

# AAA Medicare Demonstration Project Rules

Effective April 28, 2010, for disputes between CMS and the State of New York

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The Centers for Medicare & Medicaid Services (CMS) has entered into individual agreements with the state Medicaid agencies of Connecticut, Massachusetts, and New York (collectively, "the parties") to operate a demonstration program to determine the Medicare payment of certain home health services

provided to certain individuals. If any one of the states or its agents is dissatisfied with CMS' determination of Medicare coverage for these claims, the parties have agreed to utilize arbitration services provided through the American Arbitration Association to resolve the dispute. This project is being conducted under CMS' statutory authority to conduct Medicare demonstration projects, 42 U.S.C. 1395 b-1.

## **R-1. Agreement of Parties**

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under the AAA Medicare Demonstration Project rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a demand for arbitration or submission agreement received by the AAA. In the event of inconsistencies, the provisions of these rules take precedence over other provisions of the CMS contract with AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator, unless otherwise provided for in these rules.

## **R-2. AAA and Delegation of Duties**

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its case management centers.

## **R-3. Roster of Arbitrators**

The AAA shall establish a separate list of arbitrators for each of the three states consisting of neutrals mutually selected by both that state or its agents and CMS. The term "arbitrator" in these rules refers to an individual arbitrator.

## **R-4. Initiation under an Arbitration Provision in a Contract**

(a) Pursuant to the provisions of Rule R-1 of the AAA Medicare Demonstration Project Rules, the parties agree to indefinitely suspend the requirements under Rule R-4(a)(i) regarding initiation of an Arbitration, provided that:

(i) The initiating parties shall not initiate any Arbitrations prior to August 15, 2007;

(ii) Each initiating party shall initiate only those matters eligible for Arbitration that arose from federal fiscal year (FFY) 2001 within 120 days of August 15, 2007.

(b) The initiating parties shall not initiate any Arbitrations related to years other than FFY 2001 before July 1, 2008 or subsequent to the completion of all FFY 2001 arbitration proceedings for all three demonstration projects states, whichever occurs first.

(i) Upon initiation of any Arbitration requests for federal fiscal year claims other than FFY 2001, the parties agree, in accordance with Rule R-38 of the AAA Medicare demonstration Project Rules, to confer, through legal counsel, and with the AAA, to establish a schedule for the arbitration of pending cases for all other demonstration project claims.

(ii) The state and/or its agents shall simultaneously submit copies of the demand by mail or overnight

delivery to the AAA (2 copies) and to CMS at the following addresses:

American Arbitration Association  
AAA Medicare Demonstration Project  
950 Warren Avenue  
East Providence, RI 02914

Diane Ross  
Centers for Medicare & Medicaid Services  
Office of Research, Development, and Information  
7500 Security Boulevard C4-17-27  
Baltimore, MD 21244-1850  
Jennifer Osgood

TPL Appeals Data Specialist  
National Government Services  
2 Gannett Drive - ME0105-E070  
South Portland, ME 04106

(iii) The AAA shall confirm notice of such filing by mail, overnight delivery, or facsimile to CMS and its representatives at the three addresses identified in (ii), and to the state that has filed the demand, and its representatives, at the following addresses:

Pam Meliso  
Center for Medicare Advocacy, Inc.  
P.O. Box 350  
Willimantic, CT 06226  
Street address:  
11 Ledgebrook Drive  
Mansfield, CT 06250

Walter R. Keenan, Esq.  
Health Insurance Recovery Group  
156 Coventry Road  
Mansfield Center, CT 06250  
Dayce P. Moore  
Manager, Medicare Appeals and TPL Units  
The Schrafft's Center  
529 Main Street  
Charlestown, MA 02129-1120

(iv) Within 14 days of receipt of the demand, CMS' representative will send a copy of the complete case file for the case to AAA and to the state. The case file will include all materials provided by Associated Hospital Services to the CMS appeals contractor, plus the case summary provided by the appeals contractor to CMS.

(c) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator and the opposing party.

## **[R-5 through R-8 not applicable]**

## **R-9. Administrative Conference**

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, exchange of information, a timetable for hearings and any other administrative matters.

## **R-10. Fixing of Locale**

The arbitration hearings will be held at AAA hearing facilities in Boston, Massachusetts; East Hartford, Connecticut; or other site agreed upon by the parties and AAA based on mutual convenience to the parties. The preferred hearing location(s) will be identified by the parties at the pre-hearing conference. If the hearing facilities and the location selected by the parties are unavailable, AAA will contact the parties and select another location that is agreeable to the parties. If a party objects to the locale requested by the other party, the AAA shall have the power to determine the locale, and its decision shall be final and binding.

## **R-11. Appointment from State Rosters**

(a) After the filing of the demands by a state or its agents, the AAA shall select and assign the cases to an arbitrator from the appropriate state roster. Unless an arbitrator is unavailable due to scheduling conflicts or other factors, the AAA shall assign a state's cases to arbitrators on a rotational basis. AAA will assign arbitrators to the cases in alphabetical order unless the parties agree to a different ordering. The cases from a state will be assigned to a single arbitrator, except that (1) no more than 10 cases will be assigned to a single arbitrator at any time, and (2) in the first year of this agreement, if a state has fewer than 10 but more than 5 cases, the state may request that the cases be divided between two arbitrators. If a state's cases are to be divided among more than one arbitrator, the cases shall be divided as evenly as possible to assure that each arbitrator is assigned no more than 10 cases; the state or its agents may identify how the cases are to be grouped before they are assigned to arbitrators, otherwise AAA will divide the cases.

(b) If for any reason none of the arbitrators on the state roster are available or there is not a sufficient number of available arbitrators to meet the requirements of paragraph (a), then the state or its agents and CMS shall identify a mutually agreeable arbitrator from the roster of another state under this program. If the parties cannot agree on an arbitrator within 14 days, the AAA will have authority to appoint the arbitrator.

## **[R-12 through R-14 not applicable]**

## **R-15. Number of Arbitrators**

Each case in its entirety shall be heard and determined by one arbitrator. However, an arbitrator may hear more than one case.

## **R-16. Disclosure**

(a) Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

(b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

(c) In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-16 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

## **R-17. Disqualification of Arbitrator**

(a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for

- (i) partiality or lack of independence,
- (ii) inability or refusal to perform his or her duties with diligence and in good faith, and
- (iii) any grounds for disqualification provided by applicable law.

(b) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

(c) In the event an arbitrator is disqualified, replacement of the arbitrator shall be made in accordance with the provisions of R-19.

## **R-18. Communication with Arbitrator**

No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration.

## **R-19. Vacancies**

(a) If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the provisions of section R-3 and R-11.

(b) In the event of the appointment of a substitute arbitrator after a hearing has commenced, a de novo hearing shall be held for undecided cases, unless both parties agree a de novo hearing is not required.

## **R-20. Pre-Hearing Conference**

(a) The AAA shall hold, within 30 days of the filing of a demand for arbitration, a telephone conference with the parties and/or their representatives and the arbitrator. The AAA shall extend this date for an additional 30 days with the agreement of the parties.

(b) During the pre - hearing conference, the parties and the arbitrator shall discuss the future conduct of the case, including clarification of the issues and claims, establish the hearing date, and any other preliminary matters, including exchange of exhibits.

(c) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator shall direct the identification of any witnesses to be called and the timeframes for providing such information.

(d) Within 10 days after the pre-hearing conference, AAA will notify the parties of the scheduled date of the hearing.

## **R-21. Exchange of Information**

(a) The initiating party (the state and/or its agents) may file a legal memorandum in support of its position. This memorandum must be filed within 30 days of the conclusion of the pre-hearing telephone conference. The responding party (CMS) may file a legal memorandum in support of its position within 30 days of the filing of the initiating party's memorandum. These legal memoranda will be filed with AAA for transmittal to the arbitrator, with copies sent directly to the other party. In the event such a memorandum is filed, the initiating party may file a reply memorandum within 10 days of the filing of the responding party's memorandum. These timeframes can be altered with the agreement of the parties and the arbitrator, or, upon motion, by the arbitrator if the parties cannot agree.

(b) Memoranda shall be no longer than 40 double-spaced 8 1/2 X 11 inch pages, excluding appended exhibits, if any; except reply memoranda shall be no longer than 15 double-spaced 8 1/2 X 11 inch pages, excluding appended exhibits, if any.

(c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.

(d) The filing date of any pleading is the date the document is placed in the mail/express mail; any electronic/fax transmission of a pleading or other document is a courtesy.

## **R-22. Date, Time, and Place of Hearing**

In setting the date, time and place of the hearing (during the pre-hearing telephone conference), the arbitrator shall, to the extent possible, schedule consecutively all hearings assigned to the arbitrator, unless both parties agree to an alternative schedule. Unless otherwise agreed to by all parties, the arbitrator shall set a hearing date that is within 120 days of the filing of the request for arbitration.

## **R-23. Attendance at Hearings**

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any witnesses, and employees and agents of CMS and the states, may attend the hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness (including any employees and agents of CMS and the states) other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party or the persons specified in this paragraph.

## **R-24. Representation**

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

## **R-25. Oaths**

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

## **R-26. Audio Recording**

An audio recording shall be made of each hearing . CMS' fiscal intermediary for the demonstration, Associated Hospital Services, will bring recording equipment to the hearing and will provide copies of the audio recordings for all hearings on compact discs (CDs). Copies will be made available to CMS, the participating state, and the arbitrator, if requested. Each party is responsible for the security of the recording and protecting the confidentiality of the content. If the audio recording equipment is unavailable, the parties may make arrangements for a stenographic record or the use of equipment from an alternative source, and share the costs.

## **R-27. Interpreters**

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service. However, if an interpreter is required because of a hearing or other disability of a party, witness, or other participant in the hearing, CMS will assume the costs.

## **R-28. Postponements**

The arbitrator may postpone any hearing upon agreement of the parties, or upon request of a party for good cause shown. Within 10 days of the postponement, AAA will notify the parties of the rescheduled date of the hearing.

## **R-29. Arbitration in the Absence of a Party or Representative**

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

## **R-30. Conduct of Proceedings**

(a) The state or its agents shall present evidence and argument to support its claim. CMS shall then present evidence and argument to support its defense. In addition to direct examination, witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a full and fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case, while assuring that each party has the right to be heard and is given a full and fair opportunity to present its case.

(c) The parties may agree in writing to waive oral hearings in any case. The arbitrator shall establish a fair and equitable procedure for the submission of documents in such cases, which provides the parties with the opportunity to submit evidence in accordance with R-31 and R-32(a).

## **R-31. Evidence**

(a) The parties may offer such evidence that they deem relevant and material to the dispute and shall

produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary.

(b) The arbitrator shall admit all evidence offered by the parties and determine its relevance and weight.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

### **R-32. Evidence by Affidavit and Post-hearing Filing of Memoranda and/or Documents**

(a) The arbitrator shall receive and consider the evidence proffered by witnesses by declaration or affidavit, but shall give it only such weight as the arbitrator deems it entitled to after consideration of any objection made to its admission.

(b) Additional documents or other evidence or additional memoranda of law may be submitted following the hearing, (1) upon the arbitrator's request; (2) upon the agreement of the parties; or (3) upon the request of one of the parties with the arbitrator's consent. The memoranda of law, documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to all documents or other evidence not provided to all parties prior to the hearing

(c) The arbitrator shall set the time for submission of additional memoranda, documents or other evidence. No memorandum of law submitted under this Rule shall exceed ten double spaced 8 1/2 x 11 inch pages, excluding exhibits.

### **[R-33 through R-34 not applicable]**

### **R-35. Closing of Hearing**

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed. If memoranda of law, documents, or other evidence are to be filed as provided in R-32, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of the memoranda of law, documents, or other evidence. The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing.

### **R-36. Reopening of Hearing**

The hearing may be reopened on the arbitrator's initiative under compelling circumstances at any time before the award is made. If the hearing is reopened, the arbitrator shall have 30 days from the closing of the reopened hearing within which to make an award.

### **R-37. Waiver of Rules**

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection shall be deemed to have waived the right to object.

## **R-38. Extensions of Time**

The parties may modify any period of time by mutual agreement of the parties. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

## **R-39. Serving of Notice**

(a) Any papers, notices, or other documents necessary or proper for the initiation or continuation of an arbitration under these rules shall be served on each party and its representatives. Such service shall be made by mail addressed to the party and its representatives at their last known address.

(b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (E-mail), or other methods of communication.

(c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

## **[R-40 not applicable]**

## **R-41. Time of Award**

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.

## **R-42. Form of Award**

(a) Any award shall be in writing and signed by the arbitrator. It shall be executed in the manner required by law.

(b) The arbitrator will be bound by all applicable Medicare statutes, regulations and CMS Rulings regarding Medicare coverage in making his/her decisions. The arbitrator will also consult, as necessary and applicable, Medicare manual and other program instructions, but will not be bound by the Medicare manual and other program instructions.

(c) The arbitrator shall render a reasoned award, to include findings of fact that support the arbitrator's conclusions of law, which shall include pertinent citations of regulations and statutes. The reasoned award shall include the following sections:

(i) Introduction / Preliminary Statement [Brief introductory statement at beginning of decision]

(ii) Issues Presented [Sets forth the specific issues being considered by the arbitrator]

(iii) Evaluation of the Evidence / Rationale [More lengthy section with thorough analysis of the evidence presented to the arbitrator as it pertains to the issues on appeal]

(iv) Findings / Findings of Fact [Sets forth the arbitrator's factual findings based on evidence presented and analysis]

(v) Decision and Conclusions of Law [Sets forth the arbitrator's decision and the legal basis for reaching the decision]

### **R-43. Scope of Award**

The arbitrator's award is limited to a decision identifying what home health services under dispute, if any, are covered by Medicare. As part of identifying the services covered by Medicare, the scope of the arbitrator's award shall include decisions regarding the appropriate Health Insurance Prospective Payment System (HIPPS) code when the case involves a HIPPS code controversy. In cases where the award requires a new HIPPS code, repricing will be performed by AHS.

### **R-44. Award upon Settlement**

If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award."

### **R-45. Delivery of Award to Parties**

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties and their representatives at the last known addresses, personal service of the award, or the filing of the award in any other manner that is permitted by law.

### **R-46. Modification of Award**

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto.

### **R-47. Release of Documents for Judicial Proceedings**

The AAA shall, upon the written request of a party, furnish to the party, at the party's expense, certified copies of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

### **R-48. Applications to Court and Exclusion of Liability**

(a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.

(c) Neither the AAA nor any arbitrator shall be liable to any party for damages or injunctive relief for acts within the scope of these arbitrations.

### **R-49. Administrative Fees**

As a not-for-profit organization, the AAA shall prescribe an initial filing fee and a case service fee to

compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. Unless otherwise specified in these rules, the fees shall be shared equally by both parties.

## **R-50. Expenses**

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise.

## **R-51. Neutral Arbitrator's Compensation**

(a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.

(b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. Unless otherwise specified in these rules, the fees shall be shared equally by both parties.

## **R-53. Interpretation and Application of Rules**

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. The arbitrator or a party may in his/her discretion refer a question relating to the arbitrator's powers and duties to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

**[R-54 not applicable]**

## **ADMINISTRATIVE FEES**

Arbitrations for the AAA Medicare Demonstration are deemed to be nonmonetary claims. The AAA will be paid an initial filing fee for each case (i.e., each demand filed in accordance with R-4.), and a case service fee for each cases that proceeds to a hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the case service fee will remain due and will not be refunded. Arbitrator compensation is not included in these fees. AAA will simultaneously submit invoices to CMS and the applicable State for the arbitrators' fees and expenses, as well as for AAA's fees.

The initial filing fee is \$3,250 and the case service fee is \$1,250.

## **Refund Schedule**

The AAA offers a refund schedule on filing fees. For all cases, a minimum fee of \$500 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

- 50% of the filing fee, in any case with filing fees in excess of \$500, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing. .
- 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: the date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

## Hearing Room Rental

The fees described above do not cover the rental of hearing rooms, which are available on a rental basis. The rental rates per day for AAA hearing rooms are \$150 in Boston, \$100 in East Hartford, and \$250 in New York City, Hearing room rental rates at any other city shall be paid at the standard AAA rental rate.

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