



Federal District Court Rules Government's Expert Witnesses Used Wrong Standard to Determine Whether Therapy Services Were Reimbursable Under Medicare Part A

W. Jerad Rissler

The United States District Court for the Southern District of Georgia recently issued a decision excluding expert opinions in a False Claims Act case because the experts applied the wrong standard for evaluation of the medical necessity of skilled therapy services in a Medicare Part A skilled nursing facility stay. As a result of the exclusion of the expert testimony, the district court granted summary judgment in favor of the FCA defendants.

The Allegations of False Claims

In April 2010, the relator, a former physical therapist for the rehabilitation therapy company, filed a complaint against the therapy company alleging that it billed Medicare for medically unnecessary skilled therapy services. U.S. ex rel. Lawson v. Aegis Therapies, Inc., Case 2:10-cv-00072-LGW-RSB, Doc. No. 162 at 3-4 (S.D. Ga. Mar. 31, 2015). (Please click [here](#)¹ to link to order.) The government intervened in March 2013 and filed its own complaint against the therapy company and the skilled nursing facility (SNF) that submitted the claims at issue. (Id. at 4.) Generally, the complaint alleged that the therapy company set goals for high intensity therapy and pressured therapists to deliver high intensity therapy without regard to medical necessity. (Id. at 4.)

Exclusion of the Testimony of the Government's Experts

The government's experts—a nurse and a physician—reviewed a sample of 30 patients and determined that 29 out of 30 received medically unnecessary therapy services. (Id. at 8.) The experts reviewed the patients' SNF and hospital records and "noted a 'pattern of unreasonable and unnecessary therapy services that are reflected in a pattern of beneficiaries receiving all three disciplines (physical therapy, occupational therapy, and speech therapy) at alarmingly high levels of intensity and duration upon return from the hospital.'" (Id. (quoting expert report).) The experts also claimed inconsistencies between the amount of therapy delivered and the amount of therapy needed based on the patients' clinical conditions as noted in their medical records. (Id. at 8-9.)

With respect to the standard for offering expert testimony in the Eleventh Circuit, the district court noted:

In the Eleventh Circuit, a party seeking to proffer expert testimony under Rule 702 must satisfy a three-part inquiry that evaluates whether:

- (1) the expert is qualified to testify competently regarding the matters he intends to address;
- (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and
- (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

(Id. at 12-13 (quoting United States v. Frazier, 387 F.3d 1244, 1260 (11th Cir. 2004).)

The standard set forth in CMS guidance for the medical necessity of skilled therapy services in a Part A SNF stay "is whether or not the services billed to the Government were provided 'with the

¹ <http://www.agg.com/files/uploads/Jesup%20Decision.pdf>.

expectation, based on the assessment of the resident’s restoration potential made by the physician, that the condition of the patient *will improve materially in a reasonable and generally predictable period of time.*” (*Id.* at 15-16 (quoting CMS RAI Manual v. 3.0, Ch. 3, 0-18).) However, the government’s experts used the standard “significant improvement” or “significant practical improvement,” rather than “material improvement.” (*Id.* at 16.)

The district court concluded that, in light of the CMS guidance, the appropriate standard by which to evaluate the Defendants’ claims was the “expectation of material improvement” standard. (*Id.* at 17.) The district court further concluded that the “significant improvement” standard used by the government’s experts was not equivalent to the “material improvement” standard used by CMS. (*Id.* at 18-19.) “Thus, Plaintiffs seek to proffer expert testimony based on a report that repeatedly uses (306 times) a standard of expected improvement that everyone agrees has a different meaning on its face than the applicable ‘material’ standard and also hails from the Medicare Part B regulations, which are not applicable here.” (*Id.* at 19.) The district court rejected the Government’s contention that the experts were not using the phrase “significant improvement” in its legal sense, but rather to convey the necessity under Part A for an improvement beyond *de minimis*. The district court concluded:

By repeatedly using a standard—either in its regulatory sense or in its ordinary sense—that is decidedly at odds with the actual governing standard, Plaintiffs’ experts’ analysis and conclusions rest upon repeated and erroneous evaluations of Defendants’ billing practices. By evaluating the instances of care under the ‘significant improvement’ standard, the experts analyze ‘the wrong problem and therefore do not assist the trier of fact to determine a fact in issue in this case.’ See Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1028 (11th Cir. 2014).

(*Id.* at 21.) The district court, therefore, excluded the expert testimony because it relied on a “significant improvement” standard rather than the applicable “material improvement” standard. (*Id.* at 23.)

Grant of Summary Judgment

The district court noted that in the absence of the excluded expert testimony, “there is no evidence in the record that a specific claim presented to the Government by Defendants was false-objectively or otherwise.” (*Id.* at 29.) The court noted that specific examples of alleged practices could not be tied to any residents for whom therapy services were billed to Medicare. (*Id.* at 29-30.) Thus, the government could not prove “falsity.” (*Id.* at 30.) The district court further concluded that the government’s evidence did not establish the requisite “knowledge” that false claims were being presented to the government. The district court concluded that Defendants’ implementation of “prudent business practices” was not a basis upon which to conclude knowledge of the presentation of false claims. (*Id.* at 31-33.) With respect to the government’s remaining claims of unjust enrichment and payment by mistake, the district court held that these claims were “purely derivative of the FCA claims,” and that “[b]ecause summary judgment was granted as to the FCA claims, summary judgment is due for these claims as well.” (*Id.* at 33-34.)

Conclusion

This decision is a valuable reminder to ensure that experts apply the appropriate standard when forming and articulating their opinions. Application of the wrong standard can result in an opinion that does not address the issues in the case, that is unhelpful and potentially misleading, and that may result in exclusion of the opinions from the case.

Authors and Contributors

W. Jerad Rissler

Of Counsel, Atlanta Office
404.873.8780
jerad.rissler@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit www.agg.com.

Atlanta Office

171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2015. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.