OBER | KALER
Attorneys at Law

CMS GIVETH AND TAKETH AWAY: NEW CMS RULING ON MEDICARE DSH PAYMENTS

May 13, 2010

By: Thomas W. Coons

On April 28, 2010, CMS issued a sweeping ruling that will affect many hundreds of hospitals, and thousands of cost years, with disproportionate share hospital (DSH) reimbursement challenges. The Ruling, CMS-198-R [PDF], addresses three specific DSH issues: (1) the data matching process employed by CMS in calculating the days in the Supplemental Security Income (SSI) fraction; (2) prior to October 1, 2004, the exclusion from the Medicaid fraction of Medicare secondary payor (MSP) days and days for which a patient's Part A inpatient hospital benefit days were exhausted (exhausted days); and (3) prior to October 1, 2009, the exclusion of labor/delivery room inpatient days from the DSH computation. For cases presenting these issues, the Ruling requires the administrative body – whether it be the Provider Reimbursement Review Board (PRRB), the CMS Administrator, or the CMS reviewing official – to remand the appeal to the appropriate Medicare contractor for recomputation.

The overall reimbursement impact of the Ruling is hard to forecast and may vary from provider to provider. The recomputations should increase the number of days that are in the numerator of the SSI fraction through the use of improved data match procedures. The recomputation will also, however, take days for which no Part A benefits were paid – Medicare secondary payor and exhausted benefit days – and place them in the SSI fraction. In some cases, this could have the effect of diluting the SSI fraction by increasing the fraction's denominator without increasing the numerator. Additionally, placing these days in the SSI fraction means that these days will not be included in the numerator of the Medicaid fraction, which is where providers have claimed such days should be placed.

Significantly, CMS also asserts in its Ruling that, as a result of its action, there are no longer any "controversies" between the providers and CMS regarding these DSH issues and that all cases with these issues must, therefore, be remanded to the Medicare contractors for recomputation of the DSH percentages. What this means is that existing appeals that providers have brought before the PRRB challenging, for example, where the exhausted benefit days or the MSP days are to be placed – that is, whether the days should be in the Medicaid fraction or the SSI fraction – are to be governed by the CMS Ruling and that the existing appeals, unless they are already in court, cannot continue. Under CMS's logic, only after this recomputation – one that is consistent with the Ruling – has taken place will providers possess a "final" action, which they can then pursue through the administrative appeals process. This will likely result in years of additional delay.

In addition to the Ruling, CMS released its proposed inpatient PPS rule in the May 4, 2010 Federal Register (75 Fed. Reg., 23851). In that document, CMS proposes to adopt the revised data match process, effective October 1, that the Agency used to implement the decision in *Baystate Medical Center v. Leavitt*, 545 F. 2d 20, as amended 587 F. 2d 37, 44 (D.D.C. 2008). CMS said that while it continues to believe that its data matching process and resulting payments were lawful, the Agency implemented the *Baystate* decision for fiscal years 1993 through 1996 by utilizing a revised data matching process that follows the District Court's decision.

Ober|Kaler's Comments: The Ruling, once implemented by CMS, will remove from the PRRB docket many hundreds of cases involving DSH challenges. This is good for the Board and for CMS. It may not be good for providers, however. Many controversies over the DSH issues will continue. For example, whether certain days are properly placed in the Medicaid fraction or the SSI fraction is a live issue, and CMS's Ruling, which places those days in the SSI fraction, simply delays the ultimate litigation regarding the issue. Whether this is good policy is open to question, as is whether the ruling is legal. Can a ruling divest the PRRB of jurisdiction over a live issue? These are questions that hospitals and their attorneys will be wrestling with over the next several months.