

## CMS wins temporary reprieve in battle to solve appeal backlog



Courtney G. Tito | Tuesday, August 15, 2017

Back in March, we provided an update regarding the D.C. District Court decision to order the Department of Health and Human Services to [alleviate the Administrative Law Judge \(ALJ\) appeals backlog by the end of 2020](#). HHS failed in its request for reconsideration of the decision, and subsequently appealed to the D.C. Circuit Court of Appeals. On Aug. 11, 2017, the Court of Appeals found that because the District Court failed to make a finding that clearing the backlog was a “possibility,” it was vacating the mandamus order and remanded the case back to the District Court to evaluate the merits of HHS’s claim that lawful compliance with the mandamus order was impossible.

In its opinion, the Court of Appeals recognized that the backlog continued to grow. As of June 2, 2017, the backlog was 607,402 appeals – and it is projected to grow to 950,520 by the end of fiscal year 2021. This could result in some claims taking at least a decade to resolve – clearly beyond the 90 days mandated by the statutes.

Despite acknowledging that HHS refused to engage in any efforts to create a timeline to remove the backlog, the court concluded that since HHS “represented that lawful compliance with the mandamus order was impossible, it was an error of law, and therefore an abuse of discretion, to nonetheless order the Secretary to render that performance without first finding that lawful compliance was indeed possible.” The court found that HHS has a “heavy burden to demonstrate the existence of an impossibility” and stated that if the District Court found that HHS failed to meet that burden, it could reissue the mandamus order without modification.

Circuit Judge Karen Henderson dissented, arguing that the district court did not have to make a finding of impossibility. HHS did not make a “strong threshold showing of impossibility” and therefore no finding of possibility was required. Henderson also argued that even if a possibility finding was required, the District Court made that finding in rejecting HHS’s claim of impossibility.

We will continue to monitor the progress of this case and provide updates.

If you have any questions on this decision or need assistance with a Medicare records request or overpayment demand, please contact the attorney below.



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[Team member bio](#)

