



## District Court Deals Blow to DOJ in False Claims Act Case

Alan C. Horowitz

Last week, the United States District Court for the Northern District of Alabama handed the Department of Justice (DOJ) a significant defeat by dismissing a False Claims Act (FCA) case against AseraCare, a national hospice company. The DOJ alleged that AseraCare had violated the FCA by knowingly submitting false claims to Medicare by certifying patients as eligible for hospice care where those patients did not meet the government's criteria for eligibility.<sup>1</sup> Section 1814(a) (7) of the Social Security Act requires that, in order to qualify for Medicare's hospice benefit, a physician must certify that a patient has a terminal illness. The Centers for Medicare and Medicaid Services (CMS) requires that to be eligible for Medicare coverage, "The certification must specify that the individual's prognosis is for a life expectancy of 6 months or less if the terminal illness runs its normal course."<sup>2</sup> As CMS has also noted, "Predicting life expectancy is not always exact," and the issue of patient eligibility lies at the crux of this case. *Id.*

In seeking damages of approximately \$200 million, DOJ based its case on the medical records of 123 patients. According to DOJ's medical expert, these patients' records lacked "clinical information and other documentation that support [their] medical prognosis," thereby rendering the claims "false."<sup>3</sup> AseraCare's medical experts, however, testified that the patients were indeed eligible for the hospice benefit. The Court found that the difference of opinion between the DOJ's medical expert and AseraCare's experts was insufficient, as a matter of law, to support an FCA violation. As Chief Judge Karon Owen Bowdre noted, "When two or more medical experts look at the same medical records and reach different conclusions about whether those medical records support the certifying physicians' COTIs [certifications of terminal illness], all that exists is a difference of opinion. This difference of opinion among experts regarding the patients' hospice eligibility alone is not enough to prove falsity, and the Government has failed to point the court to any objective evidence of falsity." (Emphasis in original.)<sup>4</sup>

Adding to the Government's difficulties in presenting a case based on differences in medical opinion, the Government's own medical expert changed some of his opinions during the case. The expert, who reviewed the medical records at issue in 2010 and 2013, found that his opinion regarding the eligibility of some patients had changed in the interval, although he claimed his conclusions as to both reviews were accurate. The expert's opinion changed, as he testified, because "Well, I was not the same physician in 2013 as I was in 2010."<sup>5</sup> Observing the obvious contradiction by DOJ's medical expert, Judge Bowdre stated, "If Dr. Liao can look at the same medical records of the same patient on two different occasions and come to different conclusions, yet not be wrong on either occasion, his contradiction of the certifying physician's clinical judgment *alone* cannot constitute sufficient evidence of falsity."<sup>6</sup>

<sup>1</sup> *United States ex rel. Paradise v. AseraCare*, 2:12-CV-245-KOB (N.D. Ala. March 31, 2016) available at <https://ecf.and.uscourts.gov/doc1/01914124528> ("AseraCare Order").

<sup>2</sup> 42 C.F.R. §418.22(b)(1); see also CMS Medicare Benefit Policy Manual, Chapter 9 – *Coverage of Hospice Services Under Hospital Insurance* available at: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/bp102c09.pdf> (last accessed on April 2, 2016) ("An individual is considered terminally ill if the medical prognosis is that the individual's life expectancy is 6 months or less if the illness runs its normal course.")

<sup>3</sup> *AseraCare Order* at 1.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.* at 5.

<sup>6</sup> *Id.*

While the only evidence the Government presented as proof that the claims were false was Dr. Liao's opinion, AseraCare presented testimony from its medical experts as well as the hospice physicians who certified the patients' eligibility for hospice. The Memorandum Opinion granting summary judgment for AseraCare and dismissing DOJ's case notes that, "The court finds that contradiction based on clinical judgment or opinion alone cannot constitute falsity under the FCA as a matter of law."<sup>7</sup>

This case stands for the proposition that in order to prove an FCA violation, the Government needs more than just the opinion of its own medical expert that patients did not meet the criteria for hospice eligibility. Such opinion testimony, standing against the treating physicians' certifications of hospice eligibility and expert testimony corroborating those certifications, creates nothing more than a subjective clinical disagreement, which is insufficient to establish objective falsity.

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<sup>7</sup> *Id.* at 7.

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