



Center for
Medicare Advocacy

MedicareAdvocacy.org

***Jimmo* Symposium:**
Medicare Coverage to Maintain or Slow Decline

September 27, 2023

The Center for Medicare Advocacy is a national non-profit law organization that works to advance access to comprehensive Medicare, health equity, and quality health care.

- Founded in 1986
- Headquartered in CT and Washington, DC, additional attorneys in CA, MA, and MD
- Staffed by attorneys, advocates, a nurse consultant, and technical experts
- Provides education, legal analysis, writing and assistance
- Systemic change – Policy & Litigation
 - Based on our experience with the problems of real people
- Inappropriate Medicare denials – and appeals
- Medicare/Medicaid Third Party Liability Projects



AGENDA

1. Introduction and Review of Jimmo Litigation, Settlement, and Implementation
2. Patient /Activists Perspective
3. Provider Perspective
4. Advocates Perspective
5. Discussion
6. Wrap Up and Next Steps

INTRODUCTION & REVIEW OF JIMMO LITIGATION, SETTLEMENT, AND IMPLEMENTATION

Judith Stein, Executive Director/Attorney
Center for Medicare Advocacy

Michael Benvenuto, Project Director, Elder Law Unit
Vermont Legal Aid

WHY LITIGATION?

Constant Medicare Denials Due To Lack Of Improvement – Contrary to Law

“Restoration potential is not the deciding factor in determining whether skilled care is required. Even if full recovery or medical improvement is not possible, a patient may need skilled services to prevent further deterioration or preserve current capabilities.”

- 42 C.F.R. § 409.32(c)



“Glenda Jimmo, of Lincoln, VT, was one of the plaintiffs in the class-action lawsuit challenging the cutoff of Medicare payments for physical therapy and other treatments for patients who were not improving.” NY Times, 2/2013

JIMMO V. SEBELIUS, NO. 5:11-CV-17

(D. VT., Settlement Approved 2013; Corrective Action Plan, 2017)

- Federal class action to eliminate improvement standard in skilled nursing facilities (SNFs), home health (HH), outpatient therapy (OPT).
- Filed Jan. 18, 2011 by Center for Medicare Advocacy and Vermont Legal Aid, on behalf of:
- Plaintiffs: 5 individuals and 6 organizations
 1. National MS Society
 2. Alzheimer's Association
 3. National Committee to Preserve Social Security & Medicare
 4. Paralyzed Veterans of America
 5. Parkinson's Action Network
 6. United Cerebral Palsy
 7. [AMPRA – American Medical Rehabilitation Providers Association]

WHAT *JIMMO* MEANS

- Medicare covers services (nursing, therapy) if the care is considered “skilled”
 - Care Settings involved in *Jimmo*
 - Skilled Nursing Facility (SNF)
 - Home Health
 - Outpatient Physical Therapy
-
- Inpatient Rehabilitation Facility (IRF) – To different extent

WHAT *JIMMO* MEANS

- Coverage does not turn on the presence or absence of potential for improvement but rather on the need for skilled care.
- Services can be skilled and covered when:
 - Needed to maintain, prevent, or slow decline or deterioration;
 - Skilled professional is needed to provide or supervise to ensure services are safe and effective.

CMS revised Medicare policy manuals, guidelines, instructions to reflect these principles per Court approved settlement

WHAT *JIMMO* MEANS

- “Skilled” = Service is “so inherently complex that it can be safely and effectively performed only by, or under the supervision of, professional or technical personnel.” 42 C.F.R. § 409.32(a)
- A condition that does not ordinarily require skilled services, may require skill because of special medical conditions. 42 C.F.R. § 409.32(b)
- Must be documented.

WHAT *JIMMO* MEANS

Jimmo applies to:

1. Skilled Nursing Facility, Home Health, and Outpatient Therapy (PT, SLP/ST, OT)
 - Skilled maintenance therapies and nursing are covered by Medicare
2. Inpatient Rehabilitation Hospital (Facility) (IRF)
 - Claim should never be denied because patient:
 - Cannot achieve complete independence in self-care
 - Cannot be expected to return to prior level of functioning

THERAPY

TO MAINTAIN CONDITION OR SLOW DETERIORATION

“Maintenance Therapy – Therapy services in connection with a maintenance program are considered skilled when they are so inherently complex that they can be safely and effectively performed only by, or under the supervision of, a qualified therapist. ... Such a maintenance program to maintain the patient’s current condition or to prevent or slow further deterioration is covered so long as the beneficiary’ requires skilled care for the safe and effective performance of the program.”

Medicare Benefit Policy Manual, Chapter 8, §30.4.1.2.E

NURSING TO MAINTAIN CONDITION OR SLOW DETERIORATION

- Maintenance nursing is a Medicare-covered service if nurse needed to provide or supervise care
 - E.g., observation & assessment by a skilled nurse when there is a “reasonable probability” for a complication or acute episode, even if it does not occur. Medicare Benefits Policy Manual, Ch. 8, §30.2.3.2 Ex. 6
- Decision regarding coverage should turn on whether skill is needed, not whether individual is expected to improve.

NURSING SKILLED NURSING FACILITY

“Skilled nursing services would be covered where such skilled nursing services are necessary to maintain the patient’s current condition or prevent or slow further deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided... . Coverage does not turn on the presence or absence of an individual’s potential for improvement”

MBPM, Chapter 8, §30.3

NURSING HOME HEALTH

“Skilled nursing services are covered where such skilled nursing services are necessary to maintain the patient’s current condition or prevent or slow further deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided...”

MBPM, Chapter 7, §40.1.1

NURSING – HOME HEALTH

Example #1: Patient w/ malignant melanoma is terminally ill, and requires skilled observation, assessment, teaching, and treatment. The patient has not elected hospice. The documentation should describe the goal of the skilled nursing, and at each visit the services provided should support that goal. **The skilled nursing care the patient requires would be covered, notwithstanding that the condition is terminal,** because the documentation and description ... support the needed services require the skills of a nurse.

Medicare Benefit Policy Manual, Chapter 7

NURSING – HOME HEALTH

Example #2: A patient has chronic non-healing skin ulcers... .In the past, the patient's wounds have deteriorated, requiring the patient to be hospitalized. Previously a skilled nurse trained the patient's wife to perform wound care. The treating physician orders continued skilled nursing, one visit every two weeks for observation and assessment of the skin ulcers to make sure they aren't worsening. The order is reasonable and necessary because, **although the unskilled caregiver learned to care for the wounds, the skilled nurse can use observation and assessment to determine if the condition is worsening.**

Medicare Benefit Policy Manual, Chapter 7

Jimmo Symposium



Michael Benvenuto
Project Director
Elder Law Unit



Medicare Advocacy in Vermont



- Medicare appeals for dual-eligible beneficiaries
- Medicaid has already paid for the care
- We demand bill the Medicare claim and handle the appeal
- Primarily home health and SNF cases
- Most therapy in Vermont is billed to Medicare, so we see less of those cases (but still do plenty)

Maintenance Nursing is a Covered Service



- Key part of our home health care cases on appeal
- For beneficiaries that are confined to the home
- Generally, we argue maintenance in addition to the need for skilled observation and assessment
- Criteria also applies to SNF care

Maintenance Nursing is a Covered Service



- When reasonable and necessary based on the potential for complications
- Even for a patient that is chronic and stable
- When nursing is required to prevent further deterioration
- Or to slow further deterioration

Jimmo Settlement FAQs



Q10: How does the maintenance coverage standard under the *Jimmo* Settlement apply to skilled observation and assessment of homebound Medicare patients?

<https://www.cms.gov/Center/Special-Topic/Jimmo-Settlement/FAQs.html>

Jimmo Settlement FAQs



- **A10:** As with all skilled nursing services under the HH benefit, skilled observation and assessment of the patient's condition by a nurse is a Medicare covered service regardless of whether there is an expectation of improvement from the nursing care or whether the services are designed to maintain the patient's current condition or prevent or slow further deterioration. Observation and assessment are reasonable and necessary skilled services where there is a reasonable potential for change in a patient's condition that requires skilled nursing personnel to identify and evaluate the patient's need for possible modification of treatment or initiation of additional medical procedures until the patient's clinical condition and/or treatment regimen has stabilized.

Maintenance Nursing Means



- Observation and assessment for as long as the individual needs that level of care
- Potential for complications means the person is not stabilized
- Beneficiaries that have a period of time in which they are doing well, should not lose Medicare coverage for the care that is helping them do well
- Maintaining their condition, to reduce the potential for complications, is covered for as long as necessary

JIMMO SUMMARY

Questions to Ask:

- Is a skilled professional needed to ensure nursing or therapy is safe and effective? Yes → Medicare coverable.
- Is a qualified nurse or therapist needed to provide or supervise the care? Yes → Medicare coverable.

Regardless of whether the skilled care is needed to improve, or maintain, or slow deterioration of the condition. Or if condition is “chronic” or “stable” or has “plateaued.”

INDIVIDUALIZED ASSESSMENT REQUIRED

“Determination of whether skilled nursing care is reasonable and necessary must be based solely upon the beneficiary's unique condition and individual needs, without regard to whether the illness or injury is acute, chronic, terminal, or expected to last a long time.”

Home Health Regs. 42 CFR §409.44(b)(3)(iii)

See also, 42 C.F.R. §409.44(a)

NO RULES OF THUMB

- Medicare should not use “rules of thumb,” such as
 - Lack of restoration potential
42 C.F.R. § 409.32(c)

Certain phrases may indicate Rules of Thumb have been used to deny coverage.

Examples:

- Individual has “plateaued.”
- Individual has “reached baseline.”
- Individual is “chronic and stable.”
- Individual needs “maintenance therapy only.”
42 C.F.R. §409.44(b)(3)(iii)
See also, 42 C.F.R. §409.44(a)

***JIMMO* & DOCUMENTATION**

- Added documentation guidance included in *Jimmo* Manual revisions
- Theme is that the need for and receipt of skilled care must be evident – show that the care was skilled
- No magic words – but vague phrases like “patient tolerated treatment well,” “continue with POC,” and “patient remains stable” are NOT sufficient to establish coverage

Need Documentation of what was done and why.

IF improvement is occurring, note it.

If goal is/includes maintenance, or changes to maintenance, make sure that is noted in the order. If appropriate, get new order.

CORRECTIVE ACTION PLAN

Jimmo v. Sebelius, D. Vt. (August 2016; February 2017)

- Court ordered *Corrective Action Plan* to include:
 - New CMS webpage dedicated to the *Jimmo* settlement with FAQs; new training for Medicare contractors making coverage decisions;
new National Call for Medicare contractors and adjudicators
- Court approved the final wording of statement to be used by CMS to affirmatively disavow the use of an Improvement Standard, including:
“Jimmo Settlement may reflect a change in practice for those providers, adjudicators, and contractors who may have erroneously believed that the Medicare program covers nursing and therapy services under these benefits only when a beneficiary is expected to improve.”

Important Message About Jimmo, CMS.gov

IMPORTANT MESSAGE ABOUT THE JIMMO SETTLEMENT **(CMS.GOV, 12/12/2017)**

“The *Jimmo* Settlement Agreement may reflect a change in practice for those...who may have erroneously believed that the Medicare program covers nursing and therapy services under these benefits only when a beneficiary is expected to improve. **The *Jimmo* Settlement is consistent with the Medicare program’s regulations** governing maintenance nursing and therapy in skilled nursing facilities, home health services and outpatient therapy (physical, occupational, and speech) and nursing and therapy in inpatient rehabilitation hospitals for beneficiaries who need the level care that such hospitals provide.”
[Emphasis added]

Court Mandated Statement from CMS:

(<https://www.cms.gov/medicare/settlements/jimmo>; Last visited 5/15/2023)

***Jimmo* = Clearly Established Law**

PAYMENT CHANGES DID NOT CHANGE COVERAGE CRITERIA (From CMS 2/20/2020)

“HAS HOME HEALTH ELIGIBILITY AND COVERAGE CHANGED UNDER THE PDGM?

No. While there has been a change to the case-mix adjustment methodology and the unit of payment beginning in CY 2020, eligibility criteria and coverage for Medicare home health services remain unchanged. **That is, as long as the individual meets the criteria for home health services as described in the regulations at 42 CFR 409.42, the individual can receive Medicare home health services, including therapy services.** Payment under the HH PPS continues to be a bundled payment meant to cover all home health services as described at 42 CFR 409.44; including nursing, medical supplies, home health aides, and therapy services. ...” (*Emphasis added*)

MLN Matters Article - SE19027, 2/20/2020 <https://www.cms.gov/files/document/se19027.pdf>

CMS *JIMMO* REMINDER (December 2, 2021)

“Skilled Nursing Care & Skilled Therapy Services to Maintain Function Or Prevent or Slow Decline: Reminder

Medicare covers skilled nursing care and skilled therapy services under skilled nursing facility, home health, and outpatient therapy benefits when a beneficiary needs skilled care **to maintain function or to prevent or slow decline, as long as:**

- The beneficiary requires **skilled care** for the services to be provided safely and effectively
- An **individualized assessment** of the patient's condition demonstrates that the specialized judgment, knowledge, and skills of a qualified therapist are needed for a safe and effective maintenance program

Visit the [Jimmo Settlement Agreement](#) webpage for more information.”

(Emphasis added)

SUMMARY

- Coverage turns on whether skilled care is required, not improvement (This is key to *Jimmo*)
- Restoration potential is not the deciding factor
- Medicare should not be denied because the beneficiary has a chronic condition or needs services to maintain his/her condition
- An “Individualized Assessment” of each claim is required
- Rules of thumb should not be used

**Per CMS: “This is long-standing criteria,
consistent with regulations”**

Search: *Jimmo*, Important Message about *Jimmo* at CMS.gov

WHEN IT WORKS...

“This is a patient that was severely declining when we met him. Take a look at his progress since starting in our program. Not only are we keeping him in the community and healthy, but he continues to make significant gains. ...

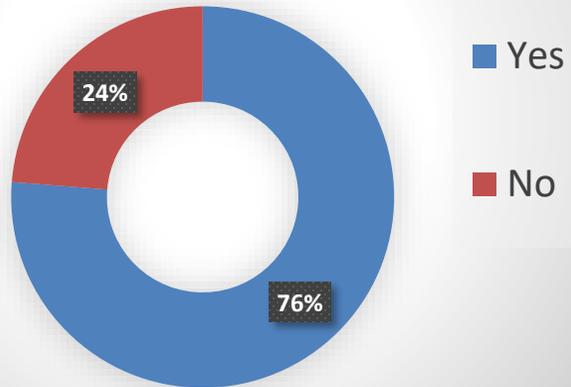
His progress would not have been possible without Jimmo. Your work has made this possible....

... this is what it looks like. I am sure this patient would be at or close to a wheelchair without this program. He is one happy guy now as he feel he has control of his disease process not the other way around.”

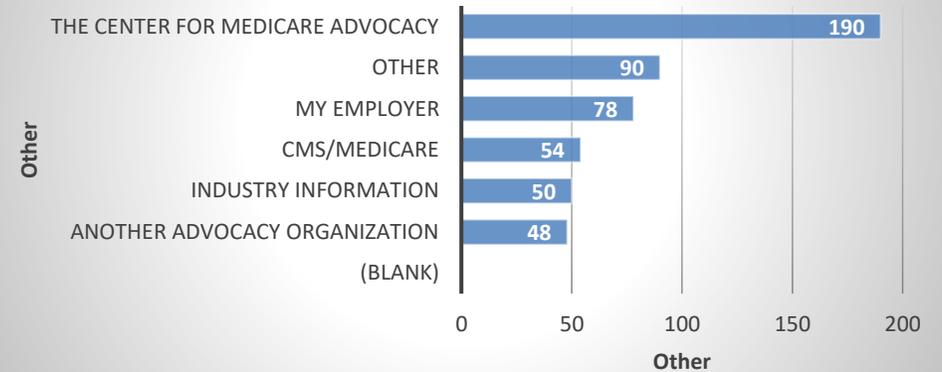
John Marmarou, DPT, MSCS, 6/15/2021

PARTICIPANT SURVEY STATISTICS

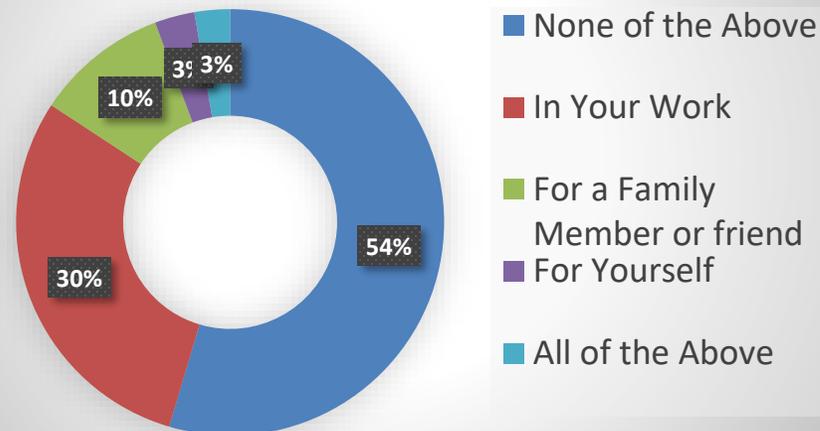
Have you heard of the Jimmo Settlement?



How did you hear about the Jimmo Settlement?



I've had success getting coverage for maintenance care.



PARTICIPANT COMMENTS

- Erin P - Tennessee

“I am extremely surprised to find out about this case because it seems to me that Medicare does not care that this happened.”

- Kathy Q - New York

“I do not understand why all this time later this is not well known in the PT, ST, OT community.”

- Kathryn V - New York

“It’s an abomination how minimally the Jimmo decision has impacted care for those in need.”

- Russell W - North Carolina

“For Jimmo to work there has to be a penalty for it not working. Many health professionals are either unaware or unwilling.”

PATIENT & ACTIVISTS PERSPECTIVE

Suzanne Bachman and Lou Costanzo, National MS Society

Lynn Brielmaier, IEEE Brain

Sam Porritt, Falling Forward

Sam Porritt, Founder



FALLINGFORWARD®
FOUNDATION



falling_fwd

2011: Spinal Cord Injury Two Years of Rehab! No Therapy Cap!



2013: Launched Falling Forward

- We fund outpatient rehab after insurance runs out
- We've partnered with 4 premiere rehab centers



Englewood, CO



Chicago, IL



Kansas City, MO



Lawrence, KS

Thank You!

Your interest, advice, and questions are appreciated and welcomed!

Sam Porritt

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Email Fallingforwardfoundation@gmail.com

www.fallingforward.org

Questions?

PROVIDER PERSPECTIVE

Cindy Krafft, PT - K&K Health Care Solutions

Dennis Knoff, PT - Pinnacle Senior Care

Renee Kinder, SLP - Broad River Rehab

Ellen Strunk, PT - Rehab Resources & Consulting



Cindy Krafft PT, MS, HCS-O

Owner

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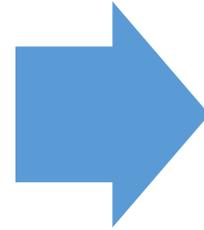
Beneficiary Expectations

Therapist Expectations



*What are my
options?*

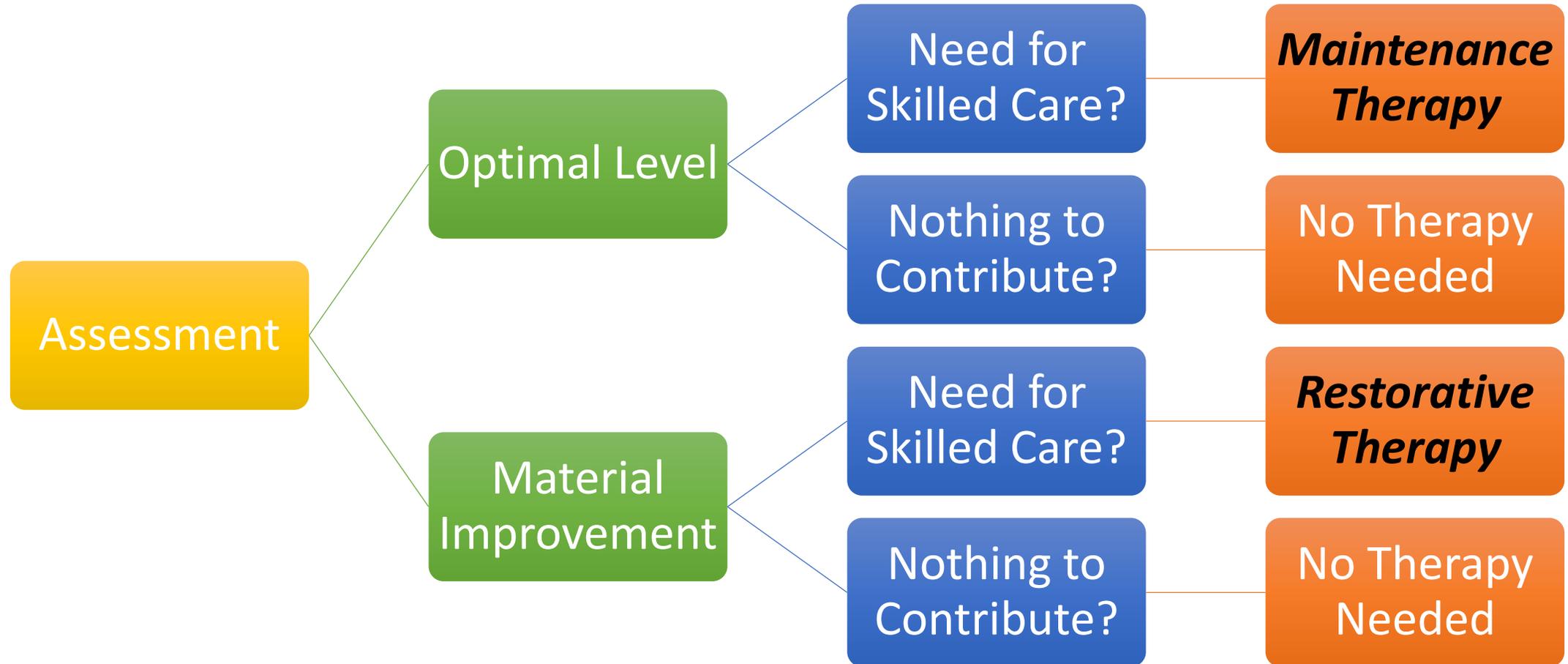
Maintenance



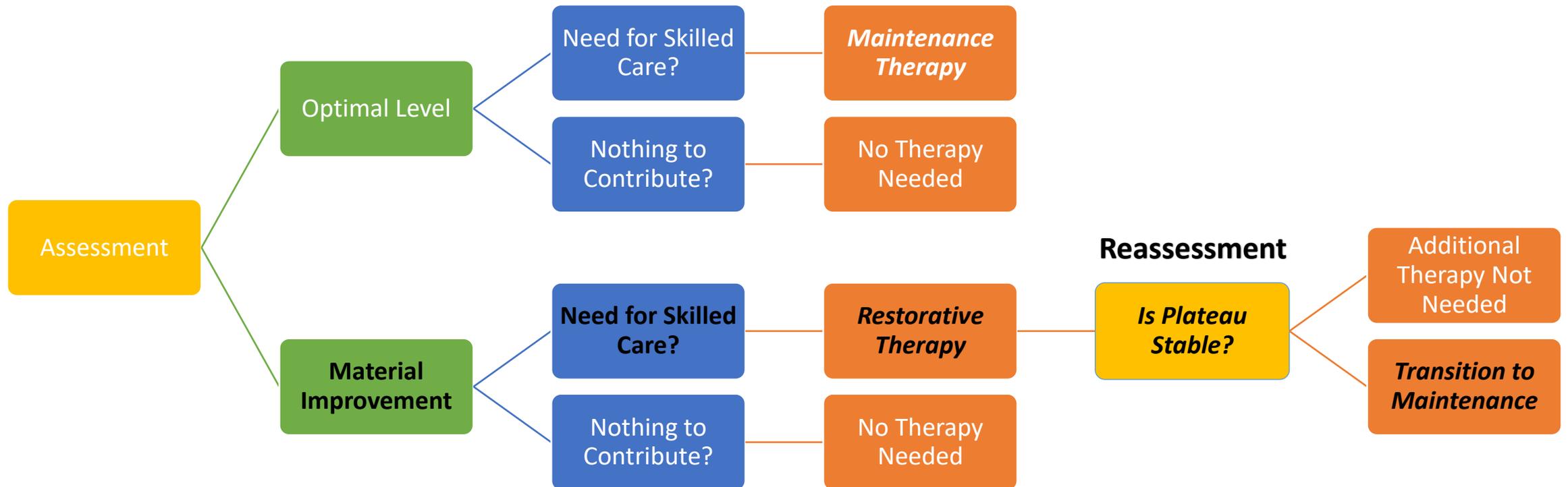
Stabilization

Reframing the Conversation

Choosing a Focus of Care



Changing a Course of Care



Moving
Forward



JIMMO DECISION - A HOME HEALTH COMPANY'S EXPERIENCE

Dennis Knoff

PINNACLE SENIOR CARE

- Home Health company in 8 states working primarily with the highest acuity and most expensive patients.
- Owned by United States Medical Management (USMM), Pinnacle participates in a USMM ACO and was part of a demonstration project (ACO) in the early 2010s in the Detroit area
- Data from this demonstration project showed a much higher utilization of home health services, but a lower ED and hospitalization rate resulting in significant savings in health care spending.
- Pinnacle began systemwide maintenance care shortly after the Jimmo decision was reached in 2013

OUR EXPERIENCE

- After researching the ruling and educating staff, Pinnacle began providing maintenance therapy in all locations
- Staff buy in was difficult at times, particularly more seasoned home health professionals
- Repeat education for may helped, but the best selling point was outcomes
- Many patients ultimately went back and forth between restorative and maintenance successfully
- For the first five years, we received no denial for maintenance treatment by any intermediary.

RESULTS

- ACO extremely successful – Ranked in the top 5 nationally in savings per beneficiary for 4 years running
- Patient satisfaction extremely high with provision of maintenance care
- Anecdotally, many patients who had been frequent ED users had significantly reduced utilization
- Payment has been less consistent in the last several years. Advantage programs and limited intermediaries have been difficult in some circumstances to recognize/allow maintenance care.

Renee Kinder, MS, CCC-SLP, RAC-CT
Executive Vice President of Clinical Services
Broad River Rehab

Rehab Therapy

- *Rehabilitative/Restorative therapy includes services designed to address recovery or improvement in function and, when possible, **restoration to a previous level of health and well-being (i.e. PLOF).***
- *Therefore, evaluation, re-evaluation and assessment documented in the Progress Report should describe objective measurements which, when compared, show improvements in function, decrease in severity or rationalization for an optimistic outlook to justify continued treatment.*

Maintenance Therapy

- *MAINTENANCE PROGRAM (MP) means a program established by a therapist that consists of activities and/or mechanisms that will assist a beneficiary in maximizing or maintaining the progress he or she has made during therapy or to prevent or slow further deterioration due to a disease or illness.*

Maintenance Program

- Therapy service in connection with a maintenance program are considered skilled when they are so inherently complex that they can be safely and effectively performed only by or under the supervision of a qualified therapist (see 42CFR 409.32)
- If all other requirements for coverage under the SNF benefit are met, skilled therapy service are covered when an individualizes assessment of the patient's clinical condition demonstrates that the specialized judgement, knowledge, and skills of a qualified therapist are necessary for the performance of a safe and effective maintenance program. Such a maintenance program to maintain the patient's condition or to prevent or slow further deterioration is covered so long as the beneficiary requires skilled care for the safe and effective performance of the program

Improvement Standard?

- Medicare program covers such services and coverage cannot be denied based on the absence of potential for improvement or restoration.
- In short, what the Settlement Agreement and the resulting revised manual provisions clarify is that Medicare coverage for skilled nursing and therapy services in these settings does not “turn on” the presence or absence of a beneficiary’s potential for improvement, *i.e.*, it does not matter whether such care is expected to improve or maintain the patient’s clinical condition

Question: Are professional therapy services available under Medicare only for patients who are improving or who are expected to improve?

- **A- Answer:** No. The *Jimmo* Settlement confirms that services by a physical therapist, occupational therapist, and speech and language pathologist are covered by Medicare, Parts A and B, and by Medicare Advantage Plans in skilled nursing facilities, home health, and outpatient therapy, when the services are necessary to maintain a patient's current condition or to prevent or slow a patient's further decline or deterioration.

Definition of Skilled Care

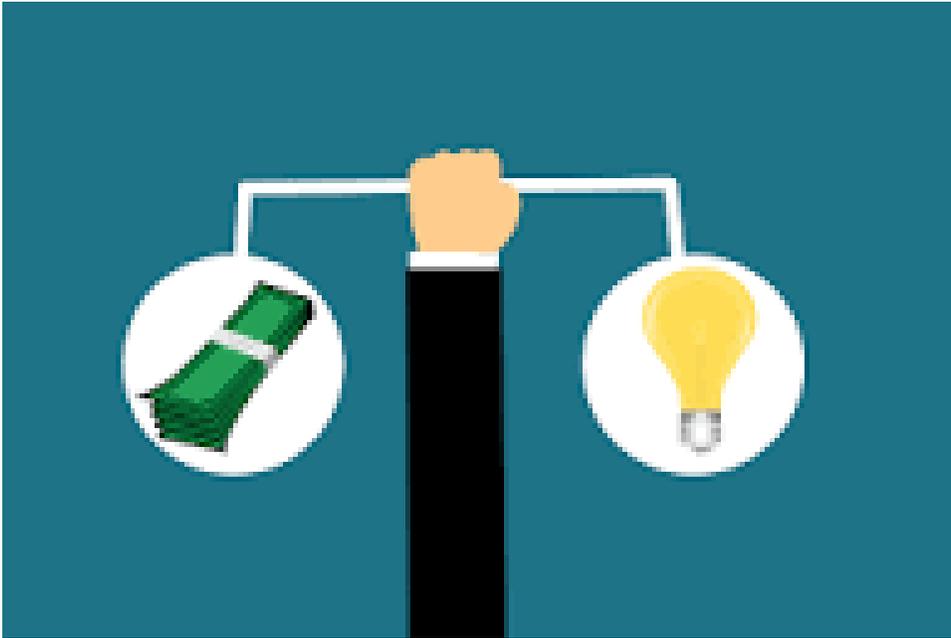
- Coverage does not turn on the presences or absence of an individual's potential for improvement, but rather, on the beneficiary's need for skilled care, along with the underlying reasonableness and necessity of the services themselves

Question: What qualifies a patient for therapist-provided maintenance services under the Medicare benefit?

- **Answer:** Since maintenance services are considered skilled care, the patient must meet the setting-specific qualifying criteria outlined in the law, regulations, and Medicare Benefit Policy Manual. Once those criteria have been confirmed, the qualified therapist will, after completion of a thorough assessment of the patient, select the focus of care in collaboration with the physician. If the patient is currently at a point where material improvement is not expected and decline is probable without skilled therapy care, a maintenance course of care may be developed and implemented.

Ellen Strunk
Rehab Resources & Consulting

Maintenance Therapy in SNF: Opportunities



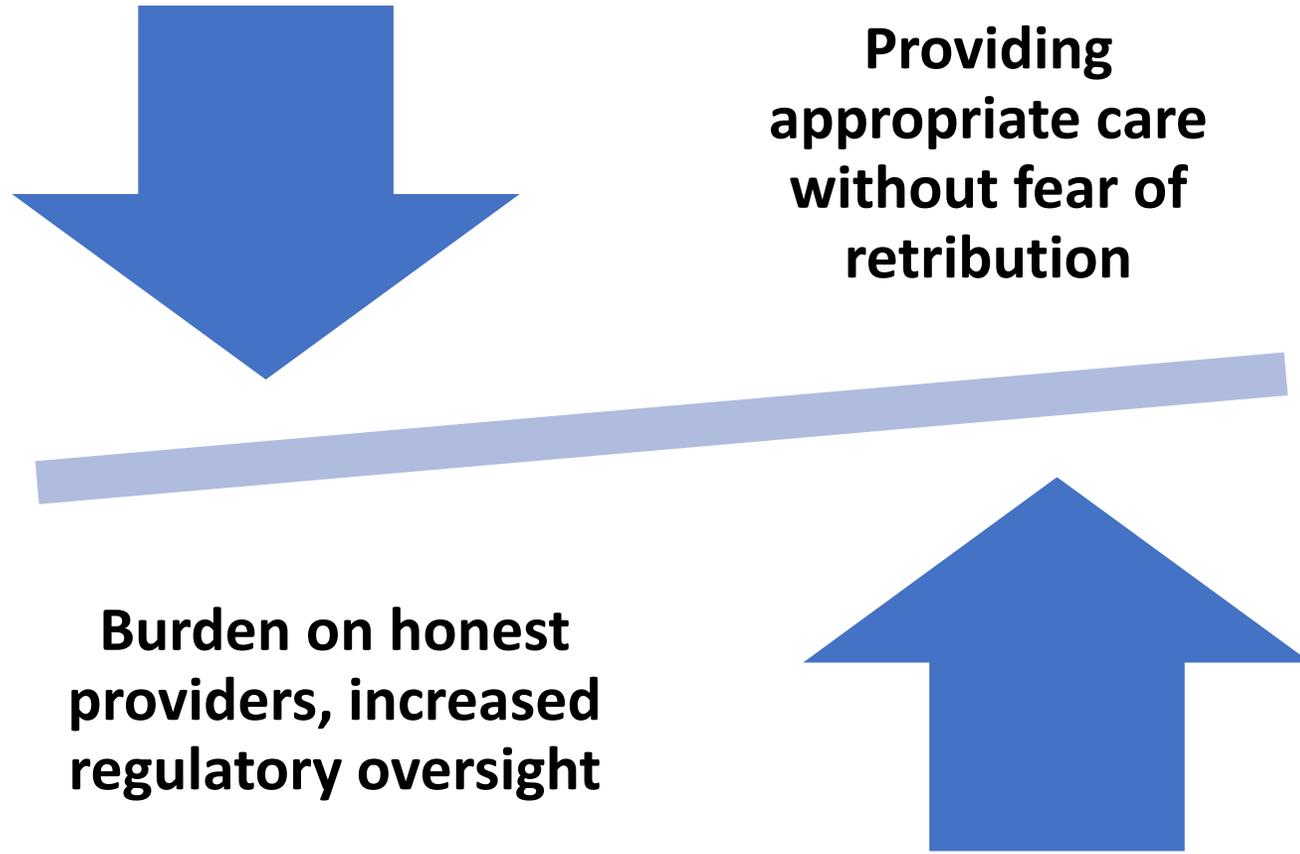
- The SNF Value-Based Payment (VBP) Program is expanding.
- The prevalence of Institutional Special Needs Plans is increasing.
- Opportunities to show the value of rehabilitation in the short and long-term care resident populations.

Maintenance Therapy in SNF: Challenges

- Scared of the unknown
- Recognizing the right patients
- Documentation
 - Goals?
 - Skill?



Need to strike a balance



VIDEO: MS THERAPY CLINIC

John Marmarou, D.P.T.
810 MS Specialty Center

ADVOCATES PERSPECTIVE

Kathy Holt, Center for Medicare Advocacy

Toby Edelman, Center for Medicare Advocacy

Ali Bers, Center for Medicare Advocacy

KATHY HOLT

Home Health & Medicare Contractor Issues

ADVOCATES PERSPECTIVE: POLICIES AND PRACTICES LIMITING ACCESS TO SERVICES

CASE STUDY: Obstacles to home health care for Ms. G, living with quadriplegia

- Provider Reimbursement
- Quality Criteria/Measures/Star Ratings
- Value-Based Purchasing Program
- Audits by Medicare Administrative Contractors (MACs) and Office of Inspector General (OIG)
- CMS Medicare Coverage Training to MACs and OIG
- MACs and OIG Medicare Coverage Training to Providers
- Oversight and Enforcement
- Appeals
- MA Plans

TOBY EDELMAN

Skilled Nursing Facility Issues

ALI BERS

Advocacy Options

DISCUSSION

Next Steps?



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