DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Medicare & Medicaid Services

Decision of the Administrator

IN THE CASE OF:	*	
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Beth Israel Deaconess Hospital-Plymouth	*	**MGCRB Case No. 25C0167**
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Provider No. 22-0060	*	**Date: January 23, 2024**
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This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision entered by the Medicare Geographic Classification Review Board (MGCRB). The review is during the 90-day period in § 1886(d)(10) of the Social Security Act (Act), as amended. The Hospital requested that the Administrator reverse the MGCRB's denial of its reclassification application. Accordingly, this case is now before the Administrator for final agency review.

ISSUE AND MGCRB DECISION

The issue involves whether the MGCRB properly denied the Hospital's request for redesignation. The Hospital, geographically located in the urban Boston, Massachusetts (MA) Core-Based Statistical Area (CBSA) but approved as rural Massachusetts under 42 C.F.R. § 412.103 (effective date of September 9, 2021), requested redesignation to the urban Boston, MA CBSA (CBSA 14454) for purposes of using the area's wage index to determine its payment rate under the Medicare inpatient prospective payment system (IPPS) for the Federal Fiscal Years (FFYs) 2025 through 2027. The MGCRB found that the pre-reclassified average hourly wage (AHW) for the requested area is lower than the pre-reclassified AHW for the area in which the Hospital is located.

COMMENTS

The Hospital commented, requesting review by the Administrator. The Hospital argued that the MGCRB treated the Hospital's home area as being rural Massachusetts, presumably because the Hospital was considered rural under 42 C.F.R. § 412.103. However, the Hospital noted, this contradicts CMS policy that clarified that hospitals classified as rural under § 412.103 would be allowed to reclassify to an area with a pre-reclassified AHW that is higher than the AHW of either the hospital's geographic home area or the rural area. As the Hospital requested to be redesignated to its geographic home area (urban Boston, MA), the AHW for the requested area is the same, thus, the Hospital's application should be approved.

DISCUSSION

The entire record furnished by the MGCRB has been examined, including any correspondence, position papers, exhibits, and subsequent submissions. All comments received timely are included in the record and have been considered.

Section 1886(d)(10)(C)(iii)(II) of the Social Security Act and the Medicare regulations at 42 C.F.R. § 412.278 provide for the CMS Administrator's review of the MGCRB decisions. In exercising its authority under § 1886(d)(10) of the Act, the MGCRB must comply with all of the provisions of Title XVIII of the Act and the regulations issued there under, including the regulations at 42 C.F.R. § 412.230, *et seq*. Likewise, the regulations promulgated by the Secretary establishing procedures and criteria for the MGCRB are binding on the agency and on the Administrator in reviewing MGCRB decisions.

Section 1886(d)(10) of the Act provides for the MGCRB to consider the application of any subsection (d) hospital requesting that the Secretary change the hospital's geographic classification for purposes of determining for a fiscal year its wage index. Further, § 1886(d)(10)(D)(i)(I) requires the Secretary to publish guidelines for comparing wages, taking into account to the extent the Secretary determines appropriate, occupational mix in the area in which the hospital is classified and the area in which the hospital is applying to be classified.

Pursuant to the statute, the Secretary established 42 C.F.R. § 412.230 setting forth criteria for an individual hospital seeking redesignation to another rural area or an urban area. The regulation in part states at (a)(1) that:

> (ii) Effective for fiscal year 2005 and subsequent fiscal years, an individual hospital may be redesignated from an urban area to another urban area, from a rural area to another rural area, or from a rural area to another urban area for the purposes of using the other area's wage index value.
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> (iii) An urban hospital that has been granted redesignation as rural under § 412.103 is considered to be located in the rural area of the state for the purposes of this section.

Relevant to this case, the regulation at 42 C.F.R. § 412.230(a)(5) notes the following limitations on redesignation:

> (i) An individual hospital may not be redesignated to another area for purposes of the wage index if the pre-reclassified average hourly wage for that area is lower than the pre-reclassified average hourly wage for the area in which the hospital is located. An urban hospital that has been granted redesignation as rural under § 412.103 is considered to be located in the rural area of the state for the purposes of this paragraph (a)(5)(i).
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> (ii) A hospital may not be redesignated to more than one area, except for an urban hospital that has been granted redesignation as rural under § 412.103 and receives an additional reclassification by the MGCRB.

Regarding the appropriate wage data, the regulation at 42 C.F.R. § 412.230(d)(2) states:

(ii) For redesignations effective beginning FY 2003:

(A) For hospital-specific data, the hospital must provide a weighted 3-year average of its average hourly wages using data from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes.

(1) For the limited purpose of qualifying for geographic reclassification based on wage data from cost reporting periods beginning prior to FY 2000, a hospital may request that its wage data be revised if the hospital is in an urban area that was subject to the rural floor for the period during which the wage data the hospital wishes to revise were used to calculate its wage index.

(2) Once a hospital has accumulated at least 1 year of wage data in the applicable 3-year average hourly wage period used by the MGCRB, the hospital is eligible to apply for reclassification based on those data.

(B) For data for other hospitals, the hospital must provide a weighted 3-year average of the average hourly wage in the area in which the hospital is located and a weighted 3-year average of the average hourly wage in the area to which the hospital seeks reclassification. The wage data are taken from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes.

In 1999, Congress enacted §401 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999[1], which established a separate procedure from the MGCRB process whereby urban hospitals can be reclassified from urban to rural status if they meet certain criteria. This provision was set forth at § 1886(d)(8)(E) of the Act and promulgated at 42 C.F.R. § 412.103. Consistent with the statute, the Medicare regulations at 42 C.F.R. § 412.103, provides special treatment for hospitals located in urban areas that apply for reclassification as rural. When the Secretary implemented 42 C.F.R. § 412.103, the Secretary also initially amended the MGCRB process at 42 C.F.R. § 412.230(a)(5)(iii) to prohibit hospitals with § 412.103 rural status from also being redesignated under the MGCRB process based upon this acquired rural status and for a year in which such status was in effect and provided certain limitations. In addition, hospitals were required to meet the reclassification proximity criteria for its geographic location verses its rural classification under § 412.103 at the time of the MGCRB decision.

However, the U.S. Court of Appeals for the Second Circuit, in *Lawrence + Memorial Hospital* v. *Burwell*[2], and Third Circuit, in *Geisinger Community Medical Center v. Secretary, DHHS*[3], respectively held the limiting language of the regulation contrary to the statute and, thus, held that a hospital with "401" rural status pursuant to 42 C.F.R. § 412.103 could reclassify based on the acquired 401 rural status and retain the rural status for the same period as the MGCRB reclassification. So as to not have different policies for different jurisdictional regions, CMS removed the limitation in the reclassification regulation that was invalidated by the courts in

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[1] Pub. Law 106-113
[2] 812 F.3d 257 (2d. Cir. 2016)
[3] 794 F.3d 282 (3d Cir. 2015).

Geisinger and *Lawrence*.[4] CMS also revised the regulation text at § 412.230(a)(5)(ii) to allow more than one reclassification for those hospitals redesignated as rural under § 412.103 and simultaneously seeking reclassification through the MGCRB. Therefore, for applications due to the MGCRB on September 1, 2016, for reclassification first effective for FY 2018, a hospital could apply for a reclassification under the MGCRB while still being reclassified from urban to rural under § 412.103, and such hospitals would be eligible to use distance and average hourly wage criteria designated for rural hospitals at § 412.230(b)(1) and (d)(1).

CMS reiterated in the August 22, 2016 Final Rule[5] that while hospitals designated as rural under § 412.103 may use the distance (35 miles for a rural hospital, compared to 15 miles for an urban hospital) and average hourly wage *criteria*, the average hourly wage *data* are to be compared to the average hourly wage of the hospital's actual urban geographic location. Thus, CMS previously allowed hospitals classified as rural under § 412.103 to use the 106 percent AHW criteria (rather than the 108 percent for an urban hospital) but still compared the hospital to the geographic area in which it was located, rather than to the rural area.

Subsequently, the United States District Court for the District of Columbia held in *Bates County Memorial Hospital, et al., v. Azar*[6] that:

> A key MGCRB regulation, in turn, requires the MGCRB to compare the hospitals' hourly wage rates with others "in the area in which [they are] located." 42 C.F.R. § 412.230(d)(1)(iii)(C). But in doing so, the Secretary interpreted Section 401 to allow him to use other hospitals in the urban area in which applicant hospitals are geographically located, instead of the rural area to which they were reclassified under Section 401. Plaintiffs sued, arguing that Section 401's command that they be treated as located in the rural areas of their states forecloses the Secretary's application of the MGCRB regulation to them in this way. The Secretary argues, to the contrary, that the statute is vague, his interpretation is reasonable, and it is entitled to Chevron deference. Not so. The Court agrees with Plaintiffs that the text of the statute requires it to enter summary judgment on their behalf, and it will remand the case to the Secretary for action consistent with this opinion.

As a result of the *Bates* court's decision, CMS revised its policy in the May 10, 2021 interim final rule with comment period (IFC)[7] so that the redesignated rural area, and not the hospital's geographic urban area, is considered the area a § 412.103 hospital is located in for purposes of meeting MGCRB reclassification criteria. Similarly, CMS revised the regulations to consider the redesignated rural area, and not the geographic urban area, as the area a § 412.103 hospital is located in for the prohibition at § 412.230(a)(5)(i) on reclassifying to an area with a pre-reclassified average hourly wage lower than the prereclassified average hourly wage for the area in which the hospital is located.

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[4] 81 Fed. Reg. 23,428, 23,433-35 (Apr. 21, 2016).
[5] 81 Fed. Reg. 56,762, 56,925 (Aug. 22, 2016).
[6] 464 F.Supp. 3d 43 (D.D.C. 2020).
[7] 86 Fed. Reg. 44,774, 24,735 (Aug. 13, 2021).

However, in the FY 2022 Final Rule[8], a commentor noted that the IFC stated that a hospital reclassified under § 412.103 "could" potentially reclassify to any area with a prereclassified average hourly wage that is higher than the pre-reclassified average hourly wage for the rural area of the state for purposes of the regulation at § 412.230(a)(5)(i). The commenter asserted that CMS' use of the word ''could'' in this context suggested that CMS would allow the hospital to use either its home average hourly wage or the rural average hourly wage for purposes of the regulation at § 412.230(a)(5)(i). The commenter suggested that CMS allow both comparison options, because the rural average hourly wage may occasionally be higher than the hospital's home urban area's average hourly wage, such as in the state of Massachusetts. CMS responded:

> The commenter's interpretation of our policy is correct. While the court's decision in *Bates* requires CMS to permit hospitals to reclassify to any area with a prereclassified average hourly wage that is higher than the pre-reclassified average hourly wage for the rural area of the state, we do not believe that we are required to limit hospitals from using their geographic home area for purposes of the regulation at § 412.230(a)(5)(i). Therefore, we are clarifying that **we would allow hospitals to reclassify to an area with an average hourly wage that is higher than the average hourly wage of either the hospital's geographic home area or the rural area.** (Emphasis added).[9]

In light of the foregoing, the Administrator finds that the pre-reclassified AHW for the requested area is not lower than the pre-reclassified AHW of the area in which the Hospital is located when the Hospital is considered to be located in its geographic home area. The MGCRB used the rural area as the Hospital's "home area", when it found that the pre-reclassified AHW of the requested area was lower than the pre-reclassified AHW of the area in which the Hospital is located. CMS policy clarified that hospitals classified as rural under 42 C.F.R. § 412.103 would be allowed to use either the hospital's geographic home area or the rural area. Thus, as the Hospital meets the other criteria for redesignation, the Hospital is approved for redesignation for purposes of using the requested area's wage index to determine its IPPS payment rate for the FFYs 2025 through 2027.

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[8] 86 Fed. Reg. 44,774 (Aug. 13, 2021).
[9] *Id.* at 45,189.

DECISION

The Administrator reverses the MGCRB's decision in accordance with the foregoing opinion.

THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES

Date: April 26, 2024

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