

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Bethany Hospice Services of Western Pennsylvania,	:	
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	:	
Petitioner	:	
	:	
v.	:	No. 576 C.D. 2013
	:	
Department of Public Welfare,	:	Argued: November 14, 2013
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge  
HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE ROBERT SIMPSON, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION  
BY JUDGE COHN JUBELIRER**

**FILED: December 9, 2013**

Bethany Hospice Services of Western Pennsylvania (Bethany) petitions for review of an Order of the Bureau of Hearings and Appeals (BHA) of the Department of Public Welfare (Department) that adopted the Recommendation of the Administrative Law Judge (ALJ) denying Bethany's appeal from a Retroactive Inpatient Denial by the Department's Bureau of Program Integrity, Division of

Program and Provider Compliance (Bureau).<sup>1</sup> The Bureau retroactively denied Medical Assistance (MA) payment for hospice services provided by Bethany to patient M.W. (Patient) from April 27, 2007, 6 months after Patient entered hospice, to August 31, 2008, on the basis that Bethany's records did not document a decline in Patient's condition. Bethany argues that Patient at all times met the relevant criteria for hospice care, which do not require a decline in a patient's condition while the patient is in hospice.

Eligibility for hospice care through the MA program is governed by Section 1130.21 of the Department's regulations, which provides, among other requirements, that a recipient must "[b]e certified as being terminally ill by a doctor of medicine or osteopathy under § 1130.22 (relating to duration of coverage)." 55 Pa. Code § 1130.21. Section 1130.22 provides for the duration of hospice coverage, stating in relevant part:

There is no limit on the available number of days of hospice coverage for a recipient who meets the eligibility requirements of § 1130.21 (relating to recipient eligibility requirements) and who is certified as being terminally ill in accordance with the following procedures:

(1) Basic requirement. For the first 60-day period of hospice coverage, the hospice obtains, within 2 calendar days after hospice care is initiated, a completed certification of terminal illness form signed by:

(i) The medical director of the hospice or the physician member of the hospice interdisciplinary group.

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<sup>1</sup> This case was argued seriatly with Bethany Hospice Services of Western Pennsylvania v. Department of Public Welfare, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth., No. 456 C.D. 2013, filed December 9, 2013).

(ii) The recipient's attending physician if the recipient has an attending physician.

....

(3) Subsequent periods. For each subsequent 60-day period, the hospice obtains, within 2 calendar days after the beginning of that period, a certification of terminal illness form completed and signed by the medical director of the hospice or the physician member of the hospice's interdisciplinary group.

(4) Certification form. The certification of terminal illness shall be carried out using the Department's certification of terminal illness form specified in Appendix A.

(5) Record retention. The hospice shall retain the certification statements described in this section for 4 years.

55 Pa. Code § 1130.22. The Department's regulations define "terminally ill" as "[a] recipient who has a medical prognosis that his life expectancy is 6 months or less." 55 Pa. Code § 1130.3.

In 2006, Patient, aged 87, resided in a long-term care facility. Patient had been diagnosed with dementia on January 31, 2004 and with paranoid schizophrenia and depression on December 28, 2004. On October 26, 2006, Bethany admitted Patient to its hospice program based on her end-stage dementia. When she was admitted to hospice, Patient required help with all her activities of daily living (e.g. feeding herself, dressing, bathing, etc.), had a Karnofsky performance scale<sup>2</sup> of 30%, a Functional Assessment Staging Scale score of 7, was non-verbal and non-ambulatory, incontinent, sustained frequent skin tears, and intermittently used oxygen. In addition, Patient had a history of chronic

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<sup>2</sup> Dorland's Medical Dictionary defines the Karnofsky performance scale as "a widely used performance scale, assigning scores ranging from 0 for a nonfunctional or dead patient to 100 for one with completely normal functioning." Dorland's Medical Dictionary 1602 (29<sup>th</sup> Ed.).

lymphocytic leukemia, hypertension, ischemic cardiomyopathy, and frequent urinary tract infections. (ALJ's Adjudication, Findings of Fact (FOF) ¶¶ 1-3.)

During her first 6 months in hospice, Patient remained incontinent and dependent for her activities of daily living. On December 15, 2006, Patient was admitted to the hospital for surgery on an infection in her ankle related to a fracture she suffered in 2004. Patient returned to the long-term care facility on December 21, 2006. After the surgery, Patient used oxygen more frequently. Patient received various medications for pain during her first 6 months in hospice. During this period Patient lost 11 pounds, going from 94 pounds at her admission to 83 pounds on April 12, 2007. Patient periodically developed skin tears, which typically healed without infection. (FOF ¶¶ 4-26.) Bethany recertified Patient for hospice care 12 times between her admission and August 11, 2008, at approximately two-month intervals. (FOF ¶¶ 15, 25, 27.) Bethany discharged Patient on December 17, 2008 because it determined she no longer met the criteria to remain in hospice due to an improved prognosis. (FOF ¶ 29.) The Department, through the MA program, paid for the services Bethany provided to Patient. (FOF ¶ 28.)

On February 10, 2009, the Bureau sent Bethany a letter indicating that a review had found a potential MA overpayment on Patient's behalf. (FOF ¶ 30.) In March and April 2009 Bethany responded to the Bureau's findings. (FOF ¶ 31.) On April 27, 2009, the Bureau sent Bethany a final review letter indicating it would retroactively deny payment for Patient's hospice care from April 27, 2007

through August 31, 2008,<sup>3</sup> on the grounds that Patient's medical records did not document medical necessity of continued hospice care.<sup>4</sup> (FOF ¶ 32.) Bethany appealed the Bureau's retroactive denial and hearings were held before the ALJ on November 30, 2012 and January 18, 2013. (FOF ¶ 34, 36.)

At the November 30, 2012 hearing, the Department clarified that it was seeking reimbursement for Patient's hospice care from April 27, 2007, through August 31, 2008, on the basis that Patient's medical records during the first 6 months of her hospice care, from October 26, 2006 through April 26, 2007, did not reflect a decline in Patient's medical condition. (Hr'g Tr. at 9-10, November 30, 2012, R.R. at 907a-08a.) Bethany had not realized that the Department was seeking reimbursement for the period in question due to a lack of documentation in only the first 6 months of Patient's hospice care. (Hr'g Tr. at 9-10, R.R. at 907a-08a.) Therefore, the ALJ continued the hearing to allow Bethany to prepare its case.

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<sup>3</sup> The ALJ's Adjudication states that the retrospective denial was for hospice treatment for Patient from October 11, 2006 through June 4, 2008. (FOF ¶ 32.) However, the Bureau's April 27, 2009 letter indicates the dates as April 27, 2007 through August 31, 2008, (Letter from Bureau to Bethany (April 27, 2009) Attachment C, R.R. at 135a), and these are the dates referred to by the parties at the hearings before the ALJ. The erroneous dates given in the ALJ's Adjudication are the dates for which the Bureau sought to retroactively deny in Bethany Hospice Services of Western Pennsylvania v. Department of Public Welfare, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth., No. 456 C.D. 2013, filed December 9, 2013).

<sup>4</sup> Bethany states that the amount at issue for this period is \$62,815.83. (Bethany Br. at 6 n.2.)

At the January 18, 2013 hearing, the Department presented the testimony of Mark Bates, M.D. Dr. Bates testified that, giving Bethany the benefit of the doubt, he did not dispute that Patient initially qualified for hospice care. (Hr'g Tr. at 8, January 18, 2013, R.R. at 919a.) Dr. Bates testified that the purpose of the recertification process required by the MA regulations is to ensure that a hospice patient is in a state of decline rather than in a stable state. (Hr'g Tr. at 8-9, R.R. at 919a-20a.) Dr. Bates testified that, except for the surgery that was unrelated to her dementia, Patient was in a chronic stable condition during her hospice care. (Hr'g Tr. at 10-12, R.R. at 921a-23a.) Because she was stable, rather than in a state of decline, she should have been discharged after 4 or 6 months. (Hr'g Tr. at 12-13, R.R. at 923a-24a.)

Bethany presented the testimony of Sam Angelo, Bethany's vice president and director of operations, and Margaret Kush, M.D., Bethany's medical director. Mr. Angelo testified that, in determining whether a patient is appropriate for hospice care, Bethany relies on guidelines (Hospice LCD)<sup>5</sup> provided by the Center for Medicare and Medicaid Services. (Hr'g Tr. at 14, R.R. at 925a.) Mr. Angelo testified that Patient met the criteria of the Hospice LCD throughout the time that Bethany provided hospice care services to her. (Hr'g Tr. at 14-15, R.R. at 925a-26a.)

Dr. Kush testified that, during the first 6 months of Patient's hospice care, her weight decreased significantly from 94 pounds to 83 pounds. (Hr'g Tr. at 23,

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<sup>5</sup> The guidelines Mr. Angelo referred to are the Local Coverage Determination for Hospice. (Hospice LCD, R.R. at 877a.)

R.R. at 934a.) In addition, she began sleeping more and was no longer able to sit in a wheelchair. (Hr'g Tr. at 23, R.R. at 934a.) These symptoms suggest that Patient's dementia was progressing and that Patient was declining. (Hr'g Tr. at 23-24, R.R. at 934a-35a.) On cross-examination, Dr. Kush agreed that many of the conditions that the hospice service addressed would also have been the responsibility of the long-term care facility in which Patient resided; she stated, however, that the goal of hospice was to provide additional services and make a patient more comfortable. (Hr'g Tr. at 36-38, R.R. at 947a-49a.)

The ALJ recommended denying Bethany's appeal. The ALJ acknowledged that Patient's baseline when she began hospice was very low, but that during her hospice care Patient did not decline significantly, and was instead in a chronic stable state. The ALJ held that Patient should, therefore, have been discharged after her first 6 months in hospice and should not have been recertified for hospice care after April 26, 2007. The BHA adopted the ALJ's recommendation without further analysis and Bethany now appeals to this Court.<sup>6</sup>

Before this Court, Bethany argues that the BHA erred in requiring Bethany to show a decline in Patient's condition because Patient met the MA regulatory

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<sup>6</sup> This Court's "review of the Department's final order is limited to determining whether constitutional rights were violated, whether an error of law was committed and whether the necessary findings of fact are supported by substantial evidence." Grane Hospice Care, Inc. v. Department of Public Welfare, 72 A.3d 322, 326 n.6 (Pa. Cmwlth. 2013).

requirements for Hospice, as well as the guidelines in the Hospice LCD at all applicable times.<sup>7</sup>

According to the Department's regulations, as set forth previously, the primary question at issue in determining whether a patient enrolled in hospice is eligible to continue receiving hospice care is whether the patient is terminally ill. In this case, as in Bethany Hospice Services of Western Pennsylvania v. Department of Public Welfare, \_\_\_ A.3d \_\_\_ (Pa. Cmwlth., No. 456 C.D. 2013, filed December 9, 2013), the Department has imposed an additional requirement that a hospice recipient show a decline in clinical status. In Bethany Hospice Services we rejected the retroactive imposition of such an unannounced standard. Id. at \_\_\_, slip op. at 9-10. For the reasons set forth in Bethany Hospice Services, we similarly reject the imposition of the "decline" standard in this case. Because the Department cited no other reason for denying Bethany's appeal, we reverse the Order of the BHA.

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**RENÉE COHN JUBELIRER, Judge**

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<sup>7</sup> At oral argument, the Department argued that Bethany waived the argument that the Department has imposed an additional requirement that a hospice provider show a decline in clinical status because Bethany raised this issue for the first time in its Reply Brief. However, this argument in Bethany's Reply Brief is fairly subsumed in Bethany's argument in its main Brief that Patient met the applicable eligibility guidelines and requirements for hospice eligibility. See Pa. R.A.P. 2116(a) (stating that a brief's statement of questions involved "will be deemed to include every subsidiary question fairly comprised therein").



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Department of Public Welfare,	:	
	:	
Respondent	:	

**ORDER**

**NOW**, December 9, 2013, the Order of the Department of Public Welfare in the above-captioned matter is hereby **REVERSED**.

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**RENÉE COHN JUBELIRER, Judge**