PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2018-D4

PROVIDER –
Pomerene Hospital (F.K.A. Joel Pomerene Memorial Hospital)

Provider No.: 36-0148

vs.

MEDICARE CONTRACTOR –
CGS Administrators

DATE OF HEARING -
January 17, 2017

Cost Reporting Periods Ended -
December 31, 2012; December 31, 2013

CASE NOs.: 16-1544 and 17-0193

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ISSUE STATEMENT

Whether the Medicare Contractor's adjustments to the Provider's Electronic Health Record ("EHR") incentive payment based on the exclusion of inpatient days for which the Provider provided covered services to Medicare Advantage ("MA") patients is correct?[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor properly calculated the Provider's EHR incentive payments for 2012 and 2013 based on the methodology in 42 C.F.R. § 495.104.

INTRODUCTION

Pomerene Hospital ("Pomerene" or "Provider") is a rural, 55-bed acute care hospital located in Holmes County, Ohio. For fiscal years 2012 and 2013, the Medicare Contractor, CGS Administrators, LLC., disallowed all inpatient days of service provided to patients who were enrolled in Medicare Advantage plans on Pomerene's cost reports.[2] As a result, Pomerene received a reduced EHR incentive payment for these years.

Pomerene timely appealed its 2012 Notice of Final Settlement of EHR Incentive Payment issued January 26, 2016 and its 2013 Notice of Final Settlement of EHR Incentive Payment issued April 28, 2016 and met the jurisdictional requirements for a hearing. Accordingly, the Board held a consolidated hearing on these appeals on January 17, 2017. James Flynn, Esq. of Bricker & Eckler LLP represented Pomerene Hospital. Joe Bauers, Esq. of Federal Specialized Services represented the Medicare Contractor.

STATEMENT OF FACTS

The Health Information Technology for Economic and Clinical Health Act, enacted as part of the American Recovery and Reinvestment Act of 2009, created incentive payments for eligible health care providers that demonstrate "meaningful use" of electronic health records through the use of certified EHR technology.[3] Pursuant to this statute, the Secretary of Health and Human Services promulgated regulations to implement the meaningful use program, with the first set of final regulations issued July 28, 2010.[4]

An EHR is an electronic version of a patient's medical record that is maintained by the provider. As a condition to receipt of the EHR incentive payments, providers are required to attest to meeting certain objectives and corresponding measures detailed in regulations contained at 42

[1] Transcript at 6.
[2] Medicare Contractor's Supplemental Final Position Paper, Exhibit I-1 and Post-Hearing Brief of Provider Pomerene Hospital at 2.
[3] Pub. L. No. 111-5, Title XII, 123 Stat. 115, 482 (2009) (codified at 42 U.S.C. § 1395ww(n)).
[4] Medicare and Medicaid Programs; Electronic Health Record Incentive Program 75 Fed. Reg. 44314 - 44588 (July 28, 2010).

C.F.R. § 495.6. Providers who successfully attest to meeting meaningful use objectives are eligible to receive an EHR incentive payment for each year of successful attestation. The calculation of an EHR incentive payment for an eligible hospitals is based on a complex formula that includes a Medicare share fraction. CMS calculates the Medicare share fraction totaling acute care inpatient-bed-days attributable to individuals for whom payment may be made under Medicare Part A and Medicare Advantage which the hospital itself reports on its cost report.[5]

Pomerene submitted Medicare cost reports for its cost reporting periods ending December 31, 2012 and December 31, 2013 claiming 764 and 734 Medicare Advantage days.[6] However, the Medicare Contractor removed these Medicare Advantage days from both cost reports because Pomerene had failed to submit "no-pay" bills for the Medicare Advantage days.[7] Pomerene's failure to submit no pay bills meant that these days did not appear on Pomerene's Provider Statistical & Reimbursement ("PS&R") report.[8]

The requirement to submit no pay bills for Medicare Advantage patients is well known to teaching hospitals that receive Indirect Medical Education ("IME") or Direct Graduate Medical Education ("DGME") payments[9] and to those hospitals that receive disproportionate share hospital ("DSH") payments.[10] Pomerene is not a teaching hospital nor does it receive DSH payments so it does not submit no pay claims for these purposes.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Pomerene requests that the Board order the Medicare Contractor to consider inpatient documentation other than the PS&R so that Medicare Advantage days can be included in the Medicare share calculation of its EHR incentive payment. The Provider argues that the Medicare Contractor relied solely on the PS&R reports when settling Pomerene's cost reports. The Provider believes if the Medicare Contractor were to perform an audit of its Medicare Advantage patient days documentation, it would be entitled to a higher EHR incentive payment.[11]

The Board reviewed the preambles to the EHR proposed and final rules that explain the methodology for calculating the EHR incentive payment as well as Change Request ("CR") 5647, dated July 20, 2007, which required all hospitals paid under the inpatient prospective payment system ("IPPS") to submit informational only or "no-pay" bills to Medicare for services rendered to Medicare Advantage patients.[12] The final rule goes on to identify the exact lines on

[5] 42 C.F.R. § 495.104(c)(4)(ii)(A)(1)-(2) (2010).
[6] Provider's Final Position Paper for 2012 at 7 and Exhibit P-7 and Provider's Final Position Paper for 2013 at 4 and Exhibit P-6.
[7] Effective in 2007, hospitals claiming the DSH adjustment were required to submit "no pay" claims to Medicare Advantage Plans for inpatient services provided to patients were members of the Plan. These claims are reported to CMS through a form called the Provider Statistical and Reimbursement report or "PS&R." *See*: Pub. 100-04 Medicare Claims Processing Manual, Change Request 5647, July 20, 2007.
[8] Provider's Final Position Paper for 2012 at 6-10 and Provider's Final Position Paper for 2013 at 3-5.
[9] Transcript at 10-11.
[10] *Id.*
[11] Provider's Final Position Paper for 2012 at 7-9 and Provider's Final Position Paper for 2013 at 4-5.
[12] 75 Fed. Reg. 44314, 44455 (July 28, 2010).

the cost report that will be used to calculate the EHR payment as follows: "We intend to derive this information from Worksheet E-1, Part II, line 3 of the pending Medicare cost report. Form CMS-2552-10 which is derived from line 2 in column 6, Worksheet S-3, Part 1 of the pending report."[13]

The Board can certainly understand that a non-DSH hospital might assume that submitting no pay bills was unnecessary, because CR 5647's subject line states "Capturing Days on which Medicare Beneficiaries are Entitled to Medicare Advantage (MA) in the "**Medicare/Supplemental Security Income (SSI) Fraction**" and the summary states that hospitals "must begin to submit "no pay" bills to their Medicare contractor for the MA beneficiaries they treat, "**in order for these days to be eventually captured in the DSH calculations.**"

Unfortunately, in the preamble of the Final EHR regulation, CMS addressed this very issue. CMS stated that while CR 5647 in 2007 required all IPPS hospitals that intended to apply for a DSH payment to submit informational only Medicare Advantage claims, subsequent guidance, CR 6821, specifically was directed to "non-teaching hospitals" and gave *all IPPS hospitals*:

> [O]ne final opportunity to comply with the requirement to submit FY 2007 informational only claims. In addition, these hospitals are required to attest in writing to their Medicare contractor that they have either submitted all of their Medicare Advantage claims for FY 2007 or that they have no Medicare Advantage claims for that fiscal year.[14]

CR 6821 instructed all hospitals to attest that they either submitted all of their Medicare Advantage no pay claims or that they didn't have any claims to submit. Simply adding up the number of inpatient days provided to Medicare Advantage patients and putting that number on Worksheet E-1, Part II, line 3 as Pomerene did in this case did not comply with the CR 6821 instruction. The Board agrees that the title of these CRs and the references to either the DSH calculation or medical residency reimbursement prevented non-DSH, non-teaching hospitals from clearly understanding the import of this instruction.

Regarding meaningful use of health care technology and the incentive payments, Congress gave authority to establish a formula for calculating the incentive payment to the Secretary, who in turn, gave authority to the Fiscal Intermediaries ("FI") and Medicare Contractors to calculate the final incentive payment using actual cost report data. In the preamble for this proposed rule, CMS states:

> **b. Incentive Payments to Eligible Hospitals**
> The FIs/MACs will calculate incentive payments for qualifying eligible hospitals, and will disburse such payments on an interim basis once the hospital has demonstrated it is a meaningful EHR user for the EHR reporting period for the payment year. As discussed above in section B.2.b. of the

[13] *Id.*
[14] *Id.*

> proposed rule, the formula for calculating a qualifying eligible hospital's incentive payment requires the following data: (1) An initial amount; (2) the Medicare share; and (3) a transition factor applicable to that payment year. FIs/MACs will use the prior-year cost report, Provider Statistical and Reimbursement (PS&R) System data, and other estimates to calculate the interim incentive payment.[15]

At the time the rule was proposed, CMS articulated the following reason for using the PS&R System data:

> The methodology and data sources for making these bed day determinations are not only well established, but also well known and understood within the hospital community. We therefore see no reason to develop or propose any alternative approach for determining the "subsection (d) hospital" numbers of Medicare Part A and Part C inpatient-bed-days for purposes of calculating these incentive payments.[16]

Although Pomerene would like the Board to order the Medicare Contractor to consider alternative documentation for these Medicare Advantage days, the Board finds that allowing this additional documentation would be a change to the methodology for calculating the EHR incentive payment specifically precluded by regulations at 42 C.F.R. § 495.110 which states :

> There is no administrative or judicial review under sections 1869 or 1878 of the Act, or otherwise, of the following:
> (b) For eligible hospitals—
> (1) The methodology and standards for determining the incentive payment amounts made to eligible hospitals including-
>
> i) The estimates or proxies for determining discharges, inpatient-bed-days, hospital charges, charity charges, and Medicare share; and
>
> (ii) The period used to determine such estimate or proxy;

In the July 2010 final rule,[17] CMS established the EHR incentive payment methodology. This methodology requires no-pay bills to be submitted through the PS&R and for the selected lines on the provider's settled cost report to be used to calculate the EHR incentive payment. The Board finds requiring the Medicare Contractor to consider additional, or alternative, documentation to determine a revised EHR incentive payment for Pomerene for the years under appeal would be a change in the EHR methodology, the review of which is prohibited by regulation.

[15] Medicare and Medicaid Programs; Electronic Health Record Incentive Program, 75 Fed. Reg. 1844, 1919-1920 (Jan. 13, 2010).
[16] *Id.* at 1912.
[17] 75 Fed. Reg. 44314, 44455 (July 28, 2010).

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that the Medicare Contractor properly calculated the Provider's EHR incentive payments for 2012 and 2013 based on the methodology in 42 C.F.R. § 495.104.

BOARD MEMBERS:

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Gregory H. Ziegler, C.P.A, CPC-A

FOR THE BOARD

/s/
L. Sue Andersen
Chairperson

DATE: November 16, 2017