

Client Alert

Healthcare Practice Group

January 15, 2014

ALJ Hearing Assignment Suspension

As some of you may be aware, the Office of Medicare Hearings and Appeals (OMHA) has recently announced that it temporarily suspended the assignment of most new requests for Administrative Law Judge (“ALJ”) hearings, as of **July 15, 2013**, due to the agency’s existing workload. **OMHA anticipates that assignments of most new requests for hearings to an ALJ may be delayed for up to 28 months.**

Recently, on **January 3, 2014**, OMHA published a Notice of Meeting in the Federal Register (“Notice”), announcing an OMHA Medicare Appellant Forum on **February 12, 2014**. Among other things, OMHA states that the purpose of the meeting is to provide updates to OMHA appellants on the status of OMHA operations and growing backlog in the processing of Medicare appeals. The Notice explains that:

[B]eginning in fiscal year 2010, new workloads including permanent establishment of the Recovery Audit (RA) program and termination of several demonstration projects involving Medicare State Agencies (MSA), have emerged that had not been built into the OMHA workload models. . . . As a result of the anticipated workload increase from the traditional appeals and the increased workload resulting from MSA appeals and the RA program, a backlog of appeals began to form in fiscal year 2012 in which more requests for hearing were being filed than could be adjudicated. **In 2013, appealed claims related to the RA program grew to over 136,000, further exacerbating the backlog of cases and resulting in a substantial increase in the adjudication time frame** (emphasis added).

You may access a copy of the notice by clicking [here](#).

OMHA’s policy to temporarily suspend assignment of most ALJ hearings was put into place in July 2013. While a short notice was posted on the OMHA website in October 2013, many providers apparently have not received direct notice of this temporary suspension or are only now receiving this notice. In a memorandum regarding the suspension received by one King & Spalding client, OMHA states “you [the provider] have been chosen to receive this letter because you have a significant number of Medicare appeals currently pending before OMHA.” However, OMHA does not further elucidate why only those providers with a “significant

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number of Medicare appeals currently pending” were chosen to receive such notification. In the memorandum, OMHA notes that it does not expect general assignments to resume for at least 24 months and that it expects post-assignment hearing wait times to continue to exceed 6 months. You can view a copy of the memorandum by clicking [here](#).

As you are well aware, the importance of this suspension cannot be understated. Under the Medicare appeals framework, providers are unable to limit recoupment after level two of the appeal process. Unilaterally suspending requests for ALJ hearings for up to 28 months will have a substantial impact on providers. Accordingly, King & Spalding is currently pursuing:

- **Continued RAC Coalition Efforts**

- The King & Spalding RAC Coalition is a group of hospital clients that was created in April 2013 in an effort to provide relief to Coalition members by communicating jointly to CMS and Congress the need for meaningful and common-sense reforms to the RAC program.
- The Coalition believes that the overburdened Medicare appeals system is strong evidence that the RAC program is poorly conceived, poorly administered and must be reformed. We have consistently made this point in our communications and, as a result, we have been asked by key congressional staff and Members of Congress to assist in developing viable legislative proposals for RAC reform.
- We will include details on these OMHA ALJ scheduling delays in upcoming meetings with Congressional members and staff and use this information to continue to press for the most meaningful RAC reform possible.

- **Potential Litigation Options**

- King & Spalding is reviewing potential litigation opportunities. We are focusing on whether OMHA’s suspension implicates any viable legal claims, whether a court would recognize jurisdiction over such a claim and, given that providers are out-of-pocket during this delay, whether courts can provide any meaningful remedies to address this situation.

- **RAC Appeal and Dispute Strategies**

- King & Spalding will continue to work closely with clients to explore effective, appropriate client-specific strategies for navigating the Medicare appeals process in light of these OMHA developments. These strategies include contemplating escalation requests and Part B rebilling options, among other considerations.
- Representatives from King & Spalding will attend the OMHA Medicare Appellant Forum on February 12, 2014 to gather additional information. We plan to circulate their notes following the Forum. As always, we will continue to keep you updated.

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