

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

ORDER AND DECISION OF MEDICARE APPEALS COUNCIL
Docket Number: M-12-216

In the case of

Commonwealth of
Massachusetts, Executive
Office of Health and Human
Services (MassHealth)

(Appellant)

(Beneficiary)

NHIC, Corp.

(Contractor)

Claim for

Hospital Insurance Benefits
(Part A)

(HIC Number)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a decision dated August 9, 2011, which concerned Medicare Part A coverage of home health services furnished to the beneficiary from September 18, 2007 to November 16, 2007. The ALJ denied coverage, finding the services were not reasonable and necessary under sections 1862(a)(1)(A) and 1833(e) of the Social Security Act (Act) and found the appellant (MassHealth), a state Medicaid agency with appeal rights under 42 C.F.R. section 405.908, and not the home health agency (HHA or provider), liable for the non-covered charges in accordance with section 1879 of the Act.

The appellant has asked the Medicare Appeals Council (Council) to review the ALJ's action. The appellant's timely-filed request for review and supporting brief are admitted into the record as Exhibit (Exh.) MAC-1.¹

The Council reviews the ALJ's decision *de novo*. 42 C.F.R. § 405.1108(a). The Council will limit its review of the ALJ's action to the exceptions raised by the party in the request for

¹ The appellant represents that the provider was sent a copy of the request for review. The Council has not received anything from the provider.

review, unless the appellant is an unrepresented beneficiary. 42 C.F.R. § 405.1112(c).

For the reasons and bases set forth below, the Council dismisses the appellant's request for hearing for the dates of service September 18, 2007 to September 30, 2007. The Council modifies the ALJ's decision on the remaining dates, October 1, 2007 to November 16, 2007, to supplement the ALJ's rationale (see Dec. at 2), for denying the appellant's request for a video teleconference (VTC) hearing and holding instead a telephone hearing.

BACKGROUND

The beneficiary was admitted to home health services in mid-2007, with a diagnosis of schizoaffective disorder and secondary diagnoses of delusions, hypertension, obstructive sleep apnea, and angina syndrome. The HHA provided the beneficiary home health skilled nursing visits from September 18, 2007 to November 16, 2007. See generally Exhs. 1 and 2.²

NHIC and the Qualified Independent Contractor (QIC) both noted that the home health services provided before October 1, 2007 were considered to be part of the Home Health Third Party Liability (TPL) Demonstration Project and are therefore not included in the contractors' reviews. Exh. 5 at 075-076; Exh. 7 at 055. As to the remaining dates of services not encompassed within the TPL Demonstration project, October 1 to November 16, 2007, both contractors denied coverage for these services. Both agreed that the beneficiary was not shown to have been homebound on those dates, and denied coverage and payment for the services. Exhs. 5 at 076; 6 at 070; 7 at 056-058.³

² The ALJ admitted ten (10) exhibits, which are organized by numbered tabs, but the documents that comprise the exhibits are not paginated. We cite the exhibits by exhibit number, or the exhibit number and the stamped record page number(s) found on the lower left corner of the page(s). *E.g.*, Exh. 1 at 099.

³ To qualify for Medicare coverage of home health services, a beneficiary must be confined to the home, under the care of a physician, in need of skilled services, under a plan of care, and the services must be provided by a participating home health agency. 42 C.F.R. § 409.42. To be considered "confined to the home" or homebound, a beneficiary should have a normal inability to leave home, and consequently, a condition that requires considerable and taxing effort when leaving home. Medicare Benefit Policy Manual (MBPM), Pub. 100-02, Ch. 7, § 30.1.1.

MassHealth, the appellant at the redetermination, reconsideration, and ALJ levels of review, specifically asked the ALJ to hold a VTC hearing in its response to the ALJ's notice of telephone hearing. The ALJ denied the request for a VTC hearing on the grounds that MassHealth is not an "individual under 42 CFR 405.1020(b)" and issued a decision following a telephone hearing held on August 3, 2011. See Exhs. 8 and 9 and Dec. at 2; Act §§ 1869(b)(1)(A), (d)(1)(A). The ALJ also found the beneficiary was not homebound and stated that Medicare coverage requirements, under sections 1862(a)(1)(A) and 1833(e) of the Act, were not met, for all dates from September 18 to November 16, 2007. The ALJ concluded that "MASSHEALTH" remained liable for the denied charges. Dec. at 6, *citing* Act § 1879.

DISCUSSION

Dates of Service - September 18 to September 30, 2007

As the contractors' decisions made clear, the dates of service before October 1, 2007 were subject to the TPL Demonstration Project. The contractors therefore did not reach the merits of the underlying claim as to the dates of service September 18 to September 30, 2007. See page 2 *supra*.

Under the TPL Demonstration Project, CMS and the Commonwealth of Massachusetts agreed to utilize a sampling approach to determine Medicare's share of the cost of home health care claims for dual eligible beneficiaries that were originally submitted to and paid for by the State Medicaid agency for Fiscal Years 2001 through 2007. See CMS Active Project Report 2007, *Demonstration of Home Health Agencies Settlement for Dual Eligibles for the State of Massachusetts*, Project Number 95-W-00085/01; Program Memorandum Transmittal A-03-046, *Demonstration-Settlement of Payments for Home Health Services to Beneficiaries Eligible for both Medicare and Medicaid in Connecticut, and Massachusetts* (May 30, 2003).⁴ This sampling was used in lieu of individually gathering Medicare claims from home health agencies for every dual eligible Medicaid claim that the state has possibly paid in error. This process eliminated the need for the home health agencies to assemble, copy, and submit large numbers of medical records and the need for the regional home health intermediary (RHII) to review every case. The sampling was applied in

⁴ See <http://www.cms.gov/ActiveProjectReports> and <http://www.cms.gov/transmittals/downloads/A03046.pdf>. Both pages last accessed on February 4, 2014.

settlement of claims paid by Medicaid which the state believed may have potential to also be covered by Medicare.

Any appeal of a claim denial under the TPL Demonstration Project is committed to arbitration outside of the Medicare administrative appeals process in accordance with the regulations in 42 C.F.R. part 405, subpart I. By participating in this project, the appellant waived any rights to claim review granted under the aforementioned regulations, for services provided prior to October 1, 2007. Consistent with this approach, NHIC and the QIC did not include the dates before October 1, 2007 in their analyses. The ALJ also did not have jurisdiction to review those dates of service and, therefore, he should have dismissed the appellant's request for hearing as to those dates.

Moreover, the TPL Demonstration Project aside, in the absence of a redetermination and reconsideration on the dates before October 1, 2007, the appellant was not entitled to ALJ review of the merits as to any date before October 1, 2007. See 42 C.F.R. §§ 405.904(a)(2), 405.940, 405.960, 405.1000(a), 405.1002(a). Nor does an ALJ have the authority to add any claim, including one that is related to an issue before the ALJ, to a pending appeal unless it has been adjudicated below and all parties are notified of the new issue(s) before the start of the hearing. 42 C.F.R. § 405.1032(c).

Accordingly, the ALJ erred in reaching a coverage determination on the home health services furnished to the beneficiary prior to October 1, 2007. We dismiss the request for hearing for the dates from September 18 to September 30, 2007 in accordance with 42 C.F.R. §§ 405.1002, 405.1052(a)(3), and 405.1108(c).⁵

Dates of Service - October 1 to November 16, 2007

Before the Council, the appellant raises no contention concerning the ALJ's decision or even any earlier contractor decision concerning the beneficiary's homebound status, or more generally the determination that Medicare home health coverage requirements were not met. Nor does it specifically dispute the ALJ's determination that "MASSHEALTH" would bear liability for the denied charges, which represents a departure from the liability determination reached through the reconsideration

⁵ The appellant's earlier appeal filings through the ALJ level consistently identified all dates, including those subject to the TPL Demonstration Project. But the request for review does not identify any dates of service.

review. NHIC and the QIC found the HHA liable for the denied charges for the dates October 1 to November 16, 2007. See Exhs. 5 at 076; 7 at 059-060.

The appellant disputes only the ALJ's decision to deny the request for a VTC hearing and instead hold (on August 3, 2011) a telephone hearing. It does not re-assert previously raised contentions concerning an inaccuracy in the notice of hearing and the ALJ's failure to issue an exhibit list. See Exh. 8 at 034 and Exh. MAC-1.⁶

The regulation the appellant previously invoked to assert that it was entitled to a VTC hearing, and again invokes in its appeal of the ALJ's denial of a VTC hearing, is 42 C.F.R. section 405.1020(b). The appellant asserts that this regulation "requires and in fact 'directs'" a VTC hearing when VTC technology is available. If it [VTC hearing] is available the rule then allows an [ALJ] to offer a telephonic hearing. It is very simple and straightforward." Exh. MAC-1 at 4.

Section 405.1020(b) states (underline added):

Determining how appearances are made. The ALJ will direct that the appearance of an individual will be conducted by videoteleconferencing (VTC) if the ALJ finds that VTC technology is available to conduct the appearance. The ALJ may also offer to conduct a hearing by telephone if the request for hearing or administrative record suggests that a telephone hearing may be more convenient for one or more of the parties. The ALJ, with the concurrence of the Managing Field Office ALJ, may determine that an in-person hearing should be conducted if -

⁶ The appellant stated that the notice of hearing inaccurately identified the state Medicaid agency as the provider. Exh. 8 at 034.

The record does include an exhibit list. Record at 011. The ALJ held a consolidated telephone hearing for this case and others the appellant had pending before the ALJ. During the hearing, the attorney for MassHealth acknowledged that MassHealth had received from the hearing office staff "numbered copies of the medical records" for the cases before the ALJ. Hearing CD 07:30-8:00. Based on this discussion, the Council assumes that, as of the hearing date, the appellant no longer had a dispute or concern about the issuance of an exhibit list specifically. Nor does it state that because it did not have an exhibit list it was not in a position to determine what the appeal file included or did not include, for the purposes of preparing for the hearing. See Exh. 8 at 034 (addendum to objection to notice of hearing).

- (1) VTC technology is not available; or
- (2) Special or extraordinary circumstances exist.

The appellant's position is grounded on a plain reading of section 405.1020(b), which we acknowledge states, in part, that the ALJ "will" direct a VTC hearing if VTC technology is available. But, as the appellant also appears to acknowledge, the ALJ stated that he was denying the request for a VTC hearing because MassHealth is not an "individual" and section 405.1020(b) contemplates an individual's appearance at a VTC hearing.⁷ On this point, the appellant appears to be asserting that MassHealth, as the state Medicaid agency with "subrogation rights and assignment of rights as said subrogee," should be considered an "individual" for the purposes of determining entitlement to a VTC hearing before an ALJ at the Office of Medicare Hearings and Appeals. Exh. MAC-1 at 3. In fact, it states its position more directly in the next page: "The State Medicaid Agency steps into the shoes of the assignor as the subrogee/assignee and becomes the individual with any rights or claims that individual may have." *Id.* at 4.

At the beginning of the hearing, the ALJ restated on the record the reasons why he previously denied a VTC hearing. Hearing CD, through 05:30. The ALJ asked the MassHealth attorney to explain how "seeing [the ALJ] on a TV camera would affect [the ALJ's] decision or the [appellant's] ability to argue this case." *Id.* at 05:30-06:30. The MassHealth attorney restated the position the appellant took in its written objection to a telephone hearing, and added that a telephone hearing does not fully comport with the appellant's due process rights, is "perfunctory," and suggests that the case is "not at an important stage."⁸ The ALJ indicated that the question before him was "whether the documentation supports home health services under Medicare law." He indicated that the hearing was not a Social Security Administration (SSA) hearing involving an

⁷ There is no indication that the ALJ or the hearing office determined that VTC technology was not available for this case.

⁸ This language ("perfunctory" and "not at an important stage") appears to have been taken from language in a U.S. District Court's opinion in a SSA disability case MassHealth relies upon as support, in part, for its position that VTC hearings are preferred over telephone hearings in SSA cases. See Exh. MAC-1 at 4-5 (quoting *Ronald J. Palaschak v. Commission of Social Security*, 08-CV-1172 (GLS) United States District Court for the Northern District of New York 2009 U.S. Dist. Lexis 126279 November 13, 2009, Decided, November 13, 2009, Filed).

"individual appellant or claimant" and that the credibility of a witness was not at issue before him. *Id.* at 06:30-07:30.

The question raised by MassHealth's argument is who is considered an "individual" for the purposes of determining entitlement to a VTC hearing under section 405.1020(b).⁹ The most commonly understood and plain meaning of the noun "individual" is a particular person, or a single person (apart from a group or class), as opposed to a legal person (like a corporation). The ALJ appears to have considered just such a meaning in denying the VTC hearing, as he wrote -

The intent [of section 405.1020(b) language on VTC hearings] was to permit individual appellants to be able to directly interact with decision-makers. MassHealth is not an 'individual' but a governmental entity ... Further, the federal case reference and the argument that MassHealth should be treated like a Social Security disability claimant is misplaced. In disability hearings the credibility of the claimant is a critical factor and visual observation of the person is important to the [ALJ]. Credibility is not an issue in these proceedings but whether the record establishes Medicare eligibility.

Exh. 9 at 023.¹⁰

The ALJ's rationale finds support in the Final Rule, 42 C.F.R. Part 405, as published in the Federal Register on December 9, 2009. 74 Fed. Reg. 65,296 (Dec. 9, 2009). In addressing the comments to the Interim Final Rule (70 Fed. Reg. 11,420 (March 8, 2005)) concerning the various types of Medicare appeal hearings available at the ALJ level, CMS stated, in part -

⁹ The 42 C.F.R. Part 405, Subpart I regulations do not explicitly define the word "individual" as it is used in 42 C.F.R. § 405.1020(b) and in various other Subpart I regulations. However, to the extent the word "individual" is used, the use appears to have been intended to refer specifically to a person. *See, e.g.*, 42 C.F.R. §§ 405.900(b)(1), (b)(2) and 405.904 (discussing determination of entitlement to benefits and amount of benefits available to an "individual"); 405.906(a) (stating that "The parties to an initial determination are the following individuals and entities:" thus distinguishing individual persons from legal persons or entities); 405.906(a) (similarly, referring to "individual or entity," thus distinguishing the two within the context of the regulation on the appointment of representation).

¹⁰ The "federal case" the ALJ stated the appellant cited was *Palaschak v. Commission of Social Security*. *See* Exh. 9 at 026.

Section 1869(b)(1)(A) of the Social Security Act as amended by BIPA provides that any individual dissatisfied with any initial determination shall be entitled to a reconsideration and to a hearing to the same extent as is provided in section 205(b) of the Act. Section 1869(b)(1)(A) does not specify the manner in which hearings must be held. Congress, however, instructed DHHS to explore the possibility of providing hearings using formats other than in-person hearings. Specifically, the MMA [Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108-173, enacted on December 8, 2003] instructed the DHHS to consider the feasibility of conducting Medicare hearings "using tele- or video-conference technologies." See section 931(a)(2)(G) of the MMA.

At approximately the same time that MMA was enacted, the SSA finalized regulations that provided for VTC hearings in Medicare and disability appeals. Taking into account SSA's regulations, the Secretary [of Health and Human Services] concluded that the expanded use of VTC and telephone hearings for Medicare appeals is appropriate for various reasons. First, contrary to the commenters' assertions, and unlike Social Security disability hearings, where in-person hearings may be needed in order to evaluate an individual's physical ability and/or credibility, Medicare hearings are generally less dependent on the physical presence or the appellant or other witnesses and are, therefore, better suited to VTC hearings.

74 Fed. Reg. at 65,321 (underline added).

The above language addresses the VTC hearing or telephone hearing as an alternative to an in-person hearing. In this case, a telephone hearing was held and, unlike a VTC hearing or in-person hearing, a telephone hearing does not provide any means for visual interaction or communication between the ALJ and those appearing at the hearing. One basic point to be drawn from the underlined language above may be that, where the adjudicator's ability to evaluate a person's physical ability and/or credibility is important to a given case, between a VTC hearing and an in-person hearing, the latter may be the better or preferred option.

The Federal Register language underlined above is instructive here because CMS made the very same point made by the ALJ, which is that Medicare hearings, unlike SSA disability hearings, generally are not dependent on the ALJ's ability to see the person(s) who appear before the ALJ. The ALJ in this case evidently determined, as he is authorized to do, that this case did not present issues or questions that call for direct observation of any specific individual, whether to assess his or her physical ability and/or credibility or for some other reason, let alone the presence of any witness. *Reference hearing CD 06:00-07:30; see, also, generally 42 C.F.R. §§ 405.1000(f), 405.1010, 405.1012, 405.1030(b), 405.1036.*

MassHealth did not seek to have the beneficiary or any other person appear before the ALJ. Only the MassHealth attorney was at the hearing to present the case and make the argument. There is no indication that the MassHealth attorney sought to or intended to have anyone testify before the ALJ on video because the attorney believed that the testimony was relevant *and* that the ALJ's ability to observe the witness himself would be important in this case.¹¹

The Council has difficulty finding merit in MassHealth's argument that the ALJ's denial of a VTC hearing in this case amounted to an infringement of a due process right when MassHealth raises no substantive contention concerning the ALJ's assessment of the evidence relevant to, or conclusion of law on, coverage or liability. MassHealth says nothing substantive about the underlying claim itself; it merely asks the Council to send this case back to the ALJ to review this case *de novo* following a VTC hearing. Exh. MAC-1 at 6. It does not state that it wishes to call any witness, the beneficiary or another person (on video) or that it wants to offer any additional evidence in the form of hearing testimony, and then explain why the ALJ should or must revisit already decided issues on the merits of the case. Even if we were to assume that the regulation expressly states that a state Medicaid agency, or for that matter any appellant, individual or entity, the right to a VTC hearing upon request, at the most basic level, this appellant's position is significantly undercut by the failure to articulate specifically how the appellant was disadvantaged or its case harmed as a result of the ALJ's decision to hold a

¹¹ Nor is there any indication that the beneficiary, who was sent notice of the reconsideration (Exh. 7 at 060), expressed any interest in participating in the ALJ proceedings.

telephone hearing instead.¹²

The Council understands MassHealth's filings to mean that MassHealth asserts that an ALJ must provide MassHealth a VTC hearing because MassHealth is an "individual" as that word is used in section 405.1020(b) *by virtue of its status as a state Medicaid agency*. The Council also reads the ALJ's ruling to mean that, ultimately, the ALJ did not reach that narrow question; the ALJ apparently did not see a need to do so. Nor does the Council. From our perspective, ultimately, the appellant does not make its case for a due process infringement.

Based on the foregoing, the Council finds no cause for remanding this case to an ALJ for readjudication following a VTC hearing.

ORDER AND DECISION

The appellant's request for hearing, as to the dates of service from September 18, 2007 to September 30, 2007, is dismissed.

The ALJ's decision on the dates of service October 1, 2007 to November 16, 2007 is modified in accordance with the foregoing discussion.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

/s/ Constance B. Tobias, Chair
Departmental Appeals Board

Date: February 27, 2014

¹² To be clear, the Council is not stating herein that under section 405.1020(b) ("The ALJ will direct that the appearance of an individual will be conducted by videoteleconferencing (VTC) if the ALJ finds that VTC technology is available to conduct the appearance.") VTC hearings may be afforded for individuals and only individuals. That is not what the regulation states, and that is not the question presented.