Observation Stays Fact Sheet

SUPPORTED BY

AADNS
American Association of Directors of Nursing Services

AAHAM
American Association of Healthcare Administrative Management

AANAC
American Association of Nurse Assessment Coordination

AARP

ACMA
American Case Management Association

Aging Life Care Association

AGS
American Geriatrics Society

AHCA
American Health Care Association

AJAS
Association of Jewish Aging Services

Alliance for Retired Americans

American College of Emergency Physicians

American Medical Association

AMDA
The Society for Post-Acute and Long-Term Care Medicine

APTA
American Physical Therapy Association

CHA
The Catholic Health Association of the United States

Center for Medicare Advocacy

The Coalition of Geriatric Nursing Organizations

Emergency Nurses Association

The Hartford Institute for Geriatric Nursing

The Jewish Federations of North America

Justice in Aging

Leadership Council of Aging Organizations

LeadingAge

LSA
Lutheran Services in America

Medicare Rights Center

n4a
National Association of Area Agencies on Aging

NAELA
National Academy of Elder Law Attorneys, Inc.

NAHCA
National Association of Health Care Assistants

NAHU
National Association of Health Underwriters

NASL
National Association for the Support of Long Term Care

NASOP
National Association for State Long-Term Care Ombudsman Programs

NCAL
National Center for Assisted Living

NCHC
National Coalition on Health Care

National Committee to Preserve Social Security & Medicare

The National Consumer Voice for Quality Long-Term Care

SHM
Society of Hospital Medicine

Special Needs Alliance

Medicare beneficiaries are being denied access to Medicare's skilled nursing facility (SNF) benefit because of the way hospital stays are classified.

Under Medicare law, patients must have an ***inpatient*** stay in a short-term acute care hospital spanning at least three days (not counting the day of discharge) in order for Medicare to pay for a subsequent stay in a SNF. However, under current Medicare rules, acute care hospitals are increasingly holding patients under "observation," an ***outpatient*** designation, rather than admitting them as inpatients. Outpatients may stay for many days and nights in hospital beds and receive medical and nursing care, diagnostic tests, treatments, medications, and food, identical to that of inpatients. As a result, although the care received by patients in observation status is the same medically necessary care received by inpatients, outpatients who need follow-up care do not qualify for Medicare coverage in a SNF. Hospital stays classified as observation, regardless of their length and the type or number of services provided, are considered outpatient. These outpatient hospital stays, even if they span several days, do not qualify patients for Medicare-covered care in a SNF; only inpatient time counts.

Hospitals' use of observation status and the amount of time patients spend in observation status are both increasing.

An early study[1] 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 increasingly becoming a substitute for inpatient status. The same study also documented increases in long-stay outpatient status, including an 88% increase in observation stays exceeding 72 hours. A 2013 report by the Office of Inspector General (OIG) found that in 2012, beneficiaries had 617,702 hospital stays that lasted at least three days, but that did not include three ***inpatient*** days. The pattern continued. In December 2016, the Inspector General reported that 748,337 long hospital stays were called outpatient, including 633,148 outpatient stays of three or more days, in FY 2014. Between FYs 2013 and 2014, outpatient stays increased by 8.1%, despite implementation of the two-midnight rule (see reverse side of document) that was expected to decrease outpatient stays.

Support for counting time spent in observation status toward the three-day prior inpatient stay continues to grow:

- The Inspector General's 2013 report was supportive of counting observation days towards the three-day inpatient stay requirement.
- 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 three-day stay requirement.
- In 2015, the Medicare Payment Advisory Commission (MedPAC) explored various policy options for counting time spent in observation toward meeting the SNF 3-day requirement. The Commission unanimously recommended that CMS revise the SNF 3-day rule to allow for up to two outpatient observation days to count toward meeting the requirement, recognizing that beneficiaries are needlessly facing barriers to accessing needed post-acute care.[2]

The *Improving Access to Medicare Coverage Act of 2017* counts the time Medicare beneficiaries spend in observation toward the three-day stay requirement, so that Medicare patients who spend three days in a hospital, regardless of inpatient/observation designation, are able to access post-acute care in a SNF when they need it.

Legislation re-introduced this Congress with bipartisan support would create a full and permanent solution. **The Improving Access to Medicare Coverage Act of 2017 (S. 568/H.R. 1421)**, sponsored by Representatives Joe Courtney (D-CT) and Glenn 'GT' Thompson (R-PA) and Senators Sherrod Brown (D-OH), Susan Collins (R-ME), Bill Nelson (D-FL), and Shelley Moore Capito (R-WV) 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.

[1] Zhanlian Feng, Brad Wright and Vincent Mor, Sharp Rise In Medicare Enrollees Being Held In Hospitals For Observation Raises Concerns About Causes And Consequences, Health Affairs, 31, no.6 (2012):1251-1259

[2] Medicare Payment Advisory Commission (MedPAC), June 2015 Report to Congress.

Recent efforts to address the problem of observation status have fallen far short of a comprehensive fix.

The NOTICE Act, while a step in the right direction, does not go far enough to ensure patients have access to needed post-acute care services.
Enacted into law in August 2015, the NOTICE Act requires hospitals to inform patients who are receiving outpatient observation services for more than 24 hours that they are outpatients, not inpatients. Hospitals and critical access hospitals had to begin using the Medicare Outpatient Observation Notice (MOON) no later than March 8, 2017. While receiving written and oral notice informs patients of their status, the law – although a positive step forward – does not give patients hearing rights or count the time in the hospital for purposes of SNF coverage.

The OIG recently found that a new rule intended to slow the growth in long outpatient stays – the so-called "two-midnight rule" – does not eliminate, and in fact has exacerbated, the barriers beneficiaries face in accessing needed post-acute care services.

How the 2-Midnight Rule Works
In October 2013, CMS adopted the "two-midnight rule", which establishes time-based criteria for physicians to use when deciding to admit a patient as an inpatient or keep them under outpatient observation. The rule states that for patients expected to require hospital services for at least two midnights, inpatient admission will be presumed appropriate for payment. Likewise, for patients expected ***not*** to require hospital services for at least two midnights, outpatient observation is presumed appropriate. The rule was intended to give admitting physicians additional assurance that their decision to admit would not be questioned by auditors, thereby reducing the incidence of long outpatient stays. CMS intended the two-midnight rule to decrease the number of long outpatient stays and decrease the number of short inpatient admissions.

What the OIG Found
In a December 2016 report[3], the OIG found that since the implementation of the two-midnight rule, total outpatient stays have increased and total inpatient stays have decreased – the opposite of CMS' expectations – exacerbating an already challenging problem. It is now clear that while CMS intended to fix the problem through implementation of the two-midnight rule, it has inadvertently worsened the situation for thousands of beneficiaries who are unable to access needed post-acute care. The report recommends that CMS analyze the potential impacts of counting time spent in as an outpatient toward meeting the SNF three-day requirement so that beneficiaries receiving similar hospital care have similar access to post-acute care services.

While the rule and its revision 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 hospitals under the same standards as before: short inpatient decisions are prioritized for review by Quality Improvement Organizations (QIOs); and the specter of audits by Recovery Auditors (still known as RACs) remains. The mission of the RACs is to identify and correct Medicare and Medicaid improper payments. 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. Recently-imposed penalties for readmitting a hospital patient within 30 days increase hospitals' motivation to classify patients as outpatients, rather than inpatients.

---

[3] Department of Health and Human Services Office of Inspector General (OIG), December 2016 Report OEI-02-15-00020.