PUBLICATION

CMS Issues Proposed Retroactive DSH Rule Requiring Medicare Part C Days in the Medicare Fraction and Blocks Providers' Appeals through Ruling

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In a Federal Register publication last month, CMS announced that it intended to retroactively adopt a change to its Medicare disproportionate share hospital (DSH) regulation. Specifically, it proposed adopting a 2014 change to the rule for periods prior to 2014. This methodology would require Medicare Part C days to be included in the DSH Medicare (or SSI) fraction and excluded from the Medicaid fraction. 85 Fed. Reg. 47723 (Aug. 6, 2020) (Proposed Rule). Subsequently, on August 17, 2020, CMS issued a ruling that would require appeals of this issue for years prior to 2014 that are pending before the Provider Reimbursement Review Board (PRRB) to be remanded to the Medicare Administrative Contractors (MACs), thereby barring providers from litigating their appeals of this issue at the PRRB. CMS-1739-R (Ruling).

Background

In the federal fiscal year (FY) 2004 inpatient perspective payment system (IPPS) proposed rule, CMS asserted that, in the Medicare DSH calculation, Medicare Part C days should be included in the Medicaid fraction (if the patient was also eligible for Medicaid) and excluded from the Medicare fraction. However, the agency adopted a very different methodology in the FY 2005 IPPS final rule, determining that the Part C days belonged in the Medicare, rather than the Medicaid, fraction. The court struck down the final rule, finding the agency's adoption of this rule was not the logical outgrowth of the rule it actually proposed. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102 (D.C. Cir. 2014) (*Allina I*).

CMS eventually adopted a change to the rule for FY 2014 through notice and comment rulemaking, requiring the inclusion of the Part C days in the Medicare and not the Medicaid fraction for discharges on or after October 1, 2013. 78 Fed. Reg. 50496, 50614 (Aug. 19, 2013). However, despite the earlier court ruling and the prospective adoption of a change in the rule for FY 2014, CMS calculated 2012 DSH payments to include the Part C days in the Medicare and not the Medicaid fraction. Providers challenged these calculations, and the United States Supreme Court struck down the agency's DSH methodology, finding that the agency must engage in proper notice and comment rulemaking before including beneficiaries enrolled in Medicare Part C in the Medicare fraction of the DSH calculation. *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (June 3, 2019) (*Allina II*).

Proposed Rule

In the August 6, 2020 preamble to the Proposed Rule, CMS asserted that the court rulings require that the agency adopt a retroactive rule governing treatment of Medicare Part C days in the DSH calculation. Specifically, the agency asserted the courts have ruled that: (1) the statute does not speak directly to how to treat the Part C days in the DSH calculation; (2) the statute requires that the Part C days be included in either the Medicare or the Medicaid fraction; and (3) there is no properly promulgated rule in place for fiscal years before 2014, since the 2005 rule was vacated. Thus, the agency asserted, in order to comply with its statutory mandate to calculate DSH payments, the agency must engage in retroactive rulemaking.

With that basis established, the agency proposed to adopt a rule following the policy that it adopted in 2014, requiring that Part C days be included only in the Medicare fraction of the DSH calculation, and to do so for discharges prior to October 1, 2013. The comment period closes October 5, 2020 at 5:00 p.m. EST.

CMS Ruling

On August 17, CMS issued CMS-1739-R. The stated purpose of the Ruling is to address how CMS will handle administrative appeals in response to the Supreme Court's decision in *Allina II*, in which the court held that CMS must engage in rulemaking before it can include Part C days in the DSH Medicare fraction.

The Ruling puts the PRRB and other Medicare administrative appeal tribunals on notice that they lack jurisdiction over certain provider appeals regarding treatment of Medicare Part C days in the DSH calculation.

CMS asserts in the Ruling that the Supreme Court has made it clear that the DSH payments in all *Allina*-like cases must be recalculated pursuant to a properly promulgated regulation. Further, the agency asserts that – in order to conserve administrative and judicial resources required for these cases to be appealed to the PRRB, then moved and consolidated in federal district court, where the Secretary seeks remand – the cases should be remanded to the MACs upon filing at the PRRB. Once remanded to the MACs, they will calculate DSH payments in accordance with CMS's forthcoming final rule.

The Ruling applies to "years before FY 2014 as to any appeals arising from NPRs [notices of final determination] from that period that pre-dates the forthcoming rule or that arise from an appeal based on an untimely NPR under 42 U.S.C. 1395oo(a)(1)(B) or (C) and any subsequently issued NPR for that fiscal year pre-dates the new final rule."

The PRRB and other applicable administrative tribunals are instructed to first determine if they have jurisdiction over the appeal and, if so, to remand to the applicable MAC. Providers who wish to dismiss their cases that qualify for remand under the Ruling may request dismissal of their appeals rather than remand. MACs are instructed to hold all recalculations until after the new final rule is promulgated. CMS asserts that the remand resolves providers' allegations that the DSH adjustments are invalid because the Secretary did not undertake notice-and-comment rulemaking before including the days at issue in the Medicare fraction. CMS therefore concludes that the remand and recalculation pursuant to the forthcoming rule would therefore eliminate any actual case or controversy and render the appeal moot.

Discussion

Despite the courts' rulings, first striking down the agency's methodology as part of the 2005 final rule and later striking down that methodology as applied in 2012 DSH calculations, the agency refuses to accept defeat.

The Proposed Rule is yet another attempt by the agency to adopt its methodology without prior notice and comment rulemaking. Further, the Ruling effectively operates as a dismissal of any providers' claims pending at the PRRB, allowing providers no means for administrative and ultimately judicial appeal, as required by statute. *See* 42 U.S.C. § 1395oo.

There no doubt will be challenges mounted to the agency's actions, both its final adoption of the Proposed Rule and its Ruling. Providers who receive DSH should continue to watch for developments.

For further information, please contact any member of Baker Donelson's Reimbursement Team.