Eli's Hospice Insider

Lawsuits: Lawsuit Over Cap Calculations Appears Headed To Federal Court

As expected, PRRB sides with CMS over including sequestered funds in cap methodology.

Hospices might be closer to getting the help they want from the U.S. legal system when it comes to Medicare calculating caps with funds they've never received - but then again, maybe not.

The **Provider Reimbursement Review Board** released a long-awaited decision Feb. 28 addressing the issue of including sequestered funds in hospices' cap calculations, report attorneys **Brian Daucher** and **Ashton Massey** with **Sheppard Mullin** in Costa Mesa, California. In the case, five California hospices - three owned by **Silverado Hospice** and two owned by **ProCare Hospice** - appealed cap overage amounts ranging from about $10,000 to more than $80,000.

Background: The **Centers for Medicare & Medicaid Services** said it would start including the 2 percent in sequestered funds in hospices' cap calculations back in 2014, applying to 2013 cap years (see Eli's Hospice Insider, Vol. 8, No. 1). In other words, Medicare uses the 2 percent of funds you are never paid to calculate how much over the cap - if at all - you are and the resulting repayment amount.

Many hospices have appealed that cap calculation. The calculation can make a big difference in how much an over-cap hospice owes back, notes consultant **Tom Boyd** with **Simione Healthcare Consultants** in Rohnert Park, California. And now the PRRB finally has issued a decision on the topic - and it's not good.

"After considering the Medicare law and regulations, the parties' contentions, and the evidence submitted, the Provider Reimbursement Review Board ... finds the Medicare Contractor properly applied sequestration to the Hospices' aggregate cap payments and calculated the Hospices' aggregate cap overpayments correctly," says PRRB Decision 2019-D18. The decision addresses the hospices' 2013 caps adjudicated by MAC **National Government Services**.

The hospices' argument: A March 2015 Technical Direction Letter from CMS, which instructs "the Medicare Contractor to use the full payment amount rather than the net reimbursement results in the Hospices having to repay amounts they never received in the first instance," the hospices argued. The "sequestration methodology is incorrect and constitutes 'double dipping' by requiring hospices to pay back certain funds that they never received," they contended, according to the decision.

The PRRB's decision: "The Board reviewed the Medicare Contractor's calculation and disagrees that the Hospices have to pay back amount(s) they never received," it says.

Key to the board's decision is a finding about what constitutes payment, notes veteran consultant **Lisa Lapin** with Simione in Sturbridge, Massachusetts. "For hospices that exceed their aggregate cap ... their aggregate cap then becomes the Medicare allowable payment for the 2013 cap year and, therefore, sequestration must be applied to the resulting Medicare allowable payment," the decision reads.

"That sums up everything in a nutshell," Lapin says.

How it works: "The simplest way to analyze sequestration is to apply it to a full cap year and to wait to apply it until the cap year has ended," the decision explains. "In this situation, the 2 percent sequestration would be applied to the resulting 'amount paid' after the hospice aggregate cap itself has been applied. More specifically, if the hospice were under its aggregate cap, then the 2 percent would be applied to all the interim hospice payments received for that cap year's 'costs.' However, if that same hospice exceeded its aggregate cap, then the full amount in excess of its aggregate

cap would be an overpayment and the resulting 'amount paid' for 'costs' for the cap year would be its aggregate cap amount (i.e., the cost ceiling for that hospice). This resulting 'amount paid' for 'costs' for the cap year (i.e., the aggregate cap amount) would then be subject to sequestration of 2 percent."

If all that accounting talk has left you confused, some examples the board includes may help.

Example #1: A hospice with a cap of $200,000 and payments of $250,000 would have to repay $50,000 due to the cap. It would receive $200,000 in payments and would be unaffected by the sequestration reduction of 2 percent. Thus, the hospice must repay $4,000 of its $200,000 payment to have its payments reduced by sequestration, as they are for under-cap hospices.

Example #2: A hospice with the same $200,000 cap and payments of $450,000 would have to repay $250,000 due to the cap. It likewise would receive $200,000 in payments and would be unaffected by the sequestration reduction of 2 percent, so must repay $4,000 of its $200,000 payment to have its payments reduced by sequestration.

Note that the 2 percent isn't applied to the hospices' overall payments, but to the cap amount which is considered the allowable payment.

The board then walks through how the current cap calculation arrives at that result.

Do Secret Instructions Imply CMS Is Hiding Something?

But the appealing hospices aren't taking the decision lying down. "Contractors have failed to measure just 'the amount of payment made' in carrying out the calculation," Daucher and Massey note in online analysis of the decision. "As appeals have dragged on, contractors have continued to apply this practice year after year." CMS may have overstated hospice cap demands by more than $100 million as a result, Daucher estimates.

In addition to including payments never actually made to hospices in the calculation, CMS's instructions for doing so were "secret," Daucher and Massey charge in online analysis of the decision. CMS never made the TDL letter public.

"If our government can by sleight of hand count as 'payment made' funds never actually paid to providers, then statutory injunctions are no barrier to the whims of bureaucratic officials," the attorneys blast.

The hospices in the suit plan to appeal at the federal court level, Daucher tells **Eli**. It is no surprise that the PRRB decision is unfavorable, as he "always thought the PRRB would defend CMS's action," he says.

Daucher also upbraids the extended length of time it took the PRRB to hand down the decision. The delay is "further evidence of CMS's failure to properly fund the appeals systems that providers rely upon to challenge adverse action," he criticizes.

Note: The PRRB has yet to post the decision on its website at www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/List-of-PRRB-Decisions.html, but you can see the decision at www.hospicelaw.com/wp-content/uploads/sites/251/2019/03/2019-2-28-15-2875GC-Silverado-ProCare-2013-PRRB-Decision.pdf.