PUBLICATION

Court Upholds HHA Face-to-Face Narrative Requirement [Ober|Kaler]

2015

The Medicare statute requires that home health agency (HHA) patients must be homebound and in need of skilled nursing or therapy services in order to receive Medicare HHA services. 42 U.S.C. § 1395f(a)(2)(C). Historically, this required that physicians certify that a patient required home health services.

As part of the 2010 Patient Protection and Affordable Care Act (ACA), Congress modified the statue to also require that physicians "document" that they have had a "face-to-face encounter" with the patient within a reasonable timeframe. CMS issued implementing regulations in 2011, requiring that physicians document the face-to-face encounter by, among other things, providing "an explanation of why the clinical findings of such encounter support that the patient is homebound and in need of either intermittent skilled nursing services or therapy services," which came to be known as the "narrative requirement." *See* 42 C.F.R. § 424.22. Although CMS eliminated this requirement for episodes of care beginning on or after January 1, 2015, it continued to enforce the requirement from 2011 until its elimination. *Id.*

The National Association for Home Care & Hospice, Inc. (NAHC) challenged the narrative requirement, arguing that it exceeded the scope of the ACA by requiring physicians to do more than simply attest to the fact that a face-to-face encounter occurred within the given timeframe. The United States District Court for the District of Columbia, however, disagreed and issued a decision in *NAHC v. Burwell* on November 3, 2015, upholding the HHA face-to-face narrative requirement.

The court applied the two-prong *Chevron* analysis, finding first that the terms of the statute were ambiguous and, second, that the interpretation provided by the Secretary of Health and Human Services (Secretary) in the 2011 regulation was reasonable and therefore was entitled to substantial deference by the court. The court's decision focused on the clarification that the Secretary's regulation gave to the term "document" in the ACA. Specifically, the court found that term to be ambiguous. The statute did not foreclose the agency's interpretation, and the regulation was consistent with the intent of the statute, which was to add a layer of accountability and program integrity to the certification process, in order to ensure that only those patients who qualified for the home health benefit received that benefit.

In applying the second prong of the *Chevron* analysis, the court asked whether the Secretary had provided a reasonable explanation for the narrative requirement when she promulgated it. Applying a review standard that was "highly deferential" to the Secretary, the court found the regulation was rationally related to the goals of the statute and, thus, must be upheld.

The Secretary's later elimination of this requirement in November of 2014, did not undermine the reasonableness of the 2011 regulation. However, the court rejected the Secretary's additional arguments that other sections of the Medicare statute supported the narrative requirement. Because the Secretary had not asserted these other authorities as support for the rule when it was promulgated, the court rejected them as mere "litigating positions" entitled to no deference.

Ober|Kaler's Comments

It is not surprising that the court ruled for the government, due to the great deference most courts grant to the Secretary's position on her own regulations. Fortunately, the provision at issue is no longer in effect. This decision, however, may not be the end of the story, as NAHC may appeal to the United States Court of Appeal for the District of Columbia.