



CMA Weekly Alert – March 1, 2007

## WHEN IS A HEARING NOT A HEARING?

From the inception of the Medicare program until the summer of 2005, face-to-face hearings were available to individuals appealing the denial of Medicare benefits. These administrative hearings were held in person throughout the country by Administrative Law Judges (ALJs) in local offices of the Social Security Office of Hearings and Appeals. In the summer of 2005, however, the function of performing Medicare administrative hearings was transferred by Congress to the Department of Health and Human Services (HHS), the umbrella agency for the Medicare program.<sup>1</sup>

In implementing this legislation, HHS located its new Medicare ALJs at only 4 sites in the United States: Cincinnati, Ohio; Irvine, California; Miami, Florida; and Arlington, Virginia. As one might expect from these very limited locations, hardly any Medicare hearings are actually conducted in person under the new system. The majority of hearings are now conducted by either telephone or videoteleconference (VTC).

HHS regulations make VTC or telephone hearings essentially mandatory, attaching vague conditions to the nominal exception for in-person hearings.<sup>2</sup> The Center for Medicare Advocacy has repeatedly attempted to obtain in-person hearings for our clients since the new system was launched, and has repeatedly been denied. In the few cases where in-person hearings were reluctantly granted, they were scheduled at one of the 4 remote sites -- imposing such burdensome and expensive travel requirements that attendance for Medicare beneficiaries is virtually impossible.

The effects of the new Medicare ALJ hearing system on elderly and disabled appellants are often harmful. Elderly and disabled individuals may be uncomfortable with technology, and have difficulty presenting their cases through unfamiliar means. The depersonalized mode of communication eliminates the empathy between judge and beneficiary that is created by physical proximity. Furthermore, HHS has contracted to provide VTC hookups for beneficiaries in Kinko stores and other commercial venues across the country, and the undignified style of such proceedings lacks the sense of formality and judicial decorum created by face to face hearings.

In addition, a number of systems problems that arise regularly during VTC hearings have been experienced by the Center for Medicare Advocacy and other advocates who represent Medicare beneficiaries at hearings. Problems that have been experienced by advocates are as follows:

- VTC equipment failed during multiple hearings.
- VTC equipment “froze” or cut off the picture during many other hearings.
- VTC equipment or noise in the store kept participants from hearing the ALJ at other hearings.
- Many times, when VTC equipment failed, the ALJs pressured participants to continue their hearings by telephone.
- In numerous cases there were problems with the exhibits, generally involving an inadequate list of the exhibits, or missing exhibits.
- In a number of cases where the ALJ failed to appear or the hearing started late, there were no personnel present in the store to explain to the beneficiary advocate what had happened.

This VTC hearing system conflicts with provisions of the Medicare Act of 2003. These provisions show that Congress intended most Medicare ALJ hearings to continue to be in-person. The legislation states that there

must be “an appropriate geographic distribution of administrative law judges performing the administrative law judge functions transferred under paragraph (1) throughout the United States to ensure timely access to such judges.”<sup>3</sup> The provision for transfer of ALJ responsibility also mandates that “[t]he Secretary [of DHHS] shall enter into such arrangements with the Commissioner [of Social Security] as may be appropriate with respect to transferred functions of administrative law judges to share office space, support staff and other resources.”<sup>4</sup> These requirements are a further expression of Congress’ intent that in-person Medicare hearings, like Social Security hearings, would continue to be available at numerous, convenient locations throughout the country.

The Medicare statute itself mandates that a beneficiary is entitled to hearings “to the same extent as is provided in section 205(g)” – the Social Security ALJ hearing provision.<sup>5</sup> However, a comparison of the Medicare and Social Security regulations shows that HHS has blatantly refused to comply with this mandate. The Social Security hearing regulations give beneficiaries an absolute right to reject telephonic or VTC hearings and receive in-person hearings.<sup>6</sup> In contrast, the new Medicare regulations specify that hearings will be held by VTC or telephone.<sup>7</sup> In-person hearings are mentioned as an exception to the rule of VTC or telephone hearings, one that is subject to the unbridled discretion of the ALJs.<sup>8</sup>

A lawsuit challenging the regulations making VTC or telephone hearings virtually mandatory was filed on behalf of several Medicare beneficiaries in December, 2005. *Webber v. McClellan*, CIV 05-4219-PHX-NVW (D.Ariz. Order Feb. 7, 2007). Unfortunately, the court recently dismissed this case on standing, mootness and venue grounds without reaching the merits of the issues concerning VTC hearings.

**The Center for Medicare Advocacy would like to take action to resolve these important issues, and urges beneficiaries and their advocates who have also experienced problems with the VTC hearing system to contact us at (860) 456-7790.**

*For more information on this issue, or the cases regarding this issue, please contact Center for Medicare Advocacy Consulting Attorney Sally Hart ([shart@vanosteen.com](mailto:shart@vanosteen.com)) at (520) 322-0126.*

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<sup>1</sup> Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Medicare Act of 2003), Pub. L. No. 108-173, § 931(a)(2)(G)(ii), 117 Stat. 2006, 2397 (2003).

<sup>2</sup> 42 C.F.R. § 405.1020(b)

<sup>3</sup> Prescription Drug Act, § 931(b)(3)

<sup>4</sup> Id., § 931(b)(6)

<sup>5</sup> 42 U.S.C. § 1395ff(b)(1)(A)

<sup>6</sup> 20 C.F.R. § 404.936(d) - (f)

<sup>7</sup> 42 C.F.R. § 405.1020(b)

<sup>8</sup> 42 C.F.R. § 405.1020(b), (e) - (i)