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LEGAL RESOURCE FOR PEOPLE WITH DISABILITIES

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Medicare Prescription Drug Coverage for People with Disabilities

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Nearly seven million of the almost forty-four million Medicare beneficiaries are eligible for benefits based on disability rather than age.[1] The total number of Medicare beneficiaries with disabilities is much larger than seven million, however. According to the Kaiser Family Foundation, 36 percent of all Medicare beneficiaries (about 16 million people) have three or more chronic conditions; 29 percent (about thirteen million people) have cognitive or mental impairments.[2] Access to medically necessary prescription drugs is critical to the health and well-being of all beneficiaries with disabilities, regardless of their age. Issues unique to people with disabilities under Medicare Part D, the Medicare prescription drug program, are (1) enrollment protection for prescription drug plans, (2) types of drug plans, (3) drug plan coverage of six classes of drugs of clinical concern, and (4) the Medicare "donut hole."[3]

[1]Kaiser Family Foundation, Medicare: A Primer (2007), www.kff.org/medicare/7615.cfm.

[2]*Id*. Individuals under 65 are entitled to Medicare if they have been entitled to social security disability benefits for twenty-four months. 42 C.F.R. § 406.12 (2006).

[3]Medicare Prescription Drug, Improvement, and Modernization Act of 2003, adding §§ 1860D-1 *et seq.* to the Social Security Act of 1935, 42 U.S.C. §§ 1395w-101 *et seq.* (2006). For an in-depth discussion of Medicare Part D, see Alfred Chiplin et al., *Dazed and Confused: Navigating the Abyss of the Medicare Act of 2003 for Low-Income Beneficiaries,* 38 Clearinghouse Review 443 (Nov.–Dec. 2004); Vicki Gottlich, *A Brave New World: Getting Medically Necessary Prescriptions Under Medicare Part D,* 39 Clearinghouse Review 507 (Jan.–Feb. 2006).

Enrollment Protection

Medicare prescription drug coverage is voluntary for most beneficiaries. Those who want drug coverage must choose and enroll in a prescription drug plan during their initial enrollment period (IEP). The seven-month period includes the three months before Medicare eligibility begins, the month of Medicare eligibility, and the three months after the month of Medicare eligibility.[4] Coverage is not voluntary for people "dually eligible" for Medicare and Medicaid; they are automatically enrolled in a Medicare prescription drug plan if they do not choose their own plan.[5] Significantly 40 percent of people eligible for Medicare based on disability are dual eligibles.[6]

Medicare gives people with disabilities a second enrollment period when they turn 65.[7] The second enrollment period is important for two reasons: elimination of late penalties and the ability to change prescription plans. Beneficiaries who do not enroll in a Part D plan during their initial enrollment period must pay a late enrollment penalty in addition to their premium for as long as they are enrolled in a Part D drug plan.[8] That late enrollment penalty ends only when the beneficiaries become eligible for a second enrollment period based on turning 65.[9]

The second enrollment period also offers younger beneficiaries with disabilities a onetime opportunity to change prescription drug plans. Generally beneficiaries are "locked in" the drug plan they choose and may not change plans until the next annual enrollment period, which runs from November 15 to December 31.[10] Because the second enrollment period begins when beneficiaries turn 65, they are able to change their drug plan without waiting for the annual enrollment period. This is crucial because the drug plan lock-in prevents beneficiaries from changing drug plans outside the annual enrollment period even when the drug plan formulary no longer meets their needs due to changes in their own medication requirements or changes in the drug plan formulary.

Types of Drug Coverage

Prescription drug coverage is provided through two types of private insurance plans: prescription drug plans (PDPs) that offer only drug coverage, and Medicare Advantage plans (MA-PDs) that offer drug coverage as well as other Medicare benefits.[11] Beneficiaries need either Medicare Part A or Part B to enroll in a prescription drug plan, but they must have both Part A and Part B to enroll in a Medicare Advantage plan.[12]

Some beneficiaries have more limited options than others. Beneficiaries with end-state renal disease may get drug coverage only through a prescription drug plan or through one type of Medicare Advantage plan—a Special Needs Plan

[4]42 U.S.C. § 1395w-101(b)(2). See also Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Prescription Drug Benefit Manual ch. 3, § 20.1, www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/CurrentPDPEnrollmentGuidance.pdf (PDP [Prescription Drug Plan] Guidance: Eligibility, Enrollment, and Disenrollment).

[5]42 U.S.C. § 1395w-101(b)(1)(C).

[6]Kaiser Family Foundation, *supra*, note 1.

[7]Centers for Medicare and Medicaid Services, *supra* note 4.

[8]42 U.S.C. § 1395w-113(b)(5). Both penalty amounts and duration of the penalty may be reduced for low-income individuals. 42 U.S.C. § 1395w-114(a).

[9]Note that a late enrollment penalty will be imposed against someone who did not enroll in a Part D plan when first eligible for Medicare based on disability, who does not enroll during the second enrollment period upon turning age 65, but who enrolls in a Part D plan some time after turning 65.

[10]42 C.F.R. § 423.38 (2006). Note that dual eligibles may change drug plans at any time. *Id.*

[11]42 U.S.C. § 1395w-101.

[12]Medicare Part A covers hospital, skilled nursing facility, hospice, and some home health care (42 U.S.C. §§ 1395c *et seq.*); Medicare Part B covers, among other items, doctor's visits, durable medical equipment, and home health care (42 U.S.C. §§ 1395j *et seq.*); 42 C.F.R. §§ 422.50, 423.30 (2006).

(SNP) that serves people with end-state renal disease.[13] Special Needs Plans are limited to serving one of three overlapping population groups: individuals with a disabling chronic condition; individuals who need an institutionalized level of care; or dual-eligible individuals.[14] Only beneficiaries who fall within the category for which the Special Needs Plan is designated (e.g., needing institutionalized level of care) may enroll in that Special Needs Plan. Seventy-four of the 469 Special Needs Plans available as of April 2007 are designated as Special Needs Plans for chronic conditions.[15] A Special Needs Plan for chronic conditions also may target beneficiaries with conditions such as HIV (human immunodeficiency virus) or AIDS (acquired immune deficiency syndrome), mental disorders, congestive heart failure, cardiovascular disease, diabetes, and osteoarthritis.[16] Note that advocates have raised concerns about Special Needs Plans; they report that beneficiaries may receive fewer services or pay higher cost sharing in some Special Needs Plans.[17]

Six Classes of Drugs of Clinical Concern

Each drug plan may establish its own formulary or list of drugs for which it provides coverage.[18] As a result of advocacy by disability groups, Part D Guidance, which is issued by the Centers for Medicare and Medicaid Services, requires drug plans to cover "substantially all" drugs that fall within the antipsychotic, antidepressant, immunosuppressant, anticonvulsant, antiretroviral, and antineoplastic classes of drugs, or the "six classes of clinical concern."[19]

However, this protection does not extend to all drugs within these classes. Part D Guidance creates exceptions to the "substantially all" requirement for multisource brands with the same molecular structure, extended release products, products with the same active ingredients, and dosage forms that do not establish a unique form of administration. Utilization management tools, such as prior authorization or requiring a different drug to be used first, may be employed when a beneficiary first begins treatment with a drug within all but the antiretroviral class of drugs. Prior authorization may be required for new users of Fuzeon, but not for users of other drugs used to treat HIV and AIDS.[20] Despite the Part D Guidance, two recent reports describe the difficulties that beneficiaries with HIV or AIDS or with mental illness encounter in getting their medications.[21]

Paying for Drugs in the Donut Hole

The Medicare drug benefit has a coverage gap, known as the "donut hole," during which beneficiaries are required to pay for the full cost of their medications. Once their total drug costs reach a certain

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[13]42 C.F.R. § 422.52(c) (2006).

[14]42 U.S.C. §§ 1395w-21(a)(2), 1395w-28(b)(6).

[15]Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Special Needs Plan: Fact Sheet and Summary, www.cms.hhs.gov/SpecialNeedsPlans/Downloads/FSNPFACT.pdf.

[16]*Id.*

[17]Alisa Halperin et al., *What's So Special About Medicare Advantage Special Needs Plans: Addressing Medicare Special Needs Plans for "Dual Eligibles,"* 8 Marquette Elder's Advisor 101 (2007).

[18]42 U.S.C. § 1395w-104(b)(3).

[19]Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, Medicare Part D Manual ch. 6, § 30.2.5, www.cms.hhs.gov/PrescriptionDrugCovContra/Downloads/PDBMChap6FormularyReqrmts_03.09.07.pdf (Part D Drugs and Formulary Requirements).

[20]*Id.*

[21]American Academy of HIV Medicine and HIV Medicine Association, HIV Medical Provider Medicare Part D Survey (2007), www.idsociety.org/HIVMA_Template.cfm?Section=Medicare&CONTENTID=18424&TEMPLATE=/ContentManagement/ContentDisplay.cfm; Joyce West et al., *Medication Access and Continuity: The Experience of Dual-Eligible Psychiatric Patients During the First 4 Months of the Medicare Prescription Drug Benefit*, 164 American Journal of Psychiatry 789 (2007).

amount, beneficiaries become eligible for catastrophic drug coverage with reduced cost sharing.[22]

Getting out of the donut hole is hard for many beneficiaries. Only the cost of drugs on a drug plan's formulary count toward the out-of-pocket limit. Payments made by state pharmaceutical assistance programs count.[23] But not all of those programs cover people eligible for Medicare due to disability.[24] Most important for people with disabilities, payments made by AIDS drug assistance programs or by patient assistance programs offered by pharmaceutical manufacturers are not included even when drugs are on the formulary.[25] Beneficiaries who avail themselves of the assistance from these programs many never reach the catastrophic limit.

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Navigating the Medicare prescription drug benefit is a challenge for all beneficiaries—even more so for beneficiaries with disabilities when they enroll in drug plans, get their drugs covered, and pay for their drugs.

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[22]42 U.S.C. § 1395w-102(b). The initial coverage gap and the catastrophic limit, $2,400 and $3,850, respectively, in 2007, increase each year.

[23]42 U.S.C. § 1395w-102(b)(4)(C).

[24]AARP Bulletin, State-by-State, Plan-by-Plan List of State Pharmacy Assistance Programs (2006), www.aarp.org/bulletin/prescription/statebystate.html.

[25]42 U.S.C. 1395w-102(b)(4)(C).

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