

How unthinking application of “two-midnight rule” can hurt patients

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Editor’s note: *The 2nd U.S. Circuit Court of Appeals has issued a favorable decision in this case, affirming the district court’s holding that CMS circumvents due process when it does not allow patients to appeal the determination to classify their stay as under “observation status” as opposed to inpatient hospitalization.*

The appeals court’s ruling concluded that “the decision to reclassify a hospital patient from an inpatient to one receiving observation services may have significant and detrimental impacts on plaintiffs’ financial, psychological, and physical well-being.” CMS must now create an appeals process for the affected patients.

If a Medicare patient is denied inpatient status under the Centers for Medicare & Medicaid Services’ (CMS) “two-midnight rule” or the denial otherwise conflicts with the treating physician’s recommendation, that patient should have the right to challenge the decision, physicians tell the 2nd U.S. Circuit Court of Appeals.

Denying inpatient status—a determination made those serving on a hospital’s utilization review committee (URC) who might have not seen the patient and often don’t even practice in the specialty in which the patient is seeking care—can have profound financial repercussions for the patient. It can even impact a patient’s ability and desire to seek further medical care and degrade the patient-physician relationship, the Litigation Center of the American Medical Association and State Medical Societies and the Connecticut State Medical Society (CSMS) tell the court in an amicus brief.

“Patients made vulnerable by an illness or injury so severe that they require hospitalization must be able to trust that the physician with whom they have a treating relationship, who has examined the patient personally and has made a determination based on his or her unique medical needs is credible and is not instead undermined by an unknown regulator seeking to reduce costs,” the AMA Litigation Center and CSMS say in the brief. “This behavior threatens the foundation of our care delivery

system.”

Letting a patient defend the treating physician’s decision through a fair process is a safeguard against the behavior, the brief tells the court in the case, *Bagnall v. Cochran*. The brief supports patients who brought the lawsuit challenging reversals of their inpatient statuses and it asks the appellate court to uphold a lower court ruling that allows the lawsuit to go forward.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center’s case-selection criteria.

Second-guessing doctors’ judgments

Medicare beneficiaries sued the Department of Health and Human Services (HHS) after they each went to a hospital emergency department and had their treating physicians determine they should be admitted as inpatients only to have a hospital committee responsible for submitting Medicare claims change their designation to observation status to comply with CMS instructions and guidance.

The designation change meant patients were billed under Medicare Part B—which generally covers outpatient services and has co-payments—instead of being billed under Medicare Part A, which generally covers inpatient hospitalization and does not require copayments.

“There is no requirement that the treating physician’s opinion be given any particular weight” during the URC process and once the URC makes its determination, a hospital cannot bill Medicare under Part A, the brief tells the court. HHS doesn’t require a URC physician member practice in the same specialty as a treating physician, be licensed in the same state or be located in the same institution.

“It would defy human nature to suppose that this second-guessing does not impact the making of admission decisions. For years, the AMA has urged HHS to modify these standards,” the brief says.

Absurd application of two-midnight rule

CMS further restricts inpatient status through unthinking application of its “two-midnight rule” that says a patient’s stay must cross over two midnights for it to be billed as an inpatient stay.

“CMS contractors’ blind application of billing regulations such as the “two-midnight rule” can produce absurd results,” the brief tells the court.

“Certainly, it would be easier for HHS if physician decision making or medical practice for that matter could be reduced to a series of algorithms. But this is simply not how medicine works,” the brief says.

“True deference, and not mere passing mention, must be afforded to physicians who have a treating relationship with the patient and the treatment decisions they order.”