IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

UNITED STATES OF AMERICA, *ex rel.* CHRISTINE RIBIK, *et al.*, **Plaintiffs,** **v.** **HCR MANORCARE, INC., *et al*.,** **Defendants.**	**1:09-cv-13 (CMH/TCB)**

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO QUASH AND PROTECTIVE ORDER BARRING RULE 45 DEPOSITION SUBPOENAS TO MEDICARE CONTRACTORS

I. PRELIMINARY STATEMENT

In its Motion to Quash and for a Protective Order (the "Motion"), the U.S. Department of Justice ("DOJ") seeks a ruling from this Court barring Defendants from taking depositions of four contractors (the "Medicare Contractors" or "Contractors") responsible for processing Medicare program claims. These Medicare Contractors processed Defendants' Medicare claims, including the claims at issue in this litigation, by applying government regulations and guidance in order to determine the validity of reimbursement claims. Defendants have consistently relied on these Medicare Contractors' payment determinations in the operations of its Medicare business. Defendants maintain that the payment determinations by the Medicare Contractors are significantly different from the determinations by the government's expert witness in this case, and seek deposition testimony from the Medicare Contractors to establish this element of their defense.

The DOJ argues that because Medicare Contractors act as agents of the Centers for Medicaid and Medicare Services ("CMS") they are not subject to a 30(b)(6) deposition without leave of court when a CMS employee has testified (or will at some point testify) at a 30(b)(6) deposition of CMS. The DOJ does not cite to a single case to support this position. Nor does the DOJ cite to a single False Claims Act ("FCA") case at all. Furthermore, DOJ omits from its pleading that it bears the burden to establish that the Defendants' subpoenas are oppressive or unduly burdensome, and also ignores statements in the cases it cited that the Federal Rules of Civil Procedure are to be construed liberally in favor of discovery, *Ameristar Jet Charter, Inc. v. Signal Composite, Inc.*, 244 F.3d 189, 192 (1st Cir. 2001), and it is not up to the DOJ to determine what discovery the Defendants need. *In Re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 174 (D.D.C. 2003).

To date, discovery in this matter has established that the DOJ's case is a one-legged stool, dependent entirely on the report of alleged expert Rebecca Clearwater, a non-independent and unqualified former physical therapist who earns all of her income from an employer who works exclusively as an agent of the government.[1] Clearwater made "reasonable and necessary" determinations about therapy provided to 180 former patients of Defendants selected from a biased sample by applying undefined interpretations of CMS regulations and guidance which exist nowhere in the real world. If when making her subjective, unverified and biased determinations, Clearwater did not interpret the regulations and guidance consistent with Medicare Contractors' real-world adjudication of Defendants' claims, then her alleged expert

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[1] Defendants submitted three expert reports stating that Clearwater, a former physical therapist, is not qualified to render clinical opinions about the reasonableness and necessity of occupational therapy or speech language pathology therapy. Clearwater conceded this fact by not responding to it in her rebuttal report.

opinions are both invalid and inadmissible, meaning this case is over.[2] *See United States ex rel. Wall v. Vista Hospice Care, Inc.*, No. 3:07-cv-604-M, 2016 WL 3449833, at *15, 18 n.134 (N.D. Tex. June 20, 2016) (granting defendants' motion to strike expert testimony regarding standards for hospice eligibility that were not supported by federal regulations and where expert claimed to be applying the standard of a third-party reviewer but later admitted that he did not know the specific protocols of various third-party reviewers whose standards he claimed to be applying) (attached as Exhibit 1).

Defendants have made it clear to the DOJ that they are seeking 30(b)(6) testimony from the Medicare Contractors to establish proof of the real-world adjudication of their claims – that is, the standards actually applied to the relevant claims at the time they were reviewed for payment by the organizations responsible for such adjudication. In its Motion, the DOJ has not established any undue burden; nor has it argued that Defendants failed to describe the topics with particularity, that the topics are irrelevant, or that the proposed testimony is privileged. Instead, the DOJ simply maintains, while ignoring the plain language of Federal Rule of Civil Procedure 30(b)(6), that it can block any such testimony by instead offering testimony from employees of CMS who have never interacted with Defendants with respect to claims adjudication. So to protect Clearwater's self-serving and invalid opinions, the DOJ seeks to deprive Defendants of establishing a record that contains the actual truth which is known to the Medicare Contractors. For these reasons, the Defendants respectfully request that the Motion be denied.

[2] The importance of this issue cannot be overstated. For example, Clearwater actually provided an opinion with respect to at least one patient in the sample that is contrary to an Administrative Law Judge's opinion about those exact claims. She also repeatedly noted in her report the absence of a physician's order for group therapy where the DOJ has conceded that no such requirement exists in any statute, regulation or guidance.

II. BACKGROUND ON THE CASE AND THIS DISCOVERY DISPUTE

This case involves allegations by the DOJ that Defendants submitted false or fraudulent claims to Medicare Part A for unnecessary or unreasonable rehabilitation therapy. The DOJ bears the burden of proof to establish the elements of its claims against Defendants at trial, and Defendants are entitled to test the allegations in discovery and discover information that supports their defenses. *See United States ex rel. Berge v. Bd. of Tr. of the Univ. of Ala.*, 104 F.3d 1453, 1462 (4th Cir. 1997) (plaintiff bears the burden to establish each and every element of a violation of the False Claims Act); Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to a party's claim or defense and proportional to the needs of the case.").

On October 20, 2016, Defendants served a Rule 30(b)(6) deposition notice on CMS. Motion at Exhibit 1. CMS, at its choosing, designated certain witnesses to testify as to the noticed topics and such depositions remain ongoing but are not completed. In addition, on December 23, 2016, HCR served Rule 45 and Rule 30(b)(6) deposition subpoenas on four Medicare Contractors. The DOJ objected to the subpoenas and claimed that the Defendants could only take the testimony from CMS. *See* Exhibit 2, December 30, 2016 letter from Jessica Weber to Eric Dubelier. The DOJ also objected to the subpoenas as requiring these non-party witnesses to travel more than 100 miles and failing to provide appropriate appearance and mileage fees. *Id*. Defendants tried but were unable to reach any compromise with the DOJ.

On January 17, 2017, Defendants re-served the Rule 45 and Rule 30(b)(6) deposition subpoenas on four Medicare Contractors, this time noticing the depositions for locations within 100 miles of the corporate headquarters of each Medicare Contractor, enclosing appropriate witness fee checks, and further narrowing the topics. After attempts at a negotiated compromise

failed because the DOJ refused to produce a 30(b)(6) witness for any of the Contractors, the DOJ filed its Motion.

III. APPLICABLE STANDARD

Federal Rule 26(b)(1) allows a party to obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). The Federal Rules are to be construed liberally in favor of discovery. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment."). While Rule 26(c) "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required," *Seattle Times Co. v. Rhinehard*, 467 U.S. 20, 36 (1984); *Hinkle v. City of Clarksburg*, *W. Va.*, 81 F.3d 416, 426 (4th Cir. 1996), protective orders "should be sparingly used and cautiously granted" with the moving party bearing the "heavy" burden to demonstrate good cause. *Baron Financial Corp. v. Natanzon*, 240 F.R.D. 200, 202 (D. Md. 2006) (*citing Medlin v. Andrew*, 113 F.R.D. 650, 653 (M.D.N.C. 1987) (the "burden of demonstrating good cause [for a protective order limiting discovery] is a heavy one")).

IV. THE DOJ HAS NOT MET ITS BURDEN FOR PROTECTION UNDER RULE 26(C) OR TO QUASH THE DEPOSITION SUBPOENAS TO MEDICARE CONTRACTORS

The straight-forward legal issue before the Court is whether the DOJ can foreclose relevant 30(b)(6) testimony from a Medicare Contractor and insist that Defendants instead

depose a CMS employee designated by the DOJ. The DOJ has not cited a single case that supports its sleight-of-hand in substituting a party for a non-party agent in order to preclude relevant discovery. Nor has the DOJ cited a single case holding that a Medicare Contractor is not subject to a 30(b)(6) deposition.

A. The Deposition Testimony is Relevant to Defendants' Defense

As a threshold matter, the DOJ concedes the relevance of the sought-after testimony. During the time period covered by the allegations in this case, Defendants filed claims for reimbursement or reimbursement review for the provision of Medicare Part A services to the Medicare Contractors named in the subpoenas the DOJ seeks to quash. *See* 42 U.S.C. §1395kk-1(a)(4) (setting forth the authorities of Medicare contractors). These contractors applied laws and regulations to adjudicate these claims, and any denial of a claim was subject by regulation to four additional levels of review (Qualified Independent Contract, Administrative Law Judge, Medicare Appeals Council, and U.S. District Court). *See* 42 U.S.C. § 1395kk-1, 1395ff. As part of this process, Defendants primarily interacted directly with the Medicare Contractors, not with CMS.[3] This ongoing process resulted in significant documentary and testimonial evidence of communications between Defendants and the Medicare Contractors regarding real-world claims adjudication. This evidence is critical to two fundamental issues in this litigation: (1) that DOJ's alleged expert did not follow the standard regulatory determinations applied to the Defendants' claims by Medicare Contractors during the relevant time period, and for that reason her alleged expert opinions are invalid and inadmissible and (2) that Defendants regularly and routinely

[3] CMS relies on Medicare contractors "to serve as the primary operational contact" between the Medicare program and health care providers. *What is a MAC*, Centers for Medicare & Medicaid Services (last modified Oct. 31, 2016), https://www.cms.gov/Medicare/Medicare-Contracting/Medicare-Administrative-Contractors/What-is-a-MAC.html (last visited Feb. 1, 2017) (attached as Exhibit 3).

followed payment determinations and guidance provided by the Medicare Contractors, and as such did not have the requisite intent required for a violation of the FCA.

B. The Deposition Subpoenas Issued to Medicare Contractors are Not Second Depositions of CMS under Rule 30

The plain language of Federal Rule of Civil Procedure 30(b)(6) states in relevant part that "[**t]he named organization** must . . . designate one or more . . . persons who consent to testify on its behalf . . ." (emphasis added). The organization must prepare the designee so that the designee can give complete, knowledgeable and binding answers on behalf of the organization. *United States v. Taylor*, 166 F.R.D. 356, 360-361 (M.D.N.C. 1996). An organization subject to a 30(b)(6) deposition "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by the party noticing the deposition and to prepare those persons in order that they can answer fully, completely, unevasively, the questions posed . . . as to the relevant subject matters." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006).

The "organizations" named in the subpoenas at issue are the four Medicare Contractors, not CMS. Thus, the subpoenas are plainly not seeking a second deposition of CMS. Defendants concede that the Medicare Contractors are engaged by CMS to process claims, but this does not negate the fact that Medicare Contractors are separate legal entities subject to a subpoena and surely have knowledge or evidence separate from that in the possession of CMS because of their routine contacts with the Defendants. While CMS has a contractual relationship with the Medicare Contractors, it does not own or operate these separate business entities. While the Medicare Contractors can designate whomever they want as their 30(b)(6) witnesses, it is inconceivable that the appropriate person to testify on behalf of each Medicare Contractor is an employee of CMS, not the Medicare Contractors themselves.

The DOJ has not cited a single case where Medicare Contractors were considered a part of CMS for purposes of deposition discovery such that a party could not depose both CMS and a Contractor. The cases cited in the Motion for the purpose of demonstrating agency merely establish certain governmental immunities may apply to government agents, not that parties cannot seek discovery directly from party agents.

C. The Deposition Topics in the Subpoenas to Medicare Contractors are Not Duplicative of the Topics in the CMS Notice

Although there is some overlap within the topics in the 30(b)(6) notice to CMS and the subpoena to the Medicare Contractors, Defendants have specifically advised the DOJ that they are seeking information regarding the practical application of the medical necessity requirements and documentation standards by Medicare Contractors (not by CMS), and specific communications between Medicare Contractors and Defendants. These topics are not within the scope of the CMS 30(b)(6) Notice.

Defendants acknowledge that the DOJ has produced a CMS employee to testify as to certain topics in Defendants' 30(b)(6) deposition notice to CMS relating to statutes, regulations and guidance pertaining to Medicare Part A reimbursement, and subsequently offered a second CMS employee to address certain additional topics which generally relate to the Medicare Contractors. In its Motion, the DOJ argues that CMS's 30(b)(6) designee Ms. Kranacs "provided extensive testimony on CMS regulations, policies, standards, and other guidance related to the SNF rehabilitation therapy benefit under Medicare Part A." Motion at 3. Defendants disagree with this assertion and note that ***only 24 hours*** prior to this deposition the DOJ informed Defendants that Ms. Kranacs would be unable to testify to the practical applications of the statutes, regulations and guidance for which DOJ had designated her. Motion

at Exhibit 2. Further, Ms. Kranacs repeatedly refused to answer questions about real-world application of statutes, regulations and guidance, or about any interactions between Defendants and CMS Contractors. Instead, Ms. Kranacs tried to answer almost every question by reading from a binder she brought to the deposition containing copies of statutes and regulations, and refused repeatedly to provide yes or no answers even when directed to do so. This deposition provided only testimony related to a parallel universe in which Ms. Kranacs operates having nothing to do with the actual process of adjudicating Defendants' claims. Notably, in preparing for her testimony, Ms. Kranacs had no discussion with any person at the Medicare Contractors and reviewed no documents relating to the Contractors' application of laws, regulations and guidance.

The DOJ has now designated another 30(b)(6) witness from CMS to testify regarding topics in Defendants' 30(b)(6) deposition notice that relate to the Medicare Contractors (Topic 5) and the substance and process by which CMS and its contractors review claims (Topic 6). The topics included in the 30(b)(6) deposition notice to CMS are:

- Topic 5: The Medicare Assistance Contractors ("MACs"), Fiscal Intermediaries ("FIs"), Zone Program Integrity Contractors ("ZPICs"), and other Medicare contractors that reviewed Defendants' skilled rehabilitation therapy claims submissions under Medicare Part A from October 1, 2006 through May 31, 2012.
- Topic 6: The substance of and processes by which CMS and its contractors review claims for reimbursement, including all phases of that process such as the standard of review, reconsideration, redetermination, and appeals, as well as ZPIC and CERT reviews, specific probe reviews of claims submitted by Defendants, and reviews of claims for patients identified in Appendix C to the United States' 5/27/16 Discovery Requests.

However, the topics noticed in subpoenas to the Medicare Contractors are:

- Topic 1: Any and all interactions, directions or communications between [the Medicare Contractor] and HCR ManorCare regarding coverage or reimbursement for SNF rehabilitation therapy and/or nursing services under Medicare Part A. This topic specifically includes laws, regulations, guidance, standards, and

policies relating to reasonable and necessary services, skilled services, documentation, group therapy, co-treatment and modalities.

- Topic 2: Any and all interactions, directions or communications between [the Medicare Contractor] and CMS regarding coverage or reimbursement for SNF rehabilitation therapy and/or nursing services under Medicare Part A. This topic specifically includes laws, regulations, guidance, standards, and policies relating to reasonable and necessary services, skilled services, documentation, group therapy, co-treatment and modalities.
- Topic 3: Laws, regulations, guidance, standards and policies [the Medicare Contractor] applied when reviewing HCR ManorCare's Medicare Part A claims for SNF rehabilitation therapy and/or nursing services and/or [the Medicare Contractor] provided to HCR ManorCare in connection with [its] review of those claims. This topic specifically includes laws, regulations, guidance, standards, and policies relating to reasonable and necessary services, skilled services, documentation, group therapy, co-treatment and modalities.

As noted above, and in the correspondence attached to the government's Motion, Defendants are seeking information regarding how Medicare Contractors adjudicated claims at the time of submission and the direct communications between those Medicare Contractors and the Defendants. These issues were not included in Defendants' 30(b)(6) Notice to CMS because CMS would not have direct knowledge of communications between the Medicare Contractors and Defendants.

D. The DOJ has Not Established an Undue Burden on its Behalf or that of the Medicare Contractors

The DOJ has not met its burden to show an undue burden on the DOJ, CMS, or the Medicare Contractors. The Motion states that the DOJ has gathered more than 14,000 documents from Medicare Contractors (that were separately in the possession of those contractors), demonstrating that Medicare Contractors maintain their own systems and documents separate from CMS. Motion at 9. Additionally, 30(b)(6) depositions of the Medicare Contractors actually save time, expense, and burden by relieving Defendants of taking (and DOJ attending) numerous depositions of individuals at each of the Medicare Contractors to obtain

relevant testimony. Further, in order to relieve any potential burden to CMS, Defendants offered to consider cancelling the deposition of CMS's designee on the topics related to the Medicare Contractors if Defendants could get the necessary testimony from the Medicare Contractors. *See* Motion at Exhibit 9, Email from E. Dubelier to D. Wiseman dated January 5, 2017 ("I am prepared to consider dropping the Handrigan deposition. But we need someone from the MACs / FIs who can testify to #5, #6 and the practical application of the medical necessity requirement and documentation.").

Notwithstanding, even if the testimony sought is duplicative of testimony also sought from CMS, the DOJ failed to satisfy its burden to establish good cause to limit Defendants from deposing both CMS and Medicare Contractors. Under the Federal Rules, DOJ cannot dictate the witnesses from whom Defendants can take testimony. *In Re Vitamins Antitrust Litig.*, 216 F.R.D. at 174 (the recognizing that the requesting party chooses what discovery it needs, not the responding party). Separate depositions of a CMS and its employees, agents, or contractors fall squarely within fundamental principles of civil discovery that liberally permit discovery depositions to test veracity and allow impeachment of inconsistent testimony. *See Hickman*, 329 U.S. at 507; *Ameristar Jet Charter*, 244 F.3d at 192. The DOJ can no more limit Defendants from taking the deposition of Medicare Contractors than can Defendants limit depositions of particular employees or former employees of Defendants because the DOJ can get the same information from Defendants. *See* Fed. R. Civ. P. 26(b)(1) and 30. The DOJ's request impermissibly limits Defendants' access to relevant discovery and allows the DOJ to dictate a single source from which relevant testimony can be taken.

E. Defendants' Conduct in Discovery Does Not Concede that Medicare Contractors are Part of CMS

Rather than addressing the underlying merits, the DOJ reverts to technicalities. The DOJ complains that Defendants sent the subpoenas the DOJ instead of directly to the Medicare Contractors. However, Defendants did so because in its Rule 26 Initial Disclosure, the United States identified the DOJ as the point of contact for the Medicare Contractors. *See* Exhibit 4, United States' Rule 26(a)(1) Disclosures. Further, when Defendants sought to serve document subpoenas on the Medicare Contractors, defense counsel asked the DOJ whether it would accept service of the subpoenas, and the DOJ instructed defense counsel to send the subpoenas to Jessica Weber, Trial Attorney at the DOJ.

The DOJ also suggests that Defendants "repeatedly recognized" that CMS contractors are an extension of CMS because Defendants included Medicare Contractors in its document requests to the United States. Motion at 8-9. But this was to insure that the DOJ would include these contractors in their document productions, not as a limitation on deposition discovery to be taken months later. Each of Defendants' document requests defines CMS and Medicare Contractors separately. Motion at Exhibit 6. The fact that Defendants included a broad definition of "you" to include "the Government of the United States of American, including its departments, agencies, employees, agents, contractors, servants, and/or representatives, including attorneys" is not an admission that CMS and Medicare Contractors are the same thing for purposes of depositions. *See id.* Moreover, Defendants subsequently issued separate document subpoenas directly to the Medicare Contractors. Motion at 9. In these document subpoenas, Defendants included "contractors" in the definition of CMS to ensure the productions by the contractors would be complete. Finally, at the DOJ's insistence, Defendants noticed the

depositions for locations near each Medicare Contractor's corporate headquarters and include separate witness checks.

V. CONCLUSION

For the reasons set forth herein, Defendants respectfully request that the Court deny the United States' Motion to Quash the subpoenas issued to the Medicare Contractors. To the extent that the Court determines that leave of Court was required to issue these subpoenas, while Defendants respectfully disagree that such leave was required, we request that the Court consider this pleading as seeking leave to take 30(b)(6) depositions from the CMS Contractors.

Dated: February 1, 2017

HCR MANORCARE, INC.

By Counsel

/s/ Kate Seikaly

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February 2017, the foregoing was filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

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