

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.

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#### § 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

the hearing are the same issues that are involved in one or more other appeals pending before the same ALJ.

(2) It is within the discretion of the ALJ to grant or deny an appellant's request for consolidation. In considering an appellant's request, the ALJ may consider factors such as whether the claims at issue may be more efficiently decided if the appeals are consolidated for hearing. In considering the appellant's request for consolidation, the ALJ must take into account any adjudication deadlines for each appeal and may require an appellant to waive the adjudication deadline associated with one or more appeals if consolidation otherwise prevents the ALJ from deciding all of the appeals at issue within their respective deadlines.

(3) The ALJ may also propose on his or her own motion to consolidate two or more appeals in one hearing for administrative efficiency, but may not require an appellant to waive the adjudication deadline for any of the consolidated cases.

(4) Notice of a consolidated hearing must be included in the notice of hearing issued in accordance with §§ 405.1020 and 405.1022.

(b) *Consolidated or separate decision and record.* (1) If the ALJ decides to hold a consolidated hearing, he or she may make either—

(i) A consolidated decision and record; or

(ii) A separate decision and record on each appeal.

(2) If a separate decision and record on each appeal is made, the ALJ is responsible for making sure that any evidence that is common to all appeals and material to the common issue to be decided, and audio recordings of any conferences that were conducted and the consolidated hearing are included in each individual administrative record, as applicable.

(3) If a hearing will not be conducted for multiple appeals that are before the same ALJ or attorney adjudicator, and the appeals involve one or more of the same issues, the ALJ or attorney adjudicator may make a consolidated decision and record at the request of the appellant or on the ALJ's or attorney adjudicator's own motion.

(c) *Limitation on consolidated proceedings.* Consolidated proceedings may only be conducted for appeals filed by the same appellant, unless multiple appellants aggregated claims to meet the amount in controversy requirement in accordance with § 405.1006 and the beneficiaries whose claims are at issue have all authorized disclosure of their protected information to the other parties and any participants.

[82 FR 5118, Jan. 17, 2017]

**§ 405.1046 Notice of an ALJ or attorney adjudicator decision.**

(a) *Decisions on requests for hearing—*

(1) *General rule.* Unless the ALJ or attorney adjudicator dismisses or remands the request for hearing, the ALJ or attorney adjudicator will issue a written decision that gives the findings of fact, conclusions of law, and the reasons for the decision. The decision must be based on evidence offered at the hearing or otherwise admitted into the record, and shall include independent findings and conclusions. OMHA mails or otherwise transmits a copy of the decision to all the parties at their last known address and the QIC that issued the reconsideration or from which the appeal was escalated. For overpayment cases involving multiple beneficiaries, where there is no beneficiary liability, the ALJ or attorney adjudicator may choose to send written notice only to the appellant. In the event a payment will be made to a provider or supplier in conjunction with the ALJ's or attorney adjudicator's decision, the contractor must also issue a revised electronic or paper remittance advice to that provider or supplier.

(2) *Content of the notice.* The decision must be written in a manner calculated to be understood by a beneficiary and must include—

(i) The specific reasons for the determination, including, to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination;

(ii) For any new evidence that was submitted for the first time at the OMHA level and subject to a good cause determination pursuant to