PUBLICATION

Court of Appeals Rules for Government in DSH Exhausted Benefit Day Appeal [Ober|Kaler]

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For the last several years, hospitals and the government have fought hard over where days associated with certain "dual eligible" patients should be placed in the Medicare disproportionate share hospital (DSH) calculation. At issue are those days that are attributable to patients who are eligible under Medicare and Medicaid but that Medicare will not pay for because the patient has exhausted his or her Medicare benefits, the patient's services are covered under a Medicare Advantage Plan, or there is other coverage that is primary under the Medicare Secondary Payor (MSP) provisions. The government has argued that all of these days are to be placed in the Medicare fraction of the DSH calculation. The providers, however, have argued with some success that the days are more appropriately counted as part of the Medicaid fraction.

Last week, the U.S. Court of Appeals for the Sixth Circuit in *Metropolitan Hosp. v. HHS (Metropolitan)* added its voice to the controversy. In a lengthy decision, the court upheld the government's position that, for the year in question (2005), patients eligible for both Medicare and Medicaid but whose Medicare Part A benefits have been exhausted belong in the Medicare fraction of the DSH computation.

At issue in *Metropolitan* were a substantial number of exhausted benefit days associated with ventilator-dependent patients eligible for Medicaid and Medicare. The hospital argued that the statutory language dictated that these days be counted in the Medicaid fraction and that, furthermore, the Secretary's position was unreasonable. The court, however, did not agree. The court concluded that Congress has not spoken directly to how the contested days should be calculated under the Medicare DSH calculation and, thus, under the familiar *Chevron* analysis, one has to examine whether the government's construction of the statute is permissible. The court held that it is. The court further held that the fact that the Secretary's interpretation of the relevant statutory language had changed in 2004 did not preclude its giving deference to that interpretation. The court additionally concluded that the 2004 amendment to the regulations was not the product of arbitrary rulemaking.

Comments

The legal conclusions of the Sixth Circuit in *Metropolitan* are in tension with certain decisions that have been issued by the United States District Court for the District of Columbia, including *Catholic Health Initiatives v. Sebelius* and *Allina Health Svcs. v. Sebelius*. Both of those District Court decisions are on appeal to the United States Court of Appeals for the District of Columbia Court, with the *Catholic Health Initiatives* case scheduled for argument on April 15. Plainly, the Sixth Circuit was willing to give the government's position far more deference than has the D.C. District Court. The question to be determined, however, is whether the U.S. Court of Appeals for the District of Columbia Circuit will agree with the D.C. District Court or the Sixth Circuit.

Much hangs in the balance. The reimbursement at stake across the nation is considerable. If the D.C. District Court's pro-hospital view of the regulation is upheld, all providers that have this issue in pending appeals will be able to ultimately seek relief before that court. Consequently, one can expect that the government will

devote its maximum resources to defending its position in D.C. and, should it lose in that forum, consider seeking relief before the Supreme Court.