

The Gottesman Report

A Newsletter For Your Benefit

October 2005

Unfavorable Medicaid changes on the Horizon ...

The Congressional Medicaid Commission, which has been directed to achieve billions of dollars in savings over the next five (5) years, has made specific recommendations which, if implemented, will be quite unfavorable to many of our clients who are on Medicaid.

One such recommendation is to allow states to establish pharmaceutical prices based on the average manufacturer price rather than the average wholesale price – this will mean that drug costs will rise significantly.

Another recommendation has to do with lifetime planning for those who may need Medicaid in the future. At present, there is a 36-month “look-back” period, meaning that any asset transfer made to impoverish an individual so that he/she will be Medicaid eligible will have a 5-year “look-back” period. In practical terms, this means that Medicaid planning must begin five years before expected need rather than three years.

Yet another recommendation will tax all managed care organizations equally, rather than just taxing those with Medicaid contracts. If implemented, this means that premiums for private health care coverage will rise significantly.

If these issues concern you, you should write to your Congress person and speak out against the recommendations. The complete report of the commission is available online in PDF format at www.cms.hhs.gov/faca/mc/details.asp

Health Care Choices ...

End-of-life decision making is a complicated subject made all the more so by its emotional aspects. Now available is a 17-page pamphlet entitled “Health Care Choices – Who Can Decide?” This pamphlet emphasizes planning for individuals who are unable to plan for themselves, including mentally and physically disabled individuals. The pamphlet can be accessed through the NYS Office of Mental Retardation and Developmental Disabilities (OMRDD) at www.omr.state.ny.us by clicking on “General Information and Publications” and again on “Health Care Choices.” If you do not have internet access, and wish a copy of this pamphlet, please call our office.

Long-Term Disability Benefits and Mental Impairments ...

It has for some time been the position of our office that the designation of a two-year limit on LTD benefits for mental impairments is discriminatory and can be challenged on that basis. Unfortunately, the Federal Court, via a Second Circuit opinion, has upheld such disparate treatment between physical and mental illnesses.

A recent decision has held that bipolar disorder, though it could be found to be physically induced, cannot be covered as a physical illness. The issue in this case was not specifically the two-year limitation, which the court upheld as being valid when the LTD plan says it is valid, but whether bipolar disorder, if found to have a physical component, can be covered as a physical

impairment. The Court found that it could not, since the effect of the chemical imbalance, assuming that such an imbalance can be proven, is mental, rather than physical. Despite the fact that Plaintiff in this matter had many opinions from various physicians that bipolar disorder is indeed the result of a chemical imbalance in the brain, the Court found that the effect of the illness, not its cause, is what determines the extent of coverage.

SSA Videoconference Hearings ...

Some time ago, we discussed the fact that SSA has tested videoconference hearings on denials of Social Security disability and SSI benefits in various locations. This program is now preparing to expand on a national basis to the point where videoconference hearings will soon be the norm rather than the exception.

While video hearings are desirable from SSA's point of view, because of administrative efficiency, they have several features that make them quite undesirable to Claimants and their attorneys. The most important drawback of video hearings is the inability for the Judge and the Claimant to meet face to face. This is particularly important in instances in which there is a significant pain component to the Claimant's disability. Pain can be expressed on an individual's face, and for the ALJ to be able to make credibility determinations without seeing the Claimant's face may be a denial of due process to the Claimant.

Moreover, while in a face-to-face hearing the Claimant can hand last-minute evidence to the ALJ for the ALJ to see prior to or at the hearing, the video conference hearing does not provide for this feature unless the evidence presented is only a small number of pages. The evidence must be faxed to the ALJ during the hearing, making submission of extensive information

impossible at the time of the hearing. Thus, the ALJ will be forced to conduct the hearing without the benefit of reviewing the new evidence. This also could be a denial of due process to the Claimant.

The regulations implementing this change provide that the ALJ is required to conduct a video hearing unless several factors making it undesirable to do so are met. Thus, Claimants will need to actively opt out of a video hearing if they do not wish to have one. Moreover, this right to opt out of a video hearing must be exercised at the earliest possible opportunity, and will not be honored if the choice is made several days or less before the hearing. However, the ALJ will find good cause to honor the wish for an in-person hearing upon mere objection by the Claimant without any explanation.

Thus, Claimants who receive notice of a videoconference hearing must immediately contact the hearing office issuing such notice that he/she wishes to have an in-person hearing. The need to implement such due-process protections is one more reason why it is necessary to have an attorney at the hearing level if not before.

Remember: The best "thank you" for a job well done is your referral of a potential new client.

Finally ...

If you are interested in seeing a particular issue addressed in this Newsletter, or if anyone you know wishes to be placed on the mailing list for future Newsletters, please let us know.