

OMHA Case Processing Manual

Chapter 15 CONDUCTING CONFERENCES AND HEARINGS; POSTHEARING DEVELOPMENT

| Section | Title |
|---------|----------------------------------------|
| 15.0 | Chapter overview |
| 15.1 | Prehearing and posthearing conferences |
| 15.2 | Matters to consider before the hearing |
| 15.3 | Conducting hearings |
| 15.4 | Consolidated hearings |
| 15.5 | Continued hearings |
| 15.6 | Supplemental hearings |
| 15.7 | Posthearing development |

15.0 Chapter overview

(Issued: 11-21-19, Effective: 11-21-19)

This chapter describes the process for conducting conferences and hearings. A conference may be conducted before a hearing to facilitate the hearing process, or after the hearing to facilitate the hearing decision. Hearings are conducted to take oral argument and testimony from the parties and non-party participants, and to allow the parties to call witnesses and cross-examine the witnesses of other parties. This chapter describes the procedural and administrative matters to consider before conducting a hearing, and describes how these matters may be addressed at the hearing. While ALJs have broad discretion in conducting a hearing, this chapter describes the regulatory and OMHA administrative requirements and provides suggested best practices. This chapter also describes when and how to stop a hearing and continue it to a later date, and actions that can be taken to develop the administrative record after an initial hearing has been conducted.

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).

15.1 Prehearing and posthearing conferences

(Issued: 11-21-19, Effective: 11-21-19)

15.1.1 When is a prehearing conference held?

A prehearing conference may be held to facilitate a hearing.¹ For example, a prehearing conference may be conducted:

- To clarify or narrow the issues or claims on appeal;
- To establish how the hearing will proceed; or
- To discuss what information the ALJ may find most useful in preparation for the hearing or for presentation at the hearing.

Example: In an appeal in which the appellant challenges the statistical sample and extrapolation, it is common for the appellant to call multiple witnesses and experts (for example, a statistical sampling expert, billing expert, and medical expert). The ALJ may determine that a prehearing conference would be beneficial to facilitate scheduling the hearing and the hearing itself. The conference may cover the length of time each proposed witness or expert is expected to testify, and whether the appellant intends to present evidence and argument for each underlying claim in the sample or address the general denial reason common to the claims.

See [OCPM 14.1](#) for instructions on scheduling and noticing a prehearing conference.

15.1.2 When is a posthearing conference held?

A posthearing conference may be held to facilitate a hearing decision.² For example, a posthearing conference may be conducted:

- To obtain a status update on the submission of posthearing documentation;
- To grant or deny a party's request for extending the deadline for documentation submission; or

¹ 42 C.F.R. §§ 405.1040(a), 423.2040(a).

² 42 C.F.R. §§ 405.1040(a), 423.2040(a).

- To confirm that any posthearing documentation submitted has been sent to the other parties and to establish a deadline by which a party's response to the posthearing documentation must be received by the ALJ.

Example: At a hearing, the ALJ kept the record open for the submission of posthearing documentation and established a submission deadline. After the hearing, the appellant requested an extension of the deadline but did not indicate a reason for the request. The ALJ may conduct a posthearing conference to determine whether to grant or deny the appellant's request for extending the deadline. A posthearing conference may not be held to receive testimony or other evidence.

15.1.3 Is there a right to a prehearing or posthearing conference?

No. A party may request a prehearing or posthearing conference, but only the ALJ determines whether one will be conducted.³ An ALJ may also decide on his or her own motion to conduct a prehearing or posthearing conference.⁴

15.1.4 Who may conduct a prehearing or posthearing conference?

An ALJ, or an OMHA attorney designated by the ALJ, may conduct either a prehearing or posthearing conference.⁵

A prehearing or posthearing conference may not be conducted for an appeal assigned to an attorney adjudicator.

15.1.5 What matters may be discussed at a prehearing or posthearing conference?

At the conference, the **matters stated in the notice** of the prehearing or posthearing conference (OMHA-153T) may be discussed.⁶

Additional matters may only be considered if:

- The **ALJ** is conducting the conference; and
- The **parties consent** to consideration of the additional matters in **writing**.⁷

³ 42 C.F.R. §§ 405.1040(a), 423.2040(a).

⁴ 42 C.F.R. §§ 405.1040(a), 423.2040(a).

⁵ 42 C.F.R. §§ 405.1040(c)(1), 423.2040(e)(1).

⁶ 42 C.F.R. §§ 405.1040(c)(1), 423.2040(e)(1).

⁷ 42 C.F.R. §§ 405.1040(c)(1), 423.2040(e)(1).

15.1.6 Can an ALJ require CMS, a CMS contractor, or a Part D plan sponsor to participate in a prehearing or posthearing conference?

An ALJ may request, but may not require, CMS, a CMS contractor, or a Part D plan sponsor to participate in a prehearing or posthearing conference. The ALJ may not draw any adverse inferences if CMS, the CMS contractor, or the Part D plan sponsor does not participate in a prehearing or posthearing conference.⁸

15.1.7 Can an ALJ require a party, a non-party participant, or a witness to participate in a prehearing or posthearing conference?

An ALJ may not require a party, a non-party participant, or a witness to participate in a prehearing or posthearing conference. Attendance at a prehearing or posthearing conference is voluntary.

15.1.8 Can testimony and evidence be taken at a prehearing or posthearing conference?

No. Testimony and other evidence may not be taken at a prehearing or posthearing conference.⁹

15.1.9 Are parties and non-party participants sworn in at a prehearing or posthearing conference?

No. Because testimony is not taken at a prehearing or posthearing conference, parties and non-party participants are not sworn in.

15.1.10 Are prehearing and posthearing conferences recorded?

Yes. An audio recording is made of the conference and included in the administrative record for the appeal.¹⁰ A backup copy of the recording is stored on the appropriate hard drive in accordance with local procedures (see [OCPM 19.3.2](#)).

15.1.11 What is a prehearing or posthearing conference order?

The Prehearing/Posthearing Conference Order (OMHA-154T) documents the actions and agreements resulting from the conference.¹¹ Absent a party's objection to the order, its terms become part of the administrative record and are binding on all parties.

⁸ 42 C.F.R. §§ 405.1010(a)(2), 423.2010(a)(2).

⁹ 82 Fed. Reg. 4974, 5076 (Jan. 17, 2017).

¹⁰ 42 C.F.R. §§ 405.1040(c)(2), 405.1042(a)(1), 423.2040(e)(2), 423.2042(a)(1).

¹¹ 42 C.F.R. §§ 405.1040(d), 423.2040(f).

15.1.11.1 Who may issue a prehearing or posthearing conference order?

The **ALJ** issues the Prehearing/Posthearing Conference Order (OMHA-154T), even if the conference was conducted by an OMHA attorney (*see* OCPM 15.1.4).¹²

15.1.11.2 To whom is the prehearing or posthearing conference order sent?

The Prehearing/Posthearing Conference Order (OMHA-154T) with a Generic Notice (OMHA-120T) is sent to all parties and non-party participants who attended the conference.¹³

15.1.11.3 When does a prehearing or posthearing conference order become binding?

Any party may object to the prehearing/posthearing conference order, including a party who was not present at the conference. If the parties do not object to the prehearing/posthearing conference order within 10 calendar days of receiving the order, or 1 calendar day for **expedited Part D** appeals, plus any additional time granted by the ALJ, the agreements and actions become part of the administrative record and are binding on all parties.¹⁴

Note: For orders that are sent by regular mail, receipt is presumed to occur 5 calendar days after the notice is placed in the mail.

Note: For **expedited Part D** appeals, a mailed notice is sent by overnight mail. Otherwise, the advance notice requirement in [OCPM 14.1.3.3](#) plus the time frame for objections would exceed the 10 calendar day adjudication period.

15.1.11.4 What if a party objects to a prehearing or posthearing conference order?

If a party objects to the prehearing/posthearing conference order, the order is not binding, but nevertheless must remain in the administrative record for the appeal.¹⁵

If a party orally objects to the order, the objection must be documented in a Report of Contact (OMHA-101). The ALJ will rule on the objection, if necessary, and may schedule another prehearing or posthearing conference, if needed.

¹² 42 C.F.R. §§ 405.1040(d), 423.2040(f).

¹³ 42 C.F.R. §§ 405.1040(d), 423.2040(f).

¹⁴ 42 C.F.R. §§ 405.1040(d), 423.2040(f).

¹⁵ 42 C.F.R. §§ 405.1040(d), 405.1042(a), 423.2040(f), 423.2042(a).

Example: A prehearing conference is conducted for an appellant that requested to participate in [OMHA's Statistical Sampling Initiative](#). The ALJ issues a prehearing conference order confirming the appellant's consent to participate and the universe of appeals for statistical sampling. The appellant objects to the order, withdrawing consent for statistical sampling. The order is not binding, and the appeals cannot be combined for statistical sampling.

Example: The parties agree to a specific date for the hearing at a prehearing conference, which is documented in the prehearing conference order. The appellant objects to the order and requests that the hearing be rescheduled. The ALJ must determine if the party has good cause to reschedule the hearing, and may change the hearing date or schedule another prehearing conference if needed.¹⁶

Example: A prehearing conference is conducted to clarify the issues on appeal. The ALJ issues a prehearing conference order confirming the issues that were agreed upon at the conference. The appellant objects, stating that the issues are not accurately described in the order. The ALJ must make a decision on the objection to the issues either in writing, at another prehearing conference, or at the hearing.¹⁷

Example: At the posthearing conference, the ALJ establishes a deadline by which a party's response to the appellant's posthearing brief must be received by the ALJ. The ALJ issues a posthearing conference order confirming the deadline date. A party, who was not present at the posthearing conference, objects to the order and requests that the deadline be extended. The ALJ must make a decision on the objection either in writing or at another posthearing conference.

15.1.12 How is a prehearing conference conducted?

An ALJ, or an OMHA attorney designated by the ALJ (see OCPM 15.1.4), typically begins a prehearing conference by stating the conference date and time, the appellant's name, and the OMHA appeal number(s). The ALJ or attorney designee should explain that the prehearing conference is being recorded and that an audio recording will be included in

¹⁶ 42 C.F.R. §§ 405.1020(e)(4), 423.2020(e)(4).

¹⁷ 42 C.F.R. §§ 405.1024(c), 423.2024(c).

the administrative record.¹⁸ All individuals present at the prehearing conference should be identified during the recorded portion of the conference.

The ALJ or attorney designee typically discusses the purpose of the prehearing conference and addresses the matters that were stated in the notice of prehearing conference. Depending on the purpose of the prehearing conference, the ALJ or attorney designee may confirm the issues on appeal, may establish how the hearing will proceed (*see* OCPM 15.1.1), and may also review the index of the administrative record, if one was distributed with the notice of prehearing conference. The parties and non-party participants will be given the opportunity to discuss the matters stated in the notice of prehearing conference, and may reach agreements or decide on actions that will facilitate the hearing. The ALJ or attorney designee should establish deadlines, if applicable, with respect to any agreements made during the prehearing conference.

The ALJ or attorney designee should explain that the ALJ will issue an order stating all of the agreements and actions resulting from the prehearing conference. The ALJ or attorney designee should also explain that if a party does not object within 10 calendar days of receiving the order, or within 1 calendar day of receiving the order for expedited Part D appeals, or any additional time granted by the ALJ, the agreements and actions will become part of the administrative record and will be binding on all parties.

Information about the prehearing conference must be included in the written decision. See [OCPM 16.3.6](#) for instructions on how to include conference information in the procedural history section of the written decision.

15.1.13 How is a posthearing conference conducted?

An ALJ, or an OMHA attorney designated by the ALJ (*see* OCPM 15.1.4), typically begins a posthearing conference by stating the conference date and time, the appellant's name, and the OMHA appeal number(s). The ALJ or attorney designee should explain that the conference is being recorded and that an audio recording will be included in the administrative record.¹⁹ All individuals present at the posthearing conference should be identified during the recorded portion of the conference.

The ALJ or attorney designee typically discusses the purpose of the posthearing conference and addresses the matters that were stated in the notice of posthearing conference. The parties and non-party participants will be given the opportunity to discuss the matters stated in the notice of posthearing conference, and may reach

¹⁸ 42 C.F.R. §§ 405.1040(c)(2), 405.1042(a)(1), 423.2040(e)(2), 423.2042(a)(1).

¹⁹ 42 C.F.R. §§ 405.1040(c)(2), 405.1042(a)(1), 423.2040(e)(2), 423.2042(a)(1).

agreements or decide on actions that will facilitate the hearing decision. The ALJ or attorney designee should establish deadlines, if applicable, with respect to any agreements made during the posthearing conference.

The ALJ or attorney designee should explain that the ALJ will issue an order stating all of the agreements and actions resulting from the posthearing conference. The ALJ or attorney designee should also explain that if a party does not object within 10 calendar days of receiving the order, or within 1 calendar day of receiving the order for expedited Part D appeals, or any additional time granted by the ALJ, the agreements and actions will become part of the administrative record and will be binding on all parties.

Information about the posthearing conference must be included in the written decision. See [OCPM 16.3.6](#) for instructions on how to include conference information in the procedural history section of the written decision.

15.1.14 Can an ALJ conduct a prehearing conference in lieu of a hearing?

No. An ALJ may not conduct a prehearing conference in lieu of a hearing. The purpose of a prehearing conference is to facilitate the hearing; it is not a substitute for the hearing itself. Unlike at a hearing, testimony and other evidence may not be taken at a prehearing conference (*see* OCPM 15.1.8).²⁰

If, after conducting a prehearing conference, the ALJ determines that a hearing is no longer necessary because the matter can be resolved without conducting a hearing under the applicable regulations, the ALJ may issue a decision on the basis of the written record, or may issue a dismissal or remand, as appropriate.²¹

15.1.15 Can an ALJ conduct a posthearing conference in lieu of a supplemental hearing?

No. If an ALJ wishes to collect additional evidence or testimony after a hearing has been conducted, the ALJ may not conduct a posthearing conference in lieu of a supplemental hearing. Unlike at a hearing, testimony and other evidence may not be taken at a posthearing conference (*see* OCPM 15.1.8).²²

²⁰ 82 Fed. Reg. 4974, 5076 (Jan. 17, 2017).

²¹ 82 Fed. Reg. 4974, 5076 (Jan. 17, 2017).

²² 82 Fed. Reg. 4974, 5076 (Jan. 17, 2017).

15.2 Matters to consider before the hearing

(Issued: 11-21-19, Effective: 11-21-19)

15.2.1 Who may hold a hearing?

Only an **ALJ** may hold a hearing; an attorney adjudicator may not hold a hearing.²³

15.2.2 Where may a hearing be held?

With the exception of in-person hearings that are held at an offsite location (see [OCPM 14.4.4](#)), hearings must be conducted on OMHA premises, either in a dedicated hearing room or another location (for example, a conference room or an ALJ's office) that is equipped with the necessary equipment to conduct and record the hearing, or other location authorized in advance by the Chief ALJ or designee. An ALJ may not conduct a hearing while teleworking from his or her alternate duty station or anywhere off of the OMHA premises, unless authorized in advance by the Chief ALJ or designee.

Example: When OMHA premises are inaccessible due to a hurricane or other natural disaster, or when the equipment to conduct a hearing is unavailable, the Chief ALJ or designee may temporarily approve a location (for example, a Courtroom Connect facility) where an ALJ may hold a hearing.

15.2.3 How do parties, non-party participants, and witnesses appear for a hearing?

Parties, non-party participants, and witnesses may appear for a hearing in person, by VTC, or by telephone.²⁴ The parties, non-party participants, and witnesses do not have to appear using the same hearing format. The default hearing format is **VTC** for an appellant who is an unrepresented beneficiary, and **telephone** for all other individuals (that is, appellants who are not unrepresented beneficiaries, and all non-appellant parties and participants).²⁵ See [OCPM 14.3.4.1](#) for more information on hearing formats.

15.2.4 Are interpreter services available during a hearing?

Interpreter services and other accommodations are available during a hearing, free of charge, for individuals with limited English proficiency or communication disabilities. Interpreter services are also available during prehearing and posthearing conferences. See [OCPM 14.4.6](#) for information on accommodating known and suspected language

²³ 42 C.F.R. §§ 405.1000, 423.2000; see also 82 Fed. Reg. 4974, 4981–4989 (Jan. 17, 2017).

²⁴ 42 C.F.R. §§ 405.1000(b), 423.2000(b), 405.1036(a), 423.2036(a).

²⁵ 42 C.F.R. §§ 405.1020(b), 423.2020(b).

barriers, and [OCPM 14.4.7](#) for information on special accommodations for individuals with physical or mental impairments.

Note: OMHA staff may not serve as an interpreter during the hearing, even if that staff is bilingual. Interpreter services are provided by outside vendors that employ qualified interpreters (oral) and translators (written). Upon a party's request for interpreter services, OMHA will arrange for interpreter services to be provided during the hearing.

15.2.5 May another ALJ hold a hearing if the assigned ALJ is unavailable on the day of the hearing?

If the assigned ALJ is unavailable on the day of the hearing, the case may be reassigned to a substitute ALJ, who is available and has sufficient time to prepare for the hearing. The appeal is reassigned to the substitute ALJ in the case processing system. The substitute ALJ would issue the disposition, and the substitute ALJ's team is responsible for mailing the disposition package and closing the case in accordance with [OCPM 19](#). At the hearing, the substitute ALJ should explain that:

- He or she is a substitute for the ALJ assigned to the case;
- The substitute is also an ALJ;
- The substitute has prepared for the hearing;
- The substitute is familiar with the facts and issues of the case; and
- None of the parties are disadvantaged by the substitution.

The substitute ALJ should also explain that the case was reassigned and that he or she will issue the disposition in the appeal. Before beginning the substantive portion of the hearing, the substitute ALJ should ask if there is any objection to the substitution. If there is an objection to the substitution, the substitute ALJ considers the party's objections and decides whether to proceed with the hearing or withdraw (see [OCPM 14.6.9](#)). If the substitute ALJ proceeds with the hearing, information about the substitution should be included in the procedural history section of the written decision.

15.2.6 Who may attend a hearing?

A hearing is open to the parties and to other persons (for example, witnesses) that the ALJ considers necessary and proper.²⁶ See [OCPM 4](#) for information on who is a party to an OMHA appeal.

CMS or a CMS contractor may elect to attend the hearing as a party in a **Part A, B, or C** appeal. In a **Part A, B, C, or D** appeal, CMS, a CMS contractor, or a Part D plan sponsor may also elect (in a Part A, B, or C appeal) or request (in a Part D appeal) to attend the hearing as a non-party participant. See [OCPM 6](#) for more information on CMS, CMS contractor, and plan participation in OMHA proceedings, including the oral hearing.

15.2.6.1 May an ALJ require parties or non-parties to participate in a hearing?

An ALJ may require the **parties** to participate in a hearing if it is necessary to decide the case.²⁷ An ALJ may also, on his or her own initiative, or at the request of a party where discovery has been initiated, issue subpoenas for the appearance and testimony of witnesses, but may not issue a subpoena to CMS, a CMS contractor, or a Part D plan sponsor to compel its appearance or testimony.²⁸

15.2.6.2 May an ALJ hold a hearing to obtain testimony from a non-party if all the parties have waived the right to appear?

Yes. If an ALJ determines that it is necessary to obtain testimony from a **non-party**, the ALJ may hold a hearing to obtain that testimony, even if all of the parties have waived the right to appear. In that event, however, the ALJ will give the parties the opportunity to appear when the testimony is given, but may hold the hearing even if none of the parties decide to appear.²⁹

15.2.6.3 May an ALJ require CMS, a CMS contractor, or a Part D plan sponsor to attend a hearing?

Subject to the limitations on when party status is permitted, an ALJ may **request**, but not require, that CMS, a CMS contractor, or a Part D plan sponsor join the proceedings, including the oral hearing, if one is held, as a party (for Parts A, B, and C

²⁶ 42 C.F.R. §§ 405.1030(a), 423.2030(a).

²⁷ 42 C.F.R. §§ 405.1000(f), 405.1036(b)(3), 423.2000(f), 423.2036(b)(3).

²⁸ 42 C.F.R. §§ 405.1036(f), 405.1036(f)(1), 423.2036(f), 423.2036(f)(1).

²⁹ 42 C.F.R. §§ 405.1000(f), 423.2000(f).

appeals) or as a non-party participant (for Parts A, B, C, and D appeals) (see [OCPM 6.4](#)).³⁰

An ALJ may not draw adverse inferences if CMS, a CMS contractor, or a Part D plan sponsor decides not to participate in any proceedings before an ALJ, including the hearing.³¹

An ALJ may not issue a subpoena to compel the appearance or testimony of CMS, a CMS contractor, or a Part D plan sponsor.³² See [OCPM 6](#) for more information on CMS, CMS contractor, and plan participation in OMHA proceedings, including the oral hearing.

15.2.6.4 May an ALJ exclude CMS, a CMS contractor, or a Part D plan sponsor from the hearing?

In **Part A, B, and C appeals**, if CMS and one or more contractors, or multiple contractors, elect to be a party to a hearing, only the first entity to file its election after the notice of hearing is issued is made a party to the hearing, unless the ALJ grants leave for an additional entity to be a party (see [OCPM 6.6.1](#), [6.6.3](#), and [6.6.5](#)).³³ The other entities may participate in the proceedings as non-party participants, but are precluded from attending the oral hearing if one is held.³⁴

In **Part A, B, and C appeals**, CMS or a CMS contractor may be precluded from attending the oral hearing if the election is determined to be invalid (see [OCPM 6.6.2](#)).³⁵

In **Part A and Part B appeals**, if CMS or a contractor does not elect to be a party and more than one entity elects to participate in the proceedings, only the first entity to file its response to the notice of hearing may participate in the oral hearing.³⁶

In **Part D appeals**, only the enrollee is a party, and an ALJ has the discretion to allow or deny non-party participant status requested by CMS, the Part D IRE, or the Part D plan sponsor.³⁷

³⁰ 42 C.F.R. §§ 405.1010(a)(2), 405.1012(a)(2), 423.2010(a)(2).

³¹ 42 C.F.R. §§ 405.1010(a)(2), 405.1012(a)(2), 423.2010(a)(2).

³² 42 C.F.R. §§ 405.1036(f), 423.2036(f).

³³ 42 C.F.R. § 405.1012(d).

³⁴ 42 C.F.R. §§ 405.1010(d)(1), (d)(3), 405.1012(d)(1).

³⁵ 42 C.F.R. §§ 405.1010(e), 405.1012(e).

³⁶ 42 C.F.R. § 405.1010(d)(2).

³⁷ 42 C.F.R. §§ 423.2008, 423.2010(c).

15.2.7 When should new evidence be examined?

Generally, an ALJ should examine new evidence before a hearing is held, and must do so for new evidence submitted by a provider, supplier, or beneficiary represented by a provider or supplier in an appeal of a **Part A or Part B QIC reconsideration**, to determine whether there is good cause for submitting the evidence for the first time at the OMHA level.³⁸

The good cause requirement for new evidence applies to a provider, supplier, or beneficiary represented by a provider or supplier in an appeal of a Part A or Part B QIC reconsideration.³⁹

The good cause requirement for new evidence does not apply to an unrepresented beneficiary, CMS or any of its contractors, a Medicaid State agency, an applicable plan, or a beneficiary represented by someone other than a provider or supplier.⁴⁰

For new evidence that is subject to the good cause requirement, if the ALJ determines that there was not good cause for submitting the evidence for the first time at the OMHA level, the ALJ must exclude the evidence from the proceeding and may not consider it in reaching a decision.⁴¹ If a hearing is scheduled, as soon as possible, but no later than the start of the hearing, the ALJ must notify all parties and non-party participants who responded to the notice of hearing whether the evidence will be considered or is excluded from consideration.⁴² This notification may be made by telephone and documented in a Report of Contact (OMHA-101), or on the record at the start of the hearing before discussion on the merits of the case. The ALJ's determination on the admissibility of the new evidence must be documented in the written decision (see [OCPM 16.3.1](#) and [OCPM 16.3.6](#)).

15.2.8 How are hearings recorded?

An audio recording is made of the hearing and included in the administrative record for the appeal.⁴³ A backup copy of the recording is stored on the appropriate hard drive in accordance with local procedures (see [OCPM 19.3.2](#)).

³⁸ 42 C.F.R. § 405.1028(a)(1).

³⁹ 42 C.F.R. §§ 405.1018(c), 405.1028(a)(1).

⁴⁰ 42 C.F.R. § 405.1018(c), (d); 423.2018(b)(3).

⁴¹ 42 C.F.R. § 405.1028(a)(3).

⁴² 42 C.F.R. § 405.1028(a)(4).

⁴³ 42 C.F.R. §§ 405.1042(a)(1), 423.2042(a)(1).

15.3 Conducting hearings

(Issued: 11-21-19, Effective: 11-21-19)

15.3.1 How does a hearing begin?

An ALJ typically proceeds through a series of preliminary steps when beginning a hearing. The content and format are left to the discretion of the ALJ, but should generally include the following:

- An introductory statement (*see* OCPM 15.3.1.1);
- Identification of the hearing attendees (*see* OCPM 15.3.1.2);
- Notifying the parties of the right to representation (*see* OCPM 15.3.1.3);
- Swearing in the witnesses (*see* OCPM 15.3.1.4);
- Admission of the exhibits (*see* OCPM 15.3.1.5);
- Statement of the issues (*see* OCPM 15.3.1.6);
- Resolution of any outstanding procedural matters (*see* OCPM 15.3.1.7); and
- A hearing overview (*see* OCPM 15.3.1.8).

15.3.1.1 What does an introductory statement include?

While there is no standard script for a hearing, the ALJ may want to begin with the following:

- Ensure everyone can hear and be heard;
- State the current date and time;
- State the name of the ALJ conducting the hearing;
- State the name of the appellant(s) and the OMHA appeal number(s);
- State that the hearing is a consolidated hearing, if applicable;
- Explain that the hearing will be recorded and will be made part of the administrative record;
- Briefly explain the ALJ hearing process (for example, the ALJ might explain the standard of review is *de novo*); and

- Explain that a written decision will be issued after the hearing.

Example: “Good Afternoon. My name is Judge Jones. I am the Administrative Law Judge assigned to hear the case of Provider Incorporated, OMHA appeal number 1-234567890. Today is March 8, 2019, and it is approximately 1:00 p.m. eastern standard time. Today’s hearing is being digitally recorded in Cleveland, Ohio, and the audio recording will be made part of the complete administrative record. This is a de novo hearing, meaning I am not bound by any prior decisions made in this matter and will conduct a complete re-examination of the facts and evidence. My decision will be based on the administrative record, including the testimony taken during today’s hearing.”

Example: “Good Afternoon. We are on the record in this appeal. The OMHA appeal number is 1-234567890. This appeal is being digitally recorded and will be made part of the complete administrative record. Today is Tuesday, December 16, 2018, at 2:00 p.m. eastern standard time. We are here on the appeal of Supplier Incorporated. My name is Judge Mary Smith, the judge assigned to hear and decide this case for the Office of Medicare Hearings and Appeals. I am conducting this hearing from the Miami, Florida field office. For the record, the jurisdictional and filing requirements have been met. This is a de novo proceeding, which means that I will take a completely new look at the facts and issues in this case. I did not participate in making the determinations in the prior proceedings, nor am I bound by those determinations. I will make my decision based on the record. The record will consist of the exhibits that are admitted into evidence, and testimony taken from today’s hearing. In order to prevail, the appellant must prove its case by a preponderance of the evidence. This means that if the evidence is placed on a balancing scale, the weight of the evidence must tilt in favor of the appellant.”

15.3.1.2 How are the hearing attendees identified?

All individuals present at the hearing should be identified during the recorded portion of the hearing. The ALJ should ask for the correct spelling of each individual’s first and last name, as well as role or job title, if applicable and not already known from the administrative record. This process helps ensure that the names are spelled correctly if they are later restated in the written decision.

It is common for providers, suppliers, or CMS contractors to identify individuals who are present but will only observe the hearing (for example, for training purposes). The ALJ should ask the other individuals present at the hearing whether there are any objections to the presence of an observer, and rule on the objection. The ALJ has discretion to exclude the observer from the hearing pursuant to [42 C.F.R. sections 405.1030\(a\)](#) and [423.2030\(a\)](#), which state that a hearing is open to the parties and other persons the ALJ considers necessary and proper.

If the ALJ wishes to have OMHA staff present at the hearing, the ALJ should identify the staff member and state his or her role in the hearing (for example, for training purposes, or to operate the hearing recording equipment). The ALJ should ask the individuals present at the hearing whether there are any objections to the presence of the OMHA staff, and rule on the objection. If the ALJ considers the OMHA staff member's presence necessary and proper, the ALJ may overrule the objection pursuant to [42 C.F.R. sections 405.1030\(a\)](#) and [423.2030\(a\)](#).

Example: To identify all individuals present at the hearing and their respective roles, the ALJ may simply ask, "Who is appearing on behalf of the appellant (or beneficiary, or CMS contractor, etc.)," thereby inviting the person to provide his or her name and role (for example, appointed representative, husband, case manager). Alternatively, the ALJ may ask for the names and roles before the recording begins. After hearing attendees have been identified, the ALJ may simply state on the record who is appearing and in what capacity, and ask whether there is anyone else present who has not been identified. If a CMS contractor is present, the ALJ should also confirm whether the CMS contractor is appearing as a party or as a non-party participant.

Example: "The administrative record indicates that the appellant is being represented by Caleb Knupp. Mr. Knupp, can you please identify yourself by spelling your name and stating what your position is or your relationship to the appellant? [Response] Next, the administrative record indicates that Mary Jones is here on behalf of the contractor. Ms. Jones, can you please identify yourself by stating your name and position with the contractor, and state whether the contractor is appearing as a party or as a non-party participant. [Response] Is there anyone else present who has not been identified?"

15.3.1.3 How is the right to representation addressed?

Parties to an ALJ hearing have a right to make their appearance by means of a representative. Representatives may either be authorized by law (for example, power of attorney, legal guardian, or executor of an estate) or appointed by the party (for example, a spouse or attorney) to represent the party in a Medicare appeal. The administrative record must contain a valid appointment of representative or other documentation of the representative's authority. See [OCPM 5](#) for more information on representatives. 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 (see [OCPM 5.1.3.2](#)).

If there are unrepresented parties present at the hearing, the ALJ should explain the right to representation and confirm whether the unrepresented parties wish to proceed with the hearing. It is common for unrepresented parties to waive their right to representation in order to proceed with the hearing as scheduled. In the event that an unrepresented party requests a continuance (see [OCPM 15.5](#)) in order to obtain an attorney or other representative, the ALJ should make a ruling at that time as to whether the continuance is granted. Specifically, the ALJ should determine whether good cause exists to grant the request and reschedule the hearing. Relevant factors to consider include whether the requesting party is an unrepresented beneficiary and/or whether the individual previously made the same request and already received a prior continuance.⁴⁴ If a continuance is granted, the ALJ should remind the party to submit a valid appointment of representative or other documentation of the representative's authority so that the Notice of Continued Hearing (OMHA-1024CT) or Notice of Continued Expedited Part D Hearing (OMHA-624CT) can be sent to the party's attorney or other representative.

Example: "The parties in this case are entitled to representation. Do you understand that right and wish to proceed today without a representative?"

Example: "The parties in this case are entitled to a representative, but it is my understanding that you wish to waive that right today, is that correct Dr. Smith? [Yes] Mr. Jones? [Yes]."

Example: When an unrepresented beneficiary appears at the hearing, the ALJ may explain, "This is an administrative proceeding, which is less formal than

⁴⁴ 42 C.F.R. §§ 405.1020(e), (f), (g), 423.2020(e), (f), (g).

other legal proceedings. You may have a friend or family member represent you. A representative is not required to be an attorney. You are entitled to have a representative, at your own expense, but it is not required that you be represented by someone else. Do you wish to represent yourself and proceed with the hearing?”

Caution: “Right to representation” is not the same as a “right to counsel.” A right to counsel means that a defendant, usually in a criminal proceeding, has a right to representation by a court-appointed lawyer if the defendant cannot afford to hire one.⁴⁵ Parties to an OMHA proceeding should not be informed that there is a right to counsel.

15.3.1.4 Who must be sworn in?

Witnesses

All witnesses must be sworn in, unless the ALJ finds an important reason to excuse them from taking an oath or affirmation.⁴⁶ At the hearing, the ALJ should make a ruling as to whether a witness is excused from taking an oath or affirmation. Attorneys and other representatives who are present only to provide legal arguments and question witnesses do not need to be sworn in.

The concept of a “witness” is construed broadly at OMHA hearings. The individuals providing testimony frequently have no first-hand account of the items or services furnished, but are often presenting statements and arguments based on their own review of the evidentiary documentation. Nonetheless, all witnesses must be sworn in.

Example: “Do you swear or affirm that your testimony today shall be the truth, under penalty of law?”

It is common for providers, suppliers, or CMS contractors to identify individuals who are present but who will only observe the hearing (for example, for training purposes). Because these individuals do not provide testimony, the ALJ does not need to swear them in.

⁴⁵ *Right to counsel*, Black’s Law Dictionary (10th ed. 2014).

⁴⁶ 42 C.F.R. §§ 405.1036(d), 423.2036(d).

Interpreters

Interpreters are generally required to swear an oath of accuracy and impartiality, affirming that the interpreter will provide an accurate and impartial interpretation of the statements at the hearing.

However, there is an exception for Video Relay Service (VRS) interpreters. Distinct from video remote interpreting, VRS is a form of Telecommunications Relay Services (TRS) that enables persons with hearing disabilities who use American Sign Language to communicate with voice telephone user through video equipment, rather than typed text. VRS interpreters do not need to be sworn in. According to Federal Communications Commission (FCC) guidance, VRS interpreters are only responsible for relaying the information transmitted to them. They bear no responsibility for whether the information they relay is received, or received accurately, and it is the position of the FCC that a VRS interpreter may not swear an oath of accuracy and impartiality because he or she is not an officer of the court.⁴⁷

Example: “Do you swear or affirm to make a true and impartial interpretation of the proceedings?”

Example: “Do you swear or affirm that the interpretations you will make in this case will be true, full, and accurate?”

15.3.1.5 How are exhibits admitted?

The ALJ should determine whether the record is complete, and whether any party objects to the admission of the exhibits identified in the index of the administrative record.

If any evidence submitted by a party was excluded by the ALJ (for example, because the information is duplicative of evidence already in the record,⁴⁸ or because the party was required to demonstrate good cause for submitting the evidence for the first time at the OMHA level, and the ALJ did not find good cause⁴⁹), the ALJ should identify the evidence that is excluded from consideration.

Example: For ECAPE: “An index of the administrative record was distributed with the notice of hearing. This index includes exhibited records and non-

⁴⁷ FCC 04-137 (June 2004).

⁴⁸ 42 C.F.R. §§ 405.1028(b), 405.1042(a)(2), 423.2042(a)(2).

⁴⁹ See 42 C.F.R. § 405.1028(a).

exhibited records. Do you have any objection to the formal admission of the exhibited records? [No] Then I hereby admit the exhibited records into the administrative record.”

15.3.1.6 What does a statement of the issues include?

By **default**, the statement of the issues before the ALJ include all of the issues brought out in the initial determination, redetermination, or reconsideration that were not decided entirely in a party’s favor, for the claims or other appealed matters specified in the request for hearing.⁵⁰

The ALJ may consider a **new issue**, including a favorable portion of a determination on a claim or appealed matter specified in the request for hearing, at the hearing if:

- The ALJ notifies the parties that were or will be sent the notice of hearing about the new issue before the start of the hearing;⁵¹
- The resolution of the new issue could have a material impact on the claim or appealed matter; and
 - There is new and material evidence that was not available or known at the time of the determination and that may result in different conclusion; or
 - The evidence that was considered in making the determination clearly shows on its face that an obvious error was made at the time of the determination.⁵²

The ALJ should present a brief statement of the issues that are described in the notice of hearing. Unless there are new issues being raised for the first time at the ALJ hearing, the issue statement may be presented generally, or with specificity if the ALJ so chooses. See [OCPM 14.6.8](#) for information on what to do if a party objects to the issues stated in the notice of hearing.

Example: General statement of the issues. “The issue before me today is whether Medicare Part A covers the skilled nursing facility services furnished to the beneficiary from January 1, 2015 to January 31, 2015. A secondary issue is whether [section 1879 of the Social Security Act](#) may limit liability

⁵⁰ 42 C.F.R. §§ 405.1032, 423.2032.

⁵¹ 42 C.F.R. §§ 405.1032(b)(2), 423.2032(b)(2).

⁵² 42 C.F.R. §§ 405.1032(b)(1), 423.2032(b)(1).

for any noncovered services. Is that your understanding of the issues before me today?”

Example: Specific statement of the issues. “One of the issues before me today is whether the ground ambulance services provided by the appellant to the beneficiary on August 8, 2013, from her home to the physician’s office, meet the origin and destination requirements of [42 C.F.R. section 410.40\(e\)](#). If I determine that the physician’s office is not a covered destination under [42 C.F.R. section 410.40\(e\)](#), a secondary issue is whether Medicare coverage is statutorily excluded under section [1861\(s\)\(7\) of the Social Security Act](#). If Medicare coverage is statutorily excluded, the last issue is whether the beneficiary is financially responsible for the non-covered ambulance services. Is that your understanding of the issues before me today?”

15.3.1.7 Are there any outstanding procedural matters to resolve?

In rare cases, there may be additional procedural matters that must be resolved before the ALJ proceeds with the substantive portion of the hearing, for example:

- Discovery requests or disputes;⁵³
- Subpoenas or subpoena requests;⁵⁴
- Escalation requests (*see* [OCPM 7.5](#));⁵⁵
- Requests to disqualify an ALJ;⁵⁶ or
- Whether a copy of written statements or other submissions (for example, position papers) was provided to the other parties.⁵⁷

15.3.1.8 What does a hearing overview include?

Before beginning the substantive portion of the hearing, the ALJ should provide a brief hearing overview that explains the order in which the hearing attendees will present their cases, if applicable, and helps facilitate a smooth and orderly hearing. For instance, the ALJ may wish to provide the following reminders:

⁵³ See [42 C.F.R. § 405.1037](#).

⁵⁴ See [42 C.F.R. §§ 405.1036\(f\), 423.2036\(f\)](#).

⁵⁵ See [42 C.F.R. § 405.1016\(f\)](#).

⁵⁶ See [42 C.F.R. §§ 405.1026, 423.2026](#).

⁵⁷ See [42 C.F.R. § 405.1036\(c\)](#).

- Hearing attendees should identify themselves by name before speaking;
- Only one person may speak at a time;
- Hearing attendees should speak loudly and clearly so that an accurate audio recording may be made; and
- If a party or party's representative disagrees with another person's argument or testimony, the party or party's representative should not interrupt, and should wait for his or her turn to respond.

However, an ALJ may choose to not give a hearing overview, particularly if the ALJ knows that the hearing attendees are familiar with the ALJ hearing process.

15.3.2 What happens during the substantive portion of a hearing?

After completing all of the steps to begin the hearing (see OCPM 15.3.1), the ALJ should proceed with the substantive portion of the hearing, which involves examining the issues, questioning the parties and other witnesses, and taking oral argument and testimony.⁵⁸ The ALJ controls the order of presentation, and should direct that statements and questions be addressed to the ALJ rather than to another party or non-party participant, *except* for questions and answers during a cross-examination or direct examination of a party's own witness. During the hearing, each party should be allowed to offer argument and/or testimony, call witnesses, and cross-examine the witnesses of other parties, as applicable. Non-party participant may not call witnesses or cross-examine the witnesses of a party during the hearing.

15.3.2.1 Who presents first at a hearing?

Generally, the appellant should be allowed to present its case first. However, the ALJ has the discretion to decide the order of presentation at a hearing.

15.3.2.2 May an ALJ limit testimony or argument at a hearing?

At a hearing, an ALJ may limit testimony and argument that are not relevant to an issue before the ALJ, that are repetitive of evidence or testimony already in the record, or that relate to an issue that has been sufficiently developed or on which the ALJ has already ruled.⁵⁹ The ALJ may, but is not required to, provide the party or representative with an opportunity to submit additional written statements and

⁵⁸ 42 C.F.R. §§ 405.1030(b)(1), 423.2030(b)(1).

⁵⁹ 42 C.F.R. §§ 405.1030(b)(2), 423.2030(b)(2).

affidavits on the matter, in lieu of testimony and/or argument at the hearing.⁶⁰ The written statements and affidavits must be submitted within the time frame designated by the ALJ.⁶¹ The other parties should be given an opportunity to respond in writing to the written statements and affidavits, within the time frame designated by the ALJ.

15.3.2.3 What if a party is uncooperative, disruptive, or abusive during a hearing?

If a party or representative is uncooperative, disruptive, or abusive during a hearing, the ALJ should warn the party or representative to stop such behavior. The warning should indicate that if such behavior continues, it will result in the party or representative being excused from the hearing. If the representative is the individual who is uncooperative, disruptive, or abusive, the ALJ should give the party, if in attendance, the opportunity to proceed with the hearing without the representative. If the behavior continues after the warning, the ALJ should excuse the party or representative from the hearing, and proceed with the hearing to provide the other parties or non-party participants with an opportunity to offer testimony and/or argument.⁶²

The ALJ will provide the excused party or representative with an opportunity to submit written statements and affidavits in lieu of oral testimony and/or argument at the hearing. The excused party or representative may request a recording of the hearing, and may respond in writing to any statements made by other parties or non-party participants and/or testimony of the witnesses at the hearing.⁶³ The written statements and affidavits must be submitted within the time frame designated by the ALJ.⁶⁴ The other parties will be given an opportunity to respond in writing to the written statements and affidavits, within the time frame designated by the ALJ.

15.3.2.4 What happens if material evidence is missing?

Material evidence includes evidence that may have an impact on the claim or appealed matter, or evidence that may result in a different conclusion. An ALJ has two options when there is material evidence missing at the hearing:

⁶⁰ 42 C.F.R. §§ 405.1030(b)(2), 423.2030(b)(2).

⁶¹ 42 C.F.R. §§ 405.1030(b)(2), 423.2030(b)(2).

⁶² 42 C.F.R. §§ 405.1030(b)(3), 423.2030(b)(3).

⁶³ 42 C.F.R. §§ 405.1030(b)(3), 423.2030(b)(3).

⁶⁴ 42 C.F.R. §§ 405.1030(b)(3), 423.2030(b)(3).

- An ALJ may stop a hearing temporarily and continue it at a later date if he or she believes that there is material evidence missing at the hearing;⁶⁵ or
- An ALJ may choose to proceed with the hearing, keep the record open for the posthearing submission, and establish a submission deadline.

In a **Part A or Part B appeal of a QIC reconsideration**, if the missing evidence is in the possession of the appellant, and the appellant is a provider, supplier, or a beneficiary represented by a provider or supplier, the ALJ must determine if the appellant had good cause in accordance with [42 C.F.R. section 405.1028](#) for not producing the evidence earlier.⁶⁶

See OCPM 15.5 for information on continuing a hearing. See OCPM 15.5.4 for information on what effect a continuance has on the adjudication time frame.

15.3.2.5 What if a hearing cannot be completed in the allotted time?

If a hearing runs longer than the allotted time, the ALJ should ask whether the hearing attendees are available to continue with the hearing beyond the allotted time. If the ALJ has a scheduling conflict, or if one of the hearing attendees is unable to continue with the hearing, the ALJ should stop the hearing temporarily and continue it at a later date to allow a full presentation by all parties. See OCPM 15.5 for information on continuing a hearing.

15.3.2.6 What if the denied items or services are no longer in dispute?

If CMS, a CMS contractor, or a plan⁶⁷ makes an oral statement at the hearing indicating that the items or services in dispute should be covered or payment may be made, or that an enrollee's at-risk determination should be reversed, the ALJ may issue a stipulated decision without making findings of fact, conclusions of law, or further explaining the reasons for the decision.⁶⁸

⁶⁵ [42 C.F.R. §§ 405.1030\(c\), 423.2030\(c\)](#).

⁶⁶ [42 C.F.R. § 405.1030\(c\)](#).

⁶⁷ [42 C.F.R. §§ 405.1038\(c\), 423.2038\(c\)](#). Although [42 C.F.R. section 405.1038\(c\)](#) applies only to CMS and CMS contractors, in the context of a Part C appeal, it is "appropriate" under [42 C.F.R. section 422.562\(d\)](#) to read the regulation as also applying to MA plans. In Part D appeals, [42 C.F.R. section 423.2038\(c\)](#) explicitly applies to statements made by a Part D plan sponsors.

⁶⁸ [42 C.F.R. §§ 405.1038\(c\), 423.2038\(c\)](#).

The ALJ should explain at the hearing that he or she will issue a stipulated decision finding in favor of the appellant or other liable parties on the basis of the oral statement.⁶⁹

Note: If the amount of payment is an issue before the ALJ or attorney adjudicator, CMS, the CMS contractor, or the plan must agree to the amount of payment the parties believe should be made.

Note: CMS, a CMS contractor, or a plan may also make a stipulation in writing. See [OCPM 16.4.3](#) for additional information on stipulated decisions.

15.3.3 How does a hearing end?

At the end of a hearing:

- The ALJ should ask if the parties have anything further to add. The parties should be afforded an opportunity to give a closing statement.
- The ALJ should explain that a written notice will be issued when a decision has been reached.
- *Unless* the record is kept open for submission of posthearing documentation (see [OCPM 15.7.3](#)), the ALJ should explain that the administrative record is closed.

Example: “That concludes today’s hearing. Thank you all for your appearance and participation. I will be taking today’s testimony under further consideration, along with the other evidence in the administrative record, in rendering a written decision, which you will receive by mail. If you disagree with my decision, please refer to the statement of your appeal rights provided on the included notice. With that, the hearing record is closed.”

Example: “Thank you all for your appearance and participation today. The record will remain open until 5:00 p.m. eastern standard time next Friday, April 26, 2019, for the receipt of any posthearing briefs. The record will close without further notice at 5:00 p.m. eastern standard time on April 26, 2019, after which you will receive a written decision in the mail. If you disagree with my decision, your appeal rights are provided on the included notice. This hearing has concluded.”

⁶⁹ 42 C.F.R. §§ 405.1038(c), 423.2038(c).

15.4 Consolidated hearings

(Issued: 11-21-19, Effective: 11-21-19)

15.4.1 What is a consolidated hearing?

A consolidated hearing occurs when an ALJ conducts a single proceeding on multiple appeals that are before the ALJ. The appeals are identified by separate OMHA appeal numbers, *unless* the ALJ decides to consolidate the decision and record (see [OCPM 9.9.3.1](#)).

15.4.2 When is a consolidated hearing permitted?

The appeals to be consolidated:

- Must have been filed by the **same appellant**, *unless* multiple appellants aggregated claims to meet the amount in controversy requirement, and the beneficiaries whose claims are at issue have all authorized disclosure of their PII/PHI to the other hearing parties and non-party participants (see [OCPM 11.3.7](#));⁷⁰ and
- Must involve one or more of the **same issues**.⁷¹

Note: For appeals involving an appellant with a presence in more than one state, ALJs may wish to consider further limiting consolidated hearings to appeals involving the **same MAC** to help prevent the unauthorized disclosure of PII/PHI (for example, the contractor for jurisdiction A is not authorized to see PII from claims processed in jurisdiction B). Also, the same local coverage policies, such as LCDs and Policy Articles, will apply to all of the appeals in the same jurisdiction. Please note that ECAPE limits consolidated hearings to appeals involving the same MAC.

15.4.3 Who may request that appeals be consolidated for hearing?

Appeals may be consolidated for hearing on the ALJ's own motion or at the request of an appellant. It is within the ALJ's discretion whether to grant an appellant's request.⁷²

⁷⁰ 42 C.F.R. §§ 405.1044(c), 423.2044(c).

⁷¹ 42 C.F.R. §§ 405.1044(a)(1), 423.2044(a)(1).

⁷² 42 C.F.R. §§ 405.1044(a)(2), (3), 423.2044(a)(1), (3).

15.4.4 What does an ALJ consider in determining whether to grant a request for a consolidated hearing?

The ALJ considers whether the criteria for consolidation are met (*see* OCPM 15.4.2), and may consider additional factors, such as whether the claims at issue may be more efficiently decided if the appeals are consolidated for hearing.⁷³

15.4.5 What if an appellant requests consolidation of an appeal with appeals that are pending with another adjudicator?

Appeals may only be consolidated if they are pending before the same adjudicator.⁷⁴ If an appellant requests to consolidate an appeal with appeals that are pending with another adjudicator, the request can only be accommodated if the appeals are reassigned to a single adjudicator for administrative efficiency (*see* OCPM 9.7.1).

15.4.6 What effect does consolidation have on the adjudication time frame when . . .

15.4.6.1 An appellant requests consolidation?

If the appellant requested consolidation and an adjudication time frame applies to any of the appeals to be consolidated, the ALJ may require the appellant to waive the adjudication time frame associated with one or more appeals if consolidation would otherwise prevent the ALJ from deciding all of the appeals at issue within their respective deadlines.⁷⁵

15.4.6.2 An ALJ proposes consolidation on his or her own motion?

There is no effect on any applicable adjudication time frame when an ALJ proposes to consolidate appeals for hearing on his or her own motion. The ALJ may not require an appellant to waive an adjudication time frame for any of the consolidated cases.⁷⁶

15.4.7 What are some of the benefits of having a consolidated hearing?

A consolidated hearing may reduce time and expense for the appellant(s) and for the government to resolve the appealed matters. Conducting a consolidated hearing enables the ALJ to perform a single opening (*see* OCPM 15.3.1), followed by an individualized discussion of the constituent appeals. A consolidated hearing may also

⁷³ 42 C.F.R. §§ 405.1044(a)(1), (2), 423.2044(a)(1), (2).

⁷⁴ 42 C.F.R. §§ 405.1044(a)(1), 423.2044(a)(1).

⁷⁵ 42 C.F.R. §§ 405.1044(a)(2), 423.2044(a)(2).

⁷⁶ 42 C.F.R. §§ 405.1044(a)(3), 423.2044(a)(3).

allow an ALJ to obtain testimony and arguments from the hearing attendees more efficiently, as they are able to more concisely present legal issues and fact patterns that are applicable to more than one appeal.

15.4.8 How does an ALJ protect PII when holding a consolidated hearing?

When holding a consolidated hearing for claims involving multiple beneficiaries, the ALJ should avoid using individual beneficiary names or Medicare numbers. The ALJ may choose to identify cases by OMHA appeal number (if there are separate OMHA appeal numbers), reconsideration numbers, or, if necessary, by beneficiary's initials. Doing so reduces the risk that another individual's PII will be inadvertently disclosed if a copy of the hearing recording is later requested by a beneficiary.

The ALJ should also ensure that hearing attendees are present for only those portions of the hearing for which their attendance is necessary and proper (see OCPM 15.4.10).

15.4.9 How is the introductory statement different for a consolidated hearing?

The ALJ should identify in the introductory statement that the hearing is a consolidated hearing, identify how many appeals were consolidated, and specify the OMHA appeal numbers. Alternatively, the ALJ may simply choose to incorporate by reference the OMHA appeal numbers listed on the consolidated notice of hearing (see [OCPM 14.5.2](#)).

Example: "Good Morning. This is the consolidated hearing of Provider Incorporated concerning 12 individual appeals. I will call each case individually by OMHA appeal number, and we will discuss the merits of each case, but we will begin by addressing several global issues applicable to all of them. Today is . . ."

Example: "Good Afternoon. My name is Judge Jones. I am the Administrative Law Judge assigned to hear the consolidated case of Provider Incorporated, which involves all of the OMHA appeal numbers specified on the notice of hearing dated [date notice was sent]. Today is . . ."

The ALJ may also choose to address the admission of exhibits globally, rather than separately for each appeal.

Example: For ECAPE: "In each of the ten cases before me in this consolidated hearing, an index of the administrative record was distributed, reflecting the exhibited records. Do you have any objection to the formal admission of this evidence in each of the ten cases? [No] Then I hereby admit the exhibited

records into the administrative record in each of the 10 cases before me today.”

Given that a consolidated hearing consists of appeals involving one or more of the same issues, the ALJ may want to confirm the statement of the issues in a global way.

Example: “The issue before me today is whether Medicare Part A covers the skilled nursing facility services furnished to the ten beneficiaries on their respective dates of service. A secondary issue is whether [section 1879 of the Social Security Act](#) may limit liability for any noncovered services. Is that your understanding of the issues before me today?”

15.4.10 What happens when a consolidated hearing involves multiple hearing attendees?

When a consolidated hearing involves multiple hearing attendees whose presence is only necessary for part of the hearing, the ALJ may ask the hearing attendees to call in at a specific time after the start of the hearing. This time may be specified in the notice of hearing, or the attendees may be asked to disconnect from a telephone or VTC hearing and call back in at a specific time when their individual case(s) are expected to be heard. If an ALJ asks a witness to disconnect and call back when it is time to testify, the ALJ may need to swear in that witness when he or she calls back in, if the ALJ has not already done so.

Example: For non-ECAPE: When multiple CMS contractors are participating in a hearing: “We will begin with the cases involving CGS Administrators as the MAC. Palmetto GBA, please disconnect and call back at 10:20 a.m. eastern standard time, when your cases are expected to be heard. Thank you.”

Example: When a beneficiary appears at a consolidated hearing: “We will begin with OMHA appeal number 1-234567890, involving Beneficiary A.B., who is present by telephone. . . . Thank you for your testimony today. You will receive a written decision in the mail. If you disagree with my decision, your appeal rights are provided on the included notice. You may now hang up the telephone. Thank you and have a good day. [Beneficiary A.B. disconnects.] The next case is OMHA appeal number 1-345678901.”

15.4.11 How does an ALJ identify individual cases during a consolidated hearing?

During the substantive portion of the hearing, the ALJ may address each appeal individually by stating the OMHA appeal number and, if necessary, may further identify the appeal by the beneficiary's first and last initials and the dates of service at issue, if applicable. For consolidated hearings where the administrative record and decision will be consolidated, the ALJ should take note of the time at which the substantive portion of the hearing begins for each beneficiary, as these times will be used when labeling the audio recording of the hearing.

Example: When the beneficiaries do not appear at a consolidated hearing: "Let's begin with OMHA appeal number 1-234567890. The corresponding beneficiary's initials are A.B., and the dates of service are December 1, 2015 to December 31, 2015."

15.4.12 What notice is required when an ALJ holds a consolidated hearing?

Notice of a consolidated hearing must be included in the notice of hearing.⁷⁷ Send a Notice of Consolidated Hearing (OMHA-1024DT). See [OCPM 14.5.2](#) for information on the content requirements for notices of consolidated hearings.

15.4.13 If an ALJ holds a consolidated hearing, does the ALJ issue a consolidated decision or a separate decision for each appeal?

If an ALJ decides to hold a consolidated hearing, he or she may issue a consolidated decision or a separate decision for each appeal.⁷⁸ See [OCPM 16.4](#) for information on consolidated decisions. See [OCPM 9.9.3.1](#) for information on combining appeals for consolidation.

If the ALJ issues a **consolidated decision**, the administrative record must also be consolidated and the cases must be combined under a single OMHA appeal number.

If the ALJ issues a **separate decision** for each appeal, the administrative records must also remain separate. The ALJ is responsible for making sure that any evidence that is common to all appeals and material to the common issue(s) to be decided, and the applicable portions of the audio recording of the oral proceedings, are included in each individual administrative record, as applicable.⁷⁹

⁷⁷ 42 C.F.R. §§ 405.1044(a)(4), 423.2044(a)(4).

⁷⁸ 42 C.F.R. §§ 405.1044(b)(1), 423.2044(b)(1).

⁷⁹ 42 C.F.R. §§ 405.1044(b)(2), 423.2044(b)(2).

15.5 Continued hearings

(Issued: 11-21-19, Effective: 11-21-19)

15.5.1 What is a continued hearing?

A continued hearing occurs when the ALJ stops a hearing temporarily and continues it to a later date.

15.5.2 Who may request a continuance?

A party may request a continuance,⁸⁰ but the ALJ determines whether to grant the request.⁸¹

15.5.3 May an ALJ continue a hearing on his or her own motion?

An ALJ may temporarily stop a hearing and continue it to a later date if the ALJ believes that there is material evidence missing at the hearing,⁸² if the hearing cannot be completed in the allotted time, or for any other reason when necessary for a full examination of the matters at issue.⁸³

15.5.4 What effect does a continuance have on the adjudication time frame?

If the **appellant** requests the continuance and an adjudication time frame applies, the adjudication period is extended by the period between the initial hearing date and the continued hearing date.⁸⁴

There is no effect on the adjudication time frame when an **ALJ** continues a hearing on his or her own motion, *unless* the hearing was continued because material evidence was missing, and the appellant, other than an unrepresented beneficiary in a Part A or B appeal or an unrepresented enrollee in a non-expedited Part D appeal,⁸⁵ submits new evidence that results in an extension of the adjudication time frame in accordance with [42 C.F.R. sections 405.1018\(b\)](#) or [423.2018\(b\)\(2\)](#) or [\(c\)\(2\)](#).

⁸⁰ [42 C.F.R. §§ 405.1030\(e\)\(1\), 423.2030\(e\)\(1\)](#).

⁸¹ *Cf.* [42 C.F.R. §§ 405.1020\(f\), \(g\), 423.2020\(f\), \(g\)](#); *see* [82 Fed. Reg. 4974, 5059](#) (Jan. 17, 2017) (stating “we believe an appellant’s request for a continuance of the hearing is similar to an appellant’s request to reschedule a hearing.”).

⁸² [42 C.F.R. §§ 405.1030\(c\), 423.2030\(c\)](#).

⁸³ [42 C.F.R. §§ 405.1030\(e\)\(1\), 423.2030\(e\)\(1\)](#).

⁸⁴ [42 C.F.R. §§ 405.1030\(e\)\(2\), 423.2030\(e\)\(2\)](#).

⁸⁵ [42 C.F.R. §§ 405.1030\(d\), 423.2030\(d\)](#).

15.5.5 What notice is required for a continued hearing?

Send a Notice of Continued Hearing (OMHA-1024CT) or Notice of Continued Expedited Part D Hearing (OMHA-624CT).

15.5.6 How is the introductory statement different for a continued hearing?

In the introductory statement, the ALJ should identify that the hearing is a continued hearing. The ALJ should also state the initial hearing date and briefly summarize the initial hearing. The ALJ has discretion as to whether the same witnesses will need to be sworn in again if a hearing is continued on a later date. Some ALJs may choose to swear in the same witnesses again at a continued hearing. Other ALJs may prefer to state on the record that the same witnesses were previously sworn in at the initial hearing, and then remind the witnesses that they are still under oath or affirmation.

Example: “Good Afternoon. This is the case of Appellant-Beneficiary, OMHA appeal number 1-234567890. For the record, today is April 19, 2019, and it is approximately 1:00 p.m. eastern standard time. My name is Judge Jones. Today’s hearing is a continued hearing. The initial hearing date was on March 15, 2019, during which time the unrepresented appellant requested a continuance in order to obtain an attorney . . .”

15.6 Supplemental hearings

(Issued: 11-21-19, Effective: 11-21-19)

15.6.1 What is a supplemental hearing?

A supplemental hearing occurs after a hearing has been held on an appeal, when the ALJ determines, on his or her own motion or at the request of a party, that another hearing is needed in order to receive new and material evidence, obtain additional testimony, or address a procedural matter.⁸⁶ The ALJ determines whether a supplemental hearing is necessary and, if one is held, the scope of the hearing, including when evidence is presented and what issues are discussed.⁸⁷

15.6.2 What is the difference between a supplemental hearing and a continued hearing?

An ALJ conducts a **supplemental hearing** when the ALJ determines **after the original hearing**, on his or her own motion or at the request of a party, that another hearing is needed in order to receive new and material evidence, obtain additional testimony, or address a procedural matter.⁸⁸

An ALJ conducts a **continued hearing** (*see* OCPM 15.5) when the ALJ determines **during the hearing**, on his or her own motion or at the request of a party, that the hearing should be stopped in order to be continued to a later date.⁸⁹

15.6.3 Who may request a supplemental hearing?

A party may request a supplemental hearing,⁹⁰ but the ALJ determines whether to grant the request.⁹¹

15.6.4 May an ALJ propose a supplemental hearing on his or her own motion?

An ALJ may decide to hold a supplemental hearing in order to receive new and material evidence, obtain additional testimony, or address a procedural matter.⁹²

⁸⁶ 42 C.F.R. §§ 405.1030(f), 423.2030(f).

⁸⁷ 42 C.F.R. §§ 405.1030(f)(1), 423.2030(f)(1).

⁸⁸ 42 C.F.R. §§ 405.1030(f)(1), 423.2030(f)(1).

⁸⁹ 42 C.F.R. §§ 405.1030(c), 405.1030(e)(1), 423.2030(c), 423.2030(e).

⁹⁰ 42 C.F.R. §§ 405.1030(f)(2), 423.2030(f)(2).

⁹¹ 42 C.F.R. §§ 405.1030(f)(1), 423.2030(f)(1).

⁹² 42 C.F.R. §§ 405.1030(f)(1), 423.2030(f)(1).

15.6.5 What effect does a supplemental hearing have on the adjudication time frame?

If an **appellant** requests a supplemental hearing and an adjudication time frame applies, the adjudication time frame is extended by the period between the initial hearing date and the supplemental hearing date.⁹³

There is no effect on the adjudication time frame when an **ALJ** schedules a supplemental hearing on his or her own motion, *unless* the supplemental hearing was held in order to receive new and material evidence, and the appellant, other than an unrepresented beneficiary in a Part A or B appeal or an unrepresented enrollee in a non-expedited Part D appeal,⁹⁴ submits new evidence that results in an extension of the adjudication time frame in accordance with [42 C.F.R. sections 405.1018\(b\)](#) or [423.2018\(b\)\(2\)](#) or [\(c\)\(2\)](#).

15.6.6 What notice is required for a supplemental hearing?

Send a Notice of Supplemental Hearing (OMHA-1024BT) or a Notice of Supplemental Expedited Part D Hearing (OMHA-624BT). See [OCPM 14.10](#) for instructions on scheduling and noticing a supplemental hearing.

15.6.7 How is the introductory statement different for a supplemental hearing?

In the introductory statement, the ALJ should identify that the hearing is a supplemental hearing. The ALJ should also state the initial hearing date and briefly summarize the initial hearing.

Example: “Good Afternoon. This is the case of Appellant-Beneficiary, OMHA appeal number 1-234567890. For the record, today is April 19, 2019, and it is approximately 1:00 p.m. eastern standard time. My name is Judge Jones. Today’s hearing is a supplemental hearing. The initial hearing date was on March 15, 2019. After the hearing concluded, the appellant contacted this office and requested a supplemental hearing to present additional witness testimony . . .”

⁹³ 42 C.F.R. §§ 405.1030(f)(2), 423.2030(f)(2).

⁹⁴ 42 C.F.R. §§ 405.1030(d), 423.2030(d).

15.7 Posthearing development

(Issued: 11-21-19, Effective: 11-21-19)

15.7.1 Can a party request a copy of the administrative record from OMHA?

At any time while an appeal is pending at OMHA, including after a hearing is held but before a decision, dismissal, or remand is issued, a party may request and receive a copy of all or part of the administrative record from OMHA, including any index of the administrative record, documentary evidence, and a copy of the audio recording of the oral proceedings, if any.⁹⁵ If a party requests a copy of the administrative record and the record, including any audio recordings, contains PII or PHI of an individual that the requesting party is not entitled to receive, such portions of the record will not be furnished unless the requesting party obtains consent from the individual.⁹⁶

If a party requests a copy of the record from OMHA and an opportunity to comment on the record, the adjudication time frame is extended by the time beginning with the receipt of the request through the expiration of the time granted for the party's response.⁹⁷

15.7.2 What if an appellant fails to appear at the hearing?

An ALJ may dismiss a request for hearing if neither the appellant nor the appellant's representative, if any, appears at the time and place set for the hearing, and the criteria of [42 C.F.R. section 405.1052\(a\)\(1\)](#) or [423.2052\(a\)\(1\)](#) are met (see [OCPM 17.1.4](#)).

Note: The mandatory OMHA notices of hearing include language notifying appellants that an appeal may be dismissed for failure to appear at the hearing. If an appellant does not acknowledge receipt of the notice of hearing and fails to appear at a hearing, the ALJ must give the appellant an opportunity to explain the failure to appear by sending an Order to Show Cause for Failure to Appear (OMHA-164T) to the appellant's last known address, before dismissing the request for hearing.⁹⁸

Example: In a Part C case, if OMHA receives a response to the notice of hearing from the MAO indicating that it will be present at the hearing, but the MAO does not appear at the scheduled hearing, the ALJ may proceed with the hearing without the MAO, so long as the appellant appears at the hearing. If, after

⁹⁵ [42 C.F.R. §§ 405.1042\(b\)\(1\), 423.2042\(b\)\(1\)](#).

⁹⁶ [42 C.F.R. §§ 405.1042\(b\)\(3\), 423.2042\(b\)\(3\)](#).

⁹⁷ [42 C.F.R. §§ 405.1042\(b\)\(2\), 423.2042\(b\)\(2\)](#).

⁹⁸ [42 C.F.R. §§ 405.1052\(a\)\(1\)\(ii\), 423.2052\(a\)\(1\)\(ii\)](#).

the hearing is held but before a decision is issued, the MAO contacts OMHA requesting a supplemental hearing, the ALJ must determine whether there is good cause for the supplemental hearing and whether there is good cause for the MAO to not appear at the initial hearing. See [OCPM 14.10](#) for instructions on scheduling and noticing a supplemental hearing. See [OCPM 15.6](#) for information on conducting a supplemental hearing.

15.7.3 May an ALJ keep the record open after the hearing?

At the ALJ's discretion, the record may be kept open for submission of posthearing documentation. Posthearing evidence submitted for the first time at the OMHA level may be subject to a good cause determination (*see* [OCPM 15.2.7](#)).

If the record is kept open, the ALJ should do the following on the record, before the hearing is adjourned:

- Confirm the specific documentation to be submitted after the hearing;
- Direct the submitting party to send a copy of the submission to the other parties (unless the other parties orally waive their right to obtain a copy), and confirm that the submitting party has the correct mailing addresses or fax numbers;

Note: If the submitting party is an **unrepresented beneficiary**, OMHA may assist in sending a copy of the submission to the other parties.

- Discuss how the other parties may respond to the submission (for example, by mail or fax), and establish a deadline by which any response must be received by the ALJ; and
- Establish a date that the administrative record will be closed. Explain the process for requesting an extension to the deadline, and the consequence for missing the deadline if an extension is not requested or granted.

Note: When establishing a submission deadline, consider factors such as:

- The quantity of documentation being submitted,
- Whether the submitting party is already in possession of the documentation, or

- Whether the party needs time to draft the documentation (for example, a posthearing brief) or obtain it from another entity (for example, medical records from a hospital).

15.7.4 Can an ALJ add to the administrative record after he or she has concluded the hearing and closed the hearing record?

An ALJ can add to the administrative record, on his or her own motion, after he or she has concluded the hearing and closed the hearing record. The ALJ may do so by holding a supplemental hearing to receive new and material evidence, obtain additional testimony, or address a procedural matter.⁹⁹ See OCPM 15.6 for information on conducting a supplemental hearing.

Example: After the ALJ has concluded the hearing and closed the hearing record, the ALJ discovers a matter that requires additional testimony. The ALJ may decide to hold a supplemental hearing. At the supplemental hearing, the ALJ should state the initial hearing date and briefly summarize the initial hearing. The ALJ should explain the purpose of the supplemental hearing. For example, the ALJ may want to state that he or she is opening the administrative record to receive additional testimony and argument with respect to a matter that has come to his or her attention. The ALJ should end the supplemental hearing by closing the hearing record.

⁹⁹ 42 C.F.R. §§ 405.1030(f), 423.2030(f).

Revision history

| Date | Description | Sections/subsections updated |
|-------------|--------------------|-------------------------------------|
| 11/21/2019 | Initial Release | N/A |

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