Is Medicare’s Obesity Coverage Policy Really a Policy?

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On July 15, 2004, Tommy Thompson, the Secretary of the federal Department of Health and Human Services (HHS), issued a press release announcing that a “new Medicare obesity coverage policy” would remove barriers to Medicare coverage of anti-obesity interventions if scientific and medical evidence demonstrate their effectiveness in improving Medicare beneficiaries’ health outcomes. However, a review of the actual changes demonstrates that Medicare has not adopted a policy of covering anti-obesity treatments and that any coverage for obesity-related interventions will not occur in the immediate future.

According to Surgeon General David Satcher, approximately sixty-one percent of adults in the United States are overweight or obese, and approximately thirteen percent of children aged six to eleven years and fourteen percent of adolescents aged twelve to nineteen years are overweight. Overweight and obesity are associated with heart disease, certain types of cancer, type two diabetes, stroke, arthritis, breathing problems, and psychological disorders including depression. Three hundred thousand deaths each year in the United States are associated with obesity and the estimated economic cost of obesity in the United States was approximately $117 billion in 2000.

3 Id.
4 Id.
As early as 2001, Satcher proclaimed that obesity had reached “nationwide epidemic proportions.” On February 11, 2004, the Food and Drug Administration’s Obesity Working Group issued a report stating that obesity is “a pervasive public health problem” and recommending more and better public education regarding nutrition and eating habits. In March, the Centers for Disease Control and Prevention stated that obesity was the fastest-growing cause of preventable death in the United States and that obesity would soon overtake tobacco as the leading cause of preventable death. HHS’ June 15 announcement identifies the latest government development relating to obesity.

According to the HHS press release, changes will be made to one section within the Medicare Coverage Issues Manual, which identifies the medical services and procedures covered by the Medicare program. Section 35-26 of the Medicare Coverage Issues Manual formerly provided:

Obesity itself cannot be considered an illness. The immediate cause is a caloric intake which is persistently higher than caloric output. Program payment may not be made for treatment of obesity alone since this treatment is not reasonable and necessary for the diagnosis or treatment of an illness or injury. However, although obesity is not in itself an illness, it may be caused by illnesses such as hypothyroidism, Cushing’s disease, and hypothalamic lesions. In addition, obesity can aggravate a number of cardiac and respiratory diseases as well as diabetes and hypertension. Therefore, services in connection with the treatment of obesity are covered services when such services are an integral and necessary part of a course of treatment for one of these illnesses.

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5 *Id.*
8 MEDICARE COVERAGE ISSUES MANUAL, § 35-26 (May 2001).
Although the online version of the Medicare Coverage Issues Manual has not been changed as of August 25, 2004, HHS states in its press release that it will remove the “obesity is not an illness” language.\footnote{HHS PRESS RELEASE, \textit{supra} note 1.}

Although HHS and several interested associations and organizations hail the manual revisions as a new “policy,”\footnote{See, e.g., Robert Longley, \textit{Dietetic Association Hails New Medicare Obesity Policy}, US.Gov, available at http://usgovinfo.about.com/od/healthcare/a/obesitypolicy2.htm.} the manual revisions only open the door to possible future changes. Under the manual revisions, members of the public will be able to request the Centers for Medicare and Medicaid Services (CMS) to review published data from clinical trials demonstrating that obesity-related treatments improve the health of Medicare beneficiaries. In theory, as individuals request coverage for obesity treatments, Medicare will engage in a timely review of the scientific evidence, using the lengthy and detailed national coverage determination (NCD) process established in 1999 and modified by the Medicare Prescription Drug, Improvement and Modernization Act of 2003.\footnote{The NCD process is described in flow-chart form at http://www.cms.hhs.gov/coverage/download/8a.ppt. The changes made to the NCD process by the Medicare Prescription Drug, Improvement and Modernization Act of 2003 are described at http://www.cms.hhs.gov/coverage/8a4.asp. Links to the federal regulations governing the NCD process are available at http://www.cms.hhs.gov/coverage/8a.asp.}

However, there is no guarantee that CMS will determine that any specific anti-obesity interventions will be covered in the future. In addition, the manual revisions do nothing to help Medicare beneficiaries who need anti-obesity interventions today or over the next few years. Although CMS has planned a fall meeting to review some scientific evidence relating to anti-obesity interventions, CMS must determine how it will handle numerous requests for coverage from individuals, physicians, and drug companies, which
likely will relate to several different anti-obesity therapies including stomach surgery, diet programs, and behavioral and psychological counseling.

The manual revisions also place the burden of change on the public, who must know to request CMS for Medicare coverage of obesity treatments. Tricia Neuman, Vice President of the Kaiser Family Foundation, doubts whether the Medicare population is even aware of the manual revisions. Citing Kaiser Family Foundation findings that many Medicare beneficiaries are still unaware of discount drug cards, Neuman states that, “There’s ample expectation to believe . . . that people may not know about it at all.”12

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