PUBLICATION

Providers Win Significant Victory in DSH Part C Days Appeal [Ober|Kaler]

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As we discussed in a *Payment Matters* article dated December 13, 2012, providers have enjoyed repeated success in challenging the Secretary's position regarding Medicare Part C days and where those days belong in the Medicare DSH calculation. In 2011 in *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 upheld, at least in part, the providers' challenge to the Secretary's position that Part C days should be excluded from the numerator of the Medicaid fraction. The *Northeast* Court ruled that the Secretary's interpretation of the statute as allowing the inclusion of Part C days in the Medicare, as opposed to the Medicaid, fraction was permissible. The court then concluded, however, that the Secretary's policy placing those days in the Medicare fraction was impermissibly retroactive when applied to providers' fiscal years 1999-2002.

Allina Health Services v. Sebelius then presented the issue of how Part C days should be treated in later years. The hospitals in *Allina*, like those in *Northeast*, challenged the Secretary's refusal to include Part C days in the Medicaid fraction, but their argument focused on the contention that the Secretary's policy regarding the Part C day issue — a policy first announced by the Secretary in a 2004 rule — was not a “logical outgrowth” of the 2003 Notice of Proposed Rulemaking. The District Court agreed with this argument, and the Secretary, not surprisingly, appealed. In a decision handed down on April 1, 2014, however, the United States Court of Appeals for the District of Columbia largely affirmed the District Court's ruling.

In its decision, the Court of Appeals discussed the history of the DSH Part C days issue in some detail. According to the court, the Secretary had treated Medicare Part C patients as not entitled to benefits under Part A prior to 2003. Nevertheless, to address some confusion regarding the appropriate treatment of those days in the DSH calculation, the Secretary issued a Notice of Proposed Rulemaking (NPRM) in 2003 to clarify her position. Contrary to the position that she ultimately adopted, however, in the NPRM the Secretary proposed that, once a beneficiary elects Medicare Part C, patient days attributable to that beneficiary should not be included in the Medicare fraction of the DSH patient population but, instead, should be included in the numerator of the Medicaid fraction. Then, in the final rule in 2004, the Secretary adopted the opposite position and concluded that Part C days should be included in the Medicare fraction.

The Court of Appeals ruled that this change in position was not permitted without further rulemaking. The court observed that, under the Administrative Procedure Act (APA), an agency may promulgate a rule that differs from a proposed rule only if the final rule is a “logical outgrowth” of the proposed rule, that is, if affected parties should have anticipated that the relevant modification was possible. The court agreed with the District Court that the Secretary's 2004 rule did not meet this standard and was not a logical outgrowth of the proposed rule.

The court then addressed the question of what steps should next be taken. The Court of Appeals agreed with the District Court that vacating the 2004 rule was warranted. The Court of Appeals, however, disagreed with the District Court that the Secretary must now recalculate the hospitals' reimbursement without using the interpretation set forth in the 2004 final rule. The Secretary had argued before the Court of Appeals that, even if the 2004 rule were invalid, the Secretary might achieve the same result through adjudication. The Court of Appeals stated that question of whether the Secretary could indeed reach the same result through adjudication had not been before the District Court and needed to be addressed.

Ober|Kaler's Comments

The *Allina* Court of Appeals decision is a significant victory for hospitals. What will happen next, however, is in question. The Secretary could seek review by the Supreme Court, although the fact that the Court of Appeals opinion was unanimous weighs against such review. The Secretary might also seek to address the Part C day's claims through adjudication — that is, through review by the Provider Reimbursement Review Board. But the Court of Appeals has already ruled that, prior to the now-vacated 2004 final rule, the Secretary had treated Part C patients as not entitled to benefits under Part A. Therefore, it is not clear what the Secretary would argue in an adjudication. In any event, the state of play regarding PART C days is still not fully resolved, and providers will have to stay tuned. In the meantime, providers with Part C days should continue to perverse their appeal rights with regard to this issue by including these costs on their cost reports and filing appeals of this issue at the Provider Reimbursement Review Board.