Judgment on life expectancy at issue in Medicare fraud case

NOV 1, 2016

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Determining life expectancy is not an exact science, but over a million Americans each year who turn to hospice care depend on a physician’s clinical judgment so they can live their remaining time in relative comfort. The Medicare hospice benefit, created in 1982, helps patients transition to end-of-life hospice care. A case before the 11th U.S. Circuit Court of Appeals is threatening physicians’ ability to exercise their judgment.

At stake in *United States of America v. GGNSC Administrative Services* is this question: When can a physician’s clinical judgment regarding a patient’s life expectancy—based on the normal course of a terminal illness—be considered false under the False Claims Act?

In this case, the government alleges that a hospice care center violated the False Claims Act by billing Medicare for services that did not qualify for reimbursement.

Two conditions must be met for a patient’s care to qualify for payment under the Medicare hospice benefit:

- A physician must certify that the patient’s medical condition is such that it appears the patient has less than six months to live
- The medical record must support the physician’s evaluation

The patients in question had the required physician certifications and their doctors testified that their medical records supported this evaluation. However, the government introduced testimony from another physician who claimed that the medical records did not support the certifications stating the patients had less than six months to live.

The trial court found that “something more” than a mere second opinion from another physician was needed to prove that the first doctor’s terminal illness certification was false. On appeal, the government maintained that it only had to show that a physician disagreed with the certifying
physicians as to the adequacy of the medical record, and it would be for the jury to determine who was telling the truth.

In defense of the hospice center physicians, the AMA and four hospice and palliative care organizations filed an amicus brief stating that for a physician’s opinion to be deemed false, it must be proved that no reasonable physician could hold that opinion.

**Clinical judgment or opinion?**

“This case does not involve something as simple as a patient’s weight or body temperature,” said the brief filed by the AMA. “Nor does it involve something as comparatively straightforward as how to lower a patient’s cholesterol. Rather, this case involves something far more complicated.”

When it comes to how long a patient is expected to live, the range of reasonable conclusions can be quite broad, the brief said. That is true for three reasons:

- Assessing a patient’s life expectancy is a judgment about the future, and there is uncertainty in any prediction. The Medicare statute and regulations demand only that a prognosis be based on an illness’ “normal course.”
- Numerous factors may influence when a person will die, making a patient’s life expectancy especially challenging to predict. That is why the Medicare statute and regulations ask only that physicians exercise their best “clinical judgment” in certifying that a patient has a six-month prognosis.
- Personal knowledge of a patient, especially information gleaned from face-to-face consultations, can be difficult to reduce to writing. Because that is the case, the determination of a physician reviewing only the written record—often years later—may well differ from the prognosis of a physician who actually saw the patient in person or consulted with clinical professionals who did. That is why the Medicare regulations require only that each certification be accompanied by documentation that “support[s]” the prognosis.

The text of the Medicare statute and regulations reflect “the fact that making medical prognostications of life expectancy is not always exact.” In 2000, Congress amended the statute to clarify that certification of a patient as terminally ill “shall be based on the physician’s or medical director’s clinical judgment.”

Clinical judgment means trusting the discretion of a certified professional and trusting that a physician is making a decision to the best of his or her ability and in the best interest of the patient. Patients in hospice care will often live longer than six months after being deemed “terminally ill.”

If the testimony of a single physician who did not have face-to-face consultations with the patients, but rather formed a judgment based solely on written documents is allowed to overturn the testimony of
several physicians who did meet with the patients and created the written documents, hospice benefits for future terminally ill patients could be denied.