
CMS “Clarifies” Direct Supervision Requirement for Hospital Outpatient Therapeutic Services

by Lee W. Kuo*

On November 18, 2008, the Centers for Medicare & Medicaid Services (“CMS”) published its 2009 Outpatient Prospective Payment System Final Rule (the “2009 OPPS Final Rule”) which became effective on January 1, 2009. In the 2009 OPPS Final Rule, CMS issued a clarification of the physician supervision requirement for outpatient hospital therapeutic services. In essence, CMS clarified that the direct physician supervision requirement must be met for outpatient therapeutic services furnished in the hospital and in both off-campus and on-campus provider-based departments of a hospital. Although positioned as a restatement and clarification of what CMS views has been a requirement since the supervision requirement rules were set in place in 2000, many are viewing CMS’s “clarification” that direct physician supervision is required for on-campus department locations as a new requirement.

Background: CMS Fearful of a Misunderstanding

Medicare Part B regulations authorize payment for outpatient hospital services and supplies provided “incident to” physician services. Because outpatient hospital therapeutic services and supplies are provided “incident to” physician services, such services and supplies must meet Medicare’s “incident to” rules and conditions for payment. One of the conditions for payment is that the services and supplies must be furnished under the direct supervision of a physician. Medicare regulations define “direct supervision” to

mean that “the physician must be present and on the premises of the location and immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room when the procedure is performed.”

CMS first required direct physician supervision as a condition to outpatient hospital services and supplies provided incident to physician services in its 2000 Outpatient Prospective Payment System Final Rule (“2000 OPPS Final Rule”). In the 2000 OPPS Final Rule, CMS made several comments regarding the direct physician supervision requirement.

In one comment, CMS emphasized that the direct physician supervision requirement applies to services furnished at an entity located off-campus designated by CMS as having provider-based status as a department of the hospital. In another comment, CMS stated that the direct supervision requirement “does not apply to services furnished in a department of a hospital that is located on the campus of that hospital. For hospital services furnished incident to a physician service to outpatients in a department of a hospital that is located on the campus of the hospital, we assume the direct supervision requirement to be met....” CMS continued further, stating that it assumed that “the physician supervision requirement is met on hospital premises because staff physicians would always be nearby within the hospital.”

2009 OPPS Final Rule Offers Clarification: Direct Physician Supervision is Required for All Outpatient Therapeutic Services

Concerned that some providers may have misunderstood CMS's assumption that the direct physician supervision requirement is met on hospital premises to mean that no supervision was required in a hospital or in an on-campus provider-based department, or, that only general supervision was required for those services, CMS issued its clarification to make clear that this was not its intent. In the 2009 OPPS Final Rule, CMS states: "It has been our expectation that hospital outpatient therapeutic services are provided under the direct supervision of physicians in the hospital and in all provider-based departments of the hospital, specifically both on-campus and off-campus departments of the hospital." CMS insists that its clarifications regarding the direct supervision requirement for outpatient therapeutic services is not a change in its policy or rules, but only a clarification to assist providers who may have previously misunderstood the policy.

In the 2009 OPPS Final Rule, CMS explains its assumption that the direct physician supervision would always be met in hospitals by noting that a physician would always be nearby in hospitals, thus satisfying the direct physician supervision requirement. CMS further offered that its references to only off-campus departments in the 2000 OPPS Final Rule were not because the direct physician supervision requirement was not applicable to on-campus departments, but because CMS's focus of the direct physician supervision requirement was on off-campus provider-based departments. In the 2009 OPPS Final Rule, CMS clarifies that it will continue to emphasize the direct physician supervision requirement for off-campus provider-based departments, but definitively noted its expectation that all hospital outpatient therapeutic services, regardless of their on-campus or off-campus location, must meet the direct physician supervision requirement.

Hospitals Should Ensure Direct Physician Supervision of Outpatient Therapeutic Services Furnished at On-Campus and Off-Campus Locations

The 2009 OPPS Final Rule makes clear that direct physician supervision is the standard for the supervision of hospital outpatient therapeutic services covered and paid by Medicare furnished in hospitals and all provider based departments of hospitals. Although the 2009 OPPS Final Rule took effect on January 1, 2009, CMS's position is that the direct supervision requirement for hospital outpatient therapeutic services has been in effect since the effective date of the 2000 OPPS Final Rule. Therefore, regardless of whether CMS's clarification is a new requirement or a restatement of an existing requirement, hospitals should ensure that physicians are directly supervising hospital outpatient therapeutic services furnished at both off-campus and on-campus provider-based hospital departments to ensure their compliance with Medicare reimbursement requirements for such services.

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