Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In re CMS LCD Complaint:

Noncovered Services (LCD L29288)

Contractor: First Coast Service Options, Inc.

Docket No. C-12-1011

Decision No. CR2662

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 June 18, 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 subject of the LCD. 42 C.F.R. § 426.400(c)(3). In her initial filing, the Aggrieved Party submitted a statement from Dr. Stanley Golovac as her treating physician's statement. In Dr. Golovac's initial statement, he did not claim to have examined the Aggrieved Party, but instead he stated he simply reviewed her medical records. Considering Dr. Golovac did not claim to be the Aggrieved Party's primary clinician responsible for her overall care, I questioned whether Dr. Golovac fully met the legal requirements of a treating physician, and I afforded the Aggrieved Party an opportunity to amend her complaint.

Therefore, on August 23 2012, I issued an Acknowledgment of Receipt of Unacceptable Complaint based on my evaluation as required by 42 C.F.R. § 426.410(b), (c) and (d). I notified the Aggrieved Party that it was unclear whether the complaint complied with 42 C.F.R. § 426.400(c)(3), which requires the written statement from a treating physician, and 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 August 31, 2012, the Aggrieved Party submitted an amended statement from Dr. Golovac. Dr. Golovac stated, "I have been treating [the Aggrieved Party] since 2009 for lumbar stenosis . . . [the Aggrieved Party] has had lumbar stenosis with neurogenic claudication for at least four years . . . [the Aggrieved Party] did not respond to [various conservative] medical interventions in a degree that would enable her to perform activities of daily living and have a normal lifestyle. She was not able to ride

a horse or walk the distance between her bedroom and bathroom." Further, Dr. Golovac stated he believed that the Aggrieved Party would benefit from the MILD procedure.

Based on his statements, and assuming the facts he alleges are all true, I still find Dr. Golovac's role as a physician clearly limited to treatment of the Aggrieved Party's lumbar 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