



**American Academy of
PHYSICAL MEDICINE & REHABILITATION**
Physicians Adding Quality to Life

VIA HAND DELIVERY

October 11, 2002

The Honorable Thomas A. Scully
Administrator
Centers for Medicare and Medicaid Services
Hubert H. Humphrey Building, Room 314G
200 Independence Avenue, SW
Washington, DC 20201

Dear Administrator Scully:

We appreciate your previous responses to our collective concerns about one of the exclusion criteria applicable to rehabilitation hospitals and rehabilitation units (inpatient rehabilitation facilities (IRFs)), which is known as the “75 Percent Rule.” We hope to continue working with you and we are increasingly anxious to resolve expeditiously the problems related to the substance of the rule, as well as its enforcement.

In that vein, we are writing to provide you with additional information. **We want to underscore the overwhelming view of the field, both from an access and provider perspective, that the 75 Percent Rule must be revised and aligned with current treatment procedures and CMS’s own prospective payment system for rehabilitation hospitals.**

We urge that CMS consider the overarching question of whether, in light of the new IRF-PPS, there is a continuing need for the rule at all. If it is not repealed, we suggest the adoption of an administrative presumption – namely, if 75 percent of an IRF’s Medicare patients fall within 20 of the 21 rehabilitation impairment categories (RICs)¹ used in the IRF PPS, then a facility would be in compliance with the 75 Percent Rule. If the facility did not meet the administrative presumption based on its *Medicare* patients, it would have to comply with an updated 75 Percent Rule as applied to *all admissions* as a fallback.

¹We do not believe it is appropriate to use RIC 20, Miscellaneous, for this determination. This RIC represents approximately 11 percent of Medicare patients and a similar percentage of all patients. Although it is not necessarily appropriate to use as a condition for the exclusion criteria, maintaining this RIC is important because it allows facilities to admit and treat medically complex patients with unique conditions and needs, such as transplant patients, and other patients with extensive comorbidities. It also provides a needed level of flexibility for providing unanticipated services in the future. Patients classified under this category have functional loss often greater than patients under the other RICs. All patients with functional loss should be able to receive services at the appropriate level, including acute inpatient services.

Evaluating the 75 Percent Rule

As we have discussed, it is important to revise the current list of ten conditions upon which the 75 Percent Rule is based. It is our firm belief that these conditions must be updated to reflect current patient patterns and beneficiary needs. Access to care is a major concern – areas not included in the current rule for which rehabilitation hospitals and units receive many referrals include cardiac, cancer, pulmonary and transplant, among others.

We appreciate CMS's efforts to gather information about the interpretation and application of the 75 Percent Rule. As we understand it, CMS asked Medicare regional offices to collect information from fiscal intermediaries about their interpretation and enforcement of the 75 Percent Rule. We support this effort and its timely completion because it is important to understand the variance and inconsistencies that have arisen as different intermediaries apply the rule. We believe CMS also needs to collect data on what cases are being targeted.

Now that CMS has gathered this information, we urge the agency to use it to make constructive changes to the rule and how it is enforced. We strongly believe that the results of this review, coupled with policy considerations, will lead CMS to conclude that (1) the list of ten conditions are outdated and fail to address current medical practice, and (2) the application of the rule to facilities should also be revised in light of the new IRF prospective payment system (IRF-PPS).

Protecting Providers

CMS staff informally indicate that the early findings of the review of the 75 Percent Rule expose wide variations in the way intermediaries apply the rule. Because of this unevenness in the current process, we applaud CMS for recognizing the need to suspend enforcement of current audits related to the 75 Percent Rule. Our members have underscored the importance of this suspension to us as well. For example, certain providers are indicating that some intermediaries and State Departments of Health continue to conduct audits of facilities. It would simply be unfair to hold facilities accountable to CMS for the results of audits conducted during this period because it is clear there is such great discrepancy in application.

Even though the suspension of enforcement is essential, it is equally important to consider what happens to providers and beneficiaries once the suspension is superceded by CMS's new guidance. Our members are concerned about how intermediaries will use the information they have collected during this period. The June 7 CMS memorandum outlining the suspension of enforcement states that intermediaries are not to take any action on their findings from audits of rehabilitation facilities related to the 75 Percent Rule until CMS issues additional instructions. Although the directive is clear regarding its immediate impact upon audits, it does not provide guidance as to the prospective application of the review process of the rule and any interpretations of it. Many facilities are concerned that while continuing to act in good faith, they may be subject to sanctions once the CMS review of the rule is completed.

Therefore, we urge you to clarify that any (1) change in the review process, (2) new or restated interpretations of the ten conditions, or (3) change in the ten conditions will be applied in a prospective manner only with adequate compliance periods provided. Given the widespread discrepancies across the country with respect to interpretation of the 75 Percent Rule, we further request that the results of any audits conducted now will not be enforced retrospectively.

These compliance periods would provide sufficient time for intermediaries to implement the rule and providers to comply with it. In addition, any data collected prior to the compliance date should not be used as the basis for determining a future compliance action because of the pervasive uncertainty under which facilities have been operating. Only data collected six months after a change, at the earliest, should be available for determining compliance.

Finally, we wish to raise concerns about the importance of ensuring a fair review and appeals process. We previously alerted the agency to problems facing New Jersey and Tennessee facilities under Riverbend's jurisdiction. Even though CMS has currently halted enforcement of audits related to the 75 Percent Rule, we understand that Riverbend is continuing to audit providers' compliance according to its (Riverbend's) interpretation of the 75 Percent Rule, which providers believe is inconsistent with the nationally accepted standards of practice. Many rehabilitation providers now face potential requirements that they change significantly their admission practices and/or redesign their rehabilitation programs. However, providers have no means by which to challenge or appeal interpretations directly.

We also believe the current reconsideration process is widely varied and thereby promotes arbitrary actions establishing a difficult threshold to meet, or, at worst, disregard. The current Regional Office and State Operations Manuals enumerate that if a facility is found to be out of compliance with this requirement or any of the other exclusion criteria, the State Department of Health is to forward the information to the Regional Office. There is no method for reconsideration of a fiscal intermediary's determination if it decides a facility has not met the 75% rule. We urge CMS to instruct its intermediaries as to how to conduct these 75 Percent Rule audits in an equitable and appropriate manner. A facility's only remedy is to wait until a Notice of Program Reimbursement (NPR) is issued. These notices are not issued until a cost report is settled which can be years after the cost reporting period for which the facility sought an exclusion. A fair and timely appeals process is essential.

We hope that this letter has provided you with additional useful information and again urge the Department to bring this problem to a prompt resolution. Please contact us if you would like to discuss any of these issues or examples in more detail. Again we appreciate your responsiveness and we urge the Department to resolve these issues promptly by bringing the 75 Percent Rule forward to reflect 21st century medical rehabilitation challenges.

Sincerely,

American Medical Rehabilitation Providers Association
American Hospital Association
Federation of American Hospitals
American Academy of Neurology
American Academy of Physical Medicine and Rehabilitation

cc: The Honorable Tommy Thompson, Secretary