

(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.

(2) A party may not take the deposition, upon oral or written examination, of another party unless the proposed deponent agrees to the deposition or the ALJ finds that the proposed deposition is necessary and appropriate in order to secure the deponent's testimony for an ALJ hearing.

(3) A party may not request admissions or send interrogatories or take any other form of discovery not permitted under this section.

(c) *Time limits.* (1) A party's discovery request is timely if the date of receipt of a request by another party is no later than the date specified by the ALJ.

(2) A party may not conduct discovery any later than the date specified by the ALJ.

(3) Before ruling on a request to extend the time for requesting discovery or for conducting discovery, the ALJ must give the other parties to the appeal a reasonable period to respond to the extension request.

(4) The ALJ may extend the time in which to request discovery or conduct discovery only if the requesting party establishes that it was not dilatory or otherwise at fault in not meeting the original discovery deadline.

(5) If the ALJ grants the extension request, it must impose a new discovery deadline and, if necessary, reschedule the hearing date so that all discoveries end no later than 45 calendar days before the hearing.

(d) *Motions to compel or for protective order.* (1) Each party is required to make a good faith effort to resolve or narrow any discovery dispute.

(2) A party may submit to the ALJ a motion to compel discovery that is permitted under this section or any ALJ order, and a party may submit a motion for a protective order regarding any discovery request to the ALJ.

(3) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute. The declaration must also be included with any response to a motion to compel or for protective order.

(4) The ALJ must decide any motion in accordance with this section and any prior discovery ruling in the appeal.

(5) The ALJ must issue and mail to each party a discovery ruling that grants or denies the motion to compel or for protective order in whole or in part; if applicable, the discovery ruling must specifically identify any part of the disputed discovery request upheld and any part rejected, and impose any limits on discovery the ALJ finds necessary and appropriate.

(e) *Reviewability of discovery and disclosure rulings*—(1) *General rule.* An ALJ discovery ruling, or an ALJ disclosure ruling such as one issued at a hearing 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), § 405.1100, § 405.1102, or § 405.1110, as applicable.

(2) *Exception.* To the extent a ruling authorizes discovery or 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 the ALJ, the Council may review that portion of the discovery or disclosure ruling immediately.

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

(ii) Upon notice to the ALJ that a party intends to seek Council review of the ruling, the ALJ must stay all proceedings affected by the ruling.

(iii) The ALJ determines the length of the stay under the circumstances of a given case, but in no event must the length of the stay be 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.

(iv) Where CMS requests the Council to take review of a discovery ruling or where the Council grants a request, made by a party other than CMS, to review a discovery ruling, the ruling is stayed until the time the Council issues a written decision that affirms, reverses, modifies, or remands the ALJ's ruling.

(v) With respect to a request from a party, other than CMS, for review of a discovery ruling, 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 ruling stands.

(f) *Adjudication period.* If an adjudication period applies to the appeal in accordance with § 405.1016, and a party requests discovery from another party to the hearing, the adjudication period is extended for the duration of discovery, from the date a discovery request is granted until the date specified for ending discovery.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37704, June 30, 2005; 74 FR 65336, Dec. 9, 2009; 82 FR 5117, Jan. 17, 2017]

§ 405.1038 Deciding a case without a hearing before an ALJ.

(a) *Decision fully favorable.* If the evidence in the administrative record supports a finding fully in favor of the appellant(s) on every issue and no other party to the appeal is liable for claims at issue, an ALJ or attorney adjudicator may issue a decision without giving the parties prior notice and without an ALJ conducting a hearing, unless CMS or a contractor has elected to be a party to the hearing in accordance with § 405.1012. The notice of the decision informs the parties that they have the right to a hearing and a right to examine the evidence on which the decision is based.

(b) *Parties do not wish to appear.* (1) An ALJ or attorney adjudicator may decide a case on the record and without an ALJ conducting a hearing if—

(i) All the parties who would be sent a notice of hearing in accordance with § 405.1020(c) indicate in writing that they do not wish to appear before an ALJ at a hearing, including a hearing conducted by telephone or video-teleconferencing, if available; or

(ii) The appellant lives outside the United States and does not inform OMHA that he or she wants to appear at a hearing before an ALJ, and there are no other parties who would be sent a notice of hearing in accordance with § 405.1020(c) and who wish to appear.

(2) When a hearing is not held, the decision of the ALJ or attorney adjudicator must refer to the evidence in the record on which the decision was based.

(c) *Stipulated decision.* If CMS or one of its contractors submits a written statement or makes an oral statement

at a hearing indicating the item or service should be covered or payment may be made, and the written or oral statement agrees to the amount of payment the parties believe should be made if the amount of payment is an issue before the ALJ or attorney adjudicator, an ALJ or attorney adjudicator may issue a stipulated decision finding in favor of the appellant or other liable parties on the basis of the statement, and without making findings of fact, conclusions of law, or further explaining the reasons for the decision.

[82 FR 5117, Jan. 17, 2017]

§ 405.1040 Prehearing and posthearing conferences.

(a) The ALJ may decide on his or her own, or at the request of any party to the hearing, to hold a prehearing or posthearing conference to facilitate the hearing or the hearing decision.

(b) The ALJ informs the parties who will be or were sent a notice of hearing in accordance with § 405.1020(c), and CMS or a contractor that has elected to be a participant in the proceedings or party to the hearing at the time the notice of conference is sent, of the time, place, and purpose of the conference at least 7 calendar days before the conference date, unless a party indicates in writing that it does not wish to receive a written notice of the conference.

(c) At the conference—

(1) The ALJ or an OMHA attorney designated by the ALJ conducts the conference, but only the ALJ conducting a conference may consider matters in addition to those stated in the conference notice if the parties consent to consideration of the additional matters in writing.

(2) An audio recording of the conference is made.

(d) The ALJ issues an order to all parties and participants who attended the conference stating all agreements and actions resulting from the conference. If a party does not object within 10 calendar days of receiving the order, or any additional time granted