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MEMORANDUM

TO: RHCF Members

FROM: Patrick Cucinelli, Senior Financial Policy Analyst

DATE: November 16, 2009

SUBJECT: **Important Bed Hold Audit Hearing Decision**

ROUTE TO: Administrator, CFO, Corporate Compliance Officer

ABSTRACT: ALJ decision refutes OMIG bed hold audit findings.

Introduction

Good news! In a September 8, 2009 *Decision after Hearing in the Matter of the Request of Metropolitan Jewish Geriatric Center* (see attached), the Administrative Law Judge (ALJ) found in favor of the appellant nursing home, in a case which could set an important precedent in combating the Office of Medicaid Inspector General's (OMIG's) bed hold audit methodology.

Background

In 2006, OMIG began a series of bed hold audits focused on determining whether nursing homes possessed documentation from the hospital confirming the expected length of the resident's stay in the hospital. The associated audit findings concerned whether residents were expected to return to the nursing home within 15 days. According to regulations at 18 NYCRR Section 505.9(6)(i)(c):

“(c) the hospital discharge planning coordinator must notify the institution of the recipient's planned discharge date by the morning of the 4th day of hospital care. The hospital discharge planning coordinator must also notify the institution by telephone if the recipient's planned discharge date must be adjusted after the 3rd and before the 16th day of hospital care because his or her condition has changed or additional medical information has become available. The hospital discharge planning coordinator must confirm in writing all bed reservation telephone communications.”

When the Department of Health (DOH) eliminated the need for local social services districts to pre-approve bed holds several years ago, the official form used by the hospital to document the need to extend bed holds beyond 15 days was also eliminated. With the elimination of the form, it became general practice for the hospital to not provide the nursing home with official documentation on bed hold extensions.

In this series of audits, OMIG seized upon this technical flaw in the process and has sought to make nursing homes solely and financially accountable for what is in reality an unclear process as administered by DOH and a regulatory responsibility of the hospital.

ALJ Decision

This is exactly the finding of the ALJ in this case. In particular, the ALJ found that:

1. The regulatory responsibility for providing written notice of the bed hold extension falls solely on the hospital, and the nursing home has no means of coercing the hospital into compliance;
2. The nursing home has no recourse but to continue the bed hold since the failure of the hospital to provide written notice does not constitute justification for the nursing home to discontinue the bed hold; and
3. As long as the nursing home is maintaining proper census, admissions/discharge, and clinical records, it has met its regulatory requirements and should not be penalized.

Providers should review the attached ALJ finding for more details. The ALJ decision is binding on OMIG in this particular case, and there is no further appeal which OMIG can pursue.

Implications

While this finding applies solely to this particular case, it establishes a strong precedent that may help provide relief to other facilities seeking to dispute similar audit findings. It may also give OMIG some pause to re-think their overly aggressive and blatantly unfair approach to these audits. This case also represents one of the first instances in which OMIG's interpretation of regulation has been refuted by an objective legal authority, and may hold promise in other instances in which we believe OMIG interpretations are inconsistent with regulation. NYAHSAs are carefully reviewing the decision and will be consulting with legal counsel on the best way to leverage this finding on behalf of our members.

Final Note

NYAHSAs also wishes to note that key testimony in this case was provided by Elliott Frost, who is a senior policy analyst with NYAHSAs. Elliott's testimony was critical because during the time period covered by the audits he was in charge of DOH's bed hold policies and procedures. The ALJ specifically states: "I have determined based upon the plain language of the regulation and the testimony of Mr. Frost that Appellant was not required to obtain this documentation from the hospital." NYAHSAs commends the ALJ for giving due consideration to Elliott's testimony, given his former key role in administering the bed hold program.

Please contact me at pcucinelli@nyahsa.org, or call 518-449-2707 ext. 145, with any further questions; or Elliott Frost at efrost@nyahsa.org or ext. 140.

Attachment

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