



Yikes: Should I Object?!?!

A Conversation with
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Overview to Making Objections

Identify the problem	Identify the rule
<ul style="list-style-type: none">▪ What is going wrong? Be specific.▪ Why is it inappropriate? Be specific	<ul style="list-style-type: none">▪ Be able to articulate at rule▪ Don't need the CFR citation

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Objections Before the Hearing



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Issues in the Notice of Hearing

Scenarios:

- The notice of hearing arrives in the mail. You read the notice and look for these points:
 - Is it noticed to be video? Is that correct?
 - Is the time and place ok?
 - What is the issue identified? Is it a closed period? Correct onset date?



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Objecting to Issues Before the Hearing

- Read the notice when it comes in.
- Watch the deadline to make an objection! Check 20 C.F.R. §§ 404.939 and 416.1439. These are made in writing.
- Be specific about the problem.
- Form of an objection: I write to object to the statement of the issues in the notice of hearing. The notice states that the period at issue is February 3, 2015 to the present. However, this is a closed period case covering February 3, 2015 until September 19, 2020. See Appeals Council Remand Order, Exh. 6A.

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Advance Objections about an ME

Scenarios:

- The notice lists an ME who has not worked for 14 years, has been suspended from medical practice, and has been the subject of multiple med mal lawsuits (with payouts that would bankrupt Canada).
- The notice lists an ME where district courts have challenged the ME's credibility (Kwock and Kahn).

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Timing of Those Objections

- Deadline: Object as soon as possible or at least 5 days prior to the hearing. Check 20 C.F.R. §§ 404.939 and 416.1439.
- Form: I write to object to Dr. Kwock as a medical expert in the upcoming hearing. Dr. Kwock has not practiced medicine for more than 10 years and he has had no practical knowledge for a decade. His gap in knowledge is underscored by numerous federal court cases questions the quality of his testimony. See *Hickman v. Saul*, No. CV 9:18-2033-RMG, 2019 WL 12363239, at *3 (D.S.C. Oct. 10, 2019)(collecting cases).

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Other Options for ME Qualifications

- Do you have to object before the hearing?
- What else can you do?

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You Check ERE the day before the hearing....

Scenario:

- You see a CV for an ME or a VE posted and the hearing notice did not include notice of an expert.

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Timing for Updates Not in Notice

- First, consider if you have an objection.
- If so, make it as soon as possible.
- HALLEX I-2-3-15.D lists the requirements for the notice of hearing, which includes notice of any witnesses.
- Form: I object to the inclusion of an expert witness as this hearing as I have not been provided with sufficient notice to prepare.

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Objections During the Hearing



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Going Forward without the Client

Scenario:

- You appeared at the hearing but the client did not. You cannot reach the client to find out where he or she is.
- The ALJ says: Counselor, I am going to go ahead and take the testimony from the ME and the VE.

Is this ok?



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Proceeding without the Client

Can you object?

- HALLEX I-2-4-25 allows in some instances for the ALJ to go ahead and obtain the expert testimony.



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The Mary Grace Ferone objection

Scenario:

- A security guard (usually a Federal Marshal) comes into the hearing room at the request of the ALJ, likely because the claimant appears disheveled or unruly or the records may indicate emotional instability.



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The Response

- Ask the ALJ on the record why the Federal Marshal is present:
Your Honor, there is a Federal Marshal in the hearing room with us, would you please explain why for the record?
- Which usually yields a response like “for everyone’s safety”
- Then ask also on the record: “Will the Federal Marshal be going to the potential workplace with the claimant as well?”

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Claimant Witnesses

Scenario:

- The client testifies. You ask the ALJ to call a third-party witness for the claimant, but the ALJ refuses. This could be a family member, a therapist, a social worker or a case worker.

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The Objection

- Form of the Objection: Your Honor, the claimant has the burden of proof and this witness has material information about the severity of the MDIs (be prepared to have more).
- Ask to put a proffer on the record.
- Submit a post-hearing affidavit. HALLEX I-2-6-20 (Affidavits and Depositions)

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Interpreters

Scenario:

- The ALJ starts questioning claimant without allowing the interpreter to interpret or the interpreter is doing a bad job of interpretation.

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The Response

- The HALLEX on interpreters (I-2-6-10) has instructions for using interpreters including when poor interpretation is alleged.
- Form of objection: Your Honor, my client needs an interpreter to understand these proceedings in full. I object to the questioning that does not include an interpreter and I ask that we start again with the interpreter.
- Form of objection: Your Honor, I object to the use of this interpreter because I have reason to believe that the interpretation is not accurate.

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Interpreter Again

Scenario:

- The ALJ instructs the interpreter to ONLY interpret questions directed to the claimant and any responses from claimant.

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The Response

- That same HALLEX has NO specific language about what must be interpreted.
- Form of objection: Your honor, the claimant is entitled to a full and fair hearing which includes the ability to participate fully. Interpretation that is limited to questions directed at the claimant does not allow the claimant to participate fully.

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Are These Questions OK?

- Ms. Biddle, do all of your children have the same father?
- Ms. Biddle, I see you spent time in prison, can you tell me what the crime was and what you did exactly?
- Ms. Biddle, the record says you have been the victim of domestic abuse but that you still love your abuser?

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How About These?

- Ms. Biddle, did you get any UI or pandemic related benefits? Are you on welfare? Did you ever work off the books?
- Ms. Biddle, you say you were self-employed. Can you send me all your tax returns for the relevant period?
- Ms. Biddle, how do you get your drugs if you are on welfare?

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Should the Client Answer this One?

- So, Ms. Biddle, your last MRI showed only one disc herniation and no impingement on the nerve, is that correct?

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What is the Objection?

- Your honor, my client is not a medical professional and cannot interpret testing or imaging results.
- Others?

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Which Question is OK?

- Mr. Biddle, wouldn't you improve if you did physical therapy?

versus

- Mr. Biddle, did you feel better after you did physical therapy?

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What is the Objection?

- Your honor, I object to that question because you are asking the claimant to guess about possible medical outcomes and the client does not have medical training.
- Your honor, I object to that question because it calls for speculation.

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Objections for ME Testimony: 1

Scenario:

- The ME says he or she only has part of the medical records.

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Objection to 1

- First, how do you know that?
- Objection: Your honor, the medical expert should not testify based on only part of the record. Under the regulations, that testimony and medical source statement would have no persuasive value.

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Objections to ME Testimony: 2

Scenario:

- The ME asks the client questions directly.

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Objection to 2

- Consider first if you have an objection.
- HALLEX I-2-6-70: The ALJ will not allow the ME to conduct any type of examination during the hearing.
- Form of Objection: Your Honor, I object to the ME's questioning of the claimant because those questions are a form of examination.

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Objections to ME Testimony: 3

Scenario:

- The ALJ calls the ME after the client testimony, swears in the ME and then starts to ask the ME questions. The ME has not, obviously, heard any client testimony.

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Objection to 3

- The ALJ must summarize pertinent testimony that the ME missed (including medications and types and sources of treatment). HALLEX I-2-6-70.
- Form: Your honor, I object to the taking of testimony from the MR before you have summarized the pertinent testimony for the ME.

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Vocational Expert Objections: 1

Scenario:

- The ALJ schedules a VE but announces she is ending the hearing without calling the VE.

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Objection to VE: 1

- Is there an objection?

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Vocational Expert Objections: 2

Scenario:

- The ALJ calls the VE to testify at the beginning of the hearing, without offering time for direct examination of the client.

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Objection to VE: 2

- Is there an objection?
- Do you need the client to testify about past work tasks?
How long past work was performed? Any training or additional education?
- Form of Objection: Your honor, I object to the taking of evidence from the vocational expert before my client has had the opportunity to testify as to past work.

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Odd Things That Happen



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What Audio Does Not Pick Up

Scenario:

- During the hearing, you see behavior or activity that a sound only recording will not capture, such as:
 - The client weeps throughout the hearing
 - The client shakes/pulls out hair
 - The client takes apart the microphone/gets up and down/walks around/falls out of the chair
- Not really an objection, but it does require you to speak up and make an audio record of what you observe

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ALJ Wants to Call a Halt

Scenario:

- The ALJ says she has heard enough and would like to end the hearing. You have not finished your direct examination.

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Objection to the Sudden End

- Are you done with questioning? Can you limit your questions to a handful more?
- Form of the Response: Your honor, if you are saying for the record that you are making a fully favorable decision, then I will stop. Otherwise, I have an obligation to make my case and that includes having my client testify to all the pertinent information related to this claim.

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ALJ Gives You One Week to Obtain Records

Scenario:

- The client testifies that she got new MRI yesterday. This is a surprise to you. The ALJ believes it is a surprise and then gives you one week to submit the records

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Objection to Short Deadline

- Form of Objection: Your Honor, are you saying for the record that your duty to develop a full record is satisfied by granting a week to secure this evidence? In our experience, it will take X days.

- Other forms?

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ALJ Refuses to Admit Late Evidence

Scenario:

- At the hearing, the ALJ notes that the evidence received the day before will not be submitted into the record because
 - The ALJ claims no notice given
 - The 5-day letter did not specify why the missing evidence is relevant

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Response on Evidence Rejection

- Check the exceptions in 20 CFR §§ 404.935(b) and 416.1425(b). Be prepared to cite to this regulation (you should know in advance if you have late evidence).

- Prehearing letters about missing/outstanding evidence must include a statement explaining why the missing evidence is material.

- BUT the five-day rule may not apply to age-18 and CDR cases. See 20 CFR §§ 416.1435(c) and 416.1470(b).

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Another Wrinkle for Missing Evidence

Scenario:

- The ALJ first wants proof of your efforts to ask for the records in time

- 20 CFR §§ 404.935(b)(3)(iv) and 416.1425(b)(3)(iv) is an exception to the late production of evidence if you can show you “actively and diligently” tried to secure it

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Resources