OBER | KALER
Attorneys at Law

Payment Matters®
Update on Medicare and Medicaid Payment Issues

Subscribe | Payment Group | Payment Matters Archive

September 10, 2010

www.ober.com

IN THIS ISSUE

Editors: Leslie Demaree Goldsmith and Carel T. Hedlund

Court of Appeals Rules for Hospital in IME Research Case: The Battle Continues

By: Thomas W. Coons

Over the past several years, one of the more contentious reimbursement issues has been whether teaching hospitals are entitled to Medicare reimbursement for indirect medical education (IME) expenses related to time spent by residents in "pure research." District courts in Ohio, Arizona, Rhode Island, Illinois and Michigan have all ruled that they are. In 2008, however, the United States Court of Appeals for the First Circuit in *Rhode Island Hospital v. Leavitt,* 548 Fed. 3d 29 (2008), issued a contrary decision and upheld the Secretary's disallowance of IME for such activities. Now, another court of appeals, the United States Court of Appeals for the Seventh Circuit, has weighed in on the issue, concluding that reimbursement for such expenses is allowed. *University of Chicago Med. Ctr. v. Sebelius,* 09-3429 (7th Cir. Aug. 25, 2010).

At issue in these cases is how to read the regulation at 42 C.F.R. § 412.105(f), which specifies that a resident may be included in the IME full-time equivalent (FTE) count if the resident (1) is enrolled in an approved teaching program and (2) is assigned to a "portion" of the hospital subject to the prospective payment system. The dispute has principally focused on whether the word "portion" as used in the regulation refers to a geographic location within the hospital, as the hospitals have contended, or to a function that the resident is performing within the hospital irrespective of physical location, as the government has argued.

In 2001, the Secretary attempted to buttress her position by amending the regulation to "reiterate" the "long standing" policy that "time spent by a resident in research not associated with the treatment or diagnosis of a particular patient" may not be included in the IME count. 42 C.F.R. § 412.105(f)(1)(iii)(B). The district courts, including the district court below in this case, all rejected the Secretary's position that the 2001 policy applies to prior periods, and all concluded that the

word “portion” refers to geographic location, not to some “patient care” requirement, thereby agreeing with the hospitals. As noted above, however, the First Circuit Court adopted a contrary view and agreed with the Secretary’s position.

It was into this conflict that the Seventh Circuit stepped. The Court of Appeals acknowledged that the issue was “less than clear” and stated that, in cases where there is an ambiguous regulation, the agency’s construction of the regulation is entitled to deference. The court then went on to conclude, however, that the recently enacted Patient Protection and Affordable Care Act (PPACA) answered the question before it. In Section 5505(b) of the Act, Congress provided that “all the time spent by an intern or resident in an approved medical residency program in non-patient care activities, such as didactic conferences and seminars … that occur in the hospital” is to be counted effective January 1, 1983. Congress also specified in the PPACA, however, that for periods after October 1, 2001, all of the time spent by an intern or resident in “an approved medical residency training program in research activities that are not associated with the treatment or diagnosis of a particular patient … shall not be counted.” PPACA § 5505(b), (c)(3). Reading these provisions together, the Court of Appeals concluded that, for periods after 1983 and before October 1, 2001, the IME FTE provisions allow the counting of pure research time, a category of “non-patient care activities.” In so ruling, the Court of Appeals rejected the government’s argument that language in the PPACA required the Court to make “no inference” regarding the PPACA’s language and its impact on the pure research issue. The Court concluded that the “no inference” provision is unclear and does not “contradict the clear meaning of the earlier language allowing reimbursement for non-patient care activities during the time relevant to the present appeal.”

Ober|Kaler's Comments

While the Seventh Circuit decision is quite favorable to providers, we can expect this battle to continue. At least one other court of appeals is currently considering the IME research issue and the impact of PPACA, and a number of IME research cases are pending in lower tribunals. Accordingly, this fight is long from over.