

Report on Medicare Compliance Volume 28, Number 32. September 16, 2019 In AseraCare FCA Case, Court Says a Contrary Medical Opinion Is Not Enough

By Nina Youngstrom

In a long-awaited decision, a federal appeals court said Sept. 9 that it takes more to prove false claims than a physician disputing the eligibility of patients for Medicare services after the fact.

With this caveat, the U.S. Court of Appeals for the 11th Circuit is giving the Department of Justice (DOJ) another chance to take AseraCare Inc., a hospice provider, to trial in a False Claims Act (FCA) case. But DOJ needs to do more than expert armchair quarterbacking.

The ruling is pretty good news for providers on the medical necessity and FCA fronts. “Providers have always been comfortable with the statement that if clinicians make good-faith judgments about the eligibility of a patient for a particular service, as long as that judgment was in good faith, it wouldn’t be second guessed afterward. The court agreed with that,” says attorney Christopher Donovan, with Foley & Lardner in Boston. “You can’t just roll out another expert who disagrees with your certification.” But the appellate court also ruled that hospice claims could be false if there’s evidence that physicians rubber-stamped certifications, as a witness alleges in the AseraCare case, says attorney Jesse Witten, with Drinker Biddle in Washington, D.C. “It’s a difficult decision to sort out because there’s something for everybody,” he says.

Where the chips ultimately fall is up to a jury, unless the two sides settle. However it turns out, the message is that “the government can’t demonstrate falsity just because there are two physicians having a good-faith disagreement,” Witten says.

AseraCare operates about 60 hospices in 19 states and admits around 10,000 patients, most enrolled in Medicare. For patients to be eligible for the Medicare hospice benefit, a physician must certify that the patient is terminally ill, with a life expectancy of six months or less. Physicians certify patients for hospice care for 90 days, with recertification every 60 or 90 days.

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