

(ii) The appellant lives outside the United States and does not inform the ALJ that he or she wants to appear, and there are no other parties who wish to appear.

(2) When a hearing is not held, the decision of the ALJ must refer to the evidence in the record on which the decision was based.

**§ 405.1040 Prehearing and posthearing conferences.**

(a) The ALJ may decide on his or her own, or at the request of any party to the hearing, to hold a prehearing or posthearing conference to facilitate the hearing or the hearing decision.

(b) The ALJ informs the parties of the time, place, and purpose of the conference at least 7 calendar days before the conference date, unless a party indicates in writing that it does not wish to receive a written notice of the conference.

(c) At the conference, the ALJ may consider matters in addition to those stated in the notice of hearing, if the parties consent in writing. A record of the conference is made.

(d) The ALJ issues an order stating all agreements and actions resulting from the conference. If the parties do not object, the agreements and actions become part of the hearing record and are binding on all parties.

**§ 405.1042 The administrative record.**

(a) *Creating the record.* (1) The ALJ makes a complete record of the evidence, including the hearing proceedings, if any.

(2) The record will include marked as exhibits, the documents used in making the decision under review, including, but not limited to, claims, medical records, written statements, certificates, reports, affidavits, and any other evidence the ALJ admits. In the record, the ALJ must also discuss any evidence excluded under § 405.1028 and include a justification for excluding the evidence.

(3) A party may review the record at the hearing, or, if a hearing is not held, at any time before the ALJ's notice of decision is issued.

(4) If a request for review is filed or the case is escalated to the MAC, the complete record, including any record-

ing of the hearing, is forwarded to the MAC.

(5) A typed transcription of the hearing is prepared if a party seeks judicial review of the case in a Federal district court within the stated time period and all other jurisdictional criteria are met, unless, upon the Secretary's motion prior to the filing of an answer, the court remands the case.

(b) *Requesting and receiving copies of the record.* (1) A party may request and receive a copy of all or part of the record, including the exhibits list, documentary evidence, and a copy of the tape of the oral proceedings. The party may be asked to pay the costs of providing these items.

(2) If a party requests all or part of the record from the ALJ and an opportunity to comment on the record, the time beginning with the ALJ's receipt of the request through the expiration of the time granted for the party's response does not count toward the 90-day adjudication deadline.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37704, June 30, 2005]

**§ 405.1044 Consolidated hearing before an ALJ.**

(a) A consolidated hearing may be held if one or more of the issues to be considered at the hearing are the same issues that are involved in another request for hearing or hearings pending before the same ALJ.

(b) It is within the discretion of the ALJ to grant or deny an appellant's request for consolidation. In considering an appellant's request, the ALJ may consider factors such as whether the claims at issue may be more efficiently decided if the requests for hearing are combined. In considering the appellant's request for consolidation, the ALJ must take into account the adjudication deadlines for each case and may require an appellant to waive the adjudication deadline associated with one or more cases if consolidation otherwise prevents the ALJ from deciding all of the appeals at issue within their respective deadlines.

(c) The ALJ may also propose on his or her own motion to consolidate two

**§ 405.1046**

**42 CFR Ch. IV (10–1–06 Edition)**

or more cases in one hearing for administrative efficiency, but may not require an appellant to waive the adjudication deadline for any of the consolidated cases.

(d) Before consolidating a hearing, the ALJ must notify CMS of his or her intention to do so, and CMS may then elect to participate in the consolidated hearing, as a party, by sending written notice to the ALJ within 10 days after receipt of the ALJ's notice of the consolidation.

(e) If the ALJ decides to hold a consolidated hearing, he or she may make either a consolidated decision and record or a separate decision and record on each claim. The ALJ ensures that any evidence that is common to all claims and material to the common issue to be decided is included in the consolidated record or each individual record, as applicable.

**§ 405.1046 Notice of an ALJ decision.**

(a) *General rule.* Unless the ALJ dismisses the hearing, the ALJ will issue a written decision that gives the findings of fact, conclusions of law, and the reasons for the decision. The decision must be based on evidence offered at the hearing or otherwise admitted into the record. The ALJ mails a copy of the decision to all the parties at their last known address, to the QIC that issued the reconsideration determination, and to the contractor that issued the initial determination. For overpayment cases involving multiple beneficiaries, where there is no beneficiary liability, the ALJ may choose to send written notice only to the appellant. In the event a payment will be made to a provider or supplier in conjunction with this ALJ decision, the contractor must also issue a revised electronic or paper remittance advice to that provider or supplier.

(b) *Content of the notice.* The decision must be written in a manner calculated to be understood by a beneficiary and must include—

(1) The specific reasons for the determination, including, to the extent appropriate, a summary of any clinical or scientific evidence used in making the determination;

(2) The procedures for obtaining additional information concerning the decision; and

(3) Notification of the right to appeal the decision to the MAC, including instructions on how to initiate an appeal under this section.

(c) *Limitation on decision.* When the amount of payment for an item or service is an issue before the ALJ, the ALJ may make a finding as to the amount of payment due. If the ALJ makes a finding concerning payment when the amount of payment was not an issue before the ALJ, the contractor may independently determine the payment amount. In either of the aforementioned situations, an ALJ's decision is not final for purposes of determining the amount of payment due. The amount of payment determined by the contractor in effectuating the ALJ's decision is a new initial determination under § 405.924.

(d) *Timing of decision.* The ALJ issues a decision by the end of the 90-day period beginning on the date when the request for hearing is received by the entity specified in the QIC's reconsideration, unless the 90-day period is extended as provided in § 405.1016.

(e) *Recommended decision.* An ALJ issues a recommended decision if he or she is directed to do so in the MAC's remand order. An ALJ may not issue a recommended decision on his or her own motion. The ALJ mails a copy of the recommended decision to all the parties at their last known address.

[70 FR 11472, Mar. 8, 2005, as amended at 70 FR 37704, June 30, 2005]

**§ 405.1048 The effect of an ALJ's decision.**

The decision of the ALJ is binding on all parties to the hearing unless—

(a) A party to the hearing requests a review of the decision by the MAC within the stated time period or the MAC reviews the decision issued by an ALJ under the procedures set forth in § 405.1110, and the MAC either issues a final action or the appeal is escalated to Federal district court under the provisions at § 405.1132 and the Federal district court issues a decision.

(b) The decision is reopened and revised by an ALJ or the MAC under the procedures explained in § 405.980;