March 21, 2005

To: Herb Kuhn
Tom Barker
From: Bill Finerfrock
Re: Therapy Service "incident to"

This past weekend, while doing research on an incident to question that was raised during a recent physician open door forum, I came across the following commentary in a November 1, 2001 CMS final rule on physician payment issues.

Comment: Many commenters wanted us to restrict the definition of auxiliary personnel so that only certain individuals may perform a given incident to service. For example, they want us to mandate that only audiologists may perform cochlear implant rehabilitation services as incident to services. Likewise, they want us to permit only physical or occupational therapists to perform physical or occupational therapy as incident to services. In support, they noted that section 4541(b) of the BBA amended section 1862(a)(20) of the Act and required that physical or occupational therapy furnished as an incident to service meet the same requirements outlined in the physical or occupational therapy benefit set forth in sections 1861(g) and (p) of the Act.

Response: We have not further clarified who may serve as auxiliary personnel for a particular incident to service because the scope of practice of the auxiliary personnel and the supervising physician (or other practitioner) is determined by State law. We deliberately used the term any individual so that the physician (or other practitioner), under his or her discretion and license, may use the service of anyone ranging from another physician to a medical assistant. In addition, it is impossible to exhaustively list all incident to services and those specific auxiliary personnel who may perform each service.

You can imagine my surprise when I came across this dialogue as it makes it clear that CMS had a policy on therapy services incident to and this was not clearly stated in the 2004 proposed rule. It would appear that CMS staff were not aware of this policy and have been misrepresenting this policy to Carriers which in turn has lead to the inappropriate denial of claims submitted for therapy services provided incident to that should have been paid by Medicare Carriers.

As you know, the 2004 final rule states that "Some contractors created local policies that paid only for services provided by licensed therapists in all settings including incident to a physician's service." In light of the clearly stated policy, adopted in 2001, if a contractor did establish a policy limiting who could provide therapy services "incident to" this was in direct violation of the 2001 policy referenced above. Those practices that were improperly denied payment for therapy services provided "incident to" by someone other than a therapist are entitled to receive payment for those services because the claims were incorrectly denied.

How would you like to handle the resubmission of those claims that were improperly denied?

The discovery of the 2001 discussion is extremely relevant to the 2004 proposed rule and comment period. As you know, CMS staff repeatedly told the public and Members of Congress who inquired about this proposed change, that this was merely a clarification of existing CMS policy and furthermore, it was required by the 1997 statute. Based upon the new information, it is quite apparent that neither of these statements is accurate.

Diminishing the significance of the change and telling elected officials that this was mandated by a previous Congress had the effect of suppressing discussion of the relevant policy issues and discouraging many Members of Congress from commenting on this proposal. In effect, you put this out for comment but told potential commenters that their comments were meaningless because the law required CMS to take this action.

The commentary cited above provides an excellent explanation of the distinction between a specifically identifiable service (i.e. therapy) and it's ability to be provided incident to by someone other than the therapist (or physician).

This dialogue makes it clear that even before this 2001 notice, CMS had a very specific policy on therapy services provided incident to and the proposal put forth by the CMS staff in the 2004 proposed rule was a change in that policy. Furthermore, the dialogue makes it clear that the policy of not limiting who can provide therapy services incident to was a clearly considered and reasoned policy, particularly as it relates to the adoption of Section 4541 of the Balanced Budget Act.

In the physician fee schedule final rule (FR 10/15/04), CMS states that your new policy is merely a reflection of the "clear meaning of the law". Specifically, it states, "In the past, we did not discuss the plain language of the law because we did not believe it needed extensive clarification." Clearly this is an incorrect statement in light of the 2001 FR commentary cited above.

You have the authority to stop this ill-conceived policy from going into effect and directing CMS staff to go back and work with the physician and other and non-physician (PT, OT, ATC and others) communities. At a minimum, you should revert back to the policy that has existed at least since 2001 whereby "any individual" can provide therapy services incident to. CMS provided no explanation or justification as to why that policy was not appropriate or in need of change.

Your consideration of this new information would be greatly appreciated. I believe CMS staff misrepresented the issue to the public and did not seriously consider the policy concerns raised by commenters. By not appropriately representing this to both the public and senior CMS staff, a reasonable opportunity for public comment was not afforded individuals interested in addressing this change.

Any guidance you can provide on how to communicate to physician's that they may have had therapy services provided incident to improperly denied by their Carrier would be greatly appreciated.

I look forward to hearing from you with regards to this new information and how CMS advises we handle the resubmission of claims for therapy services provided incident to that were improperly denied by some Medicare Carriers.