Attorneys Fees and Medicare Representation:  The Problem of the Fee Structure and Limitation of Title II of the Social Security Act\(^1\) and Medicare Representation

By Alfred J. Chiplin, Jr., AChiplin@centerproject.org
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1. **Introduction**

On August 11, 2000, HCFA stated its position that it does not believe it has the requisite authority to reimburse attorneys who represent Medicare beneficiaries in Medicare appeals; that it cannot implement the Title II fee structure and limitation. This clarification is an important step in furthering Medicare representation and client services.

The brief response of HCFA, dated August 11, 2000, is quoted below in its entirety:

This letter serves as a formal clarification that the Health Care Financing Administration (HCFA) lacks the requisite statutory authority to reimburse attorneys who represent beneficiaries in the Medicare appeals process. At this time, HCFA does not plan to amend the regulations at 42 C.F.R.\$422.560 et seq. to address the issue of whether Medicare pays attorneys fees.

If you require additional assistance, please do not hesitate to...

\(^1\) 42 U.S.C. \$401 et seq.
contact me on (410)786-6832, or Michele Edmondson of my staff at (410)786-6478.

Sincerely,

/S/

Margaret P. Sparr
Director
Beneficiary Membership Administration Group

(See section III.B of this Article for details.)

There has been an on-going problem in getting attorneys to represent claimants in Medicare appeals, either in the administrative review process or in the federal district courts. Of particular concern is whether the Social Security Act structure and limitation on the amount of a fee that an attorney can collect under Title II of the Social Security Act applies in Medicare cases. This provision is linked to Medicare through an agency-created cross-reference in the Code of Federal Regulations.

In the midst of this sits the issue of the fee. Common concerns include: (1) if fees are to be  

2 See, 42 U.S.C. §406(a)(2)(A)(administrative review) and §406(b)(1)(A)(court review). Note, also, that under §406(d), attorneys fees certified under §406(a)(4) or (b)(1) are subject to a 6.3% assessment to recover the Commissioner's cost of determining and certifying fees to attorneys from the past-due benefits of claimants. 42 U.S.C. §§406(d)(1)-(6)(assessment on attorneys). See also 20 C.F.R. §§405.1720, 405.1725, and 405.1730(b) and (c)(attorneys fees).

3 See 42 C.F.R. §405.701(c) provides that Subparts J and R of 20 C.F.R. Part 404, with respect to determinations, the administrative review process, and the representation of parties, also applies to matters arising under 42 C.F.R. §405.701(a) relating to entitlement to hospital insurance (Part A) or supplementary medical insurance (Part B) of Title XVIII of the Social Security Act.
handled according to the rules of Title II of the Social Security Act, how is a fee to be established based on a past-due award when Medicare is not that type of program; (2) how to address the practical reality that the Administrator of the Medicare program does not approve fees; and (3) whether one can charge for legal assistance on Medicare matters that are not the subject of a dispute about payment for or coverage, for example, consultations about whether to remain in fee-for-service Medicare or whether to participate in one of the new Medicare managed care options.\(^4\)

II. **Background**

A. **Title II of the Social Security Act.**

Under Title II of the Social Security Act, the claimant and his or her representative must agree on a fee, not to exceed the lesser of 25% of the total amount of such past-due benefits (before an actual reduction) or $4,000.\(^5\) This agreement must be presented in writing to the Commissioner of Social Security prior to the time of the Commissioner’s determination regarding the claim.\(^6\)

The fee is to be approved by the Commissioner at the time of the favorable determination and the

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\(^4\) To the extent one seeks to charge for these services, they should be defensible as a counseling service apart from any particular effort to appeal a denial, reduction, or termination of a specific service under Title II or the Medicare program, arguing that these services are not constrained by law. See, *e.g.*, N.Y. Jud. Law. §474 (McKinney’s 1999).


\(^6\) *Id.* at §406(a)(2)(A)(i)-(iii).
fee specified in the agreement shall be the maximum fee, except as provided in §406(a)(3) as that relates to adjustments in the amount of the fee.\(^7\)

With respect to fees in court proceedings, upon rendering a favorable judgement, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25% of the total past-due benefits to which the claimant is entitled based on the judgement of the court.\(^8\)

B. The Medicare Program (Title XVIII) of The Social Security Act.\(^9\)

Generally under Medicare Part A, payment is made to providers and suppliers of services in a variety of care settings, including hospitals, skilled nursing facilities, home health agencies, and hospice programs.\(^10\) Beneficiaries are responsible for copayment and deductible amounts.\(^11\)

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\(^10\) See, 42 C.F.R. §409.5 (General description of benefits).

\(^11\) *Id.* Hospital Insurance Deductibles and Coinsurance is described at 42 C.F.R. §§409.80-83; Skilled Nursing Facility care coinsurance (42 C.F.R. §409.85). The blood deductible is described at 42 C.F.R. §409.87. Under the home health benefit, beneficiaries are responsible only for a coinsurance amount for durable medical equipment (DME) furnished as a home health service (42 C.F.R. §409.50); the beneficiary is not otherwise responsible for a home health care copayment. See, 42 C.F.R. §410.150(c). With respect to hospice care, beneficiaries are responsible for coinsurance amounts for drugs and biologicals and respite care as provided in 42 C.F.R. §418.400.
Beneficiaries do not receive a monthly cash benefit.

Similarly, under Medicare Part B, the Supplemental Insurance Program, beneficiaries do not receive a cash benefit. Rather, payment is made for services provided to doctors and other Medicare providers of services who have in effect a provider agreement or other appropriate agreement to participate in Medicare.\textsuperscript{11} Payment is made to the individual, or to a physician or other supplier on behalf of the individual, for medical and other health services.\textsuperscript{12} Generally, Medicare covers 80 percent of the reasonable cost of the service, with the beneficiary being responsible for a 20 percent co-payment amount.\textsuperscript{13} Beneficiaries must also satisfy an annual Part B deductible amount,\textsuperscript{14} and a blood deductible amount.\textsuperscript{15}

In addition, Congress adopted a fee schedule approach to the payment of physician services, beginning on a phase-in basis, in January 1992.\textsuperscript{16} Costs may be further reduced for beneficiaries who receive services from providers and suppliers who participate in the Medicare

\begin{enumerate}
\item See, 42 C.F.R. §410.150.
\item 42 C.F.R. §410.150(b).
\item Id. at §410.150(b).
\item Id. at §410.160.
\item Id. at §410.161 (first three pints of whole blood or units of packed red cells that are furnished under Part A or Part B in a calendar year). This amount is in addition to the Part B annual deductible. See Id. §410.161(a)(5).
\item See, 42 U.S.C. §1395w-4.
\end{enumerate}
Physicians who “accept assignment” accept the Medicare reasonable charge amount as payment in full. The charges of physicians and suppliers who do not participate in the physician assignment program are subject to a Medicare limiting charge amount which is no more than 115% above the Medicare reasonable charge amount.

Persons electing services through Medicare’s managed care options (new Part C, the Medicare+Choice Program) may have limited cost-sharing obligations depending on health plan options chosen. Generally, Medicare+Choice Organizations (MCOs) receive a capitated rate for providing services to Medicare beneficiaries.

III. Advocacy Efforts Addressed to HCFA

A. Work Group on Severing the Link to Title II

17 See, 42 U.S.C. 1395u(b).

18 Id.

19 See, 42 U.S.C. §1395w-4(g).


21 See, Subpart G– Premiums and cost-sharing, 42 C.F.R. §§422.300-308.

Current thinking among Medicare advocates is that the Social Security fee structure and limitation on fees does not apply in Medicare cases. To pursue this view and to focus attention and advocacy on the importance of this question, the Public Policy Committee of the National Academy of Elder Law Attorneys, along with the Center for Medicare Advocacy, Inc., the National Senior Citizens Law Center, the Medicare Rights Center, and the Consumer Coalition for Quality Health Care formed a working group. The working group is in contact with the Health Care Financing Administration (HCFA), the agency that administers the Medicare Program within the Department of Health and Human Services. Communications have focused on the reality that in Medicare cases, unlike Title II cases, there is not a lump-sum retroactive payment (past-due amount) from which to base an award, and thus the link to this aspect of the Social Security Title II regulations is inapplicable.

B. Pursuing The HCFA Clarification

There is a general sense at HCFA that the Social Security fee structure and limitation should not apply in Medicare cases. In May of 2000, a formal letter was sent to HCFA, seeking written confirmation of HCFA’s current position.23

On August 17, 2000, we received a response to our request for clarification. The brief response of HCFA, dated August 11, 2000, is quoted below in its entirety:

23 May 22, 2000 letter to Margaret Sparr, Director, Beneficiary Membership Administration Group, Center for Beneficiary Services, HCFA, DHSS.
This letter serves as a formal clarification that the Health Care Financing Administration (HCFA) lacks the requisite statutory authority to reimburse attorneys who represent beneficiaries in the Medicare appeals process. At this time, HCFA does not plan to amend the regulations at 42 C.F.R. §422.560 et. seq. to address the issue of whether Medicare pays attorneys fees.

If you require additional assistance, please do not hesitate to contact me on (410)786-6832, or Michele Edmondson of my staff at (410)786-6478.

Sincerely,

/S/

Margaret P. Sparr
Director
Beneficiary Membership Administration Group

The text of our letter to HCFA, dated May 22, 2000, is quoted below:

As you know from our on-going correspondence, the Center for Medicare Advocacy, Inc., along with the National Academy of Elder Law Attorneys (NAELA), is part of a work group looking at issues of access to services under the Medicare statute. An outstanding problem area is the impediment posed by the Social Security Act’s attorney’s fee limitation provision found at 42 U.S.C. §§406(a)(2)(A) (administrative review) and 406(b)(1)(A) (court review) and its applicability to Medicare cases. These provisions require Social Security approval of fees, and direct the awarding of fees from the cash benefit granted to the claimant.

It is our view that 42 U.S.C. §§406(a)(2)(A) and 406(b)(1)(A) do not apply to Medicare cases. As you know, an award of Medicare of Medicare benefits results in payment of a health care provider’s bill; no cash benefits are granted to the claimant.

Thus, as a practical matter, 42 U.S.C. §§406(a)(2)(A) and 406(b)(1)(A) do not address the reality of Medicare cases and practice. HCFA does not approve fees in Medicare cases and there is no past-due amount from which to take a fee.
A formal clarification from your office would be helpful. We await your formal response.

Sincerely

/S/

Alfred J. Chiplin, Jr.
Attorney

IV. Educating Attorneys and The Public

It is important to have from HCFA a formal statement that it believes it lacks the statutory authority to reimburse attorneys who represent beneficiaries in the Medicare appeals process. The statement is in effect an acknowledgment that HCFA does not have an operational mechanism to implement the Title II attorneys fee provisions described above. This should free attorneys to develop fee arrangements for Medicare appeals work in keeping with state law practice and custom.

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24 In order to verify this position, I called Ms. Sparr's office at HCFA. Ms. Sparr is unavailable through the end of the month so I spoke to the research analyst, Ms. Michele Edmondson, who wrote the letter for Ms. Sparr's signature. Ms. Edmondson said that our interpretation of the letter is correct: that HCFA does not believe it has the requisite authority to reimburse attorneys who represent Medicare beneficiaries in Medicare appeals, that it can not implement the Title II fee structure, and thus the structure and fee limitations do not apply to Medicare.

As to the reference to M+C appeals process, 42 C.F.R. §422.560 et seq., Ms. Edmondson said that the reference was intended to indicate that the Title II fee structure and limitations do not apply to the M+C program and that HCFA does not intend to seek any amendments in this regard.
A. **Encouraging Attorneys to Do Medicare Work**

Now that there is a favorable HCFA clarification, attorneys in all states should feel free to develop compensation arrangements with their clients by agreement, either expressed or implied.\textsuperscript{25} Fees only need be reasonable.\textsuperscript{26}

Attorneys are encouraged to consider Medicare work broadly. They should look to their general practice experience and state law in developing fee agreements. In doing so, as a practical matter, what the market will bear is a primary consideration. In this regard, some attorneys have raised the practical question of Medicare work being generally quite time-consuming and thus potentially too costly for many clients, particularly those of modest means. In this regard, both clients and attorneys may find that as a practical matter taking on Medicare work may not be attractive.

A solution may be to see Medicare work as part of a package of services to be provided, and thus more feasible.\textsuperscript{27} Advocates are encouraged to develop a number of approaches to this problem and


\textsuperscript{26} **Koerner v. Associated Linen Laundry Supplies**, 62 N.Y.S. 2d 774 (1946).

\textsuperscript{27} Developing a “package of services” can be approached in a number of ways. Attorneys may consider offering assistance with Medicare matters as part of the over-all planning for long-term care process. It could also be part of implementing home and community-based services such as working with a person with a chronic health condition requiring home health
to share them so that there a catalogue of best practices is developed for dissemination and discussion.28

At the November 2000 meeting of the National Academy of Elder Law Attorneys, a seminar session was presented on adding Medicare as an area of practice. Several key points were identified as important in practice development:

- Link with the State Health Insurance Programs (SHIPs) in your area for assistance in case development and in developing mutually beneficial training opportunities for attorneys and laypersons. Through carefully coordinated relationships, SHIP staff can assist clients in initiating administrative review, particularly assuring the gathering of necessary medical and medical-social information.
- Consider developing a package of services, perhaps clustering services around planning for long-term care, or estate planning.
- Explore avenues of representation likely to generate a revenue stream as your caseload develops - denials of skilled nursing home services, denial of coverage for ambulance care, or working with a client who also needs a guardian or conservator appointed, or related services. Generally, developing a package of services requires taking a holistic look at the scope of client needs, particularly for clients who are aging who require institutional services or services in the home, or who are facing the sudden on-set of disabling circumstances either of a physical, mental, or financial nature.

28 To assure a pool of trained attorneys in each state for Medicare representation, members of the working group, through the National Academy of Elder Law Attorneys, and other groups, can identify training resources and assist state groups in developing training programs for attorneys interested in Medicare representation.
services, or the failure of managed care entities to provide services, or complaints about the quality of managed care services provided.

- Forge alliances and relationships with law school clinics, both to assure an on-going pool of attorneys interested in Medicare work, and to participate in curriculum development for students and others, including outreach to the private bar.

- Enter into collaborative relationships with national support projects that specialize in Medicare. This will help to keep attorneys informed about national developments and trends, provide guidance for public policy development, and invigorate local bar activities in support of Medicare practice.

B. **Assistance for Attorneys Through the State Bar**

Assistance in this area from state bar associations and designated subcommittees will be valuable. Bar committees would necessarily function as a practice development resource for area of practice specializations, training, beneficiary education materials development and dissemination, and as repository for best practice approaches. Critical areas of practice development are:

- assisting attorneys in learning about the Medicare program and in developing a Medicare expertise;

- identification of and use of Medicare substantive resources available locally and nationally;

- providing direct Medicare client assistance including establishing and maintaining coverage for services, items and procedures including appeals work;
• addressing issues of quality of care and services, particularly in the context of clients who receive services through managed care entities; and
• assisting clients with overall health planning needs, including the role of Medicare

C. Providing Useful Information for Medicare Beneficiaries

A major concern is to develop a good notice for explaining to Medicare beneficiaries the value of legal representation in Medicare cases and how to obtain such representation. The development of a good notice has several components:

• working with HCFA to develop language that could be added to various HCFA notices such as the Medicare Summary Notice (MSNs) forms, their Advance Beneficiary Notice Form (ABNs) and the Explanation of Medicare Benefits form (EOMBs) to include a simple statement that representation by a private attorney is available, and a state bar referral contact number or other telephone number;
• intensifying current working relationships with groups such as the network of Health Insurance Counseling Projects (HICAPs), also called the State Health Insurance Programs (SHIPs) or Insurance Counseling Assistance Projects (ICAs), to assure that attorney representation is presented as an option;
• designing brochures and pamphlets and other writings that would be useful in informing Medicare beneficiaries about the benefits and availability of legal representation through private attorneys;
developing ideas for joint training projects designed for attorneys interested in developing a Medicare advocacy expertise;

- designing attractive and user-friendly websites for seniors and their families;
- working inter-generationally with high school and junior high school students about Medicare issues and how they might assist parents and grandparents; and
- creative use of other media, including radio talk show formats, and billboards.

Second, the work group has identified the need to intensify current working relationships with groups such as the network of Health Insurance Counseling Projects (HICAPs), also called the State Health Insurance Programs (SHIPs) or Insurance Counseling Assistance Projects (ICAs). Indeed, members of our working group are very much a part of this network of front-line advocates. These networks use a variety of staffing models, including staff-based projects, volunteer networks, and contract attorneys. Other front-line advocates include the several Medicare Advocacy Projects, which, in many instances, work directly with HICAPs, SHIPs, and ICAs, providing training, administrative advocacy, and litigation assistance.

Intensified working relationships include developing ideas for joint training projects designed for attorneys interested in developing a Medicare advocacy expertise. Efforts include working with this network to design brochures and pamphlets and other writings that would be useful in informing Medicare beneficiaries about the benefits and availability of legal representation through private attorneys.
Third, our workgroup has identified the need to intensify efforts to provide information to Medicare beneficiaries about the importance of attorney representation. As described above, much of this work involves working with beneficiary counseling and advocacy networks. In addition, there is a critical need to explore other avenues for reaching Medicare beneficiaries such as designing attractive and user-friendly websites, working inter-generationally with high school and junior high school students about Medicare issues and how they might assist parents and grandparents, and creative use of other media, including radio talk show formats, and billboards.

V. Conclusion

We encourage the pursuit of opportunities to educate bar members and Medicare beneficiaries about the importance of Medicare attorney representation. Similarly, bar groups are encouraged to continue the exploration of how they might be helpful to members in approaching Medicare representation as a practice speciality and the billing for such services.
Mr. Alfred J. Chiplin, Jr.  
Attorney  
Consumer Coalition for Quality Health Care, Inc.  
1275 K St., N.W., Suite 602  
Washington, D.C. 20005  

Dear Mr. Chiplin:

This letter serves as a formal clarification that the Health Care Financing Administration (HCFA) lacks the requisite statutory authority to reimburse attorneys who represent beneficiaries in the Medicare appeals process. At this time, HCFA does not plan to amend the regulations at 42 C.F.R. § 422.560 et. seq. to address the issue of whether Medicare pays attorneys fees.

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Sincerely,

[Signature]

Margaret P. Sparr  
Director  
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