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**CMS Rulings****Department of Health  
and Human Services****Centers for Medicare &  
Medicaid Services**

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Ruling No.: CMS-1498-R2

Date: April 22, 2015

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**CMS Rulings** are decisions of the Administrator that serve as precedent final opinions or orders or statements of policy or interpretation. They are published under the authority of the Administrator of the Centers for Medicare & Medicaid Services (CMS).

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This Ruling provides notice of the determination of the Centers for Medicare & Medicaid Services (CMS) that CMS Ruling 1498-R shall be amended regarding its remedy for recalculation of certain Medicare disproportionate share hospital (DSH) payment adjustments. CMS Ruling 1498-R required the pertinent administrative appeals tribunal (that is, the Provider Reimbursement Review Board (PRRB), the Administrator of CMS, the Medicare fiscal intermediary hearing officer, or the CMS reviewing official) to remand each qualifying appeal to the appropriate Medicare contractor. CMS Ruling 1498-R further explained how CMS and Medicare contractors were to recalculate the provider's DSH adjustment resolving any of three different DSH issues, and make any payment deemed owing. CMS and the Medicare contractor also were to apply the provisions of CMS Ruling 1498-R, on all three

DSH issues, to each qualifying hospital cost reporting period where the contractor had not yet settled finally the provider's Medicare cost report. This Ruling is a modification and amendment of CMS Ruling 1498-R, but only insofar as it requires recalculation of the Medicare-SSI component of the DSH payment adjustment (also referred to herein as the Medicare-SSI fraction, Medicare fraction, or SSI ratio) for cost reports involving patient discharges prior to October 1, 2004.

## **MEDICARE PROGRAM**

### **HOSPITAL INSURANCE (PART A)**

Hospital Insurance (Part A); Appeals of Disproportionate Share Hospital (DSH) Payments, Recalculations of DSH Payments Following Remands from Administrative Tribunals, and Amendment of CMS Ruling 1498-R

**CITATIONS:** Sections 1878 and 1886(d)(5)(F) of the Social Security Act (42 U.S.C. 1395oo and 1395ww(d)(5)(F)); 42 CFR Part 405, Subpart R and 42 CFR 412.106.

## **BACKGROUND**

On April 28, 2010, the Administrator of CMS issued CMS Ruling CMS-1498-R. (See the CMS website at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings/Downloads/CMS1498R.pdf>.) The Ruling addressed administrative appeals on three different Disproportionate Share Hospital (DSH) issues: (1) the Medicare-Supplemental Security Income (SSI) fraction data matching process issue, and the method for recalculating the hospital's Medicare-SSI fraction by matching Medicare and SSI entitlement data; (2) the exclusion from the DSH calculation of non-covered inpatient hospital days for patients entitled to Medicare Part A, including days for which the patient's Part A inpatient hospital benefits were exhausted; and (3) the exclusion from the DSH calculation of labor/delivery room (LDR) inpatient days. Regarding all three

DSH issues presented in administrative appeals, CMS Ruling 1498-R provided that "unitary relief" would be provided under the Ruling for properly pending claims in appeals of the SSI fraction data matching process issue and the non-covered or exhausted benefit day issue; for properly pending claims in appeals of the LDR day issue, to the extent that the disputed LDR days were for patients who were entitled to Part A benefits; and for qualifying open cost reports (with respect to all three of the DSH issues). This modification and amendment of CMS Ruling 1498-R affects a change only with respect to Medicare-SSI fractions, and the interaction between Medicare-SSI fractions that have been suitably revised to address the data matching process issue and the issue of non-covered or exhausted benefit days for cost reporting periods involving patient discharges before October 1, 2004.

#### **The Non-Covered Day Issue and the D.C. Circuit Court's Decision in Catholic Health**

Under our original DSH policy, inpatient days were included in the numerator of the Medicare-SSI fraction only if the inpatient hospital days were "covered" under Medicare Part A and the patient was entitled to SSI benefits; Part A coverage of inpatient days alone was required for inclusion in the denominator of the Medicare-SSI fraction. (See, for example, 42 CFR 412.106(b)(2)(i) (2003).) Our original policy further provided that non-covered inpatient hospital days of patients entitled to Medicare Part A, including days for which the patient's Part A inpatient hospital benefits were exhausted, were excluded from the numerator of the Medicaid fraction (even when the patient was eligible for Medicaid), but such non-covered or exhausted benefit inpatient hospital days were included in the Medicaid fraction denominator (to the extent that the hospital reported such days on its Medicare cost report). See the August 11, 2004 final rule entitled Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2005 Rates (FY 2005 IPPS final rule) (69 FR 48916 and 49098).

However, the FY 2005 IPPS final rule amended the DSH regulations by eliminating the requirement that Part A inpatient hospital days must be covered in order for such days to be included in

the Medicare-SSI fraction and made clear that patient days were to be included in that fraction if the patient was entitled to Medicare Part A. See the FY 2005 IPPS final rule (69 FR 49246) (amending 42 CFR 412.106(b)(2)(i)). In addition, see the FY 2005 IPPS final rule (69 FR 49098 and 49099) for the discussion of the removal of the term "covered" from § 412.106(b)(2)(i), with respect to the days of a patient who was both entitled to Medicare and eligible for Medicaid ("dual eligible patient") but whose Part A inpatient hospital benefits were exhausted. Under our revised policy, the inpatient days of a person who was entitled to Medicare Part A are included in the numerator of the hospital's Medicare-SSI fraction (provided that the patient was also entitled to SSI at that time) and in the Medicare-SSI fraction denominator, regardless of whether the individual's inpatient hospital stay was covered under Part A or whether the patient's Part A hospital benefits were exhausted. The amendment to the DSH regulations made in the FY 2005 IPPS final rule was effective for patient discharges occurring on or after October 1, 2004 (69 FR 49099).

For cost reports with discharges before October 1, 2004, hospitals had filed numerous PRRB appeals seeking inclusion in the DSH calculation of inpatient days where the patient was entitled to Medicare Part A but the inpatient hospital stay was not covered under Part A.

By providing for "unitary relief" for the data matching issue and non-covered day issue for patient discharges before October 1, 2004, CMS Ruling 1498-R explained our view that, under section 1886(d)(5)(F)(vi)(I) of the Act, the Medicare-SSI fraction numerator consists of the number of SSI-eligible inpatient days for persons who were "entitled to benefits under Part A," and the denominator is the total number of inpatient days for individuals who were "entitled" to Part A benefits. Section 226(a) of the Act (42 U.S.C. 426(a)) provides that an individual is automatically "entitled" to Medicare Part A when the person reaches age 65 or becomes disabled, provided that the individual is entitled to Social Security benefits under section 202 of the Act (42 U.S.C. 402). Once a person becomes entitled to

Medicare Part A, the individual does not lose such entitlement simply because there was no Part A coverage of a specific inpatient stay or portion of such stay. In CMS Ruling 1498-R, we explained our view that providing for "unitary relief" and calculating suitably revised Medicare-SSI fractions on the basis of "total days" (as opposed to "covered days" as set forth in the agency's regulations for patient discharges before October 1, 2004), was the proper interpretation of the Medicare statute.

In *Catholic Health Initiatives v. Sebelius*, 718 F.3d 914 (D.C. Cir. 2013) (*Catholic Health*), the D.C. Circuit Court upheld the Secretary's policy of excluding such dual-eligible exhausted coverage days from the numerator of the Medicaid fraction for a 1997 cost reporting period – before the Secretary explicitly addressed the issue through regulation. However, the court did not agree with the Secretary that the Medicare statute itself required this result. Regarding the Secretary's position that the intent of the Congress was that dual-eligible exhausted coverage days must be excluded from the numerator of the Medicaid fraction and included in the numerator of the Medicare-SSI fraction because of the meaning of "entitled to benefits under Part A" used by the Congress, the court concluded "although the Department's interpretation is the better one, it is not quite inevitable," and stated "we of course defer to the Department's construction." (*Catholic Health*, 718 F.3d at 920.) Thus the D.C. Circuit Court held that the interpretation of the statute with respect to the treatment of non-covered days in the Medicare DSH calculation was to be resolved at *Chevron* step 2, as opposed to *Chevron* step 1.

The D.C. Circuit Court ultimately upheld the Secretary's determination that such dual-eligible exhausted coverage days should be excluded from the numerator of the Medicaid fraction for the 1997 cost reporting period at issue. (*Catholic Health*, 719 F.3d at 922.) However, the D.C. Circuit Court noted the 2004 rulemaking regarding the Medicare-SSI fraction "did effect a change with respect to whether Medicare-exhausted days could be included in the Medicare fraction," and it was only after that rule went into effect that CMS began to "include in the Medicare fraction all days for which patients

were *eligible* for Medicare, regardless of whether Medicare actually paid for those days." (*Catholic Health*, 718 F.3d at 921 n.5 (emphasis in original).)

## 1. Ruling

In accordance with the foregoing history and determination, CMS and the Medicare contractors will resolve each properly pending DSH appeal or hospital cost-reporting period subject to CMS Ruling 1498-R and this amendment by allowing hospitals to exercise an election. This election is applicable only to properly pending DSH appeals +that involve SSI ratios for Federal fiscal year 2004 and earlier, or SSI ratios for hospital cost-reporting periods, but only for those patient discharges occurring before October 1, 2004, where the hospital cost reporting period was subject to CMS Ruling 1498-R, and where CMS Ruling 1498-R required the calculation of a suitably revised Medicare-SSI fraction. For a particular hospital cost reporting period subject to CMS Ruling 1498-R and this amendment, hospitals may elect either to include inpatient days of a person entitled to Medicare Part A in the numerator of the hospital's Medicare-SSI fraction (provided that the patient was also entitled to SSI) and in that fraction's denominator, even if the inpatient stay was not covered under Part A or the patient's Part A hospital benefits were exhausted (that is, elect to have applied a suitably revised Medicare-SSI fraction calculated on the basis of "total days"); or such a hospital may elect to receive a suitably revised Medicare-SSI fraction that excludes such days where the patient's Part A hospital benefits were exhausted or otherwise were not covered under Part A from both the numerator and denominator of the Medicare-SSI fraction (that is, elect to have applied a suitably revised Medicare-SSI fraction calculated on the basis of "covered days").

On the one hand, resolution of properly pending appeals and affected cost-reporting periods with pre-October 1, 2004 discharges on the basis of "total days" comports with our view that the inpatient hospital days of an individual entitled to Part A belong in the Medicare-SSI fraction (assuming, for

purposes of the numerator of that fraction, the person is also entitled to SSI), regardless of whether the inpatient stay was covered under Part A, or the patient's Part A hospital benefits were exhausted. On the other hand, resolution of properly pending appeals and affected cost reporting periods on the basis of "covered days" acquiesces in the D.C. Circuit Court's decision in *Catholic Health* to the extent the court held that the Medicare statute itself does not definitively resolve this issue of how to calculate the Medicare-SSI fraction, and that the Secretary's regulations in effect for discharges prior to October 1, 2004, interpreted "entitled to benefits under part A of [Medicare] in the Medicare fraction to include only covered Medicare Part A inpatient days" (See May 6, 1986 interim final rule with comment period entitled "Fiscal Year 1986 Changes to the Inpatient Prospective Payment System" ((51 FR 16776 through 16778)).

## 2. Relation to CMS Ruling 1498-R and Implementation

This modification and amendment of CMS Ruling 1498-R allows providers to elect whether to receive Medicare-SSI fractions on the basis of "total days," or "covered days," but it does not alter any other provision of CMS Ruling 1498-R, including the mechanism for implementation by the administrative tribunals; applicability to cost reports not yet finally settled by an initial notice of program reimbursement (NPR); the Ruling's general provision for unitary relief on all three DSH issues; and the determination that CMS Ruling 1498-R is not an appropriate basis for the reopening of any final determination of the Secretary or a contractor or of any decision by a reviewing entity. This amendment does not alter in any way Medicare payment policy with respect to excluding dual-eligible exhausted coverage days from the Medicaid fraction for patient discharges before October 1, 2004, which was upheld by the D.C. Circuit Court in *Catholic Health*. Moreover, the provisions of CMS Ruling 1498-R (and this amendment) are only applicable and only provide relief to claims that satisfy the applicable jurisdictional and procedural requirements of section 1878 of the Act, the Medicare regulations, and

other agency rules and guidelines.

In sum, the purpose of this amendment is to make clear that in light of the D.C. Circuit Court's decision in *Catholic Health*, we are allowing providers to elect whether to receive suitably revised Medicare-SSI fractions on the basis of "covered days" or "total days" for Federal fiscal year 2004 and earlier, or for hospital-specific cost reporting periods, for those patient discharges occurring before October 1, 2004. This election is available for hospital cost reporting periods where the Medicare contractor has not yet settled finally the provider's Medicare cost report, as well as appeals remanded to the contractor pursuant to CMS Ruling 1498-R (assuming any such hospital cost reporting period involves patient discharges prior to October 1, 2004). In the near future, we will publish on the CMS website suitably revised Medicare-SSI fractions that display Medicare-SSI fractions calculated on the basis of "covered days," as well as "total days." Before an initial NPR or revised NPR is issued by its Medicare contractor pursuant to this amendment, a hospital's designated representative may submit to its Medicare contractor a written request that elects whether, for a particular fiscal period, the hospital's suitably revised Medicare-SSI fraction will be calculated on the basis of "total days" or "covered days." Once the hospital has made its election for a particular fiscal period covered by CMS Ruling 1498-R (as modified by this amendment), the Medicare contractor will recalculate the provider's DSH adjustment; issue an initial or revised NPR for the period at issue (see 42 CFR 405.1801(a), 405.1803, and 405.1889); and pay to or collect from the provider any monies deemed owing.

Unless specifically mentioned and modified by this amendment, all other provisions and requirements of CMS Ruling 1498-R remain in effect. CMS Ruling 1498-R does not establish policy regarding the treatment of Medicare Part C days in the Medicare DSH methodology. This amendment likewise does not change or otherwise alter Medicare payment policy regarding Medicare Part C days for patient discharges before October 1, 2004. Regarding such days, the D.C. Circuit Court has found that



before October 1, 2004 the Secretary had a "former practice of excluding M+C [Medicare Part C] days from the Medicare fraction." (*Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 16-17 (D.C. Cir. 2011).) Pursuant to CMS Ruling 1498-R and this amendment, we are not making any changes to, or otherwise adding any Part C claims, to the Medicare Provider Analysis and Review data file the D.C. Circuit Court found, as a matter of practice, excluded Medicare Part C days from the Medicare-SSI fraction for patient discharges before October 1, 2004.

We will also issue additional instructions and guidance regarding suitably revised Medicare-SSI fractions and implementation of CMS Ruling 1498-R and this amendment. Such additional instructions and guidance will address the process for providers to elect to receive suitably revised Medicare-SSI fractions on the basis of the hospital's cost reporting period (as opposed to the Federal fiscal year) (see 42 CFR 412.106(b)(3)), and the mechanism for receiving patient-level data underlying the suitably revised Medicare-SSI fractions described by CMS Ruling 1498-R, as modified by this amendment. For cost reporting periods subject to CMS Ruling 1498-R and this amendment, we will arrange to furnish (at the hospital's request) data concerning the number of the hospital's "covered" and "total" Medicare-SSI days, and the number of the hospital's "covered" and "total" Medicare days. Such data will be provided on the Federal fiscal year basis for the relevant cost reporting period, or, if the hospital does not report on the Federal fiscal year basis, during the 2 Federal fiscal years in which the hospital's cost reporting period falls. Because these provisions of CMS Ruling 1498-R and this amendment apply to patient discharges before October 1, 2004 where a hospital has a properly pending appeal, we have determined that providing this data would be a "routine use . . . applicable to appeals of determinations of a hospital's SSI ratio for cost reporting periods ending prior to December 8, 2004," and thus will be provided without cost to hospitals with properly pending appeals. Alternatively, if the Medicare contractor has not yet finally settled the hospital's Medicare cost report by issuing an initial NPR, such

data also may be furnished without cost if the hospital cost reporting period includes December 8, 2004 or later, or for any hospital that subsequently files an appeal. (See the April 6, 2006 Notice of a Modified or Altered System of Records (71 FR 17470)). Thus, we anticipate that we will be able to provide such data without cost for the vast majority (if not all) of the hospital cost reporting periods subject to CMS Ruling 1498-R and this amendment.

**EFFECTIVE DATE**

**This Ruling is effective April 22, 2015.**

**Dated: April 22, 2015**

A handwritten signature in black ink, appearing to read "Andrew Slavitt", is written over a horizontal line.

**Andrew M. Slavitt  
Acting Administrator,  
Centers for Medicare & Medicaid Services.**