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D.C. CIRCUIT UPHOLDS MEDICARE OVERPAYMENT EXTRAPOLATION DETERMINATION

EXECUTIVE SUMMARY

In an interesting Medicare Integrity Program case examining conflicting provisions 42 U.S.C. § 1395ddd(f)(3) and 42 U.S.C. § 1395kk(a) (the "Medicare Statute"), the U.S. Court of Appeals for the D.C. Circuit (the "Court") upheld a decision of a federal district court, concluding that the Secretary of the Department of Health and Human Services ("HHS") did not violate the Medicare Statute when she delegated to an outside contractor the task of determining whether there existed a "sustained or high level of payment error," justifying the use of extrapolation to determine overpayment amounts to be recovered from a Medicare home health care provider. Further, the Court held that it lacked authority to review the merits of the sustained or high level of payment error determination *even though* such determination was made by a Medicare administrative contractor ("MAC") instead of the Secretary of HHS, directly. The case is *Gentiva Healthcare Corp. v. Sebelius*, No. 1:11-cv-00438, (D.C. Circ. July 23, 2013) and can be found here.

FACTS, PROCEDURAL HISTORY AND ANALYSIS

In 2007, pursuant to the Medicare Modernization Act and acting in its role as a guardian of the Medicare trust fund, a MAC reviewed reimbursement claims submitted for home health care services provided between July 1, 2005 and November 30, 2006 by a home health company ("HHC"). The MAC found that 58% of those claims had been at least "partially denied" for failure to comply with Medicare coverage requirements. The MAC also found that payment rates to the HHC were high for the geographic area. Based on these findings, the MAC determined that the HHC's claims exhibited a sustained or high level of payment error, which in turn triggered an audit of a sample of 30 claims, nearly 87% of which (i.e., 26 claims) were found to be overpaid. Extrapolating from the 87% error rate, the MAC then determined that Medicare had overpaid the HHC by $4,242,452.10. The HHC successfully challenged 10 of the sample claims, resulting in a revised extrapolation and overpayment amount of $2,112,778.00.

In an administrative proceeding before an administrative law judge ("ALJ"), the HHC challenged the overpayment amount with respect to 10 additional claims and also the validity of the MAC's statistical sampling and extrapolation methodology. In response, the ALJ agreed that the 10 additional claims had not been overpaid and directed that the overpayment amount be reduced further. However, the ALJ upheld the MAC's sampling and extrapolation methodology.

The HHC then appealed the ALJ's approval of the MAC's use of extrapolation to the Medicare Appeals Council of HHS' Departmental Appeals Board (the "Appeals Council"). It based its appeal on 42 U.S.C. § 1395ddd(f)(3), which states: " . . . *[a] [M]edicare contractor may not use extrapolation to determine overpayment amounts to be recovered . . . unless the Secretary determines that . . . there is a sustained or high level of payment error.*" (Emphasis added.) The HHC argued that the language of the Medicare Statute makes it clear that extrapolation to calculate a total overpayment amount cannot be used *unless* the Secretary makes the sustained or high level of payment error determination, in the HHC's estimation, a non-delegable task. The Appeals Council rejected the HHC's statutory interpretation, finding it "unduly narrow" and holding that 42 U.S.C. § 1395kk(a) provides that the Medicare program is administered by the Secretary of HHS, and the Secretary may "*perform any of [her] functions under [the Medicare program] directly, or by contract . . . as the Secretary may deem necessary*." (Emphasis added.) Thus, under the Appeals Council's reasoning, since the Secretary has broad authority to contract out any of her functions, there is no absolute requirement that the Secretary, herself, make the sustained or high level of payment error determination prerequisite to performing statistical extrapolation, *notwithstanding* the plain language of 42 U.S.C. § 1395ddd(f)(3).

The HHC filed suit in federal district court, challenging the Appeals Council's decision. The district court granted summary judgment in favor of the Secretary of HHS, relying on administrative law principles firmly established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The district court held:

1. The Secretary has "broad power" to subcontract out her functions in the absence of any "explicit indication" that Congress meant for *only* the Secretary to make sustained or high level of payment error determinations;

2. The Secretary's interpretation of the Medicare Statute language (as not prohibiting her from subcontracting out her sustained or high

level of payment error determination function) was "reasonable" and therefore "warranted deference"; and

3. The district court had no jurisdiction to review the MAC's substantive sustained or high level of payment error determination; in the district court's view, the Medicare Statute bars administrative or judicial review of these determinations, even those determinations made by Medicare contractors notwithstanding the plain language of 42 U.S.C. § 1395ddd(f)(3), which seems to bar judicial review of determinations made specifically by "the Secretary."

The HHC then appealed to the Court, which affirmed the district court's decision. The Court agreed that the case was subject to the *Chevron* standard. Therefore, while it believed the HHC's statutory interpretation might well be the "better reading," courts must uphold reasonable agency interpretations, and, in the Court's opinion, the Secretary's interpretation was "not unreasonable." Further, the Court emphasized that 42 U.S.C. § 1395kk(a) permits agency delegation of *any* functions. Accordingly, it believed Congress did not "unambiguously bar" the Secretary from delegating her sustained or high level of payment error determination function to a Medicare contractor. Finally, the Court opined that while sustained or high level of payment error determinations were unreviewable by statute, even when these were delegated to an outside contractor, providers still have the ability to challenge at an agency level, or in court, the *final overpayment calculation* and the *extrapolation methodology*. It noted that the HHC successfully overturned every single overpayment claim it challenged in an administrative agency proceeding before the Appeals Council without overturning the sustained or high level of payment error determination. Thus, a decision insulating a Medicare contractor's (as well as the Secretary of HHS') sustained or high level of payment error determination from judicial review does not leave providers without adequate redress of their grievances.

CONCLUSION AND PRACTICAL TAKEAWAYS

At least for the D.C. Circuit, the *Gentiva* case resolves a potential conflict between two provisions of the Medicare Statute: one that says the Secretary of HHS has broad authority to delegate any of her functions by contract as she deems necessary, and another that suggests that extrapolation cannot be used by a Medicare contractor to determine overpayment amounts to be recovered unless *the Secretary* (and not a designee) determines there is a sustained or high level of payment error in a provider's reimbursement claims. The Court applied the *Chevron* standard, which stands for the proposition that courts must defer to agency decisions in administrative adjudications if there is statutory ambiguity and the relevant agency reasonably interprets such statute. Of course, other federal district and circuit courts are not bound by decisions of the D.C. Circuit, but *Gentiva* provides guidance in this thorny area.

Providers should be on notice that there is now precedent permitting a Medicare administrative contractor to perform extrapolation even if the contractor, and not the Secretary of HHS, determines there is a sustained or high level of payment error in a provider's reimbursement claims.

If you have any questions or would like additional information about this topic, please contact:

- Adele Merenstein at (317) 752-4427 or amerenst@hallrender.com;
- Katherine A. Kuchan at (414) 721-0479 or kkuchan@hallrender.com;
- Regan E. Tankersley at (317) 977-1445 or rtankersley@hallrender.com; or
- Your regular Hall Render attorney.