

Medicare Administrative Law Judge Hearings: Advocacy Tips

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About The Center for Medicare Advocacy

The Center for Medicare Advocacy is a national, non-profit law organization founded in 1986 that works to advance access to comprehensive Medicare and quality health care.

- Headquartered in CT and Washington, DC
 - With additional attorneys around the country
- Staffed by attorneys, advocates, nurses, and technical experts
- Education, legal analysis, writing, and assistance
- Systemic change – Policy & Litigation
 - Based on our experience with the problems of real people
- Medicare appeals
- Medicare/Medicaid Third Party Liability Projects

Key Lessons

1. Appeals and hearings continue to be scheduled, heard, and decided during the COVID-19 pandemic.
2. Persevere through the lower levels of appeal and concentrate time and energy on the hearing.
3. Read all decisions thoroughly and follow all appeals instructions closely.
4. Begin developing the case as soon as possible.
5. Know the law and be ready to combat false information!

Today's Agenda

- Overview of Medicare Appeals
- Overview of Office of Medicare Hearings and Appeals (OMHA)
- The ALJ hearing:
 - Preparing for the hearing
 - Doing the hearing
 - After the hearing
- Resources
- Questions??

Overview of Medicare Appeals

Medicare Appeals Overview

Several Kinds:

- Traditional Medicare (42 C.F.R. §§ 405.900 – 405.1208)
 - Expedited
 - Standard
- Medicare Advantage (42 C.F.R. §§ 422.560 – 422.634; Parts C & D Enrollee Grievances, Organization/Coverage Determinations, and Appeals Guidance)
 - Expedited/Fast Track
 - Standard
- Part D (42 C.F.R. §§ 423.558 – 423.638 and 423.1968 – 423.2140; Parts C & D Enrollee Grievances, Organization/Coverage Determinations, and Appeals Guidance)
 - Exception
 - Expedited
 - Standard

Overview of Office of Medicare Hearings and Appeals (OMHA)

Office of Medicare Hearings & Appeals

- OMHA administers the ALJ hearing program
 - Appeals arising from Parts A, B, C, and D claims
 - [HHS OMHA information](#)
- Currently, in addition to a central operations and headquarters office, there are 10 OMHA field office locations
- Hearing is available
- Best shot at winning coverage at this level. Hang in there!

Office of Medicare Hearings & Appeals

- Attorney Adjudicator may perform certain tasks including:
 - Issuing a decision when a decision can be issued without an ALJ conducting a hearing
 - Dismissing a case when an appellant withdraws request for hearing
 - Certain remands
 - Reviews of QIC and IRE dismissals

The ALJ Hearing

- Preparing for the hearing
- Doing the hearing
- After the hearing

Preparing for the Hearing

Right to an ALJ Hearing

- Amount in controversy must be met—\$170 in 2020
- File written request within 60 days of previous decision
 - [Use Form OMHA-100](#)

Request for an ALJ Hearing

- Content of the request for an ALJ hearing
- Where to file the request for an ALJ hearing
- Copy requirements
- Appointment of Representative
 - [Use Form CMS-1696](#)

Notice of Hearing

- Supposed to be sent 20 days prior
- Review closely
- Note hearing appearance and time and place of hearing
 - To request a change in time and place of hearing, first try calling the legal assistant to re-schedule
- Do you call them or do they call you?
- Respond to notice
- Correct errors in the notice

Pre-Hearing Conference

- A party to the hearing has a right to request a pre-hearing conference to facilitate the hearing
- Good idea to clarify issues, etc. to be addressed at the hearing

Request Administrative Records

- Request a copy of administrative record:
 - Can reference during the hearing
 - Supplement record with any missing information
 - Keep copies and records of everything!

Be Prepared to Address All Issues

- Issues at the hearing:
 - Be prepared to address all issues, even those decided favorably at previous levels of review

Develop Your Case

- Obtain medical records from all relevant providers
- Submit statement from treating physician
- Consider witness testimony
- Submit a Memorandum of Law prior to the hearing
- Submit evidence to ALJ
 - Only providers, suppliers, or beneficiaries represented by a provider or supplier need to provide good cause for submitting new evidence after the ALJ hearing has been requested. 42 C.F.R. § 405.1018.

The ALJ Hearing

General Advice

- Don't be intimidated
- Non-adversarial process
- Know the law, address the issues, be clear and concise, and get objections on the record

Appear and Present Evidence

- Right to appear and present evidence:
 - Any party to a hearing has the right to appear and state their position
- Issues, items/services, and relevant dates:
 - Listen closely to ALJ's opening to make sure issues are framed properly, the correct items and services are being considered, and the correct dates are mentioned

Additional Documentation

- Ask ALJ if they received any additional evidence you sent and ask that documentation be made part of the record
- Important because Medicare Appeals Council at next level will only consider evidence contained in the record of proceedings before the ALJ

Objections

- Object to documentation you think should not be made a part of the record
- If another party submitted documentation without also sending it to you, object and ask for additional time to review and respond to the documentation

Conduct of the ALJ

- ALJ provides a de novo review
- ALJ hearing is informal—rules of evidence do not apply
- Unrepresented beneficiaries must be assisted by ALJ
- ALJ must provide an individualized assessment of beneficiary

Presenting the Argument

- Oral argument should include:
 - Recitation of the facts
 - Citation to relevant law
 - Other support including medical research, etc.
- Written statement
- Witnesses

Know the Law and Relevant Citations

- Know the law regarding coverage criteria
- Know the law regarding notice requirements
- Know the law regarding appeals
 - Note that ALJ's, providers, and contractors sometimes don't know the law. Providers sometimes make up law/legal standards.

Keeping the Record Open

- Keeping the record open:
 - Can ask that record be kept open after the ALJ hearing so that you can submit additional information
- Supplemental hearing:
 - Can ask for a supplemental hearing to submit additional information

After the Hearing

Time Frames for Deciding an Appeal

- 90 calendar days for Part A and B appeals
- 90 calendar days does not apply to Part C appeals.
 - Current CMS policy is to prioritize beneficiary/enrollee appeals
- 10 calendar days for Part D expedited appeals

Written ALJ Decision

- Review decision carefully to determine if there are any appealable issues
- If there are technical issues in the decision, may ask ALJ to re-open case and issue an amended decision

After the Hearing Options

- Appealing the ALJ decision:
 - May request a review from the Medicare Appeals Council
 - Request must be in writing and within 60 calendar days of receipt of decision

Attorney's Fees

Q: Who can pay our attorney's fees? Is approval required? Any limitation on fees?

A: Fee must be approved by the Administrative Law Judge for services associated with the ALJ and DAB/MAC appeal. Reasonableness of fee will be evaluated in context of the complexity of services.

- [CMS Appointment of Representative form](#) includes further details
- Petition Form [Petition Form](#)
- [OMHA Case Processing Manual, Ch. 5](#)

Resources

- Medicare.gov information about [claims & appeals](#)
- Website for [Office of Medicare Hearings and Appeals](#), which administers Medicare's nationwide hearings and appeals
- Website for the [Departmental Appeals Board](#)
- Review the Center for Medicare Advocacy's [Self-Help Packets](#) for Medicare appeals of nursing home, home health and outpatient therapy cases.

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