Chapter II-6 Pre-Hearing Case Development

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II-6-1 Pre-Hearing Review, Generally

A. Overview

A pre-hearing case review helps to ensure that procedural or evidentiary issues are addressed as early in the process as possible, to avoid unnecessary steps (for example, scheduling a hearing when a procedural matter may result in a dismissal) or delays in adjudicating the request for hearing (for example, obtaining and reviewing evidence at or after the hearing). Generally, a comprehensive pre-hearing case review occurs after:

1. The procedural review has been conducted (in accordance with the provisions of II-3);
2. The administrative record has been established (in accordance with the provisions of II-4); and
3. The default issues have been identified (in accordance with the provisions of II-5).

B. Elements of a Pre-Hearing Review

- Whether the correct claim file has been provided and whether any other claim files are needed to fully adjudicate the Request for Hearing;
- Whether any special appeal procedures are required;
- Whether any parties do not have to be sent a Notice of Hearing (See I-4 for additional information on parties); (§§ 405.1020, 405.1022)
- Identification of the specific issues in the case to be included in the Notice of Hearing (See II-7-3 for additional information on Notice of Hearing requirements); (§ 405.1022(b)(1))
- Whether any accommodations of special needs are required, for example, an interpreter (See II-7-4 for additional information on accommodation of special needs);
- The identification of any missing evidence;
- Whether any special procedures may be necessary to efficiently process the case (for example, whether expert testimony, subpoenas, or interrogatories are necessary, or whether discovery may be available);
- Whether a hearing is required (for example, a hearing is not required if the ALJ can issue a fully favorable decision on-the-record, or if all the parties have waived the right to a hearing);
- Whether a pre-hearing conference is warranted.

II-6-2 Pre-Hearing Review of the Record

Citations: §§ 405.1000, 405.1002, 405.1014, 405.1018, 405.1028, 405.1032, 405.1034

A. Evidence Received from QIC or QIO

1. Standard Appeals.

i. In accordance with the procedures of II-2-7, OMHA requests cases files from the QIC or QIO that issued the reconsideration decision. The case file should include the evidence the QIC or QIO used in making the reconsideration decision. OMHA adjudicators consider this evidence along with any new, admissible evidence that may be submitted prior to the hearing to identify the pertinent facts in the appeal.

ii. In order to prevent a possibly avoidable remand and the resulting delays to an appeal, OMHA staff must first attempt to obtain missing records from CMS contractors before a remand order is issued. For example, if the reconsideration decision references evidence that is not present in the case file, staff must first request that the contractor forward the missing information to the appropriate hearing office. Staff must document all steps taken to obtain the information and include form OMHA-101, Report of Contact, in the administrative record as necessary.

iii. If staff is unable to obtain the missing information that can only be provided by CMS or its contractors after reasonable, documented attempts to directly contact the QIC or QIO, a remand may be issued.

2. Escalations

i. If a case is escalated to OMHA from a QIC, OMHA receives the case file(s) that was/were used by the Medicare Administrative Contractor (MAC) in making the redetermination decision, along with the request for reconsideration and any evidence filed with the QIC.

ii. If the record is missing information, staff must follow the provisions of I-7-5 B.3.b and document attempts to obtain the missing evidence prior to issuing a remand.

B. Examination of New Evidence

1. If an appellant has additional evidence to submit, it should provide a statement of the additional evidence in its request for hearing and indicate when the evidence will be submitted. § 405.1014(a)(7). However, evidence may be submitted by the parties, including the appellant, directly to the assigned ALJ within 10 calendar days of receiving the Notice of Hearing (except that an unrepresented beneficiary may submit evidence at any time). § 405.1018(a), (d). If a party (other than an unrepresented beneficiary)

submits evidence more than 10 calendar days after receiving the notice of hearing, the adjudication time frame is affected. § 405.1018(b), (d).

NOTE: To help expedite the processing of incoming paper requests for hearing that OMHA Central Operations must docket and store, OMHA has publicly asked appellants to hold additional evidence until their appeals are assigned to an ALJ so that the appellants may submit the evidence directly to the assigned ALJ.

NOTE: If a party, other than an unrepresented beneficiary, submits written evidence later than 10 calendar days after receiving the notice of hearing, the period between the time the evidence was required to have been submitted and the time it is received is not counted toward the adjudication time frame. See I-7 for additional information on adjudication time frames.

2. After a hearing is requested but before it is held, the ALJ examines any new evidence submitted by a provider, supplier, or beneficiary represented by a provider or supplier to determine whether there is good cause for submitting the evidence for the first time at the ALJ level. §§ 405.1018(c), 405.1028(a).

   NOTE: This requirement does not apply to Medicaid State Agencies or beneficiaries, unless the beneficiary is represented by a provider or supplier.

   i. Determining good cause.

   For example, an ALJ may determine that good cause exists when:

   a. The new evidence is material to an issue addressed in the QIC's reconsideration and that issue was not identified as a material issue prior to the QIC's reconsideration. § 405.1028(b).

   b. The new evidence is material to a new issue identified in accordance with § 405.1032.

   c. The new evidence was not required to be in the party's possession at an earlier time (for example, the document was not required when the claim was filed, or is not explicitly required by NCD or a LCD), and the record reflects that the party made reasonable attempts to obtain the evidence before the reconsideration decision was issued but was unable to do so.

   d. The record reflects that the new evidence was actually submitted to the QIC or other lower level of appeal before the reconsideration decision was issued, but through administrative error, is not associated with the current appeal file.

ii. *If good cause does not exist.*

If the ALJ determines that there was not good cause for submitting the evidence for the first time at the ALJ level, the ALJ must exclude the evidence from the proceeding and may not consider it in reaching a decision. The evidence is marked as excluded and placed at the end of the administrative record in accordance with II-4-3 D.4. As soon as possible, but no later than the start of the hearing, the ALJ must notify all parties that the evidence is excluded from the hearing. § 405.1028(b)-(d)

C. Submission of Prior Decisions

OMHA conducts a *de novo* review of each claim at issue and issues a decision based on the hearing record. § 405.1000(d); see also, § 557 of the Administrative Procedure Act. *De novo* review requires the ALJ to review and evaluate the evidence without regard to the findings of prior determinations on the claim and make an independent assessment relying upon the evidence and controlling laws. If an appellant or party provides a copy of a prior decision for a similar case decided by another ALJ or the Council as evidence to support its position in the appeal at issue, it will not be considered precedential.

II-6-3 On-the-Record Review

Citations: §§ 400.200, 405.1000, 405.1036, 405.1038

OMHA may issue a decision based on the administrative record without holding a hearing if the evidence supports a finding fully favorable to the appellant on every issue, or all parties indicate in writing that they do not wish to appear. When a hearing is not held, the decision of the ALJ must refer to the evidence in the record upon which the decision was based. § 405.1038(b)(2).

A. Fully or Wholly Favorable Decisions

1. If the evidence in the hearing record supports a finding in favor of the appellant(s) on every issue, the ALJ may issue a hearing decision without giving the parties prior notice and without holding a hearing. §§ 405.1000(g), 405.1038(a).
2. The notice of the decision must inform the parties that they have the right to a hearing and a right to examine the evidence on which the decision is based. § 405.1038(a).

NOTE: Where an on-the-record decision is possible because the evidence supports a fully favorable decision for the appellant, but is not fully favorable to all parties, the parties that may be found financially responsible should be given an opportunity for a hearing. See I-4 for additional information on who may be parties to a hearing.

Example: During an outpatient hospital care admission, a hospital supplied several self-administered drugs to a beneficiary. The claim for the drugs was initially denied. The beneficiary filed a request for redetermination. The Medicare Administrative Contractor denied coverage and found the beneficiary responsible for the non-covered cost. Subsequently, the QIC denied coverage, finding the hospital did not submit sufficient documentation about the drugs to determine coverage, and found the hospital was financially responsible for the non-covered costs for that reason. The hospital filed a request for hearing. Although the hospital was the specific party that filed the request for hearing, the beneficiary is also a party and may be held financially responsible for any non-covered costs. Therefore, the ALJ should provide both parties an opportunity for a hearing.

B. Parties Do Not Wish to Appear

1. Appellant Requests a Decision on the Record or Waives the Right to a Hearing

i. An appellant may request that a decision be made on the basis of the available record with the Request for Hearing, or at any time prior to a scheduled hearing. Use of form HHS-723, Waiver of the Right to an Administrative Law Judge Hearing, is preferred, but not required.

ii. Prior to issuing a decision on the record, OMHA will review the record to ensure that a non-appellant party was not held responsible for non-covered costs at the lower level of review.

iii. If it appears that a non-appellant party may be held responsible for any non-covered costs, a hearing is scheduled because the non-appellant party did not waive the oral hearing. In accordance with II-7-6, each party or representative that received the Notice of Hearing must acknowledge it by indicating whether they plan to attend.

iv. The ALJ may require the parties to participate in a hearing if it is necessary to decide the case, even if it does not appear that a non-appellant party may be responsible for any non-covered costs. If the ALJ determines that it is necessary to obtain testimony from a non-party, he or she may hold a hearing to obtain that testimony, even if all of the parties have waived the right to appear. In that event, however, the ALJ will give the parties the opportunity to appear when the testimony is given, but may hold the hearing even if none of the parties decide to appear. § 405.1000(f).

2. Appellant Resides Out of the United States

An ALJ may decide a case on the record and not conduct a hearing if the appellant lives outside the United States and does not inform the ALJ that he or she wants to appear, and there are no other parties who wish to appear. § 405.1038(b)(ii). The United States means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Marina Islands. § 400.200.

II-6-4 Developing the Record, Experts and the Discovery Process

Citations: §§ 556, 557 of the Administrative Procedure Act, §§ 405.1000, 405.1010, 405.1018, 405.1028, 405.1030, 405.1036, 405.1037.

A. Requests for Briefs, Memos, or Position Papers

1. The ALJ may request, or the parties may offer to submit a brief, memo, or position paper to clarify the issues prior to the hearing, if appropriate. The ALJ should set a time frame for submission of the additional information. § 405.1036(c).

   NOTE: Good cause is not required to admit briefs or position papers that summarize the evidence in the record. However, any new evidence submitted by a provider or supplier, or beneficiary represented by a provider or supplier must be submitted with a statement of good cause explaining why the evidence was not submitted to the QIC or other lower level of review. §§ 405.1018(c), 405.1028. This requirement does not apply to beneficiaries, unless the beneficiary is represented by a provider or supplier, or to Medicaid State agencies or applicable plans.

2. If there are other parties to the hearing, a copy of any written statements must be provided to the other parties at the same time they are submitted to the ALJ. § 405.1036(c)

B. Requests for CMS or CMS Contractor Participation

An ALJ may request, but may not require, CMS and/or one or more of its contractors to participate in any proceedings before the ALJ, including the oral hearing, if any. Participation includes filing position papers or providing testimony to clarify factual or policy issues, but does not include calling witnesses or cross-examining witnesses. CMS and/or one or more of its contractors may also elect to participate in the hearing process. The ALJ cannot draw any adverse inferences if CMS or a contractor decides not to participate in any proceedings before an ALJ, including the hearing. § 405.1010. See I-6-2 for additional information on CMS and CMS Contractor participation in ALJ hearings.

C. OMHA Retained Experts

1. Generally

OMHA may obtain an expert to aid in the adjudication of an appeal when the ALJ determines an expert is necessary to adjudicate the matters on appeal. Experts may be used to provide oral testimony during the hearing, to answer written questions for the record, and/or to perform tasks related to their expertise, such as conducting a statistical sample. §§ 405.1030(a) and (b), 405.1036(a)(3), and (g).

2. Obtaining an Expert

The OMHA Expert Witness Procurement (EWP) system must be used to obtain an expert.

D. Discovery

1. When Permissible.

i. Discovery (limited as set forth below) is permitted only when CMS or its contractor elects to be a party. See I-6 for more information on CMS and CMS Contractors elections, including the requirements for election of party status.

ii. The ALJ may permit discovery of a matter that is relevant to the specific subject matter of the ALJ hearing only if:

- The matter is not privileged or otherwise protected from disclosure, and
- The ALJ determines that the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate.

§ 405.1037(a); 70 Fed. Reg. 11420, 11461 (Mar. 8, 2005).

2. Limitations on discovery.

i. A party may request of another party the reasonable production of documents for inspection and copying. § 405.1037(b)(1)

ii. A party may not take the deposition, oral or written, of another party unless the proposed deponent agrees to the deposition or the ALJ finds that the proposed deposition is necessary and appropriate in order to secure the deponent's testimony for an ALJ hearing. § 405.1037(b)(2)

iii. A party may not:

- Request admissions;
- Send interrogatories; or
- Take any other form of discovery not permitted under § 405.1037. § 405.1037(b)(3).

3. Time Limits

The ALJ must set a specific date on which discovery will end. A party's discovery request is timely if the date of receipt of a request by another party is no later than the date specified by the ALJ. A party may not conduct discovery any later than the date specified by the ALJ. § 405.1037(c)(1)-(2).

4. Requests for Extensions

The ALJ may extend the time in which to request discovery or conduct discovery only if the requesting party establishes that it was not at fault in not meeting the original discovery deadline. Before ruling on a request to extend the time for requesting discovery or for conducting discovery, the ALJ must give the other parties to the appeal a reasonable period to respond to the extension request. If the ALJ grants the extension request, the ALJ must impose a new discovery deadline and, if necessary, reschedule the hearing date so that all discoveries end no later than forty-five (45) calendar days before the hearing. § 405.1037(c)(3)-(5). See I-7 for additional information on adjudication time frames.

5. Motions to Compel or for Protective Order

i. When Appropriate

Each party is required to make a good faith effort to resolve or narrow any discovery dispute. A party may submit to the ALJ a motion to compel discovery, and a party may submit a motion for a protective order regarding any discovery request to the ALJ. Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute. The declaration must also be included with any response to a motion to compel or for protective order. The ALJ must decide any motion in accordance with the provisions of § 405.1037(d) and any prior discovery ruling(s) in the appeal. § 405.1037(d)(1)-(4).

ii. Discovery Ruling

The ALJ must issue and mail to each party a discovery ruling that:

a. Grants or denies the motion to compel or for protective order in whole or in part;

b. If applicable, specifically identifies any part of the disputed discovery request upheld and any part rejected, and

c. Imposes any limits on discovery the ALJ finds necessary and appropriate. § 405.1037(d)(5).

NOTE: If a party requests discovery from another party to the ALJ hearing, the ALJ adjudication time frame is tolled until the discovery dispute is resolved. § 405.1037(d).

6. Reviewability of Discovery and Disclosure Rulings

i. General Rule

An ALJ discovery ruling, or an ALJ disclosure ruling, such as one issued at a hearing, is not subject to immediate review by the Council. The ruling may be reviewed solely during the course of the Council's review of the claim at issue. However, where CMS objects to a discovery ruling, the Council must take review and the discovery ruling at issue is automatically stayed pending the Council's order. § 405.1037(e)(1) and (2)(i).

ii. Exception

To the extent a ruling authorizes discovery or disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before the ALJ, the Council may review that portion of the discovery or disclosure ruling immediately. § 405.1037(e)(2).

7. Stays for Reviewing Discovery and Disclosure Rulings

i. When permissible.

Upon notice to the ALJ that a party intends to seek Council review of the ruling, the ALJ must stay all proceedings affected by the ruling. § 405.1037(e)(2)(ii).

ii. Length of time.

The ALJ determines the length of the stay under the circumstances of a given case, but in no event must the length of the stay be less than 15 calendar days beginning after the day on which the ALJ received notice of the party or non-party's intent to seek Council review. § 405.1037(e)(2)(iii).

iii. When Requested by CMS

Where CMS requests the Council to take review of a discovery ruling, the ruling is stayed until the time the Council issues a written decision that affirms, reverses, modifies, or remands the ALJ's ruling. § 405.1037(e)(2)(iv).

iv. When Requested by a Party Other than CMS

Where a party other than CMS requests review of a discovery ruling, if the Council does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ruling stands. § 405.1037(e)(2)(v)

E. Subpoenas

1. When Initiated by the ALJ

i. Except as set forth below, when it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying.

ii. An ALJ may not on his or her own initiative, or at the request of a party, issue a subpoena to CMS or its contractors to compel an appearance, testimony, or the production of evidence.

§ 405.1036(f)(1).

2. When Requested by a Party

i. Generally

A party may request that the ALJ issue a subpoena only where CMS or its contractor is a party and after discovery has been sought. § 405.1036(f)(4).

ii. Requirements

a. Where a party has requested a subpoena, a subpoena will be issued only where a party:

1. Has sought discovery;
2. Has filed a motion to compel;
3. Has had that motion granted by the ALJ; and
4. Has not received the requested discovery.

§ 405.1036(f)(4)

b. Written Request

1. Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the ALJ no later than the end of the discovery period established by the ALJ. § 405.1036(f)(3).
2. A party's written request for a subpoena must give the names of the witnesses or documents to be produced; describe the address or location of the witnesses or documents with sufficient detail to find them; state the important facts that the witness or document is expected to prove;

and indicate why these facts cannot be proven without issuing a subpoena. § 405.1036(f)(2).

3. Reviewability of Subpoena Rulings

i. **General Rule**

An ALJ ruling on a subpoena request is not subject to immediate review by the Council. The ruling may be reviewed solely during the course of the Council review of the claim at issue. § 405.1036(f)(5).

ii. **Exception**

To the extent a subpoena compels disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before an ALJ, the Council may review immediately the subpoena or that portion of the subpoena as applicable. Furthermore, where CMS objects to a discovery ruling, the Council must take review. § 405.1036(f)(5)(i) and (ii).

4. Stays for Subpoena Reviewing

i. Council Review

Upon notice to the ALJ that a party or non-party intends to seek Council review of the subpoena, the ALJ must stay all proceedings affected by the subpoena. § 405.1036(f)(5)(iii).

ii. Length of Stay

The ALJ determines the length of the stay under the circumstances of a given case, but in no event is the stay less than 15 calendar days beginning after the day on which the ALJ received notice of the party or non-party's intent to seek Council review. If the Council grants a request for review of the subpoena, the subpoena or portion of the subpoena, as applicable, is stayed until the Council issues a written decision that affirms, reverses, or modifies the ALJ's action on the subpoena. § 405.1036(f)(5)(iv) and (v).

iii. Council Denies Review

If the Council does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ALJ's action stands. § 405.1036(f)(5)(vi).

5. Enforcement

i. By Whom

If the ALJ determines, whether on his or her own motion or at the request of a party, that a party or non-party subject to a subpoena issued under this section has refused to comply with the subpoena, the ALJ may request the Secretary to seek enforcement of the subpoena in accordance with Section 205(e) of the Act. § 405.1036(f)(6)(i).

ii. How Performed

Any enforcement request by an ALJ must consist of a written notice to the Secretary describing in detail the ALJ's findings of noncompliance and his or her specific request for enforcement, and provide a copy of the subpoena and evidence of its receipt by certified mail by the party or nonparty subject to the subpoena. § 405.1036(f)(6)(ii).

6. Notice

The ALJ must promptly mail a copy of the notice and related documents to the party subject to the subpoena, and to any other party and affected non-party to the appeal. § 405.1036(f)(6)(iii).

II-6-5 Pre-Hearing Conferences

Citations: § 405.1040

A. Generally

If, after reviewing the record, it appears the appeal requires clarification prior to the hearing, (for example, a discussion of how the hearing will be facilitated or clarification of issues to be considered at the hearing), the ALJ may decide on his or her own initiative, or at the request of any party, to hold a pre-hearing conference. § 405.1040(a). At the conference, the matters stated in the notice of pre-hearing conference or notice of hearing are discussed. The ALJ may consider matters in addition to those stated in the notice of hearing, if the parties consent in writing. An audio recording of the conference is made as the record of the conference. § 405.1040(c).

Example. The appellant disagrees with the QIC's reconsideration decision upholding an overpayment based on a statistical sample and extrapolation. The Request for Hearing indicates that the appellant may call multiple witnesses and experts and that many of the underlying claims at issue cover the same denial reason. The ALJ may determine that a pre-hearing conference would be beneficial to facilitate scheduling. The ALJ may inquire as to the length of time each proposed witness is expected to testify and whether the appellant intends to present evidence and argument for every underlying claim in the sample so sufficient time is allotted to conduct the hearing.

B. Notice of Pre-Hearing Conference

1. The ALJ must inform the parties of the time, place, and purpose of the conference at least 7 calendar days before the conference date, unless a party indicates in writing that it does not wish to receive a written notice of the conference. § 405.1040(b).
2. The Notice of Pre-hearing Conference should contain a brief description of the matters to be discussed and must be issued in accordance with the provisions of II-7-3.

C. Order

Following the pre-hearing conference, the ALJ issues an order stating all agreements and actions resulting from the conference. The order is mailed to all parties. If the parties do not object, the agreements and actions become part of the hearing record and are binding on all parties. § 405.1040(d)