

NURSING HOME'S FAILURE TO NOTIFY LEAVES BENEFICIARY NOT LIABLE FOR CUSTODIAL CARE SERVICES

A Medicare beneficiary is not liable for custodial care services rendered by a Mississippi nursing home because the facility failed to give adequate notice the services were not covered by Medicare, a federal appeals court panel ruled on October 25. The case (*Mississippi Care Center of Morton LLC, Sebelius*, 5th Cir., No. 10-60595, Oct. 25, 2011) concerned the application of 42 C.F.R. 411.404, which states a beneficiary is considered to have known custodial care or services that are not reasonable and necessary are not covered services under Medicare, provided the beneficiary received adequate notice the services are not covered under Medicare.

Under the regulation, adequate notice would be (1) written notice; (2) a previous notice concerning similar or reasonably comparable services furnished on a previous occasion, or (3) after the beneficiary is notified that there is no Medicare payment for a service that is not covered by Medicare, the beneficiary is presumed to know that there is no Medicare payment for any subsequent such service.

In this case, the nursing home provider failed to give adequate notice to the beneficiary the custodial care services provided where not covered services under Medicare. Prior to reaching the U.S. Court of Appeals for the Fifth Circuit, the case was ruled in favor of the beneficiary in an administrative hearing before an Administrative Law Judge ("ALJ"), who, according to the Court, reached the correct conclusion, but misinterpreted the relevant regulation. The ALJ determined the regulation required the provider to give the beneficiary written notice the service was excluded from Medicare reimbursement.

Written notice is but one of the acceptable forms of notice, and the lack of written notice creates a rebuttable presumption that adequate notice has not been given. However, the nursing home provider could rebut the presumption with evidence that adequate notice, even oral notice, had been given.

For long-term care providers, this case highlights the necessity to adequately document giving beneficiaries notice when providing services that are not covered by Medicare reimbursement.

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