Legal Issues

By Janet K. Feldkamp, JD, RN, LNHA

Push to Avoid Rehospitalization Has Unintended Outcomes

The push and pull tension between hospitalization and the provision of quality care for complex and compromised nursing home residents with limited clinical resources happens daily in skilled nursing facilities (SNFs) across the country. Recent Office of Inspector General (OIG) reports have focused on rehospitalization rates and adverse events for Medicare beneficiaries in SNFs. Also, a report by the Health and Human Services (HHS) Assistant Secretary for Planning and Evaluation (ASPE), issued in June 2011, provides background and options related to SNF resident hospitalizations.

As a backdrop, the HHS ASPE report discusses the concerns surrounding avoidable hospitalizations for SNF residents with multiple comorbidities and significant frailty. Decisions to hospitalize in this report were influenced by factors such as availability of registered nurses (RNs) for frequent assessment, resident and family preferences, and physician/nurse practitioner availability and preferences.

Facility directors should determine if additional staff training is necessary before accepting residents who have needs with which the staff is unfamiliar.

A November 2013 OIG report titled, "Medicare Nursing Home Resident Hospitalization Rates Merit Additional Monitoring" (OEI-06-11-00040) found that 25% of Medicare SNF residents were hospitalized in the 2011 federal fiscal year and that most of the residents were hospitalized for diagnoses of septicemia, pneumonia, and congestive heart failure. Research reveals negative outcomes associated with hospitalized SNF residents and that these transfers are costly to the Medicare program.

The February 2014 OIG report titled, "Medicare Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries" (OEI-06-11-00370) revealed that about 22% of the Medicare beneficiaries in SNFs in 2011 experienced at least one adverse event if they resided in a facility for more than 35 days. Seventy-nine percent of those adverse events resulted in a prolonged stay, a transfer to a different SNF, or a hospitalization; 14% required intervention to sustain the resident's life; and 6% contributed to or resulted in the resident's death. More than half of the residents who experienced harm were hospitalized. The report extrapolates the cost of care for the SNF resident who is hospitalized due to adverse events to $2.8 billion. Needless to say, resident hospitalizations, whether preventable or not, are problematic and can have negative outcomes for SNFs and residents alike.

Skilled Staff Needed

SNFs strive to provide quality care with limited resources and to prevent unnecessary hospitalizations for residents. In that ongoing quest for quality, facilities must have adequate clinical staff with significant skill and expertise to care for residents requiring frequent clinical assessments and multiple types of skilled care interventions. Negative outcomes occur when facilities either cannot or do not competently provide this care for residents.

The Departmental Appeals Board case of Senior Care Health & Rehabilitation Center Dallas vs. CMS (CR3228, C-12-1150, May 12, 2014) highlights the regulatory consequences for failure to provide care that meets professional nursing standards. In this case, a licensed vocational nurse (LVN) gave a resident with a central tunneled internal jugular intravenous line (a central line) an injection into that central line with significant air bubbles noted in the intravenous fluid. Air bubbles in the intravenous line can cause emboli, resulting in stroke or death. Additionally, the LVN did this in front of the surveyor and failed to stop when the surveyor called out to the LVN that such action was dangerous.

The errors cited in the immediate jeopardy citations included failure to administer the correct rate of medication, failure to administer the correct dose of medication, failure to utilize the equipment appropriately, failure to safely administer medications, and failure to have adequate training for the clinical staff to safely perform their job functions. Also, the assistant director of nursing did not comply with acceptable standards of practice. The resulting regulatory action was a civil monetary penalty of more than $170,000 and a citation of immediate jeopardy in several clinical F-tags.

In addition to competence in complex skilled nursing intervention, SNF nurses also must possess excellent assessment skills to prevent resident hospitalization. A recent jury verdict in Colorado highlights the importance of adequately addressing rapidly deteriorating residents. A Pueblo, CO jury awarded $3.7 million to the family of Janet Smith, a short-term rehabilitation resident at Belmont Lodge Health Care Center. Ms. Smith was at the facility for a rehabilitation stay after fracturing both ankles. The allegations included the failure of staff to adequately assess and monitor the resident's changing condition when her usual alert and oriented demeanor became confused and lethargic. The resident's daughter reported that within 1 day, Ms. Smith became unresponsive, and upon hospitalization it was found that she had sepsis and a urinary tract infection. Ms. Smith subsequently died. The jury awarded the daughter $200,000 for the resident's pain and suffering and $3.5 million in punitive damages. Additional allegations included significant gaps in documentation and falsification of clinical documentation. The plaintiff's attorney argued that there were spans of 19, 22, and 12 hours, respectively, with no record of any nursing assistants entering the resident's room.

When a resident is admitted to a facility, especially a resident with complex needs (e.g., a central line or urinary catheter), the SNF must appropriately assess these needs and develop a comprehensive plan of care to address them. Resident needs can be both clinical and psychosocial. The facility staff must provide ongoing assessment and communicate the status and needs of the resident with the family and physicians in ways that meet the professional standards of nursing care. Documentation must support those assessments, plans, and communications. When staffing is inadequate or the staff is not appropriately skilled or trained, negative outcomes may include unnecessary resident injury, avoidable hospitalization, and regulatory consequences such as significant fines, penalties, and potential litigation with multi-million dollar verdicts.

Managing Expectations

Although regulatory pressures have focused on preventing resident rehospitalization, facilities must always provide consistent, quality care that meets the expectations of residents, families, and professionals, and must appropriately manage the clinical and psychosocial conditions of residents. This can be accomplished by:

- Adequate numbers of skilled registered nurses to provide assessment, reassessment, and intervention based upon the residents' needs. Staffing levels should be based on census and acuity. Studies, such as the ASPE study cited here, have discussed the importance of adequate registered nurses to provide strong assessment and analytic skills to care for today's complex SNF residents.
- Adequate numbers of skilled licensed vocational/practical nurses to administer medications, implement orders, observe, and supervise appropriately trained nursing assistants.
- A strong Quality Assurance and Performance Improvement (QAPI) program that identifies concerns and implements strong action plans to internally and constantly improve care.
- Consistently strong clinical and administrative SNF leadership. Leaders must be highly trained and experienced individuals who can engender quality care delivery on a 24/7 basis.
- Considering the use of nurse practitioners or others with advanced skills and expertise to support the clinical staff in frequent assessment, training, and care for medically complex residents.
- Active medical directors who are involved in developing and updating clinical policies and procedures and inject their knowledge and expertise into the medical care of the residents in the SNFs.

In a time when SNFs are being scrutinized and will likely soon see financial penalties for certain rehospitalizations of Medicare residents, facility directors should carefully evaluate their ability to provide quality care to residents with complex needs. Determine the need for additional training to enhance the skill and expertise of the facility staff before accepting residents who have needs with which the staff is unfamiliar. Utilize the QAPI process to ensure that the facility is identifying areas that require improvement, and then implement and monitor QAPI action plans. Concern about rehospitalization should not be permitted to cloud judgment regarding the necessity of appropriate and timely care, even if a facility is unable to provide the level of care that a resident requires. When necessary care is not provided, outcomes can be disastrous both for the resident and for the facility.

This column is not to be substituted for legal advice. The writer, Janet K. Feldkamp, *practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, OH. You can comment on this and other columns at www.caringfortheages.com, under "Views."*