

Medicare Ends Discrimination Against Alzheimer's Patients

THOSE WHO follow the reporting of medical developments in the search for a cure to Alzheimer's disease have learned to be wary of headlines that promise breakthroughs. Overly optimistic reports, such as the linking of aluminum cook-ware to Alzheimer's have been reported prominently and then discredited, less prominently. The same is true of headlines promising legal breakthroughs. It is important to read such reports in depth and with a critical eye.

The front page of The New York Times carried the following headline on March 21, 2002: "Medicare Is Now Covering Treatment for Alzheimer's." This overly optimistic headline was misread by many to mean that Medicare had agreed to cover long-term custodial care at home or in a nursing home. One of the seminal forces that contributed to the formation of the field of elder law was the impoverishment caused by disparate treatment of patients by disease. There have been calls for remedial legislation ending the distinction between skilled and custodial care. The headline seemed to herald a significant expansion of Medicare benefits. The reality of the situation is that no such change has occurred. What has happened is important, but not the landmark change the headline suggests. Medicare has agreed to stop denying benefits that it should have been covering. Medicare has admitted computers were programmed to routinely deny legitimate claims based upon the sole fact that the patient had been diagnosed with Alzheimer's disease.

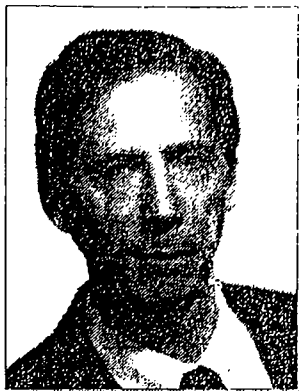
Background

Medicare can only pay for treatment that requires the intervention of medical professionals such as doctors, nurses or physical therapists, occupational therapists or speech therapists. This is called "skilled care." Medicare may not pay for care that can safely be given by a non-medical professional. This is called "custodial care."

This statutory distinction between skilled and custodial care has long been criticized as a wheel-of-fortune that results in inequitable outcomes. Medicare will pay for the heart transplant of a cardiac patient because the operation requires the intervention of doctors and nurses. Medicare will not pay for the medically necessary dressing, bathing or feeding of an Alzheimer's patient because the care can safely be given by a nonmedical professional. The need for the custodial services unquestionably arises out of the illness. However, the test for coverage is not the origin of the disease, it is in the level of care required to manage the illness.

Medicare has admitted that computers were set to classify medical care that would otherwise qualify as skilled care (and approve for payment), as custodial care (and deny payment) simply because the patient had dementia. The rationale was that a dementia patient could never benefit from skilled care. This computer-generated decision was made without an independent investigation into the specific overall medical condition of the individual patient. Diagnosis became an irrefutable presumption of custodial care.

For example, most patients require rehabilitation after a hip-replacement operation to regain the ability to ambulate. This is skilled care because it requires the judgment of a physical therapist. Such a claim would routinely be approved. If the patient suffered from Alzheimer's disease,



the physical therapy claim would be denied automatically, solely on the basis of the dementia diagnosis. Medicare did not make any investigation of the circumstances of the particular patient to see if he or she could benefit from physical therapy.

A decision by Medicare to deny coverage can have irreparable consequences. Such a decision leaves the patient and family with three options: pay privately for the care, rely upon custodial care insurance or forgo treatment entirely

The Change

The Centers for Medicare and Medicaid Services (CMS) is a division of the United States Department of Health and Human Services. It is the federal agency that administers the Medicare program. It delegates the processing of claims to private entities called "fiscal intermediaries." CMS issues program memorandum to fiscal intermediaries to communicate guidelines.

It issued a program memorandum on Sept. 25, 2001 halting the automatic denial of claims made by Alzheimer's patients. It is called transmittal AB-01-135, entitled "Medical Review of Services for Patients with Dementia." It can be found at <http://www.hcfa.gov/publicforms/transmit/AB01135.pdf>.

In this instruction to the "fiscal intermediaries," CMS forbids the use of arbitrary denials. "Contractors may not install edits that result in the automatic denial of services based solely on the ICD-9 codes for dementia" The transmittal recognizes that advanced diagnostic techniques make it possible to identify Alzheimer's at very early stages. In the early stages when dementia is not pronounced, patients may benefit from skilled services. Computers processing claims may not be set to automatically reject skilled-care claims on the sole basis of an Alzheimer's diagnosis.

The program memorandum bases its action on the improvement of medical testing. "Advances in diagnostic techniques, including neuropsychiatric testing, currently enable physicians and psychologists to diagnose some dementias when the patient's disease is at its earliest stages. Throughout the course of their disease, patients with dementia may benefit from pharmacologic, physical, occupational, speech-language and other therapies." This is recognition of the fact that the diagnosis of dementia covers a wide range of impairment, from the very mild to the very severe.

Conclusion

Attorneys should monitor Medicare claims carefully. If a client is on Medicare, has dementia and a skilled-care service is denied, consideration should be given to an administrative challenge, a fair hearing. A high percentage of such challenges are successful. Current medical services that are rendered should be monitored to ensure that the program memorandum is being implemented correctly.

While the ban on automatic denial of claims is a significant development, it only secures benefits Alzheimer's patients should have properly been receiving all along. It is not an expansion of benefits to new areas. Many families read the Times headline to mean that custodial care would now be covered. That is not true. This transmittal is very positive if it ends the discrimination and it also calls attention to the greater problem of custodial-care coverage. This underlying problem, the failure to cover custodial care, has not been addressed.