



NEWS / PROFESSION

## **Landmark Decision in ACA Lawsuit Against HHS**

APPEALS COURT RULING BREATHES NEW LIFE INTO LEGAL BATTLE

Michael Devitt

The U.S. Court of Appeals for the District of Columbia has reversed a U.S. District Court decision that allowed medical doctors and doctors of osteopathy to manipulate the spine as a means of correcting subluxations on Medicare beneficiaries. The Dec. 13, 2005 decision, which overturns a ruling made by the District Court in 2004 against the American Chiropractic Association, breathes new life into the ACA's ongoing lawsuit against the U.S. Department of Health and Human Services (HHS).



"The ACA is extremely pleased that the District Court's ruling allowing MDs and DOs to provide a uniquely chiropractic service was nullified," remarked ACA President Richard Brassard, DC. "We are happy that the issue is now whether or not a practitioner is 'qualified,' not whether or not a practitioner is simply licensed. The ACA's position has been and remains that only chiropractors are qualified by education and training to correct subluxations. Because of the Appeals Court's decision, chiropractors can continue to fight to safeguard their right to be the sole providers of this service, and to ensure Medicare patients' rights to access doctors of chiropractic."

The ACA's suit against HHS was originally filed in November 1998 in response to then-new HHS guidelines that essentially excluded chiropractic services from the Medicare managed care program. Specifically, the guidelines allowed managed care plans that belonged to the Medicare+Choice program to substitute the services of medical doctors and doctors of osteopathy for services provided by doctors of chiropractic, up to and including the ability to perform "manual manipulation of the spine to correct a subluxation."

The ACA alleged that the new guidelines unlawfully permitted non-chiropractors to perform manipulation of the spine in an attempt to correct subluxations. In addition, the ACA alleged that HHS policies unlawfully permitted managed care organizations to require a referral by a primary care physician before a Medicare patient could visit and receive manual manipulation of the spine to

correct a subluxation from a chiropractor, and that the department had failed to ensure that managed care organizations properly allocate portions of monthly, predetermined sums they received from Medicare to cover manual manipulation of the spine to correct a subluxation.

Specifically challenged was an *Operational Policy Letter* published by Medicare's Center for Beneficiary Choices in 1994, which stated, among other things, "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."

Almost immediately after the ACA filed suit, HHS attempted to have the lawsuit dismissed. In September 1999, it asked the District Court for the District of Columbia to throw out the ACA's suit on the basis that the ACA lacked "standing" and that the court lacked jurisdiction to review the ACA's claims. A federal judge denied the department's claim in July 2000, asserting that "the alleged injuries suffered by ACA members are fairly traceable to the Secretary's (of HHS) conduct," and that "the alleged injuries suffered by ACA members are likely to be redressed by a favorable decision in this case."

Soon after the judge's ruling, the HHS petitioned the court once again, this time arguing that the suit be dismissed in favor of having the ACA "exhaust administrative remedies" before it could seek relief through the federal court. However, on Jan. 22, 2001, the District Court again ruled in favor of the ACA, allowing the association to bring its claim before the federal bench.

As a direct result of the ACA lawsuit, HHS began to instate new guidelines regarding chiropractic care for Medicare patients. In January 2002, the agency 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 such manipulation must be provided by Medicare managed care plans. In revising the 1994 policy letter, the Center for Beneficiary Choices specified: "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."

On Oct. 14, 2004, the ACA suffered what many considered a mortal legal blow when District Judge John Garrett Penn granted HHS a motion for summary judgment in the case. Judge Penn's ruling essentially dismissed the ACA's case on the grounds that the U.S. Congress did not intend for only doctors of chiropractic to provide manual manipulation of the spine to correct a subluxation when the Medicare program was established in 1972. The ACA then filed a notice of appeal with the U.S. Court of Appeals for the District of Columbia, with famed chiropractic attorney George McAndrews leading the appeal.

In its Dec. 13, 2005 decision, the three-judge appeals panel overturned the District Court's ruling, noting that the District Court lacked the jurisdiction to decide whether medical doctors and osteopaths may manipulate the spine to correct subluxations. Rather, the final decision must be made via a new appeals process, through which individual doctors of chiropractic would file complaints on behalf of their Medicare patients through the managed care organization. From that point, complaints would move to an administrative law judge.

The appeals panel also questioned the District Court's opinion on the issue of which health care providers are qualified to provide chiropractic services, not just which providers are licensed to provide such services:

"The regulation states that '[i]f more than one type of practitioner is qualified to furnish a particular service, the HMO *may select the type of practitioner to be used*' (emphasis added). The HMO's invocation of this provision would squarely present the question whether medical doctors and osteopaths, as well as chiropractors, are 'qualified to furnish' the service of manual manipulation of the spine to correct a subluxation."

Dr. Brassard stressed the importance the court's decision will have on Medicare patients who may not currently have access to chiropractic services. He also encouraged all doctors of chiropractic to become familiar with the appeals process and notify the proper agencies of HMOs that do not offer chiropractor-based chiropractic care.

"The Appeals Court decision is especially significant as seniors are being encouraged to join Medicare managed care programs in which they will find no meaningful chiropractic services," said Dr. Brassard. "Doctors of chiropractic nationwide must familiarize themselves with the new appeals process and report on any Medicare HMO that does not offer chiropractic services through doctors of chiropractic."

As of this writing, the ACA has announced it is investigating ways to assist individual doctors of chiropractic with the administrative review process, and provide them with the materials necessary to establish their qualifications to an administrative law judge.

A complete copy of the Appeals Court decision is available online at the ACA's Web site. For more information, visit [www.acatoday.com/government/medicare](http://www.acatoday.com/government/medicare).

### *Resources*

1. Appeals Court overturns adverse District Court ruling; the fight continues. American Chiropractic Association press release, Dec. 14, 2005.
2. Judge rules against ACA in HHS lawsuit. *Dynamic Chiropractic*, Nov. 18, 2004. [www.chiroweb.com/archives/22/24/09.html](http://www.chiroweb.com/archives/22/24/09.html).
3. U.S. Federal Court rules against HHS attempt to dismiss ACA lawsuit. *Dynamic Chiropractic*, Feb. 26, 2001. [www.chiroweb.com/archives/19/05/05.html](http://www.chiroweb.com/archives/19/05/05.html).
4. Court says ACA has standing to sue Medicare managed care. *Dynamic Chiropractic*, Aug. 6, 2000. [www.chiroweb.com/archives/18/17/01.html](http://www.chiroweb.com/archives/18/17/01.html).

*Michael Devitt, senior associate editor.*

JANUARY 2006