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Medicare Reimbursement

HHS Losing Fight Over Regulation Limiting Medicare Appeals



By Eric Topor

Five hospitals challenging Medicare payment regulations were spared a needless trip back to the agency appeals process (*Bayshore Cmty. Hosp. v. Hargan*, 2017 BL 382122, D.D.C., No. 16-cv-2353, 10/25/17).

The U.S. District Court for the District of Columbia said Oct. 25 that the hospitals, which are challenging payment regulations regarding treatment for very costly patients, shouldn't be forced to head back to the Department of Health and Human Services Provider Reimbursement Review Board (PRRB) to continue their appeal. The court noted that prior court precedent would require the PRRB to send the appeal back to federal court anyway through expedited judicial review, making the agency's request to do so futile.

The decision puts pressure on the HHS to take some type of action on the self-disallowance regulation, which has suffered its second recent defeat in this federal district court but hasn't been withdrawn or changed by the agency.

The PRRB's continued enforcement of the self-disallowance regulation, which requires providers to file annual reimbursement claims under protest to preserve appeal rights, can tie up millions of dollars in disputed reimbursements in litigation, as it continues to do with the \$18.5 million the plaintiff hospitals claim they were unjustly denied through improper Medicare outlier regulations.

Judge Amit P. Mehta was noticeably frustrated with the HHS's procedural actions in the appeal, having decided not to appeal a prior critical ruling (*Banner Heart Hosp. v. Burwell*) against the self-disallowance regulation, yet refusing to alter the regulation or apply the critical ruling to the hospital's appeal at the PRRB level. Mehta said the regulation wouldn't stop the hospitals from proceeding with their appeal in federal court, but he wasn't prepared to declare the regulation invalid for all providers without further briefing from both parties.

Effect on Other Appeals

The self-disallowance regulation won't block the hospitals' appeal in this case, but the regulation remains in place, and this decision isn't binding on other cases or parties, health-care attorney Kenneth Marcus told Bloomberg Law Oct. 25. Marcus, a Bloomberg Law advisory board member and partner at Honigman Miller Schwartz and Cohn LLP in Detroit, said the PRRB failed to recognize that "Banner Health invalidated the application of the self-disallowance regulation to a challenge, such as this one, of a regulation."

Mark D. Polston, a partner in King & Spalding's health-care practice in Washington, told Bloomberg Law Oct. 25 that sending the case back to the PRRB as the HHS requested was "clearly unnecessary and futile." Polston said the decision was positive, as "there will be other challenges to CMS rules and policies that the PRRB lacks authority to decide" that will be able to proceed to federal court more easily.

Polston said the conflict between the regulation and unfavorable court rulings were "begging for a solution," and that the HHS could issue a ruling stating that it won't enforce the self-disallowance regulation any longer. Polston said that even without a ruling, counsel for providers could use this ruling to circumvent an attempt by the HHS to block a Medicare cost report appeal based on a failure to comply with the self-disallowance regulation.

Counsel for the hospitals declined to comment on the ruling. The HHS didn't respond to Bloomberg Law's request for comment.

Court Critical of HHS

Of note was the court's strong criticism of how the HHS has handled the appeal process, by failing to take action after the *Banner Heart* decision, and then denying the plaintiffs expedited judicial review and later saying the agency would allow judicial review only as to this case if the court sent the case back to the PRRB just for that purpose.

Mehta said it appeared the HHS was "giving these Plaintiffs the run-around," and that the agency was wasting the plaintiffs time and resources by "schizophrenically applying *Banner Heart*."

Snapshot

- HHS suffers second court defeat from hospitals challenging self-disallowance regulation
- Unclear whether HHS will continue to enforce regulation, or issue ruling accepting court results

Polston said the court was critical "because the agency's actions were worth criticizing," and the failure to respond to the *Banner Heart* ruling was "just not good agency management." Marcus said it was "refreshing" that the court "did not tolerate the litigation tactic of failing to file an answer, moving to dismiss and then urging an unnecessary and time-consuming remand to the PRRB.

The court also urged the HHS to stipulate that the hospitals may continue their appeal in federal court and amend their complaint to include the claims challenging the Medicare outlier regulations. Mehta said he was already prepared to grant such a motion if filed by the hospitals, but that a stipulation would allow the parties to "avoid an unnecessary round of briefing."

The hospitals were represented by Squire Patton Boggs LLP. The HHS was represented by the Department of Justice.

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