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February 26, 2024

Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-4204-P
P.O. Box 8013
Baltimore, MD 21244-8013

Dear Administrator Brooks-LaSure,

The Society of Hospital Medicine, representing the nation's more than 46,000 hospitalists, is pleased to offer our comments on the proposed rule entitled *Medicare Program: Appeal Rights for Certain Changes in Patient Status (CMS-4204-P)*.

Hospitalists are physicians whose professional focus is the general medical care of hospitalized patients. Due to their unique role, hospitalists are often involved in status determinations related to observation. While observation patients often receive care that is indistinguishable from the care provided to inpatients, observation care is billed as outpatient under Medicare Part B and impacts access to Medicare skilled nursing facility (SNF) coverage and inpatient hospital coverage. As a result, status determinations that classify patients as inpatient or outpatient have significant influence on out-of-pocket cost and care coverage for beneficiaries. A class action lawsuit, *Alexander vs. Azar*, which went to trial in August of 2019, sought to codify a patient's right to appeal their status if they were initially admitted as an inpatient and later re-classified as under observation. In 2020, a federal judge upheld a patient's right to appeal under this circumstance and required CMS to develop an appeals process. Included below are our comments on the newly proposed appeals process as outlined in this rule.

While we are supportive of CMS' development of an appeals process relating to observation and inpatient care, we strongly urge CMS to reconsider the narrowness of the proposal and its divergence from other appeals rights norms. We are concerned about the very small number of patients who would be eligible for appeals rights given the parameters proposed in the rule. We believe CMS has an opportunity to appreciably improve care access for Medicare beneficiaries and could build on the proposed rule to expand the appeals right to a broader set of patients.

Patients Filing Appeals Should Be Held Financially Harmless

The 2020 court decision required the department of Health and Human Services (HHS) to develop an “expedited appeals that is “substantially similar” to the existing process for expedited hospital discharge appeals at §§ 405.1205 through 405.1208; under that hospital discharge appeals process, beneficiaries receive a notice of their rights and may request an expedited determination by a Quality Improvement Organization (QIO) about the hospital's decision to discharge the beneficiary.”

The proposed rule later states: “One notable difference, as compared to that for inpatient hospital discharge appeals, is that beneficiaries **would not have financial liability protection** during this new appeals process. Section 1869(c)(3)(C)(iii)(III) of the Act, which provides beneficiaries with coverage during the inpatient hospital discharge appeal, only applies to beneficiaries being discharged from a Medicare covered inpatient hospital stay, and thus would not be applicable to beneficiaries pursuing an appeal regarding the change in status from inpatient to outpatient receiving observation services.”

We urge CMS to hold patients financially harmless during the appeals process, aligning these rights with other appeals rights in the Medicare program. Beneficiaries who decide to appeal their status determination are doing so to avoid the financial burden of uncovered hospital services (if they lack Part B) or skilled nursing facility (SNF) stays. Therefore, it is reasonable to assume beneficiaries desiring an appeal will hesitate if they are not held harmless as the process plays out.

Stated differently, **by failing to hold patients financially harmless during the appeals process, we believe CMS has essentially created a process that is not realistic for beneficiaries. The financial risk of losing an appeal will deter beneficiaries from pursuing an appeal, regardless of merit.** Further, **we believe this is counter to the court’s direction** that CMS “...should use a process for the expedited appeals that is “substantially similar” to the existing process for expedited hospital discharge appeals...”. We strongly encourage CMS to reconsider this aspect of the proposed rule.

Concern about New Notices for Patients

Patients may not understand or even read yet another notification delivered during their hospitalization and thus may fail to understand how they can exercise their appeals rights: In outlining the notification process for this appeals process (the Medicare Change of Status Notice (MCSN)), CMS has elected to add yet another notice to the multitude of notices patients receive in the hospital. For hospitalized patients feeling unwell and trying to focus on their medical care and needs, it becomes increasingly unlikely that patients are able to process each notice they receive. We strongly urge CMS to consider this proposal in the context of the totality of notices patients receive in the hospital. CMS should work to ensure that patients are reasonably informed of their appeals rights and have true access to the appeals process. We also encourage CMS to consider using one of its existing patient notices for the purpose of notifying patients of their appeals rights.

Additional Administrative Burden Associated with the Proposal

This new notification places an undue burden on hospitals that will be logistically difficult to comply with: CMS' assumption that "implementing this process should not be overly difficult or burdensome" for hospitals is unfounded. With workforce issues impacting all hospitals and health systems, adding a tracking and monitoring requirement for which patients would be eligible for this new notice and delivering it "...as soon as possible after the hospital reclassifies the beneficiary from inpatient to outpatient..." and "...no later than 4 hours prior to discharge..." on a 24/7 basis, including weekends, holidays and nights, is a logistically an enormous task for what is otherwise a very small number of affected patients. If a hospital fails to deliver the notice within 4 hours of discharge, will the hospital be held liable for a patient's lack of ability to appeal on the expedited pathway? This administrative burden could be alleviated if all patients staying three midnights could appeal to CMS and this information was included on one of CMS's existing patient notices—with CMS (via the QIOs) retaining authority in determining whether they grant the patient appeals request or not.

CMS Should Expand the Scope of this Proposed Rule

Counting all nights in the hospital towards the 3 midnight requirement for SNF coverage has been a long recommended, bipartisan policy objective: The Office of Inspector General has cited this issue in their Top 25 Unimplemented Recommendations for four consecutive years, saying "[CMS \(The Centers for Medicare & Medicaid Services\) should analyze the potential impacts of counting time spent as an outpatient toward the 3 night requirement for SNF services so that beneficiaries receiving similar hospital care have similar access to these services.](#)" The [2013 U.S. Senate Commission on Long-Term Care](#) similarly recommended that hospital observation days count towards the three night requirement. This would allow CMS the ability to solve this policy loophole through rulemaking. Fortunately, recently [released data](#) shows that Accountable Care Organizations (ACOs) permitted to waive the three-midnight requirement had only a small number of so-called waiver SNF stays, indicating the cost of allowing more broad appeals rights would be low.

Conclusion

SHM appreciates the opportunity to provide comments on the *Medicare Program: Appeal Rights for Certain Changes in Patient Status* proposed rule and looks forward to continuing work with the agency on these policies. If you have any questions or require more information, please contact Josh Boswell, Chief Legal Officer, at jboswell@hospitalmedicine.org.

Sincerely,



Kris Rehm, MD, SFHM
President, Society of Hospital Medicine