Another Small Victory For Hospitals: Court Rejects CMS' Narrow Application of DSH Payment

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In the seemingly never-ending litigation saga over which categories of patient days should be included in the Medicare disproportionate share hospital ("DSH") proxies, two recent court cases have favorably ruled for hospitals on the appropriate interpretation of the federal Medicare DSH statute.

The Medicare statute requires that DSH payments be calculated using two fractions: (1) the proportion of SSI-entitled Medicare beneficiaries to Medicare beneficiaries (also known as the "Medicare fraction"), and (2) the proportion of patients eligible for medical assistance under a Title XIX plan to the total number of patients (known as the "Medicaid fraction").

In *Northeast Hospital Corporation v. Sebelius,* Civ. No. 09-0180 (D.D.C. Mar. 30, 2010), the D.C. District Court addressed a number of DSH calculation issues. The court first rejected the hospital's attempt to have certain charity care days included in the Medicaid fraction. The hospital argued that charity care days were incorporated into payments made for Medicaid DSH under the state's Title XIX plan. The court refused to include these days in the Medicaid fraction because the patients were not themselves "eligible for assistance" under a state plan.

However, the court then ruled in favor of the hospital on the issue of inclusion of dual-eligible Medicare Advantage enrollees in the Medicaid fraction, finding that once a patient enrolls in a Medicare Advantage (or Part C) plan, that patient is no longer "entitled" to receive benefits under Part A as the Medicare fraction requires. Instead, dual-eligible Medicare Advantage patients should be counted in the Medicaid fraction, as opposed to the Medicare fraction, which would result in a more favorable financial outcome for the hospital. The court also required CMS to include patient days that were previously excluded because they were associated with days that were spent in labor and delivery areas of the hospital.

Another case, *Metropolitan Hospital, Inc. v. HHS,* No. 1:09-cv-128 (W.D. Mich. Apr. 5, 2010), addressed the single issue of whether Medicare Part A dual-eligible days should be included in the Medicaid fraction. The hospital in that case argued that dual-eligible patients who have exhausted their Medicare Part A coverage should be included in the Medicaid fraction. The court agreed and invalidated CMS' regulation (42 C.F.R. §412.106(b)) which excluded dual-eligible days from the Medicaid fraction and included them in the Medicare fraction if patients were also entitled to SSI. Accordingly, the court found that these patients belonged in the Medicaid fraction because they were eligible for Medicaid and, at the time they have exhausted benefits, they no longer were "entitled" to Medicare Part A. The court ordered CMS to instruct its fiscal intermediaries to include these days in the Medicaid fraction.

For the moment, and barring any further appeals reversing these rulings, these decisions may result in increases in Medicare DSH payments for hospitals that have preserved their rights to appeal the exclusion of such days from the DSH calculation. As a result, hospitals should continue to preserve their rights to raise these issues, and continue to pursue them through the PRRB.

About the author

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