



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 510

[CMS-5529-CN]

RIN 0938-AU01

Medicare Program: Comprehensive Care for Joint Replacement Model Three Year Extension and Changes to Episode Definition and Pricing; Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services (HHS).

ACTION: Final rule; correction.

SUMMARY: This document corrects technical errors that appeared in the final rule published in the May 3, 2021, **Federal Register**, titled “Medicare Program: Comprehensive Care for Joint Replacement Model Three Year Extension and Changes to Episode Definition and Pricing; Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency.”

DATES: This correction is effective on July 2, 2021.

FOR FURTHER INFORMATION CONTACT: Heather Holsey, (410) 786-0028.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2021-09097 of May 3, 2021 (86 FR 23496), there were technical errors in the preamble that are identified and corrected in this correcting document. The provisions in this

correction document apply as if they had been included in the document published May 3, 2021.

II. Summary of Errors

On page 23553, we stated that all Comprehensive Care for Joint Replacement (CJR) model procedures, as of CY 2021, could be performed in ambulatory surgical centers (ASCs), erroneously indicating that they would all be paid for by Medicare. We failed to note the exception to the ASC covered procedure list policy that excludes procedures that had been on the inpatient only (IPO) list as of December 31, 2020, which is codified at 42 CFR 416.166(b)(2)(ii)(A). Therefore, we erroneously suggested that total ankle replacement (TAR) is on the list of ASC covered surgical procedures and can be paid for by Medicare when performed in the ASC, whereas TAR is actually subject to the exception at §416.166(b)(2)(ii)(A) and is not paid for by Medicare when performed in the ASC. We are revising that paragraph in the preamble to state that total knee arthroplasty (TKA) and total hip arthroplasty (THA) are both on the ASC covered surgical procedures list, and we are deleting the reference to TAR.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

Under 5 U.S.C. 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Specifically, 5 U.S.C. 553 requires the agency to publish a notice of the proposed rule in the **Federal Register** that includes a reference to the legal authority under which the rule is proposed, and the terms and substance of the proposed rule or a description of the subjects and issues involved. Further, 5 U.S.C. 553 requires the agency to give interested parties the opportunity to participate in the rulemaking through public comment before the provisions of the rule take effect. Similarly, section 1871(b)(1) of the Social Security Act (the Act) requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment for rulemaking to carry out the administration of the Medicare program under title XVIII of the Act. In addition, section 553(d) of the APA, and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date

after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the notice and comment and delay in effective date APA requirements. In cases in which these exceptions apply, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act, also provide exceptions from the notice and 60-day comment period and delay in effective date requirements of the Act. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal rulemaking requirements for good cause if the agency makes a finding that the notice and comment process are impracticable, unnecessary, or contrary to the public interest. In addition, both section 553(d)(3) of the APA and section 1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and an agency includes a statement of support.

We believe that this correcting document does not constitute a rule that would be subject to the notice and comment or delayed effective date requirements of the APA or section 1871 of the Act. This correcting document corrects technical errors in the preamble of the final rule but does not make substantive changes to the policies that were adopted in the final rule. As a result, this correcting document is intended to ensure that the information in the final rule accurately reflects the policies adopted in that final rule.

In addition, even if this were a rule to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule or delaying the effective date would be contrary to the public interest because it is in the public's interest to ensure that the final rule accurately reflects our policies. Furthermore, such procedures would be unnecessary, as we are not altering payment eligibility or benefit methodologies or policies, but rather, simply correcting the preamble description of policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the final rule accurately reflects these policies. Therefore, we believe we have good cause to waive the requirements for

notice and comment and delay of effective date.

IV. Correction of Errors

In FR Doc. 2021-09097 of May 3, 2021 (86 FR 23496), make the following corrections:

1. On page 23553, second column, first partial paragraph,
 - a. Lines 6 through 11, the phrase “remove TAR and certain other orthopedic procedures from the IPO list and allow all procedures not on the IPO list to be paid when furnished in both the outpatient hospital and ASC settings” is corrected to read “add THAs to the ASC covered procedures list”.
 - b. Lines 11 through 13, the phrase “all procedures included in the CJR model can, as of CY 2021, be performed in the ASC setting” is corrected to read “both TKA and THA may, as of CY 2021, be paid for by Medicare when furnished in the ASC setting”.
 - c. Line 15, the phrase "hospital setting is corrected to read "hospital settings."

Karuna Seshasai,

Executive Secretary to the Department,

Department of Health and Human Services.

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