

PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION
ON THE RECORD
2016-D10

PROVIDER –
New Bedford Rehabilitation Hospital

Provider No.: 22-2043

vs.

MEDICARE CONTRACTOR –
CGS Administrators

DATE OF HEARING –
August 21, 2015

Cost Reporting Period Ended -
September 30, 2015

CASE NO.: 15-1874

INDEX

	Page No.
Issue Statement	2
Decision	2
Introduction	2
Statement of Facts	2
Discussion, Findings of Fact, And Conclusions of Law	3
Decision	7

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 imposed a 2 percent reduction to the annual update to the standard Federal rate used to calculate the FY 2015 Medicare payments for New Bedford Rehabilitation Hospital (“New Bedford” or “Provider”) under the inpatient prospective payment system for long-term care hospitals (“LTCH-PPS”).

INTRODUCTION

New Bedford is a Medicare-certified long-term care hospital (“LTCH”) located in New Bedford, Massachusetts. New Bedford’s designated Medicare administrative contractor is CGS Administrators (“Medicare Contractor”).

On June 27, 2014, CMS determined that New Bedford failed to meet the requirements of the LTCH Quality Reporting Program (“LTCH QRP”) for FY 2015. Specifically, the determination stated that New Bedford was subject to a 2 percent reduction in the annual update to the LTCH-PPS rates for FY 2015 because it did not submit 12 months of data for 2 of the 3 specified quality measures for calendar year (“CY”) 2013 even though it was required to do so for all 3 quality measures.²

On July 22, 2014, New Bedford requested that CMS reconsider the decision regarding the reduction affecting its FY 2015 Medicare payments.³ On September 22, 2014, CMS upheld its reduction decision.⁴ On March 19, 2015, New Bedford timely appealed this reduction to the Provider Reimbursement Review Board (“Board”).⁵

A hearing on the record was held by the Board. New Bedford 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

The Medicare Contractor reduced New Bedford’s Medicare payment for FY 2015 by 2 percent because New Bedford failed to submit the quality data required for quarters one and two for CY

¹ See Provider’s Final Position Paper at 2.

² See Provider Exhibit P-2 at 1.

³ See Provider Exhibit P-3.

⁴ See Provider Exhibit P-4.

⁵ See Provider Exhibit P-1.

2013 (*i.e.*, January through June 2013).⁶ Federal regulations required that New Bedford submit this data to the Center for Disease Control and Prevention's ("CDC's") National Health Safety Network ("NHSN") system by specific deadlines.⁷ Specifically, for FY 2013, New Bedford was required to submit data regarding:

1. Urinary Catheter-Associated Urinary Tract Infections ("CAUTI");
2. Central Line Catheter-Associated Bloodstream Infection ("CLABSI"); and
3. Percent of Residents with Pressure Ulcers that Are New or have Worsened ("Pressure Ulcer measure").⁸

New Bedford contends that it timely reported all CAUTI and CLABSI occurrences for CY 2013 and that the lack of CAUTI and CLABSI data submissions for the first half of CY 2013 was due to the fact that it had no occurrences of either CAUTI or CLABSI during these months. Accordingly, New Bedford maintains that CMS possesses all required data from New Bedford regarding the occurrences of CAUTI and CLABSI events at its LTCH for CY 2013.

New Bedford further argues that the imposition of the 2 percent penalty is actually inconsistent with the intent of the LTCH QRP "to promote higher quality and more efficient health care for Medicare beneficiaries"⁹ because it reduces the reimbursement to the LTCHs. Similarly, New Bedford contends that, in June 2014, it became aware of numerous issues with the NHSN system which prevented it from timely submitting the CAUTI and CLABSI data at issue.

Finally, New Bedford takes issue with the CMS reconsideration process on a number of grounds: (1) CMS ignored New Bedford's evidence that provided a justifiable excuse for not timely submitting the CY 2013 data at issue; and (2) CMS' reconsideration process was arbitrary and capricious because it made conclusory findings and failed to respond to New Bedford's arguments. New Bedford maintains that the Board should grant New Bedford equitable relief because New Bedford substantially complied with the reporting requirements for CY 2013.¹⁰

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 This statute specifies that, for any LTCH that fails to submit the required LTCH QRP data to the Secretary, the Secretary must assess a one-time 2 percent reduction to its annual update to the standard Federal payment under LTCH-PPS.

⁶ See Provider Exhibit P-3 at 3.

⁷ See 76 Fed. Reg. 51476, at 51753 (Aug. 18, 2011) (excerpt included at Medicare Contractor Exhibit I-2).

⁸ *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).

⁹ 76 Fed. Reg. at 51743.

¹⁰ Provider's Final Position Paper at 17-19.

¹¹ See also 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)) (copy included at Medicare Contractor Exhibit I-1).

In the preamble to the final rule published on August 18, 2011 (“August 2011 Final Rule”), CMS explained the data submission requirements and reporting deadlines.¹² The preamble explains that the data reporting would begin in CY 2012 and required submission of quality data on CAUTI, CLABSI and pressure ulcers to determine FY 2014 LTCH payment. 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, in connection with FY 2015 payment rates, LTCHs were to collect data in each of the four quarters of CY 2013 and submit this data to NHSN by August 15, 2013, 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

The Board finds that 42 U.S.C. § 1395ww(m)(5)(A)(i) clearly 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. Significantly, the statute gives broad authority to the Secretary to determine and specify the form, manner, and time by which an LTCH must submit this data to the Secretary. 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:

- (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.¹⁷

These regulations were effective October 1, 2013 and cover the reporting months at issue in the case (*i.e.*, January through June 2013).¹⁸ CMS reiterates this policy in the LTCH QRP Manual, Version 1.1 (Aug. 2012), (“2012 LTCH QRP Manual”).¹⁹ Further, in the preamble to the August 2012 Final Rule, CMS notifies LTCHs of the 2012 LTCH QRP Manual and directed

¹² 76 Fed Reg. at 51743-51748.

¹³ *Id.* at 51752.

¹⁴ *Id.* at 51754.

¹⁵ *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 this 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. See MAC’s Exhibit I-3. See also Medicare Contractor Exhibit I-7 (excerpts from the LTCH RP Manual, Version 1.1 (Aug. 2012) that was issued contemporaneously with the August 2012 Final Rule).

¹⁷ (Italics in original, bold emphasis added.) Copy included at Medicare Contractor Exhibit I-5.

¹⁸ See 78 Fed. Reg. 50496 (Aug. 19, 2013). Further, the regulation is consistent with the discussion in the preamble to the August 2012 Final Rule in which CMS notified LTCHs of the penalty for FY 2015 if LTCHs failed to submit the required data for FY 2013 in the time, form and manner specified by the Secretary.

¹⁹ Copy included at Medicare Contractor Exhibit I-7.

them to that manual for further guidance on the data submission requirements for the CY 2013 reporting year.²⁰

The following excerpt from § 5.1 of the 2012 LTCH QRP Manual makes clear that LTCHs *must submit* data on any “no events” for CAUTI and CLABSI:

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.*²¹

Similarly, § 5.3.11 includes the following instruction on the submission of data on zero occurrences during a month:

11. Complete the monthly summary form. The number of indwelling catheter days for the location *must be reported, even if that number was zero*. 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 Events: CLABSI box must be checked on the Denominator for Intensive Care Unit/Other Locations screen with the NHSN application. See pg. 14-22 for guidance on this http://www.cdc.gov/nhsn/PDFs/pscManual/14pscForm_Instructions_current.pdf*²²

Notwithstanding the availability of CMS manual provisions advising them of CMS’ requirement to report zero events, New Bedford staff apparently was unaware of these data reporting requirements. The Board concludes that CMS notified LTCHs that data on “no occurrences” of CAUTI or CLABSI during a month must be reported. The Board finds that New Bedford failed to report this data for several months of CY 2013 and, thereby, failed to comply with the requirement to submit data in the form, manner and time specified by the Secretary.

The Board disagrees with New Bedford’s contention that the imposition of the penalty would defeat the purpose of the quality reporting program. Clearly, the goal of the quality reporting program was to provide “relevant measures of quality and to share this information with the

²⁰ See e.g., 77 Fed. Reg. at 53620, 53623.

²¹ (Emphasis added).

²² *Id.* at 5-4 (emphasis added).

public.”²³ New Bedford’s failure to provide accurate data for CY 2013 in the form, manner, time specified by the Secretary has the potential to distort the overall data reporting results for CY 2013 and to misinform the public about the quality of LTCHs. The Board also finds no evidence to conclude that New Bedford was unable to submit data at issue or generate reports from the NHSN system to monitor what data had been submitted and to ensure compliance with the CY 2013 data submission requirements.²⁴ Therefore, the Board concludes that New Bedford failed to satisfy the LTCH QRP requirements for CY 2013 and that the 2 percent penalty in this case is proper.

New Bedford requests that the Board provide equitable relief because it made a good faith effort to comply with the LTCH QRP data submission requirements for CY 2013.²⁵ Although the Board is empathetic to New Bedford’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.²⁶ 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).

²³ See *supra* note 9.

²⁴ See 2012 LTCH QRP Manual at § 4.3 (discussing LTCHs ability to create a “Final Validation Report” to confirm whether data either has been transmitted to CMS or has certain “fatal” errors that result in rejection of the data necessitating corrective action and resubmission).

²⁵ Provider’s Final Position Paper at 19.

²⁶ In particular, the Board recognizes that New Bedford argues that the reconsideration decision issued by CMS was deficient because CMS failed to properly notify the basis for the decision in violation of the Administrative Procedure Act, 5 U.S.C. Ch. 5, Subch II. Even assuming *arguendo* that there was a notification deficiency, the Board would be unable to offer any relief because the Board is bound by the relevant statute and regulations which specify that New Bedford is subject to a 2 percent reduction if it fails to submit CAUTI and CLABSI data in the form, manner and time specified by the Secretary.

²⁷ *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1217 (9th Cir. 2014).

²⁸ 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 from the record that New Bedford did not have a “justifiable excuse” and simply failed to submit the “no events” data for two of the 2013 calendar quarters.

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.²⁷

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 specified by the Secretary.²⁸

In summary, the Board finds that, in this case, New Bedford failed to file all of the CY 2013 quality data for both the CAUTI and CLABSI measures by the deadlines 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 if an LTCH fails to submit the required data in the form, manner, and time specified by the Secretary that the 2 percentage point penalty must be imposed and did not provide for any waiver of or exception from that penalty in any of the regulations, final rules, and guidance issued. CMS’ 2012 LTCH QRP Manual explicitly advised LTCHs to report this data even if there were no events to report. Accordingly, the Board finds that New Bedford 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* imposed a 2 percent reduction to the annual update to the standard Federal rate used to calculate the FY 2015 Medicare payments for New Bedford under the LTCH-PPS.

BOARD MEMBERS PARTICIPATING:

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FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: May 27, 2016