

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 with-

out 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 by the ALJ, the agreements and actions become part of the administrative record and are binding on all parties.

[82 FR 5118, Jan. 17, 2017]

§ 405.1042 The administrative record.

(a) *Creating the record.* (1) OMHA makes a complete record of the evidence and administrative proceedings on the appealed matter, including any prehearing and posthearing conferences, and hearing proceedings that were conducted.

(2) The record will include marked as exhibits, the appealed determinations, and documents and other evidence used in making the appealed determinations and the ALJ's or attorney adjudicator's decision, including, but not limited to, claims, medical records, written statements, certificates, reports, affidavits, and any other evidence the ALJ or attorney adjudicator admits. The record will also include any evidence excluded or not considered by the ALJ or attorney adjudicator, including, but not limited to, new evidence submitted by a provider or supplier, or beneficiary represented by a

provider or supplier, for which no good cause was established, and duplicative evidence submitted by a party.

(3) A party may request and review a copy of the record prior to or at the hearing, or, if a hearing is not held, at any time before the notice of decision is issued.

(4) If a request for review is filed or the case is escalated to the Council, the complete record, including any prehearing and posthearing conference and hearing recordings, is forwarded to the Council.

(5) A typed transcription of the hearing is prepared if a party seeks judicial review of the case in a Federal district court within the stated time period and all other jurisdictional criteria are met, unless, upon the Secretary's motion prior to the filing of an answer, the court remands the case.

(b) *Requesting and receiving copies of the record.* (1) While an appeal is pending at OMHA, a party may request and receive a copy of all or part of the record from OMHA, including any index of the administrative record, documentary evidence, and a copy of the audio recording of the oral proceedings. The party may be asked to pay the costs of providing these items.

(2) If a party requests a copy of all or part of the record from OMHA or the ALJ or attorney adjudicator and an opportunity to comment on the record, any adjudication period that applies in accordance with § 405.1016 is extended by the time beginning with the receipt of the request through the expiration of the time granted for the party's response.

(3) If a party requests a copy of all or part of the record and the record, including any audio recordings, contains information pertaining to an individual that the requesting party is not entitled to receive, such as personally identifiable information or protected health information, such portions of the record will not be furnished unless the requesting party obtains consent from the individual.

[82 FR 5118, Jan. 17, 2017]

§ 405.1044 Consolidated proceedings.

(a) *Consolidated hearing.* (1) A consolidated hearing may be held if one or more of the issues to be considered at