1976 WL 30868 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 22, 1976

***1** Mr. Horace M. Kaiser
Pharmacy Consultant, SCDSS
1447 Hampton Street
Columbia, South Carolina 29201

Dear Mr. Kaiser:
You have requested an opinion from this Office as to whether or not the proposed procedure hereinafter outlined for regulating the prescribing and dispensing of drugs in the Title XIX (Medicaid) program in South Carolina is valid in light of this Office's July 29, 1976, opinion regarding Regulation 22 of the Board of Pharmaceutical Examiners.

As I understand it, the South Carolina Department of Social Services [DSS] intends to distribute to participating physicians for use in the Medicaid program pre-printed prescription forms bearing a legend that advises them that, in order for a prescription to be compensable in the Medicaid program, the pharmacist must be authorized by the prescribing physician to fill the prescription with a brand or manufacturer of the prescribed generic drug that is compensable in the Medicaid program, even if the prescription designates a different, non-compensable brand or manufacturer of the prescribed generic drug. Accordingly, the legend will allow the physician to authorize the pharmacist to fill the prescription with a compensable brand or manufacturer of the generic drug prescribed, notwithstanding that the prescription specifies a non-compensable brand or manufacturer thereof. Moreover, all participating physicians will have the option of using their own prescription forms and thereon authorizing the pharmacist to fill the prescription with a compensable brand or manufacturer of the prescribed generic drug in a manner similar to that available through the use of the DSS forms. Finally, regardless of the prescription form utilized, the physician will be free to decline to so authorize the pharmacist, in which case the prescription will not be a compensable one if the brand or manufacturer specified is not on the Medicaid formulary.

The thrust of this Office's July 29, 1976, opinion regarding Regulation 22 of the Board of Pharmaceutical Examiners is that a pharmacist's substitution of a different brand of drug product for the brand prescribed constitutes an unauthorized designation thereof and, thus, is included in the term ‘prescribing’ of drugs which practice can be carried on only by a licensed physician pursuant to Section 56-1354 of the Code. If, on the other hand, a physician prescribes a specific brand of drug product and, at the same time, authorizes the pharmacist to fill the prescription with ‘any reliable brand’ of the generic drug prescribed, then, in my opinion, that physician has, in effect, made the medical judgment that all of the available (and reliable) brands thereof are therapeutically equivalent and, thus, the pharmacist may choose the specific brand of drug product prescribed just as he chooses the specific drug lot or, indeed, the specific container from which the prescription is to be filled. In so authorizing the pharmacist, the physician has neither delegated a medical judgment to him nor authorized him to partially engage in the practice of medicine since the physician is deemed to have already made the medical judgment as to the generic drug to be prescribed and, at the same time, recognized that any reliable brand thereof will be therapeutically equivalent. The defect of Regulation 22 appears to me to be that the pharmacist has not been authorized by the physician to deviate from the terms of the prescription vis a vis the brand or manufacturer of the drug product prescribed and not that the pharmacist cannot be so authorized by the physician.

***2** Accordingly, the opinion of this Office is that the proposed procedure hereinabove outlined for regulating the prescribing and dispensing of drugs in the Medicaid program is a valid one.
With kind regards,

Karen LeCraft Henderson
Assistant Attorney General

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