Center for Medicare Advocacy
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Issue Brief

New Medicare Advantage Supplemental Benefits: An Advocates' Guide to Navigating the New Landscape

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Background

Medicare Advantage (MA) plans have long had the ability to offer supplemental benefits that are not covered by traditional Medicare. Plans provide such benefits using "rebate" dollars from the Medicare program based upon their annual bid[1], or by charging additional premiums for optional supplemental benefits.

Recent changes in law and policy have significantly expanded the type of supplemental benefits that MA plans can provide, including benefits that are not primarily health related. These changes have included loosening of "uniformity standards" which previously required MA plans to provide the same services at the same cost-sharing rates to all enrollees in a given service area. While such benefits and services can certainly help those who are eligible, they will not be available to everyone in a given plan. Further, informed decision making concerning plan choices will likely be more difficult, in part, because the Centers for Medicare & Medicaid Services (CMS) has issued very little guidance concerning how such benefits are to be marketed, opening the door for beneficiary confusion and marketing misconduct. This Issue Brief outlines some considerations advocates should weigh when assisting individuals sort out these new benefits.

Overview - Supplemental Benefits

Starting in 2020, there are three types of supplemental benefits that MA plans can choose to offer:[2]

- "**Standard**" – Must be primarily health related, offered to all enrollees (e.g., vision, hearing, dental, etc.)
- "**Targeted**" – (Starting in 2019), these benefits can be offered to qualifying enrollees by health status or disease state. MA plans can offer targeted benefits and/or reduced cost-sharing, at their discretion, based upon enrollees' particular health condition(s). CMS has also expanded the interpretation of what items and services can be covered as "primarily health-related."
- "**Chronic**" – (Starting in 2020), Section 50322 of the Bipartisan Budget Act of 2018 (BBA) (Pub. L. No. 115-123) allows MA plans to offer expanded supplemental benefits to plan enrollees deemed to be chronically ill. These new benefits, called **Special Supplemental Benefits for the Chronically Ill (SSBCI)**, include supplemental benefits that are not primarily health related and may be offered non-uniformly to eligible chronically ill enrollees.

  Examples of SSBCI being offered by MA plans in 2020 include non-medical transportation, in-home personal care, air conditioners, pest-control, acupuncture, sessions with a dietitian, food deliveries, health and fitness devices, and even support for service dogs.[3]

Eligibility for SSBCI

There is a two part test for plans to determine whether or not an enrollee is eligible for SSBCI, : 1) the enrollee must meet the definition of having a "chronic illness"; and 2) such benefits or services must also have a reasonable

expectation of improving or maintaining the health or overall function of the enrollee as it relates to the chronic condition or illness.

The Medicare statute defines a **chronically ill** enrollee as an individual who: (1) has one or more comorbid and medically complex chronic conditions that are life threatening or significantly limits the overall health or function of the enrollee; (2) has a high risk of hospitalization or other adverse health outcomes; and (3) requires intensive care coordination.[4] For 2020, eligible conditions will include the list of conditions that CMS uses to establish eligibility for a Chronic Condition Special Needs Plan (C-SNP), but the list for SSBI will expand in future years.[5] According to CMS, approximately 73% of current enrollees in MA plans have one or more qualifying chronic condition.[6]

The statute also requires that SSBCI must "have a **reasonable expectation of improving or maintaining the health or overall function** of the chronically ill enrollee." CMS notes, however, that "the statute does not require that maintenance or improvement expected from an SSBCI result in a permanent change in an enrollee's condition."[7] Plans have broad discretion in determining the types of items as services they may offer as SSBCI, as well as in determining what may be considered "a reasonable expectation" when choosing to offer SSBCI.

CMS guidance suggests that an **individualized assessment** must be done for each enrollee seeking SSBCI. For example, the 2020 CMS Call letter states "there must be a determination by the MA plan that the non-primarily health related benefit will have a reasonable expectation of improving the chronic disease or maintaining the health or overall function of the enrollee receiving the benefit. MA plans may make these beneficiary-specific determinations using internal criteria that are in accordance with the statute."[8] Further, CMS "expect[s] MA plans to develop objective criteria (e.g., health risk assessments) and maintain detailed documentation for determining when one chronically ill enrollee is eligible for a particular item or service and another is not. Note that maintaining detailed internal documentation is necessary to address potential beneficiary appeals, complaints, and/or general oversight activities performed by CMS."[9]

In short, not everyone will qualify for SSBCI offered by a given plan, and since a plan must do an individualized assessment of eligibility, eligibility determinations will not occur until an individual is actually enrolled in a plan.

Marketing & Disclosure of Information

CMS has provided little guidance concerning how SSBCI are to be marketed to prospective plan enrollees. CMS does require plans to clearly identify SSBCI criteria in their Evidence of Coverage (EOC) document: "[a]ny limitations on coverage should be clearly noted […] including the process and/or criteria for determining eligibility to receive a SSBCI."[10] Note that EOCs must be provided to all current enrollees and posted on plan websites by October 15 for the coming plan year.[11] In addition, the CMS Medicare Plan Finder online tool at www.medicare.gov is supposed to display such benefits.[12]

Other than proclamations by CMS that supplemental benefits may not be offered by plans solely as an inducement to enroll, the agency has said little on the topic of marketing. In an April 2019 memo, for example, the agency states that plans may "inform beneficiaries of SSBCI, including through marketing and communication materials. When marketing SSBCI, MA plans must not mislead or misrepresent these benefits to enrollees and must not state that they are guaranteed."[13]

Advocates have expressed concerns that these new MA flexibilities create incentives for sponsors to inappropriately steer or target potential enrollees and create an environment in which agents and brokers may be incentivized to ask individuals about their health status and use that information to steer them toward specific plans in violation of anti-discrimination rules.[14] Despite these concerns, there is no mention of SSBCI in Medicare's Communications & Marketing Guidelines, CMS' guidance governing the sale and promotion of MA and Part D plans.

Advocates should be aware of beneficiaries who were induced to enroll in plans based on promises of new benefits for which eligibility must be assessed and confirmed by a clinician only after someone is enrolled in a plan. **Neither an agent nor a plan customer service representative will be able to confirm eligibility for such benefits pre-enrollment.**

Appeals for Coverage

If an individual enrolled in an MA plan is denied SSBCI offered by that plan, an appeal right may be available. An MA enrollee should ask the MA plan for an organization determination relating to any disputes about eligibility for SSBCI, which should trigger an appeal right if such benefits are still denied.[15]

As noted in an April 2019 CMS memo, "We remind MA plans that coverage requests from enrollees or providers, including requests for any supplemental benefits, should be treated similar to requests for other benefits furnished by an MA plan. If a request concerning coverage of a discrete item or service submitted to a plan fits within one of the actions defined as an organization determination under 42 C.F.R. § 422.566(b), then the coverage decision is subject to the Subpart M appeals process."[16] Although an individual may have the right to appeal the denial of SSBCI, coverage appeals are time consuming and can take months to resolve.

Changing Plans

If an individual was inappropriately induced to enroll in a plan on the basis of supplemental benefits, s/he should report alleged misconduct to 1-800-MEDICARE (and ask that it be entered into the Complaint Tracking Module) and/or a local Senior Medicare Patrol program.

Outside of the Annual Election Period, from October 15th through December 7th, with elections effective the following January 1st, individuals have additional time periods during which they can get out of or change MA plans.

The Medicare Advantage Open Enrollment Period (MA OEP) allows individuals who begin a calendar year enrolled in an MA plan to get out of or change to another MA plan between January 1 and March 31 of each year.[17]

In addition, there is a Special Enrollment Period (SEP) available for certain plan "contract violations." The Medicare Managed Care Manual states that "In the event an individual is able to demonstrate to CMS that the MA organization offering the MA plan of which he/she is a member substantially violated a material provision of its contract under MA in relation to the individual, **or the MA organization (or its agent) materially misrepresented the plan when marketing the plan**, the individual may disenroll from the MA plan and elect Original Medicare or another MA plan" [emphasis added].[18] Such SEPs are granted on a case-by-case basis by CMS.

Conclusion

While the new MA supplemental benefits might be attractive to beneficiaries, they should approach them with eyes wide open. Such benefits will not be available to everyone and have few restrictions concerning how they are marketed, and are therefore likely to make informed decision-making on the part of the consumer more difficult. In addition, it is not clear how appeals of MA plans' denials of SSBCI will work as this is largely uncharted territory. Finally, unless an individual qualifies for an SEP (or some other enrollment period applies), she will be stuck in the plan.

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[1] See, e.g., Medicare Payment Advisory Commission (MedPAC), "Medicare Advantage Program Payment System" (October 2018), available at: http://www.medpac.gov/docs/default-source/payment-basics/medpac_payment_basics_18_ma_final_sec.pdf?sfvrsn=0.

[2] *See* discussion in the Federal Register at 83 FR 16482 (April 16, 2018); *also see* the Center's "Special Report: Recent Changes in Law, Regulations and Guidance Relating to Medicare Advantage and Medicare Part D" (September 2018), available at https://www.medicareadvocacy.org/wp-content/uploads/2018/09/Report.-Summary-2019-Call-letter-and-C-D-Rule-1.pdf.

[3] CMS provides a non-exhaustive examples of non-primarily related SSBCI in a memo entitled "Implementing Supplemental Benefits for Chronically Ill Enrollees" (April 24, 2019), available at: https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/Supplemental_Benefits_Chronically_Ill_HPMS_042419.pdf.

[4] Section 1852(a)(3)(D)(ii); 42 U.S.C. §1395w-22(a)(3)(D)(ii).

[5] Annual Call Letter, "Announcement of Calendar Year (CY) 2020 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter" *available at* https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Downloads/Announcement2020.pdf. As noted in the Call Letter, for CY 2020, CMS will consider any enrollee with a condition identified as a chronic condition in section 20.1.2 of Chapter 16b of the Medicare Managed Care Manual as meeting the statutory definition; this chapter is available at: https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/mc86c16b.pdf.

[6] 2020 Call Letter.

[7] The Center for Medicare Advocacy and other advocates raised concerns to CMS that eligibility determinations for SSBCI not employ an inappropriate "improvement standard" citing the settlement in the *Jimmo v. Sebelius* litigation brought by the Center and Vermont Legal Aid (No. 11-cv-17 (D.VT), filed January 18, 2011). In the 2020 Call Letter, at p. 189, CMS states: "Some commenters expressed concern that the requirement that a SSBCI benefit have a reasonable expectation of improving or maintaining the health or overall function of the enrollee could exclude individuals with degenerative diseases from receiving these benefits because some medical conditions may worsen even with appropriate interventions and thus are not be able to be maintained or improved upon. However, CMS does not believe these individuals would necessarily be excluded for this reason. MA plans are not prohibited from offering an item or service that can be expected to improve or maintain the health or overall function of an enrollee only while the enrollee is using it. In other words, **the statute does not require that the maintenance or improvement expected from an SSBCI result in a permanent change in an enrollee's condition**. Items and services may include, but are not limited to: meals furnished to the enrollee beyond a limited basis, transportation for non-medical needs, pest control, indoor air quality equipment and services, and benefits to address social needs, so long as such items and services have a reasonable expectation of improving or maintaining the health or overall function of an individual as it relates to their chronic condition or illness." [emphasis added]

[8] Annual Call Letter, "Announcement of Calendar Year (CY) 2020 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter" *available at* https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Downloads/Announcement2020.pdf.

[9] 2020 Call Letter.

[10] CMS memo entitled "Implementing Supplemental Benefits for Chronically Ill Enrollees" (April 24, 2019), available at: https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/Supplemental_Benefits_Chronically_Ill_HPMS_042419.pdf.

[11] Medicare Communications and Marketing Guidelines (MCMG) - see sections 70.1.2 and 100.4, available at: https://www.cms.gov/Medicare/Health-Plans/ManagedCareMarketing/Downloads/CY2019-Medicare-Communications-and-Marketing-Guidelines_Updated-090518.pdf.

[12] 83 Fed Reg 16484 (April 16, 2018). Based upon a limited review of the updated Medicare Plan Finder prior to the start of the 2019 open enrollment period, it appears that a summary of benefits for a given MA plan includes a section entitled "More benefits" and states either "Limited coverage" or "not covered" next to a list of potential supplemental benefits including: Fitness benefit, Transportation services for non-emergency care: Any health-related locations; Transportation services for non-emergency care: Plan-approved locations; Over the counter drug benefits; In-home support services; Home and bathroom safety devices; Meals for short duration; Annual physical exams; and Telehealth.

[13] CMS memo entitled "Implementing Supplemental Benefits for Chronically Ill Enrollees" (April 24, 2019), available at: https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/Supplemental_Benefits_Chronically_Ill_HPMS_042419.pdf.

[14] *See, e.g.,* Joint Letter to CMS sent by Center for Medicare Advocacy, Justice in Aging, Medicare Rights Center and National Council on Aging (August 18, 2019), available at: https://www.medicareadvocacy.org/joint-letter-concerning-medicare-plan-finder-and-marketing-materials/. *Also see* Center for Medicare Advocacy's comments to proposed Marketing Guidelines revisions in 2018 at: https://www.medicareadvocacy.org/center-comments-to-medicare-marketing-guidelines-mmg/ and 2019 at: https://www.medicareadvocacy.org/center-comments-on-medicare-marketing-guidelines/.

[15] *See, e.g.*, the medicare.gov website at: https://www.medicare.gov/claims-appeals/file-an-appeal/appeals-if-you-have-a-medicare-health-plan; also see the CMS website at: https://www.cms.gov/Medicare/Appeals-and-Grievances/MMCAG/index.html.

[16] CMS memo entitled "Implementing Supplemental Benefits for Chronically Ill Enrollees" (April 24, 2019), available at: https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/Supplemental_Benefits_Chronically_Ill_HPMS_042419.pdf; *also see* 83 FR 16485 (April 16, 2018).

[17] Medicare Managed Care Manual, Chapter 2, section 30.5, available at: https://www.cms.gov/Medicare/Eligibility-and-Enrollment/MedicareMangCareEligEnrol/Downloads/CY_2019_MA_Enrollment_and_Disenrollment_Guidance.pdf.

[18] Medicare Managed Care Manual, Chapter 2, section 30.4.2, available at: https://www.cms.gov/Medicare/Eligibility-and-Enrollment/MedicareMangCareEligEnrol/Downloads/CY_2019_MA_Enrollment_and_Disenrollment_Guidance.pdf