

§ 1005.16

(1) The respondent or petitioner, as applicable, bears the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and

(2) The IG bears the burden of going forward and the burden of persuasion with respect to all other issues.

(c) Burden of proof in all other exclusion cases. In all exclusion cases except those governed by paragraph (b) of this section, the ALJ will allocate the burden of proof as the ALJ deems appropriate.

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

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

(f)(1) A hearing under this part is not limited to specific items and information set forth in the notice letter to the petitioner or respondent. Subject to the 15-day requirement under §1005.8, additional items and information, including aggravating or mitigating circumstances that arose or became known subsequent to the issuance of the notice letter, may be introduced by either party during its case-in-chief unless such information or items are—

(i) Privileged;

(ii) Disqualified from consideration due to untimeliness in accordance with §1004.130(a)(2)(ii); or

(iii) Deemed otherwise inadmissible under §1005.17.

(2) After both parties have presented their cases, evidence may be admitted on rebuttal even if not previously exchanged in accordance with §1005.8.

[57 FR 3350, Jan. 29, 1992, as amended at 63 FR 46691, Sept. 2, 1998; 65 FR 24418, Apr. 26, 2000]

§1005.16 Witnesses.

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

(b) At the discretion of the ALJ, testimony (other than expert testimony) may be admitted in the form of a written statement. The ALJ may, at his or her discretion, admit prior sworn testimony of experts which has been subject to adverse examination, such as a depo-

42 CFR Ch. V (10–1–04 Edition)

sition or trial testimony. Any such written statement must be provided to all other parties along with the last known address of such witnesses, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing will be exchanged as provided in §1005.8.

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth,

(2) Avoid repetition or needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination of witnesses as may be required for a full and true disclosure of the facts.

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

(1) A party who is an individual;

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

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

[57 FR 3350, Jan. 29, 1992, as amended at 67 FR 11936, Mar. 18, 2002]

§1005.17 Evidence.

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

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, for example, to exclude unreliable evidence.

(c) The ALJ must exclude irrelevant or immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue