

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,¹

Defendant.

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

DECLARATION OF CONSTANCE B. TOBIAS

I, Constance B. Tobias, declare as follows:

1. I am the Chair of the Departmental Appeals Board (DAB) within the Department of Health and Human Services (HHS), which, organizationally, is located within the Office of the Secretary. I have held this position since April 29, 2007. Among my duties, I oversee the operations of the DAB, including the Medicare Appeals Council (Appeals Council) and the Administrative Appeals Judges (AAJs) that make up the Appeals Council, which provides the fourth and final level of administrative review for individual Medicare claim and entitlement appeals within HHS. The statements made in this declaration are based on my personal knowledge, information contained in agency files, and information furnished to me in the course of my official duties.

2. The Medicare Operations Division of the DAB provides staff support to the Appeals Council. Members of the Appeals Council issue decisions collectively as an

¹ Pursuant to Fed. R. Civ. P. 25(d), Sylvia M. Burwell, the current Secretary of Health and Human Services, is automatically substituted as the named defendant for Kathleen Sebelius, the former Secretary of Health and Human Services.

adjudicative body. There are four AAJs appointed to serve on the Appeals Council. In addition, Departmental Appeals Board members may also issue Appeals Council decisions. I have designated two senior attorneys within the Medicare Operations Division to act as Appeals Officers, through a delegation of authority, and authorized them to issue dispositive orders in certain matters pending before the Appeals Council. Board members and Appeals Officers act on only a very small percentage of the cases reviewed by the Appeals council. AAJs, Board members and Appeals Officers do not exercise the judicial independence of an Administrative Law Judge, and act only on behalf of the Appeal Council, rather than in their individual capacities.

3. On February 12, 2014, I presented the DAB update regarding the status of appeals pending before the Appeals Council at the Office of Medicare Hearings and Appeals (OMHA) Medicare Appellant Forum. A true and correct copy of the document used during that presentation is attached as Exhibit 1 (DAB Presentation). *See also*

http://www.hhs.gov/omha/omha_medicare_appellant_forum_presentations.pdf, at 102-120.

To the best of my knowledge, the information contained in the DAB Presentation continues to be true and accurate with the following updates. Since February, with the additional processing of fiscal year 2013 appeals, the size of the DAB case backlog at the end of fiscal year 2013 was 5,108 cases, rather than the 4,888 our records reflected at the time of the DAB Presentation. In addition, the DAB now expects to receive between 4,000 and 5,000 Medicare appeals in fiscal year 2014, rather than the 7,000 appeals projected in February. We have now received more than 100 escalations from OMHA to the Council (there had been 19 as of February), and we have now received seven (7) requests for escalation from the Council to United States District Courts (there had been six (6) as of February).

4. In fiscal year 2010, the DAB received approximately 2,000 Medicare appeals, but in fiscal year 2011, that number grew to approximately 3,000. While that number remained steady through fiscal year 2012, in fiscal year 2013, the DAB received more than 4,000 Medicare appeals, doubling its annual intake from 2010. The increased caseload before the Medicare Appeals Council is due in large part to additional appeals from audits conducted under the recently expanded Recovery Audit Contractor (RAC) program.

5. The DAB staff handling Medicare Appeals increased by four attorneys in 2012. Currently, the DAB's Medicare appeals workload far exceeds the Appeals Council's ability to keep up with the volume of incoming appeals, and thus the Appeals Council is unlikely to meet the 90-day timeframe for issuing decisions in most appeals.

6. The DAB has a fixed amount of resources and must set priorities for how it will utilize those limited resources in light of the unprecedented number of appeals currently before the Appeals Council. If the DAB was directed to devote additional staff to deciding Medicare Appeals, the DAB would be unable to meet statutory and regulatory deadlines in other types of cases pending in its Appellate and Civil Remedies Divisions.

7. The DAB is not aware of an instance where a case escalated from the Administrative Law Judge (ALJ) level of review to the Appeals Council has been appealed to federal district court without action by the Council. The DAB is not aware of an instance where a case has been escalated past both the ALJ and DAB levels of administrative review into federal district court for judicial review (a so-called "double escalation"). The DAB is not aware of an instance where a case has been escalated past the Qualified Independent Contractor (QIC), ALJ, and DAB levels of administrative review into federal district court for judicial review (a so-called "triple escalation").

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 11th day of September, 2014, in Washington, District of Columbia.

A handwritten signature in cursive script, reading "Constance B. Tobias", written over a horizontal line.

Constance B. Tobias