

Outpatient Observation Status

medicareadvocacy.org/medicare-info/observation-status



The Center is part of a coalition of organizations fighting the continued harm caused by Observation Status through advocacy and education, efforts which will be greatly enhanced by our work with the John A. Hartford foundation.

In addition, The Center for Medicare Advocacy, along with co-counsel Justice in Aging and Wilson Sonsini Goodrich & Rosati, is pursuing a nationwide class action lawsuit that seeks to establish a way to appeal placement on observation status to Medicare (the case is currently known as *Alexander v. Azar*, 3:11-cv-1703, U.S. District Court, Connecticut). If you are a Medicare beneficiary who received “observation services” in a hospital since January 1, 2009, and either did not have Medicare Part B, or, were hospitalized for at least three consecutive days but not three days *as an inpatient*, you may be a member of the class. **No action is required to “join” the class. If you meet the class definition, you are in the class (note that the class definition is subject to change).** We recommend that you save any paperwork relating to your observation status hospitalization and costs that may have resulted from it. We also encourage you to share your observation status story [here](#) and to [sign up for our Alerts](#) to receive news about important developments in the case.

Court Denies All Government Motions in Class Action Seeking an Appeal Right for Medicare Beneficiaries on “Observation Status.”

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Submit your own Observation Status story

The video below, created by by [Francis Ying](#), [Thu Nguyen](#) and [Lynne Shallcross](#) and published on [Kaiser Health News](#) on August 29, 2016, offers a basic introduction to the problem of Observation Status.

QUICK SCREEN FOR HOSPITAL OBSERVATION STATUS

Observation Status is a designation used by hospitals to bill Medicare. Unfortunately, it can hurt hospital patients who rely on Medicare for their health care coverage.

People who receive care in hospitals, even overnight and for several days, may learn they have not actually been admitted as inpatients. Instead, the hospital has classified them as Observation Status, which is an “outpatient” category. This designation can happen even for people who are extremely sick and spend many days in the hospital. For example, we have heard from people with recent hip and pelvic fractures who were designated as Observation Status.

Since March 8, 2017, hospitals have been required to give patients the Medicare Outpatient Observation Notice (MOON) within 36 hours if the patients are receiving “observation services as an outpatient” for 24 hours. Hospitals must also orally explain observation status and its financial consequences for patients. The MOON cannot be appealed to Medicare.

Why does this matter?

When hospital patients are classified as outpatients on Observation Status, they may be charged for services that Medicare would have paid if they were properly admitted as inpatients. For example, patients may be charged for their medications. (Thus, people may want to bring their medications from home if they have to go to the hospital.)

Most significantly, patients will not be able to obtain any Medicare coverage if they need nursing home care after their hospital stay. Medicare only covers nursing home care for patients who have a 3-day inpatient hospital stay – Observation Status doesn't count towards the 3-day stay.

Outpatient Observation Status is paid by Medicare Part B, while inpatient hospital admissions are paid by Part A. Thus, Medicare beneficiaries who are enrolled in Part A, but not Part B, will be responsible for their entire hospital bill if they are classified as Observation Status.

What can a patient do if the hospital puts her on Observation Status?

- **If the patient is still in the hospital:**
 - Seek the doctor's help to "admit the patient as an inpatient."
 - If the hospital insists on Observation Status, ask for a written notice stating this fact and;
 - Tell the hospital the patient wants their status changed because the care is "medically necessary" and an "inpatient hospital level of care." Support from the doctor will help.
- **If the patient is no longer in the hospital:**

The patient might be able to appeal the hospital care after-the-fact, however, winning Medicare coverage in Observation cases is increasingly difficult. Try to get the patient's physician to assist.

Remember: If the patient needs nursing home care after the hospitalization, it is particularly important that the hospitalization is considered an "inpatient admission." (Medicare will only cover nursing home care after a 3-day **inpatient** hospital stay.)

More Details on Observation Status – When is a Hospital Stay Not a Hospital Stay?

The Medicare statute and regulations authorize payment for skilled nursing facility (SNF) care for a beneficiary who, among other requirements, was a hospital inpatient for at least three days before the admission to the SNF. The Center for Medicare Advocacy has written before about difficulties in calculating hospital time for purposes of using Medicare's post-acute SNF benefit. In the past, the Center's primary focus was how time in observation

status and in the emergency room was *not* counted by the Medicare program when that time was followed by a beneficiary's formal admission to the hospital as an inpatient.[1] In recent months, however, a related issue has arisen.

The Center has heard repeatedly about beneficiaries throughout the country whose *entire* stay in a hospital, including stays as long as 14 days, is classified by the hospital as outpatient observation. In some instances, the beneficiaries' physicians order their admission, but the hospital retroactively reverses the decision. As a consequence of the classification of a hospital stay as outpatient observation (or of the reclassification of a hospital stay from inpatient care, covered by Medicare Part A, to outpatient care, covered by Medicare Part B), beneficiaries are charged for various services they received in the acute care hospital, including their prescription medications. They are also charged for their entire subsequent SNF stay, having never satisfied the statutory three-day hospital stay requirement.

Such was the case for Center client Lee Barrows and her husband:



Watch Video At: <https://youtu.be/QmYNGXAX3no>

Centers for Medicare & Medicaid Services (CMS) Definition of Observation Services

Neither the Medicare statute nor the Medicare regulations define observation services. The only definition appears in various CMS manuals, where observation services are defined as:

a well-defined set of specific, clinically appropriate services, which include ongoing short term treatment, assessment, and reassessment, that are furnished while a decision is being made regarding whether patients will require further treatment as hospital inpatients or if they

are able to be discharged from the hospital.[2]

In most cases, the Manuals provide, a beneficiary may not remain in observation status for more than 24 or 48 hours.[3]

Even if a physician orders that a beneficiary be admitted to a hospital as an inpatient, since 2004 CMS has authorized hospital utilization review (UR) committees to change patients' status from inpatient to outpatient. Such a retroactive change may be made, however, only if (1) the change is made while the patient is in the hospital; (2) the hospital has not submitted a claim to Medicare for the inpatient admission; (3) a physician concurs with the UR committee's decision; and (4) the physician's concurrence is documented in the patient's medical record.[4] CMS explains that retroactive reclassifications should occur infrequently, "such as a late-night weekend admission when no case manager is on duty to offer guidance." [5] Although CMS anticipated in 2004 that reclassifications would be used less frequently over time,[6] the Center has heard about this practice only recently.

Beneficiary Notice Regarding Observation Status

Hospital

Understandably, patients think that if they are kept in the hospital and spend the night in a hospital room, they are inpatients. Now that hospitals are increasingly using observation status, however, you cannot make this assumption. So when you are hospitalized, find out whether you have been admitted as an inpatient or on observation status. Since March 8, 2017, hospitals have been required to give patients the Medicare Outpatient Observation Notice (MOON) within 36 hours if the patients are receiving "observation services as an outpatient" for 24 hours. Hospitals must also orally explain observation status and its financial consequences for patients. The MOON cannot be appealed to Medicare.

Skilled Nursing Facility (SNF)

SNFs that believe that Medicare coverage will be denied because of a technical reason, such as a lack of the three-day qualifying hospital stay, may give the resident a Notice of Exclusion of Medicare Benefits (NEMB).[7] Use of the notice by SNFs is optional.

The NEMB-SNF informs the beneficiary that, in the SNF's view, Medicare will not pay for the resident's care. The form offers the beneficiary three options:

- Option 1: checking "Yes" means that the beneficiary wants to receive the services and wants Medicare to make a decision about coverage. This option requires the SNF to submit the claim, with supporting evidence, to Medicare. If Medicare denies payment, the beneficiary agrees "to be personally and fully responsible for payment."
- Option 2: checking "Yes" means that the beneficiary wants to receive the services, but does not want the claim to be submitted to Medicare.

- Option 3: checking “No” means that the beneficiary does not want to receive the services and that no claim will be sent to Medicare.

The Center for Medicare Advocacy Wants to Hear from You

The Center would like to hear your experiences as we work on solutions to these issues. [Submit your own observation status story here](#). The Center also suggests using our [Self-Help Packet](#) for more details on options for patients who are placed on observation status.

Additional Information:

- September 2017 *New York Times* article, “[Under ‘Observation,’ Some Hospital Patients Face Big Bills](#)” features Alice Bers, litigation director of the Center for Medicare Advocacy: “People call in dire situations, and we have to tell them there’s no way to challenge this. Now we can tell them, ‘You’re a member of the class, so stay tuned.’”
- August 2016 *New York Times* article on Observation Status and the NOTICE Act, [New Medicare Law to Notify Patients of Loophole in Nursing Home Coverage](#), features Center For Medicare Advocacy client. Center Executive Director Judith Stein says “the new law is an important first step, but Congress and the administration need to do more to protect beneficiaries.”
- [Kaiser Family Foundation Observation FAQs](#)
- Read our [press release](#) on Observation and the *Bagnall* case..
- See [national news](#) related to the case
- [Center and Observation Status on NBC Nightly News](#), January 9, 2014
- “[For Hospital Patients, Observation Status Can Prove Costly](#),” Ina Jaffe, NPR , September 4, 2013
- “In the Hospital, But Not Really a Patient,” *The New York Times*, *New Old Age* blog, June 22, 2012. <http://newoldage.blogs.nytimes.com/2012/06/22/in-the-hospital-but-not-really-a-patient/> And read more, in Dr. Iasky’s own words, [here](#).
- Hospitals Caught Between a Rock and A Hard Place Over ‘Observation’ – <http://bit.ly/aWwTPL>
- Medicare Rules Give Full Hospital Benefits Only to Those with ‘Inpatient’ Status – <http://www.washingtonpost.com/wp-dyn/content/story/2010/09/06/ST2010090602347.html?sid=ST2010090602347>
- (external link) CMS Hears Provider Concerns Over ‘Observation’ Status – <http://bit.ly/ageJNA>
- “[Medicare Fraud Effort Leaves Elderly Surprise Hospital Bills](#)” July 12, 2010 *Bloomberg News* article by Drew Armstrong, based on Center for Medicare Advocacy’s efforts, features Center attorney Toby S. Edelman with one of our clients.

Articles and Updates

- [HHS Inspector General Calls on CMS to Address Medicare Observation Status](#) November 11, 2021
- [Appeals Court Temporarily Pauses Implementation of Observation Status Decision While Considering Government’s Request for a Stay](#) July 22, 2021
- [Hospital Readmissions Reduction Program Misses Nearly 20% of Hospital Stays in “Observation Status”](#) June 24, 2021
- [Senators Introduce Bipartisan Observation Status Bill to Help Vulnerable Medicare Beneficiaries](#) June 17, 2021
- [Observation Status Bill Reintroduced](#) June 10, 2021
- [It’s Time to Repeal the 3-Day Inpatient Hospital Requirement for Medicare Skilled Nursing Facility Coverage](#) February 11, 2021
- [Government Seeks to Stop Implementation of Court Order in Hospital Observation Status Case](#) January 21, 2021
- [“Observation Status” May Disproportionately Burden Medicare Beneficiaries in the Most Vulnerable Neighborhoods](#) December 17, 2020
- [Federal Court Orders Appeal Rights for Some Observation Status Patients: More Advocacy is Needed](#) April 16, 2020
- [Frequently Asked Questions about Observation Status Court Decision](#) April 9, 2020

For older articles, please see [our archive](#).

References

[1] Litigation challenging CMS’s method of calculating hospital time was unsuccessful. *Estate of Landers v. Leavitt*, 545 F.3d 98 (2d Cir. 2008).

[2] Medicare Benefit Policy Manual, CMS Pub. 100-02, Chapter 6, §20.6; same language in Medicare Claims Processing Manual, CMS Pub. 100-04, Chapter 4, §290.1.

[3] *Id.*

[4] Medicare Claims Processing Manual, CMS Pub. No. 100-04, Chapter 1, §50.3, originally issued as CMS, “Use of Condition Code 44, ‘Inpatient Admission Changed to Outpatient,’” Transmittal 299, Change Request 3444 (Sep. 10, 2004).

[5] CMS, “Clarification of Medicare Payment Policy When Inpatient Admission Is Determined Not To Be Medically Necessary, Including the Use of Condition Code 44: ‘Inpatient Admission Changed to Outpatient,’” MedLearn Matters (Sep. 10, 2004). Use of Condition Code 44 is not intended to serve as a substitute for adequate staffing of utilization management personnel or for continued education of physicians and hospital staff about each hospital’s existing policies and admission protocols. As education and staffing efforts continue to progress, the need for hospitals to correct inappropriate admissions and to report condition code 44 should become increasingly rare.

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of utilization management personnel or for continued education of physicians and hospital staff about each hospital's existing policies and admission protocols. As education and staffing efforts continue to progress, the need for hospitals to correct inappropriate admissions and to report condition code 44 should become increasingly rare.

[7] Medicare Claims Processing Manual, CMS Pub. No. 100-04, Chapter 30, §90. The NEMB-SNF form is at <http://www.cms.gov/BNI/Downloads/CMS20014.pdf>.