CMS Finalizes Home Health Face-to-Face Encounter Rule

By

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On November 2, 2010, the Centers for Medicare & Medicaid Services ("CMS") published, as part of a Final Rule entitled “Medicare Program; Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices”, (“Final Rule”). The Final Rule encompasses a number of new regulations addressing the provision of home health and hospice services, including a new home health requirement for a face-to-face encounter during the initial certification and amends, in part, the home health Conditions for Payment provisions of 42 CFR §424.22. The face-to-face encounter rule is effective on and after January 1, 2011.

The face-to-face encounter provisions were promulgated in accordance with the Patient Protection and Affordable Care Act ("ACA") requirements designed to “achieve greater physician accountability in certifying a patient’s eligibility [for home health] and establishing a patient’s plan of care.” The draft face-to-face encounter rule was published on July 23, 2010 with comments extending through September 14, 2010. CMS recognized the merit in some of the comments submitted by the home health industry and, as a result, made several changes to the Final Rule and clarified a number of issues in the comments and responses.

The Final Rule adds a fifth requirement for the content provisions of home health certifications, as a Medicare condition for payment. The four current provisions, found at §424.22(a), require, in part, that a physician must certify:

1. The individual needs or needed intermittent skilled nursing care, or physical or speech therapy;
2. Home health services were required because the individual was confined to home except when receiving outpatient services;
3. A plan for furnishing the services has been established and periodically reviewed by a physician who is not otherwise precluded because of an unallowable financial relationship with the home health agency; and
4. The services were furnished while the individual was under the care of a physician.

The Final Rule amends §424.22, in part, by adding a fifth component, which is the face-to-face encounter rule.
**Face-to-Face Encounter Rule**

The home health face-to-face encounter rule generally requires that the certifying physician document that a face-to-face patient encounter has occurred not more than 90 days prior to, or within 30 days of, the home health start of care date. The encounter must be performed by either the certifying physician or permitted non-physician practitioner (“NPP”) including a nurse practitioner or clinical nurse specialist, who is working in collaboration with the physician in accordance with State law, or a certified nurse mid-wife or a physician assistant under the supervision of the physician.

The certifying physician must document the face-to-face encounter on the certification itself (or as an addendum to the certification) and such documentation must indicate that the condition for which the patient was being treated in the face-to-face encounter is related to the primary reason the patient requires home health services, and why the clinical findings of the encounter support the homebound status of the patient and the need for intermittent skilled nursing or therapy services. In addition, the documentation must be clearly titled, dated and signed by the certifying physician.

In the event a NPP performs the encounter, he or she must document the clinical findings of the encounter and communicate those findings to the certifying physician for certification. In the event a face-to-face encounter occurred within 90 days of the start of care date, but is not related to the primary reason the patient requires home health services (or in the event the patient was not seen at all during this 90 day period), a face-to-face encounter by the certifying physician or NPP must occur within 30 days of the start of home health care. The regulations also allow the encounter to occur through telehealth at originating sites (subject to requirements in section 1834(m).

Other amendments to §424.22 include:

- The home health certification and recertification must be signed and dated by the physician who certifies the plan of care (§424.22(a)(2) and (b)(1)); and

- New provisions under the Limitation on the Performance of Certification and Plan of Treatment Functions prohibiting those physicians and NPPs who have a financial relationship with the home health agency from conducting the face-to-face encounter unless the financial relationship falls within an exception. (§424.22(d)(1) and (2)). (Stark and anti-kickback rules apply - including exceptions and safe harbors. The home health agency is prohibited from hiring physicians or non-physician practitioners to perform the face-to-face encounter. For example, a home health agency may have a Medical Director whom they pay for Medical Director duties while adhering to Stark and anti-kickback rules. That Medical Director may also have his own patients who receive home health services. The Medical Director may conduct those encounters for his own patients – but may not be hired by the home health agency to provide encounters for other patients.)
Responses to Comments

In its response to comments submitted by the home health industry, CMS addressed a number of issues associated with the face-to-face encounter rule and clarified, at least in part, its intent with some of its provisions. These clarifications include:

- The home health face-to-face encounter requirements apply only to the initial certification.

- The timeframes were revised in the Final Rule to address access to care risks, especially in rural areas. The Final Rule allows the encounter to occur up to 90 days prior to the start of care, if the reason for the encounter is related to the reason the patient needs home health care. If no such encounter has occurred, the encounter may occur up to 30 days after the start of care.

- With regards to concerns surrounding the enforcement of the requirement that the face-to-face encounter be related to the reason the patient needs home health care, CMS states that “…it is not our intent that those who enforce the provision would take such a literal interpretation to look for a cause and effect relationship between a diagnosis on the physician’s claim and the diagnosis on the HH claim. Instead, it is our intent that should a patient’s clinical condition change significantly between the time of the encounter and the start of home health care such that the physician’s or NPP’s ability to accurately assess eligibility and care plan would be at risk, a more current encounter would be necessary in order to meet the goals of the requirement.” CMS will expand on this requirement in program manual guidance.

- To help ensure that a face-to-face encounter occurs during the required timeframe, CMS will issue instructions to medical review contractors. There will also be program integrity and survey oversight measures to ensure compliance with the new rule.

- Partial payments will not apply if the encounter is outside the required timeframe.

- There may be instances when a hospital physician conducts and documents the face-to-face to encounter and certifies the patient’s home health eligibility then turns the patient over to a community-based physician who then assumes responsibility for the patient. It is the home health agency’s responsibility to ensure that the certifying physician document the encounter; however, the certifying physician may or may not be the physician who continues to follow the patient. We expect that CMS will clarify further the role of the hospitalist and other institutional physicians. There is also an expectation by CMS that in these situations the community physician is identified in the hospital discharge plan.
• Home health agencies may not deliver an HHABN describing the patient’s possible financial liability in the event the face-to-face encounter does not occur as required. The home health agency assumes the risk for ensuring the rule is followed.

• CMS opposes standardized language for the physician to sign and date following the encounter because such language would be contrary to the “statutory payment requirements that the ‘physician document’ the encounter.”

• There are no “without fault” provisions for failing to meet the encounter requirements; however, CMS revised the Final Rule to clarify that CMS is not holding the home health agency responsible for the physician’s own medical record documentation of the encounter, only the physician’s documentation as part of the certification.

• The face-to-face encounter may be made at a telehealth originating site without jeopardizing the patient’s homebound status because the patient would be leaving home for health care treatment. It is important to note that the patient’s home is not, under the federal rules, a telehealth originating site.

• Physicians must date the certification as this reflects long-standing program manual guidance.

• CMS will allow RAP payments, as they currently do, while the home health agency is waiting for the physician to complete the certification.

• If the patient refuses to have a face-to-face encounter with the physician or NPP, “CMS would question whether the patient was legitimately under the care of the physician” as required by the Medicare home health benefit.

In addition to amending home health certification requirements as discussed above, the Final Rule also includes new home health therapy skilled services requirements, requirements for establishing and maintaining Medicare home health billing privileges, patient assessment data requirements and capitalization requirements for home health agencies. Home health agencies should be aware of the many new regulatory requirements that will be effecting them over the coming months and take steps now to ensure compliance.

This report was prepared for the Association of Home and Hospice Care of North Carolina and the South Carolina Home Care and Hospice Association by Michael Hale, RN, JD and does not constitute, and should not be construed as, legal advice.
**Telehealth Originating Site**

*Social Security Act - Sec.1834. 42 U.S.C.*

(C) Originating site.—

(i) In general.—The term “originating site” means only those sites described in clause (ii) at which the eligible telehealth individual is located at the time the service is furnished via a telecommunications system and only if such site is located—

(I) in an area that is designated as a rural health professional shortage area under section 332(a)(1)(A) of the Public Health Service Act (42 U.S.C. 254e(a)(1)(A));

(II) in a county that is not included in a Metropolitan Statistical Area; or

(III) from an entity that participates in a Federal telemedicine demonstration project that has been approved by (or receives funding from) the Secretary of Health and Human Services as of December 31, 2000.

(ii) Sites described.—The sites referred to in clause (i) are the following sites:

(I) The office of a physician or practitioner.

(II) A critical access hospital (as defined in section 1861(mm)(1)).

(III) A rural health clinic (as defined in section 1861(aa)(2)).

(IV) A Federally qualified health center (as defined in section 1861(aa)(4)).

(V) A hospital (as defined in section 1861(e)).

(VI) A hospital-based or critical access hospital-based renal dialysis center (including satellites).

(VII) A skilled nursing facility (as defined in section 1819(a)).

(VIII) A community mental health center (as defined in section 1861(ff)(3)(B))