

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2019-D10

PROVIDER –
Minnesota Hospice, LLC

TELEPHONIC HEARING HELD –
October 17, 2018

PROVIDER NO. – 24-1582

FISCAL YEAR– 2018

vs.

MEDICARE CONTRACTOR –
National Government Services, Inc.

CASE NO. – 18-1034

INDEX

	Page No.
Issue Statement	2
Decision.....	2
Introduction	2
Statement of the Facts	2
Discussion, Findings of Facts, and Conclusions of Law.....	4
Decision	6

ISSUE STATEMENT:

Whether the Centers for Medicare & Medicaid Services properly reduced Minnesota Hospice, LLC's annual payment update ("APU") for Fiscal Year ("FY") 2018 by 2 percentage points.¹

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board" or "PRRB") finds that the 2 percent reduction of the APU for FY 2018 for Minnesota Hospice, LLC ("Minnesota Hospice" or "Provider") was proper.

INTRODUCTION:

Minnesota Hospice is a Medicare-certified hospice provider located in Minnesota. In a letter dated July 18, 2017, CMS reduced Minnesota Hospice's FY 2018 APU by 2 percent because it failed to timely submit quality data to CMS as required.² On August 7, 2017, Minnesota Hospice requested that CMS reconsider its decision.³ By letters dated September 14, 2017 and September 27, 2017, CMS notified Minnesota Hospice of the determination to uphold the reduction in the APU by 2 percent.⁴ On March 6, 2018, Minnesota Hospice timely appealed the reconsideration decisions to the Board and met the jurisdictional requirements for a hearing.⁵

The Board held a telephonic hearing on October 17, 2018. Patricia Skogen of Pathway Health Services represented Minnesota Hospice. Scott Berends, Esq. of Federal Specialized Services represented National Government Services, Inc., the Medicare administrative contractor ("Medicare Contractor") assigned to the Minnesota Hospice.

STATEMENT OF FACTS:

In Section 122 of the Tax Equity and Fiscal Responsibility Act of 1982, Congress amended 42 U.S.C. § 1395f(i) in order to provide a Medicare Hospice Benefit for Medicare beneficiaries. The Medicare hospice benefit provides a per diem payment in one of four prospectively-determined rate categories of hospice care.⁶ Subsequently, Congress further amended the Medicare hospice benefit to include an annual increase in the daily payment rate for hospice services based upon the inpatient market basket percentage increase, also known as the annual payment update, or APU.⁷

¹ The Parties stipulated to the issue statement at the hearing. *See* Transcript ("Tr.") at 5:10-12.

² *See* Exhibit P-2.

³ *See* Provider's Responsive Position Paper at 2.

⁴ Exhibits P-2, P-3.

⁵ Exhibit P-1.

⁶ 82 Fed. Reg. 36638, 36641 (Aug. 4, 2017).

⁷ Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6005(a), 103 Stat. 2106, 2160 (1989); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4441(a), 111 Stat. 251, 422 (1997).

Under the Affordable Care Act (“ACA”), Congress added 42 U.S.C. § 1395f(i)(5) to tie a hospice provider’s eligibility for its full APU increase to submission of certain quality data based upon measures specified by the Secretary.⁸ These provisions further mandated that a hospice’s APU be reduced by 2 percent if that hospice failed to properly report the required quality data measures for a particular fiscal year.⁹ In particular, 42 U.S.C. § 1395f(i)(5)(C) states that hospices must submit their quality data measures in a form and manner, and at a time, specified by the Secretary.

In order to meet the quality reporting requirements, CMS implemented two data collection obligations. First, CMS requires hospices to use CMS’ standardized data collection instrument called the Hospice Item Set (“HIS”) and to electronically submit certain quality data measures for each patient admitted to the hospice on or after July 1, 2014.¹⁰ Second, as of January 1, 2015, CMS also requires the collection of data using the Consumer Assessment of Healthcare Providers and Systems (“CAHPS”) Hospice Survey.¹¹ The CAHPS survey seeks information from the informal caregivers of patients who died while enrolled in hospices.¹² The data from the CAHPS surveys must be submitted on behalf of the hospice by a CMS-approved third party vendor, though it remains the hospice’s responsibility to ensure their vendors are submitting the data in a timely manner.¹³

CMS finalized the hospice reporting requirements for the FY 2018 payment determination in the final rule issued on August 4, 2017.¹⁴ To avoid the APU reduction for FY 2018, ongoing monthly participation with the CAHPS survey was required for the reporting period of calendar year (“CY”) 2016, and the CAHPS quality data was to be submitted quarterly by deadlines set forth in the August 6, 2015 Final Rule.¹⁵ Hospices that had fewer than 50 “total, annual, unique, survey-eligible, deceased patient[s]” in the period from January 1, 2015 through December 31, 2015, however, were exempt from the CAHPS data collection and reporting requirements for the FY 2018 payment determination.¹⁶ To qualify for this exemption for the FY 2018 payment determination, the hospice was required to submit an exemption form no later than August 10, 2016.¹⁷

⁸ Affordable Care Act, Pub. L. No. 111-148, § 3004(c), 124 Stat. 119, 368 (2010).

⁹ 42 U.S.C. § 1395f(i)(5)(A).

¹⁰ CMS initially implemented the HIS through instructions and in preamble statements, then subsequently codified the HIS submission requirements at 42 C.F.R. § 418.312 in CMS’ August 22, 2014 final rule. *See* 79 Fed. Reg. 50451, 50486-88 (Aug. 22, 2014).

¹¹ All hospices were required to participate in the CAHPS survey for one month in the first quarter of 2015, with the requirement of ongoing monthly participation beginning April, 2015. 78 Fed. Reg. 48233, 48263 (Aug. 7, 2013).

¹² 79 Fed. Reg. at 50491.

¹³ 80 Fed. Reg. 47141, 47196 (Aug. 6, 2015).

¹⁴ 82 Fed. Reg. 36638 (Aug. 4, 2017).

¹⁵ 80 Fed. Reg. at 47196.

¹⁶ 79 Fed. Reg. at 50493. *See also* 42 C.F.R. § 418.312(e).

¹⁷ In the final rule issued on August 22, 2014, CMS set August 10, 2016 as the filing deadline for submitting an exemption request for FY 2018. 79 Fed. Reg. at 50493. In the final rule issued on August 6, 2015, CMS reaffirmed this filing deadline. 80 Fed. Reg. at 47196. Both of these final rules reference the CAHPS Hospice Survey web site for access to the Exemption Form and for additional information on the exemption. *Id.* While both final rules list

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Minnesota Hospice planned to purchase the assets related to the business operations of Hospice Advantage, LLC (“Hospice Advantage”), as early as October, 2016, but the actual sale was delayed until November 23, 2016.¹⁸ This change in ownership included the automatic assignment of Hospice Advantage’s Medicare provider agreement, along with the associated provider number.¹⁹ Hospice Advantage had served 34 patients between January and June of 2016, after which they discharged any remaining patients and ceased admitting new patients.²⁰ Healthcare First (Hospice Advantage’s CMS-approved vendor for CAHPS survey data submission) submitted CAHPS data up to May 2016.²¹ Neither Hospice Advantage nor Minnesota Hospice admitted any new patients for the remainder of 2016.²²

On February 27, 2017, Minnesota Hospice submitted a CAHPS Hospice Survey Participation Exemption for Size Form (“Exemption Form”) to seek an exemption from CAHPS data reporting for the FY 2018 payment determination period.²³ The Exemption Form contained data indicating that there were zero patients served by Minnesota Hospice in November and December 2016. Minnesota Hospice later corrected its “zero patients” submission to include Hospice Advantage’s patients, and provided the accurate figure of 34 patients served between January 1, 2016 and December 31, 2016.²⁴

Minnesota Hospice originally argued that it was exempt from the CAHPS survey data submission obligation and, therefore, was entitled to a full APU increase for FY 2018 because it had fewer than 50 “total, annual, unique, survey-eligible, deceased patient[s]” for the applicable time period.²⁵ However, eligibility for this exemption is predicated by law on the timely submission of an Exemption Form.²⁶ Minnesota Hospice in its Supplemental Provision Paper (and again at the hearing) acknowledged two errors with the Exemption Form: (1) it was completed and submitted after the deadline; and (2) it contained patient census data from

the due date for submitting the exemption request for FY 2018 as August 10, 2016, the web site lists it as December 31, 2016. *CAHPS Hospice Survey: Participation Exemption for Size Process*, available at <https://www.hospicecahpsurvey.org/en/participation-exemption-for-size/> (last accessed Dec. 20, 2018)). *See also* Exhibit I-5. The discrepancy is immaterial in this case, since the Provider acknowledged that the Exemption Form was not submitted until February 27, 2017, well after both dates. Tr. at 8:20-25, Tr. at 20:19 to 21:12.

¹⁸ Exhibit P-1.

¹⁹ 42 C.F.R. § 489.18(c). *See also* Exhibit P-6. The provider number transferred from Hospice Advantage to Minnesota Hospice is 24-1582.

²⁰ Provider’s Supplemental Position Paper at 3; Exhibit P-1.

²¹ *See* Provider’s Supplemental Position Paper at 3. The statement in the Provider’s Supplemental Position Paper conflicts with testimony provided at the hearing and exhibit P-1. The Provider testified at the hearing that CAHPS was submitted through September 2016. *See* Tr. at 27. However, the chart shows surveys completed through June 2016. Exhibit P-1 at 2.

²² *See* Provider’s Supplemental Position Paper at 3; Tr. at 18-19.

²³ *See* Exhibit P-4.

²⁴ Exhibit P-1.

²⁵ *See* Exhibit P-1.

²⁶ 79 Fed. Reg. at 50493. *See also* 42 C.F.R. 418.312(e).

CY 2016, rather than from CY 2015 as required.²⁷ Additionally, at the hearing, they acknowledged that they have no reliable record to show that Hospice Advantage actually had fewer than 50 patients in CY 2015.²⁸ Based on these facts, the Board finds that Minnesota Hospice was not eligible for an exemption and was required to submit timely CAHPS survey data for the CY 2016 reporting period.

Alternatively, Minnesota Hospice argues that it is entitled to a full APU increase for FY 2018 because CAHPS survey data was submitted by Healthcare First through May 2016, and that there were zero patients served by either Hospice Advantage or Minnesota Hospice for the remainder of 2016.²⁹ However, to avoid the APU reduction for FY 2018, ongoing monthly participation with the CAHPS survey is required for *all* months during the CY 2016 reporting period, and the CAHPS quality data gathered from this participation was to be submitted quarterly by deadlines set forth in the August 6, 2015 Final Rule.³⁰ Minnesota Hospice acknowledged at the hearing that, even though no additional patients were served after May, 2016, no data was submitted for the fourth quarter of CY 2016 by a CMS-approved third party vendor to reflect this.³¹ CMS guidance to providers made clear that hospices with zero-survey-eligible decedents/caregivers (*i.e.*, zero cases) in a month must still submit a CAHPS Hospice Survey Vendor Record and Hospice Record for that month to their CMS-approved third party vendor because the zero cases is, in and of itself, quality data.³²

The Board acknowledges the efforts made by Minnesota Hospice to correct the deficiencies in their data submission obligations, and sympathizes with the inherent difficulties small businesses may face when ownership changes hands. Nevertheless, it is undisputed that Minnesota Hospice did not submit complete CAHPS data for all four quarters of 2016 to qualify for the full APU increase for FY 2018. The statute at 42 U.S.C. § 1395f(i)(5)(C) requires hospices to submit their quality data measures in a form and manner, and at a time, specified by the Secretary. Specifically, ongoing monthly participation with the CAHPS survey was required from January 1, 2016 through December 31, 2016, and the CAHPS quality data was to be submitted for all four quarters by deadlines set forth in the August 6, 2015 Final Rule.³³

In summary, the Board finds that Minnesota Hospice failed to report the required quality data for all four quarters of the CY 2016 reporting period, failed to properly complete and timely submit

²⁷ Provider's Supplemental Position Paper at 2-3; Tr. at 20-21.

²⁸ Tr. at 25.

²⁹ See Provider's Supplemental Position Paper at 3. The statement in the Provider's Supplemental Position Paper conflicts with testimony provided at the hearing and Exhibit P-1. The Provider testified at the hearing that CAHPS was submitted through to September 2016. See Tr. at 27. However, the chart shows surveys completed through to June 2016. Exhibit P-1 at 2.

³⁰ 80 Fed. Reg. at 47196.

³¹ See Provider's Supplemental Position Paper at 3; Tr. 18-19.

³² *CAHPS Hospice Survey Quality Assurance Guidelines*, 93 (V3.0 Sept. 2016) (available at https://www.hospicecahpsurvey.org/globalassets/hospice-cahps/quality-assurance-guidelines/cahps-hospice-survey-qag-v3.0_september-2016.pdf) (last accessed Oct. 25, 2018).

³³ 80 Fed. Reg. at 47196.

a request for exemption, and, notwithstanding these procedural deficiencies, failed to establish after the fact that they even met the requirements for such an exemption.

DECISION AND ORDER:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board finds that the 2 percent reduction of the APU for FY 2018 for Minnesota Hospice was proper.

BOARD MEMBERS PARTICIPATING:

Clayton J. Nix, Esq.
Charlotte F. Benson, C.P.A.
Gregory H. Ziegler, C.P.A., CPC-A
Robert A. Evarts, Esq.
Susan A. Turner, Esq.

FOR THE BOARD:

12/28/2018

X Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: Clayton J. Nix -A