

HOSPITALS WIN BATTLE OVER SITE-NEUTRAL PAY CUTS

CMS was dealt a blow from the D.C. District Court on September 17, 2019 when the court determined the agency's "site neutral" payment policy in the CY 2019 Outpatient Prospective Payment System ("OPPS") Final Rule exceeded its statutory authority to adjust payments under the OPPS. Refusing to accept the government's argument that the plaintiffs were barred from making the challenge, the court vacated that portion of the Final Rule. While this is a huge win for the plaintiff hospitals, the court failed to provide the requested relief – a refund of financial losses stemming from the site-neutral payment; rather, the judge remanded the case back to CMS.

DISCUSSION

Under Section 603 of the Bipartisan Budget Act of 2015 ("Section 603"), qualifying off-campus provider-based departments ("PBDs") that were billing as a hospital department under the OPPS when the statute took effect on November 2, 2015 (commonly known as "excepted PBDs") would continue to be paid under the OPPS. Going forward, newly created off-campus PBDs (commonly known as "non-excepted PBDs") would be paid under the "applicable payment system," which CMS interpreted to be the Medicare Physician Fee Schedule ("MPFS"), based on a percentage of the otherwise applicable OPPS rates. For 2017, CMS set the site neutral rate for services provided at non-excepted PBDs at 50 percent of the otherwise applicable OPPS rates. For 2018 CMS reduced that rate to 40 percent of the OPPS and continued to reimburse at 40 percent for 2019.

On November 1, 2018, CMS released its CY 2019 OPPS Final Rule. Among many other changes, CMS finalized its proposal to reduce payment for E/M services **at all** off-campus PBDs, including excepted (grandfathered) off-campus PBDs (as indicated by HCPCS code G0463 billed with a PO modifier). Under the Final Rule, payment for E/M services (as described by HCPCS Code G0463) were cut to 70 percent of the OPPS rate at excepted (grandfathered) off-campus PBDs in 2019. In 2020, such services would be paid at 40 percent of the OPPS rate. Importantly, CMS made this change in a non-budget neutral manner, estimating that this change will result in reduced payments (between the Medicare Program and beneficiary copayments) of \$380 million for 2019. This "site neutral" payment policy for E/M services effectively eliminated the payment difference created by Section 603.

A group of hospitals, through the American Hospital Association, were the first to challenge this payment policy in federal court. The hospitals filed appeals for claims containing HCPCS code G04643 with a PO modifier; however, it became apparent that continuing to appeal every claim would be futile and the plaintiff hospitals proceeded to federal court. The court agreed with this approach, noting additional administrative review would do nothing further for the case since the question was purely a matter of law: "Futility may serve as a ground for excusing exhaustion, either on its own or in conjunction with other factors."

The plaintiff hospitals argued that the Secretary acted *ultra vires* because its "site neutral" payment policy exceeded its statutory authority to modify payment under the OPPS.

The government argued here that the Final Rule imposed a rate adjustment as a "method" to address requirements of § 1395/(t)(2)(F) which requires that "[T]he Secretary shall develop a method for controlling unnecessary increases in the volume of covered OPD services." The government also argued that challenges to its method is barred by the companion statute preventing administrative and judicial review of those methods:

There shall be *no administrative or judicial review* under section 1395ff of this title, 1395oo of this title, or otherwise of— (A) the development of the classification system under paragraph (2), including the establishment of groups and relative payment weights for covered OPD services, of wage adjustment factors, other adjustments, and *methods described in paragraph (2)(F)*.

42 U.S.C. § 1395/(t)(12)(A) (emphasis added).

The court found that CMS's "site neutral" payment policy does not constitute a "method" within the meaning of the statute and was an *ultra vires* action. The court also found that there is no bar for judicial review of CMS's site neutral policy. To explain its decision, the court discussed its interpretation of "method" as used in the statute. The court stated that regardless of the actual definition, one thing that a method is not is a price setting tool. Congress already created a process to set prices (i.e., payments) for the OPPS system and how those

prices (i.e. payments) may be adjusted. That statutorily created process is intended to avoid the government cherry picking certain codes or services for payment adjustments. The court stated that CMS cannot use the non-defined term "method" to "make up" a process. Additionally, the court notes Congress gave instructions to CMS on how the agency should develop and adjust payment weights for outpatient services. CMS does not have the ability to circumvent this clearly articulated process and do something that is not budget neutral.

The plaintiffs in this case requested the restoration of the payments denied to them by CMS's site neutral payment policy. While the court vacated the portion of the CY 2019 OPPS Final Rule that implemented the policy, it stopped short of ordering the restoration of payments. Instead, the judge remanded the case back to CMS and set an October 1, 2019, deadline for a status report from both parties regarding whether additional briefing is necessary as to appropriate remedies. This status report deadline falls well before the deadline for CMS to appeal this decision to the Court of Appeals, and it remains to be seen if CMS will appeal this decision, in light of the judge's order to file a status report regarding additional briefing about the proper relief.

It is unclear when and how the relief will be applied. It still remains possible that the relief might only be applied to the hospitals that preserved appeal rights either administratively or in federal court. The second phase of the site neutral payment policy is slated to be included in the CY 2020 OPPS Final Rule, but it remains to be seen whether that will now be finalized.

PRACTICAL TAKEAWAYS

- The court ruled CMS's "site neutral" payment policy for E/M services exceeded CMS's statutory authority to change OPPS reimbursement rates.
- The court's decision limits CMS's ability to adjust payments under the OPPS.
- Hospitals that did not preserve appeal rights for CY 2019 should still consider doing so, as the decision does not address whether the decision related to the site neutral payment policy will apply only to hospitals that preserved appeal rights.

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