D.C. Circuit upholds Medicare policy of paying hospital outpatient provider-based locations and physician offices the same, reversing lower court

July 20, 2020

On July 17, 2020, the D.C. Circuit Court found that the Department of Health and Human Services' (HHS) and the Centers for Medicare & Medicaid Services' (CMS') policy of paying grandfathered off-campus provider-based department clinic visit services (HCPCS code G0463) at the same rate as physician offices for evaluation and management (E&M) services was proper.

Previously, the district court held that CMS had exceeded its authority and failed to follow the statutory process for setting Medicare payment rates when it implemented its site-neutral payment policy in the CY 2019 Medicare Outpatient Prospective Payment System (OPPS) Final Rule. Nevertheless, CMS announced it was implementing the second year of the site-neutral payment policy to reduce payments for clinic visits in grandfathered off-campus provider-based locations.

In January 2020, the American Hospital Association and Association of American Medical Colleges filed a second lawsuit against CMS, this time challenging the CY 2020 OPPS rate. The impact of the circuit court's decision does not explicitly affect the CY 2020 challenge.

In reversing the district court's decision, the circuit court held that the regulation setting the grandfathered hospital outpatient clinic visits and physician office E&M visit reimbursement rates at the same level was proper and "a reasonable interpretation of HHS' statutory authority to adopt volume-control methods." The circuit court found that HHS' reduction of clinic visit service rates in hospital-based outpatient department departments under the OPPS was proper, even when done in a non-budget-neutral

manner. Although OPPS reimbursement adjustments are generally required to be budget-neutral, the court found that HHS' non-budget-neutral cuts, in this case, were proper because they were done to control the volume of claims.

The court was unpersuaded by the plaintiff group of hospitals' argument that Chevron deference to the action of HHS did not apply, and accordingly applied the deference of the Chevron standard to HHS' action. The court found that Congress did not expressly forbid HHS from reducing the reimbursement for a specific service under the OPPS in a non-budget-neutral manner as a "method for controlling the unnecessary increase in the volume of" that service. Therefore, HHS' actions regarding OPPS reimbursement, even for grandfathered provider-based locations, was within the statutory authority Congress had given HHS. In addition, the court found that Section 603 of the Bipartisan Budget Act of 2015, which created different reimbursement schedules for grandfathered and non-grandfathered provider-based locations, did not forever exempt grandfathered provider-based locations from changes to their reimbursement. Thus, HHS' change to OPPS clinic visit reimbursement was not precluded.

The hospitals may seek to appeal this decision to the Supreme Court and their second lawsuit (challenging the CY 2020 OPPS rate) is still pending. For now, HHS' prior and continued reduction to OPPS clinic visit reimbursement is allowable, with all of its resultant economic impact on hospitals.

For a full history of this case and the CMS payment policy, see our prior publications:

- Federal court invalidates CMS site-neutral payment cuts for hospital off-campus provider-based locations (September 18, 2019)
- CMS proposes payment cuts for hospital clinic visits in off-campus provider-based departments (August 19, 2019)
- CMS finalizes site-neutral payment for clinic visits but declines to finalize clinical families payment limitation (November 8, 2018)

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