



Special Bulletin

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OMHA ANNOUNCES PILOT PROGRAMS TO ADDRESS ADMINISTRATIVE LAW JUDGE APPEALS BACKLOG

In an apparent attempt to address the significant backlog of Medicare administrative appeals at the Administrative Law Judge (ALJ) level, the Department of Health & Human Services (HHS) Office of Medicare Hearings and Appeals (OMHA) recently posted information about two pilot programs that providers with Medicare appeals pending before an ALJ may use to resolve claims. The first, a [Settlement Conference Facilitation Pilot](#), is an alternative dispute resolution process applicable only to Medicare Part B claims. At least 20 claims or \$10,000 must be at issue. This pilot is not likely applicable to most hospital appeals. The second program, more directly relevant for most hospital appeals, is a [Statistical Sampling Pilot](#), under which a provider would agree to allow OMHA to adjudicate a group of appeals using statistical sampling. Details about the Statistical Sampling Pilot are included below.

OMHA announced earlier this year a temporary suspension of assignment of new Medicare appeals to an ALJ for at least 28 months as a result of the significant backlog.

STATISTICAL SAMPLING PILOT

The Statistical Sampling Pilot is limited to appellants that are single Medicare providers or suppliers; multiple providers or suppliers may qualify if the owning entity agrees to accept or make any Medicare payment due as a single payment. To participate, a provider must identify a group of at least 250 claims, all of which fall into one of the following categories: pre-payment claim denials; post-payment non-Recovery Audit Contractor (RAC) claim denials; or post-payment RAC claim denials. Claims also must meet all jurisdictional requirements for hearing before an ALJ. Currently, OMHA will only allow statistical sampling for appeals currently assigned to an ALJ but not scheduled for hearing, or appeals filed between April 1 and June 30, 2013.

Once a provider has requested statistical sampling, OMHA will secure an independent statistical expert to assist the ALJ with conducting the sampling according to existing Centers for Medicare & Medicaid Services (CMS) guidance. The provider will receive a pre-hearing conference with an ALJ to establish that the provider has consented to the process, as well as to establish the claims from which a sample will be drawn. The ALJ will then issue a pre-hearing conference order, after which participation in statistical sampling becomes binding. The universe of claims will then be consolidated into one appeal, and the ALJ will hold a hearing and issue a decision on the sample units drawn

from the larger group. A Medicare contractor will then extrapolate the ALJ's decision on the sample claims to the larger universe of claims. The appropriate Medicare Administrative Contractor (MAC) will be directed to effectuate the decision based on the extrapolated amount.

STATISTICAL SAMPLING QUESTIONS AND CONCERNS

The Statistical Sampling Pilot, as described by OMHA, raises a number of questions and concerns for AHA member hospitals. These include:

- **Timeframe:** It is not clear from the information provided by OMHA when interested hospitals may begin to request use of statistical sampling. Further, it is not clear how quickly OMHA intends to process hospitals' requests for participation in the program and resolve relevant claims given the agency's current limited resources.
- **Hospital Participation:** Given the number of claims required by OMHA and the limited timeframe to which the pilot applies, it is unclear how many hospitals would have enough claims pending at the ALJ level to qualify to use statistical sampling.
- **Use of Extrapolation:** In the materials it has published on the pilot, OMHA states that a "Medicare contractor" will extrapolate the ALJ's decision on the sample set of claims to the larger universe of claims from which the sample was drawn. The contractor will then forward the results to the MAC to effectuate the decision. It is not clear which Medicare contractor would perform the extrapolation. **The AHA would strongly oppose CMS's use of RACs to extrapolate the ALJ's decision, given the strong financial incentives they have to increase hospital claim denials.**

In addition, OMHA provides no details on how the extrapolation will be conducted – for example, whether it will extrapolate results based on number of claims or payment amounts denied. Further, though participating hospitals will have the chance to challenge the statistical sampling model via expert testimony at the ALJ hearing, it is unclear whether or how hospitals will be able to challenge whether the extrapolation is performed correctly.

- **Part B Rebilling:** OMHA states that the ALJ cannot extrapolate the amount that a hospital would receive if it submits denied Part A admissions for rebilling under Part B. Although OMHA does not directly address whether hospitals would have a right to rebill denied Part A admissions that were part of a universe of claims, it seems impossible from a practical perspective that hospitals would be able to do so. Therefore, use of statistical sampling for denials of Part A admissions may result in hospitals forgoing their ability to receive any payment for those claims.

- **Effect of Withdrawing Consent:** Hospitals will be able to withdraw consent for participation in statistical sampling until the ALJ has issued the pre-hearing conference order. However, once a hospital withdraws consent, it is not clear whether appeals that would have been subject to statistical sampling will remain in queue for hearing by an ALJ or if they will go to the back of the line.

In addition, the AHA anticipates that RACs will increase their participation in ALJ hearings for RAC-related appeals and will aggressively defend their denials, given the increased financial stakes that would result from grouping claims.

NEXT STEPS

Hospitals that are interested in participating in either of the pilot projects should carefully review the materials OMHA has provided on its website. In addition, the AHA plans to submit its questions and concerns regarding the pilots to OMHA.

Hospitals with questions and concerns regarding the pilot programs should contact Lawrence Hughes, assistant general counsel, at lhughes@aha.org or Melissa Jackson, AHA senior associate director, at mjackson@aha.org. Alternatively, questions regarding the OMHA statistical sampling pilot can be submitted directly via email to OMHA at OMHA.stat.sampling@hhs.gov. So that AHA can better monitor OMHA's response to hospital concerns, please copy AHA staff on any questions sent directly to the agency.