

# Medicare Cost Report Appeals and CMS Ruling 1498-R

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Kristin L. DeGroat, Esq.



## Overview Of Program

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  - Exhausted Dual Eligible Days
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## Background

- **"CMS Rulings** are decisions of the Administrator that serve as precedent final opinions or orders or statements of policy or interpretation. They are published under the authority of the Administrator of the Centers for Medicare & Medicaid Services (CMS)." *See* CMS Ruling 1498-R, Page 1.
- **"CMS Rulings** are binding on all CMS components, on all Health & Human Services (HHS) components that adjudicate matters under the jurisdiction of CMS, and on the Social Security Administration (SSA) to the extent that components of the SSA adjudicate matters under the jurisdiction of CMS." *See id.*



## Background

(cont'd)

- Issued by the Centers for Medicare and Medicaid Services (CMS) on April 28, 2010.
- Provided Notice to the Provider Reimbursement Review Board (PRRB or Board) that it lacked jurisdiction over provider appeals of three (3) Disproportionate Share Hospital (DSH) issues:
  - Supplemental Security Income Percentage (SSI Percentage),
  - Non-covered inpatient days for patients entitled to Medicare Part A and days where the patient's Part A benefits were Exhausted for discharges before October 1, 2004 (Exhausted Dual Eligible days) and
  - Labor/Delivery Room inpatient days (Labor Room days) for cost reports beginning prior to October 1, 2009.



## Application of the Ruling: SSI

- In *Baystate Medical Center v. Leavitt*, 545 F. Supp. 2d 20, as amended, 587 F. Supp. 2d 37, 44 (D.D.C. 2008), the District Court concluded that, in certain respects, CMS did not use the best available data in matching Medicare and SSI eligibility data. See CMS Ruling 1498-R, Page 5.
- CMS' Inpatient Prospective Payment System (IPPS) Rule for FFY 2011 adopted the same revised data matching process as used in *Baystate* for FFY 2011 and subsequent fiscal years. See *FY 2011 IPPS Final Rule*, Page 758.
- The same data matching process will also be used to implement CMS Ruling 1498-R and will apply to all properly pending appeals and "open" cost reports for cost reporting periods beginning prior to October 1, 2010. See *CMS Ruling 1498-R, Page 7*.



## Application of the Ruling: Exhausted Dual Eligible Days

- The Ruling states that these days are to be included in both the numerator, to the extent the patient was also entitled to SSI, and denominator of the Medicare (SSI) fraction. The Ruling seems to indicate that Medicare + Choice or Part C days will be treated the same way. See CMS Ruling 1498-R, Pages 8-9 .
- Appeals pending in Federal Courts over the inclusion of both the Exhausted Dual Eligible Days and Part C days in Medicare fraction.
  - *Allina Health System v. Sebelius* (Case No. 1:09-cv-01889 (RBW)).
  - *Northeast Hospital Corporation v. Sebelius* (Case No. 09-0180 (JDB)).



## Application of the Ruling: Labor Room Days

- Prior to October 1, 2009, Labor Room days furnished to patients who did not occupy a routine bed prior to occupying an ancillary labor and delivery bed before census-taking hour were **not** included as inpatient days for purposes of the DSH calculation.
- The Ruling states that these days are now to be included in either the Medicaid or the Medicare fraction of the DSH calculation, as appropriate, regardless of whether the patient occupied a routine care bed prior to occupying an ancillary bed. See CMS Ruling 1498-R, Page 16.



## Challenge to the Ruling: EJR

- The Board granted an EJR request as to the validity of Ruling 1498-R.
  - See Southwest Consulting 2004 DSH Dual Eligible Days Group, et al. v. Blue Cross Blue Shield Association/Wisconsin Physician Services/National Government Services-ME, PRRB Dec. No. 2010-D36 (June 14, 2010).
- “EJR is appropriate to determine the validity of those in the Ruling what would, if valid, deprive the Board of jurisdiction and thereby prohibit it for granting EJR as to the validity of other substantive provisions of the Ruling.” See *id.* at 5.
  - Board determined that this was a classic EJR situation with a twist.



## Challenge to the Ruling: EJR

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- As expected, the Administrator reversed and vacated the PRRB's Decision and remanded to the Medicare Administrative Contractor.
  - CMS 1498-R divested the PRRB of jurisdiction over the three categories of DSH Appeals, and thus the PRRB lacked the authority to grant EJR because the Providers' appeals came within these categories.
    - See Southwest Consulting 2004 DSH Dual Eligible Days Group, et al. v. Blue Cross Blue Shield Association/Wisconsin Physician Services/National Government Services-ME, CMS Adm'r Dec. (August 12, 2010).



## Challenge to the Ruling: EJR

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- Unclear is whether the Providers have the right to appeal to federal court.
  - The Decision does not include the usual information regarding the right to appeal to Federal Court, maybe signaling that the Administrator does not consider the decision subject to appeal.
- Twenty-Four (24) Providers, on the same day the Administrator's Decision was rendered, appealed to Federal Court.
  - See *Alegent Health v. Sebelius* (Case No. 1:10-cv-01354 (JDB)).
  - The Secretary of Health and Human Services may argue that this action is not the "final decision" of the Secretary for purpose of the jurisdiction of Federal Court, which is governed by 42 U.S.C. Section 1395oo(f)(1), and thus, the Court lacks jurisdiction over an appeal.



## Challenge to the Ruling: EJR

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- An additional Provider appealed the Administrator's Decision to Federal District Court on August 26, 2010.
  - *See Salt Lake Regional Medical Center v. Sebelius* (Case No. 1:10-cv-01447 (ESH)).

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## Challenge to the Ruling: Appeals Process

- A Provider has appealed the Administrator's reversal of the Board's Decision to include Exhausted Dual Eligible days in the Medicaid fraction of the Provider's DSH calculation.
- The Provider has requested, among other things, an injunction prohibiting CMS from implementing Ruling 1498-R.
- *See The Queen's Medical Center v. Sebelius* (Case 1:10-cv-00434 (SOM-LEK)).

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## What Happens Now?

- Guidance from CMS to Medicare Administrative Contractors/Fiscal Intermediaries
- Remands
- More Challenges
- Withdraw of Appeals



## About The Speaker

**Kristin L. DeGroat, Esq.**  
**Associate**

**Quality Reimbursement Services, Inc.**  
**3421 E. Hunter Bend Court**  
**Mansfield, TX 76063**  
**Phone: (626) 445-5092, Ext. 7501**  
**Cell: (817) 805-3769**  
**Fax: (682) 518-5082**

**Email: [kristin@qualityreimbursement.com](mailto:kristin@qualityreimbursement.com)**

