

**PROVIDER REIMBURSEMENT REVIEW BOARD  
DECISION  
ON THE RECORD  
2018-D26**

**PROVIDER –**  
Greenwood Leflore Hospital

Provider No.: 25-0099

**vs.**

**MEDICARE CONTRACTOR –**  
Novitas Solutions, Inc.

**HEARING DATE –**  
July 11, 2017

Fiscal Year Ending –  
September 30, 2017

**CASE NO.:** 17-0301

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## **ISSUE STATEMENT**

Whether the reduction of the Provider's Market Basket Update for federal fiscal year ("FY") 2017 under the Hospital Inpatient Quality Reporting ("IQR") Program was proper?

## **DECISION**

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ("Board") concludes that the reduction of the Provider's market basket update for FY 2017 was proper.

## **INTRODUCTION**

Greenwood Leflore Hospital ("Greenwood" or "Provider") is an acute care hospital located in Greenwood, MS. On March 14, 2016, the Centers for Medicare and Medicaid Services ("CMS") notified Greenwood that it failed to submit Healthcare Associated Infection ("HAI") data to the National Health Safety Network ("NHSN") by the posted submission deadline which would result in a one-fourth reduction in its FY 2017 market basket update. On March 23, 2016, Greenwood requested that CMS reconsider its decision and on June 21, 2016 CMS responded to the request and upheld the payment reduction.<sup>1</sup> The reimbursement impact of this issue is estimated to be \$133,800.

Greenwood timely appealed that decision and has met the jurisdictional requirements for a hearing before the Board. The Board approved a hearing on the record. Greenwood was represented by Jeffrey Moore of Phelps Dunbar LLP. Novitas Solutions, Inc. ("Medicare Contractor") was represented by Lauren Leong of Federal Specialized Services.

## **STATEMENT OF FACTS AND RELEVANT LAW**

The Medicare program pays acute care hospitals for inpatient services under the inpatient prospective payment system ("IPPS").<sup>2</sup> Under IPPS, the Medicare program pays hospitals predetermined, standardized amounts per discharge, subject to certain payment adjustments.<sup>3</sup> Hospitals receive annual percentage increase in the standardized amount, known as the "market basket update," to account for increases in operating costs.<sup>4</sup>

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003<sup>5</sup> amended 42 U.S.C. § 1395ww(b)(3)(B) to establish the IQR program that requires each hospital to submit quality of care data "in a form and manner, and at a time, specified by CMS."<sup>6</sup> For fiscal years 2015 and beyond, CMS reduces the hospital's annual IPPS market basket percentage increase by

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<sup>1</sup> Medicare Contractor Final Position Paper, Exhibit I-1.

<sup>2</sup> See 42 U.S.C. § 1395ww(d); 42 C.F.R. Part 412. IPPS hospitals are often referred to as "subsection (d) hospitals."

<sup>3</sup> See 42 C.F.R. Part 412.

<sup>4</sup> See 42 U.S.C. § 1395ww(b)(3).

<sup>5</sup> Pub. L. No. 108-173, 117 Stat. 2066 (2003).

<sup>6</sup> 42 C.F.R. § 412.140(c).

one-fourth if a hospital fails to report the required quality data under the IQR program.<sup>7</sup> A hospital that is subject to this penalty during a given year is also excluded from participation in the value-based purchasing (“VBP”) program and ineligible to receive any value-based incentive payments for that year.<sup>8</sup>

For FY 2017 payment determinations, CMS required hospitals participating in the IQR program to submit data regarding various HAIs beginning January 1, 2015.<sup>9</sup> CMS instructed the hospitals to submit the required HIAs through the Centers for Disease Control and Prevention’s computer system called the NHSN.<sup>10</sup> CMS posted IQR program instructions and deadlines for quarterly data submission on the QualityNet Exchange Website.<sup>11</sup> The four quarterly submission deadlines were as follows:

1. Data from the first quarter of CY 2015 was due on August 15, 2015;
2. Data from the second quarter of CY 2015 was due on November 15, 2015;
3. Data from the third quarter of CY 2015 was due on February 15, 2016; and
4. Data from the fourth quarter of CY 2015 was due on May 15, 2016.

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

Greenwood acknowledges that due to an unfortunate oversight, it did not enter its CY 2015 second quarter HAI data into NHSN by the November 15, 2015 deadline. Rather, Greenwood entered the second quarter data on November 16, 2015 (the following business day) immediately after discovering the omission. The missing data represented 2 data points out of 114. All four quarters of HAI data is currently complete in NHSN. Prior to this incident, Greenwood had been 100% compliant with all IQR Program requirement.<sup>12</sup>

Greenwood contends that there is nothing in the statute or regulations which would prohibit CMS or the Board from granting equitable relief under these circumstances. Greenwood argues that it acted reasonably and in good faith to meet the data reporting deadlines. The Provider asserts that its untimely submission was due to an unfortunate combination of human error coupled with the fact that the IQR submission deadline fell on a Sunday. The error was immediately corrected on Monday, November 16, 2015, the next business day following its discovery and within eight hours of the reporting deadline. For these reasons, Greenwood submits that the Board should utilize its equitable discretion and excuse the Provider’s untimely submission.<sup>13</sup>

Finally, Greenwood argues that the Board should apply the doctrine of substantial performance in this case. Under the doctrine of substantial performance, if there has been a minor, inadvertent breach of a contract, where there has been no willful departure from the terms of the

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<sup>7</sup> See 42 U.S.C. § 1395ww(b)(3)(B)(viii)(I); 42 C.F.R. § 412.64(d)(2)(i)(C).

<sup>8</sup> See 42 U.S.C. § 1395ww(o)(1)(C)(ii); 79 Fed. Reg. 49854, 50048-50049 (Aug. 22, 2014).

<sup>9</sup> See 79 Fed. Reg. 50259 (Aug. 22, 2014)

<sup>10</sup> See <http://www.QualityNet.org>.

<sup>11</sup> See Hospital Inpatient Quality Reporting (IQR) Program Important Dates and Deadlines at Provider’s Final Position Paper, Exhibit P-9.

<sup>12</sup> See Provider’s Final Position Paper, Exhibit P-8.

<sup>13</sup> Provider’s Final Position Paper at 4.

contract and the contractor has performed in good faith, recovery is limited only to those damages associated with the part of the contract not strictly complied with. Greenwood states that it substantially performed its obligation to submit quality data and is therefore entitled to be excused from strict compliance with the deadline. Under the substantial performance doctrine, CMS should not be allowed to recover \$133,800 when it suffered no damages as a result of the Provider's slightly late submission of data for just one quarter.<sup>14</sup>

The Board points out the August 22, 2014 Federal Register<sup>15</sup> spoke to the due dates for submission of the HAI data. This Federal Register stated:

We refer readers to the FY 2012 IPPS/LTCH PPS final rule (76 FR 51631 through 51633; 51644 through 51645), the FY 2013 IPPS/LTCH PPS final rule (77 FR 53539), and the FY 2014 IPPS/LTCH PPS final rule (78 FR 50820 through 50822) for details on the data submission and reporting requirements for healthcare-associated infection (HAI) measures reported via the CDC's National Healthcare Support Network (NHSN) Web site. The data submission deadlines are posted on the QualityNet Web site at: <http://www.QualityNet.org/>.

In the FY 2015 IPPS/LTCH PPS proposed rule (79 FR 28246) we did not propose any changes to data submission and reporting requirements for healthcare-associated infection measures reported via the NHSN.

It is clear that CMS issued regulatory guidance for at least three years which specified the requirements for data submission. Greenwood admits that it had a spotless record in timely data submission in prior years. While the Board is sympathetic to Greenwood's first, and presumably only, error in meeting these requirements, nonetheless, the Board is unable to provide the relief that Greenwood seeks. Greenwood had sufficient notice but failed to submit the CY 2015 second quarter HAI data in a form and manner, and at a time specified by CMS, and accordingly is subject to a reduction in its market basket update for FY 2017 pursuant to 42 C.F.R. § 412.64(d)(2)(i).

Greenwood requests that the Board provide equitable relief because it made a good faith effort to comply with the HAI data submission requirements or that the Board should grant relief under the doctrine of substantial performance. However, the Board cannot provide any equitable relief or apply the doctrine of substantial performance in this case when the Board is bound by applicable regulatory and statutory authorities. The statute at 42 U.S.C. § 1395ww(b)(3)(B)(viii)(I) requires that each subsection (d) hospital submit inpatient quality data as determined by the Secretary and imposes a penalty by decreasing the percentage increase in the market basket index by one-fourth. The statute gives broad authority to the Secretary to specify the time, form and manner by which a hospital must submit data.

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<sup>14</sup> Provider's Final Position Paper at 6.

<sup>15</sup> 79 FR 50259 (August 22, 2014).

In this regard, the Board notes that the Ninth Circuit Federal Court of Appeals (“Ninth Circuit”) recently weighed in on this issue in *PAMC, Ltd. v. Sebelius*.<sup>16</sup> In that case, CMS ordered a 2 percent reduction in PAMC’s annual payment update due to late submission of its quality data. The Board upheld CMS’ decision to deny the full market basket update explaining that it lacked the authority to award equitable relief because PAMC indisputably had failed to meet the applicable deadline.<sup>17</sup> PAMC appealed to the federal district court and then to the Ninth Circuit. Both courts agreed that the Board did not have independent authority to grant equitable relief in the instance of PAMC’s late submission of quality data.<sup>18</sup> In this regard, the Ninth Circuit stated:

[PAMC] claims a right to equitable relief or the benefit of the contract doctrine of substantial performance. In doing so, 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 . (1920). As we will discuss further, the Department has always insisted that the deadline for submitting data is a square corner, but PAMC seeks to make it round. It is not entitled to do so.<sup>19</sup>

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 Board finds Greenwood clearly did not submit its quality data timely, and the statute, regulations, and relevant final rules mandate the percentage increase in the market basket index be reduced by one-fourth whenever a hospital fails to submit its inpatient quality data in the form, manner, and time specified by the Secretary.

### **DECISION AND ORDER:**

After considering the Medicare law and regulations, the parties’ contentions and the evidence submitted, the Board concludes that the reduction of the Provider’s market basket update for FY 2017 was proper.

### **BOARD MEMBERS:**

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

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<sup>16</sup> 747 F.3d 1214 (9th Cir. 2014).

<sup>17</sup> See PRRB Dec. No. 2011-D15 at 6 (Dec. 14, 2010).

<sup>18</sup> See *PAMC, Ltd. v. Sebelius*, 2012 WL 12886817 at \*3 (C.D. CA 2012); 747 F.3d at 1219.

<sup>19</sup> 747 F.3d 1217.

**FOR THE BOARD:**

/s/

L. Sue Andersen, Esq.  
Chairperson

DATE: February 28, 2018