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Medicare

Court Hands HHS Win in Medicare Pay Dispute With Hospitals



By Eric Topor

Aug. 18 — The HHS's interpretation of how Medicare managed care days are accounted for in Medicare payments to hospitals with high shares of low-income patients was upheld Aug. 17 (*Allina Health Servs. v. Burwell*, 2016 BL 266234, D.D.C., No. 14-cv-1415, 8/17/16) (*Allina II*).

The U.S. District Court for the District of Columbia said the disproportionate share hospital (DSH) calculation that the Centers for Medicare & Medicaid Services published for fiscal year 2012 wasn't based on a now-vacated 2004 final rule and didn't require a formal notice and comment period. The 2012 DSH calculation counted patients covered by Medicare Advantage, formerly known as Part C, as those "entitled to Part A benefits," which resulted in reduced DSH payments to hospitals.

The interpretation of the DSH statute and whether Medicare Advantage patients should be considered entitled to Part A benefits is a long-running dispute between the CMS and hospitals, and continues despite the court's grant of summary judgment to the government.

In parallel litigation, a federal appeals court vacated the 2004 final rule and ordered the CMS to review its interpretation of the statute (*Allina I*) (64 HCDR, 4/3/14).

The CMS administrator reached the same conclusion as the original 2004 rule (that Medicare Advantage patients were entitled to Part A benefits), and an appeal of the CMS administrator's decision is before the court (and Judge Gladys Kessler) as well (*Allina Health Sys. v. Burwell*, D.D.C., No. 16-cv-150, filed 1/29/16). The Department of Health and Human Services motion to dismiss the action is currently pending in the hospitals' appeal of the CMS administrator's decision.

Kenneth Marcus, an attorney with Honigman Miller Schwartz and Cohn LLP in Detroit, told Bloomberg BNA Aug. 18 that Kessler "appears, at least implicitly, to have approved the [CMS administrator's] adjudication." He added that "it will be interesting to see what arguments, if any, the hospitals can advance before Judge Kessler that were not advanced in *Allina II*."

Marcus said that through *Allina II*, the HHS "succeed[ed] in defending the substantive validity of the Medicare Advantage days policy without the support of a valid regulation." Marcus said that the appeal from the CMS administrator's decision "squarely places before the court the validity of the adjudication on remand" from *Allina I*, and the hospitals now "will need to overcome the court's *Allina II* decision" if the court doesn't grant the HHS's motion to dismiss.

Counsel for the plaintiff hospitals declined to comment on the court's decision.

'Interpretive Rule.'

Kessler rejected several arguments from the hospitals in her decision in *Allina II* on the FY 2012 DSH rule. Kessler first rejected the argument that the 2012 rule was based on the 2004 final rule vacated by *Allina I*, and said the fact that the administrator reached the same result as the vacated rule through adjudication "is not—in and of itself—indicative that the 2004 final rule was relied upon."

Instead, the court accepted the HHS's argument that its 2012 rule stemmed from its interpretation of the Medicare DSH statute itself. The court said that while the 2012 DSH interpretation was a "rule," it was an interpretive rule that didn't require formal notice and comment periods under the Administrative Procedure Act (unlike a legislative rule, which would require public notice and comment).

Administrator's Decision Adequate

Kessler said the DSH statute "provides an 'adequate legislative basis' for including Part C days" in the DSH calculations. However, Kessler also noted that the HHS didn't actually provide an explanation of how it arrived at the 2012 DSH rule, a point the hospitals also noted in arguing that the 2012 rule was arbitrary and capricious.

Snapshot

- HHS rule on Medicare Advantage days upheld as valid "interpretive rule," no notice or comment required
- Attorney: Decision could make it more difficult for hospitals to win in related litigation

Instead, the court accepted the HHS's suggestion that it look to the CMS administrator's decision as the agency's explanation of the 2012 rule, and said the agency's process wasn't arbitrary. The court further said that the HHS's interpretation of Medicare Advantage day treatment wasn't inconsistent with the DSH statute, pointing to precedent in *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1 (D.C. Cir. 2011), and *Catholic Health Initiatives v. Sebelius*, 718 F.3d 914 (D.C. Cir. 2013), which both upheld the agency's interpretation of the phrase "entitled to Part A benefits" in the DSH statute.

Akin Gump Strauss Hauer & Feld LLP represented the hospitals. The Department of Justice represented the government.

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