

PUBLICATION

CMS Issues Instructions to Hospitals Regarding the Implementation of Ruling 1498-R2

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In April 2015, CMS issued [Ruling 1498-R2](#) addressing the calculation of the Medicare fraction of the disproportionate share hospital (DSH) adjustment for patient discharges prior to October 1, 2004. CMS has now [issued instructions to hospitals](#) on how to make the elections called for in that Ruling.

Background

Prior to October 1, 2004, the Medicare DSH regulation required that inpatient days be included in the numerator of the Medicare-Supplemental Security Income (Medicare-SSI) fraction of the DSH calculation if the inpatient days were "covered" under Medicare Part A and the patient was entitled to the SSI benefit. 42 C.F.R. § 412.106(b)(2)(i) (2003). In the Federal Fiscal Year (FFY) 2005 inpatient prospective payment system (IPPS) final rule, however, CMS amended this provision by eliminating the requirement that Part A inpatient hospital days be "covered" in order to be included in the Medicare-SSI fraction. Instead, CMS adopted a broader definition of the patient days to be included, stating that all days for patients "entitled" to Medicare Part A should be counted in the numerator of that fraction.

Many hospitals filed appeals challenging this, and other components, of the DSH calculation. In 2010, CMS issued its first ruling addressing the topic – [CMS Ruling 1498-R](#). That ruling required, among other things, that the DSH adjustments for those providers that had appealed were to be recalculated applying the 2005 IPPS final rule – using "entitled" rather than "covered" Medicare Part A days – even if the appeals related to periods prior to the 2005 rulemaking. In 2013, however, the United States Court of Appeals for the District of Columbia rejected CMS's position. The Court ruled that it was not until the FFY 2005 change to the regulations, effective October 1, 2004, that CMS had begun to include in the Medicare-SSI fraction all days for which patients were "eligible" for Medicare. *Catholic Health Initiatives v. Sebelius*, 718 F.3d. 914, 921 n.5 (D.C. Cir. 2013). In light of the *Catholic Health Initiatives* case, CMS issued a new ruling in 2015. CMS Ruling 1498-R2. The Ruling is applicable only to hospital discharges prior to October 1, 2004, and only if: (1) no final settlement has been issued for the applicable cost year; (2) a final settlement was issued and an appeal of that settlement is pending before the PRRB; or (3) a final settlement was issued, appealed to the PRRB and remanded to the Medicare contractor pursuant to the original Ruling 1498-R. CMS Ruling 1498-R2 allows a hospital to choose whether its Medicare-SSI fraction calculation includes (in both the numerator and denominator of the fraction): **total** (i.e. "entitled") Medicare Part A days, even if the stay is not covered under Part A or Part A benefits were exhausted, OR **covered** Medicare Part A days, which would exclude days for which Part A benefits were exhausted or not covered.

The Transmittal

Transmittal 1776 issued by CMS on January 27, 2017, provides instructions to hospitals regarding the 2015 Ruling's election. In the Transmittal, CMS repeats much of what it had stated in the Ruling itself and essentially reminds hospitals of the opportunity to make the election. CMS notes in the Transmittal that it has published on its website revised Medicare-SSI fractions showing the fractions calculated on the basis of "covered" days as well as "total" days. CMS further states that, before an initial Notice of Program Reimbursement (NPR) or revised NPR is issued by the contractor pursuant to the Ruling, the hospital's designated representative should submit to its contractor a written election of whether, for the particular fiscal period, the DSH calculation is to be made on the basis of "total" or "covered" days.

The Transmittal sets some important deadlines. That written election must be received by the Medicare contractor within 180 days of the date on which instructions are posted on the contractor's website, and it must include specific information that is detailed in the Transmittal. CMS also states in the Transmittal that if the hospital's request does not contain all of the required information or if the hospital does not make the election for a particular fiscal period within the appropriate timeframe, the Medicare contractor is to ask for the required information and, if the provider does not respond within 30 days of the date of that request, the contractor is to recalculate the provider's DSH adjustment using the higher of the two revised Medicare-SSI fractions.

In the Transmittal, CMS also addressed a hospital's opportunity to request that its Medicare-SSI fractions be "realigned" to reflect the hospital's cost reporting period, as opposed to the federal fiscal year. For cost reporting periods subject to Rulings 1498R and 1498-R2, CMS will furnish to a hospital, upon request, patient-level data concerning the number of the hospital's "covered" and "total" Medicare-SSI days and the number of the hospital's "covered" and "total" Medicare days. If, based on this data, a hospital determines that it would be beneficial to have calculations made on the basis of its own cost reporting period, CMS will permit this. In the Transmittal, CMS describes what the realignment request should contain, and it describes certain circumstances under which a previously submitted realignment request may need to be resubmitted.

Comments

Although many years have passed since hospitals first filed their pre-2005 DSH appeals, the calculations for many hospitals remain unresolved. By following CMS's instructions, hospitals may be able to hasten the resolution of their claims and gain additional DSH reimbursement.