PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2023-D12

PROVIDER –
Regency Hospital of Meridian

HEARING DATE –
February 16, 2022

PROVIDER NO. –
25-2006

YEAR –
Fiscal Year 2020

vs.

MEDICARE CONTRACTOR –
Novitas Solutions, Inc. – (J-H)

CASE NO. –
20-1306

INDEX

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 ("LTCH-QRP") to reduce the Provider's payment update for Federal Fiscal Year ("FFY") 2020 by two percent was proper?[1]

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board" or "PRRB") finds that CMS properly reduced the annual payment update ("APU") for Regency Hospital of Meridian ("RHM" or "Provider") for FFY 2020 by 2 percent.

INTRODUCTION:

RHM is a Medicare-certified long-term care hospital ("LTCH") located in Meridian, Mississippi.[2] RHM's designated Medicare contractor[3] is Novitas Solutions, Inc. (the "Medicare Contractor").

By email, dated July 12, 2019, the Medicare Contractor notified RHM that it failed to meet the LTCH QRP requirements and was subject to a two percent reduction in its FFY 2020 APU.[4] Concurrently, CMS notified RHM, by letter dated July 16, 2019, that it failed to meet three specific LTCH QRP requirements and was subject to a two percent reduction in its FY 2020 APU.[5] On August 15, 2019, RHM requested that CMS reconsider its decision regarding the reduction to its FY 2020 Medicare payments.[6] On September 11, 2019, CMS upheld its decision.[7] On March 3, 2020, RHM timely appealed CMS' denial to the Board and met the jurisdictional requirements for a hearing.

The Board conducted a live video hearing on February 16, 2022. RHM was represented by Jason M. Healy, Esq. of The Law Offices of Jason M. Healy, PLLC. The Medicare Contractor was represented by Joe Bauers, Esq. of Federal Specialized Services.

STATEMENT OF FACTS AND RELEVANT LAW:

The Federal statute at 42 U.S.C. § 1395ww(m)(5)(C) requires LTCHs to report on the quality of their services "in a form and manner, and at a time, specified by the Secretary."[8] The

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[1] Hearing Transcript ("Tr.") at 6; Provider's Final Position Paper (Nov. 18, 2021) (hereinafter "Provider's FPP") at 3.
[2] Provider's FPP at 3.
[3] CMS' payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries ("FIs") and these functions are now contracted with organizations known as Medicare administrative contractors ("MACs"). The term "Medicare contractor" refers to both FIs and MACs as appropriate.
[4] Exhibit (hereinafter "Ex.") C-2.
[5] Ex. P-3.
[6] Ex. P-5.
[7] Ex. P-6.
[8] *See also* Patient Protection and Affordable Care Act, Pub. L. 111-148, § 3004(a), 124 Stat. 119, 368-369 (2010) (adding LTCH QRP statutory provisions at 42 U.S.C. § 1395ww(m)(5)).

implementing regulation for this statute is located at 42 C.F.R. § 412.560 (2017) and states, in relevant part:

> (b) *Data submission requirements and payment impact*. (1) Except as provided in paragraph (c) of this section, a long-term care hospital ***must*** submit to CMS data on measures specified under sections 1886(m)(5)(D), 1899B(c)(1), and 1899B(d)(1) of the Act, and standardized patient assessment data required under section 1899B(b)(1) of the Act. Such data ***must*** be submitted *in a form and manner, and at a time, specified by CMS*.
>
> (2) A long-term care hospital that does not submit data in accordance with sections 1886(m)(5)(C) and 1886(m)(5)(F) of the Act with respect to a given fiscal year will have its annual update to the standard Federal rate for discharges for the long-term care hospital during the fiscal year reduced by 2 percentage points.[9]

The Secretary exercised the authority delegated by Congress to define the required data and specify the form and manner by which LTCHs must submit that data through notices published by CMS as rulemakings in the Federal Register. In the FY 2018 Inpatient Prospective Payment System/Long Term Care Hospital Final Rule ("FY 2018 IPPS/LTCH Final Rule"),[10] CMS provided updates to the LTCH PPS Quality Reporting Program.[11]

There are three methods through which long-term care quality data is collected: the LTCH Continuity Assessment Record and Evaluation ("CARE") Data Set, the Centers for Disease Control and Prevention's ("CDC") National Healthcare Safety Network ("NHSN"), and Medicare Fee-For-Service Claims.[12] For the 2018 calendar reporting year, all Medicare-certified LTCH providers were required to "meet or exceed two separate data completeness thresholds: one threshold set at 80 percent for completion of quality data collected using the LTCH CARE Data Set submitted through [CMS' Internet Quality Improvement and Evaluation System (iQIES)], and a second threshold set at 100 percent for completion of quality data *collected and submitted using the CDC's NHSN*."[13] Moreover, a provider's failure to comply with these requirements may result in a two percentage point APU reduction.[14]

This case concerns the CDC NHSN quality data reporting requirements for central line-associated bloodstream infection ("CLABSI") data, catheter-associated urinary tract infection

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[9] 42 C.F.R. § 412.560 (2017) (emphasis added). *See also* 80 Fed. Reg. 49325, 49769 (Aug. 17, 2015); 82 Fed. Reg. 37990, 38513 (Aug. 14, 2017).
[10] 82 Fed. Reg. 37990 (Aug. 14, 2017).
[11] 81 Fed. Reg. 56762, 57219-27 (Aug. 22, 20116); 82 Fed. Reg. at 38425-61; 83 Fed. Reg. 41144, 41624-34 (Aug. 17, 2018).
[12] https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/LTCH-Quality-Reporting-Measures-Information#:~:text=Data%20for%20the%20LTCH%20QRP,National%20Healthcare%20Safety%20Network%20(NHSN).
[13] CMS, Long-Term Care Hospital Quality Reporting Program (LTCH QRP) Frequently Asked Questions with Answers (Mar. 2019), located on-line at https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/Downloads/LTCH-QRP-FAQs-March-2019.pdf
[14] *Id*.

("CAUTI") data, and ventilator-associated event ("VAE") data.[15] The CMS imposed deadline to submit Quarter 1 (January 1 – March 31, 2018) quality data for the CLABSI, CAUTI, and VAE measures into the CDC's NHSN was August 15, 2018.[16] On July 27, 2018, RHM was notified by the CORMAC Help Desk Team that the data for CLABSI, CAUTI and VAE was missing for the month of February 2018.[17] RHM states that its monthly reporting plan had previously disappeared,[18] but this was corrected. However, sometime after RHM corrected the monthly reporting plan, "[RHM]'s NHSN Organization Identification Number ("OrgId") and name disappeared from the "Locations" box on the February 2018 monthly reporting plan."[19] According to RHM's representative, Mr. Healy, the data was never transmitted from CDC's NHSN to CMS as a result of this disappearance and, thus, was never received by CMS on or before the established deadline of August 15, 2018 for the month of February 2018.[20]

RHM insists that all required quality data was "in the agency's hands before the reporting deadlines"[21] and "it was in full compliance with the [LTCH-QRP reporting requirements]."[22] RHM asserts that full compliance is the first standard of review which CMS considered in its reconsideration, and that CMS has been provided evidence showing the quality data for the CLABSI, CAUTI, and VAE measures were reported in NHSN.[23] RHM's position is that submission of the requisite February, 2018 data into the CDC's NHSN, prior to the applicable deadline, was sufficient to meet its obligation to submit the data to CMS and avert the two percent penalty.[24] RHM also contends that the allegedly missing location identifier is not a data measure that can lead to the 2 percent penalty.[25] RHM believes CMS' Reconsideration decision was in error as it has provided proof of timely reporting for all required quality data measures.

RHM cites to *PAM Squared at Texarkana, LLC v. Azar*, 436 F. Supp. 3d 52 (D.D.C. 2020) ("*PAM Squared"*), in which case a typo in the NHSN Location Code Field resulted in data for a long term care hospital quality measure not being sent to CMS. RHM argues that it matters not "[w]hether it was an error or a glitch in the NHSN system that resulted in the disappearance of [RHM]'s NHSN identification number and name from the monthly reporting plan," as it has still timely reported all event data to NHSN,[26] similar to the situation in the *PAM Squared* case.

RHM also cites to *Landmark Hosp. of Salt Lake City v. Azar,* 442 F. Supp 3d 327 (D.D.C 2020) ("*Landmark Hosp.*"), another case in which some monthly reporting plan boxes were allegedly not checked in NHSN, resulting in a LTCH QRP payment penalty. RHM states the *Landmark Hosp.* case requires the Board to consider the documentary evidence, NHSN reports and sworn

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[15] Provider's FPP at 1.
[16] Ex. P-5 at 34; 81 Fed. Reg. at 57226; 82 Fed. Reg. at 38454-55. *See also* https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/Downloads/LTCH-QRP-Data-Collection-and-Submission-Deadlines-for-the-FY-2020-LTCH-QRP_revised.pdf (last accessed Mar. 28, 2023).
[17] Ex. P-5 at 34-35.
[18] Provider's FPP at 8.
[19] Provider's FPP at 1; Tr at 13.
[20] Tr. at 14-15.
[21] Provider's FPP at 2.
[22] *Id.*
[23] Tr. at 9.
[24] Provider's FPP at 20-21.
[25] *Id.*
[26] *Id.* at 21-22.

declaration from Donna O'Connor in this case. RHM avers this evidence establishes that all quality data was timely reported.[27]

RHM states that the second standard of review for the LTCH QRP reconsideration process is "whether there were extenuating circumstances that affected non-compliance."[28] RHM argues that if CMS perceived non-compliance with LTCH QRP requirements, that this was due to extenuating circumstances and "the evidence clearly supported a finding of 'extenuating circumstances' that required reversal of the payment penalty."[29] RHM alleges that an NHSN system issue caused monthly reporting plan information to disappear, and that disappearing data within the NHSN is a "known system issue" that has occurred in the past to RHM and other providers. RHM takes the position that this system issue which causes monthly reporting plan information to disappear is an extenuating circumstance.[30] RHM adds that the NHSN system is inadequate due to its failure to alert providers of system error and this is another extenuating circumstance.[31]

RHM contends that "the Board should reverse the CMS Reconsideration because it is arbitrary and capricious under the [Administrative Procedure Act] APA."[32] RHM states that under the 2015 Final Rule LTCH QRP reconsideration procedures, providers are required to submit all documentation and evidence which demonstrates the following: "(1) Full compliance with all LTCHQR Program reporting requirements during the reporting period; or (2) extenuating circumstances that affected noncompliance if the LTCH was not able to comply with the requirements during the reporting period."[33] RHM takes issue with CMS' Reconsideration decision letter,[34] because the letter does not explicitly discuss the documentation and evidence submitted by RHM, nor does it "address the LTCH's justifications for non-compliance."[35] RHM concludes that CMS failed to consider the documentation as it is not discussed in the reconsideration decision letter, and that improper rules were applied during CMS' LTCH QRP reconsideration process, both of which violate the APA.[36]

The Medicare Contractor argues that, while RHM insists it entered the required data in the NHSN in a timely manner, RHM also concedes that the "Locations" box in the "Device-Associated Module" was blank for the February 2018 Monthly Reporting Plan.[37] The Medicare Contractor argues that the "the fact [RHM]'s February 2018 monthly reporting plan as of 10/22/2020 where the 'location' field was not populated is dispositive of [RHM]'s claim that the data in question was correctly submitted in its entirety prior to the 08/15/2018 deadline."[38]

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[27] *Id.* at 25.
[28] *Id.* at 31.
[29] *Id.* at 32.
[30] *Id.* at 33-34.
[31] *Id.* at 36.
[32] *Id.* at 40.
[33] 79 Fed. Reg. 49853, 50317 (Aug. 22, 2014) ("FY 2015 IPPS/LTCH PPS Final Rule").
[34] Ex. P-6.
[35] Provider's FPP at 41.
[36] *Id.* at 57.
[37] Ex. P-9 at 79; Ex. P-5 at 36. *See also* Ex. P-10 at 83.
[38] Medicare Contractor's Final Position Paper (Dec. 15, 2021) (hereinafter "Medicare Contractor's FPP") at 6.

The Medicare Contractor contends that RHM discounts the importance of populating the Locations box on the monthly reporting plan, pointing out that "without a correct and complete monthly reporting plan, the quality reporting information cannot be shared with CMS."[39] The reason for the payment reduction impacting RHM is that the data measures input by RHM were not accessible by CMS. The Medicare Contractor states that RHM's failure to submit the data "in a form and manner, and at a time, specified by the Secretary" resulted in the imposition of the payment reduction.[40]

The Medicare Contractor also disagrees with RHM's position that the Reconsideration decisions in the *PAM Squared* and *Landmark Hosp.* cases "suffer from defects that are materially the same as the final agency decisions at issue"[41] in this case. The Medicare Contractor argues that the final agency decision in question in both *PAM Squared* and *Landmark Hosp.* was whether the Board applied the correct regulation in the cases, and the DC District Court remanded the cases back to the agency for reconsideration while applying the correct regulation.[42]

RHM requests that the Board reverse CMS's denial of its reconsideration request, instruct CMS to set aside the two percent penalty to its APU for FY 2020, and otherwise render it a favorable ruling in its appeal.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW:

During calendar year ("CY") 2018, RHM contends that it entered certain quality data for the first quarter of 2018 (*i.e.*, January to March 2018) into the CDC NHSN system on or before the deadlines established by CMS. However, CMS never received the February 2018 data for the CLABSI, CAUTI and VAE reporting measures. The record shows that RHM did not check the "locations" box in the monthly reporting plans for February 2018 for the CLABSI, CAUTI and VAE quality measures to thereby notify the CDC NSHN system that data was being collected so that it could be swept for submission to CMS. Therefore, due to the fact that the February 2018 monthly reporting plan was not properly completed, the February 2018 data for the CLABSI, CAUTI and VAE quality measures was not transmitted from the CDC NSHN system to CMS by the established deadline.

This is confirmed by a July 29, 2019 CDC email, in response to a RHM inquiry as to why it received the two percent penalty, that stated, "[w]ithin NHSN, the facility with CCN 252006 had incomplete VAE, CLABSI, and CAUTI, data for 2018Q1."[43] Thus, CMS never received the February 2018 data for those three measures on or before the established deadline of August 15, 2018.[44]

Further, *prior to the August 15, 2018 deadline*, RHM received the following email on July 27, 2018 from the QRP Help Desk notifying RMH that the data for February, 2018 was incomplete:

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[39] Medicare Contractor's FPP at 7.
[40] *Id.*
[41] Provider's FPP at 43.
[42] Medicare Contractor's FPP at 8.
[43] Ex. P-4 at 21.
[44] Ex. P-5 at 34. *See also* https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/Downloads/LTCH-QRP-Data-Collection-and-Submission-Deadlines-for-the-FY-2020-LTCH-QRP_revised.pdf (last accessed Mar. 28, 2023).

> We are reaching out to remind you of the upcoming submission deadline for the Long-Term Care Hospital (LTCH) Quality Reporting Program (QRP). LTCH CARE Data Set assessment data and data submitted via the Center for Disease Control and Prevention (CDC) NHSN for January 1 – March 31 (Q1) of calendar year (CY) 2018 are due with this submission deadline. All data must be submitted no later than 11:59 p.m. Pacific Standard Time on August 15, 2018.
>
> *According to our records*, as of 12:00 a.m. July 16, 2018, REGENCY HOSPITAL OF MERIDIAN (CCN: 252006) *has **not** submitted complete data for*:
>
> - *CAUTI for the month(s) of:* ***February***
> - *CLABSI for the month(s) of:* ***February***
> - *VAE for the month(s) of:* ***February***
>
> Please note: *the information within this email relates to **Q1 2018** data for FY 2020 APU*. If you have not yet submitted the required data, please submit and c*heck the appropriate CASPER and/or NHSN analysis reports for errors prior to August 15, 2018, **in order to ensure that all required data has been submitted***. Detailed guidance on how to run and interpret NHSN analysis reports can be found on the CDC NHSN website, available at http://www.cdc.gov/nhsn/cms/index.html. For detailed guidance on how to run and interpret LTCH CARE reports, refer to Section 4 of the LTCH Submission User's Guide, available online on the QTSO LTCH training webpage, available at https://www.qtso.com/ltchtrain.html. Select "Section 4 Reports" from the first drop-down box and then select the "Select" option to access the instructions.
>
> Providers are also encouraged to verify all facility information prior to submission, including their CCN and facility name.
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> There are several tools on the LTCH QRP website to assist with your submission, available at https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCHQuality-Reporting/index.html.
>
> CORMAC is contracted by CMS to provide outreach and share important reminders with providers for the IRF, LTCH, SNF, and Hospice Quality Reporting Programs.[45]

Thus, RHM was notified over two weeks ***prior to*** the deadline regarding the deficiency in their reporting of the CLABSI, CAUTI and VAE quality measures for February 2018.

[45] Ex. P-5 at 34 (emphasis added).

RHM's witness testified during the hearing that, after receiving this notification, she asserted that she noted the missing data and corrected the error. The witness was further questioned by the Medicare Contractor's counsel, Mr. Bauers, who asked, "Did you happen to print off a copy of the February plan, after you put it back in?"[46] The witness replied, "No, I did not. Usually it is the local Directors of Quality that print off that information."[47] Similarly, the witness was questioned by Mr. Evarts of the Board, who asked "[w]hen you re-did the reporting plan for February 2018, at the end of July...[d]id you print out, or take a screenshot of that document being completed, with the location and the check marks done for CLEPSI, VAE, and CAUTI?"[48] The witness again responded that "[i]t's usually the Director of Quality at the location that does that."[49] Further discussion indicated that the Director of Quality "couldn't find that report printed out."[50] There is insufficient evidence to establish that the February 2018 reporting plan for the missing data was, in fact, corrected at the end of July 2018, or that RHM verified that it was corrected, in fact, prior to the deadline of August 15, 2018.[51] Thus, it is not possible for the Board to verify the correction of the February 2018 reporting plan or the timeliness of the data submission. Moreover, the letter dated July 27, 2018 from CORMAC help desk, supported by the witness' testimony, is verification that the data at issue was, in fact, missing from RHM's February 2018 reporting plan ***prior to*** the August 15, 2018 deadline.

The Secretary specified the "*form and manner, and . . . time*" by which data was required to be submitted for the APU determination under appeal.[52] The data was required to be properly entered into the CDC NHSN by the deadline (*i.e.*, in the specified form, manner and time) so that it could then be submitted from the CDC NHSN to CMS. In this case, the proper completion of the February 2018 monthly reporting plan was critical because that is what triggers the NHSN system to sweep the data and submit it to CMS. Since the Provider failed to properly complete that monthly reporting plan, that data for that month did not get swept by the NHSN system and submitted to CMS.[53]

The Board finds that the applicable legal standard is located at 42 C.F.R. § 412.560(b)(1)-(2) (2017) which states:

> (1) Except as provided in paragraph (c) of this section, a long-term care hospital ***must*** submit to CMS data on measures specified under sections 1886(m)(5)(D), 1899B(c)(1), and 1899B(d)(1) of the Act, and standardized patient assessment data required under section 1899B(b)(1) of the Act. *Such data **must** be submitted in a form and manner, and at a time, **specified by CMS**.*

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[46] Tr. at 36
[47] *Id.*
[48] *Id.* at 56-57.
[49] *Id.* at 57. This suggests that the Provider had a practice to print out monthly reporting plans but here failed to do so.
[50] *Id.*
[51] Testimony alone is insufficient to establish that the monthly reporting plan was, in fact, properly completed, particularly since: (1) there are no reports of any systemic NHSN issues; and (2) the Provider failed to follow its normal procedure of printing out reporting plans (*see supra* note 49 and accompanying text).
[52] 42 C.F.R. § 412.560(b)(1) (emphasis added).
[53] In making this finding, the Board is not finding that, had it been swept that the February 2018 data, the data would have been sufficient to meet the reporting requirements. The Board did not reach/review that as part of this decision since it is moot (*i.e.*, not necessary to the Board's decision).

> (2) *A long-term care hospital that does not submit data* in accordance with sections 1886(m)(5)(C) and 1886(m)(5)(F) of the Act with respect to a given fiscal year *will have its annual update* to the standard Federal rate for discharges for the long-term care hospital during the fiscal year *reduced by 2 percentage points*.[54]

Accordingly, a provider *must* submit the required quality data *in the **form**, **manner**, and at the **time**,* determined by CMS. The failure of a provider to do so will result in the two percent rate reduction.[55] This legal standard is not changed or impacted by the procedural requirement of the submission deadlines. Here, the Secretary adopted, through notice and comment, the reporting of the CLABSI and CAUTI measures beginning October 1, 2012[56] and the VAE measure beginning October 1, 2015[57] using the CDC NHSN platform.[58] In adopting the NHSN platform for the reporting of these measures, the Secretary noted:

> The NHSN is a secure, Internet-based surveillance system that is maintained and managed by CDC. Many LTCHs already submit data to the NHSN either voluntarily or as part of mandatory State reporting requirements for HAIs [*i.e.,* healthcare-associated infections] . . . .[59]

The LTCH Quality Reporting Program Manual (Version 4.0)[60] provided the following general instruction in § 5.1 regarding NHSN:

> CDC submits the data to CMS on behalf of the facility, ***according to the facility's monthly reporting plan***. Data submitted to CDC more than 135 days after the end of the reporting quarter, such as data submitted to the CDC NHSN after August 15, for Q1, of that same CY will not be provided to CMS and will not be considered for the purpose of compliance determination. LTCHs are able to review data submitted to CMS on their behalf through the "Analysis – Reports" function within NHSN. More information regarding the location and interpretation of these reports can be

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[54] (Emphasis added.)
[55] 42 C.F.R. § 412.560(b) (2017). *Landmark* is not applicable since it simply dealt with the Board not applying the correct standard or regulation.
[56] 77 Fed. Reg. 53258, 53668 (Aug. 31, 2012) ("LTCH providers will begin to use the NHSN system to report CAUTI and CLABSI data on October 1, 2012. By the time that any new measures are finalized and reporting of the same begins, LTCH providers should be very familiar and comfortable with the NHSN reporting system.").
[57] 79 Fed. Reg. 49854, 50305 (Aug. 22, 2014) ("In addition to soliciting comments on our proposal to adopt the NHSN VAE Outcome measure for the LTCHQR Program, we also invited comments on our proposal to use the CDC's NHSN system for data collection and submission for this measure. We received no comments on the use of the NHSN system for data collection and submission of the VAE Outcome measure. Therefore we are finalizing the National Healthcare Safety Network (NHSN) Ventilator-Associated Event (VAE) Outcome Measure, as proposed, for FY 2018 payment update determination and subsequent years.")
[58] *See also* 82 Fed. at 38431-32, 48455.
[59] 77 Fed. Reg. at 53668. *See also* 82 Fed. Reg. at 38457.
[60] Copy at Ex. C-7. Version 4.0 of the LTCH Quality Reporting Program Manual, effective July 1, 2018 (Revised May, 2018). A complete copy of Version 4.0 is available at https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/-LTCH-Quality-Reporting-Archives (last visited on Sept. 2, 2022).

> found on the CDC Web site: http://www.cdc.gov/nhsn/ps-analysis-resources/reference-guides.html.[61]

In addition, § 5.1 provides the following instruction, in pertinent part, regarding the NHSN CAUTI Outcome Measure and the NHSN CLABSI Outcome Measure:

> *Monthly reporting plans **must** be created* or updated to include CAUTI and CLABSI surveillance ***in all locations*** *that require reporting* (i.e., surveillance must be "in-plan"). All required data fields in the numerator and the denominator, including the "no events" field for any month during which no CAUTIs or CLABSIs were identified, must be submitted to NHSN.[62]

This section similarly provides the following instruction, in pertinent part, for the NHSN VAE Outcome Measure:

> Monthly denominator data must be reported on VAEs for all adult locations, regardless of whether a ventilator-associated infection or other event occurred in the LTCH. *Monthly reporting plans **must** be created* or updated to include VAE surveillance ***in all locations*** *that require reporting* (i.e., surveillance must be "in-plan"). All required data fields in the numerator and the denominator, including the "no events" field for any month during which no VAEs were identified, must be submitted to NHSN. For additional guidance on reporting this measure, please refer to: http://www.cdc.gov/nhsn/ltach/vae/index.html[63]

Finally, § 5.3 is entitled "Basic Steps to NHSN Enrollment and Data Submission" and provides the following instruction, in pertinent part, on monthly reporting plans:

> 6. All patient care units will need to be added as location(s) and mapped in NHSN in advance by a facility user.
>
> 7. Use the monthly checklist for CMS Long Term Care Hospital Quality Reporting Program available here: www.cdc.gov/nhsn/pdfs/cms/ltch-monthly-checklist-cms-iqr.pdf.
>
> 8. ***The locations must*** also ***be added to the monthly reporting plan*** *under the device-associated module section for **each** month you plan*

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[61] Ex. C-7 at 13 (emphasis added). *See also* CDC webpage for "CMS Quality Reporting Programs Frequently Asked Questions" *available at* https://www.cdc.gov/nhsn/faqs/cms/faq_cms_hai.html#q8 (webpage last reviewed Mar. 30, 2015 when accessed Nov. 26, 2021) (webpage now listed as last reviewed Mar. 15, 2023 when accessed Mar. 28, 2023) (consistently stated: "Do I need to confer rights or join a CMS group in order to share my data with CMS for reporting purposes? • No. As long as the facility has entered their CMS Certification Number (CCN) in NHSN correctly, ***completed the monthly reporting plans***, and entered data appropriately, data will be automatically sent to CMS for required reporting programs." (emphasis added)).

[62] Ex. C-7 at 13-14 (emphasis added).

[63] *Id.* at 15 (emphasis added).

> *on submitting* the NHSN CAUTI Outcome Measure (NQF #0138), the NHSN CLABSI Outcome Measure (NQF #0139), and the NHSN VAE Outcome Measure data to CMS. After adding the location, please remember to check the "CAUTI," "CLABSI," and "VAE" boxes to ensure that the data will be appropriately sent to CMS.
>
> ****
>
> 12. If no CAUTI, CLABSI, or VAE events were identified for the month, the "Report No Events" box must be checked for the appropriate surveillance type on the Denominator for "Intensive Care Unit/Other Locations" screen within the NHSN application.[64]

The Secretary has specified that CMS may grant an exception or extension to the LTCH quality reporting requirements. Specifically, the regulation at 42 C.F.R. § 412.560(c) (2017) provides that, in the event of extraordinary circumstances beyond the control of the provider and "*upon request of a long-term care hospital*, CMS may grant an exception or extension with respect to the measures data and standardized patient assessment data reporting requirements, for one or more quarters, in the event of certain *extraordinary circumstances beyond the control of the long-term care hospital*," subject to certain conditions.[65] While this regulation is directed to CMS (rather than the Board), it requires the LTCH to submit a request to CMS in order for an exception or extension to be considered. The Board notes that the key phrase in the regulation, determining whether an LTCH would qualify for an exception, is that the "extraordinary circumstance" must be "beyond the control of the long-term care hospital."[66] In this case the Board finds that RHM has failed to demonstrate that the failure to mark the checkboxes in the relevant monthly reporting plans for February 2018 for the CAUTI, CLABSI, and VAE device associated modules was an "extraordinary circumstance beyond [its] control." Additionally, there is no evidence in the record of a systemic problem with the NHSN data collection system which directly affected the ability of the long-term care hospital to submit quality data.

The Board also recognizes that § 412.560(c)(4) (2017) provides for certain systemic or regional situations where a request need not be submitted:

> CMS may grant an exception or extension to a long-term care hospital *that has not been requested* by the long-term care hospital if CMS determines that -
>
> (i) An *extraordinary circumstance* affects ***an entire region*** or locale; or
>
> (ii) *A **systemic** problem* with one of CMS' data collection systems directly affected the ability of the long-term care hospital to submit quality data and standardized patient assessment data.[67]

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[64] *Id.* at 17-18 (emphasis added).
[65] (Emphasis added.)
[66] 42 C.F.R. § 412.560(c).
[67] 42 C.F.R. § 412.560(c)(4) (2017) (emphasis added.) *See also* 81 Fed. Reg. at 56774 (stating that "we are changing the timing for submission of exception and extension requests from 30 days to 90 days from the date of the

This regulation is not applicable to this appeal because, as noted above, there is no evidence in the record of *extraordinary* circumstances *beyond RHM's control* that caused RHM to not submit the data, nor any evidence that *RHM submitted a **request** to CMS* for an extraordinary circumstance exception. Moreover, there is no evidence of either a systemic or regional issue associated with the submission of data via NHSN.

Because an evidentiary hearing *de novo* was conducted, and the Board has reached its own conclusions, Ruston's remaining arguments related to the reconsideration stage and whether CMS failed to evaluate all of the evidence under both reconsideration standards of review are now moot.[68] As such, the Board need not address these arguments.

Based on the above findings, the Board concludes that there was no evidence submitted of any systemic problem with the NHSN system that caused RHM's failure to timely submit the required data. Rather, the record before the Board demonstrates that RHM was at fault for its failure to timely submit said data. The Board's ruling in this case is consistent with other cases where the provider failed to enter a monthly reporting plan.[69]

DECISION AND ORDER:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board finds that CMS properly reduced RHM's APU for FY 2020 by 2 percent.

BOARD MEMBERS PARTICIPATING:

Clayton J. Nix, Esq.
Robert A. Evarts, Esq.
Kevin D. Smith, CPA
Ratina Kelly, CPA

FOR THE BOARD:

3/31/2023

X Clayton J. Nix

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Chair
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qualifying event which is preventing an LTCH from submitting their quality data for the LTCH QRP."); 82 Fed. Reg. at 38457 (expanding the policies in 412.560(c) to submission f standardized patient assessment data).

[68] *See* 42 C.F.R. § 405.1869(a) (stating that the Board has "the legal authority to fully resolve the matter in a hearing decision (as described in §§ 405.1842(f), 405.1867, and 405.1871 of this subpart)").

[69] *See, e.g., Landmark Hosp. of Salt Lake City, LLC v. Cahaba Gov't Benefit Adm'rs, LLC*, PRRB Dec. No. 2019-D16 (Feb. 26, 2019). *See also id*. at n. 36 (listing additional examples of Board decisions where the provider failed to enter a monthly reporting plan).