

Court Sides with Hospitals on CMS Site Neutral Payment Rule for Hospital Outpatient Departments



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In a ruling on September 17, 2019 by Judge Rosemary M. Collyer, the U.S. District Court for the District of Columbia vacated portions of a 2018 Centers for Medicare & Medicaid Services (CMS) rule that reduced Medicare payments for clinic-visit services at off-campus hospital outpatient departments (HOPDs).

By rulemaking, on January 1, 2019, CMS instituted a “site neutral” payment policy by equalizing Medicare Part B payment rates under both the Outpatient Prospective Payment System (OPPS) and Physician Fee Schedule services delivered at off-campus HOPDs.[1] CMS established a two-year transition period to reach site neutrality. In Calendar Year (CY) 2019, CMS began paying outpatient departments 70 percent of the full OPPS rate, which equated to half of the planned 60 percent overall reduction.[2] In the CY 2020 OPPS proposed rule, which is not yet finalized, CMS intends to reduce rates to 40 percent of full the OPPS rates.[3] Hospitals that provide those services opposed the CY 2019 proposed rule, which received almost 3,000 comments, arguing that the CMS rule “is contrary to both the Medicare statutory scheme and the policy decision reached by Congress under Section 603 of the Bipartisan Budget Act of 2015.”[4]

In court, plaintiff hospital organizations argued that the Medicare statutory scheme “is intended to prevent exactly what happened here: a selective cut to Medicare

funding which targets only certain services and providers.” The government defendant raised a jurisdictional argument (dispensed with by the court) and claimed that the CMS had statutory authority to implement the change because, according to the statute, it “may develop a ‘method’ to set payment rates for a particular service which is causing an ‘unnecessary’ increase in cost (and volume)” The term “method” is not explicitly defined by statute. The Final Rule included the “method” CMS chose to reduce “unnecessary” increases in costs and volume of services provided.

In vacating the applicable portions of the Final Rule and remanding the matter back to CMS for further proceedings consistent with the ruling, the court concluded that the “CMS was not authorized to ignore the statutory process for setting payment rates in the Outpatient Prospective Payment System and to lower payments only for certain services performed by certain providers.” Unless successful on appeal, CMS will be required to withdraw the “site neutral” aspects of the Final Rule.

The court recognized that its ruling may cause complications for providers that receive payments under the OPSS. It noted that the Final Rule was less than a year old and was not budget neutral, which should lessen the burden on reconsideration, but the court will still require joint status reports from the parties as the agency reconsiders. The first joint status report is due October 1, 2019. We will continue to monitor this issue and provide updates as it develops.

[1] See 83 Fed. Reg. 58,818, 59,014 (Nov. 21, 2018) (CY 2019 Final Rule).

[2] *Id.*

[3] 84 Fed. Reg. 39,398, 39,528 (Aug. 9, 2019) (CY 2020 Proposed Rule).

[4] We previously discussed the [proposed](#) and [final rule](#) promulgated by CMS implementing Section 603 of the Bipartisan Balanced Budget Act of 2015.

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