

# **Medicare Part A and Part B Appeals**

Texas Legal Services Center  
January, 2012

# Medicare Part A and Part B Appeals

## Contents -- Slide Numbers

Introduction	3 – 7
Entitlement Appeals	8 – 10
Claim Appeals	11 – 33
Initial Determinations	34 – 43
Redeterminations	44 – 57
Reconsideration	58 – 84
ALJ Hearing	85 – 118
MAC Review	119 – 124
Federal Court Review	124 – 125
Legal Hotline for Texans	126

# Medicare:

- ❖ For persons 65 years of age or older or
- ❖ For persons who have received Social Security Disability Benefits for 24 months.

# Medicare Parts A and B are:

- ❖ Administered at the federal level by the Centers for Medicare and Medicaid Services (CMS), and
- ❖ Currently not means-tested.

# Effective Date of Current Appeals Rules:

- ❖ Generally, May 1, 2005;
- ❖ Transfer of Medicare ALJ hearings from SSA to DHHS was to occur between July 1 – October 1, 2005.

The rules apply when there has been an initial determination regarding:

- ❖ Eligibility,
- ❖ Coverage, or
- ❖ Amount of benefits.

[42 CFR §405.900](#)

Definitions used in the rules are  
found at:

42 CFR §405.902.

# General description

## Entitlement Appeals

- ❖ Initial eligibility determinations will be subject to reconsideration before SSA.
- ❖ SSA performs reconsideration under 20 CFR Part 404, Subpart J.

42 CFR §405.904(a)(1)

# General description

## Entitlement appeals

- ❖ After reconsideration, an ALJ hearing can be requested.
- ❖ The ALJ will be a DHHS (CMS) ALJ.

42 CFR §405.904(a)(1)

# General description

## Entitlement appeals

- ❖ After ALJ decision, Medicare Appeals Council (MAC) review can be sought.
- ❖ After MAC decision, federal district court review can be sought.

42 CFR §405.904(a)(1)

# General description -- Claim appeals

- ❖ Beneficiary dissatisfied with Medicare contractor's initial determination of a claim can request redetermination.
- ❖ It is the Medicare contractor who performs redeterminations of claims.

42 CFR §405.904(a)(2)

## General description – Claim appeals

- ❖ After redetermination by the contractor, the beneficiary can request reconsideration.
- ❖ “Qualified Independent Contractors” (QICs) will perform the reconsideration.

42 CFR §405.904(a)(2)

## General description – Claim appeals

- ❖ After reconsideration by the QIC, if the amount-in-controversy requirement is met, the beneficiary can request an ALJ hearing.
- ❖ The amount-in-controversy threshold is set forth at 42 CFR §405.1006.

42 CFR §405.904(a)(2)

## General description – Claim appeals

- ❖ For calendar year 2012, the required amounts in controversy are:
  - ❖ For an ALJ hearing, \$130; and
  - ❖ For federal court judicial review, \$1350.
- ❖ These amounts were announced in the Federal Register on September 23, 2011.

76 FR No. 185, pp. 59138-59139 (09/23/11)

## General description – Claim appeals

- ❖ After decision by the DHHS ALJ, Medicare Appeals Council (MAC) review can be sought.
- ❖ After the MAC decision, federal district court review can be sought, if the amount-in-controversy requirement is met.

42 CFR §405.904(a)(2)

# General description – Claim appeals

- ❖ Under certain circumstances providers may be able to appeal denials of coverage.

42 CFR §405.904(b)(1) and (2)

# Who can be a party?

- ❖ 42 CFR §405.906 states who can be a party to an initial determination.
- ❖ A party can participate in an appeal.
- ❖ The beneficiary can be a party.

# Who else can be a party?

- ❖ At the initial determination stage:
  - ❖ A supplier who has accepted assignment for items or services that are at issue in the claim.

42 CFR §405.906(a)(2)

# Who else can be a party?

- ❖ At the initial determination stage:
  - ❖ A provider of services who files a claim for items or services furnished to a beneficiary.

42 CFR §405.906(a)(3)

# Who else can be a party?

- ❖ At the redetermination, reconsideration, ALJ, and Medicare Appeals Council (MAC) stages, additional persons or entities can become parties.

42 CFR §405.906(b)

# Who else can be a party?

- ❖ At these stages beyond the initial determination, all the parties to the initial determination can be parties.

42 CFR §405.906(b)(1)

# Who else can be a party?

- ❖ At these stages beyond the initial determination:
  - ❖ The state Medicaid agency can be a party with respect to items or services furnished to a “dual eligible” for which the state agency has made payment or may be liable.

42 CFR §§405.906(b)(2), 405.908

# Who else can be a party?

- ❖ At these stages beyond initial determination: non-participating physicians or suppliers, billing on an assigned basis, who may be liable to make a refund.

42 CFR §§405.906(b)(4), (5)

## Representation of parties

- ❖ To represent a party in an initial determination or appeal a valid written appointment must be on file.
- ❖ The written appointment of representation has seven elements.

42 CFR §405.910

## Written appointment of representation – Elements

- ❖ Be signed and dated by both the party and the representative, with address and phone number of each;
- ❖ Contain a statement appointing the representative and authorizing the adjudicator to release identifiable health information to the representative; and
- ❖ Specify the purpose and scope of representation.

## Written appointment of representation -- Elements

- ❖ The written appointment of representation must
  - ❖ Include the beneficiary's Medicare health insurance claim number;
  - ❖ Show The appointed representative's professional status or relationship to the party; and
  - ❖ Be filed with the entity processing the party's initial determination or appeal.

42 CFR §405.910(c)

# Written appointment of representation -- Form

- ❖ CMS has a standard form for the written appointment of representation.
- ❖ The form is Form CMS-1696.

# Representative fees

- ❖ For services at the ALJ or MAC level, the fee must be approved by the DHHS Secretary.
- ❖ Fees will not be paid out of the Medicare trust funds.

42 CFR §405.910(f)

## Appointed representative -- responsibilities

- ❖ Act in the interest of the party;
- ❖ Keep the party informed of the status of the claim;
- ❖ Disclose to a beneficiary any financial risk the beneficiary may have; and
- ❖ Comply with all laws, and CMS regulations, rulings, and instructions.

42 CFR §405.910(g)

## Appointed representative – authority

- ❖ Obtain appeals information to the same extent that a party could;
- ❖ Submit evidence;
- ❖ Make statements about facts and law; and
- ❖ Make any request, give or receive any notice about the appeal.

42 CFR §405.910(h)

# Appointed Representative Fees

- ❖ An appointed representative who wants to charge a fee must obtain approval from the Secretary of Health and Human Services.
- ❖ Fees will only be approved for services at the ALJ level or above.

42 CFR §405.910(f)(1)

# Appointed Representative Fees

- ❖ No award of fees will be paid out of the Medicare trust funds.
- ❖ In other words, if a fee is approved, a party will be the source of any payment.

42 CFR §405.910(f)(2)

# Notice of Action

- ❖ The appointed representative is to receive notice of Medicare action at redetermination, reconsideration, appeal, in connection with an initial determination.

42 CFR §405.910(i)(2)

# Initial determinations

- ❖ The Medicare contractor (Part A, Fiscal Intermediary; Part B, Carrier) makes the initial determination.
- ❖ The contractor notifies the parties of the initial determination.

42 CFR §405.920

# Initial determinations – claims

## Concern:

- ❖ Are the items or services furnished covered or reimbursable under Medicare?
- ❖ What amount is payable?

42 CFR §405.920

# Initial determinations

- ❖ The Notice of Initial Determination sent to the beneficiary must:
  - ❖ Be written “in a manner calculated to be understood by the beneficiary” and
  - ❖ Be sent to the beneficiary’s last known address.

42 CFR §405.921(a)

# Initial determinations

- ❖ The Notice of Initial Determination must contain:
  - ❖ The reasons for the determination including whether a local medical review policy, a local coverage determination, or national coverage determination was applied.

42 CFR §405.921 (a)(2)(i)

# Initial determinations

- ❖ The Notice of Initial Determination must also contain:

- ❖ The procedures for obtaining additional information concerning the contractor's determination, such as a specific provision of the policy, manual, law or regulation used in making the determination.

42 CFR §405.921(a)(2)(ii)

# Initial determinations

- ❖ The Notice of Initial Determination must also contain:
  - ❖ Information on the right to a redetermination and instructions on how to request a redetermination, and
  - ❖ Any other requirements specified by CMS.

42 CFR §405.921(a)(2)(iii) and (iv)

# Initial determinations

- ❖ On “clean claims” the contractor must make the initial determination within 30 days of receipt or else pay interest at the rate specified at 31 U.S.C. 3902 (a).

42 CFR §405.922

# What is a “clean claim”

- ❖ A clean claim is a claim that has no defect or impropriety, including lack of substantiating documentation, or other circumstance requiring special treatment.

42 CFR §405.902

# Initial determinations

- ❖ Decisions regarding entitlement to Medicare (made by SSA); and
- ❖ Decisions regarding coverage of a claim and amounts to be paid (made by the Medicare contractor).

42 CFR §405.924(a),(b)

# Initial determinations

- ❖ Also include determinations by a Quality Improvement Organization that
  - ❖ A provider can terminate services or
  - ❖ A provider can discharge an individual from the provider of services.

42 CFR §405.924(c)

# Redetermination is next

- ❖ After the initial determination, redetermination can be requested.
- ❖ Unlike for an ALJ hearing or Federal Court review, there is no amount in controversy requirement for redetermination.

# Redetermination is next

- ❖ Redetermination, if requested, will avoid the determination itself being binding. The determination is binding if it is not revised, reconsidered, or reopened.

42 CFR §405.928

# Request for Redetermination

## ❖ Time-frame

- ❖ 120 days from receipt of Notice of Initial Determination.

- ❖ There is a rebuttable presumption of receipt 5 days after the date of the notice.

42 CFR §405.942

# Request for Redetermination

## ❖ Time-frame – Extensions

- ❖ For good cause as defined at 42 CFR §405.942 (b)(2), the contractor can extend the time for requesting redetermination.
- ❖ Serious illness, death in the immediate family, accidental destruction of records – these are examples of good cause in this regard.

42 CFR §405.942(b)

# Request for Redetermination

- ❖ Place and method of filing
  - ❖ Must be filed with the contractor; and
  - ❖ “Should be made on a standard CMS form.”

42 CFR §405.944 (a), (b)

# Request for Redetermination

## ❖ Place and method of filing

❖ If the CMS form is not used, the written request must contain:

❖ Beneficiary's name and Medicare health insurance claim number, and

❖ Services, items and dates for which redetermination is requested.

42 CFR §405.944 (b)

## Request for Redetermination -- Evidence

- ❖ Evidence the party wants considered should be submitted with the request.
- ❖ Submitting evidence after filing adds 14 calendar days to the 60 days the contractor has for redeterminations.

42 CFR §405.946

# Redetermination – Conduct of

- ❖ Contractor (carrier, intermediary)
  - ❖ Reviews evidence and findings on which the initial claim was based, and
  - ❖ Any additional evidence the parties submit or the contractor obtains on its own.

42 CFR §405.948

# Redetermination – who can do it?

- ❖ The redetermination must be made by an individual who was not involved in making the initial determination.

42 CFR §405.948

# Redetermination – time-frame

- ❖ In general, the redetermination decision is due within 60 days from the date the contractor received a timely request for redetermination.

42 CFR §405.950(a)

# Redetermination

- ❖ “Upon the basis of the evidence of record, the contractor adjudicates the claim(s) and renders a redetermination affirming or reversing, in whole or in part, the initial determination in question.”  
42 CFR §405.954

# Redetermination

- ❖ The notice of redetermination must provide a summary of the facts, an explanation of how pertinent laws and regulations were applied to the case, and a rationale for the decision.

42 CFR §405.956(b)

# Notice of Redetermination

- ❖ The notice of the redetermination decision is to be transmitted to all parties.
- ❖ The notice (if not entirely favorable to the appellant), must inform of how to seek reconsideration.

42 CFR §405.956(b)

# Redetermination – effect of

- ❖ A redetermination is final and binding on all parties unless reconsideration is requested and completed, or the redetermination decision is re-opened.

42 CFR §405.958

# Reconsideration – right to it

- ❖ A party to a redetermination may request reconsideration of the contractor's decision.
- ❖ The reconsideration will be by a “Qualified Independent Contractor” (QIC).
- ❖ 42 CFR §405.960

# Request for reconsideration – where is it filed?

- ❖ The request for reconsideration is filed with the Qualified Independent Contractor indicated on the notice of redetermination.
- ❖ CMS has a standard form to request reconsideration.
- ❖ 42 CFR §§405.964(a),(b)

# Reconsideration Request

- ❖ Must be filed within 180 calendar days from the receipt of Notice of Redetermination.
  - ❖ There is a rebuttable presumption of receipt within five days of date of Notice of Redetermination.
  - ❖ An extension of time to file the Reconsideration Request can be granted if there is good cause for missing the deadline.
    - ❖ The same good cause criteria apply as used in regard to requests for redetermination – found at 42 CFR §405.942(b).

42 CFR §405.962

## Reconsideration -- Conduct of

- ❖ Should be accompanied by any evidence the beneficiary has not already filed and by allegations of fact or law related to the issue in dispute.
- ❖ Absent good cause and with certain exceptions, failure to submit evidence with the Reconsideration Request precludes subsequent consideration of that evidence.

42 CFR §405.966(b)

# Exceptions to duty to submit evidence with the reconsideration request

- ❖ Beneficiaries who are not represented by providers or suppliers, and state Medicaid agencies, are not required to submit evidence prior to the notice of reconsideration.

42 CFR §405.966(c)

# 14-day decision extension

- ❖ Each time a party submits additional evidence that was not included with the request for reconsideration, the 60-day time-frame for the reconsideration decision is extended by 14 days.

42 CFR §405.966(b)

## Reconsideration -- Conduct of

### ❖ The Qualified Independent Contractor:

- ❖ Conducts an “independent, on-the-record review” of the initial determination; and
- ❖ Reviews any additional evidence the parties submit.
- ❖ If medical reasonableness or necessity is an issue, the QIC must use a panel of physicians in conducting reconsideration.
  - ❖ The panel must base its findings on clinical experience, the patient’s medical records, and medical, technical, and scientific evidence.

42 CFR §405.968(a)(1)

## Reconsideration -- Conduct of

### ❖ The Qualified Independent Contractor:

- ❖ Is bound by National Coverage Determinations (NCDs), CMS Rulings, and applicable laws and regulations.
- ❖ Must give substantial deference to other policies of the Centers for Medicare and Medicaid Services (such as Local Coverage Determinations, and CMS Program Guidance).

42 CFR §405.968(a)(1)

# Reconsideration – effect of LCDs, NCDs, CMS rulings

- ❖ National coverage determinations (NCDs), CMS Rulings, laws and regulations are binding on the Qualified Independent Contractor.
- ❖ Local coverage determinations (LCDs) and other CMS guidance are not binding on the QIC.
- ❖ 42 CFR §405.968(b)

# Reconsideration – effect of LCDs and other policies of CMS

- ❖ If the QIC declines to follow CMS guidance which is not binding, the QIC must explain in the reconsideration decision why the policy was not followed.

42 CFR §405.968(b)

# Reconsideration – Qualifications of the QIC panel members

- ❖ Members of the QIC panel who conduct reconsideration must have sufficient medical, legal, and other expertise, including knowledge of the Medicare program.

42 CFR §405.968(c)(1)

# Reconsideration – Qualifications of QIC panel members

- ❖ If the reconsideration concerns whether an item or service is “reasonable and necessary” the QIC is to use a panel of physicians or other appropriate health care professionals to consider the facts and circumstances.

42 CFR §405.968(c)(2)

# Reconsideration – Qualifications of QIC panel members

- ❖ If the reconsideration concerns the furnishing of treatment, items, or services by a physician, one of the reviewers must be a physician.

42 CFR §405.968(c)(3)

## Reconsideration -- Time-frame

- ❖ The Qualified Independent Contractor:
  - ❖ Must generally complete its reconsideration within 60 days, or
  - ❖ Offers the appellant the right to escalate the reconsideration to have it be conducted by an ALJ.

42 CFR §405.970

# Reconsideration -- Notice

- ❖ Written notice of reconsideration must be transmitted to all parties.
- ❖ Notice must also be sent to the entity responsible for payment of the Part A or Part B claim.

42 CFR §405.976(a)

# Reconsideration -- Notice

- ❖ The notice must include a summary of the rationale of the decision.
- ❖ The notice must also warn that (with certain exceptions) failure to submit evidence at the reconsideration level may bar that evidence from being considered by the ALJ.

42 CFR §405.976(b)(5)(ii)

# Reconsideration -- Notice

- ❖ The exceptions to the bar against evidence not submitted by the reconsideration decision include:
  - ❖ The bar does not apply to beneficiaries (unless represented by a provider or supplier) and the bar does not apply to state Medicaid agencies.

42 CFR §405.976(b)(5)(ii)

# Reconsideration -- Notice

- ❖ The exceptions to the bar against evidence not submitted by the reconsideration decision include:
  - ❖ If the appellant shows good cause for why the evidence was not submitted before the reconsideration decision.

42 CFR §405.976(b)(5)(ii)

# Reconsideration -- Notice

- ❖ The notice also informs of:
  - ❖ The right to an ALJ hearing;
  - ❖ A statement as to whether the amount in controversy for an ALJ hearing is met (if the decision is not wholly favorable).

42 CFR §§405.976(b)(6),(7)

## Reconsideration -- Effect

- ❖ Reconsideration can result in reversing or affirming in whole or in part the initial determination (including the redetermination).

42 CFR §405.974

# Reconsideration -- Effect

- ❖ A reconsideration is final and binding on all parties unless it is revised or reversed by an ALJ, a court, or through re-opening.

42 CFR §405.978

# Re-openings

- ❖ Any level of the appeal process can re-open a decision.
  - ❖ Re-opening cannot occur until all appeal rights are exhausted.
  - ❖ There is no appeal of the decision to re-open or not re-open.

42 CFR §405.980

# Re-openings – time-frames

- ❖ The request to re-open an initial determination or a redetermination can be made within one year.
  - ❖ For “good cause” the request can be made up to four years after the decision.

42 CFR §405.980(c)

# Re-openings – time-frames

- ❖ The request to re-open a reconsideration, an ALJ decision, or a decision by the Medicare Appeals Council requires “good cause” and must be made within 180 days of the decision.

42 CFR §405.980(d)

# Re-openings – “Good Cause”

❖ “Good cause” to re-open a decision can exist under two different circumstances.

42 CFR §405.986

# Re-openings – “Good Cause”

- ❖ “Good cause” to re-open a decision can exist if there is newly discovered evidence that may result in a different conclusion.

42 CFR §405.986(a)(1)

# Re-openings – “Good Cause”

- ❖ “Good cause” to re-open a decision can exist if the decision shows on its face that there was obvious error at the time of the decision.

42 CFR §405.986(a)(2)

# ALJ Hearing

- ❖ A party can have an ALJ hearing if
  - ❖ The hearing is requested within 60 days of the receipt of the Notice of Reconsideration (presumed received not later than five days after its date), and
  - ❖ If the required amount in controversy is present (\$130 in 2012).

42 CFR §405.1002

# ALJ Hearing

- ❖ May be conducted by video-teleconferencing, by phone, or in person.
- ❖ Is a chance for the party to have the ALJ consider evidence, for the party to examine evidence used in the determination, and present and/or confront witnesses.

42 CFR §405.1000

An in-person hearing must be requested

- ❖ The hearing will be by “video-teleconference” (VTC) or by phone, unless a party requests “at the earliest possible opportunity” an in-person hearing.

42 CFR §405.1020(i)(1)

An in-person hearing must be requested

❖ The request for an in-person hearing must state the reasons for the objection to the VTC or phone hearing.

42 CFR §405.1020(i)(2)

An in-person hearing must be requested

❖ The request for an in-person hearing must state the time and place that the party wants the in-person hearing.

42 CFR §405.1020(i)(2)

An in-person hearing must be requested

❖ The request for an in-person hearing must be in writing.

42 CFR §405.1020(i)(3)

# An in-person hearing must be requested

❖ The request for an in-person hearing constitutes a waiver of the 90-day time-frame in which an ALJ is supposed to decide the case.

❖ Note: The *request alone* waives the 90-day decision time-frame.

42 CFR §405.1020(i)(4)

An in-person hearing must be requested

❖ The request for an in-person hearing will only be granted if the ALJ finds “good cause.”

❖ “Good cause” is not defined at 42 CFR §405.1020(i)(5).

42 CFR §405.1020(i)(5)

An in-person hearing must be requested

❖ The “unavailability of VTC technology” or “special or extraordinary circumstances” are grounds for an in-person hearing.

42 CFR §405.1020(b)(1), (2)

An in-person hearing must be requested

❖ The ALJ cannot grant the request for an in-person hearing except with the agreement of the Managing Field Office ALJ.

42 CFR §405.1020(i)(5)

# ALJ Hearing -- Notice

- ❖ The notice of the ALJ hearing is to be sent at least 20 days before the date of the hearing.

42 CFR §405.1022(a)

# ALJ Hearing -- Notice

- ❖ The notice of the ALJ hearing advises the parties of their right to object to the VTC or telephone hearing and of the requirements of 42 CFR §405.1020(i) for requesting an in-person hearing.

42 CFR §405.1022(b)(4)

# ALJ Hearing -- Notice

- ❖ The notice of the ALJ hearing contains a statement of the specific issues to be decided at the hearing.

42 CFR §405.1022(b)(1)

# ALJ Hearing -- Notice

- ❖ If a party objects to the statement of the issues, the party must notify the ALJ in writing no later than 5 days before the hearing.
  - ❖ This applies to all parties.

42 CFR §405.1024

# ALJ Hearing – Submission of Evidence

- ❖ Evidence submitted by an “unrepresented” beneficiary does not have to be submitted within ten (10) days of receiving the notice of hearing.
  - ❖ “Represented” is defined as “represented by a provider or supplier” in 42 CFR §405.1018(c).
- ❖ 42 CFR §405.1018(d)

# ALJ Hearing – Submission of Evidence

❖ Evidence submitted by a provider, supplier, or beneficiary represented by a provider or supplier must be submitted within ten (10) days of receiving the notice of hearing.

❖ 42 CFR §405.1018(a)

# ALJ Hearing – Submission of Evidence

❖ Evidence submitted by a provider, supplier, or beneficiary represented by a provider or supplier that was not submitted before the QIC's reconsideration decision requires an explanatory statement.

❖ 42 CFR §405.1018(c)

# ALJ Hearing – Submission of Evidence

- ❖ The statement required to accompany evidence submitted by a provider, supplier, or beneficiary represented by a provider or supplier that was not submitted before the QIC's reconsideration decision must explain why the evidence was not previously submitted.
- ❖ 42 CFR §405.1018(c)

## ALJ Hearing – submitting evidence

- ❖ Thus, additional written evidence (if a provider, supplier, or beneficiary represented by a provider or supplier has any) should:
  - ❖ Be submitted within 10 days of receiving the notice of hearing, and
  - ❖ If it is not submitted within 10 days of receiving the notice of hearing, the days beyond 10 do not count toward the 90-day period within which the ALJ is to render decision.

42 CFR §405.1018

## ALJ Hearing – submitting evidence

- ❖ Only an “unrepresented” beneficiary is relieved by the wording of the regulation from the requirement of submission of evidence ahead of time.
- ❖ *Even* unrepresented beneficiaries may have time added to the decision time-frame if they submit evidence after ten days from the notice of hearing.

42 CFR §405.1018

# Prehearing ALJ review of new evidence

- ❖ After a hearing is requested but before it is held the ALJ will review newly submitted evidence to determine if good cause exists for it to be submitted for the first time at the ALJ level.

42 CFR §405.1028(a)

# Prehearing ALJ review of new evidence

- ❖ As noted, the requirement of submission of all evidence by the close of reconsideration does not apply to “unrepresented beneficiaries.” In regard to representation, the rules repeatedly use the phrase “a beneficiary represented by a provider or supplier.”

42 CFR §405.1028(a)

# ALJ Hearing Procedures

- ❖ At the hearing, “The ALJ fully examines the issues, questions the parties and other witnesses, and may accept documents that are material to the issues consistent with [the rules for submission of evidence].”

42 CFR §405.1030

# ALJ Hearing Procedures

❖ The rules of evidence that apply in a court of law do not apply in Medicare ALJ hearings.

42 CFR §405.1036(e)

# ALJ Hearing Procedures

- ❖ A party can enter written statements about the facts and law material to the case in the record, in addition to stating the party's case.

42 CFR §405.1036(c)

# ALJ Hearing Procedures – Subpoenas and Discovery

- ❖ An ALJ has the authority to issue subpoenas when necessary for the full presentation of the case.
- ❖ But subpoenas are only available when CMS elects to participate as a party.

42 CFR §405.1036(f)

# ALJ Hearing Procedures – Subpoenas and Discovery

- ❖ If CMS elects to participate as a party, “discovery” is permissible.
- ❖ Discovery can include depositions, and requests for production of documents, but *not* requests for admission nor interrogatories.

42 CFR §405.1037(b)

# ALJ Hearing Procedures – Subpoenas and Discovery

- ❖ If CMS elects to participate as a party, and thus “discovery” is permissible, the ALJ can issue “orders to compel” a response to discovery, and can issue “protective orders” to prevent abuse of discovery.

42 CFR §405.1037(d)

# ALJ Hearing – Deciding a case without an ALJ Hearing

- ❖ If the evidence supports a decision wholly favorable to the beneficiary on every issue, the ALJ can decide the case without holding a hearing.

42 CFR §405.1038

# ALJ Prehearing and Posthearing Conferences

- ❖ The ALJ can decide to hold a prehearing or posthearing conference with the parties.
  - ❖ This requires notice to the parties of the time, place, and purpose of the conference at least 7 calendars days in advance.

42 CFR §405.1040(a)

# ALJ Prehearing and Posthearing Conferences

- ❖ The ALJ must make a record of any such conference.
- ❖ Agreements and actions taken at the conference are binding if they are not objected to.

42 CFR §405.1040(d)

# Request for ALJ Hearing Record

- ❖ A party may request and receive a copy of all or part of the record, including the exhibits list, the documentary evidence, and a copy of the tape of the oral proceedings.
- ❖ The party may be asked to pay the cost of providing these items.

42 CFR §405.1042

# Request for ALJ Hearing Record

- ❖ If a party asks for all or part of the record of the hearing and requests an opportunity to comment on the record, the time from the receipt of the request through the end of the time granted does not count toward the 90-day adjudication deadline.

42 CFR §405.1042

# Binding Nature of ALJ Decision

- ❖ The ALJ's decision is binding on all parties unless it is reversed, reopened, or revised.

42 CFR §405.1048

# Medicare Appeals Council (MAC)

- ❖ The MAC is the next step in the administrative process after an ALJ hearing.
  - ❖ The MAC does not have to accept every request for its review.
  - ❖ Non-lawyers can represent parties at the MAC stage, just as at the ALJ stage.
  - ❖ Personal appearance is rare at the MAC stage.

42 CFR §405.1102

## MAC – Request for its review of ALJ decision

- ❖ A party has 60 days from receipt of the ALJ's decision in which to request review by the Medicare Appeals Council.
- ❖ If the ALJ has not decided the case within the applicable ALJ adjudication period, a party may request to escalate the matter to the MAC.
- ❖ The MAC may decide on its own motion to review an ALJ decision.

42 CFR §§405.1102,1103,1108, 1110

## MAC – Briefs and Additional Evidence and Oral Argument

- ❖ A party can request to file a brief before the MAC.
- ❖ If the MAC determines that additional evidence is needed, the MAC can remand the case to the ALJ for the receipt of the additional evidence.
- ❖ A party can request to appear before the MAC and present oral argument.

42 CFR §§405.1120,1122,1124

## MAC Decision

- ❖ MAC's review is *de novo* (“from scratch”), based on the evidence in the record.
- ❖ The MAC can either decide the case or can remand the case to an ALJ.
- ❖ If the MAC did not complete its review of the case within 90 days, a party can request that the case be escalated to Federal district court.

42 CFR §§405.1100,1120,1122

# Binding Nature of the MAC Decision

- ❖ The MAC's decision is binding on all parties unless a Federal district court issues a decision modifying the MAC's decision or the decision is revised by the MAC as a result of a reopening in accordance with 42 CFR §405.980.

42 CFR §§405.1130

## Federal Court Review

- ❖ Must be filed for in the district where the party resides.
- ❖ Must be filed for within 60 days of the receipt of a MAC decision (the decision is presumed received not later than 5 days after the date of the decision).
- ❖ Review is under the substantial evidence standard – the findings of DHHS as to any fact, if supported by substantial evidence, are conclusive.
- ❖ The Federal District Court can reverse, affirm, or remand for rehearing before an ALJ.

42 CFR §§405.1136,1138

# Federal Court Review

❖ The present required amount in controversy for federal court judicial review is \$1,350 in 2012.

❖ 76 FR No. 185, pp. 59138-59139  
(Sept. 23, 2011)

# Help is available

❖ If you are a Benefits Counselor of a Texas Area Agency on Aging and you are assisting a client with a Medicare claim at a level below the court level, the Legal Hotline for Texans is available to help you help the client.