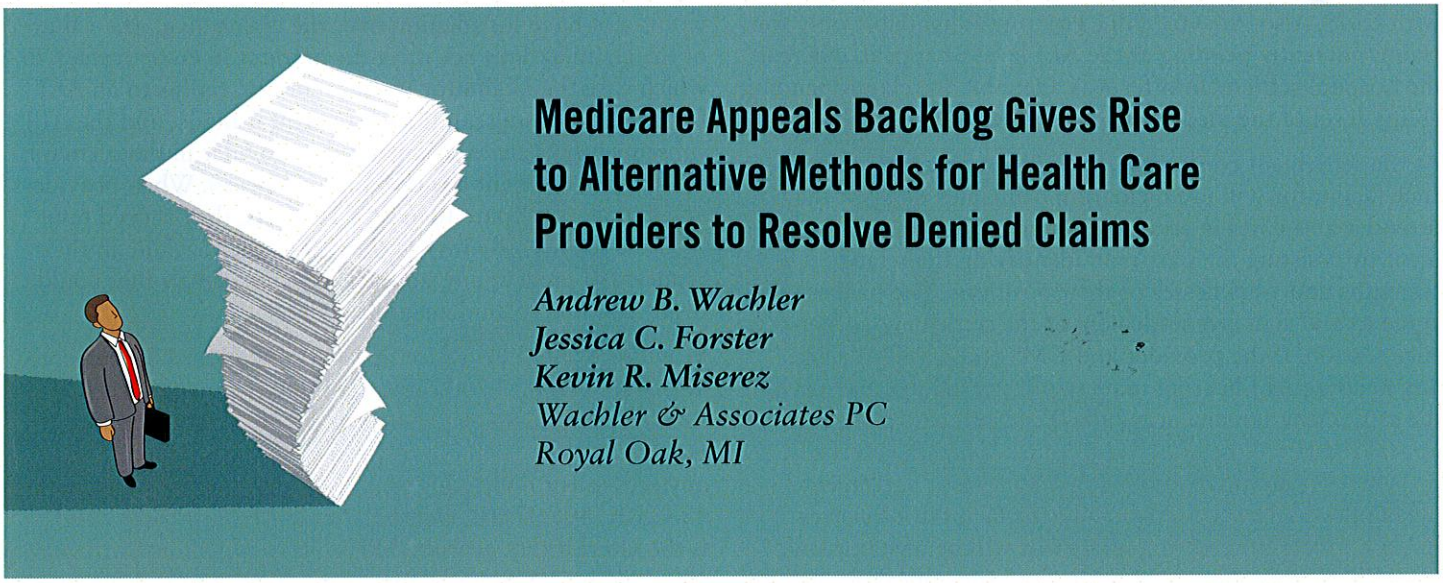

Medicare Appeals Backlog Gives Rise to Alternative Methods for Health Care Providers to Resolve Denied Claims

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In today's Medicare audit landscape, health care providers continuously find themselves targeted by Medicare audit contractors, which are entities contracted by the Centers for Medicare & Medicaid Services (CMS) to identify improper Medicare payments made to providers. When faced with claim denials following an audit, providers can elect to challenge the audit contractor's overpayment findings through the Medicare appeals process. While the number of claim denials and subsequent appeals has not slowed down in recent years, the adjudication of these appealed claim denials certainly has.

In a 2014 *Federal Register* Notice, the Office of Medicare Hearings and Appeals (OMHA) stated, "[A] backlog of appeals began to form in fiscal year 2012 in which more requests for hearing were being filed than could be adjudicated."[1] Because of the "unprecedented growth in claims appeals," OMHA held a Medicare Appellant Forum (Forum) on February 12 to address the current backlog with the health care community. During the Forum, OMHA announced that providers who have filed Administrative Law Judge (ALJ) hearing requests on or after April 2013 can expect an estimated delay of up to three years before a hearing is held.[2] Meanwhile, as providers are forced to wait three years for an ALJ hearing, CMS is authorized to recoup the entire alleged overpayment amount. Although providers have the opportunity to prevent CMS' recoupment of the funds by timely filing their appeal requests at the redetermination (first) and reconsideration (second) levels of the Medicare appeals process, CMS is authorized to begin recoupment of any remaining overpayment upon the issuance of a reconsideration decision.[3]

In light of the delays and the concerns expressed by the health care community, the U.S. Department of Health and Human Services (HHS) announced that various initiatives would be undertaken to address the backlog and improve efficiency in the appeals process. As part of these initiatives, HHS, through OMHA and CMS, recently announced the implementation of three separate alternative adjudication models to give providers the ability to reach more-expedient resolutions of their appealed claim denials and to reduce the backlog of appeals pending at OMHA. One of these alternatives, directed toward hospitals in an effort to decrease the volume of Part A inpatient status appeals, involved CMS offering eligible hospitals a 68% settlement to resolve their short-stay inpatient denials. Earlier this fall, an AHLA *Executive Summary* analyzed CMS' settlement offer.[4] Hospitals that elected to participate[5] were offered 68 cents on the dollar of the net payable amount of their patient status denials in exchange for the hospitals' withdrawal of their corresponding appeals.

Prior to the 68% settlement offer to hospitals, HHS introduced two additional initiatives aimed at reducing the backlog of appeals pending at the ALJ level—the Settlement Conference Facilitation (SCF) Pilot Program for Part B providers and suppliers and the Statistical Sampling Pilot Program. While CMS gave hospitals an October 31 deadline to elect to participate in the 68% settlement offer, the SCF and Statistical Sampling Pilot Programs remain ongoing options for eligible providers and suppliers to pursue as alternative adjudication methods for resolving their appealed claim denials.

SCF Pilot Program for Part B Providers and Suppliers[6]

Under the SCF Pilot Program, appellant Part B providers or suppliers are given the opportunity to discuss with CMS the potential of coming to a mutually agreeable resolution to their claims appealed to an ALJ hearing. Unlike the 68% settlement offer to hospitals, which was structured as a take-it-or-leave-it deal, the SCF Pilot Program is designed for providers to enter into actual settlement negotiations

with CMS. Also, the SCF Pilot Program is available only for claims currently pending at the ALJ level of appeal, whereas the hospital settlement offer was available for claims pending at any level of the medical appeals process.

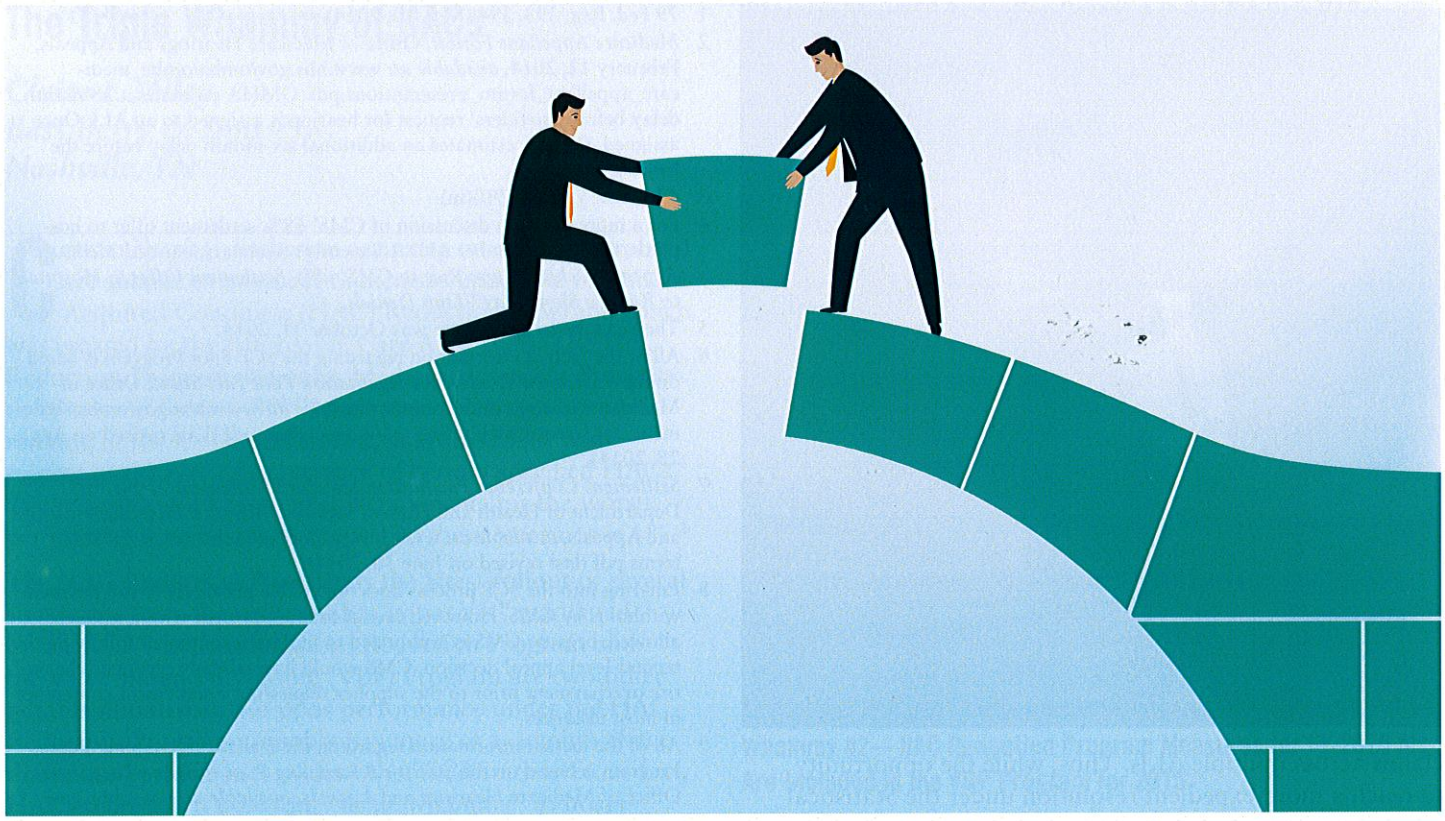
At the settlement conference, an OMHA-employed conference facilitator will use mediation principles to assist the provider and CMS in reaching a mutual settlement agreement by assisting the parties in identifying the relative strengths and weaknesses of their positions. The parties must agree to and sign any settlement at the settlement conference session. If the provider and CMS reach a settlement, any pending ALJ hearing requests for the claims covered by the settlement agreement will be dismissed, and no further appeal rights will be attached to those claims. Conversely, if the parties are unable to reach a settlement agreement during the conference session and the facilitator believes further efforts to reach an agreement will be unsuccessful, the SCF process will be concluded and the appealed claims will return to the ALJ level of appeal in the order OMHA originally received the hearing request.

In its initial stages, the eligibility requirements to participate in the SCF Program are rather narrow, although CMS has indicated that it will continue to explore expanding the eligibility requirements. Currently, the only claims eligible for the SCF process are those appealed by Medicare Part B providers or suppliers. In addition, appellants must have filed their request(s) for ALJ hearing in 2013, and those requests must not be currently assigned to an ALJ. Furthermore, the SCF request must include all of the supplier's pending ALJ appeals requested in 2013 for the same item or service. Thus, providers and suppliers may not submit an SCF request for some claims and proceed to the ALJ hearing for the remaining claims. Additional SCF eligibility requirements include that at least 20 claims must be at issue; if fewer than 20 claims are involved, at least $10,000 must be in controversy. Finally, the amount of each individual claim must be less than $100,000 or, for claims subject to statistical sampling, the extrapolated overpayment amount at issue must be less than $100,000.

As previously mentioned, by entering into a settlement agreement, the supplier agrees to waive any appeal rights to the claims covered by the settlement. Moreover, the settlement agreement is binding on both parties and cannot be appealed. The provider also has no right to appeal any decision by the facilitator as to eligibility of claims. For instance, upon review of the SCF request, the facilitator may determine that certain claims included in the provider's SCF request are not eligible for settlement (e.g., the item or service differs from those stated in the SCF request). Under this scenario, the identified claims will be returned to the ALJ-hearing level, and the facilitator's decision to return the claims is not appealable. The facilitator's review of the claims also may result in a determination that an ALJ would not have jurisdiction over the claims (e.g., the value of the claim(s) does not meet the amount in controversy), in which case the facilitator would refer the claims to an ALJ for potential dismissal. If such referral is made, and the ALJ subsequently issues a dismissal, the provider in these circumstances has the right to appeal the dismissal. When providers and suppliers prepare their SCF requests, they should take the time to carefully review the claims they include in their requests to prevent any unnecessary time delays that could result from including ineligible claims.

Providers should be aware that CMS' Standard Settlement Terms states, "CMS will not pay interest pursuant to 42 C.F.R. 405.378(j) as there will be no ALJ decision (a requirement for such interest) for the claims included in any settlement under this process."[7] Interest, pursuant to 42 C.F.R. 405.378(j), is referred to as "935 interest," which is the interest that accrues on an overpayment amount recouped by CMS. For claims appealed to the ALJ involving overpayments recouped by CMS, 42 C.F.R. 405.378(j) provides that when an ALJ reverses an overpayment in whole or in part, the provider is entitled to interest on the principal claim amount for the time period in which CMS had possession of the funds. Although CMS is correct when stating that "935 interest" does not apply to the settled claims because such interest requires an ALJ decision, providers and suppliers should nevertheless take into account the "935 interest" they may potentially forgo by entering into the settlement agreement. Depending on the aggregated claim amounts at issue during the SCF process, the "935 interest"—currently calculated at 9.625% per annum on the principal amount—may weigh significantly on the settlement amount a supplier is willing to accept.

The SCF Pilot Program offers eligible providers and suppliers the opportunity to reach a final determination for their appealed claims without having to wait three years for an ALJ decision, during which time CMS would have already taken possession of the alleged overpayment.[8] In addition, because providers and suppliers are not required to enter into a settlement agreement when participating in the SCF process, the risks of pursuing negotiations with CMS are minimal. Much like the settlement offer to hospitals, entering into a settlement agreement with CMS through the SCF process eliminates the uncertainty as to whether the supplier would ultimately prevail if the claims proceeded to an ALJ hearing. Even for providers and suppliers with strong cases, the inherent risk of not knowing which ALJ gets assigned to the cases makes pursuing settlement negotiations all the more appealing. Perhaps most importantly, because CMS is authorized to recoup any alleged overpayment amounts following a lower level decision, many Part B providers and suppliers are not financially positioned to withstand payment withholds by CMS for such an extended period of time, and, thus, the SCF process may allow some providers and



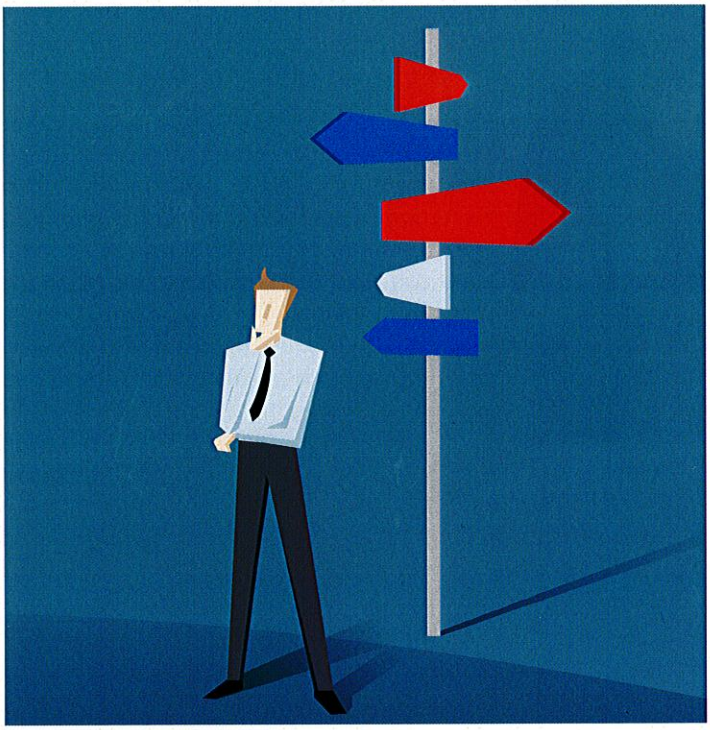
suppliers to efficiently resolve their appealed claims, receive timely payment, and remain in business.

Statistical Sampling Pilot Program[9]

The Statistical Sampling Pilot Program enables both Part A providers and Part B suppliers to resolve large volumes of claim denials by requesting adjudication of a random sample of claims selected from the provider's universe of pending ALJ claims. Once a random sample of claims has been selected, only the sample claims will proceed to a hearing before a single ALJ, after which, the ALJ's final determination is applied to the remaining universe of claims. At this time, to be eligible for the Statistical Sampling Pilot Program, the provider must have a minimum of 250 eligible claims either assigned to an ALJ or filed between April 1, 2013 and June 30, 2013. However, claims assigned to different ALJs or requested in different consolidation groups may be incorporated into the request for statistical sampling.

When a provider requests statistical sampling of its pending ALJ claims, OMHA will require the provider to consent to the statistical sampling in writing. Afterwards, a pre-hearing conference will be held to establish the universe of claims from which to take the sample. Following the pre-hearing conference, the ALJ will issue a pre-hearing conference order which will become binding if no objections are received from the parties within ten days from the date of the order, and consent can no longer be withdrawn. Thereafter, a trained and experienced statistical expert will develop the random statistical sample by using sampling methodology in accordance with Medicare requirements. Finally, a hearing on the sample claims will be held, and the ALJ's decision will be extrapolated to the remaining universe of claims.

Although designed to provide an efficient method for reaching a final determination of providers' appealed claims, the Statistical Sampling Pilot Program creates significant risks that would not otherwise exist under the standard appeals process or the previously discussed settlement options. While providers whose cases are strong on the merits across the board would be the best candidates for statistical sampling, a number of factors exist that make this program inherently risky. Unlike the SCF process, which allows appeals to revert back to the ALJ level if the supplier is dissatisfied with CMS' settlement offer, a provider cannot opt out of statistical extrapolation once an agreement to extrapolate has been executed. Furthermore, providers will likely not know the identity of the ALJ that will review the sample prior to entering into the binding agreement. Because various ALJs may reach different decisions on a particular case, to agree to the application of one ALJ's decision over a large volume of claims creates a significant risk for the provider. Instead, this risk could be mitigated by spreading



claims across multiple ALJs. Thus, while the opportunity to reach a more-expedient resolution under the Statistical Sampling Pilot Program may be appealing, providers should carefully consider the risks of engaging in this program before agreeing to participate.

1 79 Fed. Reg. 393, 394 (Mar. 10, 2014).
2 *Medicare Appellant Forum,* Office of Medicare Hearings and Appeals, February 12, 2014, *available at:* www.hhs.gov/omha/omha_medicare_appellant_forum_presentations.pdf. OMHA estimates a 28-month delay before providers' request for hearing is assigned to an ALJ. Once assigned, OMHA estimates an additional six-month delay before the hearing is held.
3 42 C.F.R. § 405.379(f)(iii).
4 For a more in-depth discussion of CMS' 68% settlement offer to hospitals, see the September AHLA Executive Summary, entitled *Medicare Appeals Backlog Gives Rise to CMS' 68% Settlement Offer to Hospitals to Resolve Short-Stay Claim Denials.*
5 The deadline to participate was October 31, 2014.
6 All of the factual information regarding the SCF Pilot Program is based on the *Settlement Conference Facilitation Pilot Fact Sheet,* Office of Medicare Hearings and Appeals, *available at:* www.hhs.gov/omha/settlement_conference_facilitation_pilot_fact_sheet.pdf (Last revised on Aug. 28, 2014).
7 *Settlement Conference Facilitation Standard Settlement Terms,* U.S. Department of Health and Human Services, Office of Medicare Hearings and Appeals, *available at:* www.hhs.gov/omha/omha_scf_standard_terms.pdf (last revised on June 30, 2014).
8 Entering into the SCF process does not enable providers to toll payment withholds by CMS. However, even if tolling payment withholds were allowed, because CMS is authorized to initiate recoupment following the second-level appeal decision, CMS would have already recouped the entire overpayment prior to the supplier requesting a settlement conference in most instances.
9 All of the factual information regarding the Statistical Sampling Pilot Program is based on the *Statistical Sampling Pilot Program Fact Sheet,* Office of Medicare Hearings and Appeals, *available at:* www.hhs.gov/omha/statistical_sampling_fact_sheet.pdf (last revised on June 27, 2014).

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