Estimated Impact of Deferring Provider Payment for RAC Appeals Until After Administrative Law Judge (ALJ) (Level 3) Determinations

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Background in Brief

The Office of Medicare Hearings and Appeals (OMHA) within the Department of Health and Human Services (HHS) handles the four levels of appeals for Medicare claims and entitlement issues. The third level (Level 3) is a hearing with an Administrative Law Judge (ALJ). While the ALJ hears appeals concerning a variety of issues, a common Level 3 appeal heard is Recovery Audit Contractor (RAC) appeals. In these instances, RACs attempt to retrospectively collect improper overpayments made from Medicare to providers.

In order for a RAC claim to enter a Level 3 appeal (ALJ hearing), the provider must first reimburse Centers for Medicare & Medicaid Services (CMS) for the payments in dispute. That is, after an unfavorable Level 2 disposition, the provider must reimburse CMS for the alleged overpayments and then submit their appeal for Level 3. If the ALJ hearing rules in the providers favor (fully or partially favorable disposition), CMS becomes responsible for reimbursing the provider for the submitted payment plus interest, for the time period between provider repayment and the ALJ determination.

According to statute, the ALJ has up to 90 days to review each appeal and issue its decision from the date of appeal request.[1] However, due to a significant increase in RAC and other types of audits, OMHA estimates that based on current volume and workload, assignment of requests for hearings could be delayed for up to 28 months, with an additional 6 month delay post-assignment.[2,3] Because interest is determined by CMS based on the interest paid back on the number of months that CMS has access to the provider's payment,[4] the backlog of ALJ appeals could represent a significant expense to CMS for successful appeals.

[1] Moore EK, Rawlings RB, Smith JL. "A Primer on RAC Appeals." McGuireWoods.

[2] Office of Medicare Hearings and Appeals (OMHA). Requests Submitted After April 1, 2013 — Deferred Assignment & Filing Alert for Requests and Additional Documentation. Retrieved from: http://www.hhs.gov/omha/important_notice_regarding_adjudication_timeframes.html#requests.

[3] Griswold N. (2013). Memorandum to OMHA Medicare Appellants, Re: Administrative Law Judge Hearings for Medicare Claims and Entitlement Appeals. Department of Health and Human Services, Office of the Secretary.

[4] CMS Manual System. (2013). Limitation on Recoupment (935) for Providers, Physicians, and Suppliers Overpayments. Pub 100-06 Medicare Financial Management. Department of Health and Human Services.

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Background in Brief

The American Orthotic and Prosthetic Association (AOPA) is formulating a legislative policy that would change the timeline for when provider payment for claims under review would need to be submitted. Specifically, the recoupment date for RAC audits would be delayed until after the ALJ hearing and determination. Under this policy, CMS would not be holding providers' payments while the ALJ hearing is in process; therefore, CMS is not accruing interest to later be paid to providers with favorable (or partially favorable) ALJ determinations.

AOPA anticipates that this proposed policy would produce savings to the Medicare program. Dobson DaVanzo & Associates, LLC was commissioned to conduct a Congressional Budget Office (CBO)-type analysis to determine the impact of this policy on Medicare expenditures. While the focus of this analysis is orthotic and prosthetic (O&P) RAC audits that reach Level 3 appeals, the analysis also considers the Medicare savings if all Part B services were included in the policy.

This report summarizes the analytical methodology and its key findings.

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Methodology

RAC Appeals for O&P Services

Identifying O&P RAC appeals

Since RAC Level 3 audits are the only type of appeal for which CMS currently pays interest, these appeals served as the universe for our analysis. OMHA recently released appeal level data by type of service for 2013.[5] This database includes: unique appeal identifier; type of service involved (e.g., O&P, DME, practitioner services); flag for RAC audit; HCPCS code involved; appeal status (i.e., closed, pending); and appeal disposition.

Under the assumption that appeals will ultimately reach a disposition, our analysis included data for both pending and closed appeals in the database. Medicare payment was calculated for each claim service using the Durable Medical Equipment, Prosthetics Orthotics and Supplies (DMEPOS) fee schedule for 2013 (to align with the OMHA database). Based on the state in which a given service was provided, a Medicare "ceiling" payment was calculated. Payments were aggregated across claims to the appeal level. On average, O&P appeals in 2013 represented an average Medicare payment of $35,338.

The OMHA 2013 database includes 17 appeals for O&P services (pending and closed) to the ALJ, which represented 140 claims. Among all claims submitted to the ALJ for O&P services, RAC audits represent 1.3 percent of the total claims, and 0.5 percent of all appeals in the OMHA database.

Calculating CMS Interest Payments

Due to a significant increase in RAC (and other) audits over the last few years, OMHA has significantly altered its timeline for reviewing and determining an appeal disposition. Since the OMHA's estimate that the typical appeals process reaches assignment within 28 month, and post-assignment 6 months thereafter, we assumed that the average interest paid for each claim to be 30 months. According to the CMS methodology for determining 935 interest at

[5] Office of Medicare Hearing and Appeals (OMHA). Health Data Sets; Receipts by Fiscal Year; Receipts by Appeal Category. Retrieved from: http://www.hhs.gov/omha/Data/Health%20Data%20Sets/index.html

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the ALJ level,[6] we calculate the average interest paid for each O&P appeal. The historic interest rate for the prior 32 quarters were averaged to produce a projected interest rate of 11 percent.

Estimating Medicare Savings

Under the proposed policy, CMS would no longer be responsible for paying interest for each favorable or partially favorable RAC disposition. We first calculate the total possible recoupment CMS could receive from RAC appeals for O&P services. Based on the OMHA data, closed appeals for O&P services have a success rate of 51.9 percent; therefore, CMS would only be required to reimburse funds with interest for about one-half of all appeals. The difference between CMS' recouped funds for unfavorable (not successful) appeals minus interest payments paid out, and CMS' recouped funds for unfavorable appeals with no interest payments made represents the total savings to Medicare.

Ten-year Medicare savings were calculated by inflating the total Medicare payments associated with ALJ appeals by the projected growth in DME expenditures over the ten-year period.[7] The analysis assumes that O&P appeals remain the same proportion of DME spending over time.

Extrapolating to Unrecognized ("Unknown") ALJ Appeals

Effective July 2013, OMHA officially stopped assigning appeals for ALJ review until its backlog is eliminated.[8] As a result, our savings estimate needs to be extrapolated from the "known" appeals (i.e., those assigned to a docket) to the "unknown" appeals that were waiting to be acknowledged by OMHA. The rationale for this extrapolation is that CMS would realize savings from all appeals in the queue, and not just those that have already been assigned to an ALJ docket.

Testimony from Nancy Griswold, Chief Administrative Law Judge, estimates that in July 2013, OMHA's Central Operations Division handled 15,000 receipts per week.[9] Based on the proportion of all claims that were RAC and the proportion of RAC claims that were O&P services, we estimated the approximate number of RAC claims for O&P services that entered OMHA without acknowledgement over the last two years (i.e., 15,000 claims submitted per week for two years, multiplied by 1.4 percent to represent the proportion of all claims that were for RAC audits, and 3.85 percent to represent the proportion of RAC claims for O&P services). We calculated that there were approximately 841 O&P RAC claims

[6] CMS Manual System. (2013). Limitation on Recoupment (935) for Providers, Physicians, and Suppliers Overpayments. Pub 100-06 Medicare Financial Management. Department of Health and Human Services.

[7] CMS Office of the Actuary (National Health Expenditure Accounts). Projections through 2023 (2024 and 2025 set equal to 2023 growth rate).

[8] Griswold N. (2013). Memorandum to OMHA Medicare Appellants, Re: Administrative Law Judge Hearings for Medicare Claims and Entitlement Appeals. Department of Health and Human Services, Office of the Secretary.

[9] Griswold N. (2013). Memorandum to OMHA Medicare Appellants, Re: Administrative Law Judge Hearings for Medicare Claims and Entitlement Appeals. Department of Health and Human Services, Office of the Secretary.

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submitted to OMHA but not yet captured in their database. Since this database currently tracks 140 known O&P RAC claims, a multiplier of 6.0 is applied to the scoring estimate to capture all 841 total claims (841 "unknown" claims divided by 140 "known" claims). (In the OMHA data, 140 claims reflect 17 appeals; therefore, in the extrapolated model, 841 claims reflect 102 appeals).

After savings were estimated for the RAC appeals for O&P services within the OMHA database, the savings were adjusted by the multiplier to account for total CMS savings for all appeals. An important caveat of this methodology is that we assumed that 15,000 claims per week will continue over the next two years. While OMHA is currently not assigning new appeals to ALJ dockets, we anticipated that these appeals would continue to be filed during the ten-year study period.

RAC Appeals for Part B Services

Using a similar methodology described above, we calculated the potential savings to Medicare for applying this policy to all Part B services. In the OMHA database, Part B services account for 319 RAC appeals, which represents 1,332 RAC claims.[10] O&P holds a disproportionate share of Part B RAC audits, as O&P services represent 10.5 percent of all Part B RAC claims and 5.3 percent of all appeals. In addition, the success rate for Part B services is lower than the overall average for O&P, with a favorable/partially favorable success rate for closed appeals of 43.9 percent.

Using the OMHA dataset, Medicare payments were calculated for Part B service claims by either the Physician Fee Schedule or DMEPOS Fee Schedule. Payments were readily available for about 60 percent of Part B service claims.[11] Missing payments were imputed for the remaining claims based on the average Medicare payment per claim for those claims costs excluding O&P services. O&P services were excluded from this average as the Part B average payment per claim were significantly lower than that of the O&P services. While O&P services represented 10.5 percent of RAC Part B claims, these represented more than one-half of all Medicare payments for RAC audits at the ALJ level. The average Medicare payment for an O&P RAC appeal was $35,338, compared to $3,572 for all Part B service appeals (including O&P Services).

Once all Part B RAC costs were calculated, a similar extrapolation methodology was used to account for the "unknown" Part B claims in the system. While 1.4 percent of all submitted claims were for RAC audits, 36.6 percent of all known RAC claims were for Part B services. Therefore, we estimated that approximately 8,007 Part B claims in the system, which

[10] Represents services identified as "Part B" and "Part B of A" in the OMHA dataset

[11] Payments were not readily available for select services within the following service types: transportation, acute care hospital (within Part B), select clinical lab/x-ray, dental, and prescription drug, among others.

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requires a multiplier of 6.0 to be applied to the "known" savings based on RAC audit frequency (8,007 "unknown" claims divided by 1,332 "known" claims). (Calculated as 15,000 claims submitted per week for two years, multiplied by 1.4 percent to represent the proportion of all claims that were for RAC audits, and 36.6 percent to represent the proportion of RAC claims for Part B services).

Table 1 and Table 2 below show the distribution of claims and appeals by Medicare Service Type (O&P compared to Part B, and all Medicare services).

Table 1: Distribution of Claims and Appeals by Medicare Service Type (2013) (Pending and Closed Appeals)

	2013 O&P	2013 Part B	2013 All Services	O&P as % of Part B	O&P as % of All Services
Total Claims	11,059	195,239	253,595	5.7%	4.4%
RAC Claims	140	1332	3,633	10.5%	3.9%
% Total RAC Claims	1.3%	0.7%	1.4%		
Total Appeals	3,392	84,247	109,282	4.0%	3.1%
RAC Appeals	17	319	977	5.3%	1.7%
% Total RAC Appeals	0.5%	0.4%	0.9%		

Source: Dobson | DaVanzo Analysis of OMHA Detailed Data: Receipts by Fiscal Year, 2013

Table 2: Distribution of Part B Claims by Provider Service Type (2013)

Service Type	Number of RAC ALJ Claims	% of Claims	% of Payment
Acute Hospital (Part B Related)	62	4.7%	0.88%
Clinic/Lab/X-Ray	162	12.2%	7.97%
Dental	58	4.4%	1.13%
DME	59	4.4%	4.02%
Medical Supplies	10	0.8%	11.04%
Other	44	3.3%	2.27%
Outpatient Mental Health	1	0.1%	7.89%
Outpatient Therapies	181	13.6%	2.89%
Practitioner Services	514	38.6%	8.91%
Prescription Drug	82	6.2%	0.93%
Prosthetics/Orthotics	140	10.5%	51.79%
Transportation	19	1.4%	0.26%
Total	**1332**	**100.0%**	**100.0%**

Source: Dobson | DaVanzo Analysis of OMHA Detailed Data: Receipts by Fiscal Year, 2013

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Study Findings

Medicare Savings for RAC Appeals for O&P Services

For the 17 appeals contained in the OMHA database (representing 140 pending and closed claims), CMS recouped $600,740 in potentially inappropriate Medicare payments in 2013 (Table 3). With a reported 51.9 percent success rate for closed cases, CMS could only recoup $289,245 of the potential total ($600,740). Accumulated interest payments for the time that successful appeals were in the review process were an estimated as $85,661. These interest payments account for 30 percent of the remaining recouped funds CMS received through the RAC audit after reimbursing providers for successful appeals. In other words, CMS is losing 30 percent of recouped funds due to required interest payments for successful appeals. A primary driver of the magnitude of these interest payments is the considerable delay between provider recoupment after Level 2 determination, and Level 3 determination – an estimated average of 30 months.

Under this policy, the saved interest payment in 2013 could yield $85,661 in Medicare savings, and $1.26 million over ten years for only the appeals captured in the OMHA system. Based on the multiplier calculation that accounts for all appeals in the backlog, CMS could save $7.57 million over ten years ($1.26 million * 6.0 multiplier). These savings could be realized by delaying provider payment until after Level 3 ALJ determination, thus eliminating CMS' need to reimburse providers with interest.

Medicare Savings for RAC Appeals for Part B Services

For the 319 appeals contained in the OMHA database (representing 1,332 pending and closed appeals), CMS could have potentially recouped $1.16 million in inappropriate Medicare payments in 2013 (Table 3). With a reported 43.9 percent success rate for closed Part B cases (including O&P services), CMS could only recoup $651,159. Accumulated interest payments for successful appeals in a 30 months review process were estimated to be $139,923, or about 21 percent of the remaining recouped funds CMS received through the RAC audit process.

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Under this policy, CMS could save $139,923 in 2013, and $2.06 million over ten years for the appeals in the OMHA system. Based on the multiplier calculation, CMS could save $12.37 million over ten years by delaying provider payment until after Level 3 ALJ determination, thus eliminating the need to reimburse providers with interest.

Table 3: Summary of Findings for O&P and Part B Services in RAC Appeals at ALJ Level (Pending or Closed)

		O&P Services		Part B Services	
		2013	10-Year (2016-2025)	2013	10-Year (2016-2025)
1	Total O&P Level 3 RAC Appeals in OMHA	17		319	
2	Total O&P RAC Level 3 Claims	140		1,332	
3	Average O&P Medicare Payment per RAC Appeal	$35,338		$3,636	
4	Success Rate (on Closed Appeals)	51.9%		43.9%	
5	Total Possible Recouped Funds for Pending and Closed RAC Appeals (line 1* line 3)	$600,740	$8,837,581	$1,159,971	$17,064,505
6	Remaining Recouped Funds After Reimbursement for Successful Appeals (5*4)	$289,245	$4,255,132	$651,159	$9,579,291
7	**Interest to Providers for Successful Appeals (Savings)**	**-$85,661**	**-$1,260,174**	-$139,923	-$2,058,434
8	Remaining Recouped Funds after Interest Payment (6+7)	$203,584	$2,994,958	$511,235	$7,520,858
9	Savings as a Percent of Remaining Recouped Funds (7/6)	30%	30%	21%	21%
10	Extrapolation of Savings to All Appeals in Backlog	-$514,481	-$7,568,603	-$841,157.91	-$12,374,399.72

Source: Dobson | DaVanzo Analysis of OMHA Detailed Data: Receipts by Fiscal Year, 2013

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Discussion

The significant growth in RAC and pre-payment audits over the last few years have resulted in an increase in the number of appeals handled by OMHA at the ALJ level. Between FY 2011 and FY 2013, the OMHA's workload for claim and entitlement appeals grew by an estimate of 545 percent[12] while the resources available to handle these claims has remained constant, or decreased due to sequestration.[13] While the productivity of the ALJ team has more than doubled between FYs 2009 and 2013, the increased workload has exceeded the ALJ's ability to provide dispositions within the 90-day window Congress requires.[14] As a result, there is a rapid accumulation in the backlogged appeals that have not reached a disposition.

The significant delays in the review process are increasing CMS interest payments to providers for successful appeals. Effectively, 20 to 30 percent of CMS' remaining recoupment for improper Medicare payments (after reimbursement for successful appeals) is being used to pay provider interest. This proportion could continue to increase over time as the delay period increases.

Under this proposed policy, CMS would not recoup payments from providers for possible overpayments until the ALJ disposition is determined. This would eliminate the need for CMS to make interest payments, estimated to be $7.57 million for O&P services over ten years or $12.37 million for all of Part B services in the appeal system (including those yet to be recognized by OMHA). Furthermore, providers with successful appeals would not have their resources withheld by CMS for upwards of 30 months before they received their repayments. To the extent that this policy could be extended to Part A services, the savings would be more significant. Part A services represented approximately two-thirds of all RAC claims at the ALJ level in 2013 (2,301 of the total 3,332 RAC claims). Further analysis is warranted to calculate the savings for all RAC audits for which CMS is required to pay interest.

[12] Griswold N. "Office of Medicare Hearing and Appeals Workloads." Statement before the United States House Committee on Oversight & Government Reform, Subcommittee on Energy Policy, Health Care & Entitlements. July 2014.

[13] Griswold N. (2013). Memorandum to OMHA Medicare Appellants, Re: Administrative Law Judge Hearings for Medicare Claims and Entitlement Appeals. Department of Health and Human Services, Office of the Secretary.

[14] Griswold N. "Office of Medicare Hearing and Appeals Workloads." Statement before the United States House Committee on Oversight & Government Reform, Subcommittee on Energy Policy, Health Care & Entitlements. July 2014.

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