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Split/Shared Visit Revisions

This newsletter is not legal advice, it is informational only. Any reader should consult an attorney for legal advice.

In the latter part of 2021, Medicare's long-standing rules regarding split/shared evaluation and management (E&M) visits underwent several changes, with more to come in 2023. Prior to 2021, the "split/shared visit" rule was just that: a rule that could be found only in Medicare's manuals. The rule allowed physicians and certain non-physician practitioners (NPPs) to perform a single E&M visit jointly in a hospital setting and bill the visit under the physician's billing number (and be paid at the physician's higher rate), as long as the physician had a face-to-face encounter with the patient. For the services of NPPs, the split/shared visit rule allowed physicians in hospitals to bill for services at least partially rendered by NPPs.

On May 9, 2021, however, the split/shared visit rule was withdrawn in response to a petition under the Department of Health and Human Services' Good Guidance regulations, when the rule itself faced an administrative challenge. https://www.cms.gov/files/document/enf-instruction-split-shared-critical-care-052521-final.pdf. Because the rule had not gone through the necessary "notice and comment" period that applies to regulations, the petitioners argued that it could not meet the requirements of Azar v. Allina Health Services, et al., 139 S.Ct. 1804 (2019). CMS withdrew the rule. From May 9 until January 1, 2022, physicians in hospitals could only bill split/shared visits based on the time they personally spent with the patient, while the NPP was required to submit a separate bill, thereby reducing the physician's reimbursement.

The 2022 Medicare Physician Fee Schedule Final Rule, effective for dates of service beginning January 1, 2022, reinstated the rule. The new rules, however, have some changes including both liberalizations and new constraints for both physicians and non-physician practitioners.

The Rule

The new rule (42 CFR § 415.140) permits E&M visits to be split or shared between a physician and an NPP in the same group, when they are performed in a facility setting and furnished according to the general requirements for E&M services when performed by either the physician or the NPP. Whereas the old rule could only be used in a hospital setting, the new rule may be used in skilled nursing facilities and nursing facilities. It is worth noting that the split/shared visit rule changes are also unaffected by the 2021 changes to E&M services that apply to outpatient services only, since the rule applies only in the facility setting. Moreover, whereas the old rule only applied to visits for established patients, the new rule also may be applied to new patients.

One impactful limitation under the new rule is how the physician and NPP determine the billing practitioner. Both the old and new rule require that a physician perform a "substantive portion" of the visit to qualify the visit for the split/shared rule. The new rule alters the definition to mean that to bill the services, more than half of the total time spent with the patient must be spent by the billing practitioner. In other words, if the NPP spends more than half of the total time with the patient, the service must be billed under the NPP's number.

The revised approach to "substantive portion" is meant to remove the physician's ability to merely "poke their head in" to the visit and thereby bill under the physician's number (at the higher rate). This new approach becomes mandatory January 1, *2023*.

The 2022 Rules

For the 2022 calendar year, however, the time-based approach is available as an option. To make the transition easier, CMS has also permitted alternative methods of looking at which practitioner performs the entirety of one of the following three components: (1) a history of present illness (HPI), (2) a physical exam (PE), or (3) medical decision-making (MDM). Performing only a portion of one of the components will not qualify as the "substantive portion."

Only a single component need be performed to qualify as the "substantive portion." Consider a scenario in which the physician performs only one of the three components (e.g., the HPI), while the NPP performs the other two; or one in which the physician performs one component, the NPP performs the other, and they each split the remaining component. In either case, the rules suggest that the visit may be billed under the physician's number, at least during the 2022 calendar year. The preface to the rule states, "the substantive portion will be defined as one of the three key components," and describes circumstances where only one portion is used as the substantive portion.

For purposes of component-based analysis (relevant to 2022 calendar year charges), the preface also addresses circumstances where both the physician and NPP perform a portion of the same component when that component is being used as the substantive portion. In these cases, the level of the visit that is billed should be based on the level of service that would be appropriate based on the services of the billing practitioner only.

For example, if the physician and NPP each perform part of the HPI, and the HPI is used as the substantive portion, the level of the visit must correspond only to the level of HPI taken by the billing practitioner. In other words, the two practitioners cannot combine their efforts in determining the appropriate level of E&M service based on their mutual performance of the HPI; the level selected must reflect the level of service that only the billing practitioner performed. If the PE is used as the substantive portion and is performed by both, the level of visit should be the level that could be appropriately billed by just the billing practitioner. If MDM serves as the substantive portion, each practitioner could perform aspects of MDM, but only the aspects performed by the billing practitioner could be used in determining the appropriate level of service. The implication, therefore, is that in most cases the billing practitioner will want to use as the substantive portion the component that (1) they have performed in its entirety, and (2) represents the highest level of service.

Time-Based Analysis

With respect to time-based analysis of what constitutes the "substantive portion," the preface describes how practitioners should approach billing for time where both practitioners perform the service. Distinct time – time spent by only one practitioner – may be counted toward determining which of the two performed the substantive portion of the visit. But when tallying up the time for purposes of selecting the appropriate level of code the time of one individual may be used (but not both).

The regulators describe an example in which the NPP spends the first 10 minutes of a visit with a patient, followed by the physician spending 15 minutes with the patient. In such circumstances, the total time would be 25 minutes for the visit, with the physician as the billing practitioner. If the physician and NPP met together for an additional 5 minutes, the overlapping time could only be counted for purposes of establishing total time, and the physician could then claim to have spent 20 minutes with the patient. The determination of who spent the "substantive portion" of the visit with the patient would remain unchanged (i.e., the physician would still be the billing practitioner). Only the additional 5 minutes spent by the physician would be counted towards the total time (with the visit now being 30 minutes, instead of 25 minutes). The NPP's time during the joint 5 minutes would not be counted at all (i.e., the total time would *not* be 35 minutes).

What Counts for Time

The type of activities that can now count towards the total time include preparing to see a patient (such as through review of test results prior to the visit); travel time; obtaining and/or reviewing a patient history obtained by another practitioner; ordering medications, tests, or procedures; or counseling or educating the patient, and/or their family, and/or caregiver.

Two things stand out from this list. First, the list is only for purposes of calculating total time and determining who spent more than half of the total time with the patient (i.e., the "substantive portion"). For 2022, *either* the time-analysis approach may be used, *or* the component-analysis may be used. For 2023 and beyond, only time analysis may be used.

However, the second thing that becomes apparent is how many services that count do *not* require face-to-face interactions with the patient. While the regulators wanted to make "just popping your head in" insufficient to allow the physician to bill a split/shared visit, they provided the physician with a broad range of activities that can count towards the total time without seeing the patient at all.

The regulators have explicitly recognized this change. In response to a question as to whether CMS' intent was to require either practitioner (or both) to have face-to-face interactions with the patient, CMS stated "*the list of qualifying activities for time do not specify whether each activity is face-to-face or not. To our knowledge, CPT has not defined the terms 'face-to-face' and 'non-face-to-face,' but in this context we interpret face-to-face to mean in-person…Our intent was that only one of the practitioners must perform the in-person part of an E/M visit when it is split (or shared), although either or both can do so. We acknowledge that Medicare policy on this was not clear in the past…We are finalizing as proposed that the substantive portion can be comprised of time that is with or without direct patient contact.*" Put another way, a physician need never actually meet with a patient face-to-face. As long as the physician performs the "substantive portion" of the visit and selects

the appropriate level of service, the physician may bill for it.

The Group Practice Dodge

The rule requires that the physician and NPP must be "in the same group." If the physician and NPP are in different groups, or the NPP works for the hospital, the regulators are clear that their respective services must be billed separately; and if each separate practitioner only performed a portion of the service, then neither would be able to bill for the service. However, the regulators declined to define what "in the same group" actually means for purposes of the split/shared rule. This included rejecting a range of suggestions, such as considering the specialty of the physician and NPP, both being employees or independent contractors of the same entity, having the same tax ID number, and (mercifully) tying the definition of "in the same group" to the Stark definition of a group practice. Instead, the regulators stated "We intend to monitor our claims data, and we thank the commenters for their recommendations and insights into current practice, which we may consider for a future rulemaking."

While on the one hand, physician groups may breathe a sigh of relief that the Stark group practice definition will not invade yet another aspect of their practice, they remain without explicit guidance from CMS as to what constitutes "in the same group practice" for purposes of the split/shared visit rule. It likely makes good sense to at least have both individuals be employees or independent contractors of the same entity, although, again, CMS has refused to tie the phrase to any specific definition.

Conclusion

The new split/shared visit rule offers a range of expansions and liberalizations that broaden health care practitioners' ability to make use of the rule. The new rule expands both the range of potential settings in which split/shared visits may be performed, and the range of patients (now including both established and new patients) to which the rule may be applied. For 2022, there remains some flexibility in how to determine the substantive portion, but for 2023 and beyond, practitioners must base the substantive portion on whichever practitioner spends more than half of the time. However, the range of activities which count for time-based analysis include many activities that are not face-to-face. Nevertheless, practitioners must still navigate the precise requirements of the rule and may have questions. We remain here to help.