Skilled Nursing: Court Reviews, Reaffirms Criteria For Medicare Part A Coverage.

The probate estate of a deceased former patient filed a lawsuit against the US Department of Health and Human Services seeking reimbursement under Medicare Part A for the patient's stay in a nursing facility following her hospitalization.

The US District Court for the Eastern District of New York reviewed in detail the Department's currently-accepted definition of skilled nursing services and concluded that the services provided to this patient were custodial in nature, rather than skilled nursing services, and were not covered by Medicare Part A.

The court expressly rejected a novel, more patient-friendly interpretation of the Department's regulations presented on behalf of the patient's estate. The argument rejected by the court essentially was that care-planning and charting by a licensed professional nurse of personal care and help with ADL's by non-licensed personnel is skilled care in and of itself.

Medicare Part A is a hospital insurance program covering inpatient care and certain post-hospital services including skilled nursing care.

To receive Medicare coverage for post-hospital skilled care, the beneficiary must have been an inpatient in a qualifying hospital for at least three consecutive calendar days, not including the day of the discharge, and must have been discharged in or after the month he or she became eligible for Medicare.

Further, the beneficiary must be in need of post-hospital skilled nursing care, be admitted to a skilled nursing facility and receive such care within thirty days after the date of discharge from the hospital. Medicare benefits include coverage for up to one hundred days of post-hospital extended care services during any spell of illness.

For Medicare to pay the costs of post-hospital extended care services, a physician, nurse practitioner, or clinical nurse specialist must certify and re-certify that such services are or were required because the individual needs daily skilled nursing and/or rehabilitative care for any condition for which the beneficiary received inpatient hospital services.

The court rejects the argument that skilled nursing services include management and evaluation of a care plan by a licensed nurse, when the actual services being provided to the patient are custodial rather than professional in nature.

Management and evaluation of the patient's care plan by a licensed nurse is a skilled nursing service when, due to the patient's physical or mental condition, the care being provided requires technical or professional personnel to meet the patient's needs.

UNITED STATES DISTRICT COURT
NEW YORK
March 19, 2007

The initial certification must be obtained at the time of admission of the beneficiary into the skilled nursing facility. An initial re-certification is required within fourteen days of post-hospital skilled nursing facility care.

Subsequent re-certifications are required at least every thirty days after the first re-certification.

In general, covered skilled nursing or rehabilitative services are (1) ordered by a physician; (2) require the skills of technical or professional personnel; and (3) are furnished directly by, or under the supervision of, such personnel. In addition, these services must be needed by the patient on a daily basis and must be ones that, as a practical matter, can only be provided in a skilled nursing facility on an inpatient basis.

The list of services that do qualify as skilled nursing services includes:

(1) intravenous or intramuscular injections or intravenous feeding;

(2) tube and gastrostomy feeding;

(3) aspiration;

(4) insertion and replacement of catheters;

(5) application of dressings;

(6) treatment of widespread skin disorders;

(7) physician ordered heat treatments;

8) administration of medical gases; and

(9) rehabilitation such as bowel and bladder training programs.

Medicare expressly *excludes* coverage for items and services that are not medically reasonable and necessary, as well as "custodial services." Custodial services consists of care which does not satisfy the requirements for coverage as skilled nursing facility care.

Custodial personal care services that do not require the skills of qualified technical or professional personnel are not skilled services and therefore are not covered by Medicare. Such personal care services include administration of oral medication; bathing and treatment of minor skin problems; assistance in dressing, eating and going to the toilet; and general supervision of previously taught exercises and assistance with walking. These personal care services are considered custodial care and are generally not covered by Medicare.

However, overall management and evaluation of a care plan involving personal care services may constitute skilled services when, in light of the patient's condition, the aggregate of these services require the involvement of technical or professional personnel.

In addition, observations and assessment by a technical or professional person may constitute skilled service when such skills are required to identify the patient's need for modification of treatment or for additional procedures until his or her condition is stabilized. **Estate of Frohnhoefer v. Leavitt, 2007 WL 841917 (E.D.N.Y., March 19, 2007).**