



Federal Bar Association

Office of the President

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Ms. Margaret J. Weber
Senior Analyst, Health Policy
General Accounting Office
200 W. Adams, 7th Floor
Chicago, IL 60606

Re: Medicare Appeals Transfer Plan

Dear Ms. Weber:

I write on behalf of the Federal Bar Association (FBA), a national association of private and government attorneys engaged in the practice of law before federal courts and federal agencies. With nearly sixteen thousand members, the FBA represents a wide variety of legal constituencies, covering at least a dozen substantive areas of practice, including health law.

FBA's membership includes attorneys involved in all aspects of Medicare adjudication, and includes Administrative Law Judges, Medicare Appeals Council judges, attorneys who represent beneficiaries and providers, staff attorneys in the Social Security Administration Office of Hearings and Appeals and Office of General Counsel, U.S. Attorneys and U.S. Magistrate Judges, District Court Judges and Circuit Court Judges. Our Section on Health Law maintains a special interest in Medicare adjudication and the appeals process.

As part of its mission, the FBA has an interest in promoting the effectiveness of the adjudicatory process associated with hearings before Administrative Law Judges, the appeals process at the Medicare Appeals Council, and judicial review in the federal courts.

Congress has mandated that the Medicare appeals process be transferred from the Office of Hearings and Appeals (OHA) of the Social Security Administration to the Department of Health and Human Services (DHHS). This move will have far-reaching implications for all aspects of Medicare appeals. As part of this transfer of function, section 931 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003) directed SSA and DHHS to submit a Plan for the Transfer of Responsibilities for Medicare Appeals (hereinafter "Transfer Plan")¹.

The Transfer Plan, designed to accomplish the transfer of responsibility for the function of ALJs responsible for hearing Medicare appeals under title XVIII of the Social Security Act, was submitted to Congress in March 2004. The GAO was charged with evaluating the Transfer Plan.

These comments express the position of the FBA and its Health Law Section regarding the proposals set forth in the Transfer Plan. The FBA is primarily concerned with the general lack of specificity regarding specific planning and implementation strategies for the transfer of the Medicare workload. Other concerns include the failure of the Plan to protect basic rights of Medicare beneficiaries with respect to in-person hearings and its failure to consider and fully respond to earlier Congressional mandates regarding the management of the Medicare appeals function.

Our comments below address the following areas of concern:

- Assurance of Sufficient ALJ Staffing
- Cost Projections and Financing
- Creation of an Orderly Transition Timetable
- Promulgation of Appeals Process Regulations
- Development of Unified Case Tracking
- Use of Precedential Authority
- Access to Administrative Law Judges
- Independence of Administrative Law Judges
- Geographic Distribution of ALJs
- Hiring of Administrative Law Judges
- Performance Standards for ALJs
- Shared Resources between SSA and DHHS
- Training of ALJs
- Recommendation for Further Congressional Action

1. Assurance of Sufficient ALJ Staffing — The statute speaks to the appointment of a sufficient number of administrative law judges (ALJs) and support staff to permit ALJs to hear and decide Medicare cases in a timely manner, taking into account the current and anticipated claims volume, appeals, number of beneficiaries, and statutory changes.²

The Transfer Plan projects a need for 50 ALJs to hear Medicare appeals. This projection is based on a calculation that in fiscal year 2003 an average of 46.18 ALJs in OHA/SSA were used to adjudicate Medicare appeals each month. Unfortunately, there is little support for this calculation.

As noted in the Transfer Report there are approximately 950 ALJs in 139 offices and 4 satellite offices currently adjudicating cases for OHA/SSA. While Medicare appeals constitute only a small percentage of OHA's workload, the average number of closed Medicare cases per year still exceeds 70,000 cases. Fifty ALJs would each have to hear, write decisions on and close 1400 cases per year under the projections of the Transfer Plan. Since very few ALJs hear Medicare appeals exclusively, there is little historical data on which to rely when estimating the number of Medicare cases an ALJ can hear and close within a year. Without additional information, further explanation or supporting data, it is impossible to assess whether the cadre of 50 ALJs referred to in the Transfer Plan will be sufficient to process Medicare appeals on a timely basis.

Complicating these calculations are the statutory deadlines imposed by section 521 of The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 ("BIPA") (Pub. L. No.

106-554, codified at 42 U.S.C 1395ff). This statute compresses the timeframes for processing Medicare cases and issuing decisions; it certainly needs to be factored into any equation regarding the number of ALJs that will be necessary to meet its guidelines.

It should also be noted that the CMS Chief of Medicare Adjudication reported to the Association of Administrative Law Judges' conference in 2003 that HHS expected to hire 134 ALJs to hear Medicare appeals in the first year. Given the above, the determination that 50 ALJs will be sufficient to process approximately 70,000 appeals a year raises serious questions. Additional data regarding the current Medicare workload is necessary before an accurate estimate can be made of the size of the cadre of ALJs that will be sufficient to provide the timely service that Congress has mandated.

In addition, the Transfer Plan raises concerns regarding the adequacy of the support staff. It proposes a support ratio of four staff members to one ALJ (4:1). Lacking the specifics necessary to adequately evaluate this statistic, the Transfer Plan is also not specific as to the type of support staff that would comprise the ratio. The Transfer Plan simply indicates that the 4:1 ratio *may* include an attorney advisor, paralegal, or other staff. Unfortunately, without more detail as to numbers, job titles and specific data relating to past and current workloads, it will be impossible to determine adequate support levels or assess the adequacy of proposed ratios to the level of service mandated by BIPA.

The plan does note that the 4:1 ratio would include support from staff in the DHHS central administrative office, which would include personnel services, training, information technology, video teleconferencing services and overall management. This overall support will be crucial to standardizing the functioning of Medicare adjudication across the country, but does reduce the direct support to the ALJs by an unknown amount.

2. Cost Projections and Financing — The statute addressed but did not define funding levels, simply referring to the budget necessary to carry out the functions transferred under the plan.³

The Transfer Plan did not address the projection of costs and funding necessary to create a new component responsible for adjudication of over 70,000 Medicare appeals a year.

Unfortunately, without specific information, cost projections, historical data regarding workload size and management and a specific budget within which to work, the Transfer Plan is less of a blueprint for transfer and more of a statement of general intent.

3. Creation of an Orderly Transition Timetable — The statute mandates the development of a timetable for the transition of the appeals function from SSA to HHS.⁴

The Transfer Plan recognizes the importance of an orderly transfer of the appeals function and sets forth an aggressive schedule to transfer responsibility for files as well as some general guidelines regarding hiring ALJs and staff support. The remainder of the initiatives outlined in the Transfer Plan does not have specific outcomes or dates.

Unfortunately, there is a failure to address specific initiatives and timeframes associated with the creation of an adjudication unit such as the physical transfer of files, handling appeals and remands, hiring staff, training staff, creating a physical office environment, setting policy and establishing a uniform hearing process. An aggressive and clearly outlined transition plan for the transfer of the Medicare appeals workload from SSA to HHA will be integral to the success of the transfer.

4. Promulgation of Appeals Process Regulations — The statute refers to the creation of regulations to govern the appeals process.⁵

The Transfer Plan indicates that DHHS intends to carry out the necessary rulemaking to implement the regulations for Medicare appeals concurrently with additional regulations required by BIPA regarding qualified independent contractors. There is no time frame associated with this statement.

The importance of specific regulations to the Medicare appeals process has been raised in a number of reports. Subsequent to the passage of Section 521 of The Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (“BIPA”), CMS initiated rulemaking with regard to Medicare appeals with publication in the Federal Register of the “Medicare Claims Appeal Procedures” (67 Fed. Reg. 69312 (Nov. 15, 2002)). Comments were submitted but, to date, regulations have not been adopted and full implementation of the BIPA reforms to the appeals process continue to be delayed pursuant to CMS Ruling 02-01, dated October 1, 2002, (67 Fed. Reg. 62478 (Oct. 7, 2002)). In this ruling CMS implemented the jurisdictional changes (amount in controversy and filing deadlines) set forth in BIPA but delayed implementation of additional processing deadlines.

Regulations specific to the Medicare appeals process are essential to creation of a separate adjudication unit. The FBA urges adoption of regulations as soon as possible.

5. Development of Unified Case Tracking — The statute refers to the development of a unified case tracking system.⁶

The lack of information in the Transfer Plan regarding the specifics of the proposed tracking system or details with respect to its implementation is of concern.

Any tracking system should be in place well before the transfer of the appeals workload begins. A unified system of data management accessible to personnel at all levels of Medicare appeals will be an important factor in promoting the success of the proposed appeals system and should be the cornerstone of a separate adjudication unit. The lack of detail regarding the process, specific dates of implementation, training and application will hinder an effective transfer of function.

6. Use of Precedential Authority — The statute directed consideration of the use of precedential authority in Medicare cases.⁷

The Transfer Plan contained an exhaustive discussion of whether some or all decisions of the Medicare Appeals Council should be adopted as binding precedential authority. HHS concluded that other steps that could be taken to improve the consistency of administrative decisions.

While the transfer plan looks to other resources to minimize the importance of precedent, the importance of precedential authority in facilitating an appeals process should be explored further to avoid some costly and lengthy appeals. The use of limited precedential authority for Medicare Appeals Council decisions or Acquiescence Rulings would curtail repetitious and costly appeals on recurring issues.

7. Access to Administrative Law Judges — The statute instructed the agencies to consider the feasibility of electronic filing for appeals and telephone or video hearings.⁸

The Transfer Plan discusses the potential of using the Internet to file appeals but defers action in this regard pending assessment of an existing pilot.

While electronic filing has advantages, it may be of limited use with the beneficiary population. However, the expanded use of the Internet and information technology for ALJs and staff offer additional important tools and represents an important step toward shortening delays in the appeal process. These delays arise from the transfer of voluminous paper files between agencies and lost tapes. The use of information technology to digitally scan and maintain files as well as digital recordings should also be considered.

Telephone hearings and video teleconferencing are mentioned in the Transfer Plan as important tools that will be available to Medicare ALJs to minimize the limiting factors of distance and scheduling.

However, the FBA is concerned about the potential adverse effects of the indiscriminate use of telephone and video hearings. The needs of the beneficiary population must be considered when planning for the use of technology for hearings. The right to an in-person due process hearing before an ALJ under the Administrative Procedure Act (APA) is an important right for a beneficiary that needs careful consideration when planning an adjudication system. The proposed Transfer Plan is not clear regarding many aspects regarding the use of telephone and video hearings. Access to technology through OHA/SSA will require significant coordination. Budgetary issues need to be worked out. Policies need to be written regarding the rights of beneficiaries to refuse a VTC or telephone hearing. Rulemaking will be necessary.

8. Independence of Administrative Law Judges — The statute makes it clear that ALJs should be independent from the Centers for Medicare and Medicaid Services and directs the agencies to address this in the Transfer Plan.⁹

The proposed Transfer Plan repeats the statutory language of the MMA but does not add any specifics.

The structure of the appeals process within DHHS should be carefully and completely outlined, including line and staff relationships. An important consideration is the appointment of a chief ALJ with clearly defined reporting and budgetary responsibilities. The composition of the proposed Medicare cadre of ALJs requires even more careful consideration.

9. Geographic Distribution of ALJs — The statute directs consideration of geographic needs in the distribution of ALJs.¹⁰

The Transfer Plan proposes an appeals process based on the DHHS regional office structure but does not provide enough details to fully understand the co-location of services. Given Congressional insistence on the independence of ALJs in the new Medicare Appeals Process, there is little support for housing the ALJ appeals process in geographic proximity to DHHS regional offices. To do so would ignore the needs of beneficiaries and those areas with large beneficiary or provider populations, such as Florida and Southern California, without a regional DHHS presence.

10. Hiring of ALJs — The statute directs clarification of steps that should be taken to hire administrative law judges and support staff.¹¹

The Transfer Plan indicates that all options will be considered when hiring ALJs, including hiring candidates from the existing OPM register, re-employed annuitants and sitting ALJs with Medicare experience.

The Plan, however, is not clear with respect to the criteria to be used or the manner in which judges will be chosen. Another concern is that HHS proposed to utilize some “Re-employed Annuitants on a “part time/full timer or on an intermittent basis.” The use of part time or intermittent hiring may jeopardize the independence of ALJs. If a Judge is hired on one case and wants more assignments, will he/she feel free to reverse the prior Medicare decision? Will the public feel that the ALJ is free from outside influence? DHHS has identified 110 Judges eligible for this program. This could constitute the entire ALJ corps for the Medicare appeals.

11. Performance Standards for ALJs — The statute directs consideration of the use of performance standards for administrative law judges with respect to timeliness for decisions.¹²

The Transfer Plan advocates the implementation of “administrative practices and programming policies that ALJs must follow...”

The FBA does not support the imposition of standards with respect to timeliness of decisions or judicial responsibilities. There is no historical support for such a move. The Medicare appeals system has been extensively studied and none of the published reports has recommended performance standards for ALJs. [Report of the Inspector General: Medicare Administrative Appeals: The Potential Impact of BIPA (January 2002) OEI-04-01-00290; Medicare Administrative Appeals: ALJ Hearing Process (OEI-04-97-00160, Sept. 1999); GAO Report to the Committee on Energy and Commerce, House of Representatives): Medicare Appeals: Disparity between Requirements and Responsible Agencies’ Capabilities (September 2003)]. Rather, published reports have suggested that many of the deficiencies of the current system relate to the unwieldy organization of Medicare Appeals within SSA. These deficiencies are at the heart of the creation of a new adjudication unit in HHS. For example, the GAO reported that 70% of the delay in issuing decisions at the ALJ level is due to the administrative processing, most of it at OHA, before it can be prepared for hearing. Medicare Appeals, Disparity between Requirements and Responsible Agencies’ Capabilities, (GAO-03-841, Sept. 2003). The Transfer Plan fails to address these issues, either as the cause of delays or in terms of preventing similar problems in the future.

The Federal Bar Association strongly supports the independence of administrative law judges as set forth in the Administrative Procedure Act. ALJs are subject to disciplinary action, including removal from office, pursuant to the APA. DHHS has made no showing that this remedy is inadequate or how it could implement performance standards with regard to timeliness without impinging on the independence of such judges. It is our understanding that no Federal agency imposes performance standards for ALJs. No justification has been shown for such a move. Time limitations on the issuance of decisions have been incorporated into BIPA. The creation of an adjudication unit devoted to Medicare appeals, staffed by committed and knowledgeable attorneys and judges with appropriate technological support and adequate flow of information between components, is more likely to result in timely decisions than performance guidelines which do not address the deficiencies at the heart of delays.

A model for addressing the issue of timeframes for decisions currently exists within the civil remedies division of the Departmental Appeals Board (DAB) of DHHS.¹³ The ALJs hearing cases brought by the Inspector General must issue decisions within a certain time frame or explain why. We suggest that DHHS consider such guidelines for the Medicare appeal system now being considered.

12. Shared Resources between SSA and DHHS — The statute directed consideration of the steps that should be taken to promote shared services between SSA and DHHS.¹⁴

The Transfer Plan identifies video teleconferencing as an important area of shared resources. Another area in which the agencies have pledged to work together involves the development of joint tracking capability.

As with so many aspects of the Transfer Plan, however, the details are missing. DHHS suggests locating the ALJs and support staff for the new adjudication unit in DHHS regional offices without reference to whether VTC equipment is available at DHHS offices or whether an OHA/SSA office is nearby with such capability. Moreover, there is no discussion of the multitude of details related to sharing technology, such as VTC sites or digital recording equipment.

13. Training of ALJs — The statute directs consideration of the training that will be necessary for the ALJs who will become part of the new Medicare adjudication unit in DHHS.¹⁵

The Transfer Plan identifies the importance of a structured and well-defined training plan as an essential element to the successful transition of Medicare appeals from SSA to DHHS. The Transfer Plan outlines four elements of DHHS training strategy covering appeals processes, claim review, coverage issues and workload management.

The FBA is in complete agreement with the need for training and for ongoing resource allocation for ALJs, attorneys and other support personnel involved in processing Medicare cases. In addition to training in the areas noted above, advanced updated electronic support for writing and researching decisions will be necessary.

14. Recommendation for Further Congressional Action — The statute authorized and encouraged recommendations for further Congressional action.¹⁶

The Transfer Plan sets forth no recommendations in this regard.

Since DHHS has not implemented most of the appeals changes mandated by BIPA, DHHS should either set forth a detailed plan with timeframes and budget for prompt implementation or set forth the statutory changes necessary to allow timely adjudications of Medicare appeals.

Thank you for your consideration of these comments. In the event you have any questions, please contact Bruce Moyer, FBA government relations counsel (301-270-8115). We look forward to continue being of service to GAO, along with SSA and DHHS, in the implementation of the Transfer Plan.

Sincerely,



Joyce E. Kitchens

¹Subtitle D—Appeals and Recovery; SEC. 931. TRANSFER OF RESPONSIBILITY FOR MEDICARE APPEALS.

(a) TRANSITION PLAN.—(1) IN GENERAL: Not later than April 1, 2004, the Commissioner of Social Security and the Secretary shall develop and transmit to Congress and the Comptroller General of the United States a plan under which the functions of administrative law judges responsible for hearing cases under title XVIII of the Social Security Act (and related provisions in title XI of such Act) are transferred from the responsibility of the Commissioner and the Social Security Administration to the Secretary and the Department of Health and Human Services.

²(a)(2)(A) WORKLOAD— The number of such administrative law judges and support staff required now and in the future to hear and decide such cases in a timely manner, taking into account the current and anticipated claims volume, appeals, number of beneficiaries, and statutory changes.

³(a)(2)(B) COST PROJECTIONS AND FINANCING: Funding levels required for fiscal year 2005 and subsequent fiscal years to carry out the functions transferred under the plan.

⁴(a)(2)(C) TRANSITION TIMETABLE.—A timetable for the transition

⁵(D) REGULATIONS.—The establishment of specific regulations to govern the appeals process

⁶(a)(2)(E) CASE TRACKING.— The development of a unified case tracking system that will facilitate the maintenance and transfer of case specific data across both the fee-for-service and managed care components of the Medicare program.

⁷(a)(2)(F) FEASIBILITY OF PRECEDENTIAL AUTHORITY.—The feasibility of developing a process to give decisions of the Departmental Appeals Board in the Department of Health and Human Services addressing broad legal issues binding, precedential authority

⁸(a)(2)(G) ACCESS TO ADMINISTRATIVE LAW JUDGES.—The feasibility of—

- (i) filing appeals with administrative law judges electronically; and
- (ii) conducting hearings using tele- or videoconference technologies.

⁹(a)(2)(H) INDEPENDENCE OF ADMINISTRATIVE LAW JUDGES.—The steps that should be taken to ensure the independence of administrative law judges consistent with the requirements of subsection (b)(2).

¹⁰(a)(2)(I) GEOGRAPHIC DISTRIBUTION.—The steps that should be taken to provide for an appropriate geographic distribution of administrative law judges throughout the United States to carry out subsection (b)(3).

¹¹(a)(2)(J) HIRING.—The steps that should be taken to hire administrative law judges (and support staff) to carry out subsection (b)(4).

¹²(a)(2)(K) PERFORMANCE STANDARDS.—The appropriateness of establishing performance standards for administrative law judges with respect to timelines for decisions in cases under title XVIII of the Social Security Act taking into account requirements under subsection (b)(2) for the independence of such judges and consistent with the applicable provisions of title 5, United States Code relating to impartiality.

¹³42 C.F.R. 1005.20(c) provides:

(c) The ALJ will issue the initial decision to all parties within 60 days after the time for submission of post-hearing briefs and reply briefs, if permitted, has expired. The decision will be accompanied by a statement describing the right of any party to file a notice of appeal with the DAB and instructions for how to file such appeal. If the ALJ fails to meet the deadline contained in this paragraph, he or she will notify the parties of the reason for the delay and will set a new deadline.

¹⁴(a)(2)(L) SHARED RESOURCES.—The steps that should be taken to carry out subsection (b)(6) (relating to the arrangements with the Commissioner of Social Security to share office space, support staff, and other resources, with appropriate reimbursement).

¹⁵(a)(2)(M) TRAINING.—The training that should be provided to administrative law judges with respect to laws and regulations under title XVIII of the Social Security Act.

¹⁶(a)(3) ADDITIONAL INFORMATION.—The plan may also include recommendations for further congressional action, including modifications to the requirements and deadlines established under section 1869 of the Social Security Act (42 U.S.C. 1395ff) (as amended)