

MEMORANDUM

ODIN, FELDMAN & PITTLEMAN, P.C.

To: Gary Cuneo
John Hymes
Rick Miller

From: TRD

Date: July 28, 2003

Re: Chiropractic Medicare Freedom and Benefit
Protection Act – H.R. 2560

I have at your request reviewed the above-referenced legislation. The legislation envisions the “separate treatment of chiropractors” by the following:

1. Chiropractors would be removed from the definition of “physician” under §1861(r) of the Social Security Act. Also removed would be the current definition of chiropractic services, i.e. “treatment by means of manual manipulation of the spine (to correct a subluxation)”.
2. “Chiropractic services” would be added as a “medical and other health services” under §1861(s)(2) of the Social Security Act and such services would be defined to include “clinically necessary care by means of adjustment of the spine (to correct a subluxation) performed by a chiropractor legally authorized to perform such adjustment by the state or jurisdiction in which such care is provided”. Chiropractic services would also include physical exam, radiological examinations and specialized diagnostic instruments used in the practice of chiropractic. Such services could only be provided by a chiropractor.
3. The term “subluxation” would be defined under the statute.
4. The new chiropractic services category would be added to the definition of “physician services” under §1848(j)(3) of the Social Security Act for the purpose of calculating payment for physician services under Medicare’s Resource Based Relative Value Scale (RBRVS) fee schedule.

The following analysis is based in large measure on my discussions with the chiropractic representatives to the AMA-CPT HCPAC and RUC HCPAC as well as the former chiropractic representative to RUC HCPAC. The unanimous view is that the proposed changes, if enacted, would devastate chiropractic reimbursement both within and outside of Medicare including Worker’s Compensation programs, Blue Cross/Blue Shield plans, med-pay programs and all forms of third party reimbursement that in any way utilize the Medicare RBRVS system or the AMA-CPT coding procedures. In addition, the

enactment of this provision would provide ammunition to those entities on a state level which would seek to either eliminate or block the ability of a chiropractor to refer to himself or herself as a “physician” and ironically serve the legislative policy goals of the American Medical Association (“AMA”). The reasons for these views are as follows:

1. The loss of the ability of a chiropractor to utilize Evaluation and Management (E&M) codes. In 2002, the AMA began a process by which it sought to develop “Evaluation and Assessment” codes for “nonphysician (*sic*) health care professionals”. The stated objective of the AMA-CPT-5 was to “review and evaluate weaknesses of the current system for coding the provision of health services by nonphysician (*sic*) health care professionals”. According to Dr. Craig Little, the current chiropractic representative to the AMA-CPT HCPAC, the podiatrists, optometrists and chiropractors have to date been effective in resisting the efforts of AMA-CPT to deny them the ability to utilize E&M codes because of their status as “physicians” under the Medicare statute at §1861(r)(3) (4) and (5) respectively. The psychologists, who currently may not utilize E&M codes, are actively seeking “physician” status within CPT in order to secure the ability to utilize these codes. The removal of doctors of chiropractic from §1861(r), thereby eliminating their status as “physicians” under Medicare, will give the AMA-CPT free reign in its attempt to eliminate the ability of doctors of chiropractic to use the physician level E&M codes. In its place, doctors of chiropractic would be relegated to utilizing the non-physician level E&A codes, which will have a substantially lower relative value for RBRVS purposes. Therefore, all third party payers that utilize AMA-CPT and the Medicare RBRVS fee schedule will pay substantially less to doctors of chiropractic who may no longer use the higher valued and varied E&M codes but rather use the more limited non-physician level E&A code.

It is critical to note that the AMA has a very limited view as to the definition of a “physician.” While HR 2560 is undoubtedly well intentioned, its aim of removing chiropractors from the definition of “physician” under the Social Security Act is nevertheless in complete lockstep with the legislative goals of the AMA. Current AMA policy states:

1. H-405.988 Definition of “Physician”: The AMA affirms that a physician is an individual who has received a “Doctor of Medicine” or “Doctor of Osteopathy” degree following a successful completion of prescribed course of study from a school of medicine or osteopathy. (Res. 33, A-89).

2. H-405.976 Definition of a Physician: The AMA urges all physicians to insist on being identified as a physician and to sign only those professional or medical documents identifying them as physicians. The AMA will review and revise its own publications as necessary to conform with the House of Delegates’ policies on physician identification and physician reference and will refrain from any definition of physicians as health care providers. The AMA supports seeking immediate modification of the social security laws to change the definition of a

physician to conform with AMA policy. The AMA will seek legislation prohibiting the use of the term “physician” as a descriptor other than in the context of a medical doctor (MD) or doctor of osteopathy (DO). (Res. 243, A-91; Reaffirmed BOT Rep. I-93-25; Reaffirmed Sub. Res. 712, I-94; Res. 241, A-97) (emphasis added)

The E&A code levels and their respected relative values have yet to be finalized by the AMA-CPT and the RUC process. However, a comparison of the existing non-physician evaluation and re-evaluation codes for physical therapists with the existing E&M codes is instructive:

| E&M CODES | DESCRIPTION | 2003 RVU |
|----------------------|--|-----------------|
| 99201 | Office/Outpatient visit new | 0.95 |
| 99202 | Office/Outpatient visit new/expanded | 1.70 |
| 99203 | Office/Outpatient visit new/detailed | 2.52 |
| 99204 | Office/Outpatient visit new/comprehensive | 3.59 |
| 99205 | Office/Outpatient visit new/high complexity | 4.58 |
| 99211 | Office/Outpatient visit estab./min. | 0.56 |
| 99212 | Office/Outpatient visit estab. | 0.99 |
| 99213 | Office/Outpatient visit estab./expanded | 1.39 |
| 99214 | Office/Outpatient visit estab./detailed | 2.17 |
| 99215 | Office/Outpatient visit estab./comprehensive | 3.18 |
| 99241 | Office consultation | 1.29 |
| 99242 | Office consultation/expanded | 2.40 |
| 99243 | Office consultation/detailed | 3.17 |
| 99244 | Office consultation/comprehensive | 4.51 |
| 99245 | Office consultation/high complexity | 5.85 |
| 99271 | Confirmatory consultation | 1.14 |
| 99272 | Confirmatory consultation/expanded | 1.79 |
| 99273 | Confirmatory consultation/detailed | 2.35 |
| 99274 | Confirmatory consultation/comprehensive | 3.21 |
| 99275 | Confirmatory consultation/high complexity | 4.05 |

| PHYSICAL THERAPY EVALUATION AND RE-EVALUATION CODES | 2003 RVU |
|--|-----------------|
| 97001 - Physical Therapy Evaluation | 1.86 |
| 97002 - Physical Therapy Re-evaluation | 0.99 |

Again, it is the view of the current and former chiropractic representatives to AMA-CPT and RUC that the loss of the “physician” status would result in the loss of the ability of chiropractors to utilize the above physician level E&M codes under the CPT system. Chiropractors would be left to use non-physician level E&A codes comparable to the above non-physician level physical therapy evaluation codes. The loss of “physician” status would also closer serve the legislative goals of the AMA rather than those of the chiropractic profession.

2. Significantly lower valuation for the new chiropractic adjustment code.

The proposed legislation would change the term “manual manipulation of the spine to correct a subluxation” to “adjustment of the spine to correct a subluxation”. Again, the view of the chiropractic experts working most closely with the CPT and RUC processes is that this change in statutory terminology would require a corresponding change to the CPT definition and the assignment of a new relative value in conformance with the Medicare RBRVS as provided under §1848.

In 1996, the ACA was able to achieve a major milestone for the profession by establishing a set of chiropractic manipulative treatment (CMT) codes with a corresponding relative value similar to the then existing osteopathic manipulative treatment (OMT) codes. At the time, Medicare commented that “We agree with the recommendations of the RUC HCPAC Review Board that the chiropractic manipulative treatment codes represent services and physician work that essentially parallel that of the osteopathic manipulation codes” (61 Fed. Reg. 59545, 11/22/1996). The proposed change in the statutory language would require a new definition as well as the assessment of a new relative value for the “adjustment” service. Such a process would provide an opportunity for the opponents of the chiropractic profession to argue against the implementation of the existing relative values for the CMT codes and for the implementation of lower relative values comparable to physical medicine codes. Significantly, the chiropractic profession could not use as reference the existing OMT codes, as it had done in 1996, because the definition will have been specifically changed from manipulation to adjustment. It is almost a certainty that the resulting relative values for the new chiropractic adjustment codes would be significantly less than those for the current CMT codes. This reduction in relative value would impact not only Medicare reimbursement but impact the reimbursement for every third party payer, i.e. Worker’s Compensation, med-pay, Blue Cross/Blue Shield and insurance plans, that may utilize Medicare RBRVS as a guide for relative values. The impact on reimbursement across the board would be substantial and reach into the tens of millions of dollars per year for the entire profession.

3. The status of “physician” under state law.

Currently, 30 states permit doctors of chiropractic to refer to themselves as “chiropractic physicians”. Such status provides them important recognition and status under state law not afforded to non-physician practitioners. In 1973, chiropractors were first included in the Medicare definition of “physician”. Since then this federal status has been used in many states to both obtain physician status and guard against attacks on physician status by the opponents of chiropractic. The elimination of the physician status under Medicare would be a powerful incentive for such opponents to seek corresponding loss of status in various state legislatures. The loss of such Medicare status would eliminate an important argument that doctors of chiropractors are and should be considered physicians under state law.

SUMMARY & RECOMMENDATION

The above referenced proposal, with its centerpiece recommendation to eliminate chiropractors as “physicians” under the Medicare program as well as to change the definition of the services that chiropractors provide under Medicare, would have a devastating and far reaching impact on chiropractic reimbursement both within and outside of Medicare. There simply is not a more potentially destructive step that this profession could take than to support the enactment of this proposed federal legislation. The possible negative impact of the proposed changes on the AMA-CPT process, the Medicare RBRVS process and on state authority to utilize the term “physician” cannot be over emphasized. The proposal, while seeking to create a separate and distinct yet limited (as compared to the ACA legislative proposal) category for chiropractic services under Medicare, may also severely impact those systems under which chiropractors are being reimbursed and those systems which currently recognize doctors of chiropractic as physicians.

The ACA should devote whatever effort is required to defeat this proposed legislation. ACA members should be encouraged to contact their Members of Congress in opposition to H.R. 2560 and to support ACA’s legislative proposal which preserves the “physician” status and offers broader Medicare coverage of chiropractic services.