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Eli's Hospice Insider

Fraud & Abuse: Beware Claims Audits Related To Drug Coverage In Wake Of OIG Report

Hospices aren't covering the meds they should, according to federal agency watchdog.

You and the feds may disagree on what medications you should cover for your patients, and the difference could means hundreds of millions of dollars out of agencies' pockets.

In a new report, the **HHS Office of Inspector General** found that hospices should have paid for at least $160.8 million in Part D drug payments in 2016, based on an audit of 200 Part D claims for hospice patients. "Additionally, although hospices told us they should not have paid for the drugs associated with the remaining $261.9 million of the $422.7 million total cost ... hospice organizations or hospice beneficiaries likely should have paid for many of these drugs, not Part D," says the report released Aug. 27.

Reminder: The Medicare hospice "conditions of participation state that 'drugs and biologicals related to the palliation and management of the terminal illness and related conditions ... must be provided by the hospice while the patient is under hospice care' (42 CFR § 418.106)," the OIG notes in the report.

The OIG isn't the only agency interested in this topic. The **Centers for Medicare & Medicaid Services** and the **Medicare Payment Advisory Commission**, just to name a few, have been focusing on this topic for years, notes **Theresa Forster** with the **National Association for Home Care & Hospice**. In fact, observers believe the newly finalized election statement changes and addendum, which will take effect in October 2020, largely target just this problem.

"CMS frequently stated that in its 1983 final rule implementing the hospice benefit, it interpreted related conditions broadly, indicating that hospices were required to cover virtually all care that terminally ill patients need," the OIG notes in the report. That "virtually all" language has shown up frequently in CMS's regulations and other materials, including the 2020 hospice payment final rule published in the Aug. 6 Federal Register.

Many hospice providers think that "virtually all" language is "overly broad," says attorney **Robert Markette Jr.** with **Hall Render** in Indianapolis. They take issue with CMS, the OIG, and others now saying that hospice is effectively an "end-of-life bundle."

If hospices are supposed to cover virtually everything, why do the law and CoP say they must cover drugs "related to" the terminal illness and "related" conditions, Markette asks. Congress didn't put "related" in the law for no reason, he argues. Hospices paying for everything was not what lawmakers envisioned.

"Given the sweeping statements on hospice coverage responsibility made by CMS in recent years, it's easy to see how the OIG may have drawn this conclusion," Forster says of the report findings. But drug coverage decisions "are only made by the hospice following a comprehensive assessment of the patient, and must be determined on an individualized basis," she points out. "So making the ultimate determination of coverage responsibility requires in-depth examination at the case level."

3 categories: The coverage decision may not be as simple as the OIG paints it, either. Hospices, and their overseers, must determine "which drugs are related to the terminal prognosis, what medications might not be reasonable and necessary for treatment under hospice, and what drugs are not a hospice's responsibility because they are prescribed for a non-hospice related condition," Forster offers.

Of the 86 drug payment errors the OIG found, the largest percentage of errors by far - 41 percent - was due to "no

knowledge that the medication was prescribed by an outside physician, filled by an outside pharmacy, or both." The second-highest reason at 15 percent was the same problem, but with nursing home staff.

Inevitable: These types of scenarios often are out of a hospice provider's control, industry members contend.

"We do not have a seamless overlap related to prescription drug coverage for hospice patients, and there are numerous ways that errors can occur without malicious intent," Forster notes. "So there will likely always be some error."

The OIG found these other causes for errors as well: hospice miscoding (13 percent); drug dispensing occurred before the system processed the hospice election (8 percent); and pharmacy billing error (7 percent).

For more than 31 percent of the errors, the hospices offered no reason for the problem.

Drug Payments For Hospice Patients Will Be In The Crosshairs

CMS has already taken steps to address this issue. Medicare Part D plans have a "prior authorization process in place for their members enrolled in hospice for ... four categories of drugs (analgesics, antinausea, anti-anxiety, and laxatives)," the final rule notes. "Hospices currently can use the standardized PA form as a means of notifying a Part D plan that their member has elected hospice care, as well as to document specific drugs that are or are not being covered by the hospice."

And the forthcoming election statement expansion and addendum requirements will tackle the issue as well, Forster notes. "This is an area of ongoing concern to policymakers," she says.

But hospices should expect to also see scrutiny ratcheted up on this point, Markette predicts. That means more audits from Medicare Administrative Contractors and other auditing authorities. Recovery Audit Contractors already have multiple topics approved for services and items for hospice patients (see Eli's Hospice Insider, Vol. 12, No. 2).

Starting next October, those audits will include close examination of the election statement addendum, which should address drugs that are not covered, Markette expects (see related story, p. 75).

CMS and others have also raised the idea of an expanded prior authorization program for hospice patients' drugs. "Prior authorization processes appear to have reduced Part D program spending for common end-of-life drugs," the OIG notes.

But the agency hasn't moved forward on that idea. "CMS, the hospice industry, and others are sensitive to the fact that expanded prior authorization requirements can have some very harmful consequences - including delays for patients in accessing medications," Forster believes. "So any movement in that area would have to be very deliberate and thought through in advance."

Concerns about access to pain management medications, particularly, may prevent any prior auth expansion.

Hospice providers may also see more scrutiny of drug coverage-related CoPs in their upcoming surveys - particularly once the new election addendum requirement is in place, Markette forecasts.

And while it won't impact hospice providers directly, more audits of other providers submitting claims for hospice patients may wind up with those providers seeking reimbursement from you as Medicare denies their claims.