

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

MARCELLA RYAN, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	No. 5:14-cv-00269
)	
ERIC D. HARGAN,)	
Acting Secretary of)	
Health and Human Services)	
)	
Defendant.)	
_____)	

**NOTICE OF SETTLEMENT OF CLASS ACTION AND OF FAIRNESS
HEARING**

Notice is hereby given to certain Medicare beneficiaries that a settlement on behalf of a regional class has been proposed in the above-reference case filed in the United States District Court for the District of Vermont. This notice contains information about:

- A. The Nature and History of the Lawsuit
- B. The Settlement of the Lawsuit
- C. The Reasons for the Settlement
- D. The Fairness Hearing and the Process for Filing Objections to the Settlement
- E. Additional Information

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

As a broad overview, to be a Class Member, you must meet the following threshold requirements: **(1)** you reside in Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, or Vermont; **and (2)** Medicare must have denied your claim for home health nursing or therapy coverage between the dates of January 1, 2010 and March 5, 2015; **and (3)** you, or someone on your behalf, appealed that denial, **and (4)** prior to this denial of home health coverage, you received another Medicare denial of home health coverage and, on appeal of that denial, received a favorable determination from Medicare that you were “confined to home,” i.e., homebound, **and (5)** your physical condition has not significantly changed or improved between your favorable appeal and unfavorable appeal.

While there are additional requirements for being a Class Member, if you believe that you satisfy the five threshold requirements, please continue reading to determine if you are eligible to be a Class Member. If you do not meet the five threshold requirements, then this Notice does not apply to you.

A. Nature and History of the Lawsuit

Plaintiffs are Medicare beneficiaries who received denials of Medicare coverage for home health services on the grounds they did not meet Medicare’s definition of being “confined to the home,” also referred to as the “homebound” requirements. Plaintiffs appealed their denials in Medicare’s administrative appeals system. At the time of Plaintiffs’ appeals, the Medicare Program Integrity Manual (“MPIM”) contained a

provision requiring Medicare reviewers to give “great weight” to a prior favorable final appellate decision finding a beneficiary to be “confined to the home.” The provision said that if a beneficiary had been found in a *previous* appeal to meet Medicare’s definition of being “confined to the home,” and that beneficiary then had a *subsequent* claim for coverage of home health services, the entity deciding the subsequent claim was to give “great weight” to the prior favorable final appellate decision that the beneficiary was homebound in evaluating whether the beneficiary is confined to home in the subsequent home health claim unless there has been a change in facts that has improved the beneficiary’s ability to leave the home. This provision is referred to as the “Prior Favorable Homebound” provision. The Prior Favorable Homebound provision was not applied to Plaintiffs’ claims for home health nursing or therapy coverage.

The Court certified a regional class defined as follows:

All beneficiaries of Medicare Part A or B, in Connecticut, Maine, Massachusetts, New Hampshire, New York, and Vermont (Medicare Administrator Contractor Jurisdiction K):

- (a) Who have received a “Favorable final appellate decision” that he or she was confined to home,” i.e., homebound, in the appeal of a home health nursing or therapy claim denial;
- (b) Who have subsequently been denied, or will be denied, coverage for additional service on the basis of not being homebound, on or after January 1, 2010;
- (c) Who had a non-lapsed, viable appeal of the subsequent denial for coverage of additional home health services as of March 5, 2015, or had a particularized individual basis for tolling of any applicable appeal deadline; and
- (d) For whom the claim for Medicare home health coverage was filed on or before August 2, 2015.

Order on Motion to Clarification (Doc. 66) at 3. The Class Members and the Defendant

(collectively, the “Parties”) have now reached a settlement of party and class claims, and have executed a Settlement Agreement.

B. The Settlement of the Lawsuit

Following extensive settlement negotiations, including numerous conference calls and a regular exchange of e-mails and draft positions, the Parties have reached a settlement of this matter, subject to Court approval. The Defendant is not guaranteeing to Plaintiffs that favorable results will be achieved once the steps set forth in this Settlement Agreement have been implemented, but the Settlement Agreement will give eligible individuals the opportunity to have their claim reviewed with the application of the Prior Favorable Homebound provision previously found in the MPIM. In exchange for Class Members dismissing their claims in this lawsuit, the Defendant has agreed that Class Members will receive review of their eligible individual Medicare claims as follows:

- Class Members will receive Review of Eligible Claims, either: (1) by Medicare Administrative Contractor (MAC), National Government Services (NGS), for cases not currently pending in the Medicare administrative claims appeals process, or (2) by the Medicare appeals adjudicator with jurisdiction over the pending appeal containing the Eligible Claim, for cases currently pending in the Medicare administrative claims appeals process.
- Each Eligible Claim submitted by a Class Member within the specified timeframe, NGS or the Medicare appeals adjudicator with jurisdiction over the pending appeal will Review the Eligible Claim and apply the Prior Favorable Homebound provision as previously found in § 6.2.1 (B) of the MPIM to determine whether the beneficiary meets the homebound

requirement under the Medicare home health benefit.

Class Members seeking Review of an Eligible Claim will be required to self-identify themselves and their eligible claim by completing and submitting a form, no later than one year after the settlement application process is published on CMS.gov. Further, only Class Members are entitled to Review Relief and must meet the following requirements:

- (1) The Class Member must be a beneficiary of Medicare Part A or B, in Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island or Vermont; and
- (2) The Class Member must have received a “favorable final appellate decision” that he or she was “confined to home,” i.e., homebound, in the appeal of a home health nursing or therapy claim denial; and
- (3) The Class Member must have subsequently been denied, or will be denied, coverage for additional service on the basis of not being homebound, on or after January 1, 2010; and
- (4) The Class Member must have had a non-lapsed, viable appeal of the subsequent denial for coverage of additional home health services as of March 5, 2015; and
- (5) The Class Member must have had a claim for Medicare home health coverage filed on his or her behalf on or before August 2, 2015.

C. The Reasons for the Settlement

Plaintiffs contend in this lawsuit that Defendant failed to follow a provision that used to be in the MPIM, which had a negative impact on a number of individuals seeking

Medicare coverage for home health services. Defendant has responded that the policy manuals are not binding, that the Prior Favorable Homebound provision ceased to be effective as of 2008 when it was deleted from the Medicare Claims Processing Manual in 2008, and that the Plaintiffs otherwise lack sufficient grounds to assert their claims. Notably, roughly one year after the Plaintiffs asserted this claim, the Secretary repealed the Prior Favorable Homebound provision found in the MPIM, in effect erasing the grounds of this lawsuit. However, Plaintiffs continued to litigate this case as they contend that eligible Class Members should still benefit from the Prior Favorable Homebound provision as it existed during the appeals process of their claim.

If this action were to continue, it is uncertain which side would prevail. Although Plaintiffs prevailed on the motion to dismiss, the Parties were in the process of briefing motions for summary judgment that would have resolved the case at the trial court level. Had Plaintiffs prevailed at the trial court level, Defendant could have appealed. Furthermore, even if Plaintiffs prevailed before both the trial and appellate courts, the nature and extent of the relief they could obtain is uncertain.

The Settlement Agreement will allow Class Members to have their eligible claims re-reviewed, which may, or may not, result in a favorable outcome. Each appeal is fact-specific, individual circumstances differ, and favorable results are not guaranteed. Given the repeal of the Prior Favorable Homebound provision and the uncertainty for both Parties of the outcome of continued litigation, the Parties believe that settlement is the best resolution of the matter and that the Settlement Agreement is fair, adequate, reasonable, and will result in Class Members receiving a fair review of their claim in accordance with policies that Plaintiffs believe should have been followed previously.

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

The Court has preliminarily approved the Settlement Agreement, but will hold a hearing (“Fairness Hearing”) to determine whether to permanently approve the Settlement as fair, adequate, and reasonable. The Fairness Hearing will take place on January 11, 2018 at 1:30pm at the U.S. District Court of Vermont at 151 West Street, Rm. 204, Rutland, Vermont, 05701. 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, Vermont Legal Aid, Inc., through the contact information listed below. Class Members do not need to appear at the Fairness Hearing or take any other action to indicate their approval of the Settlement. However, to benefit from the Settlement, Class Members must complete and submit a form no later than one year after the settlement application process is published on CMS.gov.

If you wish to object to the Settlement Agreement, you must do so in writing via letter or card (e-mails will not be accepted). Written objections must be received by Class Counsel at Vermont Legal Aid, Inc. (264 N. Winooski Ave., Burlington, VT 05401) no later than fourteen (14) days before the Fairness Hearing. Class Counsel will forward all objections to Counsel for the Defendant promptly after they are received, and will file all objections with the Court no later than five (5) 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 U.S. District Court of Vermont at 11 Elmwood Avenue,

Burlington, Vermont, 05401. You may also view the entire Settlement Agreement on www.vtlawhelp.org, and www.medicareadvocacy.org.

Dated: October 11, 2017.

Respectfully submitted,

/s/ Michael Benvenuto, Esq.

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