UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERONICA EXLEY, *et al*.,	)	
Plaintiffs,	)	
v.	)	
	)	Civil No. 3:14-cv-01230 (JAM)
SYLVIA MATHEWS BURWELL, Secretary of Health & Human Services,	)	
Defendant.	)	

NOTICE OF **AMENDED** PROPOSED SETTLEMENT OF CLASS ACTION AND OF RESCHEDULED FAIRNESS HEARING

Notice is hereby given to certain Medicare beneficiaries that an **amended** settlement on behalf of a nationwide class has been proposed in the above-referenced case filed in the United States District Court for the District of Connecticut. The Fairness Hearing on the proposed settlement has been rescheduled from May 31, 2016 to August 1, 2016. This notice contains information about:

A. The Nature and History of the Lawsuit

B. The Amended Proposed Settlement of the Lawsuit

C. The Reasons for the Settlement and its Amendment

D. The Rescheduled Fairness Hearing and the Process for Filing Objections to the Amended Settlement

E. Additional Information

PLEASE READ THIS NOTICE CAREFULLY.
YOUR RIGHTS MAY BE AFFECTED BY THESE PROCEEDINGS.

A. Nature and History of Lawsuit

Plaintiffs are individual Medicare beneficiaries who received denials of Medicare coverage for various types of medical services. They appealed those denials in Medicare's administrative review system and reached the third level of appeal, in which they requested hearings before an administrative law judge ("ALJ"). 42 U.S.C. § 13955ff(d)(1)(A), a section of the Medicare statute, directs ALJs to issue decisions on appeals no later than 90 days after the request for a hearing has been timely filed. Plaintiffs did not receive decisions within 90 days, and they filed this lawsuit on August 26, 2014 against Defendant Sylvia Mathews Burwell, the Secretary of Health and Human Services. Plaintiffs alleged that the U.S. Department of Health and Human Services (the agency that oversees Medicare) violated its obligations under the law by failing to provide ALJ decisions to Medicare beneficiaries within the specified 90-day period. They sought an injunction ordering the Department to ensure that class members receive timely ALJ decisions.

Plaintiffs filed a motion for certification of a nationwide class action on September 4, 2014, and the Court certified the class on June 10, 2015. The class is defined as:

> All Medicare beneficiaries who have pending or will have pending a timely request for an administrative law judge hearing, who are entitled by statute or by regulation to a decision from an administrative law judge within a 90-day period beginning on the date the request for hearing was filed, and for whom an administrative law judge has not rendered, or will not render, a decision on such hearing by the end of that 90-day period.

Order on Motion for Class Certification (Dkt. 67) at 13-14.

B. The Amended Proposed Settlement of the Lawsuit

Following extensive settlement negotiations, including meetings, numerous conference calls, and regular exchanges of e-mails and draft positions from April 2015 through February 2016, the parties reached a settlement of this matter, subject to Court approval. In exchange for class members dismissing their claims, defendant agreed that the Office of Medicare Hearings and Appeals ("OMHA"), which manages the ALJ level of appeal, will do the following:

- Maintain its policy of providing all beneficiary appellants (subject to certain restrictions listed in Section VIII.2 of the Agreement), with priority over other appellants in receiving ALJ decisions (or other appropriate dispositions of their appeals, such as dismissals or remands). This policy will continue to apply to all beneficiaries, regardless of whether their particular statutory claim entitles them to an ALJ decision (or other disposition) within a specific time frame.
    - **Section VIII.2 has been revised in the proposed amended Agreement and separated into two subsections**. Under Section VIII.2(a), the claims of beneficiary appellants who do **not** have potential financial liability for the claims at issue, **and** who are represented by another party to the appeal or who share representation with another party to the appeal, are not prioritized. Section VIII.2(b) will allow those claims to be prioritized nonetheless if the beneficiary's representative submits certain documentation showing that the beneficiary has pending appeals

with potential financial liability for related items or services, or that the denial under appeal is preventing the beneficiary from receiving additional related items or services.

- Designate a Headquarters Division Director within 30 calendar days of the Court's final approval of the Agreement (Approval Date) to oversee inquiries about appeals initiated by beneficiary appellants and to address any complaints or questions concerning the processing of those appeals. In addition, OMHA will establish a toll-free help line for beneficiary appellants to be answered by the Division Director's staff.
- Introduce, within six months of the Approval date, a new ALJ hearing request form that allows beneficiaries to self-identify, making their appeals more readily recognizable by OMHA. There will also be user-friendly revisions of instructions for requesting an ALJ hearing. The instructions will include the toll-free number established for the Division Director's staff, information about the "Beneficiary Mail Stop" established for beneficiary appellants, and additional information explaining the beneficiary priority policy for ALJ appeals.
- Modify the written scripts provided to contractors who staff the 1-800-Medicare toll-free assistance line within three months of the Approval Date. The modifications will properly route beneficiaries with questions regarding appeals pending at OMHA (including referrals to the toll-free number of the OMHA Division Director's staff assigned to address

problems with ALJ appeals) and will highlight the beneficiary priority policy for ALJ appeals.

- Within three months of the Approval Date, publish data on the OMHA website, with monthly updates, on the length of processing time for beneficiary appeals.
- Maintain all of the commitments made in the Agreement for three years from the Approval Date.

In addition, the Court will maintain jurisdiction over the case for three years from the final approval of the Agreement. During that period, either party may, through counsel, ask the Court to enforce one or more provisions of the Settlement Agreement if the party believes that the other party is not carrying out the terms of the Settlement Agreement.

B. The Reasons for the Settlement and its Amendment

Plaintiffs contended in this lawsuit that defendant failed to follow the law in the provision of timely ALJ decisions for beneficiaries. Defendant responded that OMHA has been making efforts to address delays in the appeal system, in particular for beneficiary appellants. Notably, in July of 2013, a year before this lawsuit was filed, OMHA instituted a policy of prioritizing appeals initiated by beneficiaries, in effect placing them at the front of the line, ahead of the medical providers whose appeals represent the vast majority of the ALJ caseload. However, plaintiffs did not believe the measures were sufficient and pointed to the persistence of processing times that exceeded 90 days. Defendant pointed to evidence of improved processing times for beneficiary appeals. Currently, OMHA continues to lack resources that would be sufficient to meet the current caseload of all ALJ appeals. However OMHA has sufficient

resources to timely process beneficiary appeals under its beneficiary prioritization policy. *See* Settlement Agreement, ¶ VIII.4.

If this action were to continue, it is uncertain which side would prevail and it would likely take at least six months for the parties to brief and the Court to resolve motions for summary judgment.

Although plaintiffs prevailed on defendant's Motion to Dismiss, which contended that the Court lacked jurisdiction over plaintiffs' claims, defendant could appeal that decision. Furthermore, even if plaintiffs prevailed before both the trial court and the appellate courts, the nature and extent of the relief that they could obtain is unknown. Defendant has recognized the particular vulnerability of beneficiary appellants and has prioritized all beneficiary appeals at the ALJ level. The Agreement will allow plaintiffs to monitor the effectiveness of defendant's measures. Given the uncertainty for both parties and the amount of time that would be consumed by the additional work in the trial court and a possible appeal, the parties believe that settlement is the best resolution of the matter and that the proposed Settlement Agreement is fair, adequate, and reasonable and will result in timely ALJ decisions for beneficiaries consistent with the law.

After the Court preliminarily approved the original Settlement Agreement and notice to the class was posted, defendant concluded that one provision of the Agreement, Section VIII.2, would inadvertently impose unnecessary administrative burdens on OMHA and would threaten to undermine the parties' shared goal of continuing to give priority to beneficiary appeals. The original language of Section VIII.2 excluded from prioritization appeals in which a beneficiary had been "recruited by a provider or supplier to file an appeal on the provider's or supplier's behalf" and where the beneficiary had no

financial liability for the claims at issue. Original Proposed Settlement Agreement, Dkt. 80-2, ¶ VIII.2. "Recruited" was not defined in the Agreement, and defendant was concerned that administering that standard would be difficult, mostly because it might require inquiry into the subjective motivation of beneficiaries, providers, suppliers, and/or their counsel.

Defendant's counsel approached class counsel about revising Section VIII.2 to clarify which appeals would not be prioritized. The parties negotiated alternative language that accomplishes the shared goals of continuing OMHA's prioritization policy for beneficiaries and protecting beneficiaries' appeal rights, but preventing providers or suppliers (who make up a far larger proportion of appellants than beneficiaries) from taking advantage of and potentially overwhelming a policy that is meant to help beneficiaries. The revised language, described above, allows for the prioritization of beneficiary appeals that would otherwise be excluded in situations where the issue is Medicare coverage only (no risk of financial liability), but circumstances make prompt resolution of the appeal important.

On May 24, 2016, defendant filed an unopposed motion to modify the Settlement Agreement with the negotiated revision to Section VIII.2, and to re-notice the class of the amended Agreement (Dkt #86 and attachments). The Court granted defendant's motion on May 26, 2016 (Dkt #87).

D. The Rescheduled Fairness Hearing and the Process for Filing Objections to the Amended Settlement

The Court preliminarily approved the settlement and its amendment, but will hold a hearing ("Fairness Hearing") to determine whether to permanently approve the proposed amended settlement as fair, adequate, and reasonable. The Fairness Hearing

will take place at 10:00 am on August 1, 2016 in Courtroom 3, United States District Court for the District of Connecticut, 141 Church Street, New Haven, Connecticut 06510. The Fairness Hearing may, from time to time and without further notice to the Class, be continued or adjourned by order of the Court. If you wish to attend the Fairness Hearing, you should confirm the date and time with Class Counsel at the Center for Medicare Advocacy (contact information below). Class Members do not need to appear at the Fairness Hearing or take any other action to indicate their approval of the settlement or to obtain the benefits of the settlement.

If you wish to object to the amended settlement, you must do so in writing via letter or card (e-mail cannot be accepted). Written objections must be received by Class Counsel, Center for Medicare Advocacy (address below), no later than fourteen days before the date of the Fairness Hearing (*i.e.*, July 18, 2016). Class Counsel will forward all objections to Counsel for the Defendant immediately after they are received and will file all objections with the Court no later than five days before the Fairness Hearing.

E. Additional Information

The pleadings and other records in this litigation may be examined and copied during regular office hours at the office of the Clerk of the Court, United States District Court for the District of Connecticut, 141 Church Street, New Haven, Connecticut 06510. You may also view the entire amended proposed Settlement Agreement at the website of the Center for Medicare Advocacy (www.medicareadvocacy.org).

Dated: June 2, 2016

Respectfully submitted,

/s/Alice Bers
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