

Elder Law: Where is 'plateauing' today in Medicare?

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What is "plateauing" in the context of Medicare skilled nursing care, and where is it today? Well, it's sort of like not going over the "fiscal cliff" because you're on the plateau, but by being on the plateau you get shoved off the cliff with adverse financial and physical results.

Plateauing has been a term applied to a condition wherein a Medicare beneficiary in a skilled nursing facility was deemed to have reached a certain physical or mental level where there was no further room for improvement and thus, the individual was denied Medicare coverage for ongoing skilled services.

To be considered a skilled service, that service needs to be so inherently complex that it could only be safely and effectively performed by, or under the supervision of, professional or technical personnel in order to meet the patient's needs, promote recovery and ensure medical safety and be rendered under a plan of care ordered by a physician.

Some examples are treatment of decubitus ulcers, surgical patients transferred to a skilled nursing facility for rehabilitation services after a hip replacement, gait evaluation and training, range of motion exercises, etc.

This is also why, absent the need for a skilled service, nonskilled services are considered "custodial" and thus not eligible for Medicare payment.

Under Medicare's rules, the restoration potential of a patient is not the deciding factor in determining whether the skilled services are needed. Even if full recovery or medical improvement is not possible, the patient could still need skilled services to prevent further deterioration or preserve current capabilities.

Previously, institutions (and Medicare) were ignoring the maintenance/preservation of the patient's current capabilities, saying they had "plateaued" in their recovery potential, and thus were denying payment for needed services. This approach of denial of payment particularly affected individuals with chronic diseases such as multiple sclerosis, cerebral palsy and Alzheimer's disease.

As a result of that misinterpretation of Medicare's own regulations, a number of physicians would no longer prescribe skilled services as they felt that would only be an exercise in frustration for them and their patients by having a plateauing determination made.

About a month ago, there was a proposed settlement agreement filed in a Vermont Federal District Court that was preliminarily approved by the judge Tuesday. The case is named Jimmo (who was a 76-year-old blind amputee who was wheelchair bound) v. Sebelius (the Secretary of the U.S. Department of Health & Human Services). The agreement was as a result of a lawsuit filed by the Center for Medicare Advocacy and the Vermont Legal Aid Society against the Centers of Medicare and Medicaid Services (the Federal agency that administers the Medicare program).

Assuming the judge finally approves the proposed agreement, Medicare will be required to redo policy manuals and have Medicare contractors revise the guidelines they have used in making adverse coverage determinations.

The court has scheduled a Fairness Hearing Jan. 24 "to determine whether the settlement agreement is fair, reasonable and adequate." If the judge determines that these criteria for the agreement are met, she would then issue an order permanently approving the settlement agreement.

Will Medicare expenses increase as a result of this agreement? No doubt they will as services previously denied payment will now be paid for.

However, it's critical to note that many individuals who were denied skilled services because of the plateauing of their physical improvement often deteriorated, necessitating subsequent acute care services, such as emergency department visits and costly inpatient hospital admissions. There could even be a positive financial impact under this agreement by minimizing these admissions, let alone seeing the improvement in the patient's quality of life.

What to do until the settlement agreement is approved?

You should first determine if you or a loved one fits into what we call the correct interpretation of existing Medicare regulations as to attaining and maintaining appropriate functioning. Then, help educate your health care providers about providing medically necessary therapy and nursing services if you need them to attain and maintain (or even slow the decline) of your function.

Remember, the primary issue is whether you need the skilled or therapeutic services of a health care professional, not simply whether you will improve or have even plateaued.

Also, once the settlement is approved, the Centers for Medicare and Medicaid Services is to state how Medicare beneficiaries can request a "re-review" of denials because of plateauing that became final and nonappealable after Jan. 18, 2011.

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