
FDA & Healthcare LawFlash

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Medicare Therapy Coverage Policy to Be Revised

Proposed class action settlement disavows and discontinues use of the “Improvement Standard.”

Under a proposed settlement of *Jimmo v. Sebelius*, No. 5:11-cv-00017 (D. Vt. filed Oct. 16, 2012) filed with the U.S. District Court for the District of Vermont, a nationwide class action lawsuit, the U.S. Department of Health and Human Services (HHS) agreed to revise portions of the Medicare Benefit Policy Manual (MBPM) to clarify Medicare's coverage of skilled nursing and therapy services necessary either to maintain a patient's current condition or to prevent or slow further deterioration, regardless of whether the patient's condition is expected to improve. The plaintiffs alleged that Medicare contractors apply local coverage determinations, internal guidelines, and policies to deny claims for skilled nursing and therapy services on the grounds that a Medicare beneficiary is not improving, without regard to an individualized assessment of the beneficiary's medical condition and the reasonableness and necessity of the treatment, care, or services in question (the Improvement Standard).

In *Jimmo*, a class of Medicare beneficiary plaintiffs who had skilled therapy in a hospital outpatient department, skilled nursing facility, or a home healthcare setting denied, terminated, or reduced due to the application of the Improvement Standard, on or after January 1, 2006, filed suit arguing that the Improvement Standard violates Medicare statutes, regulations, and other laws.

HHS did not admit any wrongdoing in the proposed settlement or that the Improvement Standard even exists. The settlement requires the Centers for Medicare and Medicaid Services (CMS) to revise portions of chapters one, seven, eight, and 15 of the MBPM to clarify the coverage standards for skilled nursing facility, home health, and outpatient therapy benefits when a patient has no restoration or improvement potential but when that patient needs skilled nursing, home health, or outpatient therapy services.

The proposed settlement requires CMS to engage in an extensive educational campaign and certain review activities, including a nationwide educational campaign and national calls with providers, suppliers, Medicare contractors, and administrative adjudicators about the clarification. The settlement also requires CMS to engage in reviews of random samples of skilled nursing facility, home health, and outpatient therapy coverage decisions by qualified independent contractors to identify any problems in applying the revised coverage standards. Finally, CMS is required to review certain skilled nursing, home health, and outpatient therapy claim denials that were based on the Improvement Standard and became final and nonappealable on or after January 18, 2011.

The settlement is expected to help Medicare beneficiaries with chronic conditions like Parkinson's disease and dementia access skilled care and physical and occupational therapy. While there are no estimates of how much the settlement will cost the Medicare program, some commentary suggests that the settlement may provide some savings by helping to keep beneficiaries out of expensive inpatient facilities.

Because audits, reviews, and claim denials have long suggested application of the Improvement Standard, there is a potential impact on existing audits and administrative proceedings and appeals related to skilled care and therapy services.

The court is expected to approve the settlement within the next several months.

View the proposed settlement at <http://www.morganlewis.com/documents/JimmoProposedSettlement.pdf>.

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View the initial complaint at <http://www.morganlewis.com/documents/JimmoComplaint.pdf>.

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