

#### § 426.470

#### 42 CFR Ch. IV (10–1–24 Edition)

challenge any part(s) of the ALJ's decision under § 426.465.

(b) Unless the Board finds good cause shown for late filing, an untimely appeal is dismissed.

(c) If a party does not timely appeal any part(s) of the ALJ's decision on an LCD review to the Board, as provided in this subpart, then the ALJ's decision is final and not subject to further review.

#### § 426.470 Board's role in docketing and evaluating the acceptability of appeals of ALJ decisions.

(a) *Docketing the appeal.* The Board does the following upon receiving an appeal of part or all of an ALJ's decision:

(1) Dockets the appeal either separately or with similar appeals.

(2) Assigns a docket number.

(b) *Evaluating the acceptability of the appeal.* The Board determines if the appeal is acceptable by confirming that the appeal meets all of the criteria in § 426.465.

(c) *Unacceptable appeal.* If the Board determines that an appeal is unacceptable, the Board must dismiss the appeal.

(d) *Acceptable appeal.* If the Board determines that an appeal is acceptable, the Board does the following:

(1) Sends a letter to the appellant to acknowledge that the appeal is acceptable, and informs them of the docket number.

(2) Forwards a copy of the appeal and the letter described in paragraph (d)(1) of this section to all parties involved in the appeal.

(3) Requires the ALJ to send a copy of the ALJ's LCD review record (maintaining any sealed documents) to the Board and a copy of the public record to all parties involved in the appeal.

(e) *No participation as amicus curiae.* The Board may not allow participation by amicus participants in the review of an LCD.

#### § 426.476 Board review of an ALJ's decision.

(a) *Review steps.* If the Board determines that an appeal is acceptable, the Board—

(1) Permits the party that did not file the appeal an opportunity to respond to the appeal;

(2) Hears oral argument (which may be held by telephone) if the Board determines that oral argument would be helpful to the Board's review of the ALJ decision;

(3) Reviews the LCD review record and the parties' arguments; and

(4) Issues a written decision either upholding, modifying, or reversing the ALJ decision, or remanding the case to the ALJ for further proceedings.

(b) *Standard of review*—(1) *In general.* The Board determines whether the ALJ decision contains any material error, including any failure to properly apply the reasonableness standard.

(2) If the ALJ erred in determining that the contractor's record was complete and adequate to support the validity of the LCD, the Board remands the case to the ALJ for discovery and the taking of evidence.

(3) If a party alleges a prejudicial error of procedure, and the Board determines that such an error was made, the Board may remand the case to the ALJ for further proceedings consistent with the Board decision or may take other appropriate steps to correct the procedural error.

(4) Harmless error is not a basis for reversing an ALJ decision.

(c) *Scope of review.* In reaching its conclusions, the Board is bound by applicable laws, regulations, and NCDs.

(d) *Dismissal as moot.* The Board dismisses an appeal by an aggrieved party of an ALJ decision finding that an LCD was valid if the contractor notifies the Board that it has retired the LCD or revised the LCD to remove the LCD provision in question.

#### § 426.478 Retiring or revising an LCD during the Board's review of an ALJ's decision.

A contractor may retire or revise an LCD during the Board's review of an ALJ's decision using the same process described in § 426.420. If an LCD is retired or revised to remove completely the challenged provision(s), the aggrieved party who sought the review is entitled to individual claim review provided at § 426.488(b).