OBER | KALER
Attorneys at Law

Payment Matters®
Update on Medicare and Medicaid Payment Issues

Subscribe | Payment Group | Payment Matters Archive

August 13, 2010

www.ober.com

IN THIS ISSUE

Editors: Leslie Demaree Goldsmith and Carel T. Hedlund

CMS Proposes Additional Changes to the Outpatient Physician Supervision Requirements

By: Thomas W. Coons

Over the past two years, CMS has implemented significant "clarifications" of, and changes to, its policies regarding supervision of diagnostic and therapeutic services furnished in hospital outpatient departments or, in some instances, furnished in non-hospital locations under arrangements. As those rules currently stand, for outpatient therapeutic services furnished in an outpatient department located "at the hospital," CMS requires that those services be directly supervised by either physicians or non-physician practitioners (NPPs) acting in accordance with state law, with the physician or NPP being present on the hospital campus and immediately available to furnish assistance and direction through the performance of the procedure. If the service is furnished in an off-campus hospital location, the supervisory personnel must be physically present in the off-campus provider-based department and immediately available to furnish assistance and direction throughout the performance of the procedure.

Hospital diagnostic services are subject to similar rules. Hospital diagnostic services provided directly or under arrangement — whether provided in the hospital, in a provider-based department of a hospital, or at a non-hospital location — must comply with physician supervision for individual tests listed in the Medicare Physician Fee Schedule relative value file. Unlike what is required for therapeutic services, if the diagnostic test requires direct supervision, a physician — not an NPP — must perform that supervision. For tests that require direct supervision and that are performed at the hospital, a supervising physician must be on the same campus and immediately available to furnish assistance and direction; if the service is provided in an off-campus hospital location, the physician must be physically present in the provider-based department in which the test is being performed.

In the recently published outpatient PPS proposed rule, 75 Fed. Reg. 46170, 46302-46310 (Aug. 3, 2010) CMS reiterates these requirements. It also states, however, that it has been informed by the regulated community that direct supervision is not clinically necessary for some services that have a significant monitoring component, which component is typically performed by nursing or other auxiliary staff. Responding to these comments, CMS is proposing to identify a limited set of services that have a "significant monitoring component that can extend to a sizeable period of time, that are not surgical, and that typically have a low risk of complication after assessment at the beginning of the service." These "non-surgical extended duration therapeutic services," CMS proposes, would be subject to direct supervision for the "initiation of the service," but would be followed by a requirement for general supervision for the remainder of the service.

CMS proposes to define "initiation of the service" as the beginning portion of a service ending when the patient is stable and the supervising physician or NPP believes that the remainder of the service can be delivered safely and under the physician's or NPP's general direction and control without the need for the physician or NPP to be physically present on the hospital campus or in the provider-based department of the hospital. Services that would qualify for this treatment would have to be of extended duration (frequently extending beyond normal business hours) with a significant monitoring component typically conducted by nursing and auxiliary staff, and the services would have to be of sufficient low risk that the service would typically not require direct supervision during the service.

CMS has prepared a list of proposed non-surgical extended duration services, which list includes certain observation services; certain intravenous infusion and subcutaneous infusion services; certain therapeutic, prophylactic, and diagnostic injections; and certain observation services. CMS has not included in its proposed list surgical services that include recovery time, given that monitoring of any patient is a key component of the surgery. Nor has CMS included chemotherapy or blood transfusions in the proposed list of non-surgical extended duration therapy services. The agency states that those services would require the physician's or NPP's recurrent physical presence in order to evaluate the patient's condition.

Having said that, CMS also has requested public comment on whether hospitals could craft, maintain, and implement internal guidelines concerning supervision, and whether general supervision would be clinically appropriate and safe for chemotherapy, blood transfusions, and similar services.

Comments on the proposed policy will be accepted through August 31, 2010. Providers should seriously consider providing clinical insight into whether services other than the proposed services might qualify for treatment as non-surgical extended duration therapeutic services.

Ober|Kaler's Comments

While many may disagree with CMS's basic position that the vast majority of therapeutic and diagnostic services performed in a hospital need to be subject to physician or, in some instances, NPP supervision, it is plain that this policy is here to stay. What we can hope for, therefore, is that CMS will be judicious in its application of the supervision policies and be willing to soften those policies where appropriate. The proposed rule, in our view, evidences such treatment by CMS.