



Issue: Observation Stays Deny Medicare Beneficiaries Access to Skilled Nursing Center Benefits

Background: Medicare beneficiaries are being denied access to Medicare's skilled nursing facility (SNF) benefit because acute-care hospitals are increasingly classifying their patients as outpatients receiving observation services, rather than admitting them as inpatients. Patient status is determined by physician/provider order. Those orders are subject to multiple regulations and cannot simply be changed by the hospital. Patients are called outpatients despite the fact that they may stay for many days and nights in hospital beds and receive medical and nursing care, diagnostic tests, treatments, medications, and food, just as they would if they were inpatients. Under the Medicare statute, however, patients must have an inpatient hospital stay of three or more consecutive days, not counting the day of discharge, in order to meet Medicare's criteria for coverage of post-acute care in a SNF. As a result, although the care received by patients in observation status is the same as the care received by inpatients, outpatients who need follow-up care in a SNF do not qualify for Medicare coverage. Hospital stays classified as observation, regardless of their length and the type of number of services provided, are considered outpatient. These hospital stays do not currently qualify patients for Medicare-covered care in a SNF; only inpatient time counts.

Use of observation status and the amount of time patients spend in observation status are both increasing. A study done by Zhanlian Fengli, Brad Wright and Vincent Mor in March 2017 titled *Sharp Rise In Medicare Enrollees Being Held In Hospitals For Observation Raises Concerns About Causes And Consequences*, found a 34% increase in the ratio of observation stays to inpatient admissions between 2007 and 2009, leading the researchers to conclude that outpatient observation status was becoming a substitute for inpatient status. The same study also documented increases in long-stay outpatient stays, including an 88% increase in observation stays exceeding 72-hours.

Support for counting time spent in observation status toward the three-day inpatient stay continues to grow. In July 2013, the Office of the Inspector General reported that hospitals varied widely in their use of observation stays, and in calendar year 2012, found that beneficiaries had 617,702 hospital stays that lasted at least three nights, but that did not include three inpatient nights. In December 2016, the OIG reported that 748,337 long hospital stays were classified as outpatient, including 633,148 outpatient stays of three or more days, in FY'2014. Between FY's 2013-2014, outpatient stays increased by 8.1% despite implementation of the two-midnight rule, which was supposed to decrease outpatient stays.

These beneficiaries did not qualify for SNF services under Medicare. The report was supportive of counting observation days towards the three-day inpatient stay minimum requirement. In addition, in September 2013, the congressionally created Long-Term Care Commission recommended that the Centers For Medicare & Medicaid Services (CMS) count time spent in observation status toward meeting the prior three-day stay requirement.

The NOTICE Act and the two-midnight rule did not resolve this problem of the observation status of patients. Beginning in August of 2016, the NOTICE Act required hospitals to inform patients receiving observation services as an outpatient for more than 24-hours, that they are outpatients, not inpatients. While receiving written and oral notice informs patients of their status, the law – which is a

positive step forward – does not give patient hearing rights or count the time in the hospital for purposes of SNF coverage.

The two-midnight rule establishes time based criteria for inpatient hospital status, and most importantly, authorizes physicians to order inpatient status if they believe their patient is likely to be hospitalized for two or more midnights. A revision to the rule in 2015 allows physicians, on a case-by-case basis, to order inpatient status for patients who are likely to be hospitalized for only a single midnight. While the rule and its revisions reflect CMS' concerns about long outpatient stays, hospitals are unlikely to change their practices when CMS provides no meaningful guidance on when an inpatient stay of fewer than two midnights is appropriate. Physician decisions about patient status continue to be reviewed by Organizations (QIOs); and the specter of audits by Recovery Auditors (still known as RACs) remains. A RAC's determination that a patient has been incorrectly classified as an inpatient requires the hospital to return most of the Medicare reimbursement for the patient's stay, despite the fact that the services were medically necessary and coverable by Medicare.

Both the NOTICE Act and the two-midnight rule reflect recognition of the problem of observation status for Medicare patients, but they are not sufficient to address the impact on SNF eligibility for beneficiaries in observation.

Bi-partisan legislation introduced recently would create a full and permanent solution. The Improving Access to Medicare Coverage Act (S. 568 and H.R. 1421), introduced by Senators Sherrod Brown (D- OH), Susan Collins (R-ME), Shelley Moore Capito (R-WV) and Representatives Joe Courtney (D-CT) would help Medicare beneficiaries who are hospitalized in observation by requiring that time spent in observation be counted towards meeting the three-day prior inpatient stay.

AAHAM Recommendation: AAHAM supports S. 568 and H.R. 1421 and urges Congress to pass this critical legislation either as part of a larger healthcare reform package or on its own. AAHAM further asks you to co-sponsor this critical legislation.

References: OIG report <https://oighhs.gov/oei/reports/oei-02-12-00040.pdf>

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