MEDICARE COST REPORT
APPEALS:
JURISDICTIONAL ISSUES

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OVERVIEW

- Introduction
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  - Providers
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  - Self-disallowance
- Jurisdictional Challenges
  - Appeal original Notice of Program Reimbursement (NPR)
  - Appeal revised NPR
- Equitable Tolling
- CMS Ruling 1498-R
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  - Remands
  - Medicare Advantage/Medicare + Choice/Managed Care Part C Days
- Considerations regarding appealing PRRB jurisdictional decisions
INTRODUCTION

- There are three (3) players in the Medicare cost report appeals arena.
  - The Provider
    - Appeals adjustments
  - The Intermediary
    - Defends adjustments
  - The PRRB
    - Strong interest in docket management
    - If a case can be dismissed, it will be dismissed

DISCRETIONARY JURISDICTION: FAILURE TO CLAIM

- Applies when a provider fails to claim a cost to which it is entitled and which, if claimed, it would have received payment, e.g. Bad debt
- Generally, the PRRB exercises its discretion to not assert jurisdiction
  
  See, e.g., Maine General Medical Center v. Shalala, 205 F.3d 493 (1st Cir. 2000)

- Several courts have held that the PRRB has discretion whether to assert jurisdiction
  - Several PRRB Decisions follow this holding
- The Ninth Circuit Court Of Appeals agreed
  - Holding that the PRRB has jurisdiction over costs not claimed in cost report and not included in a request for hearing
    
    See Loma Linda Univ. Med Center v. Leavitt, 492 F.3d 1065 (9th Cir. 2007)
DISCRETIONARY JURISDICTION: SELF DISALLOWANCE

- In contrast to the failure of the provider to claim an item that is allowable, a provider may "self-disallow" to preserve an issue for appeal
  - Norwalk Hospital v. Blue Cross Blue Shield Ass’n/Nat’l Gov’t Serv., Inc., PRRB Dec. No. 2012-D-14
  - 42 C.F.R. § 405.1803(d), 42 C.F.R. § 405.1811 and 42 C.F.R. § 405.1835

- “Dissatisfaction” and “Self Disallowance”
  - Thus, The Provider Files The Cost Report Consistent With Law, But Under Protest
  - PRRB Rule 7.2

DISCRETIONARY JURISDICTION: SELF DISALLOWANCE

Supreme Court Interpretation

- “[t]he only limitation prescribed by Congress is that the matter must have been ‘covered by such cost report,’ that is, a cost or expense that was incurred within the period for which the cost report was filed, even if such cost or expense was not expressly claimed”

  See Bethesda Hospital Ass’n v. Bowen, 485 U.S. 399, 405 (1988)
DISCRETIONARY JURISDICTION:
SELF DISALLOWANCE

PRRB Interpretation

- If you claim that the item you are appealing was not claimed on the cost report because a regulation, manual, ruling, or some other legal authority predetermined that the item would not be allowed
  - Give a concise issue statement describing the self-disallowed item
  - The reimbursement or payment sought for the item, and
  - The authority that predetermined that the claim would be disallowed.

See PRRB Rules, 7.2a

JURISDICTIONAL CHALLENGES

- The PRRB or the MAC may challenge jurisdiction

- A jurisdictional challenge can add years to the process

- The PRRB Could take 1-2 years to issue its’ Decision

- It may be necessary to proceed to court

- If successful in court, then a remand to the PRRB for a decision on the merits
JURISDICTIONAL CHALLENGES

Jurisdictional Decisions

- No interlocutory appeals of PRRB jurisdictional decisions
- May only be reviewed during the Administrator’s review of a final PRRB decision or court review of the final agency decision
  
  Refer to 42 C.F.R. § 405.1840

APPEAL OF ORIGINAL NPR: PROTESTED ITEMS

- The PRRB is currently questioning jurisdiction when a provider appeals an issue not adjusted or protested for all cost reporting periods ending on or after December 31, 2008
- The PRRB is generally denying jurisdiction
- Need to amend cost reports that have not had an NPR issued
- Protest – It may be your only avenue to appeal an issue
APPEAL OF REVISED NPR:
REGULATION Pre-8/21/2008

- Where a revision is made in a determination or decision on the amount of program reimbursement after such determination or decision is reopened as provided by § 405.1885, such revision shall be considered a separate and distinct determination or decision to which the provisions of [Medicare regulations governing appeals] are applicable.

See 42 C.F.R. § 405.1889.

APPEAL OF REVISED NPR:
REGULATION 8/21/2008 AND LATER

- (a) If a revision is made in a Secretary or intermediary determination or a decision by a reviewing entity after the determination or decision is reopened as provided in §405.1885 of this subpart, the revision must be considered a separate and distinct determination or decision to which the provisions of §405.1811, §405.1834, §405.1835, §405.1837, §405.1875, §405.1877 and §405.1885 of this subpart are applicable.

- (b)
  1. Only those matters that are specifically revised in a revised determination or decision are within the scope of any appeal of the revised determination or decision.
  2. Any matter that is not specifically revised (including any matter that was reopened but not revised) may not be considered in any appeal of the revised determination or decision.

See 42 C.F.R. § 405.1889
APPEAL OF REVISED NPR: GENERAL RULE

Scope of Appeal of Revised NPR

- **Majority (and PRRB) view**
  - Limited to items adjusted in revised NPR

- **Minority view**
  - Any matter covered by the cost report

- Note that PRRB Rule 7.1 requires the identification of specific audit adjustments. Thus, at least implicitly the PRRB rules adopt the historical view that the appeal of an amended NPR is limited to the scope of the amended NPR

APPEAL OF REVISED NPR: ISSUES NOT ADJUSTED

- Expect the MAC and/or the PRRB to question jurisdiction if the provider appeals an issue not adjusted by the revised NPR

- PRRB is going to deny jurisdiction

- Expect the courts to generally affirm the PRRB
APPEAL OF REVISED NPR: JUDICIAL DECISIONS

- Most reported judicial decisions limit the scope of an appeal of a revised NPR only to the adjustments made on that revised NPR.

- E.G., under these decisions, if the revised NPR adjusts DSH eligible days, the provider cannot appeal DSH SSI %

- However, may be an argument as to other components of DSH eligible days being covered.

APPEAL OF REVISED NPR: JUDICIAL DECISIONS

"Issue Specific" Requirement

- Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 848 (9th Cir. 1997)


- French Hosp. Med. Ctr. v. Shalala, 89 F.3d 1411, 1420 (9th Cir. 1996)
APPEAL OF REVISED NPR: JUDICIAL DECISIONS

- “[T]he most stringent interpretation of the regulation and the precedent cases dictates that appeal rights attach to any item that was reconsidered and adjusted in a revised repayment demand as long as the item was not incidentally reapplied solely to effectuate the adjustment of another, distinct item.”
  

APPEAL OF REVISED NPR: JUDICIAL DECISIONS

- At least one case held that all items are appealable from a revised NPR
  
  See Edgewater Hosp. Inc. v. Bowen, 857 F.2d 1123, 1135 (7th Cir. 1988)

- Little Company of Mary v. Sebelius, 587 F.3d 849 (7th Cir. 2009) (MAC must affirmatively reopen an item for it to be appealed)
APPEAL OF REVISED NPR: FOLLOWING SETTLEMENT

Fact Pattern

- Provider claims specific number of DSH eligible days
- MAC grants claim and issues revised NPR
- Provider subsequently discovers additional eligible days
- MAC denies inclusion of additional days
- Provider appeals revised NPR to PRRB
- PRRB and/or MAC challenges jurisdiction

Intermediary: Challenged PRRB jurisdiction

PRRB: Issued inconsistent Decisions

- Stormont-Vail Regional Medical Center Appeals
  - Fiscal Years 1994 and 1995
  - PRRB issued contradictory jurisdiction decisions following settlement and further appeal of DSH eligible days
  - The only factual distinction was that for the 1995 case there was a settlement agreement with CMS providing for further appeal, although the MAC and CMS opposed the further appeal through the stage of filing a complaint in Federal court

Court Decision

- Held that settlement of one DSH component, eligible days, does not waive appeal of another component, GA Days.
  
  See Stormont Vail Regional Medical Center V. Sebelius, 709 F. Supp. 2nd 1178 (D. Kan. 2010)
APPEAL OF REVISED NPR: FOLLOWING SETTLEMENT

○ CMS Litigation Position
  ○ The provider does not meet the “dissatisfaction” requirement for an appeal before the PRRB under 42 U.S.C. 1395oo(a).
  ○ Settlement of the appeal of the specific issue from the original NPR waives and releases CMS and precludes appeal from the revised NPR

○ Case Law Supporting CMS Litigation Position
  ○ *Little Company of Mary v. Sebelius*, 587 F.3d 849 (7th Cir. 2009)
  ○ *Stormont Vail Regional Medical Center v. Sebelius*, 709 F. Supp. 2nd 1178 (D. Kan. 2010), affirmed 10th Cir. 2011

APPEAL OF REVISED NPR: FOLLOWING SETTLEMENT

**Suggested Best Practices**

○ Appeal all issues with which the provider is dissatisfied that are adjusted by the NPR

○ Clearly identify in the request for hearing and all subsequent pleadings and correspondence the separate issues in multi-component appeals, such as DSH

○ Clearly specify issue(s) settled and withdrawn

○ Do not settle and withdraw an issue if there is a possibility that additional payment is forthcoming upon receipt of additional data

○ Carefully identify issues transferred to group appeals
EQUITABLE TOLLING

- Equitable tolling applies when a party "despite all due diligence ... is unable to obtain vital information bearing on the existence of his claim."

  *See Currier v. Radio Free Europe, 159 F.3d 1363, 1367 (D.C. Cir. 1999)*

- Sebelius v. Auburn Regional Medical Center, U.S., No 11-1231, 1/22/13)

CMS RULING 1498-R

Pursuant to CMS Ruling 1498-R, the PRRB Must Remand the Following DSH Issues:

- Supplemental Security Income (SSI),

- Non-covered inpatient days for patients entitled to Medicare Part A and days where the patient’s Part A benefits were Exhausted for discharges before October 1, 2004 (Exhausted Dual Eligible days) and

- Labor/Delivery Room inpatient days (Labor Room days) for cost reports beginning prior to October 1, 2009.
CHALLENGE TO THE RULING:
APPEALS PROCESS

*Trinity Health, d/b/a St. Joseph Mercy Oakland v. Sebelius (Case 1:10-cv-02070 (PLF))*

- In November 2008, QRS had a Hearing before the PRRB, but the PRRB did not render a decision until August 2010.
- PRRB remanded the case, but also decided that the additional SSI Days had to be incorporated into the Medicare fraction of the Provider’s DSH calculation upon remand.
- Administrator reviewed and reversed the PRRB’s Decision to include the SSI Days.
- QRS appealed the Administrator’s reversal to the District Court in the District of Columbia.
- The Case settled in June 2012.

CHALLENGE TO THE RULING:
EJR


- PRRB granted EJR as to the validity of Ruling 1498-R
- Administrator reversed, vacated and remanded back to the MAC - PRRB lacked the authority to grant EJR
- The Providers appealed to the D.C. District Court
  
  *See Alegent Health v. Sebelius (Case No. 1:10-cv-01354 (ESH))*
  - Consolidated with other cases, now over 200 Providers
  - STAYED pending the outcome of the appeal in *Catholic Health Initiatives - Iowa Corp. d/b/a/ Mercy Medical Center - Des Moines v. Sebelius (Case No. 1:10-cv-00411 (RCL))*
CHALLENGE TO THE RULING: EJR

The PRRB also granted an EJR request challenging 42 C.F.R. § 412.106(b)(2)(i), effective October 1, 2004, which eliminated the word “covered” from the Medicare fraction definition.

This change in the regulation, which applies to fiscal years prior to October 1, 2004 in CMS Ruling 1498-R, requires inclusion of all Medicare Part A exhausted days in the Medicare fraction.

The Federal District Court in the Western District of Michigan held that the regulation is inconsistent with the Medicare DSH statute and the meaning of entitled to benefits under Medicare Part A.

On March 27, 2013, the 6th Circuit Court of Appeals reversed the ruling of the district court and remanded the case with instruction to enter judgment in favor of CMS.


CHALLENGE TO THE RULING: APPEALS PROCESS

The Queen’s Medical Center v. Sebelius (Case 1:10-cv-00434 (SOM-LEK))

The Provider appealed the Administrator’s reversal of the PRRB’s Decision to include Exhausted Dual Eligible days in the Medicaid fraction of the Provider’s DSH calculation.

The Provider requested, among other things, an injunction prohibiting CMS from implementing Ruling 1498-R.

This case settled confidentially.
CHALLENGE TO THE RULING:
APPEALS PROCESS

*Catholic Health Initiatives - Iowa Corp. d/b/a/ Mercy Medical Center - Des Moines v. Sebelius (Case No. 1:10-cv-00411 (RCL))*

Picture a law written by James Joyce and edited by E.E. Cummings. Such is the Medicare statute, which has been described as "among the most completely impenetrable texts within human experience." *Rehab. Ass’n of Va. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994). Certain provisions of this labyrinthine statutory scheme are at issue in this case, which concerns a hospital seeking review of a final decision of the Secretary of the Department of Health and Human Services, who denied it certain payments it believes it is owed for providing care to low-income patients.

*See Memorandum Opinion, pg. 1.*

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CHALLENGE TO THE RULING:
APPEALS PROCESS

*Catholic Health Initiatives - Iowa Corp. d/b/a/ Mercy Medical Center - Des Moines v. Sebelius (Case No. 1:10-cv-00411 (RCL))*

- The Provider appealed the Administrator’s decision reversing the PRRB stating that CMS has a "long-standing policy" of "excluding exhausted days from the Medicaid fraction . . ."
- The Administrator also disagreed with the PRRB’s plain language argument, finding that the term “entitled” in the Medicare statute’s definitions of the Medicare and Medicaid fractions “is not in reference to the right of payment of a benefit, but rather the legal status of the individual as a Medicare beneficiary under the law”
- The Court held that this was not a long-standing policy, but retroactive rulemaking
- This case is on appeal to the D.C. Court of Appeals
  - *Alegent Health v. Sebelius* (Case No. 1:10-cv-01354 (ESH))
  - *Allina Health Services, et al. v. Sebelius* (Case No. 1:09-cv-01889 (RBW))
REMANDS

Two (2) Types of Remands

- **Alternative**
  - Best for Individual appeals
- **Standard**
  - Best for Group appeals

- If you have jurisdictional problems, always ask for a standard remand

PART C DAYS

Settled or Pending Appeals in Federal Court Over the Inclusion of Medicare Part C Days in Medicaid Fraction of DSH Calculation

- **Northeast Hospital Corporation v. Sebelius**, 657 F.3d 1 (D.C. Cir. 2011)
  - Pre 10/1/2004
  - Pre 10/1/2004
- **Alegent Health-Immanuel Medical Center, et al. v. Sebelius** (Case No. 1:11-cv-00139 (EGS))
  - Pre 10/1/2004
- **Allina Health Services, et al. v. Sebelius** (Case No. 1:10-cv-01463 (RMC))
  - 2007 - 2008
- **Baptist Medical Center, et al. v. Sebelius** (Case No. 1:11-cv-01273 (CKK))
  - 1995 - 1998
### APPEAL CONSIDERATIONS

#### The Best Offense is a Good Defense
- In light of the time, cost and speculative outcome associated with jurisdictional appeals, a provider is well advised to attend to and if possible to resolve jurisdiction issues at the level of the PRRB.

#### Cost/Benefit Analysis
- The probability weighted cost of a jurisdictional appeal should be compared to the underlying amount of payment to be recovered if the jurisdictional appeal is successful.
- A successful jurisdictional appeal returns the case to the PRRB, which does not necessarily mean that a provider will prevail.

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### APPEAL CONSIDERATIONS: TIMING

- Again, the appeal of a PRRB jurisdictional decision is not ripe until the PRRB issues a decision disposing of the case in its entirety.

- Thus, in a multi issue case, appeal of the denial of jurisdiction over one issue only becomes ripe when the PRRB decides all the issues on their merits and thus disposes of the entire case.
APPEAL CONSIDERATIONS: GENERAL

- Request PRRB reconsideration
- Request CMS Administrator review
- Appeal to Federal court

- Note the distinction between dismissal based on jurisdiction and dismissal for failure to satisfy a PRRB deadline or filing requirement
  - No reported judicial decisions ordering PRRB to reinstate involuntarily dismissed appeals

APPEAL CONSIDERATIONS: RECONSIDERATION

- No specific provision to request reconsideration
  - PRRB generally will issue a reconsideration decision if asked to do so
  - Mixed results, but generally negative
  - Relatively inexpensive
  - Even if adverse, may clarify the basis for the PRRB’s action for purposes of further appeal

- PRRB Rule 46 does provide for reinstatement of appeals dismissed for settlement or involuntarily dismissed appeals
APPEAL CONSIDERATIONS:
CMS ADMINISTRATOR REVIEW

- A request for CMS Administrator review must be filed with the Office of Attorney Advisor of CMS within 15 days of receipt of the PRRB Decision
- The Attorney Advisor will notify if review will be conducted and state a deadline for submission of comments
- If review is conducted, the decision must be issued within 60 days of the CMS Administrator’s receipt of the PRRB Decision

APPEAL CONSIDERATIONS:
JUDICIAL REVIEW

- A complaint must be filed within 60 days of receipt of either the PRRB’s Final Decision or the Decision of the CMS Administrator
- Venue is either the district where the provider is located or the D.C. District
  - For group appeals, venue is where the plurality of providers is located or the D.C. District
  - But note the PRRB may issue jurisdictional decisions in the individual provider number, which means that multiple complaints must be filed
APPEAL CONSIDERATIONS: JUDICIAL REVIEW

- Judicial review is costly
  - Briefs must fully explain the background and the arguments
  - Many Federal judges have very limited experience with Medicare Part A appeals
- The courts tend to defer to CMS
  - If the interpretation of CMS is reasonable, CMS is entitled to judicial deference
  - The court is not required to choose between competing reasonable interpretations
  - Thus, "a tie" goes to CMS
- A district court decision is subject to a court of appeals review and, in rare cases, Supreme Court review

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