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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Refer to: FQA-832

JAN 13 1994

Director
Bureau of Policy Development

Limitation of ESRD Related Services by an Employer Group
Health Plan - [redacted] Inc. (Reference
IO5/PM25g)--INFORMATION

Regional Administrator
Chicago
Attn: Associate Regional Administrator
Division of Medicare

You are requesting guidance as to whether the [redacted] group health plan is in violation of the nondifferentiation provision of the Medicare secondary payer (MSP) provision for end stage renal disease (ESRD) beneficiaries. Under the [redacted] plan, the lifetime maximum benefit for the treatment of kidney disease is \$30,000, for AIDS, \$15,000 and for mental health and substance abuse, \$25,000. It is our opinion that the maximum lifetime benefit of \$30,000 for the treatment of kidney disease violates the nondifferentiation provision.

The nondifferentiation provision of the ESRD MSP statute provides:

[a group health plan] may not differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner.

Section 3490.14 of the Medicare Intermediary Manual (MIM) provides examples of plan actions that may violate the nondifferentiation provision. Included is the following:

"The plan imposes limitations on benefits for persons with ESRD which are not applicable to others, e.g., a higher deductible or coinsurance, a longer waiting period or a lower annual or lifetime benefits limit."

A plan which provides fewer benefits for kidney disease than it does for other diseases is considered to be differentiating between persons with ESRD and others covered by the plan even though the plan also has benefit limits for certain other

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FQA-832	Walt Bolton	12/27	FQA-41	Hollings	1/13
FQA-83	James J. [redacted]	12/27			
FQA 8	Wren	1/4			

diseases. (The fact that a plan may be differentiating between persons with certain diseases other than ESRD and others covered under the plan has no bearing on whether the plan is also differentiating between persons with ESRD and others covered under the plan.) However, a plan which uniformly limits benefits across the board for all diseases would not be in violation.

Lifetime benefit limitations on treatment of diseases is distinguishable from payment variations with respect to specific services. That is, setting a lifetime benefit limit for the treatment of ESRD at a lower level than that applicable to other diseases plainly violates the prohibition against differentiation "on the basis of the existence of end stage renal disease." On the other hand, a plan which sets maximum benefit levels for various services, such as renal dialysis and kidney transplantation, which are actuarially (or empirically) derived would not violate the nondifferentiation provision.

For instance, if payment rates for all services in connection with a particular procedure such as surgery are determined on the basis of the "usual, customary, and reasonable charge" or the average costs in the area, the resulting payment rates for a kidney transplant vis-a-vis a heart transplant may vary without violating the nondifferentiation provision of the Medicare law. This is due to differences in the amount, type or cost of services required for a heart transplant, including the hospital stay, level of care, and physicians services, exceeding, on average, the amount, type or cost of services required for a kidney transplant. If the "usual, customary, and reasonable charges" for a kidney transplant are \$50,000, while those for a heart transplant are \$125,000, a plan may limit its benefits to those amounts without violating the nondifferentiation provision.

The same policies apply where there are annual and lifetime benefit limits with respect to a particular procedure, such as an organ transplant. Such limits may vary without violating the nondifferentiation provision, as long as the differences are actuarially derived, not arbitrarily set. Thus, for example, if annual and lifetime benefit limits for various transplants are determined on a uniform basis, such as a uniform multiple of the usual, customary and reasonable charges for respective procedures, resulting differences in annual and lifetime benefit limits for various transplants, including kidney transplants, would not violate the Medicare law. This is so because the plan would be treating ESRD

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patients and non-ESRD patients equally by uniformly determining annual and lifetime benefit limits for particular procedures.

Thus, the reference in the MIM to a plan imposing "a lower annual or lifetime benefit limit," pertains to limits on treatment of ESRD in general, and to arbitrarily determined limits on payment for various services.

Thus, if annual or lifetime plan benefit levels are set lower for treatment of ESRD than for other diseases, the plan would be in noncompliance with the Medicare law. This appears to be the case with the lifetime limits imposed under the [REDACTED] plan.

Please notify the plan that it's \$30,000 lifetime limit on benefits for the treatment of kidney disease violates Section 1862(b)(1)(C)(ii) of the Social Security Act (the nondifferentiation clause) and that it, therefore, must rescind this plan provision.

If you have any questions about this matter please contact Larry Bonander of my staff. He can be reached on (410) 966-4479.

Thomas A. Ault

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Additional Information: