

PUBLICATION

D.C. Court Rejects CMS's 2018 "Budget Neutrality" Policy

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In a September 17, 2019 decision, the United States District Court for the District of Columbia invalidated a CMS rule expanding site-neutral payment reductions to evaluation and management (E&M) services furnished in longstanding, off-campus provider-based locations. *American Hosp. Ass'n v. Azar*.

Background

In § 603 of the Bipartisan Budget Act (BBA) of 2015, Congress imposed payment limits on the amounts that most newly established, off-campus provider-based departments (PBDs) would be paid under Medicare's Hospital Outpatient Prospective Payment System (OPPS). Implementing § 603, CMS issued regulations effective January 1, 2017, providing that services furnished in off-campus, non-excepted outpatient departments (that is, departments that are not dedicated emergency departments and that were not grandfathered by providing services prior to November 2, 2015) are to be reimbursed at a percentage of the OPPS rate, with certain exceptions. See 81 Fed. Reg. 79,562, 79,726 (Nov. 14, 2016). Then, without any additional statutory authorization, CMS put into place an additional payment limitation effective January 1, 2019. 83 Fed. Reg. 58,818, 59,004-15 (Nov. 21, 2018). Relying on other authority contained in the OPPS statute, CMS began applying the lower physician fee schedule amounts to hospital-billed E&M services furnished in excepted off-campus PBDs, so that the payment for E&M services provided in excepted off-campus PBDs, non-excepted off-campus PBDs and physician offices would be the same.

CMS's new policy was quite significant given that E&M services represent roughly 50 percent of all separately payable or conditionally packaged services furnished in outpatient departments every year. CMS directed that the payment reduction be phased in over a two-year period, taking place in 2019 and 2020, thereby saving CMS an estimated \$300 million in 2019 alone. Not surprisingly, then, the plaintiff hospital organizations and related trade groups almost immediately challenged the final rule. Now, the United States District Court for the District of Columbia has agreed with the Plaintiffs, ruling, as explained below, that CMS acted without authority.

Arguments and Court's Ruling

Plaintiffs argued that CMS acted outside the scope of its authority in reducing payment rates to excepted off-campus PBDs. Specifically, the hospitals asserted that if CMS were to reduce payment rates for particular OPD services, the agency was required to change the relative payment rates and adjustments through an annual review process in a budget neutral manner, which it did not do. Alternatively, they argued that if CMS were to reduce Medicare costs by addressing "unnecessary increases in the volume of services," it must develop a "method" to do so, which it could then implement across-the-board by adjusting the OPPS conversion factor, which it did not do. OPPS's statutory scheme, Plaintiffs argued, was designed to prevent a selective cut in Medicare funding targeting only certain services and providers, contrary to CMS's new policy.

In response, CMS asserted that it had the authority under the statute to "develop a method for controlling unnecessary increases" in volume and that this authority was independent of any authority to adjust the conversion factor. Furthermore, the agency argued, it had the statutory authority to develop a "method" to set payment rates for a specific service that was causing "unnecessary" increases in costs (and volume) without regard to budget neutrality.

In reviewing these competing arguments, the Court sided with the Plaintiffs. The Court ruled that Congress had established an elaborate statutory scheme that spelled out the steps for determining payments of OPD services. CMS's reading of the statute, however, severed the connection between a service's payment rate and its relative resource use inconsistent with that statutory scheme. The Court found that the "method" developed by CMS to cut costs violated its obligations under the statute, enabling it to unilaterally pick and choose what to pay for OPD services, and ruled that the final rule was, accordingly, ultra vires. The Court then determined that the appropriate remedy was to vacate the applicable portions of the OPPS final rule and to remand the case to CMS for further action consistent with the correct legal standards.

Conclusion

The District Court's ruling could prove quite important by rejecting CMS's 2018 site neutrality policy, a policy that was sweeping in both its reach and financial impact. But it seems almost certain that the government will seek to appeal the ruling to the United States Court of Appeals for the District of Columbia Circuit. Thus, it is doubtful that we have heard the last regarding this matter.