CMS Rulings	**Department of Health and Human Services** **Centers for Medicare & Medicaid Services**
Ruling No.: **CMS-1739-R**	Date: **August 17, 2020**

CMS Rulings are decisions of the Administrator that serve as precedent final opinions and orders.

CMS Rulings are binding on all CMS components, Medicare contractors, the Provider Reimbursement Review Board, the Medicare Geographic Classification Review Board, and Administrative Law Judges of the Social Security Administration who hear Medicare appeals. These decisions promote consistency in application of policy and adjudication of disputes.

This Ruling provides notice of how the Centers for Medicare & Medicaid Services (CMS) will handle certain administrative appeals in response to the decision of the United States Supreme Court in *Azar v. Allina Health Services*, 139 S. Ct. 1804 (June 3, 2019). In that case, the Supreme Court held that section 1871(a)(2) of the Social Security Act (the Act) required CMS to engage in notice-and-comment rulemaking before adopting a policy of including beneficiaries enrolled in Part C in the Medicare fraction (also referred to herein as the SSI fraction), for purposes of calculating a hospital's disproportionate patient percentage for cost years when there was no governing regulation in place. CMS has announced its intention to conduct the rulemaking required by the Supreme Court's decision in *Allina.* This Ruling provides notice that the Provider Reimbursement Review Board (PRRB) and other Medicare administrative appeals tribunals lack jurisdiction over certain provider appeals regarding the treatment of patient days associated with patients enrolled in Medicare Advantage plans in the Medicare

and Medicaid fractions of the disproportionate patient percentage; this ruling applies only to appeals regarding patient days with discharge dates before October 1, 2013 that arise from Notices of Program Reimbursement (NPRs) that are issued before CMS issues a new final rule to govern the treatment of patient days with discharge dates before October 1, 2013 or that arise from an appeal based on an untimely NPR under 42 U.S.C. 1395oo(a)(1)(B) or (C) and any subsequently issued NPR for that fiscal year pre-dates the new final rule. The Ruling requires that the PRRB remand any otherwise jurisdictionally proper challenge raising this issue to the appropriate Medicare contractor. The Ruling explains that Medicare contractors will then calculate the provider's disproportionate share hospital (DSH) payment adjustment pursuant to the forthcoming final rule.

MEDICARE PROGRAM

HOSPITAL INSURANCE (PART A)

Hospital Insurance (Part A); Jurisdiction over Appeals of Disproportionate Share Hospital Payments Involving Challenges to the Treatment of Part C Days in the SSI and Medicaid Fractions for Cost Reports With Discharges before October 1, 2013.

CITATIONS: Sections 1871, 1878, and 1886(d)(5)(F) of the Social Security Act (42 U.S.C. 1395hh, 1395oo and 1395ww(d)(5)(F)); 42 CFR Part 405, Subpart R and 42 CFR 412.106.

BACKGROUND

Under the Medicare hospital inpatient prospective payment systems (IPPS), which is set forth in section 1886(d) of the Act, inpatient hospital services for Medicare patients are paid on the basis of nationally applicable payment rates. In addition, section 1886(d)(5) of the Act provides for various adjustments to the IPPS rates. Under section 1886(d)(5)(F) of the Act, a hospital subject to IPPS may qualify for a DSH payment adjustment if the hospital provides inpatient services for a significantly disproportionate number of low-income patients. One means of determining a hospital's DSH payment

adjustment for a cost reporting period requires the calculation of the provider's "disproportionate patient percentage (DPP)," which is the sum of two fractions. First, under section 1886(d)(5)(F)(vi)(I) of the Act and 42 CFR 412.106(b)(2), the "Supplemental Security Income (SSI) fraction" is the number of the hospital's inpatient days for patients who (for such days) were entitled both to SSI benefits under Title XVI of the Act (42 U.S.C. 1381 et seq.) and to benefits under Medicare Part A divided by the total number of the provider's inpatient days for patients who were entitled to Medicare Part A benefits. Second, under section 1886(d)(5)(F)(vi)(II) of the Act and § 412.106(b)(4) of the regulations, the "Medicaid fraction" is the number of the hospital's inpatient days for patients who (for such days) were eligible for medical assistance under a State Medicaid plan approved under Title XIX of the Act (42 U.S.C. 1396 et seq.) but who were not entitled to benefits under Medicare Part A, divided by the total number of the provider's inpatient days.

The DSH payment adjustment has been the subject of substantial litigation, including a recent decision by the Supreme Court in *Allina*. This Ruling addresses provider appeals raising the same issue that was raised in *Allina* pertaining to the calculation of the DPP under section 1886(d)(5)(F)(vi) of the Act and § 412.106(b) of the regulations: whether patient days associated with patients enrolled in Part C should be included in the SSI fraction for discharges before FY 2014.

In the FY 2005 IPPS final rule (69 FR 49099), we determined that, under § 412.106(b)(2)(i) of the regulations, Medicare Advantage (MA) patient days should be counted in the Medicare fraction of the DPP calculation. We explained that, even where Medicare beneficiaries elect Medicare Part C coverage, they are still entitled to benefits under Medicare Part A. Therefore, we noted that if an MA beneficiary is also an SSI recipient, the patient days for that beneficiary would be included in the numerator of the Medicare fraction (as well as in the denominator) and not in the numerator of the Medicaid fraction.

In 2012, a district court vacated the final policy adopted in the fiscal year (FY) 2005 final rule on the basis that the final rule was not a "logical outgrowth" of the proposed rule. In the FY 2014 IPPS/Long-term Care Hospital Prospective Payment System (LTCH PPS) proposed rule (78 FR 27578), we proposed to re-adopt the policy of including MA patient days in the Medicare fraction prospectively for FY 2014 and subsequent fiscal years. We finalized this proposal in the FY 2014 IPPS/LTCH PPS final rule (78 FR 50614). We made no change to the regulation text at § 412.106(b)(2)(i) because the text of the regulation already reflected the policy we adopted in the FY 2014 IPPS/LTCH PPS final rule. In 2014, the United States Court of Appeals for the D.C. Circuit upheld the district court's holding that the policy adopted in the FY 2005 IPPS final rule requiring inclusion of Part C days in the Medicare fraction was not a logical outgrowth of a proposed rule, but left open the possibility that we could employ the same approach through adjudication.

In *Allina,* the Supreme Court considered a challenge to the agency's inclusion of MA patient days in the Medicare fractions it published for FY 2012. Section 1871(a)(2) of the Act requires notice-and-comment rulemaking for any Medicare "rule, requirement, or other statement of policy" that "establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits." The Supreme Court held that section 1871(a)(2) of the Act required CMS to engage in notice-and-comment rulemaking before adopting a policy of including beneficiaries enrolled in MA in the Medicare fraction for purposes of calculating the DPP.

The D.C. Circuit has held that the Medicare statute does not speak directly to how Part C days should be treated for purposes of DSH calculations; that is, whether Part C patients are "entitled to benefits under part A" and should therefore be included in the Medicare fraction, or whether they are not so entitled, and should therefore be included in the numerator of the Medicaid fraction if they are also

eligible for Medicaid. (*See Northeast Hospital Corporation v. Sebelius*, 657 F.3d 1, 13 (D.C. Cir. 2011).) The D.C. Circuit has also found that section 1886(d)(5)(F)(vi) of the Act requires the Secretary to account for Part C days in the DPP calculation by including them in one of the fractions (Medicare or Medicaid) and excluding them from the other. (*See Allina Health Services v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014).) Because the FY 2005 IPPS final rule was vacated, the Secretary "has no promulgated rule governing" the treatment of Part C days for fiscal years before 2014. (*See Allina Health Services v. Price*, 863 F.3d 937, 939 (D.C. Cir. 2017).) As a result, in order to comply with the statutory requirement to calculate Medicare DSH payments, CMS must determine, for fiscal years before 2014, whether beneficiaries enrolled in Part C are "entitled to benefits under part A" and so must be included in the Medicare fraction (and excluded from the numerator of the Medicaid fraction), or are not so entitled and so must be excluded from the Medicare fraction and included in the numerator of the Medicaid fraction, if dual-eligible. Because the Supreme Court has held that CMS cannot establish or change its policy concerning whether Part C days are days for patients "entitled to benefits under part A" without notice-and-comment rulemaking, the Secretary has concluded that the only way for CMS to properly calculate DSH payments for time periods before FY 2014 is to establish a new regulation that would apply retroactively to the determination of Medicare and Medicaid fractions for this time period. Section 1871(e)(1)(A) of the Act authorizes CMS to engage in retroactive rulemaking if retroactive application is necessary to comply with statutory requirements or the failure to apply a change retroactively would be contrary to the public interest.

DSH APPEALS CHALLENGING THE TREATMENT OF PATIENT DAYS ASSOCIATED WITH PATIENTS ENROLLED IN MEDICARE ADVANTAGE PLANS WITH DISCHARGE DATES BEFORE OCTOBER 1, 2013, IN CALCUATING THE DPP

Hospitals have filed numerous PRRB appeals challenging the treatment of patient days associated with patients enrolled in Medicare Advantage plans with discharge dates before the effective date of the FY 2014 IPPS/LTCH PPS final rule. Specifically, many hospitals have filed PRRB appeals with claims that published Medicare fractions or DSH payment adjustments for these years are invalid because the Secretary did not undertake notice-and-comment rulemaking before including days for patients enrolled in Part C in the SSI fraction of the DSH formula, the same issue resolved against the Secretary by the Supreme Court in *Allina*. In many such cases, the PRRB has granted expedited judicial review (EJR). After the Supreme Court's decision, the United States District Court for the District of Columbia granted the Secretary's motion to consolidate most of these cases (*in re: Allina II-Type DSH Adjustment Cases*, 19-mc-190). Prior to consolidation, many such cases had been stayed pending the outcome of the *Allina* proceedings. The Secretary has since moved for a voluntary remand of these consolidated cases so that he can re-examine the claims in light of the Supreme Court's decision and take further action as necessary to comply with the applicable legal standards announced therein. The Secretary has determined that he has no choice but to engage in a new rulemaking to resolve the issue.

Although the Supreme Court has resolved the legal issue, the PRRB has continued to grant EJR to appeals presenting *Allina*-type claims. By this Ruling, the Administrator provides notice that the PRRB and other Medicare administrative appeals tribunals lack jurisdiction over the Part C days issue for years before FY 2014 as to any appeals arising from NPRs from that period that pre-dates the forthcoming rule or that arise from an appeal based on an untimely NPR under 42 U.S.C. 1395oo(a)(1)(B) or (C) and any subsequently issued NPR for that fiscal year pre-dates the new final

rule. The Supreme Court has made it clear that Medicare fractions and DSH payments in all *Allina*-like cases must be recalculated pursuant to a properly promulgated regulation. It will conserve administrative and judicial resources to remand qualifying appeals in recognition of controlling Supreme Court precedent instead of suits continuing to be filed and consolidated in federal district court, followed by the Secretary seeking remand for further proceedings consistent with the Supreme Court's decision. Instead, under this Ruling, the pertinent administrative appeals tribunal must remand each qualifying appeal to the appropriate Medicare contractor. CMS and the Medicare contractors will calculate DSH payment adjustments on remand in accordance with CMS's forthcoming rule.

IMPLEMENTATION OF THIS RULING

In order to resolve in an orderly manner pending administrative appeals of the Part C days SSI fraction issue, as previously described, for qualifying patient discharge dates and cost reporting periods, the administrative appeals tribunals will use the following procedure to begin the overall process of implementing the Ruling. The administrative tribunal (that is, the PRRB, the Administrator of CMS, the fiscal intermediary hearing officer, or the CMS reviewing official) before which an appeal is pending will first determine whether each claim at issue is for the Part C day DSH issue and whether such claim satisfies the applicable jurisdictional and procedural requirements of section 1878 of the Act, the Medicare regulations, and other agency rules and guidelines. If the administrative tribunal finds that the applicable jurisdictional and procedural requirements are satisfied for a given claim on the Part C day DSH issue and that any NPR that is the basis for the claim issued before CMS's forthcoming final rule or that arise from an appeal based on an untimely NPR under 42 U.S.C. 1395oo(a)(1)(B) or (C) and any subsequently issued NPR for that fiscal year pre-dates the new final rule then the appeals tribunal will issue a brief written order, remanding each such claim that qualifies for relief under the Ruling to the appropriate Medicare contractor for calculation of the DSH payment adjustment for the period at issue

pursuant to the forthcoming rule. Providers who wish to dismiss cases that qualify for relief under the Ruling rather than have their cases remanded may request that the PRRB dismiss their appeals. The PRRB may dismiss such appeals rather than remand them pursuant to this Ruling. However, if the administrative tribunal finds that the claim fails to meet the applicable jurisdictional and procedural requirements for relief under the Ruling, then the appeals tribunal will issue a written order, briefly explaining why the tribunal found that such claim is not subject to the Ruling. The appeals tribunal will then process the provider's original appeal of that claim in accordance with the tribunal's usual, generally applicable appeal procedures, if there are issues remaining in the provider's appeal, or, if there are no remaining issues, by issuing a dismissal decision setting forth the grounds for dismissal.

Pursuant to this Ruling, CMS and the Medicare contractors will not calculate the SSI fractions, Medicaid fractions, or DSH payment amounts that depend upon them, necessary for the DSH payment adjustment for discharges prior to October 1, 2013, until a new rule is promulgated through notice and comment rulemaking that addresses the treatment of MA days.

RULING

First, it is CMS's Ruling that the agency and the Medicare contractors will resolve each properly pending claim in a DSH appeal in which a provider alleges that its DSH payment adjustment for years prior to FY 2014 is invalid because the Secretary did not undertake notice-and-comment rulemaking before including days for patients enrolled in Part C in the SSI fraction of the DSH formula. The agency and the Medicare contractors will calculate or recalculate the provider's DSH payment adjustment in accordance with CMS's forthcoming rule. CMS's action eliminates any actual case or controversy regarding the hospital's previously calculated SSI and Medicaid fractions and its DSH payment adjustment and thereby renders moot each properly pending claim in a DSH appeal involving the issue resolved by the Supreme Court in *Allina*, provided such claim otherwise satisfies the applicable

jurisdictional and procedural requirements of section 1878 of the Act, the Medicare regulations, and other agency rules and guidelines for appeal.

Second, it is also CMS's Ruling that pursuant to 42 CFR 405.1801(a) and 405.1885(c)(1) and (2), this Ruling is not an appropriate basis for a new reopening of any final determination of the Secretary or a Medicare contractor or of any decision by a reviewing entity with respect to the Part C day DSH issue.

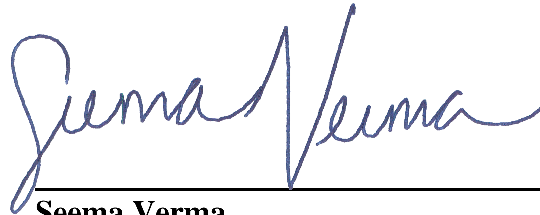
Any reopening notice previously issued by CMS, with respect to the Part C days DSH issue, should be processed according to the instructions included in this Ruling.

CMS-1739-R

EFFECTIVE DATE

This Ruling is effective _**August 17, 2020**_____________

Dated: ___**August 17, 2020**____________________



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