# CENTERS FOR MEDICARE AND MEDICAID SERVICES

*Order of the Administrator*

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| **In the case of:**<br><br>**Greenwood Leflore Hospital**<br><br>**Provider**<br>**vs.**<br><br>**Medicare Administrative Contractor - Novitas Solutions, Inc.** | **Claim for:**<br>**Fiscal Year Ending**<br><br>**September 30, 2017**<br><br>**Review of:**<br>**PRRB Dec. No. 2018-D26**<br><br>**Dated: February 28, 2018** |

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)(l) 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 and requested to submit comments regarding the application, if any, of section 216(j) of the Social Security Act (as incorporated by section 1872 of the Act.) The Provider submitted commented requesting that the Board's decision be reversed. The Medicare Administrative Contractor (MAC), requested that the Board's decision be upheld

Issue and Board Decision

The issue in this case is whether the CMS decision to reduce the Provider's Market Basket Update (MBU) for Fiscal Year (FY) 2017 by twenty-five percent, pursuant to the Hospital Inpatient Quality Reporting program (IQR), was proper.

The Board held that the Medicare Contractor properly imposed one-fourth reduction to the Provider's FY 2015 MBU. The Board found that the Provider failed to file the required Healthcare Associated Infection (HAI) quality data for the second quarter of 2015, in the time, matter and form as determined by the Secretary, which resulted in its payment reduction for 2017. Since the Provider failed to provide the HAI quality data in a form and manner, and at a time, specified by CMS, accordingly, the Provider was subjected to a reduction in its market basket update for FY 2017 pursuant to 42 C.F.R § 412.64(d)(2)(i)(C).

Summary of Comments

The Provider commented that sections 216(j) and 1872 of the Social Security Act require the deadline for the submission of second quarter HAI data to be extended to Monday, November 16, 2015. Further, section 1872 of the Act incorporates section 216(j) to apply to the Medicare program. The Provider argued that submission of quality data under the Hospital IQR Program is a required "act" which "affects eligibility for or the amount of any benefit or payment" under subchapter XVIII of the Act and "is necessary to establish or protect" a right under subchapter XVIII of the Act for purposes of section 216(j) and 1872 of the Act. The Provider argued that the period to submit quality data is set by statute and regulation as "a time, specified by CMS." The Provider argued that because the IQR program imposes required acts upon Medicare participating hospitals which affects the amount of payment under the Medicare program and affects other rights, and the deadline to complete such acts are established pursuant to the Secretary's regulations, then Section 216(j) (as incorporated by Section 1872) of the Act is fully applicable to the deadlines for the submission of quality data under the IQR program. Therefore, the CY 2015 second quarter HAI deadline was set for November 15, 2015, a Sunday, pursuant to the Secretary's regulations, and the Provider's submission of the data on the following business day, Monday, November 16, 2015, should be considered timely pursuant to Section 216(j), as incorporated by Section 1872 of the Act. Therefore, the Provider requested that the decision of the PRRB be reversed.

The MAC commented and argued that the Provider's request for equitable relief under the "doctrine of substantial performance" and that the Board could not provide equitable relief "when [it] is bound by applicable regulatory and statutory authorities." With regard to the applicability of section 216(j) of the Act, the MAC argued that by its terms, section 216(j) applies when a deadline falls on a weekend because of a "period of time" as opposed to a fixed deadline being imposed. The MAC also distinguished the Provider's HAI data filing deadline as electronic, and that it could be submitted 24/7. Therefore, the MAC stated that the Board's decision was appropriate because the HAI deadline was a "specific" date.

In response, to the MAC's comments, the Provider stated that the MAC's argument that section 216(j) only applies when the weekend date arises due to the passage of a period of time, as opposed to a specific date, has no support in the statutory language and should be disregarded by the Administrator. Further, citing section 216(j), the Provider commented that by its terms, section 216(j) applies to any applicable "period within which an act is required to be done." Therefore, the Provider stated that a timeframe in which a provider must submit quarterly data under the IQR Program is a period of time established pursuant to the Secretary's regulation, within which the act of submitting quality data must be done. Finally, the Provider requested that the Administrator consider its submission of the data on the following business day, Monday, November 16, 2015, timely pursuant to section 216(j), as incorporated by section 1872 of the Act.

## Discussion

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

The Medicare program pays acute care hospitals for inpatient services under the inpatient prospective payment system (IPPS). Under IPPS, Medicare pays hospitals predetermined amounts per discharge, subject to certain payment adjustments. The "Market Basket Update" (MBU) is a standardized amount to account for increases in operating costs.

The Hospital IQR program was developed to implement Section 501(b) of the Medicare Prescription Drug, Improvement and Modernization Act (MMA) of 2003. Section 5001(a) of Pub. 09-171 of the Deficit Reduction Act (DRA) of 2005 provided new requirements for the Hospital IQR Program. The hospital quality of care information gathered through the program is available to consumers on the Hospital Compare website.

This section of the MMA authorizes CMS to pay hospitals that successfully report designated quality measures a higher annual update to their payment rates, and also requires hospitals to submit quality of care data "in a form and manner, and at a time, specified by CMS." Ensuring data accuracy is critically important to CMS for guiding prevention priorities and protecting patients. For FY 2015 and beyond, CMS reduces a providers' MBU by one-fourth if the provider fails to report the required HAI data under the IQR program. Additionally, non-compliant providers are exclude from participating in the Value Based Purchasing (VBP) program and ineligible to receive any value-based incentive payments for that year.

The regulation at 42 C.F.R. § 412.140 sets forth the "Submission and validation of Hospital IQR Program data" and states:

> (1) General rule. Except as provided in paragraph (c)(2) of this section, subsection (d) hospitals that participate in the Hospital IQR Program must submit to CMS data on measures selected under section 1886(b)(3)(B)(viii) of the Act in a form and manner, and at a time, specified by CMS. A hospital must begin submitting data on the first day of the quarter following the date that the hospital submits a completed Notice of Participation form under paragraph (a)(3) of this section.(Emphasis added.)

The August 2, 2014 Federal Register also notified Hospitals regarding dates for submission of HAI data, which stated:

> We refer readers to the FY 2012 IPPS/LTCH PPS final rule (76 FR 51631 through 51633; 51644 through 51645), the FY 2013 IPPS/LTCH PPS final rule (77 FR 53539), and the FY 2014 IPPS/LTCH PPS final rule (78 FR 50820 through 50822) for details on the data submission and reporting requirements for healthcare-associated infection (HAI) measures reported via the CDC's National Healthcare Support Network (NHSN) Web site. The data submission deadlines are posted on the QualityNet Web site at: http://www.QualityNet.org/.
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> In the FY 2015 IPPS/LTCH PPS proposed rule (79 FR 28246) we did not propose any changes to data submission and reporting requirements for healthcare-associated infection measures reported via the NHSN.[1]

Consistent with the Federal Register notices, CMS posted IQR Program instructions and deadlines for quarterly data submission on the QualityNet Exchange Web Site.[2]

In addition, a hospital dissatisfied with a decision by CMS that it has not met the requirements of the Hospital IQR Program may request reconsideration under 42 C.F.R. § 412.140(e)(3).

> (e) Reconsiderations and appeals of Hospital IQR Program decisions.
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> (1) A hospital may request reconsideration of a decision by CMS that the hospital has not met the requirements of the Hospital IQR Program for a particular fiscal year. Except as provided in paragraph (c)(2) of this section, a hospital must submit a reconsideration request to CMS no later than 30 days from the date identified on the Hospital Inpatient Quality Reporting Program Annual Payment Update Notification Letter provided to the hospital
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> ….
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> (3) A hospital that is dissatisfied with a decision made by CMS on its reconsideration request may file an appeal with the Provider Reimbursement Review Board under part 405, subpart R of this chapter.

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[1] 79 Fed. Reg. 49,853, 50,259 (Aug. 22, 2014). *See also* 81 Fed. Reg. 56,938 (Aug. 22, 2016)(discussing the applicable percentage decrease for hospitals that fail to submit quality data for FFY 2017.)

[2] *Quality Net, Hospital Inpatient Quality Reporting (IQR) Program Overview*; https://www.qualitynet.org/dcs/ContentServer?c=Page&pagename=QnetPublic%2FPage%2FQnetTier2&cid=1138115987129.

For the second quarter FY 2015 period at issue, the Quality Net set forth the HAI filing deadline as November 15, 2015.[3] The Provider in this case admitted that it filed the data on Monday November 16, 2015, one day after the cited deadline for its second quarter 2015 quality data, but contended that the problem with its submission was due to human error and the fact that the IQR submission deadline fell on Sunday. The Provider contended that it always submitted HAI data timely, and that the Board should apply the doctrine of "substantial performance" to excuse its failure. The Provider argued that it submitted its HAI data the first business day, on Monday after the second quarter deadline of Sunday, November 15, 2015. The Provider also contended that its late HAI submission represented an omission of only 2 data points out of 114.

The Medicare Contractor, in response to Provider's arguments, maintained that the requirement to submit the HAI data is not optional. Moreover, the Provider failed to utilize the exception or extension process provided in the regulation at 42 C.F.R. § 412.140. Further, the Provider's failure to submit its HAI data was caused by its own employees, and not by an outside vendor.

While the Board considered the Provider's argument that it missed the second quarter deadline by only one day, the Board found that the Provider was bound by its responsibility to adhere to applicable regulatory and statutory authorities, which require that each "subsection (d)" hospital submit inpatient quality data, in a matter and form as determined by the Secretary. While the Board was sympathetic to Provider's argument that it had never submitted data late before, the Board could not provide equitable relief under the doctrine of "substantial performance."

The record supports a finding that the Provider submitted its second quarter HAI data on Monday, November 16, 2015, when the filing deadline set by CMS fell on Sunday, November 15, 2015. In addition, the record shows that Sunday was a nonwork day. Comments were requested regarding this fact in light of section 216(j) of the Social Security Act, as incorporated by section 1872 of the Social Security Act. Section 216(j) of the Social Security Act, states in relevant part:

> (j) Periods of Limitation Ending On Nonwork Days
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> Where this subchapter, any provision of another law of the United States (other than the Internal Revenue Code of 1986) relating to or changing the effect of this subchapter, or any regulation issued by the Commissioner of Social Security pursuant thereto provides for a period within which an act is required to be done which affects eligibility for or the amount of any benefit or payment under this subchapter or is necessary to establish or protect any rights under this subchapter. And such period ends on a Saturday, Sunday, or legal holiday, or on any other day

[3] *See* Provider Exhibit P-9. Chart from *Quality Net, Hospital Inpatient Quality Reporting (IQR) Program, Hospital Inpatient Quality Reporting (IQR) Program Important Dates and Deadlines*, Updated January 2015). https://www.qualitynet.org/

> all or part of which is declared to be a nonwork day for Federal employees by statute or Executive order, then such act shall be considered as done within such period if it is done on the first day thereafter which is not a Saturday, Sunday or legal holiday or any other day all or part of which is declared to be a nonwork day for Federal employees by statute or Executive order. For purposes of this subsection, the day on which a period ends shall include the day on which an extension of such period, as authorized by law or by the Commissioner of Social Security pursuant to law, ends.

Section 1872 of the Act, incorporates Section 216(j) of the Act, to apply to Title XVIII, the Medicare program, and states that:

> The provisions of sections 206 and 216(j)…of this title shall also apply with respect to this title to the same extent as they are applicable with respect to subchapter II, except that, in applying such provisions with respect to this subchapter, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services respectively.

Applying the relevant law and program policy to the foregoing facts, the Administrator finds that the case should be remanded to CMS' Center for Clinical Standards and Quality for reconsideration of whether the Provider filed its HAI data timely, on Monday, November 16, 2015, one day after the Sunday, November 15, 2015, in light of section 216(j) of the Act as incorporated by Section 1872.

Accordingly, the decision of the Board to uphold the one-fourth reduction in the Provider's FY 2017 MBU because of the Provider's failure to timely submit quality data, in a form and manner, and at a time, specified by CMS, pursuant to 42 C.F.R §412.64(d)(2)(i)(C), is vacated;

The case is remanded to CMS' Center for Clinical Standards and Quality (or the appropriate CMS reconsideration office under 42 C.F.R. §412.140) in accordance with the foregoing opinion; and,

A final decision issued by CMS' Center for Clinical Standards and Quality (or the appropriate CMS reconsideration office under 42 C.F.R. §412.140) will be subject to 42 C.F.R. §412.140(e) and Part 405, subpart R.

Date: 4/26/2018

/s/
Demetrios L. Kouzoukas
Principal Deputy Administrator
Centers for Medicare & Medicaid Services