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Waiver of Liability

Limitation of liability is a long-standing provision of Medicare law protecting beneficiaries who are furnished items or services on an assigned basis. The provision waives the beneficiary's liability for payment when he or she could not have known that items or services rendered on an assigned basis were not reasonable and necessary and therefore would not be paid under Medicare guidelines.

If a beneficiary could have been expected to know that an item or service furnished on an assigned basis was not reasonable and necessary, liability for payment must be accepted. A beneficiary is expected to know that the item or service is not reasonable and necessary after receiving a Medicare notice denying charges for the same or similar item or service. A beneficiary also is liable for payment if the physician or supplier accepting assignment gave the beneficiary advance written notice in the form of an Advanced Beneficiary Notice (ABN) CMS-R-131-G, which Medicare is not likely to pay for an item or service and the beneficiary agreed to pay.

Liability also is waived for a physician or supplier who did not know and could not have been expected to know that items or services provided on an assigned basis were not reasonable and necessary.

A physician or supplier is expected to know the coverage limitations for an item or service after a Medicare notice is published. For example, a Medicare publication to the provider community that Medicare does not pay for a particular service for certain medical conditions would constitute evidence that the physician could have been expected to know the coverage limitations for the service. Also, a previous denial notice to a physician or supplier for an item or service furnished in a given situation is considered evidence that the coverage limitations were known.

When neither the beneficiary nor the physician/supplier knew or could have been expected to know that an item or service furnished on an assigned basis was not reasonable and necessary, Medicare reimburses under the limitation of liability provision.

A determination of the physician's or supplier's liability is made at the initial claim adjudication. If the physician or supplier accepting assignment provided an ABN to the beneficiary that Medicare was likely to deny payment for the item or service, and the beneficiary agreed to pay, modifier GA, *Waiver of liability statement on file*, should be submitted on each detail line to which it applies. Waiver of liability statements and the beneficiary's signed and dated ABN should continue to be kept on file in the provider's office and furnished to the carrier upon request.

Liability for Medically Unnecessary Unassigned Services

The Omnibus Budget Reconciliation Act of 1986 requires that nonparticipating physicians must refund any beneficiary payments for unassigned services that are determined to not be reasonable and necessary.

The nonparticipating physician is not required to make a refund if the physician did not know and could not reasonably have been expected to know that the services were not considered reasonable and necessary. In this instance a Medicare publication or a previous claim denial notice may be considered evidence for the physician. A refund is also not required if the physician notified the beneficiary of the likelihood that Medicare would not pay for the specific service and the beneficiary agreed to pay the physician.

Advance Notice

A physician or supplier accepting assignment may collect from the beneficiary for items or services deemed not reasonable and necessary if advance notice that Medicare is likely to deny payment was provided and the beneficiary agreed to pay.

A beneficiary cannot refuse to sign an ABN and expect to have financial responsibility waived. If the



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beneficiary or their representative refuses to sign the ABN the provider can still bill the beneficiary when the refusal is witnessed and the following information is documented on the ABN:

- date of the refusal;
- who refused (the beneficiary, their representative, etc.);
- who witnessed the refusal and that person's signature, and;
- the services and dates of service involved (as they appear on the advance notice).

For non-assigned claims, the beneficiary must be issued a properly executed ABN and must agree to pay. If the patient refuses to sign the form and the provider supplies the service, the patient cannot be held liable for payment. The service could only be billed using the GZ modifier Item or service expected to be denied as not reasonable and necessary. Signed ABN was not obtained.

Providers may use modifier GA, *Waiver of liability statement on file*, to report this circumstance. The ABN and the information above should be documented in the beneficiary's file and made available to the carrier upon request.

Extended Course of Treatment

An ABN covering an extended course of treatment is acceptable if the notice identifies all services that the physician believes that Medicare will not pay. **If, as the course of treatment progresses, additional services are furnished which the physician believes Medicare will not pay, the beneficiary must be separately notified on a new ABN of the likelihood of Medicare nonpayment and the beneficiary must agree to pay.**