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FRANK KIRSCHBAUM
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March 31, 2016

****FREEDOM OF INFORMATION ACT APPEAL****

VIA U.S. Certified Mail, Return Receipt Requested
Centers for Medicare & Medicaid Services
Attn: Principal Deputy Administrator
Room C5-16-03
7500 Security Blvd
Baltimore, MD 21244-1850

Re: Appeal of CMS Constructive Denial of Freedom of Information Act Request (Control No. [redacted])

Dear Principal Deputy Administrator:

This firm represents Brier Creek Integrated Pain & Spine, PLLC ("BCIPS") in connection with the above referenced Freedom of Information Act ("FOIA") request to the Centers for Medicare & Medicaid Services ("CMS"). The failure of CMS, to date, to provide a substantive response to BCIPS's FOIA request constitutes a constructive denial of that request. Accordingly, we write to appeal the constructive denial and the failure of CMS to substantively respond to the request within the statutorily mandated time period.

In particular, on January 19, 2016, BCIPS submitted a FOIA request (the "Request") to CMS via e-mail, seeking various documents and communications relating to an ongoing CMS overpayment audit of BCIPS. The Request in its entirety is attached hereto as **Exhibit A** for your reference. On January 22, 2016, CMS transmitted a letter to BCIPS, acknowledging receipt of the Request and assigning tracking number 012020167071 to the Request (the "Acknowledgement"). A true and accurate copy of the Acknowledgement is attached hereto as **Exhibit B** for your reference. To date, BCIPS has received no further communications from CMS regarding the Request.

When, as here, a government agency receives a proper FOIA request, the agency is required to make a determination on the request within twenty (20) working days of receipt. See 5 U.S.C. § 552(a)(6)(A)(i); Dep't of Justice ("DOJ") Guide to Freedom of Information Act, 2009 ed., at 59. The U.S. Department of Justice has advised that a letter acknowledging receipt of a FOIA request is insufficient to satisfy the agency's obligation to make a substantive determination on the request within the statutorily mandated 20-day time period. FOIA Update, vol. XIII, No. 3, at 5, DOJ Office of Information Policy ("OIP"). CMS has not notified BCIPS in writing of any "unusual circumstances," as that phrase is defined in the FOIA, and, accordingly, has failed to invoke the statutorily allowed ten-day extension of its time to make a determination on the Request. See 5 U.S.C. § 552(a)(6)(B). The deadline for CMS to make a

substantive determination on the Request, excluding weekends and legal public holidays, was, therefore, February 17, 2016. CMS's failure to respond to the Request within the time period required under the FOIA qualifies as a constructive denial of the Request, and BCIPS is deemed to have exhausted its administrative remedies. See 5 U.S.C. § 552(a)(6)(C)(i); see, e.g., Ruotolo v. Dep't of Justice, 53 F.3d 4, 8 (2d Cir. 1995).

Although CMS's constructive denial of the Request would allow BCIPS to file a lawsuit to appeal that denial, for the sake of judicial economy and with the hope of resolving this issue in a less costly and more expedient manner, BCIPS has chosen to exercise its right to file an administrative appeal directly to CMS. BCIPS hereby appeals the constructive denial by CMS of the Request and respectfully requests a response from CMS within twenty (20) working days of receipt of this appeal, as required under the FOIA. See 5 U.S.C. § 552(a)(6)(A)(ii).

Please do not hesitate to contact me directly if you have any questions or need additional information.

Sincerely,

WYRICK ROBBINS YATES & PONTON LLP

Frank S. Kirschbaum

Charnanda T. Reid

From: Charnanda T. Reid
Sent: Tuesday, January 19, 2016 10:12 AM
To: FOIA_Request@cms.hhs.gov
Cc: Frank Kirschbaum
Subject: Freedom of Information Act Request for Information Regarding Brier Creek Integrated Pain & Spine, PLLC

To whom it may concern:

This email is a Freedom of Information Act request, 5 U.S.C. § 552.

This firm represents Brier Creek Integrated Pain & Spine, PLLC ("BCIPS"). CMS has subjected BCIPS to overpayment audits over the last two years.

We hereby request, on behalf of BCIPS, that copies of the following documents be provided to us:

1. CMS's complete audit file for any audit of BCIPS, including:
   a. The information on the statistical projection used to arrive at the overpayment request (if applicable);
   b. The notes, correspondence, and memos (handwritten or typed) of the auditors setting forth the specific reasons for the denials;
   c. The hand-written audit sheets;
   d. The names and credentials of all of those who participated in the audit and denial decisions;
   e. The medical records reviewed as part of the audit;
   f. All data analysis that led to or was either considered or used as a part of the audit of BCIPS;
   g. All records reviewed by CMS or its contractors as part of its audit(s) of BCIPS; and
   h. Any other information used by the auditors in making the audit decisions.

2. The names and credentials of any and all persons who have reviewed BCIPS submissions for payment, from January 1, 2013 to the present.

3. All notes, memoranda, correspondence, and other documents related to, concerning, or supporting CMS's assertion on May 23, 2014 of "credible allegations of fraud" by BCIPS.

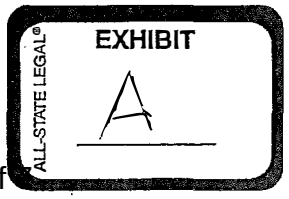
4. All notes, memoranda, correspondence, and other documents and data relating to or documenting any investigation of BCIPS or its providers by CMS or its contractors from January 1, 2013 to the present.

5. All notes, memoranda, correspondence and other documents and data evidencing, supporting or relating to CMS's determination in November 2014 that "reliable information [of] an additional overpayment exists."

6. All documents related to any "good cause" determination by CMS pursuant to 42 C.F.R. § 405.986 to reopen and/or revise a determination or redetermination related to BCIPS.

7. All notes, memoranda, correspondence, and other documents supporting CMS's position that the number of drug screenings per beneficiary billed by BCIPS (or its providers) far exceeded the peer average.

8. All documents related to CMS's decision to suspend payments to BCIPS.



9. All internal notes, correspondence, and/or memos that mention BCIPS.

10. All correspondence between CMS or its contractors, on the one hand, and any third party, on the other hand, that mentions BCIPS.

11. All internal notes, correspondence, and/or memos that mention Dr. Robert Wadley.

12. All correspondence between CMS or its contractors, on the one hand, and any third party, on the other, that mentions Dr. Robert Wadley.

13. All documents and correspondence relating to, concerning, or reflecting any communications between CMS or its contractors, on the one hand, and any representative of or reporter from *The Wall Street Journal*, on the other hand, regarding (a) Dr. Robert Wadley, (b) BCIPS, (c) AvuTox, and/or (d) the concept of paying one flat rate for a comprehensive definitive drug testing panel (CDDP), as opposed to allowing providers to use multiple individual billing codes for such comprehensive testing.

14. All documents and correspondence from January 1, 2013 to the present related to, discussing, or reflecting Palmetto GBA's decisions with regard to the CDDP Panel, including but not limited to any and all decisions by Palmetto GBA to (a) include the CDDP Panel in a particular LCD or (b) exclude the CDDP from a particular LCD.

15. Any contract(s) between CMS and AdvanceMed pursuant to which AdvanceMed conducted BCIPS post-payment review.

16. All correspondence between CMS and AdvanceMed discussing AdvanceMed's denial of claims in its post-payment review of claims, or providing AdvanceMed instructions regarding the post-payment denial of claims.

17. All documents relating to AdvanceMed's denial of BCIPS claims in its post-payment review of claims.

18. All documents and correspondence from January 1, 2013 to the present related to, discussing, or reflecting Palmetto GBA's decision to either allow or disallow reimbursement to physician office labs (POLs) performing urine drug screening (UDS) using Liquid Chromatography Tandem Mass-Spectrometry (LC-MS) technology.

19. All documents and correspondence from January 1, 2013 to the present related to, discussing, or reflecting any communications between Palmetto GBA and any reference lab, Alere Toxicology, or Quest Diagnostics regarding POLs performing UDS using LC-MS technology.

20. All documents and correspondence relating to, discussing, or reflecting Palmetto GBA's formulation, in the Fall of 2013, of the first Local Coverage Determination (LCD) defining medical necessity for UDS procedures, including the decision to designate a reflex test as the method for determining medical necessity.

21. All documents and correspondence relating to, discussing, or documenting any communications with Barry Alexander concerning the substance of Palmetto GBA's first proposed LCD relating to the medical necessity of UDS procedures.

22. All documents and correspondence relating to or discussing Palmetto GBA's retirement, in March 2014, of its first proposed LCD relating to the medical necessity of UDS procedures and the reasons for that retirement.

23. All documents and correspondence relating to, discussing, or reflecting Palmetto GBA's formulation, in March 2014, of the second LCD defining medical necessity for UDS procedures.

24. All documents and correspondence relating to, discussing, or documenting a meeting that took place in Columbia, South Carolina, in April of 2014, involving Barry Alexander Elaine Jeter, M.D., attorney Jennifer Bolen, and the Chief Executive Officer (CEO) of Palmetto GBA, which meeting concerned the substance of Palmetto GBA's second proposed LCD relating to the medical necessity of UDS procedures and the proposed across-the-board disallowance of reimbursement to POLs performing UDS procedures using LC-MS technology.

25. Any and all communications between CMS and attorney Jennifer Bolen regarding BCIPS or CMS's coverage determinations relating to BCIPS Medicare patients.

26. All documents, communications, and correspondence relating to or discussing Palmetto GBA's retirement, in May 2014, of its second proposed LCD relating to the medical necessity of UDS procedures and the reasons for that retirement.

27. All documents, communications, and correspondence relating to or discussing Palmetto GBA's decision to abandon its previously proposed policy of designating a reflex test as the method for determining medical necessity for UDS procedures.

28. All documents, communications, and correspondence related to CMS's decision to lift the suspension of payments to BCIPS.

In order to help determine our status to assess fees, you should know that we are a commercial requester. Please note we are willing to make an advance payment should that be necessary.

Please note that we are aware that we are entitled to make this request under the Freedom of Information Act and we are prepared to make an administrative appeal if necessary. In your response to our request, please indicate to us the name of the official to whom such an appeal should be addressed.

We are aware that if our request is denied, we are entitled to know the grounds for the denial. We are also aware that while the law allows your agency to withhold specified categories of exempted information, you are required by law to release any segregable portions that are left after the exempted material has been deleted from the data that we are seeking.

Please forward your response and the requested documents to us at the address listed in the signature block. Thank you for your prompt assistance in this matter, and please do not hesitate to contact us should you have any questions.

Sincerely,
Frank Kirschbaum
Charnanda T. Reid
WYRICK ROBBINS YATES & PONTON LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27609

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop N2-20-16
Baltimore, Maryland 21244-1850

CENTERS FOR MEDICARE & MEDICAID SERVICES

Office of Strategic Operations and Regulatory Affairs / Freedom of Information Group
Request has been assigned: Control Number [redacted] and PIN [redacted]

1/22/2016

Charmanda Reid
Wyrick Robbins Yates & Ponton, LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27609

Dear Ms. Reid:

The purpose of this letter is to acknowledge receipt of your Freedom of Information Act (FOIA) request (5 U.S.C. § 552) and to provide you with a tracking number for your request. Your FOIA request, dated **1/19/2016** was received on **1/19/2016** by the Centers for Medicare & Medicaid Services (CMS). To check the status of your request as it is being processed, please refer to the CMS FOIA website http://www.cms.gov/apps/FOIA and enter the control number and PIN (listed above) that have been assigned to your request.

Once we complete our initial analysis of your request, we will initiate a search for responsive records. If however, we determine that your request needs clarification, we will contact you. Additionally, if our searching units advise us that you have requested a voluminous amount of records that require extensive search, production and review, we will contact you to discuss options for narrowing the scope of your request in order to process your request as quickly and efficiently as possible.

Please note that CMS receives a very high volume of FOIA requests. The following unusual circumstances, as defined by Federal FOIA Regulations, may impact our ability to fulfill a FOIA request within 20 business days. These include circumstances such as (1) the request requires us to search for and collect records from multiple components and/or field offices; (2) the request involves a voluminous amount of records that must be located, compiled, transferred to this office, and reviewed. In addition, given our high volume of requests, and in accordance with federal regulations, our processing policy includes factors such as the date of the request as well as the complexity of the request.

The FOIA law assumes that requesters are willing to pay fees up to $25.00. If estimated fees to process your request exceed $25.00, we will notify you and may suspend processing until we receive written confirmation that you are willing to pay the estimated fees. Additionally, for

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requests in which the estimated fees exceed $250.00, the law authorizes us to collect the fees *in advance* prior to processing the request.

If your request sought a fee waiver or expedited processing, we will send additional communication to provide you with our determination decision(s).

Any questions regarding the processing of this request should be directed to **Vendetta Dutton** at **410-786-0519** and **vendetta.dutton@cms.hhs.gov**.

Sincerely yours,

Joseph Tripline

Joseph Tripline
Director, Division of FOIA Analysis – A
Freedom of Information Group