

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

(iv) Indicate why these facts cannot be proven without issuing a subpoena.

(3) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the requirements set forth in paragraph (f)(2) of this section with the ALJ no later than the end of the discovery period established by the ALJ under § 405.1037(c).

(4) Where a party has requested a subpoena, a subpoena will be issued only where a party—

- (i) Has sought discovery;
- (ii) Has filed a motion to compel;
- (iii) Has had that motion granted by the ALJ; and
- (iv) Nevertheless, has not received the requested discovery.

(5) Reviewability of subpoena rulings—

(i) *General rule.* An ALJ ruling on a subpoena request is not subject to immediate review by the Council. The ruling may be reviewed solely during the course of the Council's review specified in § 405.1016(e) and (f), § 405.1102, or § 405.1110, as applicable. *Exception.* To the extent a subpoena compels disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before an ALJ, the Council may review immediately the subpoena or that portion of the subpoena as applicable.

(ii) Where CMS objects to a subpoena ruling, the Council must take review and the subpoena ruling at issue is automatically stayed pending the Council's order.

(iii) Upon notice to the ALJ that a party or non-party, as applicable, intends to seek Council review of the subpoena, the ALJ must stay all proceedings affected by the subpoena.

(iv) The ALJ determines the length of the stay under the circumstances of a given case, but in no event is the stay less than 15 calendar days beginning after the day on which the ALJ received notice of the party or non-party's intent to seek Council review.

(v) If the Council grants a request for review of the subpoena, the subpoena or portion of the subpoena, as applicable, is stayed until the Council issues a written decision that affirms, reverses,

or modifies the ALJ's action on the subpoena.

(vi) If the Council does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ALJ's action stands.

(6) *Enforcement.* (i) If the ALJ determines, whether on his or her own motion or at the request of a party, that a party or non-party subject to a subpoena issued under this section has refused to comply with the subpoena, the ALJ may request the Secretary to seek enforcement of the subpoena in accordance with section 205(e) of the Act, 42 U.S.C. 405(e).

(ii) Any enforcement request by an ALJ must consist of a written notice to the Secretary describing in detail the ALJ's findings of noncompliance and his or her specific request for enforcement, and providing a copy of the subpoena and evidence of its receipt by certified mail by the party or nonparty subject to the subpoena.

(iii) The ALJ must promptly mail a copy of the notice and related documents to the party subject to the subpoena, and to any other party and affected non-party to the appeal.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65336, Dec. 9, 2009; 82 FR 5117, Jan. 17, 2017]

§ 405.1037 Discovery.

(a) *General rules.* (1) Discovery is permissible only when CMS or its contractor elects to be a party to an ALJ hearing, in accordance with § 405.1012.

(2) The ALJ may permit discovery of a matter that is relevant to the specific subject matter of the ALJ hearing, provided the matter is not privileged or otherwise protected from disclosure and the ALJ determines that the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate.

(3) Any discovery initiated by a party must comply with all requirements and limitations of this section, along with any further requirements or limitations ordered by the ALJ.

(b) *Limitations on discovery.* Any discovery before the ALJ is limited.

(1) A party may request of another party the reasonable production of documents for inspection and copying.