Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In re:	)	
	)	Date: February 5, 2009
CMS LCD Complaint: Patient Lifts (LCD Database I.D. No. L5064),	)	Docket No. C-07-569
	)	Decision No. CR1897
Contractor: NHIC Corp., Durable Medical Equipment Medicare Administrative Contractor, Jurisdiction A.	)	

DECISION

The complaint is dismissed pursuant to 42 C.F.R. § 426.444(b)(6).

I. Background.

The Aggrieved Party requested review of the TriCenturion Local Coverage Determination (LCD) for Patient Lifts (L5060) by letter dated June 27, 2007 (Complaint). Specifically, the Aggrieved Party challenged the provisions of LCD L5060 that provided that electric lift mechanisms are not covered by Medicare because they are a convenience feature and the underlying conclusion of the issuing contractor that electric lifts with fixed systems are not covered by Medicare because they are not durable medical equipment (DME) within the meaning of the Social Security Act. The Complaint was received at the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB) on July 9, 2007, and assigned to me for hearing and decision on August 9, 2007. On October 3, 2007, I issued an Acknowledgment of Receipt of Acceptable Complaint; Order to File LCD Record; and Schedule for Responses (Initial Order). I required Petitioner to serve copies of the Complaint upon the Medicare contractor and the Centers for Medicare and Medicaid Services (CMS). On October 18, 2007, the Aggrieved Party certified that service upon the Medicare contractor and CMS was accomplished.

On October 31, 2007, NHIC (National Health Insurance Company), Corp., the Durable Medical Equipment Medicare Administrative Contractor (DME MAC) for CMS Jurisdiction A, responded to my order to the contractor to file the LCD record (NHIC Record Production).[1] NHIC filed eight exhibits with its response, marked CMS exhibits (CMS Ex.) 1 through 8. On November 30, 2007, the Aggrieved Party filed his Statement of the Aggrieved Party (AP Statement I) with one exhibit, A. (Aggrieved Party) Ex. 14, attached. The Aggrieved Party also submitted on November 30, 2007, a copy of his original Complaint with its 13 exhibits correctly marked as A. Ex. 1 through 13. CMS Exs. 1 through 8 and A. Exs. 1 through 14 were admitted as evidence.

On December 12, 2007, counsel for CMS entered an appearance. On December 20, 2007, NHIC filed its Response to Statement of Aggrieved Party (NHIC Response I). On January 7, 2008, the Aggrieved Party requested leave to file a reply. By Order dated January 9, 2008, I deferred ruling on the motion pending receipt of the Aggrieved Party's proposed submission. On January 10, 2008, counsel for CMS advised me that CMS would rely upon the brief filed by NHIC and that CMS would not make a separate filing. On January 23, 2008, the Aggrieved Party filed his Reply of the Aggrieved Party (AP Reply). On February 7, 2008, NHIC filed a Response to Reply of Aggrieved Party (NHIC Response II). The supplemental pleadings of both NHIC and the Aggrieved Party were accepted.

On March 4, 2008, I ordered that NHIC produce documents that amounted to a constructive LCD and related record (Order to Produce). On April 3, 2008, NHIC responded to the Order to Produce (NHIC Response, Order to Produce). On April 25, 2008, the Aggrieved Party filed his Statement of the Aggrieved Party (AP Statement II) addressing the NHIC Response to the Order to Produce. On June 30, 2008, NHIC filed its response to the second statement of the Aggrieved Party (NHIC Response III).

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[1] CMS has given DME MACs the responsibility for developing and revising LCDs, maintaining the LCD record, and responsibility for LCD challenges. However, CMS requires that LCDs developed and revised by the DME MACs be identical for each jurisdiction to ensure uniformity for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies suppliers with national operations. Medicare Program Integrity Manual, CMS Pub. 100-08, Chap. 13, § 13.1.4.

On October 7, 2008, I issued a ruling pursuant to 42 C.F.R. § 426.425(c) and an order for case development (Ruling and Order). I concluded, based upon the review required by 42 C.F.R. § 426.425(c)(1), that the LCD record was not complete and adequate to support the LCD provisions challenged by the Aggrieved Party, for the reasons discussed in the Ruling and Order. Accordingly, pursuant to 42 C.F.R. § 426.425(c)(3), I ordered discovery and preparation for an evidentiary hearing, if necessary.

On December 10, 2008, NHIC filed a notice pursuant to 42 C.F.R. § 426.420(c) that it had revised the LCD under review and requested dismissal of the complaint. Specifically, NHIC notified me that it issued a revised version of LCD Database I.D. No. L5064 and a revised Policy Article A23657, and that the provisions of which the Aggrieved Party complained have been completely removed from the revised LCD and Policy Article. NHIC attached copies of the revised LCD and Policy Article to its notice. I note that the revised LCD and Policy Article are effective January 1, 2009. I further note that the provisions of which the Aggrieved Party complained have been completely removed.

II. Discussion

Pursuant to 42 C.F.R. § 426.444(b)(6), an administrative law judge (ALJ) must dismiss a LCD complaint concerning LCD provisions if the contractor notifies the ALJ that the LCD provisions are no longer in effect. Pursuant to 42 C.F.R. § 426.420(a) and (b) a contractor may retire or revise an LCD subject to my jurisdiction at anytime before I issue a decision. The regulation provides that revision of an LCD to remove the provision under review has the same effect as a decision finding the LCD invalid under the reasonableness standard as described under 42 C.F.R. § 426.460(b), *i.e.*, an aggrieved party's denied claim is to be newly adjudicated by the contractor without application of the removed LCD provision. 42 C.F.R. § 426.420(b). The regulations provide that if I receive notice that an LCD was retired or revised to remove the provision under review before I issue a decision, I must dismiss the complaint and inform the aggrieved party that individual claim review will be done by the contractor without application of the retired LCD or the removed provisions of the LCD. 42 C.F.R. § 426.420(e)(1). The regulations grant me no discretion as to what must be done when the offending provisions of a LCD are removed as has occurred in this case. The fact that a contractor invalidates, withdraws, retires, or otherwise renders the offending LCD provisions ineffective, effectively deprives me of jurisdiction to continue. *See* 42 C.F.R. § 426.405(d)(4).

III. Conclusion

Accordingly, the complaint must be dismissed. The aggrieved party is advised in accordance with 42 C.F.R. § 426.420(e)(1), that in accordance with 42 C.F.R. § 426.460(b)(1) the contractor is required to comply with the requirements of that provision with regard to claim adjudication or re-adjudication.

/s/

Keith W. Sickendick
Administrative Law Judge