

## EE. LEAVING THE RECORD OPEN FOR ADDITIONAL EVIDENCE

### OVERVIEW:

Pursuant to § [2423.31\(a\)](#), which concerns the conduct of a hearing, an ALJ “may take any action necessary to schedule, conduct, continue, control, and regulate the hearing, including ruling on motions. . . .” This authority includes ruling on motions to leave the record open for additional evidence.

### OBJECTIVE:

To provide guidance to Trial Attorneys as to the criteria for requesting to leave open the record for additional evidence; support needed for such motion; and preserving the record to cross-examine witnesses.

### 1. CRITERIA FOR REQUESTING TO LEAVE RECORD OPEN:

Under the following circumstances the Trial Attorney may request the ALJ to leave the record open until a certain date in order to take a deposition from the witness who is unavailable, or request the ALJ to continue the hearing at a later date to hear the testimony of the witness:

- A witness is unavailable to testify at a hearing due to unforeseen circumstances;
- The Trial Attorney was unaware of the existence of the witness prior to the hearing;
- A document is unavailable for introduction into evidence at a hearing due to unforeseen circumstances;
- The Trial Attorney was unaware of the existence of the document prior to the hearing;

- Certain reports or documents which are relevant to the proceedings have not as yet been issued, but will be issued within a definite time frame. Under these circumstances, the Trial Attorney may request the ALJ to leave the record open until a certain date for the submission of the document; and
- A document has been introduced into evidence which is not a good copy. Under this circumstance the Trial Attorney may request the ALJ to leave the record open until a certain date so that a good copy of the document can be obtained.

**2. WHAT TRIAL ATTORNEY MUST SHOW IN SUPPORT OF THE MOTION:**

- a. *The Trial Attorney establishes that the witness or document for which the record is to be left open will offer testimony or present evidence which is relevant to the proceedings.*
- b. *That the Trial Attorney was unable to obtain the testimony of the witness at the hearing, or was unable to obtain the document for introduction into evidence at the hearing.*

 *The Trial Attorney objects to Respondent counsel's motion to leave open the record when Respondent has not met these same standards.*

**3. PRESERVE RIGHT TO CROSS-EXAMINE WITNESS:**

The Trial Attorney preserves on the record the right of the GC to cross-examine the witness or to object to the document for which Respondent's counsel is seeking to leave the record open.