

Kathleen Martin is an attorney with O'Donnell, Weiss & Mattei, P.C., and a newspaper columnist for The Mercury, which gave permission for this article to be reprinted.

---

August 20, 2017

## Medicare improvement standard in rehabs still alive and well

Three years after the *Jimmo v. Sebelius* case was settled in which the Centers for Medicare and Medicaid Services (CMS) agreed to a settlement scuttling the so called “improvement standard,” we find this standard is stubbornly alive and well in skilled nursing facilities and home health care. Medicare beneficiaries are still being denied Medicare covered care because they are not “improving” or have “plateaued.”

In the *Jimmo* settlement, CMS acknowledged that there is no legal basis for an improvement standard which was the accepted standard for many years. This standard dictated that skilled treatment would only be covered by Medicare if the patient was making improvement, which is an impossible standard for many chronically ill beneficiaries. Under the settlement, inpatient care in a skilled nursing facility (following a qualifying three-day hospital stay and up to 100 days) will be covered by Medicare as long that the treatment helps ***maintain*** the patient’s current status or ***simply delays or slows the decline***. Outpatient home care should follow the same rules except that no qualifying hospital stay is required and if the patient is homebound, the length of treatment is indefinite, not limited to 100 days. Therefore, any patient that would ***benefit*** from any skilled care, nursing care, physical therapy, occupational therapy, or speech therapy, not just improve, is entitled to Medicare coverage for that therapy.

Despite the *Jimmo* settlement, hospitals, skilled nursing facilities, skilled home care associations, and insurance intermediaries that actually apply the rules have not responded to the directives and changes in policy manuals. CMS has now agreed to a court-ordered corrective action plan of which the statement following is a part.

“The Centers for Medicare and Medicaid Services (CMS) reminds the Medicare community of the *Jimmo* Settlement Agreement (January 2014) which clarified that the Medicare program covers skilled nursing care and skilled therapy services under Medicare’s skilled nursing facility, home health, and outpatient therapy benefits when a beneficiary needs skilled care in order to maintain function or to prevent or slow decline or deterioration (provided all other coverage criteria are met). Specifically, the *Jimmo* Settlement required manual revisions to restate a “maintenance coverage standard” for both skilled nursing and therapy services under these benefits:

Skilled nursing services would be covered where such skilled nursing services are necessary to *maintain the patient’s current condition or prevent or slow further deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided (emphasis added)*.

Skilled therapy services are covered when an individualized assessment of the patient’s clinical condition demonstrates that the specialized judgment, knowledge, and skills of a qualified therapist (“skilled care”) are necessary for the performance of a safe and effective maintenance program. Such a maintenance program to maintain the patient’s current condition or to prevent or slow further deterioration is covered so long as the beneficiary requires skilled care for the safe and effective performance of the program.

The *Jimmo* Settlement may reflect a change in practice for those providers, adjudicators, and contractors who may have erroneously believed that the Medicare program covers nursing and therapy services under these benefits only when the beneficiary is expected to improve. The Settlement is consistent with the Medicare program’s regulations governing maintenance nursing and therapy in skilled nursing facilities, home health services, and outpatient therapy (physical, occupational, and speech) and nursing and therapy in inpatient rehabilitation hospitals for beneficiaries who need the level of care that such hospitals provide.”

The Center for Medicare Advocacy ([www.medicareadvocacy.org](http://www.medicareadvocacy.org)) website is a great source of information to help with these denials of coverage. As they say, “While this doesn’t change the rights Medicare patients have always had, it should make it somewhat easier to enforce them. If you or a loved one gets denied coverage because the patient is not “improving,” then appeal.”