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## **New Executive Order Changes Process of Hiring Administrative Law Judges**

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President Trump recently signed an Executive Order that changes the process for selecting administrative law judges (ALJs). ALJs conduct trial-like hearings within federal agencies in disputes over decisions such as claims for benefits and enforcement actions against individuals or businesses. This is important to those involved with elder care because most ALJs work for the Social Security Administration (SSA) and hear appeals cases on Medicaid and Social Security Disability Income (SSDI) benefits.

In this issue of *The ElderCounselor*, we will look at what ALJs do, how this Executive Order came about, how it changes the selection process, and how this change might affect Medicaid and SSDI cases in the future.

### **What Are Administrative Law Judges (ALJs) and What Do They Do?**

Administrative law judges work within federal agencies and resolve important issues in legal proceedings, ranging from minor cases to Social Security benefit determinations. Although there are only about 2,000 of them (out of two million employees in the federal workplace), they have a great impact on taxpayers fighting the federal government, as people are more likely to see an ALJ than any other kind of federal judge in that type of case.

Last year, about 1,600 ALJs at the SSA oversaw almost 700,000 cases. Most of these were people who were appealing a reduction or denial of Medicaid and/or SSDI benefits.

### **When Does a Medicaid or SSDI case go before an ALJ?**

Social Security Disability Income is a federal cash assistance program. To be eligible for SSDI, you must be disabled as defined by the SSA, and you must also meet the program's income and asset guidelines. In most states, eligibility for SSDI means automatic eligibility for Medicaid.

If your application for SSDI or Medicaid is denied either upon initial filing or at a time of redetermination, you will receive a written notice explaining the reasons for denial. The first level of appeal is to request reconsideration, which may be case review, an informal conference or formal conference. If benefits are not granted or reinstated at the reconsideration level, the next level of appeal is to request a hearing in front of an administrative law judge. You may produce witnesses, provide supplemental medical evidence, and cross-examine any SSA witnesses. Having competent counsel represent you at a hearing before an ALJ is crucial.

If you do not receive a favorable decision at the ALJ hearing, you may request a review by the SSA Appeals Council. It may decide to hear your case, but it is not required to. The SSA's final decision may be appealed to the federal district court in your jurisdiction.

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## How ALJs Have Been Selected

Administrative law judges are selected through a competitive process used for most of the civil service. Historically, candidates were required to

1. Have at least seven years of trial experience;
2. Be recommended by fellow lawyers and/or judges;
3. Pass a written exam; and
4. Pass an oral exam.

The requirement for seven years of trial experience is non-negotiable and absolutely mandatory. The trial experience must have been in the area of law in which the ALJ was applying. The federal personnel agency, Office of Personnel Management (OPM), would send at least twenty questionnaires out to various peers, adversaries, judges, and other affiliates of the applicant, to receive recommendations and assessments of the applicant's skill set. The written exam was four hours in length; the oral exam was an in-depth interview before a representative from OPM, an attorney practitioner, and an active or retired ALJ. OPM then presented departments with a list of three finalists to choose from for any given vacancy. The OPM opens that list for new applications only occasionally, most recently about a year ago.

## What Prompted the Change: *Lucia v. SEC*

In a recent Supreme Court decision, [Lucia v. Securities and Exchange Commission \(SEC\)](#), the Court sided with Lucia, an investment adviser, finding that the administrative law judge who penalized him was not properly appointed and did not have the authority to do his job.

The Court reviewed whether agency judges are government employees with limited authority or, as Lucia argued, should be classified as officers of the United States. The SEC's administrative law judges, like the one in Lucia's case, were appointed through a selection process by agency staff, as described above. The Constitution's Appointments Clause demands more for those serving as constitutional officers, requiring them to be appointed by the president, the courts, or heads of departments.

The Court found that administrative law judges are constitutional officers because they exercise "significant authority," presiding at hearings, issuing opinions and deciding sanctions for those charged with violating the nation's securities laws.

In her opinion, Justice Kagan wrote that administrative law judges have "all authority needed to ensure fair and orderly adversarial hearings—indeed nearly all the tools of federal trial judges."

## President Trump's Executive Order

Following the Court's ruling that ALJs are constitutional officers—and therefore must be appointed by the president, courts or agency heads—President Trump issued an Executive Order that ALJs will now be appointed by agency heads under "excepted service."

The White House says the Supreme Court's decision has opened the door to more legal challenges by other improperly hired ALJs and it wants to protect agencies against challenges to the legitimacy of their ALJs.

The aim of the Executive Order is to "mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges and forestall litigation in which such concerns have been or might be raised."

According to the Executive Order, agency heads will be able to fill positions with attorneys that they feel will best fit the job, giving them additional flexibility to assess prospective appointees “without the limitations imposed by competitive examination and competitive service selection procedures that do not necessarily reflect the agency’s particular needs.” It will also give agencies “greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency.”

### Concerns About the Executive Order

*Qualifications:* Some are concerned that new appointees will not be as qualified as their predecessors. The Executive Order does not require seven years of experience; it only requires that new appointees possess a professional license to practice law and that they are authorized to practice law “under the laws of a State, the District of Columbia, the Commonwealth of Puerto Rico or any territorial court established under the U.S. Constitution.” Others point out that the Executive Order states this is a *minimum* requirement and may be subject to additional agency requirements where appropriate; and, as long as agencies act responsibly and use good judgment in hiring, there should not be a problem.

*Bias:* Another concern is that ALJs will become biased political appointees, instead of being independent and impartial. Some warn that ALJs will be appointed because they are either deeply sympathetic or deeply hostile to regulated industries. One check against this is that the Executive Order did not change the removal process; ALJs can still be removed for a good cause. The Department of Justice issued a memo that the ALJ removal statute should be construed to “allow for the removal of an ALJ who fails to perform properly.”

### How might this impact Medicaid and SSDI rulings going forward?

Some are concerned that politically-appointed ALJs could reject valid disability claims simply because of their political views and/or of those who appointed them—and that this would lead to drastic cuts in Medicaid and SSDI benefits, hurting disabled and poor Americans. However, ALJs take an oath to uphold the Constitution and not political agendas from the White House. One commentator says that the Executive Order won’t have too much of an impact on the fairness of administrative hearings because “the ALJ is a faithful agent of the true fact-finder, the agency chief,” likening their rule to that of Magistrate Judges whose work is reviewed by a District Court. Hopefully, that will prove true.

### What to Watch

Critics see President Trump’s Executive Order as an example of executive overreach, and some advocacy groups are considering challenging the legality of it in U.S. District Court. Reversing it would require congressional action, which can be difficult to achieve. In the meantime, the House Social Security subcommittee is studying the new ALJ rule. And, of course, as ALJs are appointed under the new process, there will be scrutiny of their rulings to make sure they are fair and impartial.

### Conclusion

At ElderCounsel, we care deeply about issues that affect the elderly and the disabled. We will keep a close watch on these developments and keep you informed on the long-term effects of President Trump’s Executive Order.

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