EXPANDED OPTION TO SETTLE MEDICARE APPEALS

Date: 5 June 2018

U.S. Health Care Alert

In an effort to resolve its backlog of Medicare appeals, the Department of Health & Human Services' Office of Medicare Hearings and Appeals (OMHA) established a Settlement Conference Facilitation (SCF) pilot program in June 2014. SCF is an alternative dispute resolution process used by providers and suppliers to settle Part A and Part B appeals that are pending with OMHA and the Medicare Appeals Council ("Council"). [1]

Specifically, SCF is a mediation process that involves a specially trained senior attorney or senior analyst at OMHA who acts as a facilitator. The facilitator is not a fact finder, and the merits of specific appeals are not argued during the SCF process. The parties to the mediation are the appellant, i.e., the provider or supplier that filed the appeals, and the Centers for Medicare & Medicaid Services (CMS).

OMHA recently announced that it was expanding its SCF program to allow more providers and suppliers to benefit from SCF. On May 22, 2018, Cherise Neville, a Senior Attorney Advisor at OMHA, hosted an open door call to provide details regarding the expanded SCF program. As discussed on the call, the eligibility requirements and process for OMHA's expanded SCF program include the following:

ELIGIBILITY

To be eligible for SCF, two sets of requirements—appellant requirements and appeal requirements—must be met.

APPELLANT ELIGIBILITY CRITERIA ARE AS

FOLLOWS

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- Appellant must be a Medicare provider or supplier with a National Provider Identifier (NPI).
- Appellant must have 25 or more SCF-eligible appeals pending at OMHA or the Council. If a provider or supplier has less than 25 eligible appeals, the provider or supplier is still eligible if at least one appeal has billed charges of more than $9,000.
- Appellant cannot have filed or expect to file for bankruptcy.
- Appellant must not have or have had False Claims Act litigation or investigations pending against them.

Note that organizations that are legally affiliated but have separate NPIs can be included on one SCF Request. Such SCF Request must include all associated NPIs and Provider Transaction Access Numbers.

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APPEAL ELIGIBILITY CRITERIA ARE AS FOLLOWS:

- Appeals must involve requests for administrative law judge (ALJ) hearing or Council review filed on or before November 3, 2017.
- Each individual claim must be $100,000 or less (for the purposes of an extrapolated statistical sample, the overpayment amount extrapolated from the universe of claims must be $100,000 or less).
- Appeals must not involve payment disputes (i.e., when appellant is paid as billed but believes the fee schedule amount is insufficient payment; but note that down-coding claims are eligible for SCF).
- Requests for ALJ hearing or Council review must arise from a Medicare Part A or Part B Qualified Independent Contractor (QIC) reconsideration decision.
- Appeals must not arise from a QIC or ALJ dismissal order.
- Appeals must not be scheduled for ALJ hearing or an ALJ hearing must not have been conducted. (You are still eligible if you receive a notice of hearing or decision after you file your SCF Request. If you receive a notice of hearing, you must attend the hearing.)
- Appeals must not be actively engaged in a CMS Medicare appeals initiative that was available on or after November 3, 2017, or in OMHA's Statistical Sampling Initiative.
- Appeals must not involve items, services, drugs, or biologicals billed under unlisted, unspecified, unclassified, or miscellaneous healthcare codes.
- All jurisdictional requirements for OMHA or Council review must be met.
- The beneficiary must not have been found liable for the amount in controversy after the initial determination or participated in the reconsideration.
- Appeals must not be beneficiary-initiated.

Note that all pending OMHA and Council appeals that are eligible for SCF must be included for SCF. Appellants cannot select some for settlement and others for ALJ hearing.

SCF REQUEST

Appellant must submit a SCF Request, which will be posted on the OMHA website in early June. Once an SCF Request is submitted, it is sent to CMS, which has fifteen (15) days to decide whether it wants to participate in SCF with the appellant. If CMS chooses to participate, OMHA and the Council will create a spreadsheet containing all of appellant's eligible appeals ("SCF Spreadsheet"). Upon receipt of CMS's response and the SCF Spreadsheet, appellant then has twenty (20) days to review and update the SCF Spreadsheet as needed and file a signed SCF Agreement of Participation. An SCF Confirmation Notice is then issued to appellant and CMS.

SCF EXPRESS

From here, SCF Express will commence, which as its name implies, is an expedited process to settle appeals. Within thirty (30) days of the Confirmation Notice, CMS will provide a settlement offer to appellant. The settlement offer is based only on preliminary data, as CMS will not have conducted medical review of appeals at this point.

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Appellant has seven (7) days from receipt of the offer to accept the offer, at which point the parties would sign a settlement agreement. If appellant declines the SCF Express offer, the parties will proceed to a pre-settlement conference call and a settlement conference. Note that if appellant does not provide a response within seven (7) days of receipt of the offer, appellant's SCF process will end. If appellant rejects the SCF Express offer, the offer expires, and appellant cannot later resurrect it.

SCF CONFERENCES

A pre-settlement conference is held to address logistical matters (e.g., scheduling; appellant decides whether to submit a position paper), and the settlement conference is the payment negotiation session. Merits of individual claims will not be discussed. If a settlement is reached, OMHA facilitators will draft a settlement agreement, which is signed by CMS and appellant at the settlement conference. The settlement conference serves as the dismissal order for the pending appeals. If settlement is not reached, the appeals will return to OMHA's or the Council's docket.

To view the slides from the SCF open door call, please see https://www.cms.gov/Outreach-and-Education/Outreach/NPC/Downloads/2018-05-22-Settlement-Conference-Presentation.pdf.

SCF can be beneficial for providers and suppliers who seek to expeditiously resolve their Medicare appeals. In particular, the SCF Express option allows appellants the opportunity to resolve their pending Medicare claims without medical review of claims or a conference. Additionally, appellants who ultimately do not reach settlement through SCF do not lose time in the appeals process, as claims return to their original places on the OMHA or Council docket.

If you would like to pursue SCF, the attorneys in our Health Care Practice have been following the expansion of SCF and can assist with the process.

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[1] SCF is separate and distinct from the Centers for Medicare & Medicaid Services' Low Volume Appeals (LVA) Settlement Option. For more information about LVA, please visit https://go.cms.gov/LVA.

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