PUBLICATION

Providers Lose DSH GA Day Challenge [Ober|Kaler]

April 18, 2014

As we reported in a *Payment Matters* article dated April 18, 2013, in *Nazareth Hosp. et al. v. Sebelius* (*Nazareth*), the United States District Court for the Eastern District of Pennsylvania overturned CMS's rejection of Pennsylvania general assistance (GA) days in the Medicare DSH calculation. State plans often reimburse hospitals for GA days and use both state monies and federal financial participation to fund the days. Over the years, when hospitals have sought to include these days in the Medicare DSH calculation, the courts have sided with CMS in ruling that such days are not associated with Medicare recipients and thus are not part of the DSH computation. The District Court in *Nazareth*, however, took a different position, accepting the hospitals' argument that CMS could not simultaneously exclude GA days from the Medicaid fraction of the DSH calculation and include days associated with patients enrolled in waiver programs under Section 1115 of the Social Security Act. The hospitals had argued, and the District Court agreed, that Section 1115 waiver programs treat populations that are similar or identical to GA patient populations and that CMS's distinction between the two types of patient population days was impermissible under both the Administrative Procedure Act (APA) and the Equal Protection clause of the Constitution.

In a decision filed on April 2, 2014, the United States Court of Appeals for the Third Circuit reversed the District Court's ruling. The Court of Appeals concluded that the Secretary had set forth multiple, rational bases upon which to distinguish patient days covered under Pennsylvania's GA program from days covered under a Section 1115 waiver project. The Court of Appeals accepted the Secretary's argument that the very purpose of Section 1115 waiver projects – which is to advance the objectives of the Medicaid program – distinguishes such projects from Pennsylvania's GA plan. Indeed, noted the court, a Section 1115 waiver project can be vacated if a court finds that the Secretary could not have rationally found that the program would likely advance Medicaid objectives. By contrast, the Pennsylvania GA plan constitutes a permanent state medical assistance program that requires no federal judgment that the plan is likely to assist in promoting the goals of Medicaid. In sum, the Secretary must find that an 1115 waiver project is likely to assist in promoting the objectives of Medicaid, but she is not required to make any such finding with regard to a state's GA plan.

Additionally, the court noted, the degree of federal control over Section 1115 waivers distinguishes such waivers from Pennsylvania's GA plan. The Secretary has significant authority to determine the precise scope of an 1115 waiver project, the Medicaid requirements that will be waived, and how long the waiver will last, among other matters. The Secretary, by contrast, has no analogous authority to alter the scope of a state GA plan. These distinctions, the court concluded, establish a rational basis for the Secretary to treat the GA patient days differently from days covered under a Section 1115 waiver project. Observing that a court is not to substitute its judgment for that of the agency if the agency's rationale may reasonably be discerned, the court ruled that the challenged regulation must stand.

Ober|Kaler's Comments

As noted, providers have long been challenging the Secretary's decision not to include GA days in the Medicare DSH calculation. Those challenges, however, had been repeatedly rejected, including in an earlier decision by the United States Court of Appeals Third Circuit. The *Nazareth* District Court opinion gave providers hope that the GA days issue could yet be salvaged. Unfortunately, the Third Circuit's *Nazareth* ruling throws water on those hopes.