

## § 426.500

Neither the contractor nor CMS may appeal a Board decision.

### Subpart E—Review of an NCD

#### § 426.500 Procedure for filing an acceptable complaint concerning a provision (or provisions) of an NCD.

(a) *The complaint.* An aggrieved party may initiate a review of an NCD by filing a written complaint with the Department of Health and Human Services Departmental Appeals Board.

(b) *Timeliness of a complaint.* An NCD complaint is not considered timely unless it is filed with the Board within—

(1) 6 months of the written statement from each aggrieved party's treating physician, in the case of aggrieved parties who choose to file an NCD challenge before receiving the service; or

(2) 120 days of the initial denial notice, in the case of aggrieved parties who choose to file an NCD challenge after receiving the service.

(c) *Components of a valid complaint.* A complaint must include the following:

- (1) *Beneficiary-identifying information.*
  - (i) Name.
  - (ii) Mailing address.
  - (iii) State of residence, if different from mailing address.
  - (iv) Telephone number, if any.
  - (v) Health Insurance Claim number, if applicable.
  - (vi) Email address, if applicable.
- (2) *If the beneficiary has a representative,* the representative's identifying information must include the following:

- (i) Name.
- (ii) Address.
- (iii) Telephone number.
- (iv) E-mail address (if any).
- (v) Copy of the written authorization to represent the beneficiary.

(3) *Treating physician written statement.* A copy of a written statement from the treating physician that the beneficiary needs the service that is the subject of the NCD. This statement may be in the form of a written order for the service or other documentation from the beneficiary's medical record (such as progress notes or discharge summary) indicating that the beneficiary needs the service.

- (4) *NCD-identifying information:*
  - (i) Title of NCD being challenged.

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(ii) The specific provision or provisions of the NCD adversely affecting the aggrieved party.

(5) *Aggrieved party statement.* A statement from the aggrieved party explaining what service is needed and why the aggrieved party thinks that the provision(s) of the NCD is (are) not valid under the reasonableness standard.

(6) *Clinical or scientific evidence.* (i) Copies of clinical or scientific evidence that supports the complaint and an explanation for why the aggrieved party thinks that this evidence shows that the NCD is not reasonable.

(ii) Any documents or portions of documents that include proprietary data must be marked "proprietary data," and include a legal basis for that assertion.

(iii) Proprietary data submitted by a manufacturer concerning a drug or device for which the manufacturer has submitted information to the Food and Drug Administration, must be considered and given substantive weight only when supported by an affidavit certifying that the submission contains true and correct copies of all data submitted by the manufacturer to the Food and Drug Administration in relation to that drug or device.

(d) *Joint complaints—(1) Conditions for a joint complaint.* Two or more aggrieved parties may initiate the review of an NCD by filing a single written complaint with the Board if all of the following conditions are met:

(i) Each aggrieved party named in the joint complaint has a similar medical condition or there are other bases for combining the complaints.

(ii) Each aggrieved party named in the joint complaint is filing the complaint in regard to the same provision(s) of the same NCD.

(2) *Components of a valid joint complaint.* A joint complaint must contain the following information:

- (i) The beneficiary-identifying information described in paragraph (c)(1) of this section for each aggrieved party named in the joint complaint.

- (ii) The NCD-identifying information described in paragraph (c)(2) of this section.

- (iii) The documentation described in paragraphs (c)(3) and (c)(4) of this section.

(3) *Timeliness of a joint complaint.* Aggrieved parties, who choose to seek review of an NCD—

- (i) Before receiving the service, must file with the Board a joint complaint within 6 months of the written statement from each aggrieved party's treating physician; or
- (ii) After receiving the service, must file with the Board a complaint within 120 days of each aggrieved party's initial denial notice.

**§ 426.503 Submitting new evidence once an acceptable complaint has been filed.**

Once an acceptable complaint has been filed, the aggrieved party may submit additional new evidence without withdrawing the complaint until the Board closes the record.

**§ 426.505 Authority of the Board.**

(a) The Board conducts a fair and impartial hearing, avoids unnecessary delay, maintains order, and ensures that all proceedings are recorded.

(b) The Board defers only to reasonable findings of fact, reasonable interpretations of law, and reasonable applications of fact to law by the Secretary.

(c) The Board has the authority to do any of the following:

(1) Review complaints by an aggrieved party (or aggrieved parties).

(2) Dismiss complaints that fail to comply with § 426.500.

(3) Set and change the date, time, and place of a hearing upon reasonable notice to the parties.

(4) Continue or recess a hearing for a reasonable period of time.

(5) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(6) Consult with scientific and clinical experts on its own motion, concerning clinical or scientific evidence.

(7) Set schedules for submission of exhibits and written reports of experts.

(8) Administer oaths and affirmations.

(9) Examine witnesses.

(10) Issue subpoenas requiring the attendance of witnesses at hearings as permitted by this part.

(11) Issue subpoenas requiring the production of existing documents be-

fore, and relating to, the hearing as permitted by this part.

(12) Rule on motions and other procedural matters.

(13) Stay the proceeding in accordance with § 426.340.

(14) Regulate the scope and timing of documentary discovery as permitted by this part.

(15) Regulate the course of a hearing and the conduct of representatives, parties, and witnesses.

(16) Receive, rule on, exclude, or limit evidence, as provided in this regulation.

(17) Take official notice of facts, upon motion of a party.

(18) Decide cases, upon the motion of a party, by summary judgment when there is no disputed issue of material fact.

(19) Conduct any conference, argument, or hearing in person or, upon agreement of the parties, by telephone, picture-tel, or any other means.

(20) Issue decisions.

(21) Exclude a party from an NCD review for failure to comply with a Board order or procedural request without good cause.

(22) Stay the proceedings for a reasonable time when all parties voluntarily agree to mediation or negotiation, and provide mediation services upon request.

(d) The Board does not have authority to do any of the following under this part:

(1) Conduct an LCD review or conduct LCD hearings, except as provided by § 426.465.

(2) Conduct an NCD review or conduct NCD hearings on its own motion or on the motion of a nonaggrieved party.

(3) Issue a decision based on any new evidence without following § 426.340, regarding procedures for review of new evidence.

(4) Review any decisions by CMS to develop a new or revised NCD.

(5) Conduct a review of any draft NCDs, coverage decision memoranda, or withdrawn NCDs.

(6) Conduct a review of the merits of an unacceptable NCD complaint as discussed in § 426.510.

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(7) Conduct an NCD review of any policy that is not an NCD, as defined in § 400.202 of this chapter.

(8) Allow participation by individuals or entities other than—

(i) The aggrieved party and/or his or her representative;

(ii) CMS and/or the contractor;

(iii) Experts called by the parties or Board; or

(iv) Third parties with a clearly identifiable and substantial interest in the outcome of the dispute who have petitioned for and been granted permission by the Board to participate in the proceedings as *amicus curiae*.

(9) Compel the parties to participate in a mediation process or to engage in settlement negotiations.

(10) Deny a request for withdrawal of a complaint by an aggrieved party.

(11) Compel CMS to conduct studies, surveys, or develop new information to support an NCD record.

(12) Deny CMS the right to reconsider, revise, or withdraw an NCD.

(13) Subject to the timely filing requirements, deny an aggrieved party, CMS, or its contractor the right to appeal an ALJ decision.

(14) Find invalid applicable Federal statutes, regulations, or rulings.

(15) Enter a decision specifying terms to be included in an NCD.

### § 426.506 *Ex parte contacts.*

No party or person (except Board staff) communicates in any way with the Board on any substantive matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

### § 426.510 Docketing and evaluating the acceptability of NCD complaints.

(a) *Docketing the complaint.* The Board does the following upon receiving a complaint regarding an NCD:

(1) Dockets the complaint.

(2) Determines whether the complaint is—

(i) The first challenge to a particular NCD; or

(ii) Related to a pending NCD review.

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(3) Forwards the complaint to the Board member who conducts the review.

(b) *Evaluating the acceptability of the complaint.* The Board determines if the complaint is acceptable by confirming all of the following:

(1) The complaint is being submitted by an aggrieved party or, in the case of a joint complaint, that each individual named in the joint complaint is an aggrieved party. (In determining if a complaint is acceptable, the Board assumes that the facts alleged by the treating physician's documentation regarding the aggrieved party's (or parties') clinical condition are true.)

(2) The complaint meets the requirements for a valid complaint in § 426.500 and is not one of the documents in § 426.325(b).

(c) *Unacceptable complaint.* (1) If the Board determines that the complaint is unacceptable, the Board must provide the aggrieved party (or parties) one opportunity to amend the unacceptable complaint.

(2) If the aggrieved party (or parties) fail(s) to submit an acceptable amended complaint within a reasonable time-frame as determined by the Board, the Board must issue a decision dismissing the unacceptable complaint.

(3) If a complaint is determined to be unacceptable after one amendment, the beneficiary is precluded from filing again for 6 months after being informed that it is unacceptable.

(d) *Acceptable complaint.* If the Board determines that the complaint (or amended complaint) is acceptable, the Board does the following:

(1) Sends a letter to the aggrieved party (or parties) acknowledging the complaint and informing the aggrieved party (or parties) of the docket number and the deadline for CMS to produce the NCD record.

(2) Forwards a copy of the complaint, any evidence submitted in the complaint, and the letter described in paragraph (d)(1) of this section to CMS.

(3) Requires CMS to send a copy of the NCD record to the Board and all parties to the NCD review within 30 days of receiving the Board's letter, a copy of the complaint, and any associated evidence, subject to extension for good cause shown.

(e) *Consolidation of complaints regarding an NCD*—(1) *Criteria for consideration.* If a review is pending regarding a particular NCD provision(s) and no decision has been issued ending the review, and a new acceptable complaint is filed, the Board consolidates the complaints and conducts a consolidated NCD review if all of the following criteria are met:

(i) The complaints are in regard to the same provision(s) of the same NCD, or there are other bases for consolidating the complaints.

(ii) The complaints contain common questions of law, common questions of fact, or both.

(iii) Consolidating the complaints does not unduly delay the Board's decision.

(2) *Decision to consolidate complaint.* If the Board decides to consolidate complaints, the Board does the following:

(i) Provides notification that the NCD review is consolidated and informs all parties of the docket number of the consolidated review.

(ii) Makes a single record of the proceeding.

(iii) Considers the relevant evidence introduced in each NCD complaint as introduced in the consolidated review.

(3) *Decision not to consolidate complaints.* If the Board decides not to consolidate complaints, the Board conducts separate NCD reviews for each complaint.

(f) *Public notice of complaint and opportunity for interested parties to participate.* (1) If an acceptable complaint is the first complaint the Board has received challenging the particular NCD or provision, then the Board posts notice on its Web site that it has received the complaint, specifying a time period for requests to participate in the review process.

(2) If an acceptable complaint challenges an NCD provision when review is pending and no decision has been issued ending the review, the Board may supplement the public notice on its Web site and extend the time for participation requests if indicated.

(3) The Board may allow participation, in the manner and by the deadlines established by the Board, when an NCD is being challenged and the Board decides that—

(i) The *amicus* participant has a clearly identifiable and substantial interest in the outcome of the dispute;

(ii) Participation would clarify the issues or otherwise be helpful in resolution of the dispute;

(iii) Participation does not result in substantial delay; and

(iv) The petition for participation meets the criteria in § 426.513.

**§ 426.513 Participation as *amicus curiae*.**

(a) *Petition for participation.* Any person or organization that wishes to participate as *amicus curiae* must timely file with the Board a petition that concisely states—

(1) The petitioner's interest in the hearing;

(2) Who will represent the petitioner; and

(3) The issues on which the petitioner intends to present argument.

(b) *The nature of the proposed amicus participation.* An *amicus curiae* is not a party to the hearing but may participate by—

(1) Submitting a written statement of position to the Board before the beginning of the hearing;

(2) Presenting a brief oral statement or other evidence at the hearing, at the point in the proceedings specified by the Board; and

(3) Submitting a brief or a written statement when the parties submit briefs.

(c) *Service by amicus curiae.* Serving copies of any briefs or written statements on all parties.

**§ 426.515 CMS' role in making the NCD record available.**

CMS will provide a copy of the NCD record (as described in § 426.518) to the Board and all parties to the NCD review within 30 days of the receipt of the Board's order.

**§ 426.516 Role of Medicare Managed Care Organizations (MCOs) and State agencies in the NCD review process.**

Medicare MCOs and Medicaid State agencies may participate in the NCD review process only if they meet the *amicus* participant criteria listed in §§ 426.510(f)(3) and 426.513.

**§ 426.517****§ 426.517 CMS' statement regarding new evidence.**

(a) CMS may review any new evidence that is submitted, regardless of whether the Board has stayed the proceedings, including but not limited to new evidence:

- (1) Submitted with the initial complaint;
- (2) Submitted with an amended complaint;
- (3) Produced during discovery;
- (4) Produced when the Board consults with scientific and clinical experts; and
- (5) Presented during any hearing.

(b) CMS may submit a statement regarding whether the new evidence is significant under § 426.340, by a deadline set by the Board.

**§ 426.518 NCD record furnished to the aggrieved party.**

(a) *Elements of the NCD record furnished to the aggrieved party.* Except as provided in paragraph (b) of this section, the NCD record consists of any document or material that CMS considered during the development of the NCD, including, but not limited to, the following:

- (1) The NCD being challenged.
- (2) Any medical evidence considered on or before the date the NCD was issued, including, but not limited to, the following:
  - (i) Scientific articles.
  - (ii) Technology assessments.
  - (iii) Clinical guidelines.
- (iv) Statements from clinical experts, medical textbooks, claims data, or other indication of medical standard of practice.
- (v) MCAC transcripts.
- (3) Public comments received during the notice and comment period.
- (4) Coverage decision memoranda.
- (5) An index of documents considered that are excluded under paragraph (b) of this section.

(b) *Elements of the NCD record not furnished to the aggrieved party.* The NCD record furnished to the aggrieved party does not include the following:

- (1) Proprietary data or privileged information.
- (2) Any new evidence.

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The NCD record furnished to the Board includes—

- (a) Documents included in § 426.518(a); and
- (b) Privileged information and proprietary data considered that must be filed with the Board under seal.

**§ 426.520 Withdrawing an NCD under review or issuing a revised or re-considered NCD.**

(a) CMS may withdraw an NCD or NCD provision under review before the date the Board issues a decision regarding that NCD. Withdrawing an NCD or NCD provision under review has the same effect as a decision under § 426.560(b).

(b) CMS may revise an NCD under review to remove or amend the NCD provision listed in the complaint through the reconsideration process before the date the Board issues a decision regarding that NCD. Revising an NCD under review to remove the NCD provision in question has the same effect as a decision under § 426.560(b).

(c) CMS must notify the Board within 48 hours of—

- (1) Withdrawing an NCD or NCD provision that is under review; or
- (2) Issuing a revised or reconsidered version of the NCD that is under review.

(d) If CMS issues a revised or reconsidered NCD, CMS forwards a copy of the revised/reconsidered NCD to the Board.

(e) The Board must take the following actions upon receiving a notice that CMS has withdrawn or revised/reconsidered an NCD under review:

(1) If, before the Board issues a decision, the Board receives notice that CMS has withdrawn the NCD or revised the NCD to completely remove the provision in question, the Board must dismiss the complaint and inform the aggrieved party (ies) who sought the review that he or she or they will receive individual claim review without the retired/withdrawn provisions.

(2) If, before the Board issues a decision, the Board receives notice that CMS has revised the NCD provision in question but has not removed it altogether, the Board must continue the

review based on the revised NCD. In this case, CMS must send a copy of the supplemental record to the Board and all parties. In that circumstance, the Board permits the aggrieved party to respond to the revised NCD and the supplemental record.

**§ 426.523 Withdrawing a complaint regarding an NCD under review.**

(a) *Circumstance under which an aggrieved party withdraws a complaint regarding an NCD.* An aggrieved party who filed a complaint regarding an NCD may withdraw the complaint before the Board issues a decision regarding that NCD. The aggrieved party may not file another complaint concerning the same coverage determination for 6 months.

(b) *Process for an aggrieved party withdrawing a complaint regarding an NCD.* To withdraw a complaint regarding an NCD, the aggrieved party who filed the complaint must send a written withdrawal notice to the Board (see § 426.500) and CMS. Supplementing an acceptable complaint with new evidence does not constitute a withdrawal of a complaint, as described in § 426.503.

(c) *Actions the Board must take upon receiving a notice announcing the intent to withdraw a complaint regarding an NCD—(1) NCD reviews involving one aggrieved party.* If the Board receives a withdrawal notice regarding an NCD before the date the Board issued a decision regarding that NCD, the Board issues a decision dismissing the complaint under § 426.544 and informs the aggrieved party that he or she may not file another complaint to the same coverage determination for 6 months.

(2) *NCD reviews involving joint complaints.* If the Board receives a notice from an aggrieved party who is named in a joint complaint withdrawing a complaint regarding an NCD before the date the Board issued a decision regarding that NCD, the Board issues a decision dismissing only that aggrieved party from the complaint under § 426.544. The Board continues the NCD review if there is one or more aggrieved party who does not withdraw from the joint complaint.

(3) *Consolidated NCD reviews.* If the Board receives a notice from an aggrieved party who is part of a consoli-

dated NCD review withdrawing a complaint regarding an NCD before the date the Board issued a decision regarding that NCD, the Board removes that aggrieved party from the consolidated NCD review and issues a decision dismissing that aggrieved party's complaint under § 426.544. The Board continues the NCD review if there is one or more aggrieved party who does not withdraw from the joint complaint.

**§ 426.525 NCD review.**

(a) *Opportunity for the aggrieved party after his or her review of the NCD record to state why the NCD is not valid.* Upon receipt of the NCD record, the aggrieved party files a statement explaining why the NCD record is not complete, or not adequate to support the validity of the NCD under the reasonableness standard. This statement must be submitted to the Board and CMS, within 30 days (or within additional time as allowed by the Board for good cause shown) of the date the aggrieved party receives the NCD record.

(b) *CMS response.* CMS has 30 days, after receiving the aggrieved party's statement, to submit a response to the Board in order to defend the NCD.

(c) *Board evaluation.* (1) After the aggrieved party files a statement and CMS responds as described in § 426.525(a) and § 426.525(b), or the time for filing has expired, the Board applies the reasonableness standard to determine whether the NCD record is complete and adequate to support the validity of the NCD.

(2) Issuance of a decision finding the record complete and adequate to support the validity of the NCD ends the review process.

(3) If the Board determines that the NCD record is not complete and adequate to support the validity of the NCD, the Board permits discovery and the taking of evidence in accordance with § 426.532 and § 426.540, and evaluate the NCD in accordance with § 426.531.

(d) The process described in paragraphs (a), (b), and (c) of this section applies when an NCD record has been supplemented, except that discovery and the taking of evidence is not repeated. The period for the aggrieved party to file a statement begins when

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the aggrieved party receives the supplement.

### § 426.531 Board's review of the NCD to apply the reasonableness standard.

(a) *Required steps.* The Board must do the following to review the provision(s) listed in the aggrieved party's complaint based on the reasonableness standard:

(1) Confine the NCD review to the provision(s) of the NCD raised in the aggrieved party's complaint.

(2) Conduct a hearing unless the matter can be decided on the written record.

(3) Close the NCD review record to the taking of evidence.

(4) Treat as precedential any previous Board decision made under § 426.547 that involves the same NCD provision(s), same specific issue and facts in question, and the same clinical conditions.

(5) Issue a decision as described in § 426.547.

(b) *Optional steps.* The Board may consult with appropriate scientific or clinical experts concerning clinical and scientific evidence to apply the reasonableness standard to the provision(s) listed in the aggrieved party's complaint.

(c) *Authority for the Board in NCD reviews when applying the reasonableness standard.* In applying the reasonableness standard to a provision (or provisions) of an NCD, the Board must follow all applicable laws and regulations, as well as NCDs other than the one under review.

## § 426.532 Discovery.

(a) *General rule.* If the Board orders discovery, the Board must establish a reasonable timeframe for discovery.

(b) *Protective order—(1) Request for a protective order.* Any party receiving a discovery request may file a motion for a protective order before the date of production of the discovery.

(2) *The Board granting of a protective order.* The Board may grant a motion for a protective order if it finds that the discovery sought—

(i) Is irrelevant or unduly repetitive;  
(ii) Is unduly costly or burdensome; or

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(iii) Will unduly delay the proceeding.

(c) *Types of discovery available.* A party may obtain discovery via a request for the production of documents, and/or via the submission of up to 10 written interrogatory questions, relating to a specific NCD.

(d) *Types of documents.* For the purpose of this section, the term documents includes relevant information, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained in this section will be interpreted to require the creation of a document.

(e) *Types of discovery not available.* Requests for admissions, depositions, or any other forms of discovery, other than those permitted under paragraph (c) of this section, are not authorized.

(f) *Privileged information or proprietary data.* The Board must not under any circumstances order the disclosure of privileged information or proprietary data filed under seal without the consent of the party who possesses the right to protection of the information.

(g) *Notification.* The Board notifies all parties in writing when the discovery period will be closed.

## § 426.535 Subpoenas.

(a) *Purpose of a subpoena.* A subpoena requires the attendance of an individual at a hearing and may also require a party to produce evidence authorized under § 426.540 at or before the hearing.

(b) *Filing a motion for a subpoena.* A party seeking a subpoena must file a written motion with the Board not less than 30 days before the date fixed for the hearing. The motion must do all of the following:

(1) Designate the witnesses.  
(2) Specify any evidence to be produced.

(3) Describe the address and location with sufficient particularity to permit the witnesses to be found.

(4) State the pertinent facts that the party expects to establish by witnesses or documents and state whether those facts could be established by evidence other than by the use of a subpoena.

(c) *Response to a motion for a subpoena.* Within 15 days after the written

motion requesting issuance of a subpoena is served on all parties, any party may file an opposition to the motion or other response.

(d) *Extension for good cause shown.* The Board may modify the deadlines specified in paragraphs (b) and (c) of this section for good cause shown.

(e) *Motion for a subpoena granted.* If the Board grants a motion requesting issuance of a subpoena, the subpoena must do the following:

(1) Be issued in the name of the presiding Board member.

(2) Include the docket number and title of the NCD under review.

(3) Provide notice that the subpoena is issued according to sections 1872 and 205(d) and (e) of the Act.

(4) Specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(f) *Delivery of the subpoena.* The party seeking the subpoena serves it by personal delivery to the individual named, or by certified mail return receipt requested, addressed to the individual at his or her last dwelling place or principal place of business.

(g) *Motion to quash a subpoena.* The individual to whom the subpoena is directed may file with the Board a motion to quash the subpoena within 10 days after service.

(h) *Refusal to obey a subpoena.* The exclusive remedy for contumacy by, or refusal to obey, a subpoena duly served upon any person is specified in section 205(e) of the Act (42 U.S.C. 405(e)) except that any reference to the "Commissioner of Social Security" shall be considered a reference to the "Secretary."

#### **§ 426.540 Evidence.**

(a) Except as provided in this part, the Board is not bound by the Federal Rules of Evidence. However, the Board may apply the Federal Rules of Evidence when appropriate, for example, to exclude unreliable evidence.

(b) The Board must exclude evidence that it determines is clearly irrelevant or immaterial, or unduly repetitive.

(c) The Board may accept privileged information or proprietary data, but must maintain it under seal.

(d) The Board may permit the parties to introduce the testimony of expert

witnesses on scientific and clinical issues, rebuttal witnesses, and other relevant evidence. The Board may require that the testimony of expert witnesses be submitted in the form of a written report, accompanied by the curriculum vitae of the expert preparing the report.

(e) Experts submitting reports must be available for cross-examination at an evidentiary hearing upon request of the Board or a party to the proceeding, or the report will be excluded from the record.

(f) Except as set forth in paragraph (c) of this section or unless otherwise ordered by the Board for good cause shown, all documents and other evidence offered or taken for the record is open to examination by all parties.

#### **§ 426.544 Dismissals for cause.**

(a) The Board may, at the request of any party, or on its own motion, dismiss a complaint if the aggrieved party fails to do either of the following:

(1) Attend or participate in a pre-hearing conference (the prehearing may be conducted by telephone) or hearing without good cause shown.

(2) Comply with a lawful order of the Board without cause shown.

(b) The Board must dismiss any complaint concerning NCD provision(s) if the following conditions exist:

(1) The Board does not have the authority to rule on that provision under § 426.505(d).

(2) The complaint is not timely. (See § 426.500(b)).

(3) The complaint is not filed by an aggrieved party.

(4) The complaint is filed by an individual who fails to provide an adequate statement of need for the service from the treating physician.

(5) The complaint challenges a provision or provisions of an LCD except as provided in § 426.476, regarding the Board's review of an ALJ decision. (See § 426.505, regarding the authority of the Board.)

(6) CMS notifies the Board that the NCD provision(s) is (are) no longer in effect.

(7) The aggrieved party withdraws the complaint. (See § 426.523, for requirements for withdrawing a complaint regarding an NCD under review.)

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### § 426.545 Witness fees.

(a) A witness testifying at a hearing before the Board receives the same fees and mileage as witnesses in Federal district courts of the United States. If the witness qualifies as an expert, he or she is entitled to an expert witness fee. Witness fees are paid by the party seeking to present the witness.

(b) If the Board requests expert testimony, the Board is responsible for paying all applicable fees and mileage, unless the expert waives payment.

### § 426.546 Record of hearing.

The Board must ensure that all hearings are open to the public and are electronically, mechanically, or stenographically reported. Except for privileged information and proprietary data that are filed under seal, all evidence upon which the Board relies for decision must be admitted into the public record. All medical reports, exhibits, and any other pertinent document, either in whole or in material part, must be offered, marked for identification, and retained in the case record.

### § 426.547 Issuance, notification, and posting of a Board's decision.

The Board must do the following:

(a) Issue to all parties to the NCD review, within 90 days of closing the NCD review record to the taking of evidence, one of the following:

(1) A written decision, including a description of appeal rights.

(2) A written notification stating that a decision is pending, and an approximate date of issuance for the decision.

(b) Make the decision available at the HHS Medicare Internet site. The posted decision does not include any information that identifies any individual, provider of service, or supplier.

### § 426.550 Mandatory provisions of the Board's decision.

(a) *Findings.* The Board's decision must include one of the following:

(1) A determination that the provision of the NCD is valid under the reasonableness standard.

(2) A determination that the provision of the NCD is not valid under the reasonableness standard.

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(3) A statement dismissing the complaint regarding the NCD, and a rationale for the dismissal.

(4) A determination that the LCD or NCD record is complete and adequate to support the validity of the LCD or NCD provisions under the reasonableness standard.

(b) *Other information.* The Board's decision must include all of the following:

(1) The date of issuance.

(2) The docket number of the NCD review.

(3) A statement as to whether the aggrieved party has filed a claim for the service(s) named in the complaint, the date(s)-of-service, and the disposition, if known.

(4) A basis for concluding that the NCD was or was not valid based on the application of the reasonableness standard to the record before the Board, including CMS':

(i) Findings of fact.

(ii) Interpretations of law.

(iii) Applications of fact to law.

(5) A summary of the evidence reviewed. Where proprietary or privileged data were submitted under seal, the decision must state whether the data were material and what role they played in the determination, but without disclosing the substance or contents of the evidence under seal. A separate statement of the rationale for the Board's treatment of the sealed evidence must be prepared and kept under seal itself. If the Board decision is appealed to the court, this statement must be provided to the court, under seal.

(6) A statement regarding the right to judicial review.

### § 426.555 Prohibited provisions of the Board's decision.

The Board's decision may not do any of the following:

(a) Order CMS to add any language to a provision or provisions of an NCD.

(b) Order CMS or its contractors to pay a specific claim.

(c) Set a time limit for CMS to establish a new or revised NCD.

(d) Review or evaluate an NCD other than the NCD under review.

(e) Include a requirement for CMS or its contractors that specifies payment,

coding, or systems changes for an NCD, or deadlines for implementing these types of changes.

(f) Order or address how CMS implements an NCD.

**§ 426.557 Optional provisions of the Board's decision.**

When appropriate, the Board may limit a decision holding invalid a specific provision(s) of an NCD to specific clinical indications and for similar conditions.

**§ 426.560 Effect of the Board's decision.**

(a) *Valid under the reasonableness standard.* If the Board finds that the provision (or provisions) of an NCD named in the complaint is (are) valid under the reasonableness standard, the aggrieved party may challenge the final agency action in Federal court.

(b) *Not valid under the reasonableness standard.* If the Board finds that the provision (or provisions) of an NCD named in the complaint is (are) invalid under the reasonableness standard, then CMS instructs its contractor, M + C organization, or other Medicare managed care organization to provide the following—

(1) *Individual claim review.* (i) If the aggrieved party's claim/appeal(s) was previously denied, the contractor, an M + C organization, or another Medicare managed care organization must reopen the claim of the party who challenged the LCD and adjudicate the claim without using the provision(s) of the NCD that the Board found invalid.

(ii) If a revised NCD is issued, contractors, M + C organizations, and other Medicare managed care organizations must use the revised NCD in reviewing claim/appeal submissions or request for services delivered or services performed on or after the effective date of the revised NCD.

(iii) If the aggrieved party who sought review has not yet submitted a claim, the contractor must adjudicate the claim without using the provision(s) of the NCD that the Board found invalid.

(iv) In either case, the claim and any subsequent claims for the service provided under the same circumstances,

must be adjudicated without using the NCD provision(s) found invalid.

(2) *Coverage determination relief.* Within 30 days, CMS implements the Board decision. Any change in policy is applied prospectively to requests for service or claims filed with dates of service after the implementation of the Board decision.

**§ 426.562 Notice of the Board's decision.**

After the Board has made a decision regarding an NCD complaint, the Board sends a written notice of the decision to each party. The notice must—

(a) State the outcome of the review; and

(b) Inform each party to the determination of his or her rights to seek further review if he or she is dissatisfied with the determination, and the time limit under which an appeal must be requested.

**§ 426.563 Future new or revised or reconsidered NCDs.**

CMS may not reinstate an NCD provision(s) found to be unreasonable unless CMS has a different basis (such as additional evidence) than what the Board evaluated.

**§ 426.565 Board's role in making an LCD or NCD review record available.**

Upon a request from a Federal Court, the Board must provide to the Federal Court a copy of the Board's LCD or NCD review record (as described in § 426.587).

**§ 426.566 Board decision.**

A decision by the Board constitutes a final agency action and is subject to judicial review. CMS may not appeal a Board decision.

**§ 426.587 Record for appeal of a Board NCD decision.**

(a) *Elements of the Board's NCD review record furnished to the public.* Except as provided in paragraph (b) of this section, the Board's NCD review record consists of any document or material that the Board compiled or considered during an NCD review, including, but not limited to, the following:

(1) The NCD complaint.

**§426.587**

- (2) The NCD and NCD record.
- (3) The supplemental NCD record, if applicable.
- (4) Transcripts of record.
- (5) Any other evidence relevant gathered under § 426.540.
- (6) The Board's decision.

(b) *Documents excluded from the NCD review record furnished to the court.* The NCD review record furnished to the court maintains the seal on privileged

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information or proprietary data that is maintained under seal by the Board. In the event a court seeks to obtain or requires disclosure of any documents excluded from the NCD record as privileged information or proprietary data, CMS or the Department seeks to have a protective order issued for those documents, as appropriate.

**PARTS 427-429 [RESERVED]**