

(c) *Adding claims to a pending appeal.* An ALJ cannot add any claim, including one that is related to an issue that is appropriately before an ALJ, to a pending appeal unless it has been adjudicated at the lower appeals levels and all parties are notified of the new issue(s) before the start of the hearing.

**§ 405.1034 When an ALJ may remand a case to the QIC.**

(a) *General rules.* (1) If an ALJ believes that the written record is missing information that is essential to resolving the issues on appeal and that information can be provided only by CMS or its contractors, then the ALJ may either:

(i) Remand the case to the QIC that issued the reconsideration or

(ii) Retain jurisdiction of the case and request that the contractor forward the missing information to the appropriate hearing office.

(2) If the information is not information that can be provided only by CMS or its contractors, the ALJ must retain jurisdiction of the case and obtain the information on his or her own, or directly from one of the parties.

(3) “Can be provided only by CMS or its contractors” means the information is not publicly available, and is not in the possession of, and cannot be requested and obtained by one of the parties. Information that is publicly available is information that is available to the general public via the Internet or in a printed publication. It includes, but is not limited to, information available on a CMS or contractor Web site or information in an official CMS or DHHS publication (including, but not limited to, provisions of NCDs or LCDs, procedure code or modifier descriptions, fee schedule data, and contractor operating manual instructions).

(b) *ALJ remands a case to a QIC.* Consistent with § 405.1004 (b), the ALJ will remand a case to the appropriate QIC if the ALJ determines that a QIC’s dismissal of a request for reconsideration was in error.

(c) *Relationship to local and national coverage determination appeals process.* (1) The ALJ remands an appeal to the QIC that made the reconsideration if the appellant is entitled to relief pur-

suant to 42 CFR 426.460(b)(1), 426.488(b), or 426.560(b)(1).

(2) Unless the appellant is entitled to relief pursuant to 42 CFR 426.460(b)(1), 426.488(b), or 426.560(b)(1), the ALJ applies the LCD or NCD in place on the date the item or service was provided.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65335, Dec. 9, 2009]

**§ 405.1036 Description of an ALJ hearing process.**

(a) *The right to appear and present evidence.* (1) Any party to a hearing has the right to appear before the ALJ to present evidence and to state his or her position. A party may appear by video-teleconferencing (VTC), telephone, or in person as determined under § 405.1020.

(2) A party may also make his or her appearance by means of a representative, who may make the appearance by VTC, telephone, or in person, as determined under § 405.1020.

(3) Witness testimony may be given and CMS participation may also be accomplished by VTC, telephone, or in person, as determined under § 405.1020.

(b) *Waiver of the right to appear.* (1) A party may send the ALJ a written statement indicating that he or she does not wish to appear at the hearing.

(2) The appellant may subsequently withdraw his or her waiver at any time before the notice of the hearing decision is issued; however, by withdrawing the waiver the appellant agrees to an extension of the adjudication period as specified in § 405.1016 that may be necessary to schedule and hold the hearing.

(3) Other parties may withdraw their waiver up to the date of the scheduled hearing, if any. Even if all of the parties waive their right to appear at a hearing, the ALJ may require them to attend an oral hearing if he or she believes that a personal appearance and testimony by the appellant or any other party is necessary to decide the case.

(c) *Presenting written statements and oral arguments.* A party or a person designated to act as a party’s representative may appear before the ALJ to state the party’s case, to present a written summary of the case, or to enter written statements about the

facts and law material to the case in the record. A copy of any written statements must be provided to the other parties to a hearing, if any, at the same time they are submitted to the ALJ.

(d) *Waiver of adjudication period.* At any time during the hearing process, the appellant may waive the adjudication deadline specified in § 405.1016 for issuing a hearing decision. The waiver may be for a specific period of time agreed upon by the ALJ and the appellant.

(e) *What evidence is admissible at a hearing.* The ALJ may receive evidence at the hearing even though the evidence is not admissible in court under the rules of evidence used by the court.

(f) *Subpoenas.* (1) Except as provided in this section, when it is reasonably necessary for the full presentation of a case, an ALJ may, on his or her own initiative or at the request of a party, issue subpoenas for the appearance and testimony of witnesses and for a party to make books, records, correspondence, papers, or other documents that are material to an issue at the hearing available for inspection and copying. An ALJ may not issue a subpoena to CMS or its contractors, on his or her own initiative or at the request of a party, to compel an appearance, testimony, or the production of evidence.

(2) A party's written request for a subpoena must—

(i) Give the names of the witnesses or documents to be produced;

(ii) Describe the address or location of the witnesses or documents with sufficient detail to find them;

(iii) State the important facts that the witness or document is expected to prove; and

(iv) Indicate why these facts cannot be proven without issuing a subpoena.

(3) Parties to a hearing who wish to subpoena documents or witnesses must file a written request for the issuance of a subpoena with the requirements set forth in paragraph (f)(2) of this section with the ALJ no later than the end of the discovery period established by the ALJ under § 405.1037(c).

(4) Where a party has requested a subpoena, a subpoena will be issued only where a party—

(i) Has sought discovery;

(ii) Has filed a motion to compel;

(iii) Has had that motion granted by the ALJ; and

(iv) Nevertheless, has not received the requested discovery.

(5) Reviewability of subpoena rulings—

(i) *General rule.* An ALJ ruling on a subpoena request is not subject to immediate review by the MAC. The ruling may be reviewed solely during the course of the MAC's review specified in § 405.1102, § 405.1104, or § 405.1110, as applicable. *Exception.* To the extent a subpoena compels disclosure of a matter for which an objection based on privilege, or other protection from disclosure such as case preparation, confidentiality, or undue burden, was made before an ALJ, the MAC may review immediately the subpoena or that portion of the subpoena as applicable.

(ii) Where CMS objects to a discovery ruling, the MAC must take review and the discovery ruling at issue is automatically stayed pending the MAC's order.

(iii) Upon notice to the ALJ that a party or non-party, as applicable, intends to seek MAC review of the subpoena, the ALJ must stay all proceedings affected by the subpoena.

(iv) The ALJ determines the length of the stay under the circumstances of a given case, but in no event is the stay less than 15 calendar days beginning after the day on which the ALJ received notice of the party or non-party's intent to seek MAC review.

(v) If the MAC grants a request for review of the subpoena, the subpoena or portion of the subpoena, as applicable, is stayed until the MAC issues a written decision that affirms, reverses, or modifies the ALJ's action on the subpoena.

(vi) If the MAC does not grant review or take own motion review within the time allotted for the stay, the stay is lifted and the ALJ's action stands.

(6) *Enforcement.* (i) If the ALJ determines, whether on his or her own motion or at the request of a party, that a party or non-party subject to a subpoena issued under this section has refused to comply with the subpoena, the ALJ may request the Secretary to seek

enforcement of the subpoena in accordance with section 205(e) of the Act, 42 U.S.C. 405(e).

(ii) Any enforcement request by an ALJ must consist of a written notice to the Secretary describing in detail the ALJ's findings of noncompliance and his or her specific request for enforcement, and providing a copy of the subpoena and evidence of its receipt by certified mail by the party or nonparty subject to the subpoena.

(iii) The ALJ must promptly mail a copy of the notice and related documents to the party subject to the subpoena, and to any other party and affected non-party to the appeal.

(g) *Witnesses at a hearing.* Witnesses may appear at a hearing. They testify under oath or affirmation, unless the ALJ finds an important reason to excuse them from taking an oath or affirmation. The ALJ may ask the witnesses any questions relevant to the issues and allows the parties or their designated representatives to do so.

[70 FR 11472, Mar. 8, 2005, as amended at 74 FR 65336, Dec. 9, 2009]

#### § 405.1037 Discovery.

(a) *General rules.* (1) Discovery is permissible only when CMS or its contractor elects to participate in an ALJ hearing as a party.

(2) The ALJ may permit discovery of a matter that is relevant to the specific subject matter of the ALJ hearing, provided the matter is not privileged or otherwise protected from disclosure and the ALJ determines that the discovery request is not unreasonable, unduly burdensome or expensive, or otherwise inappropriate.

(3) Any discovery initiated by a party must comply with all requirements and limitations of this section, along with any further requirements or limitations ordered by the ALJ.

(b) *Limitations on discovery.* Any discovery before the ALJ is limited.

(1) A party may request of another party the reasonable production of documents for inspection and copying.

(2) A party may not take the deposition, upon oral or written examination, of another party unless the proposed deponent agrees to the deposition or the ALJ finds that the proposed deposition is necessary and appropriate in

order to secure the deponent's testimony for an ALJ hearing.

(3) A party may not request admissions or send interrogatories or take any other form of discovery not permitted under this section.

(c) *Time limits.* (1) A party's discovery request is timely if the date of receipt of a request by another party is no later than the date specified by the ALJ.

(2) A party may not conduct discovery any later than the date specified by the ALJ.

(3) Before ruling on a request to extend the time for requesting discovery or for conducting discovery, the ALJ must give the other parties to the appeal a reasonable period to respond to the extension request.

(4) The ALJ may extend the time in which to request discovery or conduct discovery only if the requesting party establishes that it was not dilatory or otherwise at fault in not meeting the original discovery deadline.

(5) If the ALJ grants the extension request, it must impose a new discovery deadline and, if necessary, reschedule the hearing date so that all discoveries end no later than 45 calendar days before the hearing.

(d) *Motions to compel or for protective order.* (1) Each party is required to make a good faith effort to resolve or narrow any discovery dispute.

(2) A party may submit to the ALJ a motion to compel discovery that is permitted under this section or any ALJ order, and a party may submit a motion for a protective order regarding any discovery request to the ALJ.

(3) Any motion to compel or for protective order must include a self-sworn declaration describing the movant's efforts to resolve or narrow the discovery dispute. The declaration must also be included with any response to a motion to compel or for protective order.

(4) The ALJ must decide any motion in accordance with this section and any prior discovery ruling in the appeal.

(5) The ALJ must issue and mail to each party a discovery ruling that grants or denies the motion to compel or for protective order in whole or in part; if applicable, the discovery ruling must specifically identify any part of