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Providers Opting Out of Medicare Prior to Program Exclusion (OEI-04-99-00590;12/00)

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We had begun work on an analysis of the so called "opting out" provision of Medicare under which a physician or other practitioner may choose to not participate in the Medicare program but provide services to Medicare beneficiaries under terms of a contract entered into with them. In discussions with Health Care Financing Administration (HCFA) staff, we discovered that HCFA itself had commissioned work on this topic. In order to avoid a duplication of effort, we significantly reduced the scope of our study. We narrowed it to a single topic not covered under HCFA's own study effort, namely whether providers are opting out of Medicare prior to being excluded from the program.

SUMMARY

There is not a widespread problem with providers opting out Medicare before being excluded from the program. Our analysis shows that of the 1,107 providers who opted out of the Medicare program in 1998 and 1999, only one was subsequently excluded from Medicare.

However, we did discover that in the rare event of a provider being excluded from Medicare after opting out, Medicare beneficiaries lose one element of protection which is afforded to those who enter into private contracts with providers who are not excluded after opting out or who are excluded before doing so. Providers who opt-out of Medicare prior to exclusion are not required to notify Medicare beneficiaries, with whom they have existing private contracts, of their exclusionary status. Medicare beneficiaries, therefore, may not be provided an opportunity to make informed health care choices and could receive care from an excluded provider without knowing that the provider is excluded.

BACKGROUND

By October 2001, HCFA is required to report to Congress on quality of care issues and the financial impact of allowing physicians or practitioners ("providers") to opt-out of Medicare and establish private contracts with Medicare beneficiaries. To support that effort, HCFA staff requested that we determine if providers opted out prior to exclusion from the Medicare program.

Section 1802 of the Social Security Act (“Act”), as amended by §4507 of the Balanced Budget Act of 1997, permits certain physicians or practitioners to opt-out of Medicare and enter into private contracts with Medicare beneficiaries. Physicians permitted to opt-out are doctors of medicine and doctors of osteopathy.¹ Likewise, practitioners permitted to opt-out are physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, certified nurse midwives, and clinical social workers.² Hereinafter, the group of statutorily defined physicians and practitioners eligible for opting out will be referred to as providers.

Opt-out

Providers “opt-out” by severing all ties with Medicare. In such instances, providers may enter into private contracts with Medicare beneficiaries to provide items and services. Payment for provided items and services is made directly by the patient or through private insurance.

The opt-out option became available January 1, 1998. Providers choosing to opt-out must do so for a 2-year period. Providers are automatically allowed to bill Medicare at the conclusion of their opt-out period unless they renew their opt-out agreement with HCFA. With exception of emergency or urgent care, providers who opt-out of Medicare are not eligible for reimbursement under the Medicare program.

Exclusion

The Act authorizes the Inspector General of the Department of Health and Human Services to “exclude” health care providers from Medicare. Exclusionary offenses can include felony convictions, fraudulent behavior, license revocation, or loan default. During the period of exclusion, providers cannot receive Medicare reimbursement for items or services, other than in cases of emergency.³

METHODOLOGY

We conducted a national evaluation to determine if providers voluntarily opted out of Medicare prior to involuntary exclusion from the Medicare program. We analyzed two databases, the HCFA opt-out database and the Office of Inspector General (OIG) exclusions database.

1

42 C.F.R. Subpart D–Private Contracts § 405.400 (Oct. 1, 1999). *See* Social Security Act (SSA) § 1802 et seq. 42 U.S.C. § 1395a. *See also*, Balanced Budget Act, Section 4507(b)(5) of Title IV of Pub. L. 105-33 (1997) citing SSA §§ 1861(r)(1) and 1842(b)(18)(C).

² *Id.*

³ Social Security Act § 1892(e)(1). *See*, 42 C.F.R. at § 405.425(j) (Oct. 1, 1999).

We obtained calendar year 1998 and 1999 data from the opt-out database. In the 43 specialties represented in the database, 1,107 health care providers opted out of Medicare.

We downloaded calendar years 1998, 1999, and the first 4 months of year 2000 exclusions data from the OIG Internet site. We included January-April 2000 data to capture exclusions which occurred subsequent to opt-outs that came late in calendar year 1999. In total, during our relevant time frame, 6,485 individuals or entities were excluded from the Medicare program.

We also reviewed relevant laws, regulations, and HCFA policies to determine if health care providers are required to notify beneficiaries when they are excluded from Medicare. To supplement our literature reviews we interviewed HCFA central office staff.

FINDINGS

One Provider Opted Out Prior To Exclusion

We found that one provider opted out of the Medicare program prior to being excluded. We ran three computer queries matching the opt-out and the exclusions databases. The three queries, based on Unique Physician Identification Number (UPIN), First and Last Name, and Last Name and Zip Code, resulted in only one conclusive match.

Our query based on the UPINs resulted in a match between the opt-out and exclusions databases.

The First and Last Name query resulted in six matches where individuals opted out prior to exclusion. To determine if the six name matches were coincidental or actually reflected the same provider, we compared Middle Initial, City, State, and Zip Code information. Based on our review of the additional information, we concluded that five of the six Name matches were circumstantial and not actually the same providers. The one provider that matched under this query was the same provider who matched under the UPIN query.

In the final query, two pairs of providers shared identical Last Names and Zip Codes. Comparison of additional traits (i.e., First Names, Addresses, and Gender) of these common individuals clearly demonstrated they were not the same providers.

Beneficiary Protections Could Be Compromised

Congress and HCFA believe beneficiaries should receive adequate notice of their provider's exclusionary status.⁴ The regulations require beneficiary notification of exclusionary status

⁴ 63 Fed. Reg. 58853 (1998) "[HCFA] believe[s] it was Congress's intent to require clear notice of *any* exclusion, regardless of the specific statutory basis for it, in *the* contract with the beneficiary." (Emphasis added). *See also* 63 Fed. Reg. 58855 (1998) (discussing advance notice of opt-out).

when an excluded provider creates a private contract with a beneficiary. The notification must be made in writing as part of the newly established private contract with the beneficiary. The regulations, however, are not instructive on beneficiary notice for a provider who opts out and then is subsequently excluded.⁵ A provider can opt-out, establish a private contract with a beneficiary, subsequently become excluded, and is not then required to inform the previous privately contracted beneficiary of the provider's exclusionary status. The private contract remains in force throughout the opt-out period and is not voided by the exclusion. As a consequence, a beneficiary would have no knowledge of the provider's exclusionary status if the provider opted out prior to being excluded. Knowledge of the exclusionary status of a health care provider could influence the decision by a beneficiary to continue receiving items and services from that provider.

To illustrate, a provider may opt-out of Medicare in January. The provider can then sign a private contract with a beneficiary which is silent on the issue of Medicare exclusion. Several months later, the provider is excluded from Medicare. Under the law, the provider must notify the beneficiary of his or her exclusionary status in any future private contracts.⁶ However, the provider previously (in January) opted out of Medicare and then entered into a private contract with the beneficiary. The beneficiary has no required notice—retroactive or otherwise—of the exclusion.

CONCLUSION

Providers opting out of Medicare prior to their exclusion from Medicare is not a widespread problem. However, in those rare cases where it occurs, the beneficiary protection of being notified that the health care provider has been excluded from Medicare is not operative.

Should HCFA wish to strengthen beneficiary protections by eliminating this potential vulnerability, one option would be to require all pre-existing private contracts upon provider exclusion from the Medicare program be null and void. A further refinement under this approach would be to require in the future that all private contracts between Medicare beneficiaries and providers opting out of the program contain a clause noting that a provider's subsequent exclusion from a Federal health care program during the 2-year opt-out period will void and nullify the contract (i.e., the initial private contract) and that a new contract would be needed to continue the relationship between the provider and the Medicare patient.

It should be noted that any burden associated with this new procedure would only encumber only those providers who opted out of Medicare and then are subsequently excluded from the program.

⁵ SSA § 1802(b)(2)(B) and 42 C.F.R. § 405.415 (Oct. 1, 1999) (both rules require private contracts to indicate the physician's or practitioner's exclusion in all newly created private contracts but not in any of the previously constructed private contracts).

⁶ *Id.*; 63 Fed. Reg. 58855 (1998). *See* SSA § 1862 et seq.

Page 5 - Peter Griffin

If you have any questions, please do not hesitate to call me or have your staff call Stuart Wright at 410-786-3144.