PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2005-D47

PROVIDER -
Alhambra Hospital

Provider No.: 05-0281

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
United Government Services, LLC - CA

DATE OF HEARING -
February 15, 2005

Cost Reporting Periods Ended -
June 30, 2000 and June 30, 1999

CASE NOs.: 02-2129 and 04-1734
(respectively)

INDEX

ISSUE:

Whether the Provider is entitled to include in the Medicaid proxy of the DSH payment calculation patient days associated with patients who otherwise were entitled to benefits under both Medicare & Medicaid who were treated in the Provider's sub-acute unit on days when those patients were not entitled to Medicare Part A skilled nursing facility (SNF) benefits.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

The Medicare statute, Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, creates a federally funded health insurance program for the elderly and disabled known as Medicare and Medicaid. This case arises under Part A of the Medicare program, which authorizes payments for, *inter alia*, certain inpatient hospital services and related post-hospital services. See 42 U.S.C. §§1395c, 1395d. A hospital may participate in the Medicare program as a provider by entering into a "provider agreement" with the Secretary of Health and Human Services. 42 U.S.C. §1395cc. The plaintiff is a not-for-profit acute care hospital that participates as a provider of inpatient hospital services in the federal Medicare program.

The operating costs of inpatient hospital services are reimbursed by Medicare primarily through the Prospective Payment System (PPS). See 42 U.S.C. §1395ww(d). The regulations governing the PPS require a provider of inpatient hospital services to file an annual cost report with a "fiscal intermediary." 42 C.F.R. §413.20(b).[1] The fiscal intermediary -- typically an insurance company -- then audits the report and makes a final determination of the total amount of reimbursement owed by Medicare to the provider for that fiscal year. The total amount due a provider is set forth by the intermediary in an initial Notice of Program Reimbursement (NPR). See 42 C.F.R. §405.1803. A provider that is dissatisfied with that determination may timely request a hearing before the Provider Reimbursement Review Board (Board), 42 U.S.C. §1395oo(a) and (h).

The PPS statute contains a number of provisions that adjust reimbursements based on hospital-specific factors. See 42 U.S.C. §1395ww(d)(5). This case involves the hospital-specific disproportionate share adjustment (DSH), which requires the Secretary to provide increased PPS reimbursement to hospitals that serve a "significantly disproportionate number of low-income patients." 42 U.S.C. § 1395ww(d)(5)(F)(i)(I). Whether a hospital qualifies for the DSH adjustment, and how large an adjustment it receives, depends on the hospital's "disproportionate patient percentage." See 42 U.S.C. § 1395ww(d)(5)(F)(v). The "disproportionate patient percentage" is the sum of two fractions, the "Medicare and Medicaid fractions," for a hospital's fiscal period. 42 U.S.C. §1395ww(d)(5)(F)(vi). The first fraction's numerator is the number of hospital patient days for patients entitled to both Medicare Part A and Supplemental Security Income, excluding patients receiving state supplementation only, and the denominator is the

[1] Unless otherwise noted, citations to the Code of Federal Regulations are from that version of the regulations revised as of October 1, 1996.

number of patient days for patients entitled to Medicare Part A. Id. The second fraction's numerator is the number of hospital patient days for patients who were eligible for medical assistance under a State Plan approved under Title XIX for such period but not entitled to benefits under Medicare Part A, and the denominator is the total number of the hospital's patient days for such period. Id.; see also 42 C.F.R. §412.106(b)(4). The second fraction is frequently referred to as the Medicaid Proxy. Providers whose DSH percentages meet certain thresholds receive an adjustment which results in increased PPS payments for inpatient hospital services. SSA §1886(d)(5)(F)(ii).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Alhambra Hospital Medical Center (Provider) is a 144-bed acute care hospital. During the fiscal periods at issue, the Provider operated a 22-bed "subacute" care unit that was located within an area of the hospital that was subject to PPS but was not part of its Medicare SNF.[2] Medi-Cal defines "subacute" units as units that provide less intensive care than acute care units but more intensive skilled nursing care than is typically provided in a SNF. The Medicare program does not include a separate category of services called "subacute." The Provider sought to include patient days in its subacute unit as part of its DSH calculation. United Government Services (Intermediary) classified subacute patient days for patients who otherwise were entitled to both Medicare and Medicaid benefits but who had exhausted their Medicare Part A SNF benefits as "dually eligible" days and excluded them from both the numerator and denominator of the Medicaid percentage of the DSH calculation. The Provider contends the Intermediary's interpretation of "dually eligible" is overly broad. At issue is whether subacute patient days eliminated by the Intermediary should be included in the development of the Medicaid proxy of the Provider's DSH adjustment.

The Provider was represented by Laurence Getzoff, Esquire, of Hooper, Lundy & Bookman, Inc. The Intermediary was represented by Bernard Talbert, Esquire, of Blue Cross Blue Shield Association.

PARTIES' CONTENTIONS:

The Provider contends that the Intermediary erred by eliminating patient days associated with dually eligible subacute unit patients who had exhausted their Medicare Part A SNF benefits from the Medicaid proxy. The Provider argues that once a crossover patient's Part A benefit for the type and level of care being accessed is exhausted, the patient is no longer eligible for meaningful Medicare Part A benefits. Accordingly, once a subacute patient has exhausted his Part A SNF benefit, he is no longer eligible for Part A and is not dually eligible. Consequently, the remaining days of the patient's stay should be included in the Medicaid proxy of the DSH adjustment.

2 The Provider also operated a separate and distinct Medicare-certified SNF within the hospital. There is no dispute that the services of the acute & SNF facilities were properly segregated, and their operation is not the subject of this appeal.

The Provider further contends that the proper treatment of subacute days was articulated by the United States Court of Appeals for the Ninth Circuit in its decision in *Alhambra Hospital vs. Thompson*, 259 F.3d 1071 (9th Cir. 2110). Relying on the language of the Medicare DSH regulation at 42 CFR §412.106, the Court held that, because the provider's subacute unit was not located in an area of the hospital that was exempt from payment under PPS, the patient days attributable to that unit should have been included in the Medicaid proxy of the provider's DSH calculation. The Provider argues that the Court's decision remains the controlling authority for all courts located in the Ninth Circuit and applies specifically to the facts and circumstances affecting Alhambra Hospital pursuant to rules of *res judicata* and collateral estoppel.

In the alternative, the Provider contends that recent CMS policy statements and other guidance require that dual eligible Part A exhausted days must be accounted for somewhere in the DSH calculation. The Provider argues that if such days are properly excludable from the Medicaid fraction, then they should be included in the Provider's Medicare fraction.

The Intermediary contends that its policy regarding the exclusion of dual eligible days is predicated on Part A eligibility, not Part A payment. The Intermediary argues that CMS Ruling No. 97-2 only concurred with the holdings of federal court decisions in regard to counting Medicaid patients on the basis of eligibility rather than Medicaid's payment for the related services. In its memorandum dated June 12, 1997, CMS clarified its ruling and noted that 42 C.F.R. §412.106(b)(4) precludes the counting of any patient days furnished to patients entitled to both Medicare Part A and Medicaid. Once the state has verified the eligibility of the hospitals' patient data for Medicaid purposes, the intermediary must determine if any of these days are dual entitlement days and subtract them from the calculation. The Intermediary contends that, if a patient is eligible for Medicare Part A, that person must be eliminated from the Medicaid proxy for purposes of calculating DSH.

As to the Provider's contention that dual eligible Part A exhausted days must be accounted for somewhere in the DSH calculation, the Intermediary argues that subacute days are already included in the Provider's PPS rate, as the subacute unit was located in an area of the hospital subject to PPS..

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the Medicare law and program instructions, the evidence and arguments, finds and concludes that CMS and Congress had always intended that Part A exhausted days be included in the DSH calculation. The Board's examination indicated that CMS had traditionally assumed that such days were included in the SSI percentage of the DSH calculation and should not, therefore, be included in the Medicaid proxy. After examining that assumption, CMS found that the days had not been included and attempted to include them through a series of guidance statements that produced conflicting positions relative to their treatment within the DSH calculation. Effective October 1, 2004, CMS issued its final instruction, which required that Part A exhausted days be included in the Medicare SSI percentage. The Board finds that the final instruction accommodates the original intent of the

Congress and CMS. The remaining issue for the Board's determination is whether the instruction is applicable for the period under consideration.

The Provider argued that Part A exhausted days should be included in its Medicaid proxy based collectively upon eligibility standards for Part A and the findings of the Ninth Circuit in Alhambra. The Alhambra decision found that the DSH regulation is plain on its face and requires the inclusion of the subacute patient days as part of the DSH reimbursement. The Board considers the decision controlling in this case. The Board also considers CMS current policy fully consistent with the intent of Congress relative to the treatment of subacute days. The policy's application to the Provider's circumstances is fully consistent with the decision of the Court. However, CMS' policy on Part A exhausted days in the Medicare percentage applies only to discharges occurring on or after October 1, 2004. Since 1999 and 2000 are the fiscal years at issue in these two cases, the Board concludes that subacute patient days should be included in the calculation of the Medicaid proxy in the determination of Provider's DSH Adjustment.

DECISION AND ORDER:

The Intermediary's adjustment improperly eliminated from the Provider's DSH calculation subacute patient days for patients who otherwise were entitled to both Medicare and Medicaid benefits but who had exhausted their Medicare Part A SNF benefits. Such subacute patient days should be included in the calculation of the Medicaid proxy in the determination of the Provider's DSH adjustment.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Gary B. Blodgett, D.D.S.
Martin W. Hoover, Jr., Esquire
Elaine Crews Powell, C.P.A.
Anjali Mulchandani-West

DATE: July 29, 2005

FOR THE BOARD:

Suzanne Cochran, Esq.
Chairperson