Health Law Daily Wrap Up, TOP STORY—W.D. Ky.: CMS’ categorization of medical techs in 2006 occupational mix survey was reasonable, (Aug. 16, 2016)

Health Law Daily Wrap Up

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By Harold Bishop, J.D.

The occupational mix adjustment of an inpatient hospital for fiscal year 2007 was calculated correctly and consistently with CMS policy in effect at the time. The hospital claimed that its surgical technicians, mental health technicians, and heart center recovery technicians (collectively, medical technicians) should have been included in the Nursing Aides, Orderlies, and Attendants category instead of the All Other Occupations category of the applicable 2006 occupational mix survey. The court found that: (1) CMS’ categorization of the medical technicians was reasonable and entitled to deference; (2) the medical technicians provide a higher level of care than nurses, making their inclusion in the nursing category inappropriate; and (3) the hospital was not entitled to challenge CMS’ categorization of its medical technicians based on different categorization of medical technicians in other labor markets (Owensboro Health Inc. v. Burwell, August 12, 2016, McKinley, J.).

IPPS payments. To calculate payment amounts under the inpatient prospective payment system (IPPS), CMS initially determines a standardized, nationwide base-payment rate, which reflects the national average cost of a typical inpatient stay. This rate consists of: (1) the portion of costs attributable to wage and labor-related costs and (2) non-labor costs. The Medicare statute mandates that CMS adjust the labor-related share to reflect geographic differences in hospital labor costs, which CMS does through annual notice-and-comment rulemaking. This adjustment factor is known as the wage index. In addition, CMS must adjust the wage index for occupational mix. Once the adjusted labor-related share is calculated, it is added to the non-labor share. This base payment rate is then multiplied by the weight assigned to the diagnosis-related group (DRG) that best describes the treatment administered for the specific discharge being reimbursed, such as heart transplant or allergic reaction. The dispute here concerns the occupational mix adjustment to the wage index factor in the 2006 IPPS formula. Specifically, the classification of Owensboro Health Inc.’s (OHI) medical technicians on the 2006 occupational mix survey.

2006 survey. On the 2006 occupational mix survey, OHI classified its surgical technicians, mental health technicians, and heart center recovery technicians (collectively, medical technicians) in the Nursing Aides, Orderlies, and Attendants category. OHI timely submitted its FY 2007 occupational mix data to its fiscal intermediary (FI – now known as Medicare Administrative Contractors). The FI audited OHI’s data and, pursuant to CMS survey instructions and policy, reclassified the medical technicians in the All Other Occupations category. OHI objected to the FI’s reclassification of the medical technicians and requested that the audit adjustment be reversed and the data included in the OHI occupational mix survey as originally submitted.

CMS responded to OHI that it had forwarded to the FIs supplemental instructions for the 2006 survey, which stated that while surgical technicians and hospital-based paramedics may provide services similar to those provided by nursing personnel, on the occupational mix survey, these non-nursing occupations must be included in All Other Occupations.

On October 16, 2006, OHI made a Freedom of Information Act request for detailed audited Occupational Mix Survey information on 45 hospitals. The requested information revealed that for 10 of those hospitals, medical technicians were classified in the Nursing Aides, Orderlies, and Attendants category. For 35 of those hospitals, medical technicians were classified in the All Other Occupations category.
PRRB appeal. OHI appealed the FY 2007 wage index to the Provider Reimbursement Review Board (PRRB), challenging its occupational mix data. OHI contended that (1) the FI erroneously and improperly audited OHI’s Occupational Mix Survey to exclude different types of medical technicians from the Nursing Aides, Orderlies, and Attendants classification and (2) CMS compounded that error by treating those same types of technicians inconsistently or in a different manner in Occupational Mix Surveys submitted by other providers and audited by the FI elsewhere.

The PRRB concluded that the FI, consistent with CMS policy at the time, came to the correct conclusion that OHI’s medical technicians must be classified in the All Other Occupations category. The PRRB also refused to consider the argument that other providers were not held to those same classifications because it did not have the authority to address potential errors relating to other providers (see Occupational-mix survey mix-up claims terminated, August 6, 2014). OHI requested review of the PRRB’s decision by the CMS Administrator, who declined review, making the PRRB’s decision a final administrative action for purposes of federal district court jurisdiction.

District court. OHI asked the district court to reverse the decision of the PRRB and remand this matter to CMS to recalculate OHI’s occupational mix adjustment for FY 2007, including the medical technicians in the "Nursing Aides, Orderlies, and Attendants" category and to recalculate OHI’s Medicare reimbursements accordingly with interest.

The court concluded that the occupational categories used by CMS in the 2006 survey were reasonable. In doing so, the court expressed no opinion as to whether any alternative interpretation would have been better. Because CMS considered comments and other relevant factors and articulated a reasonable explanation for its policy, the court concluded that CMS’ interpretation was reasonable, not arbitrary, capricious, or manifestly contrary to the statute, and would be afforded deference.

The court also found the PRRB’s decision was supported by substantial evidence in the record and was reasonable. While OHI argued that the medical technicians at issue do provide services similar to those listed in the nursing aides definition, the Nursing Aides, Orderlies, and Attendants category is defined as providing "basic patient care," and, as CMS argued and the PRRB found, the medical technicians provide a higher level of care than that of the nursing aides, orderlies, and attendants.

OHI also claimed that CMS acted arbitrarily in failing to classify medical technicians uniformly for all hospitals. What occurred here, and what OHI complained of, was a misapplication of CMS policy by the FIs to 10 known hospitals. The court concluded that this alleged error by the FIs did not equate to a differential arbitrary policy. In addition, the court noted that OHI failed to cite to any instances where a hospital was permitted to challenge wage data of another hospital not within the challenging hospital’s labor market area. Here, OHI is in a single hospital Core-Based Statistical Area (CBSA), and the 10 identified hospitals are not in OHI’s CBSA.

The court found that it is unclear whether there is a remedy for OHI based on the classification of medical technicians contrary to governing CMS policy for 10 hospitals that are outside OHI’s labor market. However, the court was clear that the retroactive classification of OHI’s medical technicians contrary to governing CMS policy—the remedy requested by OHI—was not an appropriate remedy.

Summary judgment was granted to the government.

The case is No. 14-14-CV-00095-JHM.


Companies: Owensboro Health, Inc.

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