

Report on Medicare Compliance Volume 30, Number 2. January 18, 2021 CMS to Take Back Money It Returned Under Site-Neutral Payment Policy

By Nina Youngstrom

CMS is taking back money from hospitals for outpatient clinic visits provided in 2019 at excepted off-campus provider-based departments (PBDs) after returning the money when it lost a federal court decision on the site-neutral payment policy introduced in the 2019 Outpatient Prospective Payment System regulation.

Now that CMS won its appeal^[1] of the decision at the U.S. Court of Appeals for the District of Columbia Circuit, which restored the site-neutral payment policy, CMS “will begin reprocessing the claims” by July 1, 2021, according to an *MLN Connects*^[2] posted Jan. 14.

“It is a shame CMS is taking this action now, when hospitals are struggling with the increased costs of responding to community need around the COVID pandemic,” said attorney Larry Vernaglia, with Foley & Lardner in Boston. “While CMS has done many great things to assist the hospital community in the past 10 months, this will sting. Many hospitals will not have reserved for this recoupment. Indeed, this is an area where hospitals would have reasonably relied on CMS *not* taking this action—from the perspective of fairness and equity. No other industry could be expected to be whipsawed by their largest business partner in this fashion.”

Under the site-neutral payment policy, Medicare pays the same for certain evaluation and management (E/M) services (HCPCS code G0463) whether they’re performed in freestanding clinics or off-campus PBDs. That holds true whether they’re excepted or non-excepted PBDs. The American Hospital Association (AHA) and about 40 hospitals had sued CMS in the U.S. District Court for the District of Columbia, asking it to void the policy. They won in federal district court, and CMS started refunding the differential in 2019 payments stemming from the site-neutral payment policy. But CMS appealed and won, which means hospitals are subject to reduced payments for the E/M services in off-campus PBDs. And now CMS wants its money back for 2019 as well. CMS says the site-neutral policy is designed to reduce overutilization.

However, on Dec. 11, AHA filed a joint status report^[3] with the court, saying “the plaintiffs anticipate that they will file a petition for a writ of certiorari for review of the Court of Appeals decision” by the Supreme Court.

The recoupment is “premature,” said attorney Andy Ruskin, with K&L Gates in Washington, D.C. CMS, he said, “should have waited until there is a final, unappealable, or unappealed, decision. This seems more like the agency trying to clean up loose ends before the change in administration, as if there were concerns that the new administration might choose not to take this step. If that really is what’s going on, then this would be one of the only administrations not to take the time-honored approach of refraining from taking any major actions in the waning days of that administration.”

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¹ Nina Youngstrom, “Court Restores Site-Neutral Payments; Lawyer: More Trouble May Be Ahead,” *Report on*

Medicare Compliance 29, no. 27 (July 27, 2020), <http://bit.ly/2XW1VdP>.

2 *MLN Connects*, January 14, 2021, <https://go.cms.gov/3icHbat>.

3 *American Hospital Association v. Alex M. Azar II*, case no. 1:20-cv-80 (D.D.C. 2020), <https://bit.ly/3bIZ3IL>.

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