

Legal Update: Preparing for a Medicare Appeals Council Appeal: What You Need to accomplish by the the conclusion of the ALJ Hearing.

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Today's Agenda and Focus

Strategies for Developing Successful ALJ and Medicare Council Appeals

- Background
- Preparation for Council Appeals
- Requesting Medicare Council Review
- Contents of Medicare Council Appeal Brief
- Evidence that May be Submitted To the MAC
- Establishing "Good Cause" for submission of new evidence at the ALJ and MAC Level

Background: The Five Levels of Administrative Review

- (1) Redetermination by a Medicare Administrative Contractor ("MAC")
- (2) Reconsideration by a Qualified Independent Contractor ("QIC")
- (3) Administrative Law Judge ("ALJ") Hearing
- (4) Medicare Appeals Council ("Council") Review
- (5) U.S. District Court Review.

Preparation for the Council Appeal

Begins with:

(1) Redetermination by ("MAC")

May be supplemented at:

(2) Reconsideration by a Qualified Independent Contractor ("QIC")

May be supplemented for good cause at the ALJ

Practice Pointer -

In order to insure that ALJ will be able to make a decision on the evidence by the time you have filed your decisions before the QIC, insure including the following:

- ❑comprehensive medical records review and coding review on every claim subject to denial by the RAC.
- ❑expert testimony of physicians and coders supporting your position.
- ❑requests for all data used by RAC to make determination including all records and procedures used in probe or extrapolation audits.

Practice Pointer – (continued)

In order to insure that ALJ will be able to make a decision on the evidence by the time you have filed your decisions before the QIC, insure including the following:

- ❑ Requests for any other documentation from RAC that is has followed CMS procedural and technical guidelines.
- ❑ Requests for extensions of time to review RAC audits and analysis in order to challenge procedural defects in RAC's audit analyses.

Council Appeals

If you do not have all evidence in the record and legal arguments included in your briefs prior to the Council Appeal level, you will not have an opportunity to introduce new evidence except under very limited circumstances.

When the MAC reviews an ALJ's decision, it undertakes a *de novo* review.

Requesting Medicare Appeals Council Review

When?

(1) The appellant or any other party to the hearing may request that the MAC review an ALJ's decision or dismissal.

(2) Appellant may request that a case be escalated to the MAC for a decision even if the ALJ has not issued a decision or dismissal in his or her case when the ALJ's 90 day adjudication period has expired.

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Requesting Medicare Appeals Council Review: Escalation

The MAC may take any of the following actions:

- (1) Issue a decision based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ before the case was escalated.
- (2) Conduct any additional proceedings, including a hearing, that the MAC determines are necessary to issue a decision.
- (3) Remand the case to an ALJ for further proceedings, including a hearing

Requesting Medicare Appeals Council Review: Escalation

The MAC may take any of the following actions:

(4) Dismiss the request for MAC review because the appellant does not have the right to escalate the appeal.

5) Dismiss the request for a hearing for any reason that the ALJ could have dismissed the request

Timeframe for MAC Decisions

1. Within 90 calendar days of receipt of the appellant's request for review, unless the 90 calendar day period is extended.
2. Escalation cases: within 180 calendar days of receipt of the appellant's request for escalation, unless the 180 calendar day period is extended.

MAC actions when request for review or escalation is filed.

- The MAC will consider all of the evidence in the administrative record.
- The party requesting review does not have a right to a hearing before the MAC.

Upon completion of its review, the MAC may adopt, modify, or reverse the ALJ's decision or remand the case to an ALJ for further proceedings.

Content of request for review

The request for review must be in writing and may be made on a standard form.

A written request that is not made on a standard form is accepted if it contains:

- ✓ the beneficiary's name;
- ✓ Medicare health insurance claim number;
- ✓ the specific service(s) or item(s) for which the review is requested;
- ✓ the specific date(s) of service;
- ✓ the date of the ALJ's decision or dismissal order, if any;
- ✓ and the name and signature of the party or the representative of the party; and any other information CMS may decide.
- ✓ if the party is requesting escalation from the ALJ to the MAC, the hearing office in which the appellant's request for hearing is pending;

Content of request for review continued...

- ✓ The request for review must identify the parts of the ALJ action with which the party requesting review disagrees and explain why he or she disagrees with the ALJ's decision, dismissal, or other determination being appealed.

Example: If the party requesting review believes that the ALJ's action is inconsistent with a statute, regulation, CMS Ruling, or other authority, the request for review should explain why the appellant believes the action is inconsistent with that authority.

Obtaining evidence from the MAC

A party may request and receive a copy of all or part of the record of the ALJ hearing, including the exhibits list, documentary evidence, and a copy of the tape of the oral proceedings. However, the party may be asked to pay the costs of providing these items. If a party requests evidence from the MAC and an opportunity to comment on that evidence, the time beginning with the MAC's receipt of the request for evidence through the expiration of the time granted for the party's response will not be counted toward the 90 calendar day adjudication deadline.

Filing briefs with the MAC

Upon request, the MAC will give the party requesting review, as well as all other parties, a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.

Copies must be sent to all other parties.

The MAC may also request, but not require, CMS or its contractor to file a brief or position paper if the MAC determines that it is necessary to resolve the issues in the case.

The MAC will not draw any adverse inference if CMS or a contractor either participates, or decides not to participate in MAC review.

What evidence may be submitted to the MAC on review of ALJ decision?

The MAC limits its review of the evidence to the evidence contained in the record of the proceedings before the ALJ. **However, if the hearing decision decides a new issue that the parties were not afforded an opportunity to address at the ALJ level, the MAC considers any evidence related to that issue that is submitted with the request for review.**

If the MAC determines that additional evidence is needed to resolve the issues in the case and the hearing record indicates that the previous decision-makers have not attempted to obtain the evidence, the MAC may remand the case to an ALJ to obtain the evidence and issue a new decision.

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What evidence may be submitted to the MAC on Request for Escalation?

(1) If the MAC is reviewing a case that is escalated from the ALJ level to the MAC, the MAC will decide the case based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ before the case was escalated.

(2) If the MAC receives additional evidence with the request for escalation that is material to the question to be decided, or determines that additional evidence is needed to resolve the issues in the case, and the record provided to the MAC indicates that the previous decision-makers did not attempt to obtain the evidence before escalation, the MAC may remand the case to an ALJ to consider or obtain the evidence and issue a new decision.

Evidence related to issues previously considered by the QIC

(1) If new evidence related to issues previously considered by the QIC is submitted to the MAC by a provider, supplier, or a beneficiary represented by a provider or supplier, the MAC must determine if the provider, supplier, or the beneficiary represented by a provider or supplier had good cause for submitting it for the first time at the MAC level.

(2) If the MAC determines that good cause does not exist, the MAC must exclude the evidence from the proceeding, may not consider it in reaching a decision, and may not remand the issue to an ALJ.

Good cause for submitting additional evidence to ALJ

Determining if good cause exists.

An ALJ finds good cause, for example, when 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.

Examples of Good Cause

Medicare Appeals Council Decisions

http://www.hhs.gov/dab/divisions/medicareoperations/macdecisions/mac_decisions.html

In the case of Health & Oncology Inc. - The Council has determined that the appellant established good cause for submission of new evidence before the ALJ because the QIC reconsideration decision noted, for the first time, that the documentation was insufficient because the appellant had not specifically submitted the actual drug administration record. This was essentially a newly-identified issue at the QIC level, as the appellant had been informed that the basis for denial below was that the “medical facts” did not support coverage.

Examples of Good Cause

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- In the case of Apple Rehab, Inc. & Commissioner, Connecticut Dept. of Social Services, M-11-1546: MAC found good cause and allowed new evidence to be submitted because the ALJ based his decision on a new issue.
- Vitas Innovative Hospice Care - the MAC allowed the submission of new evidence because they were procedure in nature and do not require a good cause evaluation.

Examples of Good Cause

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- In the case of LaPorte Chiropractic Clinic - Failure of the Medicare contract to forward evidence to the QIC and the ALJ, merited the introduction of new evidence by the appellant.
- Village of Cook Springs, M-10-1771, In the interest of completeness, MAC allowed additional evidence in the form of medical records to be introduced with respect to one of the beneficiary claims under review.

Examples of Good Cause

Medicare Appeals Council Decisions

http://www.hhs.gov/dab/divisions/medicareoperations/macdecisions/mac_decisions.html

Landmark Home Health, M-2009-1209 -The appellant argues that it submitted the new evidence in both cases because it “did not anticipate that this information regarding the relevance of beneficiaries being homebound would be required prior to the ALJ level, since the issue was not identified as a problem prior to the hearing, through all levels of review.” The Council has decided that there is good cause for admitting the new evidence...

Conclusion

The time to fully develop the facts and evidence supporting your claims subject to appeal is at the First Level of Determination, and upon denial of an initial determination at the (QIC) Second Level of Determination. Do not wait to fully develop your clinical, procedural and legal arguments until your appeal is at the ALJ level. Doing so risks that important evidence and issues may be excluded from ALJ review.

If you do not have your argument fully developed by the ALJ level, your chance of success at the Council level is significantly diminished.

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