PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2017-D8

PROVIDER–
Greenbrier Behavioral Health

Provider No.: 19-4069

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Service

DATE OF HEARING –
November 12, 2015

Cost Reporting Period Ended –
December 31, 2008

CASE NO.: 11-0124

INDEX

ISSUE STATEMENT:

Whether the Provider is entitled to blended reimbursement for its fiscal year end ("FYE") December 31, 2008 cost report under 42 C.F.R. § 412.426(a)(3).[1]

DECISION

After considering the Medicare law and regulations, the evidence presented, and the parties' contentions, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor improperly reimbursed Greenbrier Behavioral Health ("Greenbrier" or "Provider") at 100 percent of the Federal *per diem* rate under the inpatient psychiatric facility prospective payment system ("IPF-PPS") for Greenbrier's FYE December 31, 2008. Accordingly, the Board remands this case back to the Medicare Contractor to reimburse Greenbrier for services furnished during FYE December 31, 2008 at the rate for year-three of the transition to IPF-PPS, namely at 25 percent of the facility-specific payment rate and 75 percent of the Federal IPF-PPS *per diem* payment rate.

INTRODUCTION

Greenbrier is a Medicare-certified inpatient psychiatric facility ("IPF") located in Covington, Louisiana. Greenbrier's designated Medicare Contractor is Wisconsin Physicians Service ("Medicare Contractor").

In the fall of 2005, CMS implemented a three year transition to the IPF-PPS reimbursement system. Effective for year-two of the transition period, Greenbrier changed its fiscal year end from November 30th to December 31st. As a result, Greenbrier had a one-time 13-month cost reporting period of December 1, 2006 to December 31, 2007.[2] The Medicare Contractor treated this 13-month cost reporting period as year-two of the transition period. However, the Medicare Contractor did not treat the next cost reporting period, FYE December 31, 2008, as year-three of the transition. Rather, the Medicare Contractor paid Greenbrier at 100 percent of the IPF-PPS rate for FYE December 31, 2008. Greenbrier contends in this appeal that it should be paid at the rate for year-three of the transition period for its FYE December 31, 2008 cost report.

STATEMENT OF THE FACTS

Prior to 2005, inpatient psychiatric facilities were reimbursed on a reasonable cost basis. Section 124 of the Medicare, Medicaid and SCHIP Balanced Budget Refinement Act of 1999 ("BBRA")[3] mandated that the Secretary develop and implement the IPF-PPS for psychiatric facilities such as Greenbrier. As part of her implementation of IPF-PPS, the Secretary exercised her discretion to provide for a transition from the then-current reasonable cost reimbursement

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[1] *See* Transcript ("Tr.") at 5-6.
[2] Provider's Final Position Paper at 6.
[3] Pub. Law 106-113—Appendix F, § 124, 113 Stat. 1501A-321, 1501A-332 (1999). In 2010, Congress incorporated the BBRA § 124 mandate into 42 U.S.C. § 1395ww(s)(1). *See* Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 3401(f), 124 Stat. 119, 483 (Mar. 23, 2010).

methodology to IPF-PPS. Specifically, the Secretary enacted 42 C.F.R. § 412.426 to provide a three-year transition period to IPF-PPS.[4]

When CMS implemented the three-year transition in the fall of 2005, Greenbrier had a fiscal year ending November 30th. Accordingly, the Medicare Contractor treated Greenbrier's FYE November 30, 2006 as the year-one of the transition period. However, on January 29, 2007, Greenbrier changed its fiscal year end from November 30th to December 31st effective for the cost reporting period that began on December 1, 2006. The implementation of this new fiscal year end resulted in the one-time 13-month cost reporting period of December 1, 2006 to December 31, 2007. The Medicare Contractor treated this 13-month cost reporting period as year-two of the transition period.

While preparing its cost report for the next cost reporting period, FYE December 31, 2008, Greenbrier used the cost reporting period start date of December 31, 2007 (rather than the correct date of January 1, 2008) because the Medicare cost reporting software would not otherwise recognize the FYE December 31, 2008 cost reporting period as year-three of the transition. However, the Medicare Contractor rejected Greenbrier's cost report because of the incorrect start date. As a result, Greenbrier revised its cost report using January 1, 2008 as the start date for the cost reporting period.[5] The Medicare Contractor reimbursed the FYE December 31, 2008 cost report entirely (*i.e.*, 100 percent) under the IPF-PPS. Greenbrier contends that its FYE December 31, 2008 cost reporting period should be treated as year-three of the transition period and, thereby, reimbursed at 25 percent of the facility-specific payment rate and 75 percent of the Federal IPF-PPS *per diem* payment rate.

Greenbrier timely appealed the Notice of Program Reimbursement ("NPR") for its FYE December 31, 2008 cost report and met the jurisdictional requirements of 42 C.F.R. §§ 405.1835 – 405.1840 (2008).[6] Greenbrier was represented by Lester W. Johnson, Jr., Esq. of Liles Parker, PLLC. The Medicare Contractor was represented by Wilson C. Leong, Esq., CPA of Federal Specialized Services, LLC.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

REGULATORY BACKGROUND

Congress mandated in BBRA § 124 that the Secretary of Health and Human Services develop and implement the IPF-PPS. The Secretary exercised her discretionary authority to develop and implement a policy that contained a three year transition period to IPF-PPS.[7] Specifically, in the final rule published on November 15, 2004, the Secretary promulgated 42 C.F.R. § 412.426 to provide for a three year transition period covering certain specified cost reporting periods.[8] The Secretary published a "correction of final rule" on April 1, 2005 ("2005 Correction"),[9] amending

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[4] *See* Provider Post-Hearing Brief at 4; Provider Exhibit P-1.
[5] *Tr.* at 21-22; 53-54.
[6] As required in 42 C.F.R. 405.1835(a)(1)(ii) (2008), Greenbrier properly protested the 100 percent Federal IPF-PPS payment on Worksheet E-3 in the amount of $350,425.
[7] 42 C.F.R. § 412.426.
[8] 69 Fed. Reg. 66922, 66980 (Nov. 15, 2004).
[9] 70 Fed. Reg. 16729 (Apr. 1, 2005).

the regulations to correct the cost reporting period coved by the transition period so that it read in pertinent part:

> *(a) Duration of transition period and composition of the blended transition payment.* . . . [**F]or cost reporting periods** beginning on or after January 1, 2005 **through January 1, 2008**, **an inpatient psychiatric facility receives a payment comprised of a blend** of the estimated Federal per diem payment amount . . . and a facility specific payment . . . .
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> (3) **For cost reporting periods beginning** on or after January 1, 2007 and **on or before January 1, 2008**, payment is based on 25 percent of the facility-specific payment and 75 percent is based on the Federal per diem payment amount.[10]

In the preamble to the 2005 Final Rule, the Secretary explained why the corrections were needed:

> [I]n § 412.426 of the regulation text, we inadvertently used incorrect dates for the cost report periods for the transition period from a blended PPS payment to a full PPS payment. Our policy is clear from the preamble on pages 66964 through 66966 that the transition period dates correlate to the cost reporting year.… This correction does not reflect a change in policy, rather, it conforms the regulation text to the actual policy."[11]

Accordingly, as a result of the correction, § 412.426(a)(3) specified that year-three of the transition period covered "cost reporting periods beginning on or after January 1, 2005 *through January 1, 2008*."[12]

Subsequently, in the preamble to the final rule published on May 9, 2006, the Secretary published the following table showing the IPF-PPS transition blend factors for the transition period:

Transition year	Cost reporting periods beginning on or after	TEFRA rate percentage	IPF-IPPS Federal rate percentage
1	January 1, 2005	75	25
2	January 1, 2006	50	50
3	January 1, 2007	25	75
	January 1, 2008	0	100

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[10] 42 C.F.R. § 412.426 (2006) (italics in original and bold emphasis added) (as amended by 69 Fed. Reg. at 66980 and 70 Fed. Reg. at 16729).
[11] 70 Fed. Reg. at 16726.
[12] (Emphasis added.)

Unlike § 412.426(a)(3), the table included any cost reporting period that began *on* January 1, 2008 as part of the fully implemented IPF-PPS (*i.e.*, paid at 100 percent of the IPF-PPS rates) rather than in year-three of the transition period (*i.e.*, paid at 25 percent facility-specific rate and 75 percent at the IPF-PPS rates).[13] A similar table was included in the preamble for subsequent IPF final rules published in 2007 and 2008.[14] The Board will refer to the 2006, 2007 and 2008 tables as the "Preamble Tables."

It was not until the final rule published on May 6, 2011 ("2011 Final Rule"), that the Secretary revised the dates of the transition period delineated in § 412.426. In particular, the Secretary revised § 412.426(a)(3) so that year-three of the transition period only applied to "cost reporting periods beginning on or after January 1, 2007 and *before* January 1, 2008."[15] The effective date for this revision was July 1, 2011.[16]

The Medicare Contractor states that it relied on the Preamble Tables to make its determination that Greenbrier should be paid at 100 percent of the Federal IPF-PPS rate for its FYE December 31, 2008. Specifically, the Medicare Contractor contends that the Preamble Tables confirm that Greenbrier's cost reporting period of January 1, 2008 through December 31, 2008 is "clearly outside of the third year blend period."[17]

Further, the Medicare Contractor asserts that the 2011 revisions to 42 C.F.R. § 412.426 were not substantive changes or an otherwise prohibited retroactive rulemaking and, therefore, are applicable to Greenbrier's FYE December 31, 2008 cost report. In this regard, the Medicare Contractor maintains that the intent of the regulation must be examined when inconsistencies are present. In support, the Medicare Contractor points to the Fourth Circuit's decision in *Brown v. Thompson*[18] where the Court provided the following guidance on statutory interpretation: "In determining whether an amendment clarifies or changes an existing law, a court, of course, looks to statements of intent made by the legislature that enacted the amendment."[19] BBRA § 124 mandated the Secretary develop a prospective payment system for IPFs and the Secretary exercised her discretion to establish a transition to that new payment system. Thus, the Medicare Contractor maintains that it is appropriate to consider the Secretary's 2011 interpretation and amendment as a clarification rather than a substantive change in existing regulation.[20]

Finally, the Medicare Contractor maintains that it issued newsletters in January 2005 and August 2006 to IPFs such as Greenbrier to notify them of the reimbursement rates for the transition period and that this notification was consistent with the Preamble Tables.[21] As a result, the Medicare Contractor maintains that Greenbrier was on notice that year-three of the transition period only applied to cost reporting period beginning on or after January 1, 2007 but *before*

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[13] 71 Fed. Reg. 27040, 27042 (May 9, 2006) (excerpt included at Medicare Contractor Exhibit I-3).
[14] *See* 72 Fed. Reg. 25602, 25603 (May 4, 2007) (excerpt included at Medicare Contractor Exhibit I-3); 73 Fed. Reg. 25709, 25710 - 25711 (May 7, 2008) (excerpt included at Medicare Contractor Exhibit I-3).
[15] 76 Fed. Reg. 26432, 26466 (May 6, 2011) (emphasis added).
[16] *Id.* at 26432.
[17] *See* Medicare Contractor Post-Hearing Brief at 4 -5.
[18] 374 F.3d 253 (4th Cir. 2004) (copy included at Medicare Contractor Exhibit I-8).
[19] *Id.* at 259 (citations omitted).
[20] *See* Medicare Contractor's Final Position Paper 11-12.
[21] *See* Medicare Contractor Exhibit I-10 (copies of the January 2005 and August 2006 newsletters).

January 1, 2008 and that IPFs would be paid at 100 percent of the IPF-PPS for any cost reporting periods beginning on or after January 1, 2008.[22]

BOARD FINDINGS AND CONCLUSIONS OF LAW

The Board finds that it is bound by the regulation text in effect *during* Greenbrier's FYE December 31, 2008 cost reporting period. The Board finds that there is a direct and irreconcilable conflict between the dates specified for year-three of the transition in 42 C.F.R. § 412.426(a)(3) as revised by the 2005 Correction and the dates specified in the Preamble Tables published subsequently in 2006 to 2008. Specifically, the regulation provides that year-three of the transition period covered cost reports with start dates "through January 1, 2008" while the Preamble Tables states that the transition period ended before January 1, 2008 such that any cost reporting periods "beginning or after January 1, 2008" are paid at 100 percent of the IPF-PPS.

The Board concludes that, when there is a direct and unresolvable conflict between dates stated in the regulation text and dates *subsequently* stated in the Preamble Tables,[23] the regulation text is binding. The Board's conclusion is supported by the fact that, when the Secretary issued the 2005 Correction to insert the dates at issue into 42 C.F.R. § 412.426(a)(3), the Secretary described this revision as a "correction [to] conform[] the regulation text to the actual policy."[24] Accordingly, the Board maintains that it does not have the authority to override and substitute the dates stated in § 412.426(a)(3) with dates subsequently stated elsewhere in *non*-regulatory text.

The Board recognizes that the Secretary issued the 2011 Final Rule to revise 42 C.F.R. § 412.426(a)(3) so that year-three of the transition only applies to "cost reporting periods beginning on or after January 1, 2007 and *before* January 1, 2008." However, as previously discussed, the effective date for this revision is July 1, 2011. Therefore, the revised regulation was not retroactive and is not applicable to this appeal. In this regard, the Board notes that the 2011 revision occurred after Greenbrier not only filed its cost report and received its NPR but also after it filed this appeal with the Board. Accordingly, without any retroactive application, it is clear the 2011 revisions to § 412.426(a)(3) are not applicable to this appeal.

DECISION AND ORDER

After considering the Medicare law and regulations, the evidence presented, and the parties' contentions, the Board finds that the Medicare Contractor improperly reimbursed Greenbrier at 100 percent of the Federal *per diem* rate under IPF-PPS for Greenbrier's FYE December 31, 2008. Accordingly, the Board remands this case back to the Medicare Contractor to reimburse Greenbrier for the services furnished during its FYE December 31, 2008 at the rates for year-three of the transition to IPF-PPS, namely 25 percent of the facility-specific payment and 75 percent of the Federal *per diem* rate.

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[22] *See* Medicare Contractor's Post-Hearing Brief at 6-7.

[23] Significantly, when the Secretary published the Preamble Tables in 2006, 2007 and 2008, the Secretary did not identify (much less correct as appropriate) the irreconcilable conflict between the tables and the regulation text. 71 Fed. Reg. at 27042; 72 Fed. Reg. at 25603; 73 Fed. Reg. at 25710-25711.

[24] 70 Fed. Reg. at 16726.

BOARD MEMBERS PARTICIPATING:

L. Sue Andersen, Esq.
Clayton J. Nix, Esq.
Charlotte F. Benson, CPA
Jack Ahern, MBA

FOR THE BOARD:

/s/
L. Sue Andersen, Esq.
Chairperson

DATE: February 24, 2017