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### Hospitals

#### **Attorneys Ask for Medicare Appeal Reinstatement After Missing Deadline**

**H**ospital group Dignity Health asked a federal district court in California May 16 to reinstate a Medicare reimbursement appeal before the Provider Reimbursement Review Board after its attorneys missed the deadline to submit a preliminary position paper by 10 days (*Dignity Health v. Burwell*, C.D. Cal., No. 2:16-mc-00066, filed 5/16/16).

Attorneys from Hooper, Lundy & Bookman PC (HLB) took over representation of Dignity Health in an appeal involving the Medicare wage index for certain Dignity Health facilities (formerly Catholic Healthcare West) for fiscal year 2008, and acknowledged receiving PRRB e-mails notifying the representing attorney of the Sept. 1, 2015, deadline for submission of the preliminary position paper.

However, HLB said the deadline was dropped from its master calendar for unknown reasons, and the position paper wasn't submitted until Sept. 10, 2015, leading the PRRB to dismiss the appeal for failure to adhere to the deadline.

Kenneth Marcus, an attorney with Honigman Miller Schwartz and Cohn LLP in Detroit told Bloomberg BNA that, "[h]istorically the PRRB has been highly intolerant to failure to satisfy and deadline, and extremely reluctant to reinstate an appeal, although reinstatements have been made."

Marcus said that an "encouraging sign" was the PRRB's inclusion of a new provision (46.3) in its amended rules on July 1, 2015, which allows reinstatement of a dismissed appeal for "good cause," though that doesn't include "administrative oversight."

HLB, which is representing Dignity Health in the action as well, didn't return a request for comment.

**No Guidance Given.** HLB said the dismissal of Dignity Health's appeal for the missed position paper deadline was arbitrary and capricious because it didn't adversely affect either party, and the PRRB lacks rules as to consideration of the actual impact of a missed deadline. HLB also said there was no PRRB guideline as to when a provider is allowed to remediate an unintentional filing error, or what sanctions will result from missed deadlines.

Marcus noted that the PRRB has regulatory discretion to impose a lesser sanction that dismissal for a missed filing deadline, "dismissal appears to be the sanction of choice." Further, Marcus said the PRRB "does not appear to impose sanctions that correlate with the transgression," and that "a provider that has devoted substantial resources to pursuit of an appeal receives the same 'death penalty' as a provider that has entirely abandoned its case."

In addition, HLB said the PRRB should have placed Dignity Health's appeal in abeyance because the wage index issue on appeal in the case was actually before another federal district court that could have resolved the legal issue at bar.

HLB also cited inequitable treatment of providers and Medicare administrative contractors (MACs, who are the opposing parties in PRRB appeals) appearing before the PRRB, because MACs "are not similarly penalized with forfeiture for failure to comply with the requirement to timely submit a position paper."

Marcus concurred with HLB's argument, noting that a MAC receives a "slap on the wrist" for missing a deadline, and in fact the PRRB is "expressly precluded from taking more severe sanctions."

By ERIC TOPOR

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