

an opportunity to offer testimony and/or argument. If a party or representative was excused from the hearing, the ALJ will provide the party or representative with an opportunity to submit written statements and affidavits in lieu of testimony and/or argument at the hearing, and the party or representative may request a recording of the hearing in accordance with § 405.1042 and respond in writing to any statements made by other parties or participants and/or testimony of the witnesses at the hearing. The written statements and affidavits must be submitted within the time frame designated by the ALJ.

(c) *Missing evidence.* The ALJ may also stop the hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing. If the missing evidence is in the possession of the appellant, and the appellant is a provider, supplier, or a beneficiary represented by a provider or supplier, the ALJ must determine if the appellant had good cause in accordance with § 405.1028 for not producing the evidence earlier.

(d) *Effect of new evidence on adjudication period.* If an appellant, other than an unrepresented beneficiary, submits evidence pursuant to paragraph (b) or (c) of this section, and an adjudication period applies to the appeal, the adjudication period specified in § 405.1016 is extended in accordance with § 405.1018(b).

(e) *Continued hearing.* (1) A hearing may be continued to a later date. Notice of the continued hearing must be sent in accordance with § 405.1022, except that a waiver of notice of the hearing may be made in writing or on the record, and the notice is sent to the parties and participants who attended the hearing, and any additional parties or potential parties or participants the ALJ determines are appropriate.

(2) If the appellant requests the continuance and an adjudication period applies to the appeal in accordance with § 405.1016, the adjudication period is extended by the period between the initial hearing date and the continued hearing date.

(f) *Supplemental hearing.* (1) The ALJ may conduct a supplemental hearing at any time before he or she mails a no-

tice of the decision in order to receive new and material evidence, obtain additional testimony, or address a procedural matter. The ALJ determines whether a supplemental hearing is necessary and if one is held, the scope of the hearing, including when evidence is presented and what issues are discussed. Notice of the supplemental hearing must be sent in accordance with § 405.1022, except that the notice is sent to the parties and participants who attended the hearing, and any additional parties or potential parties or participants the ALJ determines are appropriate.

(2) If the appellant requests the supplemental hearing and an adjudication period applies to the appeal in accordance with § 405.1016, the adjudication period is extended by the period between the initial hearing date and the supplemental hearing date.

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**§ 405.1032 Issues before an ALJ or attorney adjudicator.**

(a) *General rule.* The issues before the ALJ or attorney adjudicator include all the issues for the claims or appealed matter specified in the request for hearing that were brought out in the initial determination, redetermination, or reconsideration that were not decided entirely in a party's favor. (For purposes of this provision, the term "party" does not include a representative of CMS or one of its contractors that may be participating in the hearing.)

(b) *New issues—*(1) *When a new issue may be considered.* A new issue may include issues resulting from the participation of CMS or its contractor at the OMHA level of adjudication and from any evidence and position papers submitted by CMS or its contractor for the first time to the ALJ. The ALJ or any party may raise a new issue relating to a claim or appealed matter specified in the request for hearing; however, the ALJ may only consider a new issue, including a favorable portion of a determination on a claim or appealed matter specified in the request for hearing, if its resolution could have a material impact on the claim or appealed matter and—

(i) There is new and material evidence that was not available or known at the time of the determination and that may result in a different conclusion; or

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

(2) *Notice of the new issue.* The ALJ may consider a new issue at the hearing if he or she notifies the parties that were or will be sent the notice of hearing about the new issue before the start of the hearing.

(3) *Opportunity to submit evidence.* If notice of the new issue is sent after the notice of hearing, the parties will have at least 10 calendar days after receiving notice of the new issue to submit evidence regarding the issue, and without affecting any applicable adjudication period. If a hearing is conducted before the time to submit evidence regarding the issue expires, the record will remain open until the opportunity to submit evidence expires.

(c) *Adding claims to a pending appeal.* (1) Claims that were not specified in a request for hearing may only be added to a pending appeal if the claims were adjudicated in the same reconsideration that is appealed, and the period to request an ALJ hearing for that reconsideration has not expired, or an ALJ or attorney adjudicator extends the time to request an ALJ hearing on those claims in accordance with § 405.1014(e).

(2) Before a claim may be added to a pending appeal, the appellant must submit evidence that demonstrates the information that constitutes a complete request for hearing in accordance with § 405.1014(b) and other materials related to the claim that the appellant seeks to add to the pending appeal were sent to the other parties to the claim in accordance with § 405.1014(d).

(d) *Appeals involving statistical sampling and extrapolations—(1) Generally.* If the appellant does not assert the reasons the appellant disagrees with how a statistical sample and/or extrapolation was conducted in the request for hearing, in accordance with § 405.1014(a)(3)(iii), issues related to how the statistical sample and extrapolation

were conducted shall not be considered or decided.

(2) *Consideration of sample claims.* If a party asserts a disagreement with how a statistical sample and/or extrapolation was conducted in the request for hearing, in accordance with § 405.1014(a)(3)(iii), paragraphs (a) through (c) of this section apply to the adjudication of the sample claims but, in deciding issues related to how a statistical sample and/or extrapolation was conducted the ALJ or attorney adjudicator must base his or her decision on a review of the entire sample to the extent appropriate to decide the issue.

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#### § 405.1034 Requesting information from the QIC.

(a) If an ALJ or attorney adjudicator believes that the written record is missing information that is essential to resolving the issues on appeal and that information can be provided only by CMS or its contractors, the information may be requested from the QIC that conducted the reconsideration or its successor.

(1) Official copies of redeterminations and reconsiderations that were conducted on the appealed claims, and official copies of dismissals of a request for redetermination or reconsideration, can be provided only by CMS or its contractors. Prior to issuing a request for information to the QIC, OMHA will confirm whether an electronic copy of the redetermination, reconsideration, or dismissal is available in the official system of record, and if so will accept the electronic copy as an official copy.

(2) “Can be provided only by CMS or its contractors” means the information is not publicly available, is not in the possession of, and cannot be requested and obtained by one of the parties. Information that is publicly available is information that is available to the general public via the Internet or in a printed publication. Information that is publicly available includes, but is not limited to, information available on a CMS or contractor Web site or information in an official CMS or DHHS publication (including, but not limited to, provisions of NCDs or LCDs, procedure code or modifier descriptions, fee