I

117TH CONGRESS
2D SESSION

H. R. 8746

To amend title XVIII of the Social Security Act to restore physician judgment to prescribe the appropriate mix of skilled modalities that constitute an intensive rehabilitation therapy program in an inpatient rehabilitation hospital or unit.

IN THE HOUSE OF REPRESENTATIVES

AUGUST 26, 2022

Mr. COURTNEY (for himself, Mr. THOMPSON of Pennsylvania, and Mr. BUTTERFIELD) introduced the following bill; which was referred to the Committee on Ways and Means

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A BILL

To amend title XVIII of the Social Security Act to restore physician judgment to prescribe the appropriate mix of skilled modalities that constitute an intensive rehabilitation therapy program in an inpatient rehabilitation hospital or unit.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Access to Inpatient Rehabilitation Therapy Act of 2022''.

SEC. 2. FINDINGS AND PURPOSE.

(a) FINDINGS.—Congress finds the following:

(1) Intensive, coordinated medical rehabilitation provided in inpatient rehabilitation hospitals and units is critical to Medicare beneficiaries with injuries, illnesses, disabilities, and chronic conditions in order to return to health, full function, independent living, and a high quality of life.

(2) The Centers for Medicare & Medicaid Services (in this section referred to as ''CMS'') uses an ''intensity of therapy'' requirement to help determine which Medicare beneficiaries are appropriate for treatment in an inpatient rehabilitation hospital or unit. CMS has interpreted the intensity of therapy requirement through application of the so-called ''Three Hour Rule'' (42 C.F.R. 412.622(a)(3)(ii)) which requires the patient to be able to participate in three hours of rehabilitation therapy per day, five days per week, or 15 hours of rehabilitation therapy over a one-week period.

(3) In 1989, a Federal district court held that ''Medicare determinations for hospital rehabilitation care are to be based upon an assessment of each individual patient's need for care'' and ''denials of admissions, services, and/or Medicare coverage based upon numerical utilization screens, diagnostic screens, diagnosis, specific treatment norms, the

'Three Hour Rule', or other 'rules of thumb' are not appropriate.'' Hooper v. Sullivan, No. H–80–99 (D. Conn. 1989).

(4) Before 2010, a CMS ruling explicitly stated that physical therapy, occupational therapy, speech therapy, and orthotics and prosthetics were counted toward the Three Hour Rule on an as-needed basis. In addition, the CMS ruling stated that ''other therapeutic modalities'' that were determined by the physician and the rehabilitation team to be needed by the patient ''on a priority basis'' would quality toward satisfaction of the rule (HCFA Ruling 85–2).

(5) This language allowed physicians with specialized training and experience in inpatient hospital rehabilitation to prescribe the mix of skilled therapies and services appropriate to meet the needs of each individual patient in order to satisfy the Three Hour Rule in the inpatient rehabilitation hospital or unit setting.

(6) CMS by regulation (74 Fed. Reg. 39811 (August 7, 2009)) revised these prior requirements, effective January 1, 2010. The Secretary of Health and Human Services acknowledged that he is bound by the court's decision in Hooper v. Sullivan that ''rules of thumb'', including the Three Hour Rule,

may not be imposed to deny IRF coverage. The Secretary stated that he would ''monitor the appropriateness of instances where IRFs demonstrate the required level of intensity'' without meeting the Three Hour Rule.

(7) The Secretary's 2010 regulation limited the Three Hour Rule to recognize only four skilled services (namely, physical therapy, occupational therapy, and speech language pathology services as well as orthotics and prosthetics) and required that the patient's physician must certify that the patient requires, at admission, at least two of the four therapy modalities, one of which must be either physical therapy or occupational therapy. The Secretary's 2010 regulation removed the discretion of the physician, in consultation with the rehabilitation team, to prescribe other skilled modalities and therapeutic services needed by the patient that would count toward satisfaction of the Three Hour Rule. As a result, the full complement of medically necessary, skilled therapy services may not be available to inpatient rehabilitation hospital patients as part of their plan of care.

(8) Skilled, therapeutic modalities in addition to physical therapy, occupational therapy, speech lan-

guage pathology services, and orthotic and prosthetic services that should be counted toward the Three Hour Rule include recreational therapy services, respiratory therapy, and other skilled modalities as determined by the Secretary when such skilled services are medically necessary and prescribed by a physician as part of the patient's plan of care.

(b) PURPOSE.—The purpose of this Act is to restore reliance on the professional judgment of the treating physician, in consultation with the rehabilitation team, when determining whether a Medicare patient meets the intensity of therapy requirement of an inpatient rehabilitation hospital or unit in order for that patient to gain access to the appropriate mix of medically necessary, rehabilitation services in that setting. This Act retains the current requirement that the patient must need at admission physical therapy, occupational therapy, speech language pathology services, or orthotic and prosthetic services but permits the patient's physician to modify the intensive rehabilitation therapy program after admission to include additional necessary therapy modalities.

SEC. 3. PHYSICIAN JUDGEMENT TO DETERMINE THE THERAPY MODALITIES THAT CONSTITUTE AN INTENSIVE REHABILITATION THERAPY PROGRAM IN DETERMINING THE MEDICAL NECESSITY OF SERVICES IN AN INPATIENT REHABILITATION FACILITY.

(a) IN GENERAL.—Section 1886(j) of the Social Security Act (42 U.S.C. 1395ww(j)) is amended by adding at the end the following new paragraph:

"(9) PHYSICIAN JUDGEMENT TO DETERMINE THE THERAPY MODALITIES THAT CONSTITUTE AN INTENSIVE REHABILITATION THERAPY PROGRAM IN A REHABILITATION FACILITY.—In the case of a claim for payment under the prospective payment system under this subsection with respect to a discharge of an individual, in implementing section 412.622 of title 42, Code of Federal Regulations (or any successor to such regulation) for purposes of determining if items and services with respect to such discharge are to be considered reasonable and necessary under section 1862(a)(1), the Secretary shall provide that an intensive rehabilitation therapy program described in paragraph (a)(3)(ii) of such section 412.622—

"(A) shall, at the time of the admission associated with such discharge, consist of physical

therapy, occupational therapy, speech language pathology services, or orthotic and prosthetic services (or any combination thereof); and

"(B) may, after such admission, be modified by the rehabilitation physician treating such individual to include other skilled therapeutic modalities, including recreational therapy, respiratory therapy, and other skilled services specified by the Secretary.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to admissions occurring after December 31, 2022, or the last day of the emergency period described in section 1135(g)(1)(B) of the Social Security Act (42 U.S.C. 1320b–5(g)(1)(B)), whichever is sooner.

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