Under Construction:

The Medicare Clinical Trial Policy

by Kathleen H. McGuan

For an item or service to be covered under the Medicare program, it must be "reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member."[1] However, in addition to that relatively familiar formulation, the Medicare statute also provides that an item or service may be covered if it is "reasonable and necessary" to carry out "research conducted pursuant to section 1142 [of the Social Security Act]."[2] Section 1142 grants the Secretary of Health and Human Services (HHS) broad authority to support research "to identify the manner in which diseases, disorders and other health conditions can most effectively and appropriately be prevented, diagnosed, treated and managed clinically."[3]

It is this second—less familiar statutory basis for Medicare coverage—that has supported the development and expansion of a policy to pay for certain items and services provided to Medicare beneficiaries in the context of clinical trials.

Since 2000, the Center for Medicare and Medicaid Services (CMS) has paid for some portion of the cost of clinical trials for trial participants who are Medicare beneficiaries. The goal of this coverage policy is to increase participation of the Medicare population—primarily people 65 years of age and older—in clinical research. CMS believes that enrolling more seniors in trials will not only add to the evidence base for effective and efficient use of products and technologies specifically in the Medicare population, but will also allow beneficiaries to receive care that may have a health benefit, but for which the evidence is insufficient to allow unrestricted coverage.[4]

On June 7, 2000, President Clinton issued an Executive Memorandum that directed the Medicare Program to take steps to encourage Medicare beneficiary participation in clinical trials. In response, the Health Care Financing Administration (now CMS) released a National Coverage Decision (NCD) establishing Medicare's first Clinical Trial Policy.[5] The 2000 NCD provided reimbursement for routine patient care costs for Medicare beneficiaries in qualified trials, as well as reasonable and necessary items and services used to diagnose

Ms. McGuan
is a Partner in the Life Sciences and Health Group of the law firm of Reed Smith, LLP, in Washington, D.C.

and treat complications arising from participation in all clinical trials, when certain conditions are met. The policy did not provide coverage for the investigational item or service itself,6 items and services provided solely to satisfy trial data collection and analysis needs, or items and services customarily provided by the research sponsors free of charge for any enrollee in the trial. The 2000 policy set forth three requirements and seven "highly desirable characteristics" of a qualified trial.[7] CMS provided two options for determining that trials met these standards: a self-certification process, which was never implemented, and a "deeming" process for trials funded by certain federal agencies (e.g., National Institutes of Health (NIH)), trials conducted under an investigational new drug (IND) application reviewed by the Food and Drug Administration (FDA), and certain drug trials that are exempt from having an IND. Significantly, the policy did not withdraw coverage for items and services that had been approved under local contractor coverage policies.

CMS began reconsidering the 2000 NCD in late 2006 and issued a proposed decision memorandum on April 10, 2007.[8] Among many other things, CMS proposed (1) setting forth detailed Medicare-specific standards for qualified clinical studies (including registration on ClinicalTrials.gov, study protocols addressing applicability to the Medicare population, and a requirement to release study results); (2) disallowing payment of administrative costs associated with a clinical trial; (3) deleting the self-certification option; and (4) removing the deemed status of IND-exempt studies. The draft policy, and subsequent CMS discussions of the draft, raised a controversial interpretation that coverage under the NCD was essentially the only route to Medicare coverage in clinical trials, rather than, as others believed, an alternative path to Medicare coverage within federally funded trials that did not restrict Medicare coverage under privately funded trials.

Increasingly, CMS is demanding evidence of effectiveness in the Medicare population, rather than simply in the general population, to support a coverage decision.

CMS issued a final NCD on July 9, 2007.[9] At that time, CMS acknowledged that concerns were raised during the reconsideration process about the extent to which the Medicare policy applied to privately sponsored clinical research conducted outside the terms of the clinical trials policy, and potentially inconsistent application of this policy in the past by Medicare contractors. While CMS expressed its intention to amend its policies to provide clear and consistent standards, it acknowledged that the public had not had an adequate opportunity to comment on those changes. Given the confusion surrounding the 2000 policy and some contractors' practice of paying certain claims that did not meet the 2000 standards, CMS's July 9, 2007 policy was designed to "preserve the status quo," with the following two exceptions: (1) CMS modified the language in the 2000 policy to clarify that the item or service under investigation can be covered if it would be covered outside of the clinical research trial; and (2) CMS added a reference to CMS's "coverage with evidence development" (CED) policy, under which Medicare may require as a condition of coverage the collection of additional patient clinical data.

July 17, 2007 Proposed NCD

On July 17, 2007, CMS released yet another proposed Clinical Research Policy NCD.[10] CMS stated that it wished to ensure that coverage for Medicare beneficiaries participating in research studies is consistent across all types of studies, including both federally-funded research and privately-funded trials. The policy again proposed more detailed coverage criteria for Medicare-covered clinical trials and would have disallowed payment for administrative costs associated with trials. This version would have provided a mechanism for trial sponsors to self-certify that their trials met CMS criteria. However, as discussed below, CMS ultimately decided not to adopt these changes.

Final NCD: Oct. 17, 2007

On October 17, 2007, CMS issued its final NCD, which is the most recent and current policy statement on coverage of items and services furnished in a clinical study.[11] CMS announced that the agency is making no changes at this time to the existing July 9, 2007 NCD policy (which, as noted above, continued the 2000 NCD, except for permitting coverage of the investigational item if otherwise payable outside of the clinical trial and referencing the availability of coverage through a CED policy).

For ongoing clinical trials, CMS states that it "will continue to cover items and services in some trials that did not meet the standards of the 2000 policy but have been paid by some contractors."

CMS decided not to adopt changes in its policy after determining that there were questions regarding CMS's authority to limit coverage within research studies, continuing confusion regarding the proposal, and requests for the use of a formal rulemaking process to institute any potential coverage restrictions. Moreover, after the comment period on the proposed NCD closed, Congress passed the Food and Drug Administration Amendments Act of 2007 (FDAAA), which had a significant impact on clinical trials. FDAAA expands the clinical trial provisions of the Federal Food, Drug, and Cosmetic Act (FDCA) to require: (1) registration of almost all clinical trials involving drugs, biologics, and devices; and (2) publication of all clinical trial results for FDA-approved products. In the wake of the new FDAAA provisions, CMS decided that it would be prudent to forestall any immediate revisions to its coverage policy in order to review this new legislation and "work with other HHS components in order to avoid imposing duplicative or inconsistent obligations."[12] Since the October 2007 NCD, CMS has publicly stated that it plans to revisit its clinical trial policy in the near future, perhaps through issuing a notice of a proposed rulemaking.[13]

Observations & Conclusions

Recently published studies have shown that CMS' limited coverage policy has done little to accomplish the goal stated in the 2000 Executive Memorandum and reiterated by CMS, which was to increase the number of Medicare beneficiaries enrolling in clinical trials.[14] Cancer, for example, is an age-related disease. Patients aged 65 and older account for over 60 percent of new cancer cases and 70 percent of all cancer deaths, but their representation in clinical trials remains disproportionately low.[15] With some variation depending on the type of cancer and the exact years since 2000 considered, patients 65 and older account for only approximately 30 percent of the enrollees in cancer trials.[16] CMS acknowledges this general discrepancy across all disease states, noting that "[o]nly a very small percentage of Americans participate in clinical trials, although the elderly bear a disproportionate burden of disease in the United States."[17]

The underrepresentation of the Medicare population in clinical research is beginning to have profound consequences for drug and device manufacturers, as well as for the healthcare industry at large. Increasingly, CMS is demanding evidence of effectiveness in the Medicare population, rather than simply in the general population, to support a coverage decision. In 2003, in its Notice revising the process for developing NCDs, CMS stated that the requestor of an NCD must submit evidence that demonstrates "medical benefits for the target Medicare population," and noted that even well-designed and well-conducted trials may not supply the evidence needed for coverage if the results are not applicable to the Medicare population.[18] CMS has recently denied or limited coverage where it concluded that, because of the absence of elderly participants in the clinical trials, the evidence did not show a medical benefit or improved health outcome for the Medicare population.[19] These developments underscore the growing importance for clinical trials to go beyond conventional analyses of safety and effectiveness to document improved health outcomes, with a particular emphasis on the Medicare population, if the trial data is intended to support coverage and payment in the Medicare context.

In the January 28, 2008 issue of *Archives of Internal Medicine*, researchers at the University of California at San Francisco School of Medicine found that in the past, Medicare coverage decisions were often made using clinical data derived from a patient population that varied significantly from Medicare beneficiaries.[20] In one example, the study showed that Medicare beneficiaries differ significantly from the cardiovascular clinical trial participants used to inform Medicare coverage decisions. The study found that research participants, compared with beneficiaries, are likely to be younger (60.1 versus 74.7 years), male (75.4 percent versus 41.8 percent), and non-US residents (60 percent versus 0 percent). "The clinical trials primarily relied on to inform national coverage decisions simply do not reflect the Medicare patient population. Compounding this problem, data frequently are not reported by age, sex and race."[21] These findings support the call for clinical studies to include participants over 65 to determine the effectiveness of new treatments in the Medicare population.

It seems likely that CMS will continue to demand evidence that is specific to the Medicare population in order to support a coverage decision. Given the failure of the current policy to stimulate more participation by senior in clinical trials, CMS seems poised to continue to consider broader coverage of qualified trials. Any party involved in clinical trials should stay tuned as CMS strives to balance the health and safety of Medicare beneficiaries, the agency's fiscal limitations and a desire to promote promising new technologies

1. 42 U.S.C. 1395y(a)(1)(A).
2. 42 U.S.C. 1395y(a)(1)(E).
3. Section 1142 of the Social Security Act is codified at 42 U.S.C. 1320b-12.
4. *See* BNA HEALTH CARE DAILY, Vol. 13, No. 90 (May 9, 2008) at 2.
5. *See* Centers for Medicare & Medicaid Services, Final National Coverage Decision (Sept. 19, 2000), available at http://www.cms.hhs.gov/ClinicalTrialPolicies/01_Overview.asp#TopOfPage (last visited May 11, 2008).
6. As a general rule, Medicare does not cover experimental treatments, services or products because to be reasonable and necessary, the item must be well-accepted by the medical community. *See, e.g.*, Goodman v. Sullivan, 891 F.2d 449 (2nd Cr. 1989). Medicare does have very limited, separate regulatory authority to cover and pay for certain Category B, non-experimental, investigational devices. *See* 42 C.F.R. sec. 405.201.
7. For clinical trials receiving Medicare coverage of routine costs: 1) the subject or purpose of the trial must be the evaluation of an item or service that falls within a Medicare benefit category and is not statutorily excluded from coverage; 2) the trial must have therapeutic intent; and 3) the trials must enroll patients with diagnosed disease rather than healthy volunteers. In addition, the following "desirable characteristics" are necessary for coverage of routine costs: 1) the principal purpose of the trial is to test whether the intervention potentially improves the participants' health outcomes; 2) the trial is well-supported by available scientific and medical information or it is intended to clarify or establish the health outcomes of interventions already in common clinical use; 3) the trial does not unjustifiably duplicate existing studies; 4) the trial design is appropriate to answer the research question being asked in the trial; 5) the trial is sponsored by a credible organization or individual capable of executing the proposed trial successfully; 6) the trial is in compliance with federal regulations relating to the protection of human subjects; and 7) all aspects of the trial are conducted according to the appropriate standards of scientific integrity.
8. *See* Centers for Medicare & Medicaid Services, Proposed Decision Memo for Clinical Trial Policy (April 10, 2007), available at https://www.cms.hhs.gov/mcd/viewdraftdecisionmemo.asp?id=186 (last visited May 11, 2008).
9. *See* Centers for Medicare & Medicaid Services, Decision Memo for Clinical Trial Policy (July 9, 2007), available at https://www.cms.hhs.gov/mcd/viewdecisionmemo.asp?id=186 (last visited May 11, 2008).
10. *See* Centers for Medicare & Medicaid Services, Proposed Decision Memo for Clinical Trial Policy (July 19, 2007), available at http://www.cms.hhs.gov/mcd/viewdraftdecisionmemo.asp?id=210 (last visited May 11, 2008).
11. *See* Centers for Medicare & Medicaid Services, Decision Memo for Clinical Trial Policy (Oct., 2007), available at http://www.cms.hhs.gov/mcd/viewdecisionmemo.asp?id=210 (last visited May 11, 2008).
12. *Id.*
13. *See* BNA HEALTH CARE DAILY, Vol 13, No. 90 (May 9, 2008) at 1.
14. *See* Joseph M. Unger, et al. *Impact of the Year 2000 Medicare Policy Change on Older Patient Enrollment to Cancer Clinical Trials*, J. CLIN. ONCOL. 2008, 24: 141-144 (Jan. 1, 2006); Cary P. Gross, M.D., Natalie Wong, M.P.H., Joel A. Dubin, Ph.D., Susan T. Mayne, Ph.D., Harlan M. Krumholz, M.D., *Enrollment of Older Persons in Cancer Trials After the Medicare Reimbursement Policy Change*, ARCH. INTERN. MED. 2005, 165:1514-1520 (July 11, 2005).
15. *Id.* Arch. Intern. Med. at 1514
16. *See* Note 14, *supra.*
17. Centers for Medicare & Medicaid, Overview of Medicare Clinical Trial Policies, available at http://www.cms.hhs.gov/ClinicalTrialPolicies/ (last visited May 11, 2008).
18. Notice, Medicare Program: Revised Process for Making National Coverage Determinations 68 F.R. 55634 (Sept. 26, 2003) at 55637.
19. *See* Centers for Medicare & Medicaid Services, Decision Memo for Lumbar Artificial Disc Replacement (Oct. 1, 2007), *available* at http//www.cms.hhs.gov/mcd/viewncd.asp?ncd=150.10. *See also*, Centers for Medicare & Medicaid Services, Decision Memo for Bariatric Surgery for Treatment of Morbid Obesity (Feb. 21, 2006), available at http//www.cms.hhs.gov/mcd/biewncd_id=100.
20. *See* S. Sanket, B.A. Dhruva & Rita F. Redberg, M.D., MSc, *Variations Between Clinical Trial Participants and Medicare Beneficiaries in Evidence Used for Medicare National Coverage Decisions Medicine*, ARCH INTERN MED. 2008; 168(2):136-140 (Jan. 28, 2008), a*vailable at* http://archinte.ama-assn.org/cgi/content/short/168/2/136 (last visited May 11, 2008).
21. *Id.*