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CMS Issues Ruling To Resolve Pending Appeals Involving Three DSH Issues

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The Administrator of the Centers for Medicare and Medicaid Services (CMS) issued ruling CMS-1498-R[1] (Ruling). The Ruling directs the Provider Reimbursement Review Board (PRRB) and Hearing Officers to remand to CMS' contractors (fiscal intermediaries and Medicare audit contractors) a class of pending appeals involving the disproportionate share hospital (DSH) adjustment. Specifically, the Administrator has directed CMS contractors to reopen and revise appealed DSH adjustments relating to: (1) asserted errors in the SSI ratio; (2) exclusion of non-covered days for Medicare beneficiaries (e.g., those with exhausted Part A benefits); and (3) exclusion of certain labor and delivery room days for Medicare beneficiaries. Similarly, open cost reports are to be settled using the same terms as to be applied to the appealed issues.

The Ruling calls for these actions regardless of any individual hospital's disagreement with such process. In addition, the Administrator has determined that, because of the Ruling's terms, neither the PRRB nor any administrative tribunal retains jurisdiction over these issues. The Administrator has not established a formal timeline for implementation of the Ruling, but has given providers the opportunity to request remand and reopenings, rather than awaiting action by the tribunal before which an appeal is pending, or action by a CMS contractor to reopen the DSH adjustment.

Discussion

CMS issued Ruling CMS-1498-R, dated April 28, 2010, by posting it to the CMS website on April 29, 2010, and via an email alert on May 3, 2010. This Ruling notifies affected hospitals and CMS agents that the PRRB and other Medicare administrative appeals

tribunals shall remand to contractors pending appeals challenging any of the following three DSH issues:

- any asserted error in total SSI days;
- the exclusion of exhausted benefits or other non-covered days; and
- the exclusion of labor and delivery room days.

In addition, the Administrator directed CMS contractors to resolve these appeals. The Ruling explains how CMS contractors will recalculate the provider's DSH adjustments and make any payments "deemed owing." Finally, the Administrator directed CMS' contractors to apply the same procedures regarding these three DSH issues to any open cost reporting period for which the contractor has yet to issue a notice of program reimbursement (NPR).

The Ruling also purports to establish that, because the Ruling resolves the case or controversy in the pending appeals, neither the PRRB nor any other Medicare administrative appeals tribunal may retain jurisdiction over pending appeals including any of these three issues. The authors disagree with that jurisdictional claim, but feel it is not germane to the discussion below.

DSH Adjustments – SSI Days

CMS announced in the Ruling that it will use the federal fiscal year (FFY) 2011 rulemaking process to "determine the suitably revised data matching process that CMS will use in implementing this Ruling." The FFY 2011 proposed rule was released in the May 4, 2010 *Federal Register* [2] That Proposed Rule contains significant proposed changes to the manner in which CMS intends to calculate the SSI ratio used for providers' DSH calculations. The changes introduce the use of unique identifiers into the SSI matching process, as well as the possibility to tie more non-unique identifiers to the process. The revised match process will also be applied to all cost report years that are either not yet settled with an NPR or have a properly pending appeal with the PRRB.

These proposed changes flow directly from the decision in *Baystate Medical Center v. Leavitt*, in which the District Court for the District of Columbia concluded that CMS did not utilize the "best available data" when calculating providers' SSI ratios. *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, as amended, 587 F. Supp. 2d 37, 44 (D.D.C. 2008).

The revolutionary changes CMS proposed include the use of (1) Medicare beneficiaries' Social Security Numbers (SSNs) or other unique identifiers – a data matching tool missing from the current calculation of the SSI ratio; and (2) more current data files from the Social Security Administration (SSA). The Ruling states that three databases will be used stepwise to calculate a provider's SSI ratio. First, CMS will compare individuals'

SSNs to the SSNs contained in the Medicare Enrollment Database (EDB) to find any HICANs associated with the SSN. (The new process allows for up to 10 HICANs per SSN.)

Second, CMS will add to a beneficiary's list of HICANs any additional Title II numbers not captured in step 1. (Up to 10 Title II numbers per SSN can be accommodated in the new process).   Third, CMS will validate its findings by comparing HICANs in the EDB Title II numbers and HICANs in the MedPAR file. Once the data match is complete, CMS will determine the number of SSI days to be used in the SSI ratio.

DSH Adjustments – Exhausted Benefits (and other Non-Covered) Days

Since October 1, 2004, CMS has included in the SSI ratio patient days for Medicare beneficiaries who were not covered by Medicare Part A at the time of service due to exhaustion of the individual's benefits. Many providers have appealed cost reporting periods ending on or before September 30, 2004, challenging whether the SSI fraction should include these exhausted benefits Medicare patient days. In the Ruling, CMS directed contractors to resolve pending DSH appeals for cost reporting periods involving discharges before October 1, 2004, in which a hospital seeks to include inpatient days for an individual entitled to Medicare Part A benefits but for whom the hospital stay was not covered under Medicare Part A, including where a patient's Part A hospital benefits were exhausted. For such periods, CMS will include in the SSI ratio such non-covered and exhausted benefit days of individuals entitled to Medicare Part A.

The intended scope of this provision is quite broad. CMS sought to clarify the applicability of this provision as follows:

CMS recognizes that a hospital might seek … to include non-covered or exhausted benefit inpatient hospital days in the … Medicaid fraction instead of in the SSI fraction. … CMS' view is that a beneficiary remains *entitled* to Medicare Part A even if an inpatient stay is *not covered* under Part A and even when a patient's Part A hospital benefits were *exhausted*; thus, non-covered or exhausted benefit days do not belong in the Medicaid fraction numerator, which [by statute] consists of the number of Medicaid-eligible inpatient days of persons "who were *not entitled* to benefits under Part A." In any event, the administrative appeals tribunals should remand, in each qualifying appeal, each pending claim on the non-covered or exhausted benefit inpatient hospital day issue to the Medicare contractor for implementation of this Ruling … regardless of whether the hospital seeks … to include non-covered or exhausted benefit days in the … Medicaid fraction or in the SSI fraction or whether the provider has specifically requested that such days be included in either of the two DSH fractions. … We note that, after the Ruling is applied … the hospital might be satisfied with such recalculated (or calculated) DSH

payment even though the provider originally sought to include such days in the Medicaid fraction. Moreover, even if the hospital were dissatisfied with such recalculated (or calculated) DSH payment … this Ruling provides that the resultant NPR … would be subject to administrative and judicial review in accordance with the applicable [law]. Ruling at 13-14 (emphasis added).

Thus, CMS appears to intend its Ruling to reach many different types of appeals involving non-covered inpatient days, and not simply SSI days. The true reach of this initiative ruling is unclear, and hospitals appealing DSH issues not expressly described in the Ruling may need to undertake a cost/benefit analysis of challenging the applicability of the Ruling to their individual facts and circumstances. That a reopened NPR is subject to administrative and judicial review may be cold comfort to hospitals that have pursued such issues to the PRRB, only to receive a nominal correcting adjustment and be pushed back in the appeals process by several months or years.

DSH Adjustments – Labor and Delivery Room Days

Since October 1, 2009, CMS has allowed hospitals to include labor and delivery room (LDR) inpatient days in the DSH calculation if the LDR patient was admitted as a hospital inpatient, regardless of whether or not the patient occupied a routine bed prior to the census-taking hour. The Ruling announced that, for pending appeals or cost reporting periods beginning prior to October 1, 2009 that have not yet been settled with an NPR, CMS contractors will recalculate a hospital's DSH payment by including the LDR days in the Medicaid or SSI fraction, regardless of whether the LDR patient had occupied a routine bed prior to occupying an ancillary LDR bed before the census-taking hour. Whether the LDR days are to be included in the SSI ratio or the Medicaid ratio will depend on whether the patient is entitled to SSI benefits.

Jurisdictional Considerations

For each of the three DSH issues discussed above, CMS explains that its "action eliminates any actual case or controversy regarding the hospital's previously calculated DSH payment adjustment and thereby renders moot each properly pending claim in a DSH appeal" for that issue. "Accordingly," the Ruling concludes, PRRB and the other administrative tribunals lack jurisdiction. This argument stretches the legal fabric, as CMS lacks the unilateral authority to determine that the PRRB or other tribunals lack jurisdiction over an issue, and until the factual issues are resolved, the Ruling does nothing to eliminate the controversy over the number of SSI days, non-covered days, exhausted Part A benefits days, or LDR days to which an individual hospital is entitled. That said, a legal challenge arguing against remand would not be worthwhile if the hospital were to be made whole under the procedures described in the Ruling.

Implementation Procedures

The Ruling describes two alternatives. The default procedure is for hospitals to simply await the PRRB (or other administrative tribunal) to issue a remand decision in the ordinary course. The alternative procedure is for a hospital to affirmatively request a remand of a pending case to the contractor or for recalculation of the DSH payment adjustment. For those cases plainly falling within the parameters of the Ruling, the alternative procedure (an affirmative request for remand) may be advisable. Neither the ruling, nor the IPPS proposed rule, sets forth a time frame for any action to be taken. If a hospital or group intends to select the alternative procedure, there may be advantages from doing so early.

Group Appeals

The Ruling is generally written as though it addresses an individual hospital appeal. In setting forth the procedures for implementation of the Ruling, however, CMS makes clear that the procedures apply equally to group appeals. In the event of a group appeal, if one or more hospitals choose not to participate in (or subsequently object to) a group request for remand, the entire group must await the default procedure. The authors believe that the alternative procedure, as described, will not prejudice the rights of the group appeal participants, and may be a more expeditious route to receiving at least a portion of the amounts owed. If, after revised DSH adjustments are issued, it appears that a material understatement in SSI days remains, the group participants can consider a fresh appeal from the revised NPR at such time.

Conclusion

The Ruling is no doubt an attempt to thin the burgeoning dockets of the PRRB and other administrative tribunals. However, it remains to be seen what type of additional delays may result from remanding these cases back to the contractors, many of which operate with smaller staffs than the PRRB. A provider or group should consider a request for remand if it advances the appeal more expeditiously. Providers should also remember that the results of the remands, whenever they are determined, will yield a revised NPR that will trigger new appeal rights for providers that are dissatisfied with the results of the remand.

[1] The full text of the ruling is available at: http://www.cms.gov/rulings/cmsr/list.asp.

[2] The proposed rule is available at the following link: http://edocket.access.gpo.gov/2010/pdf/2010-9163.pdf.