PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION

2019-D13

PROVIDER-
Rehabilitation Hospital of the Pacific

Provider No.: 12-3025

vs.

MEDICARE CONTRACTOR –
Noridian Healthcare Solutions c/o Cahaba Safeguard Administrators (J-E)

HEARING DATE –
October 16, 2017

Cost Reporting Period Ended –
September 30, 2017

CASE NO. – 17-1238

INDEX

ISSUE STATEMENT:

Whether the reduction to the Provider's Market Basket Update for the fiscal year ("FY") 2017 under the Inpatient Rehabilitation Facility ("IRF") Quality Reporting Program ("QRP") was proper.[1]

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board") finds that the reduction to Rehabilitation Hospital of the Pacific's ("Provider's") Market Basket Update for FY 2017 under the IRF QRP was proper.

INTRODUCTION:

The Provider is an IRF located in Honolulu, Hawaii. The IRF QRP requirements for FY 2017 included the requirement that IRFs submit certain quality data during the calendar year ("CY") 2015. On July 7, 2016, the Centers for Medicare and Medicaid Services ("CMS") notified the Provider that it determined the Provider failed to meet IRF QRP requirements for FY 2017, and as a result, the Provider would be subject to a two percentage point ("2 percent") payment reduction in the FY 2017 Annual Increase Factor.[2] Specifically, CMS notified the Provider that it did not submit all required months of complete Catheter-Associated Urinary Tract Infection ("CAUTI") data for CY 2015.[3] Following the Provider's request for reconsideration, CMS upheld its decision.[4]

The Provider timely appealed CMS' reconsideration decision and met the jurisdictional requirements for a hearing before the Board. The Board held a telephonic hearing on October 16, 2017. Claire Reed, Esq. and Michael Grubbs, Esq. of Barnes & Thornburg, LLP represented the Provider. Noridian Healthcare Solutions ("Medicare Contractor") was represented by Jerrod Olszewski, Esq., of Federal Specialized Services.

STATEMENT OF FACTS AND RELEVANT LAW:

The Medicare program pays an IRF[5] for services under the IRF prospective payment system ("IRF PPS").[6] Under IRF PPS, the Medicare program pays an IRF predetermined, standardized

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[1] Transcript ("Tr.") at 5-6.
[2] Exhibit P-1.
[3] *Id.* The Board notes that the CMS notice dated July 7, 2016 did not identify which months had not been submitted by the Provider. However, the Medicare Contractor's Final Position Paper at 5 and the Provider's Exhibit P-3, documented that no CAUTI data was reported to CMS for the months of November and December, 2015. *See also* Provider's Final Position Paper at 1.
[4] Exhibit P-4.
[5] An IRF or "rehabilitation facility" includes inpatient hospital services of a rehabilitation hospital and a rehabilitation unit within a hospital. *See* 42 U.S.C. § 1395ww(j)(1)(A).
[6] *See* 42 U.S.C. § 1395ww(j); 42 C.F.R. §§ 412.600 – 412.634.

amounts per discharge, subject to certain payment adjustments.[7] The standardized IRF PPS payment amounts are increased each year by a "market basket update" to account for increases in operating costs.[8]

Section 3004(b) of the Patient Protection and Affordable Care Act ("ACA") of 2010[9] amended 42 U.S.C. § 1395ww(j) to establish the IRF QRP. This amendment requires each IRF to submit certain quality of care data "in a form and manner, and at a time, specified by the Secretary."[10] For 2014 and subsequent fiscal years, including the FY 2017 at issue in this case, federal law specifies that an IRF that fails to report the quality data required under the IRF QRP is subject to a 2 percent reduction to its annual increase factor to the standard federal IRF prospective payment for the affected fiscal year.[11]

The regulation governing IRF QRP data submission is located at 42 C.F.R. § 412.634 (2015) and it states:

> *(b) Submission Requirements and Payment Impact.*
>
> (1) IRFs must submit to CMS data on measures specified under section 1886(j)(7)(D), 1899B(c)(1), and 1899B(d)(1) of the Act, as applicable. Sections 1886(j)(7)(C) and (j)(7)(F)(iii) of the Act require each IRF to submit data on the specified measures in the form and manner, and at a time, specified by the Secretary.
>
> (2) As required by section 1886(j)(7)(A)(i) of the Act, any IRF that does not submit data in accordance with section 1886(j)(7)(C) and (F) of the Act for a given fiscal year will have its annual update to the standard Federal rate for discharges for the IRF during the fiscal year reduced by two percentage points.[12]

The IRF QRP requires IRFs to submit various quality measures, including data regarding CAUTI.[13] CMS instructed IRFs to submit CAUTI quality data to the Centers for Disease Control and Prevention ("CDC") through the CDC's National Healthcare Safety Network ("NHSN") computer system.[14] IRF QRP instructions and deadlines[15] for data submission are

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[7] *See* 42 C.F.R. § 412.624.
[8] *See* 42 U.S.C. § 1395ww(j)(3). The "market basket update" is also referred to as the "annual percentage update," or APU.
[9] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3004(b), 124 Stat. 119, 369-70 (2010).
[10] *Id.* at § 3004(b)(2), 124 Stat. at 369. *See also* 42 C.F.R. § 412.634(b)(1).
[11] *See* 42 U.S.C. § 1395ww(j)(7)(A)(i); 42 C.F.R. § 412.624(c)(4).
[12] *See* 80 Fed. Reg. 47135, 47139 (Aug. 6, 2015).
[13] *See* 79 Fed. Reg. 45872, 45911-14 (Aug. 6, 2014). *See also* https://www.cdc.gov/nhsn/training/patient-safety-component/.
[14] *See* 79 Fed. Reg. at 45912-13.
[15] *See* https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/IRF-Quality-Reporting-Data-Submission-Deadlines.html.

posted on the CMS "IRF QRP" website.[16] Since 2012, the NHSN website has made available instructions and manuals for using the NHSN system.[17]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

This case focuses on whether the Provider submitted certain CAUTI quality data for CY 2015 that is required under the IRF QRP for FY 2017 in order for the Provider to be eligible for the full market basket update for FY 2017. More specifically, the parties dispute whether the Provider timely submitted the requisite CAUTI data to CMS for two months from the reporting period for CY 2015—November and December 2015. The fact that the Provider had three reporting locations, two of which were not reflected on the CAUTI monthly reporting plans for these 2 months, is the central factor in this dispute.[18] Accordingly, the Board reviewed the guidance in effect for CY 2015 that CMS gave to IRFs on how to submit the requisite CAUTI quality data.

The online *Operational Guidance for Inpatient Rehabilitation Facilities*, published in November 2014 and available on the CDC website, explained that CMS published final rules in the Federal Register on August 18, 2011 that included CAUTI reporting from IRFs, including both free-standing IRFs and IRF units within hospitals, via the CDC's NHSN in the CMS Inpatient Rehabilitation Facility Quality Reporting Program requirements for 2012.[19] More specifically, the rule announced a reporting requirement for CAUTI data from free-standing IRFs and IRF units within hospitals beginning on October 1, 2012.[20]

The published *Operational Guidance* further explains that:

> NHSN users reporting CAUTI data to the system must adhere to the definitions and reporting requirements for CAUTIs as specified in the NHSN Patient Safety Component Protocol Manual http://www.cdc.gov/nhsn/inpatient-rehab/CAUTI/index.html. This includes reporting of denominator data (patient days and urinary catheter days), as well as symptomatic urinary tract infections (SUTIs) and asymptomatic bacteremic urinary tract infections (ABUTIs) that are catheter associated, i.e., the patient has an indwelling urinary catheter in place for >2 calendar days on the date of the event (with the date of device placement being day 1) and an indwelling urinary catheter was in place on the date of the event or the day before. CAUTI data must be reported from ***each*** patient care location in which facilities are required to monitor and report CAUTIs.

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[16] *See* https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/.
[17] *See* https://www.cdc.gov/nhsn/validation/index.html.
[18] *See* Tr, at 13-14, 19.
[19] *See* https://www.cdc.gov/nhsn/pdfs/cms/irfs/IRF-CAUTI-Guidance_2015.pdf at 1.
[20] *Id.*

> Free-standing IRFs and IRF units within hospitals must report CAUTIs and associated denominator data for infections that occur on or after October 1, 2012 from all inpatients.
>
> Monthly reporting plans [MRPs] must be created or updated to include CAUTI surveillance in ***all*** locations from which reporting is required, i.e., CAUTI surveillance must be "in-plan" for data to be shared with CMS. All data fields required for both numerator and denominator data collection must be submitted to NHSN, including the "no events" field for any month during which no CAUTI events were identified. Data must be reported to NHSN by means of manual data entry into the NHSN web-based application or via file imports using the Clinical Document Architecture (CDA) file format for numerator and denominator data (resources available at http://www.cdc.gov/nhsn/CDA/index.html).[21]

The key statement in the above guidance is that "Monthly reporting plans [MRPs] must be created or updated to include CAUTI surveillance in all locations from which reporting is required, i.e., CAUTI surveillance must be "in-plan" for data to be shared with CMS." So in other words, *in order for CAUTI data to transmit to CMS*, an IRF with multiple reporting location must have a CAUTI reporting plan for each month for each of its reporting locations.

The Provider contends that it properly and timely submitted all required CAUTI information through the NHSN (including the MRPs for November and December 2015), but that the November and December 2015 data the Provider submitted was not properly forwarded by NHSN.[22] The Provider also asserts that it took all steps to ensure its CAUTI information was correctly submitted under the IRF QRP and received no alerts from the NHSN regarding any missing CAUTI data for November and December 2015.[23] The Provider supplied a NHSN printout for November 2015 dated January 5, 2016 and a NHSN printout for December 2015 dated January 25, 2016.[24] The printouts are entitled "Denominators for Intensive Care Unit (ICU)/Other locations (not NICU or SCA)." As the dates for the printouts are well before the CAUTI data submission deadline of May 15, 2016,[25] the Provider argued that these printouts support its claims that it timely submitted the data and that the CAUTI data it submitted for November and December 2015 included total patient days, the urinary catheter days, and the selection of "Report No Events" for the CAUTI measure.[26]

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[21] *See* https://www.cdc.gov/nhsn/pdfs/cms/irfs/IRF-CAUTI-Guidance_2015.pdf (emphasis added).
[22] Provider's Final Position Paper at 6.
[23] Tr. at 37-39.
[24] *See* Provider's Final Position Paper at 4; Exhibit P-8 at 31-36.
[25] *See* Provider's Final Position Paper at 4. The fourth quarter deadline was May 15, 2016. Successful submission of data for all four quarters was required to qualify for a full market basket update.
[26] *Id*. *See also* Exhibit P-8 at 31-36.

However, by the Provider's own admission, the original MRPs for November and December 2015 listed only one location for CAUTI surveillance, rather than the Provider's three locations.[27] Further, the Provider acknowledged that the original MPRs for November and December 2015 were subsequently edited and the data release error was corrected by the Provider after the May 15, 2016 final deadline for data submission for the November and December 2015 MRPs.[28] After corrections were made to the November and December 2015 reporting plans, the month column properly displayed "3" instead of the previously incorrect "1."[29]

The Provider argues that "[t]he two percent (2%) statutory penalty is triggered only if a provider fails to submit certain required quality data to NHSN before the deadline [and that t]he fact that NHSN did not forward data does not trigger the statutory requirement to submit data, absent explicit instruction that submission would only occur if the Monthly Reporting Plans listed all three locations for that quarter."[30]

The Board points out that the NHSN website contains a CMS resource page dedicated to assisting providers in reporting and checking their data for the different CMS programs. This resource page includes MRP checklists, quick reference guides, facility specific operational guidelines and other helpful documentation regarding CMS reporting.[31] Providers are expected to avail themselves of these resources. The CDC *Operational Guidance* published November 2014 states "Monthly reporting plans must be created or updated to include CAUTI surveillance in all locations from which reporting is required, i.e., CAUTI surveillance must be 'in-plan' for data to be shared with CMS."[32] Further, this guidance instructs providers that "CDC will share all in-plan CAUTI data from locations that are required to report CAUTIs (all inpatient locations for free-standing IRFs and IRF units within hospitals). CDC will provide a CAUTI standardized infection ratio for each reporting IRF or IRF unit within a hospital by CMS Certification Number (CCN)."[33]

Thus, the Board finds that the Provider was on notice that IRFs were required to report all locations on their MRPs, and that failure to report all locations would be non-compliant with the reporting rules. Because the Provider's MRPs for November and December 2015 did not include CAUTI data for all three locations as required, the *actual* quality data associated for this measure for November and December 2015 was not transmitted to CMS by NHSN, leaving the Provider out of compliance with the IRF QRP requirements for the fourth quarter of CY 2015.

Although the Board is sympathetic to the Provider's position, the Board's authority is limited to the application of statutory and regulatory requirements to the facts and circumstances of the issues presented and is unable to provide equitable relief. The Ninth Circuit weighed in on this question of equitable relief in *PAMC Ltd. V. Sebelius*, stating:

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[27] Provider's Final Position Paper at 4. *See also* Tr. at 83-85.
[28] Provider's Final Position Paper at 4; Exhibit P-3 at 2.
[29] Exhibit P-3 at 2 and Attachment 4.
[30] Provider's Final Position Paper at 6.
[31] https://www.cdc.gov/nhsn/cms/index.html.
[32] https://www.cdc.gov/nhsn/pdfs/cms/irfs/IRF-CAUTI-Guidance_2015.pdf at 2.
[33] *Id.* at 3.

> [PAMC] claims a right to equitable relief or the benefit of the contract doctrine of substantial performance. In so doing, PAMC appears to have forgotten the aphorism: "Men must turn square comers 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 now seeks to make it round. It is not entitled to do so.[34]

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. Rather, the statute, regulations, and relevant final rules mandate application of the 2 percent penalty whenever an IRF fails to submit IRF quality data in the form, manner and time as specified by the Secretary.[35]

The Board recognizes that, in the preamble to the FY 2015 IRF PPS Final Rule published on August 6, 2014, CMS stated that, for reconsiderations relevant to FY 2016 and beyond IRF payments, "[w]e may reverse our initial finding of noncompliance if: (1) The IRF provides adequate proof of full compliance with all IRF QRP reporting requirements during the reporting period; or (2) the IRF provides adequate proof of a valid or justifiable excuse for noncompliance if the IRF was not able to comply with the requirements during the reporting period."[36] However, the preamble discussion is unclear whether CMS alone has the authority to consider a "justifiable excuse" and it was not incorporated into the governing regulation at 42 C.F.R. § 412.634. The Board need not resolve this issue as it is clear from the record that the Provider in this case did not have a "justifiable excuse" and simply failed to follow the instructions for including all reporting locations on the monthly reporting plans for the fourth quarter of CY 2015 which resulted in the quality data associated with the CAUTI measure not being transmitted to CMS for those months. Moreover, as the months of January to October 2015 are not in dispute, it appears that the Provider was able to properly complete the MPR for these months;[37] however, the record is unclear as to why the Provider failed to get it right for the subsequent 2 months (*i.e.*, November and December 2015). Finally, the Board notes that its decision in this case is consistent with its decisions in similar cases where the provider failed to complete the required MRP which resulted in certain quality data not being transmitted to CMS.[38]

The Board finds that the evidence in this case establishes that, by failing to include all three reporting locations in its submission, the Provider failed to properly configure its MRPs for November and December 2015 pursuant to the NHSN guidelines. As a result, the November and December 2015 CAUTI data was not transmitted from the NHSN to CMS. As the Provider did

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[34] *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1217 (9th Cir. 2014).
[35] *See* 42 U.S.C. § 1395ww(j)(7)(A)(i); 42 C.F.R. § 412.624(c)(4).
[36] 79 Fed. Reg. 45872, 45919 (Aug. 6, 2014).
[37] *See* Tr. at 22-24.
[38] *See, e.g., Westchester Gen. Hosp. v. First Coast Serv. Options*, PRRB Dec. No. 2018-D24 (Feb. 12, 2018), *declined review*, CMS Adm'r (Mar. 20, 2018); *Conway Reg. Rehab. Hosp. v. Novitas Solutions, Inc.*, PRRB Dec. No. 2018-D42 (June 28, 2018), *declined review*, CMS Adm'r (Aug. 2, 2018).

not submit its CY 2015 quality data in the form and manner, and at a time, specified by CMS, the Board concludes that the Provider is subject to a 2 percent reduction in its market basket update for FY 2017.

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board concludes that the reduction to the Provider's market basket update for FY 2017 was proper.

BOARD MEMBERS:

Clayton J. Nix, Esq.
Charlotte F. Benson, CPA
Gregory H. Ziegler, CPA, CPC-A
Robert A. Evarts, Esq.
Susan A. Turner, Esq.

FOR THE BOARD:

1/30/2019

X Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: Clayton J. Nix -A