

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

December 3, 2018

By electronic delivery to www.regulations.gov

Centers for Medicare & Medicaid Services
Department of Health and Human Services,
Attention: CMS-4174-P
P.O. Box 8013
Baltimore, MD 21244-8013

Re: CMS-4174-P Medicare Program: Changes to the Medicare Claims and Medicare Prescription Drug Coverage Determination Appeals Procedures

Justice in Aging appreciates the opportunity to provide comments on the above-referenced Notice of Proposed Rulemaking (NPRM).

Justice in Aging is an advocacy organization with the mission of improving the lives of low-income older adults. We use the power of law to fight senior poverty by securing access to affordable health care, economic security and the courts for older adults with limited resources. We have decades of experience with Medicare and Medicaid, with a focus on the needs of low-income beneficiaries and populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

We appreciate the opportunity to comment on the changes proposed in this rulemaking. We recognize that the changes are primarily technical and that they implement statutory directives.

Plain writing: We appreciate that CMS has also used the opportunity to simplify and clarify the existing regulatory structure. Many unrepresented beneficiaries use the appeals process. They need regulations that are clear and written in plain language. We ask that CMS, in conformance with HHS policy,¹ work to further apply plain writing principles to its revisions of regulations. We ask that CMS continue to work to make its regulations, particularly those that beneficiaries need to reference, as clear and simple as possible.

Signature requirement: We appreciate and support the proposal to revise §§ 405.944(b)(4), 405.964(b)(4), 405.1112(a), and 423.2112(a)(4) of the regulations to remove the requirement that the appellant sign the appeal request. In our extensive interactions with on-the-ground advocates, we have not heard of any problems or adverse consequences for beneficiaries in appeals where a signature is not required. Eliminating the signature requirement eases the burden on beneficiaries, and poses little danger of harm.

¹ See HHS, "Plain Writing and Clear Communications" at www.hhs.gov/open/plain-writing/index.html.

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Translation of appeal documents: We noted the absence of any requirement in these regulations for Medicare contractors participating in the appeals process or for the Office of Medicare Hearings and Appeals (OMHA) to translate any appeal-related communications to beneficiaries. In contrast, CMS has imposed translation requirements, though limited, on Medicare Advantage plans and Prescription Drug Plans. See 42 C.F.R. §§ 42268(a)(7) and 423.2268(a)(7) and Medicare Communications and Marketing Guidelines at 100.4.² The Guidance specifically identifies “Coverage/Organization Determination, Discharge, Appeals and Grievance Notices” as requiring translation into a threshold language. It requires translation of these and other specified “vital” plan documents into languages spoken by five percent of the population in the area served. At a very minimum, this threshold should be applied uniformly to appeals documents for all beneficiaries, not just to those issued by Medicare plans.³

It is important and consistent with Title VI of the Civil Rights Act of 1964⁴ and Section 1557 of the Affordable Care Act⁵ for CMS to place similar obligations on other parties to the appeals process. It is unfair, for example, for a Spanish speaking beneficiary receiving a denial in fee-for-service Medicare to have to struggle with an English-only appeal communications while an individual in Medicare Advantage has the right to translated notices. Further, a Medicare Advantage member who receives translated notices at the start of the appeals process should not suddenly be cut off from translated materials when proceeding to the Independent Review Entity (IRE) or Administrative Law Judge (ALJ) levels.

As already noted many individuals pursue appeals unrepresented. The appeals system is supposed to be designed to be navigable by unrepresented appellants. For individuals with limited proficiency in English, a key element to that navigation is access to notices in a language they can understand.

Thank you for considering our comments. If any questions arise concerning this submission, please contact me at jgoldberg@justiceinaging.org.

Sincerely,



Jennifer Goldberg
Directing Attorney

² Available at www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/Downloads/CY2019-Medicare-Communications-and-Marketing-Guidelines_Updated-090518.pdf.

³ Justice in Aging has repeatedly urged CMS to revisit this threshold determination. We believe that translation requirements should be triggered by meeting either a numerical threshold or a percent threshold. Plans serving population areas of many millions, such as Prescription Drug Plans in New York or California, may serve a very significant number of speakers of a non-English language but, because percentages alone are used, are not subject to any requirement beyond Spanish.

⁴ 42 U.S.C. § 2000d, et seq.

⁵ 42 U.S.C. § 18116.