OBER | KALER
Attorneys at Law

Payment Matters®
Update on Medicare and Medicaid payment issues

DECEMBER 3, 2009

Court Finds No Right of Appeal Where Intermediary Refused to Reopen

Leslie Demaree Goldsmith
410-347-7333
ldgoldsmith@ober.com

In a decision issued last week, the Seventh Circuit Court of Appeals upheld the decision of the district court that the Provider had no right to appeal an issue that the Intermediary did not take steps to affirmatively reopen. ***Little Company of Mary Hospital v. Sebelius***, No. 09-1665 (7th Cir. filed Nov. 24, 2009) [PDF]. The appeals court also upheld the lower court's denial of the Provider's discovery requests.

Little Company of Mary Hospital (Little Company) asked its Medicare fiscal intermediary (Intermediary) to reopen the hospital's 1998 cost report to reconsider its disproportionate share hospital (DSH) Medicaid Fraction calculation and its DSH SSI Fraction calculation. The Intermediary issued a Notice of Reopening to include additional days in the Medicaid Fraction but did not mention the SSI Fraction. The Intermediary subsequently issued a revised Notice of Program Reimbursement (NPR), adjusting the Medicaid but not the SSI Fraction.

Little Company timely appealed the revised NPR to the Provider Reimbursement Review Board (PRRB), specifically appealing the Medicaid Fraction calculation and the Intermediary's failure to revise the SSI Fraction. The Intermediary challenged the PRRB's jurisdiction over the SSI Fraction issue on the basis that the SSI Fraction was not reopened. The PRRB sustained the Intermediary's challenge and dismissed the issue.

The hospital appealed the PRRB's jurisdictional ruling to district court and filed a motion for discovery of PRRB and Centers for Medicare and Medicaid (CMS) Administrator decisions in similar appeals. The lower court denied the hospital's discovery request and ruled that the PRRB properly dismissed the SSI Fraction issue.

Little Company appealed the rulings to the United States Court of Appeals for the Seventh Circuit. The hospital argued that the district court afforded too much deference to the PRRB's decision below, and that a lesser degree of deference was due, based on the Seventh Circuit's decision in *Edgewater v. Bowen*, 857 F.3d 1123 (7th Cir. 1989). The court held that the lesser degree of deference discussed in *Edgewater* was not appropriate in the instant appeal

Robert E. Mazer

Christine M. Morse

Laurence B. Russell

Donna J. Senft

Susan A. Turner

Associates

Kristin Cilento Carter

Joshua J. Freemire

Mark A. Stanley

Lisa D. Stevenson

as it applied only to "reasonable cost" limits issues.

The parties agreed that the court's decision in this case turned on whether the Intermediary reopened the SSI Fraction when it reopened the Medicaid Fraction, as an Intermediary's decision not to reopen an issue is not appealable based on the holding in *Your Home Visiting Nurse Services v. Shalala*, 525 U.S. 449 (1999). Little Company argued that *Your Home* does not apply in this case because the Intermediary did reopen both the Medicaid Fraction and SSI Fraction issues but chose to adjust only the Medicaid Fraction calculation.

The court held that it is not a provider's request for reopening that determines what is considered reopened by an intermediary, but rather the affirmative action the intermediary takes regarding the request that determines whether the intermediary's actions amount to a reopening. The court distinguished its earlier decision in *Edgewater* by finding that in that case, the intermediary's letter to the provider specifically stating it would not change three cost items but would change a fourth coupled with the intermediary's decision to reopen the provider's entire NPR, constituted affirmative action that amounted to a reopening. The court went on to state that there was no such affirmative action in this case, despite evidence of communication between Intermediary employees regarding the SSI Eligible days. The court found this communication was merely the gathering of information by the Intermediary necessary to allow the Intermediary to decide whether to reopen the SSI Fraction. The court concluded that the Intermediary's failure to address the SSI Fraction issue in communications to the Provider constituted a denial of the request to reopen on that issue.

The court also ruled that the district court did not abuse its discretion in denying Little Company's discovery motions. Little Company filed two discovery requests. First it requested discovery of the PRRB's decisions in similar cases. The district court denied the request, applying the general rule that discovery outside the administrative record is inappropriate. Second, in its response to the Secretary's Motion for Summary Judgment, the hospital asserted the record was incomplete on the issue of the affirmative actions taken by the Intermediary in response to the hospital's reopening request. The appeals court found that the district court's ruling in favor of the Secretary amounted to an implicit ruling denying any discovery on this issue.

The appeals court affirmed the district court's grant of summary judgment in favor of the Secretary and the district court's denial of the hospital's discovery motions.

Ober|Kaler's Comments: The court's decision that the Intermediary's internal communications addressing the SSI Fraction did not amount to a reopening of the issue by the Intermediary is disappointing. Clearly, the Intermediary considered the SSI Fraction issue but, once considered, determined that it would not grant the relief requested by the Provider. The court's determination that such consideration does not rise to the level of a reopening is not, however, surprising, given the current trend in case law granting significant deference to the Secretary in Medicare reimbursement related issues.