

PUBLICATION

Medicare Appeals Backlog: HHS' Response to the Decade-Long Delay in Reviewing Appeals [Ober|Kaler]

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The Department of Health and Human Services (HHS) published its [proposed rule](#) [PDF] revamping the Medicare appeals process at the Administrative Law Judge (ALJ) level on July 5, 2016. The proposed rule extensively revises federal regulations and introduces several new concepts meant to address the systemic delay in the Medicare appeals process. **The proposed rule is open for comments through 5 p.m. EST on August 29, 2016.**

As we discussed in a prior [Payment Matters article](#), HHS was under increasing pressure to reduce the Medicare appeals backlog when the D.C. Circuit Court of Appeals signaled a willingness to take judicial intervention in [American Hospital Association v. Burwell, 812 F.3d 183, 185 \(D.C. Cir. 2016\)](#) [PDF]. HHS has responded by outlining its position to streamline the Medicare appeals process with publication of this proposed rule. In the preamble to the proposed rule, HHS announces a three-pronged strategy to address the backlog:

1. Request new resources at all levels of appeal to increase adjudication capacity and implement new strategies to alleviate the current backlog;
2. Take administrative actions to reduce the number of pending appeals and implement new strategies to alleviate the current backlog; and
3. Propose legislative reforms that provide additional funding and new authorities to address the volume of appeals.

The proposed rule addresses the second prong since the remaining prongs require some measure of cooperation with, and action by, Congress.

The first significant change is the proposal to make select decisions by the Medicare Appeals Council (Council) precedential. This means precedential decisions by the Council would be binding on all CMS components, including its contractors in making initial determinations, redeterminations, and reconsiderations; ALJs in the Office of Medicare Hearing and Appeals; and the Council in future decisions. However, not all Council decisions will become precedential. The Departmental Appeals Board (DAB) Chair will have the discretion to designate select Council decisions as precedential. The DAB is the office that oversees many HHS program and components by issuing final decisions on behalf of the Secretary of HHS, including cases concerning Medicare claim appeals. The proposed rule requires publication of precedential decisions in the Federal Register and requires HHS to make available such decisions via a publicly accessible website maintained by HHS.

HHS proposes another significant change which would allow senior attorneys to adjudicate ALJ level appeals, referred to as "Attorney Adjudicators" by the proposed rule. Attorney Adjudicators will have limited authority to issue decisions in circumstances where appeals at the ALJ level do not require a hearing. For example, the parties could waive their right to a hearing, which would allow an Attorney Adjudicator to review an appeal. The

proposed rule discusses Attorney Adjudicators helping with many administrative matters at the ALJ level that have attributed to the appeals backlog, such as dismissals when an appellant withdraws his or her request for an ALJ hearing or remands for further information from CMS or its contractors.

Additionally, the proposed rule revises the basis for calculating the amount in controversy by requiring the use of the Medicare allowable amount, which is a departure from the current usage of billed charges. There are various exceptions to the amount in controversy requirement, such as aggregating eligible claims to meet this threshold. However, when a claim appeal involves a post-payment denial and a demand letter specifies the overpayment amount, HHS proposes to use such amount for determining whether it meets the amount in controversy threshold.

Lastly, HHS proposes numerous revisions in the proposed rule for creating efficiencies and streamlining Medicare appeal proceedings. A few such examples include limiting the number of entities (CMS or its contractors) that can participate at the ALJ hearing, allowing ALJs to vacate their own dismissals, and revising the applicability of adjudication time frames to remanded cases so that such cases continue to move forward in the process.

Ober|Kaler's Comments

- The precedential effect of Council decisions could provide the needed binding authority to stem the tide of inconsistent decisions resulting from Recovery Audit Contractor denials.
- Stay tuned to whether the [AFIRM Act](#), a bill appropriating additional funds to HHS for administering the appeals program, is expedited in Congress to complement the administrative efforts by HHS.
- In addition to the administrative actions in the proposed rule, HHS has requested additional funding in the FY 2017 President's Budget along with legislation aimed at helping HHS process a greater number of appeals. If the proposed rule is implemented, additional funding approved, and legislative recommendations adopted, HHS projects the backlog of appeals could be eliminated by FY 2021.
- The proposed rule addresses many changes at the ALJ level but does not address the probable influx of appeals at the Council level because of the streamlined appeals process. HHS will need to address this, likely in legislative changes and additional funding appropriations, once the lower administrative appeal levels begin to operate more efficiently.