

§ 405.1010 When CMS or its contractors may participate in the proceedings on a request for an ALJ hearing.

(a) *When CMS or a contractor can participate.* (1) CMS or its contractors may elect to participate in the proceedings on a request for an ALJ hearing upon filing a notice of intent to participate in accordance with paragraph (b) of this section.

(2) An ALJ may request, but may not require, CMS and/or one or more of its contractors to participate in any proceedings before the ALJ, including the oral hearing, if any. The ALJ cannot draw any adverse inferences if CMS or the contractor decides not to participate in any proceedings before the ALJ, including the hearing.

(b) *How an election is made—* (1) *No notice of hearing.* If CMS or a contractor elects to participate before receipt of a notice of hearing, or when a notice of hearing is not required, it must send written notice of its intent to participate to—

(i) The assigned ALJ or attorney adjudicator, or a designee of the Chief ALJ if the request for hearing is not yet assigned to an ALJ or attorney adjudicator; and

(ii) The parties who were sent a copy of the notice of reconsideration or, for escalated requests for reconsideration, any party that filed a request for reconsideration or was found liable for the services at issue subsequent to the initial determination.

(2) *Notice of hearing.* If CMS or a contractor elects to participate after receipt of a notice of hearing, it must send written notice of its intent to participate to the ALJ and the parties who were sent a copy of the notice of hearing.

(3) *Timing of election.* CMS or a contractor must send its notice of intent to participate—

(i) If no hearing is scheduled, no later than 30 calendar days after notification that a request for hearing was filed; or

(ii) If a hearing is scheduled, no later than 10 calendar days after receipt of the notice of hearing by the QIC or another contractor designated by CMS to receive the notice of hearing.

(c) *Roles and responsibilities of CMS or a contractor as a participant.* (1) Subject

to paragraphs (d)(1) through (3) of this section, participation may include filing position papers and/or providing testimony to clarify factual or policy issues in a case, but it does not include calling witnesses or cross-examining the witnesses of a party to the hearing.

(2) When CMS or its contractor participates in an ALJ hearing, CMS or its contractor may not be called as a witness during the hearing and is not subject to examination or cross-examination by the parties, except as provided in paragraph (d)(3) of this section. However, the parties may provide testimony to rebut factual or policy statements made by a participant and the ALJ may question the participant about its testimony.

(3) CMS or contractor position papers and written testimony are subject to the following:

(i) Unless the ALJ or attorney adjudicator grants additional time to submit the position paper or written testimony, a position paper or written testimony must be submitted within 14 calendar days of an election to participate if no hearing has been scheduled, or no later than 5 calendar days prior to the hearing if a hearing is scheduled.

(ii) A copy of any position paper or written testimony it submits to OMHA must be sent within the same time frame specified in paragraph (c)(3)(i) of this section to—

(A) The parties that are required to be sent a copy of the notice of intent to participate in accordance with paragraph (b)(1) of this section, if the position paper or written testimony is being submitted before receipt of a notice of hearing for the appeal; or

(B) The parties who were sent a copy of the notice of hearing, if the position paper or written testimony is being submitted after receipt of a notice of hearing for the appeal.

(iii) If CMS or a contractor fails to send a copy of its position paper or written testimony to the parties or fails to submit its position paper or written testimony within the time frames described in this paragraph, the position paper or written testimony will not be considered in deciding the appeal.

(d) *Limitation on participating in a hearing.* (1) If CMS or a contractor has

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been made a party to a hearing in accordance with § 405.1012, no entity that elected to be a participant in the proceedings in accordance with this section (or that elected to be a party to the hearing but was made a participant in accordance with § 405.1012(d)(1)) may participate in the oral hearing, but such entity may file a position paper and/or written testimony to clarify factual or policy issues in the case.

(2) If CMS or a contractor did not elect to be a party to a hearing in accordance with § 405.1012 and more than one entity elected to be a participant in the proceedings in accordance with this section, only the first entity to file a response to the notice of hearing as provided under § 405.1020(c) may participate in the oral hearing. Entities that filed a subsequent response to the notice of hearing may not participate in the oral hearing, but may file a position paper and/or written testimony to clarify factual or policy issues in the case.

(3) If CMS or a contractor is precluded from participating in the oral hearing under paragraph (d)(1) or (2) of this section, the ALJ may grant leave to the precluded entity to participate in the oral hearing if the ALJ determines that the entity's participation is necessary for a full examination of the matters at issue. If the ALJ does not grant leave to the precluded entity to participate in the oral hearing, the precluded entity may still be called as a witness by CMS or a contractor that is a party to the hearing in accordance with § 405.1012.

(e) *Invalid election.* (1) An ALJ or attorney adjudicator may determine that a CMS or contractor election is invalid under this section if the election was not timely filed or the election was not sent to the correct parties.

(2) If an election is determined to be invalid, a written notice must be sent to the entity that submitted the election and the parties who are entitled to receive notice of the election in accordance with this section.

(i) If no hearing is scheduled or the election was submitted after the hearing occurred, the written notice of invalid election must be sent no later than the date the notice of decision, dismissal, or remand is mailed.

(ii) If a hearing is scheduled, the written notice of invalid election must be sent prior to the hearing. If the notice would be sent fewer than 5 calendar days before the hearing is scheduled to occur, oral notice must be provided to the entity that submitted the election, and the written notice must be sent as soon as possible after the oral notice is provided.

[82 FR 5110, Jan. 17, 2017, as amended at 84 FR 19870, May 7, 2019]

§ 405.1012 When CMS or its contractors may be a party to a hearing.

(a) *When CMS or a contractor can elect to be a party to a hearing.* (1) Unless the request for hearing is filed by an unrepresented beneficiary, and unless otherwise provided in this section, CMS or one of its contractors may elect to be a party to the hearing upon filing a notice of intent to be a party to the hearing in accordance with paragraph (b) of this section no later than 10 calendar days after receipt of the notice of hearing by the QIC or another contractor designated by CMS to receive the notice of hearing.

(2) Unless the request for hearing is filed by an unrepresented beneficiary, an ALJ may request, but may not require, CMS and/or one or more of its contractors to be a party to the hearing. The ALJ cannot draw any adverse inferences if CMS or the contractor decides not to be a party to the hearing.

(b) *How an election is made.* If CMS or a contractor elects to be a party to the hearing, it must send written notice to the ALJ and the parties who were sent a copy of the notice of hearing of its intent to be a party to the hearing.

(c) *Roles and responsibilities of CMS or a contractor as a party.* (1) As a party, CMS or a contractor may file position papers, submit evidence, provide testimony to clarify factual or policy issues, call witnesses or cross-examine the witnesses of other parties.

(2) CMS or contractor position papers, written testimony, and evidentiary submissions are subject to the following:

(i) Any position paper, written testimony, and/or evidence must be submitted no later than 5 calendar days prior to the hearing unless the ALJ grants additional time to submit the