

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2016-D5

PROVIDER –
BayCare Alliant Hospital

Provider No.: 10-2021

vs.

MEDICARE CONTRACTOR –
First Coast Service Options, Inc.

DATE OF HEARING -
May 21, 2015

Federal Fiscal Year –
September 30, 2015

CASE NO.: 15-0204

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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 to reduce the Provider’s payment update for Fiscal Year (“FY”) 2015 by two percent was proper?¹

DECISION

After considering the Medicare law and regulations, the parties’ contentions, and the evidence submitted, the Board finds that CMS properly reduced BayCare Alliant Hospital’s (“BayCare” or “Provider”) payment update for FY 2015 by two percent.

INTRODUCTION

BayCare is a Medicare-certified long-term care hospital (“LTCH”) located in Dunedin, Florida. BayCare’s designated Medicare Administrative Contractor is First Coast Service Options, Inc. (“Medicare Contractor”).

On June 27, 2014, the Medicare Contractor advised BayCare that CMS had determined that it failed to meet the requirements of the LTCH Quality Reporting Program (“LTCH QRP”) for FY 2015 because it did not submit 12 months of data for the required quality measures.² At reconsideration, CMS upheld the imposition of the 2 percent penalty.³

BayCare timely appealed the reduction to the Provider Reimbursement Review Board (“Board”).⁴ The Board held a hearing on May 21, 2015. BayCare was represented by Jason M. Healy, Esq., of the Law Offices of Jason M. Healy, PLLC. The Medicare Contractor, was represented by Brendan G. Stuhan, Esq., of the Blue Cross and Blue Shield Association.

STATEMENT OF THE FACTS

Federal regulations required that BayCare submit twelve months of quality data to the Center for Disease Control and Prevention’s (“CDC’s”) National Health Safety Network (“NHSN”) system by May 15, 2014.⁵ Specifically, BayCare was required to submit data regarding:

1. Urinary Catheter -Associated Urinary Tract Infections (“CAUTI”);
2. Central Line Catheter-Associated Bloodstream Infection (“CLABSI”); and

¹ See Transcript (“Tr.”) at 5-6.

² See Provider Exhibit P-2 at 1.

³ See Provider Exhibit P-4 (copy of the CMS reconsideration dated Sept. 22, 2014).

⁴ See Provider Exhibit P-1 (copy of the Provider’s request for a Board hearing).

⁵ See 76 Fed. Reg. 51476, 51753 (Aug. 18, 2011) (excerpt included at Medicare Contractor Exhibit I-2).

3. Percent of Residents with Pressure Ulcers that Are New or have Worsened (“Pressure Ulcer measure”).⁶

The Medicare Contractor determined that BayCare failed to submit CAUTI and CLABSI data at least for the month of October 2013.⁷ BayCare disputes that it failed to timely report all CAUTI and CLABSI occurrences for 2013 because BayCare did not in fact have *any* occurrences of either CAUTI or CLABSI during October 2013.⁸ BayCare contends that the submission of “zero events” data was not mandated by statute or regulation and that BayCare, at a minimum, substantially complied with the LTCH QRP reporting requirements for CAUTI and CLABSI. In addition, BayCare contends that the CMS redetermination was invalid because it was not the product of reasoned decision making⁹ and failed to render a specific determination with respect to whether BayCare met the CMS criteria for a “justifiable excuse” sufficient to reverse the 2 percent penalty.¹⁰

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Federal statute, 42 U.S.C. 1395ww(m)(5), requires LTCHs to report on the quality of their services in the form, manner, and time as specified by the Secretary.¹¹ A LTCH that fails to submit the quality data to the Secretary is assessed a one-time 2 percent reduction to its annual update to the standard Federal LTCH prospective payment.

CMS explained the data submission requirements and reporting deadlines in the preamble to the final rule published on August 18, 2011 (“August 18, 2011 Final Rule”). The preamble explains that the data reporting began in FY 2012 and required submission of quality data on CAUTI, CLABSI and pressure ulcers to determine FY 2014 LTCH payments.¹² Further, in the preamble, CMS directed LTCHs to the CDC website at <http://www.cdc.gov/nhsn> for additional details regarding data submission¹³ and stated that additional reporting requirements would be posted on the CMS web site at <http://www.cms.gov/LTCH-IRF-Hospitce-Quality-Reporting/> by no later than January 31, 2012.¹⁴ Finally, the preamble specified that LTCHs were to collect data in each of the four calendar quarter of 2013 and submit this data to NHSN by August 15, 2013,

⁶ *Id.* at 51745-51750. *See also* 42 U.S.C. § 1395ww(m)(5)(D)(iii) (requiring the Secretary to select and publish LTCH QRP quality measures by October 1, 2012).

⁷ The Notice of Quality Reporting Program Non-Compliance issued by CMS did not specify which months that BayCare did not submit data. *See* Provider Exhibit P-2. BayCare asserts that the only month in which the data was not submitted was October 2013. *See* Provider Exhibit P-3. However, the Medicare Contractor asserts that the Provider’s data omissions include not only October 2013 but also July and August 2013. *See* Medicare Contractor’s Post-Hearing Brief at 10.

⁸ The submission of data for the Pressure Ulcer measure is not at issue in this case. *See* Provider Exhibit P-3; Provider’s Post-Hearing Brief at 2.

⁹ Provider’s Post Hearing Brief at 9, 20-28.

¹⁰ *Id.* at 16 – 20.

¹¹ Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, § 3004(a), 124 Stat. 119, 368-369 (Mar. 23, 2010) (adding LTCH QRP statutory provisions at 42 U.S.C. § 1395ww(m)(5)).

¹² *See* 76 Fed Reg. at 51743-51748.

¹³ *See id.* at 51752.

¹⁴ *See id.* at 51754.

November 15, 2013, February 15, 2014 and May 15, 2014 respectively.¹⁵ CMS reiterated these instructions and guidance in the preamble to the final rule published on August 31, 2012 (“August 2012 Final Rule”).¹⁶

BayCare argues that CMS would not have obtained any meaningful data if the Provider had reported zero occurrences of CAUTI and CLABSI for the month at issue. Therefore, the absence of data submissions for the month at issue is irrelevant and not a valid basis for CMS to impose the 2 percent payment penalty.¹⁷

In support of its position, BayCare argues that reducing its Medicare payment for inpatient services during FY 2015 would be inconsistent with the intent of the LTCH QRP.

According to CMS, the purpose of the LTCH QRP is “to promote higher quality and more efficient health care for Medicare beneficiaries . . .”¹⁸ and that it uses the LTCH QRP to “efficiently collect information on valid, reliable, and relevant measures of quality and to share this information with the public, as provided under section 1886(m)(5)(E) of the Act.”¹⁹ CMS also states that it hopes to “achieve a comprehensive set of quality measures to be available for widespread use for informed decision-making and quality improvement.”²⁰ Accordingly, BayCare maintains that imposing the 2 percent payment penalty on BayCare, based on a failure to report that there were *no* CAUTI or CLABSI occurrences in one month of 2013, would be inconsistent with the intent and goals of the program as stated above.²¹

The Board finds that 42 U.S.C. § 1395ww(m)(5)(A)(i) requires each LTCH to submit health care quality data as determined by the Secretary and imposes a two percent penalty upon any LTCH that fails to do so. The statute gives broad authority to the Secretary to determine the time, form and manner by which an LTCH must submit this data.²² To this end, the Secretary promulgated regulations at 42 C.F.R. § 412.523(c)(4) to implement the statute, and these regulations state in pertinent part:

¹⁵ See *id.* at 51753.

¹⁶ See 77 Fed. Reg. 53258, 53619, 53621 (Aug. 31, 2012) (specifying collection and submission deadlines as well as the following CMS web site address for additional instruction and guidance: <http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/LTCHTechnicalInformation.html>). In the preamble to the August 2012 Final Rule, CMS noted that it was in the process of finalizing the LTCH QRP Manual and “invited the public to provide submit questions and comments related to the LTCHQR Program and the [then] draft LTCHQR Program Manual” to a specified email address. See *id.* at 53620, 53621, 53622-53623. Excerpts from the LTCH RP Manual, Version 1.1 (Aug. 2012) that was issued contemporaneously with the August 2012 Final Rule are located at Medicare Contractor Exhibit I-3.

¹⁷ See Provider’s Final Position Paper at 3, 5-7.

¹⁸ *Id.* at 7 (citing to 76 Fed. Reg. 51476 at 51743).

¹⁹ *Id.* (citing to 76 Fed. Reg. at 51744).

²⁰ *Id.* (citing to 76 Fed. Reg. at 51750).

²¹ See Provider’s Post-Hearing Brief at 8, 11.

²² See 42 U.S.C. § 1395ww(m)(5)(C) (stating that “such [LTCH QRP] data shall be submitted in a form and manner, and at a time, specified by the Secretary”); [emphasis added].

- (4) *For fiscal year 2014 and subsequent fiscal years*
- (i) In the case of a long-term care hospital that does not submit quality reporting data to CMS in the form and manner and at a time specified by the Secretary, the annual update to the standard Federal rate . . . is further reduced by 2.0 percentage points

These regulations were effective during the reporting month at issue in the case (*i.e.*, October 2013). CMS reiterates this policy in the LTCH QRP Manual, Version 1.1 (Aug. 2012) (“2012 LTCH QRP Manual”)²³ and again, in the preamble to the August 2012 Final Rule CMS directs LTCHs to the 2012 LTCH QRP Manual for further guidance specifically on the data submission requirements for the FY 2013 reporting year.

The following excerpt from § 5.1 of the 2012 LTCH QRP Manual specifies that LTCHs must submit data on any “no events” for CAUTI and CLAPSI during a month must be submitted:

Monthly denominator data must be reported on CAUTIs and CLABSIs, *regardless of whether an infection occurred in the LTCH*. Monthly reporting plans must be created or updated to include CAUTI and CLABSI surveillance in all locations that require reporting *All required data fields in the numerator and denominator, including the “no events” field for any month during which no CAUTIs or CLABSIs were identified, must be submitted to NHSN.*²⁴

Similarly, § 5.3.11 includes the following instruction requiring LTCHs to submit data on zero occurrences during a month:

The number of indwelling catheter days for the location *must be reported, even if that number was zero.*²⁵ The number of central line days for the location must be reported, even if that number was zero. . . .

c. If there were no CAUTI events identified for the month, the Report No Events: CAUTI box must be checked on the Denominator for Intensive Care Unit/Other Locations screen with the NHSN application. If there were no CLABSI events identified for the month, the Report No

²³ 2012 LTCH QRP Manual § 1.2 (stating “[u]nder the LTCHQR Program, for rate year 2014 and each subsequent rate year, in the case of a LTCH that does not submit data to the Secretary in accordance with section 1886(m)(5)(C) of the Act with respect to each a rate year, any annual update to a standard Federal rate for discharges for the hospital during the rate year, and after application of section 1886(m)(3) of the Act, shall be reduced by two percentage points”).

²⁴ Medicare Contractor Exhibit I-11 at 5-1. (emphasis added). *See also* Medicare Contractor Exhibits I-10 – I-20.

²⁵ *Id.* at 5-4(emphasis added).

Events: CLABSI box must be checked on the Denominator for Intensive Care Unit/Other Locations screen with the NHSN application

BayCare complains that the Medicare Contractor has provided no evidence that this guidance was available in October 2013. The Board disagrees. The Medicare Contractor has provided evidence that at least two different versions of the LTCH Quality Reporting Manual, with effective dates of May 1, 2012 and August 24, 2012, existed in before October 2013.²⁶ Further, CMS notified the public that these manuals were available as described in the preamble August 2012 Final Rule.²⁷ These manuals document that CMS required LTCHs to submit data on “zero events.”²⁸ The Board, therefore, concludes that the evidence in the record demonstrates that CMS advised BayCare of the need to report “zero events” data.²⁹

Further, BayCare’s own data submission summary report confirms that, in at least two prior months denoted as 2013MO4, 2013MO5 in column 3 entitled “Summary Year/Month,” BayCare reported “No Events” of CAUDI or CLABSI data on “11November13.”³⁰ This same summary report confirms that BayCare failed to report for 2013MO10 that it had “No Events” until July 2, 2014. This evidence demonstrates to the Board that: (1) BayCare did have knowledge of the reporting requirement and did timely report that it had “No Events” in certain months prior to October 2013; and (2) BayCare simply did not report that it had no events for October, 2013 until well after the May 15, 2014 deadline. Thus, the Board concludes that BayCare knew that it had an obligation to timely report “No Events” and that it simply did not do so for the month of October 2013.³¹ BayCare, thereby, failed to comply with the requirement to submit data in the form, manner and time specified by the Secretary and CMS properly imposed the two percent penalty.

This conclusion is further supported by evidence that BayCare had the ability to generate reports from the NHSN system to determine what data had been submitted and to ensure compliance with the data submission requirements.³² While BayCare’s witness testified that they “did not believe there to be a requirement for no events to be submitted,”³³ the Board simply cannot conclude that BayCare staff lacked knowledge of the obligation to report non-occurrences. Accordingly, the Board finds that the BayCare failed to satisfy

²⁶ Medicare Contractor Exhibit I-13 at 1-7.

²⁷ See *supra* note 16.

²⁸ Medicare Contractor Exhibits I-11 at 5-1, I-14 at 1, I-15 at 4-6, I-16 at 7-3, I-17 at 1, I-18 at 1-2.

²⁹ Medicare Contractor Exhibit I-7 at 1.

³⁰ The chart at Medicare Contractor Exhibit I-7 indicates that a provider with “no events” to report had to indicate in the affirmative (“Y” in the “No Events” column) that it had “no events” during that month.

³¹ Provider’s Post Hearing brief points to its Exhibit P-3, at 1 which states that this was a “one-time unintentional omission of the CAUTI and CLABSI indicator in October 2013” and that this omission was “due to an oversight triggered by the fact that there were no occurrences of these two indicators in October 2013.”

³² See 2012 LTCH QRP Manual at § 4.3 (discussing the ability to create a “Final Validation Report”).

³³ Tr. at 44-45, 72.

the LTCH QRP requirements that were necessary to receive a full annual payment update for FY 2015.³⁴

BayCare also requests that the Board provide equitable relief because it made a good faith effort to comply with the LTCH QRP data submission requirements.³⁵ Although the Board is empathetic to BayCare'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.³⁶ 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.³⁷

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. The Secretary's regulations make no provision for allowing any "partial" penalty that would reduce the full impact of the 2 percent reduction. Rather, the statute, regulations, and *relevant* final rules mandate application of the 2 percentage point penalty whenever an LTCH fails to submit LTCH quality data in the form, manner and time as specified by the Secretary.³⁸

³⁴The Board recently reached the same conclusion in *Riverside Hosp. of La. v. Cahaba GBA*, PRRB Dec. No. 2015-D17 (Aug. 20, 2015), *declined review*, Adm'r (Oct. 2, 2015).

³⁵ See Provider's Final Position Paper at 18-19.

³⁶ In particular, the Board recognizes that BayCare argues that CMS' reconsideration decision was arbitrary and capricious and violated the Administrative Procedure Act, 5 U.S.C. § 706 because it failed to provide a satisfactory explanation of the basis for its decision and did not determine whether the Provider's explanation for why zero events were not reported constituted a justifiable excuse. 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 subject a provider to a 2 percent reduction for failure to submit CAUTI and CLABSI data in the form, manner and time specified by the Secretary. See also *infra* note 38.

³⁷ *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1217 (9th Cir., 2014).

³⁸ 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

In summary, the Board finds that, in this case, BayCare failed to file twelve months of 2013 CAUTI and CLABSI quality data measures by the May 15, 2014 deadline in the form and manner required by the Secretary. The failure to timely file this required data triggers the imposition of the 2 percentage point penalty that was described and announced in both the August 2011 and August 2012 Final Rules. The statute expressly states that, if an LTCH fails to submit the required data in the manner, form and time specified by the Secretary, the 2 percentage point penalty must be imposed and the Secretary did not provide for any waiver of or exception from that penalty in any of the regulations, final rules, and guidance that was issued for the reporting period at issue. CMS' LTCH QRP Manuals explicitly advised LTCHs to report this data even if there were no events to report. Accordingly, the Board finds that BayCare failed to satisfy LTCH QRP reporting requirements and that the 2 percentage point penalty was correctly applied.

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board finds that CMS properly reduced BayCare's payment update for FY 2015 by two percent.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Jack Ahern, M.B.A.

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: December 3, 2015

C.F.R. § 412.523(c)(4). The Board need not resolve this issue as it is clear from the record that BayCare did not have a "justifiable excuse" and simply failed to submit the "no events" data for October 2013.