



## HHS Announces Final Rule to Remedy Medicare Appeals Backlog

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On January 17, 2017, the Department of Health and Human Services (HHS) released a Final Rule announcing a three-prong appellate process change in an effort to decrease the growing Medicare appeals backlog at the administrative level.<sup>1</sup> These modifications were announced following a federal court order mandating that HHS resolve the bottleneck of appeals by Dec. 31, 2020.<sup>2</sup>

The number of appeals has ballooned in recent years, particularly at the administrative law judge (“ALJ”) level, which is overseen by the Office of Medicare Hearings and Appeals (“OMHA”). HHS reported in September 2016 that OMHA had accumulated a backlog of over 650,000 appeals, but is able to process less than 100,000 appeals annually. As a result, many providers have been forced to wait over 900 days for an ALJ hearing, despite the 90-day statutory deadline to receive an ALJ decision.<sup>3</sup>

The Final Rule outlines a “three-prong approach by implementing rules that expand the pool of available OMHA adjudicators and improve the efficiency of the appeals process by streamlining the processes so less time is spent by adjudicators and parties on repetitive issues and procedural matters.”<sup>4</sup>

To increase efficiency, attorney adjudicators would be permitted to handle some appeals instead of administrative law judges:

[W]ell-trained attorneys can perform a review of the administrative record and more efficiently draft the appropriate order for certain actions, such as issuing dismissals based on an appellant’s withdrawal of a request for an ALJ hearing, remanding appeals for information or at the direction of the Council, and conducting reviews of QIC [Qualified Independent Contractor] and IRE [Independent Review Entity] dismissals.

As outlined in the Final Rule, HHS hopes that this change will allow ALJs to focus on more substantive issues in the hearings. In addition, the Final Rule gives authority to the Departmental Appeals Board, Medicare Appeals Council (“DAB-MAC”), the entity that handles the next level of appeal after the ALJ level, to identify certain DAB-MAC decisions as precedential. By establishing some precedent at the DAB-MAC level, HHS hopes that providers will be better equipped to make decisions about which claim denials or decisions to appeal, thereby potentially decreasing the number of appeals on the front-end.

However, skeptics of the Final Rule have noted that a fundamentally better solution would be for HHS to address the root cause of the massive appeals backlog – which many providers have attributed to the aggressive auditing practices of Recovery Audit Programs and the issuance of erroneous claims denials. Regardless, for better or worse, the Final Rule will go into effect on March 20, 2017.

1 <https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-32058.pdf> (last accessed Jan. 23, 2017)

2 <http://www.lexology.com/library/detail.aspx?q=7ccf5a91-8e2a-4d19-95fa-c89d0293cb40> (last accessed Jan. 23, 2017)

3 <https://www.hhs.gov/about/agencies/omha/about/current-workload/index.html> (last accessed Jan. 23, 2017)

4 <https://federalregister.gov/d/2016-32058> (last accessed Jan. 23, 2017)

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