

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

ORDER OF MEDICARE APPEALS COUNCIL
REMANDING CASE TO ADMINISTRATIVE LAW JUDGE
Docket Number: M-11-2222

In the case of

Claim for

Eagle Air Medical Corporation
(Appellant)

Supplementary Medical
Insurance Benefits (Part B)

(Beneficiary)

(HIC Number)

Noridian Administrative
Services, LLC
(Contractor)

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a decision dated June 13, 2011, concerning Medicare coverage for fixed wing air ambulance services (HCPCS¹ code A0430) and fixed wing air miles (HCPCS code A0435) that the appellant furnished to the beneficiary on November 18, 2009. The ALJ allowed Medicare coverage for ground ambulance transport for 112 ground miles to the nearest appropriate facility. Further, the ALJ found the beneficiary liable for the non-covered costs. The appellant has asked the Medicare Appeals Council (Council) to review this action.

The Council reviews the ALJ's decision *de novo*. 42 C.F.R. § 405.1108(a). The Council will limit its review of the ALJ's action to the exceptions raised by the party in the request for review, unless the appellant is an unrepresented beneficiary. 42 C.F.R. § 405.1112(c). The appellant's request for review,

¹ The Centers for Medicare & Medicaid Services (CMS) developed the Healthcare Common Procedure Coding System (HCPCS) to establish "uniform national definitions of services, codes to represent services, and payment modifiers to the codes." 42 C.F.R. § 414.40(a).

consisting of three pages, is admitted into the record as Exhibit (Exh.) MAC-1.

For the reasons explained below, the Council hereby vacates the ALJ's decision and remands this case to an ALJ for further proceedings, including the issuance of a new decision. See 42 C.F.R. §§ 405.1108(a), 405.1128(a).

DISCUSSION

On November 18, 2009, the beneficiary was transported by fixed wing air ambulance from one medical facility in Chinle, Arizona (Chinle), to another, in Phoenix, Arizona (Phoenix). Exh. 3, at 1. On redetermination, the contractor allowed Medicare coverage for the claim as a ground ambulance (HCPCS code A0427) transport and allowed Medicare coverage for 150 ground miles (HCPCS code A0425) to the nearest appropriate facility in Farmington, New Mexico. Exh. 5, at 2-3. The contractor also found the appellant, and not the beneficiary, financially responsible for the non-covered costs. *Id.* at 3. On reconsideration, the Qualified Independent Contractor (QIC) concurred with the contractor's conclusions. Exh. 7, at 2-4.

On appeal, the ALJ found that "[s]ince the Appellant agreed that the hospital facility in Farmington, New Mexico was the closest facility capable of providing the care that the Beneficiary required, and that ground transport would have been more appropriate than air transport, the undersigned ALJ upholds the downcoding." Dec. at 10. The ALJ also determined that only 112 ground miles, which the appellant stated was the distance between Chinle and the Farmington facility, were covered. Dec. at 3, 10-11.² Finally, the ALJ concluded that the beneficiary was "liable for the difference between the originally billed charges and the amounts paid/allowed because this is a technical denial pursuant to Section 1861(s)(7) of the Social Security Act." *Id.* at 11.

The appellant ambulance service does not raise any specific contention disagreeing with the ALJ's decision. The appellant states: "We agree with decision but resulting [Explanation of Benefits (EOB)] does not reflect correct CPT codes. See

² See, e.g., Medicare Benefit Policy Manual (MBPM), Pub. 100-02, Ch. 10, § 10.4.6.

attached claim and latest EOB. Please order corrected EOB to show #1 A0430 and #112 A0435 and #136 A0888." Exh. MAC-1.³

A finding, as occurred in this case, that the beneficiary required only ground ambulance transport to a particular facility constitutes a partial denial of the air ambulance claim under section 1862(a)(1) of the Social Security Act (Act). Thus, as detailed below, section 1879 of the Act applies to this portion of the claim.

In general, section 1879 liability protection applies when the denial of coverage is made under section 1862(a)(1)(A) of the Act - that is, because the services are not medically "reasonable and necessary." Most denials of Medicare payment made for ambulance services are made under section 1861(s)(7) of the Act and its implementing regulations. Section 1861(s)(7) provides that Medicare will cover ambulance services "where the use of other methods of transportation is contraindicated by the individual's condition, but only to the extent provided in [the] regulations." The regulation at 42 C.F.R. section 410.40 sets forth various limitations on ambulance coverage and payment, including limitations on origins and destinations. Thus, when coverage of ambulance services is denied or partially denied because the beneficiary's condition did not contraindicate other means of transport (that is, other non-ambulance methods), or because the beneficiary was not taken to the nearest appropriate facility (or did not meet other regulatory requirements in section 410.40), then the statutory basis for the denial is section 1861(s)(7) and the limitation on liability provisions in section 1879 do not apply.

Air ambulance services are considered appropriate when the time needed to transport the beneficiary by ground ambulance, or the instability of land transport, poses a threat to the beneficiary's survival or seriously endangers her health. A finding that a beneficiary required ground ambulance services, but not air ambulance transport, is not a denial under section 1861(s)(7), but an adverse level of care determination under section 1862(a)(1). Under those circumstances, non-ambulance methods of transport are not "contraindicated," and so it is

³ The appellant appears to ask the Council to change the Medicare Remittance Notice. The appellant has failed to cite to any provision that gives the Council the authority to direct a Medicare contractor to change the reason for denial, and to reissue a Medicare Remittance Notice. The Council knows of no such authority. If the appellant seeks any specific revisions to the Medicare Remittance Notice, the appellant must directly approach the contractor with such request.

appropriate to consider whether the beneficiary and the appellant are entitled to limitation on liability protection.

Section 1879(a) of the Act provides for the limitation on liability for items or services denied Medicare coverage as not medically "reasonable and necessary" under section 1862(a)(1)(A) of the Act, absent "knowledge" by a beneficiary or provider that the items or services would not be covered. Act at § 1879(a); 42 C.F.R. § 411.400(a). A beneficiary has "knowledge" of non-coverage when she has been given written notice of non-coverage by the provider, practitioner, or supplier. 42 C.F.R. § 411.404(a). A supplier may have knowledge, in relevant part, based on its written notice of non-coverage to the beneficiary or its own experience, actual notice, or constructive notice. 42 C.F.R. § 411.406. CMS has provided further guidance on financial liability protections in its Medicare Claims Processing Manual (MCPM). MCPM, CMS Pub. 100-04, at Ch. 30.

The issue under section 1879 is whether any of the parties knew or could reasonably have been expected to know that payment would not be made for air ambulance services (rather than ground ambulance services). Protection under section 1879, under the circumstances presented here, extends only to the difference between the appropriate level of payment for *ground* ambulance and the appropriate level of payment for *air* ambulance to the nearest appropriate facility.

Also, responsibility for the difference in air mileage distance between the nearest appropriate facility and the actual destination must be considered. When coverage of ambulance services is denied or partially denied because the beneficiary was not taken to the nearest appropriate facility as required by 42 C.F.R. § 410.40, the statutory basis for the denial is section 1861(s)(7) and the limitation on liability provisions in section 1879 do not apply.

The Council directs further ALJ action on remand. With the issuance of the contractor's redetermination and the QIC's reconsideration, the beneficiary was informed that the ambulance service, and not the beneficiary, would be held responsible for the non-covered costs. The record contains no evidence that the beneficiary herself (or anyone representing her) sought ALJ review. Only Eagle Air Medical Corporation requested an ALJ hearing. However, there is no evidence that the beneficiary was given a copy of the request for ALJ hearing. There is no evidence that the beneficiary was provided notice of the hearing scheduled in connection with Eagle Air Medical Corporation's

request for ALJ review. See Exhs. 9 (notice of hearing) and 10 (appellant's response to notice of hearing); 42 C.F.R. § 405.1020(c). Further, the notice of the ALJ's decision does not indicate that the beneficiary was sent a copy of the decision. Under 42 C.F.R. section 405.1046(a), the ALJ must mail a copy of his or her decision "to all the parties at their last known address" The beneficiary is a party. 42 C.F.R. §§ 405.902, 405.906.

As explained above, this case presents issues of limitation on liability under section 1879, as well as responsibility for the cost of the mileage for which the section 1879 analysis does not apply. Given the lack of any notice to the beneficiary concerning the appeal proceedings that took place after the QIC's review, the Council has determined that remand is appropriate. On remand, the beneficiary, as well as the ambulance service, must be given an opportunity to be heard on these issues. The ALJ shall, therefore, take the following actions.

1. Afford the parties an opportunity for a hearing. Any waiver of the right to a hearing shall be documented in the record.
2. Issue a new decision. The new decision must include a discussion of each party's liability (or responsibility) for the non-reimbursed costs resulting from the downcoding of the fixed wing air transport to a ground ambulance transport for the transport furnished to the beneficiary on November 18, 2009. The ALJ shall consider all applicable authorities, including those discussed in the Council's action herein.

The ALJ may take any further action not inconsistent with this order.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

/s/ Stanley I. Osborne, Jr.
Administrative Appeals Judge

Date: April 12, 2012