



E-Alliance Extra

Missouri Alliance for Home Care

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From NAHC:

Federal Court Rules In Favor of Medicare While Restricting Scope of F2F Narrative: Federal Court Decision Could Limit Medicare Power to Deny Claims Based on F2F Narrative Content

November 3, 2015

U.S District Judge Christopher R. Cooper issued his decision today in the lawsuit brought by the National Association for Home Care & Hospice (NAHC) challenging the validity of the Medicare rule that a physician provide a narrative to document the face-to-face encounter with the patient. Judge Cooper ruled against NAHC and granted “Summary Judgment” to the U.S. Department of Health and Human Services. In his ruling, Judge Cooper found that the face-to-face law enacted by Congress was ambiguous and did not foreclose the interpretation of the word “document” that the Centers for Medicare and Medicaid Services (CMS) established in its regulations.

Under the standards for determining whether a federal agency regulation violates the congressionally-enacted law, the court first determines whether the plain language of the statute forecloses the specific regulatory interpretation. If the language of that law is at all ambiguous, the regulation is considered valid unless the interpretation is unreasonable, arbitrary, or capricious. NAHC argued that the statute limited the physician documentation to the date that the encounter occurred. The court concluded that the word “document” in the statute was ambiguous as it could include both the date of the encounter and a narrative of what the physician found during the encounter.

NAHC also argued that if the court found the statute to be ambiguous that Medicare’s interpretation was not reasonable as it led to such absurd results as claims denied based on the sufficiency of the narrative alone when the whole record of the patient supported Medicare coverage. The Court held that the narrative requirement was not unreasonable, arbitrary or capricious as it is a “reasonable way to verify that an appropriate encounter actually took place.”

While the Court rejected NAHC’s claim that a narrative requirement in the face-to-face physician encounter rule is invalid, the Court’s ruling provides a crucial conclusion that can help home health agencies succeed in winning reimbursement in appeals of claim denials based on an “insufficient narrative.” Essentially, the court held that while a narrative requirement for documentation is a valid exercise of Medicare’s rulemaking power, Medicare cannot go beyond that narrative requirement and “second-guess the medical judgment of the patient’s physician” regarding the narrative content. That means that if the physician narrative presents patient clinical findings and explains why those findings support the need for home health services, the documentation requirement is met. Here is the part of the Court’s ruling that provides this important distinction.

Finally, it is important to note that this Court’s analysis would look very different if the rule allowed a Medicare claim reviewer to second-guess the medical judgment of a patient’s physician. For instance, if

the rule authorized a reviewer to deny a claim—on the basis of insufficient documentation—simply because she disagreed with the physician’s clinical findings or the physician’s reasoning for why those clinical findings support a need for home-health services, that would go far beyond what the statute allows. HHS’s interpretive authority is limited to determining, within reason, how physicians should document that an appropriate face-to-face encounter actually took place—that is, that an encounter occurred that truly focused on determining whether a patient qualifies for home-health services. In making that determination, HHS chose to require physicians to describe their clinical findings and explain why those findings support the need for home-health services. In the Court’s view, the rule requires only that. To the extent HHS may have veered from that requirement in practice, home-care organizations that have been denied reimbursement on the basis of insufficient documentation are free to contest HHS’s implementation of its rule on a case-by-case basis. (emphasis added).

NAHC is evaluating the next best steps to take on the ongoing face-to-face requirements controversy. It is expected that bicameral, bipartisan legislation will be introduced shortly that address both the current documentation standard as well as the now-abandoned narrative requirement that led to thousands of claim denials. Further, the import of the Court’s ruling is still under analysis regarding how best to use the conclusion that while a narrative requirement may be valid, it would be invalid to administer in a manner that allows Medicare to find a narrative is insufficient. The next steps in the litigation can include: an appeal to the U.S. Court of Appeals; a Motion for Reconsideration/Clarification; or settlement discussions.

Another alternative is for NAHC to undertake a consolidation of the individual appeals now pending administrative review or hearing before an ALJ. In doing so, NAHC can use the Court’s ruling to overturn decisions that are based on the narrative’s sufficiency. That would mean that unless the claim had no physician face-to-face narrative, it would be covered under Medicare. If a consolidated appeal is not possible, NAHC will develop a model legal memorandum to be used to support appeals with the narrative sufficiency in issue.

“Our fight to overturn these wrongful denials is not over,” expressed Val. J. Halamandaris, NAHC President. “We will take every course of action available to protect home health agencies from the wrongful denial of claims under the misguided physician narrative policy,” Halamandaris added.

“We would prefer that the Court held the narrative requirement categorically invalid. However, in finding that the Medicare law does not permit CMS to deny a claim based on the sufficiency of the physician narrative, we believe we can reach the intended goal of getting claim denials reversed,” stated Bill Dombi, NAHC’s legal counsel in the litigation.

[The ruling is here.](#)

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