

Medicare Administrative Law Judge Hearings: Advocacy Tips

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Center for Medicare Advocacy

The Center for Medicare Advocacy, established in 1986, is a national nonprofit, nonpartisan law organization that provides education, advocacy, and assistance to help older people and people with disabilities obtain access to comprehensive Medicare coverage and quality health care. The Center is headquartered in Connecticut and Washington, DC, with additional attorneys in California, Massachusetts, and New Jersey.

Glossary

Office of Medicare Hearings and Appeals (OMHA)

The agency that administers the Administrative Law Judge hearing program for Medicare Parts A, B, C and D appeals.

Administrative Law Judge (ALJ)

An individual who presides over Medicare appeal hearings, with the power to administer oaths, take testimony, rule on questions of evidence, and make determinations of fact.

Qualified Independent Contractor (QIC)

An independent entity that contracts with Medicare to handle the reconsideration level of a traditional Medicare appeal.

Independent Review Entity (IRE)

An organization that contracts with Medicare to handle the second level of appeals of a denial of coverage if you are in a Medicare Advantage Plan or Medicare private drug plan.

National Coverage Determinations

A decision about particular treatments that Medicare will or will not cover for particular conditions.

Introduction

The Medicare program includes an appeals system that is broken down into different levels. Steps in the appeals process differ based on whether a beneficiary is enrolled in traditional (original) Medicare, or instead, enrolled in a Medicare Advantage (MA or Part C) plan. Regardless of enrollment, for the most part, appeal rights are the same once a beneficiary reaches the Administrative Law Judge level of review.¹

The Office of Medicare Hearings and Appeals (OMHA) administers the Administrative Law Judge (ALJ) hearing program.² The ALJ hearing has traditionally been the client's best chance to win Medicare coverage previously denied. Thus, it is important to persevere through the lower levels and expend time and energy at the hearing stage. There are important steps a lawyer can take before the hearing, during the hearing, and after the hearing to maximize chances of a successful appeal. The following guide and checklist can help maximize your preparedness for an ALJ hearing.

Before the Hearing

- **Review the lower decision:** Watch for, receive, and review the Medicare Reconsideration decision—from the Qualified Independent Contractor (QIC) in traditional Medicare or from the Independent Review Entity (IRE) in Medicare Advantage.
 - » For those in traditional Medicare or enrolled in an MA plan, if the decision denies Medicare coverage, the client has 60 days to appeal from the date they receive the decision.³ If the client misses the deadline and there is a good reason for having missed it—for example, an illness or a late filing due to the national COVID-19 emergency, request an appeal anyway. Include a written explanation stating why you missed the deadline.⁴
 - » Note that an ALJ will only hear the case if the amount in controversy has been met.⁵ In 2020, the amount in controversy must be at least \$170 for an ALJ to hear the case. The amount in controversy is recalculated and published on an annual basis, and is identified in the previous decision.
- **Request an ALJ Hearing:**
 - » The form sent with the previous decision should be the basis of the hearing request. The request for an ALJ hearing must be made in writing and must include specific information.⁶ If the request for ALJ hearing does not include all of the required information, it will not be considered complete and will cause unnecessary delays. Follow the instructions on [form OMHA-100](#).⁷
 - » The request for ALJ hearing must be filed with the office specified in the lower decision. Appeals on behalf of beneficiaries may be handled first and ahead of providers, suppliers, and state agencies. However, you have to let Medicare know upfront that the appeal concerns a Medicare beneficiary.⁸
 - » Be sure to send a copy of the request for hearing to the other parties who were sent a copy of the lower decision.⁹
- **Respond to the Notice of Hearing:**
 - » Watch for and receive the Notice of Hearing.¹⁰ It should have been mailed to the client at least 20 days before the hearing. It should include the time and place of the hearing, how the appearance is scheduled (video teleconference (VTC), telephone, or in-person), a statement of the issues to be addressed, the name of the ALJ assigned to the case, and sometimes the name and contact information for the ALJ's legal assistant. It should also explain how to object if the notice indicates the wrong issues, if the client cannot attend the hearing at the scheduled time, and if the client wants a VTC hearing and a telephone hearing was scheduled or vice versa. Medicare ALJ hearings continue as scheduled during the COVID-19 pandemic, and OMHA encourages appellants to continue to appear for hearings by telephone. However, ALJ's are encouraged to exercise flexibility with regard to reasonable requests to reschedule hearings.¹¹
 - » Respond to the Notice of Hearing in writing. Make sure to object to errors in the notice, the time of the hearing if the client or valuable witnesses cannot attend, or if the client was offered a telephone hearing and they want a VTC hearing or vice versa.¹² Ask for a copy of the OMHA case file. A party is legally entitled to a copy of the record but may have to insist on it and cite to the relevant law if necessary.¹³
- **Review the Case File:**
 - » Watch for the OMHA case file and exhibit list. This should include pertinent medical records that the ALJ will have in front of them during the hearing. If medical records are missing from the case file, alert the ALJ in writing.

- **Develop the Case:** As soon as possible, you should develop the case. Many of these steps can and should be done as soon as it is learned that a service or item has been denied.
 - » Request medical records from all relevant providers in order to support the appeal. This could be multiple providers.
 - » Obtain the treating physician's support. This is key to success—consider asking the doctor who ordered the care or service for a letter describing why it was medically reasonable and necessary.
 - » Consider whether witness testimony would be helpful. This could be a family member and ideally the doctor, or a nurse or therapist. Inform the ALJ and all other parties of any witnesses who will appear during the hearing.¹⁴
 - » Consider submitting a memorandum of law with supporting documentation. No particular format is required. A letter or more formal memorandum is acceptable. It is helpful to construct a narrative including a medical argument as to why services were medically reasonable and necessary. Also, it is important to cite to relevant regulations, policy manuals, National Coverage Determinations, and supporting medical research. It is also important to be aware of the many changes to Medicare coverage rules that have occurred as a result of the COVID-19 pandemic.¹⁵
 - » Submit any missing or additional evidence before the ALJ hearing. Evidence submitted before an ALJ hearing can be either written evidence or “other evidence,” such as images or data on electronic media.¹⁶ Paginate all records and submit a copy of them to the ALJ prior to the hearing. Do this by mail rather than by fax. Send copies to all other parties and be sure and keep a copy of the records for yourself so that you can refer to them during the hearing.

During the ALJ Hearing:

- **Attend the Hearing:** Any party to a hearing has the right to appear before the ALJ to present evidence and state their position. A party may also make their appearance by means of a representative. Witness testimony may also be given.¹⁷
- **Listen Carefully:** Expect the ALJ to begin by asking questions and explaining the hearing process. The questions will probably include: Do you have an attorney? Do you understand that you have a right to an attorney? Did you receive a copy of the exhibit list? The ALJ may put your client under oath so that they can testify. The ALJ may recite the decision at the lower level and will set out the issues, items/ services and relevant dates to be addressed. Make sure when the ALJ begins the hearing, they frame the issues properly, that they are discussing the correct items/services, and that they note the correct dates of the services or items provided.
- **Additional Documentation:** Have a copy of the OMHA case file in front of you. Make sure that the ALJ has received any additional evidence that you submitted and ask that the documentation be made a part of the administrative record. **This is important because the Council (next level of review) will limit its review of the evidence to the evidence contained in the record of the proceedings before the ALJ.**
- **Objections:** Object to any documentation you think should not be made part of the administrative record. If any party has sent in documentation to the ALJ without sending it to your client, you should object to the admission of the documentation. If the ALJ allows admission of the documentation, then ask for extra time to review and respond to the documentation.
- **Presenting Your Argument:** Each party will be given the opportunity to make their case using oral argument, written summaries of the case, and witnesses.¹⁸

PRACTICE TIP: ORAL ARGUMENTS, WRITTEN STATEMENTS, AND WITNESSES

A few suggestions when presenting your oral argument:

- Present the facts of the case in a way that is easiest to follow. Explain to the ALJ what kind of health care was received, why it was so important, and why it should be covered by Medicare. Give the ALJ a feeling for the individual who received the health care, why the care was needed, and why it had to be provided in the care setting and by skilled professionals (for example, by nurses or therapists). Use the medical records in the OMHA case file and submitted additional documentation to support your argument. Refer to medical records by their page number so that the ALJ can look at them while you are referring to them.
- Cite the relevant statutes, regulations, and policy. For any appeal, you need to know the law, the regulations, and coverage sought. For regulations, it is important to know the regulations governing the coverage sought, for example, the Center for Medicare and Medicaid Services (CMS) policy, National Coverage Determinations (NCD), Local Coverage Determinations (LCDs), etc. It is also important to note that with only very few exceptions, MA plans must cover or make payment for all services that are covered by Part A and B of Medicare.¹⁹ It is also important to know the rules regarding Financial Liability Protections (Notices). Don't be afraid to object if another party misstates the law.²⁰
- Use medical experts, medical texts, and other relevant medical research.
 - » Written statements: A party can present a written summary of the case during the ALJ hearing.
 - » Witnesses: Make sure all witnesses giving testimony are sworn in. Be prepared for the ALJ to interview your witness and for any other parties to cross-examine your witness. Other participants in the hearing include CMS, CMS contractors, the provider, and/or the Medicare Advantage plan including their medical directors. Be prepared to address them and any adversarial participants/witnesses. The ALJ allows parties to ask witnesses any questions relevant to the issues.²¹

ADDITIONAL HEARING TIPS:

- Address the ALJ respectfully.
- The ALJ is required to provide an independent “de novo” review.²²
- The hearing is informal. Hearings are recorded but the “rules of evidence” are not strictly enforced. An ALJ may receive evidence at the hearing, even though the evidence is not admissible in court under the rules of evidence used by the court.²³
- The ALJ is supposed to assist unrepresented beneficiaries.

If at the end of the hearing you wish to submit additional information or address an issue that was not resolved during the hearing, you can ask the ALJ to keep the record open so that you can submit additional information.

After the ALJ Hearing

- **Time frames for deciding an appeal:** For Part A and B appeals, when a request for an ALJ hearing is filed after the QIC has issued a reconsideration, a decision is issued no later than the end of the 90 calendar day period beginning on the date the request for hearing is received.²⁴ The regulations do not specify time frames for deciding an appeal for MA or QIO Appeals.²⁵

- **Written Decision from the ALJ:** Once the decision from the ALJ is received, carefully review it and determine if there are any appealable issues—did the ALJ make errors of fact or law?
- **Appealing ALJ Decision:** If the ALJ hearing decision is unfavorable, a beneficiary may request a review from the Council. The request for Council review must be done in writing within 60 calendar days after receipt of the ALJ's or attorney adjudicator's decision.²⁶

Conclusion

Medicare appeals processes are vital to beneficiaries and their advocates. Medicare appeals are often successful at later stages of the appeal, so it is important to continue forward despite losses early on. Federal regulations and policies provide significant due process protections, and advocates should utilize those to ensure proper coverage for Medicare services.

Additional Resources

- Review the Center for Medicare Advocacy's Self-Help packets for Medicare appeals of nursing home, home health and outpatient therapy cases, available on our website at www.medicareadvocacy.org.
- Medicare.gov information about [claims and appeals](#).
- Website for [Office of Medicare Hearings and Appeals](#), which administers Medicare's nationwide hearings and appeals.
- Website for the Departmental Appeals Board: [Departmental Appeals Board](#).

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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Endnotes

- 1 Part 405 of Title 42 of the Code of Federal Regulations governs Part A and B appeals. Part 422 governs Part C appeals. When a Medicare Advantage appeal reaches the ALJ level of review, for the most part, the appeal system merges with claims originating from traditional Medicare. At this stage, absent a regulation specific to MA appeals, the regulations governing administrative review of Part A and B claims found in Part 405 apply. See 42 C.F.R. § 422.562(d)(1). See Title 42 of the Code of Federal Regulation, Part 423, Subpart M, for details on appeals arising under Medicare Part D, and 42 C.F.R. § 423.2016(b) regarding expedited Part D hearings.
- 2 Currently, ALJs operate out of ten field office locations: Miami, Florida; Cleveland, Ohio; Irvine, California; Arlington, Virginia; Kansas City, Missouri; Seattle, Washington; Albuquerque, New Mexico; Atlanta, Georgia; New Orleans, Louisiana; and Phoenix, Arizona. These are the hearing offices in which Medicare ALJs are currently housed. <https://www.hhs.gov/about/agencies/omha/contact/index.html>
- 3 See 42 C.F.R. §§ 405.1014(c)(1) and 422.602(b)(1).
- 4 See 42 C.F.R. § 405.1014(e). See also the CMS COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers Fact Sheet that outlines a number of flexibilities being given to providers in an effort to address COVID-19. The memo specifically addresses appeals filed by providers, noting that blanket waivers are available for Medicare appeals including utilizing all flexibilities in the appeal process as if good cause requirements are satisfied. Although the memo does not address appeals filed by beneficiaries and those assisting them (other than providers), individuals who are filing appeals in good faith should explicitly note on their appeal documentation that they are requesting good cause allowances for any late filings due to the national COVID-19 emergency. [cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf](https://www.cms.gov/files/document/covid19-emergency-declaration-health-care-providers-fact-sheet.pdf). The Chief ALJ at OMHA also supports ALJs exercising flexibility with regard to reasonable requests for extension of time to file a request for hearing during the COVID-19 pandemic. <https://www.hhs.gov/about/agencies/omha/index.html>
- 5 See 42 C.F.R. §§ 405.1002(a) and 422.602.
- 6 See 42 C.F.R. § 405.1014(a)(1).
- 7 [hhs.gov/sites/default/files/OMHA-100.pdf](https://www.hhs.gov/sites/default/files/OMHA-100.pdf).
- 8 See OMHA's Tips for Filing a Request for ALJ Hearing or Review of Dismissal; [hhs.gov/about/agencies/omha/filing-an-appeal/coverage-and-claims-appeals/tips-for-filing-a-request/index.html](https://www.hhs.gov/about/agencies/omha/filing-an-appeal/coverage-and-claims-appeals/tips-for-filing-a-request/index.html).
- 9 See 42 C.F.R. § 405.1014(d).
- 10 See 42 C.F.R. §§ 405.1020(c) and 405.1022(a).
- 11 [hhs.gov/about/agencies/omha/index.html](https://www.hhs.gov/about/agencies/omha/index.html).
- 12 Recent changes have been made to how appearances are made for an ALJ hearing. Appearances can be either in person, by video-conference (VTC) or by telephone. The ALJ will direct that the appearance of an unrepresented beneficiary be conducted by VTC. The ALJ will direct that the appearance by individuals other than unrepresented beneficiaries will be by telephone. If good cause is found an in-person hearing could be conducted. See 42 C.F.R. § 405.1020(b).
- 13 See 42 C.F.R. § 405.1042(a)(3).
- 14 See 42 C.F.R. § 405.1020(c)(2).
- 15 [medicareadvocacy.org/covid-19-an-advocates-guide-to-medicare-changes](https://www.medicareadvocacy.org/covid-19-an-advocates-guide-to-medicare-changes).
- 16 See 42 C.F.R. §§ 405.1018, 1028.
- 17 See 42 C.F.R. § 405.1036(a).
- 18 See 42 C.F.R. § 42 C.F.R. 405.1036(c) and (d).
- 19 See 42 C.F.R. § 422.101.
- 20 See Center for Medicare Advocacy's website for guides, toolkits and additional information regarding coverage rules. [medicareadvocacy.org](https://www.medicareadvocacy.org). See also the Centers for Medicare & Medicaid Services Medicare Beneficiary Policy Manual for coverage rules, [cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS012673](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS012673), and the Center for Medicare & Medicaid Services Medicare Claims Processing Manual for beneficiary liability protections, [cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS018912](https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS018912).
- 21 See 42 C.F.R. § 405.1036(d).

- 22 See 42 C.F.R. § 405.1000(d).
- 23 See 42 C.F.R. § 405.1036(e).
- 24 See 42 C.F.R. § 405.1016(a).
- 25 CMS determined that the Part 405 rules that govern Part A and B appeals do not apply to Parts 422 and 478 that govern Part C and QIO Appeals. See 42 C.F.R. § 422.562(d)(2).
- 26 See 42 C.F.R. §§ 405.1102(a) and 422.608. Recently revised Medicare Appeals regulations in part, authorize Attorney Adjudicators, rather than ALJs to perform a portion of OMHA's workload that does not require a hearing. Attorney adjudicators can issue decisions when a decision can be issued without an ALJ conducting a hearing under the regulations, dismissals when an appellant withdraws his or her request for an ALJ hearing, certain remands, and reviews of QIC and IRE dismissals. See 42 C.F.R. § 405.902.