

Payment Matters®

Update on Medicare and Medicaid payment issues

Subscribe

SEPTEMBER 17, 2009

Reprints

Health Law Group

www.ober.com

Payment Matters Archive

The Divide Continues: Illinois Court Rejects Secretary's Interpretation of IME Regulation to Exclude Research Time

In this Issue

Medicare Bad Debts — Providers Win One and Lose One in the Courts

Thomas W. Coons
410-347-7389
twcoons@ober.com

Kristin Cilento Carter
410-347-7309
kccarter@ober.com

The Divide Continues: Illinois Court Rejects Secretary's Interpretation of IME Regulation to Exclude Research Time

Payment Group

Principals

Thomas W. Coons

Leslie Demaree Goldsmith

Carel T. Hedlund

S. Craig Holden

Julie E. Kass

Paul W. Kim

Robert E. Mazer

Christine M. Morse

Laurence B. Russell

Less than a year after the United States Court of Appeals for the First Circuit issued the opinion in *Rhode Island Hospital v. Leavitt*, No. 07-2673 (1st Cir. Nov. 17, 2008), upholding the Secretary of the Department of Health and Human Services' ("Secretary") interpretation of the indirect medical education (IME) regulation to exclude time spent by residents engaged in research activities, the United States District Court for the Northern District of Illinois has reached the opposite conclusion. In *University of Chicago Medical Center v. Sebelius*, No. 1:07-cv-07016 (Aug. 3, 2009), the University of Chicago Medical Center ("Hospital") challenged the Centers for Medicare and Medicaid Services' (CMS) reduction of the Hospital's Medicare payments for fiscal year (FY) 1996 by excluding time spent by residents engaged in educational research from the IME full-time equivalent (FTE) resident count. Finding that the reduction was improper, the Court issued summary judgment in favor of the hospital finding that the IME resident count for FY 1996 should include resident time engaged in research when the requirements of the IME regulation are met.

The IME regulation at issue, 42 C.F.R. § 412.105(f), included, at the time, two basic requirements for a resident's time to be included in the FTE count. First, the resident must be enrolled in an approved teaching program. Second, the resident must be assigned to a *portion* of the hospital subject to the inpatient prospective payment system (IPPS) or an outpatient department. The debate in the *University of Chicago Medical Center* case was over the proper meaning of the term "portion." The Hospital argued that "portion" unambiguously refers to a geographic location within a hospital, while the Secretary contended that "portion" refers to the function that a resident is performing within a hospital, regardless of the resident's location.

Adopting the Hospital's interpretation, the Court applied principles of statutory construction to find that the term portion must possess a geographic meaning. The Court cited to the Seventh Circuit's decision in *Rush University Medical Center*, 535 F.3d 735 (7th Cir. 2008), an opinion holding that a resident must

Donna J. Senft

Susan A. Turner

Associates

Kristin Cilento Carter

Joshua J. Freemire

Mark A. Stanley

Lisa D. Stevenson

be assigned to an eligible "part of a hospital" to be counted, which means a physical location of the hospital. Moreover, the Court examined the regulatory language, which states that time is counted when the resident is assigned to one of two "areas" of the hospital, and concluded that the term "outpatient department" clearly denotes a geographic area. Finally, the Court noted that the Secretary's Medicare Intermediary Manual never advised auditors to investigate a resident's function and, instead, instructed that residents be excluded when, for example, the residents were "assigned to excluded units."

In addition to the foregoing, the Court held that a direct patient care requirement could not be read into the regulation by the Secretary. The Court found it persuasive that Congress added a direct patient care requirement for non-hospital settings in a 1997 amendment to the IME statute and did not apply the same requirement for hospital settings.

Ober|Kaler's Comments: As the *University of Chicago Medical Center* case demonstrates, there continues to be a divide among courts as to whether resident time spent in research should be counted under the IME regulation, particularly for cases applying the IME regulation prior to a 2001 rule change that explicitly excludes resident time engaged in research. The *University of Chicago Medical Center* case is significant because it is the first federal district court opinion following the First Circuit in *Rhode Island Hospital* decision (see Ober|Kaler's article on the *Rhode Island Hospital Decision* [here](#).) The *University of Chicago Medical Center* case falls in line with the more provider-friendly decisions in *Riverside Methodist Hospital v. Thompson*, No. C2-02-94, 2003 WL 22658129 (S.D. Ohio July 31, 2003) and *University Medical Center Corp. v. Leavitt*, No. 05-CV-495 TUCJMR, 2007 WL 891185 (D. Ariz. Mar. 21, 2007) where the courts specifically rejected the Secretary's attempts to exclude resident time spent in research or didactic time, or both, on the basis that such time was not directly related to patient care.

Copyright© 2009, Ober, Kaler, Grimes & Shriver