

A GUIDE FOR ENHANCED MEDICAL EXPERT TESTIMONY

A. HALLEX Provisions (I-2-530 through 545, 561, 590, 670, 730)

1. The preferred method for obtaining medical expert (ME) opinion is through live testimony at a hearing; however, interrogatories may be used if ALJ decides live testimony is not essential and interrogatories will provide a "full inquiry into the matters at issue" (I-2-530, 540, 542)

- a. However, Wallace v. Bowen, 869 F.2d 187 (3rd Cir. 1988), 25 S.S.R.S. 56, which dealt with an ME opinion obtained post-hearing, held: "We thus hold that when an administrative law judge chooses to go outside the testimony adduced at the hearing in making a determination on a social security claim, the ALJ must afford the claimant not only an opportunity to comment and present evidence but also an opportunity to cross-examine the authors of any post-hearing reports when such cross-examination is necessary to the full presentation of the case, and must reopen the hearing for that purpose if requested. The necessary consequence of our opinion requires modification of the form letter to give notice that the claimant may request a supplementary hearing at which the claimant may cross-examine the authors of any post-hearing reports submitted by the Secretary." Among other cases, Wallace cites the following cases in support: Gullo v. Califano, 609 F.2d 649 (2d Cir. 1979); Townley v. Heckler, 748 F.2d 109 (2d Cir. 1984); Lonzollo v. Weinberger, 534 F.2d 712 (7th Cir. 1976); Allison v. Heckler, 711 F.2d 145 (10th Cir. 1983); and Cowart v. Schweiker, 662 F.2d 731 (11th Cir. 1981).

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- b. Also see Tanner v. HHS, 932 F.2d 1110 (5th Cir. 1991), 33 S.S.R.S. 377 (vocational expert (VE) opinion obtained post-hearing required opportunity to cross-examine); and AR 91-1(5) (Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990)) (opportunity to cross-examine examining physician who had completed report for workers' compensation insurer required when subpoena requested and ALJ substantially relied on the report).

 - c. If interrogatories are used, the procedures in HALLEX must be used (HALLEX I-2-542, etc.) Sample interrogatories and letters are included at HALLEX I-2-590, Samples 4, 6-10.

 - d. Upon receipt of ME's responses to interrogatories, upon proffering to claimant/representative, request for supplemental hearing **must be granted**; however, ALJ decides whether request to have ME present should be granted as outlined above.
2. Procedural considerations (HALLEX I-2-532, 536, 670)
- a. ALJ may use ME before, during, or after hearing

 - b. ALJ may not use ME who has treated the claimant

 - c. ALJ may not use ME who has examined the claimant

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- d. ALJ must avoid any off-the-record discussion or correspondence with the ME; any discussion and/or correspondence must be part of the record (also see HALLEX I-2-670)
- e. ALJ must not ask ME to provide an opinion on vocational matters even if ME is a certified VE
- f. ME's opinion must be based on the medical findings and signs, not just the claimant's symptoms
- g. Weight ALJ gives to ME's opinion depends upon the extent to which the opinion is supported by the medical signs and findings, and is consistent with the other evidence of record (however, 404.1527(d)(1) and 416.927(d)(1) provide that the opinions of non-examining sources are generally entitled to less weight than the opinions of examining sources)
- h. ME's opinion is not binding on ALJ
- i. If ME to attend hearing, claimant/representative must be advised
- j. ME is not permitted to examine the claimant, either mentally or physically

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3. When ME opinion must be obtained (HALLEX I-2-534)
 - a. When ordered to do so by the Court or Appeals Council
 - b. When requesting background medical test data (HALLEX I-2-514(D))
 - c. When deciding whether an individual's impairment is equivalent in severity to any impairment in the Listings (SSR 96-6p).

4. When ME opinion may be obtained (HALLEX I-2-534)
 - a. When ALJ is determining whether services provided to claimant in a hospital or skilled nursing facility are covered under Medicare (HALLEX I-2-532)
 - b. When ALJ is determining whether claimant's impairment(s) meet -a listed impairment
 - c. When ALJ is determining the usual dosage and effect of medications and other forms of therapy

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- d. When ALJ is assessing whether a claimant has failed to follow prescribed treatment

- e. When ALJ is determining the degree of severity of a claimant's mental impairment and is preparing the Psychiatric Review Technique Form (PRTF) (Note: ALJ, not the ME, must actually complete the Form)

- f. When claimant/representative has requested ME's presence at hearing and ALJ agrees ME's opinion necessary

- g. When ALJ has doubt about the adequacy of the medical record in a case, and believes that an ME may be able to suggest additional relevant evidence, including additional tests and procedures

- h. When the medical evidence is conflicting or confusing, and ALJ believes ME may be able to clarify and explain the evidence

- i. When the significance of clinical or laboratory findings in the record is not clear, and ALJ believes ME may be able to explain the findings and assist ALJ in assessing their clinical significance

- j. When ALJ is determining claimant's residual functional capacity (RFC), ALJ may ask ME to

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explain or clarify the claimant's functional limitations and abilities as established by the medical evidence of record

- k. When ALJ has a question about the etiology of a disease or disease process (see HALLEX I-2-539(D)); and how it may affect the claimant's ability to engage in work activities at pertinent points in time, ALJ may ask ME to explain the nature of an impairment and identify any medically contraindicated activities

 - l. When ALJ desires expert medical opinion regarding the onset of an impairment (also see SSR 83-20)

 - m. To explain why a treating or evaluating physician's opinion is not supported by the evidence of record
5. Selecting a Medical Expert (HALLEX I-2-536, 670)
- a. Regional Offices maintain ME Rosters; MEs must be selected from the Roster in rotation to the extent possible

 - b. Under extenuating circumstances ME not on the Roster may be used, e.g., a particular medical specialty is not represented on the Roster

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6. ME's Testimony (HALLEX I-2-539, 670)

a. During opening statement, ALJ must explain why ME testimony necessary

b. ME may attend entire hearing, but not required

(1) However, if the ME was not present to hear pertinent testimony, e.g., testimony regarding the claimant's current medications, sources and types of treatment, etc., the ALJ should summarize the testimony for the ME on the record (HALLEX I-2-670(B))

c. Before ME testifies, ALJ must:

(1) Ensure on the record ME has examined all medical evidence of record

(2) Ensure the record contains an accurate statement of ME's professional qualification

(3) Give claimant/representative opportunity to ask ME questions about his/her professional qualifications

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- d. If claimant/representative objects to ME's opinion, ALJ must rule on objection and explain ruling in decision

 - e. ALJ, not ME, decides claimant's RFC and whether claimant disabled; however, ALJ may ask ME to provide opinions which will help ALJ decide these issues, e.g., ALJ may ask ME to describe the impact of an impairment on the claimant's ability to concentrate, sit, lift, etc.

 - f. ALJ may not ask ME to decide whether claimant can work in a competitive work situation or in a particular type of employment, e.g., as a gas station attendant. The vocational aspects of a case (e.g., a claimant's nonmedical reasons for leaving his/her former job, vocational difficulties claimant might experience adjusting to new job, or adequacy or inadequacy of claimant's education) are not within ME's area of expertise.
7. For use of dually-qualified vocational Experts and Medical Experts, see HALLEX I-2-561

B. Other considerations

- 1. MEs sometimes err: ALJ must ask ME to provide bases for opinions; ALJ must reject incorrect ME opinions and explain bases for rejection in decision

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2. The reconsideration unfavorable determination includes opinion of state agency medical consultant that claimant's impairment(s) do not meet or equal a listed impairment (404.1526, 416.926; CALJ November 1990 Reminder)
 - a. However, often new and material additional evidence received after reconsideration determination

3. While treating source opinions are given more weight (404.1527(d)(i), 416.927(d)(i), opinions from ME's may be entitled to greater weight than the opinions of treating or examining sources. (See SSR 96-6p).

4. Use of personal physician of ALJ (or of ALJ's family member) as ME may appear to be conflict of interest. If such ME used (e.g., only ME in area with necessary qualifications, etc.), ALJ should make full disclosure on record of such. This will afford claimant/representative opportunity to object. If objection is made, ALJ must rule on objection. ALJ may proceed with hearing, disqualify himself/herself, or reschedule hearing with another ME. (December 2, 1993, memorandum from Acting Chief Judge; memorandum notes opinion from special counsel being sought)

5. State agency medical consultants' RFC opinions considered medical opinions (404.1512, 1527, 416.912, 927; HALLEX I-2-115; CALJ November 1990 Reminder; Jones v. Sullivan, 954 F.2d 125 (3rd Cir. 1991), 36 S.S.R.S. 189), SSR 96-6p.

6. Use of MEs in complex cases for explanation of medical problems in terms understandable to layperson is

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proper. Richardson v. Perales, 402 U.S. 389 (1971);
SSR 71-53c

7. Physicians and psychologists employed by state agency may not serve as OHA medical expert. However, physician or psychologist on state agency list of consultative evaluators may serve as OHA ME but not on the same case (February 24, 1992, memorandum from Acting Chief Judge)

8. Relevant publications:
 - a. Medical Expert Handbook (OHA Publication, Second Edition, April 1992) and Supplement (Title XVI Childhood Disability Cases) (SSA Pub. No. 70-007, June 1994)

 - b. Disability Evaluation Under Social Security (SSA Pub. No. 64-039, ICN No. 468600, January 1995)

 - c. Physician Training Manual on Impairment Evaluation (SSA Pub. No. 64-027, June 1988)

 - d. Medical Proof of Social Security Disability, by Dr. David Morton, West Publishing Co.

 - e. Vocational and Medical Expert Programs: Operational Manual, (OHA Publication, August 1991) (outlines qualifications, recruitment, blanket

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purchase agreements, rosters, fees, sample forms and letters, etc., for VEs and MEs)

9. Medical Expert Handbook, pages 11-17, provides:

- a. Claimant/representative may question ME, however, ALJ determines propriety of questions asked
- b. ME should not comment on non-medical matters, draw conclusion whether claimant disabled, conduct physical or mental examination of claimant, or evaluate claimant's medical treatment, even if asked
- c. ME should avoid substantive contact with ALJ, claimant, or representative, before or after the hearing
- d. ME should disqualify himself/herself in cases when they have prior knowledge of the case, prior contact with the claimant, or they believe they cannot be completely impartial (although ME is not disqualified merely because s/he testified at a previous SSA hearing regarding the same individual)
- e. ME should not violate the conflict of interest provisions in the Blanket Purchase Agreement

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- f. ME should be familiar with the applicable regulations and rulings