

attorney adjudicator decision or dismissal who received notice of the decision or dismissal. Failure to copy the other parties tolls the Council's adjudication deadline set forth in § 405.1100 until all parties to the ALJ or attorney adjudicator decision or dismissal receive notice of the request for Council review. If the request for review is timely filed with an entity other than the entity specified in the notice of the ALJ's or attorney adjudicator's action, the Council's adjudication period to conduct a review begins on the date the request for review is received by the entity specified in the notice of the ALJ's or attorney adjudicator's action. Upon receipt of a request for review from an entity other than the entity specified in the notice of the ALJ's or attorney adjudicator's action, the Council sends written notice to the appellant of the date of receipt of the request and commencement of the adjudication timeframe.

(b) If an appellant files a request to escalate an appeal to the Council level because the ALJ or attorney adjudicator has not completed his or her action on the request for hearing within an applicable adjudication period under § 405.1016, the request for escalation must be filed with OMHA and the appellant must also send a copy of the request for escalation to the other parties who were sent a copy of the QIC reconsideration. Failure to copy the other parties tolls the Council's adjudication deadline set forth in § 405.1100 until all parties who were sent a copy of the QIC reconsideration receive notice of the request for escalation. In a case that has been escalated from OMHA, the Council's 180 calendar day period to issue a final decision, dismissal order, or remand order begins on the date the request for escalation is received by the Council.

[82 FR 5122, Jan. 17, 2017]

§ 405.1108 Council actions when request for review or escalation is filed.

(a) Except as specified in paragraphs (c) and (d) of this section, when a party requests that the Council review an ALJ's or attorney adjudicator's decision, the Council will review the ALJ's or attorney adjudicator's decision *de*

novi. The party requesting review does not have a right to a hearing before the Council. The Council will consider all of the evidence in the administrative record. Upon completion of its review, the Council may adopt, modify, or reverse the ALJ's or attorney adjudicator's decision or remand the case to an ALJ or attorney adjudicator for further proceedings.

(b) When a party requests that the Council review an ALJ's or attorney adjudicator's dismissal of a request for a hearing, the Council may deny review or vacate the dismissal and remand the case to the ALJ or attorney adjudicator for further proceedings.

(c) The Council will dismiss a request for review when the party requesting review does not have a right to a review by the Council, or will dismiss the request for a hearing for any reason that the ALJ or attorney adjudicator could have dismissed the request for hearing.

(d) When an appellant requests escalation of a case from the OMHA level to the Council, the Council may take any of the following actions:

(1) Issue a decision based on the record constructed at the QIC and any additional evidence, including oral testimony, entered in the record by the ALJ or attorney adjudicator before the case was escalated.

(2) Conduct any additional proceedings, including a hearing, that the Council determines are necessary to issue a decision.

(3) Remand the case to OMHA for further proceedings, including a hearing.

(4) Dismiss the request for Council review because the appellant does not have the right to escalate the appeal.

(5) Dismiss the request for a hearing for any reason that the ALJ or attorney adjudicator could have dismissed the request.

[70 FR 11472, Mar. 8, 2005, as amended at 82 FR 5122, Jan. 17, 2017]

§ 405.1110 Council reviews on its own motion.

(a) *General rule.* The Council may decide on its own motion to review a decision or dismissal issued by an ALJ or attorney adjudicator. CMS or any of its contractors may refer a case to the Council for it to consider reviewing

under this authority anytime within 60 calendar days of receipt of an ALJ's or attorney adjudicator's decision or dismissal.

(b) *Referral of cases.* (1) CMS or any of its contractors may refer a case to the Council if, in their view, the decision or dismissal contains an error of law material to the outcome of the claim or presents a broad policy or procedural issue that may affect the public interest. CMS may also request that the Council take own motion review of a case if—

(i) CMS or its contractor participated in the appeal at the OMHA level; and

(ii) In CMS' view, the ALJ's or attorney adjudicator's decision or dismissal is not supported by the preponderance of evidence in the record or the ALJ or attorney adjudicator abused his or her discretion.

(2) CMS' referral to the Council is made in writing and must be filed with the Council no later than 60 calendar days after the ALJ's or attorney adjudicator's decision or dismissal is received. The written referral will state the reasons why CMS believes the Council must review the case on its own motion. CMS will send a copy of its referral to all 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), and to the OMHA Chief ALJ. Parties to the ALJ's or attorney adjudicator's action may file 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 expired, 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.

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