

## § 405.1008

(1) Specify all of the claims the appellant(s) seeks to aggregate; and

(2) State why the appellant(s) believes that the claims involve common issues of law and fact or delivery of similar or related services.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65335, Dec. 9, 2009; 82 FR 5109, Jan. 17, 2017; 84 FR 19870, May 7, 2019]

### § 405.1008 Parties to the proceedings on a request for an ALJ hearing.

The party who filed the request for hearing and all other parties to the reconsideration are parties to the proceedings on a request for an ALJ hearing. In addition, a representative of CMS or its contractor may be a party under the circumstances described in § 405.1012.

[82 FR 5110, Jan. 17, 2017]

### § 405.1010 When CMS or its contractors may participate in the proceedings on a request for an ALJ hearing.

(a) *When CMS or a contractor can participate.* (1) CMS or its contractors may elect to participate in the proceedings on a request for an ALJ hearing upon filing a notice of intent to participate in accordance with paragraph (b) of this section.

(2) An ALJ may request, but may not require, CMS and/or one or more of its contractors to participate in any proceedings before the ALJ, including the oral hearing, if any. The ALJ cannot draw any adverse inferences if CMS or the contractor decides not to participate in any proceedings before the ALJ, including the hearing.

(b) *How an election is made—* (1) *No notice of hearing.* If CMS or a contractor elects to participate before receipt of a notice of hearing, or when a notice of hearing is not required, it must send written notice of its intent to participate to—

(i) The assigned ALJ or attorney adjudicator, or a designee of the Chief ALJ if the request for hearing is not yet assigned to an ALJ or attorney adjudicator; and

(ii) The parties who were sent a copy of the notice of reconsideration or, for escalated requests for reconsideration, any party that filed a request for reconsideration or was found liable for

the services at issue subsequent to the initial determination.

(2) *Notice of hearing.* If CMS or a contractor elects to participate after receipt of a notice of hearing, it must send written notice of its intent to participate to the ALJ and the parties who were sent a copy of the notice of hearing.

(3) *Timing of election.* CMS or a contractor must send its notice of intent to participate—

(i) If no hearing is scheduled, no later than 30 calendar days after notification that a request for hearing was filed; or

(ii) If a hearing is scheduled, no later than 10 calendar days after receipt of the notice of hearing by the QIC or another contractor designated by CMS to receive the notice of hearing.

(c) *Roles and responsibilities of CMS or a contractor as a participant.* (1) Subject to paragraphs (d)(1) through (3) of this section, participation may include filing position papers and/or providing testimony to clarify factual or policy issues in a case, but it does not include calling witnesses or cross-examining the witnesses of a party to the hearing.

(2) When CMS or its contractor participates in an ALJ hearing, CMS or its contractor may not be called as a witness during the hearing and is not subject to examination or cross-examination by the parties, except as provided in paragraph (d)(3) of this section. However, the parties may provide testimony to rebut factual or policy statements made by a participant and the ALJ may question the participant about its testimony.

(3) CMS or contractor position papers and written testimony are subject to the following:

(i) Unless the ALJ or attorney adjudicator grants additional time to submit the position paper or written testimony, a position paper or written testimony must be submitted within 14 calendar days of an election to participate if no hearing has been scheduled, or no later than 5 calendar days prior to the hearing if a hearing is scheduled.

(ii) A copy of any position paper or written testimony it submits to OMHA must be sent within the same time frame specified in paragraph (c)(3)(i) of this section to—

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