PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD
2018-D19

PROVIDER–
Sutter Health 2001-2003 Regular Bad Debts – Collection Agency CIRP Group

Provider Nos.: Various

vs.

MEDICARE CONTRACTOR –
Noridian Healthcare Solutions

DATE OF RECORD HEARING -
April 17, 2017

Cost Reporting Periods Ended -
December 31, 2001; December 31, 2002; December 31, 2003

CASE NO.: 09-2156GC

INDEX

ISSUE:

Whether the Providers are entitled to reimbursement of their Medicare bad debts for the fiscal years ending December 31, 2001, 2002 and 2003.[1]

DECISION:

After considering the law and program instructions, the evidence presented, and the parties' contentions, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor, Noridian Healthcare Solutions, LLC ("Medicare Contractor"), properly disallowed Sutter Health's claimed Medicare bad debts because the bad debts were still pending at outside collection agencies. The Medicare Contractor's adjustments are affirmed.

INTRODUCTION:

Sutter Health owns the hospitals ("Hospitals" or "Providers") in this group appeal.[2] The group appeal involves twelve cost reports from 2001, 2002 and 2003.[3] The Medicare Contractor removed the bad debts claimed by the Providers because the debts were still being pursued at a collection agency. The Hospitals disagreed with this adjustment.

Each Hospital timely requested a hearing before the Board on the collection agency bad debt issue and met the jurisdictional requirements for a hearing. Accordingly, the Board held a hearing on the record on April 17, 2017. Sutter Health was represented by Wade H. Jaeger of Sutter Health. Jerrod Olszewski, Esq. of Federal Specialized Services represented the Medicare Contractor.

STATEMENT OF FACTS:

The regulations governing bad debts are located at 42 C.F.R. § 413.89.[4] Subsection (a) states the general rule that bad debts are deductions from revenue and are not to be included in allowable costs. However, in order to ensure that costs attributable to covered services furnished to Medicare beneficiaries are not borne by individuals who are not covered by the Medicare program, subsection (d) specifies that bad debts attributable to Medicare deductibles and coinsurance are reimbursable.

Pursuant to 42 C.F.R. § 413.89(e), bad debts must meet the following criteria to be allowable:

(1) The debt must be related to covered services and derived from deductible and coinsurance amounts.
(2) The provider must be able to establish that reasonable collection efforts were made.
(3) The debt was actually uncollectible when claimed as worthless.

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[1] Stipulation of Facts at Providers' Position Paper Exhibit P-35.
[2] Providers' Position Paper Exhibit P-1.
[3] Appendix A.
[4] Redesignated from 42 C.F.R. § 413.80 at 69 Fed. Reg. 49254 (Aug. 11, 2004).

(4) Sound business judgment established that there was no likelihood of recovery at any time in the future.

Additional guidance on the Medicare bad debt requirements is located in Chapter 3 of the Provider Reimbursement Manual, CMS Pub. 15, Part 1 ("PRM 15-1" or "Manual"). PRM 15-1 § 308 mirrors 42 C.F.R. § 413.89(e) in outlining the four main criteria that must be satisfied in order for bad debts to be reimbursable by Medicare. PRM 15-1 § 310 addresses the concept of "Reasonable Collection Effort." PRM 15-1 § 310.2 sets forth the "Presumption of Noncollectability," providing that, "[i]f after reasonable and customary attempts to collect a bill, the debt remains unpaid more than 120 days from the date the first bill is mailed to the beneficiary, the debt may be deemed uncollectible."

The Medicare bad debt amounts derive from deductible and coinsurance amounts for covered services provided to Medicare-eligible patients. Providers in this case sent each debt to a collection agency immediately after the 120 day write-off date. The collection agency returned the debts to the Providers during their fiscal years ending 2001, 2002 and 2003, but retained the debts in its master files and retained the debts on the patients' credit profiles after the date the Providers wrote off the debt.[5]

DISCUSSION, FINDINGS OF FACTS AND CONCLUSIONS OF LAW:

Sutter Health maintains that it made reasonable collection efforts,[6] and that the bad debts were written off after 120 days, so they satisfy the Presumption of Noncollectability.[7] Sutter Health points out that the Medicare Contractor has offered no evidence to support their "speculation" that the claimed bad debts have value, and insists that it has shown that the debts are worthless as claimed. Sutter Health states that over a decade has passed since 2001, 2002 and 2003, when the accounts were written off to bad debt, and the accounts remain worthless.[8]

Sutter Health also argues that the bad debt is uncollectable under California's statute of limitations, which bars the collection of debts over four years old.[9]

Finally, Sutter Health contends that it has been Congress' and CMS' long-standing policy to allow providers to write off bad debts while collection efforts were continuing at a collection agency. Sutter Health states that the language of the statute, regulations and program instructions are clear and unambiguous.

For its part, the Medicare Contractor contends that a bad debt is not to be claimed as worthless until all collection efforts cease and the account is returned from the collection agency. The Medicare Contractor concludes that the debts did not satisfy the requirements of 42 C.F.R § 413.89(e) because the fact that the debts remained at a collection agency constituted evidence that the Providers did not consider the accounts to be worthless or that there was no likelihood of recovery at any time in the future.

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[5] *See* Stipulation of Facts, Providers' Position Paper Exhibit P-35 at 2, nos. 8 and 9.
[6] Providers' Position Paper at 12.
[7] *Id*. at 12-15.
[8] *Id*. at 6.
[9] California Code of Civil Procedure § 337.

The Board's review of Medicare's regulations and program instructions finds that PRM 15-1 § 310 defines what is a reasonable collection effort under 42 C.F.R § 413.89(e). Specifically, section 310A allows providers to use a collection agency in addition to, and in lieu of, the provider's collection efforts. Section 310.2 defines Presumption of Noncollectibility and states that "[i]f after reasonable and *customary* attempts to collect a bill, the debt remains unpaid more than 120 days from the date the first bill is mailed to the beneficiary, the debt may be deemed uncollectible" (emphasis added).

The Medicare program expects that the provider will establish and maintain a policy which memorializes its actual "collection effort" and that this policy is its "customary" collection effort as is defined in the Presumption of Noncollectibility, delineated in PRM 15-1 § 310.2. In order to obtain the benefit of this presumption, a provider must follow its own policies for its "reasonable *and* customary attempts to collect"[10] for more than 120 days prior to writing a bad debt off. The Board finds that the plain language of the Presumption of Noncollectibility does not create an automatic presumption after the passage of 120 days. Rather, it is a discretionary presumption and does not foreclose the possibility that a debt may still be deemed collectible after 120 days, as demonstrated by the use of the words "may be deemed."

In addition, a close reading of the conditional clause in the Presumption of Noncollectibility (*i.e.*, "[i]f after reasonable *and* customary attempts to collect a bill, the debt remains unpaid more than 120 days from the date the first bill is mailed to the beneficiary" (emphasis added)) confirms that a provider gets the benefit of the presumption for a debt only if: (1) the provider has completed its customary collection attempts for that debt; (2) the actual collection attempts for the debt being claimed are "reasonable"; and (3) the collection attempts for the debt are completed more than 120 days from the date the first bill for that debt was sent to the patient. When the prepositional phrase (*i.e.*, "[i]f after reasonable *and* customary attempts to collect a bill") is read in conjunction with the words "remains unpaid more than 120 days," it is clear that the prepositional phrase operates independent of the phrase "remains unpaid more than 120 days" and that the reasonable and customary attempts must be completed before a debt "may be deemed uncollectible."[11] Otherwise, the words "remains unpaid more than" would be rendered superfluous and would reduce the Presumption of Noncollectibility to simply meaning that, after 120 days of reasonable and customary collection attempts, a debt "may be deemed uncollectible."[12]

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[10] (Emphasis added.)

[11] The Board notes that prior to the Bad Debt Moratorium, it was not uncommon for providers to have Medicare collection processes that ended in 120 days or less. *See, e.g.*, *Wadsworth-Rittman Hosp. v. Blue Cross and Blue Shield Ass'n/Cmty. Mut. Ins. Co.*, PRRB Dec. No. 1991-D85 (Sept. 26, 1991), *aff'd*, CMS Adm'r (Nov. 25, 1991) (addressing the 1986 cost reporting period); *King's Daughters' Hosp. v. Blue Cross and Blue Shield Ass'n/Blue Cross Blue Shield of Ky.*, PRRB Dec. No. 1991-D5 (Nov. 14, 1990), *review declined*, CMS Adm'r (Dec. 26, 1990) (addressing the 1984 cost reporting period).

[12] The Board's reading is consistent with the one Board decision issued prior to the Bad Debt Moratorium that considered the Presumption of Noncollectibility – *Davie Cty. Hosp. v. Blue Cross Blue Shield Ass'n/ Blue Cross Blue Shield of N.C.*, PRRB Dec. No. 1984-D89 (Mar. 22, 1984), *review declined*, CMS Adm'r (Apr. 18, 1984) ("*Davie County*"). In *Davie County*, the provider did not write bad debts off until 6 months after the date of service and, accordingly, the provider asserted that the Presumption of Noncollectibility was applicable. The Medicare Contractor argued that the provider's collection efforts were unreasonable because "[t]he non-Medicare uncollectible accounts were referred to an outside collection agency for *further* collection attempts while the Medicare uncollectible accounts were not similarly referred, but were written off as bad debts" (emphasis added) and the provider did not even make in-house telephone or letter-writing efforts comparable to those of the outside

In this regard, the Board finds that the Presumption of Noncollectibility does not excuse a provider from satisfying the other criteria specified in 42 C.F.R. § 413.89(e). Rather, in order to satisfy the criteria of 42 C.F.R. § 413.89(e)(3), the provider must first determine that the debt is "uncollectible," by which it must exhaust what it has established as its reasonable and customary collection efforts. If a provider chooses to utilize a collection agency, these efforts must be exhausted before the debt can be determined to be uncollectable and, therefore, worthless. Accordingly, the Board finds that the policy of not allowing providers to claim bad debts until they are returned from a collection agency is consistent with the regulations and policy manual.

This reasoning was most recently affirmed by the federal District Court in *Cmty. Health Sys. v. Burwell.*[13] The Court found that the PRRB's reasoning was not arbitrary and capricious, stating "Construing the regulatory criteria as the plaintiffs' suggest — and permitting reimbursement to a provider upon referral of Medicare debt to a collection agency — would invite premature reimbursement and essentially absolve the plaintiffs from complying with 42 C.F.R. § 413.89(e)(4)."[14]

The Board concludes the Medicare Contractor's disallowance of the bad debts at issue is proper. The Board recognizes that the Providers' decision to send bad debts to a collection agency may have been above and beyond the minimum needed to establish a "reasonable collection effort." However, the Providers' decision to incorporate the use of a collection agency into its customary collection efforts necessarily means that the collection agency activities get incorporated into the "reasonable collection effort" standard that Sutter Health must meet. Therefore, the Board finds Sutter Health's collection efforts are not complete until the collection agency has completed its efforts and Sutter Health would not qualify under the "Presumption of Noncollectibility" until "*after* reasonable *and* customary attempts to collect a bill" have been completed.

It should be noted that the Board's findings regarding the Presumption of Noncollectibility are consistent with the Sixth[15] and Eleventh[16] federal Circuit Courts which upheld the Secretary of Health and Human Services' interpretation of PRM 15-1 §§ 310 and 310.2, and that "PRM § 310.2 [*i.e.*, the Presumption of Noncollectibility] does not come into effect unless the provider has complied with PRM § 310. . .and has *ceased* collection efforts with regard to all accounts after 120 days."[17]

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collection agency to collect the past-due Medicare accounts prior to writing them off and claiming them as bad debts. The Board did not apply the presumption, but rather found that the provider failed to establish that it had made reasonable collection efforts because, in deciding not to refer the Medicare accounts to the outside collection agency, the provider failed to establish that it used an acceptable in-house alternative to referral to a collection agency.

[13] 113 F. Supp. 3d 197 (D.D.C. 2015).

[14] *Id.* at 219. Commenting on the interplay between the third and fourth regulatory criteria for bad debt write-off — whether the debt was uncollectible and worthless when written off and that sound business judgment must establish that there is no likelihood of recovery at any time in the future — the Court echoed the sentiment of another D.C. District Court in *Lakeland Reg'l Health Sys. v. Sebelius*, 958 F. Supp. 2d 1, 7 (D.D.C. 2013) stating "If a provider believes that a debt is 'actually uncollectible' and 'worthless,' under the third [regulatory] criterion, sound business judgment would presumably counsel against engaging in the useless exercise of referring that debt to a collection agency and incurring concomitant service charges." *Id.* at 217-18.

[15] *Battle Creek Health Sys. v. Leavitt*, 498 F.3d 401 (6th Cir. 2007).

[16] *Univ. Health Servs. v. Health & Human Servs*., 120 F.3d 1145 (11th Cir. 1997), *cert. denied*, 524 U.S. 904 (1998).

[17] *Id.* at 1149.

In this case, the Board recognizes that many of the bad debts at the collection agency were most likely worthless. However, based upon the Medicare regulations and court decisions cited above, the Board finds that the Providers must wait until all the collection agency efforts have ceased before the bad debts can be claimed and reimbursed by Medicare.

DECISION AND ORDER:

After considering the law and program instructions, the evidence presented, and the parties' contentions, the Board finds that the Medicare Contractor properly disallowed Sutter Health's claimed Medicare bad debts on the ground that accounts related to such bad debts were still pending at outside collection agencies. The Medicare Contractor's adjustments are affirmed.

BOARD MEMBERS PARTICIPATING:

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 30, 2018

Appendix A

Sutter Health

Model Form G: Schedule of Providers in Group

Sutter Health 2001 - 2003 Bad Debts - Collection Agency CIRP Group

Case No. 09-2156GC

	Provider Number	Provider Name	FYE
1.	05-0498	Sutter Auburn Faith Hospital Auburn, Placer, California	12/31/02
2.	05-0523	Sutter Delta Medical Center Antioch, Contra Costa, California	12/31/02
3.	05-0309	Sutter Roseville Medical Center Roseville, Sacramento, California	12/31/02
4.	05-0537	Sutter Davis Hospital Davis, Yolo, California	12/31/02
5.	05-0476	Sutter Lakeside Hospital Lakeport, Lake, California	12/31/02
6.	05-0417	Sutter Coast Hospital Crescent City, Del Norte, California	12/30/02
7.	05-0523	Sutter Delta Medical Center Antioch, Contra Costa, California	12/31/01
8.	05-0498	Sutter Auburn Faith Hospital Auburn, Placer, California	12/31/03
9.	05-0537	Sutter Davis Hospital Davis, Yolo, California	12/31/03
10.	05-0309	Sutter Roseville Medical Center Roseville, Sacramento, California	12/31/03
11.	05-0523	Sutter Delta Medical Center Antioch, Contra Costa, California	12/31/03
12.	05-0108	Sutter Medical Center - Sacramento	12/31/03