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Department of Health and Human Services Sued Over Two-Midnight Rule

The American Hospital Association, joined by other hospital associations and hospital systems, filed suit against the Department of Health and Human Services ("DHHS") to challenge the two-midnight rule regarding inpatient hospital admissions, a requirement for a written physician order for all inpatient stays, and a one-year filing limit on hospitals' request for Part B payment after a Part A denial. The lawsuit seeks declaratory and other relief from the court.

The Two-Midnight Rule

In August of 2013, the Centers for Medicare and Medicaid Services ("CMS") issued a rule stating that when a patient enters a hospital for a surgical procedure not specified by Medicare as inpatient only, a diagnostic test, or any other treatment, and the physician expects to keep the patient in the hospital for a period of time that does not cross two midnights, the services are generally inappropriate for inpatient admission and inpatient payment under Medicare Part A. The rule further states that such services are generally appropriate for inpatient admission and inpatient hospital payment under Medicare Part A when the physician expects the patient to require a stay that crosses at least two midnights.

In its lawsuit, the AHA challenges this definition of "inpatient" as arbitrary and capricious, asserting that it bears no resemblance to the word's actual meaning, and that "every available definitional source" expresses the understanding of an inpatient as a person who spends a night in the hospital or who spends less time but needs intensive treatment. Notably, Chapter 1 Section 10 of CMS' Medicare Benefit Policy Manual provides as follows regarding inpatients:

An inpatient is a person who has been admitted to a hospital for bed occupancy for purposes of receiving inpatient hospital services. Generally, a patient is considered an inpatient if formally admitted as an inpatient with the expectation that he or she will remain at least overnight and occupy a bed even though it later develops that the patient can be discharged or transferred to another hospital and not actually use a hospital bed overnight.

Physician Order Requirement

CMS also issued a rule requiring that all inpatient admissions must be pursuant to a physician order as a condition of payment under Medicare Part A. This would include short-stay inpatient admissions. The order must be furnished at or before the time of the inpatient admission.

AHA asserts in its lawsuit that this rule is beyond the statutory authority of CMS. The underlying statute requires physician certification for inpatient hospital services (other than inpatient psychiatric hospital services) which are furnished over a period of time. According to the lawsuit's discussion of this statute's history, Congress specifically added the language "over a period of time" for the express purposes of eliminating a requirement that there be a physician certification of medical necessity for each hospital admission, and to require such certification on in cases of hospital stays of extended duration. Thus, it is argued, the physician order rule is contrary to the underlying statute and therefore invalid.

One-year Filing Limitation

In general, Medicare Part B claims must be filed within one year from the date of service in order to be paid. The Secretary of DHHS has the authority to specify exceptions to the one year requirement. Certain exceptions have been created by rule for specific circumstances "because providers, suppliers, and beneficiaries, through no fault of their own, would be disadvantaged by strict application" of the one year requirement in those instances.

The AHA's lawsuit challenges the imposition of this limitation in situations where hospitals request Part B payment after a request for Part A payment has been denied. According to the lawsuit, nearly all Recovery Audit Contractor ("RAC") Part A denials are issued more than a year after the date of service, as the RACs typically select claims for review that are several years old. Under this approach, it is impossible for hospitals to obtain Part B payment for a service denied under Part A.

The lawsuit challenges the application of one year time limit in these circumstances as arbitrary and capricious, for two reasons. First, it is alleged that CMS can easily convert the original Part A claim to a request for Part B payment without deeming the rebilling a new claim and triggering the time limit. CMS has apparently declined to take this approach. Second, CMS has the authority to create exceptions to the one year time limit, and has in fact done so for certain situations. CMS has refused to create such an exception for the circumstances described above, the implication being that such refusal is arbitrary and capricious, and therefore invalid.