# The “Strange World” of “Frenetic Rulemaking”: The Tenth Circuit Vindicates Home Health Agency and Chides CMS

How does one agency organize, collate, and keep current tens of thousands of guidance documents on which patients and healthcare providers rely? When the agency is the Centers for Medicare & Medicaid Services (CMS), and when the Court opining is the Tenth Circuit, apparently not very effectively.

In *Caring Hearts Personal Home Services., Inc. v. Burwell, No. 14-3243, 2016 BL 171256, (May 31, 2016)*, the Tenth Circuit noted: “The Centers for Medicare & Medicaid Services (CMS) estimates that it issues literally thousands of new or revised guidance documents (not pages) every single year, guidance providers must follow exactingly if they wish to provide health care services to the elderly and disabled under Medicare’s umbrella. Currently about 37,000 separate guidance documents can be found on CMS’s website — and even that doesn’t purport to be a complete inventory.”

## From frustrated administrative appeals to the Tenth Circuit

Healthcare is no stranger to overabundant and oft-updated rules, but the *Caring Hearts Personal Home Services., Inc. v. Burwell* case illuminates just how unwieldy this avalanche of guidelines can become—an avalanche that would have buried the home health agency in more than $800,000 of allegedly non-covered Medicare claims had it not tested the limits of its perseverance.

Following an audit, CMS sought the return of the whopping sum from Caring Hearts, an amount CMS represented as overpayment to the home health agency for services provided for 24 patients in 2008 and 2009. The grounds? Allegedly, the claims lacked the requisite documentation to prove that the services were medically necessary (or that the patients were truly homebound and therefore eligible for home health services). After Caring Hearts’ challenge was wholly unsuccessful at each and every level of administrative review (by a Medicare administrative contractor, an independent contractor, an administrative law judge, and the Medicare Appeals Council), the home health agency appealed to the Tenth Circuit, where it finally found the vindication it sought.

## The Tenth Circuit says government agency is “confused about its own law”

One striking detail in the case is that in claiming overpayment, CMS was applying *2010* stipulations on services provided in 2008 and 2009. CMS claimed that the 2010 regulations merely “clarified” rules already in place, but the Tenth Circuit vigorously disagreed, criticizing CMS for being “confused about its own law.” In an even more unambiguous statement, the Court said: “The trouble is, in reaching its conclusions CMS applied the wrong law.”

The salient question before the Court was how could have Caring Hearts, when it provided service in 2008 and 2009, known of the 2010 strictures that would have rendered its paid claims suddenly and retroactively not

covered? The Court's answer? Caring Hearts couldn't have.

In 2008, CMS used the following guidelines to determine whether a patient should be considered homebound: "[g]enerally speaking, a patient will be considered homebound if they [sic] have a condition due to an illness or injury that restricts their ability to leave the place of residence except with the aid of: supportive devices such as crutches, canes, wheelchairs, and walkers…" But in 2010, CMS expanded its homebound definition, further requiring that the patient must also "normal[ly]" be unable "to leave home" (even with the use of assistive devices), and that any attempts to leave home must also "require a considerable and taxing effort." Furthermore, in 2008, no documentation requirements were in place. The substantiation guidelines that CMS alleged Caring Hearts failed to comply with were not initiated until 2010.

## Social Security Act, 42 U.S.C. § 1395pp.

Some of the Tenth Circuit's rationale for vacating the district court's decision against the home health agency was buttressed by a section of the Social Security Act, 42 U.S.C. § 1395pp. The Court cast that section in the light of "a sort of good faith affirmative defense" in that it opens a door for claims that would be unpayable for distinct reasons, given that the provider did not know, and "couldn't have reasonably been expected to know that their services weren't permissible." The Tenth Circuit was not the first audience for Caring Hearts' argument, but the Court was the first to concur with the home health agency when it asserted that it could not have known about CMS's 2010 guidelines in 2008.

And while in no way does the Court's decision hint that healthcare providers should ignore their responsibility to stay informed of current and relevant payment guidelines, it does bemoan the state of ostensibly citizen-centered systems where fairness is lost to confusion. In the words of the Tenth Circuit:

*"This case has taken us to a strange world where the government itself — the very "expert" agency responsible for promulgating the "law" no less — seems unable to keep pace with its own frenetic rulemaking. A world Madison worried about long ago, a world in which the "laws are so voluminous they cannot be read" and constitutional norms of due process, fair notice and even the separations of powers seem very much at stake. But whatever else one might say about our visit to this place, one thing seems to us certain: an agency decision that loses track of its own controlling regulations and applies the wrong rules in order to penalize private citizens can never stand."*

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