Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In re CMS LCD Complaint:

LCD L29288

Contractor: First Coast Service Options, Inc.

Docket No. C-12-777

Decision No. CR2664

Date: November 9, 2012

DECISION DISMISSING LCD COMPLAINT

An aggrieved Medicare beneficiary (Aggrieved Party) challenges the Local Coverage Determination (LCD) titled "The list of Medicare Noncovered Services, Contractor Determination Number NCSVCS, LCD ID L29288, 0275T Minimally Invasive Lumbar Decompression (MILD)" issued by the Medicare contractor, First Coast Service Options, Inc. This LCD precludes Medicare reimbursement for the MILD medical procedure. For the reasons discussed below, I dismiss the Aggrieved Party's complaint as unacceptable.

Discussion

> ***I find the Aggrieved Party's complaint is unacceptable and must be dismissed because it does not include a written statement from her "treating physician" declaring that she needs the service that is the subject of the LCD.***

On May 24, 2012, the Aggrieved Party requested through counsel that the LCD at issue be reviewed for Medicare reimbursement eligibility pursuant to 42 C.F.R. Part 426.

The Centers for Medicare & Medicaid Services (CMS) administers the Medicare program (Social Security Act (Act) §§ 1102, 1871, 1874) and contracts with carriers and intermediaries (Medicare contractors) to act on its behalf in determining and making payments to providers and suppliers of Medicare items and services. Act §§ 1816, 1842.

To this end, Medicare contractors issue written determinations, called LCDs, addressing whether, on a contractor-wide basis, a particular item or service is covered. Act § 1869(f)(2)(B); *see also* 42 C.F.R. § 400.202.

A Medicare beneficiary who has been denied coverage for an item or service based on an LCD may challenge that LCD before an administrative law judge (ALJ). The Medicare beneficiary initiates the review by filing a written complaint that meets the criteria specified in the governing regulations. 42 C.F.R. §§ 426.400; 426.410(b)(2). I have no authority to review the merits of an "unacceptable complaint." *See* 42 C.F.R. §§ 426.405(d)(7); 426.410(c)(2).

To be acceptable, the complaint must include a written statement from the Aggrieved Party's treating physician declaring that the beneficiary needs the service that is the subject of the LCD. 42 C.F.R. § 426.400(c)(3). In her initial filing, the Aggrieved Party submitted a statement from Dr. Louis J. Raso as her treating physician's statement. In Dr. Raso's initial statement, it was clear that he reviewed the Aggrieved Party's medical record and performed the MILD procedure on her. After reviewing the complaint I issued an Acknowledgement of Receipt of Acceptable Complaint based on my evaluation required pursuant to 42 C.F.R. § 426.410(b), (c), and (d).

Upon further review, after considering that Dr. Raso did not claim to be the Aggrieved Party's primary clinician responsible for her overall care, I questioned whether Dr. Raso fully met the legal requirements of a treating physician. Therefore, on September 7, 2012, I issued a Notice of Unacceptable Complaint and Opportunity to Amend Complaint and explained it was unclear whether the complaint complied with the treating physician requirement. I specifically explained that the beneficiary's treating physician is defined as "the physician who is the beneficiary's primary clinician with responsibility for over-seeing the beneficiary's care and either approving or providing the service at issue in the challenge." *See* 42 C.F.R. § 426.110.

I also referenced the final rule's analysis and response to public comments concerning a revision of this section, where the Secretary of the U.S. Department of Health and Human Services explained that, "we continue to believe that the beneficiary's treating physician—not any treating physician—is best suited to determine 'in need' status both because he or she is the **primary caregiver** and also is responsible for the beneficiary's **overall care**." 68 Fed. Reg. 63,692, 63,696 (Nov. 7, 2003)(emphasis added).

By submission dated September 26, 2012, the Aggrieved Party filed an amended statement from Dr. Raso. Dr. Raso stated that, "[the Aggrieved Party] has had lumbar stenosis with neurogenic claudication for at least five years . . . [s]ince June 2008, I have been the physician with primary responsibility for treating [the Aggrieved Party's] lumbar spinal stenosis with neurogenic claudication . . . [and after a variety of ineffective

treatments] I performed the MILD procedure on the [Aggrieved Party] on May 12, 2012."

Based on his statements, and assuming the facts he alleges are all true, I still find Dr. Raso's role as a physician clearly limited to treatment of the Aggrieved Party's lumbar spinal stenosis condition. His statements do not establish him as the Aggrieved Party's primary clinician responsible for her overall care, and therefore he does not meet the legal definition of a "treating physician." Accordingly, I must issue a decision dismissing this complaint as unacceptable pursuant to 42 C.F.R. § 426.410(c)(2).

/s/
Joseph Grow
Administrative Law Judge