

may be asked to pay the costs of providing these items. If a party requests evidence from the Council and an opportunity to comment on that evidence, the time beginning with the Council's receipt of the request for evidence through the expiration of the time granted for the party's response will not be counted toward the 90 calendar day adjudication deadline.

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

§ 405.1120 Filing briefs with the Council.

Upon request, the Council will give the party requesting review, as well as all other parties, a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. Any party who submits a brief or statement must send a copy to all of the other parties. Unless the party requesting review files the brief or other statement with the request for review, the time beginning with the date of receipt of the request to submit the brief and ending with the date the brief is received by the Council will not be counted toward the adjudication timeframe set forth in § 405.1100. The Council may also request, but not require, CMS or its contractor to file a brief or position paper if the Council determines that it is necessary to resolve the issues in the case. The Council will not draw any adverse inference if CMS or a contractor either participates, or decides not to participate in Council review.

[70 FR 11472, Mar. 8, 2005, as amended at 82 FR 5123, Jan. 17, 2017]

§ 405.1122 What evidence may be submitted to the Council.

(a) *Appeal before the Council on request for review of ALJ's or attorney adjudicator's decision.* (1) If the Council is reviewing an ALJ's or attorney adjudicator's decision, the Council limits its review of the evidence to the evidence contained in the record of the proceedings before the ALJ or attorney adjudicator. However, if the ALJ's or attorney adjudicator's decision decides a new issue that the parties were not afforded an opportunity to address at the OMHA level, the Council considers

any evidence related to that issue that is submitted with the request for review.

(2) If the Council determines that additional evidence is needed to resolve the issues in the case and the administrative record indicates that the previous decision-makers have not attempted to obtain the evidence, the Council may remand the case to an ALJ or attorney adjudicator to obtain the evidence and issue a new decision.

(b) *Appeal before Council as a result of appellant's request for escalation.* (1) If the Council is reviewing a case that is escalated from the OMHA level to the Council, the Council will decide the case 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) If the Council receives additional evidence with the request for escalation that is material to the question to be decided, or determines that additional evidence is needed to resolve the issues in the case, and the record provided to the Council indicates that the previous decision-makers did not attempt to obtain the evidence before escalation, the Council may remand the case to an ALJ or attorney adjudicator to consider or obtain the evidence and issue a new decision.

(c) *Evidence related to issues previously considered by the QIC.* (1) If new evidence related to issues previously considered by the QIC is submitted to the Council by a provider, supplier, or a beneficiary represented by a provider or supplier, the Council must determine if the provider, supplier, or the beneficiary represented by a provider or supplier had good cause for submitting it for the first time at the Council level.

(2) If the Council determines that good cause does not exist, the Council must exclude the evidence from the proceeding, may not consider it in reaching a decision, and may not remand the issue to an ALJ or attorney adjudicator.

(3) The Council must notify all parties if it excludes the evidence. The Council may remand to an ALJ or attorney adjudicator if—

(i) The ALJ or attorney adjudicator did not consider the new evidence submitted by the provider, supplier, or beneficiary represented by a provider or supplier because good cause did not exist; and

(ii) The Council finds that good cause existed under §405.1028 and the ALJ or attorney adjudicator should have reviewed the evidence.

(iii) The new evidence is submitted by a party that is not a provider, supplier, or a beneficiary represented by a provider or supplier.

(d) *Subpoenas.* (1) Except as provided in this section, when it is reasonably necessary for the full presentation of a case, the Council may, on its own initiative or at the request of a party, issue subpoenas requiring a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. The Council may not issue a subpoena to CMS or its contractors, on its own initiative or at the request of a party, to compel the production of evidence.

(2) A party's request for a subpoena must—

(i) Give a sufficient description of the documents to be produced;

(ii) State the important facts that the documents are expected to prove; and

(iii) Indicate why these facts could not be proven without issuing a subpoena.

(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.

§ 405.1124

42 CFR Ch. IV (10–1–24 Edition)

(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