

Hospital Observation Status cancels Medicare nursing home coverage
Massachusetts Chapter, National Academy of Elder Law Attorneys – March 5, 2015

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Medicare laws enacted by Congress say a patient becomes qualified for Medicare paid skilled nursing home care, IF he was a hospital **inpatient** for 3 days in a row. After more than a week in a Connecticut hospital, Larry Barrows was disqualified for Medicare nursing home care, because the hospital kept him on Observation Status. Larry's wife Lee explains:



On the 5th day, a neurologist flanked by Larry's doctor and a social worker, ushered me into the hall and said: 'we're sorry but your husband was never admitted.' I was stunned with disbelief.

Being "admitted" to the hospital is key to qualifying for Medicare coverage of Extended Care in a Skilled Nursing Facility.

Regulations say Medicare will start paying for up to 100 days of nursing home care, as long as the inpatient of a hospital had a medically necessary stay of at least 3 consecutive calendar days. You must be in the hospital for at least three midnights after your day of Admission:



The *day of discharge* does not count, and no matter how many days you stay in the hospital, Observation Status cancels eligibility for Medicare paid nursing home rehab after discharge.

A [SELF HELP Guide](#) from the Center for Medicare Advocacy suggests you find out if you are only in the hospital for "observation." If you are, try to get that status changed to "INPATIENT." If "you are not successful with changing your hospital observation status" and you can safely return home, ask your doctor to order home health care. As long as you are homebound and require skilled care like physical therapy, Medicare should pay for home care.


Because Larry needed 24 hour skilled care, his physician couldn't allow him to return home, so Lee had no choice. *After stabilizing his blood pressure he was released and taken to a rehab facility as a "private pay patient" since the 3 day rule did not apply. He remained for 3 months, suffering various symptoms and becoming increasingly despondent.*

Nursing homes can NOT bill Medicare if you "were NOT a hospital INpatient." Lee decided to appeal when she found out Larry was not a hospital inpatient:

I tearfully blurted that I was going to fight this. Whereupon Larry's doctor and the social worker both gave me the thumbs up sign, saying this happens at least once or twice a week. I

eventually had a hearing. 6 months later it was denied. I keep thinking of past and future victims who might not have the awareness level or tenacity to navigate this economically driven system.

The case was appealed to US District Court, with several other Medicare hospital “observation” patients who were never “admitted.”

<p>United States Court of Appeals, Second Circuit.</p> <p>Lee BARROWS, et al., individually and on behalf of all others similar Plaintiffs–Appellants, v. Sylvia Mathews BURWELL, Secretary of H Human Services, Defendant–Appellee.</p> <p>No. 13–4179–cv.</p> <p>Decided: January 22, 2015</p>	
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In January, 2015 the Second Circuit Court of Appeals rejected many of the arguments presented by the Center for Medicare Advocacy, but the Appeals Court did order more discovery, to find out how hospitals are deciding to place patients on observation status. The Appeals Court decided that the hospital patients in the *Barrows* case have made a viable claim (a question of fact rather than law) that the outpatient classification decision is not discretionary, but rather made through “rote application of commercially available screening tools” with increased pressure from the Centers for Medicare and Medicaid Services.

If the hospital decisions are not medical judgments being made by individual physicians, the patients may have a property interest in having their Medicare benefits pay for their continuing care in nursing homes. This distinction is important, the court noted, because people have a right to due process when the distribution of Medicare benefits is required by “a defined administrative outcome.” The case has been remanded to the US District Court in Connecticut.

Meanwhile, Medicare has allowed patients at hospitals in Boston and some other cities to be exempted from the three-day requirement that limits nursing home coverage to seniors admitted to a hospital. If the experiment saves Medicare money and improves care, “we should be able to make an argument to Medicare that there is a way to do it for all our patients,” said Dr. Eric Weil, clinical affairs associate chief for the general internal medicine division at Massachusetts General Hospital. The hospital is one of five in the Partners Health System that began offering the waiver in April, 2014.

An Act Regarding Notification of Patient Observation, H2029, is being considered by the Committee on Public Health in the Massachusetts Legislature. If enacted, the law would require hospitals in Massachusetts to give notice to any patient kept on observation status, so Medicare beneficiaries would be aware of the need to demand to be admitted to the hospital, or that they be discharged to a rehabilitation hospital when they don’t need acute care.



Find a video-podcast of this summary on YouTube:

[Hospital Observation Status cancels Medicare nursing home coverage](#)

Medicare has published a Fact Sheet: *Are you a Hospital Inpatient or Outpatient?*

Links are posted on the Medicare page at: [MassHealthHELP.com](#)