

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2018-D20

**PROVIDER –**  
Wyatt FFY 08 Wage Index (Occupational Mix  
Adj.) Group

**HEARING DATE –**  
November 17, 2015

Provider Nos.:  
18-0038, 18-0130, 18-0138, 18-0104, 18-0103,  
18-0080

Federal Fiscal Year –  
2008

**vs.**

**MEDICARE CONTRACTOR –**  
CGS Administrators, LLC

**CASE NO.:** 08-1052G

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**ISSUES:**

## ISSUE #1

Whether the inclusion of surgical technicians, mental health technicians, and heart center recovery technicians in the “All other occupations” category instead of the “Nursing aides, orderlies and attendants” category in the Provider’s occupational-mix survey was correct?<sup>1</sup>

## ISSUE #2

Does the fact that CMS and its Medicare Contractors did not classify all medical technicians uniformly and that some medical technicians are classified in “Nursing aides, orderlies and attendants” category for some other hospitals, while the Medicare Contractor excluded them from that category here, require that they be reclassified here as “Nursing aides, orderlies and attendants,” and these Providers’ occupational mix adjustments (“OMAs”) be recalculated?<sup>2</sup>

**DECISION:**

## ISSUE #1

The Board concludes that the Medicare Contractor’s inclusion of surgical technicians, mental health technicians, and heart center recovery technicians in the “All other occupations” category in the Providers’ occupational-mix survey was correct and consistent with CMS policy at the time.

## ISSUE #2

The Board concludes that the Board is without authority to require the Medicare Contractor to classify surgical technicians, mental health technicians, and heart center recovery technicians in a manner contrary to the CMS policy in effect at the time, regardless of how it classified these employment categories for other hospitals.

**INTRODUCTION:**

Owensboro Medical Health System (“OMHS”), located in Owensboro, Kentucky, and several Baptist Hospitals (“Baptist Hospitals”) including Baptist Hospital East in Louisville, Kentucky; Baptist Hospital Northeast located in LaGrange, Kentucky; Western Baptist Hospital in Paducah, Kentucky; Central Baptist Hospital located in Lexington, Kentucky, and Baptist Regional Medical Center in Corbin, Kentucky are general acute care hospitals and participate in the Medicare program (OMHS and the Baptist Hospitals are collectively referred to as “Providers”).<sup>3</sup>

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<sup>1</sup> Joint Stipulations, November 13, 2015 at page 10 of 10.

<sup>2</sup> *Id.*

<sup>3</sup> Joint Stipulation at 1 of 10.

The Providers challenge the National Government Services<sup>4</sup> (“Medicare Contractor”) grouping of surgical technicians, mental health technicians, and heart center recovery technicians (“medical technicians”) in an occupational mix survey that was used to calculate the 2008 area wage indices (“AWI”) as published in the Federal Register on August 22, 2007<sup>5</sup> for hospitals subject to Medicare’s inpatient prospective payment system (“IPPS”). The Providers’ appeal met the jurisdictional requirements for a hearing before the Board.<sup>6</sup> The Providers were represented by Stephen R. Price, Sr., Esq., of Wyatt, Tarrant & Combs, LLP. The Medicare Contractor was represented by Ed Lau, Esq. of Federal Specialized Services (FSS).

### **STATEMENT OF FACTS**

Federal law<sup>7</sup> requires the Secretary to adjust DRG prospective payment rates to account for geographic differences in hospital wage rates. The Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000<sup>8</sup> required CMS to collect data from all Medicare-participating short term acute care hospitals every three years, on the occupational mix of their employees. CMS uses this data to establish an occupational mix adjustment (“OMA”) to the wage index beginning in October 1, 2004.<sup>9</sup> The purpose of the OMA is “to control for the effect of hospitals’ employment choices on the wage index” as “[t]he varying labor costs associated with these choices reflect hospital management decisions rather than geographic differences in the costs of labor.”<sup>10</sup>

CMS collected the OMA data in early 2004. However, due to a lack of confidence in the data collected and a desire to minimize the redistributive impact of the OMA, CMS used a blended rate to implement the OMA. The blended rate was 10 percent of an average hourly wage, adjusted for occupational mix, and 90 percent of an average hourly wage, unadjusted for occupational mix.<sup>11</sup> In 2006, in *Bellevue Hospital Center v. Leavitt*,<sup>12</sup> the Second Circuit ordered CMS to complete its data collections and to begin applying the OMA to 100 percent of the wage index for FY 2007 (*i.e.*, by October 1, 2006).<sup>13</sup> To comply with this order, CMS issued a Joint Signature Memorandum (JSM-06412) which required hospitals to collect and submit employees’

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<sup>4</sup> At the time of the determination AdminiStar Federal was the Medicare Contractor but has been succeeded by CGS Administrators.

<sup>5</sup> Joint Stipulations at 7 of 10, See also 71 Fed. Register, 47130 and 59886. The preliminary files were released on the CMS website on October 6. Hospitals were to notify their intermediaries of any revisions by December 4, 2006. This includes requesting any revisions to the OMA survey data from the first six months of 2006. After desk review by the fiscal intermediaries, CMS published the revised wage index and occupational mix files on February 23, 2006, and hospitals were to notify fiscal intermediaries of revisions due to fiscal Medicare Contractor/CMS errors by March 12, 2007 <http://www.ober.com/publications/872-fy-wage-index-occupational-mix-adjustment>.

<sup>6</sup> Joint Stipulation at 9 of 10. The received stamped date at the PRRB is February 19, 2008.

<sup>7</sup> 42 U.S.C. § 1395ww(d)(3)(E).

<sup>8</sup> Pub. L. No. 106-554, Appendix F at § 304(c), 114 Stat. 2763A-495, 2763A-494 (2000).

<sup>9</sup> Section 304(c) of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000, P.L. 106-554, amended section 1886(d)(3)(E) of the Social Security Act. See also Form CMS-10079, Medicare Wage Index Occupational Mix Survey (2008) (available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS1210932.html>) (copy included at Group Representative Final Position Paper, Exhibit P-14).

<sup>10</sup> 71 Fed. Reg. 47870, 48006 (Aug. 18, 2006).

<sup>11</sup> See 69 Fed. Reg. 48916, 49034, 49052 (Aug. 11, 2004).

<sup>12</sup> 443 F.3d 163 (2nd Cir. 2006).

<sup>13</sup> *Id.*, at 173.

wage and hour data for two calendar quarters of CY 2006.<sup>14</sup> Data from the first quarter would be used to adjust the FY2007 AWI while data from both the first and second quarter would be used to adjust the AWI for FYs 2008 and 2009.<sup>15</sup>

The Memorandum also stated that CMS' methodology required hospitals to use a subset of the occupational categories from the standard occupational categories used in the 2001 Bureau of Labor Statistics ("BLS") Occupational Employment Statistics survey.<sup>16</sup> This new survey included the following BLS categories and subcategories:

1. Nursing
  - a. Registered nurses
    - (i) Management personnel
    - (ii) Staff nurse/clinician
  - b. Licensed practical nurses
  - c. Nursing aides, orderlies and attendants
  - d. Medical assistants
2. All other occupations<sup>17</sup>

Survey results were to be submitted to the Medicare Contractor and the Medicare Contractor was to audit the data and transmit it to CMS. The Providers complied with CMS deadlines and timely submitted their OMS data for the first and second calendar quarters of 2006.<sup>18</sup>

Following the publication of the Occupational Mix Survey File, Owensboro Medical Health System ("OMHS"), sent a letter to the Medicare Contractor disagreeing with audit adjustments that moved certain medical technician positions from one of the "Nursing" classifications to the "All other occupations" classification and complained that OMHS was being treated differently from other hospitals in the same state and across the country.<sup>19</sup> OMHS complained that removing the various medical technicians from one of the "Nursing" categories to the "All other occupations" category effectively excluded the medical technicians' hours and wages from the OMA calculation.<sup>20</sup> OMHS requested that these medical technician positions be reclassified as Nursing Aides, Orderlies and Attendants.<sup>21</sup> The Medicare Contractor refused to make the adjustment because it believed OMHS' technicians were properly classified in accordance with CMS instructions under the "All other occupations" category.<sup>22</sup> OMHS estimates that its wage index was reduced by 1.4%, reducing its reimbursements by an estimated \$35,000.<sup>23</sup> The Baptist

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<sup>14</sup>Joint Stipulations ("Stipulations") ¶5. Medicare Contractor Exhibit I-2.

<sup>15</sup> *Id.* ¶6.

<sup>16</sup> *Id.* ¶7.

<sup>17</sup> *Id.* See also: Excerpt of Form CMS-10079, Medicare Wage Index Occupational Survey (2006) (available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS060037.html>) at Medicare Contractor Exhibit I-2.

<sup>18</sup> *Id.* at ¶9.

<sup>19</sup> Group Representative Final Position Paper, Exhibit P-1.

<sup>20</sup> Stipulations, ¶10.

<sup>21</sup> See: Group Representative Position Paper, Exhibits P-1, P-3, P-4, P-6, P-7, P-9, P-12.

<sup>22</sup> See: Group Representative Position Paper, Exhibits P-10, P-1.1

<sup>23</sup> Stipulations, ¶1.

hospitals believe their medical technicians were also misclassified, however the effect on the Baptist hospitals is indeterminate.<sup>24</sup>

The August 22, 2007 final rule outlined the process for developing the FY 2008 Hospital Wage Index<sup>25</sup> and essentially required the same classifications as in FY2006 and FY2007. Also in this Final Rule CMS responded to comments by modifying the occupational mix survey, providing for a 1-year reporting period from July 1, 2007 through June 30, 2008, and reclassifying surgical technicians to the Licensed Practical Nurses category and other medical technicians included as medical assistants in the Nursing category. The regulation stated the new survey would be applied beginning with the FY2010 wage index.<sup>26</sup>

The Board considered an earlier appeal for FY2007 by the same parties and found that the Medicare Contractor correctly followed CMS instructions that required the inclusion of non-nursing employees in the “All other occupations” category. The Board recognized that CMS did not classify the medical technicians in the “Nursing” category because these positions did not require the training and licensing that was required for nurses. The medical technicians could not be classified in the “Aides, orderlies and attendants” category because the patient services that they provided were more skilled in nature than were the patient services provided by aides, orderlies or attendants. The Board also found that it had no authority to require the Medicare Contractor to address any errors or inconsistencies that had resulted from inconsistent application of CMS policy.<sup>27</sup>

The CMS Administrator declined to review the Board’s decision<sup>28</sup> and the hospitals appealed to the federal district court in Kentucky seeking to overturn the Board’s decision.<sup>29</sup> On August 12, 2016, the Court affirmed the decision of the Board, finding that while the statute mandated an occupational mix adjustment to the wage index, it did not prescribe the implementation details for this adjustment. The Secretary’s decision is entitled to deference on the methodology used for the occupational mix adjustment.<sup>30</sup> The Court found that the wage index and occupational mix adjustment were promulgated through notice and comment rulemaking and her interpretation was reasonable and not arbitrary and capricious. Finally, the Court found that the Medicare Contractor’s “misapplication” of the Secretary’s policy to 10 hospitals is not evidence that the Secretary is arbitrarily applying different policies to other hospitals. Even if there was evidence demonstrating different policies, the regulation only permits a hospital to challenge its own wage data, not that of another hospital, nor authorize the PRRB to grant relief based on the wage data of other hospitals.<sup>31</sup>

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<sup>24</sup> In response to a Board inquiry, the group representative, Wyatt, Tarrant & Combs, LLP. stated that the Baptist Hospitals have been unable to calculate the amount in controversy, however, they believe the impact is more than the \$15,000.

<sup>25</sup> Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2008 Rates, 72 FR 47130-01, 47310 (Aug. 22, 2007).

<sup>26</sup> *Id.*, at 47315. *See also*: Group Representative Final Position Paper, Exhibit P-14 at 5-6.

<sup>27</sup> PRRB 2014-D17 (July 25, 2014).

<sup>28</sup> Administrator’s review of PRRB 2014-D17, September 2, 2014. *See*: <https://www.cms.gov/Regulations-and-Guidance/Review-Boards/OfficeAttorneyAdvisor/Downloads/2014-D17.pdf>

<sup>29</sup> *Owensboro Health Inc. v. Burwell*, 2016 WL 4361527 (W.D. Ky. 2016), *aff’d*. *Owensboro Health Inc. v. Secretary of Health and Human Services*, 706 Fed.Appx. 302, 6th Cir. (Ky.), Aug. 31, 2017.

<sup>30</sup> *Id.*, at 10.

<sup>31</sup> *Id.*, at 17.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:**

For the most part, the Providers in this group appeal used the same arguments that they advocated in the FY2007 appeal. They object to the classification of the medical technicians to the “All other occupations” category and claim that this classification is arbitrary. They point out that these technicians provide nursing services that supplement the nursing services provided by RNs and LPNs, and perform a higher level of patient services, which is more skilled in nature than the services of nursing aides, orderlies and attendants that are included in the “Nursing” category.<sup>32</sup> They also argue that the exclusion of the medical technicians from the “Nursing” category was simply an internal *ad hoc* decision made by CMS employees.<sup>33</sup> The Hospitals complain that they are significantly disadvantaged by the Medicare Contractors classifying Kentucky hospitals’ medical technicians differently. Finally, the Providers emphasize that CMS effectively conceded the issue through its program instructions for the FY 2010 OMA which categorized medical assistants and surgical technologists as nursing employees.<sup>34</sup>

Based upon the review of the parties’ contentions, the evidence presented, and the *Owensboro Health* decision, the Board makes the following findings:

As it did in the 2007 decision, the Board finds that the Medicare Contractor followed the policy and instructions regarding the medical technicians classification for the occupational mix survey as it was promulgated by CMS and that the Board does not have the authority to require the Medicare Contractor to classify the medical technicians in a manner that would be contrary to CMS policy in effect at the time. Further, the Board does not have the authority under the regulation, 42 CFR 412.64(k), to address any potential OMA errors made for any other provider that is not part of this appeal.

The Board finds that the facts in the present case are identical to those in the *Owensboro* decision and the Board is bound by the holding in that case.

**DECISION AND ORDER:**

## ISSUE #1

The Board finds the inclusion of surgical technicians, mental health technicians, and heart center recovery technicians in the “All other occupations” category instead of the nursing aides, orderlies and attendants’ category in the Providers’ occupational-mix survey was correct and consistent with CMS policy at the time.

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<sup>32</sup> Group Representative’s Final Position Paper at 7. They highlight the Medicare Contractor’s Preliminary Position paper which acknowledges that the technicians are more skilled and perform higher levels of patient care than aide, orderlies and attendants. This Paper can be found at Exhibit P-13 of the Group Representative’s Final Position Paper.

<sup>33</sup> *Id.*, at 13.

<sup>34</sup> Provider’s Final Position Paper at 14.

ISSUE #2

The Board finds that the Provider's OMA is not subject to correction because the regulation gives the Board no authority to require the Medicare Contractor to classify surgical technicians, mental health technicians, and heart center recovery technicians in a manner that would be contrary to the CMS policy in effect during the time at issue.

**BOARD MEMBERS PARTICIPATING:**

L. Sue Andersen, Esq.  
Charlotte F. Benson, CPA  
Gregory H. Ziegler, CPA, CPC-A

**FOR THE BOARD:**

/s/  
L. Sue Andersen  
Chairperson

**DATE:** February 6, 2018

**Model Form G: Schedule of Providers in Group**Group Name Wyatt FFY 08 Wage Index (Occupational Mix Adj)Page No. 1 of 1Representative Wyatt, Tarrant & Combs, LLPDate Prepared 8/31/09

					A	B	C	D	E	F	G
	Provider Number	Provider Name & Location	FYE	Intermediary	Date of Final Determ.	Date of Hearing Request	No. of Days	Audit Adj. No.	Amount of Reimbursement	Original Case No.	Date(s) of Add/Transf.
1.	18-0038	Owensboro Medical Health System Owensboro, Davies County, KY	5/31/08	National Government Services	8/22/07 72 Fed. Reg. 47130	2/15/08	177	Occupational Mix Adj.	\$35,053	N/A	N/A
2.	18-0130	Baptist Hospital East Louisville, Jefferson County, KY	8/31/08	National Government Services	8/22/07 72 Fed. Reg. 47130	2/15/08	177	Occupational Mix Adj.	Unable to Calculate at this Time	N/A	N/A
3.	18-0138	Baptist Hospital Northeast LaGrange, Oldham County, KY	8/31/08	National Government Services	8/22/07 72 Fed. Reg. 47130	2/15/08	177	Occupational Mix Adj.	Unable to Calculate at this Time	N/A	N/A
4.	18-0104	Western Baptist Hospital Paducah, McCracken County, KY	8/31/08	National Government Services	8/22/07 72 Fed. Reg. 47130	2/15/08	177	Occupational Mix Adj.	Unable to Calculate at this Time	N/A	N/A
5.	18-0103	Central Baptist Hospital Lexington, Fayette County, KY	8/31/08	National Government Services	8/22/07 72 Fed. Reg. 47130	2/15/08	177	Occupational Mix Adj.	Unable to Calculate at this Time	N/A	N/A
6.	18-0080	Baptist Regional Medical Center Corbin, Whitley County, KY	8/31/08	National Government Services	8/22/07 72 Fed. Reg. 47130	2/15/08	177	Occupational Mix Adj.	Unable to Calculate at this Time	N/A	N/A

**Note: The Providers believe the impact is more than the \$15,000 needed to satisfy the remainder of the juris Amount for the group.**