Editorial:

Opting Out of Medicare

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Chronic abuse of physicians by third-party payers in general, and Medicare in particular, has left many physicians feeling beaten down, hopeless, depressed, and burned out. Many physicians live day to day, trying to keep up with "playing the game," where the rules constantly change and uncompensated demands on their time constantly increase. Medicare largely drives the excessive bureaucracy in the private insurance market as well. The conflict of interest, whereby physicians are used by Medicare and third-party payers as agents of rationing, gnaws away at whatever is left of a physician's professional ethics. Physicians long for a better balance between work life and personal/family life. Many physicians feel trapped in a system that adversely affects them and their patients, and are looking for an escape hatch.

Burgeoning Bureaucracy Leads to Physician Burnout

More than half the physicians in this country today are reportedly burned out.[1] Nearly two-thirds of physicians in family medicine, urology, physiatry, and radiology are burned out.[2] An article in *Neurology* noted the significant adverse consequences of physician burnout for patients: "Burned-out physicians harm patients because they lack empathy and make errors…, [resulting] in a documented higher error rate and poorer patient outcomes."[3] In some cases, physician burnout has led to suicide.[3]

It is clear that the ever-increasing bureaucracy, including that of Medicare, is largely responsible for the increase in physician burnout in the absence of an increase in hours worked.[1] Medicare bureaucrats arrogantly presume that they know better than patients and their doctors as to what constitutes quality care and how it should be measured. And, as the Medicare bureaucracy imposes more and more meaningless requirements having little or nothing to do with quality care, third-party payers eagerly adopt the same type of bureaucratic requirements for the purpose of cost containment.

Medicare Interferes with, Obstructs, and Impedes Nearly Every Aspect of the Practice of Medicine

Although Section 1801 of Title 18 of the Social Security Act (Medicare) promised that "Nothing in this title shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which Medical services are provided," the Medicare bureaucracy today interferes with, impedes, and obstructs nearly every aspect of the practice of medicine.

Medicare beneficiaries would likely be shocked to learn that Medicare contractor employees, who have only a high school education and no medical training, sit in judgment over physicians as to what is and is not medically necessary for Medicare patients. It is a strategy designed to save costs for the Medicare program.

The results of a General Accounting Office (GAO, now Government Accountability Office) study reported in an *American Medical News* in 1993 revealed: "Close to 90% of all Medicare decisions about whether services are medically necessary are made by employees with only high school educations and no medical background or training, according to a study conducted by the General Accounting Office (GAO). The study also showed that each reviewer processes as many as 400 claims per day, spending an average of 72 seconds per claim."[4]

A more recent GAO study demonstrated that Medicare continues to be run by totally incompetent bureaucrats who provide the wrong answer to questions 96% of the time.[5]

Risk of Ruinous Fines and Prison for Those Physicians Who Remain in the Medicare System

Medicare is a giant, government-run Ponzi-like scheme that is running out of other people's money and accounting tricks needed to sustain it. Medicare has engaged in deficit spending every year since 2008, and the Medicare Board of Trustees predicts that deficit spending will continue in future years.[6] The board also predicts that the Hospital Insurance (HI) Trust Fund could be depleted as early as 2022.[6]

As Medicare heads for insolvency, the government looks to reduce physician fees and recoup funds it has already paid to physicians to prop up the terminally ill Medicare program. As a result, we have seen a proliferation of government and private agencies whose mission is to "clawback" as much of this money as possible. Inadvertent coding errors can lead to severe financial consequences for unsuspecting physicians. Private bounty hunters hired by the government, known as Recovery Audit Contractors (RACs), hunt physicians using proprietary software. Medicare contractor fraud units and the Health and Human Services Office of Inspector General, working in collaboration with Zone Program Integrity Contractors, can find irregularities that result in fines that can put the physician out of business, and even result in a long prison term.

Plea deals offered by the government to physicians ensnared in this clawback initiative often resemble extortion. Pay what the government bureaucrats demand now, or risk being prosecuted under the False Claims Act for treble damages and possible jail time. Even if the physician has committed no crime, it is an offer that many physicians find difficult to refuse.

MACRA—the Pyrrhic Victory over SGR

On Apr 16, 2015, the Medicare Access and CHIP Reauthorization Act (MACRA) was passed with great fanfare as the highly flawed and universally hated Sustainable Growth Rate (SGR) formula used to set physician Medicare fees was abolished. However, physicians still face significant cuts in fees equal to or greater than that faced under SGR.

Under the Budget Control Act of 2011, on Apr 1, 2013, sequestration cuts of 2% per year for 10 years went into effect. The Budget Control Act of 2013 extended the sequestration cuts another 2 years. The cumulative effect of 2% cuts per year for 12 years is a 24% cut in Medicare fees for physicians—about the same as physicians faced under SGR.

The "ObamaCare" Independent Payment Advisory Board (IPAB), whose sole mission is to control Medicare costs, still looms in the background, waiting for the politically correct time to appoint members to ration care using the Medicare fee structure.

Accountable Care Organizations (ACOs), another "ObamaCare" initiative for controlling costs using an "alternative payment model," will result in further cuts in physician fees. As ACOs begin to fail, physician salaries will be first to be cut. The ACO represents capitation on steroids, a model that did not work and was hated by physicians and patients alike in the 1990s.

Beginning in 2017, additional physician Medicare fee cuts are planned for what the government deems are "misvalued codes" in order to meet budget targets. These so-called "misvalued codes" will disproportionately be aimed at specialists.

And, in the latest scheme to pay physicians less, government bureaucrats have devised a complex series of hoops for physicians to jump through called the Merit-Based Incentive Program (MIPS). Physicians will receive a composite performance score which will be used to determine whether the physician can earn a few more "food pellets" or not. Those physicians who fail to achieve a certain score will face cuts of up to 4% in their fees.

Factors to Consider in Deciding to Opt Out of Medicare

There are financial and non-financial factors to consider in making the decision to stick with or opt out of Medicare. Most prominent among the non-financial considerations is the joy of being able to practice medicine again instead of being forced to practice mindless bureaucracy. High school graduates will no longer tell you what is "medically necessary," and the meddlesome Medicare bureaucrats will no longer be allowed to interfere with, obstruct, and impede your ability to provide your patients with the highest quality care. Patients are happier, as the opted-out physician is able to spend more face-to-face time with them. There is also evidence that spending more time talking with patients leads to fewer malpractice claims.[7]

Because opted-out physicians do not file claims with Medicare (except in emergency/urgent situations), patient privacy is enhanced and protected. Since no Medicare claims are filed, there is no need to use CPT or ICD-10 codes, or to keep up with the constantly changing "correct coding" and bundling initiatives. Opted-out physicians also sleep well at night knowing that there is no risk of a bounty hunter or a federal agent showing up at their door, because the opted-out physician takes no money from Medicare.

In financial considerations, the physician needs to look at the net revenue equation: gross revenue minus expenses = net revenue. Dealing with the Medicare bureaucracy is very costly. Medicare is constantly looking for ways to cheat physicians out of appropriate payment, and the Medicare appeals process is very tedious, time consuming (costly) and often not fair to the physician.

Also, the price of keeping up with the constantly changing Medicare rules and regulations is both irritating and costly. Many physician practices find that Medicare accounts for a disproportionately high percentage of administrative expense and contributes a relatively small percentage to practice revenue. Once a physician eliminates the high cost of doing business with Medicare, the net revenue equation is favorably impacted. The opted-out physician can charge affordable fees, yet maintain the ability to earn a decent living.

In making the opt-out decision, physicians should assess the types of services provided and the population served, and assess the ability to collect payment directly from patients. Identifying a niche service or services that other practices do not offer to Medicare patients is also helpful. The physician should check all contracts, including medical staff bylaws/policies, to ensure there are no obstacles to opting out of Medicare. Engaging the services of an attorney to help make this assessment may be needed in some cases.

Procedure for Opting Out of Medicare

The procedure for opting out of Medicare is slightly different for participating and non-participating physicians. Participating physicians are those physicians who have signed an agreement with Medicare to accept payment directly from Medicare for services provided to all Medicare patients, and to accept that payment as payment in full for services provided. A non-participating physician is a physician who has not signed a Medicare Participation Agreement, and who can decide on a case-by-case basis whether to accept assignment

for payment. A non-participating physician can decline direct payment on assignment from Medicare and can bill the patient up to a fixed limit (Medicare Limiting Charge). Both participating and non-participating physicians in Medicare are subject to the thousands of pages of Medicare laws, rules, regulations, and determinations about what is and is not medically necessary. If you are unsure of your Medicare participation status, you can search on the Medicare.gov website, https://www.medicare.gov/physiciancompare/, or call your Medicare contractor. (Accepts assignment = Par, May Accept Assignment = Non-Par).

It is important to inform your patients well in advance of your Medicare opt-out, and to educate them as to why you have chosen to opt out of Medicare. Patients need to understand how this will benefit them, and they will need to be aware of the new private pay-at-the-time-of-service office policy. Your office staff will also need time to adjust to a new payment procedure and to the fact that they will no longer file Medicare claims except in urgent or emergent circumstances affecting the patient.

Non-participating physicians can opt out of Medicare at any time during the year. Participating physicians can only opt out four times during the year: January 1, April 1, July 1, and October 1. The Medicare carrier(s) must receive the affidavit at least one month prior to the beginning of the next calendar quarter. Thus, the Medicare carrier must receive the opt-out affidavit by Mar 1, Jun 1, Sep 1 or Dec 1. Once the opt-out is in effect, the physician can make private contracts with willing Medicare patients. The private contract has certain requirements. Templates for Medicare private contracts are posted on the AAPS website (www.aapsonline.org).

The actual procedure for opting out of Medicare is very simple and straightforward. Step-by-step instructions, along with a template affidavit, sample private contracts, and sample letters to patients, are posted on our AAPS website. Simply search the term "opting out of Medicare." Fill in the blanks on the opt-out affidavit and submit the affidavit to all Medicare carriers with whom you do business. Send a cover letter, certified mail return receipt, with the affidavit requesting that the Medicare carrier acknowledge in writing that you have properly accomplished the opt-out. That will provide the proof you may need if at some later date the Medicare carrier claims that it "lost" your affidavit or that the opt-out was not properly accomplished. It is highly recommended that you start at least six months in advance of your predetermined opt-out date so as to accommodate inevitable delays and the "Medicare bungling factor."

Permanent Opt Out Now Available

Section 106 of the new MACRA law now provides an indefinite, automatic extension of opt-out election. The two-year opt out automatically renews unless the physician elects not to renew it under Section 106(D):

> …[T]he 2-year period beginning on the date the affidavit is signed and includes each subsequent 2-year period unless the physician or practitioner involved provides notice to the Secretary (in a form and manner specified by the Secretary), not later than 30 days before the end of the previous 2-year period, that the physician or practitioner does not want to extend the application of the affidavit for such subsequent 2-year period….

Physicians who submitted their opt-out affidavit after June 16, 2015, are eligible for the permanent opt-out. For those physicians whose 2-year opt-out period ends some time after June 16, 2015, the physician simply needs to submit an opt-out renewal to obtain the permanent opt-out. Physicians who permanently opt out of Medicare also no longer have to have patients sign a new Medicare private contract every two years.

Some Medicare Carriers Are Not Following the Rules for Opting Out and Are Demanding Additional Information

If an opted-out physician elects to order and refer services for Medicare patients, Medicare carriers are required to request that the physician provide a National Practitioner Identifier (NPI), confirmation that no exclusion from Medicare exists, date of birth, and Social Security number. According to CMS rules, a physician's failure to provide this additional information, which is not required by the law authorizing opting out of Medicare (Section 4507 of the Balanced Budget Act of 1997), shall not affect the physician's right to opt out of Medicare.[8]

Thus, the opted-out physician who refuses to provide this additional information requested will not be able to order and refer for Medicare patients, but will still be able to opt out of Medicare. Physicians who have been told that they cannot opt out of Medicare because they have not supplied this additional information should file complaints against the Medicare carrier with the CMS Regional Office in your area for failure to follow CMS rules. Regional Offices are posted on the CMS website.[9]

Early Termination of Opt-Out Available

For those physicians who are opting out of Medicare for the first time, an early termination of the opt-out is available. This early termination is only available to physicians who have not previously opted out of Medicare. If a physician determines that things are not going well as an opted-out physician, the physician can elect early termination of the opt-out by notifying the Medicare carrier(s) no later than 90 days after the effective date of the opt-out that the physician wishes to elect early termination of the opt-out. The physician must then refund to all Medicare patients whom he has treated under private contract any amount collected in excess of the Medicare Limiting Charge. The physician must also advise all Medicare patients he treated during the

opt-out period that they have the right to have his practice file Medicare claims for services provided during the opt-out period. The physician is then reinstated to his prior status in the Medicare program as if there had been no opt-out.

Urgent or Emergency Situations

Opted-out physicians cannot make a new private contract with a Medicare patient in urgent or emergency situations. CMS defines emergent and urgent situations as follows:

> Emergency care services means inpatient or outpatient hospital services that are necessary to prevent death or serious impairment of health and because of the danger to life or health, which require use of the most accessible hospital available that is equipped to furnish those services. Congress intended that the term "emergency or urgent care services" not be limited to emergency services since they also included "urgent care services." Urgent Care Services are defined in 42 CFR 405.400 as services furnished within 12 hours in order to avoid the likely onset of an emergency medical condition.[10]

In the case where an opted-out physician encounters a patient for the first time in an urgent or emergent situation, the physician can file a claim with Medicare, and be treated as if he were a non-participating physician for the purposes of payment. The physician can elect assignment or not. If the physician elects not to accept assignment, then Medicare Limiting Charges apply. An appeal process is available if a physician disagrees with Medicare's determination as to whether the patient's condition was urgent or emergent, but the appeals process is tedious and complex.

What about Hospitalization, Labs, Imaging Studies, Medications and Supplies?

Medicare will pay for hospitalization under Medicare Part A. Labs, imaging studies, and supplies ordered by an opted-out physician will be paid by Medicare provided that the opted-out physician has an NPI number and is listed in the Physician Enrollment Chain and Ownership System (PECOS) database, as stated in the Medicare Ordering and Referring Rule.[11] Medicare will not pay for the services provided by an opted-out physician who has an existing private contract with his Medicare patient during hospitalization. Physicians who are currently enrolled in Medicare as participating or non-participating physicians and who opt out should have no trouble, as they are already in the PECOS database. Confirmation that a physician is in the PECOS database can be checked by doing a search on http://www.oandp.com/pecos/, which is a privately owned website.

For physicians who are not currently enrolled in Medicare or who do not have an NPI, there is an abbreviated enrollment form, CMS Form 855O, which can be used for the sole purpose of ordering and referring for Medicare patients.[12] The form requires that the physician obtain an NPI so that the physician can be listed in the PECOS database as an opted-out physician.

Under the Medicare Ordering and Referring Rule, opted-out physicians who do not have an NPI can refer to specialists; however, an NPI is required in order to have medications covered under Part D.

Some physicians disenroll instead of opting out, hoping that their patients might be able to receive reimbursement for their services, if the patients themselves file CMS Form 1490S. However, patients may not be able to obtain coverage for any tests, consultations, or medications that a disenrolled physician orders.

Can I Opt Out of Medicare in My Office But Still Participate in Medicare in Other Situations?

Physicians who opt out of Medicare cannot receive any payment from Medicare (except in urgent or emergent circumstances) either directly or indirectly. Physicians, for example, cannot work for an employer or other entity that bills Medicare for services provided by the opted-out physician (except in emergency or urgent circumstances). A physician cannot be opted out at one office and non-opted-out in another office location. Opt-out status applies to the physician irrespective of practice location. A physician who is a member of a group practice can opt out even though other members of the group do not, provided that the group does not submit any claims to Medicare for services provided by the opted-out physician (except in emergency or urgent circumstances).

Fear is the Fence That Confines You in the Pen

Fear of what may happen if you opt out of Medicare is the fence that confines you in the government's pen. Physicians often say: "I would really love to opt out of Medicare, but I just can't do it in my area…. I am surrounded by competitors all of whom participate in Medicare, patients in my area are not wealthy, and if I opt out, all of my Medicare patients will leave, and I will be out of business."

For these physicians, the "pinky toe approach" to opting out of Medicare may provide some needed reassurance—i.e. dip your pinky toe in the water prior to diving in the pool to test the temperature. A single-page Medicare patient survey can serve the dual purpose of educating patients about the benefits of being treated by an opted-out physician while simultaneously assessing how patients feel about paying out-of-pocket for better care. The survey can be given to Medicare patients to fill out as they enter your office.

The single-page survey should begin with an educational paragraph which can be tailored to your individual practice situation:

> The Medicare bureaucracy is increasingly forcing our physicians to spend more and more time on administrative requirements having nothing to

do with providing you with quality medical care. Spending more time on bureaucracy means spending less time with individual patients. Medicare also coerces physicians to serve as agents for rationing medical care so as to save the government money. The Medicare program obstructs, impedes, and interferes with our ability to provide our patients with good care. Our physicians do not want to serve as agents of rationing for the Medicare program. In order to be able to provide you with timely, individualized care and the face-to-face time with your physician you deserve, our office is considering rejecting this government abuse of our patients and opting out of the Medicare program. Opting out of Medicare means that you would pay reasonable fees out of pocket and not be able to obtain reimbursement from Medicare for the services our opted-out physicians provide. All other labs, tests, radiologic studies and hospital care would still be covered by the Medicare program. We value your input in making this decision.

The educational paragraph can be followed by two simple questions which can also be tailored to your individual practice situation.

1. Because government interference in medicine will continue to restrict our ability to provide you with the quality care you deserve, would you be willing to receive higher quality care provided by an opted-out physician? Any comments?

2. Since you are already paying substantial Medicare deductibles and co-pays out of pocket for government-rationed care, would you be willing to pay a little more out of pocket to receive better care (getting in to see our physician sooner, and having more face-to-face time with our physician so that all of your questions and concerns can be appropriately addressed)? Any comments?

AAPS Thrive Not Just Survive Workshops

AAPS offers Thrive Not Just Survive Workshops twice per year at various locations around the country (see www.aapsonline.org). These workshops offer practical information about opting out of Medicare and transitioning to third-party-free practice. Video presentations are posted on our AAPS website, and the website also lists physicians in various specialties who have opted out of Medicare who are able to address specific questions about opting out relative to their specialty. AAPS is also happy to answer questions from our members about opting out of Medicare. Simply call our toll-free number: 1-800-635-1196.

Conclusion:

To be or not to be free, that is the question. Whether it is immutable fate to continue to accept a conflict of interest with our Medicare patients and suffer the abuse, excessive bureaucracy, and devaluation of services foisted upon us by the government Medicare program. Or, whether it is nobler to opt out of Medicare and reaffirm our professional ethics to serve the best interests of our patients without government interference, to protect patient privacy by not filing electronic claims in databases that are vulnerable to exposing a patient's most private information, and to provide the highest quality of care to our patients. The excessive and meaningless Medicare bureaucracy has led to widespread physician burnout, and burned-out physicians make more errors and increasingly treat patients with cynicism and as mere objects on the "conveyor belt" of "productivity," all of which is very harmful to patients. Escape is possible by opting out of Medicare, and AAPS stands ready to assist physicians who have the courage and integrity to do so.

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