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### Medicare Reimbursement

## Trump Budget Takes Aim at Medicare Appeals Backlog



By Eric Topor

Hospitals and other health-care providers stuck in the years-long Medicare appeals backlog at the HHS have reason to cheer the Trump administration's proposal to more than double the agency's appeals budget.

The president's budget proposes to boost funding for the Department of Health and Human Services agency that handles Medicare claim appeals from \$107 million to \$251 million in fiscal year 2019. The agency has long sought an increase in funding to address appeal delays that have led to a backlog of over 500,000 pending appeals that can take years to resolve.

The increase in funding, if implemented, would go a long way to hiring more administrative law judge teams, and could resolve litigation brought by the American Hospital Association over the agency's failure to resolve Medicare appeals within 90 days as required by law. Attorneys Bloomberg Law spoke with said the funding increase request for the Office of Medicare Hearings and Appeals—which handles ALJ appeals—is similar to those in prior presidential budgets that were ignored by Congress, including a \$135 million request from the administration for fiscal year 2018.

Nicholas F. Alarif, an associate with McDermott Will & Emery in Washington who was a former attorney with OMHA, told Bloomberg Law Feb. 14 that the request seemed to be the “same old, same old,” as far as past unfulfilled OMHA funding proposals. Alarif said the funding increase proposal was “a step in the right direction” but that further Medicare reforms were needed to address why so many appeals are being filed.

### Needed Program Reforms

Alarif cited the Recovery Audit Contractor Program and the two-midnight rule, which generally requires a Medicare patient to stay in the hospital for two midnights for the claim to be eligible for inpatient reimbursement, as two areas of reform that would stem the influx of Medicare appeals to OMHA.

Kenneth Marcus, an attorney with Honigman Miller Schwartz and Cohn LLP in Detroit, told Bloomberg Law Feb. 12 that reforms to the RAC program and an overall streamlining of the appeals process were needed to solve the backlog problem, in addition to more ALJ teams. The HHS said in a budgetary brief that the proposed funding increase would allow OMHA to process another 106,000 appeals annually, but Marcus said simply adding ALJ capacity at the agency could encourage even more Medicare provider appeals.

“There's a fair risk that the number of appeals will increase [in the future] just because more beneficiaries will be enrolling,” said Gregory N. Etzel, a partner at Morgan, Lewis & Bockius LLP in Houston. Etzel, who represents hospitals and other health-care providers, told Bloomberg Law Feb. 13 that additional ALJs will help reduce the backlog, especially when combined with other administrative initiatives OMHA has set up to resolve appeals, including claim settlements with hospitals, on-the-record hearings in lieu of full ALJ hearings, and statistical sampling initiatives.

Etzel said some providers with claim appeals stuck in the backlog, where it can take around 1,100 days to reach an ALJ resolution according to the HHS, may be hesitant to enter into the newer administrative initiatives because they are still more comfortable with the traditional appeals process. The HHS predicts that OMHA's administrative initiatives will only resolve around 32,000 Medicare appeals in FY 2019, with over 150,000 new appeals expected to come in that year.

Alarif agreed that providers “are more comfortable with the ALJ hearing process,” and if they don't understand these new OMHA pilot initiatives, “they won't go for it.”

### User Fees, Appeal Penalties

Alarif said several other proposed changes to the appeals process were concerning and made the overall budget proposal a “mixed bag” for providers despite the proposed funding increase for additional Medicare appeals capacity. These reforms included changing the level of review for the Medicare Appeals Council, which is the level

### Snapshot

- FY 2019 budget proposes \$144M increase to resolve 500,000 backlogged Medicare appeals
- Impact on providers from proposed user fees, sanctions for bad faith appeals unclear

of administrative review above the ALJ level; a proposed user fee for unfavorable nonbeneficiary Medicare appeals; and imposing sanctions or civil monetary penalties for appeals not made in "good faith."

Alarif said its unclear how these proposed changes might be implemented or affect providers in the appeals process, but they were likely aimed at reducing the overall number of Medicare appeals coming into the administrative appeals process. These proposed changes were flagged as having no budgetary impact, which might make implementation more likely than a costly funding increase that needs congressional approval.

The HHS also proposed raising the amount in controversy requirement for an appeal before an ALJ to \$1,600 (up from the current \$160), with appeals not meeting this amount to be heard by a magistrate. The administration also proposed raising the amount in controversy for ALJ hearings (to \$1,560) in last year's budget proposal.

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#### **For More Information**

The HHS budget brief is at <http://src.bna.com/wqb>.

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