

appellant withdrawals, which leaves the Department approximately 60,000 appeals short of the number of appeals the mandamus order required the Department to eliminate by December 31, 2017. Initial reports indicate OMHA received approximately 113,000 new appeals in fiscal year (FY) 2017. OMHA, however, only had the capacity to dispose of approximately 76,000 appeals through ALJ adjudications in FY 2017.

4. For FY 2018, the estimated number of appeals OMHA will be able to dispose of through ALJ and attorney adjudication may rise to as many as 93,500 appeals, but the current projected total number of new incoming appeals at OMHA for FY 2018 is 186,245.

5. OMHA has undertaken all reasonable efforts to increase the number of dispositions of appeals within OMHA's existing budgetary and statutory constraints. Disposition projections beginning in FY 2018 are based on a staffing level of 92 ALJ teams, each consisting of one ALJ and four support staff, which are estimated to dispose of 88,000 appeals. This estimated capacity accounts for expected annual attrition and the time required to hire and train replacement ALJs. The number of ALJ teams in FY 2018 represents an increase of 31 ALJ teams since FY 2012, and the expected per ALJ productivity represents an increase in productivity of approximately 500 appeals per ALJ team, per year compared to productivity in 2009, prior to the growth in receipt rates. Expected productivity represents the maximum sustainable capacity that can be achieved per ALJ team without impacting quality. This increase in productivity has been made possible in part by adding an additional legal assistant and attorney to each ALJ team in order to maximize average productivity per ALJ team.

6. In addition to traditional ALJ adjudication, OMHA has added a cadre of attorney adjudicators under new regulatory authority that became effective in March 2017. 82 Fed. Reg. 4974, 4981 (Jan. 17, 2017). Attorney adjudicators are assigned to appeals for which an oral

hearing is waived or an oral hearing is not required in order to issue a decision. These include cases being dismissed because of appellant withdrawal, cases being remanded to Centers for Medicare & Medicaid Services (CMS) contractors, and cases that can be decided favorably based on the record and therefore no oral hearing is held, e.g., a CMS contractor stipulates that the claim can be covered. OMHA estimates that, based on current resource levels and appellant interest in the program, these new attorney adjudicators will dispose of approximately 5,000 appeals each year. The scope of the program is limited by budget and appellant interest. In addition to its permanent adjudication capacity, OMHA uses the Office of Personnel Management (OPM) senior ALJ program to reemploy retired ALJs on a temporary and part-time basis, to the extent resources permit. Retired ALJs allow OMHA to add temporary ALJ adjudication capacity to conduct hearings and issue decisions. In FY 2018, OMHA will have three senior ALJs through this program, providing additional ALJ adjudication capacity of 500 appeals. The scope of this program is limited by budget and by the availability of ALJs who are appropriate for rehire in one of OMHA's six geographic locations.

7. In addition to reallocating staff to support ALJ adjudications, OMHA has taken a number of steps to increase ALJ productivity and dispositions, including investing in education and developing new electronic tools to increase support staff productivity, reorganizing structures to focus resources on adjudications, and strategically assigning cases for more efficient adjudications and to reduce appellant burden:

- a. OMHA On-the-Record Adjudication: Under this initiative, for cases filed before March 20, 2017, OMHA senior attorney advisors review cases in which the appellant has waived its right to an oral hearing and requested that OMHA decide the merits of the case on the existing record. An OMHA senior attorney advisor reviews the

record to verify that a decision can be issued without a hearing and drafts a recommended decision. An ALJ then reviews the record and the recommended decision, and if he or she concurs, issues the decision. An ALJ may also return the case to the senior attorney advisor with decision instructions. Since the initiative began in July 2015, in addition to their other duties, OMHA senior attorneys have resolved over 5,000 appeals—the equivalent of five ALJ teams' annual workload. The initiative frees ALJ time to prepare for additional hearings, rather than conducting the initial review and assessment of records for cases in which the appellant has waived the oral hearing, and then issuing case development and/or decision instructions to a decision writer. The program may also result in a faster decision because the appeal does not wait in the queue with appeals that potentially require a hearing.

b. Judicial Education Training and Other Continuing Education for OMHA ALJs and Adjudication Staff: Training sessions provide consistent training to adjudicators on Medicare coverage law and policy and Medicare administrative appeal procedures. The sessions routinely involve collaborative training using policy experts from OMHA, CMS, and the Medicare Appeals Council (the Council) within the Departmental Appeals Board (DAB). This training provides adjudicators and staff with further foundational knowledge in the various issues that may be presented across the spectrum of Medicare benefit and claim appeals, reducing research time. In addition, training increases decisional consistency among adjudicators at all levels of appeal, which may contribute to lower appeal rates by resolving issues at the lower levels of appeal and affecting appellants' business decisions whether to appeal to higher levels of appeal.

c. Field Office Reorganization: OMHA re-engineered its field office staffing structure and its physical office space to streamline and centralize administrative functions and reduce physical footprints. These changes have allowed OMHA to use more of its funding on direct case-support functions. Through these efforts, coupled with modest increases in funding, OMHA has been able to increase ALJ support to include two legal assistants and two attorneys per ALJ and open two additional offices to support its operations (Kansas City, Missouri and Seattle, Washington).

d. Strategic Case Assignments: As backlogged appeals are assigned to adjudicators, OMHA identifies appellants with a large number of filings and groups them for assignment to an ALJ as a unit for potential consolidated proceedings and more efficient adjudication.

e. Electronic Tools: OMHA continues to refine and develop electronic tools to provide appellants with information, which in turn reduces staff time fielding customer service calls, and to automate aspects of the case adjudication process, thereby reducing staff time to complete less complex or routine tasks. The reclaimed staff time is then redirected to processing more appeals. The OMHA ALJ Appeal Status Information System (AASIS) continues to provide appellants with online access to information on pending appeals, and an internal document generation system provides OMHA legal assistants with a tool for quickly drafting notices and other correspondence. OMHA also continues work towards the Electronic Case Adjudication Processing Environment (ECAPE), which will add further efficiencies to the process, including electronic filing options for appellants and increased automation in case processing. In addition, CMS continues to expand the utilization of its Medicare Appeals System (MAS) as a system of

record for Medicare appeals. MAS is a web-based system designed to support the management, execution, and administration of first, second, and third level appeals.

8. OMHA's budget is fixed by the appropriation Congress sets for the program. OMHA adjudicators, including ALJs and support staff, are operating at a capacity that balances efficiencies with quality. Under the statute, each appealed claim is individually analyzed and adjudicated by an ALJ (unless the parties have stipulated otherwise). That adjudication requires a review for procedural jurisdiction, preparation of the record, review and research on the issues involved, scheduling and conducting conferences and hearings, determinations on procedural matters and other party requests, considering the evidence and testimony to make a decision, and drafting and reviewing a decision. While OMHA currently uses strategies to group appeals to gain efficiencies, the efficiencies are already built into the expected per-ALJ adjudication capacity of 1,000 appeals per year and increasing adjudication capacity further would not allow ALJs adequate time to engage in quality decision-making. At the current expected per-ALJ adjudication rate—which as highlighted above (¶ 5), is significantly higher than the pre-backlog 2009 rate—additional opportunities for further productivity ultimately require appellant consent and are limited by appellant willingness to avail themselves of OMHA initiatives, *e.g.*, Settlement Conference Facilitation, statistical sampling initiatives, and on-the-record adjudication options. *See* ¶¶ 6, 10-18. In sum, OMHA has incorporated all reasonable and available measures to maximize its adjudication capacity under its current budget and statutory authorities.

Settlement Efforts to Reduce Existing Backlog

9. Currently, there are more than 20,000 appellants with appeals pending at OMHA. As of October 20, 2017, only 25 appellants made up nearly 50% of the number of appeals pending at OMHA. One hundred appellants made up over 58% of the number of appeals pending at OMHA. The single largest appellant, a durable medical equipment (DME) supplier, alone has filed approximately 31% of all pending appeals at OMHA. Comparatively, the acute care hospital with the largest number of appeals pending at OMHA is the 31st largest appellant and comprises just 0.19% of the total pending appeals.

10. Settlement Conference Facilitations (SCFs): Since June 2014, OMHA staff who are trained in mediation techniques have been facilitating settlement conferences between CMS and appellants to discuss administratively resolving pending appeals. SCFs provide CMS and an appellant with an opportunity to consider individualized factors, such as (1) the type of item or service at issue, (2) the governing policy regarding the item or service at issue, (3) the cost to the Department for adjudicating the appeals at issue, (4) a sample of provider's claims, and (5) the provider's historical overturn rate on appeal. To focus the program on the largest number and oldest appeals given OMHA's limited resources, SCF was initially available for Part B appeals filed in or before calendar year 2013. The program has been incrementally expanded to address newer appeals as requests are processed. As of May 2016, providers who filed appeals on or before December 31, 2015, were eligible for the SCF program if they had at least 20 claims, or \$10,000, at issue in appeals pending before OMHA for most Part B appeals, or that had at least 50 claims and \$20,000 at issue in appeals pending before OMHA for most Part A appeals. In addition, the amount of each individual claim must be \$100,000 or less, and if the appeal arises from an extrapolated statistical sample, the overpayment amount extrapolated from the universe

of claims must be \$100,000 or less. The availability of SCF has been widely publicized to the appellant community.

11. Since the SCF program began, as of September 30, 2017, 53 agreements have been reached with provider appellants to resolve over 15,500 appeals, and three (3) agreements have been reached with State Medicaid agencies to resolve almost 54,000 appeals, *see* McQueen Decl. at ¶ 6, for a total of almost 70,000 appeals. Based on the success of this initiative, OMHA added 11 new trained facilitators.

12. Because the resources used to staff the mediators and administer the SCF program come from OMHA's budget (although additional resources for CMS participation, evaluations of the appeals in dispute, and effectuation are funded by CMS), expansion of the program to date has been balanced with funding traditional ALJ adjudication in such a way as to not significantly affect the number of appeals that can be adjudicated through the standard ALJ process.

13. As of September 30, 2017, there have been 202 SCF requests from providers, with 20 of those requests still in the SCF process. Of the 182 SCF provider requests that have been fully processed:

- 53 resulted in a settlement;
- 18 did not reach a mutually agreeable settlement with CMS. While OMHA does not know with certainty the reasons why the providers did not settle, it is possible that providers may have thought they were due a higher settlement offer than CMS was prepared to give them based on individualized factors such as historic ALJ overturn rate and the types of claims at issue in the appeal;
- 104 were not eligible for participation; and

- 7 were withdrawn by the provider from the SCF process before a conference was held.

14. OMHA also proactively reached out to 18 providers with a relatively large volume of appeals and invited them to participate in SCF. Of the 18 invitations:

- 8 did not respond to the invitation;
- 4 resulted in a settlement;
- 2 did not reach a mutually agreeable settlement with CMS;
- 3 were ultimately deemed not eligible for participation; and
- 1 was withdrawn from the SCF process by the provider before a conference was held.

15. Expanded SCF: OMHA will be expanding the SCF program to make it available to more appellants. The expanded SCF program will provide a vehicle for eligible providers and suppliers, with no apparent program integrity concerns, to explore means to remove their appeals from the backlog.

16. OMHA Voluntary Statistical Sampling: Under this project, which has been in place since June 2014, appellants with 250 or more claims pending at OMHA may choose to have OMHA adjudicate their claims using statistical sampling and extrapolation, which is a cost-effective method of adjudication for this number of claims. This program allows the appellants to have large volumes of claims decided based on a statistically valid sample of the appellant's appealed claims, reducing the time and cost to obtain a decision. To date, this project has allowed OMHA to process an additional 532 appeals, and over 14,000 appeals are in the process of being resolved through statistical sampling and extrapolation, which will allow OMHA to

process at least the estimated additional 14,000 appeals HHS projected for this program from FY 2017 through the end of FY 2021.

17. As of October 27, 2017, we estimate that an additional 466 providers are eligible for this program which had the potential to remove over 337,000 appeals from the backlog. Yet only seven (7) providers have availed themselves of this process.

18. To improve participation, based on feedback from providers, OMHA made changes to the program in June 2017. Those changes included assigning a portion of the sampled claims to separate ALJs to better represent the diversity afforded in standard appeal assignment rotations—and thereby mitigate the risk of an assignment of all appeals to an ALJ that providers perceive as unfavorable. Also, the changes included removing the initial date restriction on when an appeal included in the sampling process was filed, which allowed an appellant to include all of its appeals regardless of filing date.

RAC Appeals in the OMHA Backlog

19. As a result of numerous changes that CMS made to the statutorily mandated RAC program that were designed to reduce the number of new appeals from being filed, RAC contract transitions, and CMS's targeted settlement efforts, appeals to OMHA generated from the denial of claims through the RAC program have decreased drastically from FY 2014, both in terms of incoming appeals and appeals currently pending before OMHA:

[SEE NEXT PAGE]

RAC APPEALS FILED AND PENDING AT OMHA

	FY 2013 10/1/12- 09/30/13	FY 2014 10/1/13- 09/30/14	FY 2015 10/1/14- 09/30/15	FY 2016 10/1/15- 09/30/16	FY 2017 10/1/16- 09/30/17
Fiscal Year					
New RAC-Related Appeals Filed	193,105	273,407	31,624	15,761	13,782
Percentage of RAC-Related Appeal Receipts of Total of OMHA Receipts	50.3%	53.8%	14.1%	9.5%	12.2%
Total RAC-Related Appeals Pending at OMHA (end of FY)	190,117	345,229	437,524	154,592	82,329
Percentage of RAC-Related Appeals of Total Appeals Pending at OMHA	50.4%	52.4%	57.7%	23.5%	14.2%

20. In FY 2017, there were 13,782 new RAC appeals filed at OMHA, which represents only 12% of all incoming appeals at OMHA. Based on overall historic overturn rates, OMHA projects that only 31% of these appeals will be decided in the appellant's favor (in full or part).

21. Although RAC appeals decreased in FY 2017, OMHA non-RAC appeals still exceeded its current funded ALJ capacity. Elimination of the RAC program would not resolve the OMHA backlog; it would have no effect on pending RAC appeals, and it would not resolve the ongoing disparity between new appeal receipts and adjudication capacity at OMHA. Receipt projections indicate that non-RAC appeals – both pending and projected appeal receipts will continue to exceed OMHA's currently funded adjudication capacity.

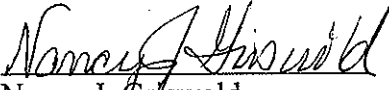
Additional Initiatives

22. Combining Appeals by Appellant: OMHA previously considered combining all of one provider's appeals under a single number, or assigning all of a provider's appeals to a single

ALJ. However, each claim must be examined individually so the superficial creation of a single appeal or assigning all of the appeals to one ALJ does little to reduce the actual work involved in adjudicating the many constituent claims that would be involved, in addition to the administrative burden of coordinating such an exercise and tracking claims going through various initiatives, as well as adding any new appeals to those existing appeals. OMHA does group appeals for efficiency in adjudication as noted above in ¶ 5(d). These grouped assignments are then assigned to OMHA's ALJs in accordance with the provisions of the Administrative Procedure Act (APA). However, OMHA is concerned that expanding this program to group all pending appeals from one appellant for assignment to one ALJ would raise concerns from appellants in light of the APA's provision to assign "cases in rotation so far as practicable." See 5 U.S.C. § 3105. Additionally, the assignment of such massive volumes of claims with ALJs would also inhibit OMHA's ability to serve beneficiary appellants, or smaller provider or supplier appellants because it would consume ALJs and support staff time with managing and preparing those large grouped appeals for hearing and decision.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on November 3, 2017 in Falls Church, Virginia


Nancy J. Griswold