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"Further points arising during meeting"

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27/11/2012 17:16

To Ben Cole/HP-SL/DOH/GB GRO-C
cc Naomi Balabanoff/OIS/DOH GRO-C, Rowena Jecock/PH6/DOH/GB GRO-C
bcc
Subject Further points arising during meeting

Ben-

A. Appeals Panel

None of the agreements are particularly revealing about the Appeals Panel. The 2011 agreement simply ensures that it acts as such in relation to 2011 Scheme payment claims in the same way that it does in relation to 2007 Scheme payments.

The 2007 Agreement just states inClause 6.3 states that it is provided by DH and that it is independent(from Skipton, at least one assumes)and adjudicates on claims rejected by Skipton. Then Schedule 1 requires Skipton to provide the secretariat and organise meetings of the Panel, prepare cases for its consideration, record decisions and communicate the decision to the appellant. It also has to pay the Panel members fees and expenses.

Skipton is obliged under the paragraph I quoted at the meeting to provide the services above in relation to the Appeals Panel to a reasonably high standard - the exact words are in Clause 4.3 of both the 2007and the 2011Agreement.

DH has a general obligation to Skipton (not the Appeals Panel, which, it should be stressed is independent) to provide medical datato Skipton to enable it to carry out the Services(seeclause 6.1.2 of the 2011 Agmt).

So:

1. You are not obliged to provide guidance to the Appeals Panel. Nor are you, perhaps surprisingly, obliged to provide guidance to Skipton. Interestingly, Paragraph 10 of Schedule 1 statessomething quite contrary tothat.It says,"Skipton will inform DH of *its policies* for assessing eligibility for participation in the Scheme, *particularly in cases where medical and other records have been destroyed as a matter of routine procedure, are otherwise missing or incomplete. However, all claims are to be assessed on the balance of probabilities."*

The Agreement merely sets out the services and certain service levels in relation to some of them. The detailed development of policy as to how Skipton assesses eligibility of claimants, "particularly" (but presumably then, not solely)where records are missing,is a matter not for DH, but Skipton. All the Agreement insists upon is thatSkipton tells DH how it is going to go about assessing eligibility and that however theydecide todo so,all claims are assessed on the balance of probabilities. They do not even have to consult us or take on board our views.

This is a very hands off approach, which you and Skipton may choose to ignore, given the DH is the funder of these payments, but it is interesting that that is what was envisaged by the initial agreement. I should point out that this doesin my view,provide you with some protectionor insulationfrom judicial review of any assessment policies that Skipton settles on. You have no means of objecting to what they decide on, on a legal basis (unless they break the balance of probabilities rule). This is not water tight; a contract can always be waivedand if Skipton wantadvice or input and you refuse or, you give bad advice as to these policies after they have asked you for it, all that ispossiblychallengeable (though I think even that a remote legal risk). But the decision as to the exact detail of eligibilityassessment policyislegallyin the hands of Skiptonanda court could not expect you to be held responsible for a decision made under an agreement you are not in fact entitled to make under that agreement. The agreement makes it clear that these policies are a matter for Skipton not DH.

It might be worth gently pointingoutthis ultimate legal responsibility/right to Skipton in a gentle way. Of course, their independence from DH, may give you other causes for concernandyou may want to guide their hand.

However, this paragraph does not appear in the 2007 Agreement. I assume because the (pre03) payments are created by the 2011 agreement and in these case missing records are going to be more of a problem.

2. The agreement says nothing about governance, expert presence on the Appeals Panel, quality control of recruited staff etc.

B.Obligation to contact potential claimants

I notice that DH has obligations to advertisefor potential claimantsunder the 2011 Agreement (although it's a subjective test "as they think necessary") and to supply the FAS2 and application procedures to them. And there is talk of Skipton telephoning all previous recipients of Stage 2 payments. But there is no reference to chasing up those who have never claimed orwhohave a

stage 1 payment and have gone no further with Skipton.

So, of relevance hereis the statement in paragraph 1, that requires Skipton to perform such Services asis necessary to assess eligibility and DH's obligation to advertise as much as it thinks necessary to attract potential claimants. A bad decision as to whatadvertisingis necessary (despite the discretionary element) is judicially reviewable. I think we need to bear that in mind.

I hope that's helpful. I will try to check out the law relevant to Rowena's concern about trustee-beneficiaries and MFT tomorrow.

Regards,

Mike Riedel

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