PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2016-D8

PROVIDER –
Landmark Hospital of Columbia

Provider No.: 26-2020

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Service

DATE OF HEARING –
June 11, 2015

Cost Reporting Period Ended –
September 30, 2015

CASE NO.: 15-0199

INDEX

ISSUE STATEMENT

Whether the payment penalty that the Centers for Medicare and Medicaid Services ("CMS") imposed under the Long-Term Care Hospital Quality Reporting Program to reduce the Provider's update for Fiscal Year ("FY") 2015 by two percent was proper?[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that CMS properly imposed a 2 percent reduction to the standard Federal rate used to calculate the FY 2015 Medicare payments for Landmark Hospital of Columbia ("Landmark" or "Provider") under the inpatient prospective payment system for long-term care hospitals ("LTCH-PPS").

INTRODUCTION

Landmark is a Medicare-certified long-term care hospital ("LTCH") located in Columbia, Missouri. Landmark's designated Medicare administrative contractor is Wisconsin Physicians Service ("Medicare Contractor").

On June 27, 2014, CMS determined that Landmark failed to meet the requirements of the LTCH Quality Reporting Program ("LTCH QRP") for FY 2015. Specifically, the determination stated that Landmark was subject to a 2 percent reduction in the FY 2015 annual payment update because it did not submit 12 months of data for 2 of the 3 quality measures.[2]

On July 22, 2014, Landmark requested that CMS reconsider the decision regarding the reduction to its FY 2015 Medicare payments.[3] On September 22, 2014, CMS upheld its reduction decision.[4] On October 9, 2014, Landmark timely appealed this reduction to the Provider Reimbursement Review Board ("Board").[5]

The Board held a live hearing on June 11, 2015. Landmark was represented by Jason M. Healy, Esq., of The Law Offices of Jason M. Healy, PLLC. The Medicare Contractor was represented by Robin Sanders, Esq., of the Blue Cross and Blue Shield Association.

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[1] *See* Transcript ("Tr.") at 5-6.
[2] *See* Provider Exhibit P-2 at 1.
[3] *See* Provider Exhibit P-3.
[4] *See* Provider Exhibit P-4.
[5] *See* Provider Exhibit P-1.

STATEMENT OF THE FACTS

The Medicare Contractor reduced Landmark's payment update for FY 2015 by 2 percent because Landmark failed to submit quality data for the first quarter of 2013.[6] As delineated in the final rule published on August 18, 2011 ("August 2011 Final Rule"), CMS required that Landmark submit this data to the Center for Disease Control and Prevention's ("CDC's") National Health Safety Network ("NHSN") system by August 15, 2013.[7] Specifically, Landmark was required to submit data regarding:

1. Urinary Catheter -Associated Urinary Tract Infections ("CAUTI");
2. Central Line Catheter-Associated Bloodstream Infection ("CLABSI"); and
3. Percent of Residents with Pressure Ulcers that Are New or have Worsened ("Pressure Ulcer measure").[8]

Landmark acknowledges it missed the August 15, 2013 deadline for submission of the first quarter 2013 CAUTI and CLABSI data. Landmark explains the deadline was missed due to an inadvertent mistake on the part of the Provider's former CEO and Director of Quality Management ("DQM") as they failed to verify that the first quarter data was submitted.[9] In its reconsideration request, Landmark explained that the former CEO and DQM had received a warning letter regarding its Q4 2012 missing data but did not apprise corporate leadership that the data had not been submitted to CMS per the established guidelines.[10] The reconsideration request further stated these individuals had been removed.[11] To show its good faith effort in meeting all of the 2013 reporting requirements, Landmark submitted a spreadsheet containing the data for the first quarter of 2013 with its reconsideration request.[12] CMS upheld its decision to reduce the annual payment update for FY 2015.[13] Landmark then appealed this determination to the Board.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Federal statute, 42 U.S.C. 1395ww(m)(5), requires LTCHs to report on the quality of their services in the form, manner, and time as specified by the Secretary.[14] A LTCH that

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[6] *See* Provider Exhibit P-1 at 11.
[7] *See* 76 Fed. Reg. 51476, 51753 (Aug. 18, 2011) (excerpt included at Medicare Contractor Exhibit I-2)**{** TA \l "FY 2012 IPPS/LTCH PPS Final Rule, 76 Fed. Reg. 51476 (Aug. 18, 2011)" \s "FY 2012 IPPS/LTCH PPS Final Rule" \c 4 **}**.
[8] *See id*. at 51745-51750. *See also* 42 U.S.C. § 1395ww(m)(5)(D)(iii) (requiring the Secretary to select and publish LTCH QRP quality measures by October 1, 2012)**{** TA \l "SSA § 1886(m)(5)(D)(iii)" \s "SSA § 1886(m)(5)(D)(iii)" \c 2 **}**.
[9] *See* Provider's Final Position Paper at 2.
[10] *See* Provider Exhibit P-3 (copy of the Provider's request for reconsideration); Provider Exhibit P-6 (copy of the CMS warning letter).
[11] *See* Provider Exhibit P-3 at 1.
[12] *See* Provider Exhibit P-3 at 5.
[13] *See* Provider Exhibit P-4.
[14] *See also* Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, § 3004(a), 124 Stat. 119, 368-369 (Mar. 23, 2010) (adding LTCH QRP statutory provisions at 42 U.S.C. § 1395ww(m)(5)). **{** TA \l "SSA § 1886(m)(5)(C)" \s "SSA § 1886(m)(5)(C)" \c 2 **}**

fails to submit the LTCH QRP data to the Secretary is assessed a one-time 2 percent reduction to its annual update to the standard Federal LTCH prospective payment.

The preamble to the August 2011 Final Rule established FY 2012 as the first reporting year for the LTCH QRP and required submission of quality data on CAUTI, CLABSI and pressure ulcers. This submission would be used to determine FY 2014 LTCH payments.[15] CMS directed LTCHs to the CDC website at http://www.cdc.gov/nhsn for additional details regarding data submission[16] and stated that additional reporting requirements would be posted on the CMS web site at http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/ by no later than January 31, 2012.[17] CMS restated this information as well as the due dates for data submission in preamble to the final rule published on August 31, 2012 ("August 2012 Final Rule").[18]

Landmark acknowledges that it did not timely submit its first quarter 2013 data. However, it asserts the 2 percent payment penalty should be reversed because: (1) Landmark made a good faith effort to comply with all requirements of the LTCH QRP; (2) CMS and the Board have equitable discretion to refuse application of the penalty where only one quarter of data is missing; and (3) the doctrine of substantial compliance precludes application of the penalty in this case.[19] Further, Landmark argues that CMS' reconsideration is arbitrary and capricious because it did not follow the procedures established for the LTCH QRP reconsideration process, as the reconsideration did not include a discussion of Landmark's arguments establishing a valid or justifiable excuse for not reporting the CAUTI and CLABSI data for the first quarter of FY 2013 by the due date.[20]

The Board finds that 42 U.S.C. § 1395ww(m)(5)(A)(i) requires each LTCH to submit health care quality data as determined by the Secretary and imposes a two percent penalty upon any LTCH that fails to do so. Significantly, the statute gives broad authority to the Secretary to determine and specify the time, form and ***manner*** by which an LTCH must submit this data.[21] To this end, the Secretary promulgated regulations at 42 C.F.R. § 412.523(c)(4) to implement the statute, and these regulations state in pertinent part:

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[15] *See* 76 Fed Reg. at 51743-51748.
[16] *Id.*, at 51752.
[17] *Id*. at 51754.
[18] *See* 77 Fed. Reg. 53258, 53619 (Aug. 31, 2012) (specifying collection and submission deadlines as well as the following the CMS web site address for additional instruction and guidance: http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/LTCHTechnicalInformation.html). In the preamble to the August 2012 Final Rule, CMS noted that it was in the process of finalizing the LTCH QRP Manual and "invited the public to provide submit questions and comments related to the LTCHQR Program and the [then] draft LTCHQR Program Manual" to a specified email address. *See id.* at 53620, 53621, 53622-53623. Excerpts from the LTCH RP Manual, Version 1.1 (Aug. 2012) that was issued contemporaneously with the August 2012 Final Rule are located at Medicare Contractor Exhibit I-3.
[19] *See* Provider's Final Position Paper at 15 - 21.
[20] *Id.* at 6-12.
[21] *See* 42 U.S.C. § 1395ww(m)(5)(C) (stating that "such [LTCH QRP] data shall be submitted in a form and manner, and at a time, specified by the Secretary" (emphasis added)).

> (4) *For fiscal year 2014 and subsequent fiscal years*
> (i) In the case of a long-term care hospital that does not submit quality reporting data to CMS in the form and manner and at a time specified by the Secretary, the annual update to the standard Federal rate . . . is further reduced by 2.0 percentage points.

CMS provides similar guidance in § 1.2 of the LTCH QRP Manual, Version 1.1 (Aug. 2012) ("2012 LTCH QRP Manual"):[22]

> Under the LTCHQR Program, for rate year 2014 and each subsequent rate year, in the case of a LTCH that does not submit data to the Secretary in accordance with section 1886(m)(5)(C) of the Act with respect to each a rate year, any annual update to a standard Federal rate for discharges for the hospital during the rate year, and after application of section 1886(m)(3) of the Act, shall be reduced by two percentage points.

Based on its review of the record, the Board finds that Landmark failed to timely report the CAUTI and CLABSI data for the first quarter of 2013 and, thereby, failed to comply with the requirement to submit data in the form, manner and time specified by the Secretary. The Board notes that Landmark had the ability to generate reports from the NHSN system to monitor what data had been submitted and to ensure compliance with the data submission requirements.[23] Accordingly, the Board finds that the Landmark failed to satisfy the LTCH QRP requirements that were necessary to receive a full annual payment update for FY 2015.

Landmark requests that the Board provide equitable relief because it made a good faith effort to comply with the LTCH QRP data submission requirements.[24] The Board, however, notes that the Provider's good faith claim does not appear to comport to the totality of circumstances and facts presented in this case. The record indicates that CMS had already granted Landmark a "deferral" from a finding of non-compliance due to its failure to submit 2012 4th quarter QRP data prior to the 2013 deadline. This letter goes further to state, "Please be advised that CMS will require strict adherence to the ACA 3004 LTCH reporting requirements…"[25] The Board is convinced that Landmark had ample notice that CMS would require "strict adherence" and that its good faith effort to

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[22] Excerpts from the 2012 LTCH QRP Manual are located at Medicare Contractor Exhibit I-3.
[23] *See* Medicare Contactor Exhibit I-3 at 4-2 (2012 LTCH QRP Manual at § 4.3 discussing the ability to create a "Final Validation Report"); Tr. at 49 (Landmark witness stating: "The other issues that we have is not being able to run reports. There's not technical guidance within the NHSN manual that shows how to actually run the reports.").
[24] Provider's Final Position Paper at 18-19.
[25] Provider Exhibit P-6 at 2.

provide the data belatedly as part of its reconsideration request would be insufficient to meet the filing deadlines.

Regardless of Landmark's good faith efforts, the Board cannot consider Landmark's request for equitable relief because the Board's authority is limited to the statutory and regulatory requirements and to the facts and circumstances of the issues presented.[26] Specifically, in connection with the penalty, the Board does not have the authority to consider factors outside those specifically recognized under the statute and regulations. The Secretary's regulations make no provision for circumstances in which the penalty is overly punitive.[27] Likewise, neither the statute nor relevant regulation provide for any partial penalty that would reduce the full impact of the 2 percent reduction. Rather, the statute, regulations, and relevant final rules mandate application of the 2 percentage point penalty whenever an LTCH fails to submit LTCH quality data in the form, manner and time as specified by the Secretary.[28]

Finally, the Board disagrees with Landmark's assertion the reconsideration process was arbitrary and capricious because it did not include a discussion of Landmark's arguments establishing a valid or justifiable excuse for not reporting the first quarter 2013 CAUTI and CLABSI data timely. When CMS established the LTCH QRP appeal process the final rule made clear that LTCHs could choose whether to exercise its right to reconsideration prior to appealing an initial determination of non-compliance to the Board.[29] This final rule also set forth the standard for review in the event a provider elected to use the reconsideration process. Specifically, the final rule stated:

> Upon conclusion of our review of each request for reconsideration, we will render a decision. We may reverse our initial finding of non-compliance if (1) The LTCH

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[26] In particular, the Board recognizes that Landmark argues that the reconsideration decision issued by CMS was deficient because if failed to properly notify the basis for the decision in violation of the Administrative Procedure Act, 5 U.S.C. Ch. 5, Subch II. Even assuming *arguendo* that there was a notification deficiency, the Board would be unable to offer any relief or to consider substantial compliance as grounds for reversing the penalty because the Board is bound by the relevant statute and regulations which specify that Landmark is subject to a 2 percent reduction if it fails to submit CAUTI and CLABSI data in the form, manner and time specified by the Secretary.

[27] The Board recognizes that, in the preamble to the LTCH final rule published on August 19, 2013, CMS stated that, for reconsiderations relevant to FY 2015 LTCH payments, "[w] e may reverse our initial finding of non-compliance if: (1) The LTCH provides proof of compliance with all requirements during the reporting period; or (2) the LTCH provides adequate proof of a valid or justifiable excuse for non-compliance if the LTCH was not able to comply with requirements during the reporting period." 78 Fed. Reg. 50495, 50886 (Aug. 19, 2013). However, it is unclear whether it is only CMS that has the authority to consider a "justifiable excuse" as this discussion was not incorporated into the governing regulation at 42 C.F.R. § 412.523(c)(4). The Board need not resolve this issue as it is clear from the record that Landmark did not have a "justifiable excuse" and simply failed to submit the "no events" data for October 2013.

[28] *See* 42 U.S.C. § 1395ww(m)(5)(A)(i).

[29] *See* 78 Fed. Reg.50496, 50887 (Aug. 19, 2013) (excerpts are located at Medicare Contractor Exhibit I-12) (stating "LTCHs dissatisfied with our initial finding of non-compliance, or a decision rendered at the CMS reconsideration level may appeal the decision with the PRRB under 42 CFR Part 405, Subpart R… We would like to clarify that we recommend, rather than require, LTCHs use this order of appeals. We note that the CMS reconsideration process is voluntary…").

> provides proof of compliance with all requirements during the reporting period; or (2) the LTCH provides adequate proof of a valid or justifiable excuse for non-compliance if the LTCH was not able to comply with requirements during the reporting period. We will uphold our initial finding of non-compliance if the LTCH cannot show any justification for non-compliance.[30]

The Board finds that CMS followed the reconsideration process established in the final rule. The record shows that CMS sent a form letter on September 22, 2014 to Landmark informing it of the CMS reconsideration decision. This letter states:

> CMS has re-reviewed the quality data submitted …and found that this LTCH was not in compliance with the LTCHQR Program requirements…
>
> CMS reviewed this LTCH's reconsideration request and has determined this LTCH did not meet the LTCH QR program requirements. Hence, CMS upholds the decision to reduce the annual payment update….[31]

The record also shows Landmark's reconsideration request explained its non-compliance as an anomaly due to performance issues of two of its staff. In a good faith effort to comply with all LTCH reporting requirements Landmark included the missing data with its reconsideration request.[32]

Based on Landmark's explanation, the Board finds Landmark was able to comply with the LTCH QRP requirements for the first quarter FY 2013, but it failed to do so. Assuming arguendo that the Board does have the authority to consider whether Landmark had a valid or justifiable excuse,[33] the Board notes that there is no statutory or regulatory specification or directly applicable guidance as to what constitutes as valid or justifiable excuse for non-compliance with LTCH QRP reporting requirement. Further, the Board finds that the preponderance of the evidence in this case supports the CMS decision to uphold the initial finding of non-compliance as Landmark did not provide a valid or justifiable excuse as to why it was ***unable*** to comply with the requirements during the reporting period.

In summary, the Board finds that, in this case, Landmark failed to file its first quarter FY 2013 quality data for both the CAUTI and CLABSI measures by the August 15, 2013 deadline in the form and manner required by the Secretary. The statute expressly states that, if an LTCH fails to submit the required data in the manner, form and time specified

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[30] *Id.* at 50886.
[31] Provider Exhibit P-1 at 6-7.
[32] Provider Exhibit P-3.
[33] *See supra* note 30.

by the Secretary, the 2 percentage point penalty must be imposed and did not provide for any waiver of or exception from that penalty in any of the regulations, final rules, and guidance that was issued. Accordingly, the Board finds that Landmark failed to satisfy LTCH QRP reporting requirements and that the 2 percentage point penalty was correctly applied.

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that CMS properly imposed a 2 percent reduction to the standard Federal rate used to calculate the FY 2015 Medicare payments for Landmark under LTCH-PPS.

BOARD MEMBERS PARTICIPATING:

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Clayton J. Nix, Esq.
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FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: January 20, 2016