December 5, 2014

Nancy J. Griswold
Chief Administrative Law Judge
Office of Medicare Hearings and Appeals
Department of Health and Human Services
Attention: OMHA-1401-NC
1700 N. Moore St., Suite 1800
Arlington, VA 22209

Re: **Medicare Program; Administrative Law Judge Hearing Program for Medicare Claim Appeals [OMHA-1401-NC].**

Dear Chief Administrative Judge Griswold:

On behalf of the members of the American Academy of Home Care Medicine, thank you for the opportunity to provide the Academy's views on the appeals backlog. This two-year backlog is unreasonable for both beneficiaries and their Part B providers, and needs to be resolved. We support the effort of the Office of Medicare Hearings and Appeals (OMHA) to address this issue with the resources and legal authorities available to it, and we appreciate OMHA's decision to reach out to the provider community to seek potential solutions. We offer recommendations in this letter.

We are also writing under separate cover to Centers for Medicare & Medicaid Services (CMS) Administrator Tavenner to express our view that the fundamental problem and explanation for the appeals backlog is the Recovery Audit Contractor (RAC) and other audit programs, and to seek relief through the improvement of those programs. Multiple changes, including penalties assessed against the RACs for erroneous determinations, extension of the one-year timely filing requirement for claims audited by the RACs, and increased Part B provider involvement are among the suggestions we have asked Administrator Tavenner to consider.

In regard to changes to the appeals process by OMHA, we offer the following recommendations:

- OMHA should continue and consider expanding the **Settlement Facilitation Conference Pilot**. This Pilot provides a more expedient and in some ways straightforward process for Medicare Part B providers who have appealed to the Administrative Law Judge (ALJ) level and would like to swiftly resolve a number of claims.

However, some reservations that we have heard about this Pilot are that Part B providers must give up future appeal rights to participate, and that there are set benchmarks for the number of claims at issue or the amount in dispute to be considered eligible to participate.

Accordingly, we encourage OMHA to look at whether the loss of future appeal rights, as a programmatic requirement rather than as a settlement term, may dissuade participation. We also ask that OMHA consider the dollar amount /number of claims in controversy parameters with increased flexibility so as to allow the maximum number of Part B providers to avail themselves of this option.

- OMHA should continue and consider expanding the **Statistical Sampling Initiative**. The potential to resolve a large number of outstanding claims through this initiative may be attractive for certain Part B providers who have received a large number of same-service audits, and utilization of this initiative by appellants may significantly decrease the appeals backlog. Again, we ask that OMHA consider adding some flexibility to the requisite conditions of participation in this Initiative. For example, currently OMHA requires that there be a minimum of 250 claims on appeal. This high number puts the Statistical Sampling Initiative out of reach for many providers that may want to consider this Initiative.

  Additionally, OMHA currently requires that claims within the Statistical Sampling Initiative all must fall into only one of the following categories: pre-payment audits, non-RAC post-payment audits, or RAC post-payment audits from one RAC. While we can understand the administrative quandary posed by reconsidering the determinations of several audit contractors in one remedial initiative—or in one data set—from a provider point of view these parameters for eligibility do not make sense. For example, providers under the next round of RAC contracts may be audited by a new RAC for the same issue for which they were audited previously. Limiting the universe of claims which may be included in the statistical sample based on the identity of the audit contractor seems arbitrary to a provider who views these audits as deriving only from Medicare. Again, while the Initiative should be available as an option – there also needs to be recognition that Sampling itself has greater implication to the small practice such as comprises much of the Academy membership and where most or all practice revenue is for service to Medicare beneficiaries as compared to providers who practice in other settings where the potential implication of Sampling outcome would be reduced.

- OMHA should consider extending the (65 percent) settlement option which has been offered to hospitals to physicians and other providers. It is unreasonable to offer this option to some health care providers and not others, and the same reasons that OMHA and CMS hope that this hospital settlement offer will reduce the appeals backlog could be applied in the Part B provider context. Part B providers under the tremendous strain in cost and time of appeals, desire to resolve their outstanding appeals, and may want the option to resolve them in similar settlement manner.

Therefore, we recommend that this option be extended to Part B providers. However, given that as noted above Part B providers such as Academy members for whom Medicare is the predominant if not sole source of practice revenue and sustainability that the percent established for this Part B settlement option needs to be higher than that for hospitals and large practices.

- OMHA should continue to move to an electronic system for appeals management and resolution. We also applaud OMHA's efforts to offer hearings and conferences by videoconference. This has been a critical element of an ALJ appeal for providers and is extremely valuable. OMHA should build on this success by focusing on its electronic records management and the development of optional electronic portals for document submission.

The Academy appreciates OMHA efforts to reduce the appeals backlog and to keep Part B providers informed of this progress. Thank you for your consideration of these recommended changes to the RAC program. If you have any questions, please contact Constance Row at edrow@aahcm.org or Gary Swartz gary.swartz@aahcm.org, or either at 410-676-7966.

Sincerely,

Robert Sowislo
Chair, Public Policy Committee
American Academy of Home Care Medicine