

§ 426.460

42 CFR Ch. IV (10–1–06 Edition)

the ALJ compiled or considered during the LCD review, including, but not limited to, the following:

- (1) The LCD complaint.
- (2) The LCD and LCD record.
- (3) The supplemental LCD record, if applicable.
- (4) Transcripts of record.
- (5) Any other relevant evidence gathered under § 426.440.
- (6) The ALJ's decision.

(b) *Elements of the ALJ's LCD review record furnished to the Board under seal.* The ALJ's review record must include, under seal, any proprietary data or privileged information maintained under seal, and such data or information must not be included in the review record furnished to the public.

§ 426.460 Effect of an ALJ's decision.

(a) *Valid under the reasonableness standard.* If the ALJ finds that the provision or provisions of the LCD named in the complaint is (are) valid under the reasonableness standard, the aggrieved party or parties may appeal that (those) part(s) of the ALJ decision to the Board under § 426.465.

(b) *Not valid under the reasonableness standard.* If the ALJ finds that the provision or provisions of the LCD named in the complaint is (are) invalid under the reasonableness standard, and no appeal is filed by the contractor or CMS under § 426.465(b), the contractor, the M+C organization, or other Medicare managed care organization must provide the following—

(1) *Individual claim review.* (i) If neither the contractor nor CMS appeals the ALJ decision under § 426.425(b), and if the party's claim or appeal(s) was previously denied, the contractor, an M+C organization or another Medicare managed care organization must reopen the claim of the party who challenged the LCD and adjudicate the claim without using the provision(s) of the LCD that the ALJ found invalid.

(ii) If a revised LCD is issued, the contractor, the M+C organization, and any other Medicare managed care organization within the contractor's jurisdiction uses the revised LCD in reviewing claim or appeal submissions or request for services delivered or services performed on or after the effective date of the revised LCD.

(iii) If the aggrieved party who sought the review has not yet submitted a claim, the contractor adjudicates the claim without using the provision(s) of the LCD that the ALJ found invalid.

(iv) In either case, the claim and any subsequent claims for the service provided under the same circumstances is adjudicated without using the LCD provision(s) found invalid.

(2) *Coverage determination relief.* If neither the contractor nor CMS appeals the ALJ decision under § 426.425(b), the contractor implements the ALJ decision within 30 days. Any change in policy applies prospectively to requests for service or claims filed with dates of service after the implementation of the ALJ decision.

§ 426.462 Notice of an ALJ's decision.

After the ALJ has made a decision regarding an LCD complaint, the ALJ sends a written notice of the decision to each party. The notice must—

(a) State the outcome of the review; and

(b) Inform each party to the determination of his or her rights to seek further review if he or she is dissatisfied with the determination, and the time limit under which an appeal must be requested.

§ 426.463 Future new or revised LCDs.

The contractor may not reinstate an LCD provision(s) found to be unreasonable unless the contractor has a different basis (such as additional evidence) than what the ALJ evaluated.

§ 426.465 Appealing part or all of an ALJ's decision.

(a) *Circumstances under which an aggrieved party may appeal part or all of an ALJ's decision.* An aggrieved party (including one or more aggrieved parties named in a joint complaint and an aggrieved party who is part of a consolidated LCD review) may appeal to the Board any part of an ALJ's decision that does the following:

(1) States that a provision of an LCD is valid under the reasonableness standard; or

(2) Dismisses a complaint regarding an LCD (except as prohibited in paragraph (b) of this section).

(b) *Circumstance under which a contractor or CMS may appeal part or all of an ALJ's decision.* A contractor or CMS may appeal to the Board any part of an ALJ's decision that states that a provision (or provisions) of an LCD is (are) unreasonable.

(c) *Stay of an implementation pending appeal.* (1) If an ALJ's decision finds a provision or provisions of an LCD unreasonable, an appeal by a contractor or CMS stays implementation as described under § 426.460(b) until the Board issues a final decision.

(2) The appeal request must be submitted to the Board in accordance with paragraph (e) of this section.

(d) *Circumstances under which an ALJ's decision may not be appealed.* An ALJ's decision dismissing a complaint is not subject to appeal in either of the following circumstances:

(1) The contractor has retired the LCD provision(s) under review.

(2) The aggrieved party who filed the complaint has withdrawn the complaint.

(e) *Receipt of the appeal by the Board.* Unless there is good cause shown, an appeal described in paragraphs (a) or (b) of this section must be filed with the Board within 30 days of the date the ALJ's decision was issued.

(f) *Filing an appeal.* (1) To file an appeal described in paragraph (a) of this section, an aggrieved party, who sought LCD review, a contractor, or CMS must send the following to the Board:

(i) The full names and addresses of the parties, including the name of the LCD.

(ii) The date of issuance of the ALJ's decision.

(iii) The docket number that appears on the ALJ's decision.

(iv) A statement identifying the part(s) of the ALJ's decision that are being appealed.

(2) If an appeal described in paragraph (a) of this section is filed with the Board later than the date described in paragraph (c) of this section, it must include a rationale stating why the Board must accept the late appeal.

(3) An appeal described in paragraph (a) of this section must include a statement explaining why the ALJ's decision should be reversed.

§ 426.468 Decision to not appeal an ALJ's decision.

(a) Failure to timely appeal without good cause shown waives the right to challenge any part(s) of the ALJ's decision under § 426.465.

(b) Unless the Board finds good cause shown for late filing, an untimely appeal is dismissed.

(c) If a party does not timely appeal any part(s) of the ALJ's decision on an LCD review to the Board, as provided in this subpart, then the ALJ's decision is final and not subject to further review.

§ 426.470 Board's role in docketing and evaluating the acceptability of appeals of ALJ decisions.

(a) *Docketing the appeal.* The Board does the following upon receiving an appeal of part or all of an ALJ's decision:

(1) Dockets the appeal either separately or with similar appeals.

(2) Assigns a docket number.

(b) *Evaluating the acceptability of the appeal.* The Board determines if the appeal is acceptable by confirming that the appeal meets all of the criteria in § 426.465.

(c) *Unacceptable appeal.* If the Board determines that an appeal is unacceptable, the Board must dismiss the appeal.

(d) *Acceptable appeal.* If the Board determines that an appeal is acceptable, the Board does the following:

(1) Sends a letter to the appellant to acknowledge that the appeal is acceptable, and informs them of the docket number.

(2) Forwards a copy of the appeal and the letter described in paragraph (d)(1) of this section to all parties involved in the appeal.

(3) Requires the ALJ to send a copy of the ALJ's LCD review record (maintaining any sealed documents) to the Board and a copy of the public record to all parties involved in the appeal.

(e) *No participation as amicus curiae.* The Board may not allow participation by amicus participants in the review of an LCD.