

July 28, 2004

The American Association for Homecare
625 Slaters Lane, Suite 200
Alexandria, VA 22314-1171

Secretary Tommy Thompson
Department of Health and Human Services
Food and Drug Administration
Division of Dockets Management
5630 Fishers Lane, Room 1061
Rockville, MD 20852-20201

Dear Mr. Thompson:

RE: Docket Number 2004S-0270

The American Association for Homecare (AAHomecare) appreciates the opportunity to comment on the Department of Health and Human Services' (HHS) and the Social Security Administration's (SSA) joint Report to Congress on the "Plan for the Transfer of Responsibility for Medicare Appeals," issued in the Federal Register on June 28.

AAHomecare's membership reflects a cross-section of the home care community, including national, regional, and local providers and suppliers. Our members provide home health services, durable medical equipment and supplies, home infusion and inhalation drug therapies, and rehabilitation and assistive technologies and services to individuals in their homes. With approximately 700 member companies at 3000 locations nationwide, AAHomecare and its members are committed to advancing the value and practice of quality health care services at home.

AAHomecare understands that the Medicare Modernization Act of 2003 mandates transfer of the appeals function as well as maintenance of independence from the Centers for Medicare and Medicaid Services (CMS). Our members, however, are concerned that this transfer out of the SSA Office of Hearings and Appeals could lead to pressure being applied to Administrative Law Judges (ALJ) to reach conclusions favored by HHS and CMS.

AAHomecare members have used the Medicare appeals process frequently and have had a remarkable record of success at the Administrative Law Judge level. The appeals process has brought a significant element of due process and fairness to the Medicare program.

We have a number of questions and concerns about the plan for transfer of Medicare appeals to HHS, as mandated by the Medicare Modernization Act. To begin with, we

request that HHS provide the affected public with the “joint strategy” being developed to enable SSA to complete its pending workload. When will this strategy be made public?

AAHomecare is concerned that the new hearing process will not be ready in a timely fashion. The SSA ALJs will complete all their pending Medicare appeals by September 30, 2005, while HHS will assume adjudicative authority on July 1, 2005. HHS, however, will not begin hiring and training ALJs and support staff until the second quarter of 2005. This would not appear to provide sufficient time for the process to be fully operative by next July 1, in turn leading to a backlog of cases going into the new system.

With regard to training of the ALJs, there must be a comprehensive initial and on-going training plan developed, implemented, and updated as laws and regulations change. Who will train the new specialized Medicare ALJs? What HHS and CMS laws, regulations, manual issuances, and guidelines will be used in training them? AAHomecare members find that ALJs currently rely almost exclusively on Medicare law and regulation in their decisions. We urge that this practice be continued and that ALJs not be pressured to give equal weight to internal CMS policies.

Using video-teleconferencing and obtaining expert witness testimony by telephone are positive developments, as long as providers and suppliers continue to have the right to an in-person hearing. The ability to challenge the government’s expert witnesses has regularly led to favorable decisions for our members. A video-teleconferencing option, however, could allow for a more effective and efficient use of limited provider, supplier, HHS, and ALJ financial and staff resources. It could lead to greater use of expert witnesses, and more physician involvement in the appeals process.

With regard to the number of Medicare ALJs, 50 judges would appear inadequate, with an average of only one per state. AAHomecare believes that reducing support staff from 4.5 to one ALJ to a four to one ratio will slow down the appeals process and make it extremely difficult for providers and supplies to obtain timely decisions. Although there is a 90 day time limit for conducting ALJ appeals, it can take providers and suppliers a number of months just to get an ALJ hearing scheduled. HHS must establish timeframes for scheduling as well as for issuing decisions.

On the issue of ALJ evaluations, who will develop performance standards? On what areas will ALJs be evaluated? Will the affected public have input into this process? How will HHS guard against performance evaluations being used as a tool to reassign, reduce in grade, or remove judges if HHS or CMS staff do not like the decisions issued by particular ALJs? HHS should also specify who will have the authority to dismiss cases, as well as the criteria for dismissal.

For informational purposes, we urge HHS to post ALJ decisions so that providers and suppliers as well as ALJs would have access to prior decisions. In the future HHS should consider whether prior decisions on specific patients where the circumstances are essentially the same should have precedential authority. As a general rule,

Administrative Law Judges should make independent objective decisions based on the particular circumstances of each case.

AAHomecare would welcome the opportunity to work with HHS and OHA as you develop additional policies and procedures to implement the transfer of the ALJs.

Sincerely yours,

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