

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2016-D6

PROVIDER –
QRS 1997-1999 Kansas DSH MediKan
Days Groups

Provider Nos.: Various (see
Appendix A)

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Service

DATE OF HEARING –
January 16, 2014

Cost Reporting Periods Ended -
1997-1999

CASE NOs.: 03-1202G; 07-2262G and
07-2263G

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ISSUE STATEMENT

Whether secondary MediKan days should have been included in the Provider's Medicaid fraction for the Disproportionate Share Hospital ("DSH") calculation in the disputed cost reports.¹

DECISION

For the sole hospital remaining in this consolidated group appeal, Stormont-Vail Regional Medical Center ("Stormont-Vail"), the Board finds that the Medicare Contractor properly excluded unpaid secondary MediKan days in the calculation of Stormont-Vail's DSH payment for fiscal year ("FY") 1999 because these days are not included under the hold harmless provisions of Program Memorandum A-99-62. Accordingly, the Board affirms the Medicare Contractor's DSH adjustments to Stormont-Vail's cost report for FY 1999.

INTRODUCTION

This consolidated group appeal now consists of only one hospital, Stormont-Vail with respect to its cost report for FY 1999.² Stormont-Vail is an acute care hospital which participates in the Medicare program and is reimbursed under the inpatient prospective payment system ("IPPS").³ Under this reimbursement system, Medicare pays predetermined, standardized amounts per discharge, increased for certain payment adjustments.⁴

One of those adjustments is the hospital-specific DSH adjustment ("Medicare DSH") which provides additional payments to qualifying hospitals that treat a disproportionate share of low-income patients.⁵ The Medicare DSH adjustment is calculated using two fractions known as the Medicare fraction and the Medicaid fraction.⁶ Stormont-Vail contends that the Medicare Contractor reduced its Medicare DSH payment by approximately \$69,000 due to the exclusion of some patient days from the numerator of the Medicaid fraction of the DSH calculation.⁷

Stormont-Vail timely appealed the Medicare Contractor's determination to the Provider Reimbursement Review Board ("Board") and met all jurisdictional requirements for a hearing.

¹ Transcript (Tr.) at 6.

² See Appendix A for list of the consolidated cases covered by this decision and the providers in each of these cases. During the hearing, the representative for this consolidated group appeal asserted that the Final Schedule of Providers included two additional Kansas hospitals covering certain fiscal years and presented argument and testimony regarding these two Kansas hospitals. See Tr. at 26-27. However, following the hearing, the Board confirmed that it had previously dismissed the MediKan issue for each of these two Kansas hospitals for the relevant fiscal years at issue and denied the corresponding transfer requests to the relevant group in this appeal. See Board Jurisdictional Dec. Ltrs dated Dec, 9, 2011, Feb. 27, 2012, Nov. 28, 2012. As the record reflects that the representative did not request the Board to reconsider these dismissals and the Board has not in fact reconsidered them, the Board finds that they remain in effect and, accordingly, has disregarded those portions of the hearing presentations and testimony pertaining to these two Kansas hospitals because they were made in error.

³ See 42 U.S.C. § 1395ww(d); 42 C.F.R. Part 412.

⁴ Id.

⁵ See also 42 C.F.R. § 412.106.

⁶ See 42 U.S.C. § 1395ww(d)(5).

⁷ See Provider's Revised Supplemental Position Paper, Case No. 07-2263G at 5.

A hearing was held on January 16, 2014. The Hospital was represented at the hearing by Kristin DeGroat, Esq., of Quality Reimbursement Services, Inc. The Medicare Contractor, in this case, Wisconsin Physicians Service, was represented by Adam Peltzman, Esq., of the Blue Cross and Blue Shield Association.

STATEMENT OF THE FACTS

Stormont-Vail appealed a determination of the Medicare Contractor to exclude certain unpaid “MediKan,” days from the numerator of the Medicaid fraction of the DSH calculation for the various cost report years. MediKan is a state-only program which provides medical services for disabled individuals who do not qualify for Medicaid but are eligible for cash benefits under the [Kansas] General Assistance (GA) program.”⁸ For purposes of this case a “MediKan day” refers to each day a MediKan-eligible person was in the hospital as an inpatient. Some MediKan days were “primary” MediKan days because MediKan was the primary payer of hospital services. The Medicare Contractor historically included MediKan *primary* days in the numerator of the Medicaid fraction of the DSH calculation.

Another category of MediKan patient days is referred to as MediKan “secondary” days because the hospital received payment from another source and MediKan, as the “secondary” payer, made *no* payment. The Medicare Contractor historically did *not* include any MediKan secondary days in the numerator of the Medicaid fraction of the DSH calculation. It is these secondary days that are at issue in this appeal.⁹

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Since 1986, CMS limited the number of Medicaid inpatient days included in the numerator of the Medicaid fraction of the DSH calculation to only those days for which the state Medicaid program had *paid* for the hospital stay. CMS refused to include days for which the state Medicaid program did not pay.¹⁰ This policy was challenged and rejected by four federal circuit courts.¹¹ In response to these court decisions, CMS issued a new policy, HCFA Ruling No. 97-2 (“Ruling 97-2”), which ordered Medicare contractors to include in the Medicaid fraction of the DSH calculation all days attributable to inpatient stays for patients who were eligible on that day for medical assistance under a State Medicaid plan, whether or not the hospital received payment from Medicaid for those inpatient hospital services.

The language in Ruling 97-2 stirred a new controversy as to what types of days are properly included in the Medicaid fraction of the DSH calculation. In December 1999, CMS issued Program Memorandum A-99-62 (“PM A-99-62”)¹² clarifying that for cost reporting periods

⁹ Providers’ Revised Supplemental Final Position Paper, Case No. 07-2263G at 4-5, ¶¶ 4-7.

¹⁰ This was referred to as CMS’ “paid days” policy. See 51 Fed. Reg. 16,772, 16,777 codified at 42 CFR §412.106(1986).

¹¹ *Legacy Emanuel Hosp. & Health Ctr. v. Shalala*, 97 F.3d 1261 (9th Cir. 1996); *Deaconess Health Servs. Corp. v. Shalala*, 83 F.3d 1041 (8th Cir., 1996) (*per curiam*); *Jewish Hosp. Inc. v. Sec’y of Health and Human Servs.* 19 F.3d 270 (6th Cir. 1994); *Cabell Huntington Hosp. Inc. v. Shalala*, 101 F.3d 984 (4th Cir. 1996).

¹² Program Memorandum, HCFA Pub. 60A, Transmittal No. A-99-63 (Dec. 1999) (copy included at Providers’ Exhibit P-2, Case No. 07-2263G).

beginning on or after January 1, 2000, only those days on which a patient is eligible for medical assistance benefits under an approved *Title XIX* State plan would be counted in the Medicaid fraction of the DSH calculation. Specifically, it was clarified that patient days provided to beneficiaries of State-funded income support programs not funded under Title XIX of the Social Security Act would not be included in the numerator of the Medicare fraction of the DSH calculation.¹³ As a result, some Medicare contractors, including the Medicare contractor for Kansas, that had historically allowed providers to include in their DSH calculation inpatient days attributable to individuals eligible for general assistance (“GA days”) and other State-only funded programs (collectively, “State-only program days”) now reversed their position and began excluding the State-only program days.

Concerned with hospitals’ need to repay the portion of the DSH payments attributable to the State-only program days, CMS established a “hold harmless” for certain hospitals that had received additional DSH payments due to the inclusion of State-only program days in the numerator of the Medicaid fraction of the DSH calculation. For cost reports settled *before* January 1, 2000, PM A-99-62 allowed hospitals whose DSH payments included State-only program days (referred to as the “past payment prong”) to keep that portion of the DSH payment attributable to the inclusion of the State-only program days in the numerator of the Medicaid fraction of the DSH calculation. In addition, the PM stated that for *as yet unsettled* cost reports (for cost reporting periods beginning before January 1, 2000), Medicare contractors were to allow State-only program days in the numerator of the Medicaid fraction of the DSH calculation only if the hospital had *received* payment for these days in previous cost reporting periods settled before October 15, 1999.

ARGUMENTS RELATING TO PROGRAM MEMORANDUM A-99-62

Stormont-Vail argues that it should be allowed to include both primary and secondary MediKan days in the numerator of the Medicaid fraction of the DSH calculation based on PM A-99-62. Stormont-Vail asserts general assistance patient days are defined as one “type of day” as that term is used throughout the PM without distinction between whether MediKan paid primary or secondary for that day. Stormont -Vail argues that, if primary general assistance days were allowed, then all general assistance type days should be allowed, including those paid secondary.¹⁴ Stormont-Vail relies on the following pertinent language from the PM A-99-62:

For cost reporting periods beginning before January 1, 2000, you are to continue to allow these types of days in the Medicare DSH calculation for all open cost reports only in accordance with the practice followed for the hospital at issue before October 15, 1999 (i.e. for open cost reports, you are to allow only those types of otherwise ineligible days that the hospital received payment for in previous cost reporting periods settled before October 15, 1999).¹⁵

¹³ *Id.* at 2.

¹⁴ Providers’ Consolidated Post Hearing Brief at 2-3.

¹⁵ Providers’ Exhibit P-2, Case No. 07-2263G, at 3.

Stormont-Vail asserts that it is clear from the PM language that general assistance days are a single unitary type of days. Further, specifically included within this single unitary type of day are both paid and unpaid general assistance days. Therefore, it is improper to treat unpaid (*i.e.*, secondary) general assistance days different from any other general assistance days (*i.e.*, paid or primary days).

The Board finds that the hold harmless provisions of PM A-99-62 do not apply in this case. The Board disagrees with Stormont-Vail's assertion that all State-only program days (whether they are primary or secondary days) are the same and, therefore, should be treated the same for the purpose of inclusion in the DSH calculation. The Board finds that, while the Medicare Contractor included the primary days in the pre-2000 DSH calculation, the Medicare Contractor never included secondary days in the pre-2000 DSH calculation because, unlike the primary days, the secondary days were never included in the State report from which the Medicare Contractor pulled the Medicaid data used in the numerator of the Medicaid fraction of the DSH calculation.¹⁶ Thus, the Board concludes that A-99-62 provides no basis to allow MediKan secondary days in the DSH calculation.

As discussed in the D.C. District Court's decision in *University of Kansas Hosp. Authority v. Sebelius* ("*University of Kansas*"),¹⁷ the purpose of the hold harmless provision was to provide relief to hospitals that may have come to rely on payment resulting from the inclusion of State-funded program patient days in their DSH determinations prior to October 15, 1999. The Board finds no evidence in the record to establish that Stormont-Vail expected to receive or may have relied on payment for *unpaid* secondary general assistance days prior to October 15, 1999. Quite to the contrary, the evidence establishes that, unlike the paid primary general assistance days which were included in Stormont-Vail's DSH payment prior to October 15, 1999, the unpaid secondary general assistance days were never included in Stormont Vail's DSH calculation. For these reasons, the hold harmless provision of PM A-99-62 is not applicable in this case. The Board's conclusion is consistent with the D.C. District Court's decision in *University of Kansas* in which the plaintiff hospitals appealed the same issue for a previous year.

ARGUMENTS RELATED TO APA AND CONSTITUTIONAL GROUNDS

Stormont-Vail asserts that: (1) PM A-99-62 cannot be applied retroactively to pre-2000 cost reporting period because it represents a change in legal interpretation of the DSH statute and, accordingly, violates the notice and comment rulemaking requirements of the Administrative Procedures Act ("APA"); and (2) the October 15, 1999 deadline of the PM A-99-62 violated the APA and the Equal Protection Clause of the U.S. Constitution.¹⁸ The Board disagrees with the assertion that PM A-99-62 represents a change in interpretation of the DSH statute or violates the APA and the Constitution.¹⁹ The following discussion in the D.C. District Court's decision in

¹⁶ Providers' Revised Supplemental Final Position Paper, Case No. 07-2263G, at 5; Medicare Contractor's Consolidated Supplemental Position Paper at 6.

¹⁷ 953 F. Supp. 2d 180, 192 (D. D.C 2013) (copy included at Medicare Contractor Exhibit I-4).

¹⁸ See Providers' Consolidated Post-Hearing Brief at 6-9.

¹⁹ See HCFA Ruling 1997-2 at 3 (the Medicaid Fraction does "not include days for which no Medicaid payment was made . . . because an individual was not eligible for Medicaid at that point"); PM A-99-62 ("[T]he focus is on the patient's eligibility for *medical assistance under an approved Title XIX [i.e., Medicaid] State plan*, not medical assistance under a State-only program [S]ome States provide medical assistance to beneficiaries of State-

University of Kansas summarizes why it is not a change in legal interpretation of the DSH statute and explains the legal basis for the Secretary's authority to issue the hold harmless provision in PM A-99-62:

The fact that the Secretary implemented a hold harmless provision in the Program Memorandum is not a concession that MediKan beneficiaries are Medicaid eligible, as Plaintiffs would have this Court believe. Rather, it is the Secretary's measured attempt to remedy a breakdown in the system. The hold harmless provision is well within the Secretary's discretionary authority to avoid the transaction costs attributable to reopening and recouping erroneous payments, defending ensuing appeals, and to avoid the unfair repercussion for those providers who calculated their budgets based on these erroneous payments. This is particularly true under the specific circumstances of the Program Memorandum, which noted that the erroneous payments were made due to the actions of third parties.²⁰

Further, to the extent these arguments directly challenge HCFA Ruling 1997-2 or any Medicare statute, the Board notes that, pursuant to 42 C.F.R. § 405.1867, it does not have the authority to address whether such ruling or statute violates the APA or is unconstitutional.

DECISION

For the sole hospital remaining in this consolidated group appeal, Stormont-Vail, the Board finds that the Medicare Contractor properly excluded unpaid secondary MediKan days in the calculation of Stormont-Vail's DSH payment for FY 1999 because these days are not included under the hold harmless provisions of Program Memorandum A-99-62. Accordingly, the Board affirms the Medicare Contractor's adjustments to Stormont-Vail's cost report for FY 1999.

BOARD MEMBERS PARTICIPATING

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, CPA

funded income support programs [*i.e.*, State-only plans]. These beneficiaries, however, are not eligible for Medicaid under a State plan approved under Title XIX, and, therefore, days utilized by these beneficiaries do not count in the Medicare disproportionate share adjustment calculation" (emphasis in original)); *University of Kansas*, 953 F. Supp. 2d at 190-191.

²⁰ 953 F. Supp. 2d at 191 (citations omitted).

FOR THE BOARD

/s/
Michael W. Harty
Chairman

DATE: December 16, 2015

APPENDIX A

CN 03-1202G QRS 1997 Kansas DSH Medikan Days Group²¹

SOP #	Provider Number	Provider Name	FYE	Medicare Contractor	Final Determ.	Date of Appeal
1*	17-0040	University of Kansas Hospital	06/30/97	WPS	11/22/02	03/06/03

CN 07-2262G QRS 1998 Kansas DSH Medikan Days Group

SOP #	Provider Number	Provider Name	FYE	Medicare Contractor	Final Determ.	Date of Appeal
1*	17-0040	University of Kansas Hospital	06/30/98	WPS	02/04/04	07/01/04

CN 07-2263G QRS 1999 Kansas DSH Medikan Days Group

SOP #	Provider Number	Provider Name	FYE	Medicare Contractor	Final Determ.	Date of Appeal
1	17-0086	Stormont-Vail Regional Medical Center	09/30/99	WPS	09/11/01	03/01/02
2*	17-0122	Via Christi Regional Medical Center	09/30/99	WPS	02/25/03	07/30/03

* These cases have been dismissed by the Board due to lack of jurisdiction.

²¹ Tr. at 26-27.