

Chapter I-5 Representatives

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I-5-1 Definitions—Appointed, Authorized

Citations: §§ 405.902, 405.910; see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

NOTE: Though there are slight differences in terminology, the representation concepts in 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, while Parts 422 and 423 fold the two distinct concepts under a single term (“representative” under Part 422, and “appointed representative” under Part 423). Therefore, for purposes of appeals before OMHA, the Part 405 terminology is used throughout this chapter and is applied to all appeals. In addition, for applications to Part 422 and Part 423 appeals, all references to a “beneficiary” should be understood to mean an “enrollee.”

A. 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 the appointment of representative form.

Examples of an authorized representative include, but are not limited to, the following:

- A court-appointed guardian for a beneficiary;
- In the case of a deceased beneficiary, a surviving spouse when authorized by applicable law, or an executor, conservator, or administrator of an estate;
- 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.

B. Appointed Representative

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

NOTE: An appointment of representative is not an assignment of appeal rights. Assignment of appeal rights is addressed in I-4-2 C.3.

NOTE: An appointment of representation is not necessary for a provider or supplier to appeal a claim, if the provider or supplier is already a party to the claim appeal. Party status is addressed in I-4.

1. Who may be an appointed representative.

Examples of appointed representatives, include, but are not limited to, the following:

- Family members, such as spouses or children;
- Friends or other non-familial relations, such as non-spouse partners or neighbors;
- Member of a beneficiary or provider or supplier advocacy group;
- Attorneys;
- Providers or suppliers;
- Physicians;

NOTE: In the case of a Medicare Part D appeal, although a prescribing physician or other prescriber can request a redetermination or reconsideration with only providing simple notice to the enrollee, in order to request a hearing before an ALJ, the prescribing physician or other prescriber must be an authorized representative of the enrollee.

NOTE: Regulations at [§ 423.560](#) include appointed representatives in the definition of authorized representatives. See IV-3-3 A for additional information on standing to file a request for hearing in Part D appeals.

- An employee of a company that provides billing 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;
- 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, an appointment of representative is not appropriate.

2. Who is not considered an appointed representative.

Examples of circumstances where an individual is not considered an appointed representative (and thus, does not require an appointment of representative to act on behalf of the party) include, but are not limited to, the following

- An employee acting on behalf of an employer that is a party.
- An employee of a parent company acting on behalf of a subsidiary company that is a party (for example, an MA Plan).
- An employee of a company that purchased another company that is a party.

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 hearing, and providing testimony) through the employee-employer relationship.

- A physician who is providing treatment to an enrollee may, upon providing notice to the enrollee, request a reconsideration on the enrollee's behalf. [§ 422.578](#). In this limited circumstance, an appointment of representative is not required.

See [I-4](#) for additional information on parties.

I-5-2 Qualifications of an Appointed Representative

Citations: [§ 405.910\(b\)](#); see also [§§ 422.561, 423.560, 478.40\(c\)](#); 20 C.F.R. [§§ 418.1010\(b\)\(10\), 418.1350, 418.2010\(b\)\(8\), 418.2350](#) (referencing Part 405 representation rules).

An appointed representative can 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 appeals, before SSA.

I-5-3 Valid Representation

Citations: §§ 405.902, 405.910(c)-(d), (g); see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

A. Generally

To ensure compliance with HIPPA and PII mandates, OMHA will verify that an appointment of representative received with the case file from the lower level of review, or an appointment submitted for the first time to OMHA, is valid and meets all regulatory requirements.

B. Valid Authorized Representative

The record must contain written documentation granting the individual such status (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 [I-5-1](#) for examples of an authorized representative.

C. Valid Appointment of Representation

1. The record must contain an appointment that satisfies the following required elements ([§ 405.910\(c\)](#)):

- Be in writing.
- Signed by the party and individual agreeing to be the representative (in ink if executed after July 14, 2014). See [CMS, Medicare Claims Processing Manual, Pub. 100-04, Ch. 29, § 270.1.2.A \(MCPM, Ch. 29, § 270.1.2.A\)](#).

NOTE: An appointment may list multiple individuals who may serve as a representative to represent a party (for example, attorneys associated with an advocacy group or law firm), as long as one of the named individuals signs the document.

- Dated by the party and individual agreeing to be the representative.
- Provides a statement appointing the representative to act on behalf of the party.
- If a beneficiary is being represented, authorize the adjudicator to release identifiable health information to the appointed representative.
- Includes an explanation of the purpose and scope of the representation.
- Contains the name, address, and phone number of the party.

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- Contains the name, address, and phone number of the appointed representative.
- If a beneficiary is being represented, identifies the beneficiary's Medicare health insurance claim number (HICN).

NOTE: Where a provider or supplier is the appointing party, a National Provider Identifier (NPI) may be substituted for a beneficiary HICN. See [§ 405.910\(c\)\(5\)](#); [MCPM, Ch. 29, § 270.1.2.B\(5\)](#).

- Includes the appointed representative's professional status or relationship to the party.
- Be filed with the entity processing the party's initial determination or appeal.

For appointments executed after July 14, 2014 the appointment must be signed, in ink, by both the party and the appointed representative within 30 days. [MCPM, Ch. 29, § 270.1.2.B\(5\)](#).

NOTE: If a provider or supplier is acting as an appointed representative for a beneficiary, the following requirements must be in the appeal request ([§ 405.910\(g\)\(2\)](#)):

- 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 an issue as described in [§ 1879\(a\)\(2\) of the Act](#), the provider or supplier must sign a statement waiving the right to payment from the beneficiary for the services or items to which the [§ 1879\(a\)\(2\) of the Act](#) issue applies.

NOTE: Although not required, use of [form CMS-1696](#) is recommended to appoint a representative.

2. The appointment must be timely filed, in accordance with [I-5-4](#).

D. Addressing an Invalid Authorization or Appointment of Representation

If the representation is invalid, the party must be given an opportunity to cure the defect(s).

NOTE: All communication must be between OMHA and the party. OMHA is not authorized to discuss any matters with a potential representative.

E. Providing the Opportunity to Cure ([§ 405.910\(d\)](#))

1. Potential representative filed the request for hearing.

Subject to the exception for expedited Part D appeals discussed below, the following steps must be taken:

- a. Issue an interim letter (mandatory form, OMHA-110, Interim Letter, available in MATS) to the party named on the request for hearing (with a redacted courtesy copy containing no PII to the potential representative):
 - i. Notifying the party that there is insufficient or missing documentation or information related to the appointed or authorized representative, and describing the documentation or information needed for a valid representation;
 - ii. Explaining that until the insufficient or missing documentation or information has been furnished, the potential 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;
 - iii. Informing the party that OMHA's receipt of the request protects the filing date for timeliness purposes;
 - iv. If there are no other procedural defects with the request for hearing, the party is given 14 calendar days from the date of the letter for the party to either (1) submit the missing documentation or information for a valid appointment or authorization, or (2) affirm in writing that the party will not have a representative; and explaining that if no response is received, the ALJ will dismiss the request for hearing because the individual who submitted the request for hearing was not a party and was not authorized by a party to submit the request.

NOTE: If the request for hearing filed is also deficient (for example, the request for hearing filed did not include all required elements), the party is given 60 days to cure the deficient request for hearing and deficient appointment of representative.

NOTE: The letter must be mailed on the date printed on the interim letter and sent to the party's last known address (for example, as reflected on the request for hearing, in MAS, on the lower level decision, or in a letter updating the party's address).

Example 1. The potential representative for a beneficiary files a valid request for hearing along with an appointment of representative using [form CMS-1696](#). The appointment filed is dated January 1, 2015, but is not signed by the beneficiary and

does not contain the beneficiary's HICN. OMHA sends an interim letter to the beneficiary with a redacted courtesy copy containing no PII to the potential representative providing an opportunity to cure the defects within 14 calendar days of the date on the letter.

Example 2. The potential representative for a beneficiary files a request for hearing along with an appointment of representative using [form CMS-1696](#). The request for hearing does not include the beneficiary's address or HICN. The appointment filed is dated January 1, 2015, but is not signed by the beneficiary and does not contain the beneficiary's HICN. OMHA sends an interim letter to the beneficiary with a redacted courtesy copy containing no PII to the potential representative providing an opportunity to cure the defective request for hearing and defective appointment of representative within 60 days of the date on the letter. See [II-3-6](#) for additional information on complete requests for hearing requirements.

- b. Review the information, if any, submitted by the party, and determine whether it provides the documentation or information detailed in the interim letter.
 - i. If the party cures the defective representation, or affirms in writing that the party will not have a representative and wants to proceed with the request for hearing, OMHA will continue processing the case, communicating with the representative or party, as appropriate.
 - ii. If the party does not respond, cure the defective representation, or affirm in writing that the party will not have a representative and wants to proceed with the request for hearing, the ALJ dismisses the request for hearing because the individual requesting the hearing is not a proper party to the appeal or does not otherwise have a right to appeal, in accordance with [§§ 405.1052](#) or [423.2052](#).

2. Potential representative did not file the request for hearing.

The following steps must be taken:

- a. Issue an interim letter (mandatory form, OMHA-110, Interim Letter, available in MATS) to the party named on the request for hearing (with a redacted courtesy copy containing no PII to the potential representative):
 - i. Notifying the party that there is insufficient or missing documentation or information related to the appointed or authorized representative, and describing the documentation or information needed for a valid representation;
 - ii. Explaining that until the missing documentation or information has been furnished, the potential representative lacks the authority to act on behalf of the

party, and is not entitled to obtain or receive any information related to the appeal; and

- iii. If there are no other procedural defects with the request for hearing, the party is given 14 calendar days from the date of the letter for the party to either (1) submit the missing documentation or information for a valid appointment or authorization, or (2) affirm in writing that the party will not have a representative; and explaining that if no response is received, all further correspondence will be made directly with the party only.

NOTE: The letter must be mailed on the date printed on the interim letter and sent to the party's last known address (for example, as reflected in the request for hearing, in MAS, on the lower level decision, or in a letter updating the party's address). Since the potential representative is copied, the letter must not include PII.

- b. Review the information, if any, submitted by the party, and determine whether it provides the documentation or information detailed in the interim letter.
 - i. If the party cures the defective representation within the applicable period, staff may begin communication with the representative.
 - ii. If the party affirms in writing the party will not have a representative, staff continues processing the case, communicating only with the party.
 - iii. If the party does not respond, cure the proposed representation, or affirm in writing that the party will not have a representative, staff continues processing the case, communicating only with the party.

NOTE: If the party continues to be non-responsive to staff contact about the case (for example, if staff attempts to schedule a hearing and is unable to contact the appellant despite reasonable efforts to do so,) dismissal for abandonment may be appropriate. See, [§ 405.1052\(a\)\(7\)](#).

3. Expedited Part D appeals exception.

Due to the nature of expedited Part D appeals, the cure process outlined above is not applicable to expedited Part D appeals. The following steps must be taken:

- a. Notify the party by telephone of the missing documentation or information, explaining that:
 - i. The party may respond by fax;
 - ii. The cure should be provided as soon as possible so that staff may continue processing the case on an expedited basis; and

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- iii. If the party filed the request for hearing, the case will continue to be processed on an expedited basis; however, no information will be provided to the potential representative until the defective appointment is cured.
- b. Execute a report of contact, form OMHA-101, to document the telephone conversation and include a copy of the report of contact in the administrative record.

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

I-5-4 Duration of an Appointment

Citations: § 405.910(e); see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

An appointment of representation 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. The appointment must be filed in an appeal within one year of the date of both signatures.

If the appointment of representation is timely when initially filed in appealing the claim at issue (that is, it is filed within one year from the date of both signatures), 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).

Example. On May 2, 2013, a party submits an appointment of representative with the request for redetermination. The signatures on the appointment of representative are dated January 14, 2013. On September 30, 2014, the party submits a request for hearing with OMHA. The only appointment of representative in the record is the one signed on January 14, 2013. The appointment of representative remains valid, as the appointment had a signature date (January 14, 2013) within one year of when it was initially filed timely (May 2, 2013).

Exception. For an initial determination of a Medicare Secondary Payer recovery claim, the appointment does not have to be filed within one year of the date of both signatures. 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.

I-5-5 Responsibilities of an Appointed Representative

Citations: [§ 405.910\(g\)](#); see also [§§ 422.561, 423.560, 478.40\(c\)](#); [20 C.F.R. §§ 418.1010\(b\)\(10\), 418.1350, 418.2010\(b\)\(8\), 418.2350](#) (referencing Part 405 representation rules).

The appointed representative must:

- 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, but not limited to, notification of appeal determinations, decisions, and further appeal rights;
- 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.

I-5-6 Authority of a Representative

Citations: §§ 405.902, 405.910(h); see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

A. Authorized representatives

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. Authorized representatives have all of the rights and responsibilities of a beneficiary or party, as applicable, throughout the appeals process. § 405.902.

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

B. Appointed representatives

1. Actions an Appointed Representative May Take (§ 405.910(h)).

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

- 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.

2. Actions an Appointed Representative May 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 § 405.912.

I-5-7 Communicating with Representatives and Represented Parties

Citations: § 405.910(i), (k); see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

A. Generally

Notices and requests are sent only to the authorized or appointed representative. §§ 405.902, 405.910(i)(2)–(3).

Exception. For Medicare Secondary Payer (MSP) cases in which a beneficiary is a party, notices and requests are sent to both the beneficiary and the appointed representative. § 405.910(i)(4).

B. Communicating with Representatives

1. Insufficient evidence of a valid authorization or appointment.

Staff may 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 I-5-3.

- However, information that does not involve PII may be disclosed (for example, a status inquiry by an individual who provides a QIC appeal number to a receptionist).

2. Sufficient evidence of a valid authorization or appointment.

Any information that would be available to a party may be discussed with or disclosed to a representative within the scope of the representation. § 405.910(k).

NOTE: If the representative represents one of multiple beneficiaries in a 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 or claims, only information related to the specific claim or claims may be disclosed to the representative.

C. Communicating with Represented Parties

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

1. Responding to contacts from a represented party.

If a represented party contacts OMHA, staff may provide information to the party who is represented, 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 and to request that the representative discuss communication protocols with the party.

2. 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 of any communication and place in the administrative record.

I-5-8 Delegation of an Appointment

Citations: § 405.910(l); see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

A. Requirements

An appointed representative may only designate another individual to act as the appointed representative where:

1. The appointed representative provides written notice to the party of the appointed representative's intent to delegate to another individual. The notice must include:
 - a. The name of the designee; and
 - b. The designee's acceptance to be obligated and comply with the requirements of representation under [Part 405 Subpart I](#) regulations.
2. The party accepts the designation as evidenced by a written statement signed by the party.

Exception. This signed statement is not required when the appointed representative and designee are attorneys in the same law firm or organization.

B. Effect of a Valid Delegation

If there is a valid delegation of an appointment of representative, the following occur:

1. The original appointed representative no longer has rights to obtain information about the appeal or obligations regarding duty to the person or entity previously represented.
2. The newly designated appointed representative has all the rights and obligations of an appointed representative.

NOTE: As stated in subsection **A.2**, above, a party acknowledgement of the delegation is not required for attorneys in the same law firm or organization.

C. Effect of an Invalid Delegation

If there is an invalid delegation of an appointment of representative, issue an interim letter (mandatory form, OMHA-110, Interim Letter, available in MATS) to the appointed representative (with a redacted courtesy copy containing no PII to the potential representative), explaining why the delegation is invalid and that, in absence of a valid delegation, staff will only correspond or contact the appointed representative in the case.

I-5-9 Revocation or Termination of an Appointment

Citations: [§ 405.910\(m\)](#); see also [§§ 422.561, 423.560, 478.40\(c\)](#); [20 C.F.R. §§ 418.1010\(b\)\(10\), 418.1350, 418.2010\(b\)\(8\), 418.2350](#) (referencing Part 405 representation rules).

A. Revocation

A party may revoke an appointment of representative at any time. The revocation becomes effective when the ALJ receives a signed, written statement of the revocation from the party.

B. Termination upon Death of a Party

The death of a party terminates the authority of the appointed representative.

Exception. A party's death does not terminate an appeal that is in progress if 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. The appointment of representative remains in effect for the duration of the appeal, except for MSP recovery claims.

I-5-10 Representative Fees Charged to a Party

Citations: § 405.910(f); see also §§ 422.561, 423.560, 478.40(c); 20 C.F.R. §§ 418.1010(b)(10), 418.1350, 418.2010(b)(8), 418.2350 (referencing Part 405 representation rules).

A. When a Representative must Obtain Approval of a Fee

1. Approval of fees is only required for fees charged to a beneficiary by an appointed representative, in connection with an appeal before OMHA.

Exception: A fee arrangement made by a beneficiary for the purpose of making a claim for third party payment is not subject to review, even though the representation may include representation for appeals of a Medicare Secondary Payer (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.

2. The representative fee approval process does not apply to the following:
 - A representative appointed by a non-beneficiary party, such as a provider, supplier, or Medicaid State Agency; or
 - Authorized representatives.

B. Petitions for Fee Approval

An appointed representative who wishes to charge the beneficiary a fee for services rendered in connection with appeals before the Secretary, including an appeal before an ALJ, must obtain approval for the fee. Services rendered below the ALJ level are not considered proceedings before the Secretary and are not subject to approval.

1. Timing of submission of the fee petition.

A representative may submit a petition for fee approval to the assigned ALJ within 30 days of the date the notice of decision letter was mailed.

2. Content Requirements of a fee petition.

The petition for fee approval must be submitted to the assigned ALJ. The petition must include the following information:

- The ALJ Appeal Number (assigned by OMHA).
- The name and Health Insurance Claim Number of the represented beneficiary.

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- The amount of the fee, or the anticipated amount of the fee (for example, if an hourly rate, the total fee based on the expected number of hours, and any retainer fee; if a contingency fee, the terms of the fee).
- An itemized list of the services rendered for the appeal before OMHA, including:
 - A list describing each meeting, conference, item of correspondence, telephone call, and other activity that the representative engaged in, such as research, preparation of a brief, attendance at a hearing, travel, etcetera, related to the services in the case;
 - Date of each activity listed;
 - Actual time spent on each activity; and
 - Total hours spent on the appeal.
- If the representative is an attorney, whether he or she has been disbarred or suspended from a court or bar to which he or she was previously admitted.
- Whether the representative has been disqualified from participating in or appearing before a Federal program.
- The name, address, telephone number, and signature of the representative, and the date of the signature.

3. Curing a defective fee petition.

If a fee petition is missing information:

- a. Notification must be provided to the representative and beneficiary.

NOTE: The ALJ must issue a defective fee petition letter (OMHA-110, Defective Fee Petition Letter) to the representative and beneficiary explaining the information that is missing from the fee petition.

- b. The submission of the missing information must be signed and dated by both the beneficiary and representative and provided to the ALJ within 90 calendar days of the date of the letter, unless extended by agreement of the ALJ.
- c. The defective fee petition letter and any submission to cure the fee petition must be kept in the ALJ folder.

C. Determining the Reasonableness of the Fee

In determining the reasonableness of a fee, the ALJ considers (see [form CMS-1696 \(06/12\)](#), [70 Fed. Reg. 11420, 11429 \(Mar. 8, 2005\)](#)):

- 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: In determining the reasonableness of a representative's fee, the ALJ will not apply the test specified in [§ 206\(a\)\(2\)–\(3\) of the Act](#).

D. Review of the Fee

Upon receipt of a complete fee petition, the ALJ considers the reasonableness of the fee, based on the factors in subsection **C**, above, and evaluates objections submitted by the beneficiary, if any.

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

1. Approval of the fee.

If the ALJ determines the representative fees requested are reasonable, based on the factors in subsection **C**, above, and review of any objections, the ALJ approves the fees, and issues a fee approval order.

2. Reduction or disapproval of the fee.

- a. If the ALJ determines an amount less than the representative fees requested are appropriate, based on the factors in subsection **C**, above, and review of any objections, the ALJ may :
 - i. Reduce the fee to a reasonable amount; or
 - ii. Disapprove the fee.

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- b. The ALJ issues the fee approval order, and includes the rationale for reduction or disapproval of the fee, including a discussion of the factors in subsection **C**, above, and responds to any objections.

E. Timing of the Determination of the Fee

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

I-5-11 Equal Access to Justice Act (EAJA) Fees

Citations: [5 U.S.C. §§ 504, 554](#); [42 C.F.R. § 405.1012](#); [45 C.F.R. Part 13](#);
[74 Fed. Reg. 65296, 65319 \(Dec. 9, 2009\)](#)

A. Generally

The Equal Access to Justice Act (EAJA) provides for an award of reasonable attorney fees and other expenses to an eligible party who prevails in an adversary adjudication against a federal agency, unless the agency's position was substantially justified. Each agency is required under [5 U.S.C. § 504\(c\)\(1\)](#) to promulgate regulations establishing uniform procedures for the submission and consideration of applications for an award under the EAJA. The U.S. Department of Health and Human Services' rules are found at [45 C.F.R. Part 13](#).

B. Definitions

1. "Adversary adjudication" means an adjudication required to be under [5 U.S.C. § 554](#), in which the position of the Department or one of its components is represented by counsel or another representative ("the agency's litigating party") who enters an appearance and attends the proceeding. [45 C.F.R. § 13.3\(a\)](#).

NOTE: Both a writing or personal appearance may sufficiently represent the government's position to establish an adversary adjudication. See *Handron v. Secretary Dept. of Health and Human Services*, 677 F.3d 144 (3rd Circuit 2012).

2. "Eligible individual" means a party to the adversary adjudication for which the party seeks an award who can show that the party meets the eligibility requirements in [45 C.F.R. § 13.4](#) and [45 C.F.R. Part 13, Subparts A and B](#).

NOTE: For individuals whose involvement in an adversary adjudication is related primarily to their individual interests, the individual's net worth may not exceed two million dollars at the time the adversary adjudication is initiated. [5 U.S.C. § 504\(b\)\(1\)\(B\)](#); [45 C.F.R. § 13.4\(b\)\(3\), \(d\)](#).

C. Application to Hearings with CMS or CMS Contractor Involvement

1. If CMS elects party status in an ALJ hearing under [§ 405.1012](#), 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. However, if CMS elects a non-party participant role in an ALJ hearing, its role in the hearing is non-adversarial, and the EAJA does not apply.

However, even if a party prevails at an ALJ hearing that CMS has elected to join as a party, the party must still meet the eligibility requirements in [45 C.F.R. Part 13, Subparts A and B](#). Furthermore, before any award of attorney fees or other costs may be made, the Department must be given an opportunity to show that its position was substantially justified. [74 Fed. Reg. 65296, 65319 \(Dec. 9, 2009\)](#)

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

2. If a non-governmental entity, such as a QIC or MAO, joins the proceeding as a party, the proceeding does not meet the definition of an adversary adjudication, as the Department's position is not being represented by an attorney or other representative employed by the Department.

D. Application Procedures

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 days after the Department's final disposition of the proceeding in which the applicant believes it has prevailed. [45 C.F.R. §§13.22\(a\); 13.30](#). 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. [45 C.F.R. § 13.22\(b\)](#).

NOTE: If review of a favorable ALJ decision is sought or taken, whether within the agency (for example, a case is referred to the Council) or to the courts, proceedings on the application shall be stayed pending final disposition of the underlying controversy. [45 C.F.R. § 13.22\(d\)](#).