

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In re LCD Complaints

Category III CPT Codes (L25275)

Contractor: National Government Services, Inc.

Docket No. C-13-564

Decision No. CR3202

Date: April 16, 2014

DECISION DISMISSING LCD CASE

I dismiss the complaints of two aggrieved parties because the contractor, National Government Services, Inc., (NGS) retired the local coverage determination (LCD) at issue.

On February 26, 2013, an aggrieved party requested through counsel that the LCD entitled “Category III CPT Codes (L25275),” specifically as it relates to 0275T minimally invasive lumbar decompression (MILD), be reviewed pursuant to 42 C.F.R. Part 426. The case was docketed as C-13-427. On March 22, 2013, the complaint docketed as C-13-564, previously docketed as C-12-1019, was remanded to me by the Departmental Appeals Board (Board) and docketed as C-13-564. On April 26, 2013, I consolidated the cases under C-13-564, because both cases involve a common question of law and fact, the same provisions of the same LCD, the same representative for both aggrieved parties, the same contractor, and the same LCD record. Order Acknowledging Acceptable Complaint; Order Consolidating Cases; Order to File LCD Record; and Briefing Schedule (April 26 Order).

Pursuant to deadlines in my April 26 Order, CMS filed the LCD record, the aggrieved parties filed their statement regarding the validity of the LCD record, and NGS responded to their statement.

On January 9, 2014, the Centers for Medicare & Medicaid Services (CMS) issued a national coverage determination (NCD) “Decision Memo for Percutaneous Image-guided Lumbar Decompression for Lumbar Spinal Stenosis (CAG-00433N)” (Decision Memo).¹ In the Decision Memo, CMS determined that percutaneous image-guided lumbar decompression (PILD)² for lumbar spinal stenosis is not reasonable and necessary under section 1862(a)(1)(A) of the Social Security Act. CMS determined, however, that Medicare will provide coverage for PILD for Medicare beneficiaries with lumbar spinal stenosis who are enrolled in an approved clinical study that meets certain criteria.

On January 28, 2014, I issued an “Order for Supplemental Briefing” (January 28 Order). I noted that an Administrative Law Judge (ALJ) is not authorized to disregard, set aside, or otherwise review an NCD. 42 C.F.R. § 405.1060(b). I also noted that according to the PILD Decision Memo, the NCD’s preliminary language is effective immediately and subject to formal revision and formatting changes prior to the release of the final NCD publication in the National Coverage Determination Manual. I then required the parties to brief how issuance of the January 9, 2014 Decision Memo might affect my review in this case. I required specifically that NGS address whether it planned to retire the LCD.

The regulation at 42 C.F.R. § 426.420 governs what happens when a contractor retires or revises an LCD under review. It states:

(a) A contractor may retire an LCD or LCD provision under review before the date the ALJ issues a decision regarding that LCD. Retiring an LCD or LCD provision under review has the same effect as a decision under § 426.460(b).

* * * *

(e) The ALJ must take the following actions upon receiving a notice that the contractor has retired or revised an LCD under review:

- (1) If, before the ALJ issues a decision, the ALJ receives notice that the contractor has retired the LCD or revised the LCD to completely remove the provision in question, the ALJ must dismiss the complaint and inform the aggrieved party(ies) who sought the review that he or she or they receive individual claim review without the retired/withdrawn provision(s).

The regulations also state that an ALJ must dismiss a case when a contractor notifies the ALJ that an LCD provision is no longer in effect. 42 C.F.R. § 426.444(b)(6). Under 42

¹ Available at <http://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=269>.

² The Decision Memo explains MILD is a registered trademark for a particular PILD procedure.

C.F.R. § 426.460, the effect of a revised or retired LCD is that a contractor must provide the aggrieved party or parties with individual claim adjudication without considering the provision or provisions of the retired or revised LCD.

NGS responded to my January 28 Order on February 18, 2014. NGS stated that it has published three medical policy articles in support of L25275, only one of which, A51849 addresses and specifically excludes the PILD procedure from Medicare coverage. NGS stated that the NCD supplants and supersedes A51849. NGS stated that in accordance with Chapter 13, § 13.4 of the Medicare Program Integrity Manual, it has **“retired A51849 – the portion of the LCD that specifically applies to the PILD procedure”** and asserted that **“L25275 will in no way be used by NGS to adjudicate any mild®/PILD claims”** (emphasis added). NGS then requested that I dismiss the aggrieved parties’ complaint as it relates to 0275T because it has retired the part of the LCD that specifically applies to the PILD procedure. NGS also asserted that issuance of the NCD divests me of subject matter jurisdiction to adjudicate this complaint under section 1869(f)(1)(A) of the Social Security Act (42 U.S.C. § 1395ff(f)(1)(A)) and 42 C.F.R. § 405.1060(b).

The aggrieved parties do not dispute that MILD is a PILD procedure. Instead, the aggrieved parties urge that I continue to hear their LCD complaint for other reasons. They assert that:

The Decision Memorandum has no legal impact and should be given no evidentiary weight because (1) the Decision Memorandum and its evidence and analysis were not the basis of the LCD and are not in the LCD record, (2) the Decision Memorandum was based on different evidence, a different analysis and resulted in conditional coverage, and (3) the Decision Memorandum is pre-decisional and no NCD exists as a result of the Decision Memorandum.

Aggrieved Parties’ Supplemental Briefing at 5. I have considered the parties’ arguments. I find, however, that based on NGS’s retirement of the LCD, I am not authorized to consider the merits of the LCD complaint or whether the NCD has divested me of the authority to hear the complaint. This is because NGS’s retirement of the LCD provision at issue requires that I dismiss the complaint.

CMS did not enter a separate appearance from that of counsel for NGS. *See* 42 C.F.R. § 426.415 (regulation allowing CMS to identify the person who represents the contractor or CMS). NGS represents, and I accept, that it retired the provision of the LCD at issue and that the LCD will not be used to adjudicate any MILD claims, including this one. Under 42 C.F.R. § 426.420(e)(1) I must dismiss a complaint when the contractor retires the LCD that is the subject of an aggrieved party’s complaint. Given NGS’s representation that it retired the LCD, I must dismiss the aggrieved parties’ complaints. Section 426.420(e)(1) also requires that if I dismiss a case based on the retirement of an

