PUBLICATION

Court Rules That Medicare DSH Statute Means What It Says [Ober|Kaler]

January 24, 2013

In recent times, the provider community has enjoyed success in challenging the Secretary's interpretation of the Medicare disproportionate share hospital (DSH) adjustment provisions and what, the providers have maintained, often was the impermissible retroactive application of those interpretations to past years' claims. Not every DSH challenge, however, is successful, as a recent case out of the United States Court of Appeals for the Fifth Circuit illustrates.

In *Memorial Hospital at Gulfport v. Sebelius*, No. 12-60333 (5th Cir. Dec. 6, 2012), the court dealt with an unusual challenge to the DSH computation. The providers – four Medicare participating hospitals – recognized that, under the statute, the hospitals' disproportionate patient percentage is the sum of two fractions. One fraction comprises patient days for patients entitled to benefits under Medicare Part A and entitled to SSI under Chapter XVI of the Social Security Act, divided by the number of hospital patient days for patients entitled to benefits under Part A. The other fraction comprises days for patients eligible for medical assistance under Medicaid (Title XIX of the Social Security Act) but not entitled to benefits under Medicare Part A, divided by the total number of the hospital's patient days. Stated another way, in determining a hospital's disproportionate patient percentage, the statute includes patients who are entitled to Medicare Part A and SSI benefits as well as patients who are eligible for Medicaid but not entitled to Medicare Part A.

Despite the limitations contained in the statute's language, the hospitals here included days on their cost reports associated with patients who qualified only for Medicare Part A, but not for SSI, and for Medicaid. And when those claimed days were denied by their fiscal intermediary, the providers then appealed their claims to the Provider Reimbursement Review Board (PRRB) which, not surprisingly, rejected the appeal. The PRRB found first that the plain language of the statute did not allow for the inclusion of non-SSI qualifying Medicare patients in the disproportionate patient percentage calculation. Second, the PRRB concluded that it was without authority to decide the question of whether the statute was legally valid.

Continuing their challenge, the hospitals then appealed in federal district court, which affirmed the PRRB and concluded that Congress has spoken to the precise question at issue. According to the court, only Medicare Part A patients covered by SSI (not Medicaid) are included in the disproportionate patient percentage. Still dissatisfied, the providers then appealed to the Fifth Circuit, which again affirmed the ruling. Before the Fifth Circuit, the hospitals conceded that the non-SSI qualifying Medicare patients are excluded from “the patient formula as enacted,” but argued that excluding such patients from the computation runs contrary to the legislative history and intent. The court, however, ruled that courts must presume that a legislature says in a statute what it means and means in a statute what it says. When the words of the statute are unambiguous, the judicial inquiry is complete, said the court. In any event, the court noted, the statute's plain language indicates that Congress chose SSI eligibility, rather than Medicaid eligibility, as the income proxy for the Medicare fraction and ruled that this choice was not so “bizarre” that Congress could not have intended it.

Comments

The challenge that the providers mounted here is an unusual one, to say the least. While some might question whether the use of SSI eligibility as opposed to Medicaid eligibility is the best proxy for determining whether a patient is “low income,” the choice made by Congress is hardly irrational. Given this fact, it is unlikely that we

shall see other cases similar to *Memorial Hospital at Gulfport*, in which providers attack this component of the statutory scheme. Instead, what is more likely to be seen and to be successful are more tailored challenges that recognize the statutory language for what it is and then question either the Secretary's regulatory implementation of that definition or, as has often been the case of late, a change in the Secretary's interpretation of that language. These challenges have a much greater chance of success, as we have seen in recent appeals.