

exceptions to the referral by submitting written comments to the Council within 20 calendar days of the referral notice. A party submitting comments to the Council must send such comments to CMS and all other parties to the ALJ's or attorney adjudicator's action who received a copy of the decision under §405.1046(a) or the notice of dismissal under §405.1052(d).

(c) *Standard of review*—(1) *Referral by CMS after participation at the OMHA level.* If CMS or its contractor participated in an appeal at the OMHA level, the Council exercises its own motion authority if there is an error of law material to the outcome of the case, an abuse of discretion by the ALJ or attorney adjudicator, the decision is not consistent with the preponderance of the evidence of record, or there is a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review under this standard, the Council will limit its consideration of the ALJ's or attorney adjudicator's action to those exceptions raised by CMS.

(2) *Referral by CMS when CMS did not participate in the OMHA proceedings or appear as a party.* The Council will accept review if the decision or dismissal contains an error of law material to the outcome of the case or presents a broad policy or procedural issue that may affect the general public interest. In deciding whether to accept review, the Council will limit its consideration of the ALJ's or attorney adjudicator's action to those exceptions raised by CMS.

(d) *Council's action.* If the Council decides to review a decision or dismissal on its own motion, it will mail the results of its action to all the parties to the hearing and to CMS if it is not already a party to the hearing. The Council may adopt, modify, or reverse the decision or dismissal, may remand the case to an ALJ or attorney adjudicator for further proceedings or may dismiss a hearing request. The Council must issue its action no later than 90 calendar days after receipt of the CMS referral, unless the 90 calendar day period has been extended as provided in this subpart. The Council may not, however, issue its action before the 20 calendar day comment period has ex-

pired, unless it determines that the agency's referral does not provide a basis for reviewing the case. If the Council does not act within the applicable adjudication deadline, the ALJ's or attorney adjudicator's decision or dismissal is binding on the parties to the ALJ's or attorney adjudicator's action.

(e) *Referral timeframe.* For purposes of this section, the date of receipt of the ALJ's or attorney adjudicator's decision or dismissal is presumed to be 5 calendar days after the date of the notice of the decision or dismissal, unless there is evidence to the contrary.

[82 FR 5122, Jan. 17, 2017, as amended at 84 FR 19871, May 7, 2019]

#### **§405.1112 Content of request for review.**

(a) The request for Council review must be filed with the entity specified in the notice of the ALJ's or attorney adjudicator's action. The request for review must be in writing and may be made on a standard form. A written request that is not made on a standard form is accepted if it contains the beneficiary's name; Medicare number; the specific service(s) or item(s) for which the review is requested; the specific date(s) of service; the date of the ALJ's or attorney adjudicator's decision or dismissal order, if any; and the name of the party or the representative of the party; and any other information CMS may decide.

(b) The request for review must identify the parts of the ALJ's or attorney adjudicator's action with which the party requesting review disagrees and explain why he or she disagrees with the ALJ's or attorney adjudicator's decision, dismissal, or other determination being appealed. For example, if the party requesting review believes that the ALJ's or attorney adjudicator's action is inconsistent with a statute, regulation, CMS Ruling, or other authority, the request for review should explain why the appellant believes the action is inconsistent with that authority.

(c) The Council will limit its review of an ALJ's or attorney adjudicator's actions to those exceptions raised by the party in the request for review, unless the appellant is an unrepresented

#### § 405.1114

beneficiary. For purposes of this section only, we define a representative as anyone who has accepted an appointment as the beneficiary's representative, except a member of the beneficiary's family, a legal guardian, or an individual who routinely acts on behalf of the beneficiary, such as a family member or friend who has a power of attorney.

[82 FR 5123, Jan. 17, 2017, as amended at 84 FR 19871, May 7, 2019]

#### § 405.1114 Dismissal of request for review.

The Council dismisses a request for review if the party requesting review did not file the request within the stated period of time and the time for filing has not been extended. The Council also dismisses the request for review if—

(a) The party asks to withdraw the request for review;

(b) The party does not have a right to request Council review; or

(c) The beneficiary whose claim is being appealed died while the request for review is pending and all of the following criteria apply:

(1) The request for review was filed by the beneficiary or the beneficiary's representative, and the beneficiary's surviving spouse or estate has no remaining financial interest in the case. In deciding this issue, the Council considers whether the surviving spouse or estate remains liable for the services that were denied or a Medicare contractor held the beneficiary liable for subsequent similar services under the limitation on liability provisions based on the denial of the services at issue;

(2) No other individual or entity with a financial interest in the case wishes to pursue an appeal under § 405.1102;

(3) No other party to the ALJ's or attorney adjudicator's action filed a valid and timely review request under §§ 405.1102 and 405.1112.

[70 FR 11472, Mar. 8, 2005, as amended at 82 FR 5123, Jan. 17, 2017; 84 FR 19871, May 7, 2019]

#### § 405.1116 Effect of dismissal of request for Council review or request for hearing.

The dismissal of a request for Council review or denial of a request for review

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of a dismissal issued by an ALJ or attorney adjudicator is binding and not subject to further review unless reopened and vacated by the Council. The Council's dismissal of a request for hearing is also binding and not subject to judicial review.

[70 FR 11472, Mar. 8, 2005, as amended at 82 FR 5123, Jan. 17, 2017]

#### § 405.1118 Obtaining evidence from the Council.

A party may request and receive a copy of all or part of the record of the ALJ's or attorney adjudicator's action, including any index of the administrative record, documentary evidence, and a copy of the audio recording of the oral proceedings. However, the party may be asked to pay the costs of providing these items. If a party requests evidence from the Council and an opportunity to comment on that evidence, the time beginning with the Council's receipt of the request for evidence through the expiration of the time granted for the party's response will not be counted toward the 90 calendar day adjudication deadline.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65337, Dec. 9, 2009; 82 FR 5123, Jan. 17, 2017]

#### § 405.1120 Filing briefs with the Council.

Upon request, the Council will give the party requesting review, as well as all other parties, a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. Any party who submits a brief or statement must send a copy to all of the other parties. Unless the party requesting review files the brief or other statement with the request for review, the time beginning with the date of receipt of the request to submit the brief and ending with the date the brief is received by the Council will not be counted toward the adjudication timeframe set forth in § 405.1100. The Council may also request, but not require, CMS or its contractor to file a brief or position paper if the Council determines that it is necessary to resolve the issues in the case. The Council will not draw any adverse inference if CMS or a contractor either