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September 27, 2002

The Honorable Tommy Thompson
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

The Honorable Thomas Scully
Administrator
Centers for Medicare and Medicaid Services
Hubert Humphrey Building, Room 314-G
200 Independence Avenue S.W.
Washington, D.C. 20201

Dear Secretary Thompson and Administrator Scully:

We are writing to express our serious concern that the proposed regulation on the appeals of Medicare National Coverage Determinations (NCD) directly contravenes clear Congressional intent. Congress passed the provision in the Benefits Improvement and Protection Act (BIPA) of 2000 so that beneficiaries could challenge the Centers for Medicare and Medicaid Services (CMS) administrative policy on national coverage decisions. If a beneficiary was successful in his or her challenge, the policy would apply to all beneficiaries. However, in the proposed rule, CMS retains all discretion on the scope, substance and effect of any decision.

In the statute, Section 522 of BIPA (1869(f)(1)(A)(v)) was unambiguous about who has the final say when a beneficiary appealed a coverage decision: "(v) A decision of the Departmental Appeals Board constitutes a final agency action and is subject to judicial review."

But in the proposed rule, if the Departmental Appeals Board (DAB) -- the independent adjudicator -- finds that the NCD is unreasonable, the outcome (under 426.560 of the proposed regulation) is that CMS can choose do one of the following:

- “(A) Supplement the NCD record or rationale, and issue a new NCD.
- (B) Revise the NCD.
- (C) Repeal the NCD.”

Effectively, the proposed rule states that the Board’s decision is *not* the final agency action. The beneficiary may have provided scientific information to the Board supporting a revision of the overall policy, but the Board cannot enjoin CMS to act on that information. The board is prohibited from:

- Ordering CMS to modify a provision or provisions of an NCD;
- Ordering CMS to pay a specific claim;
- Establishing a time limit for the establishment of a new or revised NCD; or
- Establishing coding or systems changes for an NCD or deadlines for implementing these types of changes.

Indeed, under the regulation, the DAB’s powers are so limited it cannot even give CMS a time limit for circumscribing CMS’s further deliberations.

What has the beneficiary gained under the proposed regulation? Under the proposed rule, if a beneficiary’s complaint is successful, the regulation states “the contractor must reopen the aggrieved party’s claim and adjudicate the claims without using the provisions of the NCD that the Board felt invalid.” Thus, the beneficiary that appealed has gained the right to go through the existing claims adjudication process. The remaining 39 million beneficiaries will have gained little or nothing if CMS chooses to retain the NCD.

If Congress had wanted beneficiaries to have the ability to challenge his or her own claim rather than the underlying policy, Congress would have only altered the existing claims adjudication process. However, the whole point of the Benefit Improvement and Protection Act coverage provisions was to have a successful appeal by a single beneficiary create policy for others, much like Supreme Court rulings become the new law of the land.

Additionally, we have a number of other substantive issues about the regulation such as CMS’ ability to stay the proceedings at any point to review the evidence and the lack of specified deadlines. This compounds other problems such as the right of the estate of a beneficiary who has died during the appeals process to pursue the complaint. We are concerned that if the estate had no right to continue the appeal and the beneficiary received a very expensive uncovered medical procedure, this could have a financially devastating consequence to the family.

We know you share our concern on how to improve the program for beneficiaries and look forward to working with you on revising the regulation. We ask that the revision reflect both the letter and spirit of the law.

Sincerely yours,



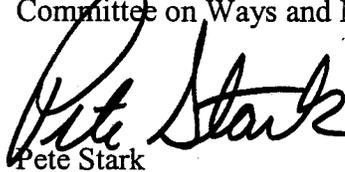
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