PUBLICATION

Two Midnight Rule Updates and How to Preserve Rights to Challenge Rule [Ober|Kaler]

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Last month, CMS updated its FAQs related to the two midnight rule. In addition, CMS conducted two recent Open Door Forum Calls related to the new rule. Some of the highlights from the updated FAQs and calls are discussed below.

- ***New Exception to Two Midnight Rule:*** CMS announced the first rare and unusual exception to the two midnight rule: mechanical ventilation initiated during present visit. Patients receiving mechanical ventilation initiated in a visit may appropriately be admitted as an inpatient and Part A inpatient payment made, even if the expectation is that the patient will remain only one midnight. CMS noted that the exception does not apply to anticipated intubations related to minor surgical procedures or other treatment. *See* CMS FAQs, Q/A 4.4. Additionally, CMS has acknowledged that procedures on the Medicare inpatient only list are appropriately treated as inpatient services regardless of the number of anticipated midnights in the hospital. CMS is accepting additional suggestions for exceptions at IPPSAdmissions@cms.hhs.gov (subject line "Suggested Exception").
- ***New Billing Code to Indicate Total Midnights (Inpatient and Outpatient):*** The National Uniform Billing Committee (NUBC) has redefined Occurrence Span Code 72 (12/1/2013) by allowing "contiguous outpatient hospital services that preceded the inpatient admission" to be reported on inpatient claims. This is a voluntary code that hospitals may now use to report the number of midnights the beneficiary spent in the hospital from the start of care until formal inpatient admission. Use of this code will allow Medicare reviewers to see that the patient has been in the hospital for at least two midnights, thereby substantiating the inpatient admission.
- ***Expectation of a Two Midnight Stay for Patient Who Physician Knows May Not Survive:*** A question was raised during the January 21, 2014 Open Door Form Call regarding whether it is appropriate for a physician to have an expectation of a two midnight stay when the physician knows the patient may not survive that long. Dr. Mike Handrigan, Medical Office for Provider Compliance Group, CMS, advised that it is reasonable to assume a patient will survive, unless it is very obvious that a patient will expire in minutes or hours.
- ***Transfer Cases, and Order and Certification Requirements:*** In the most recent open door forum call, on January 21, CMS advised that it still working on guidance applicable to transfers and to order and certification requirements. CMS also advised that transfer cases should not be examined as part of the probe and education audits, which review admissions from October 1, 2013 through March 31, 2014.

Ober|Kaler Comment: Preserve Your Appeal Rights

CMS estimates that implementation of the new two midnight rule will increase IPPS Medicare expenditures by approximately $220 million. In order to offset this amount, CMS has finalized a 0.2 percent reduction to the operating IPPS standardized amount, the hospital-specific rate, and the national capital Federal rate. *See* CMS's discussion in the FY 2014 IPPS Final Rule, 78 Fed.Reg. 50496, 50746-47, 50952-53.

Recent talk in the hospital community has included assertions that CMS's estimate is not accurate. In order to preserve the right to challenge these reductions by an appeal of a Notice of Program Reimbursement (NPR) to the Provider Reimbursement Review Board (PRRB), hospitals must include the reduction amounts as protested items on their cost reports. Since the rule went into effect for admissions beginning October 1, 2013, hospitals should include this as a protested item for all cost reports with admissions beginning October 1, 2013.

The challenge to this estimate of the effect of the rule through the cost report/PRRB process would be in addition to any appeals of individual claims that are denied for failure to comply with the rule.