

**Contractor Involvement in the Medicare Appeals Process**  
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Providers challenging audit claim denials through the Medicare appeals process can expect to encounter various degrees of contractor involvement at each stage of appeal. Providers should be aware of the contractor's role at each stage of appeal, the information requests to make at each level and the limits on the scope of the contractor's participation.

**Requests for Information**

Providers undergoing a Medicare or RAC audit are typically notified of the contractor's findings by way of an audit results letter. Often this letter will provide general conclusions about the audit and may include a spreadsheet listing each claim or claim line determination. After review of the audit letter, providers are often left with unanswered questions about the claim denials and the nature of the audit review conducted by the contractor, information which would be helpful in connection with an appeal. In our audit experience, it is important to begin requesting additional information that may be available in the contractor's audit file. This information may include the reviewers' credentials, data necessary to recreate the statistical sampling and projection applied, internal notes, memos, correspondence addressing the audit denials, as well as guidelines or policies referenced in making the claim determinations. These requests can be made directly to the contractor by the provider in connection with the appeal or may reference the federal Freedom of Information Act (FOIA) as a basis for release of the information. Providers are advised to calendar the date they submit their request and continue to follow up with the contractor on the status of the release of information. Documentation of a provider's ongoing efforts to procure the requested information may provide future support for a good cause argument for the admission of additional evidence at subsequent levels of appeal.

At the Administrative Law Judge (ALJ) stage of appeal, providers may request a copy of the audit file. Through the appeals process, the appeal record is developed as the audit file is passed on to the various contractors at subsequent levels of appeal. Providers may request a copy of the audit file and should direct their request to the office of the ALJ assigned to hear the appeal. The Medicare appeal regulations at 42 CFR 405.1042 provide that a party may request and receive a copy of all or part of the record. Obtaining a copy of the audit file can reveal internal contractor correspondence, including the guidelines and policies applied in their review, which may reveal inappropriate standards or inconsistencies that can be used to challenge the claim denials. Further the audit file also allows the provider to see what documentation the ALJ has in his or her possession going into the hearing, so they can determine if additional information should be submitted. In a recent audit appeal, review of the audit file revealed that the Medicare contractor that conducted the initial audit review had ultimately discarded the statistical sampling and extrapolation originally applied in favor of a claim by claim review. Based on the language of the audit letters and appeal decisions, the provider understood the audit to involve an extrapolated overpayment. It was not until a review of the audit file at the ALJ hearing that the claim-by-claim overpayment calculation was discovered. This type of information is vital to challenging the propriety of the audit conducted.

**Contractor Participation**

In recent audit appeals, we have also experienced increase contractor participation in ALJ hearings. CMS contractors may elect to participate as either parties or non-party participants in an ALJ

hearing. The nature of the contractor's involvement in the hearing is impacted by whether they choose to act as a party or non-party participant. In our experience, contractors more commonly participate as non-party participants. As participants, contractors may not call witnesses or cross-examine the provider's witnesses, nor may the provider call the contractor as a witness. Pursuant to 42 C.F.R. 405.1010, participation as a non-party participant may include filing position papers and providing testimony to clarify factual or policy issues of the case. ALJs vary on the scope of involvement they permit from contractors acting as non-party participant. In some instances, the ALJ will simply allow the contractor to listen to the hearing or will pose a few questions to the contractor representatives for clarification. In other instances, ALJs have allowed the contractor representative to offer testimony on the substance of the audit review. This can be problematic where the contractor is not placed under oath and where the provider or their attorney is not permitted to engage in cross-examination. That said, contractor participation does not always have a negative impact on a provider's appeal, in some instances contractor testimony and position papers have been helpful in revealing shortfalls in the audit review. Regardless, it is helpful for providers to know in advance of the hearing whether contractors plan to participate.

CMS or its contractors may also elect to act as parties to an ALJ hearing of a provider appeal. When acting as a party, the contractor is permitted to call witnesses or cross-examine the witnesses of other parties, as well as submit position papers and provide testimony to clarify issues. Notably, limited discovery rights are permitted when a contractor acts as a party to the hearing. While contractors are required to advise the ALJ and the provider of their intent to participate in the hearing as either a party or non-party participant within 10 days of receiving the notice of hearing, it is not uncommon to have a contractor attend on the day of the hearing with little or no prior notice. Providers should proactively contact the ALJ's office in advance of the hearing to determine if any of the CMS contractors involved have indicated their intent to participate in the hearing or submit a position paper.

Providers and their attorneys must recognize the potential impact of contractor involvement during the appeals process and utilize contractor contact through information requests and hearing appearances to their advantage. Providers are advised to monitor contractor participation in light of the Medicare regulations and raise objections where their involvement goes beyond the scope permissible.