

LEGAL CHALLENGES TO CONSIDER IN INDIVIDUAL PROGRAM INTEGRITY PROCEEDINGS

Now that Judge Gray's Decision has become the Final Agency Decision ("the Decision") in the AHHC case challenging DMA's actions on the verbal order and dual eligibility issues, there is language in his Decision that could be useful to individual home care agencies challenging recoupment proceedings and other Program Integrity actions. This paper outlines the key findings and conclusions in the Decision that could be useful in challenging certain actions by DMA. Providers also should be aware of the strict time period imposed upon DMA for conducting reconsideration hearings. If not followed by DMA, this may be grounds for having a decision by DMA set aside. You may want to consult with your counsel if you are involved in a Program Integrity proceeding involving any of these issues.

DMA's Attempt to Recoup Monies from the 31st Day of Services When a Verbal Order is not Countersigned in 30 Days

Some home care providers may be involved in recoupment proceedings in which DMA is attempting to recover money for services provided from the 31st day of services until the verbal order was countersigned, which had been DMA's practice before the attempted change to recouping from the first day of services. There is language in the Decision indicating this practice also is unlawful. Judge Gray specifically concluded:

"The absence of regulatory authority for recouping monies from the 1st day of services, as addressed in these conclusions of law, also applies to recoupments from the 31st day of services based upon countersignatures not being obtained within 30 days."

(Decision, p. 11, ¶ 8) The Decision is authority for challenging recoupments from the 31st day of service.

DMA's Reliance upon a Licensure Regulation to Justify Recoupment

Judge Gray also determined that DMA could not rely upon a licensure regulation as authority for recouping money if a verbal order is not countersigned in 30 days. Instead, DMA should have promulgated its own regulation notifying providers of the reimbursement consequences if a verbal order is not countersigned in 30 days. (Decision, p. 10, ¶ 4).

If DMA attempts to rely upon licensure regulations to justify a recoupment decision or other Program Integrity action, the Decision could be cited in challenging DMA's actions.

DMA's Reliance upon Provider Manuals

DMA contended that its provider manual was authority for being able to recoup monies from the first day of services when a verbal order is not countersigned. Judge Gray rejected this argument concluding that “provider manual provisions do not have the force and effect of a regulation, unless promulgated in accordance with APA rule-making.” (Decision, p. 10, ¶ 4, and p. 11, ¶ 7).

If DMA is relying upon statements in provider manuals which are not part of its regulations to justify a recoupment decision, Judge Gray's Decision could be cited in challenging DMA's actions.

DMA's Failure to Conduct Timely Reconsideration Reviews

There also are specific time periods in DMA's regulations that could be useful in defending against recoupment actions. Upon request, DMA is required to reconsider a decision to recoup monies from a home care provider. If DMA is proceeding under the “provider abuse” regulations, 10 N.C.A.C. 26G, these regulations require that DMA offer the provider an opportunity for a reconsideration of the “tentative decision”. If a timely request is made (within 15 working days from the date of receipt of the notice), the reconsideration review “shall be scheduled within 20 calendar days from receipt of the request.” 10 N.C.A.C. 26G.0402(c).

If DMA has failed to provide the reconsideration review hearing within 20 calendar days from receipt of the request as required, there is a strong argument that DMA has lost its jurisdiction to proceed and the “tentative decision” or decision upon reconsideration is a nullity.

In a recent case, DMA was willing to settle for substantially less than the amount being recouped because it had failed to provide a reconsideration review hearing within 20 calendar days. In another recent case involving the reconsideration procedures of 10 N.C.A.C. 26K (applicable to the appeal of reimbursement rates, payment denials, disallowances, payment adjustments, and cost settlements), the Administrative Law Judge determined that DMA lost jurisdiction to proceed with reconsideration hearings and the recoupment of money because DMA failed to provide timely reconsideration reviews.

Renée J. Montgomery, Esq.
Parker, Poe, Adams & Bernstein, LLP
150 Fayetteville Street Mall, Suite 1400
Post Office Box 389
Raleigh, NC 27602
Telephone: (919) 828-0564