

Kathleen Martin is an attorney with O'Donnell, Weiss & Mattei, P.C., and a newspaper columnist for The Mercury, which gave permission for this article to be reprinted.

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Class certified in Medicare observation status lawsuit

Any Medicare beneficiary, or the family of one, who has experienced the financial fallout from a hospital stay classified as “observation status,” will appreciate the fact that the Center for Medicare Advocacy (CMA) is still working tirelessly to eliminate “observation status” for Medicare beneficiaries. Recently, an appeal to the U.S. Court of Appeals reversed in part the original decision by the District Court to dismiss the case, and now the District Court has granted certification of a class in this action.

Observation status, for anyone who has not yet experienced this growing trend, is when a Medicare beneficiary is in the hospital but not actually admitted, even though it might appear that they are a patient in the hospital. If a beneficiary is in the hospital under observation status, their care costs are not being covered under their Medicare Part A benefit which is the hospitalization portion of Medicare. In fact, all costs are being borne by the person’s Part B benefit, provided that they have Part B. This is the outpatient portion of the Medicare benefit and follows the Medicare Part B rules, which for most is subject to the annual deductible and co-insurance. Furthermore, all medications will be charged through the beneficiary’s Medicare Part D plan. The end result, for most Medicare beneficiaries, is a cost, sometimes not insignificant, for the hospitalization. Additionally, if the beneficiary is not actually admitted for three days, and if rehab is needed following the hospital stay, long term care in a rehab will not be covered under the Medicare benefit. Many beneficiaries, when faced with a bill for thousands of dollars of care not covered by insurance, opt not to follow through on the ordered rehabilitation.

The district court granted the Secretary’s (of the Centers for Medicare and Medicaid or CMS) motion to dismiss originally because the court felt that the decision to admit a patient or not is a complex medical judgment best left to physicians. The U.S. Court of Appeals for the Second Circuit reversed in part holding that “more evidence was needed to determine if there was a violation of the due process clause.” The determinative question appears to be as to whether the beneficiaries have a property interest. The U.S. District Court, District of Connecticut granted class certification. The class is “All Medicare beneficiaries who, on or before January 1, 2009: (1) have received or will have received ‘observation services’ as an outpatient during a hospitalization; and (2) have received or will have received an initial determination that the observation services are covered (or subject to coverage) under Medicare Part B.” Any beneficiaries who pursued an administrative appeal and received a final decision before September 4, 2011 are excluded from the class. It is important to note that the court did not limit the class to those who were denied payment for care in a rehab post-hospitalization “because even the small dollar amounts of in-hospital costs can create an important private interest.”

Elder Law Answers (www.elderlawanswers.com) reports that Alice Bers, the Center for Medicare Advocacy’s litigation director indicates that the class is likely to number in the hundreds of thousands. CMA spearheaded this litigation. Ms. Bers states that the decision to certify the class “recognizes that Medicare patients across the country face dire situations, including having to choose between spending thousands of dollars on nursing home care or simply forgoing that necessary care. We look forward to establishing that the right to review is required as a matter of constitutional due process.”

Although the current law requires that hospitalized patients be notified that they are under “observation status” (MOON), there is no appeal process associated with that notice. CMA continues to work for Medicare beneficiaries to protect their rights. Go to www.medicareadvocacy.org for more information.