PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2017-D15

PROVIDER –
Community Health Network Rehabilitation Hospital

Provider No.: 15-3043

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Services

DATE OF HEARING -
July 31, 2015

Cost Reporting Period Ended –
September 30, 2015

CASE NO.: 15-0660

INDEX

ISSUE STATEMENT

Whether the Provider satisfied Inpatient Rehabilitation Facility ("IRF") Quality Reporting Program ("QRP") requirements applicable to it during its first year of Medicare participation such that it would be entitled to the full market basket[1] rate during fiscal year ("FY") 2015.[2]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ("Board") finds that the Centers for Medicare & Medicaid Services ("CMS") properly imposed a 2 percent reduction to the standard Federal rate used to calculate the FY 2015 Medicare payments for Community Health Network Rehabilitation Hospital ("Community Health" or "Provider"), an inpatient rehabilitation facility paid under the inpatient prospective payment system ("IRF-PPS").

INTRODUCTION

Community Health is an IRF located in Indianapolis, Indiana. Community Health's designated Medicare Administrative Contractor is Wisconsin Physicians Service ("Medicare Contractor").[3]

In order to avoid a 2 percent reduction in the FY 2015 annual payment update for the IRF-PPS, the IRF QRP required hospitals to submit certain quality data for calendar year ("CY") 2013. CMS notified Community Health that it failed to meet the requirements of the IRF QRP for FY 2015 and that it would be subject to a 2 percent reduction in the FY 2015 annual payment update for IRF-PPS. The parties agree that CMS imposed the 2 percent penalty *solely* because Community Health failed to submit timely all of the required quality data on catheter-associated urinary tract infections ("CAUTI") for CY 2013.[4]

STATEMENT OF THE FACTS

As explained below, CMS reduced Community Health's payment update for FY 2015 by 2 percent because Community Health failed to submit all of the required CAUTI quality data for the *third quarter* of CY 2013.[5]

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[1] *See* https://www. cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/MedicareProgramRatesStats/MarketBasketResearch.html (CMS webpage on market basket research and information).

[2] *See* Joint Issue Statement and Stipulations (July 29, 2015) ("Stipulations").

[3] The term "Medicare contractor" refers to both fiscal intermediaries and Medicare administrative contractors.

[4] The original CMS determination stated that Community Health was subject to a 2 percent reduction in the FY 2015 annual payment update for failure to "submit Pressure Ulcer data on time" and "12 months of CAUTI data." However, the record confirms that only the CAUTI data remains at issue because the parties recognize that the Pressure Ulcer data required for CY 2013 was timely submitted and is not at issue. *See* Provider Exhibit P-7 at 1; Medicare Contractor Post-Hearing Brief at 2 (citing to Tr. at 64-65 and conceding the Pressure Ulcer data issue by recognizing that Community Health timely submitted the required Pressure Ulcer data).

[5] *See* Provider Final Position Paper at 7. Although the appeal initially challenged data submission compliance for the third and fourth quarters of CY 2013 (July 17, 2013 through December 31, 2013), the parties agree that the Provider timely submitted its 2013 data for September through December. *See* Tr. 23:4-9; Stipulations.

In the preamble to the FY 2012 IRF PPS Final Rule published on August 5, 2011 ("August 2011 Final Rule"), CMS notified providers that CMS would post quality data reporting deadlines for each quarter of CY 2013 on CMS' website.[6] CMS required providers to gather CAUTI data and submit this data electronically on a quarterly basis to the Center for Disease Control and Prevention's ("CDC's") National Health Safety Network ("NHSN"). If a provider failed to properly submit any of the requisite quality data for CY 2013, the provider would be subject to a 2 percent penalty for FY 2015. CMS' website subsequently posted February 15, 2014 as the deadline for submitting quality data for the third quarter of 2013.[7]

On June 27, 2014, CMS issued a "Notice of Quality Reporting Program Non Compliance"[8] which notified Community Health that its FY 2015 payments would be reduced by 2 percentage points. Community Health requested reconsideration of CMS' decision. On September 22, 2014, CMS upheld the determination to reduce the annual payment update for FY 2015.[9]

On December 11, 2014, Community Health timely requested a hearing before the Board and met all the jurisdictional requirements.[10] The Board held a live hearing on July 31, 2015. Community Health was represented by Amy S. Leopard, Esq., of Bradley Arant Boult Cummings, LLP. The Medicare Contractor was represented by Robin Sanders, Esq., of the Blue Cross and Blue Shield Association.

At the hearing, Community Health confirmed that it failed to timely submit the third quarter CAUTI data but maintained that it should not have been required to submit the July and August 2013 quality data because it was not accepted as a Medicare Provider until it received its CMS Certification Number ("Medicare CCN") in October 2013.[11] In this regard, Community Health argues that the Secretary failed to specify a form, manner and time for quality data submissions to be made by new IRFs until it issued the FY 2015 IRF PPS Final Rule on August 6, 2014 ("August 2014 Final Rule").[12] Indeed, Community Health notes that, under this guidance, CMS specified that new IRFs are responsible for reporting quality data beginning with the first day of the calendar quarter subsequent to the date on which the IRF is designated as operating in the Certification and Survey Provider Enhanced Reports ("CASPER") system.[13]

Finally, Community Health has asked the Board to consider: (1) whether Community Health should be held responsible for communication and data transmission errors under the control of the HHS, CMS, or its agents and contractors;[14] and (2) whether HHS' failure to respond to

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[6] *See* 76 Fed. Reg. 47836, 47873-83 (Aug. 5, 2011) (discussing in particular at 47879 that the deadlines for CAUTI quality data submissions were being posted on the CMS website, http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/).
[7] *See* Provider Exhibit P-12-1 (CMS chart of CY 2013 quality data reporting deadlines); Medicare Contractor Exhibit I-3 (printout of CMS webpage with CY 2013 quality data reporting deadlines).
[8] *See* Medicare Contractor Exhibit I-6 (copy of the June 27, 2014 notice of non-compliance).
[9] *See* Medicare Contractor Exhibit I-7 (copy of the September 22, 2014 notice of non-compliance upheld).
[10] *See infra* note 4.
[11] *See* Provider Exhibit P-3 (the effective date of Medicare participation is July 16, 2013).
[12] 79 Fed. Reg. 45872, 45918 (Aug. 6, 2014). .
[13] *See* Provider Final Position Paper at 11.
[14] *See id.* at 9.

Community Health's direct request for guidance in October 2013, citing a government shutdown, constitutes an "exceptional circumstance" justifying a reporting exception, or a "valid and justifiable excuse for noncompliance" entitling Community Health to its full market basket update for Federal Fiscal Year ending 2015.[15]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Federal statute, 42 U.S.C. § 1395ww(j)(7)(C),[16] requires IRFs to report on the quality of their services in the form, manner, and time as specified by the Secretary.[17] An IRF that fails to submit the required IRF QRP data to the Secretary is assessed a one-time 2 percent reduction to its annual update to the standard federal IRF prospective payment. CMS codified this requirement at 42 C.F.R. § 412.624(c)(4)(i).

As discussed above, the preamble to the August 2011 Final Rule established CY 2013 as the first reporting year for the IRF QRP and required submission of quality data on CAUTI. This submission would be used to determine FY 2015 IRF payments. CMS directed IRFs to the CDC website at http://www.cdc.gov/nhsn for additional details regarding future data submissions[18] and stated that additional reporting requirements would be posted on the CMS website at http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/ by no later than January 31, 2012.[19] CMS restated this information, as well as the due dates for data submission, in the preamble to the final rule published on November 15, 2012 ("November 2012 Final Rule").[20]

On June 13, 2013, the Indiana State Department of Health notified Community Health that it was authorized to admit and treat patients, but that it was not yet enrolled in the Medicare program.[21] As a result, Community Health was treating patients as of June 2013, in anticipation that it would later receive its Medicare certification, a retroactive enrollment date into the Medicare program, as well as its Medicare CCN.[22] Community Health received its Medicare CCN on October 23, 2013, with a retroactive effective date of enrollment into the Medicare program of July 16, 2013.[23]

In its final position paper, Community Health listed the following chart[24] to demonstrate all of the CAUTI data submissions that were made to NHSN for the IRF QRP for CY 2013:

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[15] *See id.*
[16] The Provider Final Position Paper at 3 incorrectly identifies the federal statute as 42 U.S.C. § 1395ww(b)(3)(B)(viii)(I)-(II)). This section relates to subsection (d) hospitals, not to IRFs.
[17] *See also* Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 3004(b), 124 Stat. 119, 369-70 (Mar. 23, 2010) (adding IRF QRP statutory provisions at 42 U.S.C. § 1395ww(b)(3)).
[18] *See* 76 Fed. Reg. at 47874.
[19] *See id.* at 47879.
[20] 77 Fed. Reg. 68210, 68501, 68505 (Nov. 15, 2012).
[21] *See* Provider Final Position Paper at 5.
[22] *See id.*
[23] On October 28, 2013, the Provider received a notice amending the October 23, 2013 notice in order to correct the Medicare CCN. *See* Provider Exhibit P-3.
[24] *See* Provider Final Position Paper at 7. *See also* Provider Exhibit P-14 (NHSN summary of CAUTI data submitted as of October 23, 2014).

- September – Submitted on October 17, 2013
- October – Submitted on December 24, 2013
- November – Submitted on February 27, 2014
- December – Submitted on February 27, 2014

A. FINDINGS RELATED TO NEW PROVIDER STATUS

Community Health asks the Board to consider whether CMS requires new IRFs to submit quality data for the period prior to receiving a Medicare CCN.[25] Community Health argues that because "[b]etween June 2013 and October 2013, [Community Health] was ***not*** a Medicare participating provider," it should *not* be required to submit "QRP data for services rendered prior to being accepted into the Medicare program."[26] Community Health asserts that "QRP data reporting obligations do not attach until after an IRF is certified to be *paid* as a participating Medicare provider,"[27] citing 42 C.F.R. § 412.624(c)(4), which reads:

> (i) In the case of an IRF *that is paid under the prospective payment system specified in § 412.1(a)(3) of this part* that does not submit quality data to CMS, in the form and manner specified by CMS, the applicable increase factor specified in paragraph (a)(3) of this section is reduced by 2 percentage points.[28]

Community Health also maintains that, during CY 2013, it was CMS policy "to *not* require IRFs to submit QRP data prior to the time the IRF received its [Medicare] CCN."[29] Specifically, Community Health argues that "[t]he first time CMS specified when a new IRF was required to submit IRF QRP data was in the FY 2015 IRF PPS Final Rule."[30] In support of this contention, Community Health points to the FY 2016 IRF PPS Proposed Rule[31] where CMS further refined this policy and clearly states that a new IRF must begin to submit QRP data no later than "the first day of the calendar quarter subsequent to 30 days after the date on its CMS Certification Number (CCN) notification letter."[32]

In addition, Community Health contends that, in the past, CMS has made case-by-case determinations for other new IRF providers exempting them from quality data reporting and the 2 percent penalty. The Provider cites a series of emails between Community Health's legal counsel and CMS establishing that CMS has issued such exemptions for new IRFs.[33]

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[25] *See* Provider Final Position Paper at 9.
[26] *See* Provider Responsive Brief at 6.
[27] *See id.* (emphasis added).
[28] *See id.* at 5 (emphasis in original).
[29] *See id.* at 6 (emphasis added).
[30] *See* Provider Post Hearing Brief at 5.
[31] *See* 80 Fed. Reg. 23331 (Apr. 27, 2015). *See also* IRF PPS Final Rule, 80 Fed. Reg. 47036, 47138-39 (Aug. 6, 2015) (codified at 42 C.F.R. § 412.634).
[32] *See* Provider Post Hearing Brief at 6 (quoting 80 Fed. Reg. at 23386).
[33] *See* Provider Supplemental Brief at 5 and Attachment 1.

The Board finds that, by its own admission, Community Health acted as a Medicare provider during the period in question because it anticipated a retroactive acceptance into the Medicare program. This is evidenced not only by its voluntary acceptance and treatment of Medicare patients during the interim period between its June 2013 opening and its receipt of its Medicare CCN in October 2013, but also by its own statements that it "began treating patients in June 2013 *in anticipation of future Medicare certification and a retroactive enrollment date*."[34] Indeed, Medicare regulations at 42 C.F.R. § 489.13 allow for certain retroactive enrollment. Since Community Health was voluntarily acting as a Medicare provider it should, therefore, be subjected to the same rules as all other Medicare providers.

In addition, by its own admission, Community Health clearly anticipated having to report the quality data because it collected and reported the data on the other quality measures (*e.g.*, quality data on the pressure ulcer measure) for July, August and September 2013, which are the months that the retroactive acceptance into the Medicare program applied.[35] Moreover, Community Health did collect CAUTI data for July, August and September 2013. This is evident by the reporting of the September data to CMS and by witness testimony that there were zero events for the months of July and August. Community Health also stated that, although it "awaited its Medicare certification, and receipt of its Medicare CCN, Community [Health] *knew* that IRF QRP data reporting requirements would *eventually* be required assuming the facility was approved as a Medicare provider" and it "registered within the CDC's NHSN for the *future submission of QRP data"* in August 2013.[36]

The Board concludes that, based on its actions, Community Health reasonably anticipated the ability to retroactively bill CMS for the services rendered during the interim period and receipt of payment for those services under IRF-PPS. As noted above, the Medicare CCN was provided to Community Health with a *retroactive enrollment date* of July 16, 2013.

The Board also disagrees with Community Health's interpretation of the FY 2015 IRF PPS Final Rule, which suggests that CMS intended to differentiate the reporting requirements of new IRFs from existing IRFs. CMS clearly required *all* IRFs serving Medicare patients to submit quality data reports for those patients – regardless of whether they were new or existing. While CMS changed its policy effective for FY 2017, the Secretary was not "silent"[37] by not specifying or differentiating between new or existing IRFs. Instead, the Board finds that the IRF quality reporting requirement was to be applied equally among all IRFs with no differentiation between new or existing IRFs.[38] The Board concludes that Community Health was required to submit

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[34] *See* Provider Final Position Paper at 5 (emphasis added).
[35] *See* Tr. at 65-66 (confirming that the pressure ulcer data was submitted for the third quarter 2013 through the CMS website).
[36] Provider Final Position Paper at 5 (emphasis added).
[37] *See* Provider Supplemental Brief at 5.
[38] The Board does not agree that the emails between Community Hospital's legal counsel and CMS establish that CMS treated new IRFs differently than existing IRFs regarding the quality reporting requirements. CMS' response in the emails stated: "[O]ur approach, previous to implementing this [2014] policy, was to review and understand if a provider had submitted an [sic] Medicare claims during the data submission period affecting a particular fiscal year (FY) annual payment update. While lack of claims did not necessar[ily] exempt a provider from having the 2% penalty assessed (as they still had the potential to submit future claims), I can say that if a provider had no claims

IRF QRP data from the retroactive Medicare CCN date of July 16, 2013 and had the ability to do so as demonstrated by the fact that it complied with the submission requirements for other quality measures for the third quarter of CY 2013.

B. FINDINGS RELATED TO REQUESTS FOR EQUITABLE RELIEF

The Board finds that 42 U.S.C. § 1395ww(j)(7)(C) and regulations at 42 C.F.R. §§ 412.624(c)(4)(i) and 412.634(b) require each IRF to report on the quality of their services in the form, manner, and time as specified by the Secretary and imposes a 2 percent penalty upon any IRFs that fails to do so. The statute gives broad authority to the Secretary to determine the time, form and *manner* by which an IRF must submit this data. The CDC website, which included guidance for the IRF QRP on how to report zero CAUTI events,[39] was available and Community Health acknowledges that they should have submitted zero events both at the hearing and in its reconsideration letter, which states that "[s]ome of the original data was not submitted during the 2013 year…[*t]his is our error*, and we now know to continue with submissions at all times."[40]

Community Health also asked the Board to consider whether Community Health should be held responsible for communication and data transmission errors under the control of the HHS, CMS, or its agents and contractors.[41] While Community Health raises data transmission issues, it fails to establish how any transmission issues occurred to affect the July and August 2013 CAUTI data submissions, which are the only submissions at issue in this case. In particular, Community Health neither demonstrated that it attempted to make any CAUTI data submissions for the July or August 2013 CAUTI data, nor asserted that it had submitted the July or August CAUTI data, but that CMS did not receive the submission due to transmission issues. Rather, as discussed above, during the hearing, Community Health admitted that it did not submit CAUTI data for July or August 2013. The Board, therefore, finds that Community Health failed to establish how that communication and the data transmission errors had any bearing on the missing July and August 2013 CAUTI data.

Similarly, Community Health also asked the Board to consider whether HHS' failure to respond to Community Health's direct request for guidance in October 2013, citing a government shutdown, constitutes an "exceptional circumstance" justifying a reporting exception, or a "valid and justifiable excuse for noncompliance" entitling Community Health to its full market basket update for Federal Fiscal Year ending 2015.[42] While it is true that HHS agencies, including CMS and CDC, were closed due to a government shutdown from October 1 to October 16, 2013, it is unclear how this prevented Community Health from obtaining any needed guidance and

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during any portion of the calendar year, but then began submitting Medicare claims (say in June, for example), we inquired as to why this might be the case, reaching out to these providers, and in some cases, were able to determine that they were only certified by Medicare for a portion of the submission period. Much of this was dealt with through the reconsideration process." *See* Provider Supplemental Brief at Attachment 1.

[39] *See* Medicare Contractor Exhibit I-9 at 5.

[40] *See* Provider Exhibit P-6-5 (emphasis added).

[41] *See* Provider Final Position Paper at 9.

[42] *See* Provider Final Position Paper at 9.

submitting its July and August 2013 data because the deadline to submit CAUTI data for the third quarter of 2013 was February 15, 2014, roughly four months after the government reopened on October 17, 2013.[43] Accordingly, the Board finds that the government shutdown had no effect on Community Health's failure to timely submit the required July and August 2013 CAUTI data.

The Board generally is unable to provide equitable relief in situations where the provider made a good faith effort to comply with the IRF QRP data submission requirements.[44] Although the Board is empathetic to Community Health's position, the Board's authority is limited to the application of statutory and regulatory requirements to the facts and circumstances of the issues presented and is unable to provide equitable relief.[45] The Ninth Circuit Court recently weighed in on this question of equitable relief in a similar quality reporting case, *PAMC, Ltd. v. Sebelius*, stating:

> [PAMC] claims a right to equitable relief or the benefit of the contract doctrine of substantial performance. In so doing, PAMC appears to have forgotten the aphorism: "Men must turn square corners when they deal with the Government." *Rock Island A. & L. R. Co. v. United States*, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L. Ed. 188 (1920). As we will discuss further, the Department has always insisted that the deadline for submitting data is a square corner, but PAMC now seeks to make it round. It is not entitled to do so.[46]

Similarly, the Board does not have the authority to make the corner "round" by considering factors outside those specifically recognized under the statute and regulations. Rather, the statute, regulations, and *relevant* final rules mandate application of the 2 percentage point penalty whenever an IRF fails to submit IRF quality data in the form, manner and time as specified by the Secretary.[47]

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[43] Indeed, Community Health acknowledges that it submitted CAUTI data for September 2013 on October 17, 2013. Clearly the government shutdown did not prevent Community Health from making its September submission and, similarly, it could have included the July and August data with that submission.

[44] *See* Provider Final Position Paper at 13.

[45] In particular, the Board recognizes that Community Health argues that it should be granted relief because CMS failed to respond to its specific question regarding when they should start reporting. Even assuming *arguendo* that there was a notification or other adjudication deficiency, the Board would be unable to offer any relief or to consider substantial compliance as a rationale for reversing the penalty because the Board is bound by the relevant statute and regulations which require a provider to submit CAUTI data in the form, manner and time specified by the Secretary. *See* 42 C.F.R. § 405.1867.

[46] 747 F.3d 1214, 1217 (9th Cir. 2014).

[47] The Board recognizes that, in the preamble to the FY 2015 IRF PPS Final Rule published on August 6, 2014, CMS stated that, for reconsiderations relevant to FY 2015 IRF payments, "[w] e may reverse our initial finding of noncompliance if: (1) The IRF provides adequate proof of full compliance with all IRF QRP reporting requirements during the reporting period; or (2) the IRF provides adequate proof of a valid or justifiable excuse for noncompliance if the IRF was not able to comply with the requirements during the reporting period." 79 Fed. Reg. at 45919. However, it is unclear whether CMS alone has the authority to consider a "justifiable excuse" as this discussion was not incorporated into the governing regulation at 42 C.F.R. § 412.634. The Board need not resolve

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 Community Health under IRF-PPS.

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: April 21, 2017

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this issue as it is clear from the record that Community Health did not have a "justifiable excuse" and simply failed to submit the "no events" data for July and August 2013 as it did for September 2013 and every month thereafter.