



CMS Issues Update for Contractors Defending Medical Review Decisions at Medicare ALJ Hearings

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On October 13, 2017, the Centers for Medicare and Medicaid Services (CMS) issued a CMS Transmittal to update the Medicare Program Integrity Manual (MPIM) on recent regulatory changes in the Office of Medicare Hearings and Appeals process, effective on November 14, 2017. The changes reflect the regulatory updates made earlier this year to place certain limits on Medicare contractor participation in Administrative Law Judge (ALJ) hearings as a participant, party, or witness, as outlined below.¹

I. Role of the Participant

For Medicare contractors electing to participate in ALJ hearings as a participant (i.e., a non-party), the changes clarify that activities are limited to the submission of written testimony or position papers, with some exceptions.² Multiple CMS contractors are allowed to participate in the ALJ hearing as a participant. However, if no contractor invokes party status, only the first contractor that elects to participate in the hearing as a non-party participant may participate in the oral hearing, and all other entities may only participate in the ALJ hearing via submission of written testimony or position papers.³ Status as a “participant” does not include the same rights as full party status; therefore, the contractor may not call witnesses or cross-examine witnesses of another party.⁴

II. Role of the Party

Contractors may invoke party status in ALJ hearings for cases of interest to CMS.⁵ Under the regulations, the first contractor to invoke party status with the ALJ is made the party to the hearing, and any other contractors who would like to have party status are limited to participant status and precluded from the hearing. If the contractor is interested in a case, but precluded from the hearing, the contractor may request “leave” from the ALJ.⁶ In doing so, the contractor is formally requesting that the ALJ grant the contractor the right to be a secondary party to the hearing, and must include the reason their presence is necessary. Alternatively, if not allowed to participate as a secondary party, the contractor may serve as a witness, based on the circumstances.

As a party, the contractor may orally participate in the hearing, file position papers, call witnesses, and cross-examine witnesses of other parties. The contractor must submit any position paper or additional evidence requested by the ALJ.⁷ As a party to the hearing, the contractor is subject to discovery by the other party to the hearing.⁸

CMS directs that, when the ALJ hearings involve issues deemed to be significant by CMS, the

¹ 42 C.F.R. §§ 405.1010 and 405.1012

² A non-party participant may be permitted to provide testimony to clarify factual or policy issues in the case. See example MPIM, Chapter 3, Section 3.9

³ 42 C.F.R. § 405.1010(d)(1) and (2). This participation is limited to clarification of factual or policy issues, as requested by the ALJ. CMS would not expect contractors to be responsible for clarifying factual or policy issues for cases or claims outside of their jurisdiction.

⁴ 42 C.F.R. § 405.1010(c)(1).

⁵ Party status election is subject to the regulatory provisions in 42 C.F.R. § 405.1012 and the CMS-prescribed Qualified Independent Contractor (QIC) prioritization process.

⁶ 42 C.F.R. § 405.1010(d)(2).

⁷ 42 C.F.R. § 405.1010(c)(2)(i) and (ii).

⁸ 42 C.F.R. § 405.1037.

contractor shall invoke party status to participate in the ALJ hearing, which may also require participation in any pre-ALJ hearing conference calls, as necessary, with other contractors, and coordination with Medical Directors or related personnel from other contractors intending to participate as consultants or expert witnesses, as necessary.⁹

III. Role of the Witness

A contractor may be called as a witness by CMS or another CMS contractor that is a party to a hearing. A need for a witness is determined by the party to the hearing, and contractors are encouraged to participate as witnesses when another CMS contractor or CMS has requested their support in a hearing. As a witness, contractors are tasked with supporting the party to the hearing in responding to policy and factual issues related to a particular case by direct examination and are subject to cross-examination by the opposing party.

The MPIM update also included revisions to the section outlining contractor obligations regarding electing their participation status, directing the contractors to establish a process for assessing which cases should be selected for participation, as well as the type of participation. Factors to be considered include, but are not limited to: (i) originator of initial denial, (ii) policy implications, (iii) dollars at issue, (iv) program integrity matters, and (v) the extent to which a particular issue is, or has been, a recurring issue at the ALJ level of appeal.

In cases in which the contractor was the medical reviewer issuing the denial subject to appeal (the "Initial Reviewer"), that contractor is required to have a prioritized ability to invoke party status. Contractors who did not perform the original review and denial can only invoke party status after the Initial Reviewer confirms it does not wish to invoke party status.¹⁰

Finally, the updates to the MPIM revised the ALJ hearing coordination requirements for multi-participant contractors. The QIC, as needed, will set-up a brief pre-hearing conference call to discuss the respective entities' participation in the case and the roles and responsibilities of each participant. The MPIM provides examples where a call might be necessary, including high dollar cases, extrapolated overpayments, policy implications, or fraud related cases. The contractor will establish a single point of contact for the ALJ offices on administrative matters related to the hearing.

⁹ 42 C.F.R. § 405.1010(d)(3).

¹⁰ See, 42 C.F.R. §§ 405.1010 and 405.1012 for further detail.

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