PUBLICATION

Providers Again Win in Medicare Disproportionate Share Adjustment Challenge [Ober|Kaler]

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In a 2011 decision, *Northeast Hospital Corp. v. Sebelius*, 657 F. 3d 1 (D.C. Cir. 2011), the United States Court of Appeals for the District of Columbia Circuit ruled for the providers in a challenge to the Secretary's position regarding the calculation of the Medicare disproportionate share (DSH) adjustment. The specific issue before the court in that case was whether the Secretary's policy of excluding Medicare Part C enrollees from the numerator of the Medicaid fraction and, instead, including them in the Medicare fraction, was appropriate. The court ruled that the Secretary's interpretation was arguably permissible under the time-honored *Chevron* analysis, but it nevertheless went on to find the Secretary's policy was impermissibly retroactive when applied to the providers' fiscal years 1999-2002. *See* earlier *Payment Matters* article "D.C. Appeals Court Provides Mixed Victory to Provider on DSH Calculation Involving Medicare Part C Days" discussing *Northeast* decision.

Following the *Northeast* case, a number of other DSH decisions have similarly been handed down in the hospitals' favor, including most recently, *Allina Health Services v. Sebelius*, No. 1:10-CV-1463 (D.D.C. Nov. 15, 2012). In *Allina*, plaintiff hospitals challenged the Secretary's refusal to include M+C days in the Medicaid fraction, but for other years. The *Northeast Hospital* case had involved fiscal years 1999 through 2002, as noted above, but in *Allina* the hospitals challenged the Secretary's later policy pronouncements that took place in 2003, 2004 and in 2007, in which the agency stated with greater clarity Medicare's current DSH position. Again, however, plaintiffs prevailed. Plaintiffs persuaded the court that the Secretary's interpretation of the M+C day issue and whether it should be included in the DSH fractions – a policy first announced by the Secretary in 2004 but not added to the Code of Federal Regulations until 2007 – was not a “logical outgrowth” of a 2003 Notice of Proposed Rulemaking (NPRM). The rulemaking process, the court concluded, was flawed in that the 2003 NPRM was not written in a way that interested parties should have anticipated that a change was possible and that comments were required. Moreover, in 2004 the Secretary completely reversed course, repudiated the proposed interpretation set forth in the 2003 NPRM and, instead, adopted its inverse. In short, the court held, the 2003 NPRM did not furnish interested parties with adequate notice of the interpretation of the DSH fraction that the Secretary ultimately adopted in 2004. The court further concluded that the Secretary's explanation of her rationale for reaching her 2004 conclusion was impermissibly abbreviated, contained no reasoned explanation, and was thus arbitrary and capricious.

Comments

The decision in *Allina* was handed down by the U.S. District Court for the District of Columbia, where much of the DSH litigation has taken place over the last several years. We can expect that, as with other DSH cases, the Secretary will appeal and that this case, too, will make its way up to the court of appeals. In the meantime, providers should continue to preserve appeals involving DSH calculations at least through 2007.