Workers' Compensation Board

NOTICE OF ADOPTION

Telehealth

I.D. No. WCB-09-23-00019-A
Filing No. 494
Filing Date: 2023-06-09
Effective Date: 2023-07-11

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Addition of section 325-1.26 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 141

Subject: Telehealth.

Purpose: Provides the option for telehealth visits in certain circumstances.

Text of final rule: A new section 325-1.26 of Title 12 NYCRR is hereby added to read as follows:

325-1.26. Telehealth.

(a) Definitions. Telehealth shall mean treatment by physicians, podiatrists, psychologists, nurse practitioners, physician assistants, and licensed clinical social workers authorized by the Chair to provide treatment and care under the Workers' Compensation Law (hereinafter "Authorized Medical Provider") using two-way audio and visual electronic communication, or audio only.

(1) When rendering medical treatment or care via telehealth, an Authorized Medical Provider must be available for an in-person clinical encounter with the claimant should such in-person encounter be medically necessary. This means the Authorized Medical Provider must be able to meet the claimant at the Authorized Medical Provider's office within a reasonable travel time and distance from the claimant's residence.

(2) Telehealth must be used in accordance with this section and any applicable New York State Medical Treatment Guideline incorporated by reference under section 324.2 of this Title.

(3) Authorized Medical Providers shall bill using the applicable Evaluation and Management code 99212 using Modifier 95 when services are rendered by telehealth using two-way audio and visual communication. When services are rendered by audio only in accordance with section 325-1.8 of this Title, the Authorized Medical Provider shall use Modifier 93. Place of service Code 10 shall be used when services are rendered while patient is in their home. Place of service code 02 shall be used when services are rendered while patient is in a healthcare setting that is not their home. When completing the report of treatment, the Authorized Medical Provider shall identify the address from which they rendered Medical Care via telehealth as the Authorized Medical Provider's business address. Notwithstanding the codes listed in this paragraph, appropriate telehealth codes as may appear in any future versions of the Official New York Workers' Compensation Medical Fee Schedule as incorporated by reference in section 329-1.3 of this Title may be used and will have the same effective date as the effective date of the future version of the Official New York Workers' Compensation Medical Fee Schedule.

(b) Treatment via telehealth.

(1) Treatment by Board-authorized physicians, podiatrists, nurse practitioners, and physician assistants under the Official New York Workers' Compensation Medical Fee Schedule as incorporated by reference in section 329-1.3 of this Title or the Official New York Workers' Compensation Podiatry Fee Schedule as incorporated by reference in section 343.2 of this Title may be rendered by telehealth following an initial in-person clinical encounter when medically appropriate and subject to the following restrictions:

(i) Acute and Subacute phases of injury or illness. Within the first three months following the date of injury or illness, use of telehealth shall be at the clinical discretion of the treating physician, podiatrist, nurse practitioner, or physician assistant, except that at least every third clinical encounter must be an in-person assessment by the treating physician, podiatrist, nurse practitioner, or physician assistant.

(ii) Chronic phase of injury or illness. When more than three months has passed from the date of injury or illness, use of telehealth shall be at the clinical discretion of the treating physician, podiatrist, nurse practitioner, or physician assistant, except that there must be an in-person assessment by the treating physician, podiatrist, nurse practitioner, or physician assistant, no less than every three months unless or until such provider has determined the patient has reached Maximum Medical Improvement (MMI) and has stated that the impairment or disability status is permanent and unlikely to change.

(iii) Injury or illness at MMI. When the claimant is in the chronic phase of injury or illness as defined in subparagraph (ii) of this paragraph and the treating physician, podiatrist, nurse practitioner, or physician assistant's opinion is that the claimant has reached MMI and the patient's impairment or disability status is permanent and unlikely to change, use of telehealth shall be at the discretion of the treating physician, podiatrist, nurse practitioner, or physician assistant, except that there must be an in-person assessment by such provider at least annually.

(2) Treatment by Board-authorized psychologists and licensed clinical social workers under the Official New York Workers' Compensation Behavioral Health Fee Schedule as incorporated by reference in section 333.2 of this Title may be rendered by telehealth when medically appropriate and in accordance with applicable Medical Treatment Guidelines using the following codes:

(i) New patient Evaluation and Management codes 99201-99204.

(ii) Psychotherapy combination codes and crisis codes: 90832-90834, 90836-90840, 90853.

(iii) Group therapy: 90853. The number of patients participating in a group therapy session via telehealth shall not exceed the number that would otherwise be permissible if the group therapy session had been held in person and does not require that every participant in the group therapy session be a workers' compensation claimant.

(iv) Remote behavioral health visits should be limited to those situations when there is no benefit to in-person services (versus remote services) or when an in-person office visit poses an undue risk or hardship on the patient. The reason for the use of a remote telehealth visit should be documented with each use of a telehealth visit.

(3) Treatment rendered by Board-authorized chiropractors, acupuncturists, physical therapists, and occupational therapists under the Official New York Workers' Compensation Chiropractic Fee Schedule as incorporated by reference in section 348.2 of this Title and the Official New York Workers' Compensation Acupuncture and Physical Therapy and Occupational Therapy Fee Schedule as incorporated by reference in section 329-4.2 of this Title may not be rendered via telehealth.

(c) Medically appropriate for telehealth means that an in-person physical examination of the claimant is not needed in order to assess the claimant's clinical status, need for further diagnostic testing, appropriate treatment, or the determination of causal relationship or level of disability. The terms and factors referenced in this subdivision use medical terms of art in the context of best medical practice and are parameters by which providers should prospectively determine whether an in-person physical examination is necessary and should not be the basis of a denial by carriers, self-insured employers, or third-party administrators.

(1) Factors where an in-person physical examination may not be necessary and therefore treatment by telehealth may be medically appropriate include but are not limited to:

(i) Management of chronic conditions where the Authorized Medical Provider has previously conducted a medically appropriate and comprehensive in-person assessment of the patient and condition and is fully familiar with the applicable medical history.

(ii) Discussion of test results.

(iii) Counseling about diagnostic and therapeutic options.

(iv) Dermatology, for visits not requiring palpation or biopsy of a lesion to accurately diagnose or treat the condition.

(v) Prescriptions for medication, subject to the limitations in paragraph (2) of this subdivision.

(vi) Nutrition counseling.

(vii) Mental health counseling, for which in-person assessment of body movements, postures, and other nonverbal cues is not needed for accurate diagnosis, treatment, or interim assessment of a condition or the potential adverse side-effects of a medication.

(viii) Other clinical scenarios as may be prescribed in Medical Treatment Guidelines or other related Board communications.

(2) Factors that indicate an in-person physical examination is necessary and treatment via telehealth is not medically appropriate include but are not limited to:

(i) Health concerns that require a procedure.

(ii) Abdominal pain, chest pain, clinically altered mental status, any situation in which it appears the claimant may pose a risk to themselves or others, severe headache, signs or symptoms of a stroke, or any other clinical presentation that is generally accepted as requiring in-person, emergent or urgent medical assessment, and for which in-person resources (e.g. regional hospital emergency departments or free-standing urgent care centers, as may be clinically appropriate) are readily available.

(iii) Eye or vision complaints.

(iv) Highly nuanced or multiple complex health concerns requiring an in-person examination to assess subtle interactions between comorbidities or medications.

(v) Any situation in which an in-person physical exam might reasonably impact the accuracy, quality, or certainty of the Authorized Medical Provider's assessment, treatment, or recommendations.

(vi) Any situation where an in-person physical examination is needed to assess disability or range of motion, including but not limited to strength testing, formal range of motion testing, assessment of joint stability, nuanced orthopedic and/or neurologic testing, spirometry or pulmonary function testing, or exercise tolerance testing.

(vii) Any physical therapy, occupational therapy, or chiropractic services utilizing physical modalities other than instruction on range of motion or strengthening exercises.

(viii) Any other clinical scenarios as may be prescribed in Medical Treatment Guidelines or other related Board communications.

(ix) Assessment of causal relationship for an injury or illness unless an in-person physical examination is not necessary to make the determination of causal relationship, in which case the Authorized Medical Provider must specifically articulate in the medical record why an in-person examination was not necessary in order to make a determination of causal relationship.

(3) Notwithstanding any of the factors listed in paragraph (1) of this subdivision, the following procedures or situations are not medically appropriate for telehealth:

(i) Urine drug testing.

(ii) The initial prescription of long-term medications or follow-up monitoring of those medications without periodic in-person evaluation.

(iii) Where the nature of treatment set forth in the Medical Treatment Guidelines necessitates an in-person examination.

(iv) Assessment of permanent disability.

(v) Any other clinical scenarios as may be outlined by the Board in Medical Treatment Guidelines or other related Board communications.

(vi) The patient lacks suitable technology or equipment necessary to conduct the telehealth visit.

(vii) The patient has physical and/or cognitive challenges that would be a barrier to an effective telehealth visit (without the assistance of another individual).

(viii) The patient has expressed a preference for an in-person visit, as well as a willingness and capability to travel to an in-person visit.

(d) Independent Medical Examinations (IMEs) are not treatment under the Workers' Compensation Law. Accordingly, IMEs conducted pursuant to section 300.2 of this Title and section 137 of the Workers' Compensation Law, may be conducted via telehealth when all parties of interest consent to such telehealth examination, and the independent medical examiner is not offering an opinion on permanent impairment.

Final rule as compared with last published rule: Nonsubstantial changes were made in section 325-1.26.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 328 State Street, Schenectady NY 12305, (518) 486-9564, email: regulations@wcb.ny.gov

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2026, which is no later than the 3rd year after the year in which this rule is being adopted.

Revised Regulatory Impact Statement, Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis and Rural Area Flexibility Analysis is not required because the changes made to the last published rule do not necessitate revision to the previously published document. These changes do not affect the meaning of any statements in the document.

Revised Job Impact Statement

A Job Impact Statement is not required because the proposal will not have any impact on jobs or employment opportunities. The proposal provides the option for telehealth visits in some circumstances.

Assessment of Public Comment

During the public comment period, the Board received approximately 20 unique public comments.

Several of the comments supported the new permanent telehealth proposal which took into account the feedback received on previous proposal iterations.

A handful of comments objected to the requirement that Board-authorized physicians, podiatrists, nurse practitioners, and physician assistants can only treat via telehealth following an initial in-person encounter. Whether an in-person initial encounter should occur is a topic widely discussed in telehealth circles, and the Board has found that most experts still agree that initial in-person visit provides the opportunity for a more comprehensive history and physical examination and affords a greater ability to detect subtle findings not readily obvious via telehealth. Requiring an initial in-person encounter for these provider types also creates a baseline for future telehealth visits, so no change has been made in response to these comments.

Several comments received expressed a belief that flexibility for telemedicine in behavioral health is necessary and stated in-person visits should not be required on a specific timeline in the behavioral health realm. Because the proposal already reflects this position, no change has been made in response to these comments.

Some comments objected to the requirement that the provider document the reason for use of telehealth in behavioral health visits, opining these visits are just as effective as in-person, as well as objecting to the "no benefit to in-person services" and "risk" language for remote behavioral health visits. As telehealth is still different from normal medical treatment in the past and is still becoming more widely accepted and used, it remains best clinical practice to articulate the reasons for a telehealth visit (versus an in-person visit) and to ensure it is beneficial to the patient, so no change has been made in response to these comments.

One comment disagreed with not allowing assessment of permanent disability via telehealth, especially for behavioral health. As with the above comments, telehealth is still evolving and at this point in time the Board believes best clinical practice is that permanency evaluations of any type should not be done via telehealth.

A few comments disagreed with the requirements for the different phases of illness or injury, opining that the increments requiring in-person visits are too frequent in most instances, and especially in the case of someone too ill or injured to travel to a doctor's office. Over the last few years, the Board has drafted various iterations of telehealth regulations – both emergency adoptions and draft permanent proposals. The requirements for telehealth have ranged from highly proscriptive to a great deal of latitude, and the Board believes this proposal strikes the best balance of all prior versions. For workers unable to travel to a doctor's office, the procedures in effect prior to the pandemic or any prior telehealth proposal remain in effect – this is not a new situation. Therefore, no change has been made in response to these comments.

The Board received a handful of comments objecting to the "reasonable travel time and distance" requirement for providers if an in-person encounter is medically necessary. This requirement is not a new concept and exists in workers' compensation case law independent of telehealth, so no change has been made in response to these comments.

Two comments requested the COVID-19 emergency adoption be permanently adopted. The COVID-19 emergency adoptions reflected the state of emergency for which greater latitude is afforded with respect to clinical standards to ensure adequate access to care during such an emergency, so no change has been made in response to these comments.

The Board received a few comments objecting to the use of code 99212, opining that it is insufficient. The Board has made a clarifying change to the proposal to reflect that changes in recommended coding may change and be reflected in future iterations of the fee schedule as they are updated.

The board received a few comments opining that the proposal should be changed to allow telehealth treatment by Board-authorized chiropractors, acupuncturists, physical therapists, and/or occupational therapists. Telehealth is still evolving, and like the case of permanency evaluations, the Board believes current best clinical practice is that these treatment types should not use telehealth, so no change has been made in response to these comments.

One comment requested the addition of a definition of "procedure" in subdivision (c)(2) which outlines that any visit requiring a "procedure" is not appropriate for telehealth. The term "procedure" is commonly understood in medical terminology, so no change has been made in response to this comment.

Changes made:

- Clarifying change to include language allowing future flexibility with updated coding