

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the case of:	)	
	)	DATE: November 20, 2007
<i>In re</i> CMS LCD COMPLAINT:	)	
Intravenous Immune Globulin (IVIG) -	)	Docket No. C-07-737
(L11961).	)	Decision No. CR1697

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**DECISION**

I dismiss the hearing request in this case because the complaining beneficiary did not file an acceptable complaint establishing her to be an aggrieved party. Specifically, the complaining beneficiary did not explain if or how she was denied coverage for items or services based on application of a local coverage determination (an LCD).<sup>1</sup>

**I. Background**

On September 5, 2007, the complaining beneficiary filed a document with the Civil Remedies Division of the Departmental Appeals Board which was docketed and assigned to me for a hearing and a decision. The Civil Remedies Division staff, evidently concluding that the case might involve an LCD, assigned a caption to the case designating it as an LCD complaint.

I reviewed the hearing request and, based on my review, I asked the staff attorney assigned to work with me on the case to communicate with the complaining beneficiary in order to ascertain more precisely the nature of her complaint. The complaining beneficiary filed two e-mails on October 11, 2007. On October 19, 2007, I sent a letter to the beneficiary in which I asked her to provide me with more information concerning the nature of her complaint. In that letter I defined the ambit of my authority to hear and

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<sup>1</sup> In order to protect the privacy of the beneficiary whose complaint is at issue here I am omitting any personal identifying information from this decision.

decide cases involving LCD coverage. I asked the complaining beneficiary to provide me with evidence showing that she had been denied Medicare coverage on one or more claims based on coverage limitations stated in an LCD. The complaining beneficiary responded to my letter with an e-mail dated November 8, 2007.

I designate as exhibits the complaining beneficiary's two October 11, 2007 e-mails and the November 8, 2007 e-mail. They are identified as LCD Ex. 1 (the October 11, 2007 e-mail sent at 5:07 a.m.); LCD Ex. 2 (the October 11, 2007 e-mail sent at 5:28 p.m.); and LCD Ex. 3 (the November 8, 2007 e-mail). I receive LCD Exs. 1-3 into the record.

## **II. Issues, findings of fact and conclusions of law**

### **A. Issue**

The issue in this case is whether the complaining beneficiary established that she was an aggrieved party as is defined at 42 C.F.R. § 426.110.

### **B. Findings of fact and conclusions of law**

I make findings of fact and conclusions of law (Findings) to support my decision in this case. I set forth each Finding below, as a separate heading.

#### ***1. The complaining beneficiary did not establish that she is an aggrieved party.***

A jurisdictional prerequisite to my hearing and deciding a case involving a challenge to an LCD is that the complaining beneficiary file an acceptable complaint establishing that he or she is an aggrieved party. 42 C.F.R. §§ 426.110; 426.400. An "aggrieved party" is defined at 42 C.F.R. § 426.110 to mean a Medicare beneficiary who, among other things:

Is in need of coverage for a service that is denied based on an applicable LCD . . . , regardless of whether the service was received.

In other words, my authority is limited by regulation to deciding the reasonableness of an LCD only in the case where a complaining individual can establish that he or she has had coverage for a service denied based on application of an LCD.

The complaining beneficiary in this case failed to make the requisite showing. In her hearing request she asserted that she is a Medicare beneficiary who has been prescribed infusions of a product in order to treat a blood disorder. She averred that she had not been denied coverage for these items or services by the Medicare program. However, she

complained that providers of services have refused to provide the prescribed items or services. According to her, providers asserted to her, falsely, that they cannot provide her with covered items or services due to lack of availability of the prescribed product.

Neither in her hearing request nor in her October 11, 2007 e-mails did the complaining beneficiary state a precise reason why various providers had refused to give her the prescribed item or service. LCD Exs. 1, 2. She asserted that “no one wants to provide the medicine” that had been prescribed to her. LCD Ex. 2. And, she suggested that providers might be reluctant to provide her with the prescribed substance because they had concluded that the reimbursement they received from Medicare for it was insufficient. She asserted, “[t]he papers [referring to requested documentation concerning the basis for her hearing request] I am looking for say that I can appeal if I believe that Medicare is not paying enough for the services . . . ‘the amount paid’. This is a major part of the discrimination . . . the facilities do not believe they are paid enough. They tell me that I am a non-profit patient and they can not afford to treat me.” LCD Ex. 1.

However, although the complaining beneficiary asserted that providers had refused to furnish her with a covered item or service, she did not assert that she had been denied coverage due to the operation of an LCD. Hearing request; LCD Exs. 1, 2. In my October 19, 2007 letter to the complaining beneficiary I explained to her that she had an obligation to establish that she was an aggrieved party and I asked that she provide me with any information that she had showing that she was denied benefits based on the limitations imposed by an LCD. I suggested to her that she might supply me with a denial of benefits form which stated that her claims for items or services had been denied based on the limitations imposed by an LCD. I suggested, alternatively, that she might supply me with a letter to her from a Medicare carrier explaining that her claims for items or services had been denied based on limitations imposed by an LCD.

The complaining beneficiary’s response to my October 19 letter is her November 8, 2007 e-mail. LCD Ex. 3. In this e-mail she explained that her problem was that the payments for the item or service that she had been prescribed were so low “that no provider wants to take orders to provide the infusions . . . I need to receive.” *Id.* She also averred that “I do not believe I have ever said that Medicare has denied me” the item or service that had been prescribed to her. *Id.*

What is apparent from the complaining beneficiary’s hearing request and subsequent statements is that she is not contending that she has been denied benefits by the Medicare program based on the operation of an LCD but that she has been denied services *by individual providers* because they have decided that the reimbursement they would receive from Medicare for the prescribed item or service is inadequate to give them the profit that they seek. That assertion is not a basis for me to provide the complaining

beneficiary with a hearing because it establishes no link between her inability to find a provider willing to provide the prescribed item or service and the coverage limitations of an LCD. As the complaining party acknowledges, she has not been told at any time by the Medicare program or its representatives that her prescribed item or service is not covered by Medicare.

I have no authority to hear and decide a dispute between a provider and the Medicare program over the reimbursement amount that the provider will receive for a covered item or service unless that reimbursement amount is directly addressed by an LCD and unless the LCD operates to deny coverage to a beneficiary. That is not the case here, and therefore, the complaining beneficiary is not an aggrieved party. Consequently, I have no authority to give her a hearing.<sup>2</sup>

***2. I must dismiss the complaining beneficiary's hearing request because she is not an aggrieved party.***

I must dismiss a hearing request if it is not filed by an aggrieved party. 42 C.F.R. § 426.444(b)(3). Consequently, I must dismiss the complaining beneficiary's request because she has not established that she is an aggrieved party.

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/s/  
Steven T. Kessel  
Administrative Law Judge

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<sup>2</sup> I am not suggesting that the complaining beneficiary is without recourse, only that I have no authority to hear her complaint as a challenge to an LCD.