Dynamic Chiropractic
THE CHIROPRACTIC NEWS SOURCE
An MPN Media Publication

Print this Document!

Dynamic Chiropractic – October 8, 2002, Vol. 20, Issue 21

Is a Level Playing Field Too Much to Ask?

By James Edwards, DC

Four years ago, George McAndrews, formerly the lead attorney for chiropractic in the *Wilk et al. vs AMA et al.* litigation, filed a lawsuit on behalf of the ACA against the U.S. Department of Health and Human Services (HHS). Two years ago, the ACA joined with the Virginia Chiropractic Association, six brave and committed chiropractic doctors and 18 loyal and agitated patients, in a lawsuit against National Blue Cross/Blue Shield and Trigon.

After each of these filings, there was real excitement at the ACA and within the profession. While discrimination against chiropractors always existed, it was interesting to see how the level of discrimination seemed to intensify after we were successful in getting through the AMA CPT process and going from one chiropractic manipulation code to four. Finally, we were going to fight back.

We had not yet survived our first motion for dismissal, but we had a great deal of optimism and, most importantly, raising money was relatively easy. We would do a mailing and thousands of dollars would come our way. Now, four years into the litigations, we have already garnered significant benefits, but, naturally, fundraising is becoming more difficult. This should not be a surprise to anyone. No one promised a quick fix. In fact, I recall that Mr. McAndrews was asked in 1998 how long the suit against HHS would last. He responded that he didn't know, but indicated that he thought the *Wilk* case would last four years, and it went on for 12. Although we understand impatience by doctors in the field, financial support from this group remains level with past years. In fact, the number of doctors who have signed up on EZ Pay (automatic $100 monthly credit card deductions) has increased to 330.

When people tell me that they are getting impatient with the length of the lawsuits or their costs, I remind them why we got involved in the first place. Our focus groups of members and nonmembers have told us that many in the profession either have no understanding of the lawsuits or don't even know they were filed. The good news is that when I tell the story, the response is always positive. If you are one of those who hasn't heard the full story, let me take a few moments to explain both lawsuits and their extreme importance.

The HHS Lawsuit

We filed the lawsuit against HHS in 1998 for adopting a regulation that a federally approved managed care organization could use any provider, including a physical therapist, to provide the chiropractic-specific benefit of manual manipulation of the spine to correct a subluxation. Was it right that the medical profession, which had always ridiculed the subluxation, should now be reimbursed for "correcting a subluxation"? Was it right for a physical therapist to now get reimbursed for a service that Congress specifically intended in 1974 to be a chiropractic service?

The American Physical Therapy Association was so concerned about the outcome of our lawsuit that it submitted a brief (under penalty of perjury) that physical therapists have corrected the subluxation for years, but called it by another name. That position was as ridiculous as someone saying, "Yes, I perform brain surgery, but I call it clipping my nails."

The outcome of this suit is extremely important. If left unchallenged, the chiropractic profession would be squeezed out of Medicare. But this issue has implications beyond Medicare because more and more private pay and workers' compensation carriers are adopting the Medicare model. And finally, if we cannot preserve what is unique to this profession, the correcting of subluxations, we will have lost our identity.

The Blue Cross/Blue Shield (BCBS) Lawsuit

BCBS plans in recent years had instituted new discriminatory barriers against the chiropractic profession. Trigon Blue Cross/Blue Shield of Virginia provided an example of a particularly aggressive anti-chiropractic plan. Trigon established a $500 cap on spinal manipulation, and would pay for only one CPT code, even though more than one code was justified. Trigon paid doctors of chiropractic 60 percent of what they would have paid medical doctors for the same service, and they would not reimburse for CA services. In addition, wherever possible, they would steer patients away from chiropractic doctors.

You would expect that when confronted about these activities in legal briefs filed by our counsel, Trigon would come up with some explanation for these practices. Trigon's arrogance, however, is such that the company didn't even try to hide its disdain for the

chiropractic profession. Consider what Trigon acknowledged in its legal brief to the court:

- "Defendants (Trigon) admit that they pay limited-license providers (doctors of chiropractic and others) less than they pay medical doctors for some procedures that are billed under the same CPT code.
- "Some of the payments made to limited-license providers are less than the payments made to medical doctors under the same CPT code for several reasons.
- "Market forces factor into the determination of how much providers are paid and market demand has justified making some lower payments to limited-license practitioners, lower than those made to medical doctors for procedures billed under the same CPT code.
- "The procedure performed by a medical doctor under a particular CPT code often is not identical to the procedures performed by a limited-license provider under the same CPT code because the medical doctor has a higher degree of education, expertise, training, skill, and medical knowledge.
- "The condition treated by medical doctors can be different and can be more severe than the conditions treated by limited-license providers.
- "The applicable defendants pay limited-license providers, such as chiropractors, in accordance with the terms and conditions of the professional provider agreements, which the limited-license providers have voluntarily accepted and agreed to in order to participate in the defendants' networks."

When asked for verification or studies that show chiropractors have less education than medical doctors in the treatment of musculoskeletal conditions, Trigon had no proof. So why would a chiropractic doctor sign an agreement with Trigon? Simple: Doctors in Virginia sign the agreements because Trigon basically monopolizes the marketplace. A Virginia doctor of chiropractic basically has two choices: Sign the agreement or "wither on the vine."

A recent article in the *AMA News* discussed the good relationship that exists between Trigon and the medical profession. The headline read: "The Medical Society of Virginia Is One of Many that Helps Resolve Problems." The article began: "When Trigon Healthcare announced it wasn't going to recognize a certain coding extender, the Medical Society of Virginia physician practice advocate called company officials and reminded them that state law requires the insurer to recognize it. Trigon changed its policy."

Imagine: All of that was accomplished by a single phone call from the MSV, yet it takes a federal lawsuit when the chiropractic profession is involved.

Before filing our lawsuit against Trigon, representatives of the Virginia Chiropractic Association (VCA) tried to resolve this issue by phone. No one even bothered to return their calls. The VCA tried by letter, but received a convoluted response. And when the ACA and the VCA got together and met with Trigon's medical director and associates, Trigon stonewalled. One of the representatives acknowledged that one of the reasons they pay us less than others is because our doctors are willing to accept the unreasonable fee.

Benefits from the Lawsuits

All the reasons for initiating both lawsuits are as valid today as they were four years ago, and the cost is justifiable. It should be recalled that the *Wilk* suit was long and costly, but our doctors stuck it out and we prevailed. It is also worth noting that we have an advantage that *Wilk* didn't have at a similar stage: We have some specific successes to point to. Not only have we survived motions for dismissal in both suits, thereby acknowledging that we have standing (which, by the way, surprised many in the legal community), but we can already point to four positive benefits of the lawsuits:

- HHS reversed a policy that it had held since 1994 that permitted HMO managed care companies to use physical therapists to provide the chiropractic benefit: manual manipulation of the spine to correct a subluxation. No longer can a federally approved managed care company substitute a physical therapist for providing a service that only a chiropractic doctor can provide. Additionally, the policy reminded federal HMOs of their obligation to provide "the physician service of manual manipulation of the spine to correct a subluxation to all Medicare beneficiaries." Our lawsuit against HHS continues because the department continues to permit reimbursement to medical doctors and osteopathic doctors for providing a service that Congress intended to be done only by chiropractic doctors.
- National Blue Cross scheduled a meeting that included ACA leadership and the medical directors from all their plans, allowing an opportunity for both sides to speak frankly and openly about their differences. The result of this meeting was the establishment of a liaison program throughout the country, where in some states there have been tangible positive results. One thing is certain. Neither the meetings with the medical directors nor the liaison program would have occurred if the lawsuit had not been filed.
- National Blue Cross agreed to push for a chiropractic provision in its federal health plan for employees, which up to now contained none. A new "Basic Option" plan was adopted for federal employees that included a chiropractic provision. We know that 100,000 new contracts have been executed so far for the basic option plan. This adds an estimated 250,000 covered lives to the rolls of potential new chiropractic patients

under the federal plans. While the coverage isn't great and needs to be improved, it would never have been implemented if not for our discussions with them.

- The one other important benefit that has come from the lawsuits is professional unity. Think about it. When was the last time the chiropractic profession was so unified behind a specific cause? Every significant chiropractic organization has come out in support of the HHS lawsuit: the International Chiropractors Association; the World Chiropractic Alliance; the Congress of Chiropractic State Associations; the Federation of Chiropractic Licensing Boards; FCER; NCMIC; the National Association of Chiropractic Attorneys; the Association of Chiropractic Colleges; 46 state associations; 66 regional and/or district associations; the plaintiffs in the *Wilk* suit; the members of the *Wilk* Anti-Trust Fund; and the majority of the chiropractic colleges.

We haven't received a decision from the courts in either case, and yet we have already accomplished a great deal. And the potential is there for a positive verdict that will force a managed care company to stop discriminating against us. That would spread like wildfire throughout the country, and not only with the Blues. The ultimate prize is within our reach, but it doesn't come cheap, which is a way of introducing you to the last issue - fundraising.

The Cost of Litigation Is High

Ask Bill Gates: Litigation isn't cheap when you legally "lock horns" with the federal government. And at the same time, we are also fighting the powerful Blues! We are opposed by one of the largest law firms in the country in our lawsuit against HHS, and by very prominent firms representing the Blues. Mr. McAndrews has had to use as many as 14 attorneys and paralegals to match the resources of the opposition. We also face going back to court to compel Trigon to provide basic, discoverable information, and to pay for the depositions scheduled by both sides. To date, 37 depositions have been taken. We have deposed a number of Trigon people, including the former medical director, whose testimony is under seal. We have deposed representatives from the National Blue Cross/Blue Shield Association. We have also deposed representatives from the Medical Society of Virginia and the Virginia Physical Therapy Association. Trigon has deposed or is scheduled to depose all the plaintiffs in the suit, including 18 patients, 11 doctors and the ACA executive vice president.

The legal process continues to be very expensive because in each instance we have to have our team of attorneys present. The depositions have also required a great deal of travel, as they've been held in Richmond, Roanoke and McLean, Virginia, and also in Chicago.

Your Financial Support Is Essential

This law suit is about parity and a level playing field. It's not just about Trigon. If we are successful against Trigon, it will impact not only the other Blue plans, but also other managed care plans in the country. For too long, members of this profession have been treated as second-class citizens by the insurance industry. By extension, chiropractic patients have been treated as second-class citizens. Although they pay the same premium as other subscribers, barriers have been erected to keep them from receiving chiropractic treatment. If we win this lawsuit, these unfair policies will end. If we are not successful, our status becomes permanently established as limited practitioners, with limited ability to provide our unique type of treatment. Therefore, we must win!

Whether it's the lawsuit against the federal government, in which we are asking HHS to follow Congress' intent, or the lawsuit against the Blues, in which we seek parity, these two legal actions will define chiropractic for decades to come. Success is not optional and there is no "plan B." We must win both lawsuits. Your financial support is needed, and needed now! Call the ACA and tell them you want to enlist in these important battles by agreeing to contribute $100 per month for as long as it takes to win!

James Edwards,DC,ACA Chairman of the Board
Austin, Texas
jamesedwards@jamesedwards.com

Click **here** for more information about James Edwards, DC.

■