

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2018-D13

PROVIDER –
Mercy Hospital, Inc. dba
Carolinas Healthcare System -- Pineville

Provider Nos.: 34-0098

vs.

MEDICARE CONTRACTOR –
Palmetto GBA c/o National Government
Services

DATE OF HEARING -
October 18, 2017

Fiscal Year - 2017

CASE NO.: 17-1310

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ISSUE STATEMENT

Whether the full reduction of the Provider's annual increase factor by 2 percent for fiscal year ("FY") 2017 for failing to timely submit one of the six required data under the Inpatient Rehabilitation Facility ("IRF") Quality Reporting Program ("QRP") was proper.¹

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ("Board") concludes that the reduction of Mercy's market basket update for FY 2017 was proper.

INTRODUCTION

Mercy Hospital, Inc. dba Carolinas Healthcare System – Pineville ("Mercy" or "Provider") is an acute care hospital, with an IRF subunit, located in Charlotte, NC. Palmetto GBA was Mercy's Medicare Contractor. On July 7, 2016, the Centers for Medicare and Medicaid Services ("CMS") notified Mercy that it failed to meet IRF QRP reporting requirements which would reduce its FY 2017 annual payment increase by two percent. Specifically, CMS alleged that Mercy's IRF failed to submit data related to influenza vaccinations of its healthcare personnel. On August 9, 2016, Mercy requested that CMS reconsider its decision and on September 29, 2016, CMS upheld the payment reduction.

Mercy timely appealed CMS reconsideration decision and met the jurisdictional requirements required for a hearing before the Board. A hearing was held on October 18, 2017. Paul Kim, J.D., MPH of Cole Schotz, P.C. represented Mercy. Jerrod Olszewski, Esq., of Federal Specialized Services represented the Medicare Contractor.

STATEMENT OF FACTS AND RELEVANT LAW

42 U.S.C. § 1395ww(j)(7)(C) requires IRFs to report on the quality of their services in the form, manner, and time as specified by the Secretary.² 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).

The IRF PPS FY 2014 Final Rule introduced the Influenza Vaccination Coverage Among Healthcare Personnel as a new quality measure to be included in the overall quality data requirements for an IRFs' annual payment increase.³ CMS explains in the Final Rule that providers are to submit the data on the National Healthcare Safety Network ("NHSN") for the

¹ Transcript at 6.

² 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)).

³ 78 Fed. Reg. 47860, 47905 (Aug. 6, 2013).

period from October 1 (or when the vaccine becomes available) through March 31 and imposed a May 15 deadline to coincide with the deadlines for submitting other quality measures.⁴

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Mercy argues that it “sincerely” thought that it had submitted all six required data submissions and was not aware that it missed the influenza reporting requirement until the July, 7 2016 notice from CMS. It submitted the missing data on July 27, 2016.⁵ Mercy asserts that CMS is only authorized to penalize a provider that has failed to submit the data.⁶ Mercy argues that since it eventually submitted all six types of mandatory data, CMS is not authorized to penalize it. Mercy further states the Board can exercise its discretion and determine that Mercy has a “valid and justifiable excuse” for failing to meet a quality reporting requirement and impose less than a 2 percent penalty because there is no statute, regulation, or policy that prohibits the Board from doing so.⁷

The Board reviewed section 1886(j)(7)(A)(i) and (C) of the Social Security Act that specifically addresses the issue of reporting IRF QRP data and the penalty to be imposed if the data is not reported in the form and manner, and at a time specified by the Secretary. The section states:

(7) QUALITY REPORTING

(A) REDUCTION IN UPDATE FOR FAILURE TO REPORT

(i) IN GENERAL – For purposes of fiscal year 2014 and each subsequent fiscal year, in the case of a rehabilitation facility that does not submit data to the Secretary in accordance with subparagraph (C) and (F) with respect to such a fiscal year, after determining the increase factor described in paragraph (3)(C), and after application of paragraphs (C)(iii) and (D) of paragraph (3), the Secretary shall reduce such increase factor for payments for discharges occurring during such fiscal year by 2 percentage points.

(C) SUBMISSION OF QUALITY DATA – For fiscal year 2014 and each subsequent rate year, each rehabilitation facility 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.

The Board finds this language clearly requires a reduction of 2 percentage points when a provider does not submit all of the IFR QRP data in the form, manner, and at the time specified. Additionally, the wording does not allow for a reduction of the penalty because the statute specifically says, “shall reduce...by 2 percentage points.”⁸ The Board believes the use of the

⁴ 78 Fed. Reg. 47904, 47912, and 47918 (Aug. 6, 2013).

⁵ Transcript at 10.

⁶ Provider’s Final Position paper at 3.

⁷ Transcript at 16-17.

⁸ Social Security Act § 1886(j)(7)(A)(i).

word “shall” is mandatory and does not allow the Board to grant equity relief to reduce the penalty imposed by the Secretary.

The Board notes that the Ninth Circuit has weighed in on this issue in *PAMC, Ltd. v. Sebelius*. In that case, CMS ordered a 2 percent reduction in PAMC’s annual payment update due to late submission of its quality data. The Board upheld CMS’ decision to deny the full market basket update explaining that it lacked the authority to award equitable relief because PAMC indisputably failed to meet the deadline.⁹ The Ninth Circuit Court of Appeals (“Court”)¹⁰ agreed with the lower court’s decision¹¹ that the Board did not have independent authority to grant equitable relief to PAMC for its late submission of quality data.¹²

In its determination, the Ninth Circuit cited 42 C.F.R. § 405.1867, which states:

In exercising its authority to conduct proceedings under this subpart, the Board must comply with all the provisions of Title XVIII of the Act and regulations issued thereunder, as well as CMS Rulings issued under the authority of the Administrator as described in § 401.108 of this subchapter. The Board shall afford great weight to interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS.

The Court further stated:

[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.D. 141, 143 . . . (1920). As we will discuss further, the Department has always insisted that the deadline for submitting is a square corner, but PAMC now seeks to make it round. It is not entitled to do so.¹³

Similarly, the Board here does not have the authority to make the corner “round” by considering factors outside those specifically recognized under the statute and regulations. The Board finds that Mercy did not timely submit its employees’ influenza vaccination data as required and the statute, regulations, and relevant final rules mandate application of the 2 percentage point penalty whenever a hospital fails to submit its IRF QRP data in the form and manner, and at a time specified by the Secretary.

⁹ PRRB Dec. No. 2011-D15 at 6 (Dec. 14, 2010).

¹⁰ *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1215-16 (9th Cir. 2014).

¹¹ *PAMC, Ltd. v. Sebelius*, 2012 WL 12886817 (C.D. Cal, 2012).

¹² *PAMC*, 747 F.3d at 1219.

¹³ *Id.* at 1217.

DECISION AND ORDER:

After considering the Medicare law and regulations, the parties' contentions and the evidence submitted, the Board concludes that the reduction of the Mercy's market basket update for FY 2017 was proper.

BOARD MEMBERS:

L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Gregory H. Ziegler, CPA, CPC-A

FOR THE BOARD:

/s/
L. Sue Andersen, Esq.
Chairperson

DATE: January 3, 2018