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D.C. District Court Sets Aside Medicare Low-Wage Index Redistribution Rule

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On March 2, the U.S. District Court for the District of Columbia issued a favorable decision for the plaintiff hospitals in *Bridgeport Hospital, et al. v. Becerra*, in their challenge to the 2019 Department of Health and Human Services ("HHS") rule[1] that increased the Medicare wage index calculation for hospitals in the lowest quartile and offset this adjustment by reducing the wage index for all other hospitals.[2] The rule essentially redistributed Medicare payments from higher wage index to lower wage index hospitals.[3]

The plaintiffs, a number of hospitals outside of the lowest quartile of wage index values, asserted that the rule is inconsistent with the Medicare Act as the statute requires HHS to calculate the wage index based on data collected through hospital surveys, and the agency's decision to inflate the wage values for hospitals in the bottom quartile of wage index amounts violates that requirement.[4] The Court agreed, finding "the rule must be set aside" and concluding the agency exceeded its statutory authority when it altered the wage index for hospitals in the bottom quartile.[5] The Court, however, also ordered additional briefing on the specifics of the appropriate remedy.[6] The Court's further decision on remedy will be key to understanding the implications of this decision for hospitals inside and outside of the lowest quartile of wage index values.

Background on Wage Index & HHS Rule

The central question in this case is whether HHS has the authority to alter the wage index values for hospitals in the lowest quartile at the expense of the remaining hospitals under the Medicare Act.[7] The Medicare Inpatient Prospective Payment System reimburses hospitals based on a predetermined base payment rate related to the national average cost of treating any given ailment.[8] The base rate includes both a non-labor related portion and a labor related portion, and the labor related portion of this rate consists of the proportion of hospitals' costs that are attributable to wages and wage-related costs.[9] As Congress recognized that hospitals in different regions have different wage and labor costs, the statute directs HHS to multiply the labor-related portion by a wage index that is created by comparing the average hourly wage rate for hospitals in a given geographic area with the national average based on an annual survey.[10] In 2018, HHS invited public comment on potential changes to how the wage index is calculated,[11] and in its 2019 proposed rule it highlighted as an area of concern what it called the "downward spiral" – a scenario in which higher wage hospitals remain perpetually in the higher end of the wage index while lower wage hospitals cannot afford to ascend and remain in the lower end.[12] HHS, and several commenters, saw this as a concern because in their view providers in low-wage areas may need to reduce expenses in other areas to keep up with wages from other geographic areas, causing hospital with low wage index values to be in financial distress and face potential closure.[13] To address these perceived disparities, HHS initially proposed to increase the wage index values for the hospitals in the bottom quartile and to offset this increase by decreasing the wage index values only of hospitals in the top quartile.[14] Following the comment period, HHS finalized a rule increasing wage index values for hospitals in the lowest quartile, which was instead offset in a budget-neutral manner by decreasing the wage index values for all hospitals outside of the lower quartile.[15] In 2020, a group of hospitals located outside of the lower quartile of wage index values initiated this action, asking the Court to set aside the rule and order HHS to recalculate the hospitals' FFY 2020 IPPS payments and make those additional payments that were offset by the rule plus interest.[16]

Court's Decision

In arriving at its decision that HHS had exceeded its statutory authority, the Court undertook a close reading of the statutory language. The statute provides in pertinent part:

> [T]he Secretary shall adjust the proportion, (as estimated by the Secretary from time to time) of hospitals' costs which are attributable to wages and wage-related costs, of the DRG prospective payment rates computed under

> subparagraph (D) for area differences in hospital wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average hospital wage level . . . . [A]t least every 12 months . . . , the Secretary shall update the factor under the preceding sentence on the basis of a survey conducted by the Secretary (and updated as appropriate) of the wages and wage-related costs of subsection (d) hospitals in the United States.[17]

The Court found that the plain language of this statutory provision undermines the validity of the rule.[18] First, the use of the definite article "the" in the phrase "the national average hospital wage level" means that in any particular year there is a single national average hospital wage level. Second, Congress's use of the singular— "the proportion" and "a factor"— show that the wage index must be uniformly determined and applied and should not be adjusted depending on whether a hospital falls into a certain percentile. Third, the requirement that HHS rely on survey data implies that the wage index must encompass only the wages and wage-related costs, as described in the statute, and not other factors as HHS may see fit. Fourth, the Court found that the statute's use of "the" in the phrase "the relative hospital wage level" indicates that Congress intended that there would be one single wage index for each geographic area.

All told, the Court found that the statutory language clearly indicates that HHS "is required to calculate *the* relative wage levels of hospitals in different geographic regions as compared to *the* national average hospital wage level."[19] The Court found the rule upwardly adjusting the wage index values for the lowest quartile was not a proper part of the calculation of the wage index, but was instead an adjustment made after the calculation is performed, and is therefore contrary to the express terms of the wage index provision of the statute.

After finding the statute clearly prevents the government's redistributive rule, the Court went on to address various other arguments presented by HHS. First, the Court did not find persuasive the argument that HHS has broad authority to establish the wage index as nothing in the statute suggests that Congress intended to give HHS the authority to inflate the wage index values in a manner that does not reflect the requirements of 42 U.S.C. § 1395ww(d)(3)(E)(i).[20] Second, the Court rejected the argument that the phrase "reflecting the relative hospital wage level" is ambiguous, and thus should have deferred to the agency's interpretation, finding that while "reflects" and "equals" do not have the exact same meaning, the dictionary meaning of the word "reflect" still indicates that Congress intended there to be only one single index and that "[i]ncreasing the wage index for the lowest-wage hospitals does not 'reflect' such hospitals' relative wage levels, but rather reflects something else entirely."[21]

Lastly, the Court also rejected HHS's position that it could make this adjustment pursuant to its separate authority under the Medicare statute to make "exceptions and adjustments" as it deems appropriate.[22] The Court concluded the clause does not authorize this rule as, under accepted canons of statutory construction, specific provisions control over general ones, especially in the case of complex statutory schemes, such as Medicare.[23] According to the Court, reading the "exceptions and adjustments" clause to permit HHS' rule "would gut . . . [and] would render meaningless the statutory framework in place to calculate wage index levels."[24]

Looking Ahead

While the Court has decided in favor of the hospitals on the validity of the rule and determined that "the rule must be set aside," the Court ordered further briefing on the full contours of the appropriate remedy.[25] In the summary judgment briefing, the hospitals asked the Court to invalidate the payment reduction and order the agency to recalculate their payments without the offset, plus interest,[26] and in response, the government only requested the opportunity to brief the issue of remedy in the event the Court ruled in favor of the hospitals on the merits.[27] The Court set further briefing on remedy that concludes on May 9, 2022. That briefing would likely address the extent to which the Court should direct specific action by the agency on remand, or leave to the agency how to proceed in unraveling the prior year payments based on this rule. Regardless of what approach to specific remedy the Court adopts, the government would have the opportunity to file an appeal to the D.C. Circuit Court of Appeals, as would the hospitals potentially if dissatisfied with any further decision on remedy. In the meantime, the prospect of action by the agency to correct payments based on the rule remains.

1. 84 Fed. Reg. 42,044 (Aug. 16, 2019).
2. *See Bridgeport Hospital, et al. v. Becerra*, Case No. 1:20-cv-01574 (CJN) (D.D.C. Mar. 2, 2022), ECF No. 28.
3. 84 Fed. Reg. at 42,331.
4. *Bridgeport Hospital,* Case No. 1:20-cv-01574. at 1.
5. *Id.* at 21.
6. *Id.*
7. 42 U.S.C. § 1395ww(d)(3)(E).
8. *Cape Cod Hospital v. Sebelius*, 630 F.3d 203, 205 (D.C. Cir. 2011).
9. 42 U.S.C. § 1395ww(d)(3)(E).
10. *Id.*
11. 83 Fed. Reg. 20,164, 20,372 (May 7. 2018).
12. *See* 84 Fed. Reg. 19,158, 19,394 (May 3, 2019).
13. *Id.* at 19,394–95.
14. *Id.* at 19,162, 19,394–95 (The downward spiral together with a "lag between when hospitals increase the compensation and when those increases are reflected in the calculation of the wage index," exacerbate these disparities).
15. 84 Fed. Reg. at 42,331.
16. Complaint at 6, *Bridgeport Hospital, et al. v. Becerra*, Case No. 1:20-cv-01574 (CJN) (D.D.C. June 16, 2020), ECF No. 1.
17. 42 U.S.C. § 1395ww(d)(3)(E)(i).
18. *Bridgeport Hospital*, 1:20-cv-01574 at 14–15.
19. *Id.* at 15 (emphasis added).
20. *Id.* at 16.
21. *Id.* at 16–17.
22. *Id.* at 19; 42 U.S.C. § 1395ww(d)(5)(I)(i) ("The [agency] shall provide by regulation for such other exceptions and adjustments to such payment amounts under this subsection as [it] deems appropriate.")
23. *Bridgeport Hospital*, 1:20-cv-01574 at 20.
24. *Id.*
25. *Id.* at 21.
26. Pls.' Opp'n to Def.'s Mot. for Summ J. and Reply to Def.'s Opp'n to Pls.' Mot. for Summ. J. at 4, 19 n.2, *Bridgeport Hospital, et al. v. Becerra*, Case No. 1:20-cv-01574 (CJN) (D.D.C. May 25, 2021), ECF No. 20.
27. Def.'s Mot. for Summ. J. at 44–45, *Bridgeport Hospital, et al. v. Becerra*, Case No. 1:20-cv-01574 (CJN) (D.D.C. Apr. 8, 2021), ECF No. 16.