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Provider Reimbursement Review Board Revises Rules, Effective Immediately

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On August 29, 2018, the Provider Reimbursement Review Board (Board) issued new rules (Rules), which took effect immediately for both existing and future appeals. Failure to comply with the Rules could result in the loss of appeal rights. The Rules incorporate a number of changes to the Board's requirements. The most significant changes involve the implementation of electronic filing, a decrease in the number of position papers and briefs that must be filed, and the adoption of new rules to address recent legal shifts in appealing self-disallowed items.

Electronic Filing

The Rules implement a long-awaited electronic filing and case management system that operates through the Office of Hearings Case and Document Management System (OH CDMS), which is a web-based portal. (Rule 2). Appeal requests, briefs, Model Forms, and any additional correspondence with the Board can be filed directly through OH CDMS. Parties utilizing the electronic filing system can expect to receive Board notices and decisions via email through the filing system. While use of electronic filing is not currently mandatory, the shift to mandatory electronic filing in the federal civil courts makes it likely the same will eventually happen at administrative tribunals, such as the Board.

Providers using electronic filing will have the benefit of a few extra hours to get documents filed, as electronic submissions will be accepted until 11:59 p.m. Eastern Time (ET) on the date of filing, while hard copy submissions must be received by close of business on the date of filing, keeping in mind that the Board's mail room's business hours are 8:00 a.m. to 4:00 p.m. ET. (Rule 3). If both parties are using the electronic filing system, then the system generated notice will fulfill the requirement for service on the opposing party. If one party is not registered for OH CDMS and therefore must submit hard copy documents, then that party must include a notice with each filing that the information is being filed outside of the OH CDMS and submit copies of the filing to the opposing party and Appeals Support Contractor. The other party that files electronically must still provide timely service on the opposing party since it will not be completed through OH CDMS.

Completion of the Board's Model Forms for group appeals through OH CDMS includes some changes that must be observed. (Rule 20). Most significantly, the Board has noted that since the OH CDMS is still in the beginning stages, it will take some time to fully populate the parties in group cases. The Board is requiring that providers continue to file a hard copy of the schedule of providers and accompanying supporting documentation until further notice. The Schedule of Providers will eventually be replaced by the listing of participating providers and the associated documentation provided through add and transfer requests made within OH CDMS.

Position Papers and Post-Hearing Briefs

Each party is now required to file its complete preliminary position paper with the Board, whereas in the past the parties provided the Board only with a copy of the cover sheet, listing of exhibits, and good faith statement. The Board will dismiss an appeal if a party fails to timely file a complete

preliminary position paper. Submission of final position papers is optional for appeals filed on or after August 29, 2018. If a party elects to file a final position paper, it should provide a deeper analysis on the issues in the appeal. Final position papers remain mandatory for all appeals filed prior to August 29, 2018. All position papers must now use a typeface of at least 10 points. (Rules 25, 27).

In keeping with the theme of reduced filings, post-hearing briefs may be submitted only if requested by the Board. (Rule 36.1).

Appeals of Protested Items

The Rules contain updated legal authority and corresponding direction for appealing issues that were included as protested amounts on a provider's cost report. (Rule 7.3.3). Effective January 1, 2016, the federal regulations no longer required that an issue be included as a claimed cost or protested amount for the Board to have jurisdiction to address the issue; however, as of that date the regulations incorporated that same requirement as a condition of payment.^[1] The change in the rule was prompted by the decision in *Banner Heart Hosp. v. Burwell*.^[2] Thereafter, CMS issued CMS-1727-R, which acknowledges a provider's right to a hearing before the Board for an issue that the provider did not include on its cost as a claimed cost or protested amount, so long as the provider had a "good faith belief that the item was subject to a payment regulation or other policy that gave the MAC [Medicare Administrative Contractor] no authority or discretion to make payment in the manner the provider sought." CMS-1727-R applies to fiscal years that ended on or after December 31, 2008, and began before January 1, 2016.

The Rules acknowledge CMS-1727-R's authority over applicable appeals. However, if a provider does appeal a protested item, the provider must include additional documentation to support the appropriate filing of that item. (Rule 7.3.3). Additionally, for cost reporting periods beginning on or after January 1, 2016, a provider must be able to prove that it included an appropriate claim, protested or otherwise, for the cost on its cost report. (Rule 7.4).

Additional Revisions

The Rules included numerous other changes. Some of those changes are noted below:

- The Rules specifically state that the Board does not accept appeals or other correspondence filed via email or fax. (Rule 3.2).
- While formerly a letter from the provider appointing the representative before the Board had to be signed by "an owner or officer of the [p]rovider," now such a letter must be signed by "an authorizing official of the provider or parent organization." (Rule 5.4). No definition of an authorizing official is provided in the Rules.
- Withdrawal of an appeal must be signed not only by the provider representative but also by "an authorizing official of the provider." (Rule 5.5.2).
- The person filing the appeal request must include the following four certifications: (1) For individual appeals—The issues are not pending for the provider in a current, adjudicated, withdrawn, or dismissed Board appeal. For group appeals—The issue is not pending in any other appeal for the same period for the same providers. (2) For individual and group appeals—No other related providers have a pending appeal for the same issue for the same year. (3) For individual and group appeals—The filing party has read all applicable rules and the appeal is filed in compliance therewith. (4) For individual and group appeals—The filing party is authorized to submit the appeal by the provider(s). (Rules 6.5, 12.10).
- Additional requirements for the appeal of determinations other than an initial notice of program reimbursement (NPR) are set forth. (Rules 7.1.2, 7.2.2, 7.5).

- For each issue appealed, in addition to describing the adjustment, why the adjustment is incorrect, how the payment should be determined differently, and the reimbursement impact, the Rules require identification of the controlling authority and the basis for jurisdiction before the Board. (Rule 7.2.1).
- Issues that belong in a group appeal should be transferred prior to the filing of the preliminary paper. (Rule 12.11).
- Common Issue Related Party (CIRP) groups must notify the Board within one year of filing if the group is complete. (Rule 19.2).
- Although parties may modify deadlines established in a proposed joint scheduling order, modifications to preliminary position paper due dates, as well as final position paper due dates and hearing dates, require Board approval and a showing of good cause. (Rule 24.2.C).
- Providers' preliminary position papers must identify resolved issues. (Rule 25.1.1.A).
- MAC jurisdictional challenges must be filed as separate documents, i.e., not merely included in the MAC's review of a group appeal schedule or in a MAC's preliminary position paper. (Rules 22, 25.1.2).
- A provider may request a consolidated hearing for cases that have identical legal issues. The Board will also consider requests to consolidate cases for a single decision post-hearing. (Rule 30.4).
- The Board anticipates the ability to hold video hearings in the future for cases that involve a strictly legal issue or have few disputed material facts and witnesses would require minimal reference to exhibits. (Rule 32.3).
- Six copies of the most recently filed position papers, with exhibits, must be received by the Board 10 days before the hearing date. (Rule 35.1).
- The Rules no longer include specific format instructions for requests for expedited judicial review (EJR); however, the content requirements remain the same with the additional specific requirement that the request demonstrate that the Board has jurisdiction. (Rule 42.3).
- Requests for mediation must include a jointly executed list of issues and a statement that the parties believe the issues are jurisdictionally proper, do not involve conflicting interpretations of CMS regulations or policy, and may potentially be resolved or narrowed through further discussion and review of documentation. (Rule 43.2).
- New provisions address reinstatement when a provider simultaneously requests to appeal an issue and requests to withdraw the issue (and the case in its entirety), in order to pursue resolution through a reopening. If the MAC denies the reopening or fails to reopen and issue a new final determination for that issue, the Board will grant reinstatement of that issue. This rule applies only to appeals where all issue(s) filed (and not immediately transferred to group appeals) can be resolved through reopening. In this situation the provider does not need to obtain MAC agreement to reopen prior to withdrawal of the appeal. (Rule 47.2.3).
- Subpoena requests also must now include contact information for the party to be subpoenaed, or the location of the documents to be obtained and the contact information for the custodian of the documents. (Rule 48.1).
- The Rules continue to include Model Forms, which are still not mandatory but do provide prompting to include the information and supporting documentation necessary to properly complete the filing. The new Model Forms have been redesigned and can be completed online. (Appendices).

Endnotes

[\[1\]](#) See 42 C.F.R. § 413.24.

[\[2\]](#) 201 S.Supp.3d 131 (D.D.C. 2016).

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