

# OMHA Case Processing Manual

## Chapter 12 ADMINISTRATIVE RECORD AND EXHIBITS

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### 12.0 Chapter overview

(Issued: 10-28-22, Effective: 10-28-22)

OMHA is responsible for creating and organizing a complete record of the evidence and administrative proceedings of the appealed matter.<sup>1</sup> This chapter provides guidance on processing and developing the administrative record for appeals processed electronically or in paper. OMHA processes most appeals electronically using OMHA's electronic case adjudication processing environment (ECAPE). Certain appeals cannot be processed in ECAPE and are instead processed electronically outside of ECAPE, to the extent possible, or in paper, as necessary. The chapter explains how OMHA obtains the case file from the prior adjudicating entity, organizes and exhibits records, creates the index of the administrative record, processes new evidence, documents oral and electronic communications, and addresses other record-related issues that may arise in processing the appeal. The chapter also discusses how to ensure the record is complete after disposition and addresses post-adjudication records.

*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).

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<sup>1</sup> 42 C.F.R. §§ 405.1042(a)(1), 423.2042(a)(1).

## **12.1 Obtaining the case file from the prior adjudicating entity**

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### **12.1.1 How does OMHA obtain the prior adjudicating entity's records . . .**

#### **12.1.1.1 For ECAPE appeals?**

For **Part A** and **Part B** appeals of QIC reconsiderations or dismissals, and **Part D** appeals of IRE reconsiderations and dismissals, Central Operations receives the request for hearing or review of a QIC dismissal from the appellant, enters the request into ECAPE, and the electronic records are promoted from the Medicare Appeals System (MAS) to ECAPE.

For **Part C** appeals of IRE reconsiderations, the IRE receives the request for hearing and notifies Central Operations. The IRE uploads the Request for Hearing and case file to MAS. Central Operations enters the appeal into ECAPE, and the electronic records are promoted from MAS to ECAPE.

For appeals of **SSA** reconsiderations of appealable entitlement, eligibility, and premium issues (except IRMAA appeals), SSA receives the request for hearing and forwards the request and case file to Central Operations. After Central Operations enters the request in ECAPE, Central Operations scans and uploads the request and case file to the ECAPE appeal.

For appeals of **Part A** and **Part C** QIO appeals, Central Operations receives a request for hearing, enters the appeal in ECAPE, and sends a message to the QIO requesting that the case file be uploaded to the OMHA e-Appeal Portal. The QIO transmits the case file through the portal and Central Operations assigns the appeal to the adjudication team after the case file is received.

For **Council remands** to OMHA, Central Operations receives notification of the Council remand and obtains the case file from the Council. Central Operations uploads the case file and the Council-level documents to ECAPE.

#### **12.1.1.2 For appeals not processed in ECAPE?**

For **Part A** and **Part B** appeals of QIC reconsiderations or dismissals, and **Part D** appeals of IRE reconsiderations and dismissals, Central Operations uploads the request for hearing into MAS and verifies the presence of the case file in MAS.

For **Part C** appeals of IRE reconsiderations, the IRE receives the request for hearing and notifies Central Operations. The IRE uploads the Request for Hearing and case file to MAS. Central Operations assigns the appeal in MAS.

For appeals of **SSA** reconsiderations of appealable entitlement, eligibility, and premium issues (except IRMAA appeals), SSA receives the request for hearing and forwards the request and case file to Central Operations. Central Operations scans and uploads the request and case file to MAS.

For appeals of **Part A** and **Part C** QIO appeals, Central Operations receives a request for hearing and sends a message to the QIO requesting that the case file be transmitted to OMHA. Central Operations scans and uploads the request and case file to MAS.

For **Council remands** to OMHA, Central Operations receives notification of the Council remand and obtains the case file from the Council. Central Operations uploads the case file and the Council-level documents to MAS.

*Note:* Due to heightened security requirements for Federal tax information that is furnished by the IRS, records for IRMAA appeals are not electronic.

### 12.1.2 What should the prior adjudicating entity records include?

The prior adjudicating entity's records should contain the determinations made at each level of appeal (for example, the redetermination and reconsideration), the requests for appeal, and any other documents filed at each level of appeal or issued by a prior adjudicating entity. The record should also contain the medical or other records received and relied on by the review entities, and an evidence of coverage document, if applicable. The records may also include other materials, such as initial determination documentation, claim processing information, and documentation related to contractor reviews and other communications with the parties.

*Note:* Certain appeals, such as entitlement appeals, do not have a redetermination level of review. In entitlement appeals, the levels of review prior to the ALJ hearing level are the initial determination and the reconsideration, performed by SSA.<sup>2</sup>

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<sup>2</sup> See, e.g., 42 C.F.R. §§ 405.904(a)(1) and 405.1200–1208.

## **12.2 Administrative record contents and standards**

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### **12.2.1 What is the administrative record and what does it contain?**

The administrative record is the official agency record for an appeal. The administrative record established at the OMHA level contains a complete record of the evidence and administrative proceedings on the appealed matter.<sup>3</sup> The record contains, but is not limited to:

- The request for redetermination, if applicable, with any materials submitted with the request;
- A copy of the redetermination, coverage determination, or organization determination, if applicable, preferably an official copy provided by the contractor;
- The request for reconsideration, with any materials submitted with the request;
- A copy of the reconsideration, preferably an official copy provided by the contractor;
- Records that are referenced in prior adjudicating entity determinations;
- For Part C and Part D appeals, the evidence of coverage that applies to the enrollee and the plan year(s) at issue;
- The request for hearing or request for review of a QIC dismissal, with any materials submitted with the request;
- Correspondence created by OMHA;
- Compendium entries for appeals involving drugs, if they are considered by the OMHA adjudicator;
- If a conference or hearing is conducted on the appeal, the hearing recording(s) that pertain to the appeal (such as electronic audio files attached to the administrative record); and
- Any records related to an interlocutory or post-adjudication request or action.<sup>4</sup>

These materials may include duplicate documents and other documents the adjudicator does not necessarily consider in decision-making. However, removing,

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<sup>3</sup> 42 C.F.R. §§ 405.1042(a)(1), 423.2042(a)(1)

<sup>4</sup> 42 C.F.R. §§ 405.1042(a)(2), 423.2042(a)(2).

disposing of, or deleting such materials from the case file is not permitted, unless specified in this chapter.

Official copies of the redeterminations and reconsiderations that were conducted on the appealed claims or issues, and official copies of dismissals of a request for redetermination or reconsideration, can be provided only by CMS, CMS contractors, the plan, or SSA (see [OCPM 18.1.1.2](#)). However, if an official copy of a redetermination or reconsideration is not included in the case file received from the prior adjudicating entity, but the record contains a complete unofficial copy of the redetermination or reconsideration, the assigned adjudicator may, but is not required to, consider the complete copy as sufficient for the administrative record.

*Note:* The initial determination is frequently not included in the record received from the prior adjudicating entity.

*Example:* The electronic records from the prior adjudicating entity do not contain an official copy of the redetermination from the contractor, but the appellant included a complete copy of the redetermination with the request for a reconsideration. The adjudicator may accept the copy submitted by the party as sufficient for the administrative record.

### **12.2.1.1 What materials are *not* considered part of the administrative record?**

The following materials are not considered part of the administrative record:

#### *Prior adjudicating entity administrative materials or inadvertent inclusions*

Administrative materials from prior adjudicating entities and inadvertently included documents are not considered part of the administrative record. Examples of these materials may include:

- Materials pertaining to a beneficiary whose claims were not part of the initial determination or subsequent appeals, but were inadvertently included in the records forwarded to a prior adjudicating entity or OMHA;
- Case file transmittal sheets;
- Administrative checklists or divider sheets used by CMS contractors; and
- Blank pages that are not pre-paginated.

*Note:* If PII is present in non-substantive or non-probative materials, the materials must be handled in accordance with OMHA's PII policy, (see [OCPM 2.6](#)).

*Example:* The adjudication team is assigned an ECAPE appeal in which the QIC inadvertently included an entire file that only contains medical records for Beneficiary P. Sherman in an appeal of a claim related to Beneficiary E. Rivera, and the beneficiaries were not part of the same reconsideration, redetermination, or initial determination. The adjudication team contacts the ECAPE help desk to have the electronic file relating to P. Sherman removed and alerts the QIC of the PII breach (see [OCPM 12.2.6](#)).

### *Deliberative materials*

The administrative record does not include adjudicator notes and communications among OMHA staff pertaining to the deliberative process on the disposition of an appeal. This includes documents such as internal case processing materials, attorney work product, hearing scripts, and decision-related deliberative documents.

*Note:* Although not included as part of the administrative record, OMHA deliberative (working) documents are subject to, and retained for, the applicable three-year records retention period.<sup>5</sup>

*Example:* An attorney drafted a prehearing review for a novel issue on appeal. The prehearing review is attorney work product and is not part of the administrative record.

### *Congressional inquiries*

Congressional (and other government body) inquiries on the status of an appeal or other questions directed to OMHA are not included in the administrative record. See [OCPM 2.3](#) for additional information on handling Congressional inquiries.

### *Litigation hold notices*

Litigation hold notices are not part of the administrative record. Litigation hold notices received from the HHS Office of General Counsel or the Department of

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<sup>5</sup> See [80 Fed. Reg. 63562, 63564](#) (Oct. 20, 2015) (stating that the ALJ working file will be retained for three years after the final action in the appeal is taken and then the electronic and paper records will be destroyed); OMHA, Records Management File Plan.

Justice are privileged materials and should not be added to the administrative record.

### *System-Generated Hearing Transcripts*

OMHA does not generally create transcripts of hearings and conferences when processing an appeal. System-generated recording transcripts are not official transcripts, and are not included in the administrative record, because the automatic generation may not produce an accurate or complete transcript.

In certain circumstances, generally related to accessibility and language access, OMHA will send hearing recordings to a contractor to create official hearing transcripts. If created, these official transcripts must be included in the administrative record. For information on when and how official transcripts are created at the OMHA appeal level, see [OCPM 10.2](#).

### *Publicly available materials*

Materials available to the public through publicly accessible resources, websites, or databases, or through Freedom of Information Act (FOIA) requests, are not included in or added to the administrative record. These materials include, but are not limited to:

- Copies of statutes, regulations, CMS Rulings, NCDs, LCDs, policy articles, Medicare manuals, or other CMS or CMS contractor guidance or informational materials;
- Copies of articles that are accessible through publicly available resources, websites, or databases; and
- Council decisions used as a reference.

*Caution:* All materials submitted by a party or participant, or present in the prior adjudicating entity's case file, are maintained in the administrative record, even if they are publicly available materials.

*Example:* The appellant submits a copy of the LCD as part of the request for hearing. The LCD copy is part of the appellant's request for hearing and is included in the administrative record.

## **12.2.2 What are duplicate records and what do we do with them?**

Duplicate records are exact copies of materials in the administrative record. If there is any difference in the materials, they are not considered duplicates.

*Example:* A file contains two orders for diabetic testing supplies on pages five and six. The orders are the same except for a hand-written note on the top of the order on page six. These pages are not duplicates.

Duplicate records must be retained in the administrative record; however, they do not need to be considered.<sup>6</sup>

### **12.2.3 How are OMHA hearing recordings added to the administrative record and retained?**

The audio files of OMHA conferences and hearings are a part of the administrative record.<sup>7</sup> When the hearing or conference is complete, the hearing recording must be added to the record. For electronic appeals, the recording is uploaded to the attachment tab in ECAPE or added to MAS, as applicable. For paper appeals, the recording is downloaded to a CD and attached to the paper record.

*Note:* Due to technical limitations in MAS, the name of an audio file cannot exceed 99 characters, including spaces and punctuation. In addition, recordings can only be saved as MP3, MP4, and WAV file formats.

#### *Consolidated hearings or conferences*

For consolidated hearings (*see* [OCPM 15.4](#)), if the ALJ also elects to consolidate the decision and record (i.e., elects to “combine” the appeals in the case processing system), then the complete hearing recording is attached to the consolidated record.

*Note:* In ECAPE appeals, one appeal will be designated as the parent appeal. Ensure the hearing recording is attached to the parent appeal.

If the ALJ elects to make separate decisions and records for each appeal, ensure the relevant portions of the hearing recording are attached to the individual appeal records, and that these portions include PII only for the beneficiary or beneficiaries that are the subject of the individual appeal.

*Caution:* If a consolidated hearing includes multiple beneficiaries, and a beneficiary requests a copy of the administrative record or the hearing recording, the beneficiary must only be given the portions of the hearing recording that are general in nature or relate to the beneficiary’s claim, to prevent unauthorized

<sup>6</sup> See 42 C.F.R. §§ 405.1042(a)(2), 405.1028(b), 423.2042(a)(2).

<sup>7</sup> *Id.* 42 C.F.R. §§ 405.1042(a)(1), 423.2042(a)(1).



disclosure of PII. See [OCPM 2.2](#) for additional information on party requests for copies of records.

**Note:** In order to ensure the hearing recording is limited to appropriate appeal and avoid PII breaches due to adding an unrelated appeal recording to an appeal's record, the ALJ should take steps during the recording process to identify each individual appeal in a way that will allow it to be identified by the adjudication team and properly added to the record (see [OCPM 15.4.8](#)).

#### **12.2.4 How are materials added to the administrative record?**

All administrative record materials that are received or created by OMHA pertaining to a specific appeal must be attached to that appeal's administrative record. Litigation hold notices, congressional inquiries, and publicly available materials are not administrative record materials and are not added to the administrative record (see [OCPM 12.2.1](#)).

**Note:** The administrative record includes both marked exhibits and any evidence excluded or not considered.<sup>8</sup>

##### *Electronic documents and materials*

For ECAPE appeals, electronic documents and materials submitted through the OMHA e-Appeal Portal will automatically associate with the appeal identified at submission. The adjudication team will then process the submission and exhibit the material, as appropriate.

For ECAPE and other electronically processed appeals, electronic documents and materials created or received by OMHA are attached to the appeal in the original electronic format, if possible (e.g., Microsoft Word or PDF documents), *unless* the file type is not supported by ECAPE or MAS. See [OCPM 9.2.1.3](#) for additional information on electronic media submissions.

- If the materials are submitted on a CD, DVD, or another electronic file storage medium, each file on the medium must be individually attached.
- If the file type is not supported by ECAPE, convert the file to a PDF, if possible, and upload the converted PDF to the attachment tab.
- The file should be opened in ECAPE to ensure the attachment was successful.

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<sup>8</sup> See [42 C.F.R. § 405.1042](#).

For paper appeals, electronic documents and materials created or received by OMHA are attached to the appeal in the format submitted, if possible, or by downloading the material to a CD and attaching.

*Note:* If an electronic file is not in an acceptable format, fails virus scanning software, or cannot be opened, send the filer a Notice of Rejected Electronic Media (OMHA-124) (see [OCPM 9.2.1.3](#)).

#### *Paper documents and other non-electronic materials*

For electronically processed appeals, paper documents or other non-electronic materials, such as photographs, that are received or created by OMHA, must be scanned to create an electronic file, and the electronic file is attached to the appeal. Once scanned and preserved in the record, the materials may be discarded in accordance with PII and PHI disposal guidelines. If an item cannot be disposed of, return the item to the sender. If the item is large or bulky and cannot be reproduced in a reduced-size copy, such as an x-ray or sample of an item at issue, the OMHA adjudicator may request that the party submit an image of the item and return the original item.

For paper appeals, paper documents or other non-electronic materials, such as photographs, that are received or created by OMHA are attached to the appeal case file. If the item is large or bulky, such as an x-ray or sample of an item at issue, the OMHA adjudicator may request that the party submit an image of the item and return the original item.

#### **12.2.5 What action should be taken if it appears that not all records from the prior adjudicating entity are included in the OMHA record, or the case file contains corrupted files?**

If the record does not appear to include required documents, or the documents are not accessible, OMHA adjudication staff must take action to ensure the record is complete.<sup>9</sup> Required documents include the requests for appeals at prior levels of appeal, the official copies of the determinations made at the prior levels, and case-specific documents discussed in the requests or determinations (for example, medical records) (see OCPM 12.2.1).

##### **12.2.5.1 What do we do when required documents are not present in the case file received from the prior adjudicating entity?**

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<sup>9</sup> 42 C.F.R. § 405.1042(a)(1).

If, after reviewing the case file, an adjudicator determines that required or previously included documents are missing from the record, the adjudicator may:

- If applicable, initiate the request for information process (see [OCPM 18.1](#)) if the missing document is necessary to decide the case and can only be furnished by CMS or its contractors, such as an official copy of a prior appeal determination; or
- Request that parties produce the missing documents, such as copies of medical records.

<p><i>Note:</i> Before initiating the request for information process, check whether the missing information is available in MAS, the system of record. For ECAPE appeals, this check can be completed by refreshing the appeal.</p>
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#### **12.2.5.2 What do we do when an electronic record file is corrupted or will not open?**

If an electronic file in an ECAPE appeal is corrupted or will not open, request assistance from the ECAPE help desk through established field office channels. For non-ECAPE electronic appeals and paper appeals, or if the ECAPE help desk cannot resolve the issue, the adjudication team may contact the prior adjudicating entity to inquire whether an uncorrupted or legible file is available.

#### **12.2.6 What do we do with materials that pertain to beneficiaries whose claims are not at issue at OMHA?**

Materials pertaining to beneficiaries whose claims are not at issue are addressed based on the type of record and how they became associated with the administrative record. If materials pertaining to beneficiaries whose claims are not at issue are retained in the administrative record, the OMHA PII policy must be observed if copies of the records are requested. See [OCPM 2.6](#) for information on providing copies of the administrative record.

##### **12.2.6.1 When the beneficiary's claim was once part of the appeal or review?**

When the beneficiary's claim was previously part of the appeal or review, the materials must be retained with the administrative record and may be exhibited as a "record not considered" in ECAPE or placed in the non-exhibited part of the record for non-ECAPE appeals (see [OCPM 12.3.4.3](#)). If a file or document contains information on both beneficiaries at issue and those not at issue, the file or document should be marked with a PII alert and/or a note in the exhibiting

description field indicating that the file or document contains materials relating to beneficiaries not at issue. If a copy of the administrative record is requested, the record must be properly redacted of any information the requesting party is not authorized to receive (see [OCPM 2.2.1](#)).

*Example:* The QIC's reconsideration was partially favorable for a multiple-beneficiary appeal. The appellant requested an ALJ hearing for the remaining unfavorable claims. The case file includes materials for the beneficiaries whose claims were decided favorably in the reconsideration and are not at issue before OMHA. In this situation, all the records must be retained in the administrative record. Files and documents associated with the claims not at issue should be exhibited as records not considered.

#### **12.2.6.2 When the beneficiary's claim was never part of the appeal or review?**

If the materials were submitted by a party and are part of the record from a lower appeal level, retain the materials in full in the administrative record. Though these records are retained, the records are exhibited as a record not considered.

If a party submits the materials to OMHA, alert the party to the erroneous inclusion and inquire whether the party wishes to withdraw the submission and resubmit an appropriately redacted version of the materials.

*Example:* A supplier submits a copy of a favorable unredacted OMHA decision that it received on a different appeal for another beneficiary as an example of a favorable outcome for a similar fact pattern. The submission is retained in the record.

See OCPM 12.2.1.1 for information on addressing materials inadvertently included in the case file by a prior adjudicating entity, such as records for a beneficiary unrelated to the appeal.

#### **12.2.6.3 When the material consists of an additional documentation request, remittance advice, or similar document?**

If a contractor or party includes the full, unredacted copy of a document that lists multiple beneficiaries, including a beneficiary whose claim is or was at issue, the entire document is retained in its unredacted form.

**12.2.7 What do we do if an appellant's submission pertains to multiple appeals?**

If an appellant submits materials and the entire submission pertains to multiple appeals, the submission must be added to the administrative record of each appeal (see [OCPM 9.2.1.2](#)). Any PII or PHI in the submission relating to other appeals must be redacted by OMHA from the copy placed in an individual record.

*Example:* An appointed representative submits a delegation to another representative in the same form for five appeals that are identified by appellant name, beneficiary name, and OMHA appeal number on the fax cover page. The entire submission is scanned, a version is created for each appeal with PII properly redacted, and the appropriate redacted version is uploaded to the administrative record of each appeal.

If a portion of a submission relates to multiple appeals and a portion relates to individual appeals, the portion that relates to multiple appeals is scanned and uploaded to each individual appeal's administrative record, and the portion related to an individual appeal is only included in the individual appeal's administrative record.

If separating the submission into relevant parts may cause confusion, include a cover sheet indicating that the original submission pertained to multiple appeals and only the records relating to the individual appeal are included in the record. For portions of the submission that relate to multiple appeals, any PII or PHI relating to other appeals must be redacted from the copy placed in an individual appeal record.

**12.2.8 How do we cite to the administrative record?**

For exhibited records, cite materials in accordance with the OMHA Citation System.<sup>10</sup> If the administrative record does not require exhibiting (for example, dismissals and remands), but the adjudicator chooses to reference a document in the remand or dismissal order, the adjudicator may cite to a document title and date that will be unique to the document.

*Example 1:* "Request for hearing, stamped received August 14, 2019."

*Example 2:* "Remittance Advice dated February 11, 2021."

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<sup>10</sup> The OMHA Citation System is available as chapter support material to OCPM 16.

**12.2.9 Can we alter the administrative record materials?**

No, administrative record materials may not be altered, *unless* redactions are needed to protect PII, as provided for in this chapter (see [OCPM 2.6](#)).

## 12.3 Identifying and exhibiting records

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### 12.3.1 Which appeals require exhibiting?

Generally, with few exceptions, OMHA appeals require exhibiting. Adjudication teams must exhibit the administrative record when the anticipated appeal disposition is a decision (not including a decision affirming dismissal), or whenever the adjudicator determines exhibiting is necessary for the appeal.<sup>11</sup>

### 12.3.2 Which appeals do not require exhibiting?

Exhibiting is not required when a disposition other than a decision will be issued, *unless* the adjudicator determines that exhibiting is necessary for an individual appeal.<sup>12</sup> Even if the administrative record does not need to be exhibited, the administrative record must include all record materials received or created by OMHA.

The following appeal dispositions do not require exhibiting:

- Dismissals;<sup>13</sup>
- Decisions affirming dismissal;
- Remands;<sup>14</sup>
- Escalations to the Council;<sup>15</sup>
- Removals by order of the Council;<sup>16</sup> and
- Requests for Expedited Access to Judicial Review in which the request for hearing and case file are forwarded to the DAB as the review entity.<sup>17</sup>

**Example:** OMHA receives a request for review of a QIC dismissal. After reviewing the administrative record, the adjudicator decides the dismissal was in error and a remand will be issued. No exhibiting of the record is necessary. The request for review and the remand order are part of the administrative record and will be transmitted to MAS, the system of record.

<sup>11</sup> See 42 C.F.R. §§ 405.1042(a)(2) (“The record will include marked as exhibits, the appealed determinations, and documents and other evidence used in making the appealed determinations and the ALJ’s or attorney adjudicator’s *decision* . . .”) (emphasis added); 423.2042(a)(2) (providing the same).

<sup>12</sup> See 42 C.F.R. §§ 405.1042(a)(1); 423.2042(a)(1).

<sup>13</sup> 42 C.F.R. §§ 405.1052(a), 405.1052(b), 423.2052(a), 423.2052(b) (outlining when requests for hearing and review of a dismissal may be dismissed).

<sup>14</sup> 42 C.F.R. §§ 405.1056, 405.1058, 423.2056, 423.2058.

<sup>15</sup> 42 C.F.R. § 405.1106.

<sup>16</sup> 42 C.F.R. §§ 405.1050, 423.2050.

<sup>17</sup> 42 C.F.R. §§ 405.990, 423.1990.

### 12.3.3 When in the adjudication process is the administrative record exhibited?

Generally, records are exhibited following the prescheduling procedural review of the appeal. The timing of exhibiting is at the discretion of the adjudicator; however, exhibiting must occur by certain points in the adjudication process.

- If an appeal *will be scheduled for a hearing*, preferably, the administrative record should be exhibited before the notice of hearing is issued, so that the administrative record index can be sent with the notice of hearing.
- If the appeal is *scheduled for a hearing* and the administrative record was not exhibited before sending the notice of hearing, the record must be exhibited no later than the day of the hearing, so the index of the administrative record can be provided to the parties prior to or at the start of the hearing (see [OCPM 14.5.7.3](#)).
- If the appeal *will not be scheduled for a hearing* (i.e., a decision is being issued “on-the-record”) and exhibiting is necessary for the appeal, the administrative record must be exhibited before the decision is issued. For appeals that were initially exhibited for a hearing and later determined to be appropriate for a decision on the record, additional exhibiting may be necessary for materials received or created after the initial exhibiting.
- When a request for a copy of the record is received while an appeal is pending at OMHA, the administrative record must be exhibited to provide the records and the index of the administrative record.

*Note:* Any party or representative may request a copy of all or part of the administrative record and is entitled to receive the portion of the record they are authorized to view.<sup>18</sup> OMHA is responsible for processing these requests during the period that an appeal is pending at OMHA. See [OCPM 2.2](#) for more information on administrative record requests.

### 12.3.4 How is the administrative record exhibited?

This subsection provides guidance for a base-level of exhibiting to ensure appropriate records are exhibited, as required by regulations, and a sufficient index of the administrative record is created for the adjudicator and parties. An adjudicator may

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<sup>18</sup> 42 C.F.R. §§ 405.1042(b), 423.2042(b).



determine that an appeal warrants more detailed exhibiting. The adjudicator has discretion to set additional exhibiting standards and expectations.

All prior level determinations, including the initial determination (if available), redetermination (if applicable), and reconsideration must be identified in the administrative record. Additionally, all medical records or records used in reaching the previous determinations, e.g., eligibility documentation, must be identified in the administrative record.

#### **12.3.4.1 How do we exhibit an electronic file?**

An electronic file is exhibited by assigning exhibiting information to all pages in the electronic file. An electronic file will be exhibited into one or more exhibits.

*Example 1:* In an ECAPE appeal, an electronic file contains the request for redetermination on pages 1 through 9, and medical records submitted with the request on pages 10 through 100. The legal assistant creates an exhibit for the redetermination request with an evidence type of “Request for Redetermination” and a page range of 1 through 100. The legal assistant creates a second exhibited record for the medical records, with a page range of 10 through 100.

*Example 2:* In an ECAPE appeal, an electronic file contains the request for redetermination on pages 1 through 9, and medical records submitted with the request on pages 10 through 100. The legal assistant creates an exhibit for the redetermination request under record category “Procedural–CMS Level” with a page range of 1 through 9. The legal assistant creates a second exhibited record under record category “Medical & Related” with a page range of 10 through 100.

*Example 3:* In a non-ECAPE electronic appeal, an electronic file contains the request for redetermination on pages 1 through 9, and medical records submitted with the request on pages 10 through 100. The legal assistant creates an exhibit marked “Request for Redetermination with Medical Records” and a page range of 1 through 100.

#### **12.3.4.2 How do we exhibit a file in a paper appeal?**

A paper file is exhibited by assigning exhibiting information to all pages in the file. Exhibits are identified based on the organization of the administrative record. If the adjudication team uses reverse chronology organization (i.e., most recent document

to oldest document), begin at the bottom of the exhibited portion of the record and assign an exhibit number to each document category or individual document in the record. If the adjudication team uses document category organization (e.g., redetermination, reconsideration, request for hearing), assign a sequential exhibit number to each document category.

#### **12.3.4.3 What materials may be marked or categorized as records not considered?**

Materials that are part of the administrative record but are not considered in decision-making may be marked as records not considered. Examples of records not considered include:

- Duplicate documents (*see* OCPM 12.2.2);
- New evidence where good cause for late submission was required and the adjudicator did not find good cause; and
- Records related to beneficiaries whose claims are no longer at issue.

#### **12.3.4.4 How are hearing recordings added to the record?**

Audio recordings created by OMHA, and those created at other levels of appeal, are part of the administrative record.

##### *Audio recordings created at other levels of appeal*

If the administrative record contains an audio recording from a prior level of appeal, or from the Council in reestablished appeals, the recording is exhibited in the administrative record.

*Example:* An ECAPE appeal record contains an audio recording from a QIC demonstration project telephone discussion. The legal assistant exhibits the audio recording under the “Proceedings (Audios)” record category.

##### *Audio recordings created at OMHA level*

Audio recordings of conferences, hearings, and supplemental hearings created at the OMHA level are part of the administrative record and must be attached to the appeal. However, it is not necessary to exhibit these recordings.

*Example:* After a hearing on an ECAPE appeal, the legal assistant uploads the recording to ECAPE, where it appears on the “Attachments” tab. The

hearing recording will automatically transfer, without exhibiting, from this ECAPE location to MAS when the appeal is closed in ECAPE.

*Note:* If the OMHA hearing recording is exhibited, the index of the administrative record is updated, and the new version must be provided to all parties and participants owed a copy.<sup>19</sup>

Any recording should be uploaded to ECAPE, where it will appear under the Attachments tab and will be included with the administrative record that is automatically sent to the system of record when the appeal is closed.

*Note:* Failure to attach OMHA hearing and conference recordings to the record may result in clarification requests from the AdQIC and remanded decisions from the Council.

#### **12.3.4.5 What if we exhibited the record and the appellant submits additional materials?**

The materials must be scanned to an electronic file, if necessary, and attached to the appeal to maintain a complete administrative record. The file is then exhibited, unless exhibiting is not required for the type of document or appeal. See OCPM 12.2.1.1 and 12.3.2 for information on documents and appeals that may not require exhibiting. For electronic appeals, once the materials are uploaded to the record, the originals can be destroyed in accordance with applicable PII requirements.

*Note:* If the appeal is not exhibited, or the submitted materials do not require exhibiting, the materials still must be attached to the appeal to maintain a complete administrative record.

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<sup>19</sup> 42 C.F.R. §§ 405.1042(a)(3), 405.1042(b)(1), 423.2042(a)(3), 423.2042(b)(1).

## **12.4 Index of the administrative record**

(Issued: 10-28-22, Effective: 10-28-22)

### **12.4.1 When is an index of the administrative record created?**

The index of the administrative record, if necessary, is created prior to the notice of hearing being sent; or if the index is not prepared and sent with the notice of hearing, it should be prepared as soon as possible after, and before the hearing (see [OCPM 14.5.3](#)). For appeals that require exhibiting, an index of the administrative record must be created:

- When a copy of the administrative record or administrative record index is requested;<sup>20</sup> and
- Before the notice and decision are issued.

### **12.4.2 What form is used to create an index of the administrative record?**

The index of the administrative record is created using the Index of Administrative Record form (OMHA-156). No handwriting or marking is permitted on the administrative record index that is sent to the parties.

### **12.4.3 What information is included on the index of the administrative record?**

The index of the administrative record includes a list of numbered exhibits with descriptions, as appropriate, and the date the index is created. The exhibits are numbered, and the index identifies the page range of the exhibited record.

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<sup>20</sup> [42 C.F.R. §§ 405.1042\(a\)\(3\), 405.1042\(b\)\(1\), 423.2042\(a\)\(3\), 423.2042\(b\)\(1\)](#).

## **12.5 Documenting electronic and oral communications**

(Issued: 10-28-22, Effective: 10-28-22)

### **12.5.1 When is a report of contact necessary and when are the reports of contact added to the administrative record?**

Contact made with parties and participants concerning a pending appeal in which information is provided or exchanged that may affect the how the appeal is processed or the outcome of the appeal must be documented by completing a report of contact form (OMHA-101).

The reports of contact form may be an exhibited record, or a record not considered, depending on whether and how the contact affects the processing of that appeal. For example, if a party contacts the team after receiving the notice of hearing and calls to request a new or different hearing date the report of contact must be exhibited.

### **12.5.2 When should an email communication be added to the administrative record?**

Emails that are administrative in nature, such as an email requesting appeal status, generally do not need to be added to the administrative record. However, an email objecting to the time and date of a scheduled hearing must be added into the administrative record and exhibited. Emails do not require a report of contact form if the email contains information on the sender and date received (see [OCPM 2.1.1](#) and [OCPM 9.1.4](#)).

### **12.5.3 What must be included when an email is added to the administrative record?**

If an email communication is added to the administrative record, the email and any attachments must be included. Emails should be saved as a PDF and uploaded through the attachment tab.

### **12.5.4 Are emails relaying the Electronic Notice of Hearing (eNOH) to a CMS contractor added to the administrative record?**

Emails conveying an eNOH do not have to be exhibited to the administrative record, *unless* an issue arises during the adjudication process that warrants adding the email to the administrative record. For ECAPE appeals, the generated eNOH is automatically

added to the attachments tab as part of the non-appellant notice of hearing package.<sup>21</sup> See [OCPM 14.5.5](#) for eNOH guidance.

*Note:* Although the email conveying the eNOH does not need to be added to the administrative record, any contractor elections or requests to participate must be added to the record.

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<sup>21</sup> See [42 C.F.R. §§ 405.1010, 405.1012, 423.2010](#).

## 12.6 Ensuring the administrative record is complete

(Issued: 10-28-22, Effective: 10-28-22)

### 12.6.1 What is a complete administrative record?

The administrative record is generally complete when exhibiting is finalized before a disposition is issued and the record is sent for effectuation. See [OCPM 19](#) for information on closing the case and mailing the disposition package.

If a hearing is held, the record is generally complete at the end of the hearing, after the hearing recording is uploaded, *unless*:

- The ALJ provides additional time after the hearing to submit evidence or testimony, in which case the record is closed at the end of the period allowed by the ALJ, (see [OCPM 15.7.3](#));
- The ALJ stops the hearing temporarily and continues it at a later date because the ALJ believes there is material evidence missing at the hearing; or
- An unrepresented beneficiary submits evidence after the hearing, and the appeal is not an expedited Part D appeal.

When a hearing is *not* held, the record remains open for the submission of additional items and written argument until a disposition has been issued. Typically, all evidence should be submitted upon the filing of the request for hearing, *unless*:

- The appellant indicated in the request for hearing that additional evidence would be submitted; or
- The appellant is an unrepresented enrollee and the appeal is not an expedited Part D appeal.

*Note:* The regulations do not specifically address closing the administrative record. Items may continue to be added to the record until the disposition is issued and the record transmits back to MAS, the system of record. For example, the notice and disposition documents are added to the record at the time of closing an ECAPE appeal but do not require exhibiting.

Additional information on evidence submission can be found in [OCPM 10.5](#).

### 12.6.2 Can we update the administrative record after OMHA issues a disposition?

Any materials received or created by OMHA related to requests, submissions, or actions taken on an appeal after a disposition is issued must be added to the administrative record, *unless* the documents are purely administrative. For ECAPE appeals, the

materials are added to the administrative record in ECAPE through a clerical edit and will automatically transfer to MAS. For other electronically processed appeals, the materials are added to the system of record. For paper appeals, the materials are sent to the custodian of the record. See [OCPM 20.2](#) for additional information on adding post-adjudication materials to the administrative record.

Administrative materials that do not need to be added to the administrative record after a disposition has been issued include:

- Incidental inquiries or communications that invoke no request, review, or action, such as an appreciative note or phone call;
- Documentation related to shipping or transferring the administrative record or lower level case file;
- Courtesy copies of actions taken to appeal or refer a decision or dismissal, or seek review of a remand; and
- CMS, CMS contractor, plan, or SSA clarification requests.



**Revision history**

<b>Date</b>	<b>Description</b>	<b>Sections/subsections updated</b>
10/28/2022	Initial Release	N/A