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Acting Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
Room 445-G, Hubert H. Humphrey Building  
200 Independence Ave., S.W.  
Washington, D.C. 20201

CMS-1633-P, Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; Short Inpatient Hospital Stays; Transition for Certain Medicare-Dependent, Small Rural Hospitals Under the Hospital Inpatient Prospective Payment System

Submitted electronically: <http://www.regulations.gov>

August 31, 2015

Dear Mr. Slavitt and CMS Colleagues:

The undersigned coalition of national organizations representing physicians, nurses, other health care disciplines and professionals, advocates for Medicare beneficiaries, and others, has come together around the issue of observation status.

In proposed rules for the annual update to Medicare reimbursement of outpatient care at acute care hospitals, the Centers for Medicare & Medicaid Services (CMS) includes proposed revisions to the “two-midnight rule” and methods for enforcing the rule. During this comment period, the Coalition encourages CMS to take it a step further and fix one of the unintended negative consequences for beneficiaries of the in-patient vs. out-patient payment dilemma, by promulgating new rules that would count all time spent by a patient in the hospital, for purposes of satisfying the three-midnight rule for Medicare Part A coverage of post-acute care in a skilled nursing facility (SNF). As we explain in detail below, we believe that CMS has authority under the existing Medicare statute to count all of a patient’s time in the hospital.

### **Counting All Time in the Hospital**

The coalition urges CMS to revise its definition of inpatient care, for purposes of qualifying for Part A SNF coverage, to count all time spent by a patient in the hospital.

The Coalition came together several years ago in support of federal legislation that would count all time spent by a patient receiving outpatient observation services in the hospital for purposes of satisfying Medicare’s three-midnight rule for SNF coverage. The identical bipartisan bills are H.R.1571 and S.843, the Improving Access to Medicare Coverage Act of 2015.<sup>1</sup>

## **CMS Has Authority under Existing Law to Define Inpatient Care**

While fully supporting the federal legislation, the coalition also believes that CMS has authority under existing law to count all time spent by a patient in the hospital for purposes of qualifying for Part A coverage in a SNF. We urge CMS to exercise its regulatory authority and to publish rules that would count all time spent in the hospital.

In 2008, the Second Circuit Court of Appeals confirmed that the Secretary of HHS has authority under the Medicare statute to include a hospital patient's time in observation as part of inpatient time in the hospital for purposes of determining whether the patient qualifies for Part A coverage of a subsequent stay in a SNF. *Estate of Landers v. Leavitt*, 545 F.3d 98 (2<sup>nd</sup> Cir. 2008). Although it upheld the Secretary's position in that case – that only time in formal inpatient status may be counted toward satisfying the qualifying three-day inpatient requirement – it acknowledged that the Secretary had authority to *change* this interpretation of inpatient to include time spent in observation. The Court wrote:

[W]e note that the Medicare statute does not unambiguously require the construction we have adopted. If CMS were to promulgate a different definition of inpatient in the exercise of its authority to make rules carrying the force of law, that definition would be eligible for *Chevron* deference notwithstanding our holding today.

545 F.3d at 112.

In fact, CMS has recognized its authority to change the definition of inpatient. More than a decade ago, in the May 2005 annual update to Medicare reimbursement for SNFs, CMS asked for public comment on whether time in observation should be counted towards satisfying the three-day inpatient requirement for Medicare Part A SNF coverage.<sup>2</sup> In final rules published in August 2005, CMS acknowledged that most commenters “expressed support for the idea that hospital time spent in observation status immediately preceding a formal inpatient admission should count toward satisfying the SNF benefit's statutory qualifying three-day hospital stay requirement.”<sup>3</sup> CMS reported that “some advocated eliminating the statutory requirement altogether.”<sup>4</sup>

CMS analyzed the two recommendations separately. With respect to *repealing* the three-day requirement entirely, CMS wrote, “we note that such an action would require legislation by the Congress to amend the law itself and, thus, is beyond the scope of this final rule.”<sup>5</sup> *Id.* With respect to *counting* time in observation towards the qualifying inpatient stay, CMS wrote, “we note that we are continuing to review this issue, but are not yet ready to make a final determination at this time.”<sup>6</sup>

CMS correctly understood that it could not repeal the three-day statutory requirement by regulation but that it *could* count the time in outpatient status through regulatory change, if it chose. Its only stated reason for not counting observation time, despite widespread support of such a change from most commenters, was that it wanted to continue reviewing the issue.

Finally, CMS allows certain hospital stays to count in qualifying a patient for Part A-covered SNF care in a variety of situations when the hospital care is different from Part A-covered hospital care. These include hospice services<sup>7</sup> and foreign hospital stays.<sup>8</sup>

In 2013, in describing why a beneficiary continues to be eligible for Part A SNF coverage after the hospital withdraws its Part A claim and submits Part B claims for the patient's care instead (the hospital rebilling option), CMS wrote, "the 3-day inpatient hospital stay which qualifies a beneficiary for 'posthospital' SNF benefits need not actually be Medicare-covered, as long as it is medically necessary."<sup>9</sup> CMS confirmed that a hospital's decision to withdraw its claim for Part A reimbursement and to seek Part B reimbursement instead for a patient's hospital stay does not negate the fact that the patient received medically necessary inpatient care, for purposes of Part A SNF coverage. CMS continued:

In addition, the status of the beneficiaries themselves does not change from inpatient to outpatient under the Part B inpatient billing policy. Therefore, even if the admission itself is determined to be not medically necessary under this policy, the beneficiary would still be considered a hospital inpatient for the duration of the stay – which, if it occurs for the appropriate duration, would comprise a "qualifying" hospital stay for SNF benefit purposes so long as the care provided during the stay meets the broad definition of medical necessity described above.<sup>10</sup>

A patient's actually receiving "medically necessary" care in the hospital, not the classification of the care as "inpatient," is the key factor for determining the patient's eligibility for subsequent Part A SNF coverage.

The argument for counting observation or outpatient time for purposes of calculating eligibility for the Part A SNF benefit is, of course, far stronger than the prior examples since, as CMS acknowledges in the proposed rules modifying the two-midnight rule, care in the hospital is indistinguishable whether the patient is formally admitted as an inpatient or is called an outpatient.

As the Court in *Landers* held and CMS itself recognized in 2005, CMS has authority under the Medicare statute to redefine inpatient status to count all time in the hospital. In Manual provisions, CMS recognizes that time in a hospital that is different from Medicare-covered hospital time can nevertheless count for purposes of Part A SNF coverage. In the hospital rebilling option, CMS recognizes that receiving medically necessary care in the hospital is the key factor in determining Part A SNF coverage.

We urge CMS to confirm in new rules that time spent in observation or outpatient status qualifies a patient for Medicare Part A SNF coverage so long as the time in the hospital was medically necessary.

Thank you for the opportunity to comment on the proposed revision to the two-midnight rule. If you have any questions, please don't hesitate to let us know. On behalf of the observation stays Coalition, [Dana Halvorson](#) at 202-898-2822 from the American Health Care Association (AHCA) and [Marsha Greenfield](#) at 202-508-9488 from LeadingAge are happy to answer any questions.

Sincerely,

- AARP
- American Case Management Association (ACMA)
- Aging Life Care Association
- American Health Care Association (AHCA)
- Association of Jewish Aging Services (AJAS)
- Alliance for Retired Americans
- American College of Emergency Physicians (ACEP)
- AMDA-The Society for Post-Acute and Long-Term Care Medicine
- Center for Medicare Advocacy
- The Jewish Federations of North America
- Justice in Aging
- LeadingAge
- Lutheran Services in America (LSA)
- Medicare Rights Center
- National Association of Area Agencies on Aging (n4a)
- National Academy of Elder Law Attorneys, Inc. (NAELA)
- National Association for the Support of Long Term Care (NASL)
- National Association of State Long-Term Care Ombudsman Programs (NASOP)
- National Center for Assisted Living (NCAL)
- National Committee to Preserve Social Security & Medicare
- Society of Hospital Medicine (SHM)
- Special Needs Alliance

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<sup>1</sup> The coalition's Fact Sheet is available at <http://www.medicareadvocacy.org/wp-content/uploads/2015/06/6.30.15.Observation-Stays-Coalition-One-Pager.pdf>.

<sup>2</sup> 70 Fed. Reg. 29069, 29098-29100 (May 19, 2005).

<sup>3</sup> 70 Fed. Reg. 45025, 45050 (Aug. 4, 2005).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Medicare Benefit Policy Manual, Chapter 9, §40.1.5, <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c09.pdf>.

<sup>8</sup> Medicare Benefit Policy Manual, Chapter 8, §20.1.1, <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c08.pdf>.

<sup>9</sup> 78 Fed. Reg. 50495, 50921 (Aug. 19, 2013).

<sup>10</sup> *Id.*