

CENTERS FOR MEDICARE AND MEDICAID SERVICES

In the case of:

D. M Cogwell Memorial Hospital

Provider

vs.

Novitas Solutions, Inc.

Medicare Contractor

Claim for:

**Cost Reporting Period Ending:
December 31, 2012**

Review of:

**PRRB Dec. No. 2022-D01
Dated: October 26, 2021**

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision of the Provider Reimbursement Review Board (Board).¹ The review is during the 60-day period in §1878(f) (1) of the Social Security Act (Act), as amended (42 USC 1395oo (f)). The parties were notified of the Administrator's intention to review the Board's decision. The Center for Medicare (CM) and the Medicare Administrative Contractor (MAC) both submitted comments requesting that the Administrator uphold the Board's decision, but disagreed with the Board's methodology. Accordingly, this case is now before the Administrator for final agency review.

ISSUE AND BOARD DECISION

The issue is whether the MAC, properly calculated the volume decrease adjustment (VDA) owed the Provider for the significant decrease in inpatient discharges that occurred in its cost reporting period ending December 31, 2012 (FY 2012).

The Board first found that the parties disagreed over the use of the Medicare cost report to remove the variable costs to recompute the Medicare Inpatient costs to be used in the Provider's VDA calculation.² The Board also noted that the Provider did not provide an alternative calculation. Since the methodology used by the Medicare Contactor resembles the calculations that have been found acceptable in the *Unity*, *Lakes Regional* and *Fairbanks* cases, the Board found that the Medicare Contractor's calculation was acceptable.

The Provider also disagreed with the data used to determine the core staffing. With regard to core staffing, the Provider stated that the CMS manual states that peer hospital information is obtained from

¹ The Administrator notes that the term PRRB and Board are used interchangeably to reference the same party, the Provider Reimbursement Review Board.

² See, Provider Reimbursement Review Board (PRRB) Dec. No. 2022-01 at 5.

Hospital Administrative Services Monitrend reports, which is currently unavailable. The most current substitute data published on the CMS website is from American Hospital Association annual survey for FY 2009 and FY 2009 Occupational Mix data. Thus, the Provider argued that all available core staffing data published by CMS is based on outdated information that is not contemporaneous with the VDA period under review. The Provider also contended that the MAC's methodology included nursing staff from areas of the hospital outside of the cost report centers identified as "Adults and Pediatrics" and "Intensive Care Unit" which is not consistent with PRM 15-1 § 2810.1(C)(6).

The MAC responded that, since the occupational mix data used in the excess staffing analysis was from 2009, they were concerned and forwarded the Provider's inquiry to CMS. CMS instructed the MAC that, since no similar updated data was available, the MAC was to use the 2009 information. The MAC argued that the use of the older data would most likely benefit the Provider as it is apparent that staffing levels are declining and people are doing more with less by employing technology and developing other efficiencies. The MAC responded to the Provider's objection to using nursing staff beyond the "Adults and Pediatrics" and "Intensive Care Unit" cost centers of the cost report by arguing that the Provider's objections are unsupported and references PRM-1 § 2810.1.C.6 which states "[t]he intermediary's analysis of core staff is limited to those cost centers (General Service, Inpatient, Ancillary, etc.) whose costs are components of Medicare inpatient operating cost."

The Board found that the PRM 15-1 §2810.1 specifically required that a provider's staffing levels are to be compared to occupational mix survey or AHA Annual Survey data. The FY 2009 Occupational Mix data was the best available data to use when computing excess staffing. The Board agreed with the MAC that PRM -1 § 2810.1(C)(6) states that the excess staffing analysis is limited to "general service, inpatient, ancillary, etc." which would include inpatient cost centers outside of the "Adults and Pediatrics" and "Intensive Care Unit" cost centers.

Finally, the Board held that the MAC's calculation of the Provider's VDA payment for FY 2012 was incorrect because it was not based on CMS' stated policy as delineated in the PRM 15-1 § 2810.1 and the Secretary's endorsement of this policy in the preambles to the relevant Final Rules.³ The Board determined that the MAC's calculation of the Provider's VDA payment was based on "an otherwise *new* methodology that the Administrator adopted through adjudication."⁴ However, after revising the Provider's VDA calculation, using a proportional method, the Board concluded that the Provider was still not entitled to a VDA payment for FY 2012 because the Provider's IPPS payments (that proportion the Board attributed relating to fixed costs) exceeded the Provider's fixed inpatient operating cost for FY 2012.⁵

SUMMARY OF COMMENTS

The MAC requested that the Administrator reverse the Board's decision with respect to the methodology for calculating Provider's VDA as it is not supported by statute or regulation. The Administrator has repeatedly advised the Board regarding the proper methodology for performing a VDA calculation. In this case, the MAC utilized the Administrator's methodology, which has been upheld by the Eighth Circuit; the only circuit court to address this issue. That Court's decision clearly demonstrates that the Administrator's methodology has been weighed, measured and been

³ *Id.* at 10.

⁴ *Id.*

⁵ *Id.* at 14-15.

found statutorily appropriate. The Board's methodology requires modifications to existing law to survive a statutory challenge, and those modifications are prospective only and not relevant to the fiscal year at hand. Finally, regardless of which methodology is applied, the Provider is not entitled to a VDA payment since the Provider's IPPS payments exceeded the Provider's fixed inpatient operating cost for FY 2012.

CM submitted comments requesting that the Administrator uphold the Board's decision in this case but for different reasons than those articulated by the Board. CM agreed with the Board's decision that the Provider is not entitled to a VDA payment. However, CM disagreed with the Board determination that the MAC improperly calculated the VDA payment for the Provider. CM contends that the methodology used by the MAC to calculate the VDA payment to the Provider is consistent with the statute, regulations and CMS policy and recent court decisions. In sum, CM recommends that the Administrator reverse the Board's decision with respect to the methodology used for calculating the Provider's VDA payments and affirm the Board's determination that the Provider should not receive a VDA payment for FY 2012 because the Provider's IPPS payments exceeded the Provider's fixed inpatient operating cost for 2012.

CM explained that it disagreed with the Board that the MAC improperly calculated the VDA payment for the Provider for the same reasons set forth in multiple court decisions involving this same issue. For a comprehensive discussion of CMS' position on the issues presented in this case, CM referred the Administrator to: the decisions in *Stephens County Hosp. v. Becerra*, No. 19-cv-3020 (DLF), 2021 WL 4502068 (Sept. 30, 2021) ("*Stephens*"), *Unity HealthCare v. Azar*, 918 F.3d 571 (8th Cir. 2019) ("*Unity*"), *St. Anthony Regional Hospital v. Azar*, 294 F.Supp.3d 768 (N.D. Iowa 2018), and in *Trinity Regional Medical Center v. Azar*, No. 17-3029, 2018 WL 4295290 (N.D. Iowa Sept. 10, 2018) (district court decision), 2018 WL 1558451 (N.D. Iowa Mar. 19, 2018) (magistrate decision). CM also referred the Administrator to the government's (Eighth Circuit) brief in *Unity*, two briefs in *Stephens*, and opening brief in *Lake Region Healthcare Corporation v. Becerra*, No. 20-3452 (KBJ) (D.D.C.) (all of which were attached).

In further support of CM's position, CM also referred to the August 2017 final rule, in particular the language at 82 Fed. Reg. 37,990, 38,179-83 (Aug. 14, 2017) and a series of adjudications, in which the PRRB and the CMS Administrator have upheld CM's current approach to calculating the VDA.

Additionally, CM noted that the Provider disagreed with the MAC's methodology of computing the variable costs. The Board determined that the MAC's methodology resembled the calculations that were found acceptable in *Unity*, *Lakes Regional and Fairbanks* court cases and the Board, therefore, found the MAC's calculation acceptable. CM also noted that the Provider contended that the Occupational Mix data used by the MAC to calculate the excess staffing was outdated and not contemporaneous with the VDA period under review. The Provider also asserted that the MAC should not have included nursing staff from areas of the hospital outside of Adults and Pediatrics and Intensive Care Unit in its comparison of current year nursing staff to prior year nursing staff for purposes of the excess staffing calculation. CM stated that the Board correctly concluded that (1) the MAC's inclusion of the Occupational Mix in the Excess Staffing calculation was in accordance with PRM 15-1 § 2810.1(C)(6)(a) and (2) that the MAC correctly calculated the nursing staff comparison by including cost centers from general service, inpatient and ancillary, "where costs are components of Medicare inpatient operating cost," as per PRM 15-1 § 2810.1.C.6.

Therefore, while CM agreed with the outcome of the Board's decision that the Provider is not entitled to a VDA payment, CM disagreed with the Board that the MAC improperly calculated the VDA payment for the Provider and recommended that the Administrator uphold the decision for different reasons than those articulated by the Board. On the separate issues of variable costs and excess staffing calculations, CM recommended that the Administrator uphold the Board's reasoning and decision.

BACKGROUND AND DISCUSSION

The entire record, which was furnished by the Board, has been examined, including all correspondence, position papers, and exhibits.

The Provider is a 45-bed acute care hospital located in Snyder, Texas⁶. The Provider was designated a Sole Community Hospital ("SCH") during FY 2012.⁷ For the fiscal period in dispute, the Provider experienced a decrease in discharges greater than 5 percent, due to circumstances beyond its control, and as a result, was eligible to have the VDA calculation performed.⁸ On October 8, 2014, the Provider submitted a request to the MAC for a VDA.⁹ The MAC performed a review and determined that the Provider's IPPS reimbursement exceeded its fixed costs, and therefore the Provider was not entitled to a VDA payment for that year.¹⁰

Section 1886(d)(5)(D)(iii) defines a SCH as any hospital:

- (I) that the Secretary determines is located more than 35 road miles from another hospital,
- (II) that, by reason of factors such as the time required for an individual to travel to the nearest alternative source of appropriate inpatient care (in accordance with standards promulgated by the Secretary), location, weather conditions, travel conditions, or absence of other like hospitals (as determined by the Secretary), is the sole source of inpatient hospital services reasonably available to individuals in a geographic area who are entitled to benefits under part A of this subchapter, or (III) that is located in a rural area and designated by the Secretary as an essential access community hospital under section 1820(v)(i) of this title as in effect on September 30, 1997.

Section 1886(d)(5)(D)(ii) of the Act authorizes the Secretary to adjust the payment of SCHs that incur a decrease in discharges of more than 5 percent from one cost reporting year to the next, stating:

In the case of a sole community hospital that experiences, in a cost reporting period compared to the previous cost reporting period, a decrease of more than 5 percent in its total number of inpatient cases due to circumstances beyond its

⁶ See, Provider's Final Position Paper (FPP) at 2.

⁷ *Id.*

⁸ See, MAC's Final Position Paper (FPP) at 2.

⁹ See, Provider's Final Position Paper (FPP) at 3.

¹⁰ *Id.*

control, ...as may be necessary to fully compensate the hospital for the fixed costs it incurs in the period in providing inpatient hospital services, including the reasonable cost of maintaining core staff and services.

The regulations implementing this statutory adjustment are located at 42 C.F.R. §412.92(e). In particular, subsection (e)(1) specifies the following regarding low volume adjustment:

The intermediary provides for a payment adjustment for a sole community hospital for any cost reporting period during which the hospital experiences, due to circumstances [beyond the hospital's control] a more than five percent decrease in its total discharges of inpatients as compared to its immediately preceding cost reporting period.

Once an SCH demonstrates that it has suffered a qualifying decrease in total inpatient discharges, the MAC must determine the appropriate amount, if any, due to the provider as an adjustment. The regulation at 42 C.F.R. §412.92(e)(3) specifies the following regarding the determination of low volume adjustment amount:

(3) The intermediary determines a lump sum adjustment amount not to exceed the difference between the hospital's Medicare inpatient operating costs and the hospital's total DRG revenue for inpatient operating costs based on DRG-adjusted prospective payment rates for inpatient operating costs

- (i) In determining the adjustment amount, the intermediary considers –
 - (A) The individual hospital's needs and circumstances, including the reasonable cost of maintaining necessary core staff and services in view of minimum staffing requirements imposed by State agencies;
 - (B) The hospital's fixed (and semi-fixed) costs, other than those costs paid on a reasonable cost basis under part 413 of this chapter; and
 - (C) The length of time the hospital has experienced a decrease in utilization.¹¹

In addition to the controlling regulation, CMS also provides interpretive guidelines in the Provider Reimbursement Manual, (PRM 15-1). The Manual is intended to ensure that Medicare reimbursement standards “are uniformly applied nationally without regard to where covered services are furnished.”¹² Specifically, §2810.1 provides guidance to assist MACs in the

¹¹ As reflected in the foregoing regulation and in the notice and comment rulemaking history, even if section 1871 of the Act required the VDA calculation methodology to be established through rulemaking, the agency satisfied that obligation by utilizing notice and comment rulemaking to promulgate, revise, and clarify the implementing regulation, and describing in regulation and preamble how the VDA is to be calculated. See, e.g., 49 Fed. Reg. 234, 270-271 (Jan. 3, 1984) (Final rule, responding to comments); 48 Fed. Reg. 39,752, 39,781-82 (Sept. 1, 1983) (Interim final rule with comment period); 42 C.F.R. § 405.476(d) (1984). See 52 Fed. Reg. 33,034, 33,049 (Sept. 1, 1987) (final rule); 52 Fed. Reg. 22,080, 22,090-91 (June 10, 1987) (proposed rule); 42 C.F.R. § 412.92(e)(3) (1987). And, finally, in 2017, CMS issued a notice of proposed rulemaking and then a final rule which explicitly stated (and amended the regulation's text to provide) the longstanding, then-current VDA calculation methodology (under which the VDA=Fixed Costs-DRG payments) would continue to govern earlier periods such as those at issue here. See, e.g., 82 Fed. Reg. 37,990, 38,179-83, 38,511 (Aug. 14, 2017) (final rule); 82 Fed. Reg. 19,796, 19,933-35 (Apr. 28, 2017) (proposed rule); 42 C.F.R. § 412.92(e)(3) (2018).

¹² See CMS Pub. 15-1, Foreword.

calculation of VDAs for sole community hospitals (SCHs). In this regard, § 2810.1(B) of the PRM states the following regarding the amount of a low volume adjustment:

B. Amount of Payment Adjustment. Additional payment is made to an eligible SCH for *fixed costs* it incurs in the period in providing inpatient hospital services including the reasonable cost of maintaining necessary core staff and services, *not to exceed the difference between the hospital's Medicare inpatient operating cost and the hospital's total DRG revenue.*

Fixed costs are those costs over which management has no control. Most truly fixed costs, such as rent, interest, and depreciation, are capital-related costs and are paid on a reasonable cost basis, regardless of volume. Variable costs, on the other hand, are those costs for items and services that vary directly with utilization such as food and laundry costs.

In a hospital setting, however, many costs are neither perfectly fixed nor perfectly variable, but are semi-fixed. Semi-fixed costs are those costs for items and services that are essential for the hospital to maintain operation but also vary somewhat with volume. For purposes of this adjustment, many semi-fixed costs, such as personnel-related costs, may be considered as fixed on a case-by-case basis.

In evaluating semi-fixed costs, the MAC considers the length of time the hospital has experienced a decrease in utilization. For a short period of time, most semi-fixed costs are considered fixed. As the period of decreased utilization continues, we expect that a cost-effective hospital would take action to reduce unnecessary expenses. Therefore, if a hospital did not take such action, some of the semifixed costs may not be included in determining the amount of the payment adjustment. (Emphasis added.)

In addition, in determining core staffing, § 2810.1(C)(6)(a)¹³ states that:

6. Core Staff and Services.

a. For cost reporting periods beginning on or after October 1, 2007, and prior to October 1, 2017, a comparison, by cost center, of full-time equivalent (FTE) employees and salaries in both cost reporting periods must be submitted. The requesting hospital must identify core staff and services in each center and the cost of these staff and services. The request must include justification of the selection of core staff and services including minimum staffing requirements imposed by an external source. The contractor's analysis of core staff is limited to those cost centers (general service, inpatient, ancillary, etc.) where costs are components of Medicare inpatient operating cost.

Core nursing staff is determined by comparing FTE staffing in the Adults and Pediatrics and Intensive Care Unit cost centers to FTE staffing in the prior year and FTE staffing in peer hospitals. Peer hospital information is obtained from data on

¹³ Rev. 479.

nursing hours per patient day using the results of the occupational mix survey or the AHA Annual Survey for hospitals of the same size, geographic area (Census Division), and period of time. Acceptable core nursing staff for a year in which a hospital had a volume decline is the lesser of actual staffing in the prior fiscal year or core staff for the prior fiscal year as determined from the occupational mix survey or the AHA Annual Survey data from peer hospitals. When determining core staff hours for other than a full year, the standard hours worked must be multiplied by the actual number of weeks in the cost reporting period. For example, a hospital with a standard work week of 37.5 hours requesting a VDA for a cost reporting period of January 1, 2008, through June 30, 2008, has a paid hours per year of 975 (26 weeks x 37.5 hours per week).

In the discussion included in the preamble to the August 18, 2006 final rule¹⁴, it was noted:

The process for determining the amount of the volume decrease adjustment can be found in section 2810.1 of the Provider Reimbursement Manual. Fiscal intermediaries are responsible for establishing whether an SCH or MDH is eligible for a volume decrease adjustment and, if so, the amount of the adjustment. To qualify for this adjustment, the SCH or MDH must demonstrate that: (a) A 5 percent or more decrease of total discharges has occurred; and (b) the circumstance that caused the decrease in discharges was beyond the control of the hospital. Once the fiscal intermediary has established that the SCH or MDH satisfies these two requirements, it will calculate the adjustment. The adjustment amount is determined by subtracting the second year's DRG payment from the lesser of: (a) The second year's costs minus any adjustment for excess staff; or (b) the previous year's costs multiplied by the appropriate IPSS update factor minus any adjustment for excess staff. The SCH or MDH receives the difference in a lump-sum payment.

In the 2018 Final IPSS Rule, CMS changed the method of calculating the VDA, effective for cost reporting periods beginning on or after October 1, 2017. In discussing this change, CMS again explained the method that is at issue in this case:

As we have noted in Section 2810.1 of the Provider Reimbursement Manual, Part 1 (PRM-1) and in adjudications rendered by the PRRB and the CMS Administrator, under the current methodology, the MAC determines a volume decrease adjustment amount not to exceed a cap calculated as the difference between the lesser of (1) the hospital's current year's Medicare inpatient operating costs or (2) its prior year's Medicare inpatient operating costs multiplied by the appropriate IPSS update factor, and the hospital's total MS-DRG revenue for inpatient operating costs (including outlier payments, DSH payments, and IME payments). In determining the volume decrease adjustment amount, the MAC considers the individual hospital's needs and circumstances, including the reasonable cost of maintaining necessary core staff and services in view of minimum staffing requirements imposed by State agencies; the hospital's fixed costs (including whether any semi-fixed costs are to be considered fixed) other than those costs paid on a reasonable

¹⁴ 71 Fed. Reg., 47,870, 48,056 (Aug. 18, 2006).

cost basis; and the length of time the hospital has experienced a decrease in utilization.¹⁵

CMS noted that the VDA has been the subject of a series of adjudications, rendered by the PRRB and the CMS Administrator,¹⁶ and that in those adjudications, the PRRB and the CMS Administrator have recognized that: “(1) The volume decrease adjustment is intended to compensate qualifying SCHs for their fixed costs only, and that variable costs are to be excluded from the adjustment; and (2) an SCH’s volume decrease adjustment should be reduced to reflect the compensation of fixed costs that has already been made through MS–DRG payments.”¹⁷ CMS explained that it was making the change in how the VDA is calculated because:

As the above referenced Administrator decisions illustrate and explain, under the current calculation methodology, the MACs calculate the volume decrease adjustment by subtracting the entirety of the hospital’s total MS–DRG revenue for inpatient operating costs, including outlier payments and IME and DSH payments in the cost reporting period in which the volume decrease occurred, from fixed costs in the cost reporting period in which the volume decrease occurred, minus any adjustment for excess staff. If the result of that calculation is greater than zero and less than the cap, the hospital receives that amount in a lump sum payment. If the result of that calculation is zero or less than zero, the hospital does not receive a volume decrease payment adjustment.

Under the IPPS, MS–DRG payments are not based on an individual hospital’s actual costs in a given cost reporting period. However, the main issue raised by the PRRB and individual hospitals is that, under the current calculation methodology, if the hospital’s total MS–DRG revenue for treating Medicare beneficiaries for which it incurs inpatient operating costs (consisting of fixed, semi-fixed, and variable costs) exceeds the hospital’s fixed costs, the calculation by the MACs results in no volume decrease adjustment for the hospital. In some recent decisions, the PRRB has indicated that it believes it would be more appropriate for the MACs to adjust the hospital’s total MS–DRG revenue from Medicare by looking at the ratio of a hospital’s fixed costs to its total costs (as determined by the MAC) and applying that ratio as a proxy for the share of the hospital’s MS–DRG payments that it assumes are attributable (or allocable) to fixed costs, and then comparing that estimate of the fixed portion of MS–DRG payments to the hospital’s fixed costs. In

¹⁵ 82 Fed. Reg. 37,990, 38,179 (Aug. 14, 2017).

¹⁶ *Greenwood County Hospital Eureka, Kansas, v. Blue Cross Blue Shield Association/Blue Cross Blue Shield of Kansas*, 2006 WL 3050893 (PRRB August 29, 2006); *Unity Healthcare Muscatine, Iowa v. Blue Cross Blue Shield Association/ Wisconsin Physicians Service*, 2014 WL 5450066 (CMS Administrator September 4, 2014); *Lakes Regional Healthcare Spirit Lake, Iowa v. Blue Cross Blue Shield Association/Wisconsin Physicians Service*, 2014 WL 5450078 (CMS Administrator September 4, 2014); *Fairbanks Memorial Hospital v. Wisconsin Physician Services/BlueCross BlueShield Association*, 2015 WL 5852432 (CMS Administrator, August 5, 2015); *St. Anthony Regional Hospital v. Wisconsin Physicians Service*, 2016 WL 7744992 (CMS Administrator October 3, 2016); and *Trinity Regional Medical Center v. Wisconsin Physician Services*, 2017 WL 2403399 (CMS Administrator February 9, 2017).

¹⁷ 82 Fed. Reg. at 38,180.

this way, the calculation would compare estimated Medicare revenue for fixed costs to the hospital's fixed costs when determining the volume decrease adjustment.¹⁸

However, CMS pointed out that despite the change, the previous method was still reasonable and consistent with the statute. CMS stated:

We continue to believe that our current approach in calculating volume decrease adjustments is reasonable and consistent with the statute. The relevant statutory provisions, at sections 1886(d)(5)(D)(ii) and 1886(d)(5)(G)(iii) of the Act, are silent about and thus delegate to the Secretary the responsibility of determining which costs are to be deemed "fixed" and what level of adjustment to IPPS payments may be necessary to ensure that total Medicare payments have fully compensated an SCH or MDH for its "fixed costs." These provisions suggest that the volume decrease adjustment amount should be reduced (or eliminated as the case may be) to the extent that some or all of an SCH's or MDH's fixed costs have already been compensated through other Medicare subsection (d) payments. The Secretary's current approach is also consistent with the regulations and the PRM-1. Like the statute, the relevant regulations do not address variable costs, and the regulations and the PRM-1 (along with the Secretary's preambles to issued rules (48 FR 39781 through 39782 and 55 FR 15156) and adjudications) all make it clear that the volume decrease adjustment is intended to compensate qualifying SCHs and MDHs for their fixed costs, not for their variable costs, and that variable costs are to be excluded from the volume decrease adjustment calculation. Nevertheless, we understand why hospitals might take the view that CMS should make an effort, in some way, to ascertain whether a portion of MS-DRG payments can be allocated or attributed to fixed costs in order to fulfill the statutory mandate to "fully compensate" a qualifying SCH for its fixed costs.¹⁹

CMS revised the regulations at 42 C.F.R. § 412.92(e)(3) to reflect the change in the MAC's calculation of the volume decrease adjustment that would apply prospectively to cost reporting periods beginning on or after October 1, 2017, and to reflect that the language requiring that the volume decrease adjustment amount not exceed the difference between the hospital's Medicare inpatient operating costs and the hospital's total DRG revenue for inpatient operating costs would only apply to cost reporting periods beginning before October 1, 2017, but not to subsequent cost reporting periods. While some commenters suggested that the new method should be applied retroactively, CMS noted:

We also do not agree that we should apply our proposed methodology retroactively. The IPPS is a prospective system and, absent legislation, a judicial decision, or other compelling considerations to the contrary, we generally make changes to IPPS regulations effective prospectively based on the date of discharge or the start of a cost reporting period within a certain Federal fiscal year. We believe following our usual approach and applying the new methodology for cost reporting periods beginning on or after October 1, 2017 would allow for the most equitable

¹⁸ *Id.*

¹⁹ *Id.*

application of this methodology among all IPPS providers seeking to qualify for volume decrease adjustments. For these reasons, we are finalizing that our proposed changes to the volume decrease adjustment methodology will apply prospectively for cost reporting periods beginning on or after October 1, 2017.²⁰

The Eighth Circuit Court of Appeals upheld the methodology used by CMS, noting:

The Secretary’s interpretation is a reasonable interpretation of the plain language of the statute. The precise language at issue says that the VDA should be given “as may be necessary to fully compensate” a qualified hospital “for the fixed costs it incurs . . . in providing inpatient hospital services.” 42 U.S.C. § 1395ww(d)(5)(D)(ii). The Secretary’s interpretation ensures that the total amount of a hospital’s fixed costs in a given cost year are paid out through a combination of DRG payments and the VDA. As the Secretary points out, the prospective nature of DRG payments makes it difficult to determine how best to allocate those payments against the actual fixed costs a hospital incurs. Given the lack of guidance in the statute and the substantial deference we afford to the agency in this case, the Secretary’s decision reasonably complied with the mandate to provide full compensation.²¹

The Eighth Circuit found that, just because CMS prospectively adopted a new interpretation, that it was not a sufficient reason to find that the Secretary’s prior interpretation was arbitrary or capricious.²² The Eighth Circuit pointed out that the main argument that the Secretary’s prior interpretation was arbitrary and capricious relied on the premise that the PRM’s sample calculations conflict with the Secretary’s interpretation and that the Secretary is bound by the PRM. As the Eighth Circuit pointed out, though:

However, the examples are not presented in isolation. The same section of the Manual reiterates that the volume-decrease adjustment is “not to exceed the difference between the hospital’s Medicare inpatient operating cost and the hospital’s total DRG revenue.” In a decision interpreting § 2810.1(B) immediately following the Secretary’s guidance, the Board found “that the examples are intended to demonstrate how to calculate the adjustment limit as opposed to determining which costs should be included in the adjustment.” See *Greenwood Cty. Hosp. v. BlueCross BlueShield Ass’n*, No. 2006-D43, 2006 WL 3050893, at *9 n.19 (P.R.R.B. Aug. 29, 2006). That decision was not reviewed by the Secretary and therefore became a final agency action. The agency’s conclusion that the

²⁰ *Id.* at 38,182.

²¹ *Unity HealthCare v. Azar*, 918 F.3d 571, 577 (8th Cir. 2019).

²² The Eighth Circuit cited, “An initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis.” *Nat’l Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Chevron*, 467 U.S. at 863–64); see also *LaRouche v. FEC*, 28 F.3d 137, 141 (D.C. Cir. 1994) (“The mere fact that regulations were modified, without more, is simply not enough to demonstrate that the prior regulations were invalid.”). The Court also noted, “A statute can have more than one reasonable interpretation, as in this case. See *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 744–45 (1996) (stating that “the question before us is not whether [an agency interpretation] represents the best interpretation of the statute, but whether it represents a reasonable one”).”

examples are meant to display the ceiling for a VDA, rather than its total amount, is a reasonable interpretation of the regulation’s use of “not to exceed,” rather than “equal to,” when describing the formula. We conclude that the Secretary’s interpretation was not arbitrary or capricious and was consistent with the regulation.²³

This case centers on the application of the statute and regulation to the proper classification and treatment of costs and the proper calculation of the amount for the low volume adjustment. The Administrator’s examination of the governing statute and implementing regulations and guidance clearly recognize three categories of costs, i.e., fixed, semi-fixed and variable. The guidance only considers fixed and semi-fixed costs within the calculation of the volume adjustment but not variable costs. On the issues of variable costs and excess staffing calculations, the Administrator finds that the Board properly upheld the MAC’s determination regarding the determination of the variable costs and excess staffing calculation.

Regarding the methodology and proper calculation of the Provider’s payment adjustment, the Administrator finds that, although the Board properly found Provider should not receive VDA payment, the Board improperly calculated the Provider’s adjustment. The VDA calculation methodology used by the Board is in direct contradiction to the statute and CMS’ regulations and guidance. The Board found the VDA in this case should be calculated as follows:

Step 1: Calculation of the CAP

2011 Medicare Inpatient Operating Costs	\$1,895,508
Multiplied by the 2012 IPPS update factor	<u>1.019</u>
2011 Updated Costs (Max allowed)	\$1,931,523
2012 Medicare Inpatient Operating Costs	\$1,458,549
Lower of 2011 Updated Costs or 2012 Costs	\$1,458,549
Less 2012 IPPS payment	<u>\$1,497,883</u>
2012 Payment Cap	-\$39,334

Step 2: Calculation of VDA

2012 Medicare Inpatient Costs - Fixed Operating Costs	\$1,313,278
Less Excess Staffing	<u>-\$98,597</u>
2012 Medicare Inpatient Fixed Operating Costs less Excess Staff	\$1,214,681
Less 2012 IPPS/SCH payment – Fixed Portion (90.04 percent)	<u>\$1,348,694</u>
Payment adjustment amount (subject to CAP)	-\$134,013²⁴

As shown above, the Provider’s IPPS payments exceeds its total inpatient operating costs. Accordingly, the Board determined that the Provider was not eligible for a VDA payment. After

²³ *Unity* at 578.

²⁴ *See*, Provider Reimbursement Review Board (PRRB) Dec. No. 2022-01 at 14.

reviewing the statute, regulations, CMS policy and the Eight Circuit decision in *Unity HealthCare v. Azar*, 918 F.3d 571, 577 (8th Cir. 2019), the Administrator, upholds the Board's decision in this case but using the following methodology. The Administrator agrees that the Provider should not receive a VDA payment for FY 2012, because the Provider's IPPS/SCH payments exceed the Provider's total inpatient operating costs. The Administrator finds that the MAC properly calculated the correct payment adjustment, by following the controlling statute, regulations and various Administrative and Court decisions as reflected in *Greenwood* and *Unity*, cited *supra*, is as follows:

Step 2: Calculation of VDA

2012 Medicare Inpatient Costs - Fixed Portion	\$1,189,278
Less 2012 IPPS payment	<u>\$1,249,018</u>
Payment adjustment amount (subject to CAP)_	-\$59,740²⁵

In sum, the Administrator finds that the Provider's IPPS payments exceeds the Provider's fixed inpatient operating cost for 2012 and therefore, the Provider is not entitled to a VDA payment.

²⁵ See, MAC's Exhibit C-1 at 9.

DECISION

The decision of the Board is upheld in accordance with the foregoing opinion.

THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE
SECRETARY OF HEALTH AND HUMAN SERVICES

Date: December 10, 2021

/s/

Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services