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OPPS Final Rule: CMS Ends Inpatient-Only List, Puts Related Audits on Ice Indefinitely

By Nina Youngstrom

CMS is eliminating the inpatient-only (IPO) list in phases, which pushes all procedures into the realm of the two-midnight rule, and shelving audits of inpatient vs. outpatient status of the procedures for the foreseeable future, according to the final outpatient prospective payment system (OPPS) regulation,[1] which was announced Dec. 2. When the OPPS rule takes effect Jan. 1, physicians and hospitals will make patient status determinations for hundreds of procedures, and eventually more than 1,000 procedures, without fear of claim denials by quality improvement organizations (QIOs) or recovery audit contractors (RACs). "Providers are still expected to bill in compliance with the 2-Midnight rule," CMS said.

The indefinite audit pause came as a big surprise. "It's contrary to their general theme of protecting the Medicare Trust Fund to allow such a high-dollar, high-volume area to be unaudited," said Ronald Hirsch, M.D., vice president of R1 RCM.

QIOs will continue to audit eligible DRGs under the two-midnight rule, including medical DRGs and procedures removed from the IPO list before 2021. Hospitals still face reviews by the HHS Office of Inspector General (OIG), which announced just before Thanksgiving that it added audits[2] of the two-midnight rule to its Work Plan. CMS's unified program integrity contractors (UPICs) also review patient-status determinations.

CMS will begin its termination of the IPO list, which guarantees Medicare payment for procedures only when they're performed on inpatients, Jan. 1. By 2024, all 1,740 services will be subject to the two-midnight rule. For starters, CMS is moving 266 musculoskeletal services off the IPO list.

The audit shocker is a departure from the proposed rule, which said for the two years after procedures are taken off the IPO list, they would be exempt from claim denials under the two-midnight rule. That was the case with total knee arthroplasty (TKA) and total hip arthroplasty. The Beneficiary and Family Centered Care-Quality Improvement Organizations (BFCC-QIOs) only audited them in compliance with the two-midnight rule for education purposes.

But the final rule sets CMS audits aside for the time being. "Procedures removed from the IPO list on or after January 1, 2021 will be indefinitely exempted from site-of-service claim denials under Medicare Part A, eligibility for BFCC-QIO referrals to RACs for noncompliance with the 2-Midnight rule, and RAC reviews for 'patient status' (that is, site-of-service) indefinitely, until the procedure is more commonly performed in the outpatient setting then the inpatient setting."

A procedure will be ripe for audit when CMS has claims data showing it's performed in an outpatient setting more than 50% of the time.

CMS will be monitoring hospital billing patterns, said attorney Jessica Gustafson, with The Health Law Partners in Farmington Hills, Michigan. If hospitals ignore the two-midnight rule, they could be setting themselves up for allegations of systemic fraud and abuse, she said. And the audit moratorium "does nothing to limit the authority

of other contractors, such as UPICs or the OIG, from reviewing such claims. I think the biggest risk would be to get on the radar of the [UPICs]," Gustafson noted. Whistleblowers also are a threat.

Hospitals Get a Breather With 'Monumental Shift'

Because the end of the IPO list is a "monumental shift," it seems appropriate to stop auditing while providers adapt to the judgment call of the two-midnight rule for all procedures, said Alvin Gore, M.D., physician advisor and director of utilization management at St. Joseph Health System in Santa Rosa, California. "Trauma and orthopedic surgeons are very good clinically, but they're not used to making these types of decisions, so an until-further-notice period is reasonable. They need time to adjust." He figures audits will resume in three to six years, "once the pendulum swings" and 50% of procedures are performed in outpatient settings.

Gore will mention to physicians at his hospital that there will be no financial penalty for making patient-status mistakes on procedures, but he won't "accentuate" it. "The main message to physicians should be that procedures are not mandatory inpatient," he said. "The decision is on you." They admit patients as inpatients based on the severity of illness and the expectation of a two-midnight stay. However, if patients are truly complex and sick, but expected to stay only one day, they may be admitted with the case-by-case exception to the two-midnight rule, "but documentation is everything."

Gore thinks CMS will have to publish subregulatory guidance because the regulation is not crystal clear beyond the stark fact of getting rid of the IPO list. "In typical CMS fashion, this creates confusion, and people are viewing it differently."

It's a little odd that CMS indefinitely suspended audits at the same time that TKA was added to the Program for Evaluating Payment Patterns Electronic Report (PEPPER), a CMS-funded data tool to help hospitals improve their billing compliance, Hirsch said. "The PEPPER data showed the vast majority of hospitals continued to admit almost every TKA as inpatient," he said. "It's clear to me an audit moratorium carries with it negative implications as far as compliance." That's why Hirsch doubts hospitals will ever cross the 50% threshold.

Meanwhile, hospitals will have an obligation, as CMS said, to be compliant. He recommends they do post-discharge audits of one-day stays.

On another note, CMS finalized the addition of two procedures, cervical fusion with disc removal and implanted spinal neurostimulators, to the prior authorization process.[3]

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1 CMS, HHS, "Medicare Program: Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs; New Categories for Hospital Outpatient Department Prior Authorization Process; Clinical Laboratory Fee Schedule: Laboratory Date of Service Policy; Overall Hospital Quality Star Rating Methodology; Physician-owned Hospitals; Notice of Closure of Two Teaching Hospitals and Opportunity To Apply for Available Slots, Radiation Oncology Model; and Reporting Requirements for Hospitals and Critical Access Hospitals (CAHs) to Report COVID-19 Therapeutic Inventory and Usage and to Report Acute Respiratory Illness During the Public Health Emergency (PHE) for Coronavirus Disease 2019 (COVID-19)," unpublished final rule, December 2, 2020, https://go.cms.gov/2JvaJTN.
2 "CMS Oversight of the Two-Midnight Rule for Inpatient Admissions," HHS Office of Inspector General, accessed December 4, 2020, https://bit.ly/2V07upL.
3 Nina Youngstrom, "CMS: M.D.s Requesting Prior Auth for Hospitals Could 'Bridge Gap,'" *Report on Medicare Compliance* 29, no. 38 (October 26, 2020), https://bit.ly/340h7d5.