



CMA Weekly Alert – May 26, 2005

## **CASE FILED CHALLENGING NEW REGULATION THAT DENIES NOTICES OF INITIAL DETERMINATION TO MEDICARE BENEFICIARIES' REPRESENTATIVES**

On May 24, 2005, attorneys from the Center for Medicare Advocacy filed a lawsuit in federal court in Hartford challenging the Medicare's refusal to send a copy of Initial Determination notices to the representative of the beneficiary. The suit was filed on behalf of a nationwide class of Medicare beneficiaries.

The case, *Lirov v. Leavitt*, was brought because, without receiving a copy of the notice, representatives frequently do not know that an initial determination has been issued and that the time to seek review is running. They are dependent on the beneficiary to decipher the Medicare Summary Notice (MSN), which the Secretary deems an initial determination, and to grasp that the representative needs to be informed of its content. The failure to seek redetermination of the initial determination cuts off the beneficiary from any possibility of administrative or judicial review, unless the intermediary can be convinced that there was good cause for the failure.

As Medicare Summary Notices (MSNs) were phased in the late 1990s, the Secretary changed his policy on sending notices of initial determination to beneficiaries' appointed representatives. Where he had previously read his own regulations to require that a copy of the notice be sent to the representative, he refused to send a copy of the MSN to the representative. He made this about-face change in policy without altering the regulations.

As part of the regulations that took effect on May 1, 2005, however, the Secretary has now changed the policy to prohibit sending a copy of the notice to the representative. 42 C.F.R. § 406.910(i). Not only does this repudiate the past regulations, but it is also inconsistent with the proposed new regulations, which stated that copies of *all* notices of decisions issued during the administrative process would be sent to the representative. Although the Secretary did not attempt to explain his change of heart between the proposed and final regulations, he did state in the preamble to the final regulations his belief that the MSN contained information beyond that which the appointed representative was entitled to see under privacy rules and therefore the MSN could not be distributed to the representative. In essence, the Secretary relied on his unilateral decision to announce initial determinations via MSNs as his reason for not sending copies of the notice of the initial determination to the representative.

Another irony is that the Secretary carved out an exception for initial determinations involving Medicare Secondary Payer (MSP) recovery claims. See 42 C.F.R. § 405.910(i)(4). Since initial determinations on those kinds of claims are not announced via the MSN, he explained, it was possible to send a copy of the notice to the representative. The Secretary did not explain, however,

why the same type of form used to announce MSP decisions could not be used in place of the MSN to avoid the privacy concerns.

In 2002 a federal judge ruled that the regulations then in existence and the Due Process Clause required that a copy of the notice of initial determination be sent to the representative. *Conn. State Dept. of Social Services v. Thompson*, 242 F.Supp.2d 127 (D.Conn. 2002). That decision, which is on appeal to the Second Circuit (case no. 03-6052), only applied to a relatively small class of dually eligible home health beneficiaries in Connecticut, however, and thus did not directly affect the rights of beneficiaries beyond the class. By contrast, the instant case, if certified, will have a national effect, and, if plaintiffs are successful, the Secretary will be forced to send a copy of the notice of initial determination to representatives in all situations. Plaintiffs contend that the new regulation was issued in violation of the Administrative Procedure Act and the Medicare statute, and that the policy violates the Due Process Clause.

Further information on the case is available from plaintiffs' attorney Gill Deford, in the Center for Medicare Advocacy's Connecticut office, at (860) 456-7790 or [gdeford@medicareadvocacy.org](mailto:gdeford@medicareadvocacy.org). Attorney Deford is also interested in hearing from beneficiaries, representatives, or advocates who know of people who are waiting for initial determinations and who have appointed representatives.