



Healthcare Law News

An update on RAC activity and a report on the recent OMHA Medicare Appellant Forum

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The Office of Medicare Hearing and Appeals (OMHA) recently let the provider community know that it had stopped assigning provider appeals to its ALJs, citing an excessive backup of claims (over 350,000 pending). The decision is contrary to the plain text of the controlling Medicare statute, and OMHA has not provided any legitimate justification for this departure from controlling law. The decision will result in a two year or more delay in the processing of Medicare claim appeals, including MAC pre-payment audits and RAC and ZPIC post-payment audits. Provider Medicare reimbursement revenue is already being affected.

CMS has since suspended the RAC program. (http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Recovery-Audit-Program/Recent_Updates.html.)

While the given reason for the suspension is to complete a new contract procurement process, many in the healthcare community suspect that the suspension may be extended given the backlog of claims caused by the program. The provider community will have to wait and see. In the meantime, providers should evaluate the status of their RAC appeals and consider their options as described below.

On February 12th, OMHA held a forum for Medicare appellants, presumably to address issues surrounding their decision to effectively suspend the appeals process. I attended that forum, and offer the following report.

Key OMHA and CMS managers seemed genuinely surprised to hear about the extent of problems at the MAC and QIC level. They expressed their concern and indicated they would try to make that end of the appeals process more efficient. But there were no firm

commitments to any particular reform or timeline for reform.

CMS and OMHA management did not provide any legal authority for OMHA's decision to suspend case assignment. CMS and OMHA declined to frankly admit that RAC audits were the predominant driver of the OMHA backlog. Just days before the Forum, over 100 members of Congress wrote to HHS requesting reform to the RAC program and pointing out its role in the delays at OMHA. The concerns in this letter were not addressed at the Forum.



Providers can and should keep an eye out for the promised Federal Register solicitation of comments.

An OMHA representative did promise that a solicitation of comments would be forthcoming in the Federal Register. However, OMHA did not reveal the substance of the solicitation, nor the timing. In the end it became clear that OMHA had no short term solution to solve its backlog, and that providers were just being asked to be patient for the next three years.

Providers left the forum without a short term solution that would alleviate the over two year wait providers now face.

Smaller providers might face bankruptcy; larger providers are certainly experiencing disruptions to cash flow. What can the embattled provider do?

Escalation to the Medicare Appeals Council is a poor substitute for an ALJ hearing, as there is no independent review, no written decision, and no opportunity to put on witnesses. If a provider chooses to escalate to the Council they may face delays similar to those occurring at OMHA. If a provider does face long delays at the Council they may escalate to federal court. This may be an option for some providers, but others may not be able to handle the costs of federal court litigation.

Providers can and should keep an eye out for the promised Federal Register solicitation of comments. This will be the first opportunity for the provider community to clearly lay out the problems with the first three levels of the appeal process.

Finally, a provider or provider trade associations may wish to consider litigation against OMHA, CMS, or both. OMHA's decision to suspend assignment of appeals is plainly in violation of the statutory language requiring an ALJ decision in 90 days. OMHA's decision may be arbitrary and capricious under the Administrative Procedures Act. OMHA's decision could also be construed as a deprivation of due process to providers. Providers may be able to protect further interruptions in Medicare reimbursement by seeking an injunction against OMHA's suspension of appeals, or an injunction against RAC recoupment until OMHA's suspension ends. Providers should discuss all of these options with qualified counsel.

If you have additional questions about the content of the OMHA forum or issues surrounding the RAC program, feel free to contact me.

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