Are ALFs Long-Term Care Facilities?

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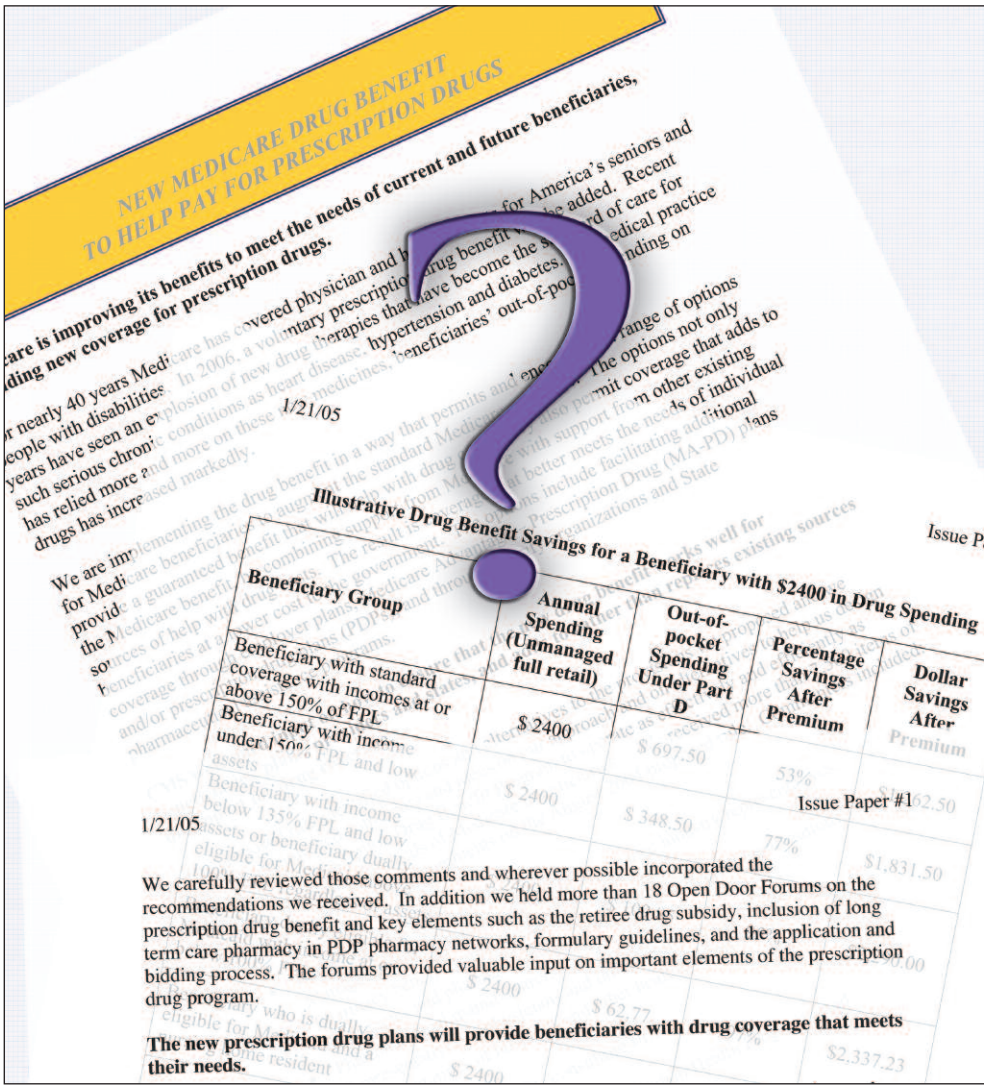
Practitioners, providers, and others involved in nursing facilities, assisted living facilities (ALFs), and continuing care retirement communities generally consider themselves to be part of the long-term care continuum. In embracing this term, they take the definition for granted. Now, some federal government activities are making lots of people take a second look at what long-term care means and where AL and other settings fit in the continuum.

On January 21, 2005, the Centers for Medicare and Medicaid Services (CMS) released its final rule implementing the Medicare prescription drug benefit. This rule, which creates the process for private drug plans to offer the benefit as of January 1, 2006, contains a host of special benefits for "long-term care facility" (LTCF) residents. These include an enhanced "dispensing fee" payment so that pharmacies can continue to receive payment for delivering prescription drugs in unit dose or "bingo card" packaging and providing 24/7 delivery services.

The final rule, however, does not specifically address ALFs. This has left many to question whether—for the purposes of the new prescription drug benefit—Medicare beneficiaries residing in ALFs are considered LTCF residents and, therefore, entitled to the special benefits made available by the new law.

At present, CMS says "no." Despite numerous recommendations from advocates for the elderly that ALF residents be included in the official long-term care facility definition, CMS has rejected these recommendations and excluded AL from the definition in the final rule.



In the Beginning...

How did this controversy start? Last July, when CMS proposed its rule, the agency solicited comments on whether it should expand its proposed definition of a long-term care facility from a skilled nursing facility or a nursing facility to include intermediate care facilities for the mentally retarded (ICF/MRs) or other care settings. CMS felt that ICF/MRs should be considered for inclusion because:

- Residents of these facilities often were dually eligible for both Medicare and Medicaid
- These facilities exclusively contract with long-term care pharmacies

At the time, CMS noted that—to the extent that other types of facilities exclusively contract with long-

term care pharmacies in a manner similar to that of skilled nursing facilities and nursing facilities—the agency would consider modifying its definition of long-term care facility accordingly in the final rule. Advocates for ALF residents and long-term care pharmacy providers serving these individuals argued that this status would reflect the prescription drug needs of ALF residents, as well as the presence of exclusive contracts with long-term care pharmacies in many ALFs.

With this expanded definition, dually eligible ALF residents (ie, those individuals receiving both Medicare and Medicaid who are required to transition from Medicaid prescription drug coverage to the new Medicare prescription drug benefit on January 1, 2006) would qualify for the special rules for access to covered Part D drugs that apply to LTCF residents. For example, full-benefit dually eligibles who reside in long-term care facilities will have no cost-sharing for covered part D drugs under their prescription drug plan (PDP) or Medicare Advantage Plan (MA-PD). If AL residents aren't eligible for this benefit, they will have to shell out co-pays that could add up to hundreds of dollars per year.

Now, the Ruling Is Final

Unfortunately, the CMS final rule defines a "long-term care facility" as a "...nursing facility as defined in section 1819(a) of the Act, or a medical institution or nursing facility for which payment is made for an institutionalized individual under section 1902(q)(1)(b) of the Act."[1]

CMS interprets this definition to include ICF/MRs, inpatient psychiatric hospitals, skilled nursing facilities, and nursing facilities that receive Medicaid payments for institutionalized individuals. At the same time, the agency explicitly has rejected expanding this definition any further to include facilities recognized by state law, but not by Medicare and Medicaid, even if these facilities exclusively contract with long-term care pharmacies. So while the regulation's reference to a "medical institution" leaves open the door to including ALFs in the long-term care facility definition, CMS is excluding ALFs from the definition for now, even if states have statutory and regulatory ALF provisions and the facilities have exclusive contracts with long-term care pharmacies.

From a policy perspective, the final regulation does not acknowledge the role ALFs play in caring for our nation's elderly. Instead, assisted living has been described as a "long-term care option."[2] This doesn't take into account the reality that assisted living and nursing facilities increasingly form a continuum of care, with many more elderly electing to live in the community setting of an ALF for as long as possible before entering a nursing facility. In some places, ALFs even are located near or physically connected to nursing facilities so that residents may have access to a continuum of care without having to relocate to another setting as their medical care and physical assistance needs increase. Many ALFs also enable couples to reside together when one partner is able to care for a more disabled or chronically ill partner, with some assistance in bathing, transfer, and medication administration.

The final rule by the Centers for Medicare and Medicaid Services does not specifically address ALFs.

Hope for the Future

Although CMS's regulatory interpretation has been set in stone for the short term, the regulatory language provides ample room for CMS to change its interpretation and include ALFs in the long-term care facility definition. In the coming months, senior advocates will be urging Congress and CMS to expand the definitions to include ALFs so that residents of these facilities have same access to the medications as other long-term care residents have. This is a priority issue that only will increase in urgency as AL becomes the care option of choice for more seniors, particularly the rapidly aging baby boomers. Addressing this concern now will ensure that tomorrow's aging citizens will have the same prescription drug benefits, regardless of the senior living setting that they choose. ALC

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The views expressed in this article are those of the authors alone and do not reflect the views of Patton Boggs or its clients. The authors welcome feedback and can be reached at dfarber@pattonboggs.com and kthiel@pattonboggs.com.

References

1. 42 C.F.R. § 423.100 (Definitions).

2. Kane RA, *Assisted Living as a Long-Term Care Option: Transition, Continuity, and Community.* Assisted Living Research Institute, 2004.