

MEMORANDUM

To: O&P Alliance
From: Peter Thomas and Ron Connelly
Date: September 19, 2016
Re: D.C. District Court Denies Stay of ALJ Delay Case

On September 19, 2016, the U.S. District Court for the District of Columbia declined to stay proceedings in the ALJ delay suit filed by the American Hospital Association (AHA) against the Secretary of Health and Human Services (HHS), Silvia Burwell. The court signaled strongly that it will likely order the Department of HHS to comply with the 90-day statutory deadline to decide Administrative Law Judge (ALJ) appeals, but stopped short of doing so in its opinion. Instead, it called for a status conference with the litigants to discuss the matter further.

The court relied, in part, on data generated from the inpatient rehabilitation hospital field to demonstrate the ALJ backlog was causing harm to the health and welfare of Medicare beneficiaries. A “friend of the court” brief, filed by the Fund for Access to Inpatient Rehabilitation (FAIR Fund), which is represented by the Powers Law Firm, was cited several times throughout the opinion. The court held that the Secretary of HHS is not making adequate progress toward solving the ALJ backlog. FAIR Fund serves as a common legal fund to address Medicare audits and appeals that impact inpatient rehabilitation hospital providers.

AHA filed suit in 2014 against the Secretary of HHS, seeking a writ of mandamus, which is an order directing a government official to comply with a duty. Here, the duty is to decide ALJ appeals within 90 days as required by the Medicare statute.¹ In December 2014, the court dismissed AHA’s suit.² The court believed at that time that the extensive delays in ALJ decisions should be addressed by HHS and Congress, not the courts. AHA appealed to the D.C. Circuit Court of Appeals, where the FAIR fund filed an *amicus curiae* (friend of the court) brief in support of AHA.

The D.C. Circuit reversed the district court. The D.C. Circuit held that AHA satisfied the core requirements for mandamus jurisdiction because hospitals have a clear right to ALJ decisions in 90 days; the Secretary has a clear duty to decide ALJ appeals in 90 days; and hospitals have no adequate alternative remedy other than mandamus.³ The D.C. Circuit noted

¹ 42 U.S.C. § 1395ff(d)(1)(A).

² *AHA v. Burwell*, 76 F. Supp. 3d 43 (D.D.C. 2014).

³ *AHA v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016).

that the ALJ backlog is having a real impact on human health and welfare because some providers are admitting fewer cases that are likely to be targeted by Recovery Audit Contractors (RACs). The D.C. Circuit remanded to the district court, however, to determine whether Congress and the Secretary are making “significant progress” toward solving the ALJ backlog.

The Secretary’s first action on remand was to request that the district court stay—delay—proceedings for seventeen months, until September 30, 2017, arguing that the agency’s initiatives and legislation pending in Congress would clear the backlog without judicial intervention. AHA opposed the stay, and the FAIR Fund filed another *amicus* brief, also opposing the stay. The theory was that the Secretary’s initiatives would actually result in an increase in the ALJ backlog unless Congress provides substantial additional funding, which is unlikely. The FAIR Fund’s data, which derived from nearly one fourth of reporting rehabilitation hospitals and units, demonstrated that IRFs win more than 80% of their appeals and have millions of dollars tied up in the ALJ backlog.

Although the FAIR Fund is focused on IRF care, its experience is equally applicable to orthotists and prosthetists, physicians, and all other providers who submit claims to the Medicare program across a wide variety of settings. The ultimate decision of the court in this case will apply equally to all providers and suppliers who serve Medicare patients.

On September 19, 2016, the district court denied the Secretary’s motion to stay.

Although the court did not formally decide whether to order the Secretary to comply with the deadline, the judge did weigh factors for and against the issuance of a mandamus order when analyzing whether to grant the stay. In other words, the judge was clear that the outcome of the motion would indicate whether or not he would grant the writ of mandamus. In the Secretary’s favor, he noted the intrusiveness of a writ of mandamus and the Secretary’s assurances that solving the backlog is a high priority. The court also cited Congress’s awareness of the ALJ delay.

Ultimately, the District Court determined that the factors in favor of a writ of mandamus outweighed the factors against. The court agreed with AHA that the Secretary’s current initiatives would not solve the ALJ backlog and would actually result in it growing over time. The court emphasized that “significant progress toward a solution cannot simply mean that things get worse more slowly than they would otherwise.” The court also faulted the Secretary for not exercising greater control over the RAC program.

The court concurred that Congress is unlikely to solve the backlog. The court pointed out that the House and Senate Budget Committees have refused to hold hearings on the President’s 2017 budget, which would provide significant additional funding for ALJs. The court also stated that lack of action on the AFIRM Act to date shows that this bill is unlikely to relieve the backlog in the near term.

Analysis

For all these reasons, the court denied the motion to stay, and at the same time, the court strongly implied that it will order HHS to comply with the ALJ deadline. The court stated, however, that it cannot simply waive a “magic wand” to eliminate the backlog. The court scheduled a status conference for October 3, 2016 “to discuss how to proceed.” We will attend that status conference and provide you with an update following that conference.

While this decision will not solve the ALJ backlog overnight, it is a very important decision that will place tremendous pressure on CMS to meaningfully address the over 750,000 cases it has pending at the Office of Medicare Hearings and Appeals. This means that O&P practitioners and facilities that have Medicare claims pending at OMHA will likely begin to see some relief from the lengthy delays in getting their ALJ appeals heard and decided. The question of when this will occur still remains, however. We will be closely monitoring this situation as developments occur.