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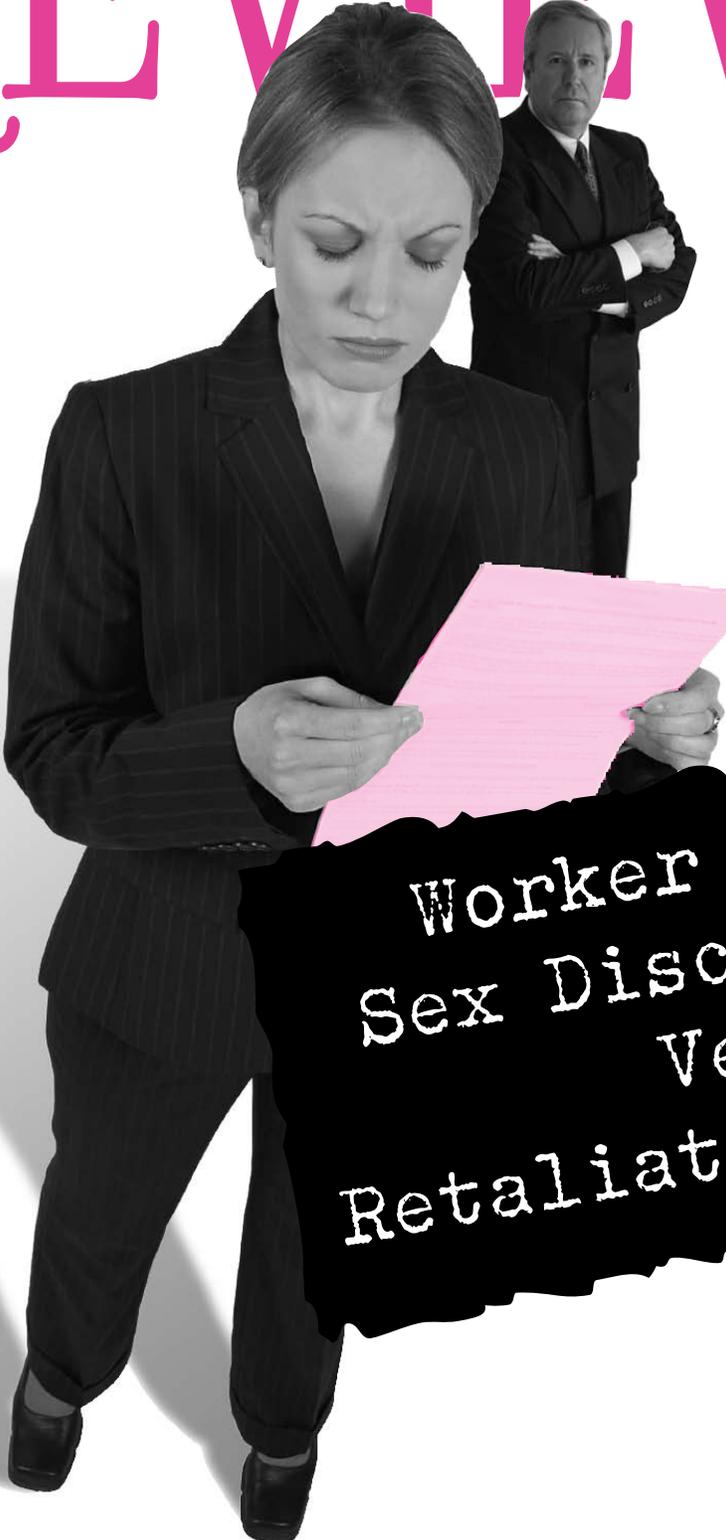
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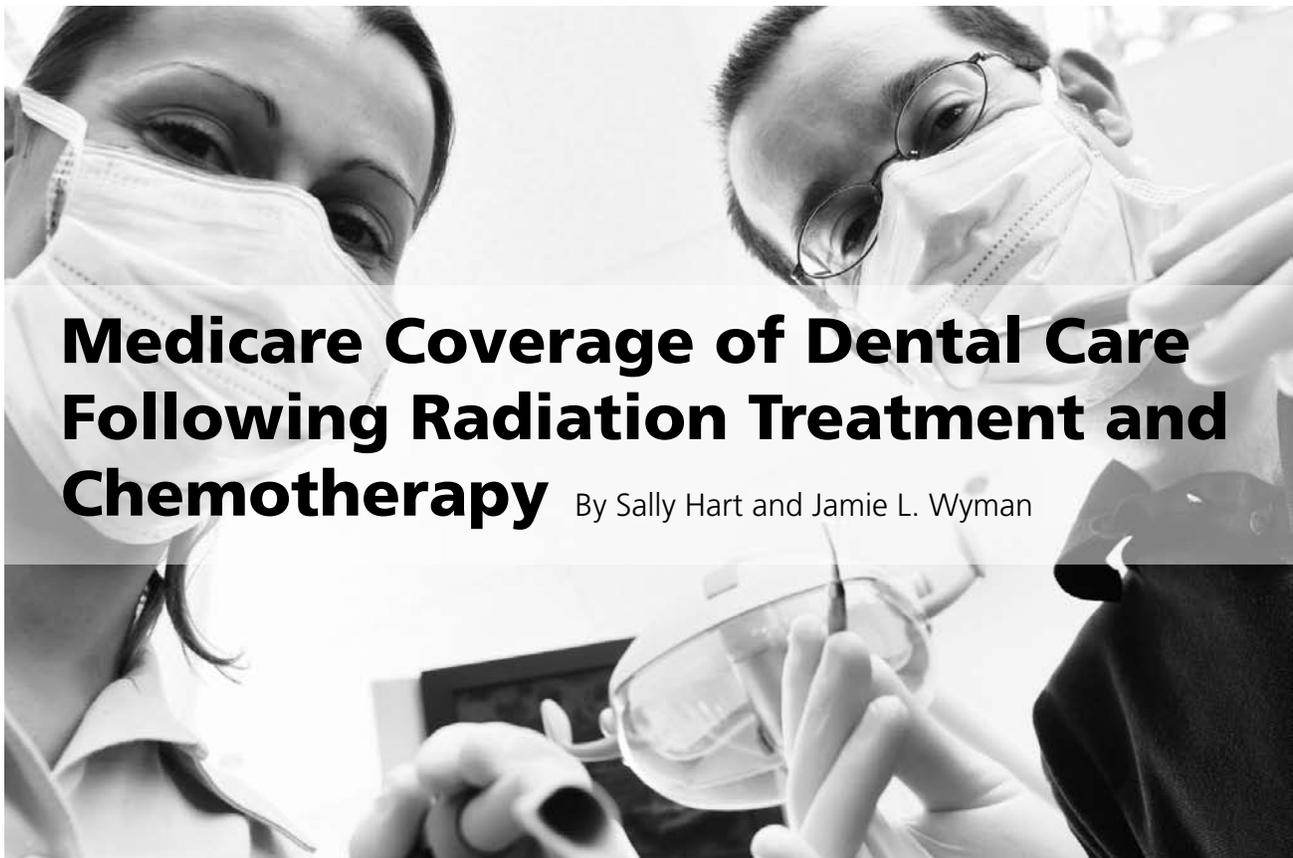
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Medicare Coverage of
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Medicare Coverage of Dental Care Following Radiation Treatment and Chemotherapy

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Doctors often prescribe radiation treatment and chemotherapy for individuals with oral, head, and neck cancer. However, these treatments in turn often cause serious dental problems. Radiation treatment and chemotherapy can result in mucositis, altered salivary gland function, and risk of mucosal infection.¹ Mucositis is an “inflammation and ulceration of the oral mucosa,” which together with xerostomia (dry mouth) increases susceptibility to infection.² Radiation treatment also can cause fibrosis and changes in the bone of teeth, jaws, and surrounding tissues.³ The resulting dental problems, requiring care such as fillings, crowns, or root canals, may appear years after the radiation treatment and chemotherapy. Lack of dental care can affect the individual’s overall health and chances of recovering from the cancer.

In this article we discuss Medicare policy on dental care coverage, the limiting provision in the Medicare statute, and judicial interpretations of the statute and agency policy. We also recommend ways to maximize a person’s chances of obtaining Medicare coverage of dental care resulting from radiation treatment or chemotherapy.

Medicare Policy

Notwithstanding the clear medical need for dental care to correct problems following and caused by radiation treatment and chemotherapy, individuals who require such dental care find that the Medicare program usually refuses to cover it. When they submit claims to Medicare, its administrative contractors make initial determinations based on the *Medicare Benefit Policy Manual*.⁴ This policy manual states that “[i]tems and services in connection with the care, treatment, filling, removal, or replacement of teeth, or structures directly supporting the teeth are not covered. Structures di-

¹Pamela J. Hancock et al., *Oral and Dental Management Related to Radiation Therapy for Head and Neck Cancer*, 69 JOURNAL OF THE CANADIAN DENTAL ASSOCIATION 585 (2003).

²*Id.* at 586–87.

³*Id.* at 585–87.

⁴CENTERS FOR MEDICARE AND MEDICAID SERVICES, MEDICARE BENEFIT POLICY MANUAL, PUB. NO. 100-02 (last modified Aug. 11, 2005), www.cms.hhs.gov/Manuals/IOM/list.asp (click on “100-02”) [hereinafter MEDICARE BENEFIT POLICY MANUAL].

rectly supporting the teeth mean the periodontium, which includes the gingivae, dentogingival junction, periodontal membrane, cementum, and alveolar process.”⁵

The policy manual does provide for Medicare coverage of certain other dental services related to cancer treatment. It states that Medicare covers the extraction of teeth to prepare the jaw for radiation treatment of neoplastic disease, although the manual warns that this is an exception to the usual rule that the dental service must be “incident to and an integral part of a covered procedure or service performed by the dentist.”⁶

The fundamental requirement of the manual is that dental services be “incident to and an integral part of” a covered service. An example in the manual of a dental service satisfying the fundamental “incident to and an integral part of” requirement is the ridge reconstruction performed as a result of and at the same time as the surgical removal of a tumor.⁷

Under the policy manual’s rules, then, Medicare contractors most likely will deny an initial claim for coverage of dental procedures required by radiation treatment and chemotherapy. Yet, while the manual’s rules limiting coverage of dental services are entitled to some deference, they are not controlling authority as a claimant goes higher in the appeals process, where only the Medicare statute and regulations are binding law.⁸

Medicare Statute

Although the Medicare statute appears at first reading to exclude payment for dental care, it can be construed to cover dental services that are required to treat the

effects of radiation treatment and chemotherapy. The provisions in the statute concerning dental care read as follows: “No payment may be made [by Medicare] ... for any expenses incurred for items or services ... where such expenses are for services in connection with the care, treatment, filling, removal, or replacement of teeth or structures directly supporting teeth....”⁹

This language certainly excludes coverage of routine dental services. Furthermore, Congress placed it in a section of the Medicare statute that excludes coverage of a number of other medical services generally considered to be routine; such services include frequent screening tests, personal comfort items, physical checkups, eyeglasses, hearing aids, and immunizations that are not specifically covered.¹⁰ For these reasons, the exclusionary language of the Medicare statute can be read as limited to dental services that are “routine.” Therefore Medicare might cover the special care necessitated by the effects of radiation treatment and chemotherapy prescribed to treat oral, head, and neck cancer.

This interpretation is supported by the legislative history of 42 U.S.C. § 1395y(12). The Senate Report states:

Payments would not be made for routine physical examinations or for eyeglasses, hearing aids, or the fitting expenses or other costs incurred in connection with their purchase. The committee bill provides a specific exclusion of *routine* dental care to make clear that the services of dental surgeons covered under the bill are restricted to complex surgical procedures. Thus,

⁵*Id.*, ch. 16, § 140 (“Dental Services Exclusion”).

⁶*Id.*, ch. 15, § 150 (“Dental Services”).

⁷*Id.*

⁸*Public Citizen v. U.S. Department of Health and Human Services*, 332 F.3d 654, 660 (D.C. Cir. 2003) (Clearinghouse No. 55,364).

⁹42 U.S.C.A. § 1395y(12) (West, Westlaw through 2007).

¹⁰See *id.* § 1395y(1)(F), 1395y(1)(G), 1395y(1)(H), 1395y(6), 1395y(7).

... a routine annual or semiannual checkup would not be covered.... Similarly, too, routine dental treatment—filling, removal, or replacement of teeth or treatment of structures directly supporting teeth—would not be covered.¹¹

A more liberal reading of the language excluding coverage of dental services in the Medicare statute is reinforced by the inconsistent coverage rules in Medicare's policy manual. The manual allows coverage of the reconstruction of a ridge that can be used to prepare the mouth for dentures if it is done at the same time as the surgical removal of a tumor but not afterwards.¹² Although there would seem to be no practical or legal justification for this distinction, it is based on the requirement of the Center for Medicare and Medicaid Services (CMS) that a dental service be "incident to and an integral part of" a covered service. However, CMS itself admits that the "incident to and an integral part of" requirement is not applied consistently.¹³ The policy manual allows for coverage of the extraction of teeth to prepare the jaw for radiation treatment of neoplastic disease, although the extractions occur before the radiation treatment and, CMS admits, are not "incident to and an integral part of" the radiation treatment.¹⁴ Because the restrictive dental coverage provisions of the manual are inconsistent and lack "the power to persuade," decision makers should not give the provisions deference.¹⁵

Judicial Interpretations

Medicare beneficiaries have challenged the CMS policy of excluding coverage of dental services that result from treatments for oral, head, or neck cancer in a number of cases. Although the courts in these cases disagreed in their outcomes—with some ordering coverage and others upholding CMS' denial of coverage—their reasoning provides useful guidelines for beneficiaries and their advocates.

Three cases resulted in denials of coverage of dental services; those denials were based on the exclusionary provisions in the policy manual. An individual whose situation was typical of oral, head, and neck cancer patients brought the first case.¹⁶ The plaintiff needed root canals and crowns because of damage to his gums following radiation treatments for head and neck cancer.¹⁷ The court gave "considerable deference" to the *Medicare Carrier Manual* and found that the plaintiff's dental procedures were not "incident to and an integral part of" the radiation treatments.¹⁸ Two facts were the basis for this finding: (1) the dental procedures were performed four years after his radiation treatments, and (2) his oncologist did not provide or prescribe the dental services.¹⁹ The court upheld Medicare's denial of the dental procedures.²⁰

A beneficiary who needed bone augmentation surgery and dental implants to correct atrophy of the jaw resulting in chronic pain and nutritional deficits

¹¹S. Rep. No. 89-404 (1965), as reprinted in 1965 U.S.C.C.A.N. 1943, 1989-90 (emphasis added).

¹²MEDICARE BENEFIT POLICY MANUAL, *supra* note 4, ch. 15, § 150.

¹³See *id.*

¹⁴*Id.*, ch. 16, § 140.

¹⁵See *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (Clearinghouse No. 52,993); see also *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984); *Skidmore v. Swift and Company*, 323 U.S. 134, 140 (1944).

¹⁶*Bick v. Secretary of Health and Human Services*, No. CV 95-0313-ABC(RMC), 1996 WL 393656 (C.D. Cal. 1996).

¹⁷*Id.* at *1.

¹⁸*Id.* at *3 (citing HEALTH CARE FINANCING ADMINISTRATION [now operating under the name Center for Medicare and Medicaid Services], MEDICARE CARRIER MANUAL § 2136 [hereinafter MEDICARE CARRIER MANUAL] (the MEDICARE CARRIER MANUAL is the predecessor to the online MEDICARE BENEFIT POLICY MANUAL)).

¹⁹*Id.*

²⁰*Id.* at *3-4.

brought a second case.²¹ The administrative law judge held that the bone augmentation surgery was not subject to the dental services exclusion but that the implants were.²² In this beneficiary's further appeal, the court held that Medicare was justified in denying coverage of the beneficiary's porcelain veneer crowns because they were not "incident to and an integral part of" the covered bone augmentation surgery as required by the policy manual.²³

An individual who required dental extractions prescribed before heart valve surgery because of the risk of infection posed by his severe periodontal disease brought a third case resulting in another unfavorable decision.²⁴ The court first held that the exclusion of dental services in the Medicare statute was ambiguous, and thus the court could proceed to conduct its own analysis independent of the agency rule in the policy manual.²⁵ Having gone this far in the direction of allowing coverage of the dental services, the court then reversed direction and found that the exclusion of coverage in the policy manual was reasonable.²⁶ This conclusion is surprising because the policy manual expressly allows Medicare coverage of an analogous procedure—teeth extractions necessary to prepare for radiation treatments.²⁷ The inconsistency between coverage in this situation and the denial of coverage when extractions are needed to prepare for heart valve surgery seems unreasonable.

However, a court issued a favorable decision for a beneficiary who needed crowns and a prosthesis to correct nutritional deficiencies affecting his treatment for leukemia and thrombocytopenia.²⁸ Here the court found that the dental services at issue met the policy manual standard that they be "incident to and an integral part of" the covered treatment that the beneficiary was receiving for his leukemia.²⁹ It noted that the dental services were at the direction and under the supervision of the beneficiary's primary oncologist.³⁰ This decision is excellent precedent for coverage of dental care resulting from radiation treatments because the court refused to interpret the "incident to and an integral part of" language as limiting coverage to dental services provided at the same time and by the same provider as the underlying treatment.

A favorable decision that did not directly involve coverage of dental services nevertheless supports Medicare coverage for those whose need for dental care results from radiation treatment or chemotherapy.³¹ A Medicare beneficiary needed the use of a video monitor to enhance his vision because he suffered from macular degeneration.³² The court ruled that the statutory exclusions of coverage for eyeglasses and dental services applied only to Medicare coverage of routine eye and dental care.³³ The court looked to the legislative history of the dental exclusion, cited above, as well as the language of the statute itself, in coming to this conclu-

²¹*Chipman v. Shalala*, 894 F. Supp. 392, 393 (D. Kan. 1995), *aff'd*, 90 F.3d 421 (10th Cir. 1996).

²²*Id.* at 394.

²³*Id.* at 396.

²⁴*Wood v. Thompson*, 246 F.3d 1026, 1028 (7th Cir. 2001) (Clearinghouse No. 53,737).

²⁵*Id.* at 1031.

²⁶*Id.* at 1035.

²⁷*Id.* (citing MEDICARE CARRIER MANUAL, *supra* note 18, § 2136).

²⁸*Maggio v. Shalala*, 40 F. Supp. 2d 137, 138 (W.D.N.Y. 1999).

²⁹*Id.* at 141.

³⁰*Id.*

³¹*Currier v. Thompson*, 369 F. Supp. 2d 65, 71 (D. Me. 2005).

³²*Id.* at 65–66.

³³*Id.* at 71.

sion.³⁴ Because the beneficiary’s video monitor was not “routine” eye care, the court reasoned that the statutory exclusion did not preclude coverage.³⁵ This limiting construction of the exclusionary provision in the Medicare statute would also result in coverage of dental services required by radiation treatment and chemotherapy because they are not routine either.

Practical Recommendations

What, then, should Medicare beneficiaries who require radiation treatment or chemotherapy or both do to maximize their chances of obtaining Medicare coverage of resulting dental care? First, the attending physician should incorporate follow-up dental care into a radiation treatment or chemotherapy plan established at the outset. When a patient needs particular dental services, the physician should note in the patient’s records that the services are incident to the patient’s cancer treatment, and the physician should prescribe and supervise (indirectly) the actual dental services. If the dental services are also medically necessary to meet the patient’s nutritional requirements for recovery, the physician should document that fact. These steps help establish that such dental services are not subject to the exclusion for routine care and that they are “incident to and an integral part of” the radiation treatment and chemotherapy for cancer.

If the administrative contractor at the initial determination level denies a claim for Medicare coverage of dental services,

the beneficiary should consider appealing the denial. To obtain a successful decision, the beneficiary needs to go through a number of lower levels of administrative appeal that will probably be unsuccessful before reaching the administrative law judge or federal court levels. At these higher levels, the beneficiary or the beneficiary’s advocate can show that the beneficiary’s services should be covered under the statute because they were not routine but were part of the covered treatment for oral, head, or neck cancer.

The advocate should present testimony from the beneficiary’s physicians to show that the physicians ordered and supervised the dental services as part of the beneficiary’s covered oncology treatment. The advocate should argue that, as the Medicare statute’s legislative history shows, the controlling Medicare statute excludes only coverage of routine dental services, and the beneficiary meets the *Medicare Benefit Policy Manual* requirement that services be “incident to and an integral part of” covered services, or—if the beneficiary does not meet the requirement—the manual’s interpretations of the statute are too inconsistent and unreasonable to be given deference.



Whether the current Medicare policy of denying coverage for dental care after radiation treatment and chemotherapy can be changed is uncertain. However, a carefully planned challenge based on the approach that we describe here offers hope for a reversal of Medicare’s restrictive coverage policy.

³⁴*Id.*

³⁵*Id.* at 72.

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