CENTERS FOR MEDICARE AND MEDICAID SERVICES
Order of the Administrator

In the case of:	**Claim for:**
Southwest Consulting DHS Group Appeals—Consolidated Pilot Project	**Payment Determination for Cost Reporting Period Ending: Various**
Provider	
vs.	
Blue Cross Blue Shield Association/ Wisconsin Physician Services	**Review of: PRRB Dec. No. 2010-D48 Dated: September 24, 2010**
Intermediary	

These cases are 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)). The parties were notified of the Administrator's intention to review the Board's EJR decision. The Provider, Intermediary and CMS' Center for Medicare Management (CM) submitted comments. 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).[1]

The Board held that it had jurisdiction over the Providers' group appeal necessary to grant EJR, but found that it did not have authority to make a determination of whether the Ruling deprived it of continuing jurisdiction. The challenged substantive provisions of the Ruling were the foundation for CMS' claim that the

[1] See Providers' Request for Expedited Judicial Review at p. 1. The Providers in this group appeal are challenging CMS' calculation of the Medicare/SSI fraction that was used to determine their eligibility for, and the amount of, the Medicare DSH payment under section 1886(d)(5)(F) of the Social Security Act and 42 C.F.R. § 412.106.

Board lacked jurisdiction to grant EJR. In addition, the Board held that EJR was appropriate as it preserved the status quo and aided the Board's determination of its own jurisdiction.

The Providers' submitted comments challenging the validity of the Ruling. With respect to the SSI "data matching process" issue, the Providers' argued that CMS' Ruling misrepresents the court's decision in Baystate,[2] in that the Ruling includes the days at issue in the SSI fraction. The Providers' argued that the court's decision in *Baystate* did not include Part A exhausted benefit days or Medicare Secondary Payor (MSP) days in the revised Supplemental Security Income (SSI) fraction. The Providers' contended that the days at issue should be included in the Medicaid fraction.

The Intermediary submitted comments and incorporated by reference its response to the Providers' request for EJR filed with the Board. The Intermediary requested that these cases be remanded to the Intermediary consistent with the provision of CMS Ruling 1498-R, dated April 28, 2010.

The Center for Medicare Management (CM) submitted comments, requesting that the Administrator reverse and remand the Board's decision. The CM argued that the Board did not have jurisdiction to grant EJR. The CM noted that CMS Ruling 1498-R clearly stated, that the Board and the other Medicare administrative appeals tribunals lacked jurisdiction over the three DSH issued discussed in the Ruling. 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.

Section 1878(f)(1) of the 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…" 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 jurisdictional determinations.

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

[2] See Baystate Med. Ctr. v. Leavitt, 545 F. Supp. 2d 20, amended by 587 F. Supp. 2d 37 (D.D.C. 2008).

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...."

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 data matching for 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 record shows that this case involves appeals of the SSI data matching process. The Providers various submissions show that they were challenging the SSI data match used to calculate the Medicare/SSI fraction of the disproportionate share payment.[3] The Administrator finds that, since this case involves the SSI "data matching process" issue, CMS-1498-R is applicable.

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[3] See, e.g., Southwest Consulting Carolinas Healthcare System 2005 DSH SSI Group (Fiscal year 2005) "Formation of Group Appeal" letter, dated May 29, 2007 ("The Providers assert that CMS' computation of the Medicare/SSI fraction

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: 11/19/2010

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

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systemically flawed, as recently found by the Board in Baystate Medical Center v. Mutual of Omaha, PRRB Dec. No. 2006-D20,….and the resulting fraction is therefore understated."); Providers' Formation of Group Appeal" letters dated May 24, 2007, April 3, 2007, September 5, 2007, June 12, 2007, December 16, 2006; Southwest Consulting Carolinas Healthcare System 2003 DSH SSI Group (Fiscal year 2003) Final position Paper, dated October 29, 2009 ("The Providers' contend that CMS' computation of the Medicare fraction is systematically flawed for the reasons found by the Court in Baystate Medical Center v. Leavitt, 545F.Supp. 2d 20 (D.D. C. 2008) and by the Board in Baystate Medical Center v. Mutual of Omaha, PRRB Dec. No. 2006-D20….").