PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2011-D15

PROVIDER –
Pacific Alliance Medical Center
Los Angeles, CA

Provider No.: 05-0018

vs.

INTERMEDIARY -
Wisconsin Physicians Service

DATE OF HEARING -
November 10, 2009

Federal Fiscal Year (FFY) Ending - 2009

CASE NO.: 09-1796

INDEX

ISSUES:

Whether the Provider is entitled to the full market basket update for Federal Fiscal Year ending 2009 under the Reporting Hospital Quality Data for Annual Payment Update Program.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program provides health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. The Centers for Medicare & Medicaid Services (CMS) is the operating component of the Department of Health and Human Services (DHHS) charged with the programs administration. CMS' payment and audit functions are contracted to organizations known as fiscal intermediaries (Intermediaries) and Medicare administrative contractors (MACs). Intermediaries/MACs determine payment amounts due providers under Medicare law, regulations, and interpretative guidelines published by CMS. *See,* 42 U.S.C. §1395(h). A provider dissatisfied with a final determination of its intermediary/MAC or CMS may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of such determination. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

Under 42 U.S.C. §1395g, no Medicare payments will be made to any provider unless it has furnished such information as the Secretary may request in order to determine the amounts due such provider. The operating and capital-related costs of inpatient hospital services are reimbursed by Medicare primarily through the Prospective Payment System (PPS). *See*, 42 U.S.C. §1395ww(d) and (g). Medicare payment for hospital inpatient operating and capital-related costs is made at predetermined, specific rates for each hospital discharge.

Section 501(b) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108-173) established the Reporting Hospital Quality Data for Annual Payment Update (RHQDAPU) program. The RHQDAPU program is intended to furnish consumers with quality of care information to enable them to make more informed decisions about their health care, while also encouraging hospitals and clinicians to improve the quality of care provided to all patients. Section 501(b) of the MMA amended 42 U.S.C. § 1395ww(b)(3)(B) and revised the mechanism used to update the standardized amount of payment for inpatient hospital operating costs. Specifically, the statute provided for a reduction of 0.4 percentage points to the update percentage increase (also known as the market basket update) for each of FYs 2005 through 2007 for any PPS hospital that did not submit data on a set of 10 quality indicators established by the Secretary[1] as of November 1, 2003. This measure established an incentive for PPS hospitals to submit data on the quality measures established by the Secretary. The statute also provided that any reduction would apply only to the fiscal year involved, and would not be taken into account in computing the applicable percentage increase for a subsequent fiscal year.

Section 5001(a) of the Deficit Reduction Act of 2005 (Pub. L. 109–171) (DRA) further amended 42 U.S.C. § 1395ww(b)(3)(B) by adding new § 1395ww(b)(3)(B)(viii). New

[1] Secretary of the Department of Health and Human Services.

§§ 1395ww(b)(3)(B)(viii)(I) and (II) provide that the payment update for FY 2007 and each subsequent fiscal year be reduced by 2.0 percentage points for PPS hospitals that do not submit certain quality data in a form and manner, and at a time, specified by the Secretary.

The statutory provisions were implemented at 42 C.F.R § 412.64(d)(2), which states in pertinent part,

> (i) In the case of a ``subsection (d) hospital," as defined under section 1886(d)(1)(B) of the Act, that does not submit quality data on a quarterly basis to CMS, in the form and manner specified by CMS, the applicable percentage change specified in paragraph (d)(1) of this section is reduced--
> (A) For fiscal years 2005 and 2006, by 0.4 percentage points; and
> (B) For fiscal year 2007 and subsequent fiscal years, by 2.0 percentage points.
> (ii) Any reduction of the percentage change will apply only to the fiscal year involved and will not be taken into account in computing the applicable percentage change for a subsequent fiscal year.

42 C.F.R. §412.64(d)(2)(i) and (ii) (2006).

CMS set out the RHQDAPU program procedures, including the form, manner and timing of the quality data submission, and the appeal procedures involving a RHQDAPU determination in the Federal Register (FR) and on the QualityNet Exchange Web site at *http://www.QualityNet.org*.[2] A hospital dissatisfied with the result of CMS' reconsideration decision may file an appeal with the Provider Reimbursement Review Board.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Pacific Alliance Medical Center ("Provider") is a general acute care hospital located in Los Angeles, California. On September 16, 2008, CMS notified the Provider that it did not meet the requirements of the RHQDAPU program, because the Provider failed to submit the required hospital quality data for second quarter of 2007 by the posted submission deadline of November 20, 2007.[3] CMS informed the Provider that this failure would result in foregoing 2.0 percentage points of the annual FY 2009 market basket update. The Provider filed a request for reconsideration of CMS' determination.[4] On January 23, 2009, CMS issued a reconsideration decision upholding its determination to grant only the reduced market basket update for FY

[2] 73 FR. 48616, 48625 (August 19, 2008). Established by the Centers for Medicare & Medicaid Services (CMS), QualityNet Exchange provides healthcare quality improvement news, resources and data reporting tools and applications used by healthcare providers and others. It is the only CMS-approved website for secure communications and healthcare quality data exchange between: quality improvement organizations (QIOs), hospitals, physician offices, nursing homes, end stage renal disease (ESRD) networks and facilities, and data vendors.
[3] Provider's Exhibit P-22, page 3.
[4] Intermediary's Exhibit I-2.

2009. [5]

The Provider appealed CMS' decision to the Board, and met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-1840 (2008). The Provider was represented by Lloyd A. Bookman, Esq. of Hooper, Lundy & Bookman, Inc. CMS was represented by Byron Lamprecht, Wisconsin Physicians Service (Intermediary).

PARTIES' CONTENTIONS:

The Provider contends that the 2.0 percentage point reduction to its FY 2009 market basket update is invalid because the RHQDAPU filing requirements are not absolute. The Provider argues that CMS has established internal unpublished guidelines which describe circumstances for which an untimely filing will be excused.[6] These guidelines, along with the Provider's right to seek reconsideration, establish that some grounds for relief exist and that equitable factors may be considered by CMS and the Board when determining whether to grant the Provider's full payment update.[7]

The Provider asserted that it acted reasonably, diligently and in good faith in submitting the hospital quality data. Specifically, it processed and sent the data to its vendor, Thomson Reuters, well in advance of the November 20, 2007 deadline.[8] As soon as it was alerted that there was a problem with the submission,[9] it promptly communicated with its vendor and QualityNet. The Provider acknowledged that its vendor inadvertently missed the submission deadline due to a technical error; however, the error was corrected promptly and the data was submitted a mere 12 hours after the deadline had expired.[10]

The Provider asserts that it should receive the full payment update because it substantially complied with the RHQDAPU requirements. Specifically, it submitted quality data on time for three of the four quarters of FY 2007, and for the quarter at issue (the second quarter of FY 2007) it missed the applicable deadline by only a few hours.[11] CMS suffered no damages as the result of the Provider's minor breach. The Provider contends that the 2 percent penalty is too harsh and does not serve as a deterrent for late submission, because there was nothing more that the Provider could have done to submit its data on time.

The Provider also asserts that the use of data from FY 2007 to establish FY 2009 reimbursement rates is contrary to the statute.[12] Specifically, the statute provides that the 2 percent reduction "shall apply only with respect to the fiscal year involved, and the Secretary shall not take into account such reduction in computing the applicable percentage increase… for a subsequent

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[5] Provider's Exhibit P-2.
[6] Provider's Exhibit P-24.
[7] Tr. at 14 - 17.
[8] The Provider initially asserted that the second quarter 2007 data was submitted to the QIO Clinical Warehouse prior to the deadline albeit with a missing provider number. However, at the hearing the Provider acknowledged that the data was not submitted by its vendor contractor. *See*, Tr. 25-27.
[9] Tr. at 20-22; Provider's Exhibit P-8.
[10] Tr. at 28, Provider's Exhibits P-9, P-10 and P-11.
[11] Provider's Position Paper at 11; Tr. at 22-24.
[12] Provider's Position Paper at 16-17.

year." 42 U.S.C. §1395ww(b)(3)(B)(viii)(F). The Provider maintains that since the data at issue pertains to FY 2007, CMS may only reduce the payment rate for that fiscal year, and may not take such reduction into account in determining the Provider's payment update for FY 2009.

Finally, the Provider contends that the RHQDAPU requirements are invalid because they were not properly promulgated under 42 U.S.C § 1395hh or the Administrative Procedure Act (APA).[13] The Provider asserts that the specific RHQDAPU requirements, such as submission deadlines and annual lists of core requirements, must be promulgated as formal regulations under 42 U.S.C. § 1395hh. The Provider maintains that the Secretary has not promulgated any regulations relating to the RHQDAPU program and instead has published such requirements in the Federal Register and web-based publications. Moreover, CMS has failed to follow the APA, which sets forth the process that agencies must follow when developing rules. The process requires CMS to provide a notice and comment period on proposed rules, which include agency policies regarding future rates or payments. The Provider maintains that CMS's failure to follow the rulemaking process addressed in the APA invalidates the RHQDAPU program requirements.

The Intermediary responds that the Provider simply failed to submit the quality data in a timely manner despite having a 4 ½ month period following the last day of a discharge quarter to submit their quality data to the Quality Improvement Organization (QIO) Clinical Data Warehouse.[14] In addition, the Provider was given more than ample time to submit its quality data. Specifically, the Provider was advised that CMS extended the deadline date for submission from November 15, 2007 to November 20, 2007.[15] Next, the Provider was advised by its QIO on four separate occasions, November 1, 2007, November 13, 2007, November 15, 2007 and November 20, 2007, to submit its quality data.[16] The Intermediary asserts that despite the sufficient timeline and notifications by CMS, the Provider failed to meet the deadline for data submission, and therefore the 2 percentage point reduction in the annual market basket update for FY 2009 must be imposed.

Finally, the Intermediary contends that the Federal Register specifies that hospitals are held responsible for any errors in data submission caused by their vendors.[17] Therefore while the Provider's vendor acknowledged missing the deadline for data submission, the Provider remains responsible for the actions of its vendor.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After consideration of the Medicare law and guidelines, the parties' contentions, and evidence presented, the Board finds and concludes that the Provider failed to satisfy the RHQDAPU program requirements for submission of quality data in the time specified by the Secretary. Consequently the Provider is not entitled to the full market basket update for federal FY ending 2009.

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[13] Provider's Position Paper at 15 – 16.
[14] 70 FR 47426 (August 12, 2005); *See also*, Intermediary's Position Paper 5-6.
[15] Intermediary's Exhibit I-6.
[16] Intermediary's Exhibit I-7.
[17] 71 FR 48041 (August 18, 2006). *See also* Intermediary's Position Paper at 6.

It is undisputed that the Provider's vendor, Thomson Reuters, submitted the Provider's second quarter quality data for 2007 on November 21, 2007, one day after the expiration of the deadline for data submission.[18] The Provider's initial argument was premised on the belief that the data was submitted absent a provider number. However, as the Provider conceded at the hearing, the data was never submitted to the QIO Clinical Warehouse by the deadline date.[19] The Provider asserts that these RHQDAPU filing requirements are not absolute, however, and that CMS and the Board have some discretion in awarding equitable relief for the minor delay in submitting its data.

42 U.S.C. § 1395ww(b)(3)(B)(viii)(I) and (II) provide that the payment update for FY 2007 and each subsequent fiscal year be reduced by 2.0 percentage points for any subsection (d) hospital that does not submit certain quality data in *a form and manner, and at a time, specified by the Secretary*. (Emphasis added). Congress has given the Secretary broad authority in implementing the procedures of the RHQDAPU program. The procedures for participation in the RHQDAPU program are published in the Federal Register and on the QualityNet Exchange web site.[20] While the Federal Register does indicate CMS has some discretion in awarding equitable relief, e.g. data processing errors clearly under the control of CMS or its contractors,[21] there is no indication in either the statute or the Federal Register that this discretion was expanded to the Board. Consequently, the Board finds it does not have the authority to award the Provider equitable relief in this case.

The Provider also argues that a four and half month period is insufficient to submit the data considering the numerous steps involved in abstracting and validating the necessary information prior to submission. Moreover, it was its vendor, Thomson Reuters, who was responsible for the delay in submitting the data. The Board is not persuaded by the Provider's arguments. First, the Provider acknowledged it missed the deadline, therefore any comment as to process and timeline for data submission is moot. Second, while the Provider's vendor took responsibility for missing the deadline, CMS holds the hospitals ultimately responsible for ensuring that their vendors submit timely data and adhere to the requirements of the RHQDAPU program.[22]

The Provider contends that the 2% reduction in the full market basket is severe and punitive in nature, considering it was only one day late in submitting its data. The Board notes the percentage point reduction is mandated by statute.

The Provider argued that it is entitled to the full market update because it substantially complied with the RHQDAPU program requirements, by virtue of its timely submission of data for 3 out of 4 quarters for FY 2007. Assuming arguendo that the substantial compliance standard can be considered in this case, the Provider's failure in submitting its quality data for the second quarter equates to a 25% error rate, and as such does not qualify as a minor error. Indeed, the nature of the error, i.e. "failure to submit the data" is considered a major error. Moreover, the Secretary has defined precisely what is required in order for hospitals to receive the full market basket

[18] Provider's Exhibit P-9.
[19] Tr. at 26-27.
[20] *See*, n. 2.
[21] 71 FR 48041 (August 18, 2006).
[22] *Id*.

update. Specifically, the full market basket update is predicated on the successful submission of data to CMS via the QIO Clinical Warehouse by the established deadline.[23] The Provider in this case acknowledged that its data was not submitted by the deadline date.

The Provider contends that CMS' attempt to use data for the second quarter of 2007 to apply to FY 2009 is contrary to the statutory provision, which specifies that the 2 percentage point payment reduction applies only to the fiscal year at issue, and not to a subsequent fiscal year. The Board finds it would be impractical, if not impossible, not to use prior data to establish future rates. As published in the Federal Register, CMS specified that data from the 4th quarter CY 2006 discharges through 3rd quarter 2007 discharges will be used to determine the FY 2009 market update.[24]

Finally, the Provider asserts that the RHQDAPU requirements are invalid because they were not properly promulgated under 42 U.S.C § 1395hh or the APA. The Board finds the statute is clear in establishing the legal standard of the 2 percentage point payment reduction and that the regulation, 42 C.F.R. § 412.64(d)(2), substantially mirrors the statutory provision. The Secretary has published in the federal Register and on the website detailed procedural steps that pertain to the process. Whether the publication of the procedural steps only in the Federal Register and on the website contravenes the APA and is, therefore, arbitrary and capricious is a legal question outside this Board's authority to determine.

The Board concludes that because the Provider failed to satisfy the RHQDAPU program requirements for submission of quality data in the time specified by the Secretary, it is not entitled to the full market basket update for FFY 2009.

DECISION AND ORDER:

The Provider is not entitled to the full market basket update for federal FY ending 2009. CMS' reconsideration dated January 23, 2009 is affirmed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Yvette C. Hayes
Keith E. Braganza, C.P.A.
John Gary Bowers, C.P.A.

FOR THE BOARD:

Suzanne Cochran, Esquire
Chairperson

DATE: DECEMBER 14, 2010

[23] 70 FR 47421 (August 12, 2005).
[24] 73 FR 48621 (August 19, 2008).