PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2016-D24

PROVIDER –
Texas Specialty Hospital of Lubbock
Lubbock, Texas

Provider No.: 45-2116

vs.

MEDICARE CONTRACTOR –
Novitas Solutions, Inc.

HEARING DATE –
November 13, 2015

Cost Reporting Period Ended –
December 31, 2015

CASE NO.: 15-1975

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ISSUE STATEMENT

Whether the payment penalty that the Centers for Medicare and Medicaid Services ("CMS") imposed under the Long-Term Care Hospital Quality Reporting Program to reduce the Provider's update for Fiscal Year ("FY") 2015 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 Texas Specialty Hospital of Lubbock ("Texas Specialty" or "Provider") under the inpatient prospective payment system for long-term care hospitals ("LTCH-PPS").

INTRODUCTION

Texas Specialty is a Medicare-certified long-term care hospital ("LTCH") located in Lubbock, Texas. Texas Specialty's designated Medicare administrative contractor is Novitas Solutions, Inc. ("Medicare Contractor").

On June 27, 2014, CMS determined that Texas Specialty failed to meet the requirements of the LTCH Quality Reporting Program ("LTCH QRP") for FY 2015. Specifically, the determination stated that Texas Specialty was subject to a 2 percent reduction in the FY 2015 annual payment update because it did not submit 12 months of data for 2 of the 3 quality measures.[2]

On July 1, 2014, Texas Specialty requested that CMS reconsider the decision regarding the reduction to its FY 2015 Medicare payments.[3] On September 22, 2014, CMS upheld its reduction decision.[4] On March 26, 2015, Texas Specialty timely appealed this reduction[5] and has met the jurisdictional requirements for a hearing before the Board.

The Board held a live hearing on November 13, 2015. Texas Specialty was represented by Monica L. Narvaez, Esq., of Underwood Law Firm, PC. The Medicare Contractor was represented by Joe Bauers, Esq. and Wilson Leong, Esq., CPA of Federal Specialized Services.

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[1] Transcript ("Tr.") at 5-6.
[2] Provider Exhibit P-2.
[3] Provider Exhibit P-3.
[4] Provider Exhibit P-4.
[5] Provider Exhibit P-5.

STATEMENT OF THE FACTS

The Medicare Contractor reduced Texas Specialty's payment update for FY 2015 by 2 percent because Texas Specialty failed to submit quality data for the first, second, and third quarters of 2013.[6] Specifically, Texas Specialty did not enter the required data for the months of March, May, June, July, August, and September of 2013.[7] As delineated in the final rule published on August 18, 2011 ("August 2011 Final Rule"), CMS required that Texas Specialty submit this data to the Center for Disease Control and Prevention's ("CDC's") National Health Safety Network ("NHSN") system for the first quarter by August 15, 2013, for the second quarter by November 15, 2013, and for the third quarter by February 15, 2014.[8] Specifically, Texas Specialty was required to submit data regarding:

1. Percent of Residents with Pressure Ulcers that Are New or have Worsened ("Pressure Ulcer measure");
2. Catheter-Associated Urinary Tract Infections ("CAUTI"); and
3. Central Line Catheter-Associated Bloodstream Infections ("CLABSI").[9]

Texas Specialty acknowledges that it missed the deadlines for submission of the first, second, and third quarters of 2013 CAUTI and CLABSI data.[10] Texas Specialty explains that it missed the deadlines because there were no incidences in the months of March, May, June, July, August, and September and, thus, there was nothing to report. Texas Specialty maintains that, because the term "data" is not clearly defined and, therefore, open to interpretation, it believed reporting was required only when there was an incidence number greater than zero.[11] Further, Texas Specialty contends that consumers are intelligent enough to understand that, if no data was reported, there were no incidences.[12]

Texas Specialty further argues that the reporting process is confusing. Even though the reporting process is explained in the Final Rule issued on August 31, 2012, the operational details and functional "to do steps" of the reporting process are not clearly specified. For instance, the NHSN system is the repository of the data for all three quality reporting measures: pressure sore ulcers, CAUTI, and CLABSI. The NHSN system *automatically* submits the pressure sore data to CMS; however, with respect to the other two quality measures, CAUTI and CLABSI, these data sets are not automatically submitted by NHSN and require *manual* submission which is subject to human error.[13] Texas Specialty contends that it was 100 percent compliant on submitting data for pressure sores, and it

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[6] Medicare Contractor's Final Position Paper at 7-8.
[7] Provider's Final Position Paper at 1.
[8] 76 Fed. Reg. 51476, 51753 (Aug. 18, 2011).
[9] *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).
[10] Provider's Final Position Paper at 1.
[11] Provider Exhibit P-5 at 30.
[12] Provider's Final Position Paper at 2.
[13] *Id.*

submitted data for the second and third measures (CAUTI and CLABSI) in 6 of the 12 months of 2013. Texas Specialty argues that it should be given credit for part of the 2 percent reduction and believes that the application of the full 2 percent reduction is excessive and an abuse of discretion.[14]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

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.[15] 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.

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.[16] CMS directed LTCHs to the CDC website at http://www.cdc.gov/nhsn for additional details regarding data submission[17] 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.[18] 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").[19]

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.[20] The latitude and exercise of this broad authority and discretion to mandate how and when the provider must submit quality reporting data is central to the Board's findings in this case. With respect to quality data submission requirements, the

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[14] *Id*. at 3 and *Tr*. at 65-66.
[15] *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)).
[16] 76 Fed. Reg. at 51743-51753.
[17] *Id*. at 51752.
[18] *Id*. at 51754.
[19] 77 Fed. Reg. 53258, 53619, 53636 (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 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.
[20] 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)).

Secretary promulgated regulations at 42 C.F.R. § 412.523(c)(4) to implement the statute. These regulations impose a 2 percent reduction to the LTCH's annual update.[21]

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. Significantly, the following excerpt from § 5.1 of the 2012 LTCH QRP Manual makes clear that the ***data on any "no events" for CAUTI and CLAPSI during a month must be submitted***:

> For reporting of data on the CAUTI and CLABSI measures . . ., LTCHs must adhere to the definitions and reporting requirements for CAUTIs and CLABSIs as specified in the CDC's NHSN Patient Safety Component Manual available at http://www.cdc.gov/nhsn/TOC_PSCManual.html. . . . These include reporting of denominator data (patient days, urinary catheter days, and central line days), as well as CAUTIs and CLABSIs, to NHSN each month. Monthly denominator data must be reported on CAUTIs and CLABSIs, *regardless of whether an infection occurred in the LTCH*. Monthly reporting plans must be created or updated to include CAUTI and CLABSI surveillance in all locations that require reporting . . . . *All required data fields in the numerator and denominator, **including the "no events" field for any month during which no CAUTIs or CLABSIs were identified**, must be submitted to NHSN*.[22]

Similarly, § 5.3.11 includes the following instruction on the submission of data on zero occurrences during a month:

> The number of indwelling catheter days for the location *must be reported, even if that number was zero*.[23] The number of central line days for the location must be reported, even if that number was zero.
>
> . . . .
>
> c. If there were no CAUTI events identified for the month, the Report No Events: CAUTI box must be checked on the

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[21] *See also:* LTCH QRP Manual, Version 1.1, Section 1.2 (Aug. 2012). Excerpts from the 2012 LTCH QRP Manual are located at Board Exhibit B-1.
[22] (Emphasis added.)
[23] (Emphasis added.)

> Denominator for Intensive Care Unit/Other Locations screen with the NHSN application. If there were no CLABSI events identified for the month, the Report No Events: CLABSI box must be checked on the Denominator for Intensive Care Unit/Other Locations screen with the NHSN application. See pg. 14-22 for guidance on this http://www.cdc.gov/nhsn/PDFs/pscManual/14pscForm_Instructions_current.pdf.

Texas Specialty acknowledges it missed the deadlines for submission of the first, second, and third quarters of 2013 CAUTI and CLABSI data. In its July 1, 2014 Reconsideration Request, Texas Specialty noted that the reason it missed the deadlines was that "[s]taff members entering data into NHSN website were not consistent with their responsibilities, in that the entering of the data was either not entered or entered incorrectly." [24]

Based on the above, the Board finds that CMS notified LTCHs that data on "no occurrences" of CAUTI or CLABSI during a month must be reported. Further, based on its review of the record and Texas Specialty's admission, the Board concludes that Texas Specialty failed to timely report the CAUTI and CLABSI data for the first, second and third quarters of 2013 and, thereby, failed to comply with the requirement to submit data in the form, manner and time specified by the Secretary. Further, the Board notes that Texas Specialty had the ability to generate reports from the NHSN system to monitor what data had been submitted and to ensure compliance with the data submission requirements.[25] Accordingly, the Board concludes that Texas Specialty failed to satisfy the LTCH QRP requirements that were necessary to receive a full annual payment update for FY 2015.

Texas Specialty requests that the Board provide partial relief for the reporting that was compliant with the LTCH QRP data submission requirements.[26] However, the Board cannot consider Texas Specialty's request for relief because the Board's authority is limited to the statutory and regulatory requirements and to the facts and circumstances of the issues presented. Specifically, in connection with the penalty, the Board does not have the authority to consider factors outside those specifically recognized under the statute and regulations. The Secretary's regulations make no provision for circumstances in which the penalty is overly punitive.[27] Likewise, neither the statute nor relevant regulation provide

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[24] Provider Exhibit P-3 at 11.
[25] 2012 LTCH QRP Manual at § 4.3 (discussing the ability to create a "Final Validation Report").
[26] Provider's Final Position Paper at 3.
[27] 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." 78 Fed. Reg. 50495, 50886 (Aug. 19, 2013). However, it is unclear whether it is only CMS that 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 from the record that Texas

for any partial penalty that would reduce the full impact of the 2 percent reduction. Rather, the statute, 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 as specified by the Secretary.[28]

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 annual update to the standard Federal rate used to calculate the FY 2015 Medicare payments for Texas Specialty under LTCH-PPS.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Jack Ahern, M.B.A.

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: September 28, 2016

Specialty did not have a "justifiable excuse" and simply failed to submit the "no events" data for the first, second and third quarters of 2013.

[28] 42 U.S.C. § 1395ww(m)(5)(A)(i).