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Administrative Law Judges Offer Hospitals An Appeals Shortcut With Risks, Rewards

Administrative law judges (ALJs) are asking some hospitals if they're willing to skip hearings on appeals of claims denials for inpatient admissions and instead accept outpatient payments, *RMC* has learned. ALJs are apparently trying to cut to the chase and reduce their paralyzing workload, but it may be risky for hospitals to accept the
offer because hearings are where they bring the cases to life, compliance experts say.

The ALJs are proposing this to hospitals that have appealed RAC denials of Part A claims that were deemed medically unnecessary in terms of the site of service. Hospitals in this position lost the first two levels of appeal — at Medicare administrative contractors (MACs) and qualified independent contractors (QICs) — and have now prevailed upon the ALJs for relief. But with more than 40,000 appeals pending before ALJs *(RMC 12/10/12, p. 1)*, they have devised a potential shortcut. If hospitals are "amenable," ALJs are offering them "partially favorable decisions under Medicare Part B," according to an offer spelled out in letters from the Office of Medicare Hearings and Appeals (OMHA). The letters were sent by different regions of OMHA to a compliance firm representing hospitals in their appeals.

A letter from the OMHA Western Field Office states that "the claim would be paid as an 'outpatient observation' claim, assuming that a determination can be made that the services were medically reasonable and necessary." The decision would be made on the record based on documentation but without a hearing with the interested parties, including the RAC, the hospital and perhaps CMS, the letter states.

"I understand why they are doing it," says Colleen Dailey, clinical coordinator of defense audits for WellSpan Health in York, Pa., which is the subject of one letter from the Office of Medicare Hearings and Appeals. ALJs could review the appeals in their own time and render decisions on paperwork alone rather than schedule hearings, which require coordinating everyone's schedules, swearing people in and hearing them out. "But a lot of facts come out at the hearing," Dailey says. While all the arguments are on the record beforehand, the interaction during the hearing seems to make a big difference to the outcome. "ALJs ask all these questions because they are not medical people. 'How does ejection fraction of 15% affect the risk of patients? What does CHF mean?' 75% of our ALJ hearings have been fully favorable because we go to hearings for just about everything," she says. "This precludes that opportunity and that's my only beef with it."

The ALJ letter makes it clear that hospitals' hands are not tied. They don't have to agree to a partially favorable decision with no hearing, but if they do, they could still pursue the full Part A payment to the highest HHS administrative appeals tribunal, the Medicare Appeals Council, says Steven Greenspan, vice president of regulatory affairs at Executive Health Resources in Newtown Square, Pa. If hospitals win, the Part B payment awarded by the ALJ would be deducted from the Part A payment, he says. And the ALJ could always reverse the QIC and uphold the Part A payment, Dailey notes.

Will Hospital Credibility Be Harmed?

Greenspan also thinks the ALJs are reaching out to hospitals in an effort to manage their skyrocketing caseload *(RMC 12/17/12, p. 1)*. But there's a risk to going along with their proposal, he says. Hospitals may "seem disingenuous" if they accept the Part B offer after insisting through their MAC and QIC appeals that their Part A inpatient claims were medically necessary, Greenspan says. Even worse, "what would the OIG say?" And it's even more suspect if hospitals go before the Medicare Appeals Council and argue for the legitimacy of their admission after already accepting the observation payment.

But this partially favorable prehearing decision could help hospitals as they pursue full reimbursement before the Medicare Appeals Council, Greenspan says. "ALJs will spell out the deficiencies in the case and how they think it's only appropriate for Part B," he notes. "It arms you with ammunition."

There are some technical problems with the ALJs' offer. The letter from the Office of Medicare Hearings and Appeals states that the offer applies only if beneficiaries have coverage under fee-for-service Medicare Part B. But "we are finding these patients may not even have Medicare Part B," Dailey says. They may have Medicare Advantage for outpatient services or AARP.

WellSpan doesn't want to accept the lower payment for observation services offered by the ALJs unless forced to, Dailey says. It has already prepared its appeals and is ready for the hearing and there isn't much incentive to go along with the ALJ's proposal. "How practical is it for everyone to take this opportunity to say they would be amenable to on-the-record, partially favorable decisions?" Again, though, she understands the motive behind the ALJs' offer. After all, WellSpan has cases that have been waiting 18 months to be scheduled on the ALJ docket. And delays have gotten worse since ALJs late last year began remanding cases to the QICs with instructions to consider Part B payment after Part A denials. ALJs want more information about denials, including the offset amount *(RMC 12/17/12, p. 5)*.

"ALJs are offering a good argument that the QICs don't give them enough information about whether this case should be paid under Part A or Part B and what the payment would be if it were inpatient or outpatient," Dailey says. But that delays the outcomes of appeals another year.

Dailey doesn't think CMS expected an appeal tsunami from providers or so much resistance to overpayment determinations. "I think they expected us to roll over so they could scratch our bellies."

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