

Judge Rules Against ACA in HHS Lawsuit

ASSOCIATION VOWS TO CONTINUE LEGAL BATTLE; SAYS PROFESSION, PATIENTS HAVE BENEFITED

Editorial Staff

The American Chiropractic Association (ACA) has vowed to appeal U.S. District Judge John Garrett Penn's Oct. 14 decision to dismiss its lawsuit against the Department of Health and Human Services (HHS). The lawsuit was filed in November 1998 to protect the most fundamental element of the chiropractic profession's services under Medicare - manual manipulation of the spine to correct a subluxation.

In his decision, Judge Penn granted HHS a motion for summary judgment, stating that Congress did not intend for only chiropractors to provide "manual manipulation of the spine to correct a subluxation" when it established the Medicare program in 1972, and that the Medicare statute is "neither silent nor ambiguous" in this regard. The judge's rationale is "perplexing," according to ACA officials, given the fact that even the U.S. government itself admitted ambiguity in the 32-year-old language governing the Medicare program - and that, according to the government's own position with the court, "Congress has not directly spoken to the precise issue of who may provide manual manipulation of the spine to correct a subluxation to Medicare beneficiaries."

"While we are understandably disappointed in the judge's decision, we take pride in the fact that our lawsuit has already put an end to years of discrimination against doctors of chiropractic and their patients," commented ACA President Dr. Donald J. Krippendorf. "Before we filed our lawsuit, Medicare HMOs were given the green light to misappropriate taxpayer dollars to pay non-physician physical therapists to deliver the chiropractic physician service of 'manual manipulation of the spine to correct a subluxation' under Medicare - or to deny the service to beneficiaries altogether. That unfair and illegal practice has ended as a direct result of our lawsuit. We strongly believe that we owe it to our patients - and have a strong legal basis - to continue our battle in an effort to prohibit medical doctors and osteopaths from correcting subluxations, a service that is uniquely chiropractic."

Dr. Krippendorf also noted the "monumental victories for Medicare patients" already achieved through the lawsuit, including: compelling the government to prepare and release a study showing the virtual elimination of chiropractic services to Medicare beneficiaries entering the Medicare managed care system; prohibiting federal payments to physical therapists providing manual manipulation of the spine to correct a subluxation to Medicare patients; and mandating that all Medicare managed care plans must make available and pay for manual manipulation of the spine to correct a subluxation.

"We have a responsibility to our Medicare patients to continue this fight. They deserve to have chiropractic services delivered by doctors of chiropractic," added Dr. Krippendorf. "We believe the use of the term 'subluxation' at the time it was inserted in the Medicare statute was meant to assign the correction of the subluxation exclusively to doctors of chiropractic."

The ACA has 30 days to file a notice of appeal to the U.S. Court of Appeals for the District of Columbia - a court known as "the second highest court in the land" because many of its judges are

ultimately appointed to the U.S. Supreme Court. From there, the court will issue a briefing schedule. Typically, the U.S. Court of Appeals for the District of Columbia makes a decision on cases within 12 months. ACA officials said they would continue the legal battle until doctors of chiropractic are the only providers who can offer the profession's core service.

When the ACA first filed the suit in 1998, it contended that HHS guidelines unlawfully allowed Medicare managed care plans to substitute the services of other health care providers for services that should legally be performed by DCs, and that chiropractic services were not being provided under Medicare managed care programs. Specifically challenged was a 1994 *Operational Policy Letter* that stated: "Managed care plans contracting with Medicare are not required, however, to offer services of chiropractors, but may use other physicians to perform this service. In addition, managed care plans may offer manual manipulation of the spine as performed by non-physician practitioners, such as physical therapists, if allowed under applicable state law."

In January 2002, as a direct result of the ACA lawsuit, HHS issued a new policy directive which stated that under Medicare, physical therapists could not be reimbursed for providing manual manipulation of the spine to correct a subluxation, and that manual manipulation to correct a subluxation must be provided by Medicare managed care plans. In its revision to the 1994 policy letter, Medicare's Center for Beneficiary Choices wrote: "The (Medicare) statute specifically references manual manipulation of the spine to correct a subluxation as a physician service. Thus, Medicare+Choice organizations must use physicians, which include chiropractors, to perform this service. They may not use non-physician physical therapists for manual manipulation of the spine to correct a subluxation" [emphasis added]. In addition, the new policy provided: "As a standard of Medicare Part B benefit, manual manipulation of the spine to correct a subluxation must be made available to enrollees in Medicare+Choice plans" [Updated *Operational Policy Letter* #23, Jan. 15, 2002; emphasis added].

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