

CENTERS FOR MEDICARE & MEDICAID SERVICES

Order of the Administrator

In the case of:	PRRB Case No.: 19-1983GC
Empire Health Foundation, et al.,	For: Deaconess Medical Center, Provider
Plaintiffs	No. 50-0044, FYE December 31, 2007;
vs.	and
Xavier Becerra, SECRETARY of	Valley Hospital Medical Center,
Health and Human Services	Provider No. 50-0119, FYE December 31,
Defendant	2006.
	Case No. 20-2149(JEB) (D.D.C.)

By Order dated February 8, 2022, the United States District Court for the District of Columbia (D.D.C.) remanded the above captioned case to the Secretary of Health and Human Services for further proceedings consistent with its opinion. *Empire Health Foundation v. Becerra*, Civil Action No. 20-2149 (JEB) (February 8, 2022) (*Empire III*), ECF 39; *see also id.*, ECF 40 (Mem. Op.).

The Provider Reimbursement Review Board (PRRB) appeal at issue in this case involves revised Notices of Program Reimbursement (NPRs) issued to Plaintiff Hospitals Deaconess Medical Center for FYE December 31, 2007, and Valley Hospital Medical Center for FYE December 31, 2006 (Deaconess 2007 and Valley 2006, respectively), where the Medicare/SSI fractions used in the Medicare Disproportionate Share Hospital (DSH) payment adjustment in each were realigned to the Hospitals' cost years. The PRRB dismissed the Hospitals' request for expedited judicial review (EJR) for lack of jurisdiction under 42 C.F.R. § 405.1889, finding that the specific matter of counting Medicare Part C patient days in the DSH payment adjustment calculation had not been revised in the realigned NPRs. Plaintiff Hospitals sought review of the jurisdictional dismissal in federal court. The Secretary, considering *Azar v. Allina Health Services*, 139 S. Ct. 1804 (June 3, 2019) (*Allina II*), which held that Medicare payment policies that establish substantive legal standards and that are avowedly gap-filling must be issued through notice and comment rulemaking, moved for a voluntary remand to allow the Secretary to re-examine the Plaintiff Hospitals' challenge to their DSH payment adjustments in their realigned NPRs. The Secretary asserted that because each of Plaintiffs' federal court claims was aimed at obtaining a decision as to whether the Secretary had properly treated the Hospitals' Medicare Part C patient days in the Disproportionate Patient Percentage (DPP)

in calculating their Medicare DSH payment adjustments, remand to the Secretary was the most efficient way forward. The agency explained that it sought a remand to reconsider the treatment of the Hospitals' Part C days under a (then) forthcoming retroactive final rule regarding the treatment of Part C days in the Medicare DSH payment adjustment calculation. *See* Medicare Program; Treatment of Medicare Part C Days in the Calculation of a Hosp.'s Medicare Disproportionate Patient Percentage, 85 Fed. Reg. 47,723 (proposed Aug. 6, 2020) (CMS 1739P).

The Court agreed, finding that Plaintiffs'

claims all “redound[] to [an] administrative challenge[] that their DSH adjustments were too low because the Secretary wrongly interpreted the DSH statute by including Part C patient days in the Medicare/SSI fraction.” In other words, each of Plaintiffs' procedural challenges is merely an attempt to expedite a recalculation of their realigned NPRs that omits the Part-C days from the Medicare/SSI fraction.

Empire III, ECF 40 at 9 (alterations in original; citations omitted).

In addition, the Court recognized that

Defendants have clarified . . . that the agency's reopening regulations — which led to dismissal on jurisdictional grounds of the prior PRRB appeals — would not apply to these claims on remand. Rather, “[t]he DSH payment adjustments for Part C patient days that will be calculated under the forthcoming rule will be new determinations with statutory appeal rights,” even if the NPRs are not changed. [Def. Reply Br.] at 10 (citing 42 U.S.C. § 1395oo(a)(3), (f)). The prejudice Plaintiffs fear, then, will not come to pass.

Empire III, ECF 40 at 11. Therefore, the Court concluded that remand to the agency to calculate Deaconess 2007's and Valley 2006's DSH payment adjustments under the (then) forthcoming new Part C days rule was appropriate.

In addition to the Court's February 8, 2022 order remanding the appeal of Deaconess 2007's and Valley 2006's realigned NPRs (PRRB Case No. 19-1983GC), the Administrator issued an order on July 18, 2022, instructing the Medicare Administrative Contractor (MAC) to recalculate under the (then) forthcoming new Part C days rule the DSH payment calculations for Deaconess 2007 and Valley 2006 that the Hospitals had challenged in PRRB Case No. 17-0555GC (appeal of determinations for the same cost years based on earlier, revised NPRs).

Finally, the Administrator is aware that Deaconess also appealed its initial NPR for cost year 2007 to the PRRB (PRRB Case No. 10-1172GC); that the PRRB granted the hospital's request for EJR in that case on the treatment of its Part C days; that the Federal District Court for the District of Columbia in *In Re: Allina II-Type DSH Adjustment Cases*, Misc. Action No. 19-0190 (ABJ) (Nov. 4, 2019), has remanded that matter to the agency to calculate Deaconess 2007's DSH payment adjustment pursuant to the new Part C days

rule;¹ and that the CMS Administrator has issued a remand order for Deaconess to receive a revised NPR for cost year 2007 that sets forth a DSH payment adjustment that accounts for Part C patient days in the calculation of the DPP in the manner set forth in the final Part C days rule. *See* CMS Admin. Remand Order, *In re: Allina II-Type DSH Adjustment Cases* (June 16, 2023).

On June 9, 2023, the Secretary finalized the Proposed Rule to count Part C days in the Medicare/SSI fraction of the DPP used to calculate the DSH payment adjustment and to apply this methodology to fiscal years prior to FY 2014. 88 Fed. Reg. 37772 (June 9, 2023).

Accordingly, the Administrator ORDERS:

THAT, pursuant to 42 C.F.R. § 405.1877(g)(2)(ii), the Deaconess 2007 and Valley 2006 appeal of realigned NPRs (at issue in PRRB Case No. 19-1983GC) is remanded to the Office of Financial Management (OFM), Centers for Medicare & Medicaid Services, with instructions to direct the relevant MACs to issue revised NPRs, each of which shall set forth a DSH payment adjustment that accounts for Part C patient days in the calculation of the DPP in the manner set forth in the final Part C days rule;

THAT OFM will also direct each relevant MAC to use the most recent cost report for each remanded cost reporting year for each provider over which it is responsible as the basis to recalculate that year's DSH payment adjustment to account for Part C patient days in the calculation of the DPP in the manner set forth in the final Part C days rule;

THAT, in light of the fact that the Hospitals have had multiple appeals for a single cost reporting year remanded to recalculate their DSH payment adjustments to reflect the treatment of Part C days in the DPP in the manner of the final Part C days rule, OFM will further direct the relevant MAC to issue to each provider one revised NPR that reflects that treatment as applied to the most recent cost report for that cost year;

THAT OFM will also direct the MAC to issue a revised NPR to each provider that reflects the treatment of Part C days in the DPP adopted through notice-and-comment rulemaking in the final Part C days rule. Thus, even if the Medicare/SSI fractions used in the DPP are unchanged or calculating the DPP under the new rule has no impact on the DSH payment adjustment, the fractions will be revised within the meaning of 42 C.F.R. § 405.1877(g)(2)(iii)(A) because they will be issued pursuant to the new final rule; and

¹ *See In Re: Allina II-Type DSH Adjustment Cases*, Misc. Action No. 19-0190 (ABJ), order dated January 19, 2021, (ECF 74, 74-1) (referencing *University of Washington Medical Center*, 1:19-cv-01104-ABJ (D.D.C.), which includes PRRB Case No. 10-1172GC).

THAT, pursuant to this remand order, the revised DSH payment adjustments calculated pursuant to the final rule to account for Part C patient days in the calculation of the DPP issued in revised NPRs will be subject to appeal as revised determinations pursuant to 42 C.F.R. § 405.1877(g)(2)(iii)(A).

Date: December 22, 2023

/s/
Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services