

Medicare Appellant Forum Recap: OMHA Overwhelmed with Appeals Backlog, Providers Will Wait Close to 3 Years for a Hearing

Despite the impending snowstorm that dropped over a foot of snow on the Washington, DC area last week, over 300 representatives from healthcare providers, industry groups, and other organizations from across the country attended the Medicare Appellant Forum hosted by Office of Medicare Hearings and Appeals (“OMHA”). HDJN attorneys [Emily Towey](#) and [Colin McCarthy](#) attended the Forum to learn what OMHA is doing to alleviate the growing backlog in Medicare payment appeals.

Chief Administrative Law Judge (“ALJ”) Nancy Griswold provided an overview of the current state of the Medicare appeals backlog, OMHA officials discussed initiatives the agency has started to address the growing number of appeals, and ALJs provided insights into the “do’s and don’ts” of Medicare appeals and answered questions. Unfortunately for the provider community, OMHA’s initiatives fall short of dealing with the appeals backlog in a meaningful manner. Most providers will wait approximately three years before having a hearing, during which time the government has possession of the provider’s payments.

I. A Growing Backlog

Chief Judge Griswold described the substantial growth in OMHA’s workload over the past several years. In 2012, OMHA received approximately 1,250 appeal requests per week. As of January 2014, the agency is receiving approximately 15,000 appeal requests per week. The increase in appeal activity has outpaced OMHA’s ALJs’ ability to process appeals, leading to a backlog of over 350,000 appeals that have been assigned to an ALJ. An additional 480,000 appeals are awaiting assignment to an ALJ, and 225,000 appeals have been filed but have not been entered into OMHA’s database. In total, appellants in over one million appeals are awaiting an ALJ hearing; at least 700,000 of those hearings will not occur for almost three years.

The growth in the number of appeals, CMS officials acknowledged, is due in large part to expansion of post-payment audits, specifically Recovery Audit Contractor (“RAC”) audits. Chief Judge Griswold described the problem as workload versus resources: while the number of appeals has increased significantly, OMHA’s funding and resources (including number of ALJs and physical office space) have remained relatively constant. OMHA received an 18.6% increase in appropriation in the FY2014 budget, but it is not clear that this increase will be enough to get the agency up to speed with its workload.

To address the backlog, OMHA has suspended the assignment of newly-filed appeals to an ALJ for 28 months. The estimated wait time to obtain a hearing after assignment to an ALJ’s docket exceeds 6 months, meaning that providers filing appeals today should prepare to wait almost three years before having the chance to present their case at an ALJ hearing. By regulation, ALJs are required to hold a hearing within 90 days of the date a hearing request is filed. If that time period has passed, a provider has a right to escalate its appeal to the Medicare Appeals Council. Many providers are reluctant to escalate appeals to the Council because they lose the opportunity for an in-person or telephonic hearing with witness testimony, which is how many cases are won.

During the Q&A sessions, providers shared frustrating anecdotes highlighting problems in the appeal process, often rousing applause from the audience. Most acknowledged that OMHA’s workload is due in large part to the lack of objectivity and quality in the Level 1 and Level 2 appeals handled by Medicare Administrative Contractors (“MACs”) and Qualified Independent Contractors (“QICs”), respectively. In a typical scenario, a provider receives a pre- or post-payment denial from a RAC or MAC for a specific reason. When the provider submits a Level 1

appeal to the MAC, it responds to the original denial reason, often providing additional documentation and supporting arguments. The MAC denies payment again for a wholly different reason, without acknowledging that the provider responded to the original denial reason. The provider is then forced to appeal to the QIC, which may deny the case again for a third, new reason.

Overwhelmingly, providers shared their belief that the ALJ level of appeal is the first time their appeal is objectively reviewed and their voice is heard. This sentiment is backed by data from the Office of Inspector General, which [found](#) that providers are successful at the ALJ level in 56% of appeals, with the highest success rate belonging to hospitals (72%). Providers noted that if the MACs and QICs gave more consideration to lower level appeals, many of the appeals currently clogging up OMHA's workload would never have been filed.

II. OMHA Initiatives

OMHA is suspending assignment of newly-filed appeals to give its ALJs time to work through the backlog. The agency is also working on several programmatic and IT initiatives to make its processes more efficient. These projects will take time to implement, and OMHA noted that there is no "quick fix" to speed up its processing time of appeals in the backlog. These initiatives include:

- OMHA Adjudication Manual. OMHA is developing a manual to standardize policies and procedures in its appeals process. The goal of the manual will be to increase consistency in ALJ decisions while giving ALJs the discretion to address the circumstances of each case. The manual will also include revised forms to be used in the appeals process. OMHA expects to release the manual in stages, with the first section being released sometime in Spring 2014.
- Statistical Sampling. OMHA is considering the use of statistical sampling and extrapolation methods to speed up adjudication timeframes. This method could be used—with appellant consent—to address a large number of appeals filed by a provider with similar issues.
- Alternative Dispute Resolution. OMHA is also considering the use of Alternative Dispute Resolution methods, like mediation, to allow for settlement of appeals without the need for a hearing. Chief Judge Griswold noted that mediation could be an avenue for dealing with the large numbers of denials based on technical errors.
- Attorney Case Reviews. Another promising initiative is for OMHA attorneys to review case records and "fast-track" potentially favorable claims or narrow issues for a hearing. This may help to address procedural issues earlier in the appeals process.
- Revisions to Medicare Appeal Regulations. OMHA's policy division is considering a long-term plan to revise the Medicare Appeal Regulations to enable the agency to act more efficiently in adjudicating cases.
- ALJ Appeal Status Information System ("AASIS"). Providers will be able to check on the status of their filed appeals by logging into AASIS, which is expected to be implemented in May 2014. This system was described as an "interim initiative" until a more substantive online appeals system is established.
- Medicare Appeals Template System ("MATS"). MATS is a document-generation system that will provide users with fillable forms to create individualized templates, with the goal of improving efficiency in the appeals process through increased data propagation. OMHA plans to roll out MATS in the second quarter of 2014.
- Electronic Case Adjudication and Processing Environment ("ECAPE"). ECAPE will be a full-service portal for ALJ appeals that will serve as a shared system of the appeal record. The ECAPE system will have capabilities including case intake, assignment, workflow management, exhibiting, decision writing, closing, and management information. This system will allow providers to manage their appeals in an electronic environment, including electronic filing of the Request for Hearing, submission of electronic evidence, and the ability to view the entire file electronically. OMHA plans to release the ECAPE system in three phases, starting in Spring 2015 (electronic filing) and ending in Summer 2016 (full implementation).

III. "Do's and Don'ts"

OMHA officials and a panel of ALJs offered some "do's" and "don'ts" to assist providers—and OMHA—in dealing with the backlog.

DO's

- **DO:** If filing late, submit a request for an extension of time with the request for hearing.

- **DO:** Submit only the ALJ Request for Hearing form, appointment of representative form, first page of the QIC decision, and proof of service to other parties.
- **DO:** Prominently include the QIC Medicare Appeal Number on the Request for Hearing.
- **DO:** Document that you provided proof of service to other parties identified on the reconsideration decision.
- **DO:** Mail your Request for Hearing via tracked mail.
- **DO:** If requesting aggregation of appeals, prepare a separate request form for each appeal, provide a cover letter explicitly and prominently asking for aggregation, and submit the requests in one package. Only combine appeals if the claims are under the jurisdiction of the same MAC.
- **DO:** If you have a strong case, consider waiving the right to a hearing and ask for a decision on the record. This strategy will typically result in a decision 3-6 months earlier than cases in which a hearing is required.
- **DO:** Be concise in written arguments filed with a Request for Hearing. Each ALJ has thousands of cases on his or her workload, and appreciates (and may be more likely to side with) concise arguments that explain why the law and facts of the case warrant a decision in favor of the appellant.
- **DO:** If planning to withdraw a case, do so as early as possible.

DON'Ts

- **DON'T:** Submit duplicate requests for hearing. OMHA also has a mailroom backlog. Appeal filings received at OMHA Central Docketing's mail room are not opened and entered into OMHA's system for 15-22 weeks.
- **DON'T:** Submit additional documentation in support of your appeal request until the case is assigned to an ALJ. Instead, submit any supporting documentation directly to the ALJ after the case is assigned.
- **DON'T:** Submit copies of documentation already submitted at a prior level. The QIC is required to send the entire case file to OMHA.
- **DON'T:** Submit courtesy copies of the Request to the QIC. These copies are sometimes forwarded to OMHA and become duplicate requests.
- **DON'T:** Use a standard office speakerphone if participating in a telephonic hearing. Instead, use a dedicated speakerphone system to avoid technical problems that may delay the hearing.

OMHA's Forum educated providers about future enhancements to the ALJ appeal process, but offered little hope of the backlog being cleared anytime soon. More importantly, the Forum gave providers the opportunity to voice their concerns with the entire Medicare appeals process to the CMS officials in attendance. It is yet to be seen whether CMS will take steps to address providers' grievances and the fundamental problems at the MAC and QIC levels of appeal.

HDJN's Reimbursement team is closely following developments in this area and will publish updates to this Client Advisory as CMS and OMHA continue to implement changes. If you have any questions regarding the Forum or the Medicare appeals process in general, please contact a member of HDJN's Reimbursement team:

Mary Malone	mmalone@hdjn.com	(804) 967-9604
Emily Towey	etowey@hdjn.com	(804) 967-9604
Michelle Calloway	mcalloway@hdjn.com	(804) 967-9604
Colin McCarthy	cmccarthy@hdjn.com	(804) 967-9604
Clay Landa	clanda@hdjn.com	(804) 967-9604
Tommy Miller	tmiller@hdjn.com	(804) 967-9604
Andrew Schutte	aschutte@hdjn.com	(804) 967-9604

Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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