

by the reopening may be subsequently appealed.

(g) *Effect of a revised determination or decision.* A revised determination or decision is binding unless it is appealed or otherwise reopened.

[70 FR 11472, Mar. 8, 2005, as amended at 82 FR 5108, Jan. 17, 2017]

§ 405.986 Good cause for reopening.

(a) *Establishing good cause for reopening.* Good cause may be established when—

(1) There is new and material evidence that—

(i) Was not available or known at the time of the determination or decision; and

(ii) May result in a different conclusion; or

(2) The evidence that was considered in making the determination or decision clearly shows on its face that an obvious error was made at the time of the determination or decision.

(b) *Change in substantive law or interpretative policy.* A change of legal interpretation or policy by CMS in a regulation, CMS ruling, or CMS general instruction, or a change in legal interpretation or policy by SSA in a regulation, SSA ruling, or SSA general instruction in entitlement appeals, whether made in response to judicial precedent or otherwise, is not a basis for reopening a determination or hearing decision under this section. This provision does not preclude contractors from conducting reopenings to effectuate coverage decisions issued under the authority granted by section 1869(f) of the Act.

(c) *Third party payer error.* A request to reopen a claim based upon a third party payer's error in making a primary payment determination when Medicare processed the claim in accordance with the information in its system of records or on the claim form does not constitute good cause for reopening.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37703, June 30, 2005; 86 FR 65660, Nov. 19, 2021]

EXPEDITED ACCESS TO JUDICIAL REVIEW

§ 405.990 Expedited access to judicial review.

(a) *Process for expedited access to judicial review.* (1) For purposes of this section, a “review entity” means an entity of up to three reviewers who are ALJs or members of the Departmental Appeals Board (DAB), as determined by the Secretary.

(2) In order to obtain expedited access to judicial review (EAJR), a review entity must certify that the Council does not have the authority to decide the question of law or regulation relevant to the matters in dispute and that there is no material issue of fact in dispute.

(3) A party may make a request for EAJR only once with respect to a question of law or regulation for a specific matter in dispute in an appeal.

(b) *Conditions for making the expedited appeals request.* (1) A party may request EAJR in place of an ALJ hearing or Council review if the following conditions are met:

(i) A QIC has made a reconsideration determination and the party has filed a request for—

(A) An ALJ hearing in accordance with § 405.1002 and a decision, dismissal order, or remand order of the ALJ or attorney adjudicator has not been issued;

(B) Council review in accordance with § 405.1102 and a final decision, dismissal order, or remand order of the Council has not been issued; or

(ii) The appeal has been escalated from the QIC to OMHA for an ALJ hearing after the period described in § 405.970(a) and § 405.970(b) has expired, and the QIC does not issue a decision or dismissal order within the timeframe described in § 405.970(e).

(2) The requestor is a party, as defined in paragraph (e) of this section.

(3) The amount remaining in controversy meets the requirements of § 405.1006(b) or (c).

(4) If there is more than one party to the reconsideration, hearing, or Council review, each party concurs, in writing, with the request for the EAJR.

(5) There are no material issues of fact in dispute.

(c) *Content of the request for EAJR.* The request for EAJR must—

(1) Allege that there are no material issues of fact in dispute and identify the facts that the requestor considers material and that are not disputed; and

(2) Assert that the only factor precluding a decision favorable to the requestor is—

(i) A statutory provision that is unconstitutional, or a provision of a regulation or national coverage determination and specify the statutory provision that the requestor considers unconstitutional or the provision of a regulation or a national coverage determination that the requestor considers invalid, or

(ii) A CMS Ruling that the requester considers invalid;

(3) Include a copy of any QIC reconsideration and of any ALJ or attorney adjudicator decision that the requester has received;

(4) If any QIC reconsideration or ALJ or attorney adjudicator decision was based on facts that the requestor is disputing, state why the requestor considers those facts to be immaterial; and

(5) If any QIC reconsideration or ALJ or attorney adjudicator decision was based on a provision of a law, regulation, national coverage determination or CMS Ruling in addition to the one the requestor considers unconstitutional or invalid, a statement as to why further administrative review of how that provision applies to the facts is not necessary.

(d) *Place and time for an EAJR request—*(1) *Method and place for filing request.* The requestor may—

(i) If a request for ALJ hearing or Council review is not pending, file a written EAJR request with the HHS Departmental Appeals Board with his or her request for an ALJ hearing or Council review; or

(ii) If an appeal is already pending for an ALJ hearing or otherwise before OMHA, or the Council, file a written EAJR request with the HHS Departmental Appeals Board.

(2) *Time of filing request.* The party may file a request for the EAJR—

(i) If the party has requested a hearing, at any time before receipt of the notice of the ALJ's or attorney adjudicator's decision; or

(ii) If the party has requested Council review, at any time before receipt of notice of the Council's decision.

(e) *Parties to the EAJR.* The parties to the EAJR are the persons or entities who were parties to the QIC's reconsideration determination and, if applicable, to the ALJ hearing.

(f) *Determination on EAJR request.* (1) The review entity described in paragraph (a) of this section will determine whether the request for EAJR meets all of the requirements of paragraphs (b), (c), and (d) of this section.

(2) Within 60 calendar days after the date the review entity receives a request and accompanying documents and materials meeting the conditions in paragraphs (b), (c), and (d) of this section, the review entity will issue either a certification in accordance to paragraph (g) of this section or a denial of the request.

(3) A determination by the review entity either certifying that the requirements for EAJR are met pursuant to paragraph (g) of this section or denying the request is not subject to review by the Secretary.

(4) If the review entity fails to make a determination within the time frame specified in paragraph (f)(2) of this section, then the requestor may bring a civil action in Federal district court within 60 calendar days of the end of the time frame.

(g) *Certification by the review entity.* If a party meets the requirements for the EAJR, the review entity certifies in writing that—

(1) The material facts involved in the claim are not in dispute;

(2) Except as indicated in paragraph (g)(3) of this section, the Secretary's interpretation of the law is not in dispute;

(3) The sole issue(s) in dispute is the constitutionality of a statutory provision, or the validity of a provision of a regulation, CMS Ruling, or national coverage determination;

(4) But for the provision challenged, the requestor would receive a favorable decision on the ultimate issue (such as whether a claim should be paid); and

(5) The certification by the review entity is the Secretary's final action for purposes of seeking expedited judicial review.

(h) *Effect of certification by the review entity.* If an EAJR request results in a certification described in paragraph (g) of this section—

(1) The party that requested the EAJR is considered to have waived any right to completion of the remaining steps of the administrative appeals process regarding the matter certified.

(2) The requestor has 60 calendar days, beginning on the date of the review entity's certification within which to bring a civil action in Federal district court.

(3) The requestor must satisfy the requirements for venue under section 1869(b)(2)(C)(iii) of the Act, as well as the requirements for filing a civil action in a Federal district court under § 405.1136(a) and § 405.1136(c) through § 405.1136(f).

(i) *Rejection of EAJR.* (1) If a request for EAJR does not meet all the conditions set out in paragraphs (b), (c) and (d) of this section, or if the review entity does not certify a request for EAJR, the review entity advises in writing all parties that the request has been denied, and forwards the request to OMHA or the Council, which will treat it as a request for hearing or for Council review, as appropriate.

(2) Whenever a review entity forwards a rejected EAJR request to OMHA or the Council, the appeal is considered timely filed, and if an adjudication time frame applies to the appeal, the adjudication time frame begins on the day the request is received by OMHA or the Council from the review entity.

(j) *Interest on any amounts in controversy.* (1) If a provider or supplier is granted judicial review in accordance with this section, the amount in controversy, if any, is subject to annual interest beginning on the first day of the first month beginning after the 60 calendar day period as determined in accordance with paragraphs (f)(4) or (h)(2) of this section, as applicable.

(2) The interest is awarded by the reviewing court and payable to a prevailing party.

(3) The rate of interest is equal to the rate of interest applicable to obligations issued for purchase by the Federal Supplementary Medical Insurance Trust Fund for the month in which the

civil action authorized under this subpart is commenced.

(4) No interest awarded in accordance with this paragraph shall be income or cost for purposes of determining reimbursement due to providers or suppliers under Medicare.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37703, June 30, 2005; 74 FR 65334, Dec. 9, 2009; 82 FR 5108, Jan. 17, 2017]

ALJ HEARINGS

§ 405.1000 Hearing before an ALJ and decision by an ALJ or attorney adjudicator: General rule.

(a) If a party is dissatisfied with a QIC's reconsideration, or if the adjudication period specified in § 405.970 for the QIC to complete its reconsideration has elapsed, the party may request a hearing before an ALJ.

(b) A hearing before an ALJ may be conducted in-person, by video-teleconference (VTC), or by telephone. At the hearing, the parties may submit evidence (subject to the restrictions in § 405.1018 and § 405.1028), examine the evidence used in making the determination under review, and present and/or question witnesses.

(c) In some circumstances, CMS or its contractor may participate in the proceedings under § 405.1010, or join the hearing before an ALJ as a party under § 405.1012.

(d) The ALJ or attorney adjudicator conducts a de novo review and issues a decision based on the administrative record, including, for an ALJ, any hearing record.

(e) If all parties who are due a notice of hearing in accordance with § 405.1020(c) waive their right to appear at the hearing in person or by telephone or video-teleconference, the ALJ or an attorney adjudicator may make a decision based on the evidence that is in the file and any new evidence that is submitted for consideration.

(f) The ALJ may require the parties to participate in a hearing if it is necessary to decide the case. If the ALJ determines that it is necessary to obtain testimony from a non-party, he or she may hold a hearing to obtain that testimony, even if all of the parties who are entitled to a notice of hearing in accordance with § 405.1020(c) have