



Elder Law: 'Observation status' due for a change

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By Julian Gray and Frank Petrich /

Observation status" -- in the context of Medicare hospitalization and potential, subsequent, skilled nursing care -- refers to an acute-care hospital patient classified as an outpatient, who, just like an inpatient, is put into a hospital bed, stays overnight and receives medically necessary nursing care and diagnostic tests, treatments, therapy, food and medications with the hospital stay paid for by Medicare.

Medicare is presently the country's only national health insurance program. Eligible individuals are those who are entitled to Social Security, who are 65 years or older and those receiving Social Security disability benefits along with those who have end-stage renal disease and amyotrophic lateral sclerosis (or Lou Gehrig's Disease).

So, what's the fuss with "observation status" if you're a Medicare beneficiary?

Well, if you need subsequent care at a skilled nursing facility, the Medicare statute and regulations only authorize payment for that skilled care (up to the Medicare maximum approved number of days, which are not that great to begin with) for the Medicare beneficiary if certain conditions are met:

- Post-hospital transfer to a skilled nursing facility normally must be made within 30 days of leaving the hospital.
- You must require daily skilled nursing and/or rehabilitation.
- The skilled services must be provided on a daily basis, and
- Only admissions after a three-day hospital (inpatient) stay, not counting the day of discharge, are covered. This is the requirement at issue.

It's not uncommon for a hospital, once a patient arrives in the Emergency Department, to keep that patient under observation for extended periods of time and not formally admit that patient as an inpatient.

This observation classification was intended to serve as a time period (generally between 24 to 48 hours) of evaluation. However, some patients have been kept under observation status, if you can believe it, for as long as 13 days! And, some individuals originally classified as inpatients have retroactively been reclassified as observation-status patients.

Some recent studies have shown as much as a 34 percent increase in the ratio of observation stays to inpatient admissions. In addition, when the Medicare program began in 1965, the average length of stay as an inpatient for a person 65 and older was more than 13 days. Today, the average length of stay for that same person is about 5.6 days (a decrease of about 57 percent) -- while the three-day inpatient rule for skilled nursing eligibility has not changed.

Much of the decrease of the average length of stay was as a result of the Prospective Payment System, which created flat-fee payments to hospitals for many diagnostic categories. Thus, hospitals became more efficient in treating patients, shortening lengths of stay and treating certain conditions on an outpatient basis rather than on an inpatient basis.

This hotly debated observation status policy was put in place to discourage hospitals from gaming the system by having the hospitals classify as inpatients those individuals who failed to meet certain medical and illness criteria.

At the same time, Medicare created a payment method for hospitals, paying them about a third as much for observation status patients as they would pay for inpatient status. Hospitals have deemed this level of payment as inadequate for these services.

In addition, if Medicare concluded that your hospital billed Medicare for an inpatient admission and treatment when you really should have been considered an "observation" patient, the hospital could lose all of its payment for the services rendered. Thus, there is some incentive for a hospital to classify patients as under observation rather than have them admitted.

So, if you're classified as an outpatient and don't meet the three-day hospital stay requirement because you're not an inpatient, you do not qualify for the skilled-nursing benefits. Being classified as an outpatient would result in very expensive skilled-nursing care -- at a rate averaging \$267 a day in Pennsylvania -- that would have been otherwise covered but for the "three-day rule".

Where does this issue now stand?

The Center for Medicare Advocacy, Inc. (www.medicareadvocacy.org) and the National Senior Citizens Law Center (www.nscclc.org) filed a federal lawsuit in November 2011 to end this method of coverage. As of this writing, no hearing date has been scheduled. There also has been federal legislation introduced that would count all time spent in the hospital toward the three-day requirement regardless of classification.

In addition, the Centers for Medicare & Medicaid Services, the agency that administers the Medicare and Medicaid programs, recently published proposed rule making as to possible policy changes in observation status classification and is asking for comments on potential policy changes.

If you or a loved one have found yourself in this twilight zone of observation status and have a story to tell, you can tell the Centers for Medicare & Medicaid Services about your experience, in as much detail as possible (and without having to identify the Medicare beneficiary, hospital or skilled nursing facility by name unless you want to).

These comments are to be filed by 5 p.m. Sept. 4, referring to file code CMS-1589-P by email at www.regulations.gov, following the instructions under the tab "How to submit a comment" on the right side of the screen and using the file code or by writing:

Centers for Medicare & Medicaid Services

Department of Health & Human Services

Attention: CMS-1589-P

P.O. Box 8013

Baltimore, MD 21244-1850

Remember, one of the ways to effect change is to make known your experiences and views. It could be you in an observation status bed and on your way to an expensive skilled-nursing experience.

Julian Gray and Frank Petrich are both certified elder law attorneys with over 55 years of combined elder law experience who practice in the Pittsburgh area at Gray Elder Law. Send questions for consideration in this column to elderlawguys@grayelderlaw.com, and visit their website at www.grayelderlaw.com.

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