

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2017-D10

**PROVIDER –**  
Hospice & Palliative Care of Westchester

Provider No.: 33-1520

**vs.**

**MEDICARE CONTRACTOR –**  
National Government Services, Inc.

**HEARING DATE –**  
September 23, 2015

Cost Reporting Period Ended –  
December 31, 2015

**CASE NO.:** 15-0839

## INDEX

	<b>Page No.</b>
<b>Issue Statement .....</b>	<b>2</b>
<b>Decision.....</b>	<b>2</b>
<b>Introduction.....</b>	<b>2</b>
<b>Statement of the Facts.....</b>	<b>3</b>
<b>Discussion, Findings of Facts, and Conclusions of Law.....</b>	<b>4</b>
<b>Decision.....</b>	<b>6</b>

**ISSUE STATEMENT**

The Provider appeals the Centers for Medicare & Medicaid Services' ("CMS") determination that the Provider is subject to a reduced Federal Fiscal Year ("FY") 2015 Annual Payment Update ("APU") under the Hospice Quality Reporting Program ("HQRP").<sup>1</sup>

**DECISION**

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ("Board") finds that CMS properly reduced Hospice & Palliative Care of Westchester's ("Westchester" or "Provider") payment update for CY 2015 by two percent.

**INTRODUCTION**

Westchester is a Medicare certified hospice located in Westchester County, New York. Westchester's designated Medicare administrative contractor is National Government Services, Inc. ("Medicare Contractor"). On June 27, 2014, CMS determined that Westchester failed to meet the requirements of the HQRP for FY 2015. Specifically, the determination stated that Westchester was subject to a 2 percent reduction in the FY 2015 APU because it failed to submit the required quality data by the April 1, 2014 deadline.<sup>2</sup> Westchester estimates that it will suffer a reduction of \$154,231 in its FY 2015 Medicare payments.<sup>3</sup>

On July 7, 2014, Westchester requested that CMS reconsider the June 27, 2014 determination.<sup>4</sup> On September 22, 2014, CMS upheld its decision.<sup>5</sup> Westchester timely appealed both the June 27, 2014 final decision and the September 22, 2014 reconsideration denial to the Board.<sup>6</sup> At Westchester's request, the Board consolidated these appeals.

Westchester met the jurisdictional requirements for a hearing. Accordingly, the Board held a live hearing on September 23, 2015. Westchester was represented by Roy W. Breitenbach, Esq. of Garfunkel Wild, P.C. The Medicare Contractor was represented by Arthur E. Peabody, Jr., Esq. of the Blue Cross and Blue Shield Association.

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<sup>1</sup> Transcript ("Tr.") at 5-6 (copy included at Provider Exhibit P-17).

<sup>2</sup> Provider Exhibit P-3.

<sup>3</sup> Provider Exhibits P-1 at 3, P-2 at 3.

<sup>4</sup> Provider Exhibit P-4.

<sup>5</sup> Provider Exhibit P-5.

<sup>6</sup> Provider Exhibit P-1, P-2.

## **STATEMENT OF THE FACTS**

The Medicare Contractor reduced Westchester's payment update for FY 2015 by 2 percent because Westchester failed to submit the required quality data by the specified due date. Specifically the final rule published on November 8, 2012 ("November 2012 Final Rule"), required that Westchester submit certain quality data on the following quality measures for calendar year ("CY") 2013 by April 1, 2014:

1. The National Quality Forum ("NQF") endorsed measure that is related to pain management; and
2. Participation in a Quality Assessment and Performance Improvement ("QAPI") program that includes at least three quality indicators related to patient care.<sup>7</sup>

Westchester explained that its long-time Compliance Officer left sometime around the beginning of May 2013. The outgoing Compliance Officer instructed Westchester's Office Manager regarding the log-in information in order to submit the required HQRP data for CY 2013.<sup>8</sup> Westchester states that the Office Manager attempted to file the required data in July of 2013 and then multiple times thereafter through the April 1, 2014 due date. However, Westchester asserts that, each time the Office Manager attempted to log in, the message on the computer screen appeared to indicate that submissions were not being accepted at that time. Westchester entered into evidence an example of that message, dated June 17, 2013, to illustrate this fact pattern.<sup>9</sup>

The Provider further contends that the Office Manager and the Executive Director collectively misinterpreted the message received each time they attempted to submit data, and believed they had nothing due until after the April 1, 2014 deadline had passed. The Provider contends that it received no email correspondence from the system as all responsive emails would have gone to the former compliance officer and should have been "returned to sender."<sup>10</sup> Westchester claims that it only learned of a problem with their submission attempts upon receipt of the June 27, 2014 Notice of Quality Reporting Program Non-Compliance.<sup>11</sup>

Westchester submitted a request for reconsideration to CMS explaining the circumstances surrounding its data submission.<sup>12</sup> CMS upheld its decision to reduce the annual payment

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<sup>7</sup> 77 Fed. Reg. 67068, 67133-67134 (copy included at Medicare Contractor Exhibit I-5).

<sup>8</sup> Provider's Post-Hearing Brief at 6.

<sup>9</sup> *Id.*; Tr. 48-52; Provider Exhibit P-11 (printout dated Aug. 1, 2013 from CMS's [www.cms.gov](http://www.cms.gov) website of a CMS posting dated June 17, 2013 discussing quality data submissions for hospices).

<sup>10</sup> Tr. 92-98.

<sup>11</sup> Tr. 48-49, 85-86, 105-107; Provider Exhibit P-3.

<sup>12</sup> Provider Exhibit P-4.

update for FY 2015, on the grounds that the Provider failed to prove the data was timely submitted.<sup>13</sup>

### **DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW**

Medicare's payment for hospice care is governed by 42 U.S.C. § 1395f (i). On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act ("ACA"). ACA § 3004 amended 42 U.S.C. § 1395f (i) to include quality reporting requirements for hospices. As amended, § 1395f (i)(5)(C) provides that:

For fiscal year 2014 and each subsequent fiscal year, each hospice program shall submit to the Secretary data on quality measures specified under subparagraph (D). Such data shall be submitted in a form and manner, and at a time, specified by the Secretary for purposes of this subparagraph.<sup>14</sup>

To comply with this program for FY 2015, hospices were required to collect the requisite quality data throughout CY 2013 and report it to CMS' designated website by April 1, 2014.<sup>15</sup> Pursuant to 42 U.S.C. § 1395f(i)(5)(A)(i), if a hospice fails to comply with this quality reporting program, the Secretary will reduce the amount of its Medicare annual payment update by two percentage points.

Westchester contends that it complied with the regulations by collecting and reviewing the requisite quality data and sought to submit the quality data throughout the year in order to be as timely as possible. Westchester claims it made every effort to satisfy the Secretary's criteria, and it was prevented from doing so only because of CMS' confusing log-in notice.<sup>16</sup> Westchester claims that CMS' final determinations subjecting Westchester's FY 2015 APU to a two percent reduction were improper because "there is sufficient grounds to determine [Westchester] complied with the submission criteria set by the Secretary."<sup>17</sup>

The Board finds that that 42 U.S.C. § 1395f (i)(5)(C) requires each hospice to submit quality data in a form and manner, and at a time determined by the Secretary and 42 U.S.C. § 1395f(i)(5)(A)(i) imposes a two percent reduction upon a hospice that fails to do so. Significantly, the statute gives broad authority to the Secretary to determine and specify the form, manner, and time by which a hospice must submit the data. To this end, CMS published a final rule establishing the reporting process in the November 2012 Final Rule for FY 2015. In addition, CMS established a website with comprehensive guidance

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<sup>13</sup> Medicare Contractor Exhibit I-1.

<sup>14</sup> See Medicare Contractor Exhibit 1-3.

<sup>15</sup> 77 Fed. Reg. 67134 (Nov. 8, 2012).

<sup>16</sup> Provider's Post-Hearing Brief at 9.

<sup>17</sup> *Id.* at 11.

on Hospice Quality Reporting. The website contained information, guidance, and resources for hospices to use in determining the data submission requirements and how to comply with them. The website also contained a “User Guide for Hospice Quality Reporting Data Collection” (“User Guide”) Version 2.0.<sup>18</sup> The User Guide also noted that CMS had set up telephone help desks to assist providers with questions and technical issues. The Help Desk was accessible by email or by telephone.<sup>19</sup> The User Guide also contained detailed information on the collection and submission of data.

In addition to the User Guide, CMS also published on its website a “Technical User’s Guide for Hospice Quality Reporting Data Entry and Submission”, Version 2.02 (“Technical User’s Guide”).<sup>20</sup> This Technical User’s Guide provided detailed information to the hospice provider community regarding quality data collection and submission. In particular, it contained the following special “NOTE” that was repeated several times:

Accounts established for the submission of FY 2014 Reporting Cycle HQRP data (data collected in Q4 of 2012) are no longer available. Each provider submitting FY 2015 Reporting Cycle HQRP data (data collected in CY 2013) must register for an account specifically for the new submission period in 2014.<sup>21</sup>

The CMS website also included a fact sheet for the FY 2015 Annual Payment Update Data Collection and Submission Requirements.<sup>22</sup> This fact sheet provided the data submission due date and links to training materials and the user guides. Additionally, CMS published a Hospice Quality Data Reporting reminder in an MLN Matters article, SE1301, which notified hospices of the need to collect its quality data beginning in January 2013 and submit this data no later than April 1, 2014. This article warned that submission of this data would affect the FY 2015 payment determination for hospices.<sup>23</sup>

Westchester appears to have made efforts to timely submit the required quality data by the established deadline, but it failed to do so. Although Westchester claims its late submission was due to both the departure of an employee and CMS’ confusing log-in notices, the Board is not convinced that these hindrances sufficiently precluded Westchester from timely submitting the requisite quality data for CY 2013. The Board finds that CMS issued adequate guidance regarding CY 2013 quality data submissions and that Westchester did not avail itself of the CMS resources, including numerous publications as well as telephone and email helplines. In addition, the Board notes that the

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<sup>18</sup> Medicare Contractor Exhibit I-8.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> Medicare Contractor Exhibit I -10.

<sup>21</sup> *Id.* at 4, 9, 11.

<sup>22</sup> Medicare Contractor Exhibit I-6.

<sup>23</sup> Medicare Contractor Exhibit I-7.

date of departure of the former employee and the date of Westchester's sole example of the sign-in notice were eleven and eight months respectively prior to the April 1, 2014 filing deadline.<sup>24</sup> During the period following these events, Westchester failed to contact CMS, Medicare program contractors, or check the website to ensure proper submission. It appears the only action taken by the Office Manager as follow-up prior to the April 1, 2014 deadline, was to notify Westchester's Executive Director and to get her concurrence that "no follow up was required."<sup>25</sup>

Finally the Board has determined that a cursory reading of the CMS website and the HQRP requirements would have informed Westchester of: (1) the requirement to register for a new user log-in ID for CY 2013 quality data submissions and that the old log-in information would no longer be accepted for CY 2013; (2) the submission requirement had changed such that hospices were required to submit all of the CY 2013 data in a single submission between January 1, 2014 and the April 1, 2014 deadline as opposed to the previous practice of submitting data on a quarterly basis; and (3) training and assistance related to the HQRP was available to hospices. The Board concludes that Westchester's inaction to seek out the quality reporting requirements and guidance significantly contributed to Westchester's reporting failures. As a result 42 U.S.C. § 1395f (i)(5)(A)(i) mandates that the Provider's APU be reduced by two percentage points.<sup>26</sup>

## **DECISION**

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that CMS properly reduced Westchester's payment update for FY 2015 by two percent.

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<sup>24</sup> Further, the sole example of the notice that the Provider received at sign-in still refers to the April 1, 2014 deadline for CY 2013 data submissions. See Provider Exhibit P-11

<sup>25</sup> Declaration of Julia Lake at Par. 4. At the hearing the Board asked for clarification as to how the Provider entered the HQRP data on to the CMS designated website. The Provider witness noted that Ms. Julia Lake, a Provider employee entered the HQRP data and that she would need clarification from Ms. Lake, who was not present as a witness for the Provider at the hearing. The Provider's counsel suggested that this information could be provided by an affidavit from Ms. Lake. The Medicare Contractor counsel objected to the submission of the affidavit by Ms. Lake since the Medicare Contractor would not have the opportunity to ask Ms. Lake questions about her precise role. The Board suggested that the Medicare Contractor could depose Ms. Lake sometime in the future or address the affidavit in the post hearing briefs. However the Medicare Contractor did not have access to the Declaration of Ms. Lake prior to filing its post hearing briefs. Therefore, the Board allowed the Medicare Contractor thirty days to depose Ms. Lake, if necessary. The Medicare Contractor elected not to depose Ms. Lake and instead filed a Response to Affidavit of Julia Lake with the Board on January 31, 2016.

<sup>26</sup> The Board recognizes that, in the preamble to the final rule published on August 7, 2013, CMS introduced the concept of "justifiable excuse" in connection with its reconsiderations. In this regard, the preamble stated "[w]e could reverse our initial finding of non-compliance if: (1) The hospice provides proof of full compliance with all requirements during the reporting period; or (2) the hospice was not able to comply with requirements during the reporting period, and it provides adequate proof of a *valid or justifiable excuse* for this non-compliance." 78 Fed. Reg. 50495, 50886 (Aug. 19, 2013) (emphasis added). 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. § 418.312. The Board need not resolve this issue as it is clear from the record that Westchester did not have a "justifiable excuse" and failed to timely submit the requisite quality data by April 1, 2014.

**BOARD MEMBERS PARTICIPATING:**

Clayton J. Nix, Esq.  
L. Sue Andersen, Esq.  
Charlotte F. Benson, CPA  
Jack Ahern, M.B.A.

**FOR THE BOARD:**

/s/  
L. Sue Andersen, Esq  
Chairperson

**DATE:** March 7, 2017