

OMHA Case Processing Manual

Chapter 17 DISMISSALS

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17.0 Chapter overview

This chapter addresses the reasons an ALJ or attorney adjudicator may dismiss a request for hearing or review of a reconsideration dismissal, the contents of a dismissal order and its associated notice, and the effect of a dismissal. This chapter also addresses appeal rights and an adjudicator's authority to vacate his or her own dismissal.

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).

17.1 Reasons for dismissal

(Issued: 07-12-19, Effective: 07-08-19)

17.1.1 When may an ALJ dismiss a request for hearing?

An **ALJ** may dismiss a request for hearing for any of the following reasons:

- Failure to appear at the hearing (*see* OCPM 17.1.4);¹
- No right to hearing (that is, no appealable action, request not filed by a party with standing to appeal, insufficient AIC, or appellant waived the right to appeal) (*see* OCPM 17.1.5);²
- Untimely filing (*see* OCPM 17.1.6);³
- Death of the beneficiary (*see* OCPM 17.1.7);⁴
- Res judicata (that is, when there has been a prior binding determination or decision about the appellant's rights on the same facts and on the same issues or claims) (*see* OCPM 17.1.8);⁵
- Abandonment (*see* OCPM 17.1.9);⁶
- Failure to cure a defect in the request for hearing after being given opportunity to do so (for example, failure to copy the other parties on the request for hearing in a Part A or Part B appeal, or incomplete request for hearing) (*see* OCPM 17.1.10);⁷ or
- Withdrawal (*see* OCPM 17.1.11).⁸

17.1.2 May an attorney adjudicator dismiss a request for hearing?

An **attorney adjudicator** may dismiss a request for hearing only when the appellant **withdraws** the request for hearing (*see* OCPM 17.1.11).⁹ An attorney adjudicator may not dismiss a request for hearing for any other reason.

¹ 42 C.F.R. §§ 405.1052(a)(1), 423.2052(a)(1).

² 42 C.F.R. §§ 405.1052(a)(2), 423.2052(a)(2).

³ 42 C.F.R. §§ 405.1052(a)(3), 423.2052(a)(3).

⁴ 42 C.F.R. §§ 405.1052(a)(4), 423.2052(a)(4).

⁵ 42 C.F.R. §§ 405.1052(a)(5), 423.2052(a)(5).

⁶ 42 C.F.R. §§ 405.1052(a)(6), 423.2052(a)(6).

⁷ 42 C.F.R. §§ 405.1052(a)(7), 423.2052(a)(7).

⁸ 42 C.F.R. §§ 405.1052(c), 423.2052(c).

⁹ 42 C.F.R. §§ 405.1052(c), 423.2052(c).

17.1.3 When may an ALJ or attorney adjudicator dismiss a request for review of a reconsideration dismissal?

An **ALJ or attorney adjudicator** may dismiss a request for review of a reconsideration dismissal for any of the following reasons:

- No right to review (that is, no appealable action, request not filed by a party with standing to appeal, insufficient AIC, or appellant waived the right to appeal) (*see* OCPM 17.1.5);¹⁰
- Untimely filing (*see* OCPM 17.1.6);¹¹
- Death of the beneficiary (*see* OCPM 17.1.7);¹²
- Failure to cure a defect in the request for review after being given an opportunity to do so (for example, failure to copy the other parties on the request for review in a Part A or Part B appeal, incomplete request for review) (*see* OCPM 17.1.10);¹³
or
- Withdrawal (*see* OCPM 17.1.11).¹⁴

17.1.4 When does an ALJ dismiss a request for hearing for failure to appear?

The mandatory OMHA Notice of Hearing (OMHA-1024, or OMHA-624 for expedited Part D hearings) includes language notifying the appellant or the appellant's representative that failure to appear at the scheduled hearing without good cause may result in dismissal of the request for hearing.¹⁵

An ALJ may dismiss a request for hearing for failure to appear if neither the appellant nor the appellant's representative appears at the scheduled hearing, and one of the following two scenarios applies:

- 1) If OMHA **receives** a response to the notice of hearing from the appellant, an ALJ may dismiss a request for hearing when:
 - The appellant was notified before the time set for the hearing that the request for hearing might be dismissed for failure to appear (for example,

¹⁰ 42 C.F.R. §§ 405.1052(b)(1), 423.2052(b)(1).

¹¹ 42 C.F.R. §§ 405.1052(b)(2), 423.2052(b)(2).

¹² 42 C.F.R. §§ 405.1052(b)(3), 423.2052(b)(3).

¹³ 42 C.F.R. §§ 405.1052(b)(4), 423.2052(b)(4).

¹⁴ 42 C.F.R. §§ 405.1052(c), 423.2052(c).

¹⁵ 42 C.F.R. §§ 405.1022(b)(3), 423.2022(b)(3).

by means of the language in the mandatory Notice of Hearing OMHA-1024, or OMHA-624 for expedited Part D hearings);

- The record contains documentation that the appellant acknowledged the notice of hearing; and
- The appellant **does not** contact the ALJ within 10 calendar days after the hearing (or 2 calendar days after the hearing for an expedited Part D appeal), or does contact the ALJ, but the ALJ determines the appellant did not demonstrate good cause for not appearing;¹⁶ or

Note: The OMHA Notice of Hearing (OMHA-1024, or OMHA-624 for expedited Part D hearings) contains a statement that if the appellant or the appellant's representative does not appear at the scheduled hearing, the request for hearing may be dismissed unless the ALJ finds good cause for the failure to appear. No additional evidence is required to show that the appellant was notified that the request for hearing might be dismissed for failure to appear at the scheduled hearing.

2) If OMHA **does not receive** a response to the notice of hearing from the appellant, an ALJ may dismiss a request for hearing when:

- The record does not contain documentation that the appellant acknowledged the notice of hearing;
- The ALJ sends an Order to Show Cause for Failure to Appear (OMHA-164) with a Generic Notice (OMHA-120) to the appellant at the last known address asking why the appellant did not appear; and
- The appellant **does not** respond to the ALJ's order within 10 calendar days after receiving the order (or 2 calendar days after receiving the order with respect to an expedited Part D appeal), or does contact the ALJ, but the ALJ determines the appellant did not demonstrate good cause for not appearing.¹⁷

Note: For notices that are mailed, OMHA presumes mail is received five calendar days after the date it was sent, absent evidence to the contrary.

¹⁶ 42 C.F.R. §§ 405.1052(a)(1)(i), 423.2052(a)(1)(i).

¹⁷ 42 C.F.R. §§ 405.1052(a)(1)(ii), 423.2052(a)(1)(ii).

In determining whether good cause exists, the ALJ considers any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) the appellant may have.¹⁸

Example: The appellant-provider submits a response to the notice of hearing indicating that it will attend the scheduled telephone hearing and confirms the telephone number OMHA should use to initiate the call. However, there is no answer at the telephone number provided in the response to the notice of hearing. Five days after the scheduled hearing, the appellant faxes an explanation stating that it missed the hearing due to a change in staff, and requests that the hearing be rescheduled.

Because the appellant contacted the hearing office within 10 calendar days and provided an explanation for not appearing at the scheduled hearing, the ALJ must determine whether the appellant's explanation constitutes good cause for not appearing.

Note: The Council has previously held that an appellant's failure to appear at a scheduled hearing due to a change in staffing does not constitute good cause, as normal staff turnover is an expected event of doing business.¹⁹

17.1.5 When does an OMHA adjudicator dismiss a request for hearing or review because the requesting party has no right to a hearing or review?

An ALJ may dismiss a request for hearing, or an ALJ or attorney adjudicator may dismiss a request for review, if the requesting party has no right to a hearing or review under the applicable regulations.²⁰ Examples of situations where there is no right to hearing or review include:

- There has been no appealable action;
- The request was not filed by or on behalf of a party with standing to appeal;
- The AIC does not meet the minimum amount required for an ALJ hearing or review of a reconsideration dismissal;²¹ or

¹⁸ 42 C.F.R. §§ 405.1052(a)(1)(iii), 423.2052(a)(1)(iii).

¹⁹ M-15-994 (Nov. 18, 2015). As of the effective date of this chapter, the Chair of the DAB has not designated this Council decision as precedential.

²⁰ 42 C.F.R. §§ 405.1052(b)(1), 423.2052(b)(1).

²¹ See 42 C.F.R. §§ 405.1002(b)(3), 405.1004(a)(2), 405.1006, 423.2006(a).

- The appellant waived the right to appeal.

17.1.5.1 When is there no appealable action?

An ALJ or attorney adjudicator only has jurisdiction to review certain actions, such as a QIC reconsideration or a dismissal of a request for reconsideration. If there is no appealable action, the request for hearing or review is dismissed because there is no right to hearing or review.

Example: Where a MAC dismisses a redetermination request, and the QIC also dismisses a request for review of that dismissal, the QIC's action is not subject to further review by an ALJ or attorney adjudicator.²²

17.1.5.2 When is there no standing to appeal?

Not a valid party with appeal rights

An individual or entity must have party status and be otherwise authorized under the applicable regulations to request an ALJ hearing or review of a reconsideration dismissal.²³ If there is no party with standing, the request for hearing or review is dismissed because there is no right to hearing or review.²⁴

Example: Even though the MAO is a party in a **Part C case**, the MAO may not request a hearing.²⁵

Example: In a **Part D case**, only the enrollee is a party, and only the enrollee or the enrollee's representative may request a hearing.²⁶

Example: In an **MSP case** where Medicare is pursuing recovery directly from the applicable plan, the applicable plan is the sole party to the initial determination, and the beneficiary does not have party status or standing to appeal.²⁷

Not a valid representative

An ALJ may dismiss a request for hearing, or an ALJ or attorney adjudicator may dismiss a request for review, if the request was filed on a party's behalf by an individual who is not authorized to act on the party's behalf (such as a power of

²² 42 C.F.R. § 405.972(e).

²³ 42 C.F.R. §§ 405.906(b), 422.602(c), 423.2008.

²⁴ 42 C.F.R. §§ 405.1052(a)(2), 423.2052(a)(2).

²⁵ 42 C.F.R. §§ 422.600(a), 422.602(c).

²⁶ 42 C.F.R. § 423.2008.

²⁷ 42 C.F.R. § 405.906(a)(4).

attorney), *unless* the prospective representative files a valid appointment of representative or documentation of a valid authorization.

If an appointment of representative is missing any of the elements required by [42 C.F.R. section 405.910\(c\)](#), and the party does not cure the defect after being given an opportunity to do so, the request may be dismissed because the prospective representative lacks authority to request a hearing or review.²⁸

See [OCPM 5](#) for more information on representatives.

Note: In accordance with [OCPM 5.2.7](#), if the party did not complete a valid appointment of representative, OMHA staff will issue a Notice of Filing Defect (OMHA-125) to inform the party and the prospective representative, as appropriate, of the defect and provide the party an opportunity to cure the defect. The Notice of Filing Defect notifies the party that the request for hearing or review will be dismissed unless the defect is cured or the party elects to proceed without a representative.

17.1.5.3 When is there insufficient AIC?

A party has a right to a hearing or review of a dismissal if the amount remaining in controversy (that is, the AIC) meets the minimum amount published annually by the Secretary.²⁹ If the minimum AIC is not met, the request for hearing or review is dismissed because there is no right to hearing or review.

Note: For an appeal of a QIO reconsideration under [42 C.F.R. section 478.40](#), the minimum AIC is \$200. If the AIC threshold is not met, the adjudicator must notify the parties, using a Notice of Filing Defect (OMHA-125), and allow 15 calendar days from receipt of the notice for the parties to submit additional evidence to demonstrate the AIC is met.³⁰

²⁸ 42 C.F.R. §§ 405.910(d)(2), 405.1052(a)(2), (b)(1), 423.2052(a)(2), (b)(1).

²⁹ 42 C.F.R. §§ 405.1002(b)(3), 405.1004(a)(2), 405.1006(b), 422.600, 423.2006, 478.44.

³⁰ 42 C.F.R. § 478.44(b).

17.1.5.4 When has the appellant previously waived its right to the appeal process?

An ALJ may dismiss a request for hearing, or an ALJ or attorney adjudicator may dismiss a request for review, if the appellant has previously waived its right to the appeal process for the appealed claims.³¹

Example: The appellant agrees to participate in a CMS demonstration project that requires the appellant to waive its right to appeal claims involved in the demonstration. If a request for hearing is filed for claims subject to the demonstration, an ALJ dismisses the request with respect to the claims involved in the demonstration because the appellant has no right to a hearing on the claims based on the terms of the CMS demonstration project.

Example: The appellant, a debtor in a bankruptcy proceeding, signs a bankruptcy settlement agreement with the government. One of the terms of the settlement states that the appellant will not appeal claims specified in the agreement beyond the QIC reconsideration level of appeal. If the appellant files a request for hearing for one of the specified claims, an ALJ dismisses the request for the claims subject to the agreement because the appellant has no right to a hearing on the claims based on the terms of the bankruptcy settlement agreement.

17.1.6 When does an adjudicator dismiss a request for hearing or review because it was not timely filed?

An ALJ may dismiss a request for hearing, or an ALJ or attorney adjudicator may dismiss a request for review, if it was not timely filed, unless the ALJ or attorney adjudicator finds good cause for extending the deadline.³²

If a request for hearing or review is untimely and there is no good cause for extending the filing deadline, the request for hearing or review is dismissed.

Note: If an appellant files an untimely request, but does not provide a reason for the late filing, a Notice of Filing Defect (OMHA-125) is sent to inform the

³¹ 42 C.F.R. §§ 405.1052(a)(2), 405.1052(b)(1), 423.2052(a)(2), 423.2052(b)(1).

³² 42 C.F.R. §§ 405.1052(a)(3), (b)(2), 423.2052(a)(3), (b)(2).

appellant of the defect and provide an opportunity to show cause for the late filing, if one of the following applies:

- The appellant is an unrepresented beneficiary, or is represented by someone other than a provider or supplier; or
- There is evidence in the record that suggests notice would be appropriate given the unique circumstances of the case.

17.1.7 When does an adjudicator dismiss a request for hearing or review because the beneficiary has died?

An ALJ may dismiss a request for hearing, or an ALJ or attorney adjudicator may dismiss a request for review, when the beneficiary whose claim is being appealed dies while the request is pending if all of the following apply:³³

- The beneficiary was the only party that filed a request for hearing or review;
- The beneficiary's surviving spouse or estate has no remaining financial interest in the case;

Note: In deciding whether the beneficiary's surviving spouse or estate has any remaining financial interest in the appeal, the ALJ or attorney adjudicator considers whether the surviving spouse or estate remains liable for the services that were denied or whether the beneficiary was held liable for subsequent similar services under the limitation of liability provisions based on the denial of the services at issue.³⁴

Note: In *United States v. Windsor*, the Supreme Court of the United States held that Section 3 of the Defense of Marriage Act (DOMA), which limited the definition of the word "spouse" to persons of opposite sex, was unconstitutional.³⁵ CMS subsequently issued Ruling 4176-R, announcing that, for purpose of benefits provided under sections 1818(d), 1837(i), and 1839 of the Act, same-sex marriages will be recognized on the same terms as opposite-sex marriages to the greatest extent reasonably possible when the same-sex marriage was lawful where and when it occurred.³⁶ Consistent with the intent of this ruling, OMHA interprets the word "spouse" as used in 42 C.F.R.

³³ 42 C.F.R. §§ 405.1052(a)(4), (b)(3), 423.2052(a)(4), (b)(3).

³⁴ 42 C.F.R. § 405.1052(a)(4)(i), (b)(3)(i).

³⁵ *United States v. Windsor*, 570 U.S. 744 (2013).

³⁶ 80 Fed. Reg. 7975 (Feb. 13, 2015).

sections 405.1052(a)(5)(i) and 423.2052(a)(5), regarding the dismissal of a request for hearing before an ALJ, as including same-sex spouses when:

- The state or territory in which the individuals live recognizes the relationship as a marriage; or
- The individuals entered into a legally valid marriage under the law of any state, territory, or foreign jurisdiction.

Note: Civil unions and domestic partnerships are not marriages. Therefore, individuals in a civil union or domestic partnership are not regarded as spouses.³⁷

- In a **Part A, B, or C case**, no other individual or entity with a financial interest in the case wishes to pursue an appeal; and
- In a **Part D case**, the enrollee's representative, if any, does not wish to continue the appeal.

17.1.8 When does an ALJ dismiss a request for hearing because there has been a prior binding determination or decision?

Under the principles of res judicata (also known as claim preclusion), an ALJ may dismiss a request for hearing in its entirety or refuse to consider one or more of the issues if there has been a prior binding determination or decision about the appellant's rights on the same facts and on the same issue(s) or claim(s). This includes any prior determinations or decisions by a QIC, IRE, an ALJ or attorney adjudicator, or the Council that have become binding by either administrative or judicial action.³⁸ An attorney adjudicator may not dismiss a request for hearing based on res judicata.

Note: Prior administrative decisions and Federal district court decisions are generally not precedential and, thus, cannot serve as the basis for dismissal based on res judicata.³⁹ Res judicata issues will most likely occur when a party asks for another adjudication of a claim for the same date(s) of service based on the same facts and evidence, and the previous decision on the claim is either administratively or judicially final.⁴⁰

³⁷ See 80 Fed. Reg. 7975, 7976 (Feb. 13, 2015).

³⁸ 42 C.F.R. §§ 405.1052(a)(5), 423.2052(a)(5).

³⁹ However, as of March 20, 2017, the Chair of the DAB may designate a Council decision as precedential. 82 Fed. Reg. 4974 (Jan. 17, 2017).

⁴⁰ 67 Fed. Reg. 69311, 69334 (Nov. 15, 2002).

Example: The appellant files a request for hearing with respect to claims for multiple dates of service. One of the claims was addressed in a prior decision by the Council, and was not remanded to OMHA. An OMHA adjudicator does not have authority to consider the claim because the Council's decision is binding, unless: (1) a Federal district court issues a decision modifying the Council's decision; or (2) the decision is reopened and revised by the Council.⁴¹ Therefore, the request for hearing is subject to dismissal with respect to this claim.

17.1.9 When does an ALJ dismiss a request for hearing for abandonment?

An ALJ may conclude that an appellant has abandoned a request for hearing when OMHA attempts to schedule a hearing and is unable to contact the appellant after making reasonable efforts to do so.⁴² An attorney adjudicator may not dismiss a request for hearing due to abandonment.

17.1.9.1 What are “reasonable efforts” to schedule a hearing?

“Reasonable efforts” to schedule a hearing vary depending on the circumstances. If an appellant is unreachable by telephone, the appellant is contacted by other means, such as an email that does not contain PII or a letter, depending on the contact information available in the case processing system or case file. When contacting the appellant to schedule a hearing, the appellant should be informed that the request for hearing may be dismissed if the appellant does not respond within five calendar days.

Note: OMHA staff is not required to set a time and date for the hearing or mail a notice of hearing before determining that a request for hearing has been abandoned, as long as all readily available means of contacting the appellant prior to scheduling have been exhausted.

All attempts to contact the appellant must be documented in the administrative record, including:

- Copies of written correspondence sent to the appellant;
- Returned mail, including a copy of the envelope showing that the mail was returned, and documented attempts to resend the mail to a forwarding or

⁴¹ 42 C.F.R. §§ 405.980, 405.1130, 423.2130.

⁴² 42 C.F.R. §§ 405.1052(a)(6), 423.2052(a)(6).

corrected address, if applicable. (See [OCPM 14.5.8](#) and [OCPM 20.3](#) for general procedures for handling returned mail); and

- Reports of Contact (OMHA-101) for attempts to contact the appellant by telephone.

Example: An ALJ team member calls the appellant's telephone number listed on the request for hearing to determine the appellant's availability for a hearing, but gets a message that the number is no longer in service. The ALJ team member then sends a letter to the appellant's mailing address listed on the request for hearing and requests an updated contact number, and informs the appellant that the request for hearing may be dismissed if the appellant does not respond to the letter within five calendar days. If the appellant has not responded to the letter by the date indicated, either in writing or by telephone, the ALJ may dismiss the request for hearing due to abandonment.

Note: In general, OMHA staff should not search the internet or otherwise attempt to obtain contact information for parties and/or participants. Internet or other sources of potential contact information may not be accurate and may result in a PII or PHI breach if used. Parties and participants to the hearing are obligated to keep OMHA apprised of any necessary updates to the contact information listed in the request for hearing.

17.1.9.2 Does failure to respond to a notice of hearing constitute abandonment?

No, an appellant's failure to respond to a notice of hearing, by itself, does not constitute abandonment. OMHA staff is required to attempt to contact any party who does not respond to a notice of hearing for an explanation.⁴³ See [OCPM 14.5.8](#) for information on what OMHA staff should do when a notice of hearing is returned as not deliverable, and [OCPM 14.6.2](#) for information on what OMHA staff should do when the appellant does not respond to the notice of hearing.

If, however, OMHA staff attempt to contact an appellant who has not responded to a notice of hearing, and the party is unreachable by telephone or writing, then the ALJ may conclude that the appellant has abandoned the request for hearing and

⁴³ 42 C.F.R. §§ 405.1022(c)(1), 423.2022(c)(1).

dismiss the request, provided documentation of the attempted contacts are in the administrative record.

Note: If an ALJ receives no response to the notice of hearing and proceeds with the hearing without first attempting to contact the appellant for an explanation, and the appellant fails to appear, then the ALJ team is required to send an Order to Show Cause for Failure to Appear (OMHA-164) with a Generic Notice (OMHA-120) to the party's last known address. The appellant will have 10 calendar days from receipt of the notice to respond before the request can be dismissed. See OCPM 17.1.4 for information on dismissing a request due to failure to appear at a scheduled hearing.

17.1.10 When does an adjudicator dismiss a request for hearing or review because of a filing defect?

An ALJ may dismiss a request for hearing, or an ALJ or attorney adjudicator may dismiss a request for review, if the appellant does not cure a defect in the request after being given an opportunity to do so. The appellant must be given an opportunity to cure a defect in the request for hearing or review if:

- It is missing information that is required by regulation;⁴⁴ or
- The appellant in a **Part A or Part B appeal**, *other than an unrepresented beneficiary*, did not send a copy of its request to the other parties.⁴⁵

If the appellant does not cure a defect in the request by providing the required information or sending the required copy (or copies) after being given an opportunity to do so, the request for hearing or review is dismissed.⁴⁶

Note: If the appellant in a **Part A or Part B appeal**, *other than an unrepresented beneficiary*, did not provide a copy of its request for hearing or review to the other parties who were sent a copy of the QIC's reconsideration or dismissal, a Notice of Filing Defect (OMHA-125) is issued to inform the appellant of the defect, provide the appellant with an opportunity to cure

⁴⁴ See 42 C.F.R. §§ 405.1014(a)(1), 423.2014(a)(1).

⁴⁵ 42 C.F.R. § 405.1014(d)(1).

⁴⁶ 42 C.F.R. §§ 405.1052(a)(7), 423.2052(a)(7), 405.1052(b)(4), 423.2052(b)(4).

the defect, and notify the appellant that the request may be dismissed if the defect is not cured.

Note: If the appellant is an unrepresented beneficiary and the request does not appear to have been sent to the other parties, OMHA staff must send a copy of the beneficiary's request to the other parties who were sent a copy of the QIC's reconsideration or dismissal, using a Notice of Request Filed by Unrepresented Beneficiary (OMHA-310).

17.1.11 When and how may a request for hearing or review be dismissed if an appellant withdraws the request?

At any time before the notice of decision, dismissal, or remand is mailed, if only one party requested the hearing or review and that party asks to withdraw the request, an adjudicator may dismiss the request for hearing or review.⁴⁷ The request for withdrawal:

- May be submitted in writing or made orally at the hearing, if one is held; and
- Must include a clear statement that the appellant is withdrawing the request for hearing or review and does not intend to further proceed with the appeal.

Written requests with respect to **assigned cases** are sent to the attention of the **adjudicator**.

Written requests with respect to **unassigned cases** are filed with **Central Operations** at:

OMHA Central Operations
Attn: Withdrawal Mail Stop
200 Public Square, Suite 1260
Cleveland, OH 44114-2316

The appellant may, but is not required to, use a Withdrawal of Request for Administrative Law Judge Hearing or Review of Dismissal (OMHA-119) to request withdrawal. If there was a hearing scheduled, OMHA staff will need to cancel the hearing when the request for hearing is withdrawn and subsequently dismissed. See [OCPM 14.9](#) for information on canceling the hearing.

⁴⁷ 42 C.F.R. §§ 405.1052(c), 423.2052(c).

If the request for withdrawal is made by an attorney or other legal representative, the adjudicator may presume the representative has advised the appellant of the consequences of the withdrawal and dismissal.⁴⁸

17.1.11.1 How do we process withdrawals when multiple requests for hearing or review were filed for the same appeal?

If OMHA receives more than one request for hearing or review from different parties to the same appeal, the requests are assigned to the same adjudicator under the same OMHA appeal number. If one party subsequently withdraws its request for hearing or review, the request for hearing or review filed by the other party is not affected.⁴⁹ Because only one administrative record can exist for the claim, rather than issuing a dismissal on the withdrawn request for hearing immediately, the ALJ or attorney adjudicator will issue a single disposition document that addresses the disposition rendered on the remaining request for hearing or review, and includes information on the withdrawal.

Example: A supplier files a request for hearing for items provided to the beneficiary. Subsequently, the beneficiary files a separate request for hearing for the same items. The beneficiary's request for hearing is added to the administrative record. Prior to the scheduled hearing, the supplier files a Withdrawal of Request for ALJ Hearing or Review of Dismissal (OMHA-119), which is added to the administrative record. The hearing is held with the beneficiary. Following the hearing, the ALJ issues a single disposition document that addresses both the disposition of the beneficiary's request for hearing and dismissal of the supplier's request for hearing, and the supplier's status as an appellant. The title and notice of decision of this single decision should reflect that it is a "Decision in Part, Dismissal in Part."

17.1.11.2 What if the appellant withdraws one or more, but not all, of the claims that were the subject of the request for hearing or review?

If an appellant filed a request for hearing or review that includes multiple claims and subsequently elects to withdraw the request with respect to one or more, but not

⁴⁸ 42 C.F.R. §§ 405.1052(c), 423.2052(c).

⁴⁹ 42 C.F.R. § 405.1052(d).

all, of the claims, the OMHA adjudicator takes one of the following actions depending on how the claims are combined in the record:

- If the claims are associated with a **single reconsideration appeal number**, the OMHA adjudicator will issue a single disposition document that addresses the dismissal of the withdrawn claims and the disposition of the remaining claims;
- If the claims are associated with **multiple reconsideration appeal numbers** and were assigned **individual OMHA appeal numbers**, but are consolidated for hearing or were grouped for assignment, the OMHA adjudicator may immediately dismiss the request for hearing or review with respect to the appeals for which all appealed claims are withdrawn; or
- If the claims are associated with **multiple reconsideration appeal numbers**, but were combined into a **single OMHA appeal number**, the OMHA adjudicator may:
 - Issue a single decision that addresses the dismissal of the withdrawn claims and the disposition of the remaining claims; or
 - Un-combine the appeals and immediately dismiss the request for hearing or review with respect to the appeals for which all appealed claims are withdrawn. The remaining appeals may be recombined.

Example: The appellant files a request for hearing involving multiple beneficiaries. The claims are associated with multiple reconsideration appeal numbers, but were combined into a single OMHA appeal number. At the hearing, the appellant's representative states on the record that the appellant wishes to withdraw its appeal with respect to the claim for services provided to one of the beneficiaries.

- If the ALJ decides to issue a single disposition document that addresses each of the beneficiaries' claims, the dismissal is included in the single disposition document (that is, a "Decision in Part, Dismissal in Part").
- If the ALJ decides to issue a separate decision for each beneficiary (after OMHA un-combines the appeals), then the

ALJ may immediately issue a separate dismissal order for the withdrawn appeal.

Note: If an appellant aggregated claims to meet the AIC, and the withdrawal of one or more claims would result in the remaining claims not meeting the minimum AIC required for a request for ALJ hearing or review, the remaining claims would be subject to dismissal.

17.2 Notices and orders of dismissal

(Issued: 07-12-19, Effective: 07-08-19)

17.2.1 What information does a notice of dismissal contain?

A dismissal of a **request for hearing** is accompanied by a Notice of Dismissal (OMHA-1072), which informs recipients of the right to request a review by the Council and the right to request that the ALJ or attorney adjudicator who issued the dismissal vacate the dismissal.⁵⁰ The notice also contains information on how to file a request for review by the Council and how to request that the adjudicator vacate the dismissal.

A dismissal of a **request for review of a dismissal** is accompanied by a Notice of Dismissal of Request for Review of a Dismissal (OMHA-171), which informs recipients of the right to request that the ALJ or attorney adjudicator who issued the dismissal vacate the dismissal.⁵¹ A dismissal of a request for review of a dismissal is binding and not subject to further review, unless it is vacated by the ALJ or attorney adjudicator.⁵²

17.2.2 What information does an order of dismissal contain?

The Order of Dismissal (OMHA-173) must contain the following information:

- The **date** the request for hearing or review was filed;
- The **reason(s)** the request for hearing or review is being dismissed;

Note: The reason(s) for dismissal should be supported by citations to the applicable authorities (such as the specific provision of [42 C.F.R. section 405.1052](#) or [423.2052](#) that establishes the basis for dismissal), relevant findings of fact, and citations to the administrative record. See OCPM 17.1 for reasons that a request for hearing or review may be dismissed. It is generally not necessary to discuss the merits of the underlying claim(s).

Note: If the administrative record is not paginated, citations to specific documents should include the title or type of document and the date created, when possible. For example, "Request for Hearing, stamped received August 14, 2017."

Example: If a request for hearing is dismissed for insufficient AIC, the order of dismissal:

⁵⁰ See [42 C.F.R. §§ 405.1052\(d\), 423.2052\(d\), 405.1100, 423.2100](#).

⁵¹ See [42 C.F.R. §§ 405.1052\(d\), 423.2052\(d\)](#).

⁵² See [42 C.F.R. §§ 405.1054\(b\), 423.2054\(b\)](#).

- States what the minimum AIC required for an ALJ hearing was at the time the request for hearing was filed, citing to the Federal Register Notice for the appropriate year;
- Identifies the AIC in the case, citing to the claim form or other document(s) where the AIC can be found in the administrative record;
- Explains how the AIC was calculated in accordance with [42 C.F.R. section 405.1006](#) or [423.2006](#); and
- Explains that there is no right to hearing because the AIC requirement was not met, citing to [42 C.F.R. section 405.1052\(a\)\(2\)](#) or [423.2052\(a\)\(2\)](#).

Example: If a request for hearing is dismissed due to abandonment, the order of dismissal:

- Explains the attempts that OMHA made to contact the party to schedule the hearing, citing to the administrative record for any applicable Reports of Contact (OMHA-101) or written attempts to contact the party; and
- Explains the criteria for abandonment, citing to [42 C.F.R. section 405.1052\(a\)\(6\)](#) or [423.2052\(a\)\(6\)](#), and how the criteria have been satisfied based on the facts of the case.

- A **clear statement** that the request for hearing or review is dismissed; and
- The adjudicator's **signature**.

17.2.3 Do we include beneficiary information in the dismissal order?

In the **caption** of the order, use the beneficiary's first initial, last name, and truncated Medicare number (HICN or MBI).

In the **body** of the order, beneficiary PII and PHI should be limited.

- Use the term "beneficiary" or "enrollee," as applicable, instead of using names or gender-specific pronouns.
- Characteristics of the beneficiary should be limited to only those relevant to the reason for dismissal.
- Identifiers such as general health conditions, age, and residence should not be included unless relevant to the reason for dismissal.

If the appeal involves claims arising from multiple beneficiaries, create a beneficiary list attachment to the order of dismissal.

- The attachment should contain a list of beneficiaries identified by first initial and last name, a truncated Medicare number (HICN or MBI), and the date(s) of service, if applicable.
- Where possible, beneficiary information should be grouped by MAC.

For more complex cases involving multiple beneficiaries or claims, additional information may be necessary to identify the claim(s) or issue(s) that are subject to dismissal (for example, procedure codes).

17.2.4 Where do we send the dismissal disposition package?

Mail or otherwise transmit:

- A copy of the written Order of Dismissal (OMHA-173); and
- Notice of Dismissal (OMHA-1072) or Notice of Dismissal of Request for Review of Dismissal (OMHA-171);

To the following at their last known address:

- The appellant (or representative);
- Any parties (or their representatives) who were sent a copy of the request for hearing or request for review; and
- In **Part A, B, and C appeals**, to CMS or a CMS contractor that elected to be a party to the proceedings (*see* [OCPM 19.5.2.3](#)).

17.3 After a dismissal is issued

(Issued: 11-30-18, Effective: 11-30-18)

17.3.1 What is the effect of a dismissal of a request for hearing?

If an ALJ or attorney adjudicator dismisses a **request for hearing**, the decision of the prior adjudicator remains in effect. The dismissal is binding unless it is vacated by the Council (*see* OCPM 17.3.5), or vacated by the ALJ or attorney adjudicator (*see* OCPM 17.3.3).⁵³

17.3.2 What is the effect of a dismissal of a request for review?

If an ALJ or attorney adjudicator dismisses a **request for review**, the prior adjudicating entity's dismissal remains in effect. The ALJ's or attorney adjudicator's dismissal is binding and not subject to further review unless it is vacated by the ALJ or attorney adjudicator (*see* OCPM 17.3.3).⁵⁴

17.3.3 When may an adjudicator vacate his or her own dismissal?

An adjudicator may vacate his or her dismissal of a request for hearing or review within six months of the date of the notice of dismissal (that is, the date the notice of dismissal was issued), if good and sufficient cause is established.⁵⁵ See [OCPM 20.7](#) for more information on vacating a dismissal.

17.3.4 May an ALJ or attorney adjudicator issue an amended dismissal to correct a clerical error?

An ALJ or attorney adjudicator may issue an amended dismissal to correct a clerical error, and must issue an amended dismissal if the error prevents effectuation of the dismissal (for example, to correct a transposed Medicare number (HICN or MBI) or appeal number). See [OCPM 20.5](#) for more information on clerical edits.

17.3.5 What are a party's appeal rights after receiving a dismissal?

For a dismissal of a **request for hearing**, a party may request review by the Council within 60 calendar days after receipt of the ALJ's or attorney adjudicator's dismissal.⁵⁶ The date of receipt of the ALJ's or attorney adjudicator's dismissal is presumed to be five calendar days after the date of the notice of dismissal, unless there is evidence to the

⁵³ 42 C.F.R. §§ 405.1054(a), 423.2054(a).

⁵⁴ 42 C.F.R. §§ 405.1054(b), 423.2054(b).

⁵⁵ 42 C.F.R. §§ 405.1052(e), 405.1054, 423.2052(e), 423.2054.

⁵⁶ 42 C.F.R. §§ 405.1102(a)(1), 423.2102(a)(1).

contrary.⁵⁷ The Council may deny review or vacate the dismissal of a request for hearing and remand the case to the ALJ or attorney adjudicator for further proceedings.⁵⁸ An ALJ's or attorney adjudicator's dismissal of a **request for review of a dismissal** is binding and not subject to review by the Council.⁵⁹

In the alternative, a party may request that the adjudicator vacate the dismissal action.⁶⁰ A request to vacate a dismissal does not extend the 60 calendar day period to request Council review of a dismissal (see [OCPM 20.7.3.2](#)). If good and sufficient cause is established, the adjudicator may vacate his or her dismissal of a request for hearing or review within six months of the date of the notice of dismissal (that is, the date the notice of dismissal was issued) (see [OCPM 17.3.3](#)).⁶¹

⁵⁷ 42 C.F.R. §§ 405.1102(a)(2), 423.2102(a)(3).

⁵⁸ 42 C.F.R. §§ 405.1102(a), 423.2102(a), 405.1108(b), 423.2108(b).

⁵⁹ 42 C.F.R. §§ 405.1054(b), 423.2054(b).

⁶⁰ 42 C.F.R. §§ 405.1052(d), 423.2052(d).

⁶¹ 42 C.F.R. §§ 405.1052(e), 423.2052(e).

Revision history

Date	Description	Sections/subsections updated
07/08/2019	Revised footnote citations to reflect relocation of Part D AIC provisions in 42 C.F.R. section 423.1970 to new section 423.2006.	17.1.5, 17.1.5.3, 17.2.2
11/30/2018	Initial Release	N/A

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