PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION

2025-D04

PROVIDER–
Community Stroke and Rehabilitation Center

RECORD HEARING –
June 6, 2024

Provider No.:
15-3045

Federal Fiscal Year –
2023

vs.

MEDICARE CONTRACTOR –
WPS Government Health Administrators

Case No. –
23-1218

INDEX

ISSUE STATEMENT

Whether Community Stroke and Rehabilitation Center ("Community Stroke" or "Provider") should be subject to a two (2) percentage point reduction to its federal fiscal year ("FFY") 2023 inpatient rehabilitation facility annual payment update ("APU") for failure to meet the Inpatient Rehabilitation Facility ("IRF") Quality Reporting Program ("QRP") requirements, in accordance with 42 C.F.R. § 412.634(f).[1]

DECISION

After considering Medicare law and regulations, the arguments and testimony presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board") finds that the two (2) percentage point reduction of Community Stroke's Medicare APU for FFY 2023 was proper.

INTRODUCTION

Community Stroke is an IRF located in Crown Point, Indiana.[2] Community Stroke's designated Medicare administrative contractor[3] is WPS Government Health Administrators (the "Medicare Contractor").[4] Swingtech Consulting, Inc. ("Swingtech") is a company used by the Centers for Medicare and Medicare Services ("CMS") to provide certain data analytic and technical support needed for Post-Acute Care ("PAC") QRPs.[5]

In order to receive the full APU for FFY 2023 reimbursement under the IRF prospective payment system ("IRF PPS"), IRFs such as Community Stroke were required to submit data on certain quality measures during calendar year ("CY") 2021. By letter dated June 27, 2022, the Medicare Contractor notified Community Stroke that it failed to submit the required data and/or submit the required quality measures[6] and, as a result, its Medicare APU would be reduced by two (2) percentage points for FFY 2023.[7] Community Stroke sought reconsideration of that determination by letter dated August 9, 2022,[8] but on September 26, 2022, CMS upheld its decision.[9] On March 24, 2023, Community Stroke timely appealed that decision and has met the jurisdictional requirements for a hearing before the Board. [10]

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[1] Provider's Preliminary Position Paper (hereinafter "Provider's PPP") (Case No. 23-1218) at 1 (Nov. 20, 2023).
[2] Updated Joint Stipulations of the Parties (hereinafter "Stip.") at ¶ 1 (Case No. 23-1218) (May 10, 2024).
[3] CMS' payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries ("FIs") and these functions are now contracted with organizations known as Medicare administrative contractors ("MACs"). The relevant law may refer to FIs and MACs interchangeably, and the Board will use the term "Medicare contractor" to refer to both FIs and MACs, as appropriate and relevant.
[4] Stip. at ¶ 1.
[5] Exhibit (hereinafter "Ex.") P-3 (CMS Contract with Swingtech) (Case No. 23-1218) at COMM000011. (For clarity and context, the Board has included the *party's* exhibit name after the first reference to each exhibit).
[6] Ex. P-21 (FFY 2023 Reduction Notice) (Case No. 23-1218).
[7] *Id*.
[8] Ex. P-22 (8.9.2022 Reconsideration Request) (Case No. 23-1218).
[9] Ex. C-2 (CMS's Denial of Reconsideration) (Case No. 23-1218). *See also* Ex. P-23 (9.26.2022 Unfavorable Reconsideration Decision) (Case No. 23-1218).
[10] Ex. P-24 (3.24.2023 PRRB Acknowledgement and Critical Due Dates Notice) (Case No. 23-1218). (The Board notes that the Provider's Exhibit List identifies this Exhibit as "3.24.2023 PRRB Acknowledgement…" but the actual date of the letter is March 27, 2023.)

Community Stroke previously appealed a two (2) percentage point reduction for FY 2022 in Case No. 22-0953, whereby a video hearing was held on September 14, 2023. In a series of motions, Community Stroke requested that the instant case be decided based on Case No. 22-0953, stating that the cases "involve similar facts and evidence," and both cases involve a payment reduction to the Provider's inpatient rehabilitation facility annual payment update.[11] Accordingly, the instant appeal was approved for a record hearing on June 6, 2024; thus, any references to a hearing or transcript herein relate back to the September 14, 2023 hearing for Case No. 22-0953.[12] In both of the appeals, Community Stroke was represented by Michael Grubbs, Esq. of Barnes & Thornburg, LLP. The Medicare Contractor was represented by Scott Berends, Esq. of Federal Specialized Services.

On July 22, 2024, the Board issued Decision No. 2024-D22 (Case No. 22-0953) upholding the two (2) percentage point reduction to Community Stroke's FFY 2022 IRF APU.

STATEMENT OF RELEVANT FACTS

Community Stroke states that it was accepted for participation in the Medicare Program and assigned CMS Certification Number ("CCN") 15-0185 by CMS on September 30, 2019. Later, on October 25, 2019, CMS notified Community Stroke that Community Stroke's CCN had been terminated and replaced by CCN 15-3045, effective August 31, 2019.[13] The CCN format in the letters from CMS *included a hyphen* [xx-xxxx]. The October 25, 2019 letter noted that the original CCN (15-0185) was incorrect because it was applicable to an acute care hospital, while the replacement CCN (15-3045) was the correct one for a rehabilitation hospital.[14]

CMS requires providers to collect data on certain quality measures on an annual or quarterly basis (*e.g.*, the first quarter of CY 2021) and to report the data in the next year, or quarter, based on published submission deadlines (*e.g.*, August 16, 2021) to be eligible for a full APU in the applicable fiscal year (*e.g.*, FY 2023).[15] Community Stroke was required to submit data on the following quality measures for the first quarter of calendar year 2021 ("Q1 CY 2021"):

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[11] Provider's Motion to Incorporate Record and Motion for on the Record Decision (October 19, 2023) at ¶ 1.

[12] On September 14, 2023, at the live video hearing for Case No. 22-0953, Community Stroke requested that the Board decide Case No. 23-1218 based on the record in Case No. 22-0953. On October 19, 2023, Community Stroke requested to incorporate the record, including the evidence and testimony presented during the September 14, 2023 video hearing, into the Case No. 23-1218. The Board requested that the parties supplement the record with relevant manuals and sub-regulatory materials related to the IRF-QRP issue under appeal for CY 2021 for purposes of FFY 2023 payments. The parties filed all relevant documentation between April 10, 2024, and May 10, 2024 in the Office of Hearings Case and Document Management System ("OH CDMS") in the instant appeal.

[13] Provider's Final Position Paper (Case No. 22-0953) (hereinafter "Provider's FPP") at 2. *See also* Exs. P-1 (Community Stroke formal notification from CMS issuing CCN 15-0185 and NPI number) (Case No. 23-1218), and P-2 (CMS letter to Community Stroke terminating CCN 15-0185 and replacing with CCN 15-3045) (Case No. 23-1218).

[14] Ex. P-2 (CMS letter to Community terminating CCN 15-0185 and replacing with CCN 15-3045) (Case No. 23-1218) at COMM000003.

[15] *See* Inpatient Rehabilitation Facility Quality Reporting Program Data Collection & Final Submission Deadlines for the FY 2023 IRF QRP *available at* https://www.cms.gov/files/document/irf-qrp-data-collection-and-final-submission-deadlines-fy-2023-irf-qrp.pdf (accessed Oct. 30, 2024) .

- "NQF #0138 - NHSN Catheter-associated Urinary Tract Infection (CAUTI) Outcome Measure – Q1;"

- NQF #1717 - Facility-wide Inpatient Hospital-onset Clostridium difficile Infection (CDI) Outcome Measure – Q1"[16]

Community Stroke states that it timely submitted its Q1 CY 2021 QRP Data "before the end of April [2021], a couple of months before the July 16[, 2021] snapshot date."[17] Additionally, Community Stroke states that it changed its CCN in the NHSN reporting system from the Acute Care CCN to the IRF CCN on May 14, 2021[18] – prior to the August 16, 2021 reporting deadline.[19] While none of the exhibits submitted with this case show a definitive filing date, based on Community Stroke's arguments and the MAC's responses, the Board will accept that the Q1 CY 2021 QRP Data was submitted on time using CCN "15-3045," *including the hyphen*.[20]

On August 4, 2021, Swingtech sent an email notice to Community Stroke indicating that data was missing and/or underreported for Q1 CY 2021.[21] While Community Stroke acknowledges its receipt of this reminder, it argues that "Swingtech did not identify Community [Stroke]'s use of the hyphenated CCN as the reason CMS did not receive the data."[22] Specifically, Swingtech's email (1) notified Community Stroke that as of July 16, 2021, there were no data for Q1 CY 2021 relating to either the CAUTI or CDF outcome measures; and (2) reminded Community Stroke of the upcoming August 16, 2021 submission deadline for the Q1 CY 2021 data on the CAUTI or CDI outcome measures.[23]

Following receipt, Community Stroke sent several ***internal*** emails questioning why it was receiving this notice.[24] However, it was not until October 6, 2021 (after the deadline for Q1 CY 2021 data submission), that Community Stroke sought any ***external*** assistance. Specifically, on October 6, 2021, via email, Community Stroke sought assistance from the

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[16] Ex. C-2 (Case No. 23-1218). *See also* Medicare Contractor's Preliminary Position Paper (hereinafter "Medicare Contractor's PPP") at 9 (Feb. 14, 2024). The Board takes notice that, while Case Nos. 22-0953 and 23-1218 involve similar facts and evidence, Case No. 22-0953 includes a third deficiency related to "NQF #0431 – Influenza Vaccination Coverage Among Healthcare Personnel," a deficiency which is not at issue in the instant case because it is not one of the measures collected for the time frame at issue (Q1 CY 2021). *See* Ex. C-3 (Case No. 23-1218).

[17] Provider's Post-Hearing Brief (Case No. 22-0953) (Oct. 30, 2023) at 3. The Board notes that the filings for Case No. 23-1218 do not definitively state a filing date.

[18] Provider's Preliminary Position Paper (hereinafter "Provider's PPP") (Case No. 23-1218) at 3 (Nov. 20, 2023).

[19] Ex. C-3. Final submission deadline for the FY 2023 IRF QRP CAUTI and CDI measures was August 16, 2021 for January 1 – March 31, 2021 (Q1 CY 2021).

[20] Provider's PPP at 3. **Note**: As evidence thereof, the Provider cites Exs. P-7 (May 14, 2021 Community change of CCN from 15-0185 to 15-03045) *[sic]* (Case No. 23-1218), P-8 (Attached NHSN reports showing corrected CCN 15-3045 and NHSN output Line Listing for all Summary Data) (Case No. 23-1218), and P-9 (HCW vaccination data FY 2021 for October 1, 2020 through March 31, 2021 with updated CCN) (Case No. 23-1218). However, in its review, the Board notes that the only reference to FY 2021 Q1 data is limited to Ex. P-8 and is dated July 12, 2021. This is prior to the deadline but includes the hyphen. In fact, Ex. P-9 related to NQF #0431 is not relevant to the instant case (discussed *supra* at note 16).

[21] Ex. P-17 (CY 2021 Q1 Reminder) (Case No. 23-1218) at COMM000297 – COMM000300.

[22] Provider's PPP at 4 (Case No. 23-1218).

[23] Ex. P-22 (Case No. 23-1218) at Ex. L, COMM000393.

[24] *Id.* at COMM000390 – 393.

Swingtech QRP Help Desk regarding QRP data not reported for Q1 CY 2021 and the emails appear to have included certain attachments.[25] However, as noted in the hearing record, the October 6, 2021 email was sent to the wrong email address, "***QPR***Help@swingtech.com," rather than "***QRP***Help@swingtech.com," which is the correct email address, per the original August 4, 2021 email.[26]

Community Stroke corresponded with Swingtech's QRP Help Desk on November 15, 2021.[27] This correspondence was the result of a QRP Help Desk reminder email, dated November 12, 2021, of the due date for the second quarter of calendar year 2021 ("Q2 CY 2021") QRP data. In the correspondence, a representative of Community Stroke asks about the use of the hyphen. Community Stroke presented evidence showing that Community Stroke updated its reporting *at that time* to reflect the six (6)-digit CCN "153045" *without the hyphen*.[28]

The parties do not dispute the foregoing facts;[29] however, the parties disagree with: (1) whether these facts give rise to a failure on Community Stroke's part to meet the IRF QRP requirements and, thus, the two (2) percentage point reduction to its federal fiscal year ("FY") 2023 APU; and (2) if so, whether Community Stroke should be excused for its failure to submit quality data based on a systemic problem with one of CMS's data collection systems.

STATEMENT OF RELEVANT LAW

Under the IRF prospective payment system ("IRF PPS"), the Medicare program pays an IRF predetermined, standardized amounts per discharge, subject to certain payment adjustments.[30] The standardized IRF PPS payment amounts are increased each year by a "market basket update" (also referred to as the "Annual Payment Update" or "APU") to account for increases in operating costs.[31]

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[25] Ex. P-17 (Case No. 23-1218). The Board notes that in these emails the Swingtech QRP Help Desk uses CCN "153045" *without the hyphen* while the NHSN documents attached by Community Stroke to prove timely submission reflect CCN "15-3045" *including the hyphen*.

[26] Hearing Transcript (Case No. 22-0953) (hereinafter "Tr.") at 109-110 (Sept. 14, 2023).

[27] Ex. P-18 (CY 2021 Q2 Reminder) (Case No. 23-1218).

[28] *See* Community Stroke internal emails (Ex. P-18) (Case No. 23-1218), witness testimony (Tr. at 85), and NHSN CMS Report run on November 15, 2021 (Ex. P-19) (Case No. 23-1218). Interestingly, the Board notes that as part of their July 12, 2021 Request for Reconsideration (Ex. P-11 (July 12, 2021 reconsideration request from Community to CMS) (Case No. 23-1218)) for the prior FY, Community Stroke indicates that the NHSN account was "updated to the correct CCN:153045" from the original CCN:15-0185. This update to CCN 153045 would have occurred more than a month prior to the August 16, 2021 reporting deadline for Q1 CY 2021 QRP data, however, the Board is unable to discern whether the July 12 update was only to revise the CCN and whether it did or did not include the hyphen.

[29] The Board notes that the Provider's PPP at 2 – 4 and Medicare Contractor's PPP at 8 – 9 recite congruous facts.

[30] *See* 42 C.F.R. § 412.624 (2018). *See also* 42 U.S.C. § 1395ww(j); 42 C.F.R. §§ 412.600 – 412.634. The term "rehabilitation facility" as used in 42 U.S.C. § 1395ww(j) refers to inpatient hospital services of a rehabilitation hospital or a rehabilitation unit.

[31] *See* 42 U.S.C. § 1395ww(j)(3). The "market basket update" is also referred to as the "annual percentage update," or APU.

Section 3004(b)(2) of the Patient Protection and Affordable Care Act amended 42 U.S.C. § 1395ww(j) to establish the IRF QRP.[32] As a result, each IRF is required to submit certain quality data "in a form and matter, and at a time, specified by the Secretary."[33] Specifically –

> (b) *Submission Requirements*. (1) IRFs must submit to CMS data on measures specified under section 1886(j)(7)(D), 1899B(c)(1), and 1899B(d)(1) of the [Social Security] Act, and standardized patient assessment data required under section 1899B(b)(1) of the [Social Security] Act, as applicable. **Such data must be submitted in the form and manner, and at a time, specified by CMS**.[34]

An IRF that fails to report the quality data required under the IRF QRP is subject to a two (2) percentage point reduction to its APU.[35] The data completion thresholds set by CMS for IRF quality reporting are as follows:

> (f) *Data Completion Thresholds*. (1) IRFs must meet or exceed two separate data completeness thresholds: One threshold set at 95 percent for completion of required quality measures data and standardized patient assessment data collected using the IRF-PAI submitted through the CMS designated data submission system; and **a second threshold set at 100 percent for measures data collected and submitted using the CDC NHSN**.
>
> (2) These thresholds (95 percent for completion of required quality measures data and standardized patient assessment data on the IRF-PAI; **100 percent for CDC NHSN data**) will apply to all measures and standardized patient assessment data requirements adopted into the IRF QRP.
>
> (3) **An IRF must meet or exceed both thresholds to avoid receiving a 2 percentage point reduction to their annual payment update for a given fiscal year, beginning with FY 2016 and for all subsequent payment updates**.[36]

The quality data required by 42 U.S.C. § 1395ww(j) are collected through the Centers for Disease Control and Prevention ("CDC") National Healthcare Safety Network ("NHSN") system.[37] In adopting quality measures that are collected and submitted to CMS via the CDC's

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[32] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 at 369 (2010).
[33] *Id*. at § 3004(b)(2); *see also* 42 U.S.C. § 1395ww(j)(7)(C).
[34] 42 C.F.R. § 412.634(b)(1) (2019) (bold emphasis added and italics in original).
[35] 42 C.F.R. § 412.624(c)(4)(i) (Oct. 1, 2018 – Sept. 30, 2022) ("In the case of an IRF that is paid under the prospective payment system specified in § 412.1(a)(3) that does not submit quality data to CMS in accordance with § 412.634, the applicable increase factor […] is reduced by 2 percentage points."); *see also* 42 U.S.C. § 1395ww(j)(7)(A)(i).
[36] 42 C.F.R. § 412.634(f) (2019) (bold emphasis added and italics in original).
[37] 42 C.F.R. § 412.634(f)(1) (2019).

NHSN, the Secretary confirmed that the substantive aspects of the quality reporting process had been adopted through appropriate notice and comment rulemaking:

> *Comment*: One commenter had concerns about measures that are collected via the CDC's NHSN system, noting that more data is collected through NHSN than is required for the quality measure, and that those reporting processes are not subject to rulemaking and may add additional reporting burdens.
>
> *Response*: When we propose to adopt a quality measure that is collected and submitted to CMS via the CDC's NHSN, we make certain that the proposed rule provides a detailed description of the measure, and we address and respond to public comments on the reporting burden related to the measure. **In addition, we make certain that the measure specifications and protocols for the measure are posted on the CDC's NHSN Web site, the CMS Web site, and the NQF Web site, as applicable and available for public scrutiny and comment, <u>including details related to the procedures for using NHSN for data submission</u> and information on definitions, numerator data, denominator data, data analysis, and measure specifications for the proposed measure.** Because of this, we believe that the substantive aspects of the reporting processes are subject to rulemaking.[38]

An IRF may be granted an exception or extension to the previously mentioned reporting requirements when certain extraordinary circumstances exist. The IRF QRP disaster/extraordinary circumstances waiver and appeals process is as follows:

> (c) *Exception and Extension Requirements*. (1) An IRF may request and CMS may grant exceptions or extensions to the measures data or standardized patient assessment data reporting requirements, for one or more quarters, when there are **certain extraordinary circumstances beyond the control of the IRF**.
>
> (2) An **IRF must request an exception or extension within 90 days** of the date that the extraordinary circumstances occurred.
>
> (3) Exception and extension requests must be submitted to CMS from the IRF by sending an email to IRFQRPReconsiderations@cms.hhs.gov containing all of the following information:
>
> (i) IRF CMS Certification Number (CCN).
>
> (ii) IRF Business Name.

[38] 80 Fed. Reg. 47036, 47087 (Aug. 6, 2015) (bold and underline emphasis added and italics in original).

(iii) IRF Business Address.

(iv) CEO or CEO–designated personnel contact information including name, telephone number, title, email address, and mailing address. (The address must be a physical address, not a post office box.)

(v) IRF's reason for requesting the exception or extension.

(vi) **Evidence of the impact of extraordinary circumstances, including, but not limited to, photographs, newspaper, and other media articles**.

(vii) Date when the IRF believes it will be able to again submit IRF QRP data and a justification for the proposed date.

(4) **CMS may grant exceptions or extensions to IRFs without a request if it is determined that one or more of the following has occurred**:

(i) An extraordinary circumstance affects an entire region or locale.

(ii) **A systemic problem with one of CMS's data collection systems directly affected the ability of an IRF to submit data**.

(5) **Email is the only form of submission that will be accepted. Any reconsideration requests received through another channel will not be considered as a valid exception or extension request**.[39]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. Form, Manner, and Time.

To find in favor of Community Stroke (*i.e.*, to find that the two (2) percentage point reduction does not apply), there must be a finding that Community Stroke submitted both the IRF-PAI data and the data on the relevant quality measures in the form and manner, and at a time, specified by CMS.[40] Here, the IRF-PAI data requirements are not at issue; thus, the focus of the instant appeal is the CDC NHSN IRF-QRP quality data requirements.[41] As previously stated, the quality data required by 42 U.S.C. § 1395ww(j) are collected through the CDC NHSN system for transmission to CMS (form and manner), and CMS notifies providers of the due dates of the reports (time). Each year, information on the form, manner, and time are published by CMS on its website.[42]

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[39] 42 C.F.R. § 412.634(c) (2019) (bold emphasis added and italics in original). The Federal Register in which this exception process was adopted refers to it as "the IRF/QRP disaster/extraordinary circumstances waiver and appeals processes". 78 Fed. Reg. 47860, 47920 (Aug. 6, 2013).
[40] 42 C.F.R. § 412.634(b)(1) (2019).
[41] Ex. C-2 (Case No. 23-1218).
[42] *See, e.g.,* "Inpatient Rehabilitation Facility (IRF) Quality Reporting Program (QRP) Data Submission Deadlines" *available at* https://www.cms.gov/medicare/quality/inpatient-rehabilitation-facility/irf-quality-reporting-data-

The parties' dispute over the Q1 CY 2021 data submission revolves around the fact that, while Community Stroke updated NHSN with the IRF CCN prior to the submission data for Q1 CY 2021, it later entered that IRF CCN incorrectly with a hyphen between the second and third digits.[43] CMS did not receive the data from the CDC NHSN system due to the incorrect use of the hyphen between the second and third digits of the six (6)-digit CCN.[44]

Community Stroke states that, up until November 15, 2021, it had been entering the CCN in the NHSN system with a hyphen between the first two (2) digits and the last four (4) digits.[45] On November 15, 2021, the due date for the Q2 CY 2021 QRP data, Community Stroke corresponded with Swingtech, a contractor helpdesk for QRP reporting.[46] Community Stroke internal emails,[47] witness testimony,[48] and a November 15, 2021 NHSN CMS Report,[49] all show that the CCN was updated to the six (6) digits of the CCN *without the hyphen* on November 15, 2021, and at that time, Community Stroke determined the hyphen was the issue that was causing the reporting failures (hereinafter referred to as the "hyphen hypothesis").[50] Witness testimony showed that Community Stroke's reporters entered the CCN with a hyphen because the system allowed it,[51] and asserted that there had been no prior notice nor QRP guidance to enter the CCN without a hyphen.[52] The witness testimony suggests that Community Stroke's reporters referenced NHSN guidance in entering the CCN; however, Community Stroke did not produce for the record any such NHSN guidance materials .[53] Further, the characterization that there had been no prior notice or guidance to enter the CCN without a hyphen conflicts with the actual guidance in effect during the time period at issue and still publicly available.

submission-deadlines (accessed Oct. 4, 2024) (publishing the submission deadlines and resources on the form and manner requirements).

[43] Ex. P-8 (Case No. 23-1218).

[44] Ex. C-2 (Case No. 23-1218); Tr. at 29-31; Ex. P-18 (Case No. 23-1218).

[45] Tr. at 85-90.

[46] Ex. P-18 (Case No. 23-1218).

[47] *Id*.

[48] Tr. at 85.

[49] Ex. P-19 (11.15.2021 Validation Reports) (Case No. 23-1218).

[50] Tr. at 85-90. The Board, in Decision No. 2024-D22 (Case No. 22-0953), characterized Community Stroke's assertion that their use of the hyphenated CCN in NHSN entries caused reporting failures as the "hyphen hypothesis" in order to differentiate it from the concurrent failure to use its updated IRF CCN rather than its superseded acute care CCN.

[51] *Id*. at 17.

[52] *Id*. at 90 and 91. *See also* Ex. P-20 (Case No. 23-1218).

[53] Tr. at 52-53, 61-62.

Specifically, CMS provides many resources to providers on how to properly submit quality data using the CDC NHSN system, including how to change or update your CCN.[54,55] Additionally, and specific to Community Stroke, on May 3, 2021, the Swingtech Help Desk Team sent an email – that twice listed Community Stroke's CCN as "153045" (*i.e.*, *without a hyphen*)[56] – to Community Stroke's Operational Assistant. On May 4, 2021, the Operational Assistant forwarded the email to Community Stroke's Quality Manager, Control Coordinator and Patient Advocate ("Quality Manager").[57] On May 11, 2021, the Quality Manager then forwarded Swingtech's correspondence on to the one staffer at Community Stroke with the ability to change the "basic facility info" in NHSN.[58] The foregoing all took place *prior to* the Q1 CY 2021 deadline of August 16, 2021.

However, as discussed *infra* in Statement of Relevant Facts, the evidence demonstrates that the first instance of Community Stroke reaching out to a help desk for assistance is an October 6, 2021 email from the Quality Manager to Swingtech regarding Q1 CY 2021 data, nearly two (2) months after the Q1 CY 2021 reporting deadline of August 16, 2021.[59] The response from Swingtech advised that Swingtech does not have up-to-date information on data submission, and for questions on verification reports Community Stroke must contact the NHSN Help Desk.[60] The Board would like to emphasize that this was over three (3) months after Community Stroke had been informed that their Q3 and Q4 CY 2020 QRP data was insufficient and Community Stroke would be penalized with the two (2) percentage point reduction to its FY 2022 APU and nearly two (2) months after the deadline for Q1 CY 2021 QRP data, *long after this outreach would have been relevant to the data in question.*

The Medicare Contractor's position is that Community Stroke acknowledged it reported Q1 CY 2021 data under the hyphenated CCN (form and manner), and so it remains in violation of the reporting requirements; therefore, the two (2) percentage point reduction should be upheld.[61]

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[54] Examples of CDC materials before or from the time period at issue providing instruction on entry of a provider's CCN and give an example of a CCN entry without using a hyphen (e.g., "999999" or "123456") include: "Changing a CMS Certification Number within NHSN" (Mar. 2020) *available at* https://www.cdc.gov/nhsn/pdfs/cms/Changing-CCN-within-NHSN.pdf (last visited Oct. 7, 2024); and "CMS certified IRF Locations within Acute Care, Critical Access, and Long Term Acute Care Hospitals" (January 2021) *available at* https://www.cdc.gov/nhsn/pdfs/irf/updating-irf-locations-within-nhsn.pdf (last visited Oct. 7, 2024) .

[55] The CDC NHSN weblink at https://www.cdc.gov/nhsn/pdfs/cms/Changing-CCN-within-NHSN.pdf is referenced in other NHSN publications and guidance and has been active at least since December 2017 as it is referenced in the NHSN Newsletter, Vol 12, Issue 4 at 14 (Dec. 2017) (referenced in the context of ensuring your CCN is entered into NHSN and stating "Specific guidance on adding/updating the facility CCN and CCN effective date within NHSN can be found here: www.cdc.gov/nhsn/pdfs/cms/changing-ccn-within-nhsn.pdf."); *id.* at 10 (similarly including reference to weblink). *See also* "CMS certified IRF Locations within Acute Care , Critical Access, and Long-Term Acute Care Hospitals: Location Mapping" (Jan. 2021) (available at: https://www.cdc.gov/nhsn/pdfs/irf/Updating-IRF-locations-within-NHSN.pdf (last visited: Oct. 7, 2024)) (all examples to illustrate data entry in NHSN have no hyphens); "NHSN CHECKLIST FOR HCP REPORTING TO CMS HOSPITAL, IRF and LTCH QUALITY REPORTING PROGRAMS" (Sept. 2021) *available at* https://www.cdc.gov/nhsn/pdfs/cms/hcp-monthly-checklist-cms-508.pdf (last visited Oct. 7, 2024).

[56] Ex. C-1 (Case No. 22-0953) at C-0004.

[57] Ex. P-6 (Case No. 23-1218).

[58] Tr. at 73. *See also* Ex. P-7 (Case No. 23-1218).

[59] Ex. P-17 (Case No. 23-1218) at COMM000295 –296.

[60] *Id*. at COMM000294.

[61] Medicare Contractor's PPP at 11 (Case No. 23-1218). *See also* Tr. at 102; Ex. P-18 (Case No. 23-1218).

The Board agrees with the Medicare Contractor on this point and finds that in submitting data under the hyphenated CCN for Q1 CY 2021, Community Stroke failed to submit data on measures *in the form and manner, and at a time, specified by CMS*.

B. Data Completion Thresholds.

To comply with the IRF QRP requirements, Community Stroke must show that it met or exceeded *both* a ninety-five percent (95%) data completeness threshold for "completion of required quality measures data and standardized patient assessment data collected using the IRF-PAI submitted through the CMS designated data submission system," ***and*** a one hundred percent (100%) data completeness threshold for "measures data collected and submitted using the CDC NHSN."[62] Again, the IRF-PAI is not at issue in this case.

For the reasons expressed in "Form, Manner, and Time," *supra* at pages 9 – 11, the Board finds that, by submitting data under the hyphenated CCN for Q1 CY 2021, Community Stroke failed to meet the one hundred percent (100%) data completeness threshold for measures data collected and submitted using the CDC NHSN.

C. Exception and Extension Requirements.

As set forth more fully in "Statement of Relevant Law," *supra* at pages 5 – 8, an IRF may request exceptions or extensions to the measures data or standardized patient assessment data reporting requirements in extraordinary circumstances beyond the control of the IRF.[63] CMS, on its own accord, "may grant exceptions or extensions to IRFs without a request if … [a]n extraordinary circumstance affects an entire region or locale" and/or a "systemic problem with one of CMS's data collection systems directly affected the ability of an IRF to submit data."[64] Within ninety (90) days of the occurrence of an extraordinary circumstance beyond the control of the IRF, an IRF must request an exception or extension by sending an email to CMS that includes certain pertinent information.[65] Reconsideration requests are only accepted by email.[66]

Community Stroke argues that the NHSN's system permitting, or specifically not "reject[ing]" the data entry of a hyphenated CCN, even though that entry of an incorrect or hyphenated CCN would result in CMS not receiving the data, is a "systemic flaw."[67] The use of the word "systemic" is intentional and an attempt to connect this issue to the 42 C.F.R. § 412.634(c)(4) exceptions for systemic problems with data collection. Community Stroke requests that the Board grant this exception for its failure to meet the deadline.[68]

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[62] *See* 42 C.F.R. § 412.634(f) (2019).
[63] *See* 42 C.F.R. § 412.634(c)(1) (2019).
[64] 42 C.F.R. § 412.634(c)(4) (2019).
[65] *See* 42 C.F.R. § 412.634(c)(1) – (3) (2019).
[66] 42 C.F.R. § 412.634(c)(5) (2019).
[67] Tr. at 10-12.
[68] Provider's Post Hearing Brief (Case No. 22-0953) at 5. ("WHEREFORE, the Provider requests the Board remand [this] matter to CMS with instructions to grant an exception to the reporting deadlines at issue pursuant to 42 C.F.R. § 412.634 (c)(4)(ii) due to systemic problems with the NHSN data collection system that directly affected the ability of CMS to receive the Provider's QRP data it timely reported associated with seven character CCNs.")

Community Stroke's plea to the Board to grant an exception to the August 16, 2021 reporting deadlines at issue pursuant to 42 C.F.R. § 412.634(c)(4)(ii) is misplaced. CMS requires exceptions based on the occurrence of extraordinary circumstances to be requested by sending an email to CMS within ninety (90) days of the occurrence of the extraordinary circumstances.[69] The record does not reflect an assertion of any extraordinary circumstance. In the same way, the Board finds no evidence in the record to show such an exception request was properly submitted by sending an email to CMS within the required time. Accordingly, an analysis of whether the alleged system problems were extraordinary circumstances is unnecessary for resolving the issues currently before the Board.[70]

The open question is whether the NHSN's system's ability to allow for a seven (7) character CCN constitutes a *systemic problem* for which CMS should have granted an exception. An exception or extension for a *systemic problem* may *only* be initiated by and communicated by CMS:

> We also proposed, for the FY 2017 adjustments to the IRF PPS annual increase factor and subsequent year increase factors, that we may grant an exception or extension to IRFs *if we determine* that a systemic problem with one of our data collection systems directly affected the ability of the IRF to submit data. Because we do not anticipate that these types of systemic errors will happen often, we do not anticipate granting an exception or extension on this proposed basis frequently. We proposed that *if we make the determination* to grant an exception or extension, *we will communicate this decision* through routine communication channels to IRFs and vendors, including, but not limited to, issuing memos, emails, and notices on the CMS Web site at

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[69] 42 C.F.R. § 412.634(c)(2) (2019).

[70] The Board notes that CMS differentiates the processes for *extraordinary events* and *systemic problems*. An exception or extension for an *extraordinary event* may be requested by providers *or* initiated by CMS:

> [W]e finalized a policy that *allowed us to grant waivers (which we are now calling exceptions or extensions) to IRFs that have not requested them if we determine that an extraordinary circumstance*, such as an act of nature, affects an entire region or locale. We stated that if this determination was made, we will communicate this decision through routine communication channels to IRFs and vendors…."

79 Fed. Reg. 45872, 45920 (Aug. 6, 2014) (emphasis added); s*ee also* 78 Fed. Reg. at 47920 (Aug. 6, 2013). An IRF must provide "[e]vidence of the impact of extraordinary circumstances, including, but not limited to, photographs, newspaper, and other media articles." 42 C.F.R. § 412.634(c)(3)(vi) (2019). It is clear from the preamble discussion in the Federal Register from which this regulation was adopted that CMS's intent was to offer leniency "when providers are unable to submit quality data due to the occurrence of extraordinary circumstances beyond their control (for example, natural or man-made disasters)." 78 Fed. Reg. at 47920 (Aug. 6, 2013). A "disaster" is a "catastrophe which causes damages of sufficient severity and magnitude to partially or completely destroy or delay access to medical records and associated documentation." *Id*. Examples include "hurricanes, tornadoes, earthquakes, volcanic eruptions, fires, mudslides, snowstorms, and tsunamis" and "terrorist attacks, bombings, floods caused by man-made actions, civil disorders, and explosions." *Id*.

> http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/IRF-Quality-Reporting/index.html.[71]

The Board finds no evidence in the record to show that the NHSN's system's ability to allow for a seven (7) character CCN (*i.e.*, a CCN *including a hyphen*) without generating an error message was a systemic problem. If such evidence exists, Community Stroke failed to produce it.

When Community Stroke first introduced the "hyphen hypothesis" regarding the Q4 CY 2020 and, relevant to this decision, Q1 CY 2021 data, at the hearing, the Medicare Contractor emphasized the hyphen hypothesis is a problem specific to the provider and not a systemic problem *as that term is used by the regulations*.[72]

The Board, therefore, finds that Community Stroke's ability to file its Q1 CY 2021 QRP data was not affected by any systemic problem with CMS's data collection systems, but instead was a provider-specific failure, and as such, no exception applies.

In making this finding, the Board also observes that neither the Medicare Contractor nor Swingtech educated the provider on proper entry of the CCN in the reports or explained where that guidance is located.[73] The letters in Exhibits P-1 and P-2, drafted by the Principal Program Representative for Non-Long Term Care Certification & Enforcement Branch of CMS, are misleading in including the hyphen. CDC NHSN guidance on entering CCNs gives examples and screen shots of correct CCN entries without the hyphen, but does not explicitly state that the hyphen should be omitted.[74] One example goes so far as to state, "It is very important to make sure you are correctly entering your CCN," but does not elaborate on elements that make the CCN correct or incorrect.[75] The inability of the NHSN system to accept a hyphen may well be a design flaw that would benefit from an upgrade, but the evidence does not suggest that it is a *malfunction*. While the Board is sympathetic to Community Stroke's frustration with the hyphen issue, the Board is likewise obligated to adhere to the regulations, and thus does not have discretion to provide equitable relief.[76]

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[71] 79 Fed. Reg. at 45920 (Aug. 6, 2014) (emphasis added). *Compare* 42 C.F.R. § 412.433(f) (Where CMS may grant an exception in the event of extraordinary circumstances beyond the control of an inpatient psychiatric facility ("IPF"), "such as when an act of nature affects an entire region or locale or a *systemic problem with one of CMS's data collection systems directly or indirectly affects data submission*. CMS may grant an exception as follows: (1) *Upon request by the IPF*. (2) At the discretion of CMS. CMS may grant exceptions to IPFs that have not requested them when CMS determines that an extraordinary circumstance has occurred" (emphasis added)).

[72] *See* Tr. at 14.

[73] *See supra* notes 54, 55.

[74] *Id*. *But see* Tr. at 91, "MR. GRUBBS: And to date, as you prepared for this hearing, is there any guidance anywhere that's available in the NHSN system that says don't use the hyphen when you're entering in CCN? THE WITNESS: No, it does not." *See generally* Exs. C-9, C-11 (Case No. 23-1218).

[75] Ex. C-7 (Case No. 23-1218) at C-0088.

[76] In the preamble to the final rule, 84 Fed. Reg. 39054, 39164-65 (Aug. 8, 2019), the Secretary states:

> *Comment*: Some commenters suggested that CMS provide flexibility in its application of the IRF QRP payment penalty for IRFs who make a good-faith effort to comply and submit quality reporting data.
>
> *Response*: We interpret the commenter's suggestion that we take into consideration case by case exceptions and apply leniency for providers have attempted but failed to submit their quality reporting data for the IRF QRP. We are unable to provide flexibility with respect to the 2 percent

D. Burden of Proof and Standard of Review

A Board decision must include findings of fact and conclusions of law that "the provider carried its burden of production of evidence and burden of proof by establishing, by a preponderance of the evidence, that the provider is entitled to relief on the merits of the matter at issue."[77] Additionally, "[a] decision by the Board shall be based upon the record made at such hearing, which shall include the evidence considered by the [Medicare contractor] and such other evidence as may be obtained or received by the Board, and shall be supported by substantial evidence when the record is viewed as a whole."[78] In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), the U.S. Supreme Court held, "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[79] Accordingly, in an appeal before the Board, a provider must prove by a preponderance of substantial, relevant evidence that it is entitled to the relief sought.

In summary, as described above, Community Stroke's witness states that it referenced CDC NHSN guidance when entering the CCN, incorrectly, with a hyphen; however, Community Stroke failed to include that guidance in the record.[80] The evidence demonstrates that the first instance of Community Stroke seeking assistance is nearly two (2) months after the Q1 CY 2021 reporting deadline.[81] Therefore, the Board finds that, per 42 C.F.R. § 405.1871(a)(3), Community Stroke has not "carried its burden of production of evidence and burden of proof by establishing, by a preponderance of the evidence, that [it] is entitled to relief on the merits of the matter at issue."

DECISION

After considering Medicare law and regulations, the arguments and testimony presented, and the evidence admitted, the Board finds that the two (2) percentage point reduction of Community Stroke's Medicare APU for FY 2023 was proper.

> payment penalty; as noted previously, section 1886(j)(7) of the Act requires the Secretary to reduce the annual increase factor for IRFs that fail to comply with the quality data submission requirements. While we did not seek comment on flexibilities on which the penalty is applied, we note that we have provided flexibility where the failure of the IRF to comply with the requirements of the IRF QRP stemmed from circumstances beyond its control. For example, we have finalized policies that grant exceptions or extensions for IRFs if we determine that a systemic problem with one of our data collection systems affected the ability of IRFs to submit data (79 FR 45920). We have also adopted policies (78 FR 47920) that allow us to grant exemptions or extensions to an IRF if it has experienced an extraordinary circumstance beyond its control.

[77] 42 C.F.R. § 405.1871(a)(3) (as of Oct. 1, 2020).

[78] 42 U.S.C. 1395oo(d). This statutory provision further confirms that "[t]he Board shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) even though such matters were not considered by the intermediary in making such final determination." *But also see* 42 C.F.R. § 405.1869(a).

[79] *See also Pomona Valley Hosp. Med. Ctr. v. Becerra*, 82 F.4th 1252, 1258-59 (D.C. Cir. 2023).

[80] Tr. at 52-53, 61-62.

[81] Ex. P-17 (Case No. 23-1218) at COMM000295 – 296.

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FOR THE BOARD:

11/7/2024

X Kevin D. Smith, CPA

Kevin D. Smith, CPA
Acting Chair
Signed by: Kevin D. Smith -A