

## **GROWING CONFUSION**

### ***The Eight-Month Peril***

by

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No rule or regulation issued by CMS has caused inpatient rehabilitation providers more confusion and controversy than the “75 percent rule” for qualifying as an inpatient rehabilitation facility (“IRF”). In July 2002, CMS suspended enforcement of the 75 percent rule. The moratorium on enforcement remained in effect until CMS finalized revisions to the 75 percent rule which went into effect for each IRF’s cost reporting period beginning on or after July 1, 2004.

#### **The “New” 75 Percent Rule**

Since its implementation in 1983, the inpatient acute care hospital PPS has exempted from its provisions freestanding rehabilitation hospitals and inpatient rehabilitation units of general hospitals that meet certain criteria. One these criteria is that 75 percent of the exempt hospital’s or unit’s patients, during its most recent twelve-month cost reporting period, must have a diagnosis that falls into one or more categories. The “new” 75 percent rule retains nine of the diagnosis categories that have been included in the rule since it was first implemented:

- Stroke
- Spinal cord injury
- Congenital deformity
- Amputation
- Major multiple trauma
- Fracture of femur (hip fracture)
- Brain injury
- Neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease
- Burns<sup>1</sup>

Newly added to the 75 percent rule are provisions:

- Replacing the former diagnosis category of “polyarthritis” with three groups of conditions that will more precisely identify the types of arthritis related conditions appropriate for care in a rehabilitation facility. As a result there are now 12 qualifying conditions.
- Continuing to use the facility’s total patient population to determine compliance with the applicable percentage. However, the rule

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<sup>1</sup> 42 C.F.R. §§ 412.23(b)(2), 412.29(a), 412.30(b),(c).

establishes an administrative presumption that if the facility's Medicare patient population complies with the rule, the facility's total population complies.

- Counting secondary medical conditions that meet one of the 12 proposed conditions toward the applicable percentage. However, this method of compliance with the 75 percent rule disappears with the IRF's first cost reporting period beginning on or after July 1, 2007.

The most controversial addition to the new rule, however, was a special provision dealing with knee and hip replacements. CMS placed in the final rule a provision for hip and knee replacements counts hip or knee replacements count as qualifying conditions if one of the following three requirements is satisfied:

1. The patient underwent a bilateral hip or knee replacement during an inpatient hospital stay immediately preceding the IRF admission;
2. The patient is extremely obese, with a Body Mass Index of at least 50 at the time of admission to the IRF; or
3. The patient is age 85 or older at the time of admission to the IRF.

In order to give IRFs time to comply with the new provisions, CMS also introduced a graduated scale for the percentage of admissions that are required to meet one or more of the qualifying conditions:

1. 50 percent for cost reporting periods beginning on or after July 1, 2004 and before July 1, 2005;
2. 60 percent for cost reporting periods beginning on or after July 1, 2005 and before July 1, 2006;
3. 65 percent for cost reporting periods beginning on or after July 1, 2006 and before July 1, 2007; and
4. 75 percent for cost reporting periods beginning on or after July 1, 2007.

### **Adding to the Confusion**

Unsatisfied with CMS' solution, the provider community turned to Congress. The resulting Congressional action, however, has only added to the confusion over the current status of the 75 percent rule. Congress included a provision in the Consolidated Appropriations Act of 2005, enacted at the end of 2004, that prohibits CMS from revoking the Medicare certification of any IRF certified prior to June 30, 2004, on the basis of non-compliance with the 75 percent rule, until not later than 60 days after the Government Accountability Office ("GAO") issues a report on the clinical appropriateness of the diagnosis categories listed in the rule and the Secretary of Health and Human Services either determines that the report is not inconsistent with the rule as written or immediately issues a new interim rule consistent with the report. Although the GAO report was expected in January, it had still not been published as of the second week of March. In the mean time, CMS has stated that it plans to have fiscal intermediaries proceed

with enforcement audits under the rule, delaying only the consequences of a finding of non-compliance—decertification—until after the GAO report is issued.

### **The Eight-Month Peril**

If the Congressional and regulatory situations were not dangerous enough for the unwary IRF, CMS' instructions to fiscal intermediaries and providers on the methodology for conducting compliance reviews under the 75 percent rule have created an imminent peril for certain IRFs that have delayed their compliance efforts in the expectation of Congressional relief. Although compliance determinations will apply at the beginning of each IRF's next cost reporting period, the 12-month review period will overlap current and preceding cost reporting periods. CMS' rationale for the overlap is that the fiscal intermediary will need four months to review the facility's data and make a compliance determination. Thus, for example, if an IRF's cost reporting period begins on September 1, 2006, the fiscal intermediary will count back four months and use the period from May 1, 2005 through April 30, 2006 as the compliance review period.

Although CMS' chosen methodology may be confusing, for cost reporting periods beginning on or after November 1, 2004, it at least tracks the language of the rule, providing for a full 12-month review period. For IRF's with cost reporting periods beginning from July 1, 2004 through October 1, 2004, however, CMS has chosen a questionable and highly perilous review methodology for the initial compliance review period. Because the new diagnosis categories did not take effect prior to July 1, 2004, CMS has determined that it cannot use data from any IRF prior to that date. Therefore, no compliance review period can begin before July 1, 2004. At the same time, CMS insists that the fiscal intermediary must have the full four-month period prior to the start of the facility's next cost reporting period for making its compliance determination. As a result, IRFs with cost reporting periods beginning between July and October face drastically shortened compliance review periods. For facilities with cost reporting periods beginning on July 1, 2004, the initial compliance review period is only eight months: July 1, 2004 through February 28, 2005. For facilities with cost reporting periods beginning August 1, 2004, the initial compliance review period expands to nine months, July 1, 2004, through March 31, 2005. Only those facilities whose cost reporting periods begin on November 1, 2004 or after will be afforded a full twelve-month initial review period. The effective result of this methodology is that not only will those facilities whose cost reporting period begins on July 1<sup>st</sup> have just an eight-month window in which to demonstrate compliance with the 50 percent level of the rule, the time period in which they need to demonstrate that compliance has already passed, ending on February 28, 2005.

For those IRFs who have delayed compliance with the new rule in the expectation that a moratorium on enforcement was continuing or that further Congressional action was in the offing, the imminent peril is obviously great.

Barring an unexpected conclusion in the GAO report that the 75 percent rule, as written, is clinically inappropriate, these facilities face loss of their IRF certification, with no opportunity for correction, as early as July 1<sup>st</sup> of this year.

The best hope for these facilities may lie in the language of the 75 percent rule itself. The rule, as written, requires compliance to be measured over the course of a cost reporting period—a full twelve months. By adopting an enforcement methodology that shortens the review period by as much as four months, CMS seems to be disregarding the language of its own rule. Doubtless IRFs that feel the sting of this determination will put that methodology to the test in the courts. That, of course, will only serve to extend the confusion and uncertainty that has always gone hand-in-hand with CMS' 75 percent rule.

About the Author:

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