PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD
2016-D15

PROVIDER –
Mid-Delta '03 Hospice Cap Group

Provider Nos.:
Mid-Delta Hospice, Provider No.: 25-1560
Destiny Hospice, Provider No.: 25-1565

vs.

MEDICARE CONTRACTOR –
Palmetto GBA

DATE OF HEARING -
July 1, 2015

Hospice Cap Year Ended –
October 31, 2003

CASE NO.: 07-2449G

INDEX

ISSUE STATEMENT

Whether the Medicare Contractor used the proper date to start the running of the 3-year reopening period for the 2003 hospice cap calculation by CMS for the cap tear ending October 31, 2003 (November 1, 2002 through October 31, 2003)?[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions and the evidence, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor's reopening of the Providers' 2003 hospice cap determinations was both timely and proper.

INTRODUCTION

Mid-Delta Hospice and Destiny Hospice ("Providers") are Mississippi providers of hospice care[2] and participate in the Medicare program. The Providers designated Medicare contractor[3] is Palmetto GBA ("Medicare Contractor").

The Providers appealed the Medicare Contractor's reopening of their hospice cap determinations for the 2003 cap year and have met the jurisdictional requirements for a hearing. The Providers claim the 3-year time limit for reopening the Medicare Contractor's determination had expired.

The Board conducted a hearing on the record. The Providers were represented by Katherine Karker-Jennings, Esq., of the Law Offices of Katherine Karker-Jennings, P.A. The Medicare Contractor was represented by Arthur E. Peabody, Jr., Esq., of the Blue Cross and Blue Shield Association.

STATEMENT OF FACTS

Medicare program rules specify that, for each year or "cap period," the total Medicare payments to a hospice for care furnished during that "cap period" may not exceed the "aggregate cap amount" calculated for that cap period.[4] The "cap period" is a year that runs from November 1 through October 31 of the following year.[5] A hospice's "aggregate cap amount" is calculated for each "cap period" by multiplying the following: (1) the relevant "cap amount" which is updated and published annually by CMS;[6] and (2) the number of Medicare beneficiaries who elected to

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[1] Stipulations at 1.
[2] "Hospice care" means the items and services provided to terminally ill individuals as defined in 42 U.S.C. § 1395x(dd). Congress imposed a "cap" on the hospice payment to ensure that payments for hospice care do not exceed the amount that would have been spent by Medicare had the patient been treated in a traditional setting. 48 Fed. Reg. 56018 (Dec. 16, 1983).
[3] The term "Medicare contractor" encompasses both fiscal intermediaries ("FIs") and Medicare administrative contractors ("MACs").
[4] 42 U.S.C. § 1395f(i)(2); 42 C.F.R. § 418.308(a).
[5] 42 C.F.R. § 418.309(a).
[6] *Id.*

receive care from the hospice during the relevant cap year.[7] Within 30 days following the end of a cap period, each hospice is required to submit a report to its Medicare contractor showing the number of Medicare beneficiaries that received care from the hospice.[8] The Medicare contractor uses this report to calculate the hospice's aggregate cap amount for the cap period.

The Medicare contractor then compares the hospice's aggregate cap to total Medicare payments made to that hospice during the cap period. If the Medicare contractor determines that the total Medicare payments exceed the hospice's aggregate cap, then the Medicare contractor issues a notice of overpayment requiring the hospice to pay the Medicare program the amount over the cap.[9] If a hospice believes that the overpayment assessment is incorrect, it may request a review by the Board.[10]

On July 3, 2003, CMS issued Transmittal A-03-057 notifying hospices that the "cap amount" for cap year ending October 31, 2003 was $18,661.29.[11] Mid-Delta Hospice and Destiny Hospice timely filed their cap reports listing the number of Medicare beneficiaries by the end of November 2003.[12]

The Medicare Contractor calculated Mid-Delta Hospice's initial 2003 aggregate cap amount and issued a hospice cap overpayment determination letter on May 6, 2004 and a revised hospice cap overpayment determination letter on August 11, 2006.[13] Similarly, the Medicare Contractor calculated Destiny Hospice's initial 2003 aggregate cap amount and issued a hospice cap overpayment determination letter on November 9, 2004.[14] The Medicare Contractor based these determinations on the cap amount published by CMS on July 3, 2003.

Subsequently, CMS discovered that it made an error in setting the cap amount at $18,661.29 for 2003. Accordingly, on April 20, 2007, CMS issued a second transmittal revising the 2003 cap amount down to $18,143.26.[15] This transmittal instructed Medicare contractors to notify providers of the correction. In addition, it specifically directed Medicare contractors to:

> recompute the aggregate cap for the cap period ending October 31, 2003 *for those providers whose initial cap determination is within the 3-year reopening period. The date of the cap determination letter is to be used to decide if the cap is within the 3-year reopening period*.[16]

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[7] 42 C.F.R. § 418.309(b).
[8] Medicare Claims Processing Manual, CMS Pub. 100-04, § 80.2.1 (as revised by Transmittal No. 1 issued Oct. 1, 2003).
[9] 42 C.F.R. § 418.308(c), (d).
[10] 42 C.F.R. § 418.311.
[11] CMS Program Memorandum, Transmittal No. A-03-057 (July 3, 2003) (copy included at Provider Exhibit P-1).
[12] Stipulations at ¶ 8.
[13] *Id.* at ¶ 11; Medicare Contractor Exhibit I-3 at 1 (stating "the original overpayment of $394,117 determined on May 6, 2004 and a revised calculation determined on August 11, 2006 created an additional overpayment of $56,327").
[14] Stipulations at ¶ 13.
[15] Medicare Claims Processing Manual, CMS Pub. 100-04, Transmittal No. 1226 (Apr. 20, 2007) (copy included at Medicare Contractor Exhibit I-1).
[16] *Id.* at 2. (emphasis added).

In response to this transmittal, the Medicare Contractor used the revised cap amount to recalculate Mid-Delta Hospice's aggregate cap amount and issued a third hospice cap overpayment determination letter on April 26, 2007 informing Mid-Delta of an additional $68,831 owed to the Medicare program for 2003.[17] Similarly, the Medicare Contractor used the revised cap amount to recalculate Destiny Hospice's aggregate cap amount and issued a second revised hospice cap overpayment determination letter on June 8, 2007 informing Destiny of an additional $63,778 owed to the Medicare program for 2003.[18]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

With respect to these appeals, the parties agree that the 2007 Transmittal corrected the cap amount to a lower amount and instructed the Medicare contractors to re-compute the total aggregate cap amount for each hospice and issue demand letters as relevant by July 31, 2007.[19] The Providers do not dispute the amount of the overpayment so generated, but contend that proper reopening procedures were not met.[20] In particular, the Providers contend that the downward revision of the cap was not applied uniformly to *all* hospices operating during 2003.

Per the Providers, the cap reduction was arbitrary and capricious because the starting date for the 3-year reopening time limit varied by provider fact pattern as specified by CMS in Transmittal No. 1226 as being *either* the date that the Medicare contractor issued the hospice's "cap determination letter," *or*, if no "cap determination letter" was issued, the date that the 2003 cap report was submitted by the provider.[21] The Providers contend the proper start date for the running of the 3-year reopening period for the 2003 aggregate hospice cap calculations should be July 3, 2003 — the date when CMS first published the 2003 cap amount.[22]

Mid-Delta Hospice and Destiny Hospice argue that, for reasons completely unrelated to compliance with CMS reporting requirements, some "lucky" providers did *not* receive a "cap determination letter" and were thereby unfairly protected from reopening and subsequent recoupment. This two-tier provider classification approach arbitrarily benefited only those providers for whom the Medicare Contractor had issued no "cap determination letter."

The central question before the Board is: Does the 3-year reopening period for the hospice cap determination start on the date that CMS published the original cap amount, or does this reopening period start on the date that the hospice cap determination letters were issued? Federal regulations governing reopenings generally allow Medicare contractors to reopen any "intermediary determination" within 3-years of the date of the notice of that determination.[23] These regulations define the term "intermediary determination" as "a determination of the amount of total reimbursement due the provider."[24] These regulations control the reopening of the hospice cap determinations at issue.

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[17] Stipulations at ¶ 12.
[18] *Id.* at ¶ 13.
[19] Providers' Final Position Paper at 3.
[20] Stipulations at ¶¶ 14, 15.
[21] *Id.* at ¶ 17.
[22] Providers' Final Position Paper at 3.
[23] 42 C.F.R. § 405.1885(a).
[24] 42 C.F.R. § 405.1801(a).

The Board notes that, when a Medicare contractor initially conducts the annual hospice cap reconciliation process, it will never result in additional payment to hospices. Rather, this reconciliation process simply identifies whether a hospice has been overpaid (*i.e.*, exceeded the aggregate cap) and, if so, the amount of the resulting overpayment.[25] As a result for the 2003 cap year, hospices may have been treated differently with respect to receiving notices. Hospices that exceeded their 2003 aggregate cap amount were overpaid and would have received a notice of overpayment specifying the overpayment amount that must be refunded.[26] However, for hospices that did not exceed their 2003 aggregate cap amount, those hospices may or may not receive notices as they were not overpaid (and were not due any additional reimbursement). CMS recognized this when it issued Transmittal 1226 by stating "[t]he date of the cap determination letter is to be used to decide if the cap is within the 3-year reopening period. If a determination letter was not sent the date the provider submitted its 2003 cap report will be used to decide if the cap determination is within the 3-year reopening period."[27]

Consistent with 42 C.F.R. § 405.1885, the Board finds that the Medicare Contractor was correct to use the date of the Providers' hospice cap determination letter (*i.e.*, the Providers' notice of overpayment) as the date that the reopening period started to run, because this is the date of the Medicare Contractor's determination on the application of each of the Providers' aggregate cap amount. The Federal regulations governing reopenings clearly state that "any request to reopen must be made within 3-years of the date of the notice of the intermediary determination."[28]

In addition, the Board finds it appropriate for the agency to pick a date to start the reopening period for those hospices that did not receive a 2003 hospice cap determination notice. For these hospices, it is likely that the relevant Medicare contractor made a hospice cap determination but did not issue a notice because it determined that the hospice had not been overpaid. In these instances, as a determination was made but no notice was issued to the provider, the question becomes what date to assign to the determination and CMS chose to assign the date that the provider submitted its 2003 cap report.

CMS' approach is reasonable. In terms of timing, it is only when the cap amount and the number of beneficiaries are available to a Medicare contractor that it can properly calculate the individual hospice's aggregate cap amount and reconcile it with the total payments made to the hospice. Therefore, the earliest date the hospice cap determination can be made is the date the hospice submits its report on the number of beneficiaries that received care. Therefore, the Board concludes it was not arbitrary and capricious to use the date the hospice submitted its cap report as the date of the hospice cap determination for hospices that did not receive notices as this is the earliest possible date the hospice cap determination could have been made.

The Board rejects the Providers assertion that July 3, 2003, the date CMS issued the original notice of the "cap amount," should be used as the beginning date for reopening the 2003 hospice

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[25] 42 C.F.R. § 418.308.
[26] 42 C.F.R. § 418.308(c); Medicare Contractor Exhibits I-3, I-5.
[27] Medicare Claims Processing Manual, CMS Pub. 100-04, Transmittal No. 1226 (Apr. 20, 2007).
[28] *See* 42 C.F.R. § 405.1885. The Board notes that CMS addresses the hospice cap calculation reopening period in the following excerpt from the preamble to the FY 2012 Hospice Wage Index Final Rule: "[T]he reopening period is three years. We are changing proposed regulatory text at 418.309(d)(3) to indicate that adjustment of prior year cap determinations is subject to existing reopening regulations." 76 Fed. Reg. 47302, 47324 (Aug. 4, 2011).

cap determinations. As July 3, 2003 is before the end of the 2003 cap year,[29] the Board finds it was not possible for the Medicare Contractor to have made a final 2003 hospice cap determination for the Providers by that date because the hospice cap determination is provider specific and the number of beneficiaries served by the hospice during the 2003 cap period would not have been available at that time.

For these cases, the record shows the Medicare Contractor issued hospice cap determination letters for the 2003 cap year on May 6, 2004 and again on August 11, 2006 for Mid-Delta Hospice, and on November 9, 2004 for Destiny Hospice. If the Medicare Contractor reopens these determination within three years, the reopening is valid, notwithstanding whether the start dates for the reopening of other provider determinations are earlier or later than these dates. The record indicates that Mid-Delta Hospice's cap calculation was reopened on April 26, 2007 and Destiny Hospice's cap calculation was reopened on June 8, 2007 — both within three years of the date on prior hospice cap determination letters. Accordingly, the Board concludes that both were valid reopenings.

DECISION AND ORDER

After considering the Medicare law and regulations, the parties' contentions and the evidence, the Board finds that the Medicare Contractor's reopening of the Providers' 2003 hospice cap determinations was both timely and proper.

BOARD MEMBERS PARTICIPATING

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Jack Ahern, MBA

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: June 23, 2016

[29] The 2003 hospice cap year started November1, 2002 and ended October 31, 2003.