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### Medicare

## HHS Has Four Years to Clear Medicare Claim Appeals Backlog



By Eric Topor

Dec. 7 — The HHS will have until the end of 2020 to fully resolve a backlog of about 658,000 pending Medicare provider claim appeals or face further judicial action (*Am. Hosp. Ass'n v. Burwell*, 2016 BL 403557, D.D.C., No. 14-cv-851, 12/5/16).

In a significant win for providers, the U.S. District Court for the District of Columbia Dec. 5 imposed the four-year timetable requested by the American Hospital Association to reduce a Medicare appeals backlog at the administrative law judge level that has exploded in recent years. Medicare appeals at the ALJ level are statutorily required to be resolved within 90 days, but hospitals and other providers are facing resolution timelines of a year or more due to the Department of Health and Human Services' inability to process the number of ALJ appeals, which skyrocketed fourfold from fiscal years 2012 to 2014.

The AHA's general counsel, Melinda Hatton, said the decision "is a victory for hospitals that continue to have billions of dollars in Medicare reimbursement tied up in a heavily backlogged appeals system." Hatton told Bloomberg BNA Dec. 6 "we trust that HHS will implement real reforms critical to resolving the backlog, including fundamental reforms of the RAC program," to meet the annual backlog reduction targets.

Representatives of the HHS didn't respond to a request for comment from Bloomberg BNA.

### Judicial Intervention

Though previously reluctant to take direct action to address the HHS's administrative issues, Judge James E. Boasberg agreed with the AHA that judicial intervention was necessary. Boasberg ordered the HHS to hit annual backlog reduction rates of 30, 60, 90 and 100 percent at the end of 2017, 2018, 2019 and 2020, respectively.

Mark D. Polston, a partner in King & Spalding's health-care practice in Washington, told Bloomberg BNA Dec. 6 the ruling was "significant" but wasn't a "total victory for providers." Polston regularly counsels providers concerning Medicare reimbursement issues.

The types of denied Medicare claims that are trapped in the appeals backlog are varied, comprising both prepayment and postpayment review denials. The AHA said in its complaint that providers' medical judgment is often an issue in the appealed and backlogged claims, and in "a growing number of cases, original payment decisions are overturned based on reviewers' findings that certain services were not medically necessary."

Kenneth Marcus, with Honigman Miller Schwartz and Cohn LLP in Detroit, told Bloomberg BNA Dec. 6 that the HHS "likely will take the timetable seriously." But Marcus pointed out that the court didn't provide for any penalty against the HHS and granted no relief to the plaintiffs "in the event there is significant slippage in satisfying the timetable."

### No Specific Actions Ordered

The HHS argued that even the imposition of the AHA's suggested timetable would result in it making payments on Medicare claims regardless of whether the payment is merited and "conflict with the Medicare statute." Boasberg pointed out that the court wasn't ordering payment of Medicare claims lacking merit and that the HHS was already violating the Medicare statute's 90-day deadline for issuing rulings in ALJ appeals.

Boasberg said meeting the "statutory demands for both accuracy and timeliness will no doubt prove challenging" for the HHS, "but such is the task at hand." Boasberg also ordered the HHS to give the court quarterly status reports on its efforts to reduce the ALJ appeals backlog.

The AHA asked the court to order the HHS to take specific actions to reduce the backlog, including expanding Medicare claim settlements program, changing the recovery audit contractor (RAC) program and deferring repayment and interest on Medicare claims past the 90-day statutory appeal deadline. Boasberg declined to order the HHS to implement any specific change to hit the annual backlog reduction targets, however, and instead allowed the HHS to decide what steps to take.

### Snapshot

- HHS must meet annual targets to reduce ALJ Medicare appeals backlog until full reduction by end of 2020
- Court didn't order any changes to RAC program; HHS has discretion on how to meet annual backlog targets

Marcus said the AHA's timetable solution "invited the court to take an easy way out" instead of imposing more direct actions to reduce the appeals backlog. Marcus noted that the annual backlog reduction targets only apply to the current Medicare appeals backlog, and the court's order gave "no assurance that newly filed appeals will not result in another huge backlog." Marcus has extensive experience representing providers in Medicare and Medicaid appeals.

### **Aggressive Action Needed**

The court clearly wanted to see more aggressive efforts in backlog reduction from the HHS if the agency wanted to stave off court action, but Boasberg noted that the HHS "[didn't] point to any categorically new administrative actions." Polston said the HHS should consider "more aggressive" steps to reduce the appeals backlog, including expanded use of settlements (which the HHS used to settle 260,000 inpatient hospital admission claims in 2014 at 68 cents on the dollar).

The HHS urged the court to allow the measures it had already put in place more time to work and pointed to a Nov. 7 declaration by Ellen Murray, the HHS's assistant secretary for financial resources and chief financial officer, that the backlog was already decreasing at a faster pace than previously anticipated. Murray estimated there were 658,307 Medicare appeals pending at the ALJ level as of the end of FY 2016 (lower than the agency's earlier projection of 757,090 pending appeals), and now estimated only 560,663 appeals pending at the end of FY 2017.

The HHS recently reopened a settlement program that offers certain hospitals an opportunity to receive nearly two-thirds of their contested reimbursement in return for dropping their appeals. The settlement program opened on Dec. 1 and allows acute care and critical access hospitals to request a settlement for inpatient services claims before Oct. 1, 2013, that were denied by a Medicare contractor because of a challenge to the inpatient nature of the claim and are now on appeal.

The court said the number of backlogged claims was "still unacceptably high" though, and granted the AHA's request for a mandamus order in the form of the annual backlog reduction timetable. Boasberg said the HHS's assertion that "legislative action" from Congress was ultimately necessary to resolve the backlog entirely was "a significant caveat" to its argument against any judicial intervention.

### **Problems With RACs**

Polston said tackling the conditions that led to the backlog in the first place, namely changes to the recovery audit contractor program, needed to be part of the HHS's course of action as well. Although the HHS and the AHA dispute how big a factor Medicare claim denials from the RAC program were in creating the backlog, Polston said "the agency has not resolved the fundamental problem with RACs—their contingency fee which rewards large numbers of denials such that RACs get to keep what is not appealed or what sticks on appeal."

The AHA argued in its motion for summary judgment that the court should order changes to the RAC program, specifically in the way RAC financial incentives are structured and to impose financial penalties on specific RACs that have the highest ALJ reversal rates. Polston said, "It's disappointing that the agency feels that it cannot financially penalize RACs for a large overturn rate."

Polston said he expected the HHS to support future legislation that could alleviate the backlog, including the AFIRM Act, if the agency "sincerely believes legislation is necessary to help it reduce the backlog." The Audit & Appeals Fairness, Integrity, and Reforms in Medicare Act of 2015 (S. 2368) aims to reform the appeals process and allocate additional funding for the Medicare appeals process. The bill was introduced in December 2015 by Sen. Orrin Hatch (R-Utah), but hasn't advanced.

The court rejected one portion of the AHA's suggested timetable: that a default judgment be entered for all outstanding backlogged ALJ claims still pending by Jan. 1, 2021. Boasberg instead said the AHA can make a motion for default judgment on any remaining backlogged claims in 2021 if the HHS does indeed fail to eliminate the backlog.

Hogan Lovells US LLP represented the AHA. The Department of Justice represented the government.

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### **For More Information**

The decision is at <http://src.bna.com/kxG>.

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