

CMS'S PROPOSED RULE CLARIFIES ENROLLEES' MEDICARE ADVANTAGE APPEAL RIGHTS FOR INPATIENT ADMISSIONS AND LEVEL OF CARE DETERMINATIONS

On November 26, 2024, the Centers for Medicare & Medicaid Services ("CMS") released a **proposed rule** that revises the Medicare Advantage ("MA") Program, Medicare Prescription Drug Benefit Program ("Part D"), Medicare Cost Plan Program and Programs of All-Inclusive Care for the Elderly for the Contract Year 2026 ("Proposed Rule"). The Proposed Rule clarifies the definition of an organization determination that triggers enrollees' notice and appeal rights, strengthens notice requirements and eliminates MA discretion to reopen approved authorizations.

APPLICABILITY OF APPEALS WHEN "NO FURTHER FINANCIAL LIABILITY"

A longstanding MA appeals rule states that when an enrollee receives plan-directed care from a contracted provider, the enrollee cannot be financially liable for more than the applicable cost-sharing for that service and accordingly, the decision is not subject to the appeal requirements of **42 C.F.R. 422, Subpart M**. The Proposed Rule clarifies the application of this provision.

First, CMS explains that the limitation only applies to contracted (i.e., in-network) provider payment disputes arising from a claim payment decision in which the enrollee has no additional financial liability. CMS notes that it has found some MA organizations ("MAOs") improperly label adverse coverage decisions as "contractual denials" or "payment decisions" even when a claim has not yet been submitted or the services are still being rendered at the time of the MAO's decision. CMS clarifies that this is inappropriate because an enrollee may still be potentially liable to pay for a service until the MAO makes a determination following the submission of a provider's claim for the furnished service.

Second, CMS notes that some MAOs have misapplied this appeal limitation to noncontractual, out-of-network services, particularly to decisions about an enrollee's inpatient admission, type of services rendered and level of care or duration of services—all of which CMS considers *coverage* decisions about which an enrollee has a right to notice of termination or reduction in services and the right to appeal, as distinguished from *payment* decisions between the MAO and the provider.

DEFINITION OF MAO ORGANIZATION DETERMINATION

CMS expands the interpretation of an organization determination to include when an MAO makes a coverage decision on inpatient admission and service (as noted above) contemporaneously with an enrollee's receipt of the services at issue. This means an organization determination may be made prior to the receipt of services (e.g., prior authorization), after the receipt of services (e.g., payment requests) or during receipt of services (e.g., continuation or termination of services, often referred to as "concurrent review") which the enrollee receives from either contracted or non-contracted providers, and that the enrollee, physician or other person acting on behalf of the enrollee has a right to receive notice of the decision and right to appeal.

CMS observes that some MAOs have misinterpreted the organization determination provisions to exclude decisions that rescind a previously authorized inpatient admission, deny coverage for inpatient services or downgrade an enrollee's hospital coverage from inpatient to outpatient while the enrollee is still receiving such services. This sometimes occurs when an enrollee is admitted to the hospital as an inpatient and the hospital alerts the MAO of the admission but does not request approval. The MAO denies inpatient admission because certain coverage criteria have not been met. When the hospital ultimately submits a claim, the MAO denies payment but does not inform the enrollee of the determination nor provide the enrollee with the required appeal rights.

Similarly, a physician may request expedited reconsideration of an adverse concurrent decision but the MAO will determine that the organization determination is a "contractual denial" in an in-network facility, the provider must accept contractual payment in full, and the determination is non-appealable. CMS has addressed these issues on a case-by-case basis in the past but notes that it is now revising **42 CFR § 422.566(b)(3)** of the regulation to clarify that a decision by an MAO made "pre-service, post-service, or concurrent with the enrollee's receipt of services in an inpatient or outpatient setting" is an *organization determination* and the enrollee (and provider, as appropriate) must be given timely notice of the decision to downgrade their level of care and an opportunity to appeal.

LIMITING REOPENING RULES FOR APPROVED DECISIONS

Similarly, if the MAO approved services through a prior authorization or pre-service determination, it may not deny coverage later on the basis of lack of medical necessity or additional clinical information obtained after the initial organization determination because the determination was made based on what was known and documented at the time of admission.

PRACTICAL TAKEAWAYS

- An enrollee of an MAO may appeal disputes regarding in-network coverage decisions, including inpatient admissions, changes in level of care and type of or duration of services.
- An enrollee may not appeal in-network contractual payment disputes in which the enrollee has no additional financial liability.
- An MAO's decision on in-network or out-of-network "pre-service, post-service, or concurrent with the enrollee's receipt of services in an inpatient or outpatient setting" is an organization determination and the enrollee (and provider, as appropriate) must be given timely notice of the decision and an opportunity to appeal.
- An MAO may not reopen a prior authorization or pre-service approval of medical services.

CMS is taking comments on the Proposed Rule until **5:00 PM ET, January 27, 2025**.

Should you like to submit comments on the Proposed Rule, CMS provides instructions at the beginning of the Proposed Rule. Hall Render is here to assist you in drafting or submitting your comments.

If you have any questions on this topic, please contact:

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