

ILLUSTRATIVE CALCULATION OF STATE PHASED-DOWN MONTHLY CONTRIBUTION FOR 2006—  
Continued

	Item	Illustrative Value	Source
(ii) ....	Aggregate State rebate receipts in calendar year 2003 .....	\$100,000,000 .....	CMS–64
(iii) ....	Gross State Medicaid expenditures for prescription drugs in calendar year 2003. ....	\$500,000,000 .....	CMS–64
(iv) ...	Rebate adjustment factor .....	0.2000 .....	(2) ÷ (3)
(v) ....	Adjusted 2003 gross per capita Medicaid expenditures for prescription drugs for full-benefit dual eligibles not in comprehensive managed care plans. ....	\$1,600 .....	(1) × [1 – (4)]
(vi) ...	Estimated actuarial value of prescription drug benefits under comprehensive capitated managed care plans for full-benefit dual eligibles for 2003. ....	\$1,500 .....	To be Determined
(vii) ...	Average number of full-benefit dual eligibles in 2003 who did not receive covered outpatient drugs through comprehensive Medicaid managed care plans. ....	90,000 .....	CY MSIS data
(viii) ..	Average number of full-benefit dual eligibles in 2003 who received covered outpatient drugs through comprehensive Medicaid managed care plans. ....	10,000 .....	CY MSIS data
(ix) ...	Base year State Medicaid per capita expenditures for covered Part D drugs for full-benefit dual eligible individuals (weighted average of (5) and (6)). ....	\$1,590 .....	[(7) × (5) + (8) × (6)] ÷ [(7) + (8)]
(x) ....	100 minus Federal Medical Assistance Percentage (FMAP) applicable to month of State contribution (as a proportion). ....	0.4000 .....	FEDERAL REGISTER
(xi) ...	Applicable growth factor (cumulative increase from 2003 through 2006). ....	50.0% .....	NHE projections
(xii) ...	Number of full-benefit dual eligibles for the month .....	120,000 .....	State submitted data
(xiii) ..	Phased-down State reduction factor for the month .....	0.9000 .....	specified in statute
(xiv) ..	Phased-down State contribution for the month .....	\$8,586,000 .....	1 / 12 × (9) × (10) × [1 + (11)] × (12) × (13)

(2) *Method of payment.* Payments for the phased down State contribution begins in January 2006, and are made on a monthly basis for each subsequent month. State payment must be made in a manner specified by CMS that is similar to the manner in which State payments are made under the State Buy-in Program except that all payments must be deposited into the Medicare Prescription Drug Account in the Federal Supplementary Medical Insurance Trust Fund. The policy on collection of the Phased-down State contribution payment is the same as the policy that governs collection of Part A and Part B Medicare premiums for State Buy-in.

(c) *State Medicaid Statistical Information System (MSIS) Reporting.* Effective with calendar year (CY) 2003 and all subsequent MSIS data submittals, States are required to provide accurate and complete coding to identify the numbers and types of Medicaid and Medicare dual eligibles. Calendar year 2003 submittals must be complete and must be accepted, based on CMS' data quality review, by December 31, 2004.

(d) *State monthly enrollment reporting.*—

(1) States must submit an electronic file as specified in paragraph (d)(2) of this section, identifying each full-benefit dual eligible individual enrolled in the State for each month. This file must include specified information including identifying information, a dual eligible type code, available income data and institutional status. The file includes data on enrollment for the current month, plus retroactive changes in enrollment characteristics for prior months. This file will be used by CMS to establish the monthly enrollment for those individuals with Part D drug coverage who are also determined by the State to be eligible for full Medicaid benefits subject to the phased down State contribution payment. This file is due to CMS no later than the last day of the reporting month. For States that do not submit an acceptable file by the end of the month, the phased down State contribution for that month is based on data deemed appropriate by CMS.

(2)(i) For the period prior to April 1, 2022, States must submit the file at least monthly and may submit updates to that file on a more frequent basis.

(ii) For the period beginning April 1, 2022, States must submit the file at least monthly and must submit updates to that file on a daily basis.

(e) *Data match*. CMS performs those periodic data matches as may be necessary to identify and compute the number of full-benefit dual eligible individuals needed to establish the State contribution payment.

(f) *Rebate adjustment factor*. CMS establishes the rebate adjustment factor using total drug expenditures made and drug rebates received during calendar year 2003 as reported on CMS 64 Medicaid expenditure reports for the four quarters of calendar year 2003 that were received by CMS on or before March 31, 2004. Rebates include rebates received under the national rebate agreement and under a State supplemental rebate program, as reported on CMS-64 expenditure reports for the four quarters of calendar year 2003.

(g) *Annual per capita drug expenditures*. CMS notifies each State no later than October 15 before each calendar year, beginning October 15, 2005, of their annual per capita drug payment expenditure amount for the next year.

[70 FR 4525, Jan. 28, 2005, as amended at 73 FR 20509, Apr. 15, 2008; 85 FR 25634, May 1, 2020]

### Subpart T—Appeal Procedures for Civil Money Penalties

SOURCE: 72 FR 68736, Dec. 5, 2007, unless otherwise noted.

#### § 423.1000 Basis and scope.

(a) *Statutory basis*. (1) Section 1128A(c)(2) of the Act provides that the Secretary may not collect a civil money penalty until the affected party has had notice and opportunity for a hearing.

(2) Section 1857 (g) of the Act provides that, for Part D sponsors found to be out of compliance with the requirements in part 423, specified remedies may be imposed instead of, or in addition to, termination of the Part D sponsor's contract. Section 1857(g)(4) of the Act makes certain provisions of section 1128A of the Act applicable to civil money penalties imposed on Part D sponsors.

(3) Section 1860D-14A(e)(2) of the Act specifies that the Secretary must impose a civil money penalty on a manufacturer that fails to provide applicable beneficiaries discounts for applicable drugs of the manufacturer in accordance with its Discount Program Agreement. Section 1860D-14A(e)(2)(B) of the Act makes certain provisions of section 1128A of the Act applicable to such civil money penalties imposed on manufacturers.

(b) [Reserved]

[72 FR 68736, Dec. 5, 2007, as amended 77 FR 22171, Apr. 12, 2012]

#### § 423.1002 Definitions.

As used in this subpart—

*Affected party* means any Part D sponsor or manufacturer (as defined in § 423.2305) impacted by an initial determination or, if applicable, by a subsequent determination or decision issued under this part, and “party” means the affected party or CMS, as appropriate.

*ALJ* stands for Administrative Law Judge.

*Departmental Appeals Board or Board* means a Board established in the Office of the Secretary to provide impartial review of disputed decisions made by the operating components of the Department.

*Part D sponsor* has the meaning given the term in 423.4.

[72 FR 68736, Dec. 5, 2007, as amended 77 FR 22171, Apr. 12, 2012]

#### § 423.1004 Scope and applicability.

(a) *Scope*. This subpart sets forth procedures for reviewing initial determinations that CMS makes with respect to the matters specified in paragraph (b) of this section.

(b) *Initial determinations by CMS*. CMS makes initial determinations with respect to the imposition of civil money penalties in accordance with part 423, subpart O.

#### § 423.1006 Appeal rights.

(a) *Appeal rights of Part D sponsors*. (1) Any Part D sponsor dissatisfied with an initial determination as specified in 423.1004, has a right to a hearing before an ALJ in accordance with this subpart and may request Departmental Appeals Board review of the ALJ decision.

#### § 423.1008

(2) Part D sponsors may request judicial review of the Departmental Appeals Board's decision that imposes a CMP.

(b) [Reserved]

#### § 423.1008 Appointment of representatives.

(a) An affected party may appoint as its representative anyone not disqualified or suspended from acting as a representative in proceedings before the Secretary or otherwise prohibited by law.

(b) If the representative appointed is not an attorney, the party must file written notice of the appointment with the ALJ or the Departmental Appeals Board.

(c) If the representative appointed is an attorney, the attorney's statement that he or she has the authority to represent the party is sufficient.

#### § 423.1010 Authority of representatives.

(a) A representative appointed and qualified in accordance with 423.1008 may, on behalf of the represented party—

(1) Give and accept any notice or request pertinent to the proceedings set forth in this part;

(2) Present evidence and allegations as to facts and law in any proceedings affecting that party to the same extent as the party; and

(3) Obtain information to the same extent as the party.

(b) A notice or request may be sent to the affected party, to the party's representative, or to both. A notice or request sent to the representative has the same force and effect as if it had been sent to the party.

#### § 423.1012 Fees for services of representatives.

Fees for any services performed on behalf of an affected party by an attorney appointed and qualified in accordance with 423.1008 are not subject to the provisions of section 206 of Title II of the Act, which authorizes the Secretary to specify or limit those fees.

#### § 423.1014 Charge for transcripts.

A party that requests a transcript of prehearing or hearing proceedings or

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Board review must pay the actual or estimated cost of preparing the transcript unless, for good cause shown by that party, the payment is waived by the ALJ or the Departmental Appeals Board, as appropriate.

#### § 423.1016 Filing of briefs with the Administrative Law Judge or Departmental Appeals Board, and opportunity for rebuttal.

(a) *Filing of briefs and related documents.* If a party files a brief or related document such as a written argument, contention, suggested finding of fact, conclusion of law, or any other written statement, it must submit an original and 1 copy to the ALJ or the Departmental Appeals Board, as appropriate. The material may be filed by mail or in person and must include a statement certifying that a copy has been furnished to the other party.

(b) *Opportunity for rebuttal.* (1) The other party will have 20 calendar days from the date of mailing or in person filing to submit any rebuttal statement or additional evidence. If a party submits a rebuttal statement or additional evidence, it must file an original and 1 copy with the ALJ or the Board and furnish a copy to the other party.

(2) The ALJ or the Board will grant an opportunity to reply to the rebuttal statement only if the party shows good cause.

[72 FR 68736, Dec. 5, 2007, as amended at 79 FR 29966, May 23, 2014]

#### § 423.1018 Notice and effect of initial determinations.

(a) *Notice of initial determination—*(1) *General rule.* CMS, as required under 422.756(f)(2), mails notice of an initial determination to the affected party, setting forth the basis or reasons for the determination, the effect of the determination, the party's right to a hearing, and information about where to file the request for a hearing.

(b) *Effect of initial determination.* An initial determination is binding unless—

(1) The affected party requests a hearing; or

(2) CMS revises its decision.

**§ 423.1020 Request for hearing.**

(a) *Manner and timing of request.* (1) A Part D sponsor is entitled to a hearing as specified in 423.1006 and may file a request with the Departmental Appeals Board office specified in the initial determination.

(2) The Part D sponsor or its legal representative or other authorized official must file the request, in writing, to the appropriate Departmental Appeals Board office, with a copy to CMS, within 60 calendar days after receipt of the notice of initial determination, to request a hearing before an ALJ to appeal any determination by CMS to impose a civil money penalty.

(b) *Content of request for hearing.* The request for hearing must—

(1) Identify the specific issues, and the findings of fact and conclusions of law with which the affected party disagrees; and

(2) Specify the basis for each contention that a CMS finding or conclusion of law is incorrect.

[72 FR 68736, Dec. 5, 2007, as amended at 79 FR 29966, May 23, 2014]

**§ 423.1022 Parties to the hearing.**

The parties to the hearing are the affected party and CMS, as appropriate.

**§ 423.1024 Designation of hearing official.**

(a) The Chair of the Departmental Appeals Board, or his or her delegate, designates an ALJ or a member or members of the Departmental Appeals Board to conduct the hearing.

(b) If appropriate, the Chair or the delegate may substitute another ALJ or another member or other members of the Departmental Appeals Board to conduct the hearing.

(c) As used in this part, “ALJ” includes a member or members of the Departmental Appeals Board who are designated to conduct a hearing.

**§ 423.1026 Disqualification of Administrative Law Judge.**

(a) An ALJ may not conduct a hearing in a case in which he or she is prejudiced or partial to the affected party or has any interest in the matter pending for decision.

(b) A party that objects to the ALJ designated to conduct the hearing must give notice of its objections at the earliest opportunity.

(c) The ALJ will consider the objections and decide whether to withdraw or proceed with the hearing.

(1) If the ALJ withdraws, another ALJ will be designated to conduct the hearing.

(2) If the ALJ does not withdraw, the objecting party may, after the hearing, present its objections to the Departmental Appeals Board as reasons for changing, modifying, or reversing the ALJ’s decision or providing a new hearing before another ALJ.

**§ 423.1028 Prehearing conference.**

(a) At any time before the hearing, the ALJ may call a prehearing conference for the purpose of delineating the issues in controversy, identifying the evidence and witnesses to be presented at the hearing, and obtaining stipulations accordingly.

(b) On the request of either party or on his or her own motion, the ALJ may adjourn the prehearing conference and reconvene at a later date.

**§ 423.1030 Notice of prehearing conference.**

(a) *Timing of notice.* The ALJ will fix a time and place for the prehearing conference and mail written notice to the parties at least 10 calendar days before the scheduled date.

(b) *Content of notice.* The notice will inform the parties of the purpose of the conference and specify what issues are sought to be resolved, agreed to, or excluded.

(c) *Additional issues.* Issues other than those set forth in the notice of determination or the request for hearing may be considered at the prehearing conference if—

(1) Either party gives timely notice to that effect to the ALJ and the other party; or

(2) The ALJ raises the issues in the notice of prehearing conference or at the conference.

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### § 423.1032 Conduct of prehearing conference.

(a) The prehearing conference is open to the affected party or its representative, to the CMS representatives and their technical advisors, and to any other persons whose presence the ALJ considers necessary or proper.

(b) The ALJ may accept the agreement of the parties as to the following:

(1) Facts that are not in controversy.

(2) Questions that have been resolved favorably to the affected party after the determination in dispute.

(3) Remaining issues to be resolved.

(c) The ALJ may request the parties to indicate the following:

(1) The witnesses that will be present to testify at the hearing.

(2) The qualifications of those witnesses.

(3) The nature of other evidence to be submitted.

### § 423.1034 Record, order, and effect of prehearing conference.

(a) *Record of prehearing conference.* (1) A record is made of all agreements and stipulations entered into at the prehearing conference.

(2) The record may be transcribed at the request of either party or the ALJ.

(b) *Order and opportunity to object.* (1) The ALJ issues an order setting forth the results of the prehearing conference, including the agreements made by the parties as to facts not in controversy, the matters to be considered at the hearing, and the issues to be resolved.

(2) Copies of the order are sent to all parties and the parties have 10 calendar days to file objections to the order.

(3) After the 10 calendar days have elapsed, the ALJ settles the order.

(c) *Effect of prehearing conference.* The agreements and stipulations entered into at the prehearing conference are binding on all parties, unless a party presents facts that, in the opinion of the ALJ, would make an agreement unreasonable or inequitable.

### § 423.1036 Time and place of hearing.

(a) The ALJ fixes a time and place for the hearing and gives the parties written notice at least 10 calendar days before the scheduled date.

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(b) The notice informs the parties of the general and specific issues to be resolved at the hearing.

### § 423.1038 Change in time and place of hearing.

(a) The ALJ may change the time and place for the hearing either on his or her own initiative or at the request of a party for good cause shown, or may adjourn or postpone the hearing.

(b) The ALJ may reopen the hearing for receipt of new evidence at any time before mailing the notice of hearing decision.

(c) The ALJ gives the parties reasonable notice of any change in time or place or any adjournment or reopening of the hearing.

### § 423.1040 Joint hearings.

When two or more affected parties have requested hearings and the same or substantially similar matters are at issue, the ALJ may, if all parties agree, fix a single time and place for the prehearing conference or hearing and conduct all proceedings jointly. If joint hearings are held, a single record of the proceedings is made and a separate decision issued with respect to each affected party.

### § 423.1042 Hearing on new issues.

(a) *Basic rules.* (1) Within the time limits specified in paragraph (b) of this section, the ALJ may, at the request of either party, or on his or her own motion, provide a hearing on new issues that impinge on the rights of the affected party.

(2) The ALJ may consider new issues even if CMS has not made initial determinations on them, and even if they arose after the request for hearing was filed or after a prehearing conference.

(3) The ALJ may give notice of hearing on new issues at any time after the hearing request is filed and before the hearing record is closed.

(b) *Notice and conduct of hearing on new issues.* (1) Unless the affected party waives its right to appear and present evidence, notice of the time and place of hearing on any new issue will be given to the parties in accordance with 423.1036.

(2) After giving notice, the ALJ will, except as provided in paragraph (c) of

this section, proceed to hearing on new issues in the same manner as on an issue raised in the request for hearing.

(c) *Remand to CMS.* At the request of either party, or on his or her own motion, in lieu of a hearing under paragraph (b) of this section, the ALJ may remand the case to CMS for consideration of the new issue and, if appropriate, a determination. If necessary, the ALJ may direct CMS to return the case to the ALJ for further proceedings.

#### § 423.1044 Subpoenas.

(a) *Basis for issuance.* The ALJ, upon his or her own motion or at the request of a party, may issue subpoenas if they are reasonably necessary for the full presentation of a case.

(b) *Timing of request by a party.* The party must file a written request for a subpoena with the ALJ at least 5 calendar days before the date set for the hearing.

(c) *Content of request.* The request must:

(1) Identify the witnesses or documents to be produced;

(2) Describe their addresses or location with sufficient particularity to permit them to be found; and

(3) Specify the pertinent facts the party expects to establish by the witnesses or documents, and indicate why those facts could not be established without use of a subpoena.

(d) *Method of issuance.* Subpoenas are issued in the name of the Secretary.

#### § 423.1046 Conduct of hearing.

(a) *Participants in the hearing.* The hearing is open to the parties and their representatives and technical advisors, and to any other persons whose presence the ALJ considers necessary or proper.

(b) *Hearing procedures.* (1) The ALJ inquires fully into all of the matters at issue, and receives in evidence the testimony of witnesses and any documents that are relevant and material.

(2) If the ALJ believes that there is relevant and material evidence available which has not been presented at the hearing, he may, at any time before mailing of notice of the decision, reopen the hearing to receive that evidence.

(3) The ALJ decides the order in which the evidence and the arguments of the parties are presented and the conduct of the hearing.

(4) CMS has the burden of coming forward with evidence related to disputed findings that is sufficient (together with any undisputed findings and legal authority) to establish a *prima facie* case that CMS has a legally sufficient basis for its determination.

(5) The affected party has the burden of coming forward with evidence sufficient to establish the elements of any affirmative argument or defense which it offers.

(6) The affected party bears the ultimate burden of persuasion. To prevail, the affected party must prove by a preponderance of the evidence on the record as a whole that there is no basis for the determination.

(c) *Review of the penalty.* When an ALJ finds that the basis for imposing a civil money penalty exists, as specified in 423.752, the ALJ may not—

(1) Set a penalty of zero or reduce a penalty to zero, or

(2) Review the exercise of discretion by CMS to impose a civil money penalty.

#### § 423.1048 Evidence.

Evidence may be received at the hearing even though inadmissible under the rules of evidence applicable to court procedure. The ALJ rules on the admissibility of evidence.

#### § 423.1050 Witnesses.

Witnesses at the hearing testify under oath or affirmation. The representative of each party is permitted to examine his or her own witnesses subject to interrogation by the representative of the other party. The ALJ may ask any questions that he or she deems necessary. The ALJ rules upon any objection made by either party as to the propriety of any question.

#### § 423.1052 Oral and written summation.

The parties to a hearing are allowed a reasonable time to present oral summation and to file briefs or other written statements of proposed findings of fact and conclusions of law. Copies of

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any briefs or other written statements must be sent in accordance with 423.1016.

#### § 423.1054 Record of hearing.

A complete record of the proceedings at the hearing is made and transcribed in all cases.

#### § 423.1056 Waiver of right to appear and present evidence.

(a) *Waiver procedures.* (1) If an affected party wishes to waive its right to appear and present evidence at the hearing, it must file a written waiver with the ALJ.

(2) If the affected party wishes to withdraw a waiver, it may do so, for good cause, at any time before the ALJ mails notice of the hearing decision.

(b) *Effect of waiver.* If the affected party waives the right to appear and present evidence, the ALJ need not conduct an oral hearing except in one of the following circumstances:

(1) The ALJ believes that the testimony of the affected party or its representatives or other witnesses is necessary to clarify the facts at issue.

(2) CMS shows good cause for requiring the presentation of oral evidence.

(c) *Dismissal for failure to appear.* If, despite the waiver, the ALJ sends notice of hearing and the affected party fails to appear, or to show good cause for the failure, the ALJ will dismiss the appeal in accordance with 423.1058.

(d) *Hearing without oral testimony.* When there is no oral testimony, the ALJ will—

(1) Make a record of the relevant written evidence that was considered in making the determination being appealed, and of any additional evidence submitted by the parties;

(2) Furnish to each party copies of the additional evidence submitted by the other party; and

(3) Give both parties a reasonable opportunity for rebuttal.

(e) *Handling of briefs and related statements.* If the parties submit briefs or other written statements of evidence or proposed findings of facts or conclusions of law, those documents will be handled in accordance with 423.1016.

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#### § 423.1058 Dismissal of request for hearing.

(a) The ALJ may, at any time before mailing the notice of the decision, dismiss a hearing request if a party withdraws its request for a hearing or the affected party asks that its request be dismissed.

(b) An affected party may request a dismissal by filing a written notice with the ALJ.

#### § 423.1060 Dismissal for abandonment.

(a) The ALJ may dismiss a request for hearing if it is abandoned by the party that requested it.

(b) The ALJ may consider a request for hearing to be abandoned if the party or its representative—

(1) Fails to appear at the prehearing conference or hearing without having previously shown good cause for not appearing; and

(2) Fails to respond, within 10 calendar days after the ALJ sends a “show cause” notice, with a showing of good cause.

#### § 423.1062 Dismissal for cause.

On his or her own motion, or on the motion of a party to the hearing, the ALJ may dismiss a hearing request either entirely or as to any stated issue, under any of the following circumstances:

(a) *Res judicata.* There has been a previous determination or decision with respect to the rights of the same affected party on the same facts and law pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, because the affected party did not timely request reconsideration, hearing, or review, or commence a civil action with respect to that determination or decision.

(b) *No right to hearing.* The party requesting a hearing is not a proper party or does not otherwise have a right to a hearing.

(c) *Hearing request not timely filed.* The affected party did not file a hearing request timely and the time for filing has not been extended.

**§ 423.1064 Notice and effect of dismissal and right to request review.**

(a) Notice of the ALJ's dismissal action is mailed to the parties. The notice advises the affected party of its right to request that the dismissal be vacated as provided in 423.1066.

(b) The dismissal of a request for hearing is binding unless it is vacated by the ALJ or the Departmental Appeals Board.

**§ 423.1066 Vacating a dismissal of request for hearing.**

An ALJ may vacate any dismissal of a request for hearing if a party files a request to that effect within 60 calendar days from receipt of the notice of dismissal and shows good cause for vacating the dismissal.

**§ 423.1068 Administrative Law Judge's decision.**

(a) *Timing, basis and content.* As soon as practical after the close of the hearing, the ALJ issues a written decision in the case. The decision is based on the evidence of record and contains separate numbered findings of fact and conclusions of law.

(b) *Notice and effect.* A copy of the decision is mailed to the parties and is binding on them unless—

(1) A party requests review by the Departmental Appeals Board within the time period specified in 423.1076, and the Board reviews the case;

(2) The Departmental Appeals Board denies the request for review and the party seeks judicial review by filing an action in a United States District Court or, in the case of a civil money penalty, in a United States Court of Appeals;

(3) The decision is revised by an ALJ or the Department Appeals Board; or

(4) The decision is a recommended decision directed to the Board.

**§ 423.1070 Removal of hearing to Departmental Appeals Board.**

(a) At any time before the ALJ receives oral testimony, the Board may remove to itself any pending request for a hearing.

(b) Notice of removal is mailed to each party.

(c) The Board conducts the hearing in accordance with the rules that apply to ALJ hearings under this subpart.

**§ 423.1072 Remand by the Administrative Law Judge.**

(a) If CMS requests remand, and the affected party concurs in writing or on the record, the ALJ may remand any case properly before him or her to CMS for a determination satisfactory to the affected party.

(b) The ALJ may remand at any time before notice of hearing decision is mailed.

**§ 423.1074 Right to request Departmental Appeals Board review of Administrative Law Judge's decision or dismissal.**

Either of the parties has a right to request Departmental Appeals Board review of the ALJ's decision or dismissal order, and the parties are so informed in the notice of the ALJ's action.

**§ 423.1076 Request for Departmental Appeals Board review.**

(a) *Manner and time of filing.* (1) Any party that is dissatisfied with an ALJ's decision or dismissal of a hearing request, may file a written request for review by the Departmental Appeals Board.

(2) The requesting party or its representative or other authorized official must file the request with the DAB within 60 calendar days from receipt of the notice of decision or dismissal, unless the Board, for good cause shown by the requesting party, extends the time for filing.

(b) *Content of request for review.* A request for review of an ALJ decision or dismissal must specify the issues, the findings of fact or conclusions of law with which the party disagrees, and the basis for contending that the findings and conclusions are incorrect.

**§ 423.1078 Departmental Appeals Board action on request for review.**

(a) *Request by CMS.* The Departmental Appeals Board may dismiss, deny, or grant a request made by CMS for review of an ALJ decision or dismissal.



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(b) *Request by the affected party.* The Board may deny or grant the affected party's request for review or may dismiss the request for one of the following reasons:

(1) The affected party requests dismissal of its request for review.

(2) The affected party did not file timely or show good cause for late filing.

(3) The affected party does not have a right to review.

(4) A previous determination or decision, based on the same facts and law, and regarding the same issue, has become final through judicial affirmance or because the affected party failed to timely request reconsideration, hearing, Board review, or judicial review, as appropriate.

(c) *Effect of dismissal.* The dismissal of a request for Departmental Appeals Board review is binding and not subject to further review.

(d) *Review panel.* If the Board grants a request for review of the ALJ's decision, the review will be conducted by a panel of three members of the Board, designated by the Chair or Deputy Chair.

### § 423.1080 Procedures before the Departmental Appeals Board on review.

The parties are given, upon request, a reasonable opportunity to file briefs or other written statements as to fact and law, and to appear before the Departmental Appeals Board to present evidence or oral arguments. Copies of any brief or other written statement must be sent in accordance with 423.1016.

### § 423.1082 Evidence admissible on review.

(a) The Departmental Appeals Board may admit evidence into the record in addition to the evidence introduced at the ALJ hearing, (or the documents considered by the ALJ if the hearing was waived), if the Board considers that the additional evidence is relevant and material to an issue before it.

(b) If it appears to the Board that additional relevant evidence is available, the Board will require that it be produced.

(c) Before additional evidence is admitted into the record—

(1) Notice is mailed to the parties (unless they have waived notice) stating that evidence will be received regarding specified issues; and

(2) The parties are given a reasonable time to comment and to present other evidence pertinent to the specified issues.

(d) If additional evidence is presented orally to the Board, a transcript is prepared and made available to any party upon request.

### § 423.1084 Decision or remand by the Departmental Appeals Board.

(a) When the Departmental Appeals Board reviews an ALJ's decision or order of dismissal, or receives a case remanded by a court, the Board may either issue a decision or remand the case to an ALJ for a hearing and decision or a recommended decision for final decision by the Board.

(b) In a remanded case, the ALJ initiates additional proceedings and takes other actions as directed by the Board in its order of remand, and may take other action not inconsistent with that order.

(c) Upon completion of all action called for by the remand order and any other consistent action, the ALJ promptly makes a decision or, as specified by the Board, certifies the case to the Board with a recommended decision.

(d) The parties have 20 calendar days from the date of a notice of a recommended decision to submit to the Board any exception, objection, or comment on the findings of fact, conclusions of law, and recommended decision.

(e) After the 20-calendar day period, the Board issues its decision adopting, modifying or rejecting the ALJ's recommended decision.

(f) If the Board does not remand the case to an ALJ, the following rules apply:

(1) The Board's decision—

(i) Is based upon the evidence in the hearing record and any further evidence that the Board receives during its review;

(ii) Is in writing and contains separate numbered findings of fact and conclusions of law; and

(iii) May modify, affirm, or reverse the ALJ's decision.

(2) A copy of the Board's decision is mailed to each party.

**§ 423.1086 Effect of Departmental Appeals Board Decision.**

(a) *General rule.* The Board's decision is binding unless—

(1) The affected party has a right to judicial review and timely files a civil action in a United States District Court or, in the case of a civil money penalty, in a United States Court of Appeals; or

(2) The Board reopens and revises its decision in accordance with 423.1092.

(b) *Right to judicial review.* Section 423.1006 specifies the circumstances under which an affected party has a right to seek judicial review.

(c) *Special rules: Civil money penalty.* Finality of Board's decision. When CMS imposes a civil money penalty, notice of the Board's decision (or denial of review) is the final administrative action that initiates the 60-calendar day period for seeking judicial review.

**§ 423.1088 Extension of time for seeking judicial review.**

(a) Any affected party that is dissatisfied with an Departmental Appeals Board decision and is entitled to judicial review must commence civil action within 60 calendar days from receipt of the notice of the Board's decision, unless the Board extends the time in accordance with paragraph (c) of this section.

(b) The request for extension must be filed in writing with the Board before the 60-calendar day period ends.

(c) For good cause shown, the Board may extend the time for commencing civil action.

**§ 423.1090 Basis, timing, and authority for reopening an Administrative Law Judge or Board decision.**

(a) *Basis and timing for reopening.* An ALJ of Departmental Appeals Board decision may be reopened, within 60 calendar days from the date of the notice of decision, upon the motion of the ALJ or the Board or upon the petition of either party to the hearing.

(b) *Authority to reopen.* (1) A decision of the Departmental Appeals Board may be reopened only by the Departmental Appeals Board.

(2) A decision of an ALJ may be reopened by that ALJ, by another ALJ if that one is not available, or by the Departmental Appeals Board. For purposes of this paragraph, an ALJ is considered to be unavailable if the ALJ has died, terminated employment, or been transferred to another duty station, is on leave of absence, or is unable to conduct a hearing because of illness.

**§ 423.1092 Revision of reopened decision.**

(a) Revision based on new evidence. If a reopened decision is to be revised on the basis of new evidence that was not included in the record of that decision, the ALJ or the Departmental Appeals Board—

(1) Notifies the parties of the proposed revision; and

(2) Unless the parties waive their right to hearing or appearance—

(i) Grants a hearing in the case of an ALJ revision; and

(ii) Grants opportunity to appear in the case of a Board revision.

(b) *Basis for revised decision and right to review.* (1) If a revised decision is necessary, the ALJ or the Departmental Appeals Board, as appropriate, renders it on the basis of the entire record.

(2) If the decision is revised by an ALJ, the Departmental Appeals Board may review that revised decision at the request of either party or on its own motion.

**§ 423.1094 Notice and effect of revised decision.**

(a) *Notice.* The notice mailed to the parties states the basis or reason for the revised decision and informs them of their right to Departmental Appeals Board review of an ALJ revised decision, or to judicial review of a Board reviewed decision.

(b) *Effect—*(1) *ALJ revised decision.* An ALJ revised decision is binding unless it is reviewed by the Departmental Appeals Board.

(2) *Departmental Appeals Board revised decision.* A Board revised decision is