MEDICARE'S "IMPROVEMENT STANDARD" FALLS BY THE WAYSIDE

Throughout the years, I cannot count the number of times I have had clients explain the following scenario to me: a family member was hospitalized and then transferred to a skilled nursing facility. While in the skilled nursing facility, the family member's care was being paid for by Medicare. Although Medicare can pay a portion of the nursing home bill for up to 100 days, there is no guarantee that the patient will receive the 100 days. Frequently, the patient's Medicare days are cut short because he has "plateaued" and his condition is not going to improve. This scenario illustrates what has become known as applying the "Improvement Standard." However, this practice has been improperly used.

For decades, Medicare beneficiaries have been denied necessary care based on the "Improvement Standard," which sets forth that Medicare coverage for vital care will be denied on the grounds that the individual's condition was stable, chronic, not improving, or that the necessary services were for maintenance only. The use of this standard has had a devastating effect on patients with chronic conditions such as Alzheimer's disease, ALS, Parkinson's disease, and Multiple Sclerosis.

However, the court case of Jimmo v. Sebelius will change this practice. On January 24, 2013, in the Jimmo case, the Court approved a settlement where the plaintiffs alleged that Medicare contractors were inappropriately applying the "Improvement Standard" in making determinations for Medicare coverage involving skilled care, home health, and outpatient therapy benefits. As a result of the Jimmo v. Sebelius case, the application of this improper standard will fall by the wayside. Under the maintenance coverage standard set forth in the Jimmo settlement, the determining issue regarding Medicare coverage is whether the skilled services of a health care professional are needed, not whether the Medicare beneficiary will improve. This settlement resolves once and for all that Medicare coverage is available for skilled maintenance services in home health, nursing home, and outpatient settings.

As a result of the settlement, the Centers for Medicare and Medicaid Services, hereinafter referred to as "CMS", must revise its Medicare Benefit Policy Manual, as well as many other

policies and guidelines, to ensure that Medicare coverage is available for skilled services in the home, nursing home, and outpatient settings. In addition, CMS must also develop and implement a nationwide educational campaign for contractors, adjudicators, providers, and suppliers to clarify the point that the coverage of therapy is not determined by the beneficiary's ability to improve but on whether skilled care is required along with the underlying reasonableness and necessity of the service.

Although CMS must revise its manuals, the settlement agreement standard for Medicare coverage for skilled maintenance services applies now. Although CMS is revising its manuals, policies, and guidelines, CMS states it is only clarifying what has always been the Medicare coverage standard and that the settlement does not change its rules and regulations. Since the law never supported the requirement that a patient must improve in order to receive Medicare, health care providers should implement the maintenance standard now.

As a result of the settlement, if your skilled services were stopped due to the "Improvement Standard" but your physician thinks these services are needed, then you should ask your doctor to prescribe the skilled nursing care or therapy again. The physician needs to explain, in writing, why skilled nursing care or therapy is required; how you will benefit from this treatment; and how these services will help you maintain your condition or prevent or slow further deterioration. The physician should be as specific as possible in explaining why skilled care is needed given your unique medical condition. Since the "Improvement Standard" has been in existence for so many years, you may need to show your physician the Jimmo settlement agreement to make it clear that improvement is not required for Medicare coverage.

The Jimmo standard will also increase the ability to win appeals concerning the denial of Medicare coverage. In the past, when a Medicare beneficiary appealed a case involving the denial of coverage based on the "Improvement Standard," the appeal was usually unsuccessful. In light of the Jimmo settlement, Medicare beneficiaries stand a better chance of winning an appeal of the denial of Medicare coverage by explaining that the settlement confirms, and the government has agreed, that skilled services are covered when they are required to maintain a patient's condition or to prevent further deterioration. Any Medicare coverage or appeal decision must reflect this basic principle. In addition, it is also essential that claims for skilled

care include sufficient documentation to clearly prove that skilled care is needed, that it is in fact provided, and that the services are reasonable and necessary.

If you or someone you know has been denied Medicare coverage based on the "Improvement Standard," then you should seek the advice of an elder law attorney to explore the options available to you.

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