

(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.

[82 FR 5116, Jan. 17, 2017]

#### § 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

schedule data, and contractor operating manual instructions).

(b) The ALJ or attorney adjudicator retains jurisdiction of the case, and the case remains pending at OMHA.

(c) The QIC has 15 calendar days after receiving the request for information to furnish the information or otherwise respond to the information request directly or through CMS or another contractor.

(d) If an adjudication period applies to the appeal in accordance with § 405.1016, the adjudication period is extended by the period between the date of the request for information and the date the QIC responds to the request or 20 calendar days after the date of the request, whichever occurs first.

[82 FR 5117, Jan. 17, 2017, as amended at 84 FR 19870, May 7, 2019]

**§ 405.1036 Description of an ALJ hearing process.**

(a) *The right to appear and present evidence.* (1) Any party to a hearing has the right to appear before the ALJ to present evidence and to state his or her position. A party may appear by videoconferencing (VTC), telephone, or in person as determined under § 405.1020.

(2) A party may also make his or her appearance by means of a representative, who may make the appearance by VTC, telephone, or in person, as determined under § 405.1020.

(3) Witness testimony may be given and CMS participation may also be accomplished by VTC, telephone, or in person, as determined under § 405.1020.

(b) *Waiver of the right to appear.* (1) A party may submit to OMHA a written statement indicating that he or she does not wish to appear at the hearing.

(2) The appellant may subsequently withdraw his or her waiver at any time before the notice of the hearing decision is issued; however, by withdrawing the waiver the appellant agrees to an extension of the adjudication period as specified in § 405.1016 that may be necessary to schedule and hold the hearing.

(3) Other parties may withdraw their waiver up to the date of the scheduled hearing, if any. Even if all of the parties waive their right to appear at a hearing, the ALJ may require them to

attend an oral hearing if he or she believes that a personal appearance and testimony by the appellant or any other party is necessary to decide the case.

(c) *Presenting written statements and oral arguments.* A party or a person designated to act as a party's representative may appear before the ALJ to state the party's case, to present a written summary of the case, or to enter written statements about the facts and law material to the case in the record. A copy of any written statements must be provided to the other parties to a hearing, if any, at the same time they are submitted to the ALJ.

(d) *Witnesses at a hearing.* Witnesses may appear at a hearing. They testify under oath or affirmation, unless the ALJ finds an important reason to excuse them from taking an oath or affirmation. The ALJ may ask the witnesses any questions relevant to the issues and allows the parties or their designated representatives to do so.

(e) *What evidence is admissible at a hearing.* The ALJ may receive evidence at the hearing even though the evidence is not admissible in court under the rules of evidence used by the court.

(f) *Subpoenas.* (1) Except as provided in this section, when it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. An ALJ may not issue a subpoena to CMS or its contractors, on his or her own initiative or at the request of a party, to compel an appearance, testimony, or the production of evidence.

(2) A party's written request for a subpoena must—

(i) Give the names of the witnesses or documents to be produced;

(ii) Describe the address or location of the witnesses or documents with sufficient detail to find them;

(iii) State the important facts that the witness or document is expected to prove; and