Legal Basics: Medicaid Appeals

NATIONAL CENTER ON LAW & ELDER RIGHTS

CHAPTER SUMMARY • June 2018

Eric Carlson, Justice in Aging

Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. Since the organization's founding in 1972, we have focused our efforts on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency. Justice in Aging authored this issue brief under a contract with the National Center on Law and Elder Rights.

Key Lessons

1. **Appeal rights are established by the Constitution and federal Medicaid law.** The Constitution guarantees due process, as do federal Medicaid laws and policies.

2. **The state Medicaid agency must provide adequate notice of the right to appeal an adverse action.** Notice must be provided whenever the agency denies, terminates, or limits Medicaid coverage. The notice must clearly describe the action to be taken, along with the right to appeal. Generally the notice must be provided at least ten days prior to the proposed action, and the claimant has a reasonable time of 20 to 90 days to request appeal. If the appeal request is made before the proposed effective date, a beneficiary has the right to continued benefits at the current level, pending a subsequent decision on the appeal.

3. **The claimant can appeal the adverse action through an administrative hearing.** The hearing is conducted at a reasonable time, date and place by someone who was not involved in the original determination. The claimant has the right to present witnesses, establish relevant facts, present arguments, and refute opposing testimony. If an appeal involves medical issues and an additional assessment is deemed necessary, the Medicaid agency can be required to fund such an assessment. In some states, the hearing may be a local evidentiary hearing with the right to request a de novo hearing by the state agency.

4. **A state must honor rulings favorable to claimants, and further appeal is available when rulings are unfavorable.** The hearing decision must specify relevant facts and laws. If the claimant prevails, the Medicaid agency must take all necessary corrective actions. Subject to privacy protections, the public must have access to all hearing decisions.

5. **Advocates should be aggressive in requesting and pursuing Medicaid fair hearings.** Appeals frequently can be resolved prior to the hearing, through discussions with the state appeals worker. In preparation for the hearing, advocates should obtain and review the record, and brief the facts and law in an appropriate format.

Appeal Rights Are Established by the Constitution and Federal Medicaid Law

Under the Fifth and Fourteenth Amendments, the federal and state governments cannot deprive a person of property without due process of law. In *Goldberg v. Kelly*, the Supreme Court ruled that monetary public benefits are "property" under the Constitution and that an advance hearing is required before such benefits can be reduced or terminated. The Court rejected the defendants' arguments that benefits were just privileges, and

that a post-termination process was sufficient.[1] This same reasoning has been applied without question in cases involving Medicaid coverage and benefits.[2]

Comparable due process principles are enshrined in federal Medicaid law. A state Medicaid agency must "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness."[3] The State Medicaid Manual counsels states to promote appeal rights through wide distribution of rules and/or pamphlets.[4] The hearing system must be accessible to limited-English-proficient persons and persons with disabilities.[5]

The State Medicaid Agency Must Provide Adequate Notice of the Right to Appeal an Adverse Action

An appealable action is defined broadly to include denials, terminations, reductions, and any action that limits coverage or increases a claimants's financial obligations.[6] Regardless, no hearing right exists when the action results from a change in law that affects multiple claimants.[7] Appeal would be futile in such cases, since the issue is not a dispute over facts, but is instead the result of an undisputed change in relevant law.

The Medicaid agency must give adequate notice when taking an appealable action. The notice must clearly describe the action to be taken, the reasons for that action, and the supportive law.[8] The notice also must inform the claimant of the right to a fair hearing, the right to request an expedited hearing when the claimant's health otherwise would be jeopardized, the way in which to request a hearing, the right to represent himself or herself or to obtain representation by another, and the relevant time frames.[9]

In general, notice must be provided at least ten days prior to the date of the proposed action.[10] Shorter notice is authorized when the resident's physician prescribes a change in the level of medical care, the claimant has been admitted to an institution (a prison, for example) where he or she is ineligible for Medicaid, or in certain specified but relatively rare circumstances.[11]

The claimant must be given a reasonable time of between 20 and 90 days in which to request a hearing.[12] The state must allow for appeal requests to be made in person or through the mail. Some states allow requests to be made via the internet, by telephone, or through other electronic means.

If the claimant requests an appeal prior to the action's effective date, benefits are continued at least until the hearing decision is issued.[13] These continued benefits are often referred to as "aid paid pending." If the Medicaid agency prevails in the hearing, the agency may initiate recovery procedures against the claimant to recover the cost of services provided during the pendency of the hearing request as a result of the aid-paid-pending policy.[14] Such recovery requests are uncommon, however, given that Medicaid recipients generally do not have the financial resources to make such payments. Also, recovery is allowed only if the claimant is notified of the possibility of recovery when he or she requests the appeal and aid paid pending.[15]

CMS advises Medicaid agencies that they "keep informed" about local legal services programs so that they can advise claimants about these programs' availability.[16]

The Claimant Can Appeal an Adverse Action through an Administrative Hearing

If an action has been appealed timely, the claimant has the right to a hearing at "a reasonable time, date, and place."[17] As necessary, a hearing can be conducted over the telephone, or held in the claimant's home.[18] At a reasonable time prior to the hearing, the claimant has the right to examine the Medicaid case file, as well as all documents to be used by the Medicaid agency at the hearing.[19]

The hearing is conducted by an impartial person who was not involved in the initial determination.[20] At the hearing, the claimant has the right to present witnesses, establish relevant facts, present arguments without undue interference, and refute opposing testimony, through cross-examination or otherwise.[21] A translator must

be provided as necessary for the claimant.[22] If an appeal involves medical issues, and the hearing officer believes that an additional medical assessment is necessary, the Medicaid agency must fund such an assessment.[23] Federal financial participation is available for "[t]ransportation for the applicant or beneficiary, his representative, and witnesses to and from the hearing."[24]

The decision or recommendation of the hearing officer must be based solely on evidence introduced in the hearing. Thus, the record includes only the transcript (or an official report of what occurred at the hearing), all documents filed in the proceeding, and the hearing officer's recommendation or decision.[25]

At a state's option, the administrative hearing may be set up as a local evidentiary hearing with the right of appeal to the Medicaid agency.[26] If a local hearing decision is adverse to the claimant, the Medicaid agency must notify him or her of a right to appeal the decision to the Medicaid agency within ten days after receipt of the notice (which is generally assumed to be five days after the date of the notice).[27] The claimant has the right to a de novo hearing with a new submission of evidence (as opposed to an appellate-type review of the initial administrative hearing).[28]

Upon a further appeal, the state's "conclusive decision" is made by the hearing authority, who may be the state agency's highest officer, a panel of agency officials, or an official appointed for that purpose. Anyone who was involved in the case at a lower level may not participate in this decision. The hearing authority may adopt the hearing officer's recommendations, reach a different conclusion based on the evidence, or remand the matter back to the hearing officer if the underlying evidence is insufficient.[29]

In all states, the decision on an appeal must be issued within 90 days of the hearing request. A delay of up to 30 days may be allowed at the claimant's request, or if required medical evidence cannot be obtained within the 90-day period.[30]

A State Must Honor Rulings Favorable to Claimants, and Further Appeal Is Available When Rulings Are Unfavorable

In an evidentiary hearing, the decision must summarize the facts and identify the relevant regulations.[31] Similarly, after a de novo hearing in front of the Medicaid agency, the decision must specify the reasons for the decision, and identify the supporting evidence and regulations.[32] In either case, the notice must include the claimant's right to further review. The regulations reference possible judicial review; indeed, state law generally provides for review by state courts. Procedures vary from state to state, depending on the state's administrative procedures.[33]

If the decision is favorable to the claimant, the agency must promptly make fully-retroactive corrective payments.[34] On the other hand, as previously mentioned, a state has the right to seek compensation for any aid-paid-pending benefits if the hearing decision affirms an adverse action.[35]

Subject to privacy protections, "[t]he public must have access to all agency hearing decisions."[36]

Advocates Should Be Aggressive in Requesting and Pursuing Medicaid Fair Hearings

Many cases settle prior to the hearing

The fair hearing process can be invaluable for claimants and their representatives. For a multiplicity of reasons, Medicaid programs make frequent mistakes, and the fair hearing process is the available mechanism to rectify those mistakes.

In many cases, requesting a fair hearing can bear fruit immediately, without any need to appear at or even prepare for the hearing. The hearing request generally results in the case being assigned to a state appeals worker, which provides an opportunity for resolution prior to the hearing. The appeals worker may find a mistake made by the eligibility worker, and is less likely to be personally invested in, or defensive about, the eligibility worker's work. Also, at the appeals level, the appeals representative may have a greater interest in settling a case, rather than preparing for or participating in a hearing.

The advocate should prepare witnesses and brief the issues

Hearing officers are busy, and the advocate can increase the chances of prevailing by presenting clear briefing on the relevant issues. The state's appeals worker may or may not give a clear explanation of the relevant law, so it often is up to the advocate to present the relevant law and the corresponding facts.

Remember and take advantage of the state's obligation to provide access to the Medicaid case file and all other documents to be used by the Medicaid agency at the hearing.[37] The state's material should be reviewed as soon as possible. Not infrequently, review of the file reveals that a state's decision was based upon missing information; in these cases, providing that information may lead to a relatively smooth resolution in the claimant's favor.

Preparation of witnesses—most obviously the claimant—should not be overlooked. The average person is unfamiliar with testifying, and may be intimidated by the hearing process. Even 30 minutes of preparation and practice can give the witness a greater sense of confidence, and increase the changes that the material is presented in a useful way. Likewise, health care providers are often unfamiliar with the fair hearing process, and require preparation to be most effective witnesses.

Conclusion

Medicaid appeals processes are vital to applicants, beneficiaries, and their advocates. Medicaid programs make frequent mistakes, and the appeals process is the designated avenue for rectifying those mistakes. Federal regulations and policies provide significant due process protections, and advocates should utilize those to protect their clients' Medicaid benefits.

Additional Resources

- Medicaid Fair Hearing Regulations: 42 C.F.R. §§ 431.200–431.250
- CMS State Medicaid Manual §§ 2900–2904.2 (Fair Hearings and Appeals)

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

This Chapter Summary was supported by a contract with the National Center on Law and Elder Rights, contract number HHSP233201650076A, from the U.S. Administration for Community Living, Department of Health and Human Services, Washington, D.C. 20201.

Endnotes

1 Goldberg v. Kelly, 397 U.S. 254 (1970).
2 *See, e.g.*, Catanzano v. Dowling, 60 F.3d 113, 117 (2d Cir. 1995).
3 42 U.S.C. § 1396a(a)(3); *see also* 42 C.F.R. § 42 C.F.R. §§ 431.200(a), 431.205(d); CMS State Medicaid Manual § 2900.
4 CMS State Medicaid Manual § 2900.2.
5 42 C.F.R. §§ 431.205(e), 431.206(e).
6 42 C.F.R. § 431.201; *see also* CMS State Medicaid Manual § 2900.1.
7 42 C.F.R. § 431.220(b).
8 42 C.F.R. § 431.210.
9 42 C.F.R. §§ 431.206(b); 431.224 (expedited appeals).
10 42 C.F.R. § 431.211; CMS State Medicaid Manual § 2901.1(A)(1).
11 42 C.F.R. §§ 431.213, 431.214; CMS State Medicaid Manual §§ 2901.1(B), 2901.2.
12 42 C.F.R. § 431.221(d); CMS State Medicaid Manual § 2901.3.
13 42 C.F.R. §§ 431.210(e), 431.230(a); CMS State Medicaid Manual § 2902.2(A)(1).
14 42 C.F.R. § 431.230(b).
15 CMS State Medicaid Manual § 2904.2.
16 CMS State Medicaid Manual § 2900.3.
17 42 C.F.R. § 431.240(a)(1).
18 CMS State Medicaid Manual § 2902.6.
19 42 C.F.R. § 431.242(a).
20 42 C.F.R. § 431.240(a)(3); CMS State Medicaid Manual § 2902.7.
21 42 C.F.R. § 431.242(b)-(e); CMS State Medicaid Manual § 2902.9.
22 CMS State Medicaid Manual § 2902.9.
23 42 C.F.R. § 431.240(b); CMS State Medicaid Manual § 2902.8.
24 42 C.F.R. § 431.250(f).
25 42 C.F.R. § 431.244(a)-(b).
26 42 C.F.R. §§ 431.205(b), 431.232.
27 42 C.F.R. § 431.232(b).
28 42 C.F.R. § 431.232(c).
29 42 C.F.R. §§ 431.232, 431.233, 431.244(b)-(d), 431.245; CMS State Medicaid Manual § 2903.2.
30 42 C.F.R. § 431.244(f); CMS State Medicaid Manual §§ 2902.10, 2903.3(B).
31 42 C.F.R. § 431.244(d).
32 42 C.F.R. § 431.244(e).
33 *See, e.g.*, Cal. Civ. Proc. Code § 1094.5 (review through administrative mandamus); Ind. Code Ann. § 4-21.5-5-2 (judicial review of final agency action).
34 42 C.F.R. § 431.246; CMS State Medicaid Manual § 2903.3(C).
35 42 C.F.R. § 431.230(b); CMS State Medicaid Manual § 2904.2.
36 42 C.F.R. § 431.244(g); CMS State Medicaid Manual § 2903.4.
37 42 C.F.R. § 431.242(a).