

5. I serve as Assistant Director, Clinical Information, Health Information Management for Einstein Philadelphia. I have served at this post since 1992.

6. In my capacity as Assistant Director, it is my responsibility to direct and manage all aspects of the Medicare claims appeals process for Einstein Philadelphia and Einstein Montgomery. I oversee the team that responds to and manages requests for medical charts and handles the review of denied claims and the filing of appeals.

7. It is my understanding that the Centers for Medicare & Medicaid Services (“CMS”) has instructed its Medicare Administrative Contractors (“MACs”) to review small samples of each hospital’s Part A inpatient claims spanning less than two midnights during an ongoing “Probe & Educate” period. These Probe & Educate reviews are conducted on a prepayment basis to assess whether hospitals are in compliance with the admission order requirements and the two-midnights rule. If a MAC finds that a hospital’s claim does not meet the new requirements, the MAC determines that the hospital is not entitled to receive Medicare Part A reimbursement and the claim is denied.

8. In March 2014, Einstein Montgomery’s MAC, Novitas Solutions, denied claims based on Einstein’s failure to comply with the two-midnights rule and the physician order requirement. In appealing these denials, Einstein Montgomery asserted that both of these new rules are unlawful.

9. Since the Plaintiffs submitted their motion for summary judgment and opposition to the Secretary’s motion to dismiss on August 4, 2014, Einstein Montgomery has continued to pursue its appeals of these denials. As of January 29, 2016, the current status of the appeals is as follows:

Claim No. 1

10. On or about April 2, 2014, Novitas Solutions determined that Einstein Montgomery was not entitled to payment under Medicare Part A for an inpatient stay that occurred in early 2014. Novitas Solutions concluded that the documentation available in the medical record did not support an expected length of stay for the patient for a period lasting 48 hours.

11. On or about July 15, 2014, Einstein Montgomery appealed the Probe & Educate denial. In its request for redetermination, Einstein Montgomery argued that the two-midnights rule is arbitrary and capricious and thus is invalid under the Administrative Procedure Act (“APA”). Einstein Montgomery effectively conceded, for purposes of the appeal, that the inpatient stay did not meet the two-midnights standard and did not submit additional documentation from the patient’s medical record. There are no facts in dispute. The only issue in the appeal is Einstein Montgomery’s legal challenge to the validity of the two-midnights rule.

12. On or about September 9, 2014, Novitas Solutions issued an unfavorable decision, finding that Einstein Montgomery was not entitled to payment under Part A because the information in the medical record did not support an inpatient admission under the two-midnights rule.

13. On or about November 17, 2014, Einstein Montgomery requested reconsideration by the Qualified Independent Contractor (“QIC”), Maximus Federal Services, of the unfavorable redetermination. Einstein Montgomery argued that the two-midnights rule is unlawful under the APA because it is arbitrary and capricious.

14. On or about January 20, 2015, the QIC issued an unfavorable decision on the reconsideration.

15. Einstein Montgomery did not request a hearing by an administrative law judge (“ALJ”) of the QIC’s decision.

Claim No. 2

16. On or about July 15, 2014, Einstein Montgomery requested reconsideration by the QIC of the unfavorable redetermination issued by Novitas Solutions, in which Novitas Solutions determined that Einstein Montgomery was not entitled to payment under Part A for an inpatient stay that occurred in late 2013. In its request, Einstein Montgomery challenged both the two-midnights and physician order rules. Einstein Montgomery argued that the two-midnights rule is unlawful under the Administrative Procedure Act because it is arbitrary and capricious and that in any event, Novitas Solutions had failed to apply the two-midnights standard correctly based on the evidence in the medical record. Einstein Montgomery also did not provide a formal physician order as part of the documentation in the medical record as a condition of Part A payment, arguing that the requirement was contrary to the Medicare statute and thus invalid under both the Medicare Act and the APA.

17. For these reasons, Einstein Montgomery asked the QIC to reverse Novitas Solutions’ unfavorable redetermination and instruct Novitas Solutions to pay the hospital for the inpatient stay under Medicare Part A. Einstein Montgomery also requested that the QIC declare the two-midnights and physician order rules unlawful and invalid.

18. On or about September 3, 2014, the QIC issued an unfavorable reconsideration decision, finding that Einstein Montgomery was not entitled to Part A payment for the inpatient stay. The QIC recited both the two-midnights rule and the physician order requirement, and concluded that payment through Part A cannot be provided because “[t]echnical requirements for payment eligibility through Medicare Part A were not met.” The QIC stated that “although the

expectation of a stay greater than 2 midnights was a reasonable one, the actual time in the hospital fell short of the expectation” and that “[i]n the absence of documentation of an unforeseen circumstance defined by CMS as an acceptable explanation for a shortened stay, inpatient payment cannot be made.” The QIC then informed Einstein Montgomery of its right to rebill for the inpatient stay under Part B or, in the alternative, to continue to appeal its Part A claim to an ALJ. The QIC noted that Einstein Montgomery is not permitted to file Part B claims while it has a pending Part A appeal.

19. On or about November 4, 2014, Einstein Montgomery submitted a request for an ALJ hearing. In its request for an ALJ hearing, Einstein Montgomery effectively conceded that the inpatient stay did not meet the two-midnights standard and asked the ALJ to address four legal issues:

- Whether the hospital is entitled to Part A reimbursement for the reasonable and medically necessary items and services that it provided to the beneficiary;
- Whether the two-midnights rule is unlawful under the APA;
- Whether the physician order rule is unlawful under the Medicare Act and the APA; and
- Whether the one-year time limit, as applied to situations where a Medicare contractor has denied a Part A payment on the ground that the treatment should have been provided on an outpatient basis and the hospital has sought to rebill for Part B payment, is unlawful under the APA.

20. Einstein Montgomery asked the ALJ to order CMS to pay Einstein Montgomery for the inpatient stay under Medicare Part A and to declare that the two-midnights rule, the

physician order rule, and the application of the one-year time limit to rebilled Part B claims are unlawful and invalid.

21. The Office of Medicare Hearings and Appeals acknowledged receipt of Einstein Montgomery's request on or about January 12, 2015. The appeal has not yet been assigned to an ALJ, and thus no decision has been issued.

Rebilling Under Medicare Part B

22. For the appeals described above, the original dates of service for the inpatient stay occurred in late 2013 and early 2014.

23. It is my understanding that under CMS's Part B rebilling policy, Einstein Montgomery is permitted to rebill under Part B after Part A payment is denied on the ground that the inpatient admission was not reasonable and necessary, which would include a denial on the basis that the two-midnights rule or physician order rule was not met. It is also my understanding that Einstein Montgomery must submit its request for Part B payment within one year of the original dates of service for the inpatient stay.

24. It is my understanding that there is a backlog of more than 800,000 Medicare claim appeals pending before the Office of Medicare Hearings and Appeals' ALJs and that as of October 2015, it is taking on average 765 days for an ALJ to issue a decision on an appeal.

25. As a result of CMS's application of the one-year time-limit to claims that can be rebilled under Part B, Einstein Montgomery is no longer able to rebill under Part B for either of the two Part A appeals described above.

Costs of Compliance

26. In addition to the lost Medicare Part A reimbursement at issue in the two appeals described above, Einstein also has devoted significant resources and will continue to need to devote resources to comply with the technical requirements of the two-midnights and the

physician order rules, such as creating new forms, training its physicians and residents and revising its workflow processes.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of January, 2016.

A handwritten signature in cursive script, appearing to read "Am L. Brown", is written over a horizontal line.