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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF ARIZONA**

8 William D. Wallis,

9 Plaintiff,

10 v.

11 Michael O. Leavitt, Secretary of Health and
Human Services,

12 Defendant.

CV 02-448 TUC DCB

ORDER

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14 On November 17, 2005, Plaintiff filed a Motion to Enforce the Judgment entered in
15 his favor on January 30, 2004, which determined that Medicare had improperly refused to
16 retroactively apply coverage criteria to pay for the treatment for angina, Enhanced External
17 Counterpulsation (EECP), which Plaintiff received in late 1997 and 1998. The Court held
18 that he had been wrongfully denied coverage for the procedure. Following the January 30,
19 2004, ruling, Defendant filed a motion for clarification, which was resolved in favor of the
20 Plaintiff, then Defendant filed an appeal with the Ninth Circuit, which it later voluntarily
21 dismissed. The Defendant referred the matter back to the Social Security Administrative
22 Law Judge (ALJ) for a coverage determination based on the correct legal standard as
23 determined by the Court. The ALJ issued a favorable coverage determination, which became
24 final on July 20, 2005. As of November 17, 2005, the Plaintiff still had not secured
25 reimbursement of \$7,500.00 that the Court had held on January 30, 2004 was improperly
26 denied him.
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1 Attempts to secure payment having failed, the Plaintiff filed the motion for
2 enforcement for reimbursement of \$7,500 for the EECp treatment, plus interest from July 20,
3 2005, plus his attorney's fees for the time expended in bringing this enforcement action.

4 On December 2, 2005, this Court issued an Order for the Defendant to show cause
5 why an order enforcing the Judgment and providing for interest and attorney fees should not
6 issue. The Order to Show cause crossed in the mail with the Defendant's Opposition to the
7 Plaintiff's Motion for Enforcement.

8 The Defendant, Michael O. Levitt, Secretary of Health and Human Services, argued
9 that regulations implementing Medicare + Choice plans explicitly make the provider
10 responsible for complying with any adverse decisions of an ALJ, such as the one rendered
11 here in Plaintiff's favor because the healthcare provider is responsible for paying benefits,
12 including the \$7,500.00 owed in reimbursement to the Plaintiff. The Defendant contacted
13 the Center for Health Dispute Resolution (CHDR), *a private entity that contracts with the*
14 *Department of Health and Human Services*, to request compliance with the ALJ's decision.
15 The Defendant asserts it, thereby, fully complied with the directives of the Court's January
16 30, 2004, Order.

17 The Court disagrees. After the ALJ concluded the treatment at issue met the criteria
18 for Medicare coverage and ordered reimbursement for the Plaintiff on May 19, 2005, his
19 decision became final on July 20, 2005. Instead of contacting Plaintiff's health plan directly
20 regarding the ALJ's order for reimbursement, Defendant contacted CHDR. As of December
21 13, 2005, CHDR had sent three different letters to three different providers regarding
22 reimbursing the Plaintiff the \$7,500.00. Whereas the ALJ's decision informed the Plaintiff
23 that he would be reimbursed within 60 days of the decision, each letter from the CHDR gave
24 the provider 60 days from receipt of the letter to reimburse the Plaintiff. So, Plaintiff's
25 entitlement date shifted in progression as follows: a CHDR letter sent on September 7, 2005,
26 set reimbursement for November 6, 2005; a CHDR letter sent November 25, 2005, made
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1 reimbursement due January 24, 2006, and the November 30, 2005, CHDR letter made the
2 reimbursement payment due January 29, 2006.

3 Ultimately, none of the entities contacted by CHDR paid the Plaintiff. Instead,
4 Defendant secured the reimbursement payment on January 17, 2006, from a forth entity:
5 Ovation, Inc., Unitedhealthcare. (Defendant's Status Report filed January 20, 2006.)
6 Whether or not the Defendant was in a position to directly issue the reimbursement check to
7 the Plaintiff is irrelevant. Defendant most certainly was in a position to ascertain the correct
8 entity to contact, to contact the entity responsible for reimbursing the Plaintiff, request
9 reimbursement be made to the Plaintiff, and continue to request payment until payment was
10 made of the reimbursement amount owed the Plaintiff. This did not occur until after the
11 Plaintiff filed the motion for enforcement.

12 Plaintiff and his attorney went to great lengths attempting to secure the payment due
13 him before filing the motion. Initially, Plaintiff contacted the Social Security Office of
14 Hearings and Appeals and the local Social Security office. Plaintiff also contacted the
15 provider, Empire Medicare Services, the ALJ, and Congressman Kolbe's office. In October,
16 2005, Plaintiff contacted Defendant's attorney, the Assistant United States Attorney (the
17 AUSA) in Tucson, and asked for assistance in navigating the administrative system to effect
18 satisfaction of the Judgment. After some discussions, the AUSA told the Plaintiff that there
19 was nothing the Defendant could do to secure payment for the Plaintiff. Subsequently,
20 Plaintiff filed the Motion for Enforcement.

21 In addition to continuing to argue that it has satisfied the Judgment, the Defendant
22 argues that the Government cannot be responsible for interest and attorneys fees related to
23 the payment of an amount that a private corporation was responsible to pay, and did pay.
24 The Court notes, however, that the private corporation did not pay the Plaintiff until after the
25 Motion for Enforcement was filed and this Court issued the Order to Show Cause.
26 Defendant's failure to route the Plaintiff's claim through its bureaucratic maze resulted in his
27 incurring further expenses to file the enforcement motion to secure the reimbursement of the
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1 \$7,500 that he expended in 1997 and 1998, which he was entitled to as of July 20, 2005.
2 Plaintiff's entitlement did not include interest.

3 The Court grants the Plaintiff's request for an award of attorney fees related to the
4 Motion for Enforcement, but not interest. The Court has discretion to award Plaintiff the
5 expense of bringing the enforcement proceeding, including his attorney fees. *Spain v.*
6 *Mountanos*, 690 F.2d 742, 747 (9th cir. 1982) (equitable remedies are available under Fed.
7 R. Civ. P. 70); *see also, Roadway Express Inc. v. Piper*, 447 U.S. 752, 766 (1980) (discussing
8 the inherent power of court to levy sanctions for civil contempt because without such power
9 the courts could not administer justice). *See Donovan v. Burlington Northern, Inc.*, 781 F.2d
10 680, 683-684 (9th Cir. 1986) (discussing court's discretion to award attorney fees for the
11 expense of bringing a contempt action). The Plaintiff did not bring the administrative
12 confusion surrounding the payment of the claim to Defendant's attention until October, 2005,
13 and while Defendant asserted its lack of responsibility for the nonpayment, it nevertheless
14 secured payment of Plaintiff's claim by January 17, 2006.

15 **Accordingly,**

16 **IT IS ORDERED** that the Motion to Enforce Judgment (document 65), is
17 GRANTED IN PART as to this Court's issuance of the Show Cause Order on December 8,
18 2005, and as to an award of related attorney fees and DENIED IN PART as to interest.

19 **IT IS FURTHER ORDERED** that Plaintiff has ten days from the filing date of this
20 Order to file a motion and supporting documentation requesting payment of his attorney fees

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1 related to the enforcement motion. Any objection by the Defendant shall be limited to the
2 amount, not the merits of the award.

3 DATED this 21st day of March, 2006.

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6 David C. Bury
7 United States District Judge

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