Judgment on life expectancy at issue in Medicare fraud case

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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

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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.