PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2019-D17

PROVIDER –
Landmark Hospital of Savannah, LLC

PROVIDER NUMBER: 11-2018

vs.

MEDICARE CONTRACTOR –
Cahaba Gov't Benefit Administrators, LLC
c/o National Gov't Services, Inc.

DATE OF HEARING -
October 2, 2017

FISCAL YEAR - 2017

CASE NUMBER: 17-1223

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ISSUE STATEMENT:

Whether the payment penalty that the Centers for Medicare and Medicaid Services ("CMS") imposed under the Long Term Care Hospital Quality Reporting Program ("LTCH-QRP") to reduce the Provider's payment update for Fiscal Year ("FY") 2017 by 2-percent was proper?[1]

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board") finds that CMS properly reduced the Provider's annual payment update ("APU") for FY 2017 by 2 percent.

INTRODUCTION:

Landmark Hospital of Savannah, LLC ("Provider") is a Medicare-certified long-term care hospital ("LTCH") located in Savannah, Georgia. The Provider's designated Medicare administrative contractor[2] is Cahaba Government Benefit Administrators, LLC ("Medicare Contractor").

By letter dated July 15, 2016, CMS notified the Provider that it failed to meet the LTCH QRP requirements and was subject to a 2-percent reduction in its FY 2017 APU.[3] The Provider requested that CMS reconsider its decision regarding the reduction to its FY 2017 Medicare payments[4] and on September 22, 2016, CMS upheld its decision.[5] On March 17, 2017, the Provider timely appealed CMS' denial to the Board[6] and met the jurisdictional requirements for a hearing.

The Board held a live hearing on October 2, 2017. The Provider was represented by Jason M. Healy, Esq. The Medicare Contractor was represented by Joe Bauers, Esq. of Federal Specialized Services.

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[1] Transcript ("Tr.") at 7.
[2] CMS' payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries ("FIs") and these functions are now contracted with organizations known as Medicare administrative contractors ("MACs"). The term "Medicare contractor" refers to both FIs and MACs as appropriate.
[3] Provider's Post-Hearing Brief, 7-8 (Nov. 16, 2017); Exhibit P-2 at 1.
[4] Provider's Post-Hearing Brief at 12; Exhibit P-3.
[5] Provider's Post-Hearing Brief at 13; Exhibit P-4.
[6] Exhibit P-1.

STATEMENT OF FACTS AND RELEVANT LAW:

Federal statute, 42 U.S.C. § 1395ww(m)(5)(C), requires LTCHs to report on the quality of their services in the form and manner, and at a time, specified by the Secretary.[7] The implementing regulation states:

> (b) *Submission of data requirements and payment impact*. (1) Except as provided in paragraph (c) of this section, a long-term care hospital must submit to CMS data on measures specified under sections 1886(m)(5)(D), 1899B(c)(1), and 1899B(d)(1) of the Act, as applicable, in a form and manner, and at a time, specified by CMS.
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> (2) A long-term care hospital that does not submit data in accordance with sections 1886(m)(5)(C) and 1886(m)(5)(F) of the Act with respect to a given fiscal year will have its annual update to the standard Federal rate for discharges for the long-term care hospital during the fiscal year reduced by 2 percentage points.[8]

The Fiscal Year 2013 Inpatient Prospective Payment System Long Term Care Hospital Prospective Payment System Final Rule ("FY 2013 IPPS/LTCH PPS Final Rule") adopted the Healthcare Personnel ("HCP") Influenza Vaccination Coverage quality measure (NQF #0431) for the LTCH QRP FY 2016 payment determinations and subsequent years.[9] CMS instructed LTCHs that data for this measure must be submitted to the Center for Disease Control and Prevention's ("CDC's") National Health Safety Network ("NHSN")[10] system.

This case concerns the quality data reporting requirements for HCP influenza vaccination measure for FY 2017 payment determinations. Specifically, for FY 2017 payment determinations, LTCHs had to collect data related to the HCP influenza vaccination measure from October 1, 2015 through March 31, 2016 and submit that data by the deadline of May 15, 2016.[11]

In this regard, CMS issued operational guidance in April, 2014 related to the HCP influenza vaccination measure stating:

> The NHSN protocol provides guidance for healthcare facilities to report HCP influenza vaccination summary data from October 1 (or

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[7] *See also* Patient Protection and Affordable Care Act, Pub. L. 111-148, § 3004(a), 124 Stat. 119, 368-369 (2010) (adding LTCH QRP statutory provisions at 42 U.S.C. § 1395ww(m)(5)).
[8] 42 C.F.R. § 412.560 (2015) (emphasis in original). *See also* 80 Fed. Reg. 49325, 49769 (Aug. 17, 2015).
[9] 77 Fed. Reg. 53257, 53630-53631 (Aug. 31, 2012).
[10] NHSN is a secure, Internet-based surveillance system maintained and managed by the CDC, and can be used by many types of health care facilities in the United States to collect and use data about HAIs, adherence to clinical practices known to prevent HAIs, the incidence or prevalence of multidrug-resistant organisms within their organizations, and other adverse events. 77 Fed. Reg. at 53557.
[11] 78 Fed. Reg. 50495, 50858 (Aug. 19, 2013). *See also* Exhibit P-8.

> when the vaccine became available) through March 31, which includes all influenza vaccinations administered during the influenza season at the facility or elsewhere . . . .
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> ***
>
> HCP influenza vaccination summary reporting in NHSN consists of a single data entry screen per influenza season, so each time a user enters data for a particular influenza season, all previously reported data for that season will be overwritten . . . . For the purpose of fulfilling CMS quality reporting measurements reporting requirements, this summary report will only be submitted once to CMS. The summary report must be entered by May 15 for data to be shared with CMS.
>
> HCP influenza vaccination summary data submitted to NHSN by May 15 will be reported by CDC to CMS for each long term care hospital CMS Certification umber (CCN). CDC will share all in-plan HCP influenza vaccination summary data with CMS. CDC will provide a HCP influenza vaccination percentage for each reporting long term care hospital CCN.[12]

CMS also directed providers to the CDC website at http://www.cdc.gov/nhsn/cms/index.html, recommending that providers run output reports within their facilities prior to reporting deadlines and utilize provided checklists to ensure complete reporting to NHSN.[13]

The Provider was a newly certified LTCH and began reporting quality data on October 15, 2015.[14] The Provider submitted its quality data for the HCP influenza vaccination measure for the October 1, 2015 through March 31, 2016 reporting period.[15] However, it apparently failed to enter its CCN.[16] NHSN notified the Provider prior to the submission deadline that there was "incomplete/missing data related to healthcare personnel influence vaccination."[17] Specifically the Provider's Director of Quality Management (DQM) was notified on May 5, 2016 that the "facility CCN still needs to be entered in NHSN in order for the data to be transmitted to CMS."[18]

In response to NHSN's notice regarding the missing CCN, the Provider's DQM added the CCN information on May 5, 2016 and requested confirmation from NHSN that the CCN was now in

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[12] https://www.cdc.gov/nhsn/PDFs/HCP/Operational-Guidance-LTCH-HCP-Flu.pdf. *See also* Exhibit I-2 at 1-2 (Nov. 16, 2017). Note that the Medicare Contractor submitted Exhibits identified as "I-2" with both its Final Position Paper and its Post-Hearing Brief. As such, references herein to Exhibit I-2 shall reference the document to which it is attached.
[13] Exhibit P-8 at 1.
[14] Tr. at 19.
[15] Provider's Final Position Paper at 2-3; Exhibit P-3 at 2.
[16] Provider's Final Position Paper at 3. *See also* Exhibit P-5 at 1.
[17] Provider's Final Position Paper at 3. *See also* Exhibit P-5 at 2.
[18] Provider's Final Position Paper at 3. *See also* Exhibit P-5 at 1.

the system.[19] NSHN responded stating "it appears that you have now added your CCN."[20] Unfortunately, the Provider did not realize it had inadvertently transposed two digits of its CCN entering 11-0218 instead of 11-2018.[21] The Provider states that it was not aware of this data entry error until it received the July 15, 2016 determination letter from CMS.[22] By that date, it was too late to resubmit the data using the correct CCN.

Notwithstanding its data entry mistake, the Provider maintains that CMS' decision to reduce its FY 2017 APU by 2-percent is legally invalid because: (1) the Provider submitted data for all applicable quality measures by the quarterly deadlines;[23] (2) CMS failed to follow the reconsideration procedure set forth in the Federal Register when it ignored the Provider's explanation for the alleged non-compliance;[24] and (3) CMS' reconsideration decision uses a form letter that makes only conclusory statements with no indication that CMS engaged in reasoned decision-making which is in violation of the Administrative Procedure Act ("APA").[25] Additionally, the Provider argues it substantially complied with LTCH QRP reporting requirements in good faith.[26]

The Provider argues that the Board has the authority to "affirm, modify, or reverse" the Secretary's findings on each matter at issue in the determination under appeal pursuant to 42 C.F.R. § 405.1869(b)(l)(i), and that the Board must decide whether the Provider is entitled to relief based on a preponderance of the evidence as required by 42 C.F.R. § 405.1871(a)(3).[27]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

This case focuses on whether the Provider met the LTCH QRP reporting requirements when it submitted its HCP influenza vaccination data to CDC's NHSN for the October 1, 2015 through March 31, 2016 data collection time period, using an incorrect CCN. The Provider did not correct the CCN error until July 19, 2016, well after the May 15, 2016 deadline, so its HCP influenza vaccination data was not shared with CMS. The Provider claims it should not be penalized for this error because it timely submitted its data and therefore there is no valid basis for CMS to impose the penalty.[28]

Accordingly, the Board reviewed the CMS guidance in effect for October 1, 2015 through March 31, 2016 – the data collection time period for FY 2017 payment determinations. Contrary to the Provider's arguments, the Board finds that the Provider's failure to submit an accurate CCN

[19] *Id.*
[20] Exhibit P-5 at 1.
[21] Provider's Final Position Paper at 3.
[22] *Id.* at 3-4.
[23] *Id.* at 9-11.
[24] *Id.* at 11-14.
[25] *Id.* at 14-21.
[26] *Id.* at 26-28.
[27] Provider's Post-Hearing Brief at 15.
[28] Provider's Final Position Paper at 10-11.

number into NHSN by the May 15, 2016 deadline is relevant to successfully meeting the LTCH QRP requirements.

The CMS LTCH Quality Reporting Manual (October 2015)[29] gives basic steps for data submission to NHSN. Chapter 5.3 makes clear that a hospital's CCN must be entered *correctly* in NHSN to ensure that data is shared with CMS, stating:

> 3. Register for the NHSN, which includes accepting the NHSN Rules of Behavior and providing your contact information at http://nhsn.cdc.gov/RegistrationForm/index. If you use an identifier other than your CCN during the enrollment process, you will have to enter your CCN on NHSN's Facility Information screen after your facility is enrolled *to ensure that the appropriate data are shared with CMS*.[30]

Additionally, in April of 2014, CMS issued "Operational Guidance for Long Term Care Hospitals* to Report Healthcare Personnel (HCP) Influenza Vaccination Data to CDC's National Healthcare Safety Network (NHSN) for the Purpose of Fulfilling CMS's Long Term Care Hospital Quality Reporting (LTCHQR) Program Requirements."[31] Page 2 of this guidance states:

> HCP influenza vaccination summary data submitted to NHSN by May 15 will be reported by CDC to CMS for each long term care hospital CMS *Certification Number (CCN)*. CDC will share all in-plan HCP influenza vaccination summary data with CMS. CDC will provide a HCP influenza vaccination percentage for each reporting long term care hospital CCN.[32]

Similarly, NHSN had guidance dated July 2015 posted on a webpage entitled "CMS Requirements"[33] that instructs providers such as LTCHs on how to add or correct their CCN in the NSHN system and reminds providers to double and triple check that they entered the CCN correctly:

> Enter the new CCN and Effective Date in the appropriate boxes . . . . *Make sure to double check that the new CCN* and Effective Date *are correct!* . . . Click the Close button to close the Edit CCN Records pop

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[29] https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/Downloads/LTCH-QRP-Manual-V-300-FINAL.zip

[30] (Emphasis added.)

[31] https://www.cdc.gov/nhsn/pdfs/cms/Operational-Guidance-LTCH-HCP-Flu.pdf . *See also* Exhibit I-2 at 1-2.

[32] (Emphasis added.)

[33] *See* https://www.cdc.gov/nhsn/cms/index.html.

> up to return to the Edit Facility Information page. *Then verify that the new CCN* and effective date *are correctly listed*.[34]

Based on the above, the Board finds that CMS provided ample notice to LTCHs that they must input their CCN into the NHSN system in order to enroll in the system, and to ensure quality data is shared with CMS. The Board concludes that, while the Provider timely reported HCP influenza vaccination data to NHSN by May 15, 2016, the Provider nonetheless failed to timely report its correct CCN by the May 15, 2016 submission deadline. Therefore, the Provider failed to comply with the requirement to submit its HCP influenza vaccination data in a *form and manner, and at a time*, specified by CMS.

Notwithstanding its acknowledged data entry mistake, the Provider maintains that CMS' reconsideration decision is legally invalid because CMS ignored the Provider's explanation for its non-compliance and used a form letter that makes only conclusory statements with no indication that CMS engaged in reasoned decision-making. Additionally, the Provider argues the failure to submit an accurate CCN number by the data submission deadline was "clearly extenuating circumstances for any perceived non-compliance."[35]

The Board finds that CMS' reconsideration procedures in this case were sufficient. There is no evidence that CMS ignored the Provider's explanation for its non-compliance. Rather, the Board finds that the Provider conceded its non-compliance in its request for reconsideration by admitting that "two digits of the LTCHs CMS Certification Number (CCN) were reversed in the reporting system."[36] Contrary to the Provider's allegations, CMS' reconsideration decision clearly states that "CMS reviewed the reconsideration of this LTCH" and found "that this LTCH did not provide evidence that it submitted required quality data during the required timeframes."[37]

Moreover, the Board finds that the Provider's failure to submit an accurate CCN number by the data submission deadline is not an "extenuating circumstance" entitling the Provider to relief from the 2-percent penalty. The controlling regulation at 42 C.F.R. § 412.560(c) explains that "[u]pon request of a long-term care hospital, ***CMS*** *may grant an exception or extension* with respect to the quality data reporting requirements, for one or more quarters, in the event of certain extraordinary circumstances beyond the control of the long-term care hospital," subject to certain conditions.[38] While this regulation is directed to CMS (rather than the Board) and it requires the LTCH to submit a request to CMS, the Board notes that the key phrase in the regulation determining whether a LTCH would qualify for an exception is that the "extraordinary circumstance" must be "beyond the control of the long-term care hospital."[39] In this case, the Board finds that, even if the regulation were applicable (*i.e.*, the Provider had submitted a proper

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[34] NHSN Guidance entitled "Adding/Correcting a CMS Certification Number within NHSN" dated July 2015 (*available at*: https://www.cdc.gov/NHSN/pdfs/CMS/Changing-CCN-within-NHSN.pdf) (emphasis added).
[35] Provider's Post-Hearing Brief at 2.
[36] Exhibit P-3 at 1.
[37] Exhibit P-4.
[38] 42 C.F.R. § 412.560(c) (2015) (emphasis added).
[39] *Id.*

request to CMS), the Provider failed to demonstrate that its failure to properly submit its CCN number was an extraordinary circumstance *beyond its control*.[40]

The Board also recognizes that § 412.560(c)(4) (2015) provides for certain systemic or regional situations where a request need not be submitted:

> CMS may grant an exception or extension to a long-term care hospital *that has not been requested by the long-term care hospital* ***if CMS determines*** that -
>
> (i) An extraordinary circumstance *affects an entire region or locale*; or
>
> (ii) A *systemic problem* with one of CMS' data collection systems directly affected the ability of the long-term care hospital to submit quality data.

Thus, under this regulation, CMS has the authority to grant a national exception but there is no evidence that CMS has conceded that the Provider's transposition of the digits in its provider number qualifies as a systemic problem with data collection.

Based on the above analysis, the Board concludes that the Provider failed to satisfy the LTCH QRP requirements that were necessary to receive a full APU for FY 2017. The Board's ruling in this case is consistent with other cases where the provider incorrectly entered the CCN or facility identification number.[41]

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[40] The Board recognizes that, in the preamble to the LTCH final rule published on August 19, 2013, CMS stated that, for reconsiderations relevant to FY 2015 LTCH payments, "[w] e may reverse our initial finding of non-compliance if: (1) The LTCH provides proof of compliance with all requirements during the reporting period; or (2) the LTCH provides adequate proof of a valid or justifiable excuse for non-compliance if the LTCH was not able to comply with requirements during the reporting period." 78 Fed. Reg. 50495, 50886 (Aug. 19, 2013). 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. §412.523(c)(4). The Board need not resolve this issue as it is clear that the Provider does not have a "justifiable excuse." The Provider has admitted that it failed to enter the CCN correctly which was the primary cause of alleged data submission failure.

[41] *See, e.g., Christian Healthcare Ctr. v. Novitas Solutions, Inc.*, PRRB Dec. No. 2019-D9 (Dec. 28, 2018); *North Carolina Baptist Hosp. v. Palmetto GBA*, PRRB Dec. No. 2018-D38 (May 25, 2018), *declined review*, CMS Adm'r (Aug. 2, 2018); *Cornerstone Hosp. West Monroe v. Novitas Solutions, Inc.*, PRRB Dec. No. 2017-D3 (Jan. 26, 2017), *declined review*, CMS Adm'r (Feb. 21, 2017); *Liberty Healthcare Group, LLC v. Palmetto GBA*, PRRB Dec. No. 2015-D10 (May 27, 2015), *declined review*, CMS Adm'r (June 23, 2015).

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board finds that CMS properly reduced the Provider's APU for FY 2017 by 2 percent.

BOARD MEMBERS PARTICIPATING:

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FOR THE BOARD:

2/26/2019

X Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: Clayton J. Nix -A