LEGAL EASE

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Observation status and improvement standards re-visited

Use of "observation status" and the "improvement standard" have been two reasons that cost Medicare beneficiaries a great of money when they enter a skilled nursing facility for rehabilitation after a hospital stay. Beneficiaries in the first situation will be denied any Medicare coverage for their rehabilitation as they did not have a qualifying hospital stay, even though they were unaware that they were not actually considered an inpatient. The second situation should have been corrected by the *Jimmo* Settlement two years ago, but federal officials are doing little to insure that it is followed. The Center for Medicare Advocacy (www.medicareadvocacy.org) continues to take the lead in assisting Medicare beneficiaries receive the benefits to which they are entitled. This organization recently reported on Elder Law Answers (www.elderlawanswers.com) and on their website some news about these specific issues.

Medicare beneficiaries brought a class action to Federal District Court claiming that their Due Process rights were violated due to being classified as outpatients under observation status rather than having been admitted. These beneficiaries were required to spend thousands of dollars on follow-up care after a hospitalization since Medicare will only pay for rehabilitation after a three day hospital stay as an *inpatient*. These beneficiaries were never aware that they were not actually admitted, and Medicare would not permit an opportunity to appeal the decision. A hospital stay under Observation Status not only precludes Medicare payment for subsequent rehab costs, but it means that any testing done during the hospitalization, as well as physician costs, will be billed under Part B as outpatient procedures, and prescription drug costs will be billed under the patient's Part D. The lower court dismissed the suit but a three judge panel of the U.S. Court of Appeals for the Second Circuit decided that Medicare beneficiaries classified as Observation Status may have an interest, protected by the Constitution, in challenging that classification. The case was sent back for further consideration. Therefore, beneficiaries classified as being in "observation" rather than as being an inpatient, have some hope as to perhaps being able to appeal that classification in a timely fashion.

On a less positive note, the settlement agreement in *Jimmo v. Sebelius* is nearly two years old but many care providers seem unaware of the settlement terms. Furthermore, the federal government seems uninterested in the education campaign that was mandated as a result of the settlement. In *Jimmo*, the long standing practice of requiring Medicare beneficiaries to show improvement in order to qualify for continued Medicare coverage of rehab or home care was ended, and the actual standard of coverage of skilled care for as long as the beneficiary needs it was approved. No improvement need be documented but if such care would simply maintain the beneficiary's current condition or slow further deterioration, such care qualifies. Even Medicare Administrative Law Judges (ALJs) seem unaware of the settlement provisions. Mrs. Jimmo, the original lead plaintiff, was required to file a federal lawsuit for relief.

The Center for Medicare Advocacy has a great deal of information and self-help materials on its website, www.medicareadvocacy.org. They encourage any Medicare beneficiary denied coverage because of lack of progress, hitting a plateau, or otherwise considered not improving, to appeal the decision. There is even information with key provisions from the updated Medicare manuals to show your providers. Self-help is apparently necessary in this settlement.