

## Report on Medicare Compliance Volume 29, Number 27. July 27, 2020 Court Restores Site-Neutral Payments; Lawyer: More Trouble May Be Ahead

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By Nina Youngstrom

In a blow to hospitals, the U.S. Court of Appeals for the District of Columbia Circuit ruled July 17 that CMS was within its rights to cut outpatient hospital payments under its site-neutral payment policy.<sup>[1]</sup> In overturning a 2019 federal district court decision, the appeals court agreed that CMS has statutory authority to use methods to control unnecessary increases in outpatient services.

In addition to the huge revenue losses, one attorney sees the decision as ominous in the larger scheme of things, because he said it gives CMS blanket permission to cut outpatient payments based on overutilization. “The logical implication of the decision should give everyone pause,” said attorney Andy Ruskin, with K&L Gates in Washington, D.C. “They will be making medical-necessity determinations through a payment rule.”

CMS’s site-neutral payment policy requires Medicare to pay the same for certain evaluation and management (E/M) services (HCPCS code G0463) whether they’re performed in freestanding clinics or off-campus provider-based departments (PBDs). CMS said the parity was necessary to reduce overutilization. It translated into a 60% payment cut for PBDs.

In response, the American Hospital Association and about 40 hospitals sued CMS to void the policy and won, with the U.S. District Court for the District of Columbia agreeing that CMS overstepped when it selectively changed payments for E/M services to make them comparable to payments for E/M services performed at freestanding physician clinics. CMS appealed, but hospitals were confident about the merits of their case. The appeals court reversal shook their world.

“I thought this was an easier case,” said Larry Vernaglia, with Foley & Lardner in Boston. “This is a particularly cruel cut when it’s coming on top of the COVID losses.” The 60% reduction from the site-neutral policy affects the same services that are already significantly down in volume because of the COVID-19 pandemic, he noted. It will be another blow if CMS recoups the 2019 repayments it made when the federal district court sided with hospitals. “They should not attempt to recapture the 2019 dollars,” Vernaglia said. “Presumably this is for 2020 and on.”

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