

GOVERNMENTAL AFFAIRS
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

DIRECTOR

Robert D. Evans
(202) 662-1765

rdevans@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

Denise A. Cardman
(202) 662-1761

cardmand@staff.abanet.org

Kevin J. Driscoll

(202) 662-1766

driscollk@staff.abanet.org

Lillian B. Gaskin

(202) 662-1768

gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

R. Larson Frisby

(202) 662-1098

frisbyr@staff.abanet.org

Kristi Gaines

(202) 662-1763

gainesk@staff.abanet.org

Kenneth J. Goldsmith

(202) 662-1789

goldsmithk@staff.abanet.org

Ellen McBarnette

(202) 662-1767

mcbarnee@staff.abanet.org

E. Bruce Nicholson

(202) 662-1769

nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS

OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie

(202) 662-1764

strandlj@staff.abanet.org

INTELLECTUAL PROPERTY

LAW CONSULTANT

Hayden Gregory

(202) 662-1772

gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar

(202) 662-1780

aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo

(202) 662-1776

jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR

INFORMATION SERVICES

Sharon Greene

(202) 662-1014

greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion

(202) 662-1017

mcmillionr@staff.abanet.org

July 27, 2004

Honorable Tommy Thompson
Secretary
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue
Washington, D.C. 20201

Re: *Plan for the Transfer of Responsibility for Medicare Appeals*

Dear Secretary Thompson:

The American Bar Association appreciates the opportunity to comment on the *Plan for the Transfer of Responsibility for Medicare Appeals*, published in the Federal Register on Monday, June 28, 2004, 69 Fed. Reg. 36809.

The ABA is the world's largest voluntary professional organization with more than 400,000 members. The ABA's Commission on Law and Aging is an interdisciplinary group established in 1979 to examine law-related issues affecting older persons. The Commission has worked for many years to strengthen procedural due process in Social Security and Medicare. In 1987, it co-sponsored a Symposium on Medicare Procedures that resulted in major policy recommendations. The Commission currently sponsors a Medicare Advocacy Project with the Alzheimer's Association, which addresses barriers to access to health care and Medicare coverage for individuals with Alzheimer's disease.

Our comments are based on numerous policies of the ABA that support efforts to improve the administrative and judicial processes utilized by the Department of Health and Human Services (HHS) and the Social Security Administration (SSA). The ABA's policies seek to ensure that claimants and beneficiaries receive due process throughout the appeals process and that the independence and impartiality of administrative law judges (ALJs) are preserved. We have consistently opposed any attempt to deny beneficiaries the right to a full due process hearing under the Administrative Procedure Act before an ALJ. Most recently, in August 2003, the ABA adopted a policy that addresses some of the issues involved in the transfer of ALJs to HHS in order to assure that Medicare beneficiaries are afforded due process.

There must be a sufficient number of administrative law judges and staff to guarantee timely hearings and decisions.

The transition plan provides that HHS will initially hire only 50 ALJs to hear Medicare appeals nationwide. In FY 2003, SSA received over 75,000 ALJ Medicare appeals and closed approximately 78,000 cases. In FY 2004, there were over 37,000 pending cases. Given the legislative changes over the past few years that impose time limits for conducting appeals at every level, it is inevitable that the ALJ workload will increase. In addition, it is anticipated that there will be increased appeals as a result of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA). The ABA is concerned that the projected number of ALJs will be inadequate to guarantee a timely, in-person, due process hearing for beneficiaries. It is imperative that there be sufficient ALJs and support staff to hear and decide cases within the statutory time frames adopted by Congress.

The transfer plan must specify a course of action that protects the independence of the ALJ corps.

Beneficiaries must continue to have a right to an independent ALJ hearing regardless of any changes to the Medicare appeals process. Courts have recognized at least three broad public policy interests that favor due process hearings to mediate claims and disputes with respect to entitlements such as Medicare: the desire for accuracy, the need for accountability, and the necessity for a decision-making procedure perceived as fair. *Gray Panther v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980). The due process rights of beneficiaries must be protected by ensuring that every beneficiary will continue to be entitled to a due process hearing, on the record, before an independent administrative law judge who can assert authority for development of the record. The ABA has long supported the special role of the ALJ as an independent fact finder who develops the factual record. This unique role needs to continue.

When Congress enacted the MMA, it purposefully included a provision to ensure the independence of ALJs from any undue influence from the Centers for Medicare & Medicaid Services (CMS). The statute requires that ALJs be transferred to HHS and be in an office that is separate from CMS and its contractors. They are to report to, and be under the supervision of, the Secretary of HHS and not any other officer of the Department. However, the proposed plan gives no details on how HHS intends to protect the independence of the Medicare ALJs from the agency that oversees the Medicare program. The plan only recites the language within the statute; it does not include any further information regarding this important protection. We believe that, at a minimum, the transfer plan must address the following specifics:

- ?? The new office or agency in which the ALJs will be placed;
- ?? Firewalls that will be put in place to assure independence;
- ?? Procedures for reporting and oversight by the Secretary; and
- ?? Standards against which independence will be measured.

The independence of ALJs is especially relevant given the possibility that HHS may utilize “re-employed annuitants” or former judges on an intermittent basis. There must be standards to ensure that the use of temporary or contract judges does not affect the ALJs decisions. We are particularly concerned that a contract ALJ might feel compelled to resolve a case in favor of CMS in order to continue to receive additional cases in the future. The Secretary must assure that the number of cases resolved in favor of beneficiaries and against CMS is not taken into consideration when hiring or rehiring contract ALJs.

The transfer plan must provide for an appropriate geographic distribution of administrative law judges.

As stated in the transfer plan, SSA currently has ALJs stationed throughout the country. Local ALJs in the nation’s 139 hearing offices hear most of the beneficiary cases. It is imperative to have ALJs available nationally in order to provide all Medicare beneficiaries the opportunity for an in-person, face-to-face hearing before the trier-of-fact.

The MMA requires that HHS provide for an appropriate geographic distribution of ALJs performing ALJ functions throughout the country to ensure timely access; yet there is no detail within the transfer plan that specifies how this statutory mandate will be accomplished. The transfer plan should address the following questions:

- ?? How will regions be identified?
- ?? Will ALJs be housed permanently in one location, or will they ride circuit?
- ?? Will hearing sites be at least as geographically accessible as they currently are, or will beneficiaries have to travel greater distances?
- ?? What safeguards will be available to beneficiaries in rural areas to assure they have the same access to ALJ hearings as beneficiaries in urban areas.

These questions are critical for low-income Medicare beneficiaries, who may have greater difficulty traveling long distances to have the face-to-face hearing required by due process. In addition, many of the beneficiaries who bring appeals have chronic and other conditions that make traveling long distances difficult. Moreover, because many beneficiaries desire to have in-person contact with the ALJ after having gone through several impersonal stages of appeal, easy geographic access to an in-person hearing is of paramount importance and concern in assuring the integrity of the ALJ hearing process.

Training for administrative law judges must promote fairness and independence.

The transfer plan provides that HHS must design a comprehensive training plan that will promote a greater understanding of the practices and principles of the Medicare program. However, it also indicates that HHS training will “improve decisional accuracy and accountability at every step in the process.” These goals give rise to concerns that CMS may, through training modalities and materials, attempt to influence the decisional independence of the ALJs handling Medicare appeals.

In making their decisions, ALJs abide by the federal regulations and statute, not the informal local coverage decisions or local medical review policies developed by CMS' contractors. Currently, neither an ALJ nor the Medicare Appeals Council is bound by contractors' policies, informal CMS' policies or CMS' program memoranda, which are frequently more restrictive than the statute and regulations. The present regulations require that the ALJs and Medicare Appeals Council base their decisions only on the Medicare statute, published regulations and national coverage decisions. This is consistent with ABA policy that provides that ALJs should apply the statute and published regulations, rather than informal CMS or contractors' policies, when deciding Medicare appeals.

Reports by the Office of Inspector General and other entities have documented that beneficiaries have a greater success rate at the ALJ level of review than they do at lower appeal levels, often precisely because ALJs apply the federal regulations and statute. We are concerned the HHS training may focus on CMS policy manuals and local contractor rules, rather than on the statute, regulations, and case law, to encourage ALJs to abide by policy guidelines that are inconsistent with, and do not have the weight of, the statute and regulations. To assure that the training protects the independence of ALJs to apply the law to the facts of each claim, the training should include information about the requirements of the Administrative Procedures Act and case law relating to deference to agency policies.

Conclusion

The ABA has advocated for almost two decades for increased efficiency and fairness in the administrative adjudication process, and we have drawn upon the experience and expertise of our membership to develop a wide body of recommendations and policy in this area. These comments on the proposed plan, like our policy positions, seek to reinforce the important role qualified, independent ALJs perform in protecting the due process rights of beneficiaries.

Thank you for the opportunity to share our concerns with you regarding the transfer plan. We welcome the opportunity to work with CMS and HHS on these important issues. If we can be of any assistance, please contact Leslie B. Fried, ABA Commission on Law and Aging, at (202) 662-8684 or friedl@staff.abanet.org.

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

Robert D. Evans