IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

American Chiropractic Association, Inc., a non-profit corporation,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 98-2762 (JGP)**
Tommy G. Thompson, Secretary of Health and Human Services,	)	
Defendant.	)	

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff, American Chiropractic Association, Inc. ("ACA"), submits this supplemental memorandum in support of its cross-motion for summary judgment pursuant to the Court's orders of March 22, 2004 and May 26, 2004. For the reasons discussed herein, as well as in the complete set of briefs previously filed, ACA is entitled to summary judgment that: (1) the Medicare laws require that all Medicare patients be entitled to have access to licensed chiropractors for the treatment of manual manipulation of the spine to correct a subluxation; and (2) neither the Secretary, the Centers for Medicare and Medicaid Services (CMS)[1], nor any Medicare sponsored managed care organization ("MCO")[2] may purport to provide this mandated chiropractic service through non-chiropractors.

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[1] Formerly called the Health Care Financing Administration.

[2] The term MCO refers to a private insurance organization, such as health maintenance organization ("HMO"), competitive medical plan ("CMP") or Medicare + Choice organization ("M+CO"), that has contracted with the Defendant to provide Medicare benefits to senior citizens.

I. Background and Summary of Arguments

Since its founding in 1895, the profession of chiropractic has been targeted for extinction by the larger, competitive medical profession. Hostile battles were fought in each state legislature over chiropractic's efforts to be licensed. The medical profession lost every one of those battles. In 1962, the American Medical Association ("AMA") and its 1900 state, county and local affiliated societies, in alliance with national medical specialty societies and hospital groups, commenced what was described by the Seventh Circuit as a "lengthy, systematic, successful, and unlawful boycott" targeting the chiropractic profession for "containment" and "elimination." *See Wilk v. American Medical Ass'n*, 895 F.2d 352, 371 (7th Cir. 1990), *cert. den.*, 496 U.S. 927 (1990); 719 F.2d 207, 213 (7th Cir. 1983).

Despite the efforts of the AMA and the Defendant's predecessor (Department of Health, Education and Welfare ("HEW")),[3] Congress responded to the demands of senior citizens by adding chiropractic services to the Medicare program through the Social Security Amendments of 1972. Now, some thirty-two years later, the chiropractic community is fighting the actions and policies of the Defendant that attempt to nullify the laws of Congress by allowing MCOs to deny Medicare beneficiaries access to chiropractic services.

ACA's position is very simple – chiropractic services are services that are provided by licensed chiropractors. Congress intended to provide Medicare patients with access to licensed chiropractors so that they could receive the unique chiropractic service of manual manipulation of the spine to correct a subluxation. There is no provision in the Medicare laws that would

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[3] The medical physicians at the HEW were full participants in the illegal effort to extinguish the profession of chiropractic up to and including defrauding Congress in the effort to prevent the chiropractic benefit from being included in Medicare. (*See* Mem. of Points and Authorities in Support of Plaintiff's Mot. for Summ. J. at 4-5 (and Exhibits 2, 3 and 9 referenced therein) and Plaintiff's Mem. of Points and Authorities in Opposition to the Defendant's Mot. for Summ. J. at 3-5 (and Exhibits A, B, C and D referenced therein).)

allow the Secretary or its agents (*e.g.*, MCOs) to substitute lesser, non-equivalent services of other types of practitioners. By allowing Medicare sponsored MCOs to purport to provide "chiropractic services" through non-chiropractic providers such as medical doctors, orthopedic surgeons, osteopaths or physical therapists, the Secretary has failed to uphold the laws of the United States.

The service recited by 42 U.S.C. § 1395x(r)(5) – "manual manipulation of the spine to correct a subluxation" – describes a unique chiropractic technique. To date, the Secretary has not provided a single scrap of evidence to the contrary. The terminology chosen by Congress, particularly the use of the term "subluxation," is chiropractic terminology describing the very theory upon which chiropractic diagnosis and treatment is based. The legislative history and the facts and circumstances surrounding the passage of 42 U.S.C. § 1395x(r)(5) demonstrate that Congress understood and, more importantly, intended, that the treatment of manual manipulation of the spine to correct a subluxation would be provided only by licensed chiropractors.

ACA's position is <u>not</u> that non-chiropractic providers should be precluded from providing whatever services they provide, but that the services of non-chiropractic providers may only be offered in addition to, <u>not instead of</u>, the services of a chiropractor. For example, when a Medicare patient has lower back pain, a physical therapist may still provide a massage or assist in a stretching routine, an osteopath may still manipulate the muscles and tendons around a joint to improve blood flow, an orthopedic surgeon may still use traction or surgery to remove a disc, or a medical doctor may still prescribe a muscle relaxant or pain medication. However, since none of these providers manually manipulate the spine to correct a subluxation, the Medicare patient must have the option of being treated by a chiropractor to receive this service. This option must be the patient's option, not, as the Secretary's policies allow, the option of the MCO in which the patient is enrolled.

The Secretary argues that he has had a longstanding interpretation of 42 U.S.C. § 1395x(r)(5) that is entitled to deference pursuant to *Chevron U.S.A. v. Natural Resources Defense Counsel, Inc. et al.*, 467 U. S. 837, 104 S. Ct. 2778 (1984). The Secretary's reliance on *Chevron* is misplaced. *Chevron*-style deference is only allowed if the statute and legislative intent are ambiguous. Here, no such ambiguity exists. Furthermore, deference is only warranted when an agency sets forth a reasonable and permissible interpretation of a statute through its regulations, which have the full force and effect of law. Here, no such regulatory interpretation exists. Instead, the Secretary relies on an opinion letter, a report, and his arguments in this litigation. Such informal "interpretations" (*e.g.*, opinion letters, policy statements, agency manuals and reports) are not entitled to deference.

> 'Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking.' 'Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference.'

Christensen et al. v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000).

Moreover, the Secretary's informal interpretations do not represent a reasonable and permissible interpretation. Defendant's predecessor made it clear to Congress during and prior to the passage of 42 U.S.C. § 1395x(r)(5) that it and medical doctors believed chiropractic to be nothing more than an unscientific cult, and did not believe subluxations of the spine existed, nor that vertebrae could be manually manipulated. It is simply not possible that Congress intended that anyone other than licensed chiropractors would provide the treatment of manual manipulation of the spine to correct a subluxation.

Our Federal Courts have recognized the inherent danger in allowing an agency to interpret Congressional Acts under the circumstances presented in this case – where the

Defendant has been hostile from the start to the very idea of including chiropractors in the Medicare program. *See Cabell Huntington Hosp., Inc. v. Shalala, et al.*, 101 F.3d 984, 990 (4th Cir. 1996) ("We are mindful of the expertise of agencies charged with implementing statutory directives. We cannot, however, allow an agency, hostile from the start to the very idea of making the payments at issue, to rewrite the will of Congress.") citing *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2781-82.

II. Recent Developments

A. Posture of The Case

ACA's original complaint, filed in 1998, sought, among other things, a court order forcing the Secretary to prepare a report on the use of chiropractic services under Medicare that was supposed to have been submitted to Congress in 1994. As a result of that complaint, the Secretary finally complied with that Congressional mandate on April 12, 1999. That report showed a dramatic suppression of the chiropractic benefit in Medicare MCOs as compared to fee-for-service Medicare, where patients have direct access to chiropractors. (*See* Mem. of Points and Authorities in Support of Plaintiff's Mot. for Summ. J. at 10-11.)

On May 18, 1999, ACA filed its amended complaint, addressing issues brought to light by HHS' untimely report. The amended complaint contained five counts. After briefing on Defendant's Motion to Dismiss, Counts I and IV were dismissed and Counts II, III and V remained at issue.

In Count II of the amended complaint, ACA sought a retraction of Operational Policy Letter # 23 (OPL #23), in which the Secretary included physical therapists among those practitioners qualified to render the service of manual manipulation of the spine to correct a subluxation. After the summary judgment briefing was completed, the Secretary agreed to

amend OPL #23 to state that MCOs may not use physical therapists to provide manual manipulation of the spine to correct a subluxation.[4] As a result of the Secretary's compliance with that agreement, the parties entered into a Stipulation of Dismissal with respect to Count II on March 1, 2002.

However, the 2002 amendment to OPL #23 only addressed the issue of substituting physical therapists for chiropractors to deliver the treatment of manual manipulation of the spine to correct a subluxation. The amended OPL #23 still permits MCOs to illegally deny Medicare beneficiaries access to chiropractors by allowing MCOs to substitute the services of other non-chiropractic physicians for chiropractic services. The Secretary's endorsement of the illegal substitution of medical doctors and osteopaths, who are not educated or trained to properly diagnose and treat a subluxation via manual manipulation of the spine, must finally come to an end.

Count V of ACA's amended complaint seeks to remedy the affect of diverting capitated funds that have been misspent or otherwise diverted from chiropractors to medical doctors, osteopaths, physical therapists (up to March of 2002) and other non-chiropractor care providers.

B. Factual and Legal Developments

While ACA primarily relies on the facts and circumstances surrounding the passage of 42 U.S.C. §1395x(r)(5) in 1972, there are some recent developments further demonstrating that chiropractic is recognized as unique and unduplicated by other healing arts.

In January of 2002, President Bush signed into law H.R. 3447 – the Department of Veterans Affairs Health Care Programs Enhancement Act of 2001. The Act provided that all

[4] The fact that the Secretary was willing to amend OPL #23 in 2002 also contradicts his argument that the Defendant's "interpretation" of § 1395x(r)(5) has been "longstanding."

veterans enrolled in VA medical programs would be entitled to chiropractic services performed by licensed chiropractors. In July of 2003, the committee reported on the progress of the VA since that Act was signed into law and on the continuing need for chiropractic care. The House Committee stated:

> The Committee's previously expressed concerns continue regarding veterans who are enrolled in VA's health care system and who are unable to receive chiropractic care. VA has resisted authorizing this type of specialty care. The Committee has found that chiropractic care is an effective therapy in a number of instances, and can be less costly than other medical approaches to low back pain, back spasm, and other maladies of the spinal region, including health problems caused by the aging process and physical exertion.

(*See* Exhibit A, 2003 Committee Reports, July 10, 2003, at p. 4.) In passing that Act (and continuing to monitor and report on the VA's progress in implementing that Act), Congress recognized the need to provide our nation's veterans with chiropractic care. Obviously, if medical doctors and osteopaths were capable of providing chiropractic services, such as manual manipulation of the spine to correct a subluxation, there would have been no need to add chiropractic services to the VA.

Similarly, Congress directed the Secretary of Defense, with the assistance of an oversight advisory committee made up of representatives from chiropractic organizations, to evaluate the feasibility of introducing chiropractic care into the military. That report was issued in 2000 and, although that report failed to recommend adding chiropractic care to the military due to financial concerns, Congress was otherwise persuaded to do so. On October 30, 2000, Congress determined that the unique treatment offered by doctors of chiropractic was necessary for our nation's military personnel and was to be implemented in 2001. (See Exhibit B, Public Law 106-398.) Again, Congress recognized the need for chiropractic care in addition to the care already available to our military personnel.

Congress' most recent amendments to our nation's laws providing medical benefits for our nation's military and veterans reflect that Congress continues to recognize what it must have in 1972 – that medical doctors and osteopaths cannot provide chiropractic services because they do not receive the same education and training relating to the musculo-skeletal system that doctors of chiropractic receive. This fact was confirmed in a 2002 study conducted by the Journal of Bone and Joint Surgery ("JBJS"), a leading medical journal, that reported on a nationwide test, which found that the vast majority of recent medical school graduates failed to pass a basic competency exam on the musculo-skeletal system.[5] (*See* Exhibit C, Journal of Bone and Joint Surgery, Inc., 2002.) The study concluded that: "It is therefore reasonable to conclude that medical school preparation in musculo-skeletal medicine is inadequate." (*Id.*) This lack of basic knowledge of the musculo-skeletal system is in addition to the fact that no medical doctors or osteopaths receive any training on how to physically manipulate the spine to correct a subluxation.

III. Conclusion

In 1972, due to the demands of the voting public, Congress added the unique chiropractic treatment to the Social Security Act, in spite of the objections from the AMA and HEW, so that our nation's senior citizens could receive chiropractic care. Medical doctors, osteopaths and all of the other branches of organized medicine publicly ridiculed chiropractic as an unscientific cult. The AMA along with the medical leaders in HEW engaged in decades of systematic, and highly successful, illegal conduct in an effort to eliminate the practice of chiropractic. Based

[5] The 2002 study conducted by JBJS was a follow-up to the study that it conducted in 1998, where seventy (82 percent) of eighty-five medical school graduates from thirty-seven different schools failed to demonstrate basic competency on a validated examination of fundamental concepts relating to the musculo-skeletal system. (*See* Exhibit D, Journal of Bone and Joint Surgery, Inc., 1998.)

upon the facts and events before, during and for years after the Amendments to the Social Security Act in 1972, it is simply not possible to conclude that Congress intended for medical doctors and osteopaths (or other non-chiropractic health care providers) to provide the treatment set forth in 42 U.S.C. §1395x(r)(5) -- a treatment that, in fact, those medical doctors and osteopaths, thought to be medically impossible. Therefore, for all the reasons set forth herein, as well as in the complete briefing set forth on this issue in 2001, ACA's Motion for Summary Judgment should be granted and the Secretary should be ordered to comply with the will of Congress, and mandate that the services of licensed chiropractors be made available to all Medicare and Medicaid beneficiaries at the choice of those beneficiaries. ACA further asks for an Order mandating the Defendant to account for the capitated grants that were misdirected from their intended purpose of providing the chiropractic service.

Respectfully submitted,

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George P. McAndrews
Peter J. McAndrews
Gerald C. Willis
McAndrews, Held & Malloy, Ltd.
500 West Madison Street, 34th Floor
Chicago, Illinois 60661
(312) 775-8000

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Thomas R. Daly, D.C. Bar No. 386795
Matthew A. Rizzo, D.C. Bar No. 450697
Odin, Feldman & Pittleman, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2100

Attorneys for Plaintiff, American Chiropractic Association, Inc.