

UNITED STATES DISTRICT COURT  
DISTRICT OF COLUMBIA

FRANCISCAN HEALTH DYER CAMPUS )  
24 Joliet Street )  
Dyer, IN 46311 )

FRANCISCAN HEALTH LAFAYETTE )  
EAST )  
1701 South Creasy Lane )  
Lafayette, IN 47905 )

FRANCISCAN HEALTH INDIANAPOLIS )  
8111 South Emerson Avenue )  
Indianapolis, IN 46237 )

vs. )

ALEX M. AZAR, II )  
Secretary of the United States Department )  
of Health and Human Services, Room 700- )  
E )  
200 Independence Avenue, S.W. )  
Washington, D.C. 20201 )

Case No. 20-3497

Defendant.

**COMPLAINT**

Plaintiffs (Hospitals) sue Defendant, Alex M. Azar II, in his official capacity as Secretary of the United States Department of Health and Human Services (HHS) and seek judicial review of dismissals of their appeals before the Provider Reimbursement Review Board (PRRB).

**STATEMENT OF THE CASE**

1. This action is an appeal of a final determination by the PRRB. 42 U.S.C. § 1395oo(f)(1).

2. The Hospitals appeal the PRRB's dismissal of their reimbursement appeals for lack of jurisdiction. The PRRB wrongly concluded that Congress had precluded administrative review of CMS's action. *See* 42 U.S.C. § 1395ww(r)(3) ("the Review Preclusion Statute"). The Hospitals seek judicial review of the PRRB's dismissal because it erred in finding that Congress precluded any administrative or judicial review of the challenged reimbursement.

3. The PRRB's analysis was flawed. Though Congress has precluded review of the estimates underlying the specific reimbursement at issue, it has not precluded review to ensure that CMS lawfully implements such changes under the Medicare Act and the Administrative Procedures Act. 42 U.S.C. § 1395; 5 U.S.C. § 551.

4. CMS violated the Medicare Act when it failed to submit the policy change impacting the Hospitals' reimbursement through audits to Notice-and-Comment Rulemaking. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1809 (2019).

5. The Medicare Act requires CMS to promulgate properly any policy—including audits—which may impact a hospital's payment through Notice-and-Comment Rulemaking. *Id.* at 1809. But here, CMS created a new policy to adjust the Hospitals' reimbursements without following the required Notice-and-Comment. Because CMS failed to promulgate properly the audit policy—the audit policy is procedurally unlawful under the Medicare Act and its use to alter Hospitals' payments was impermissible.

6. CMS also violated the APA in two ways. First, CMS implemented audits applying the changed policy in an arbitrary and capricious manner, harming the Hospitals. Second, CMS's reliance on a procedurally improper policy to change hospital reimbursement was contrary to the law.

7. The APA requires the Secretary to refrain from acting arbitrarily or capriciously when implementing CMS's policies. But the Secretary implemented a new reimbursement policy through audits that lacked standard auditing principles to calculate the Hospitals' Uncompensated Care Disproportionate Share Hospital (UC DSH) adjustments. The lack of standard principles resulted in disparities, inconsistencies, and errors that negatively impacted many hospitals' UC DSH payments. Such arbitrary and capricious implementation of the new policy violated the APA.

8. The APA requires the Secretary to act consistently with the law. When CMS used the improper audits as the foundation for adjustments to the Hospitals' UC DSH payments for Federal Fiscal Year 2020, he acted inconsistently. Thus, the FFY 2020 UC DSH adjustments returned to Hospitals in their Notices of Program Reimbursement are contrary to the law and in violation of the APA.

9. The PRRB's jurisdictional dismissals are incorrect because the Preclusion Statute does not apply to the Hospitals' challenges. The Preclusion Statute only applies to challenges of the substantive calculations made by CMS; not challenges to whether CMS followed the law. Here, the Hospitals challenge the legality of CMS's adjustments because they were procedural violations of the Medicare Act and violated the APA.

10. The Hospitals thus request the Court:

- vacate the PRRB's jurisdictional dismissal;
- vacate all UC DSH payments made - pursuant to the 2019 Final Rule – that incorporated or relied upon the procedurally unlawful S-10 audits;
- order the PRRB to exercise jurisdiction over the Hospitals' appeals; and

- order the Secretary to recalculate the Hospitals' UC DSH payments and pay the amounts owed in addition to the required statutory interest.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action and the parties under the Medicare Act, the Administrative Procedure Act, or both. 42 U.S.C. § 1395oo(f)(1) and 28 U.S.C. § 1331.

12. The Secretary has a non-discretionary duty to promulgate all statements of policy that govern the payment for services through Notice-and-Comment Rulemaking. This Court has statutory jurisdiction to compel the Secretary to do so. 28 U.S.C. § 1361.

13. Venue is proper in this judicial district. 28 U.S.C. § 1391(e); 42 U.S.C. § 1395oo(f)(1).

### **PARTIES**

14. The Hospitals were, at all times relevant to this action, qualified as Medicare-participating, general acute care hospital providers in the federal Medicare program under the Medicare Act.

15. The Hospitals appealed the Secretary's action before the PRRB based on Notices of Program Reimbursement that adjusted each Hospital's UC DSH reimbursement.

16. Defendant Alex M. Azar, II is the Secretary of HHS. The Secretary delegated his responsibilities to administer the Medicare program to CMS.

### **STATUTORY AND REGULATORY BACKGROUND**

#### **A. The Medicare Act and Disproportionate Share Hospital Programs**

17. The Medicare Act establishes a system of health insurance for the aged, disabled, and individuals with end-stage renal disease federally funded and administered

by the Secretary through CMS and its contractors. 42 U.S.C. § 1395c; 1395kk; 42 Fed. Reg. 13,282 (Mar. 9, 1977).

18. CMS implements the Medicare program, in part, through issuing official rulings, regulations in the Federal Register, manuals, and subregulatory guidance. *See* 42 C.F.R. § 401.108.

19. The Medicare Act mandates that any rule, requirement, or other statement of policy that affects payment for services be “promulgated by the Secretary” through Notice-and-Comment Rulemaking. 42 U.S.C. § 1395hh(a); *Allina Health Servs.*, 139 S. Ct. at 1809. This includes any change that “is not a logical outgrowth of previous Notice-and-Comment Rulemaking.” 41 U.S.C. § 1395hh(a)(4).

20. The Medicare program is divided into five parts: A, B, C, D, and E. Medicare Part A provides coverage and payment for inpatient hospital services on a fee-for-service basis. 42 U.S.C. § 1395c.

21. CMS pays Medicare Part A providers for covered services through Medicare Administrative Contractors (MACs) that are agents of the Secretary. Each Medicare-participating hospital is assigned to a MAC that determines the amount of Medicare Part A payments for the hospital under CMS instruction. 42 U.S.C. § 1395h.

22. The hospital inpatient prospective payment system (IPPS) reimburses hospitals for inpatient hospital operating costs. Costs are determined based on predetermined, nationally applicable rates linked to the diagnosis of a patient at the time of discharge from an inpatient stay. These payments are subject to adjustments, including the UC DSH adjustment. 42 U.S.C. § 1395ww(d)(5)(F).

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