

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

DECISION OF MEDICARE APPEALS COUNCIL
Docket Number: M-2010-509

In the case of

Claim for

United HealthCare d/b/a
Evercare

(Appellant)

Medicare Advantage (MA)
Benefits (Part C)

**** (deceased)

(Enrollee)

(HIC Number)

United HealthCare d/b/a
Evercare

(MA Organization (MAO))

(ALJ Appeal Number)

The Administrative Law Judge (ALJ) issued a decision dated November 5, 2009. The ALJ found that the enrollee required and received daily skilled care in a skilled nursing facility (SNF) from July 7, 2008, through July 31, 2008. Consequently, the ALJ found that the MAO was responsible for payment for the SNF care. The appellant MAO has asked the Medicare Appeals Council to review this action.

The regulation codified at 42 C.F.R. § 422.608 states that "[t]he regulations under part 405 of this chapter regarding MAC [Medicare Appeals Council] review apply to matters addressed by this subpart to the extent that they are appropriate." The regulations "under part 405" include the appeal procedures found at 42 C.F.R. part 405, subpart I. With respect to Medicare "fee-for-service" appeals, the subpart I procedures pertain primarily to claims subject to the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) and the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), 70 Fed. Reg. 11420, 11421-11426 (March 8, 2005). The Council has determined, until there is amendment of 42 C.F.R. part 422 or clarification by the Centers for Medicare & Medicaid Services (CMS), that it is "appropriate" to apply, with

certain exceptions, the legal provisions and principles codified in 42 C.F.R. part 405, subpart I to this case.

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 MAO's timely request for Council review, filed January 11, 2010, and attachments, are admitted into the record as Exh. MAC-1.¹ For the reasons articulated below, the Council concludes that there is no basis for changing the ALJ's decision. The Council adopts the ALJ's decision.

DISCUSSION

On April 9, 2009, the ALJ issued his initial decision in which he determined that the enrollee required and received daily skilled care in a SNF from July 7, 2008, through July 31, 2008, and consequently, the MAO was responsible for payment for the SNF care provided during these dates. The MAO sought Council review. On August 13, 2009, the Council vacated the ALJ's April 9, 2009 decision and remanded the matter for further ALJ action. The purpose of the Council's remand order was to obtain an opinion from an independent medical expert on whether the enrollee did or did not require and receive daily skilled care. Post remand, following a supplemental hearing held on October 26, 2009,² the ALJ issued his decision on November 5, 2009. The ALJ again determined that the enrollee required and received

¹ The ALJ issued his initial decision on April 9, 2009. The Council vacated that decision by an August 13, 2009 remand order. The MAO's initial request for Council review, filed in June 2009, is of record as Exh. 1 at 124-132. A duplicate copy of the June 2009 filing was included with Exh. MAC-1.

² During the supplemental hearing, the MAO and the Commissioner of the Connecticut Department of Social Services, the Medicaid State agency, represented by the Center for Medicare Advocacy, Inc. (CMA), each called a medical expert to testify. CMA called Dr. G.S., a Professor of Medicine at the University of Connecticut Center on Aging. Dr. G.S. is not an employee of CMA. She stated that she testifies for CMA only "occasionally" and is compensated on an hourly basis. Her compensation is not based on the outcome of any case. The MAO raised no objection to Dr. G.S.'s qualifications as an expert in the area of geriatric medicine. Dr. W.O., United HealthCare's Medical Director, testified for the MAO. Dr. W.O. testified that he is employed by a subsidiary of United HealthCare and has no medical employer other than United Healthcare.

daily skilled care in a SNF from July 7, 2008, through July 31, 2008, and held the MAO responsible for payment for the SNF care provided during these dates. The appellant MAO has asked the Council to review the ALJ's November 5, 2009 decision.

The MAO raises two arguments in its request for Council review. First, the MAO takes issue with a part of the Council's August 13, 2009 remand order, in which the Council stated:

The name and qualifications of the [Independent Review Entity's, or IRE's] Doctor Consultant have been redacted. [Citation omitted.] We give no weight to the unsigned anonymous opinion of a physician whose qualifications are unknown.

Remand Order at 3. The MAO's position is that the pre-remand record contained an IRE (i.e., Maximus Federal Services) physician consultant's opinion that was consistent with the MAO's determination that the enrollee did not require, or receive, daily skilled care at a SNF between July 7 and July 31, 2008, but that the Council "marginalized" this opinion "simply because the [doctor's] name was redacted in the ALJ Exhibit File copy." On this point, the MAO writes that Maximus has declined to disclose information about the identity of the IRE doctor consultant citing confidentiality reasons, and did not respond to the MAO's request for a copy of the original IRE doctor consultant's opinion bearing the doctor's name, post remand. See Exh. MAC-1 at 2-3. We note that during the supplemental ALJ hearing, the MAO representative (who prepared the January 2010 request for review) discussed the plan's attempts to obtain information about the IRE doctor consultant. The MAO representative also stated that in his eleven years of experience as a health plan representative it has been standard practice for Maximus to redact the identity of doctor consultants for confidentiality reasons. Exh. MAC-1 at 3. The MAO urges the Council not to "marginalize" the value of the Maximus doctor consultant's opinion merely based on a "technical error" in the form of redaction of the doctor's name. *Id.* at 3-4.

The Council has considered the circumstances specific to this case and, in particular, the MAO's explanations to the ALJ and the Council concerning unsuccessful attempts to obtain additional information concerning the IRE doctor consultant. The Council has considered the IRE doctor consultant's opinion on which Maximus, the IRE, relied to affirm the plan's

unfavorable determination, as part of our *de novo* review of this case. The ALJ's decision (see Dec. at 5) and the recording of the supplemental hearing indicate that the ALJ, too, considered the IRE doctor consultant's opinion. And, having carefully considered the recording of the ALJ hearing, it is also apparent that the ALJ did not discount the weight accorded to the IRE doctor consultant's opinion in reaching his decision based on the above-quoted portion of the Council's remand order.

Second, the MAO asserts that, post remand, the MAO was not given an "opportunity to object to the expert's qualifications and, as appropriate ask questions of the independent medical expert," as directed in the Council's remand instructions. Exh. MAC-1 at 4, citing Remand Order at 4. The MAO's objection concerns the written interrogatories issued by the ALJ following remand and Dr. J.B.'s (internist) October 22, 2009, interrogatory answers, which, generally speaking, favor CMA's position that the enrollee required and received daily skilled care from July 7 to July 31, 2008. See Exh. 1 at 3-4.

As the Council stated on remand:

Under the circumstances of this case, we believe that an opinion from an independent medical expert is necessary. We therefore remand for the ALJ to obtain such an opinion through written interrogatories or live testimony. *All parties shall be afforded the opportunity to object to the expert's qualifications and, as appropriate, ask questions of the independent medical expert.*

Remand Order at 3-4 (emphasis added). The Council notes that Dr. J.B. was not present during the post-remand hearing held on October 26, 2009; neither CMA, nor the MAO, had the opportunity to orally question Dr. J.B. concerning her professional background and qualifications, or the rationale and bases for any opinion or answer given in response to the interrogatories.³

However, taking into consideration the circumstances specific to this appeal, the Council declines to vacate the ALJ's second

³ The Council also notes that, prior to the supplemental hearing, the MAO raised objections to the manner in which most of the interrogatories were framed, i.e., it asserted that the questions were too generally worded. See Exh. 1 at 103-106. The MAO raised the same objections during the supplemental hearing.

(November 5, 2009) decision based on the ALJ's consideration of Dr. J.B.'s written interrogatory answers as part of his review of the whole record that was before him, as the MAO urges the Council to do, while now simultaneously arguing that Dr. J.B.'s statements in some respects favor the MAO's position.⁴ See Exh. MAC-1 at 4-5. On this point, we note that, during the supplemental hearing, the MAO representative - the same representative who submitted the January 2010 request for review - asked the ALJ to exclude Dr. J.B.'s interrogatory answers altogether from consideration in reaching his decision. Supplemental Hearing CD, at approximately 3:30 to 3:31 PM.

The Council will not vacate the ALJ's November 5, 2009 decision, for several reasons. First, the ALJ appears to have had Dr. J.B. provide written interrogatories in an effort to comply with the Remand Order, which specifically stated: "We therefore remand for the ALJ to obtain such an opinion through *written interrogatories or live testimony*." Emphasis supplied. In fact, the ALJ referred to this remand order language at the supplemental hearing during the discussion concerning the MAO's objections to the wording of the interrogatories. Thus, while the MAO objected to the interrogatories as they were framed by the ALJ, and apparently continues to object to a consideration of Dr. J.B.'s answers to those interrogatories to the extent they do not favor the MAO's position, the Remand Order contemplated that *written* interrogatories and interrogatory answers provided by an independent medical expert could satisfy the requirements of the Remand Order. Furthermore, we note that the ALJ did provide the MAO and CMA copies of the written interrogatories in advance and allowed both parties an opportunity to object to them. The MAO availed itself of that opportunity, in writing (see Exh. 1 at 103-106), and, orally, during the supplemental hearing. Both the MAO and CMA also were provided copies of the interrogatory responses before the supplemental hearing, as was noted during that hearing.

Additionally, as the MAO itself stated, in Exh. MAC-1 at 5, "We . . . request that the issues of medical necessity be addressed by an independent agent qualified to affirm the issue of medical necessity. We believe that that was the intent rendered by the Medicare Appeals Council on August 13, 2009." That was the Council's intent in remanding this matter on August 13, 2009, and, ALJ proceedings post remand have resulted in not only the written interrogatory answers from Dr. J.B., an independent

⁴ During the supplemental hearing, the ALJ, too, noted that Dr. J.B.'s interrogatory answers favored the MAO's position in some respects.

physician, but also lengthy medical expert testimony provided by Dr. G.S., for CMA, and Dr. W.O., for the MAO, during the supplemental hearing that lasted over three and one-half hours. We note that while the MAO did not have an opportunity to directly ask Dr. J.B. questions in a hearing, the MAO does not specifically argue that Dr. J.B. is not *independent*. The MAO representative had ample opportunity to ask Dr. G.S. questions. We note that, following approximately a half-hour of testimony on direct examination, the MAO representative cross-examined Dr. G.S. for approximately forty-five minutes. The MAO also had Dr. W.O., who, unlike Dr. G.S., is employed by a party to this case,⁵ provide equally lengthy testimony. We also note that, while the MAO representative himself did not have the benefit of cross-examining Dr. J.B. during the hearing, he had Dr. W.O. address Dr. J.B.'s interrogatory responses and explain why he disagrees with aspects of Dr. J.B.'s interrogatory answers to the extent that they seem to favor CMA's position. Supplemental Hearing CD.

That said, the Council has considered the medical evidence, including the IRE medical consultant's opinion, albeit brief, and medical expert testimony for and against a finding that the enrollee required and received daily skilled care in a SNF from July 7 through 31, 2008. The ALJ discussed the medical evidence and hearing testimony in some detail. He found that the medical documentation supports a conclusion that daily skilled care was required for overall management and evaluation of the plan of care, and observation and assessment of the enrollee's changing condition. The Council agrees with the ALJ's assessment of the evidence. We find Dr. G.S.'s hearing testimony, viewed with the medical documentation, particularly persuasive in this case.

⁵ In the Remand Order, at 3, the Council considered the written statement of Dr. W.O. submitted as a request for review of the ALJ's initial decision. The Council stated, preliminarily, that it was persuasive. However, we also explicitly stated that Dr. W.O. is "acting on behalf of his employer, and in addition is seeking an affirmation of his previous opinion as a reviewer," referring to his previous opinion admitted as Exh. C at 49-50. On that basis, the Council determined then, and does so now, that Dr. W.O.'s statement and hearing testimony do not amount to *independent* medical expert testimony or opinion. And, while Dr. G.S., too, was not an independent medical expert, in light of Dr. W.O.'s employment status (see footnote 2 above), we find it appropriate to assign more weight to Dr. G.S.'s testimony and less weight to Dr. W.O.'s testimony.

The Council adopts the ALJ's decision.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

Date: February 16, 2010