

## OMHA's Second Medicare Appellant Forum Reveals Some Forward Momentum but No Simple or Quick Solutions for Medicare Administrative Appeals Backlog

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On October 29, 2014, the Office of Medicare Hearings and Appeals (“**OMHA**”) hosted its second Medicare Appellant Forum (“**Forum**”) to address the status of the Medicare appeals backlog and related processing delays of Administrative Law Judge (“**ALJ**”) appeals, which are the third level of the Medicare appeals process that is available to suppliers, providers, and Medicare beneficiaries to challenge denied claims. Last week’s Forum was a follow-up to OMHA’s February 2014 Appellant Forum, which offered few assurances to stakeholders that any effective remedies to the delays in the appeals process will have a meaningful impact in the near term.<sup>1</sup> As was the case during OMHA’s February Forum, last week’s Forum provided an opportunity for OMHA to share with stakeholders an update regarding the actions that OMHA is taking to reduce the Medicare appeals backlog and the actions that OMHA plans to take going forward.

Importantly, the backlog is not the only issue at stake. Beyond the obvious frustrations felt by providers affected by the backlog, which impacts both the financial value of the unresolved claims and the time, effort, and expense required to navigate the Medicare appeals process, the backlog raises significant questions about the legality of the approach being taken by OMHA and the Centers for Medicare & Medicaid Services (“**CMS**”) to fix the problem. Under both the Medicare statute and regulations, appeals at the ALJ level are supposed to be decided within 90 days of the filing of a timely request for a hearing, unless that period is waived by the appellant. If that deadline is missed by OMHA, the appellant may elect to escalate the appeal to the Medicare Appeals Council, which is the next and last step in the CMS administrative appeals process.<sup>2</sup> In reality, OMHA’s backlog and the current deferred assignment policy, launched in December 2013, extends the ALJ level appeals hearing timeline well beyond the mandated 90-day

<sup>1</sup> Please see Epstein Becker Green’s February 2014 Client Alert regarding the first OMHA Medicare Appellant Forum, available at <http://www.ebglaw.com/publications/omhas-medicare-appellant-forum-offers-few-meaningful-answers-for-frustrated-medicare-providers-and-suppliers/>.

<sup>2</sup> See 42 U.S.C. § 1395ff((d)(3)); 42 C.F.R. §§ 405.1016; 405.1104.

period. This presents a direct challenge to an otherwise binding set of laws. CMS's current position, as evidenced by at least one legal challenge to date regarding the backlog dilemma, is that the Medicare statute says a claimant "may" escalate an appeal to the Medicare Appeals Council, interpreting "may" as exempting OMHA from the 90-day deadline. Time will tell whether CMS's litigation position prevails.

### *Setting the Tone*

OMHA's Chief ALJ, Nancy Griswold, presided over last week's Forum once again. During her opening remarks, Judge Griswold acknowledged that no one approach will resolve the Medicare appeals backlog; as a result, OMHA ALJs and their teams are pursuing "holistic" solutions to the backlog. Judge Griswold explained that CMS and the Departmental Appeals Board are now working collaboratively with OMHA to find additional ways to reduce the burden on appellants and to streamline the Medicare appeals process at all levels. Arrah Tabe-Bedward, Director of CMS's Medicare Enrollment and Appeals Group, participated in last week's Forum and recalled during her remarks that participants who attended the February Forum had shared their experience that the first opportunity they had to interact with adjudicators was at the ALJ level. To understand the process and to resolve more cases at the lower levels of the Medicare appeals process, as well as to reduce the number of cases that flow upward from the first two levels of appeal, these individuals stated during February's Forum that they wanted an opportunity to interact with their adjudicators. Ms. Tabe-Bedward reported during last week's Forum that, although planning is still in the early stages, CMS is "trying to incorporate an opportunity for such a dialogue."

### *State of the Backlog – What's New?*

Currently, OMHA is entering cases received in July 2014 into their case processing system and is assigning ALJ hearings for appeals received during the third quarter of fiscal year 2013. Forum participants learned that OMHA still has approximately 59,000 cases to assign from that time period. Given these numbers, appellants can expect to see an increase in processing times. Yet, while the average processing time for appeals decided in FY 2014 is currently **414 days**, Forum participants were told to expect processing times of almost **515 days** for cases received in September 2014.

### *Signs of Progress*

Judge Griswold and her colleagues reported on several developments to Forum participants. For example, Congress has increased OMHA's 2014 budget by 18.6 percent, which has enabled OMHA to "increase its adjudication capacity" by establishing a new field office of eight teams in Kansas City, Missouri, in February 2014.<sup>3</sup> Currently, OMHA is receiving 14,000 new appeals per week and admitted that the current workload per ALJ is not sustainable, even with the new field office. However, according to Judge Griswold, if OMHA's 2015 budget is approved, the agency will be able to add 10 more teams to the new field office that can address appeals, and those

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<sup>3</sup> OMHA's other field offices are located in Miami, FL; Cleveland, OH; Irvine, CA; and Arlington, VA.

additional resources would allow OMHA to increase their adjudication capacity by 18,000 appeals per year, an average of 1,000 appeals per ALJ per year.

Judge Griswold and her colleagues also discussed how the 2014 budget increase allowed OMHA to initiate a more “holistic” approach to addressing the Medicare appeals workload and the large number of pending appeals. Forum speakers described various information technology and infrastructure initiatives impacting OMHA’s operations that have progressed since first being described during February’s Forum. The focus of these efforts largely has been to improve and upgrade OMHA’s case intake and adjudication capabilities and to convert OMHA’s processes from paper-based to electronic, wherever possible. In similar fashion, OMHA also has focused its efforts on implementing process improvements, such as electronic filing and the development of a portal for appellants to review the record and other information relevant to their pending cases. With an intended launch date at the end of 2014, a status information website referred to as the ALJ Status Information System (“**AASIS**”) is under development. Once launched, AASIS would serve as a stopgap measure until OMHA can fully develop its Electronic Case Adjudication and Processing Environment (“**ECAPE**”) system, which will have the capability to cover case intake and assignment and workflow management, as well as share case records. Judge Griswold stated that a contract for development of the ECAPE system will be awarded in January 2015, with the system due to be up and running by the summer of 2015.

Jason Green, Director of OMHA’s Program Evaluation and Policy Division, reported during the Forum on the progress of two pilot projects that OMHA has launched since the February Forum. These pilots were described during February’s Forum and then launched more recently, in July 2014:

- **Statistical Sampling Pilot.** OMHA launched the [statistical sampling pilot](#) to provide appellants with an option for addressing large volumes of claim disputes at the ALJ hearing level. Statistical sampling is a practice that has been used in the past by specific judges, and this is the first time that such an option is available to appellants on a general level and based simply on an appellant’s request. In order to qualify for the statistical sampling pilot, the Medicare provider must have requested an ALJ hearing during the time period currently being assigned by OMHA’s Central Operations and must have a minimum of 250 claims to be appeals. Once an appellant opts to partake in the statistical sampling pilot, a random sample is drawn from a universe of the appellant’s claims that are pending appeals. The results of the sample are extrapolated to the entire universe of the appellant’s pending claims. An ALJ then reviews the results of the sample and makes determinations. No provider has taken advantage of the statistical sampling pilot yet. However, according to OMHA representatives, they are reevaluating and revamping the pilot as needed, which hopefully will allow for a more inclusive set of appeals by expanding the date range of impacted appeals.
- **Settlement Conference Facilitation Pilot.** The [settlement conference facilitation pilot](#) brings appellants and CMS representatives together in an

alternative dispute resolution format to discuss the possibility of a mutually agreeable resolution to the appellant's claims appealed to the ALJ hearing level. The facilitator is not a fact finder and does not reach any decision on the merits of the case. If the parties reach a resolution, the settlement conference facilitator drafts a settlement document, which is signed by both CMS and the appellant. A required part of the settlement is that any requests for an ALJ hearing for any of the claims covered by the settlement are dismissed. If the settlement conference does not lead to a resolution, the claims are placed back into the ALJ assignment queue in the same position where the appeal would have been based on the original filing date. OMHA advised during the Forum that the agency has facilitated only one attempt to settle Part B appeals using this pilot process, and unfortunately, this attempt did not resolve in settling the appeals at issue. OMHA has secured a second provider that has agreed to partake in the settlement conference facilitation pilot, and this provider will begin the process shortly.

OMHA is actively monitoring the performance of these pilots and, if they are successful, plans to roll them out nationally as funding allows.

### ***So What Happens Next?***

CMS stated that it is putting together a mechanism to allow for people to comment or offer suggestions regarding the appeals backlog, via the CMS website. However, as of now, the mechanism has not yet been fully developed.

On November 4, 2014, OMHA released a Request for Information (OMHA-1401-NC) "soliciting suggestions for addressing the substantial growth in the number of requests for hearing filed with [OMHA], and backlog of pending cases." This notice was subsequently published in the *Federal Register* on November 5, 2014. Comments are due to OMHA no later than 5 PM (EST) on December 5, 2014. OMHA seeks input regarding a few specific questions:

- Are there suggestions related to the current initiatives for addressing the increased workload and/or backlog of appeals at the ALJ level that comply with current statutory authorities and requirements?
- Are there other suggestions for addressing the increased workload and/or backlog of appeals at the ALJ level that comply with current statutory authorities and requirements?
- Are there any current regulations that apply to the ALJ level of the Medicare claim and entitlement appeals process that could be revised to streamline the adjudication process while ensuring that parties to the appeals, as defined at 42 C.F.R. § 405.902 and § 405.906, are afforded opportunities to participate in the process and are kept apprised of appeals related to claims submitted by them or on their behalf?

Until there is a comprehensive statutory or regulatory solution to the Medicare appeals backlog, interested parties should keep abreast of these changes and how they affect legal strategies and business decisions involving Medicare participation, coverage, and reimbursement. Epstein Becker Green is available to assist with the drafting and submission of comments to OMHA as well as developing a strategy for undertaking a Medicare appeal.

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*This Client Alert was authored by **Amy F. Lerman** and **Robert E. Wanerman**. For additional information about the issues discussed in this Client Alert, please contact one of the authors or the Epstein Becker Green attorney who regularly handles your legal matters.*

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