

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In re CMS LCD Complaint: ) Date: June 25, 2008  
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Trailblazer Health Enterprise, LLC )  
Electrodiagnostic Studies (NCS/EMG). ) Docket No. C-08-143  
) Decision No. CR1809  
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**DECISION DISMISSING REQUEST  
FOR HEARING**

I dismiss the hearing request filed by the aggrieved party. I do so because the Local Coverage Determination (LCD) that he challenged has now been revised to cover the claim for Medicare reimbursement that was the basis for his hearing request. I am required to dismiss a hearing request challenging an LCD where a revision provides coverage for a procedure that was previously not covered and where the aggrieved party's claim is now covered under the revised LCD. 42 C.F.R. § 426.420(e)(1).

The aggrieved party filed a hearing request pursuant to 42 C.F.R. Part 426 to challenge an LCD made by Trailblazer Health Enterprises (Trailblazer). The procedure at issue consists of the performance of a nerve conduction study (NCS) with an NC-stat system in order to confirm the treating physician's diagnosis of diabetic neuropathy. It is asserted that coverage would be denied for the NCS using a device with fixed anatomic templates when performed without a concomitant needle electromyography (EMG or needle-EMG). *See* aggrieved party's Complaint at 3. The aggrieved party's treating physician states that, based on the LCD in issue, other physicians in his region have been denied payment for claims relating to NCS studies performed with the NC-stat system, and not the needle electromyography. A. Ex. 2. The NC-stat system is comprised of the NC-stat monitor, a stationary docking station used to download test data, disposable biosensors, and the onCall information system which receives the test data and generates a hard copy report deliverable by email or telefax. *See* aggrieved party's Complaint at 5-6. The aggrieved party concludes that the LCD is unreasonable in that it denies coverage for a medically necessary service. *Id.* at 1.

The aggrieved party's case was assigned to me for a hearing and a decision. By submission filed May 13, 2008, I received correspondence from Dr. Charles Haley, the Medicare Medical Director, advising me that the LCD had been revised. The LCD was revised to: 1) remove information related to non-coverage of tests performed with fixed anatomic templates and computer generated reports; 2) remove references to limitations in use of NCS without an accompanying EMG; and 3) remove the sentence referencing Medicare review of the medical record in instances where more than 25% of NCS are performed in the absence of concurrent electromyography. The Medicare Medical Director further states that Medicare interprets the LCD provision regarding the "25%" provision to mean:

. . . that the provider who determines that an EMG is not medically necessary may proceed with the nerve conduction test without subjecting the patient to a needle-EMG. Since the policy was issued, TrailBlazer has routinely allowed nerve conduction testing when performed without concomitant use of EMG.

Contractor's Rebuttal (Rebuttal), dated May 9, 2008, at 1.

This case is governed by regulations that are at 42 C.F.R. Part 426. 42 C.F.R. §§ 426.420(d) and (e) provide that, where a challenged LCD provision has been revised by the contractor, a copy of the revised LCD must be forwarded to the ALJ by the contractor, and the ALJ, if notice of the revision is received prior to the issuance of a decision, "must dismiss the complaint and inform the aggrieved party(ies) who sought the review that he or she or they receive individual claim review without the retired/withdrawn provision(s)." Further, 42 C.F.R. § 426.460(b)(1)(iii), which is incorporated by reference at 42 C.F.R. § 426.420(b), provides that "[i]f the aggrieved party who sought the review has not yet submitted a claim, the contractor adjudicates the claim without using the provision(s) of the LCD . . . ." Dr. Haley indicated that the aggrieved party's provider incorrectly interpreted the LCD provision at issue and did not file a claim on behalf of the aggrieved party because the provider believed the claim would be denied. Rebuttal at 1. Dr. Haley noted that, in fact, payments have been made previously for NCS without use of a needle-EMG. *Id.* However, Dr. Haley acknowledged that the language of the provision could reasonably cause confusion, which resulted in the determination to revise the LCD and related Article. *Id.*

