

PUBLICATION

CMS Issues DSH Ruling 1498-R2 [Ober|Kaler]

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CMS recently issued [Ruling 1498-R2 \(Ruling\)](#), dated April 22, 2015, amending its 2010 [Ruling 1498-R](#). The new Ruling addresses the calculation of the Medicare fraction of the disproportionate share hospital (DSH) adjustment for discharges prior to October 1, 2004.

CMS's earlier ruling, Ruling 1498-R, required that certain appeals by hospitals of their DSH calculations be remanded to the Medicare Administrative Contractor (MAC) for recalculation of the DSH adjustment with regard to three different DSH issues. The new Ruling modifies the earlier ruling with regard to one of these DSH issues, specifically the Medicare-Supplemental Security Income (SSI) component for patient discharges prior to October 1, 2004.

Background

Prior to October 1, 2004, the applicable regulation required that inpatient days be included in the numerator of the Medicare-SSI fraction only if the inpatient days were "covered" under Medicare Part A and the patient was entitled to SSI benefits. 42 C.F.R. § 412.106(b)(2)(i) (2003). The federal fiscal year (FFY) 2005 inpatient perspective payment system final rule amended this provision by eliminating the requirement that Part A inpatient hospital days must be *covered* in order to be included in the Medicare-SSI fraction. The final rule adopted a broader definition of the patient days to be included, i.e., all days for patients *entitled* to Medicare Part A.

Many hospitals filed appeals of this aspect of their DSH calculations, which included appeals of fiscal years prior to FFY 2005, to the Provider Reimbursement Review Board (PRRB). CMS then issued its first Ruling, 1498-R, which required that the appealing providers' DSH adjustments be recalculated applying the 2005 final rule, using entitled rather than covered Medicare Part A days.

Subsequently, the United States Court of Appeals for the District of Columbia opined that it was not until the FFY 2005 change to the regulations, effective October 1, 2004, that CMS began to include in the Medicare fraction all days for which patients were *eligible* for Medicare, whether or not those days were actually paid (i.e., covered). *Catholic Health Initiatives v. Sebelius*, 718 F.3d 914, 921 n.5 (D.C. Cir. 2013).

Ruling 1498-R2

Based on this history, CMS issued its new Ruling, which takes into consideration the court's decision in *Catholic Health*. The Ruling is applicable only to discharges prior to October 1, 2004, and only in the following circumstances: (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 MAC per the 2010 Ruling 1498-R.

The Ruling allows hospitals the choice of whether their Medicare-SSI fractions would include (in both the numerator and denominator):

- **total**, i.e., entitled, Medicare Part A days, even if the stay was not covered under Part A or Part A benefits were exhausted, OR
- only **covered** Medicare Part A days, which would exclude days where Part A benefits were exhausted or not covered.

For purposes of recalculating the Medicare fraction, CMS will not be adding Medicare Part C days to the data file that the D.C. Circuit Court found, as a matter of practice, excluded Medicare Part C days from the Medicare-SSI fraction for discharges before October 1, 2004. See *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 16-17 (D.C. Cir. 2011)

CMS has posted links on its [website](#) to data files listing the Medicare-SSI ratios for all providers for FFYs 1988 through 2005, calculated both ways, i.e., using total and using covered days. A hospital designated representative must submit a written request to the MAC electing that the hospital's Medicare-SSI fraction be calculated on the basis of “total days” or “covered days.”

Ober|Kaler's Comments

CMS has yet to issue instructions to its MACs on implementing the Ruling. Providers should review the data files to determine if they would be better off using total or covered Medicare Part A days in the Medicare fraction calculations, and watch for further instructions from CMS or the MACs on how to proceed on this issue.

Providers that still wish to pursue the Medicare fraction issues that were the subject of the decision in *Baystate Med. Ctr. v. Leavitt*, (D.D.C. 2008), i.e., that the data is inaccurate and the matching process improper, should be mindful of preserving their appeal rights upon recalculation of their DSH adjustments.