



MEDICARE DRUG & HEALTH PLAN CONTRACT ADMINISTRATION GROUP

DATE: August 29, 2013

TO: All Medicare Advantage Organizations

FROM: Danielle R. Moon, J.D., M.P.A., Director

SUBJECT: Impact of United States v. Windsor on Skilled Nursing Facility Benefits for Medicare Advantage Enrollees – IMMEDIATE ACTION REQUIRED

The purpose of this memorandum is to advise that, effective immediately, in accordance with the Supreme Court’s ruling in United States v. Windsor, Medicare Advantage (MA) organizations must cover services in a skilled nursing facility (SNF) in which a validly married same sex spouse resides to the extent that they would be required to cover the services if an opposite sex spouse resided in the SNF.

Under section 1852(l) of the Social Security Act, an MA organization is required to provide an MA plan enrollee Medicare-covered SNF services in a particular SNF if (1) the enrollee elects coverage in that SNF; (2) the SNF either contracts with the MA organization, or agrees to accept payment under the same terms and conditions that apply to similarly situated contracting SNFs; and (3) the SNF meets the definition of a “home skilled nursing facility.” One of the ways that a SNF can qualify as a “home” SNF is that it is the SNF “in which the *spouse* of the enrollee is residing at the time of [the enrollee’s] discharge from [a] hospital” after a qualifying 3 day hospital stay entitling the enrollee to Medicare coverage of SNF services. Section 1852(l)(4)(A)(iii) (emphasis added).

In United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013), the Supreme Court held section 3 of the Defense of Marriage Act (DOMA) unconstitutional. Section 3 of DOMA provided, in part, that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife. 1 U.S.C. § 7.

The Supreme Court concluded that section 3 of DOMA “undermines both the public and private significance of state-sanctioned same sex marriages” and impermissibly says that these valid marriages are unworthy of federal recognition. United States v. Windsor, Slip Op. at 22-23.

In light of the Supreme Court’s decision in Windsor, CMS believes it would be impermissible to interpret the term “spouse,” as used in section 1852(l)(4)(A)(iii), to exclude individuals who are in a legally valid same-sex marriage sanctioned by a state, territorial, or foreign government. Accordingly, based on the Supreme Court’s decision in Windsor, CMS concludes that the term “spouse” in section 1852(l)(4)(A)(iii) includes individuals of the same sex who are lawfully married under the law of a state, territory, or foreign jurisdiction. The foregoing analysis applies to individuals of the same sex

who are domiciled in a state or territory that recognizes their relationship as a marriage. It also applies to individuals of the same sex who were legally married in a state or other jurisdiction without regard to whether they are domiciled in a state or territory that recognizes their relationship as a marriage. This policy is consistent with a post-Windsor policy of treating same-sex marriages on the same terms as opposite-sex marriages to the greatest extent reasonably possible.

MA organizations therefore are required, effective immediately, to cover services in a SNF in which a validly married same sex spouse resides to the extent that they would be required to cover the services if an opposite sex spouse resided in the SNF. The benefit requirement is codified at 42 CFR §422.133(b) and addressed in section 10.9 of Chapter 4 of the Medicare Managed Care Manual.

If you have any questions about the guidance in the memorandum, please contact Marty Abeln at (410) 786-1032.