UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ST. MARY'S MEDICAL CENTER, INC. 2900 First Avenue Huntington, WV 25702 Plaintiffs, v. XAVIER BECERRA, Secretary United States Department of Health and Human Services, 200 Independence Avenue, S.W. Washington, DC 20201, Defendant.	)	Case No. 21-995

COMPLAINT

INTRODUCTION

1. Plaintiff St. Mary's Medical Center (the "Hospital"), by and through its counsel, challenges the Secretary of Health and Human Services' (the "Secretary") calculation of the disproportionate share hospital "DSH" adjustment relating to in-patients enrolled in a Medicare Advantage plan under Part C of the Medicare Act ("Part C").

2. The Hospital filed a jurisdictionally proper appeal challenging the DSH Part C Policy with the Provider Reimbursement Review Board ("PRRB") in accordance with 42 U.S.C. §1395oo(a). The Secretary, however, seeks to prevent the Hospital's appeal. First, although the Court of Appeals and the Supreme Court have invalidated the DSH Part C Policy, the Secretary persists in applying it. *See Northeast Hosp. Corp. v. Sebelius*, 657 F. 3d 1, 16-17 (D.C. Cir. 2011); *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014) ("*Allina I*"); *Allina Health*

Servs. v. Price, 863 F. 3d 937, 943-44 (D.C. Cir. 2017) ("*Allina II*"); *Azar v. Allina Health Servs*., 139 Ct. 1804 (2019) (affirming *Allina II*).

3. On August 6, 2020, the Secretary published a notice of proposed rulemaking it which he proposed to retroactively adopt the same policy that was vacated in *Allina* litigation. 85 Fed. Reg. 47,723 (August 6, 2020) (the "Proposed Rule"). The Proposed Rule suggests that due to the vacatur of the 2004 rule, the Secretary has no rule governing the treatment of Part C days, and must, therefore engage in retroactive rulemaking. *Id*. at 47,724.

4. On August 17, 2020, the Secretary issued CMS Ruling 1739-R ("The Ruling"). Exhibit 1. The Ruling deprives the PRRB of jurisdiction over any pending jurisdictionally proper administrative appeals "regarding the treatment of patient days associated with patients enrolled in Medicare Advantage plans in the Medicare and Medicaid fractions of the disproportionate patient percentage" so that MACs can apply the result of the retroactive rulemaking to those pending appeals once the new rule is in place.

5. The Ruling requires the PRRB to determine whether the appeal "satisfies the applicable jurisdictional and procedural requirements of section 1878 of the [Medicare] Act, the Medicare regulations, and other agency rules and guidelines." *See* Exhibit 1 at 7. The Ruling instructs the PRRB to remand jurisdictionally proper appeals of the "Part C day DSH issue" back to the Medicare Administrative Contractors ("MACs") that issued the payment determinations under appeal. *Id*. at 2, 7-8. The Ruling was not adopted through notice-and comment rulemaking.

6. Although the Ruling deprives the Hospital of relief to which it is entitled, the Proposed Rule has not been finalized, and the Secretary concedes that the Proposed Rule has no payment effect, the Ruling claims the Proposed Rule "eliminates any actual case or controversy regarding the hospital's previously calculated SSI and Medicaid fractions and its DSH payment

adjustment and thereby renders moot each properly pending claim in a DSH appeal involving the issue resolved by the Supreme Court in *Allina*…" *Id*. at 8.

7. Here, the Hospital filed a jurisdictionally proper appeal with the PRRB, challenging the DSH determinations based on the DSH Part C policy. The PRRB remanded the Hospital's appeal, justifying the remand solely on the Proposed Rule and the Ruling. (Attached as Exhibit 2).

8. The Ruling and subsequent remand of the Hospital's appeal must be vacated because they were arbitrary and capricious, and contrary to the law. The ruling and remand violated the Medicare Act and the Administrative Procedure Act (APA) by throwing out the Hospital's rightful appeal of final Medicare payment determinations and implementing substantive payment policy changes without notice-and-comment rulemaking. The Secretary's ruling also violated the Constitution by ending the properly filed appeals and providing no means of review of the Secretary's ruling—or adjudication of the issues in the Hospital's appeals.

9. For these reasons, and those set forth herein, the Hospital respectfully request that this Court issue a ruling:

a. Vacating the Secretary's ruling, 1739-R;

b. Vacating the PRRB's orders remanding the Plaintiff's appeals to the MACs to comply with 1739-C;

c. Reinstating the Hospital's appeal before the PRRB;

d. In the alternative, issuing a writ of mandamus ordering the Secretary to rescind 1739-R and reinstate the Hospital's appeals before the PRRB;

e. Ordering the Secretary to recalculate the Hospital's DSH payments for the Fiscal Period at issue as directed by the *Allina* Court and to make prompt payment of any additional amounts due to the Plaintiff Hospital, plus interest

calculated in accordance with 42 U.S.C. §1395oo(f(2), 42 U.S.C. §1395g(d), or both;

f. Requiring the agency to pay legal fees and cost of suit incurred by the Plaintiff Hospital; and

g. Providing such other relief as the Court may consider appropriate.

JURISDICTION AND VENUE

10. This action arises under the Medicare Statute, title XVIII of the Social Security Act, 42 U.S.C § 1395, and the APA, 5 U.S.C. § 551.

11. Jurisdiction is proper under 42 U.S.C. §§ 1395oo(a)(1)(A)(ii), 42 U.S.C. §1395oo(f)(1), 28 U.S.C. §1331; and 28 U.S.C. 1361.

12. Venue is proper in this judicial district in accordance with § 1395oo(f) and 28 U.S.C. § 1391(e).

PARTIES

13. The plaintiff in this action is St. Mary's Medical Center, Provider No. 51-0007. The Hospital participates in the Medicare program and challenged the payment determination in its cost reporting period ending September 30, 2006. The Plaintiff in this action.

14. Defendant Xavier Beccera is the Secretary of the United States Department of Health and Human Services ("HHS") and is sued in his official capacity. HHS is the Federal agency that administers CMS. CMS is the Federal agency to which the Secretary has delegated administrative authority over the Medicare program, which is established under title XVIII of the Social Security Act. *See* 42 U.S.C. § 301 *et seq*. References to the Secretary herein are meant to refer to him, his subordinate agencies and officials, and to his official predecessors or successors as the context requires.

LEGAL AND REGULATORY BACKGROUND

Medicare DSH Payment

15. Part A of the Medicare statute addresses "inpatient hospital services." 42 U.S.C. § l395d(a)(l). Beginning in 1983, the Medicare program pays most hospitals for the operating costs of inpatient hospital services under the prospective payment system ("PPS"). *See* 42 U.S.C. §§ 1395ww(d)(l)-(5); 42 C.F.R. Part 412. Under PPS, Medicare pays standardized amounts per discharge, subject to certain payment adjustments. *Id*. The DSH payment is one type of PPS payment adjustments. *See* 42 U.S.C. § 1395ww(d)(5)(F); 42 C.F.R. § 412.106.

16. A hospital may qualify for a DSH adjustment based on its "disproportionate patient percentage" ("DSH patient percentage"). *See* 42 U.S.C. § 1395ww(d)(5)(F)(i)(I) and (d)(S)(F)(v); 42 C.F.R. § 412.106(c)(l) (2002). Hospitals that serve a disproportionate share of low-income patients may be entitled to an upward percentage adjustment to the standard PPS rates. *See* 42 U.S.C. § 1395ww(d)(5)(F); *see also* 42 C.F.R. § 412.106. The DSH patient percentage serves as a proxy for utilization by low-income patients, establishes a hospital's qualification as a DSH, and determines the amount of the DSH adjustment. *See* 42 U.S.C. §§ 1395ww(d)(5)(F)(iv) and (vii)–(xiii); 42 C.F.R. § 412.106(d) (2002). The DSH patient percentage is comprised of the sum of two fractions expressed as percentages. 42 U.S.C. § 1395ww(d)(5)(F)(vi).

17. The first fraction, commonly known as the "Medicare fraction" or "SSI fraction" is defined as:

> the fraction (expressed as a percentage), the numerator of which is the number of such hospital's patient days for such period which were made up of patients who (for such days) were entitled to benefits under part A of this subchapter and were entitled to supplemental security income benefits (excluding any State supplementation) under subchapter XVI of this chapter, and the denominator of which is the number of such hospital's patient days for such fiscal year which were made up of patients who (for such days) were entitled to benefits under part A of this subchapter . . .

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