
Health Law Daily Wrap Up

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By Cathleen Calhoun, J.D.

CMS was unauthorized to ignore the statutory process for setting payment rates.

The lowering of Medicare payments for off-campus hospital services could not be decided by CMS without following the proper process. The federal district court for the District of Columbia handed hospitals a victory, finding that CMS was not authorized to ignore the statutory process for setting payment rates in the Outpatient Prospective Payment System (OPPS) and lower payments only for certain services performed by certain providers. The court also vacated applicable portions of the Final Rule (American Hospital Association v. Azar, September 17, 2019, R. Collyer).

Payment rates. The court noted that CMS determined that many evaluation and management (E&M) of patient services provided by off-campus provider-based departments were unnecessary increases in the volume of outpatient department services and financially unnecessary since they could likely be provided in a lower cost setting. The court gave an example of cost differences—in 2017 the OPPS rate for the most voluminous outpatient department (OPD) service provided by off-campus provider-based departments, E&M, was $184.44 for new patients and $109.46 for established patients. The Physician Fee Schedule rate for the comparable service at a physician office was $109.46 for a new patient and $73.93 for an established patient.

Final rule. On November 21, 2018, CMS issued a final rule implementing a proposed payment method effective January 1, 2019. The final rule applied an amount equal to the site-specific physician fee schedule payment rate for nonexcepted items and services furnished by a nonexcepted off-campus provider-based department (PBD) of a hospital for the clinic visit service (HCPCS code G0463), when provided at an off-campus PBD excepted from Soc. Sec. Act §1833(t)(21).

Analysis. The government argued that the court lacked jurisdiction to hear the claim because Congress precluded judicial review of the OPPS, and because remedies were not exhausted under the Medicare statute. The court disagreed, finding that CMS’ action did not constitute a method within the meaning of the statute, and the administrative remedies would not bring an answer since no administrative review body has authority to override CMS’ regulations.

On the OPPS statutory scheme, the court noted that although the government’s method for controlling unnecessary increases in volume is not clear, the method is clearly not a price-setting tool. The court also found that the government’s effort to wield the method in such a manner was manifestly inconsistent with the statutory scheme. Specifically, according to the court, Congress established an elaborate statutory scheme that spells out each step for determining the amount of payment for OPD services under the Outpatient Prospective Payment System, and provided details directing how CMS should develop and adjust relative payment weights. Consequently, for those and additional other reasons, the court found the "method" developed by CMS to cut costs was impermissible and violated its obligations under the statute.

The case is No. 18-2841 (RMC).

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Companies: American Hospital Association; Association of American Medical Colleges

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