

Eli's Hospice Insider

Finance: Should You Pay Cap-Based Overpayment Demands?

Pre-2013 cap recalculations plague hospices, but maybe not for much longer.

Whether you want pay cap overpayment demands for cost report years 2012 and earlier may depend on how much risk you're willing to take.

The problem: Hospices recently have begun receiving demands for cap years more than three years in the past, based on cap recalculations (see Eli's Hospice Insider, Vol. 10, No. 3). That's despite language in the August 2011 final rule stating the **Centers for Medicare & Medicaid Services** was revising its proposal to "make it clear that there is a 3-year time frame for reopening."

"It was obviously the industry's understanding that cap liability computations would only be made within three years of the original determination," says **The Health Group** in Morgantown, W. Va. "Otherwise, hospice cap liability calculation could be continually revised until such time as all patients served in the respective cap year are deceased."

This area is rife with gray areas that CMS needs to clarify, notes financial expert **Mark Sharp** with **BKD**. "The MAC can reopen any time within a 3-year period after the 'determination or decision that is the subject of the reopening' per guidance in 42 CFR 405.1885," Sharp explains. "Regulation has made it clear that the 'determination or decision' for a Medicare cost report comes in the form of the Notice of Program Reimbursement ... which is the MAC's issuance of its final determination on that cost report."

And while "they do issue tentative settlements before the NPR ... the 3-year clock doesn't start ticking until the NPR is issued," Sharp adds.

Sticking point: "With the hospice cap, I have not seen definitive guidance on what is the 'final' determination or decision," Sharp tells **Eli**. "Is the MAC's first, second, or third issuance of a cap calculation determination considered a 'tentative settlement,' or should the initial calculation determination be the point in which the 3-year clock starts ticking based on a final determination?" he asks.

Bottom line: "It is not clear ... and we need clarification," Sharp concludes. "Hospice agencies deserve answers." That goes for both time frames for reopening, and for reasonable materiality thresholds for reopening. (MACs are telling hospices informally that the threshold is \$5,000, according to attorney **Ashton Bracken** with **Sheppard Mullin** in Orange County, Calif.)

Once hospices have the official time frame and threshold information from CMS, "they can plan accordingly," Sharp says.

Right now industry representatives are working to secure those answers from CMS, they say. The **National Hospice & Palliative Care Organization** and the **National Association for Home Care & Hospice** "have jointly sought guidance from CMS on this issue," NHPCO's **Judi Lund Person** tells **Eli**. The trade groups hope to hear back from CMS on the issue soon.

MAC Withdraws Overpayment Demand

Meanwhile, hospices might have a glimmer of hope in a recent cap overpayment demand case development reported by The Health Group in its newsletter. "We have now been provided documentation from a hospice where one MAC has withdrawn a cap liability demand relating to a computation made beyond three years from the date of the original cap liability computation," the consulting firm says. "The letter from the MAC relates to the 2012 cap year and states, 'A letter was sent to your facility on September 30, 2016, indicating a payment due Medicare. Please disregard this letter sent on September 29, 2016,'" according to The Health Group.

Do this: What does this mean for you? "Pending a formal statement of CMS policy, the withdrawal of the demand for repayment is a clear indication that if your hospice has received a revised notice of cap liability issued more than three years from the original notice, a request for refund or reconsideration should be requested by the hospice," The Health Group advises in its newsletter.

Industry veteran **Tom Boyd** with **Simione Health Consulting** agrees with this advice, but qualifies it. "I would hold off pending clarification" from CMS, Boyd tells **Eli**. But hospices need to understand they could then "run some risk of being on withhold for the amount."

A complicating factor for this decision is that two of the HHH MACs "have handled the issue differently, causing some confusion among providers," says Lund Person.

Consider this: When weighing the risk of a withhold, keep in mind that if you repay the demand, "it could be very hard to get a refund," Boyd notes.

Ultimately, Boyd recommends advising the MAC of the nonpayment and why, he says.