

(3) A party to the Council review on escalation that wishes to subpoena documents must file a written request that complies with the requirements set out in paragraph (d)(2) of this section within 10 calendar days of the request for escalation.

(4) A subpoena will issue only where a party—

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

(e) Reviewability of subpoena rulings—

(1) *General rule.* A Council ruling on a subpoena request is not subject to immediate review by the Secretary.

(2) *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 the Council, the Secretary may review immediately that subpoena or portion of the subpoena.

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

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

(5) If the Secretary grants a request for review, the subpoena or portion of the subpoena, as applicable, is stayed until the Secretary issues a written decision that affirms, reverses, modifies, or remands the Council's action for the subpoena.

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

(f) *Enforcement.* (1) If the Council determines, whether on its 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

Council 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).

(2) Any enforcement request by the Council must consist of a written notice to the Secretary describing in detail the Council's findings of non-compliance and its 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.

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

(4) If the Secretary does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the subpoena stands.

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

**§ 405.1124 Oral argument.**

A party may request to appear before the Council to present oral argument.

(a) The Council grants a request for oral argument if it decides that the case raises an important question of law, policy, or fact that cannot be readily decided based on written submissions alone.

(b) The Council may decide on its own that oral argument is necessary to decide the issues in the case. If the Council decides to hear oral argument, it tells the parties of the time and place of the oral argument at least 10 calendar days before the scheduled date.

(c) In case of a previously unrepresented beneficiary, a newly hired representative may request an extension of time for preparation of the oral argument and the Council must consider whether the extension is reasonable.

(d) The Council may also request, but not require, CMS or its contractor to appear before it if the Council determines that it may be helpful in resolving the issues in the case.

(e) The Council will not draw any inference if CMS or a contractor decides

not to participate in the oral argument.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65338, Dec. 9, 2009; 82 FR 5124, Jan. 17, 2017]

#### **§ 405.1126 Case remanded by the Council.**

(a) *When the Council may remand a case.* Except as specified in § 405.1122(c), the Council may remand a case in which additional evidence is needed or additional action by the ALJ or attorney adjudicator is required. The Council will designate in its remand order whether the ALJ or attorney adjudicator will issue a decision or a recommended decision on remand.

(b) *Action by ALJ on remand.* The ALJ or attorney adjudicator will take any action that is ordered by the Council and may take any additional action that is not inconsistent with the Council's remand order.

(c) *Notice when case is returned with a recommended decision.* When the ALJ or attorney adjudicator sends a case to the Council with a recommended decision, a notice is mailed to the parties at their last known address. The notice tells them that the case was sent to the Council, explains the rules for filing briefs or other written statements with the Council, and includes a copy of the recommended decision.

(d) *Filing briefs with the Council when ALJ or attorney adjudicator issues recommended decision.* (1) Any party to the recommended decision may file with the Council briefs or other written statements about the facts and law relevant to the case within 20 calendar days of the date on the recommended decision. Any party may ask the Council for additional time to file briefs or statements. The Council will extend this period, as appropriate, if the party shows that it has good cause for requesting the extension.

(2) All other rules for filing briefs with and obtaining evidence from the Council follow the procedures explained in this subpart.

(e) *Procedures before the Council.* (1) The Council, after receiving a recommended decision, will conduct proceedings and issue its decision or dismissal according to the procedures explained in this subpart.

(2) If the Council determines that more evidence is required, it may again remand the case to an ALJ or attorney adjudicator for further inquiry into the issues, rehearing if applicable, receipt of evidence, and another decision or recommended decision. However, if the Council decides that it can get the additional evidence more quickly, it will take appropriate action.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65338, Dec. 9, 2009; 82 FR 5124, Jan. 17, 2017]

#### **§ 405.1128 Action of the Council.**

(a) After it has reviewed all the evidence in the administrative record and any additional evidence received, subject to the limitations on Council consideration of additional evidence in § 405.1122, the Council will make a decision or remand the case to an ALJ or attorney adjudicator.

(b) The Council may adopt, modify, or reverse the ALJ's or attorney adjudicator's decision or recommended decision.

(c) The Council mails a copy of its decision to all the parties at their last known addresses. For overpayment cases involving multiple beneficiaries where there is no beneficiary liability the Council may choose to send written notice only to the appellant. In the event the decision will result in a payment to a provider or supplier, the Medicare contractor must issue any electronic or paper remittance advice notice to that provider or supplier.

[70 FR 11472, Mar. 8, 2005, as amended at 82 FR 5124, Jan. 17, 2017]

#### **§ 405.1130 Effect of the Council's decision.**

The Council's decision is final and binding on all parties unless a Federal district court issues a decision modifying the Council's decision or the decision is revised as the result of a reopening in accordance with § 405.980. A party may file an action in a Federal district court within 60 calendar days after the date it receives notice of the Council's decision.

[74 FR 65338, Dec. 9, 2009, as amended at 82 FR 5124, Jan. 17, 2017]