

# PUBLICATION

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## HHS Publishes Final Rule Overhauling the Medicare Appeals Process

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**The Department of Health and Human Services (HHS) published its final rule revamping the Medicare appeals process at the Administrative Law Judge (ALJ) level on January 17, 2017. The final rule extensively revises federal regulations and finalizes several new concepts meant to address the systemic delay in the Medicare appeals process.**

As we mentioned in our [article](#) on the proposed rule, HHS was, and continues to be, under increasing pressure to reduce the Medicare appeals backlog. On December 5, 2016, the D.C. Circuit Court of Appeals ordered the Secretary of HHS to eliminate the backlog of Medicare reimbursement appeals in *American Hospital Association v. Burwell*, which we discussed in our prior *Payment Matters* [article](#). With publication of this final rule, HHS has outlined its position to streamline the Medicare appeals process. In the preamble to the final rule, HHS endorses 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 final rule addresses only the second prong since the remaining steps require some measure of cooperation with, and action by, Congress.

The first significant change is that some decisions by the Medicare Appeals Council (Council) may be designated as precedential. This means selected 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 which Council decisions will be considered binding on a given controversy. The DAB is the office that oversees many HHS programs and components by issuing final decisions on behalf of the Secretary of HHS, including cases concerning Medicare claim appeals. The final 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.

The final rule adopts the precedential decision process as initially proposed except for the addition of factors that the DAB may take into consideration when determining which decisions will have precedential effect. Those factors include decisions that "address, resolve, or clarify recurring legal issues, rules or policies, or that may have broad application or impact, or involve issues of public interest." HHS reiterates that the primary goal of precedential decisions is to address issues of "wide applicability where designation as precedent is likely to materially contribute to improving predictability and consistency in decisions prospectively." Notably, HHS mentions in the preamble that appellants or CMS or its contractors can argue in their appeal requests or own motion referrals on whether a certain case should have precedential status.

HHS finalizes another significant change that allows senior attorneys who are not ALJs to adjudicate certain ALJ level appeals. Referred to as "Attorney Adjudicators," these attorneys will have "knowledge of Medicare coverage and payment laws and guidance." HHS states that Attorney Adjudicators will undergo the same training as ALJs. However, 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 final 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.

HHS finalizes numerous revisions in the final rule for creating efficiencies and streamlining Medicare appeal proceedings. The rules also include new detailed instructions on addressing notice to all parties, challenges to statistical samples and contractor participation. The rules provide new due dates for notices of participation by CMS contractors and for position papers. Lastly, the rules add clarity on when new issues can be raised on appeal and on the standards for submission of new evidence after the reconsideration level of appeal.

### Comments

- In addition to the administrative actions in the final rule, HHS is relying on congressional action to help alleviate the backlog of appeals as part of its three-prong strategy, which is outlined above. In today's increasingly uncertain political environment, HHS's expectation of additional funding and legislative fixes may be met with resistance, thus placing HHS in the untenable position of an exponentially growing backlog of appeals.
- 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. On the other hand, not all precedential decisions will be provider- or supplier-friendly and some avenues for appeal may be cut off. When drafting appeals to the Council, and depending on the unique facts and circumstances of a particular case, appellants should consider adding argument either for or against the Council granting precedential status.
- The final 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.