PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2017-D3

PROVIDER–
Cornerstone Hospital West Monroe

Provider No.: 19-2031

vs.

MEDICARE CONTRACTOR –
Novitas Solutions, Inc.

HEARING DATE –
February 4, 2016

Fiscal Year - 2015

CASE NO.: 15-1819

INDEX

ISSUE STATEMENT

Whether the payment penalty imposed by the Centers for Medicare and Medicaid Services ("CMS") to reduce Cornerstone Hospital West Monroe's Fiscal Year ("FY") 2015 Medicare payment by 2 percent was proper?[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ("Board") finds that CMS properly imposed a 2 percent reduction to the annual update to the standard federal rate used to calculate the FY 2015 Medicare payments for Cornerstone Hospital West Monroe under the inpatient prospective payment system for long-term care hospitals ("LTCH-PPS").

INTRODUCTION

Cornerstone Healthcare Group Hospital West Monroe, LLC d/b/a Cornerstone Hospital West Monroe ("Cornerstone Hospital" or "Provider") is a Medicare-certified long-term care hospital ("LTCH") located in West Monroe, Louisiana. Cornerstone Hospital's designated Medicare administrative contractor is Novitas Solutions, Inc. ("Medicare Contractor").

On June 27, 2014, CMS determined that Cornerstone Hospital failed to meet the requirements of the LTCH Quality Reporting Program ("LTCH QRP") for FY 2015. Specifically, the determination stated that Cornerstone Hospital was subject to a 2 percent reduction in the FY 2015 annual payment update because it did not submit data for 2 of the 3 quality measures[2] for the four quarters of calendar year ("CY") 2013 (*i.e.*, January 1, 2013 through December 31, 2013).[3]

Subsequently, Cornerstone Hospital requested that CMS reconsider the decision regarding the reduction to its FY 2015 Medicare payments.[4] On September 22, 2014, CMS upheld its reduction decision and denied Cornerstone Hospital's request for reconsideration.[5] On March 13, 2015, Cornerstone Hospital timely appealed CMS' denial to the Board, and met the jurisdictional requirements for a hearing.[6]

The Board held a live hearing on February 4, 2016. Cornerstone Hospital was represented by Husch Blackwell LLP. The Medicare Contractor was represented by Ed Lau, Esq. and Jerrod Olszewski, Esq., of Federal Specialized Services.

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[1] Transcript ("Tr.") at 5-6.
[2] Provider Exhibit P-1.
[3] Medicare Contractor's Final Position Paper at 7.
[4] Provider Exhibit P-2.
[5] Provider Exhibit P-3.
[6] Provider Exhibit P-4.

STATEMENT OF THE FACTS

As delineated in the final rule published on August 18, 2011 ("August 2011 Final Rule"), CMS required that Cornerstone Hospital submit data regarding catheter-associated urinary tract infections ("CAUTI") and central line catheter-associated bloodstream infections ("CLABSI")[7] to the Center for Disease Control and Prevention's ("CDC's") National Health Safety Network ("NHSN")[8] system for all four quarters of CY 2013.[9] The four quarterly submitting deadlines were:

1. Data from the first quarter of CY 2013 was due on August 15, 2013;
2. Data from the second quarter of CY 2013 was due on November 15, 2013;
3. Data from the third quarter of CY 2013 was due on February 15, 2014; and
4. Data from the fourth quarter of CY 2013 was due on May 15, 2014.[10]

CMS determined that Cornerstone Hospital missed the deadlines for submission of CY 2013 CAUTI and CLABSI data for the first, second, third and fourth quarters.[11] These omissions resulted in a 2 percent reduction in the Medicare payment update for FY 2015.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Cornerstone Hospital explains that its Director of Quality Management accidentally transposed the last two digits of Cornerstone Hospital's Medicare Identification Number while enrolling in the CDC's NHSN system. As a result, all the data that was submitted for all four quarters of CY 2013[12] was submitted in error under the CCN "192013" rather than the correct CNN of "192031."[13] Cornerstone Hospital states that it was not aware of this error until it received the June 27, 2014 determination letter from CMS.[14] By that date, it was too late to resubmit the CY 2013 data using the correct CCN.

Notwithstanding its data entry mistake, Cornerstone Hospital maintains that the overall fault lies with CMS because: (1) the NHSN data collection system accepted, confirmed submission and posted the data that Cornerstone Hospital submitted for CY 2013 on its website over the course of a year without alerting Cornerstone Hospital that its CCN number was wrong; and (2) NHSN itself never actually transmitted this data to CMS. Cornerstone Hospital states that "a properly functioning reporting system would have

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[7] *Id*. at 51745-51750. *See also* 42 U.S.C. § 1395ww(m)(5)(D)(iii) (requiring the Secretary to select and publish LTCH QRP quality measures by October 1, 2012).
[8] NHSN is a secure, Internet-based surveillance system maintained and managed by the CDC, and can be used by many types of health care facilities in the United States… to collect and use data about HAIs, adherence to clinical practices known to prevent HAIs, the incidence or prevalence of multidrug-resistant organisms within their organizations, and other adverse events. 77 Fed. Reg. 53258-01, 53557 (Aug. 31, 2012)
[9] 76 Fed. Reg. 51476, 51751-51753 (Aug. 18, 2011)(excerpt included at Medicare Contractor Exhibit I-2).
[10] *Id.* at 51753.
[11] Provider Exhibit P-1.
[12] Provider Exhibit P-2.
[13] Provider's Final Position Paper at 1.
[14] Medicare Contractor Exhibit I-1.

either refused to process Cornerstone Hospital's submission outright based on the transposition, or recognized the transposition and credited Cornerstone Hospital for the submission.[15]

Cornerstone Hospital argues that the Board should reverse the payment penalty because CMS abused its discretion and imposed the penalty "for data processing and communication errors that were clearly under the control of CMS or its contractors."[16] Cornerstone Hospital also argues that the financial penalty of over $280,000 is not justified given the facts of this case.[17]

Cornerstone Hospital acknowledges that the Board may not have the authority to provide equitable relief in this instance. However, Cornerstone Hospital argues that the Board has the authority to review, and reverse, CMS' decision not to grant equitable relief in this case under 42 U.S.C. § 1395oo and 42 C.F.R. § 405.1869(b)(l)(i), the latter of which states the Board is authorized to "affirm, modify, or reverse the intermediary's or Secretary's findings on each specific matter at issue in the intermediary or Secretary determination under appeal."

Federal statute, 42 U.S.C. 1395ww(m)(5), requires LTCHs to report on the quality of their services in the form, manner, and time as specified by the Secretary.[18] An LTCH that fails to submit the LTCH QRP data to the Secretary is assessed a one-time 2 percent reduction to its annual update to the standard federal LTCH prospective payment.[19]

The preamble to the August 2011 Final Rule established FY 2012 as the first reporting year for the LTCH QRP and required submission of quality data on CAUTI, CLABSI and pressure ulcers. This submission would be used to determine FY 2014 LTCH payments.[20] CMS directed LTCHs to the CDC website at http://www.cdc.gov/nhsn for additional details regarding data submission[21] and stated that additional reporting requirements would be posted on the CMS web site at http://www.cms.gov/LTCH-IRF-Hospice-Quality-Reporting/ by no later than January 31, 2012.[22] CMS restated this information as well as the due dates for data submission in the preamble to the final rule published on August 31, 2012 ("August 2012 Final Rule").[23]

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[15] Provider's Response to Medicare Contractor's Final Position Paper, at 3.
[16] Provider's Final Position Paper at 7-8 (quoting 71 Fed. Reg. 47870, 48041 (Aug. 18, 2006)).
[17] Provider's Response to Medicare Contractor's Final Position Paper, at 11-12.
[18] *See also* Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, § 3004(a), 124 Stat. 119, 368-369 (Mar. 23, 2010) (adding LTCH QRP statutory provisions at 42 U.S.C. § 1395ww(m)(5)).
[19] 42 U.S.C. § 1395ww(m)(5). *See also:* 42 C.F.R. § 412.523(c)(4).
[20] 76 Fed. Reg. at 51743-51748.
[21] *Id.* at 51752.
[22] *Id*. at 51754.
[23] 77 Fed. Reg. 53258, 53619 (Aug. 31, 2012) (specifying collection and submission deadlines as well as the following the CMS web site address for additional instruction and guidance: http://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/LTCH-Quality-Reporting/LTCHTechnicalInformation.html). In the preamble to the August 2012 Final Rule, CMS noted that it was in the process of finalizing the LTCH QRP Manual and "invited the public to provide submit questions and comments related to the LTCHQR Program and the [then] draft LTCHQR Program Manual" to a specified email

The Board finds that 42 U.S.C. § 1395ww(m)(5)(A)(i) requires each LTCH to submit health care quality data as determined by the Secretary and imposes a two percent penalty upon any LTCH that fails to do so. Significantly, the statute gives broad authority to the Secretary to determine and specify the time, form and manner by which an LTCH must submit this data.[24]

In the preamble to the August 2012 Final Rule, CMS directs LTCHs to the 2012 LTCH QRP Manual for further guidance on the data submission requirements for the FY 2013 reporting year. In particular, the 2012 LTCH QRP Manual explains the requirements and obligations of each LTCH with respect to data submission. Chapters 4 and 5 of the 2012 LTCH QRP Manual contains the guidelines for data submission. The following excerpt from § 5.1 of the Manual makes clear that the *provider must correctly enter its own CCN* when reporting data on CAUTI and CLABSI measures under the LTCH QRP:

> To report CAUTI and CLABSI data for the LTCHQR Program through CDC's NHSN, the LTCH must be enrolled in the NHSN…*[i]f your LTCH is already enrolled as an LTCH in the NHSN, please do the following***:** 1) Confirm that your CMS Certification Number (CCN) is *correctly* entered on the Facility Information screen…[25]

Similar instruction is located in § 5.3 of the Manual:

> Register for the NHSN, which includes accepting the NHSN Rules of Behavior and providing your contact information at http://nhsn.cdc.gov/RegistrationForm/index.jsp. If you use an identifier other than your CCN during the enrollment process, *you will have to enter your CCN on NHSN's Facility Information Screen* after your facility is enrolled *to ensure that its CAUTI and CLABSI data are shared with CMS*.[26]

Cornerstone Hospital states in its Reconsideration Request to CMS that "…we have thoroughly reviewed our records and believe we have discovered the issue in question…we recognized that our CCN number had been incorrectly transposed when we first started the program."[27]

Based on the above, the Board finds that CMS notified LTCHs that they must confirm their CCN was correctly entered into the NHSN system in order to enroll in the system, and also to correctly report CAUTI and CLABSI data, in order to ensure CMS receives that data. Further, as admitted

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address. *See id.* at 53620, 53621, 53622-53623. Excerpts from the LTCH QRP Manual, Version 1.1 (Aug. 2012) that was issued contemporaneously with the August 2012 Final Rule are located at Board Exhibit B-1.

[24] 42 U.S.C. § 1395ww(m)(5)(C) (stating that "such [LTCH QRP] data shall be submitted in a form and manner, and at a time, specified by the Secretary" (emphasis added)).

[25] Medicare Contractor Exhibit I-8 at 2.

[26] (Emphasis added.)

[27] Provider Exhibit P-2 at 1.

by Cornerstone Hospital,[28] there were summary reports available within NSHN that list Cornerstone Hospital's CCN but Cornerstone Hospital failed to go back and check its data.[29] Indeed, the record reflects that Cornerstone Hospital's corporate office was able to identify the CCN error after the 2 percent penalty was imposed and Cornerstone Hospital admits that it did not go back to double-check its data until after the corporate office's discovery of this fact.[30] Accordingly, the record suggests that Cornerstone Hospital had opportunities to review the CCN but failed to exercise diligence to ensure it had entered the correct CCN.[31]

Finally, the Board notes that, except for testimony from the Provider's witness, there is nothing in the record to confirm that Cornerstone Hospital did indeed timely upload the data (albeit with the incorrect CCN) for ***each*** of the four quarters for CY 2013. During the hearing the Board requested that Cornerstone Hospital submit documentation supporting its claim that each of the four quarters' data was timely submitted.[32] However, the record only contains NHSN summary reports at Provider Exhibits 5 and 6 that were printed after the CY 2013 reporting deadlines and do *not* list when any of the data listed in these reports were uploaded/entered into NHSN.[33]

Based the above, the Board concludes that Cornerstone Hospital failed to timely report the CAUTI and CLABSI data for the first, second, third and fourth quarters of CY 2013 and, thereby, failed to comply with the requirement to submit data in the form, manner and time specified by the Secretary. Accordingly, the Board concludes that Cornerstone Hospital failed to

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[28] *See* Tr. at 57-58.

[29] *See* Tr. at 30, 45-47; Provider Exhibits P-5, P-6 (copies of NHSN summary reports generated by Cornerstone Hospital showing the CCN); Medicare Contractor Exhibit I-10 (referencing Casper validation reports and NHSN CMS reports). Cornerstone Hospital's witness testified that the welcome page for NHSN did not include the CCN during the time at issue and that CMS subsequently updated the sign-in page to include the CCN. *See* Tr. at 119-20. However, the record only includes a screenshot of the current NHSN welcome page with the CCN. *See* Provider Exhibit P-18.

[30] *See* Tr. at 45-47.

[31] The record suggests that, if a reporting deadline was approaching and CMS had not yet received the requisite NHSN quality data from a hospital, CMS was emailing that hospital prior to that deadline to notify it of this fact. *See* Provider Exhibit P-7 (sample notice given to one of Cornerstone Hospital's sister facilities about an approaching May 15, 2014 deadline for the first quarter of CY 2015). Indeed, if Cornerstone Hospital was timely entering data into NHSN and did not discover the CCN issue until after May 15, 2015 (the deadline for the submission of data for both the fourth quarter of CY 2013 *and* the first quarter of CY 2014), one would expect that CMS would have emailed Cornerstone Hospital with a notice similar to its sister facility at least for the May 15, 2014 deadline. However, Cornerstone Hospital's witness testified that she never received any such email notification. *See* Tr. at 67-69. Further, the record reflects that Cornerstone Hospital's CEO also was a designated NHSN user for Cornerstone Hospital and the witness could not confirm that the CEO had not received any such email notification other than to say that "I'm sure he would have shared it with me" if he had received such an email. *See* Tr. at 84. Cornerstone Hospital did enter examples of other NHSN emails into the record at Provider Exhibits P-8 to P-14; however, none of these emails were ones sent to Cornerstone Hospital itself but rather were all sent to sister facilities. As a result, it is unclear both whether CMS was issuing this type notification for CY 2013 quality data filings and, if so, whether Cornerstone Hospital may have received such notification but failed to act on it.

[32] *See* Tr. at 76-77 (asking for NHSN reports showing the date the data was uploaded and/or NHSN screenshots or internal emails confirming the uploading of data).

[33] *See* Tr. at 76-78 (Board request for documentation to confirm timely data entry into NHSN on a post-hearing basis).

satisfy the LTCH QRP requirements that were necessary to receive a full annual payment update for FY 2015.

Cornerstone Hospital requests that the Board review CMS's decision to not provide equitable relief.[34] However, the Board cannot consider Cornerstone Hospital's request for review of CMS's equitable relief decision because the Board's authority is limited to the statutory and regulatory requirements and to the facts and circumstances of the issues presented. The Board finds no statutory or regulatory authority which compels the Board to reverse CMS' decision not to grant Cornerstone Hospital with equitable relief. The Ninth Circuit recently weighed in on this question of equitable relief in a similar reporting case, *PAMC Ltd. V. Sebelius,* stating:

> [PAMC] claims a right to equitable relief or the benefit of the contract doctrine of substantial performance. In so doing, PAMC appears to have forgotten the aphorism: "Men must turn square corners when they deal with the Government." *Rock Island A. & L. R. Co. v. United States,* 254 U.S. 141, 143 . . . (1920). As we will discuss further, the Department has always insisted that the deadline for submitting data is a square corner, but PAMC now seeks to make it round. It is not entitled to do so.[35]

Similarly, the Board does not have the authority to make the corner "round" by considering factors outside those specifically recognized under the statute and regulations. The Secretary's regulations make no provision for allowing any "partial" penalty that would reduce the full impact of the 2 percent reduction. Rather, the statue, regulations, and relevant final rules mandate application of the 2 percentage point penalty whenever an LTCH fails to submit LTCH quality data in the form, manner, and time specified by the Secretary.

Notwithstanding, the Board recognizes that, in the preamble to the LTCH final rule published on August 19, 2013, CMS stated that, for reconsiderations relevant to FY 2015 LTCH payments, "[w] e may reverse our initial finding of non-compliance if: (1) The LTCH provides proof of compliance with all requirements during the reporting period; or (2) the LTCH provides adequate proof of a valid or justifiable excuse for non-compliance if the LTCH was not able to comply with requirements during the reporting period."[36] However, it is unclear whether CMS alone has the authority to consider a "justifiable excuse" as this discussion was not incorporated into the governing regulation at 42 C.F.R. §412.523(c)(4). The Board need not resolve this issue as it is clear that Cornerstone Hospital does not have a "justifiable excuse." Cornerstone Hospital has not established that it timely uploaded *each* of the four quarters of CY 2013 data to NHSN and has admitted that it failed to enter the CCN correctly which was the primary cause of alleged data submission failure for the four quarters of CY 2013.

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[34] Provider's Final Position Paper at 2-3.
[35] *PAMC, Ltd. v. Sebelius*, 747 F.3d 1214, 1217 (9th Cir. 2014).
[36] 78 Fed. Reg. 50495, 50886 (Aug. 19, 2013).

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Board concludes that CMS *properly* imposed a 2 percent reduction to the standard Federal rate used to calculate the FY 2015 Medicare payments for Cornerstone Hospital under LTCH-PPS.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq. (concurring)
Charlotte F. Benson, CPA
Jack Ahern, MBA (concurring)

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: January 26, 2017

Concurrence in Cornerstone Hospital:

The undersigned Board Members agree with the decision of the Board majority upholding the 2 percent reduction in the FY2015 payment update but believe that it is necessary to raise two issues which make this decision a close question.

The preamble to CMS regulations allow waiver of the reduction of the annual payment update if the provider can demonstrate that it has a "justifiable excuse" for its failure to submit complete and accurate quality data. As noted by the Board majority, CMS may find that a LTCH has a "valid or justifiable excuse" if it can demonstrate that it was "not able to comply with requirements during the reporting period."[37] There is no dispute that Cornerstone Hospital was able to comply with the filing requirements, it simply made a transposition error which resulted in the penalty. Nonetheless, CMS has not provided any other guidelines to suggest that a provider would have a justifiable excuse in the case of such a transposition and the Board has no authority to grant one.

However, a mitigating factor in Cornerstone Hospital's situation is the fact that CMS contracted with CDC to use its NSHN system to gather the data. The system clearly did not have adequate software to prevent the kind of error that was made in this case. The fact that a witness provided uncontroverted testimony that once she enrolled in the NHSN system using the transposed CCN, the CCN itself was displayed only in the "Profile" section of the website which made the error not easily discoverable by the user.[38] The undersigned Board Members also agree with Cornerstone Hospital that most commercial websites make it difficult, if not impossible, to purchase goods or services if credit card data or other information is incorrectly entered and that it is clear to the user that she/he cannot satisfactorily complete the task until the error is corrected. Yet the NHSN system was not equipped to prevent this error until several years after this issue arose.[39]

In addition, the data gathering effort seemed to lull the user into complacency once the data was submitted to NHSN. For example, Cornerstone Hospital's witness testified that after she had timely submitted the data, she returned to the site and checked that the data was there for her to see.[40] Obviously, it was her understanding that the data had been "submitted" when it was displayed on the NHSN website. It was not apparent to her that CDC had yet to actually submit the data to CMS. While CMS, in its Manual, did, indeed, tell the user that the CCN was necessary to submit the data to CMS,[41] it did not tell the user that the data was simply "displayed" on the NSHN website and that it took another step for the data to actually be

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[37] 78 Fed. Reg. 50495, 50886 (Aug. 19, 2013).
[38] Tr. 117: 25-29-118:1-5. Her testimony also indicated that while the website did not initially display the CCN prominently, the CDC has now included the CCN on the sign-on page. Tr. 120: 9-13.
[39] Cornerstone Hospital did present evidence indicating that the CDC did improve NHSN by posting the CCN prominently on the first page when accessing the website.
[40] Tr. 29:22-25-30:2-12.
[41] Section 5.3 #3 of the CMS LTCH Quality Reporting Program Manual, specifically cautions about the particular importance of the CCN: "If you use an identifier other than your CCN during the enrollment process, you will have to enter your CCN on NHSN's Facility Information screen after your facility is enrolled to ensure that its CAUTI and CLABSI data are shared with CMS." *See:* Medicare Contractor's Post Hearing Brief, Exhibit I-8 at Page 5-3.

transmitted to CMS—and it was this step that actually correlated the data with the CMS's provider identifier, the CCN. Most importantly, and not easily understood by the user, was that it was this second step which actually submitted the data to CMS. This duplicity, despite numerous publicized CMS warnings, created an unnecessary and regulatory trap for an unwary provider. As a result, the undersigned Members reject the Medicare Contractor's assertion that Cornerstone Hospital was "negligent" in the submission of the data when these software issues equally contributed to the error that was made. [42]

Having said this, the undersigned Board Members concur with the majority that providers must strictly comply, and exercise close scrutiny, in its submission of the quality data in order to receive the full annual payment update. As highlighted by Justice Sotomayer[43], the Medicare statute in great part "applies to 'sophisticated' institutional providers' who are 'repeat players' in the Medicare system." Ultimately, the responsibility to provide the correct information despite the inadequacies of the NHSN website at the time remain with Cornerstone Hospital, and the undersigned agree that it simply failed to exercise the requisite care in the data submission process.

CONCURRING BOARD MEMBERS

_____/s/_____

L. Sue Andersen, Esq.

_____/s/_____

Jack Ahern, MBA

January 26, 2017

[42] Medicare Contractor's Post-Hearing Brief at 9.
[43] *Sebelius v. Auburn Regional Medical Center,* 184 L.Ed.2d 627, 133 S.Ct. 817, 829-830 (2013).