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

Decision of the Administrator

IN THE CASE OF:	*	**MGCRB Case No. 25C0304**
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Deaconess Hospital, Inc.	*	
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Provider No. 15-0082	*	**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 time period in 42 C.F.R. §412.278. The Hospital submitted comments requesting the Administrator reverse the MGCRB's decision. 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 reclassification. The Hospital, geographically located in the urban Evansville, Indiana-Kentucky (IN-KY) Core-Based Statistical Area (CBSA) but classified as rural Indiana under 42 C.F.R. § 412.103 requested reclassification to rural Illinois 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 (FFY) 2025 through 2027. The MGCRB found that the Hospital did not meet the qualifications, as 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. The MGCRB found that the AHW for the requested area is 40.8117 and the AHW for the Hospital's home area is 40.8303.

HOSPITAL'S COMMENTS

The Hospital commented, requesting review by the Administrator. The Hospital stated that it disagreed with the method used to calculate the pre-reclassified average hourly wage, as it should include the wage data for both geographically rural hospitals and hospitals approved as rural under 42 C.F.R. § 412.103. The Hospital noted that there was extensive discussion of this in the FFY 2024 Final Rule, in which CMS made clear that urban hospitals approved as rural should be treated as if they are physically located in the rural area of their state. The Hospital argued that the language in § 412.230(a)(5)(i) should not exclude these hospitals. The Hospital acknowledged that while the pre-reclassified AHW for rural IL would be lower than the pre-reclassified AHW for rural Indiana under CMS' previous interpretation, under CMS clarified policy that §412.103 hospitals should be treated as if they were physically located in the rural area of the state, the pre-

reclassified AHW for rural IL would be higher as it would include a large number of hospitals that have redesignated under § 412.103 hospitals.[1]

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.

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 §

[1] The Hospital included a table showing what the pre-reclassified AHW would be if the calculation included not only hospitals that are physically located in the rural area of IL and IN, but also those hospitals classified as rural under § 412.103 in each state. *See* Attachment B of the Hospital's comments to the Administrator.

412.103 is considered to be located in the rural area of the state for the purposes of this paragraph (a)(5)(i).

(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.

Specifically, MGCRB Rule 5.2(B) states:

(4) *Appropriate wage data*. The provider must submit a weighted 3-year average of its hospital-specific data, plus a weighted 3-year average of the AHW in both the area in which the hospital is located and 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.

The Board will use the ***final*** official wage data in evaluating if a provider meets the redesignation criteria. Providers may obtain this wage data information via the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-ServicePayment/AcuteInpatientPPS/Wage-Index-Files.html* by accessing the "Three Year MGCRB Reclassification Data" file for the appropriate FFY. Any

inquiries concerning the CMS wage data should be directed to *wageindex@cms.hhs.gov*.

In constructing the wage survey, the Social Security Act requires that the wage index be updated annually, based on a survey of wages and wage-related costs of short-term, acute care hospitals. Because of the amount of time that is needed for hospitals to compile and submit cost reports and for the MAC to then review these cost reports for wage data, there is usually a three-to-four-year lag between the date upon which the Hospital reports the wage data and the date when the wage data is used for the IPPS wage survey and IPPS payment. In addition, due to statutory changes to the MGCRB reclassifications, a three-year weighted average hourly wage (AHW) is used under 42 C.F.R. § 412.230(d), except for hospitals with new owners that do not take assignment, thus, the wage survey data from three constructed wage surveys used for IPPS payment purposes are used.

Significant to this case, the wage survey data used by the MGCRB for this application period comes from the "Three Year MGCRB Reclassification Data for FY 2025 Applications". The three-year weighted AHW uses the FFYs 2022, 2023, and 2024 wage surveys, which are based on cost reports beginning in Federal fiscal years 2018, 2019 and 2020. Notably, the congressional purpose of establishing the statutory three-year wage data requirement was to provide stability in the wage reclassification process and eliminate wide swings in the AHW from year to year. Neither the MGCRB, nor the Administrator can alter this data when deciding reclassification cases.

In 1999, Congress enacted §401 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999[2], 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.

However, the U.S. Court of Appeals for the Second Circuit, in *Lawrence + Memorial Hospital* v. *Burwell*[3], and Third Circuit, in *Geisinger Community Medical Center v. Secretary, DHHS*[4], 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 *Geisinger* and *Lawrence*.[5] 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

[2] Pub. Law 106-113
[3] 812 F.3d 257 (2d. Cir. 2016)
[4] 794 F.3d 282 (3d Cir. 2015).
[5] 81 Fed. Reg. 23,428, 23,433-35 (Apr. 21, 2016).

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[6] 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*[7] 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)[8] 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 pre-reclassified average hourly wage for the area in which the hospital is located.

However, in the FY 2022 Final Rule[9], a commentor noted that the IFC stated that a hospital reclassified under § 412.103 "could" potentially reclassify to any area with a pre-reclassified average hourly wage that is higher than the pre-reclassified average hourly wage for the rural area

[6] 81 Fed. Reg. 56,762, 56,925.
[7] 464 F.Supp. 3d 43 (D.D.C. 2020).
[8] 86 Fed. Reg. 24,735.
[9] 86 Fed. Reg. 44,774 (Aug. 13, 2021).

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 pre-reclassified 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.[10]

The Hospital in this case argues that the CMS policy set forth in the 2024 IPPS rule addressing how the "wage index" is to be calculated for rural areas with respect to § 412.103 hospitals,[11] should guide the "pre-reclassification"/pre-designation wage data to be used in the MGCRB reclassification process. That is, the Hospital argues that the pre-reclassification wage data used in the MGRCB process should include, in rural areas, any urban hospital reclassified under §412.103 as rural.

However, the CMS policy on calculating the wage index is separate from the wage data policies for purposes of the pre-reclassification wage data used under the MGRCB process. The determination of wage index policy is for hospital payment purposes, whereas the wage data the Hospital challenges here is for reclassification determinations. CMS applies the many and extensive wage index policies and statutory requirements for determining the wage index, *after* reclassifications determinations for the Federal fiscal year are made with pre-reclassification wage data.

The wage survey data to be used for this application period come from the "Three Year MGCRB Reclassification Data for FY 2025 Applications". This same wage data must be used by the Administrator. The MGCRB process does not provide for the reconstruction of the wage data to accommodate an alternative policy as the Hospital suggests. The three-year weighted AHW uses the FFYs 2022, 2023, and 2024 wage surveys, which are based on cost reports beginning in Federal fiscal years 2018, 2019 and 2020. This data includes CBSA codes, based on pre-reclassified wage data designation. which is used to determine the reclassification requests under the respective MGCRB wage criteria.

In this case, the MGCRB correctly found, using the appropriate data, that the Hospital did not meet the wage criteria per 42 C.F.R. § 412.230(a)(5)(i). The pre-reclassified average hourly wage

[10] *Id.* at 45,189.

[11] 87 Fed. Reg. 48,780, 49,004 (Aug. 10, 2022). CMS also proposed, beginning with FY 2024, to include the data of all § 412.103 hospitals (including those that have an MGCRB reclassification) in the calculation of the rural floor.

(AHW) for the requested area is lower than the pre-reclassified AHW for the area in which the Hospital is located; the AHW for the requested area is 40.8117 and the AHW for the Hospital's home area is 40.8303. In light of the foregoing and based on the record, the Administrator finds that the MGCRB properly determined that the Hospital did not qualify for redesignation.

DECISION

The Administrator affirms 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 11, 2024

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