Center for Medicare Advocacy

Advancing Access to Medicare and Health Care

January 31, 2020

Commissioner Andrew Saul
Social Security Administration
6401 Security Boulevard
Baltimore, MD 21235-6401

Submitted via www.regulations.gov

Re: Notice of Proposed Rulemaking on Rules Regarding the Frequency and Notice of Continuing Disability Reviews, 84 Fed. Reg. 36588 (November 18, 2019), Docket No. SSA-2018-0026

Dear Commissioner Saul:

The Center for Medicare Advocacy ("Center") and California Health Advocates ("CHA") appreciate this opportunity to submit joint comments on the above-referenced notice of proposed rulemaking (NPRM). As discussed below, the Center and CHA are opposed to these proposed rules, and urge the Social Security Administration (SSA) to rescind this proposal.

The Center, founded in 1986, is a national, non-partisan education and advocacy organization that works to ensure fair access to Medicare and to quality healthcare. At the Center, we educate older people and people with disabilities to help secure fair access to necessary health care services. We draw upon our direct experience with thousands of individuals to educate policy makers about how their decisions affect the lives of real people. Additionally, we provide legal representation to ensure that people receive the health care benefits to which they are legally entitled, and to the quality health care they need.

Founded in 1997, CHA is the leading Medicare advocacy and education non-profit in California. We receive financial support from private and public organizations. Advocating on behalf of Medicare beneficiaries and their families, we target federal and state level legislators and their staff through media and educational campaigns. We also build and lead coalitions of strategic partners concerned with Medicare-related issues, conduct public policy research to support improved rights and protections of Medicare beneficiaries and their families, and frequently partner with other statewide and national Medicare organizations to promote policies that positively impact Medicare.

I. Overview

Continuing disability reviews (CDRs) are an important part of ensuring that only claimants who meet the statutory eligibility requirements for Social Security disability benefits continue to receive them. Because CDRs are burdensome and can be unnecessarily taxing for disabled Medicare beneficiaries, the agency must make a reasoned case supported by facts and evidence that

there is a need to subject beneficiaries to more frequent reviews than required by the Social Security Act. In short, the Social Security Administration fails to do so. The lack of rationale and evidence supporting the proposed changes makes it impossible to meaningfully comment on the proposal and violates the Administrative Procedures Act (APA). Further, it is clear that many people eligible for Medicare based upon receipt of Social Security Disability Insurance (SSDI) will unfairly lose their legitimate right to coverage if this rule is implemented. The Center and CHA urge SSA to rescind this proposal.

II. Burden on Individuals

The process to qualify for disability benefits through SSA can take years. Once people qualify for such benefits, they face continuing disability reviews (CDRs), to see if they still meet the disability standard. If medical improvement is expected, SSA will review the claim in six to eighteen months. If medical improvement is possible, SSA will review the claim every three years. If medical improvement is not expected, SSA will review the claim every five to seven years.

Everyone who receives a CDR has been determined by SSA to have at least one severe and medically determinable impairment expected to last at least 12 months or to be fatal. While a requirement to complete paperwork and submit documentation at the risk of losing monetary benefits and health care would be challenging for anyone, it is likely more difficult, stressful, and time-consuming for disability beneficiaries, who as a group are older,[1] poorer,[2] and sicker than the general population.

Under the proposed rule, SSA would create a new category of Medical Improvement Likely (MIL), and review most people every two years instead. As outlined in the NPRM, SSA proposes to conduct an additional 1.1 million full medical reviews over the next ten years, and additional 1.5 million smaller-scale reviews, over and above their currently planned reviews. Altogether, SSA would conduct 19.3 million reviews in the next decade under the proposed rule. Pushing more people into the determination system will likely slow down the process for everyone.

Even more troublesome, under the proposed rule, SSA expects to pay people $2.6 billion less in SSI and SSDI benefits over ten years, meaning hundreds of thousands of people would lose their benefits. As noted by the National Organization of Social Security Claimants' Representatives (NOSSCR) in their comments to the NPRM, though, to the extent that CDRs remove people from the disability rolls, this is often because their impairments make it difficult for them to understand and comply with the CDR process, not because their impairments have improved in a way that dictates cessation.

[1] More than 75% of SSDI beneficiaries are age 50 or older, over 35% are age 60 or older, and nearly 6% are age 65. https://www.ssa.gov/OACT/ProgData/benefits/da_age201612.html

[2] 71% of Title II disability beneficiaries have household income below 300% of the poverty level; 20% were in poverty. Among SSI recipients, the poverty rate was 34% for children and 43% for adults aged 18-64. https://www.ssa.gov/policy/docs/rsnotes/rsn2015-02.html

III. Impact on Medicare Eligibility

People under age 65 who receive SSDI generally become eligible for Medicare after a two-year waiting period (those diagnosed with end-stage renal disease (ESRD) and amyotrophic lateral sclerosis (ALS) can become eligible for Medicare more quickly). In 2016, more than one in seven Medicare beneficiaries (15%) were under age 65 and living with a long-term disability.[3]

Compared to Medicare beneficiaries eligible based on age, those under-65 face additional challenges. Pursuant to a grant from the U.S. Department of Health and Human Services, Administration for Community Living, between 2015 and 2016 the Center for Medicare Advocacy undertook an innovative, model project to assist State Health Insurance Assistance Programs (SHIPs) and Senior Medicare Patrol Programs (SMPs) to reach and serve Medicare Beneficiaries under 65 years old.[4] As noted on our website,

> While people under 65 with disabilities comprise only 8.4% of the general U.S. population, that percentage is nearly doubled among Medicare recipients. Regrettably, those with disabilities often have lower incomes, require more health care, and find it more difficult to pay for and obtain care compared to Medicare beneficiaries over 65 years of age. They are more likely to have cognitive impairments, report themselves in poor health, and are more likely to have limitations in one or more activities of daily living.

Increasing the burden on the under-65 Medicare population by requiring more frequent CDRs will negatively impact this group, who already face more challenges than the over-65 Medicare population. Not only will more frequent CDRs impose a significant and unwarranted burden on these individuals, many will lose their health insurance coverage. Those who do not lose their health insurance coverage will bear negative health consequences imposed by the strain of unnecessary and burdensome CDRs. If implemented, the proposed rule will lead to more people losing Medicare eligibility, at a time when other avenues to obtaining pre-Medicare health insurance coverage is becoming more difficult, including due to efforts to repeal or otherwise diminish the Affordable Care Act and restrict Medicaid eligibility.

IV. SSA Fails to Provide Adequate Rationale

Although the Social Security Act gives the Commissioner of Social Security authority to create CDR categories that schedule reviews at shorter or longer intervals than those explicitly listed in the statute, and to create the criteria for placing an individual in a particular category, notice and comment rulemaking required by the Administrative Procedure Act (APA) also requires the Commissioner to provide a publicly-available rationale for those timeframes and any data, evidence, or studies that the Commissioner relied on in creating those categories and for classifying an impairment into a particular category when proposing new regulations or regulatory changes.

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[3] Kaiser Family Foundation "An Overview of Medicare" (February 2019), available at: https://www.kff.org/medicare/issue-brief/an-overview-of-medicare/

[4] See the Center's website at: https://www.medicareadvocacy.org/under-65-project/

Unfortunately, as articulated in comments from NOSSCR, in this NPRM, the SSA fails to include the criteria the agency used to identify the impairments it proposes to include in the newly created Medical Improvement Likely (MIL) CDR category. Nor does the proposed rule share the data, evidence, or studies, the agency relied on in selecting the impairment or beneficiary types it opted to place in the new category. The proposed rule fails to state the CDR categories that would be used for many of the most common impairments, making it impossible to determine what changes would occur, what the rationale is for them, and what the effect would be on disability beneficiaries and others. The failure to provide the public with all but the most rudimentary information about its rationale or process creates an impermissible procedural error under the APA, making it impossible for the public to make meaningful comments regarding the time frames proposed in the NPRM or the classification of impairments into CDR categories.

V. Conclusion

The Center and CHA oppose this proposed rule, and strongly urge SSA to withdraw it.

We appreciate the opportunity to submit these comments. For additional information, please contact David Lipschutz, Center for Medicare Advocacy Senior Policy Attorney, dlipschutz@MedicareAdvocacy.org or Kata Kertesz, Center for Medicare Advocacy Policy Attorney, kkertesz@MedicareAdvocacy.org, both at 202-293-5760; David Wilder, California Health Advocates Board Member, kadwilder@msn.com and 909-794-0561 or Bonnie Burns at California Health Advocates, bburns@cahealthadvocates.org and 831-438-6677.
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