CENTERS FOR MEDICARE AND MEDICAID SERVICES
Order of the Administrator

In the case of:	**Claim for:**
Southwest Consulting 2004 DSH Dual Eligible Days Group; CHI 2004 Dual Eligible Days Group; and Caritas Christi Health Care 2004 DSH Dual Eligible Days Group **Providers** **vs.** **Blue Cross Blue Shield Association/ Wisconsin Physician Services/ National Government Servs. ME** **Intermediary**	**Reimbursement Determination for Cost Reporting Periods ending: 2004** **Review of:** **PRRB Dec. No. 2010-D36** **Dated: June 14, 2010**

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review, of the decision of the Provider Reimbursement Review Board (Board). The review is during the 60-day period in § 1878(f)(1) of the Social Security Act (Act), as amended (42 USC 1395oo(f)). CMS' Center for Medicare (CM) commented, requesting review of the Board's expedited judicial review (EJR) decision. The parties were notified of the Administrator's intention to review the Board's EJR decision. The Intermediary commented requesting reversal of the Board's decision. The Provider submitted comments stating that the Board's decision should be affirmed.. Accordingly, this case is now before the Administrator for final agency review.

The issue is whether the Board had jurisdiction to grant the Providers' request for EJR over the validity of the provisions of the CMS Ruling CMS-1498-R(Ruling).

The Board held that it had jurisdiction over the Providers' group appeal necessary to grant EJR.

The CM submitted comments, requesting review of the Board's decision. The CM argued that the Board did not have jurisdiction to grant EJR. The CM argued that the Board is bound by the Ruling and the Ruling clearly states that the Board and

the other Medicare administrative appeals tribunals lack jurisdiction over the three disproportionate share hospital (DSH) payment issues discussed in the Ruling. The CM argued that the only action the Ruling permits the Board to take is to identify all appeals raising any of these three issues that are properly pending and to remand those appeals to the Medicare contractor with jurisdiction over the provider.

The Providers' submitted comments stating that the Board had jurisdiction to grant their request for EJR, without conceding the Administrator's right to review. The Providers' incorporated by reference their submission to the Board requesting EJR. In their request for EJR to the Board, the Providers' challenged the validity of the Ruling. The Providers' argued that for the cost reporting periods in dispute, CMS position was that the dual-eligible days in question were not counted in either the SSI fraction or the Medicaid fraction. The Providers argued that the Ruling includes the days at issue in the SSI fraction. However, the Providers' contend that the days should be included in the Medicaid fraction. Therefore, the Providers claim that the pending issue to have the days included in the numerator of the Medicaid fraction is not rendered moot by the Ruling.[1]

The Intermediary submitted comments requesting reversal of the Board's jurisdiction determination.

Under § 1878(f)(1) of the Social Security Act and the regulation at 42 C.F.R. §405.1842(a)(3), the Administrator has the authority to conduct final agency review of Board determinations. Section 1878(f)(1) of Act provides for EJR when a provider "is entitled to a Board hearing" and "the Board determines…that it is without authority to decide" a question of law or regulation. Consistent with the statute, the regulation at 42 C.F.R § 405.1842(f)(2), a provider is not entitled to an EJR if "the Board determines that it does not have jurisdiction to conduct a hearing on the specific matter at issue…"

The regulation at 42 C.F.R. § 401.108, states that CMS Rulings are binding on all CMS components. With respect to the scope of the Board's legal authority, the regulation at 42 C.F.R. §405.1867 states that, "[i]n exercising its authority to conduct proceedings… the Board must comply with all the provisions of Title XVIII of the Act and regulations issued thereunder, as well as CMS Rulings issued under the authority of the Administrator as described in § 401.108...."

The underlying issue in dispute involved the treatment of inpatient days for patients who were "enrolled in both Medicare Part A when they were treated by the

[1] *See* Providers' Request for Expedited Judicial Review at 4.

hospital" but did not have Medicare part A payment made on their behalf for the particular patient days at issue, either because the patient had exhausted his or hers Medicare Part A benefits for the inpatient hospital stays or another payor had primary obligation to pay and thus Medicare was the secondary payor. On March 31, 2010 the Board conducted a hearing. Subsequently, on April 28, 2010, CMS issued CMS Ruling CMS-1498-R. The Ruling provided notice that the Board and the other Medicare administrative appeals tribunals lacked jurisdiction over three specific types of provider appeals regarding the calculation of the Medicare disproportionate share hospital (DSH) adjustment. The CMS-1498-R titled "Medicare Program Hospital Insurance (Part A)—Jurisdiction over appeals of disproportionate share hospital (DSH) payments and recalculation of DSH payments following remands from Administrative Tribunals" provides the following:

> The Ruling provides notice of the determination of the Centers for Medicare & Medicaid Services (CMS) that the Provider Reimbursement Review Board (PRRB) and the other Medicare administrative appeals tribunals lack jurisdiction over provider appeals of any of three issues described [therein] regarding the calculation of the Medicare disproportionate share hospital (DSH) payment adjustment. The Ruling also requires the pertinent administrative appeals tribunal (that is, the PRRB, the Administrator of CMS, the Medicare fiscal intermediary hearing officer, or the CMS reviewing official) to remand each qualifying appeal to the appropriate Medicare contractor.

Specifically, CMS Ruling CMS-1498-R prohibits the Board and the Administrator from review and removes jurisdiction to review provider appeals regarding three issues: 1) the calculation of the SSI fraction; 2) inpatient days where the patient was entitled to Part A benefits, but the inpatient hospital day was not covered under Part A or the patient part A benefits were exhausted. (MSP days and exhausted benefit days for dual-eligible patients) for cost reporting periods with discharges before October 1, 2004; and 3) labor and delivery room days for cost reporting periods with discharges before October 1, 2009.

The Administrator finds that the issue appealed by the Providers involved Part A exhausted benefit days and MSP days for discharges occurring before October. 1, 2004 and, therefore, CMS-1498-R is applicable.

Accordingly, the Administrator orders:

That the Board's jurisdictional decision in this case is hereby vacated in accordance with the CMS ruling; and

That the case is remanded to the appropriate Medicare contractor for resolution consistent with CMS-1498-R.

Date: Aug 12, 2010

/s/

Marilyn Tavenner
Principal Deputy Administrator and Chief Operating Office
Centers for Medicare & Medicaid Services