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Elder Law: Settlement Agreement Ends the "Improve or You're Out" Era of Medicare

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March 1, 2013

On January 24, 2013, a federal judge approved the proposed Settlement Agreement in the class-action lawsuit, *Jimmo v. Sebelius*, No. 5:11-cv-17 (D.Vt.), filed by the Center for Medicare Advocacy and Vermont Legal Aid against the Secretary of Health and Human Services. Under the terms of the Settlement Agreement, the decades-old "Improvement Standard," which was used to deny Medicare coverage to individuals in skilled nursing facilities with conditions that were not improving, will be discarded and Medicare will pay for services that are needed to "maintain the patient's current condition or prevent or slow further deterioration."

Medicare – General Information and Coverage Threshold for Skilled Nursing Facility Care

Medicare is the federally funded and administered program of health insurance for those who are over age 65 or qualifying persons with disabilities. Medicare covers up to 100 days of skilled nursing facility care per benefit period. To qualify for skilled nursing facility coverage, a Medicare recipient must enter a skilled nursing facility within 30 days after a qualifying three day hospital stay. During the possible 100 days of coverage, days 1-20 are covered by Medicare in full, while days 22-100 have a co-payment. Medicare pays nothing after day 100. If a recipient fails to meet Medicare's requirements during the 100 day possible coverage period, benefits can be terminated at any time.

Under the Medicare statute and regulations, skilled nursing facility coverage is available during the 100 day period as long as it is "medically necessary." Medicare regulations clearly state that treatment designed to maintain a person's current condition and prevent deterioration is "medically necessary." Unfortunately, many Medicare contractors have misinterpreted this standard over the years largely in part to their reliance on various Medicare manuals which misstate Medicare's rules to require a termination of benefits when a patient fails to show signs of improvement. Until *Jimmo*, this "Improvement Standard" was widely promulgated and accepted as the rule for terminating coverage in skilled nursing facilities albeit a completely inaccurate interpretation of the Medicare rules. Sadly, the result has been many providers prematurely stopping treatment when a patient could have greatly benefited from additional skilled care.

The *Jimmo* Settlement Agreement

The plaintiffs in the *Jimmo* case alleged that the Government imposed a covert and illegal "Improvement Standard" test that denied coverage to persons who had "plateaued," had "chronic" conditions or were not improving. This "Improvement Standard" was found in the internal guidelines and manuals of lower-level decision makers where a vast majority of coverage determinations were made. A typical guideline or manual would state that Medicare coverage was only available when there is "an expectation that conditions will improve significantly in a reasonable and generally predictable period of time." While this "Improvement Standard" was blatantly wrong, it was used for decades and never challenged until the *Jimmo* case.

The Government initially requested that the Court dismiss the *Jimmo* case on the basis that Plaintiffs were not entitled to relief. After the Court largely denied the Government's Motion, the Plaintiffs and Government, rather than proceed to trial, entered into a Settlement Agreement that was approved by the Court on January 24, 2013.

Under the terms of the Settlement Agreement, tens of thousands of individuals suffering from chronic conditions will find it easier to qualify for Medicare coverage for home health services, skilled nursing facilities, outpatient therapy services and rehabilitation facilities. Specifically, the coverage standards set forth in the Medicaid manuals will be clarified to specifically exclude the "Improvement Standard" and emphasize that the proper test is the *need* for skilled care. Moreover, the Government will undertake an educational campaign to inform contractors, adjudicators, providers and suppliers of the revised standards.

Impact of the Settlement Agreement

As a result of the Settlement Agreement, Medicare will cover rehabilitation, physical and occupational therapy necessary to maintain a person's quality of life, even if that person shows no signs of actual improvement. In other words, Medicare cannot terminate coverage of skilled nursing care and physical therapy because a recipient's condition is not improving. Rather, coverage will be available during the 100 day coverage period if skilled services are needed to maintain the person's current condition or prevent or slow further deterioration.

The Settlement Agreement is limited to Medicare and the removal of the "Improvement Standard." It is important to note that the Settlement Agreement does not expand Medicare coverage for skilled care beyond the 100 day maximum coverage period. Coverage for a skilled facility stay beyond day 100 will require private payment or qualification for Medicaid, the government program that covers long-term nursing facility care. While the settlement will make it easier for Medicare recipients to access the coverage they are entitled to, it does not negate the need for sound pre-planning for a possible long-term skilled nursing home care beyond the 100 possible days covered by Medicare.

If you have any questions regarding the Settlement Agreement or questions involving Medicare, Medicaid or long-term care planning, our office will be happy to discuss them with you.