AMERICAN ORTHOTIC & PROSTHETIC ASSOCIATION

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MEMORANDUM

TO: **AOPA Board of Directors and Membership**
FROM: **Thomas F. Kirk, President**
Thomas F. Fise, Executive Director
Date: **July 22, 2013**

SUBJECT: Update Report on RAC & Pre-Payment Audits, AOPA Litigation Challenging Their Legitimacy as Implemented in O&P, and Related Matters

Two months ago, we informed you that AOPA on May 13, through its attorneys with the firm Winston & Strawn, had filed suit in the Federal District Court against HHS Secretary Sebelius, CMS, and the Medicare program. Our suit challenges the absence of appropriate due process around Medicare's decision in August, 2011 to change the standard for demonstrating medical necessity in violation of the federal Administrative Procedure Act and the Medicare statute, as evidenced in the new physician documentation requirements and related audits of claims for services both before and after August, 2011. It is important for members to understand that AOPA has not challenged the right of the Medicare program to conduct RAC audits—such a suit would fail. Our suit, in essence, says Medicare violated several federal rules and statutes in ***the way*** they implemented these changes, violations which AOPA has asserted render the changed standard illegal, and therefore contends that amounts clawed back via audits by Medicare RAC and other auditors relying on that changed standard are also invalid. In essence, Medicare cannot rely on changed standards for claims processing and audits unless and until Medicare goes through the appropriate process, including a public, ***Federal Register*** notice and comment rulemaking to develop any changed standard through the right process.

So, what has happened with the AOPA lawsuit since AOPA filed its complaint? The federal government is represented in this lawsuit by the Department of Justice, and, as the Defendant, they have 60 days to respond to such a legal Complaint. The Department of Justice asked for, and was granted an additional week to craft its response, which it submitted late in the evening on Friday, July 19. As expected, the DOJ/Medicare response to our suit was to file with the court a Motion to dismiss our lawsuit. The DOJ/Medicare maintains that the Federal District Court does not have the jurisdiction to hear and decide this lawsuit, and also that AOPA has not 'exhausted all of its administrative remedies' within the Medicare system itself, and for other reasons has failed to meet the requirements imposed on anyone who wants to sue Medicare.

The Medicare statute makes it rather difficult for aggrieved parties to sue the Medicare program. Congress set up some strong restrictions limiting judicial review of Medicare program decisions. For example, it is difficult, if not impossible, to get your day in Court if you want to prove that Medicare pays too little in its reimbursement for a particular service because Congress excluded such claims from any right of judicial review. That being said, AOPA's attorneys studied all of the rules very carefully before filing our suit and they think we have a solid basis to bring this matter to trial in the Federal Courts. They will be filing our rationale in our own submission to the Federal District Court within the next two weeks, contesting the DOJ/Medicare Motion to Dismiss. This is a critical juncture in our litigation—our prospects for success will expand significantly if the Court does not grant the government's Motion to Dismiss.

Significant Related Developments/ Update Report on RAC & Pre-Payment Audits

All of us will doubtless agree that there has been little, if any, good news on RAC and related audits on O&P over the past 23 months. But something quite remarkable has happened in the past couple of weeks, something that we attribute to the filing of AOPA's lawsuit. One of the major claims AOPA has made in our suit is that the CMS audit contractors have inappropriately applied the new standard articulated in the August 2011 Dear Physician Letter retroactively to claims in 2009 or 2010, well before anyone had any reason to think the standard had changed. Over the past two weeks, we have heard from a fair number of AOPA O&P provider members that the CMS RAC contractors had notified them that audits of claims with dates of service before August, 2011—the very claims that were contested by one of the AOPA suit's most vociferous assertions—have been cancelled. Just this past week, AOPA has gotten word from two separate members in different states that audit contractors explained these cancellations by saying that they had received a notification from CMS instructing that any O&P prosthetic audits relating to claims with a service date before August, 2011 be cancelled. CMS has said nothing to explain this action, but they seem to have recognized that they did make an important change in the standard via the August, 2011 Dear Physician letter AND that it is unfair and inappropriate (if not illegal) to apply that new standard retroactively.

This is not the first time CMS has initiated major changes in policy of RACs as a result of a lawsuit being filed. Earlier this year, the American Hospital Association (AHA) sued CMS relating to what AHA deemed to be inappropriate and confiscatory actions by CMS audit contractors. Shortly after the lawsuit was filed, CMS announced a new interim rule whereby if audits determined that a Medicare patient should not have been admitted as an in-patient under Part A to receive a service/surgery/procedure, Medicare (instead of its old policy which had been, by RAC audit, to claw back **every dollar** of the claim paid on behalf of that Medicare beneficiary) would allow the hospital to re-file a claim under Part B for the amount Medicare would have paid for that patient on a claim submitted had the service/surgery/procedure been received on an outpatient basis. So far, this has not resulted in any change in the lawsuit itself. It is possible that the government decided it would be easier to defend its position in the lawsuit if it adopted prospectively a more reasonable position.

What the CMS Action Cancelling Some Selected Current Prosthetic O&P Audits as to Claims Where Date of Service was before August, 2011 <u>Does Not Mean</u>

It is very possible that the action we have reported, whereby CMS has instructed its audit contractors to cancel O&P prosthetic claims relating to dates of service before August 2011 is simply a similar case of the government deciding to in some sense "cut its losses" by changing its policy so it can report in Court that it no longer pursues the retroactive claims. Nothing reported either from CMS or the DOJ/Medicare legal team sheds any further light on this action.

We must caution AOPA members not to infer from this that there is any probability or certainty that CMS will adopt a consistent and rational policy, namely, there is **no indication or assurance whatsoever** that CMS/Medicare will return the dollar amounts its auditors have already collected retroactively as to prosthetic O&P claims where the date of service was before August, 2011. That would make sense to all of us, but as we know, Medicare very often does not act logically. We hope that this might be the eventual result of either Medicare attempting to treat O&P prosthetic providers more fairly, or as a result of the ongoing litigation, but at this point there is no way, and no information at our disposal to speculate about what the government might do. We are left with the encouraging fact that CMS appears to have instructed its audit contractors to cancel existing claims under review for prosthetic O&P services where the service date is prior to August, 2011, and presumably NOT to initiate new prosthetic O&P claims for that retroactive period. If true, that is indeed a positive step/outcome from the filing of the AOPA lawsuit.

Related Matters

A. CMS has announced plans for a second conference call meeting to discuss its Clinical O&P Template, slated for Wednesday afternoon, July 31, beginning at 1:00 pm, EDT – details can be accessed here.

B. AOPA has written CMS Administrator Tavenner (dated Jul y 22, 2013) raising concerns about aspects and processes relating to the template. This letter can be accessed here.

C. If you wish to read the DOJ/Medicate Motion to Dismiss, it is accessible here.

Conclusion

Back to the lawsuit, we believe our position is the right one and we are very hopeful that the Federal District Court will ultimately rule in our favor on the government's pending Motion to Dismiss. But all of us know that there is no certainty when one is considering what may happen in a court of law. We must wait for next steps, and we plan to continue to keep our AOPA members informed of any further significant developments. Thank you again for your support of our efforts.