UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HOSPITAL ASSOCIATION, *et al.*,

Plaintiffs,

v.

SYLVIA M. BURWELL, in her official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Civil Action No. 14-cv-00851 (JEB)

DEFENDANT'S MOTION FOR RECONSIDERATION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, Defendant Secretary of Health and Human Services (HHS) Sylvia M. Burwell hereby moves, through undersigned counsel, for reconsideration of the Court's December 5, 2016 Memorandum Opinion and Order, ECF Nos. 47-48.

The Secretary respectfully submits that reconsideration is warranted to correct a clear error in the Court's ruling and to prevent manifest injustice. Specifically, the ruling errs in ordering scheduled percentage reductions in the Medicare appeals backlog that the Secretary cannot achieve unless she were to pay pending claims without regard to their merit, which would violate her statutory obligation to protect the Medicare Trust Funds. Those funds are reserved by statute for the payment of meritorious claims for Medicare-covered services to the elderly and disabled and associated administrative costs. An order that has the practical effect of requiring payment for non-meritorious claims would amount to a manifest injustice.

District courts have considerable discretion under Rule 59(e) and may grant reconsideration to correct a clear error or prevent manifest injustice. *E.g.*, *Lance v. United Mine Workers of Am. 1974 Pension Trust*, 400 F. Supp. 2d 29, 31 (D.D.C. 2005).

The attached Supplemental Declaration of Ellen Murray explains that HHS cannot resolve pending claims on the merits under the schedule that the Court has ordered without substantial new resources and authorities that, as the Court observed, Congress has not provided. Supplemental Decl. of Ellen Murray (attached as Ex. 1). The result is that in order to comply with the December 5 order, the agency would have to settle claims without regard to their merit and thereby pay a large number of non-meritorious claims as well as some fraudulent claims. *Id.* ¶ 4. Such a massive payment of claims regardless of merit would significantly damage the Medicare Trust Funds. *Id.* ¶ 6.

Thus, the December 5 order traps the Secretary between a statutory rock and a statutory hard place. The D.C. Circuit has held the 90-day deadline for Administrative Law Judge (ALJ) decisions to be mandated by the Medicare statute.[1] The Medicare statute also prohibits payment of Medicare claims unless they are meritorious. 42 U.S.C. §§ 1395f, 1395g(a), 1395y(a)(1)(A). It is impossible for the Secretary to comply with both mandates, as she explained in her prior briefing, *see* Def.'s Mem. in Supp. of her MSJ. and in Opp'n to Pls.' MSJ, ECF No. 41 (Nov. 7, 2016), Def.'s Reply Mem. in Supp. of her MSJ, ECF No. 45-1 (Nov. 23, 2016), Murray Supplemental Decl. of November 7, 2016, ECF No. 41-1, and as Ms. Murray's Supplemental Declaration unequivocally reiterates. *See* Supplemental Decl. ¶ 4 ("Absent substantial new

[1] The Northern District of Illinois recently concluded that the 90-day deadline is not mandatory, following the Fourth Circuit's holding in *Cumberland County Hospital System v. Burwell*, 816 F.3d 48, 55 (4th Cir. 2016). *See Ivanchenko v. Burwell*, No. 16 C 9056, 2016 WL 6995570 (N.D. Ill. Nov. 30, 2016).

resources and authorities from Congress, the Department has no means to, and therefore cannot, meet the reduction targets required by the Court's December 5, 2016 order and simultaneously satisfy its fiduciary duty to the Medicare Trust Funds to pay only for claims that satisfy coverage requirements as set forth by statute.").

Because the Secretary is caught between two statutory mandates that are incompatible given HHS's present resources and authorities, the Court should have left resolution of the conflict to the Secretary's discretion and allowed the Secretary to continue to address the backlog through the administrative measures she deems appropriate. The Supreme Court recently recognized that "[w]hen an agency [] resolves statutory tension, ordinary principles of administrative deference require us to defer." *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2207 (2014) (plurality opinion) (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007)); *see also In re Barr Labs., Inc*., 930 F.2d 72, 76 (D.C. Cir. 1991) (recognizing need for agency discretion in prioritizing between conflicting priorities and noting that Congress "did not choose a super-priority" for one); *cf. Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979) (noting that Supreme Court had "acknowledged the substantive authority of the Secretary to take appropriate action to cope with the administrative impossibility of applying the commands of the substantive statute" where Congress had provided insufficient funding) (citing *Morton v. Ruiz*, 415 U.S. 199, 230-31 (1973)).

It was therefore clear error to order the Secretary to reduce the backlog of pending appeals on a schedule that the Secretary cannot meet without violating her statutory responsibilities. The result of this error, unless corrected, will be significant damage to the Medicare Trust Funds. Supplemental Decl. ¶¶ 4-6. The Court should grant the Secretary's motion for reconsideration to prevent that manifest injustice.

The Secretary respectfully asks that the Court rule on this motion no later than January 31, 2017, so as to allow adequate time for the Secretary to obtain appellate review, if necessary, in advance of the first deadline that the order has imposed for a reduction in the backlog.

Respectfully submitted this 15th day of December, 2016.

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