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Hospice False Claims Case Helps Clarify Law

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Following a trial in which a national hospice chain (***AseraCare)*** was initially found to have submitted false claims, the Court ordered a new trial. In making this rare order, the Court acknowledged that it had failed to provide the jury with proper instructions as to required findings for a false claim, including that the government must show an "objective falsehood," and not a mere lack of supporting evidence; and that a mere "difference of opinion" between doctors, without more, could not support a false claim finding. In the same order, the Court indicated it will reconsider granting summary judgment to the hospice and required the government to identify any evidence offered at trial that it believes would support a finding of "objective falsehood."

While most hospices are fortunate enough not to attract "false claims" scrutiny, most hospices are all too familiar with the inconsistent and unfair second-guessing of hospice eligibility by ***CMS*** and its contractors.

The filings in the AseraCare case lay out the government's hypocrisy, noting repeated statements from CMS that eligibility is a matter of "clinical judgment," that "decline" is not required, and that predicting life expectancy is not an "exact science."

CMS uses these statements to reject calls for objective eligibility criteria, leaving this important judgment to hospices and their medical directors. While this may be an understandable position, it is fairly cynical for the government to later second guess these subjective decisions.

By definition, patients with the same objective symptoms/characteristics will experience a life expectancy that is distributed along a normal curve, from short to long. Yet, time and again, the governments points to those at the long end, after the fact, and cries foul.

In the AseraCare case, we see all of the typical inconsistencies found in these matters, including government claims that are inconsistent with prior favorable ADR results or appeal decisions on the *same* claim, application of inconsistent eligibility criteria, and even the government's expert changing his opinion on a number of claims.

For these and other reasons, the work done in the AseraCare case provides a useful handbook for hospices responding to any type of eligibility challenge.

The real-time determination whether a patient has a life expectancy of six months or less is a complex assessment. If the government itself won't establish objective criteria, then hospices should not face criticism for these calls absent clear evidence of fraud, such as billing for services not rendered.

Whether in the context of false claims assessment or pre- or post- payment review, the government should show substantial deference to doctors called upon to make these decisions.

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