PUBLICATION

D.C. District Court Strikes Down PRRB's Application of the "Self-Disallowance" Jurisdictional Requirement [Ober|Kaler]

2016

In *Banner Heart Hospital, et al. v. Burwell*, the United States District Court for the District of Columbia (Court) held on August 19, 2016, that the Provider Reimbursement Review Board (PRRB) incorrectly declined to hear an appeal request for expedited judicial review that involved a legal challenge to the outlier payment regulations. The PRRB based its decision on, as commonly referred to in Medicare parlance, the "self-disallowance" regulations, adopted in 2008. As further discussed below, the Court found that this regulatory requirement directly contradicts the authorizing Medicare statute and legal precedent established by the Supreme Court of the United States in *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399 (1988).

The self-disallowance regulation restricts a provider's right to an appeal before the PRRB to situations where the provider has claimed the cost on its cost report either as an allowable cost or, if the provider believes the Medicare administrative contractor (MAC) would find the cost not allowable, as a protested amount. 42 C.F.R. § 405.1835(a)(1). The providers in this appeal did not claim the cost at issue, *i.e.*, outlier costs, either as an allowable cost or in protest. The providers argued that they did not include the costs on their cost reports, because the MAC was bound by CMS regulation to disallow the costs and, thus, such a claim would be futile. Rather, the providers filed a request at the PRRB for expedited judicial review, which authorizes the PRRB to refer the case to federal district court when the PRRB has jurisdiction over the case but is not authorized to grant the relief sought. The PRRB rejected the providers' request for expedited judicial review, asserting that the providers' failure to include the costs on their cost reports as either allowable costs or protested amounts violated the self-disallowance regulation and thereby was a bar to the PRRB's jurisdiction over the case.

The Court analyzed the self-disallowance regulation through the two-step *Chevron* analysis and found that Congress had directly spoken to this issue in 42 U.S.C. § 1395oo, which is Step One of the *Chevron* analysis. The Court discussed at length the Supreme Court's decision in *Bethesda* that interprets section 1395oo and addresses substantively the same issue. In *Bethesda*, and as reiterated by the Court, a provider does not have to include items in its cost report that are the result of a regulatory challenge in order to have jurisdiction before the PRRB.

The Court further discussed that raising a regulatory challenge to the MAC – an entity that must follow regulations and has no authority to do otherwise – is futile, and as stated in *Bethesda*, is "quite unnecessary." Consistent with the precedent from *Bethesda*, the Court found the self-disallowance regulation conflicts with the plain reading of section 1395oo, and the PRRB erred in ruling it had no jurisdiction to hear the providers' challenge to the outlier regulations. The Court therefore remanded the case to the PRRB.

Ober|Kaler's Comments

- The Court made its ruling based on the previous 2008 regulatory language of 42 C.F.R. § 405.1835(a)(1) and did not consider the effect of the newly revised regulatory language on its decision. Effective January 1, 2016, CMS removed the self-disallowance jurisdictional rule and, in its place, implemented a rule that requires costs to be claimed on a cost report as an allowable cost or

protested amount, as a prerequisite to any entitlement to payment. (*See* our discussion of this new rule in this earlier Payment Matters article.) Providers can expect future litigation on the revised regulatory language since CMS has now maneuvered what is essentially the same disclosure obligation to the MAC as an explicit cost-reporting requirement instead of a jurisdictional precondition for review by the PRRB.

- Providers should stay tuned as it is likely the government will appeal this decision to the appeals court.
- Providers that wish to challenge a CMS regulation or policy but have not claimed the related cost on their cost report as an allowable cost or a protested amount, should continue to protect their appeal rights until this case has become final, particularly for cost years prior to implementation of the cost reporting regulations that became effective January 1, 2016, discussed above.