

Medicare Cost Report Appeals and CMS Ruling 1498-R

HFMA Lone Star Chapter Fall West Texas Meeting
October 6, 2011

Kristin L. DeGroat, Esq.



Overview Of Program

- Background
- Application of the Ruling
 - SSI Percentage
 - Exhausted Dual Eligible Days
 - Labor Room Days
- Challenge of the Ruling
 - Expedited Judicial Review (EJR)
 - Appeals Process
- Remands
- What Happens Now?



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.



Background

(cont'd)

- **ALERT 7 – PROCEDURES FOR IMPLEMENTING CMS RULING NO. CMS-1498-R – (May 25, 2010)**
 - Addressed the handling of appeals containing the three (3) issues referenced in 1498-R.
 - Not required to file a Position Paper on the issues.
 - Can ask for a Remand.



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)) – Exhausted Dual Eligible Days.
 - *Northeast Hospital Corporation v. Sebelius* (Case No. 09-0180 (JDB)) – Part C Days.



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.



Challenge to the Ruling: EJR

(cont'd)

- 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

(cont'd)

- 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.
 - This case has been stayed until 45 days after the D.C. Circuit issues its decision in *Northeast Hospital Corporation v. Sebelius* (Case No. 09-0180 (JDB)) .

QRS QUALITY REIMBURSEMENT SERVICES Medicare Consultants

Challenge to the Ruling: EJR

(cont'd)

- The Board also granted an EJR request challenging 42 C.F.R. § 412.106(b)(2)(i), effective October 1, 2004, which eliminated the word "covered" from the Medicare fraction definition.
 - This change in the regulation, which is applied to fiscal years prior to October 1, 2004 in CMS Ruling 1498-R, requires inclusion of all Medicare Part A exhausted days in the Medicare fraction.
 - The Federal District Court in the Western District of Michigan held that the regulation is inconsistent with the Medicare DSH statute and the meaning of entitled to benefits under Medicare Part A.
 - *Metropolitan Hospital v. U.S. Dept. of Health and Human Services*, 702 F. Supp. 2d 808 (W.D. Mich., Apr. 5, 2010)

QRS QUALITY REIMBURSEMENT SERVICES Medicare Consultants

Challenge to the Ruling: Appeals Process

- A Provider 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 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 (LEK)).



Challenge to the Ruling: Appeals Process

- QRS has appealed the Administrator's reversal of the Board's Decision to include additional SSI Days in the Medicare fraction of a Provider's DSH calculation.
- The Case has been assigned to Judge Friedman (*In Re Medicare Reimbursement* litigation).
- *See Trinity Health, d/b/a St. Joseph Mercy Oakland v. Sebelius* (Case 1:10-cv-02070 (PLF)).



Remands

- The Board has begun remanding cases and/or issues upon Provider request.
- The Board does not plan on remanding cases or issues on their own motion any time soon. However, the Board has indicated that they would start remanding Labor Room Days this Fall.

What Happens Now?

- Guidance from CMS to Medicare Administrative Contractors/Fiscal Intermediaries
- More 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

