

PUBLICATION

D.C. District Court Resolves Challenge to Medicare's Outlier Payment Rules for *Banner Health v. Burwell* [Ober|Kaler]

2016

On March 31, 2016, Judge Colleen Kollar-Kotelly of the United States District Court for the District of Columbia (the “D.C. District Court”) issued a highly anticipated memorandum opinion [PDF] settling what will probably be the final issue regarding numerous hospitals' challenges to Medicare outlier payments for fiscal years 1997-2007. The D.C. District Court ultimately granted summary judgment in favor of the Secretary of the U.S. Department of Health and Human Services (the “Secretary”).

As we have reported in an earlier *Payment Matters* article, the D.C. District Court previously concluded that the Secretary's regulations governing Medicare outlier payments were consistent with the statute and, with the exception of the 2004 year rulemaking, adequately explained. *Banner Health f/b/o Banner Good Samaritan Medical Center v. Burwell*, Case No. 10-1638 (Sept. 2, 2015). As for 2004, the D.C. District Court reconciled its decision in light of a related United States Court of Appeals for the District of Columbia Circuit (the “D.C. Circuit”) opinion [PDF], see *District Hospital Partners, LP v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015), by remanding the 2004 rule back to the Secretary “to allow the agency to explain its decision regarding its treatment of certain data, or to recalculate the fixed loss threshold for [FY 2004] if necessary.” *Banner Health f/b/o Banner Good Samaritan Medical Center v. Burwell*, Case No. 10-1638 (March 31, 2016). Specifically, the D.C. District Court required the Secretary to “explain further why it did not exclude the 123 identified turbo-charging hospitals from the charge inflation calculation for FY 2004,” and retained its jurisdiction pending this limited remand.

The U.S. Department of Health and Human Services (the “Agency”) published a notice [PDF] in the Federal Register on January 22, 2016, providing clarification on its “methodological choices made in the FY 2004 fixed-loss threshold determination” and determining no further calculations were necessary. Specifically, the Agency explained that excluding the 123 turbo-charging hospitals from the data analysis would have hurt the overall quality of the data.

After ordering supplemental briefing regarding the sufficiency of the Agency's explanation, Judge Kollar-Kotelly, in a brief five-page opinion, concluded that the Agency had provided an adequate explanation for the FY 2004 fixed-loss threshold rule. Additionally, she concluded that the Agency had not introduced any new problems in its explanation. She therefore granted summary judgment to the Secretary.

Ober|Kaler's Comments

As noted in our previous *Payment Matters* article, the D.C. Circuit will presumably have the opportunity to review the *Banner* decision and evaluate whether it agrees with the district court's conclusions. Because this case has been pending at the D.C. District Court, a review by the D.C. Circuit will likely address both the sufficiency of the Secretary's 2016 explanation pertaining to the 2004 fixed-loss threshold and the validity of her other positions for all other years in the 1997-2007 timeframe.