



PRACTICAL COMPLIANCE

From Contribution Health

July 14, 2022

Marietta Memorial Hospital Employee Benefit Plan v. DaVita

Supreme Court allows Reduced Reimbursement Rates for Outpatient Dialysis

On June 21, 2022, the Supreme Court handed down a decision in Marietta Memorial Hospital Employee Benefit Plan v. DaVita. Justice Kavanaugh, writing for the 7-2 majority, held that the Medicare Secondary Payer rules do not prevent an employee benefit plan from limiting reimbursements for outpatient dialysis.

DaVita had argued, and had been successful through the appeal by Marietta Memorial Hospital Employee Benefit Plan at the Sixth Circuit Court of Appeals, that low outpatient dialysis reimbursements differentiated between and/or had a disparate impact on health plan members with end stage renal disease and therefore violated the Medicare Secondary Payer Statute (the "MSP"). The MSP does not allow a plan to "differentiate in the benefits it provides between individuals having end stage renal disease and other individuals covered by such plan on the basis of the existence of end stage renal disease, the need for renal dialysis, or in any other manner."

The majority opinion held that there is no differentiation in benefits between individuals with end stage renal disease and those without it because the benefits were the same regardless of the individual's diagnosis. The only difference was that the reimbursement rate was low, in DaVita's opinion, compared to reimbursements for other benefits. The majority pointed out that there were no benchmarks provided to compare those rates to other outpatient services.

In addition, Justice Kavanaugh dismissed the disparate impact argument by pointing out that the law does not prohibit a plan from having a disparate impact on those with end stage renal disease. The dissenting opinion pointed out that renal dialysis is the treatment used by 97% of end stage renal disease patients and that most of the individuals receiving dialysis have end stage renal disease so there is essentially a disparate impact.

Of particular importance, the opinion makes it clear that the MSP statute addresses coordination of benefits and does not dictate that any particular benefit reimbursement level must be maintained by the health plan.

Tips and Take Aways

There are a number of different ways that a health plan may work to reduce the costs of outpatient dialysis, which has greatly increased in price over the past years:

- 1) Limit reimbursement rates (now permitted by Supreme Court in DaVita case)
- 2) Exclude coverage for dialysis once Medicare becomes primary (after 30 months) - likely not permissible based on the wording in the MSP. This is because benefits would differ based on whether the individual had end stage renal disease
- 3) Follow the coordination of benefits rules in the Medicare Secondary Payer statute and pay primary for the first 30 months and secondary after that. Some employers will also pay secondary based on Medicare reimbursement rates whether or not the individual is enrolled in Medicare (whether this option violates Medicare Secondary Payer rules has not been addressed by the Supreme Court).

Employers with self-funded plans should review their plan documents to determine which, if any, of these options is used and whether they should now make a change.

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