**Summary of Final Rule:**

**“Medicare Program: Changes to the Medicare Claims and Entitlement, Medicare Advantage Organization Determination, and Medicare Prescription Drug Coverage**

**Determination Appeals Procedures”[[1]](#footnote--1)**

**Overview**: The final rule provides new and revised rules that expand the pool of available OMHA adjudicators; increase decision-making consistency among the levels of appeal; and improve efficiency by streamlining the appeals process so less time is spent by adjudicators and parties on repetitive issues and procedural matters.

**Effective date:** These regulations are effective on March 20, 2017.

**Permit designation of Medical Appeals Council decisions as precedential**

The final rule deems that the Chair of the Departmental Appeals Board has the authority to designate a final decision of the Secretary issued by the Medicare Appeals Council as precedential. In determining which decisions should be designated as precedential, the DAB Chair may take into consideration decisions that address, resolve, or clarify recurring legal issues, rules or policies, or that may have broad application or impact, or involve issues of public interest. To the extent that appellants, CMS or its contractors believe that a case may result in a decision that should be considered precedential, then the parties are free to argue so in their appeal requests or motion referrals. Publication of the designation of a decision as precedential will be published in the Federal Register around the same time as a precedential decision is identified on the HHS Web site in order to provide public notice. Opinions will be made public once all confidential information is redacted. The precedential decisions will apply to all Medicare parts and Part C and D plans will be required to determine the applicability of precedential decisions when adjudicating future cases at the firs level of appeal.

**Impact*:*** HHS acknowledges that it will take time to establish a body of precedential decisions addressing enough issues to meaningfully impact the backlog. Nevertheless, HHS believes that establishing precedential decisions will allow for more predictable and consistent outcomes at all levels of administrative review.

**Expand OMHA’s available adjudicator pool**

Citing a significant strain on ALJ workloads with respect to matters not requiring a hearing, the final rule provides authority for attorney adjudicators to issue:

(1) Decisions that can be issued without an ALJ conducting a hearing;

(2) Dismissals when an appellant withdraws his or her request for an ALJ;

(3) Remands to the QIC, IRE, or other contractor, or the Part D plan sponsor; and

(4) Reviews of QIC and IRE dismissals.

Attorney adjudicators would receive the same training as OMHA ALJs, which would focus on substantive areas of Medicare coverage and payment policy, as well as administrative procedures.

**Impact:** The final rule says attorney adjudicators would

* Allow OMHA to identify and adjudicate appeals that do not require a hearing as early in the administrative process as possible.
* Reduce the wait time for appellants to receive decisions in cases in which no hearing is required or conducted.
* Help to address the volume of appeals OMHA continues to receive by channeling some of those appeals through a less costly adjudicator, which will allow OMHA to hire more adjudicators than the same resources would allow if allocated to hiring ALJs and support staff.
* The proposal to expand the pool of adjudicators could redirect approximately 24,500 appeals per year to attorney adjudicators based on FY 2016 data.

Note: This may be in lieu of congressional authority for “magistrates” in the FY17 budget request and the AFIRM bill.

**Simplify proceedings when CMS or its contractors are involved**

The final rule limits the number of entities (CMS or its contractors) that can be a participant or party at the hearing. However, additional entities may submit position papers and/or written testimony or serve as witnesses.

**Party to the hearing:** Party means an individual or entity[[2]](#footnote-0) that has standing to appeal an initial determination and/or a subsequent administrative appeal determination.

* The final rule allows CMS or one of its contractors to elect to be a party to the hearing upon filing a notice of intent to be a party to the no later than 10 calendar days after the QIC receives the notice of hearing (unless the request for hearing is filed by an unrepresented beneficiary).

**Participation in the hearing:** The final rule allowsCMS or a contractor to elect to participate in an ALJ hearing on request, in addition to participating in an ALJ hearing as a non-party participant.

* When CMS or its contractor has been made a *party* to a hearing, CMS or its contractor that elected to be a *participant* may not participate in the oral hearing, but
  + They may file position papers and/or provide written testimony to clarify factual or policy issues. Copies of position papers and/or written testimony must be provided to the enrollee.
  + CMS or its contractor may be called as a witness by CMS or its contractor that is a party to the hearing. OMHA expects this to be an infrequent occurrence.
* An ALJ may request, but not require CMS and/or one or more if its contractors to participate in any proceedings before the ALJ, including oral hearings. The ALJ cannot draw any adverse inferences if CMS or its contractor decides not to participate in the proceedings.
* Participation may include filing position papers and/or providing written testimony to clarify factual or policy issues, but it does not include calling witnesses or cross-examining a party’s witnesses.
* When CMS or its contractor participates in an ALJ hearing, CMS or its contractor may not be called as a witness during the hearing and is not subject to examination or cross examination by the parties (unless the ALJ determines that their participation is necessary for a full examination of the matters at issue). However, the parties may provide testimony to rebut factual or policy statements made by a participant and the ALJ may question the participant about its testimony.
* **If CMS or a contractor did not elect to be a participant to the hearing, but more than one entity elected to be participate, only the first entity to file a response to the notice of hearing may participate in the oral hearing.** 
  + Additional entities that filed responses to participate may file position papers and/or provide written testimony to clarify factual or policy issues. Copies of position papers and/or written testimony must be provided to the enrollee.
* HHS believes that contractors have generally set forth their positions on those arguments in the lower-level decisions or will have an opportunity to do so through the written submissions to OMHA.
* The ALJ may grant leave to additional entities to attend the hearing such as when an LCD involves multiple MACs or when the contractor that conducted the statistical sampling and extrapolation and a contractor to clarify the policy are involved.
* If the hearing is scheduled, the ALJ will notify the contractors regarding their possible participation prior to the hearing. OMHA will develop a consistent notification process including when notifications should be made and method of notification delivery.
* With respect to concerns related to a contractor’s ability to satisfy its contractual obligations, after the final rule is effective, CMS intends to make modifications to account for the provisions of this final rule regarding participation of contractors and encourage the contractors to coordinate participation in the hearings. However there is no timeframe for the modifications.
  + (This was in MAXIMUS’ comment letter.)

If CMS or its contractor is a party or participant to the oral hearing but does not appear as scheduled, the hearing may proceed without that entity because the regulation does not require or guarantee such participation.

**Notification of Hearings:** Currently, CMS and its contractors can view in the case management system used by QICs if a QIC reconsideration has been appealed. However, OMHA and CMS plan to establish a process for notification to CMS contractors and Part C and D plan sponsors that a request for a hearing has been filed. (However there is no timeframe for the modifications.) If a hearing is ultimately scheduled, any entity that has already elected to participate in the proceeding will receive a notice of hearing.

**Timeline for Election to Participate:** CMS or its contractors must make an election to participate in a hearing:

* No later than 30 calendar days after the notification that a request for hearing was filed, or,
* Once a hearing is scheduled, no later than 10 calendar days after receiving the notice of hearing.

**Timeline for Election to Participate** **For Part D Issues**: CMS, the IRE or the Part D plan sponsor,

* Must request to participate in an appeal within 30 calendar days after notification that a standard request for a hearing was filed or
* Must request to participate in an appeal within 2 calendar days if an expedited request was filed.

**Timeline for Submission of Position Paper or Written Testimony:**

A position paper or written testimony from CMS or its contractor must be submitted, unless the ALJ or attorney adjudicator grants additional time

* Within 14 days of an election to participate if no hearing has been scheduled or
* No later than 5 calendar days prior to the scheduled hearing.

If an expedited Part D hearing is requested, CMS, the IRE and/or the Part D plan sponsor must submit the position papers and written testimony:

* Within 14 days of an election to participate if no hearing has been scheduled or
* No later than 5 calendar days prior to the scheduled hearing.
* For Part D expedited hearings
  + No later than 1 calendar day after receipt of the ALJ’s or attorney adjudicator’s decision on a request to participate prior to the expedited hearing (unless the ALJ grant additional time).
  + Or 1 calendar day prior to the expedited hearing

If position papers and written testimony are not filed within the time frames, they will be excluded from consideration. When CMS or its contractors file position paper or written testimony to OMHA, they must send a copy either to the parties who were sent a copy of the notice of reconsideration or to the parties who were sent a copy of the notice of hearing

**Impact:** OMHA believes limiting the number of entities that may elect to be a participant or to be a party to a hearing will make hearings easier to schedule and not take as long to conduct.

**Requesting Information From the QIC or IRE, without Remanding an Appeal**

If an ALJ or attorney adjudicator believes that the written record is missing information that is essential to resolving the issues on appeal and that information can be provided only by CMS or its contractors, the information may be requested from the QIC that conducted the reconsideration. Previous to the final rule, the ALJ would remand the case to the QIC or the IRE.

The QIC would have 15 calendar days after receiving the request for information to furnish the information or otherwise respond to the request for information, either directly or through CMS or another contractor. For expedited appeals, the IRE has 2 calendar days after receiving a request for information to furnish the information or otherwise respond to the request, and the extension to the adjudication time frame would be up to 3 calendar days, to allow for time to transmit the request to the IRE and for the IRE to respond.

Under the final rule, the appeal will be remanded:

* if the ALJ or attorney adjudicator requests an official copy of a missing redetermination or reconsideration and the QIC does not respond in a timely fashion
  + If the QIC, IRE or Part D plan sponsor or other contractor cannot reconstruct the record, the remand may direct the QIC to initiate a new appeal adjudication.
* when the QIC IRE or Part D plan sponsor does not furnish a case file for an appealed reconsideration.
  + CMS expects this type of remand to be very rare.

Where a record is reconstructed by the QIC, IRE or Part D plan sponsor, the reconstructed record would be returned to OMHA, the case would no longer be remanded and the reconsideration would no longer be vacated. If an adjudication period applies to the case, the period would be extended by the time between the date of the remand and the date the case is returned to OMHA.

**Request for Remand to the QIC for Resolution:** At any time prior to an ALJ or attorney adjudicator issuing a decision or dismissal, the appellant and CMS or one of its contractors, may jointly request a remand of the appeal to the entity that conducted the reconsideration because the matter can be resolved by a CMS contractor if jurisdiction of the claim is returned to the QIC or IRE. The request must include the reasons why the appeal should be remanded and indicate whether remanding the case would likely resolve the matter in dispute. An ALJ or attorney adjudicator may remand the case if resolution is likely.

**Submission of New Evidence at the ALJ Level:** Current regulations specify that evidence not submitted during the first two levels of appeal may not be admitted at the ALJ level, unless a party can demonstrate “good cause” for its admission. The final rule states that new evidence may be admitted where

* the ALJ or attorney adjudicator finds that the new evidence is material to an issue addressed in the qualified QIC’s reconsideration decision, and the issue was not identified as a material issue prior to the QIC’s decision;
* the new evidence is material to a new issue identified in the QIC’s decision;
* the party was unable to obtain the evidence before the QIC issued its reconsideration decision, and submits evidence that establishes the party’s reasonable attempts to obtain the evidence before the decision was made;
* the evidence was submitted by the party to the QIC or another contractor and submits evidence that, in the opinion of the ALJ or attorney adjudicator, demonstrates the new evidence was submitted to the QIC or another contractor before the QIC

issued the reconsideration

* the ALJ or attorney adjudicator determines the party has demonstrated that it could not have obtained the evidence before the QIC issued its reconsideration.

**Impact:** Fewer parties will introduce newer evidence at the AJL level with a clear definition of “good cause”.

**Other provisions:** The final rule includes a number of other provisions including:

* Allowing ALJs to vacate their own dismissals rather than requiring appellants to appeal a dismissal to the Medicare Appeals Council;
* Allowing the ALJ to offer to conduct a hearing by telephone if the request for hearing or administrative record suggests that a telephone hearing may be more convenient for the unrepresented enrollee.
* Requiring additional information from appellants challenging statistical sampling and extrapolations.
* Requiring additional information for ALJ hearing requests including appellant telephone number, Medicare appeals numbers, and a statement of any additional evidence to be submitted and the date it will be submitted.

1. Federal Register, Vol. 82, No. 10. January 17, 2017. Pages 4974-5140. [↑](#footnote-ref--1)
2. listed in § 405.906 -- beneficiary, person responsible for deceased beneficiary’s financial debts, supplier, provider, applicable plan, state agency. [↑](#footnote-ref-0)