

OMHA Case Processing Manual

Chapter 5 REPRESENTATIVES

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5.0 Chapter Overview

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This chapter describes the role of representatives in the appeals process, including the documentation required to establish a valid representation, representative rights and responsibilities, permitted communications between OMHA staff and representatives and represented parties, and changes of representative due to delegation or revocation. This chapter also discusses the fee approval process for representatives and the circumstance under which an individual or entity may be entitled to an award of reasonable attorney fees and other expenses under the Equal Access to Justice Act.

Caution: When taking the actions described in this chapter, ensure that all PII, PHI, and Federal Tax Information is secured and only disclosed to authorized individuals (internally, those who need to know).

5.1 Definitions—appointed, authorized

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5.1.1 Is there a difference between an authorized representative and an appointed representative?

There are differences in how the two types of representation originate and the extent of their authority to act for the represented party. However, both types of representatives operate similarly in the appeals process and the representation concepts in 42 C.F.R. parts 405 (Part A and Part B), 422 (Part C), and 423 (Part D) are very similar.

- Part 405 separately defines an appointed and an authorized representative.¹ See OCPM 5.1.2 and 5.1.3, immediately below, for definitions of authorized and appointed representatives, respectively.
- Part 422 encompasses the two distinct concepts in a single term (“representative”).²
- Part 423 folds the two distinct concepts into a single term (“appointed representative”).³

Part 405 terminology is used throughout this chapter and it will be used in the context of Part A, B, C, and D appeals. In places where the authorities and rights and responsibilities of a Part 423 appointed representative differ from Part 405, those differences will be specifically noted.

5.1.2 What is an authorized representative?

An authorized representative is an individual authorized under **State or other applicable law** to act on behalf of a beneficiary or other party involved in the appeal. For example, an authorized representative acts on behalf of a beneficiary when the beneficiary is no longer mentally capable of giving consent or signing an appointment of representative instrument.

Examples of authorized representatives include:

- A court-appointed guardian for a beneficiary;

¹ 42 C.F.R. § 405.902. See also 20 C.F.R. § 418.1010(b)(10) for application of the part 405 concept of representatives to Part B IRMAA appeals.

² 42 C.F.R. § 422.561.

³ 42 C.F.R. § 423.560. See also 418.2010(b)(8) for application of the part 423 concept of representatives to Part D IRMAA appeals.

- An executor, conservator, or administrator of an estate, or in the case of a deceased beneficiary without an estate, a surviving spouse when authorized by applicable law;
- An individual with a power of attorney (durable or non-durable), and an individual designated under a State health care consent statute; or
- An individual with a document explaining the State law that provides him or her with the authority to act as a representative for the beneficiary without the beneficiary's consent.

Note: The individual must be authorized to act on behalf of the party in taking actions that concern the party's financial interests or healthcare. Other types of authorizations, such as a power of attorney that is limited to the party's interest in real property, are not sufficient.

5.1.3 What is an appointed representative?

An appointed representative is an individual appointed by a party to represent the party in a Medicare **claim** or in a **claim or entitlement appeal**.

Note: An appointment of representative is not an assignment of appeal rights.

Note: If a provider or supplier is already a party to an appeal, an appointment of representative is not necessary for the provider or supplier to appeal a claim.

5.1.3.1 Who may be an appointed representative?

An appointed representative may be any individual who is not disqualified, suspended, or otherwise prohibited by law from acting as a representative in proceedings before HHS, or in entitlement, Part B late enrollment penalty, or IRMAA appeals before SSA.⁴ Examples of appointed representatives include:

- Family members, such as spouses or adult children;
- Friends or other non-familial relations, such as non-spouse partners or neighbors;

⁴ 42 C.F.R. § 405.910(b).

- Members of an advocacy group;
- Attorneys;
- Providers or suppliers;
- An employee of an outside firm or company that provides billing or appeals services to a Medicare provider or supplier;
- An employee of a company that furnishes consulting services (for example, physicians or attorneys acting in a non-attorney capacity) to a Medicare provider or supplier;
- Physicians, physician assistants, registered nurses, licensed therapists, or other medical professionals; and

Caution: In the case of a Medicare Part D appeal, a prescribing physician or other prescriber can request a redetermination or reconsideration without being an appointed representative. However, in order to request a hearing before an ALJ, the prescribing physician or other prescriber must be an appointed representative of the enrollee.

- Congressional staff members.

Note: A congressional staff member could choose to act as a representative of a party. However, congressional offices and staff members generally only make inquiries and ask questions on behalf of their constituents. In such circumstances, a Privacy Act release, but *not* an appointment of representative, is required to provide responsive information to the inquiry.

5.1.3.2 When is an appointment of representative not required?

Generally, an appointment of representative is not required if the relevant individual is a party to the appeal or is an employee of a party. An employee acting on behalf of an employer that is a party is *not* considered an appointed representative (and, thus, does *not* require an appointment of representative to act on behalf of the party). Additionally, employees of a parent company acting on behalf of a subsidiary company that is a party, and employees of a company that purchased another company that is a party, also do not require an appointment of representative.

Note: In these circumstances, the employee is the point of contact for the party, and acting on behalf of the party (for example, by submitting the request for hearing, attending the hearing, and providing testimony), through the employee-employer relationship. The employee is not an authorized or appointed representative, and documentation of the employee's status as an employee is not required unless evidence in the record casts doubt on the employment relationship.

5.2 Valid representation

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5.2.1 What is the general requirement?

If a party is represented, the representative must be authorized or appointed in accordance with the applicable regulations.⁵ If the request was filed by a purported representative and the record does not contain documentation establishing the individual is a valid authorized or appointed representative, the request is subject to dismissal, but an opportunity to cure the deficiency must be provided before such action is taken (see OCPM 5.2.7 and 5.2.8).

5.2.1.1 What are the requirements for a valid authorized representative?

The record must contain written documentation identifying the party and granting the individual status as an authorized representative (for example, documentation of a durable/non-durable power of attorney or documentation of State law authorizing an individual to take action on behalf of a party). See OCPM 5.1.2 for examples of an authorized representative.

5.2.1.2 What are the required elements for a valid appointment of representative?

The record must contain an appointment that satisfies the following required elements:⁶

- Must be **in writing**;
- Must be **signed** by the party and individual agreeing to be the representative **within 30 calendar days** (in ink if executed after July 14, 2014);

Note: An appointment may list multiple individuals from the same organization or entity who may serve as the representative (for example, attorneys associated with an advocacy group or law firm), as long as one of the listed individuals signs the document.

- Must be **dated** by the party and the individual agreeing to be the representative;

⁵ 42 C.F.R. §§ 405.902, 422.561, 423.560.

⁶ 42 C.F.R. § 405.910(c); Medicare Claims Processing Manual, pub. 100-04, ch. 29, § 270.1.2.

- Must provide a **statement** appointing the representative to act on behalf of the party;
- Must include an explanation of the **purpose and scope** of the representation;
- Must contain the **name, address, and phone number** of the party and of the appointed representative;
- If a beneficiary is the appointing party, must contain the beneficiary's **Medicare number (HICN⁷)** and authorize the adjudicator to release individually identifiable health information to the appointed representative;
- If the provider or supplier that furnished the item or service is the appointing party, must contain the provider or supplier's **National Provider Identifier (NPI)** number;

Note: If a State Medicaid agency or applicable plan is the appointing party, no specific identifier is required.

- Must include the appointed representative's **professional status or relationship** to the party;
- Must be **filed with the entity** processing the party's initial determination or appeal; and
- Must have been **timely when initially filed** (*see* OCPM 5.3).

Note: If a provider or supplier that furnished the items or services is acting as an appointed representative for a beneficiary, the following additional requirements apply:⁸

- The representative must sign a statement that no financial liability is imposed on the beneficiary in connection with the representation (that is, the provider or supplier will not charge a fee in connection with the representation); and
- If there is a limitation on liability issue, as described in [section 1879\(a\)\(2\) of the Act](#), the provider or supplier must sign a statement waiving the right to payment from the

⁷ Or MBI. *See* CJB 18-001.

⁸ [42 C.F.R. § 405.910\(g\)\(2\)](#).

beneficiary for the services or items to which the limitation on liability issue applies.

Note: Although not required, [form CMS-1696](#) (Appointment of Representative) is recommended to appoint a representative. Parties and their representatives may use an alternate writing, provided the writing meets the requirements of [42 C.F.R. section 405.910\(c\)](#).

5.2.2 What if the authorizing or appointing documents were filed at a prior level of appeal?

5.2.2.1 When can we assume a valid representation?

If documents establishing an authorized or appointed representative were filed at a prior level of appeal and treated as valid, OMHA will not re-visit the prior determination that the representation was valid or that the individual who acted as the representative at a prior level of appeal is the duly appointed or authorized representative.

5.2.2.2 Does the party or representative have to re-file documentation of the representation?

A representative may, but is not required to, re-file documentation of the representation with the request for hearing or review.⁹

5.2.3 What if the authorizing or appointing documents were *not* filed at prior level of appeal?

If a representative submits the request for hearing or review and has not acted as a representative in the prior levels of appeal, review the document that authorizes the representative and ensure the representation is valid.

- See OCPM 5.2.1.1 for what constitutes a valid **authorized** representative.
- See OCPM 5.2.1.2 for what constitutes a valid **appointment** of representative.

If a purported representative submits the request for hearing or review and there is a deficiency in the authorizing or appointing documents, the request is subject to

⁹ [42 C.F.R. § 405.910\(e\)\(2\)](#); [Medicare Claims Processing Manual, pub. 100-04, ch. 29, §§ 270.1, 270.1.3](#) (distinguishing between subsequent appeals for the same item or service, and new appeal requests to begin the appeals process for a different item or service).

dismissal. Prior to issuance of any dismissal, however, the party and individual must be contacted and provided with an opportunity to cure the deficiency (see OCPM 5.2.7).

5.2.4 What if the individual who filed the request for hearing or review is not named . . .

5.2.4.1 On an authorizing document?

If the individual who filed the request for hearing or review is not named on an authorizing document, the individual is not authorized to file the request. Because authorized representatives are authorized by State or other applicable law to act on behalf of a party, an authorizing document must name the individual (see OCPM 5.2.1.1).

Note: An authorized representative has all of the rights and responsibilities of a party, and therefore may appoint a representative. If the individual who filed the request is not named on the authorizing documents, check the record for an appointment of representative naming the individual, made by the authorized representative.

5.2.4.2 On an appointment of representative?

If the individual who filed the request for hearing or review is not named on the appointment of representative, check the record for a written delegation. The individual cannot file the request for hearing or review if there is no written delegation or the delegation is invalid (see OCPM 5.6.1). If there is an invalid delegation, the appointed representative must be given an opportunity to cure the defect(s) (see OCPM 5.6.4).

5.2.5 What do we do if an authorization or appointment of representative is invalid?

If the authorization or appointment of representative is invalid, the party must be given an opportunity to cure the defect(s) (see OCPM 5.2.7).

Caution: Unless the defect is cured, the prospective representative is not entitled to any information about the case, and OMHA is not authorized to discuss the case with the prospective representative. All communication must be between OMHA and the party.

5.2.6 What if the representative who filed the request for hearing or review is not qualified to act as a representative?

A party may not name an individual as a representative if the individual is disqualified, suspended, or otherwise prohibited by law from acting as a representative in any proceedings before HHS, or in entitlement, Part B late enrollment penalty, or IRMAA appeals before SSA.

If the record contains any indication that the named representative is not qualified as described above, that individual may not act as an appointed representative. OMHA will send the party a Notice of Filing Defect (OMHA-125) to notify the party of the disqualification and provide an opportunity to appoint another individual.

Note: OMHA adjudicators are not authorized to disqualify, suspend, or otherwise prohibit an individual from acting as a representative.

5.2.7 How do we provide an opportunity to cure an invalid authorization or appointment of representative?

All cases except Part D expedited cases

Issue a Notice of Filing Defect (OMHA-125) to the **party** named on the request for hearing (with a **redacted** courtesy copy containing no PII to the prospective representative).

The Notice of Filing Defect is sent to the party's last known address and:

- Describes the missing documentation or information needed for a valid representation;
- Explains that, until the insufficient or missing documentation or information has been furnished, the prospective representative lacks the authority to act on behalf of or as a representative of the party, and is not entitled to obtain or receive information related to the appeal;
- Provides **20 calendar days** from the date of the letter for the party to either submit the missing documentation or information for a valid appointment or authorization, or affirm in writing that the party will not have a representative;
- If the request for hearing or review was filed by the **prospective representative**, explains that, if no response is received, the adjudicator will dismiss the request

because the individual who submitted the request was not a party and was not authorized by a party to submit the request.

- If the request for hearing or review was filed by the **party**, explains that if no response is received, all further correspondence will be made directly with the party only.

Example: The prospective representative for a beneficiary files an otherwise valid request for hearing along with an appointment of representative using [form CMS-1696](#). The appointment is signed and dated by the prospective representative, but is not signed by the beneficiary. OMHA sends a Notice of Filing Defect (OMHA-125) to the beneficiary with a redacted courtesy copy containing no PII to the prospective representative providing an opportunity to cure the defect within 20 calendar days of the date on the letter. The letter states that, if OMHA does not receive a response, the request for hearing will be dismissed.

Part D expedited cases

Due to the time-sensitive nature of expedited Part D appeals, the following steps are taken to cure appointment deficiencies:

1. Notify the enrollee by **telephone** of the missing documentation or information;
2. Explain that the enrollee may respond by **fax**, and that the cure should be provided as soon as possible, so that OMHA may continue processing the case on an expedited basis;
3. If the enrollee filed the request for hearing, continue processing the case on an expedited basis, but do not provide any information about the case to the prospective representative until the defective appointment is cured; and
4. Execute a Report of Contact (OMHA-101) to document the telephone conversation and include a copy in the administrative record.

Note: The party may give oral consent for OMHA to contact the prospective representative to assist in curing the defective appointment; however, staff must comply with OMHA's PII policy until the cured appointment document is received.

5.2.8 What if the party or prospective representative does not cure the invalid authorization or appointment of representative?

Request filed by prospective representative

For requests filed by the prospective representative, if the party or prospective representative does not respond within **20 calendar days** to the Notice of Filing Defect (OMHA-125), or replies but does not provide the missing documentation or information, the request for hearing or review is dismissed.

Request filed by the party

For requests filed by the party, if the party or prospective representative does not respond within **20 calendar days** to the Notice of Filing Defect (OMHA-125), or replies but does not provide the missing documentation or information, OMHA will continue processing the case, communicating only with the party.

<p><i>Note:</i> If the party continues to be non-responsive about the case (for example, if OMHA attempts to schedule a hearing and is unable to contact the appellant despite reasonable efforts to do so), dismissal for abandonment may be appropriate.</p>
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5.3 Duration of an appointment

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5.3.1 How long is an appointment valid . . .

5.3.1.1 In all cases except MSP cases?

An appointment of representative is valid for one year from the signature dates of both the party and the appointed representative, as reflected on [form CMS-1696](#) or other written appointment.¹⁰ The appointment must be filed in an appeal within one year of the date of both signatures.

If the appointment of representative is valid when initially filed, the appointment remains valid throughout the entire appeal process, unless the appointment is revoked or is otherwise terminated (for example, by death of the appointing party or withdrawal of the representative).¹¹

Example: On May 2, 2017, a party submits an appointment of representative with the request for redetermination. The signatures on the appointment of representative are dated August 14, 2016. On September 30, 2017, the party submits a request for hearing with OMHA. The appointment of representative remains valid, as the appointment had a signature date (August 14, 2016) within one year of when it was initially filed with the request for redetermination (May 2, 2017).

5.3.1.2 In an MSP case in which the beneficiary is a party?

For an initial determination of an MSP recovery claim, the appointment does not have to be filed within one year of the date of both signatures (beneficiary and representative). An appointment signed in connection with the party's efforts to make a claim for third party payment (for example, an agreement with an attorney to represent the beneficiary in pursuing a civil claim), is valid from the date that appointment is signed for the duration of any subsequent appeal, unless the appointment is specifically revoked (*see* OCPM 5.7.1).¹²

¹⁰ 42 C.F.R. § 405.910(e)(1).

¹¹ 42 C.F.R. § 405.910(e)(2).

¹² 42 C.F.R. § 405.910(e)(3).

5.3.1.3 In an MSP case in which the applicable plan is a party?

For an initial determination of an MSP recovery claim, the appointment does not have to be filed within one year of the date of both signatures (applicable plan and representative). The appointment is valid from the date the appointment is signed for the duration of any subsequent appeal, unless the appointment is specifically revoked.¹³ (See OCPM 5.7.1 for revocations.)

5.3.2 Does a party or representative have to re-file documentation of the representation?

If documents establishing an authorized or appointed representative were filed at a prior level of appeal, the party or representative may, but is not required to, re-file documentation with the request for hearing or review.

¹³ 42 C.F.R. § 405.910(e)(4).

5.4 Representative authorities and responsibilities

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5.4.1 What authority does an authorized representative have?

Authorized representatives have all of the rights and responsibilities of a beneficiary or other party, as applicable, throughout the appeals process.¹⁴

Example: An authorized representative can appoint a representative because the authorized representative has the same rights as the represented party.

5.4.2 What actions may an appointed representative take?

An **appointed** representative may, on the party's behalf:¹⁵

- Obtain appeals information about the claim to the same extent as the party;
- Submit evidence;
- Make statements about facts and law; and
- Make any request, or give or receive any notice, about the appeal proceedings.

5.4.3 What actions may an appointed representative not take?

An **appointed** representative does not have other rights and responsibilities with respect to the represented party, and **may not**:

- Sign documents as the party; or
- Assign appeal rights under [42 C.F.R. section 405.912](#).

5.4.4 What responsibilities does an appointed representative have?

An **appointed** representative must:¹⁶

- Inform the party of the scope and responsibilities of the representation;
- Inform the party of the status of the appeal and the results of actions taken on behalf of the party, including notification of appeal determinations, decisions, and further appeal rights;

¹⁴ [42 C.F.R. § 405.902](#).

¹⁵ [42 C.F.R. § 405.910\(h\)](#).

¹⁶ [42 C.F.R. § 405.910\(g\)](#).

- Disclose to a beneficiary any financial risk and liability of a non-assigned claim that the beneficiary may have;
- Not act contrary to the interest of the party; and
- Comply with all laws and CMS regulations, CMS Rulings, and instructions.

Note: The definition of an appointed representative in a Part D appeal includes an authorized representative (see OCPM 5.1.1). However, an authorized representative **does not** have the same obligations to a party as an appointed representative under part 405, subpart I.

5.5 Communicating with representatives and represented parties

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5.5.1 Where do we send notices and other appeals correspondence . . .

5.5.1.1 In an MSP case in which the beneficiary is the represented party?

For MSP cases in which a beneficiary is a party, send notices, requests, and other appeals correspondence to both the beneficiary **and** the appointed representative.¹⁷

5.5.1.2 In all other cases?

For all cases other than MSP cases in which a beneficiary is the represented party, send notices, requests, and other appeals correspondence **only** to the authorized or appointed representative.¹⁸

5.5.2 May we discuss a case with a representative?

Any information that would be available to a party may be discussed with, or disclosed to, a valid representative within the scope of the representation.¹⁹

Note: If the representative represents one beneficiary in a multiple beneficiary case, only information related to the represented beneficiary may be disclosed to the representative. Similarly, if the representative only represents the party with respect to a specific claim, only information related to the specific claim may be disclosed to the representative.

5.5.3 If a party is represented, may we communicate with the represented party?

Generally, communications should be made through a party's representative. However, there are instances when communication with represented parties occurs.

Responding to contacts from a represented party

If a represented party contacts OMHA, staff may provide information to the represented party, but should convey that the party should work through the representative to reduce potential confusion. If necessary, staff may contact the representative to convey any information provided to the party and to request that the representative coordinate any future communications with the party.

¹⁷ 42 C.F.R. § 405.910(i)(4).

¹⁸ 42 C.F.R. §§ 405.910(i)(2), (3).

¹⁹ 42 C.F.R. § 405.910(k).

Initiating contact with a represented party

If a party's representative is not responsive, staff should send a letter to both the party and the representative, noting that attempts to contact the representative were not successful, so contact is being made to both the party and representative.

Note: Staff must make a Report of Contact (OMHA-101) and place it in the administrative record to document any oral communication.

5.5.4 What if there is insufficient evidence of a valid authorization or appointment?

Do not provide or discuss PII or the facts of a case with an individual purporting to be a representative, unless the administrative record contains documentation of a valid representation, in accordance with OCPM 5.2.1.

However, information that does not involve PII may be disclosed (for example, a receptionist may provide the status of a case to an individual who provides a QIC appeal number).

5.6 Delegation of an appointment

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5.6.1 What documentation is required for a valid delegation of an appointment of representative?

A valid delegation of an appointment of representative generally requires:²⁰

1. Written **notice** to the party of the delegation (*see* OCPM 5.6.1.1); and
2. Written **acceptance** by the party of the delegation (*see* OCPM 5.6.1.2).

5.6.1.1 What are the requirements for valid notice?

An appointed representative may delegate (designate) another individual to act as the appointed representative by providing **written** notice to the party that includes:²¹

1. The appointed representative's **intent to delegate** to another individual;
2. The **designee's name**; and
3. The **designee's acceptance** to be obligated by and comply with the requirements of representation under [part 405, subpart I](#) regulations.

5.6.1.2 What are the requirements for valid acceptance?

A delegation of an appointment is valid when the record contains an acceptance by the party of the delegation that is:²²

1. **In writing**; and
2. **Signed** by the party.

Note: A party's acceptance is not required when the appointed representative and designee are attorneys in the same law firm or organization and this is indicated in the written notice to the party described in OCPM 5.6.1.1.

²⁰ 42 C.F.R. § 405.910(l)(1).

²¹ 42 C.F.R. § 405.910(l)(1)(i).

²² 42 C.F.R. § 405.910(l)(1)(ii).

5.6.2 When does a delegation become effective?

A delegation is effective when the adjudicator (or OMHA Central Operations, if an appeal is not yet assigned) receives a copy of the written acceptance described in OCPM 5.6.1.2.

If acceptance is not required because the appointed representative and designee are attorneys in the same law firm or organization, the delegation is effective when the adjudicator receives a copy of the written notice described in OCPM 5.6.1.1.

5.6.3 What is the effect of a valid delegation on the designee?

The newly designated appointed representative has all the rights and obligations of an appointed representative. *See* OCPM 5.4.

5.6.4 What do we do if a delegation is invalid?

If there is an invalid delegation of an appointment of representative, issue a Notice of Filing Defect (OMHA-125) to the appointed representative (with a redacted courtesy copy containing no PII to the prospective designee). The Notice explains why the delegation is invalid and informs the appointed representative that, in absence of a valid delegation, OMHA will only correspond with or contact the appointed representative in the case.

5.7 Revocation or termination of an appointment

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5.7.1 How can a party revoke an appointment?

A party may revoke an appointment of representative without cause at any time. The revocation becomes effective when the adjudicator receives a signed, written statement of the revocation from the party.²³

5.7.2 What if the party dies?²⁴

The death of a party terminates the authority of the appointed representative, *unless* an appeal is in progress and another individual or entity may be entitled to receive, or is obligated to make, payment for the items or services that are the subject of the appeal. In this circumstance, the appointment of representative remains in effect for the duration of the appeal, except for MSP recovery claims.²⁵

5.7.3 What if the representative withdraws?

The representative may withdraw his or her representation of the party at any time. The party must be given an opportunity to appoint a new representative or proceed without a representative.

Note: If the party appoints a new representative within 10 calendar days of a scheduled hearing, an ALJ may find good cause to change the time or place of the hearing if the new representative needs additional time to prepare.²⁶

²³ 42 C.F.R. § 405.910(m)(1)–(2).

²⁴ For incapacitation of a beneficiary, see [Medicare Claims Processing Manual](#), pub. 100-04, ch. 29, § 270.1.7

²⁵ 42 C.F.R. § 405.910(m)(3).

²⁶ 42 C.F.R. § 405.1020(g)(3)(ii).

5.8 Representative fees charged to a party

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5.8.1 When must a representative obtain approval of a fee?

Approval of representative fees in connection with an appeal before OMHA is only required for fees charged to a **beneficiary**. Representation services rendered prior to an appeal reaching the OMHA level are not considered appeals before the Secretary and, therefore, are not subject to approval.²⁷

Note: A beneficiary's fee arrangement when making a claim for third-party payment is not subject to review, even if the representation includes representation for appeals of an MSP recovery claim.

Note: A provider or supplier that furnished the items or services to a beneficiary that are the subject of the appeal and is acting as the appointed representative for the beneficiary may not charge the beneficiary any fee associated with the representation.²⁸

The representative fee approval process does *not* apply to the following:

- A representative appointed by a non-beneficiary party, such as a provider, supplier, Medicaid State agency, or applicable plan; or
- Authorized representatives.

5.8.2 When can a representative request approval of a fee?

A representative must submit a petition for fee approval to the assigned adjudicator no later than **60 calendar days** after the date the notice of decision, dismissal, remand, or escalation was mailed.

5.8.3 How does a representative request approval of a fee?

An appointed representative who wishes to charge the beneficiary a fee for services rendered in connection with an appeal before OMHA **must** submit a completed Petition to Obtain Approval of a Fee for Representing a Beneficiary (OMHA-118) to the assigned adjudicator, and must provide a copy to the beneficiary. The OMHA-118 must be signed by the representative and may also be signed by the beneficiary to indicate agreement

²⁷ 42 C.F.R. § 405.910(f)(1).

²⁸ 42 C.F.R. § 405.910(f)(3).

with the requested fee amount. The beneficiary's signature does not waive the right to later disagree with the final fee amount approved by the adjudicator.

5.8.4 What if the representative submits a defective fee petition?

If a fee petition is missing any of the information required on the OMHA-118, send a Defective Fee Petition letter (OMHA-381) to the representative, with a copy to the beneficiary.

Note: The submission of the missing information must be signed and dated by the representative and provided to the assigned adjudicator with a copy to the beneficiary within 20 calendar days of the date of the Defective Fee Petition letter (OMHA-381), unless additional time is granted by the adjudicator.

5.8.5 What does an adjudicator consider when reviewing a fee petition?

In determining the reasonableness of a fee, the adjudicator considers:²⁹

- The nature and type of services performed (for example, research required, whether the representative met all requirements, such as OMHA time frames, compilation of evidence required, and participation in hearing);
- The complexity of the case;
- The level of skill and competence required and provided by the representative;
- The amount of time spent on the case;
- The results achieved by the representative;
- The level of administrative review to which the representative carried the appeal; and
- The amount of the fee requested by the representative.

Note: The adjudicator must also evaluate and consider any objections submitted by the beneficiary.

Caution: In determining the reasonableness of a representative's fee, an adjudicator does *not* apply the test specified in [section 206\(a\)\(2\), \(3\) of the Act](#).³⁰

²⁹ See [Appointment of Representative form \(CMS-1696\)](#).

³⁰ See [70 Fed. Reg. 11420, 11429 \(Mar. 8, 2005\)](#); [42 C.F.R. § 405.910\(f\)\(5\)](#).

5.8.6 What action does the adjudicator take when . . .

5.8.6.1 The adjudicator determines that the fee is reasonable?

If the adjudicator determines the representative's requested fees are reasonable based on the factors in OCPM 5.8.5 and a review of any objections filed by the beneficiary, the adjudicator issues a Generic Notice (OMHA-120) and an Order on Fee Petition (OMHA-382) approving the fee.

Note: No award of attorney's or any other representative's fees or any costs in connection with an appeal may be made against the Medicare trust funds.³¹ The beneficiary is responsible for the fees.

5.8.6.2 The adjudicator determines that the fee is unreasonable?

If the adjudicator determines an amount less than the representative's requested fees is appropriate based on the factors in OCPM 5.8.5 and a review of any objections filed by the beneficiary, the adjudicator may:

1. Reduce the fee to a reasonable amount; or
2. Disapprove the fee.

The adjudicator issues a Generic Notice (OMHA-120) and an Order on Fee Petition (OMHA-382) either reducing or disapproving the fee. The order states the rationale for reduction or disapproval of the requested fees, including:

1. A discussion of the factors in OCPM 5.8.5; and
2. A response to any objections filed by the beneficiary.

5.8.7 How long does an adjudicator have to make a determination?

An adjudicator must make a determination on the reasonableness of the fees within 90 calendar days of submission of the fee petition or the curing of a defective fee petition, whichever is later.

³¹ 42 C.F.R. § 405.910(f)(2).

5.9 Equal Access to Justice Act (EAJA) fees

(Issued: 07-27-18, Effective: 07-27-18)

5.9.1 What is the Equal Access to Justice Act?

The Equal Access to Justice Act (EAJA) provides for an award of reasonable attorney fees and other expenses to an **eligible individual or entity** who prevails in an **adversary adjudication** against a Federal agency, unless the agency's position was substantially justified.

HHS's rules establishing uniform procedures for the submission and consideration of applications for an award under the EAJA are found at [45 C.F.R. part 13](#).

5.9.1.1 What is an "adversary adjudication"?

"Adversary adjudication" means an adjudication required to be conducted under [5 U.S.C. section 554](#), in which the position of HHS or one of its components is represented by counsel or another representative ("the agency's litigating party") who enters an appearance and participates in the proceeding.

Note: Either a writing or personal appearance may sufficiently represent the government's position to establish an adversary adjudication.³²

5.9.1.2 What is an "eligible individual or entity"?

"Eligible individual or entity" means an individual or entity who:

1. Is a **party** to an adversary adjudication;
2. Is **seeking an award** in connection with the adversary adjudication; and

³² See *Handron v. Secretary Dept. of Health and Human Services*, 677 F.3d 144 (3rd Circuit 2012).

3. Can show that the individual or entity **meets EAJA eligibility requirements**.³³

Note: For individuals whose involvement in an adversary adjudication is related primarily to their individual interests, the individual's net worth may not exceed \$2,000,000 at the time the adversary adjudication is initiated.³⁴

Note: Non-profit organizations and some small businesses may also be eligible to receive EAJA fees. Different net worth limits apply to businesses.³⁵

5.9.1.3 When does an OMHA adjudication qualify as an “adversary adjudication”?

Cases before an OMHA adjudicator are generally non-adversarial and, therefore, EAJA awards are not available to the prevailing party.

However, if **CMS elects party status** in an ALJ hearing,³⁶ the hearing meets the definition of an adversary adjudication, and attorney fees and other expenses may be available to a party who prevails in the hearing against CMS.

Caution: CMS, *not* a CMS contractor or plan, must be a party to the hearing in order for the case to qualify as an adversary adjudication.

Caution: Cases in which CMS or a CMS contractor requests or elects a non-party participant role do not qualify as adversary adjudications because HHS's position is not being represented by an attorney or other representative employed by HHS.³⁷

Note: In Part D appeals, CMS can never be a party to an ALJ hearing, and therefore EAJA has no application in those appeals.

Even if an appealing party prevails at an ALJ hearing that CMS has elected to join as a party, the party must still meet EAJA eligibility requirements.³⁸ In addition, HHS must

³³ See 45 C.F.R. § 13.4; 45 C.F.R. part 13, subparts A and B.

³⁴ 5 U.S.C. § 504(b)(1)(B); 45 C.F.R. § 13.4(b)(3), (d).

³⁵ 5 U.S.C. § 504(b)(1)(B); 45 C.F.R. § 13.4(b)(3), (d).

³⁶ See 42 C.F.R. § 405.1012.

³⁷ See 74 Fed. Reg. 65296, 65319 (Dec. 9, 2009).

³⁸ See 45 C.F.R. § 13.4; 45 C.F.R. part 13, subparts A and B.

be given an opportunity to show that its position was substantially justified before any award of attorney fees or other costs may be made.³⁹

5.9.2 How can a party apply for an award under EAJA for purposes of an ALJ decision?

Parties who wish to file an application for an award of attorney fees and other costs must do so with the ALJ no later than **30 calendar days** after HHS's final disposition of the proceeding in which the applicant believes it has prevailed.⁴⁰ For the purpose of determining when an application may be filed, an ALJ's decision becomes a "final disposition" when the time to request a review of the decision by the Council has elapsed and no appeal or referral for own motion review has been filed with the Council.⁴¹

Note: If review is sought or taken of an ALJ decision as to which an appellant believes it has prevailed, whether within the agency (for example, a case is referred to the Council) or in the courts, proceedings on the application are stayed pending final disposition of the underlying controversy.⁴²

³⁹ 74 Fed. Reg. 65296, 65319 (Dec. 9, 2009).

⁴⁰ 45 C.F.R. § 13.22(a).

⁴¹ 45 C.F.R. § 13.22(b).

⁴² 45 C.F.R. § 13.22(d).

Revision history

Date	Description	Sections/subsections updated
07/27/2018	Initial Release	N/A

If the table above indicates there are prior versions of this chapter, click [here](#) to view them.