

(b) *Content of the request for EAP.* The request for the EAP:

(1) Alleges that there are no material issues of fact in dispute; and

(2) Asserts that the only factor precluding a decision favorable to the party is a statutory provision that is unconstitutional or a regulation, national coverage decision under section 1862(a)(1) of the Act, or CMS Ruling that is invalid.

(c) *Place and time for requesting an EAP—(1) Place for filing request.* The person must file a written request—

(i) At an office of SSA or CMS; or

(ii) If the person is in the Philippines, at the Veterans Administration Regional Office or with an ALJ; or

(iii) If the person is a qualified railroad retirement beneficiary, at an office of the Railroad Retirement Board.

(2) *Time of filing request.* The party may file a request for the EAP—

(i) If the party has requested a hearing, at any time prior to receipt of the notice of the ALJ's decision;

(ii) Within 60 days after the date of receipt of notice of the ALJ's decision or dismissal, unless the time is extended in accordance with the standards set out in 20 CFR 404.925(c). For purposes of this section, the date of receipt of the notice is presumed to be 5 days after the date on the notice, unless it is shown that the notice was received later; or

(iii) If the party has requested DAB review, at any time prior to receipt of notice of the Board's decision.

(d) *Parties to the EAP.* The parties to the EAP are the persons who were parties to the reconsideration determination and, if appropriate, to the hearing.

(e) *Determination on request for EAP.* (1) For EAP requests initiated at the ALJ level, an ALJ determines whether all conditions of paragraphs (a) and (b) of this section are met.

(2) If a hearing decision has been issued, the DAB determines whether all conditions of paragraphs (a) and (b) of this section are met.

(f) *ALJ or DAB certification for the EAP.* If the party meets the requirements for the EAP, the ALJ or the DAB, as appropriate, certifies the case in writing stating that:

(1) The facts involved in the claim are not in dispute;

(2) Except as indicated in paragraph (f)(3) of this section, CMS's interpretation of the law is not in dispute;

(3) The sole issue(s) in dispute is the constitutionality of a statutory provision or the validity of a regulation, CMS Ruling, or national coverage decision based on section 1862(a)(1) of the Act.

(4) Except for the provision challenged, the right(s) of the party is established; and

(5) The determination or decision made by the ALJ or DAB is final for purposes of seeking judicial review.

(g) *Effect of ALJ or DAB certification.*

(1) Following the issuance of the certification described in paragraph (f) of this section, the party waives completion of the remaining steps of the administrative appeals process.

(2) The 60-day period for filing a civil suit in a Federal district court begins on the date of receipt of the ALJ or DAB certification.

(h) *Effect of a request for EAP that does not result in certification.* If a request for the EAP does not meet all the conditions for use of the process, the ALJ or DAB so advises the party and treats the request as a request for hearing or DAB review, as appropriate.

[62 FR 25852, May 12, 1997]

§ 405.720 Hearing; right to hearing.

A person has a right to a hearing regarding any initial determination made under § 405.704 if:

(a) Such initial determination has been reconsidered by the CMS;

(b) Such person was a party to the reconsidered determination;

(c) Such person or his representative has filed a written request for a hearing in accordance with the procedure described in § 405.722; and

(d) The amount in controversy is \$100 or more.

[40 FR 1025, Jan. 6, 1975. Redesignated at 42 FR 52826, Sept. 30, 1977, as amended at 62 FR 25855, May 12, 1997]

§ 405.722 Time and place of filing request for a hearing.

The request for a hearing shall be made in writing and filed at an office of the SSA or the CMS or with an ALJ, or, in the case of a qualified railroad retirement beneficiary, at an office of

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the Railroad Retirement Board. Such request must be filed within 60 days after the date of receipt of notice of the reconsidered determination by such individual, except where the time is extended as provided in 20 CFR 404.933(c). For purposes of this section, the date of receipt of notice of the reconsidered determination shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

[45 FR 73933, Nov. 7, 1980, as amended at 62 FR 25855, May 12, 1997]

§ 405.724 Departmental Appeals Board (DAB) review.

Regulations beginning at 20 CFR 404.967 regarding SSA Appeals Council Review are also applicable to DAB review of matters addressed by this subpart.

[62 FR 25852, May 12, 1997]

§ 405.730 Court review.

(a) To the extent authorized by sections 1869, 1876(c)(5)(B), and 1879(d) of the Act, a party to a Departmental Appeals Board (DAB) decision or an ALJ decision if the DAB does not review the ALJ decision, may obtain a court review if the amount remaining in controversy is \$1,000 or more. A party may obtain court review by filing a civil action in a district court of the United States in accordance with the provisions of section 205(g) of the Act. The filing procedure is set forth at 20 CFR 422.210.

(b) A party to a reconsidered determination or an ALJ hearing decision may obtain a court review if the amount in controversy is \$1,000 or more, and he or she requests and meets the conditions for the expedited appeals process set forth in § 405.718.

[62 FR 25852, May 12, 1997]

§ 405.732 Review of a national coverage determination (NCD).

(a) *General rule.* (1) An NCD is a determination by the Secretary for whether or not a particular item or service is covered nationally under title XVIII of the Act.

(2) An NCD does not include a determination of what code, if any, is assigned to a particular item or service

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covered under title XVIII or a determination for the amount of payment made for a particular item or service.

(3) NCDs are made under section 1862(a)(1) of the Act or other applicable provisions of the Act.

(4) An NCD is binding on all Medicare carriers, fiscal intermediaries, QIOs, HMOs, CMPs, HCPPs, the Medicare Appeals Council, and ALJs.

(b) *Review by ALJ.* (1) An ALJ may not disregard, set aside, or otherwise review an NCD.

(2) An ALJ may review the facts of a particular case to determine whether an NCD applies to a specific claim for benefits and, if so, whether the NCD has been applied correctly to the claim.

(c) *Review by Court.* For initial determinations and NCD challenges under section 1862(a)(1) of the Act, arising before October 1, 2002, a court's review of an NCD is limited to whether the record is incomplete or otherwise lacks adequate information to support the validity of the decision, unless the case has been remanded to the Secretary to supplement the record regarding the NCD. In these cases, the court may not invalidate an NCD except upon review of the supplemental record.

[68 FR 63715, Nov. 7, 2003]

§ 405.740 Principles for determining the amount in controversy.

(a) *Individual appellants.* For the purpose of determining whether an individual appellant meets the minimum amount in controversy needed for a hearing (\$100), the following rules apply:

(1) The amount in controversy is computed as the actual amount charged the individual for the items and services in question, less any amount for which payment has been made by the intermediary and less any deductible and coinsurance amounts applicable in the particular case.

(2) A single beneficiary may aggregate claims from two or more providers to meet the \$100 hearing threshold and a single provider may aggregate claims for services provided to one or more beneficiaries to meet the \$100 hearing threshold.