OBSERVATION STATUS

AMERICAN ACADEMY OF NURSING
WEBINAR

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INTRODUCTION

- Observation status
  - Description of issue and background
    - Issues related to access, cost, and quality
  - Research studies, articles
  - What to tell clients; when and how to appeal
  - Strategies for systemic change
    - Litigation: *Bagnall v. Sebelius*
3-DAY QUALIFYING HOSPITAL STAY

- The beneficiary must have been hospitalized . . ., for medically necessary inpatient hospital care . . . for at least 3 consecutive calendar days, not counting the day of discharge. 42 C.F.R. §409.30(a)(1).
  - Shorthand description: need 3 midnights.
  - Some managed care organizations do not require 3-day hospital stay; some do.
OBSERVATION STATUS

- Medicare statute and regulations do not define observation status.
- Only Medicare Manuals address observation status.
OBSERVATION STATUS
MEDICARE MANUALS

- CMS’s Manuals say observation is appropriate while decision is made whether to admit as inpatient or to safely discharge patient.
  - Manuals say, generally, observation should not exceed 24-48 hours.
3-DAY QUALIFYING HOSPITAL STAY

- Time spent in observation status or in the emergency room prior to (or instead of) an inpatient admission . . . does not count toward the 3-day qualifying inpatient stay. CMS Pub. 100-02, Ch. 8, §20.1.
  - *Bagnall v. Sebelius*
CONDITION CODE 44

- Even if admitted as an inpatient by the attending physician, the hospital’s utilization review committee may persuade/coerce physician to retroactively reverse the admission determination to outpatient observation services.

Patients in observation are in a hospital bed, receiving medical and nursing care, diagnostic tests, treatment, medications, food, but are called outpatients (covered by Part B), not inpatients (covered by Part A).
Care in hospital is generally indistinguishable for inpatients and outpatients/observation status patients.

Outpatients are often intermingled with inpatients.

Patients are often not told about their status until discharge.
Consequences for beneficiaries whose entire time in hospital is considered to be observation or who do not otherwise have 3 days’ inpatient status

- Denied Part A coverage for hospital stay (If patient does not have Part B, hospital charges “sticker price.”);
- Denied Part A coverage for prescription drugs received while in hospital (Patient must seek out-of-network coverage from Part D plan);
- Denied Part A coverage for SNF stay.
OBSERVATION STATUS: HOSPITAL NOTICE

- Notice to patient not required if outpatient
  - Unless status is changed by hospital from inpatient to outpatient.
  - But CMS brochure, “Are You a Hospital Inpatient or Outpatient?”*, CMS Product No. 11435 (Dec. 2009), [http://www.medicare.gov/Publications/Pubs/pdf/11435.pdf](http://www.medicare.gov/Publications/Pubs/pdf/11435.pdf) advises people to ask about their status.
  - Some new state laws (NY, MD) require hospitals to give notice of outpatient status (but no rights to get immediate appeal to Medicare).

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OBSERVATION STATUS: SNF NOTICE

- SNF may give beneficiary SNF Notice of Exclusion from Medicare Benefits (SNF NEMB) for lack of qualifying 3-day hospital stay, [http://www.cms.gov/Medicare/Medicare-General-Information/BNI/Downloads/CMS20014.pdf](http://www.cms.gov/Medicare/Medicare-General-Information/BNI/Downloads/CMS20014.pdf) but use of SNF NEMB is discretionary for SNFs.
CMS IS CONCERNED ABOUT LONG OUTPATIENT STAYS


2012: CMS asked for public comment on possible changes to observation status (e.g., automatic inpatient status after certain amount of time; requiring prior authorization for inpatient stay), 77 Fed. Reg. 45,061, at 45155 (July 30, 2012); CMS declined to make any changes, 77 Fed. Reg. 68,209, at 68,433 (Nov. 15, 2012).
NEW FEDERAL REGULATIONS

  - 2-midnight presumption (physician expectation)
  - 2-midnight benchmark (reviewers)
NEW FEDERAL REGULATIONS (cont’d)

- Temporary CMS moratorium on enforcement of final rules; moratorium now extended by law through March 31, 2015.
- New rules do not change (statutory) 3‐midnight rule for inpatient hospital care as a requirement for SNF coverage.
- Inpatient status does not begin until there is physician order for inpatient status.
NEW FEDERAL REGULATIONS (cont’d)

Final rules (78 Fed. Reg. 50,495, at 50,918, Aug. 19, 2013) also authorize hospitals to rebill (from Part A to Part B) within a year of providing care (if Part A claim is denied or on hospitals’ own initiative).

- Hospital refunds Part A inpatient deductible, rebills patient for Part B co-payments and medications.
- Medicare coverage of SNF stay remains valid and in effect; no retroactive payback required from residents.
Survey of members found

- 71% of their hospitals added staff to make medical necessity determinations on admission
- Nearly 1/3 spent more than $150,000 for new staff (in utilization review)
- Nearly 2/3 use outside secondary reviewer
- 79% report patients spending more time in observation.
BROWN UNIVERSITY STUDY (2012)

- Reviewed 100% of Medicare claims data 2007-2009.
- Found **number** of observation stays increased 34%, inpatient admissions decreased, suggesting “a substitution of outpatient observation services for inpatient admissions.”
BROWN STUDY (cont’d)

- Found average **length of stay** in observation increased by more than 7%.
- Found more than 10% of patients on observation for more than 48 hours.
- Identified Recovery Audit Contractor program and Condition Code 44 as primary causes.

Described observation stays, long outpatient stays, and short inpatient stays.

2012: 1.5 million hospital stays were classified as observation; 1.4 million, as long outpatient stays.

- More than 600,000 hospital stays were 3 or more midnights, but not including 3 inpatient midnights.
IG recommended that CMS consider how to ensure beneficiaries with similar post-acute care needs have same access to, and cost-sharing; possible need for legislation.

Review of all Observation Status and inpatient stays at the University of Wisconsin Hospital and Clinics, 7/1/2010 to 12/31/2011, found

- 4,578 of the total 43,853 hospital stays (10.4%) were observation stays
- 756 observation stays (16.5%) exceeded 48 hours;
- 1,791 observation stays (39.1%) were 24-48 hours;
- 2,031 observation stays (44.4%) were less than 24 hours
25.4% of patients in observation had longer lengths of stay and were more likely to be discharged to a SNF, to have more acute/unscheduled admissions, to have more "avoidable days" (days not accounted for by medical need), and to have more "repeat encounters."
Conclusion: "observation care in clinical practice is very different than what CMS initially envisioned and creates insurance loopholes that adversely affect patients, health care providers, and hospitals."

Robert M. Wachter, MD, Department of Medicine University of California, San Francisco, described "Observation Status" as having "morphed into madness" and wrote, “[I]n fact, if one was charged with coming up with a policy whose purpose was to confuse and enrage physicians and nearly everyone else, one could hardly have done better than Observation Status.”

APPLICATION OF 2-MIDNIGHT RULE

- Retrospective application of new 2-midnight rule, 1/1/2012-2/23/2013
  - Admission after 4:00 pm, inpatients 31.2% of time; admission before 8:00 am, inpatient 13.6% of time,
  - Little overlap in diagnosis codes for short-stay inpatients and observation patients.
  - Most diagnosis codes in observation were same, regardless of length of stay.
OBSERVATION UNITS

- Article describes 4 hospital settings in which observation services are provided.
- Suggests Type 1, “protocol driven observation unit,” has “lower costs, shorter lengths-of-stay, lower rates of inpatient admissions, less diagnostic uncertainty, greater patient satisfaction, better clinical outcomes, and improvements in the use of hospital resources.”
Suggests Type 4, “discretionary care, bed in any location,” is most common practice, but “unstructured care, poor alignment of resources with patients’ needs”

Attributes increased use of observation to Condition Code 44 and Hospital Reduction Program (does not mention Recovery Audit Contractors).

Finds national decrease in hospitalizations and rehospitalizations (composite of hospital care).

WHAT TO DO IF THE PATIENT IS IN THE HOSPITAL

- Try to get the status changed to inpatient
  - However, there is no official way to get status changed (Medicare does not consider observation status a denial of Medicare coverage).
  - Physician is most important ally, but often the physician’s inpatient decision has been reversed by the hospital’s utilization review committee.
WHAT TO DO IF THE PATIENT IS IN A SNF

- Ask SNF to give the resident the SNF Notice of Exclusion from Medicare Benefits, SNF NEMB, to get into Medicare appeals system, http://www.cms.gov/Medicare/Medicare-General-Information/BNI/Downloads/CMS20014.pdf,
- Tell SNF resident is appealing.
- Make sure resident receives a Medicare-covered level of care.
WHAT TO DO IF THE PATIENT IS IN A SNF (cont’d)

- Two appeals necessary, both from Medicare Summary Notice (MSN), which beneficiaries receive quarterly and which list all health care charges submitted to Medicare.
  - Appeal hospital stay (listed on MSN under Part B)
  - Appeal SNF stay (therapy listed on MSN under Part B)
  (Alternatively, appeal non-coverage of SNF stay from SNF NEMB)
MEDICARE APPEALS

- Appeal from MSN, redetermination
- Reconsideration
- Administrative Law Judge
- Medicare Appeals Council
- Federal District Court
WHAT TO DO IF RESIDENT WENT TO SNF?

- Determine if resident received Medicare-covered level of care.
- If yes, request SNF NEMB or appeal from Medicare MSN if resident received therapy 5 days a week, billed to Part B.
- If resident did not receive Medicare-covered level of care, Medicare will not pay for stay. There is no point in appealing.
CMA SELF-HELP PACKET FOR APPEALS

  - Step-by-step instructions for appeals
LITIGATION

- *Jenkel* (individual case), successful
- Systemic litigation unsuccessful so far
**BAGNALL v. SEBELIUS, No. 3:11-cv-01703 (D. Conn., filed Nov. 3, 2011)**

- Nationwide class action, filed on behalf of 7 (later 12) individuals.
- Alleged that use of observation status violates the Medicare Act, Administrative Procedures Act, Due Process Clause.
- Sought injunctive and declaratory relief; notice and appeal rights.
- Court dismissed complaint, Sep. 23, 2013.
- Plaintiffs have appealed.
H.R. 1179, S. 569, the Improving Access to Medicare Coverage Act of 2013, would count all time in the hospital towards meeting 3-day qualifying hospital stay.

Coalition of 26 national organizations supports legislation; no opposition to legislation.

Primary Congressional concern about the bills: What is the Congressional Budget Office score? What is the cost of implementation?
UPDATES ON OBSERVATION STATUS

  - Lot of information: articles, reports, self-help packet
WHAT THE ACADEMY CAN DO

- Advocate with hospitals to give timely, accurate, and meaningful information to patients about their status and what it means for their hospital charges and post-hospital care.

- Evaluate the impact of observation status on your hospital and its patients and write up your findings for professional journals.
STATE ADVOCACY

- Sponsor/co-host a local public forum on observation status and its impact on patients, hospitals, the community.
- Support state legislation to give patients timely and accurate information.
- Write letters-to-the-editor or opinion pieces for local newspapers about observation status.
FEDERAL ADVOCACY

- Write your Senators and Representatives about your experience with observation status and ask them to sign on to S.569 and H.R.1179, respectively.
- Join the *ad hoc* national coalition supporting the federal legislation.
- Engage other national nursing organizations.
- Write letters-to-the-editor or opinion pieces for local newspapers about observation status.