered determination prepared by the disability hearing officer, before submitting your comments. You will be given 10 days from the date you receive the Director's notice of proposed action to submit your written comments, unless additional time is necessary to provide access to the pertinent file materials or there is good cause for providing more time, as illustrated by the examples in § 416.1411(b). The Director or his or her delegate will consider your comments before taking any further action on your case.

51. In Part 416, Subpart N, newly redesignated § 416.1421 is revised to read as follows:

§ 416.1421 Effect of a reconsidered determination.

The reconsidered determination is binding unless—

(a) You or any other party to the reconsideration requests a hearing before an administrative law judge within the stated time period and a decision is made;

(b) The expedited appeals process is used; or

(c) The reconsidered determination is revised.

52. In Part 416, Subpart N, the center heading "Hearings", and the title of § 416.1429 are revised to read as follows:

Hearing Before an Administrative Law Judge

§ 416.1429 Hearing before an administrative law judge—general.

53. In Part 416, Subpart N, § 416.1430, the title of the section and paragraph (a) are revised to read as follows:

§ 416.1430 Availability of a hearing before an administrative law judge.

(a) You or another party may request a hearing before an administrative law judge if we have made—

(1) A reconsidered determination;

(2) A reconsideration of a revised determination of an initial or reconsidered determination that involves a suspension, reduction or termination of benefits;

(3) A revised initial determination or revised reconsidered determination that does not involve a suspension, reduction or termination of benfits; or

(4) A revised decision based on evidence not included in the record on which prior decision was based.

* * * * *

54. In Part 416, Subpart N, the title of § 416.1432 is revised to read as follows:

§ 416.1432 Parties to a hearing before an administrative law judge.

55. In Part 416, Subpart N, the title of § 416.1433 is revised to read as follows:

§ 416.1433 How to request a hearing before an administrative law judge.

56. In Part 416, Subpart N, the title of § 416.1435 is revised to read as follows:

§ 416.1435 Submitting evidence prior to a hearing before an administrative law judge.

57. In Part 416, Subpart N, the title of § 416.1436 is revised to read as follows:

§ 416.1436 Time and place for a hearing before an administrative law judge.

58. In Part 416, Subpart N, the title of § 416.1438 is revised to read as follows:

§ 416.1438 Notice of a hearing before an administrative law judge.

59. In Part 416, Subpart N, the center heading, "Hearing Procedures", and the titles of §§ 416.1444, 416.1446 and 416.1448 are revised to read as follows:

Administrative Law Judge Hearings Procedures

§ 416.1444 Administrative law judge hearing procedures—general.

§ 416.1446 Issues before an administrative law judge.

§ 416.1448 Deciding a case without an oral hearing before an administrative law judge.

60. In Part 416, Subpart N, the title of § 416.1450 is revised to read as follows:

§ 416.1450 Presenting evidence at a hearing before an administrative law judge.

61. In Part 416 Subpart N, the title of § 416.1451 is revised to read as follows:

§ 416.1451 When a record of a hearing before an administrative law judge is made.

62. In Part 416, Subpart N, the titles of §§ 416.1452, 416.1453, and 416.1455 are revised to read as follows:

§ 416.1452 Consolidated hearings before an administrative law judge.

§ 416.1453 The decision of an administrative law judge.

§ 416.1455 The effect of an administrative law judge's decision.

63. In Part 416, Subpart N, the title of § 416.1456 is revised to read as follows:

§ 416.1456 Removal of a hearing request from an administrative law judge to the Appeals Council.

64. In Part 416, Subpart N, the title of § 416.1457 is revised to read as follows:

§ 416.1457 Dismissal of a request for a hearing before an administrative law judge.

65. In Part 416, Subpart N, the title of § 416.1458 is revised to read as follows:

§ 416.1458 Notice of dismissal of a request for a hearing before an administrative law judge.

66. In Part 416, Subpart N, the title of § 416.1459 is revised to read as follows:

§ 416.1459 Effect of dismissal of a request for a hearing before an administrative law judge.

67. In Part 416, Subpart N, the title of § 416.1460 is revised to read as follows:

§ 416.1460 Vacating a dismissal of a request for a hearing before an administrative law judge.

68. In Part 416, Subpart N, § 416.1492 is amended by revising paragraphs (b) through (e), by redesignating paragraphs (d) through (f) as (e) through (g) and adding a new paragraph (d) to read as follows:

§ 416.1492 Notice of revised determination or decision.

* * * * *

(b) If a determination is revised and the revised determination requires that your benefits be suspended, reduced, or terminated, the notice will inform you of your right to continued payment (see § 416.1336 and the exceptions set out in § 416.1337) and of your right of reconsideration.

(c) If a determination is revised and the revised determination does not require that your benefits be suspended, reduced, or terminated, the notice will inform you of your right to a hearing before an administrative law judge.

(d) If a reconsidered determination that you are blind or disabled, based on medical factors, is reopened for the purpose of being revised, you will be notified, in writing, of the proposed revision and of your right to request that a disability hearing be held before a revised reconsidered determination is issued. If a revised reconsidered determination is issued, you may request a hearing before an administrative law judge.

(e) If an administrative law judge or the Appeals Council proposes to revise a decision, and the revision would be based on evidence not included in the record on which the prior decision was based, you and any other parties to the decision will be notified, in writing, of the proposed action and of your right to request that a hearing be held before any further action is taken. If a revised decision is issued by an administrative law judge, you and any other party may request that it be reviewed by the Appeals Council, or the Appeals Council may review the decision on its own initiative.

(f) If an administrative law judge or the Appeals Council proposes to revise a decision, and the revision would be based only on evidence included in the record on which the prior decision was based, you and any other parties to the decision will be notified, in writing, of the proposed action. If a revised decision is issued by an administrative law judge, you and any other party may request that it be reviewed by the Appeals Council, or the Appeals Council may review the decision on its own initiative.

PART 422—ORGANIZATION AND PROCEDURES

Subpart C—Procedures of the Bureau of Hearings and Appeals

69. The authority citation for Part 422, Subpart C continues to read as follows:

Authority: Secs. 205, 221, 1102, 1869, and 1871, 53 Stat. 1368, as amended, 68 Stat. 1081, as amended, 79 Stat. 330, 331; sec. 5 of Reorganization Plan No. 1 of 1953, 67 Stat. 18,631; 42 U.S.C. 405, 421, 1302, 1395ff, and 1395hh. Sec. 422.203(a) is also issued under sec. 413(b) of title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 794; 30 U.S.C. 923(b).

70. In 20 CFR Part 422, § 422.140 is revised to read as follows:

§ 422.140 Reconsideration of initial determination.

Any part who is dissatisfied with an initial determination with respect to entitlement to monthly benefits, a lump-sum death payment, a period of disability, a revision of an earnings record, with respect to any other right under title II of the Social Security Act, or with respect to entitlement to hospital insurance benefits or supplementary medical insurance benefits, or the amount of hospital insurance benefits, may request that the Social Security Administration reconsider such determination. The information in § 404.1503 of this chapter as to the respective roles of State agencies and the Social Security Administration in the making of disability determinations is also generally applicable to the reconsideration of initial determinations involving disability. However, in cases in which a disability hearing as described in §§ 404.914 through 404.918 and 416.1414 through 416.1418 is available, the reconsidered determination may be issued by a disability hearing officer or by the Director of the Office of Disability Hearings or his or her delegate. After such initial determination has been reconsidered, the Social Security Administration will mail to each of the parties written notice and inform him or her of his right to a hearing before an administrative law judge (see § 422.201). Regulations relating to the details of reconsideration of initial determinations with respect to rights under title II of the Act or with respect to entitlement to hospital insurance benefits or supplementary medical insurance benefits may be found in Part 404, Subpart J of this chapter.

71. In 20 CFR Part 422, Subpart C, § 422.203, paragraphs (a)(1) and (b)(2) are revised to read as follows:

§ 422.203 Hearings.

(a) *Right to request a hearing.* (1) After a reconsidered or a revised determination (i) of a claim for benefits or any other right under title II of the Social Security Act; or (ii) of eligibility or amount of benefits or any other matter under title XVI of the Act, except where an initial or reconsidered determination involving an adverse action is revised, after such revised determination has been reconsidered; or (iii) as to entitlement under Part A or Part B of title XVIII of the Act, or (where the amount in controversy is $100 or more) as to the amount of benefits under Part A of such title XVIII or of health services to be provided by a Health Maintenance Organization without additional costs, any party to such a determination may, pursuant to section 205, 221, 1631, 1869, or 1876 of the Act, as applicable, file a written request for a hearing on the determination. After a reconsidered determination of a claim for benefits under Part B of title IV (Black Lung benefits) of the Federal Coal Mine Health and Safety Act of 1969 (30 U.S.C. 921–925), a party to the determination may file a written request for a hearing on the determination.

* * * * *

(b) *Request for hearing.* * * *

(2) Unless for good cause shown an extension of time has been granted, a request for hearing must be filed within 60 days after the receipt of the notice of the reconsidered or revised determination, or after an initial determination described in 42 CFR 405.1502(b)(2), (c), (d)(2), and (e) (see §§ 405.933, 410.631, and 416.1433 of this chapter and 42 CFR 405.722, 405.1530, 405.1531, and 405.2060.)

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[FR Doc. 86-31 Filed 1-2-86; 8:45 am]

BILLING CODE 4190-11-M