

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2017-D24

**PROVIDER–**  
Twin Lakes Regional Medical Center

Provider No.: 18-0070

**vs.**

**MEDICARE CONTRACTOR –**  
CGS Administrators

**DATE OF HEARING –**  
May 24, 2016

Fiscal Year – 2013

**CASE NO.:** 13-0009

## INDEX

	<b>Page No.</b>
<b>Issue Statement .....</b>	<b>2</b>
<b>Decision.....</b>	<b>2</b>
<b>Introduction.....</b>	<b>2</b>
<b>Statement of the Facts.....</b>	<b>2</b>
<b>Discussion, Findings of Facts, and Conclusions of Law.....</b>	<b>3</b>
<b>Decision .....</b>	<b>5</b>

## **ISSUE STATEMENT**

Whether the decision by the Centers for Medicare and Medicaid Services (“CMS”) to impose a 2 percent reduction to the Market Basket Update for fiscal year (“FY”) 2013 for Twin Lakes Regional Medical Center (“Provider” or “Twin Lakes”), which also resulted in the ineligibility of Twin Lakes to participate in the Hospital Value Based Purchasing Program, was proper.<sup>1</sup>

## **DECISION**

After considering the Medicare law and regulations, the parties’ contentions and the evidence submitted, the Provider Reimbursement Review Board (“Board”) finds that CMS properly imposed a 2 percent reduction to the annual update to the standard Federal rate used to calculate the FY 2013 Medicare payments for Twin Lakes under the inpatient prospective payment system for acute care hospitals (“IPPS”).

## **INTRODUCTION**

Twin Lakes is a Medicare-certified acute care facility located in Leitchfield, Kentucky. Twin Lakes’ designated Medicare administrative contractor is CGS Administrators (“Medicare Contractor”).

On June 27, 2012, CMS determined that Twin Lakes failed to meet the requirements of the Hospital Inpatient Quality Reporting Program (“IQRP”) for FY 2013. Specifically, the determination stated that Twin Lakes was subject to a 2 percent reduction in the FY 2013 annual payment update because it did not submit data for Healthcare Associated Infection (“HAI”) for 2Q 2011 to the National Healthcare Safety Network (“NHSN”) by the deadline.<sup>2</sup>

Subsequently, Twin Lakes requested that CMS reconsider the decision regarding the reduction to its FY 2013 Medicare payments. On August 28, 2012, CMS upheld its reduction decision and denied Twin Lakes’ request for reconsideration.<sup>3</sup> On October 2, 2012, Twin Lakes timely appealed CMS’ denial to the Board, and met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-405.1840.

The Board held a telephonic hearing on May 24, 2016. Twin Lakes was represented by Christopher A. Melton, Esq., of Wyatt, Tarrant & Combs, LLP. The Medicare Contractor was represented by Scott Berends, Esq., of Federal Specialized Services.

## **STATEMENT OF THE FACTS**

The Medicare Contractor reduced Twin Lakes’ payment update for FY 2013 by 2 percent because Twin Lakes failed to submit twelve months of quality data for calendar year (“CY”) 2011. CMS required that Twin Lakes submit quality data to the Center for Disease Control and

---

<sup>1</sup> Transcript (“Tr.”) at 5-6.

<sup>2</sup> Provider Final Position Paper at 4.

<sup>3</sup> Medicare Contractor Exhibit I-2.

Prevention's ("CDC's") NHSN<sup>4</sup> system for all four quarters of CY 2011.<sup>5</sup> The four quarterly submitting deadlines were:

1. Data from the first quarter of CY 2011 was due on August 15, 2011;
2. Data from the second quarter of CY 2011 was due on November 15, 2011;
3. Data from the third quarter of CY 2011 was due on February 15, 2012; and
4. Data from the fourth quarter of CY 2011 was due on May 15, 2012.<sup>6</sup>

CMS determined that Twin Lakes missed the deadline for submission of Central Line Blood Stream Infection ("CLABSI") data for the second quarter of CY 2011.<sup>7</sup> These omissions resulted in a 2 percent reduction in the Medicare payment update for FY 2013 and made Twin Lakes ineligible for the Hospital Value Based Program ("HVBP").<sup>8</sup>

### **DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW**

Federal statute, 42 U.S.C. § 1395ww(i)(5)(c), requires acute care hospitals to report on the quality of their services in the form, manner and time as specified by the Secretary. An acute care hospital that fails to submit the IQRP data to the Secretary is assessed a one-time 2 percent reduction to its annual update to the standard Federal prospective payment.<sup>9</sup> Specifically:

For . . . fiscal year 2007 and each subsequent fiscal year, in the case of a subsection (d) hospital that does not submit to the Secretary in accordance with this clause, data required to be submitted on measures selected . . . with respect to such a fiscal year, the applicable percentage increase . . . for such fiscal year shall be reduced by 2.0 percentage points . . . . Such reduction shall apply only with respect to the fiscal year involved and the Secretary shall not take into account such reduction in computing the applicable percentage increase . . . for a subsequent fiscal year . . . .<sup>10</sup>

Twin Lakes argues that it was "substantially compliant" with the regulations and statutes at issue in this case.<sup>11</sup> Twin Lakes contends that the problem was with the process of submitting the quality data due to an expired digital certificate which NHSN uses to ensure that the registered user at the provider is communicating privately and securely with NHSN. Therefore, it was not able to submit the data by the November 15, 2011 deadline.

---

<sup>4</sup> NHSN is a secure, Internet-based surveillance system maintained and managed by the CDC, and can be used by many types of health care facilities in the United States... to collect and use data about HAIs, adherence to clinical practices known to prevent HAIs, the incidence or prevalence of multidrug-resistant organisms within their organizations, and other adverse events. 77 Fed. Reg. 53258-01, 53557 (Aug. 31, 2012)

<sup>5</sup> 75 Fed. Reg. 50224-50225 (Aug. 16, 2010).

<sup>6</sup> *Id.* at 50225. *See also* Medicare Contractor Exhibit I-4.

<sup>7</sup> Provider Final Position Paper dated October 29, 2015 at 4; Medicare Contractor Exhibit I-1 at 7.

<sup>8</sup> *Id.*

<sup>9</sup> 42 U.S.C. § 1395ww(b)(3)(B)(viii)(I).

<sup>10</sup> *Id.*

<sup>11</sup> Tr. at 9.

Twin Lakes further asserts that there were historical problems with NHSN's digital certificate process that led to quite a bit of confusion. Twin Lakes tried to timely submit its second quarter data for 2011 on November 15, 2011 at 3:15pm (the date the data was due)<sup>12</sup> but was unable to do so because Twin Lakes realized that the digital certificate for its registered user had expired.<sup>13</sup> Further, Twin Lakes asserts that they did not receive notice that its digital certificate was going to expire.<sup>14</sup> Twin Lakes obtained the updated digital certificate on November 16, 2011 and later submitted its quality data that same day at 6:00 pm.<sup>15</sup> Accordingly, Twin Lakes places the blame on the NHSN digital certificate system for its failure to submit its quality data on time. Indeed, Twin Lakes argues that the difficulties that it experienced with the digital certificate process became "nationally known" and that the CDC later moved from digital certificates to the Secure Access Management Services ("SAMS") system.<sup>16</sup>

While empathetic to the difficulties Twin Lakes faced and its assertion that it substantially complied with the data submission requirements, the Board finds that it is bound by applicable regulatory and statutory authorities. The statute at 42 U.S.C. § 1395ww(b)(3)(B)(viii)(I) requires that each subsection (d) hospital submit inpatient quality data as determined by the Secretary and imposes a 2 percent penalty upon a hospital that fails to do so. Significantly, the statute gives broad authority to the Secretary to specify the time, form and manner by which a hospital must submit data.

In this regard, the Board notes that the Ninth Circuit Federal Court of Appeals ("Ninth Circuit") recently weighed in on this issue in *PAMC, Ltd. v. Sebelius*.<sup>17</sup> In that case, CMS ordered a 2 percent reduction in PAMC's annual payment update due to late submission of its quality data. The Board upheld CMS' decision to deny the full market basket update explaining that it lacked the authority to award equitable relief because PAMC indisputably had failed to meet the applicable deadline.<sup>18</sup> PAMC appealed to the federal district court and then to the Ninth Circuit. Both courts agreed that the Board did not have independent authority to grant equitable relief in the instance of PAMC's late submission of quality data.<sup>19</sup> In this regard, the Ninth Circuit stated:

[PAMC] claims a right to equitable relief or the benefit of the contract doctrine of substantial performance. In doing so, PAMC appears to have forgotten the aphorism: "Men must turn square corners when they deal with the Government." *Rock Island A. & L. R. Co. v. United States*, 254 U.S. 141, 143 . (1920). As we will discuss further, the Department has always insisted that the deadline for submitting data is a square corner, but PAMC seeks to make it round. It is not entitled to do so.<sup>20</sup>

---

<sup>12</sup> Tr. at 26.

<sup>13</sup> See Provider's Post Hearing Brief at 4-6.

<sup>14</sup> Twin Lakes states that it may have received email notification that it needed to renew its security certificate but it possibly went to spam. Provider's Final Position Paper at 5; Provider Exhibit P-2 at 4.

<sup>15</sup> Tr. at 27-28.

<sup>16</sup> Provider's Final Position Paper at 5-6.

<sup>17</sup> *PAMC Ltd. v. Sebelius*, 747 F.3d 1214 (9th Cir. 2014).

<sup>18</sup> See PRRB Dec. No. 2011-D15 at 6 (Dec. 14, 2010).

<sup>19</sup> See *PAMC, Ltd. v. Sebelius*, 2012 WL 12886817 at \*3 (C.D. CA 2012); 747 F.3d at 1219.

<sup>20</sup> 747 F.3d 1217.

Similarly, the Board does not have the authority to make the corner “round” by considering factors outside those specifically recognized under the statute and regulations. The Board finds Twin Lakes clearly did not submit its quality data timely, and the statute, regulations, and relevant final rules mandate application of the 2 percentage point penalty whenever a hospital fails to submit its outpatient quality data in the form, manner, and time specified by the Secretary.

The Board recognizes that 42 C.F.R. § 412.140(c)(2) provides for certain exemptions and exceptions. However, the regulation specifies that the hospital must initiate the process by submitting a request to CMS following the submission requirement on the QualityNet website and that CMS will grant such requests only at its discretion where CMS determines there were "extraordinary circumstances beyond the control of the hospital." As Twin Lakes has not argued that it submitted (or even qualified for) an exemption/exception, the Board need not address exemptions/exceptions.

Notwithstanding, the record is clear that Twin Lakes would not have qualified for such an exemption/exception. NHSN notified providers through user manuals and newsletters that each user at a facility would need to acquire and maintain a security certificate in order to submit quality data, that each digital certificate expires 12 months from the date of installation and that each user must apply for a new certificate every year.<sup>21</sup> Further, NHSN newsletters provided updates on the impending new SAMS system and notified providers that they needed to continue to renew any soon-to-expire digital certificates prior to NHSN finalizing and implementing the new SAMS system.<sup>22</sup>

While Twin Lakes claimed that it did not receive notification of the expiring digital certificate, it stated “[t]he possibility exists the email notifying her of the expiration of the digital certificate could have been filtered to our information system’s spam mail. In any case, Twin Lakes did not follow NHSN’s directions regarding updating its digital certificates.

## **DECISION**

After considering the Medicare law and regulations, the parties’ contentions and the evidence submitted, the Board finds that CMS properly imposed a 2 percent reduction to the annual update to the standard Federal rate used to calculate the FY 2013 Medicare payments for Twin Lakes under IPPS.

---

<sup>21</sup> See, e.g., Medicare Contractor Exhibit I-8 at 17-18 (page 7 of this exhibit confirms these training materials were issued June 15, 2009); Medicare Contractor Exhibit I-11 at 3; NHSN Facility Administrator Enrollment Guide at 15 (Oct. 12, 2010) (available from NHSN).

<sup>22</sup> See, e.g., Medicare Contactor Exhibit I-9 at 3; Medicare Contractor Exhibit I-11 at 4-5. Other examples of NHSN Newsletters discussing the renewal of digital certificates are available at [www.cdc.gov/nhsn/newsletters/index.html](http://www.cdc.gov/nhsn/newsletters/index.html) and include: NHSN Newsletter, Vol. 4, Issue 3, at 3 (Aug. 2009); NHSN Newsletter, Vol. 5, Issue 1, at 5 (Apr. 2010); NHSN Newsletter, Vol. 5, Issue 3, at 3 (Oct. 2009).

**BOARD MEMBERS PARTICIPATING:**

L. Sue Andersen, Esq.  
Clayton J. Nix, Esq.  
Charlotte F. Benson, CPA  
Gregory Ziegler

**FOR THE BOARD:**

/s/  
L. Sue Andersen, Esq.  
Chairperson

**DATE:** August 25, 2017