CENTERS FOR MEDICARE AND MEDICAID SERVICES

Decision of the Administrator

In the case of:	**Claim for:**
HCA 00, 02, 03, 04 DSH Medicare + Choice Plan Days	**Provider Cost Reimbursement Determination for Cost Years Ending: 2000, 2002, 2003 & 2004 (through 9/30/2004)**
Provider	
vs.	**Review of:**
MEDICARE CONTRACTORS- Noridian Healthcare Solutions/ Wisconsin Physicians Services	**PRRB Dec. No. 2016-D1**
Intermediary	**Dated: October 06, 2015**

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 mandated in § 1878(f) (1) of the Social Security Act (Act), as amended (42 U.S.C. § 1395oo (f)). The parties were notified of the Administrator's intention to review the Board's decision. The Providers commented, requesting that the Board's decision be affirmed. Accordingly, this case is now before the Administrator for final agency review.

BACKGROUND

The Providers in this group appeal sought to include in the numerator of the Medicaid fraction the days attributable to patients who were eligible for Medicaid and enrolled in a Medicare+Choice (M+C) managed care plan during their inpatient hospital stay. The Medicare Contractors did not include those days in the numerator of the Medicaid fraction. The Providers appealed.

ISSUE AND BOARD'S DECISION

The issue as stated by the Board was whether inpatient days for Medicaid-eligible patients who were enrolled in a Medicare+Choice (M+C) plan under Medicare part C were properly excluded from the numerator of the Medicaid fraction that is used to calculate the disproportionate share hospital (DSH) payment.

The Board concluded that the M+C days should be included in the Medicaid fraction used to calculate the DSH adjustment, and directed the Medicare Contractor to revise the Providers' DSH calculations for each cost reporting period under appeal. The Board noted that, the D.C. Circuit did not foreclosed the Secretary's interpretation that M+C days should be included in the numerator of the Medicare fraction, and thereby excluded from the numerator for the Medicaid fraction. However, the Secretary could not apply this interpretation to patient discharges prior to October 1, 2004. Therefore, the Board concluded that the D.C. Circuit's decision in *Northeast* mandated that M+C days be included in the numerator of the Medicaid fraction of the DSH adjustment for inpatient discharges prior to October 1, 2004.[1]

SUMMARY OF COMMENTS

The Providers commented, requesting that the Administrator affirm the Board's decision. The Providers noted that the case involved cost reporting periods ending prior to October 1, 2004, and that accordingly, the Court of Appeals' decision in *Northeast Hospital* and CMS' TDL dated June 12, 2012 was dispositive.

DISCUSSION

The entire record, which was furnished by the Board, has been examined, including all correspondence, position papers, and exhibits. The Administrator has reviewed the Board's decision. All comments received timely are included in the record and have been considered.

On June 12, 2012, CMS issued a Technical Direction Letter (TDL) 12391, 0606-12, to clarify how the D.C. Circuit Court of Appeals' decision in *Northeast Hosp. Corp. v. Sebelius*, dated September 13, 2011, affected patient days on the Medicare cost report for providers with pending appeals on the issue of inclusion of Medicare part C dual eligible days in the Medicaid fraction of the disproportionate patient percentage (DPP).

The TDL instructed Medicare Contractors to include any disallowed patient days attributable to patients who were enrolled in a Medicare Part C Plan and also eligible for Medicaid for discharges occurring on or after January 1, 1999 through September 30,

[1] *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1 (D.C. Cir. 2011).

2004 in the Medicaid fraction of the DPP on the Medicare cost report. The TDL stated that the policy described above should only be applied to discharges occurring on or after January 1, 1999 through September 30, 2004, if one of the following circumstances were present:

1) The FI or A/B MAC has not yet issued an initial notice of program reimbursement (NPR) with respect to the cost report containing the relevant discharges; or

2) The provider has filed, or files within the period allowed under § 405.1835, a jurisdictionally proper appeal for the cost report in which the discharges are reported, and that appeal, is an active appeal; and the provider identifies as a basis for that appeal the FI's/MAC's exclusion under § 412.106(b)(4) of patient days attributable to patients who were enrolled in a Medicare Part C Plan and also eligible for Medicaid for discharges occurring on or after January 1, 1999 through September 30, 2004.[2]

Accordingly, because this case includes patient discharges prior to October 1, 2004, the Administrator affirms the Board's decision, and instructs the Medicare Contractor to include any disallowed patient days attributable to patients who were enrolled in a Medicare Part C Plan and also eligible for Medicaid for discharges occurring on or after January 1, 1999 through September 30, 2004 in the Medicaid fraction of the DPP on the Medicare cost report consistent with the CMS' TDL dated June 12, 2012.

[2] CMS' Technical Direction Letter (TDL) dated June 12, 2012.

DECISION

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

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

Date: 12/01/2015

/s/

Patrick H. Conway, M.D., MSc
Acting Principal Deputy Administrator
Centers for Medicare & Medicaid Services