



American Orthotic &  
Prosthetic Association

## **OMHA Session Underscores Controversy About ALJs, Good Intentions Abound, But No Short-Term Solutions Offered and Proposed Reforms Carry Challenges**

Everyone in O&P, and Medicare providers more generally are concerned and incensed by recent actions to limit immediate provider access to ALJ hearings. On February 12, 2014, the Office of Medicare Hearing Appeals (OMHA) held a public session to explain the problems and to discuss efforts toward remedying the situation. AOPA was represented in-person at this meeting by Joe McTernan, Director of Coding and Reimbursement Services, Education, and Programming, and Lauren Anderson, MPH, Manager of Member Services, who were among the 350 in-person attendees along with several AOPA members.

The comments at the meeting, especially from Nancy Griswold, the Chief Judge for the 65 Administrative Law Judges, painted a daunting picture, although not in quite as absolute terms as had appeared from the December 24 notice she issued announcing a two-year suspension of assigning new cases to administrative law judges for hearing. Notably, Judge Griswold underscored that: (1) OMHA has begun to resume assigning a limited number of backlogged cases to some administrative law judges (ALJs), as their current backlog eases; and (2) refused to characterize the deferral in the process of assigning cases as a freeze in ALJs hearing appeals. It seems that may be a distinction without a difference.

She cited data indicating that the ALJs are reviewing more than twice as many cases per day as they were a few years ago. She outlined several new long-term initiatives to increase efficiencies: mediation, attorney reviews, statistical sampling. A pending plan to allow electronic tracking of the status of appeals was also touted. The 2014 fiscal year brings an 18.6% increase in appropriations, but we do not expect to see any immediate increase in case processing. It appears there are presently nearly a half million cases/claims awaiting assignment of an ALJ.

The concerns and efforts expressed in the OMHA session are laudable. There has been a huge outcry from the provider community, which at least finally has prompted HHS to move to reallocate some resources to improve ALJ timing. Still, from AOPA's standpoint, they come up decidedly short. Unfortunately, the ALJ process is really the **only** due process right that O&P professionals (and other Medicare providers) have at their disposal to try to reverse the overreaching 'long arm' of the federal government, the Medicare program and its contractors in hyper-aggressively 'clawing back' huge sums of legitimate claims paid-moneys which without such recourse put small business providers out of business. It is no secret

that Medicare has been unhappy with the fact that ALJs very often rule in favor of Medicare providers-which has decidedly been the case with O&P RAC audit claims that have gotten to the ALJ level thus far. CMS has been concerned enough with ALJ reversals that they have retained a few experts for 'training' of ALJs-ostensibly to help assure that the position of the Medicare program in these appeals is better understood. AOPA has always been quite concerned that there is a very fine line between such 'education' of ALJs, and what might be termed lobbying of judges. To be clear, we are not asserting that the line has been crossed, but that CMS is edging very close to the line of potentially inappropriate activity. The resources for the ALJs come from HHS, and those resources provided, even if supplemented by belated increase in budget resources announced yesterday, are not enough to clear the backlog. Some might question what incentives CMS/HHS have to rectify the backlog problems and restore a system of timely appeals-ones that meet the requirements of the federal law that your case be heard/decided within 90 days, a standard which is being breached every day.

The reported remedies have a potentially problematic side-making a fixed number of ALJs handle twice as many cases per day threatens the thoroughness of the appeal, and calls for mediation, attorney reviews, and statistical profiling all seem alarmingly geared toward changing measures of speed at the expense of the quality of the appeal, and that could all bode poorly for Medicare providers and the depth of examination and understanding the ALJs can exert on each case they decide. The long-standing ALJ system works, on those cases that are decided, albeit horribly delayed. AOPA fears that every 'reform' discussed at yesterday's session has some potential to make for less favorable results for provider success, alarming since this is really the only pathway providers have to seek fairness in a system of appeals and recoupments that is stacked against them.

Finally, a reminder that two weeks ago, AOPA President, Anita Liberman-Lamphear wrote to the CMS Administrator highlighting the problems, insisting that more resources be allocated to the ALJ system, and demanding that new RAC audits be suspended until HHS gets its house in order and can demonstrate compliance with the federal law that says you are entitled to an ALJ hearing and decision within 90 days. AOPA members have pressed this matter with their legislators, and recently many members of Congress signed on to similar letter deploring the claim appeals backlog. We expect there will be even more efforts in the works. [\*\*Come to the AOPA Policy Forum, set for April 2-4 in Washington, DC\*\*](#) and make your voice heard on this and over issues critical to the viability of O&P practices and to the mobility of patients who require the cost saving O&P interventions which maintain the mobility and independence of Medicare beneficiaries.

[\*\*Click here to see AOPA's letter to Medicare on the ALJ delays.\*\*](#)

[\*\*Click here to use AOPA Votes to contact your legislator and urge his/her support for AOPA's letter on ALJs.\*\*](#)

[\*\*Click here to see the letter from Chief Administrative Law\*\*](#)

**Judge Nancy Griswold announcing the interruption of  
assigning claims to ALJs.**

**[Click here to review details and register for the April 2-4  
AOPA Policy Forum.](#)**

Questions regarding this issue may be directed to Steve Custer at  
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