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Recent GME/IME Case: Proceed with Caution in Use of Stipulations

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Stipulations streamline evidentiary proceedings by eliminating the need to introduce documents and testimony in supporting facts and propositions that are uncontested. As a result, administrative tribunals often encourage litigants to stipulate to both facts and to the application of those facts to legal principles. For example, the Provider Reimbursement Review Board (PRRB or Board) rules encourage parties to file written stipulations in advance of a hearing to assist the parties and Board members to prepare for the hearing. The government's position taken in recent cases, however, suggests that providers should be cautious in relying on stipulations before the PRRB and possibly other tribunals.

In cases before an administrative tribunal, such as the PRRB, the parties are establishing a record that will form the basis for not only the tribunal's decision but also the further review of that decision. In the Board's proceedings, the Secretary's agent – the Medicare contractor – presents the "government's case" and takes positions that would appear to be those of the Secretary and CMS. In so doing, the contractor's representative decides which arguments to make, which evidence to present, and which stipulations, if any, to make. These decisions, one might think, are binding on CMS. According to CMS, however, they are not.

CMS takes the position that neither the Secretary nor CMS is a party, and indeed may not be made a party, to proceedings before the Board. 42 C.F.R. § 405.1843(b). At the same time, CMS also states that "the Secretary is the real party-in-interest in a civil action seeking relief under title XVIII of the Act," 42 C.F.R. § 405.1877(g), meaning that the Secretary is only a party once the matter is in court. Taking advantage of this distinction – that the Secretary is not a party until the matter is in court – CMS is increasingly arguing that positions taken by its Medicare contractor, through stipulations, arguments, or otherwise, do not "bind" CMS or the Secretary in the judicial review of PRRB decisions.

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This point is well illustrated by a recent decision by the United States Court of Appeals for the 8th Circuit in *MedCenter One Health Systems v. Sebelius*, No. 10-1377, 2011 WL 668111 (8th Cir. 2011) [PDF]. In *MedCenter One*, the court addressed the issue of whether providers had satisfied the requirements to be reimbursed for medical education expenses associated with residents who trained in a nonhospital site. The hospitals had rotated these residents through a nonhospital family practice facility, and the government asserted that the rotations were not supported by written agreements that satisfied Medicare's rules. The hospitals, in response, maintained that HHS had waived that issue and pointed to a finding by PRRB that the intermediary had "conceded that the written agreement requirement … was also met." The Eighth Circuit, however, was not swayed. The court ruled that "even taking these as concessions, the intermediary's position before the PRRB does not bind HHS, which was not a party to these proceedings."

Unfortunately, the *MedCenter One* case does not stand in isolation. For example, the Seventh Circuit stated in *Howard Young Med. Ctr., Inc. v. Shalala*, 207 F.3d 437, 443 (7th Cir. 2000) "[W]e will not hold the HCFA, much less the Secretary, responsible for a stipulation that they had no chance to challenge and that may conflict with the agency's official position …."

Ober|Kaler's Comments

In these and other cases, the government has sent a clear message: utilize stipulations at your peril, particularly stipulations in which the intermediary concedes that you have satisfied a condition necessary to reimbursement (e.g., the provider satisfied the "written agreement" standard). Although stipulations are encouraged by the PRRB and make for an efficient presentation, they do not appear to be a substitute for evidence that the parties have placed in the record.

The government's position regarding stipulations, combined with its refusal to be a party to PRRB proceedings, means that providers should approach the use of stipulations with caution. Although these cases involved PRRB hearings, the government may try to extend these same positions in cases that begin in other

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types of administrative proceedings in which CMS is not specifically named as a party. The government's position seems likely to ensure that administrative proceedings will be longer than necessary, with counsel presenting evidence and arguments when stipulations might do.

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