

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2021-D16

PROVIDER

Jewish Healthcare Center, Inc.,
d/b/a JHC HomeCare,

Provider No.: 22-7515

vs.

MEDICARE CONTRACTOR –
National Government Services, Inc.

DATE OF HEARING –

December 15, 2020

Cost Reporting Period Ended
December 31, 2019

CASE NO.: 19-1988

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ISSUE STATEMENT

Whether the payment penalty imposed on the Provider's home health prospective payment system Annual Payment Update ("APU") for calendar year ("CY") 2019 was proper.¹

DECISION

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board" or "PRRB") finds that the Centers for Medicare and Medicaid Services ("CMS") properly imposed a two percent reduction to the CY 2019 home health prospective payment system APU for Jewish Healthcare Center, Inc. d/b/a JHC HomeCare ("JHC HomeCare" or the "Provider").

INTRODUCTION

JHC HomeCare is a Medicare-certified freestanding home health agency ("HHA") located in Worcester, MA. JHC HomeCare's assigned Medicare contractor is National Government Services, Inc. ("Medicare Contractor").

On October 5, 2018, the Medicare Contractor informed JHC HomeCare that, for CY 2019, it would be subject to a 2 percent reduction in the CY 2019 APU for not meeting the Deficit Reduction Act ("DRA") of 2005² requirement for HHAs to submit quality data.³ JHC HomeCare was notified that, if it did not agree with the CMS decision, it must submit a letter requesting reconsideration and provide documentation of its compliance. JHC HomeCare submitted a request for reconsideration with documentation to CMS on October 29, 2018.⁴ On December 10, 2018, CMS denied JHC HomeCare request for reconsideration and instructed them of their appeal rights to the Board.⁵

On May 31, 2019, JHC HomeCare timely submitted an appeal request to the Board and met the jurisdictional requirements for a hearing. Following the parties' submission of Position Papers, the Board approved a joint request for a video hearing which was held on December 15, 2020. JHC HomeCare was represented by Scott S. Sinrich, Esq., and Katelyn A. Bushe, Esq., from Phillips, Silver, Talman, Aframe & Sinrich, P.C. The Medicare Contractor was represented by Scott Berends, Esq., of Federal Specialized Services, LLC.

STATEMENT OF FACTS

The survey requirements at issue in this case arose from the Balanced Budget Act of 1997 (the "BBA").⁶ BBA § 4603 added 42 U.S.C. § 1395fff and required the Secretary to establish a

¹ Transcript ("Tr.") at 5; *see also* Provider's Preliminary Position Paper at 1 (Jan. 22, 2020).

² Pub. L. No. 109-171, 120 Stat. 4 (2006).

³ Exhibit C-10.

⁴ *See* Exhibit C-11.

⁵ *Id.*

⁶ Pub. L. 105-33, 111 Stat. 251 (1997).

prospective payment system for Medicare-covered home health services (“HHA PPS”).⁷ The Secretary of Health & Human Services (“Secretary”) codified the regulations governing the HHA PPS at 42 C.F.R. Part 484, Subpart E.⁸

Subsequently, the DRA connected a quality data reporting requirement to HHA prospective payments. Specifically, § 5201(c)(2) of the DRA added language to 42 U.S.C. § 1395fff(b)(3)(B) requiring HHAs to submit health care quality data as determined by the Secretary and imposing a penalty upon HHAs that failed to do so:

(v) ADJUSTMENT IF QUALITY DATA NOT SUBMITTED

(I) ADJUSTMENT — For purposes of clause (ii)(V), for 2007 and each subsequent year, in the case of a home health agency that does not submit data to the Secretary in accordance with subclause (II) with respect to such a year, the home health market basket percentage increase applicable under such clause for such year shall be reduced by 2 percentage points. Such reduction shall apply only with respect to the year involved, and the Secretary shall not take into account such reduction in computing the prospective payment amount under this section for a subsequent year, and the Medicare Payment Advisory Commission shall carry out the requirements under section 5201(d) of the Deficit Reduction Act of 2005.

(II) SUBMISSION OF QUALITY DATA — For 2007 and each subsequent year, each home health agency shall submit to the Secretary such data that the Secretary determines are appropriate for the measurement of health care quality. Such data shall be submitted in a form and manner, and at a time, specified by the Secretary for purposes of this clause.

(III) PUBLIC AVAILABILITY OF DATA SUBMITTED — The Secretary shall establish procedures for making data submitted under subclause (II) available to the public. Such procedures shall ensure that a home health agency has the opportunity to review the data that is to be made public with respect to the agency prior to such data being made public.⁹

The Secretary codified the HHA quality reporting requirements at 42 C.F.R. § 484.250 (2007) and the penalty for failure to comply with those reporting requirement at § 484.225(h), (i) (2007).¹⁰

⁷ *Id.* at 467.

⁸ *See* 65 Fed. Reg. 41127 (July 3, 2000).

⁹ 120 Stat. at 46-47.

¹⁰ The regulation was later amended and, for the relevant time period, these requirements were found at 42 C.F.R. § 484.225(c) (2016). *See* 80 Fed. Reg. 68624, 68718 (Nov. 5, 2015).

For CY 2007, the HHA PPS Final Rule advised providers that the 2 percent penalty to the APU was tied to the submission of data for the Outcome and Assessment Information Set (“OASIS”), a pre-existing HHA reporting requirement, for episodes between July 1, 2005, and July 1, 2006.¹¹ CMS likewise published notices for CYs 2008, 2009, and 2010 as Final Rules in the Federal Register.¹² As was the case for 2007, CMS tied the 2 percent APU penalty to the submission of OASIS data.

In the CY 2009 HHA PPS Final Rule, CMS notified providers that it would expand HHA quality measure reporting requirements to include a new survey tool, referred to as the Home Health Care Consumer Assessment of Healthcare Providers and Systems (“HHCAHPS”) Survey.¹³ The HHCAHPS Survey would measure and publicly report patient experiences with home health care. In the CY 2010 HHA PPS Final Rule, CMS provided additional information on the expansion of HHA quality measure reporting requirements, to include the HHCAHPS Survey.¹⁴ Submission of the HHCAHPS Survey became a requirement for HHAs to receive their full 2012 annual payment update.¹⁵

Home health reporting requirements are mandated by 42 CFR § 484.250(a) (2016), which requires HHAs to submit OASIS assessments and HHCAHPS data to meet the quality reporting requirements of 42 U.S.C. § 1395fff(b)(3)(B)(v). CMS established the following reconsideration and appeal procedures in the CY 2011 HHA PPS Final Rule for providers who incurred the 2 percent penalty to their APUs:

A reconsiderations and appeals process is being developed for HHAs that fail to meet the HHCAHPS data collection requirements. We proposed that these procedures will be detailed in the CY 2012 HH payment rule, the period for which HHCAHPS data collection would be required for the HH market basket percentage increase. During September through October 2011, we will compile a list of HHAs that are not compliant with OASIS-C and/or HHCAHPS for the 2012 APU requirements. These HHAs would receive explicit instructions about how to prepare a request for reconsideration of the CMS decision, and these HHAs would have 30 days to file their requests for reconsideration to CMS. By December 31, 2011, we would provide our final determination for the quality data requirements for CY 2012 payment rates. HHAs have a right to appeal to the [Provider] Reimbursement Review Board (PRRB) if they are not satisfied with the CMS determination.¹⁶

¹¹ See 71 Fed. Reg. 65884, 65889 (Nov. 9, 2006).

¹² See 72 Fed. Reg. 49762 (Aug. 29, 2007); 73 Fed. Reg. 65351 (Nov. 3, 2008); 74 Fed. Reg. 58078 (Nov. 10, 2009).

¹³ 73 Fed. Reg. at 65356.

¹⁴ 74 Fed. Reg. at 58104.

¹⁵ *Id.* at 58103.

¹⁶ 75 Fed. Reg. 70372, 70405-70406 (Nov. 17, 2010). See also 81 Fed. Reg. 76702, 76789 (Nov. 3, 2016) (restating this reconsideration and Board appeal process).

CMS also announced in that Final Rule that, for calendar year 2013 and beyond, it would require providers to collect and report four quarters of HHCAHPS data to obtain the full APU.¹⁷ The specific reporting months and deadlines are published in the Federal Register for each calendar year's APU.

In order to meet the HHCAHPS requirement for CY 2019, HHAs were required to collect monthly HHCAHPS data and submit data to the Home Health CAHPS Data Center from April 1, 2017 through March 31, 2018:

For the CY 2019 APU, we require continuous monthly HHCAHPS data collection and reporting for four quarters. The data collection period for the CY 2018, APU includes the second quarter 2017 through the first quarter 2018 (the months of April 2017 through March 2018). HHAs will be required to submit their HHCAHPS data files to the HHCAHPS Data Center for the second quarter 2017 by 11:59 p.m., e.d.t. on October 19, 2017; for the third quarter 2017 by 11:59 p.m., e.s.t. on January 18, 2018; for the fourth quarter 2017 by 11:59 p.m., e.d.t. on April 19, 2018; and for the first quarter 2018 by 11:59 p.m., e.d.t. on July 19, 2018. These deadlines are firm; no exceptions will be permitted.¹⁸

If an HHA had less than 60 patients between April 1, 2016 and March 31, 2017, it was exempt from HHCAHPS participation for 2019. In order to claim the exemption, the HHA had to complete an HHCAHPS Participation Exemption Request form on the HHCAHPS Web site.¹⁹

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The facts in this case are not in dispute.²⁰ In this case, JHC HomeCare acknowledged that the requisite patient satisfaction survey data for Q4 2017 were not uploaded by the published submission deadlines.²¹ However, JHC HomeCare requests reversal of the 2 percent APU penalty because, while “JHC fulfilled its obligations” under the HHCAHPS regulations, “the failure to submit Q4 2017 data to CMS was due to a vendor error and not through any actions or failures of JHC.”²²

JHC HomeCare offered the following facts in support of its position. On or about December 8, 2010, JHC HomeCare entered into Home Health HHCAHPS Patient Satisfaction Agreement No. 3071-111510 (the “Agreement”) with Deyta, LLC (“Deyta”).²³ Deyta is a CMS-approved HHCAHPS vendor that distributes surveys to JHC HomeCare's patients, collects responsive data, and submits the survey data to CMS. Pursuant to the Agreement, Deyta was to distribute

¹⁷ *Id.* at 70406.

¹⁸ 81 Fed. Reg. at 76789.

¹⁹ *Id.*

²⁰ Tr. at 7.

²¹ *Id.*; Provider's Preliminary Position Paper at 2.

²² Provider's Preliminary Position Paper at 5.

²³ *Id.* at 1 (citing Exhibit P-1).

patient satisfaction surveys to a sampling of JHC HomeCare's patients, collect and aggregate the results, and submit the results to CMS, in compliance with the relevant regulations.²⁴

For nearly seven years, Deyta met its contractual obligations to JHC HomeCare under the Agreement.²⁵ On September 20, 2017, JHC HomeCare submitted written notice to Deyta that it was terminating the vendor contract *as of January 1, 2018*.²⁶ JHC HomeCare received written notice from Deyta dated November 6, 2017 acknowledging receipt of JHC HomeCare's termination letter and confirming that services would terminate as of December 31, 2017.²⁷ JHC HomeCare continued to pay its monthly fees to Deyta and continued to submit patient data to Deyta through the end of 2017 to permit Deyta to complete the Q4 2017 patient surveys.²⁸

On March 22, 2018, Deyta notified JHC HomeCare that, due to an internal error, it had failed to distribute patient satisfaction surveys for October, November, and December 2017. Deyta explained that it mistakenly cancelled services to JHC HomeCare as of October 2017, despite previously confirming that service would not terminate until December 31, 2017. As a result, patient satisfaction data was not collected for Q4 of 2017 and, therefore, was not submitted to CMS by the published April 19, 2018 deadline.²⁹ JHC HomeCare states that it attempted to monitor Deyta's submissions "by obtaining written confirmation that Deyta would continue to distribute patient satisfaction surveys and collect the data from those surveys through the end of 2017 calendar year."³⁰

The Medicare Contractor contends that JHC HomeCare failed to carry out its responsibility to monitor/review the data submission reports to ensure that the data was submitted timely and without problems.³¹

Thus, the issue presented for the Board's consideration does not involve an interpretation of the statute or the regulations. Nor is there a difference of opinion on the relevant facts.³²

In addition to setting forth very specific deadlines and requirements, the 2013 HHA PPS Final Rule directed HHAs to utilize additional resources that were available to them, to assist them in complying with the reporting requirements:

We strongly encourage HHAs to learn about the survey and view the HHCAHPS Survey Web site at the official Web site for the HHCAHPS at <https://homehealthcahps.org>. Home health agencies can also send an email to the HHCAHPS Survey Coordination

²⁴ *Id.* at 1-2.

²⁵ *Id.* at 2.

²⁶ *See* Exhibit P-2.

²⁷ *See* Exhibit P-3.

²⁸ Provider's Preliminary Position Paper at 2.

²⁹ *Id.*; Exhibit P-4.

³⁰ Provider's Preliminary Position Paper at 4.

³¹ Medicare Contractor's Preliminary Position Paper at 9.

³² Tr. at 7.

Team at HHCAHPS@rti.org, or telephone toll-free (1-866-354-0985) for more information about HHCAHPS.³³

The HHCAHPS website, which is regularly updated, has a vast amount of information about the HHCAHPS Survey, including the Home Health Care CAHPS Survey Protocols and Guidelines Manual (the “HHCAHPS Manual”).³⁴ The HHCAHPS Manual explains the requirements and obligations of the HHAs and their vendors with respect to data submission.³⁵

Section III of the HHCAHPS Manual identifies the HHA’s role and responsibilities as they relate to the HHCAHPS survey. One of the HHA’s responsibilities is to “[r]eview data submission reports to ensure that its survey vendor has submitted data on time and without data problems.”³⁶ The HHCAHPS survey website reports are described in Section XI of the Manual:

HHAs will be able to access two reports via the secured section of the HHCAHPS Survey website. The first report, the *Data Submission Summary Report*, **is intended to provide a means for the agency to monitor its vendor’s data submission activities and should be reviewed on a monthly or quarterly basis**, depending on the agreement that the agency has worked out with the vendor in terms of frequency of data submission. The second report available to HHAs is the *HHCAHPS Survey Results for Public Reporting*—this report is a preview of the HHCAHPS Survey results that are compiled for each HHA on a quarterly basis prior to being publicly reported.³⁷

The Manual goes on to state:

[T]he **purpose** of [the Data Submission Summary Report] is to allow an HHA to monitor whether its vendor is successfully submitting data files by the required quarterly data submission deadlines. An HHA can use this report for reference when it follows up with its vendor if expected data submissions do not appear.³⁸

The HHA ultimately remains responsible for ensuring that vendors submit data files on time and in accordance with the guidelines in the HHCAHPS Manual. As JHC HomeCare did not become aware of the missing surveys until March 22, 2018, when it was first notified by its vendor, the Medicare Contractor contends that JHC HomeCare was not properly monitoring its vendor’s submissions.³⁹

³³ 77 Fed. Reg. 67068, 67096 (Nov. 8, 2012).

³⁴ See Exhibit C-12 (copy of selected Chapters from the HHCAHPS Manual Version 9.0 (Jan. 2017)).

³⁵ *Id.* at 2.

³⁶ *Id.* at 4.

³⁷ *Id.* at 13 (emphasis added).

³⁸ *Id.* (emphasis added).

³⁹ Medicare Contractor’s Preliminary Position Paper at 10.

JHC HomeCare's vendor, Deyta, submitted a discrepancy notification report to CMS on March 28, 2018, in which Deyta stated that, "[t]he Home Health CAHPS services were mistakenly cancelled as of October 2017 *instead of December 2017*, therefore the patient data files received for October, November and December 2017 were never processed, sampled or fielded."⁴⁰ JHC HomeCare further states that Deyta acknowledged both verbally and in writing that it is at fault for the forgoing events.⁴¹ The Medicare Contractor's notice of payment reduction included language from the Medicare Quality Reporting Incentive Programs Manual which informed JHC HomeCare that failure to comply due to the fault of a vendor or contractor is NOT support of a finding of compliance.⁴²

The Board finds that JHC HomeCare had an obligation to conduct regular oversight of its HHCAHPS survey vendor to ensure that its HHCAHPS survey data was submitted correctly but has not offered any documentation or oral testimony to suggest that it conducted that oversight.⁴³ In this regard, CMS stated in the CY 2017 HHA PPS Final Rule:

HHAs should monitor their respective HHCAHPS survey vendors to ensure that vendors submit their HCAHPS data on time, by accessing their HHCAHPS Data Submission Reports on <https://homehealthcahps.org>. This helps HHAs ensure that their data are submitted in the proper format for data processing to the HHCAHPS Data Center.⁴⁴

Further, as discussed above, the HHCAHPS Manual specifically noted that the Data Submission Report was created "to allow an HHA to monitor whether its vendor is successfully submitting data files by the required quarterly submission deadlines" and that "[a]n HHA can use this report for reference when it follows up with its vendor if expected data submissions do not appear."⁴⁵ CMS' regulations require submission of HHCAHPS survey data "in a form and manner, and at a time, specified by the Secretary" as dictated by 42 U.S.C. § 1395fff(b)(3)(B)(v)(II) and 42 C.F.R. § 484.225(c).⁴⁶ This includes submitting all survey data every quarter.

The Board notes that, had JHC HomeCare monitored its HHCAHPS survey vendor and been accessing the HHCAHPS Data Submission Reports, JHC HomeCare likely would have realized that its Q4 HHCAHPS survey data was not submitted, possibly in time to rectify its vendor's

⁴⁰ Exhibit P-5 (emphasis added).

⁴¹ Tr. at 11-12 ("Our administrator at the time sent a letter to [Deyta] to terminate our contract on December 31, 2017 and they -- due to an internal communication issue within [Deyta], made a mistake and didn't collect our surveys. And therefore, the patients weren't surveyed and the results were never -- were unable to be uploaded to CMS. We -- she -- [Deyta] notified me in, it was like I said, March maybe 22nd and that they would let Medicare know that it was a vendor mistake and they would submit a form explaining that that they didn't collect the surveys for that quarter."); *see also id.* at 18-19.

⁴² MAC Preliminary Position Paper at 11-12, Exhibit C-10.

⁴³ Tr. at 24, 37.

⁴⁴ 80 Fed. Reg. 68624, 68708 (Nov. 5, 2015).

⁴⁵ Exhibit C-12 at 13.

⁴⁶ 42 U.S.C. § 1395fff(b)(v)(II).

error and comply with the regulatory deadlines.⁴⁷ It was not sufficient for JHC HomeCare to simply rely on the November 6, 2017 letter from Deyta confirming that the HHCAHPS services “shall terminate at end of business on December 31, 2017” because Deyta was its contractor and JHC HomeCare was responsible for ensuring its data was submitted in the time, form, and manner specified by the Secretary.

Accordingly, the Board finds that CMS properly imposed a two percent reduction to JHC HomeCare's CY 2019 APU from the Medicare Program because JHC HomeCare failed to satisfy the HHCAHPS program reporting requirements that were necessary to receive a full APU for CY 2019. The Board notes that its decision in this case is consistent with earlier decisions in similar HHCAHPS cases where a third-party vendor failed to submit timely survey data.⁴⁸

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board finds that CMS properly imposed a two percent reduction to the CY 2019 HHA PPS APU for JHC HomeCare.

BOARD MEMBERS:

Clayton J. Nix, Esq.
 Gregory H. Ziegler, C.P.A.
 Robert A. Evarts, Esq.
 Susan A. Turner, Esq.
 Kevin D. Smith, C.P.A.

FOR THE BOARD:

4/28/2021

X Clayton J. Nix

Clayton J. Nix, Esq.
 Chair
 Signed by: Clayton J. Nix -A

⁴⁷ Indeed, the explanation that JHC HomeCare gave in its Discrepancy Notification Report to CMS suggest that Deyta had multiple contracts with JHC HomeCare (or related entites) and that Deyta may have ended up terminating both in October or mixing up which contract terminated October 2017 versus December 2017:

CCN notified Deyta (HEALTHCARfirst) that they were cancelling their HomeHealth CAHPS services as of December 2017. In addition to the cancellation of their Home Health CAHPS services, *they canceled another CAHPS services as of October 2017*. The Home Health CAHPS services were mistakenly cancelled as of October 2017 instead of December 2017[.]

Exhibit P-5 (emphasis added). If true, this illustrates why it was important for JHC HomeCare to monitor its contractor, Deyta.

⁴⁸ See, e.g., *RX Home Health Servs., Inc. v. Palmetto GBA*, PRRB Dec. No. 2019-D21 (Mar. 27, 2019); *Livinrite Home Health Servs. v. BlueCross Blue Shield Ass’n*, PRRB Dec. No. 2013-D30 (Aug. 27, 2013); *CMK Home Health Agency, Inc. v. BlueCross BlueShield Ass’n*. PRRB Dec. No. 2013-D26 (Aug. 22, 2013).