

1 Sally Hart, AZ Bar No. 013453
CENTER FOR MEDICARE ADVOCACY, INC.
2 2033 E. Speedway Blvd., Suite 200
Tucson, AZ 85719-4743
3 (520) 322-0126
shart@vanosteen.com

4 Gill Deford
CENTER FOR MEDICARE ADVOCACY, INC.
5 P.O. Box 350
Willimantic, CT 06226
6 (860) 456-7790
gdeford@medicareadvocacy.com

7 Attorneys for Plaintiffs
8

9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11
12 RONALD FOURNIER, HIC Number)
526-21-2195A, DELORES BERG, HIC) No. CV 08-2309-PHX-ROS
13 Number 376-32-7289A, THOMAS)
DICECCO, JR., HIC Number 169-32-4210A,) **SECOND AMENDED COMPLAINT**
14 and a class of persons similarly situated,) **FOR DECLARATORY AND**
15) **INJUNCTIVE RELIEF**
Plaintiffs,)
16)
v.)
17)
18 KATHLEEN SEBELIUS, Secretary of the)
Department of Health and Human Services,)
19) Class Action
Defendant.)
20)
21)

22 **I. INTRODUCTION**

23 1. This action commenced on December 18, 2008 when the original Plaintiff, Ron
24 Fournier, filed suit against the Secretary of Health and Human Services. A second Plaintiff,
25 Delores Berg joined in the first Amended Complaint filed on April 13, 2009. Now an additional
26 Plaintiff, Thomas DiCecco, Jr., joins the case in this Second Amended Complaint. The three
27
28

1 individual Plaintiffs seek to represent a nationwide class of plaintiffs in challenging Defendant's
2 restrictive dental coverage policy.

3 2. At issue is the Medicare administration's overly broad interpretation of a provision of
4 the Medicare statute that excludes coverage of routine dental care. The statutory exclusion of
5 routine services has been improperly expanded by Defendant Secretary to deny Plaintiffs
6 extraordinary dental services needed to treat serious medical conditions. Plaintiff Fournier
7 received chemotherapy and radiation treatments for tonsillar cancer that have virtually destroyed
8 his mouth and teeth, causing him to suffer constant pain, chronic infections of the mouth, and
9 aspiration pneumonia. Plaintiff Berg suffers from Sjogren's syndrome, a systemic, inflammatory
10 autoimmune disorder that eliminates saliva from the mouth and has caused her to experience
11 extensive tooth decay, loss, and gum infections. Plaintiff Di Cecco received an allogenic bone
12 marrow transplant for treatment of chronic myelogenous leukemia, which led to the development
13 of graft versus host disease (GVHD) that caused complicated dental problems. Although their
14 physicians prescribed restoration of Plaintiffs' dental structures for medical reasons, Defendant
15 denied Medicare coverage of the needed services based on its uniform nationwide policy.
16
17

18 II. JURISDICTION

19 3. This Court has jurisdiction pursuant to 42 U.S.C. §§ 1395w-22(g)(5), 1395ff(b)(1),
20 and 405(g). The amount in controversy requirement is met.
21

22 III. PARTIES

23 4. Plaintiff Ronald Fournier is a Medicare beneficiary residing in Phoenix, Arizona. His
24 requests for the extraction and restoration of his teeth for medical reasons have been wrongly
25 denied by Medicare. Plaintiff Fournier appealed the denial unsuccessfully through the
26
27
28

1 administrative appeal process. Plaintiff has notified his most recent Medicare Advantage plan,
2 Humana, that he is seeking judicial review.

3 5. Plaintiff Delores Berg is a Medicare beneficiary residing in Oro Valley, Arizona. Her
4 request for the restoration of her teeth and dentures for medical reasons has been wrongly denied
5 by Medicare. Plaintiff Berg appealed the denial unsuccessfully through the administrative
6 appeal process. Plaintiff has notified her Medicare Advantage plan, HealthNet of Arizona, that
7 she is seeking judicial review.
8

9 6. Plaintiff Thomas DiCecco, Jr., is a Medicare beneficiary residing in Glen Mills,
10 Pennsylvania. His request for payment of restorative dental services needed for medical reasons
11 was wrongly denied by Medicare. Plaintiff appealed the denial unsuccessfully through the
12 administrative appeal process.
13

14 7. Defendant Sebelius is the Secretary of Health and Human Services and as such is
15 responsible for the administration of the Medicare program through the Centers for Medicare &
16 Medicaid Services (CMS). She is sued in his official capacity.
17

18 IV. CLASS ALLEGATIONS

19 8. Pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, Plaintiffs
20 bring this suit both individually and on behalf of a nationwide class of persons similarly situated.
21 The class consists of persons who are or will be entitled to Medicare benefits, but are denied
22 Medicare coverage of extraordinary, medically related dental services.
23

24 V. LEGAL FRAMEWORK

25 9. Medicare is the federal program that provides health insurance to the aged and the
26 disabled. It was established by Congress in 1965 as Title XVIII of the Social Security Act,
27 codified at 42 U.S.C. § 1395 *et seq.* Part A of traditional Medicare covers institutional services
28

1 including hospital, skilled nursing facility, home health and hospice services. Part B of
2 traditional Medicare covers supplemental medical services such as physician services, therapy,
3 ambulance services, medical equipment, etc. Part C gives Medicare beneficiaries the option of
4 receiving these same services under various alternative delivery systems, including managed care
5 and private fee for service plans. Prescription drug coverage is available under Part D.
6

7 10. The Medicare statute specifically excludes coverage of certain items and services.

8 These are set out, particularly, at 42 U.S.C. § 1395y. In relevant parts that section states:

9 (a) Items or services specifically excluded. Notwithstanding any other
10 provision of this title . . . no payment may be made under Part A or Part B . . . for
any expenses incurred for items or services -- . . .

11 (7) where such expenses are for routine physical checkups,
12 eyeglasses . . . or eye examinations for the purpose of prescribing, fitting, or
13 changing eyeglasses, procedures performed (during the course of any eye
examination) to determine the refractive state of the eyes, hearing aids or
examinations therefore, or immunizations . . . ;

14 (8) where such expenses are for orthopedic shoes or other
15 supportive devices for the feet, other than shoes furnished pursuant to section
1861(s)(12) . . . ;

16 (9) where such expenses are for custodial care . . . ;

17 (10) where such expenses are for cosmetic surgery or are incurred
in connection therewith, except as required for the prompt repair of accidental
injury or for improvement of the functioning of a malformed body member;

18 (11) where such expenses constitute charges imposed by
19 immediate relatives of such individual or members of his household;

20 (12) *where such expenses are for services in connection with the*
care, treatment, filling, removal, or replacement of teeth or structures directly
supporting teeth, except that payment may be made under part A . . . in the case of
inpatient hospital services in connection with the provision of such dental services
if the individual, because of his underlying medical condition and clinical status
or because of the severity of the dental procedure, requires hospitalization in
connection with the provision of such services;

23 (13) where such expenses are for –

24 (A) the treatment of flat foot conditions and the
prescription of supportive devices therefore,

25 (B) the treatment of subluxations of the foot, or

26 (C) routine foot care (including the cutting or removal of
27 corns or calluses, the trimming of nails, and other routine hygienic
care)

28

1 42 U.S.C. § 1395y (emphasis added).

2
3 11. The legislative history of 42 U.S.C. § 1395y(a)(12) emphasizes that the statute
4 excludes coverage only of routine dental services. The Senate Report states:

5 Payments would not be made for routine physical examinations or for eyeglasses,
6 hearing aids, or the fitting expenses or other costs incurred in connection with
7 their purchase. The committee bill provides a specific exclusion of *routine* dental
8 care to make clear that the services of dental surgeons covered under the bill are
9 restricted to complex surgical procedures. Thus, . . . a routine annual or
10 semiannual checkup would not be covered. . . . Similarly, too, *routine* dental
11 treatment -- filling, removal, or replacement of teeth or treatment of structures
12 directly supporting teeth -- would not be covered.

13
14 S.Rep.No. 89-404 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 1989-90 (emphasis
15 added).

16 12. The CMS policy manual provides that dental services are covered when they are
17 “incident to and an integral part of” a covered medical service. *Medicare Benefits Policy*
18 *Manual* (“MBPM”), Ch. 15 – Covered Medical and Other Health Services, § 150, and Ch. 16 –
19 General Exclusions from Coverage, § 140.

20 13. The CMS policy manual sets out examples of dental services that are covered by
21 Medicare, as follows:

22 a. The reconstruction of a ridge performed at the same time and as
23 the result of surgical removal of a tumor is covered by Medicare, unless the
24 primary purpose of the construction of the ridge is to prepare the mouth for
25 dentures when it is not covered.

26 MBPM, Ch. 15, § 150, Ch. 16, § 140.

27 b. The wiring of teeth is covered if it is done in connection with
28 the reduction of a jaw fracture.

Id.

c. The extraction of teeth to prepare the jaw for radiation
treatment of neoplastic disease is covered, with an admission that this policy is an

1 exception to the requirement that the procedure be “incident to and an integral
2 part of a covered procedure or service.” It is an exception because the dentist is
3 not the physician who administers the radiation treatment, e.g., a radiologist.

4 *Id.*

5 VI. STATEMENT OF FACTS

6 Plaintiff Ronald Fournier

7 14. Plaintiff Fournier was diagnosed in 2003 with squamous cell cancer of his right
8 tonsil that had metastasized to his right neck nodes. He was initially treated with chemotherapy
9 and radiation that was completed in 2004.

10 15. Plaintiff’s cancer recurred, and it was necessary for him to receive another course of
11 chemotherapy and radiation treatment that was completed in June 2005.

12 16. Radiation and chemotherapy predictably result in mucositis, altered salivary gland
13 function, and risk of mucosal infection. Pamela J. Hancock, Joel B. Epstein & Georgia Robins
14 Sadler, *Oral and Dental Management Related to Radiation Therapy for Head and Neck Cancer*,
15 69 J. Can. Dental Assn. 585 (2003). Mucositis is an “inflammation and ulceration of the oral
16 mucosa,” which together with xerostomia (dry mouth) increases susceptibility to infection. *Id.*
17 at 586-587. Radiation therapy can also cause fibrosis and changes in the bone of teeth, jaws, and
18 surrounding tissues. *Id.* at 585-587.

19 17. As a direct result of the chemotherapy and radiation treatments he received for his
20 tonsillar cancer, Plaintiff suffered severe damage to his mouth and teeth. He experiences
21 xerostomia, a dry mouth, and has difficulty opening the mouth. His teeth are decayed and
22 broken off at gum level, and he continues to suffer pain and numerous dental infections. Plaintiff
23 was hospitalized and continues to be at risk for aspiration pneumonia. He cannot eat regular
24 food, but survives on liquid nutrition.
25
26
27
28

1 First Denial: Pacificare/Secure Horizons

2 18. Plaintiff's oral surgeon, Dr. Corwin Martin, requested prior authorization for
3 treatment from his Medicare Advantage Organization, Pacificare/Secure Horizons. Dr. Martin
4 prescribed extractions of all 21 of Plaintiff's teeth, in conjunction with hyperbaric oxygen
5 (HBO) therapy.
6

7 19. Pacificare/Secure Horizons denied the request, stating that extraction of teeth is only
8 covered for beneficiaries undergoing transplants, radiation for cancer, or emergency treatment of
9 injuries to the jawbone or surrounding tissues.

10 20. Redetermination of this denial by the Medicare Advantage plan was requested, and
11 on August 27, 2007 Pacificare/Secure Horizons affirmed its denial of coverage. The
12 Redetermination decision stated that the Plaintiff's situation did not meet the criteria set out in a
13 Medicare National Coverage Determination (NCD).
14

15 21. Reconsideration by MAXIMUS Federal Services was requested, and MAXIMUS
16 affirmed the denial decisions of Pacificare/Secure Horizons. The Reconsideration decision
17 stated that Medicare policy only allows coverage of dental extractions to prepare the jaw for
18 radiation treatments.
19

20 22. Plaintiff then requested an ALJ hearing. Extensive and undisputed evidence was
21 introduced at the ALJ hearing that Plaintiff Fournier's need for a full mouth extraction with HBO
22 therapy was caused by the chemo/radiation therapy treatments he had received for his tonsillar
23 cancer.
24

25 23. At the ALJ hearing two letters were submitted by Dr. Corwin Martin explaining his
26 recommended plan of care for Plaintiff. A letter from Lee Raddatz, DDS, states that Plaintiff's
27 acute peripheral arterial insufficiency is associated with prior head and neck radiation, and
28

1 describes the use of HBO therapy for peripheral arterial insufficiency. Dr. Robert Gin, who
2 initially treated Plaintiff with chemotherapy and radiation treatments, described the changed
3 condition of his teeth between 2003, before the chemo/radiation treatments, and afterwards in
4 2007 when the teeth were dying. A letter from another physician, Dr. Patrick Miller, also
5 indicated that Plaintiff's dental condition was caused by his chemotherapy and radiation
6 treatments. There was no evidence to the contrary.
7

8 24. The ALJ found that "the requested extractions are needed to remedy the results of the
9 prior cancer treatments"

10 25. Uncontradicted evidence was also offered that Plaintiff has been hospitalized with
11 pneumonia brought on by his damaged teeth, and that the condition of his teeth is likely to cause
12 further pneumonia in the future. Letter of September 27, 2007 from Dr. Khaled M. Saleh.
13

14 26. The evidence additionally showed that Plaintiff suffers on an ongoing basis from
15 recurrent infections and pain resulting from the poor condition of his teeth. Letter of November
16 13, 2007 from Dr. Corwin D. Martin; letter of December 3, 2007 from Appellant Fournier.
17

18 27. In his Decision, the ALJ ruled that the extractions requested to treat conditions
19 resulting from the chemo/radiation treatment Plaintiff received for cancer are "not a covered
20 service under Medicare."

21 28. The ALJ relied on the language of the CMS policy manual, holding that the
22 extractions could be covered only if they had been needed "'to prepare the jaw for radiation
23 treatment of cancer . . . ' as provided in accordance with the Medicare Benefit Policy Manual-
24 CMS Publication 100-02, Chapter 15, Section 140 [sic]." The ALJ also upheld the denial of
25 HBO therapy, based on his ruling that the extraction of Plaintiff's teeth is not a covered benefit.
26
27
28

1 29. Plaintiff requested review of the adverse ALJ decision by the Medicare Appeals
2 Council MAC). On May 13, 2008 the MAC denied the request for review.

3 30. The MAC decision stated that the ALJ was required to give substantial deference to
4 Medicare coverage guidelines, “Medicare coverage policy, as set forth in the MBPM,” and was
5 bound by the NCD, “as set forth in the NCD Manual (CMS Pub. 100-3), § 20.29.” The MAC
6 did not address the arguments made by Plaintiff that the ALJ misinterpreted the provisions of the
7 Medicare coverage guidelines, or whether the ALJ correctly applied the NCD.
8

9 Second Denial: Humana

10 31. On March 1, 2008, Plaintiff Fournier changed his Medicare health maintenance
11 organization from Pacificare/Secure Horizons to another Medicare Advantage plan, Humana.
12

13 32. Plaintiff’s new, primary care physician through Humana is Dr. John Williams. He
14 identified Plaintiff’s radionecrosis and consequent need for extensive dental services.

15 33. Dr. Williams was unable to locate an oral surgeon who would provide the dental
16 services needed by Plaintiff under the Humana Medicare plan.

17 34. Eventually Plaintiff found Dr. Moussaud Eftekhari, D.D.S., who agreed to provide
18 him with dental services. Dr. Eftekhari prepared a plan of care including both extractions and
19 reconstructive work.
20

21 35. Initially, Dr. Eftekhari extracted four of Plaintiff’s teeth.

22 36. By notice dated September 7, 2008 Plaintiff was informed that Humana denied
23 coverage of the dental extractions. The reason set out was “[d]ental services not related to an
24 accidental injury are not covered.”
25

26 37. By notice dated September 23, 2008, Plaintiff was informed that Humana denied
27 further dental services requested by Dr. Eftekhari. The reason set out was “under Medicare
28

1 guidelines, routine dental care such as cleanings, fillings, extractions, dentures and dental
2 implants are not covered under Medicare benefits. One exception is dental services limited to
3 the extraction of teeth to prepare the jaw for radiation treatments of neoplastic cancer disease.”

4
5 38. On October 9, 2008, Plaintiff filed a request for reconsideration of the Humana
6 denials of September 7 and 23, 2008, through his appointed attorney. Included with the appeal
7 letter were letters from five doctors supporting the need for the extraordinary dental services
8 required by Plaintiff as a result of the radiation therapy he had received for his cancer. The
9 appeal letter showed that the damage to Plaintiff’s mouth and teeth causes him ongoing pain and
10 infection, and presents a threat to his overall health.

11
12 39. Humana did not respond to the requests for reconsideration filed by Plaintiff’s
13 Plaintiff’s attorney within the 30 days mandated by the federal regulations. 42 C.F.R. §
14 422.590(a).

15 40. By notice dated November 12, 2008, Humana sent Plaintiff a third initial notice of
16 denial of requested dental services. Plaintiff’s attorney filed another request for reconsideration
17 in response to this duplicate denial notice.

18
19 41. By letter of November 20, 2008, Humana sent Plaintiff’s attorney a letter stating that
20 it could not respond to the request for reconsideration until a “Provider Reconsideration Waiver”
21 form was completed and submitted. Because Plaintiff’s attorney is not a provider, Plaintiff’s
22 attorney wrote back to Humana explaining its mistake. Plaintiff’s attorney further advised
23 Humana that it was then almost one month late in making a reconsideration decision on coverage
24 of the urgently needed dental services.

25
26 42. By letter of November 21, 2008, Humana responded to Plaintiff’s request for
27 reconsideration. The letter stated “Humana upheld your request for services because according
28

1 to an internal medical review your request for dental extractions does not meet the Centers for
2 Medicare and Medicaid (CMS) criteria and is not covered under Medicare or Mr. Fournier’s
3 Humana plan.” Despite the fact that this sentence begins by stating that the request for services
4 is “upheld,” the rest of the sentence states that the reconsideration was actually denied by
5 Humana. Presumably, the request for reconsideration of authorization for reconstructive work is
6 also included in this denial, although the notice mistakenly refers only to coverage of extractions.
7

8 43. The next stage in the administrative appeal process was automatic reconsideration by
9 Maximus CHDR, the Medicare Independent Review Entity (IRE). On January 6, 2009 and,
10 curiously, again on April 6, 2009, MAXIMUS affirmed the denial of Plaintiff’s request for
11 dental services. Since this IRE, as well as an Administrative Law Judge and the Medicare
12 Appeals Council, had previously denied Plaintiff’s right to the dental services he urgently needs,
13 (paragraphs 20–29, *supra*.) it is to be expected that further administrative appeals in this case
14 would be futile.
15

16 44. Plaintiff Fournier requested an ALJ hearing with respect to his Humana appeal prior
17 to April 22, 2009, and the ALJ hearing was held on May 22, 2009. Although the Medicare
18 regulations require that a decision be issued within 90 days of the receipt of a request for a
19 hearing, 42 C.F.R. § 405.1046(d), Plaintiff had received no hearing decision by October, 6, 2009.
20

21 Plaintiff Delores Berg

22 45. Plaintiff Berg was diagnosed with Sjogren’s syndrome or disease in 2003.
23 She also suffers from the related autoimmune disorders of Raynaud’s disease, limited
24 Scleroderma, and Hypoththyroidism. In addition she has experienced two heart attacks, with
25 heightened risk of infection that might travel to her heart.
26
27
28

1 46. Sjogren’s syndrome is a multisystem inflammatory disorder of the exocrine glands,
2 that comprises the salivary output. As a result, the patient is at risk of developing oral diseases,
3 including dental caries, oral candidiasis, and allergic musositis. “The management of Sjogren’s
4 syndrome in dental practice,” Journal of the American Dental Association, Vol. 132, no. 10,
5 1409 -1417.
6

7 47. As a result of her disease Plaintiff Berg lost the saliva in her mouth, and her teeth
8 deteriorated. She experienced sore gums and gingivitis, and her teeth began to break off. Her
9 ability to chew and swallow was impaired. These serious oral problems posed a risk to her
10 overall health.

11 48. Plaintiff’s dentist, Dr. Steven S. Swidler, prepared a treatment plan, which was
12 submitted to her Medicare health plan, HealthNet.
13

14 49. On March 3, 2008, HealthNet denied coverage of the services requested for Plaintiff
15 by Dr. Swidler.¹ Plaintiff requested a reconsideration by HealthNet, and by letter of April 16,
16 2008, Health Net affirmed its initial denial of coverage.

17 50. Plaintiff Berg appealed the HealthNet denial to the next level, reconsideration by
18 MAXIMUS. On May 15, 2008 MAXIMUS issued a decision upholding the HealthNet denial.
19 The decision stated, “Medicare will not pay for items and servicers involving the care, treatment,
20 filling, removal or replacement of teeth or structures directly supporting the teeth,” citing the
21 Medicare statute, regulations, and policy manual provisions.
22

23 51. Plaintiff further appealed to the administrative hearing level. On November 13,
24 2008, the ALJ issued his decision upholding the earlier denials of coverage. He stated, “Pursuant
25

26
27 ¹ Curiously, the HealthNet denial notice referred only to the portion of the treatment plan
28 in her claim throughout the administrative appeal process.

1 to the Act and regulations, “items and services in connection with the care, treatment, filling,
2 removal, or replacement of teeth or structures directly supporting the teeth are not covered.”

3 52. Plaintiff Berg further appealed the denial of her claim to the MAC, the last level in
4 the Medicare administrative appeals process. On March 27, 2009 the MAC denied her appeal. It
5 stated, “In general, dental services are excluded from Medicare. Services performed in
6 connection with the care, treatment, filling, removal, or replacement of teeth or structures
7 directly supporting teeth are not covered and, to the extent coverage is provided, it is only under
8 limited circumstances not applicable to this case.”

9
10 53. During the year in which Plaintiff Berg was pursuing the Medicare appeals process,
11 her dental condition continued to worsen. It was necessary to begin the treatment plan, and she
12 paid and continues to pay for a portion of the needed services as she receives them.

13
14 Plaintiff Thomas DiCecco, Jr.

15 54. Plaintiff DiCecco received an allogeneic bone marrow transplant to treat his chronic
16 myelogenous leukemia in January, 1996, and donor lymphocyte infusion in June, 1999. These
17 treatments caused the common complication of chronic graft versus host disease (GVHD), and
18 essentially ended the production of saliva in his mouth.

19
20 55. As a result, Plaintiff DiCecco’s gums receded, exposing sensitive areas that resulted
21 in infection and decay. His teeth began to crack off at their roots, and his ability to eat was
22 harmed.

23 56. Plaintiff’s physicians found that the deterioration of his teeth and gums could
24 exacerbate his chronic GVHD, and posed a threat to his overall health. They prescribed repair
25 and treatment of his severe dental problems as part of the standard of care for a transplant patient
26 such as Plaintiff DiCecco.
27
28

1 57. Plaintiff DiCecco received the prescribed dental services in April through June,
2 2008. A claim for coverage of these services was submitted to the Medicare Part B contractor.

3 58. The Medicare Part B contractor denied payment for Plaintiff's dental services, and
4 Plaintiff appealed the decision to the next level of administrative review.
5

6 59. On December 29, 2008 the Medicare Qualified Independent Contractor denied
7 Plaintiff's appeal at the reconsideration level. Plaintiff requested an appeal to the ALJ hearing
8 stage.

9 60. On May 27, 2009 the Medicare ALJ issued an unfavorable decision in Plaintiff's
10 appeal. He found that the record "demonstrates that without the dental services at issue, the
11 beneficiary would be at serious risk of odontogenic infection and subsequent tooth loss, which
12 would exacerbate the beneficiary's chronic graft-versus-host disease." He further found that the
13 medical need for the dental services is well documented. Nevertheless the ALJ held that
14 Plaintiff's services are not covered by Medicare because they do not fall into the limited
15 exceptions to the general Medicare exclusion of dental services. Plaintiff requested a review of
16 the unfavorable decision to the MAC.
17

18 61. A MAC decision adopting the ALJ's unfavorable decision in Plaintiff's case was
19 issued on August 18, 2009. The MAC decision acknowledged that the need for dental services
20 was provoked by Plaintiff's medical condition, and that the services were required to prevent
21 subsequent infections that could exacerbate his GVHD as well as to prevent further tooth decay
22 and loss. Nevertheless, the MAC held that Plaintiff's services did not fall within an exception to
23 the Medicare exclusion of dental services because they were not performed at the same time and
24 by the same dentist as Plaintiff's treatments for his covered medical condition.
25
26
27
28

1 VII. INADEQUACY OF REMEDY AT LAW

2 62. Plaintiff Fournier is presently suffering irreparable injury that will continue in the
3 future by reason of the Defendant’s actions complained of herein. Plaintiffs have no adequate
4 remedy at law. Only the declaratory and injunctive relief that this Court can provide will fully
5 redress the wrongs done to Plaintiffs.
6

7 VIII. FIRST CAUSE OF ACTION:
8 VIOLATION OF MEDICARE STATUTE

9 63. Defendant’s refusal to cover Plaintiffs’ extraordinary, medically-related dental
10 services violates the Medicare statute, which excludes only coverage of routine dental care.

11 IX. SECOND CAUSE OF ACTION:
12 VIOLATION OF THE EQUAL PROTECTION CLAUSE

13 64. Defendant’s refusal to cover Plaintiffs’ extraordinary, medically-related dental
14 services while covering other dental services to persons similarly situated violated the Equal
15 Protection Clause of the United States Constitution.

16 X. PRAYER FOR RELIEF

17 WHEREFORE, Plaintiffs respectfully ask this Court to:

18 1. Certify that this action is maintainable as a nationwide class action pursuant to Rule
19 23(b)(2) of the Federal Rules of Civil Procedure.

20 2. Issue a declaratory judgment that the exclusion of dental services in the Medicare
21 statute applies only to routine dental services; that it does not exclude coverage of extraordinary
22 dental services that are medically-related; and that its application by Defendant to deny coverage
23 of extraordinary dental services that are medically-related violates the Equal Protection Clause of
24 the United States Constitution.
25
26
27
28

1 3. Issue a permanent injunction prohibiting Defendant from continuing its policy of
2 denying Medicare coverage of extraordinary dental services that are medically-related, and
3 ordering Defendant to clarify in its policy statements that the exclusion of dental services in the
4 Medicare statute applies only to routine dental service.
5

6 4. Issue a preliminary injunction prohibiting Defendant from denying Plaintiff Fournier
7 the extraordinary, medically related dental services that he urgently needs, and ordering
8 Defendant to immediately provide the dental services recommended for Plaintiff by his
9 physicians through its contracting managed care plan.
10

11 5. Reverse and remand the decisions of the Defendant Secretary denying coverage of the
12 extraordinary, medically related dental services for Plaintiffs Fournier, Berg, and DiCecco as
13 prescribed by their physicians.

14 6. Order Defendant to pay Plaintiffs' costs of suit herein.

15 7. Order Defendant to pay Plaintiffs' reasonable attorneys' fees and expenses pursuant to
16 the Equal Access to Justice Act, 28 U.S.C. § 2412.

17 8. Grant such further relief as to the Court shall seem just and proper.
18

19 DATED: October 6, 2009

20 /s/Sally Hart
21 SALLY HART, AZ Bar No.013453
22 Center for Medicare Advocacy, Inc.
23 2033 E. Speedway Blvd., Suite 200
24 Tucson, AZ 85719-4743
25 (520) 322-0126
26 shart@vanosteen.com

27 GILL DEFORD
28 Center for Medicare Advocacy, Inc.
P.O. Box 350
Willimantic, CT 06226
(860) 456-7790
gdeford@medicareadvocacy.com
Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that on this 6th day of October, 2009, I electronically transmitted the foregoing Second Amended Complaint for Declaratory and Injunctive Relief to the Clerk’s Office using the ECF System for filing, and transmitted same, with Notice of Electronic Filing, to the ECF Registrants.

/s/Marc Kelley