

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN HOSPITAL ASSOCIATION, *et al.*,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity as  
SECRETARY OF HEALTH AND  
HUMAN SERVICES,

Defendant.

Civil Action No. 14-cv-00851 (JEB)

**DECLARATION OF NANCY J. GRISWOLD**

I, Nancy J. Griswold, declare as follows:

1. I am the Chief Administrative Law Judge for the Office of Medicare Hearings and Appeals (OMHA) within the Department of Health and Human Services (HHS or Department). I have held this position since March 1, 2010. Among my duties, I oversee the third level of administrative review for individual Medicare claims and entitlement appeals within HHS, which is also known as the Administrative Law Judge (ALJ) level of review.

2. The statements made in this declaration are based on my personal knowledge, information contained in agency files, and information furnished to me in the course of my official duties.

3. OMHA is not privy to and does not independently possess information about which appellants may ultimately be ineligible to participate in potential settlements due to program integrity concerns. It is my understanding from the Declaration of George Mills, Deputy Director of CMS's Center for Program Integrity (filed on November 22, 2017), however, that as of November 22, 2017, at least 41.2% of the pending appeals at OMHA, amounting to

approximately 219,200 appeals, were filed by appellants that are the subject of open investigations by the Department of Justice encompassing a wide range of alleged improper practices, including criminal investigations and investigations under the False Claims Act. *See* Mills Program Integrity Decl. ¶¶ 5, 7.

4. As of January 26, 2018, there were approximately 501,700 appeals pending at OMHA. After removing 219,200 appeals involving program integrity concerns (*see* Nov. 22, 2017 Mills Decl. ¶ 7), using OMHA data as of January 26, 2018, OMHA estimates that approximately 92 percent of the remaining appeals pending at OMHA are potentially eligible for resolution through either the planned expanded OMHA Settlement Conference Facilitation (SCF) process or the Centers for Medicare & Medicaid Services (CMS) Low Volume Appellant (LVA) option. *See* Exhibit 1, OMHA Appeals Potentially Eligible for Settlement via SCF/LVA. This estimate has not been reduced to account for appeals that are ineligible because they were filed by appellants that have declared bankruptcy, are already involved in OMHA's Statistical Sampling Initiative, did not meet jurisdictional requirements for OMHA review or sought review of a Qualified Independent Contractor dismissal, involved a beneficiary who was found liable for the items or services at issue following the initial determination or participated in the reconsideration, have already been scheduled for a hearing by an assigned ALJ, or involve issues that require resolution through the normal adjudication and effectuation process, such as an unspecified procedure code for which no standard Medicare payment amount has been established or certain appeals where an appellant is challenging the sufficiency of a Medicare payment amount. The number of such appeals is not readily quantifiable.

5. In making the above calculation, OMHA began with the total number of pending appeals and subtracted the 219,200 appeals estimated by CMS to have program integrity

concerns (to get 282,524). It then added together, the five particular types of appeals that are ineligible for potential settlement via SCF or LVA or are already subject to settlement as described in ¶ 6, (for a total of 22,241), subtracted them from 282,524 (to get 260,283), and calculated the percentage of 260,283 over 282,524 (92.1%) that would be potentially eligible for SCF or LVA.

6. These are the five categories of appeals ineligible for SCF or LVA or already subject to settlement that are readily quantifiable:

a. First, appeals brought by beneficiaries are ineligible for settlement as they are generally being processed within the statutory or regulatory timeframes (1,483).

b. Second, the majority of the pending appeals filed by State Medicaid Agencies (SMAs) will already be dismissed pursuant to settlement agreements reached between CMS and the SMAs in Connecticut, New York and Massachusetts. Most of the remaining appeals filed by SMAs are either appeals that an SMA opted not to settle because the SMA believes the provider is liable for the underlying claims, or that CMS cannot settle because the appeals involve adverse coverage determinations made by Part C Medicare Advantage plans, certain health maintenance organization and competitive health plans, or health care prepayment plans (11,444 total).

c. Third, appeals involving Medicare Secondary Payer issues are ineligible because they are non-provider appeals involving a challenge to Medicare's attempt to recover conditional payments for services Medicare made on behalf of a beneficiary with another source of payment (73).

d. Fourth, appeals for which the amount in dispute for an individual claim involved in the appeal is over \$100,000 are ineligible because HHS cannot settle claims

over \$100,000 without first obtaining Department of Justice approval. In the case of an extrapolated statistical sample, appeals for which the overpayment amount extrapolated from the universe of claims is over \$100,000 are similarly ineligible. OMHA used appeals involving a Zone Program Integrity Contractor (ZPIC) or Unified Program Integrity Contractor (UPIC) determination as a proxy for these groups because ZPICs and UPICs tend to conduct reviews where there are significant dollar amounts at issue and frequently use extrapolation in their reviews (6,174).<sup>1</sup>

e. Fifth, Part C Medicare Advantage, certain health maintenance organization and competitive health plan, or health care prepayment plan appeals are ineligible where the appeal is filed by an out-of-network provider who furnished the items or services at issue, and not the Part C enrollee. In these cases, any settlement agreement would be between the provider and the plan, not CMS (3,067).

7. According to OMHA's estimates, in total these five types of appeals constitute just 4.4% of the total appeals pending at OMHA (501,724), or 7.9% of the total appeals pending at OMHA not affiliated with open DOJ investigations according to Mr. Mills' Declaration (282,524).


8. The number of appeals ultimately removed from OMHA's backlog of pending appeals as a result of these initiatives is dependent upon appellant willingness to avail themselves of the resolution options provided by OMHA and CMS.

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<sup>1</sup> It is possible that appeals arising from a provider whose appeals were excluded from this calculation due to program integrity concerns are also captured here using this proxy; this comparatively small figure, however, is being included as an additional exclusion out of an abundance of caution.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on February 1, 2018 in Washington, D.C.

  
Nancy J. Griswold



**Exhibit 1: OMHA Appeals Potentially Eligible for Settlement via SCF/LVA**

Appeals (Complete Request Received)	Total Pending	Ineligible: Beneficiary	Ineligible: SMA	Ineligible: MSP	Ineligible: ZPIC/UPIC	Ineligible: Non-K Provider	Ineligible: Part C	Total Ineligible
Part A	117,392	333	11,183	25	4,282	0	0	15,823
Part B	380,339	461	38	48	1,892	0	0	2,439
IRMAA and Entitlement	84	84	0	0	0	0	0	84
Part C	3,729	439	223	0	0	3,067	0	3,729
Part D	166	166	0	0	0	0	0	166
Unspecified	14	0	0	0	0	0	0	0
Appeals Affiliated With Open DOJ Investigation Per Mills PI Declaration	501,724	1,483	11,444	73	6,174	3,067	0	22,241
<b>New Total</b>	<b>282,524</b>							

Calculations:

Total Ineligible as a Percent of Total Pending:  $22,241 / 501,724 = 4.4\%$

Total Ineligible as a Percent of Total Pending Not Affiliated With Open DOJ Investigation:  $22,241 / 282,524 = 7.9\%$

Total Eligible Not Affiliated With Open DOJ Investigation:  $282,524 - 22,241 = 260,283$

Total Eligible as a Percent of Total Pending Not Affiliated With Open DOJ Investigation:  $260,283 / 282,524 = 92.1\%$

Run date: 01/26/2018

