Making the Most of Your Limited Time Before the ALJ

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Preparation is the key

• Remember the law school adage?

• And keep in mind: *By failing to prepare, you are preparing to fail* - Ben Franklin
The Law

- Attorney Adjudicators 42 C.F.R. § 405.1026
- Evidence review 42 C.F.R. §§ 405.1018 and 405.1028
- Hearing process changes 42 C.F.R. § 405.1020
- Limits on Contractor Kibitzing 42 C.F.R. §§ 405.1010 and -1012
- Precedential Decisions 42 C.F.R. § 401.109
- Rules for hearing decorum 42 C.F.R. § 405.1030
When do you start preparing?

- When you get the denial letter
- Do not wait until you get the hearing notice!
- Use your proposed decision as a template
- Think about your closing argument, and work backwards
- Practice your presentation using a timer
Why a proposed decision?

- Briefs are passé if you want the ALJ to pay
- “Progress would be impossible if we always did things the way we’ve always done them.” - Dr. Wayne Dyer
Use the *Request for Hearing* form

- 42 C.F.R. § 405.1014
- For reason I disagree with … write: “Please refer to attached proposed decision.”
- Remember: a dismissal is a disposition
Prehearing submissions

- “Be better - be brief” - Joe McCormack

What do you say to an ALJ?

- Elevator pitch your case
- What’s an elevator pitch?
- What was wrong with the beneficiary?
- What did the provider / supplier do?
- Why did the provider have to do it?
Playing fair

▪ “Integrity is doing the right thing even when nobody is looking” - Captain Sully Sullenberger

▪ APA allows the ALJ to dismiss or deny for *ex parte* communications, 5 U.S.C. § 557(d)(1)(D)

▪ Duty to disclose adverse authority: ABA Model Rule of Professional Responsibility 3.3(a); ABA Committee on Professional Ethics & Grievances, Formal Op. 280 (1949)

▪ Does the duty to disclose apply to Precedential Decisions promulgated by 42 C.F.R. § 401.109?

▪ Hat tip: The Temptation Not to Disclose Adverse Authority, *Litigation*, Volume 40, Number 2, Winter 2014 (American Bar Association)
Help the ALJ help you

- Submit a proposed decision
- Findings of Fact:
  - Start with beneficiary’s date of birth
  - Past medical history
  - Physical findings, test results
  - What the provider did - write in active voice
  - How the treatment helped the beneficiary
WORD
CHOICE 101
If
HE
 wouldn't say it
You shouldn't
D. O. B.

Past Medical History

Symptoms / Event

DOS

Result
Proposed decision - analysis

- Analysis:
  - Recite requirements
  - Plug in the facts
  - Apply the facts to the law
  - Accordingly …
Cover sheet

Attention: Attorney Advisor
or Legal Assistant:

Request Fully Favorable
On the Record Decision

Proposed Decision
Attached

Central Ops: Please leave this sheet on top the Hearing Request
The hearing

• Do you really need to make an opening statement?

• Object to improper contractor participation, 42 CFR 405.1010 and -1012.

• If you want the ALJ to pay, get to the point right away.

• Answer the ALJ’s questions. The ALJ is *always* “Your honor.”

• Tell the entire story.

• Be an advocate.
Post hearing

• “No” means no.

• Respond to own-motion review requests

• Let the wheels turn
Questions?
Thank you

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How to Handle Your Medicare Hearing

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