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Appeals Procedure Under Old-Age and Survivors Insurance

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Of increasing importance to lawyers everywhere is a knowledge and understanding of the hearing and review procedure necessary for the settlement of claims arising under Title II of the Social Security Act. The provisions of the original Social Security Act did not include, in its insurance program, benefit provisions for the members of the wage earner's family either upon his retirement or after his death. The Social Security Act Amendments of 1939 not only extended these benefits, but also provided for the hearing of old-age insurance claims on the right to benefits or lump sum payments. Furthermore, under the provisions of the amended Act, any individual, upon request, may challenge the wage record from which his benefits are computed by the Board. Thus, because of the increased number of claims which now arise under the insurance program, to-
together with the inclusion of provisions for administrative hearing and review, there has already arisen a significant number of claims which have advanced to the hearing stage, and it is conceded that their number will steadily increase.5

Although not frequently, it is sometimes necessary for a claimant to rely upon the assistance of legal counsel in the hearing and review procedure. Therefore, the purpose of this article is simply to enumerate and explain the various procedures employed by the Social Security Board for the settlement of a contested claim.

Each individual who alleges entitlement to benefit payments or who seeks a revision of his wage record is required to make application for such benefits or wage record revision. Thus, the individual claiming entitlement to benefit payments must supply proofs, for example, as to age, marriage and death; the individual seeking a wage record revision must show proof of facts concerning the duration of employment or amount of wages paid.

For the purpose of administering the old-age and survivors insurance program the Social Security Board has established twelve geographic regions within the United States of approximately equal population. In each region the Bureau of Old-Age and Survivors Insurance maintains a regional office, and spread throughout all the twelve regions are some 477 field offices. These field offices receive an individual's application and necessary proofs and forward them to the Bureau in Washington, D.C. for adjudication. There they are examined by a staff of adjudicators and reviewers. Where a claim presents a doubtful question of law for which there is no clear precedent, it is transmitted to the General Counsel's office of the Federal Security Agency for legal interpretation. Upon a finding of the facts involved in a particular claim, and a resolution as to all doubtful questions of law involved, the Bureau will make its determination as to whether the claimant is entitled to benefits, or whether the wage record of the particular wage earner should be revised.

If the claimant or wage earner is dissatisfied with the Bureau's initial determination, he may then secure either a reconsideration of his claim by the Bureau, and upon this

5The present number of requests for hearings total nearly 100 a month.
second determination by the Bureau, if he is still dissatisfied, a hearing; or, he may request a hearing immediately after the Bureau's initial determination. The hearing is held by a referee who is an employee of the Social Security Board, but independent of the Bureau of Old-Age and Survivors Insurance. At present, there is one referee assigned to each region who has an office at regional headquarters but who, for the convenience of the parties to the hearing, travels in his region to places of hearing much in the same manner as did the old circuit judge or judge of assizes. Any claimant who is dissatisfied with the result of his hearing may request a review by the Appeals Council composed of three members. This Council has been established in Washington, D.C., by the Social Security Board, and is also independent of the Bureau of Old-Age and Survivors Insurance. Upon exhausting his administrative remedies, the claimant may resort to a civil suit in a Federal District Court.

I. ADMINISTRATIVE ACTION PRIOR TO HEARING

The Social Security Board is authorized to make findings of fact, and decisions as to the rights of any individual who applies for a payment under Title II of the Social Security Act, as amended. This power has been delegated by the Board to the Bureau of Old-Age and Survivors Insurance in connection with the initial and reconsidered determination of claims and to the referees and the Appeals Council in connection with hearings and review.

Because of the tremendous volume of claims which must be decided it has always been imperative to employ an informal procedure for the great bulk of claims, reserving the formal procedure for those claims which are contested.

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6 See, p. 446 infra.
7 See note 3, supra.
8 42 U.S.C. §405(1) (Supp. V 1939) provides that: "The Board is authorized to delegate to any member, officer or employee of the Board designated by it any of the powers conferred upon it by this section * * * * * ."
9 "A vast number of claims will be presented annually under the Railroad Retirement Act and the Social Security Act. Obviously all but a handful of these will and must be disposed of informally. No system of administration could survive procedure which involved formal hearings in all these cases," Report of the Attorney General's Committee on Administrative Procedure, Administrative Procedure in Government Agencies, Senate Document No. 8, 77th Cong. 1st Sess., 1941, at p. 38. It should be noted that the
The Bureau of Old-Age and Survivors Insurance decides claims entirely under an informal procedure, its decision being termed either an "initial determination" or a "reconsidered determination"; the hearing referee and the Appeals Council, on the other hand, employ formal or quasi-judicial procedure. The material which immediately follows relates to the informal administrative procedure employed by the Bureau for the disposition of the great majority of all the claims arising under the Social Security Act.

1. Initial Determination

The initial determination of a claim by the Bureau of Old-Age and Survivors Insurance is based upon facts arising from one of five questioned situations. First, whether an individual, having filed an application for benefits or lump-sum payments, is actually entitled to them. This situation is commonly referred to as "entitlement," and involves both "coverage" and "status" questions. Second, whether there should be a modification in the amount of benefits or lump-sum payments to which an individual has been found to be entitled. Third, whether the payment...
benefits awarded to an individual should be terminated.\textsuperscript{14} 

\textit{Fourth}, whether an individual, for the purpose of parent's insurance benefits, was wholly dependent upon and supported by a fully insured individual at the time of such individual's death.\textsuperscript{15} 

\textit{Fifth}, whether an individual's wage record should be revised.\textsuperscript{16} The individual whose right to payment is decided by the Bureau under any of these first four situations and whose wage record might be revised under the fifth situation is referred to as the "party to the determination," and is mailed a written notice by the Bureau of its initial determination.\textsuperscript{17} Incorporated in every notice of initial determination is a statement advising the claimant that he can, if he is dissatisfied with the determination, request either a reconsideration by the Bureau or a hearing before a referee of the Social Security Board. \textsuperscript{18}

2. Reconsideration or Hearing

Pursuant to the provisions of the Social Security Act Amendments of 1939, any individual, or wife, widow, child or parent of the individual whose rights may be prejudiced by the Bureau's initial determination is entitled to reasonable notice and an opportunity for a hearing.\textsuperscript{19} A hearing is not available to the individual, however, unless he files a request for a hearing. Accordingly, the Board's regulations afford the individual an opportunity for a review by the Bureau of its initial determination prior to his request for a hearing. Thus, subsequent to the initial determination, an individual may request either that a reconsideration be made by the Bureau of its initial determination, or that an actual hearing be held.\textsuperscript{20} This option of administrative action is given to the individual solely to facilitate a prompt and fair

\textsuperscript{14} Soc. Sec. Bd. Reg. 3, §403.706 (a) (3), as amended.
\textsuperscript{15} Id. §403.706 (a) (4), as amended.
\textsuperscript{16} Id. §403.706 (a) (5), as amended.
\textsuperscript{17} Id. §403.706 (b) (5), as amended. No written notice is necessary, however, where there is a determination made by the Bureau that a party's entitlement to benefits has ended because of such party's death.
\textsuperscript{18} Id. §403.706 (b), as amended. It should be noted that an initial determination may be revised by the Bureau, either upon the Bureau's own motion or upon the petition of any party when it clearly appears that such determination was procured by misrepresentation or fraud, Sec. 403.711 (b) of Regulations No. 3, as amended.
\textsuperscript{19} 42 U.S.C. §405 (b) (Supp. V 1939).
adjudication of his claim. Successful administration of the old-age and survivors insurance system requires that expense, technicalities and complexities of proceedings be held to a minimum, but not to an extent which would sacrifice accuracy and fairness in the system. In the effort to maintain the proper administrative balance it is therefore frequently necessary to afford an individual an option of several procedures. Thus, subsequent to the initial determination, when it appears that there is new documentary evidence which clearly would alter the Bureau's initial determination, a reconsideration by the Bureau of its initial determination, involving less delay and expense, would be more advantageous to the individual. The situation may be one, however, where there is no new documentary evidence, and where it is apparent that only oral testimony would more fully develop the facts favorable to the individual. Under these circumstances it would, of course, be advisable for the individual to request a hearing of his claim.

Although the individual is made aware of this option of administrative action, no effort is made to influence him as to which procedure he should adopt, unless such advice is requested by him of the Bureau's field office manager. In any event, his election for a reconsideration of the Bureau's initial determination does not preclude him from later requesting a hearing, if, subsequent to the reconsideration, he is still dissatisfied. 21

3. Reconsideration

If the individual elects to pursue his right to a reconsideration by the Bureau, 22 his request must be in writing and filed with the Bureau, or at its field office, within six months from the date of the mailing notice of the initial determination. 23 The party to the initial determination and

21 Id. §403.707, as amended.
22 Id. §403.708(a), as amended.
23 Id. §403.708(b), as amended. An extension of time may be given by the Bureau, however, upon the filing of a petition which shows good cause why the reconsideration was not filed within the required time. Sec 407.711(a) of Regulations No. 3, as amended. A request for a reconsideration of the Bureau's determination relative to the wage record revision may be filed at any time after the mailing of the notice of the initial determination, provided such request is filed within 60 days following the fourth calendar year after wages in question were paid or are alleged to have been paid. Sec. 403.708(b) of Regulations No. 3, as amended; 42 U.S.C. §405(e)(4) (Supp. V. 1939).
any individual who makes a showing in writing that his
rights with respect to benefits or a lump-sum will be pre-
judiced may file a written request for a reconsideration.24
After the Bureau reconsiders the initial determination, it
issues a reconsidered determination which either affirms or
revises, in whole or in part, the initial determination.25 A
written notice of the reconsidered determination is then
mailed to the parties which states the basis for such deter-
mination and informs the parties of their right to a hear-
ing.26

II. THE HEARING

A difficult line for demarcation is the termination of
the Bureau’s jurisdiction of a particular claim and the be-
inning of the hearing procedure. The initial determination,
the reconsideration of such determination, or the decision
that reconsideration is unnecessary are clearly in the ex-
clusive province of the Bureau. Throughout this entire ad-
ministrative process it is the Bureau, its field office man-
agers and representatives who contact the dissatisfied party,
advise him of what further action he may take, and help
him to secure additional evidence. The Bureau’s reconsider-
ation represents its final effort to dispose of the claim in a
satisfactory manner. It might be said that the reconsider-
ation marks the cessation of jurisdiction of the Bureau.
Yet, if the claimant is dissatisfied with the reconsideration
and requests a hearing, the Bureau’s field offices continue
to assist the claimant in his preparation for the hearing.
Thus, the Bureau remains somewhat as an advisory party
to the dissatisfied claimant even when its own efforts to
successfully adjudicate his claim apparently failed.

1. Prerequisites for Hearing

All dissatisfied parties to the Bureau’s initial or re-
considered determination are entitled to a hearing.27 The

24 The request for a reconsideration, like that for a hearing, may be
filed by an individual whose rights are prejudiced by the initial
determination, Sec. 42 U.S.C. §405(b) (Supp. V 1939); Note 19,
supra. As to what constitutes "prejudice" see p. 455 infra.
26 Id. §403.708(f), as amended. Revision for error also applies to a
reconsideration in the same manner as it does for an initial
determination. See note 18, supra.
request for a hearing must be in writing and filed with the field office, with a referee, or with the Appeals Council of the Social Security Board. If the dissatisfied party did not seek a reconsideration, then the request for the hearing must be filed within six months from the date of the mailing notice of the initial determination. If the individual is a dissatisfied party to a reconsideration the request for hearing may be filed at any time prior to the mailing of notice of the reconsideration if forty-five days have lapsed since his request was made for the reconsideration, or, it may be filed within three months after the date of the mailing notice of the reconsideration. These time period requirements do not apply, however, where the hearing will concern a revision of the Board’s wage records except that where a request for a reconsideration has been filed, the request for a hearing may not be filed until after the mailing of the notice of the reconsideration unless such notice has not been mailed within forty-five days after the filing of the request for reconsideration.

2. Parties

Any individual who is a party to an initial determination or a reconsideration may be a party to the hearing. Any other individual may be a party if his rights may be prejudiced with respect to benefits or lump-sum payments. "Prejudice" may be shown by an individual other than the individual who has filed an application for benefit or lump-sum payments, or, in a wage record revision case, by the wage earner or, if he is dead, his widow, child or parent.

27 42 U.S.C. §405(b) (Supp. V 1939); Sec. 403.709(a) of Regulations No. 3, as amended.
28 Soc. Sec. Bd. 3, §403.709 (b), as amended. An extension of time, however, may be given to the dissatisfied party both when he requests a hearing after an initial determination and a reconsideration. Id. §407.711(a), as amended. See note 23, supra.
29 Id. §403.709(b), as amended.
30 Id. §403.709(b), as amended. The time period for the request of hearing with respect to revision of the Board’s wage records is the same as that required for a reconsideration involving revision of the Board’s wage records. See note 23, supra.
31 Id. §403.709(c), as amended.
32 Ibid.
33 Several examples may more clearly illustrate the meaning of "prejudice":

(a) X, wage earner, has been denied primary insurance benefits by either an initial determination or reconsideration.
Although the determination of the question of "coverage" of claimants may also entail a determination of the coverage of his employer, it is not within the province of the Social Security Board to determine tax liability of employers and for that reason employers are not parties, but may oftentimes be material witnesses.\textsuperscript{34}

3. Issues

The Bureau, by the development of the facts of a particular claim prior to the hearing, endeavors to secure all the possible evidence relevant to the particular claim. Thus, when the claim reaches the hearing stage, the issue involved is clear and sharply defined. It involves one of the five situations which formed the basis of the initial determination.\textsuperscript{35} Some of the issues will be similar in nature to those found in the ordinary court proceeding, such as age, death, relationship and personal identity of insured individuals and beneficiaries. Other issues, however, will arise which are peculiar only to the Social Security Act, such as, revision of wage records, termination or deduction of payments, whether an individual was in "employment," or whether such "employment" was excepted from the provisions of the Act. Thus the similarity of the hearing of a contested claim with ordinary court proceedings depends principally upon the issue involved.

4. Preparatory Conference

Prior to the hearing, the Bureau's field office offers an opportunity for consultation between the claimant and

\begin{itemize}
  \item Y, the wife of X, would not be entitled to a wife's insurance benefit unless X is entitled to primary insurance benefits. Therefore Y's rights are prejudiced, and is a proper party to a hearing with respect to X's right to primary insurance benefits.
  \item (b) X, wage earner, is survived by Y who alleges to be the widow of X. Z, who has filed application for parent's insurance benefits, is X's parent. The initial determination or reconsideration has decided Y to be the widow of X. Therefore Z's rights are prejudiced and is a proper party to the hearing since a condition for the allowance of parent's benefits is that X was not survived by a widow.
\end{itemize}

\textsuperscript{34} Nor are the rights of the employer "prejudiced." Thus, for example, if X, wage earner, seeks a revision of his wage record, Y, as his employer, has no right to benefits or lump-sum payments growing out of X's wage record. Therefore, Y has no right which is prejudiced, and is not a proper party to the hearing.

\textsuperscript{35} See p. 443 supra.
a member of the field office staff. At this conference the claimant is given his application for a hearing and is assisted generally in the preparation of his case. Extreme care is taken to clarify for the claimant the exact issues involved in his claim; to acquaint him fully with the evidence that will be necessary for a favorable decision; and to suggest witnesses for the hearing. Finally, there is discussed his option to dispense with the hearing and have a review of the claim on the record. By eliminating unnecessary and irrelevant material, the preliminary conference serves the same function as the "pre-trial conference" in federal court procedure.

5. Notice, Time and Place, Abandonment of Hearing

The Social Security Act specifically requires that reasonable notice be given to any individual who is a party to the hearing. Upon receipt by the referee of the application for a request for a hearing, he will schedule the hearing for a time and place mutually convenient to all concerned, and notify the parties in writing as to the time and place selected. The notice must be mailed to the last known address of the parties or delivered to them by personal service not less than ten days prior to the time fixed for the hearing. The referee may change the time and place of hearing upon his own motion, or for good cause shown by a party upon that party's filing with the referee at the earliest opportunity his objections in writing. Reasonable notice also is required to be given the parties of any change in the time or place of the hearing.

If the party, or his representative, does not show good cause why he cannot appear prior to the hearing, and he is absent from the hearing, the referee will mail the party a notice requesting him to show good cause why he did not appear. If the party does not respond to this request within

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39 See p. 450 infra.
40 42 U.S.C. §§405(b), 405(c) 3 (Supp. V 1939).
41 Soc. Sec. Bd. Reg. 3, §403.709(e), as amended.
42 Ibid.
15 days it will be considered that he has abandoned the hearing. 43

6. Optional Review on Record; Dismissal

As a result of the preparatory conference, it may become evident that there is really no conflict in the evidence concerning the claimant's or wage earner's case which requires oral testimony and that the dissatisfaction with regard to the Bureau's determination or reconsideration arose over the conclusions of fact drawn from the evidence or the legal consequences of these facts. In this case, the parties may waive their right to appear at the hearing and present evidence. 44 For the exercise of this option, however, it is necessary that all the parties to the hearing give their consent. 45 In this event the referee considers the evidence set forth in the file on the case and on the basis of this material gives his decision. 46 At any time before the referee's decision, however, any party to the hearing may reclaim his procedural right and request that the parties be required to appear and present evidence. 47 But if there are facts in issue which can only be developed by oral testimony, a referee may require that a hearing be held regardless of the fact that all the parties have requested a waiver of the hearing. 48 The referee quite obviously is not frequently confronted with this situation.

All the parties to the hearing, or one party having the consent of all the parties, may request at any time prior to or during the course of the hearing that it be dismissed by the referee. 49

7. Conduct of Hearings

Although the hearing before the referee has been classified as the formal part of the administrative process in contrast to the informal adjudication of claims by the Bu-

43 Ibid.
44 Ibid. §403.709 (i), as amended.
45 Ibid.
46 Ibid.
47 Ibid.
48 Ibid.
49 Ibid. §403.709 (j), as amended.
reau of Old-Age and Survivors Insurance, the proceedings are relatively informal in comparison with judicial proceedings. Except for the formalities entailed by the requirements that witnesses testify under oath and that the proceedings be recorded by a stenographer, strict formalities are not observed. Strict formalities hinder the claimants, who often appear without representatives, and who should be encouraged to tell their own stories as simply and naturally as possible.

The referee usually opens the hearing by advising the parties of their privilege to state any facts which they deem relevant and by assuring them that they will not be prejudiced by their lack of knowledge of courtroom procedures. The parties are also allowed the privilege of asking any questions relative to the proceedings, in order that they may know what is happening at each stage. The referee maintains the attitude that the purpose of the hearing is to receive and consider for the purposes of his decision all evidence relevant to the issues inquired of at the hearing. An "open and fair atmosphere and a receptive presiding officer," considered by the Attorney General's Committee as the minimum requirements of a fair hearing, are exceeded by the provision for hearings before referees of the Social Security Board. Most hearings, except in those cases involving multiple claimants for a single benefit, are ex parte hearings, i.e., there are no adversaries. The referee not only affords the parties to the hearing full opportunity to bring forward all facts which they wish to present, but also takes the affirmative responsibility of "inquiring fully into the matters at issue."

Since the Social Security Board is not a regulatory but a benefit-paying agency, the need for public hearings does not seem to be so important as it does in the formulat-

50 See note 9, supra.
52 Administrative Procedure in Government Agencies, op. cit. supra note 9, at 69.
53 Administrative Procedure in Government Agencies, op. cit. supra note 9, at 68.
54 Soc. Sec. Bd. Reg. 3, §403.709(g), as amended.
ing of regulations which will affect the public generally. Nevertheless, the public is not excluded from the hearings except in cases where "intimate matters of scandalous nature" are involved. The decision as to what cases fall within the latter class rests with the referee. The regulations provide that "the hearing shall be open to the parties and to such other persons as the referee deems necessary and proper." Because of the nature of the claims that reach the hearing stage, a substantial percentage of the cases fall within this private category. As a matter of practice, the referee admits to the hearing anyone having a legitimate interest in the proceedings and anyone requested by the parties. An effort is made to avoid undue publicity. This is done solely for the purpose of protecting claimants' feelings and avoiding any circumstances that would cause the parties to be unduly reticent about stating their cases.

The hearing is begun by the referee introducing in evidence all the relevant papers from the claims file on which the Bureau of Old-Age and Survivors Insurance made its initial determination. The purpose of introducing these documents is to relieve the referee of the necessity of duplicating the investigative work that has already been done by the staff of the Bureau. This procedure does not, however, militate against a hearing that is completely independent of the initial determination. The referee has not participated in any of these investigations, and these papers are simply introduced along with other documents and the testimony of witnesses as some evidence to be considered by the referee and as some evidence forming a part of the record.

After the introduction of these documents the referee proceeds to examine the witnesses. The referee may examine the witnesses or allow the parties or their representatives to do so. If the referee conducts the examination of the witnesses, he is required to allow the parties to the

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55 Administrative Procedure in Government Agencies, op. cit. supra note 9, at 68, also Ch. VII.
56 Soc Sec. Bd. Reg. 3, §403.709(g), as amended.
57 Ibid.
58 See p. 451 supra.
59 As to the desirability of shortened procedure, see Administrative Procedure in Government Agencies, op. cit. supra note 9, at 69.
60 Soc. Sec. Bd. Reg. 3, §403.709(g), as amended.
hearing to suggest matters as to which they desire the witnesses to be questioned, and the referee must question the witnesses with respect to such matters if they are relevant and material to the issues.\footnote{Ibid.}

The claimant is usually allowed to testify first. He is given full opportunity to make any statements relevant to the issue, and the referee assists him by asking questions designed to bring out all the facts of which the referee thinks the claimant may have knowledge.\footnote{See p. 455 infra and p. 450 supra.} The attitude of the referee in conducting the examination is that of a sympathetic solicitor helping the claimant, rather than that of a hostile prosecutor. After the claimant is examined the referee proceeds in a similar fashion to examine all other witnesses who have been brought into the hearing, and receives in evidence all the pertinent documents.

If the referee believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing from time to time or he may, prior to mailing notice of his decision, reopen the hearing for the receipt of additional evidence.\footnote{Soc. Sec. Bd. Reg. 3, §403.709(e).} In addition to according parties to the hearing full opportunity to present all relevant evidence, the parties upon their request are allowed a reasonable time for the presentation of oral arguments or for the filing of briefs. The regulations provide no definite order in which the evidence shall be presented, and the procedure of the hearing generally, except for the specific requirements of the regulations and the Social Security Act and the Amendments of 1939 is left to the discretion of the referee. This discretion is limited only by the requirement that the procedure "shall be of such nature as to afford the parties a reasonable opportunity for a fair hearing."\footnote{Id. §403.709 (g), as amended.}

8. The Referee

The referee's duties have been outlined in the previous section. It may, therefore, suffice here to indicate only his official capacity and the scope of his powers. The Hearing and Review system is under the supervision of the of-
office of the Appeals Council. The referee is, therefore, under the administrative supervision of the chairman of the Appeals Council. The Appeals Council is in turn under the administrative supervision of the Social Security Board, but it is important to note that the Hearing and Review organization known as the “Office of Appeals Council” is not an integral part of the Bureau of Old-Age and Survivors Insurance, but is a separate office. As a result of this separation the referee is able to conduct an inquiry and render a decision that is entirely independent of the Bureau of Old-Age and Survivors Insurance, which conducted the initial investigation and rendered the initial determination.

The referee’s only responsibilities are to conduct hearings and render decisions. He does not participate at any stage of the initial investigation and initial determination. Each case that advances to the hearing stage comes to the referee as a “new case.”

The referee travels with his reporter to the place of hearing, which is arranged to suit the convenience of the claimant. While some of the referees are not lawyers, they have all been specially trained in the administrative tasks they have to perform in connection with Old-Age and Survivors Insurance claims. They have access to the advice of the Office of the General Counsel on legal questions. The general supervision of the chairman of the Appeals Council and the Consulting Referee assists them in achieving consistent and uniform application and interpretation of the Social Security Act and the Social Security Board’s Regulations. Yet to a large extent the independence of the referee as a hearing officer is preserved, and much weight is attached to his findings and conclusions when his cases are appealed to the Appeals Council. The referee’s findings and decision are final in all cases that are not (1) revised for error, (2) reviewed by the Appeals Council, or (3) reviewed by the courts after refusal to review by the Appeals Council.

65 The failure to separate these functions has been the subject of much adverse criticism in some agencies.
66 Administrative Procedure in Government Agencies, op. cit. supra note 9, at 384.
67 The Administrative Tribunal as distinguished from the Office of the Appeals Council.
The Regulations expressly prohibit a referee from conducting a hearing in which he is personally prejudiced or partial with respect to any party. The referee is empowered to consider objections to his conducting the hearing and “according to his determinations either proceed with the hearing or withdraw.” If he decides to withdraw, another referee is designated by the chairman of the Appeals Council to conduct the hearing. If the referee does not withdraw, the objecting party may present his objections to the Appeals Council as a reason why the referee’s decision should be revised or a new hearing held before another referee.

9. Evidence

The Social Security Act Amendments of 1939 provide that “evidence may be received at any hearing before the Board, even though inadmissible under rules of evidence applicable to court procedure.” This does not mean, however, that “everything goes.” Some discretionary power is given to the referee in determining what evidence is “relevant and material to the issues.” The possibility of court review (section 405(g) of the Act), however, disposes the referee to let in evidence which sometimes may be of doubtful relevance. Yet demands of expeditious disposition of claims militates against too voluminous records. Evidence that is merely repetitious or cumulative is generally excluded. The referee always considers the reliability and the probative value of evidence in reaching his decision.

The bulk of the record consists principally of the transcript of testimony and the exhibits. All testimony is given

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69 Ibid.
71 This function is delegated to the hearing referee pursuant to 53 Stat. 1368(1939) 42 U.S.C.A. §405(a) (Supp. 1940).
72 53 Stat. 1368(1939), 42 U.S.C.A. §405(b) (Supp. 1940). See also Sec. 403.709(g), Regulations No. 3, as amended.
73 Soc. Sec. Bd. Reg. 3, §403.709 (g), as amended.
75 “The ultimate test of admissibility must be whether the proffered evidence is reliable, probative and relevant.” Administrative Procedure in Government Agencies, op. cit. supra note 9, at 71.
under oath or similar affirmation. The exhibits consist of documents from the claims files, certified affidavits or depositions, and other documents relating to the claims such as sales manuals, birth certificates, marriage records, etc. The wage record of an individual established by the Social Security Board pursuant to section 405(c) (1) (42 U.S.C.A. 405) is conclusive evidence of wages earned after four years and sixty days except that such wage records may be thereafter revised by the Board to conform its records with tax returns filed by employers with the Bureau of Internal Revenue.

As indicated in the section on Conduct of Hearings, no formal burden of proof is imposed on any party to the hearing. The referee simply "inquires into all the facts" and makes his findings and conclusion on the basis of the evidence adduced.

10. Witnesses and Subpoena

The Social Security Act gives the Board specific power to issue subpoenas for the attendance and testimony of witnesses and for the production of any evidence which may be material and relevant to the issues involved. Thus, any individual whose testimony is deemed necessary for the hearing, or any books, records, correspondence, papers, or other documents which are material and relevant to the issues under consideration may be brought to the hearing by subpoena. The Board has delegated this power to issue subpoenas to the referees, members of the Appeals Council, or any other duly authorized employee of the Board. The Act requires that subpoena be served either by delivery or by registered mail, and that the verified return, or if served by registered mail, the returned post office receipt signed by the individual served, constitute proof of service. It is also stipulated in the Act that subpoenaed witnesses will be paid the same fees and mileage as paid to witnesses in the United States District Courts.

Not only may the individual authorized by the Board

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76 Soc. Sec. Bd. Reg. 3, §403.709(g), as amended.
77 42 U.S.C. §405(d) (Supp. V. 1939).
79 42 U.S.C. §405(d) Supp.)
80 Ibid.; see also Soc. Sec. Bd. Reg. 3, §403.709(f), as amended.
issue subpoenas on his own motion, but also he may issue them upon the request of any party to the hearing. Such party must file his request within 5 days prior to the time fixed for the hearing with the referee or a field office of the Bureau. The request must specifically designate the witness or documents to be produced and it must sufficiently identify by address, location and description, the witness or document which is to be subpoenaed. The party requesting the subpoena must also state the pertinent facts which he expects to establish by the testimony of the witness or by the document to be subpoenaed, and that such facts could not be reasonably established by other evidence without the use of the subpoena.

By the terms of the Act the enforcement of the subpoena, upon the application of the Board, is given to the District Court of the United States for the district in which that person is found or resides or transacts business. Failure of the individual to appear and give testimony or to produce evidence is punishable by the District Court as contempt. Nor will any person who is subpoenaed or ordered by the United States District Court to appear and give testimony or produce evidence be excused on the ground that such testimony or evidence would incriminate him or subject him to a penalty or forfeiture; but such person is given the right to claim his privilege against self-incrimination, and if this privilege is claimed he shall not be subject to any penalty or forfeiture except if his testimony is perjurious.

11. Remand

If new and material evidence is adduced at the hearing which was not before the Bureau at the time its determination was made, the referee may in his discretion remand the case to the Bureau.

81 Sec. 403.709(f) of Regulations No. 3, as amended.
82 Ibid.
83 Ibid.
84 Ibid.
86 Ibid.
Although the Attorney General's Committee in April 1940 anticipated that "one of the perplexing problems which will no doubt arise during hearings before referees is the proper course to be pursued when evidence not previously offered in support of the claimant's case is for the first time produced at the hearing," it now appears that the complexity of this problem was overestimated. The power to remand is discretionary with the referee. No case has come to the attention of the writers where there has been a remand for "flagrant failure" to produce affirmative evidence. Perhaps this is due to the fact that every claimant will naturally submit to the Bureau all the evidence which he thinks will support his case. Of course, cases of fraudulent concealment of material facts adverse to claimant's interest will naturally arise. But the referee's responsibility to get the complete facts includes the duty to get all adverse facts. Moreover, cases which reach the hearing stage have been wholly or partially disallowed by the Bureau and new adverse evidence simply strengthens the Bureau's original disallowance. Nevertheless, the referee generally renders his decision in such cases.

Cases involving multiple claimants sometimes bring forward new evidence adverse to the claimant who has already been paid or who is receiving benefits. But in such cases all persons claiming the benefit are made parties to the hearing and are bound by the referee's decision.

The contingency of remand should never be an impediment to the introduction of evidence at the hearing. Although there are steps preliminary to the hearing, the hearing is necessarily in the nature of a de novo proceeding and the referee attempts to get every material fact in the record. The referee usually renders a decision in every case where he has all the evidence before him. To exercise the alternative of remanding too frequently would slow down the administrative process. The most frequent type of remanded case occurs in wage record revision cases when the new evidence discovered is of such a nature that the referee has

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89 Ibid., pp. 18-19.
91 Basic Provisions, pp. 21-22.
92 See p. 447 supra.
no substantial doubt but that the Bureau would make the correction of the wage record if it had had such evidence.

If the Bureau does not revise its previous determination, the Bureau must return the case to the referee for his decision or for certification by him to the Appeals Council. If the Bureau revises its determination, the claimant, if he is still not satisfied with the Bureau's revised determination as a result of the referee's remand, may appeal directly to the Appeals Council.\(^93\)

12. Referee's Decision

After the close of the hearing, the referee is required to render his decision "as soon as practicable."\(^94\) Despite the elasticity of the time requirement in practice, such decisions are usually, except in difficult cases, rendered within thirty days after the hearing. If the difficulty of the question involved\(^95\) occasions a delay in excess of thirty days, claimants are notified of the occasion for the delay.

The referee may, after the hearing, remand, certify to the Appeals Council, or issue his own decision. The decision of the referee, except in cases involving a review of the claims file,\(^96\) is based on the evidence adduced at the hearing. Record reviews are the exception rather than the rule, but the referee is always furnished with a photostatic copy of the claims file and appropriates for his record as exhibits all documents which contain evidence material to the question in issue. The claimant, however, is always apprised of such procedure and accorded full opportunity to examine such documents and record any objection to the introduction of such documents.

The referee's decision is made in writing and is required to contain "findings of fact" and a statement of reasons for the decision.\(^97\) Of the two requirements, it is apparent that the claimant is most interested in the referee's findings of fact. Since the referee has the opportunity to confront

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\(^94\) Id. §403.709 (k).
\(^95\) Administrative Procedure in Government Agencies, op. cit. supra note 9, at 51.
\(^96\) Id. §403.709 (l), Regulations No. 3, as amended.
\(^97\) Id. §403.709 (k), Regulations No. 3, as amended.
the witnesses and judge their credibility, the referee's find- 
ings of fact are generally not disturbed either on review by the consulting referee98 or by the Appeals Council so long as such findings are supported by substantial evidence.99

All parties to the hearing are furnished with a copy of the referee's decision. The statement of reasons for the decision are particularly important to parties desiring to appeal the referee's decision.

The decision of the referee is final unless it is reviewed by the Appeals Council100 or unless it is "revised for error."101

13. Coordination of Referees' Decisions

For the purpose of assuring uniform application and interpretation of the Social Security Act, all decisions of the referees which reverse or modify the previous determination of the Bureau,102 or cases about which the referees "are in doubt as to the correct decision,"103 are submitted to the Consulting Referee.104 No mention is made of this procedure in the regulations. This may indicate that eventually this procedure will be eliminated.

The function of the consulting referee is to see that the referee has properly applied the provisions of the Act to his findings of fact and to assist the chairman of the Appeals Council in supervising the work of the referees. In performing the former function, the Consulting Referee is guided by the precedent opinions of the General Counsel's Office, the opinions of other referees, and the opinions of the Appeals Council.

If the Consulting Referee finds that the referee's find- 
ings of fact are not supported by substantial evidence or if the Consulting Referee concludes that the referee has mis-applied the provisions of the law, he may forward to the referee his suggestions for revision of his decision.

98 See Coordination, infra.
99 See p. 462 infra.
100 Soc. Sec. Bd. Reg. 3, §§403.709(l) and 403.710(b), as amended.
101 Id. §403.711(b), as amended.
102 See p. 453 supra.
103 See Basic Provisions. Obviously, cases in the latter category will become decreasingly fewer as the referees become more familiar with their work.
The referee may, if he agrees with the Consulting Referee's suggestions, revise his decision, or he may certify the case to the Appeals Council. 105

14. Appeals
Referees' decisions may be reviewed by the Appeals Council (1) at the request of the claimant, or (2) by the Appeals Council on its own motion. 106

The request for review may be made to the Appeals Council by any party to the hearing. 107 The request must be in writing and filed at any office of the Social Security Board or with the Appeals Council within 30 days from the date of mailing notice of the referee's decision or the Bureau's revised determination. 108 The Appeals Council may, in its discretion, decline a party's request for review of a referee's decision. In the event the request for review is denied, the party may appeal directly to a United States District court. 109

If a case comes before the Appeals Council, either on its own motion or on certification 110 by the referee, the parties to the hearing are mailed a notice of such action "at their last known address." 111 No definite length of time for such notice is prescribed, except that the regulations provide that "the parties shall be given, upon their request, a reasonable opportunity to appear before the Appeals Council for the purpose of presenting oral argument. The parties, upon their request, are given a reasonable opportunity to file briefs or other written statements of contentions." 112 The briefs need not be in any particular form, but if there is more than one party to the hearing briefs must be filed in sufficient number to supply copies to all the other parties. Such briefs may be filed any time before the Council renders its final decision.

105 See p. 462 infra.
106 Soc. Sec. Bd. Reg. 3, §403.710(b) and 403.711(b).
107 See p. 447 supra.
110 Id. § 403.709(k), as amended.
111 Sec. 403.710(a), Regulations No. 3, as amended.
112 Presumably, no less than ten days' notice will be given unless the parties waive their right to such notice. Sec. 403.709(e), Regulations No. 3, as amended, requires ten days' notice before the original hearing.
15. Procedures Before the Appeals Council

The action of the Appeals Council is always a review of the record. A stenographic record is made of all proceedings before the referee.\(^{113}\)

The regulations\(^{114}\) provide that "a copy of the transcript of evidence adduced at the hearing shall be made available to the parties" or, where the hearing before the referee has been waived,\(^{115}\) copies of the documents which are the evidence in the case.

The record that goes up to the Council need not be prepared by the appellants. The records are typed at the Board's own expense. The only thing necessary for the appellant to do in order to obtain a review by the Appeals Council is simply to request such a review in writing addressed to the Appeals Council. Like the hearing, there are no costs or fees for such appeal.

New evidence cannot be introduced at the Appeals Council proceeding "except where it appears to the Council that additional, material evidence is available which may affect its decision."\(^{116}\) In such event, the Council will designate a referee, or member of the Council, before whom the evidence will be introduced, recorded and made a part of the record which the Council reviews. Before such additional evidence can be presented, notice must be mailed to all parties at their last known address unless notice has been waived; and the parties must be given a reasonable opportunity to present evidence which is relevant and material to the issue likely to be affected by the additional evidence.

16. Decisions of Council

If it appears to the Council that the conduct of the hearing by the referee was not in substantial compliance with section 403.709 of the regulations, the Council may remand the case to the referee for further hearing and decision "where such action is reasonably necessary for the correction of error."\(^{117}\)

\(^{113}\) Soc. Sec. Bd. Reg. 3, §403.709 (g), as amended.

\(^{114}\) Id. §403.710, as amended.

\(^{115}\) Id. §403.709 (i), as amended.

\(^{116}\) Id. §403.710 (a), as amended.

\(^{117}\) Id. §403.710 (d), as amended.
The decision of the Appeals Council, where the case is not remanded to the referee, is based on the referee's record and such additional evidence as may be taken by the Council in accordance with section 403.710(a) and (b).\(^\text{118}\)

The decision of the Council is required to be in writing and to contain findings of fact and a statement of reasons. Obviously, the Council by virtue of this power can modify the findings of the referee, but the findings of fact by the Council are the ultimate findings of fact made by this administrative agency. These findings of fact cannot be overruled so long as they are supported by substantial evidence in the limited court review accorded by the Social Security Act Amendments of 1939.\(^\text{119}\)

A party has not exhausted his administrative remedy until after he has obtained the decision of the Appeals Council on his claim or the Council's denial of his request for review.\(^\text{120}\) The action of the Council is, therefore, the last step in the administrative process.

The decision of the Appeals Council is final and binding on the parties unless a civil action in a United States District Court\(^\text{121}\) is begun or unless the decision is revised for error in accordance with section 403.711(b) of Regulations No. 3, as amended.

17. Revision for Error, Time Extension, etc.

Except in the case of wage record questions which are barred after four years and sixty days\(^\text{122}\) the Council may, on its motion, or at the request of a party to the hearing, revise its decision "when it clearly appears that there was an error of fact or law in such decision or that such decision was procured by fraud or misrepresentation."\(^\text{123}\)

In the event of such revision, notice of the revision must be mailed to all parties to the hearing and the revised decision is final and binding on the parties unless within 60 days such party requests a hearing on the revised determina-

\(^{118}\) Id. §403.710(a), as amended.


\(^{120}\) Soc. Sec. Bd. Reg. 3, §403.709(l), as amended.


\(^{122}\) 42 U.S.C. Supp. V, Sec. 405(c).

\(^{123}\) Soc. Sec. Bd. Reg. 3, §403.711(a), as amended.
tion. In such event, a new hearing will be held on the revised determination.

18. Extension of Time

The Appeals Council, when requested in writing by any party to a hearing, may "on good cause shown" extend any of the time limits specified, except the statutory limitation on wage record questions.124

19. Court Review

The jurisdictional minimum of $3,000 is waived in all Social Security claims.125 After the final decision of the Social Security Board (usually the Appeals Council except for the rare cases which may be reviewed by the Board itself), "irrespective of the amount in controversy," any individual who was a party to the hearing "may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow."126

The action shall be brought in the District Court where such individual has his legal residence or, if no residence, in the United States District Court for the District of Columbia.

As a part of its answer, the Board is required to file a certified copy of the transcript of the hearing record, including the evidence upon which the findings and decision complained of are based.

The court has the power to modify, affirm, or reverse the Board's decision, or to remand the case to the Board.127 The scope of the review is limited.

124 Id. §403.711(a), as amended.
125 "Any individual, after any final decision of the Board made as to a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow." 53 Stat. 1370 (1939), 42 U.S.C.A. §405(g) (Supp. 1940).
126 See p. 461 supra; Sec. 403.711, Regulations No. 3, as amended.
127 "The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the case for a rehearing." 53 Stat. 1370 (1939), 42 U.S.C.A. §405(g) (Supp. 1939).
The findings of the Board as to any fact, if supported by substantial evidence, cannot be disturbed by the Court.\textsuperscript{128}

The Board may have the case remanded to it by filing a request for remand before filing its answer. The court may at any time "on good cause shown order additional evidence to be taken by the Board."

The Board may make its findings on such additional evidence and such findings are reviewable in the same manner as set out above.

The judgment of the court is final unless it is reviewed in the same manner as a judgment in other civil actions, i.e., appeal to the Circuit Court.\textsuperscript{129} Section 405(h)\textsuperscript{130} precludes a court review of the Social Security Board's action in any other manner than that set out in section 405(g).\textsuperscript{131}

### 20. Representatives\textsuperscript{132} and Costs

Any lawyer who should have a client with a claim arising under any of the benefits provisions of Title II of the Social Security Act will wonder just what he can do to assist the client, how he can do it, and what fees are permitted.

Since the benefits payable at the present time are not very large, it is contemplated that most claimants will not be able to afford the expense of retaining a lawyer to help them collect. Every application form has the legend at the

\textsuperscript{128}"The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation described under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations." \textit{Ibid.}

\textsuperscript{129}\textit{Ibid.}

\textsuperscript{130} 53 Stat. 1371(1939), 42 U.S.C.A. §405(h) (Supp. 1940).

\textsuperscript{131} 53 Stat. 1370(1939), 42 U.S.C.A. §405(g) (Supp. 1940).

\textsuperscript{132} "The Board may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Board . . . An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts shall be entitled to represent claimants before the Board upon filing with the Board a certificate of his right to so practice from the presiding judge or clerk of any such court." 53 Stat. 1372(1939), 42 U.S.C.A. §406 (Supp. 1940).
top of it that it is not necessary to retain a lawyer in order to obtain benefits. In most cases this will be true, and the field office staff of the Social Security Board makes every effort to assist claimants in the execution of applications and the assembling of all necessary supporting papers. Moreover, claimants are assisted by the field office staff through all the procedural steps of administrative adjudication, and great pains are taken to explain each step about which the claimants have any questions.

And yet, notwithstanding this helpful attitude, claims for benefits will be denied for reasons that will not placate the claimants, and such claims will find their way to lawyers' offices.

It is then that the lawyer will begin to inquire as to what he can do about it and the fees involved. His financial return is limited. The regulations provide "a fee in an amount not greater than $10 may be charged and received by an attorney who is admitted to practice . . . ," and "upon the petition of such an attorney the Bureau, a referee, or the Appeals Council may for good cause shown authorize the attorney to charge and receive a maximum fee in excess of $10." This restriction is sanctioned by threat of disqualification from practice before the Social Security Board in the event a fee larger than that allowed by the Board is charged.

Although no definite maximum is imposed, where an unusual amount of work is involved, fees up to $25 are sometimes approved. An "unusual amount of work" gen-

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133 The legend is as follows: "It is not necessary to employ anyone to assist in collecting the amount due you. If you need any assistance, communicate with the nearest office of the Social Security Board."

134 Soc. Sec. Bd. Reg. 3, §403.713(d), as amended. "The Board may by rule and regulation prescribe the maximum fees which may be charged for services performed in connection with any claim before the Board under sections 401-409 of this chapter, and any agreement in violation of such rules and regulations shall be void." 53 Stat. 1372 (1939), 42 U.S.C.A. §406 (Supp. 1940).

135 Soc. Sec. Bd. Reg. 3, §403.713(e) (2), as amended; 53 Stat. 1372 (1939), 42 U.S.C.A. §406 (Supp. 1940). "Any person . . . who shall knowingly charge or collect, directly or indirectly, any fee in excess of the maximum fee, or make any agreement, directly or indirectly, to charge or collect any fee in excess of the maximum fee prescribed by the Board, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall for each offense be punished by fine not exceeding $500 or imprisonment not exceeding one year, or both."
APPEALS PROCEDURE

eraly entails assistance at a hearing and the briefing of a
troublesome legal question.

To those whom fees in these amounts appeal and to
those who think primarily in terms of public service it may
be comforting to know that the procedure involved is com-
penatingly simple. The regulations require that both ap-
plications for benefits leading to the initial determination
and the request for hearing must be filed by the individual
claimants or party. The individual claimant must also file
with the Appeals Council a written "Appointment of Rep-
resentative." Thereafter the representative "may make
or give, on behalf of the party he represents, any request
or notice relative to the hearing . . . and shall be entitled
to present evidence and contentions in any proceeding affect-
ing the party he represents and to obtain information with
respect to the claim of such party to the same extent as such
party."

Theoretically, any individual can act as a party's repre-
sentative, but only lawyers who are admitted to the bar
in some State or the District of Columbia or persons who
"make a showing in writing that he has special qualifications
which enable him to render valuable services to a party" and
who are not otherwise prohibited from charging fees may
exact fees for acting as representatives. The writers know
of no instances where fees have been charged by any one

136 See p. 442 supra.
137 For the qualifications of representatives, see 53 Stat. 1372 (1939),
42 U.S.C.A. §406 (Supp. 1940); section 403.713(a), Regulations
No. 3, as amended. With reference to representatives other than
attorneys, the statute provides that the Board "may require of
such agents or other persons before being recognized as repre-
sentatives of claimants that they shall show that they are of good
character and in good repute, possessed of the necessary qualifi-
cations to enable them to render such claimants valuable service
and otherwise competent to advise and assist such claimants in
the presentation of their cases."

138 Soc. Sec. Bd. Reg. 3, §403.713(c), as amended. Such information
may be obtained by having access to the claims file or any other
documents relating to the claim. A copy of such papers can be
mailed to any field office of the Social Security Board and can
be there examined by the representative. These papers will show
what action has been taken on the claimant's application, the
issue decided unfavorably to him, and what additional evidence,
if any, remains to be produced.

139 53 Stat. 1372 (1939), 42 U.S.C.A. § 406 (Supp. 1940); Sec. 403.713(d),
Regulations No. 3, as amended. Criminal penalties are attached to
the violation of the rules governing the conduct of representatives
before the Social Security Board.
other than lawyers, although others, such as relatives or friends, have acted as "representatives."

The rules governing representation are set out in section 403.713(e) of the Regulations. These rules are not harsh. They simply prohibit fraud, require the representatives to obey the criminal laws of the United States, and inhibit the divulgence of confidential information (subsection (e)(4)) or the charging of excessive fees. Responsibility for the ethical conduct of the members of the bar of each jurisdiction is entrusted in the main to the bar associations of each jurisdiction, yet proceedings for disbarment from practice before the Board may be instituted against any representative who fails to observe the minimum requirements.

Notice and right to hearing before such disbarment is assured by section 403.713 of the Regulations.

There are no "costs" to any of the administrative proceedings before the Social Security Board. Unless a claimant engages a lawyer at his own expense, he may proceed from the filing of his original application until he receives a final decision from the Appeals Council without incurring one cent in "costs." All records are typed at the Board's expense, and either the claimant or his representative may have access to examine such transcripts.

Even the record that goes to the District Court is prepared at the expense of the Social Security Board.

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141 Criminal penalties are attached to the violation of the rules governing the conduct of representatives before the Social Security Board.