

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

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In re CMS LCD Complaint:)
) Date: February 02, 2007
Local Medical Review Policy (LMRP))
Title ICD-9 477.8 Allergen Immuno-) Docket No. C-05-406
therapy H-11B-R3.) Decision No. CR1562
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DECISION DISMISSING CASE

In an Order issued December 18, 2006, I informed Ms. Waters, the Medicare beneficiary who filed the complaint challenging the Local Coverage Determination (LCD) at issue in this case, that it appeared that the Carrier had demonstrated that I did not have jurisdiction over this case. I reached that tentative conclusion because the Carrier argued persuasively that Ms. Waters' claims for allergen immunotherapy had been denied based on individual medical review and not based on the LCD at issue in this case. According to the Carrier, individual medical review of those claims led to the conclusion that payment should be denied because the use of allergen immunotherapy to treat allergies to smuts and terpenes was regarded by the Carrier as investigational.

The Carrier's contention that Ms. Waters' claims had not been denied based on the LCD was significant because, if Ms. Waters' claims were not denied based on the LCD, then she could not be an "aggrieved party" with standing to challenge the LCD. Under the applicable regulations, only an aggrieved party may initiate an LCD challenge. 42 C.F.R. § 426.320. The regulatory definition of an aggrieved party includes three criteria. He or she (1) must be a Medicare beneficiary, who (2) is in need of a service that is denied based on the applicable LCD, and (3) must have documentation of need from the treating physician. 42 C.F.R. § 426.110 (emphasis added).

In an earlier Order, issued February 3, 2006, I had found that Ms. Waters satisfied the criteria and, thus, could be considered an aggrieved party. In the February 3 Order, I also found that Ms. Waters' complaint was acceptable to challenge the LCD at issue. The

further developments outlined above led me to conclude that my earlier findings had been premature, and required reconsideration.

Accordingly, my December 18 Order gave Ms. Waters until January 4, 2007 to file any additional arguments or evidence she might have to show that she is an “aggrieved party” as defined by the regulations. The time for filing such information has passed, and Ms. Waters has not filed anything further. Therefore, based on the present record, I conclude that Ms. Waters is not an “aggrieved party” and, accordingly, I must dismiss this case.

As outlined above, Ms. Waters is not an “aggrieved party” because her claims for allergen immunotherapy were not denied based on the applicable LCD. Since Ms. Waters is not an “aggrieved party,” her complaint is unacceptable. 42 C.F.R. § 426.410(b)(1). I have afforded her the opportunity to demonstrate that she is an “aggrieved party,” which satisfies the regulatory requirement at 42 C.F.R. § 426.410(c)(1) that I permit her the opportunity to amend her complaint. Because she has failed to demonstrate that she is an “aggrieved party,” Ms. Waters has failed to submit an acceptable complaint within the timeframe I have established. Therefore, pursuant to 42 C.F.R. § 426.410(c)(2), I must issue a decision dismissing the complaint.

Pursuant to 42 C.F.R. § 426.450(a), my decision must include findings. Therefore, as required by 42 C.F.R. § 426.450(a)(3), I find that Ms. Waters has failed demonstrate that she is an “aggrieved party,” as defined by the regulations and, for that reason, she has failed to file an acceptable complaint challenging an LCD. Accordingly, for the reasons set forth above, I decide that this case must be dismissed.

This decision contains the information required by 42 C.F.R. § 426.450(b)(1), (2), and (6). Because I am dismissing this case for failure to file an acceptable complaint, the information required by 42 C.F.R. § 426.450(b)(3), (4), and (5) is not applicable and is not included for that reason.

The aggrieved party has 30 days from the date of this Decision to file an appeal with the Departmental Appeals Board, in accordance with 42 C.F.R. § 426.465.

/s/

Alfonso J. Montano
Administrative Law Judge