

**PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION**

2022-D30

PROVIDER-
Henry County Hospital

HEARING DATE –
December 1, 2021

PROVIDER No.: 15-0030

Cost Reporting Period Ended –
12/31/2012

vs.

MEDICARE CONTRACTOR –
WPS- Government Administrative Services

CASE NO. 16-2233

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ISSUE STATEMENT

Whether the Provider is entitled to receive a volume decrease adjustment (“VDA”) for a Medicare dependent hospital (“MDH”).¹

DECISION

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board (“Board”) finds that the Medicare Contractor properly denied the request of Henry County Hospital (“Henry County” or “Provider”) for a VDA payment for fiscal year (“FY”) 2012.

INTRODUCTION

Henry County is an acute care hospital located in New Castle, Indiana² and was designated an MDH during FY 2012, the fiscal year at issue.³ The Medicare contractor⁴ assigned to Henry County for this appeal is WPS-Government Health Administrators (“Medicare Contractor”).

On August 24, 2015, Henry County requested a VDA in the amount of \$2,464,139⁵ and gave the following explanation:

During fiscal year 2012, Henry County Hospital faced a number of factors that caused a decrease in discharges at the hospital. A declining population, higher than average unemployment, outmigration of Henry County workers and increased competition all share responsibility.⁶

On February 15, 2016, the Medicare Contractor issued a denial of the VDA stating “we are not convinced that the decline in discharges was due to an unusual event or occurrence beyond the provider’s control.”⁷ Specifically, the Medicare Contractor gave the following rationale:

While the provider did experience a significant decline in discharges during the current period, it does appear to be consistent with the ongoing trend at the hospital and we do not believe any of the several reasons presented in the request adequately explains the situation. You noted the high rate in unemployment and declining population, however the rate of unemployment has declined significantly since 2010 and the decline in 2012 appears to be insignificant. You also discuss the impact that outmigration of

¹ Transcript (“Tr.”) at 6; Medicare Contractor’s Final Position Paper (hereinafter “Medicare Contractor’s FPP”) at 3.

² Stipulations (“Stipulations”) at ¶ 1 (copy at Exhibit P-11).

³ *Id.*

⁴ CMS’ payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries (“FIs”) and these functions are now contracted with organizations known as Medicare administrative contractors (“MACs”). The term “Medicare Contractor” refers to both FIs and MACs as appropriate and relevant.

⁵ Medicare Contractor’s FPP at 2; Stipulations at ¶¶ 4, 6.

⁶ Exhibit P-8 at 1. *See also* Provider’s Final Position Paper at 6 (confirming that Exhibit P-8 was submitted with the original VDA request).

⁷ Exhibit C-1 at 1.

workforce from Henry County may have had on hospital admissions, which we believe is based on the supposition that residents working outside the county would be inclined to use healthcare services outside the county. We found no convincing evidence that this would be the case. Finally you contend an increase in competition has led to the decline in discharges. While we typically do not view competition as an unusual event or occurrence, we also find that most of the hospitals cited in your request experience declines in discharges similar to the providers, which would not be an indication they are drawing patients away from Henry County. Therefore we are not convinced that the decline in discharges was due to an unusual event or occurrence beyond the provider's control.⁸

On April 16, 2016, Henry County filed a Request for Reconsideration.⁹ However, on October 5, 2016, the Medicare Contractor denied the Request for Reconsideration based on the following rationale:

The submitted data shows that more Henry County patients are going to other hospitals but the difference does not seem to be significant and does not appear to be unusual. We note that the provider only drew 39% of the county's patients in 2011, so it appears that patients choosing hospitals outside the county appears to be a normal circumstance. We also note that the total number of patients from Henry County declined by 207 so it would seem a decline in discharges was going to occur simply because there were fewer patients. The provider has not established that the outmigration of workers or competition from other hospitals is the cause for this decrease but only speculates that the decline "may be due to the outmigration of the workforce...and increased hospital competition". We also note the provider has experienced at least four consecutive years of declines in discharges that appears to be continuing, indicating that this is an ongoing decline that is not an unusual circumstance.¹⁰

As a result, on August 10, 2016, Henry County timely appealed the Medicare Contractor's final decision and met all jurisdictional requirements for a hearing before the Board.

The Board held a live video hearing on December 1, 2021. Henry County was represented by Kyle Smith of Blue & Co., LLC. The Medicare Contractor was represented by Scott Berends, Esq. of Federal Specialized Services.

STATEMENT OF FACTS AND RELEVANT LAW

Medicare pays certain hospitals a predetermined, standardized amount per discharge under the inpatient prospective payment system ("IPPS") based on the diagnosis-related group ("DRG")

⁸ *Id.*

⁹ Medicare Contractor's FPP at 2.

¹⁰ Exhibit C-1 at 4.

assigned to the patient. These DRG payments are also subject to certain payment adjustments. One of these payment adjustments is referred to as a VDA payment and it is available to MDHs if, due to circumstances beyond their control, they incur a decrease in their total number of inpatient cases of more than 5 percent from one cost reporting year to the next.¹¹ VDA payments are designed to fully compensate a hospital for the fixed costs it incurs providing inpatient hospital services during the period covered by the VDA, including the reasonable cost of maintaining necessary core staff and services.¹² The implementing regulations, located at 42 C.F.R. § 412.108(d), reflect these statutory requirements. When promulgating § 412.108(d), CMS made it clear that the VDA rules for MDHs were identical to those already in effect for sole community hospitals (“SCH”).¹³ The regulation at 42 C.F.R. § 412.108(d) states:

(d) Additional payments to hospitals experiencing a significant volume decrease. (1) CMS provides for a payment adjustment for a Medicare-dependent, small rural hospital for any cost reporting period during which the hospital experiences, due to circumstances as described in paragraph (d)(2) of this section, a more than 5 percent decrease in its total inpatient discharges as compared to its immediately preceding cost reporting period. ...

(2) To qualify for a payment adjustment on the basis of a decrease in discharges, a Medicare-dependent, small rural hospital must submit its request no later than 180 days after the date on the intermediary’s Notice of Amount of Program Reimbursement and it must—

(i) Submit to the intermediary documentation demonstrating the size of the decrease in discharges and the resulting effect on per discharge costs; and

(ii) Show that the decrease is due to circumstances beyond the hospital’s control.¹⁴

The sole issue in dispute is whether Henry County meets the requirement of § 412.108(d)(2)(ii), that is, that it experienced a decrease in discharges greater than 5 percent from FY 2011 to FY 2012 due to circumstances beyond its control.¹⁵

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Henry County asserts that it experienced a decrease in discharges for FY 2011-2012 beyond its control. Henry County explains that from 2009 through 2013, it experienced a decrease in total and Medicare discharges and that it “took actions from 2010-2013 to control costs as volumes continued to decrease . . . demonstrate[ing] that the Hospital was trying to reduce costs over a several year period.”¹⁶ Further, Henry County maintains that “[d]ue to the efforts of the Hospital

¹¹ 42 U.S.C. § 1395ww(d)(5)(G)(iii).

¹² *Id.*

¹³ 55 Fed. Reg. 15150, 15155 (Apr. 20, 1990). *See also* 71 Fed. Reg. 47870, 48056 (Aug. 18, 2006).

¹⁴ (Bold emphasis added.)

¹⁵ Exhibit C-1 at 1, 4.

¹⁶ Provider’s FPP at 5.

to reduce costs in each year, we believe all costs should be considered fixed for the [VDA] as indicated in the regulations.”¹⁷

Henry County asserts that the drop in discharges was due to the following facts: (1) the county itself (*i.e.*, Henry County, Indiana) “experienced a 3.18% decline in discharges compared with the preceding year”; and (2) Henry County lost “170 admissions in FY 2012 (compared with FY 2011), from a physician group that was impacted as a result of the Provider contracting with a hospitalist physician group from St. Vincent Health, Inc. due to recruiting difficulties.”¹⁸ The Provider explained that, in the years following the hospitalist contract with St. Vincent, “the physician group steadily reduced its admissions to [Henry County], because the physician patients were no longer being seen at the [Henry County] location and were being transferred to the St. Vincent Health location in Indianapolis, Indiana.”¹⁹ In support of this contention, Henry County noted that: (1) the 170 lost discharges was more than 5 percent of its total discharges for FY 2011; and (2) the Medicare Contractor had approved a VDA payment for FY 2010 and that the greater than 5 percent decline in discharges for FY 2010 was “a fact in large part by this same agreement.”²⁰

Finally, during the hearing, Henry County explained that the economic decline in the area started as far back as 2004 with the closure of the Chrysler plant and that this decline contributed to the decrease in discharges.²¹ Henry County also explained that it has had trouble recruiting physicians.²² Specifically, one of its physicians, Dr. Stevenson, left in the middle of 2011 to transition his practice to outpatient only and his departure impacted the number of transfers to the facility, which was beyond the hospital’s control.²³

The Medicare Contractor contends that it “was not convinced the decline in discharges was due to an unusual even[t] or occurrence beyond [Henry County’s] control.”²⁴ In response to the VDA denial, Henry County gave three main reasons for the decrease in discharges:

1. “[A] decline in the county’s population and high unemployment rate”;
2. “[O]utmigration of workers to surrounding areas”; and
3. “[I]ncreased competition with new and current hospitals in the surrounding counties.”²⁵

With its reconsideration request, the Medicare Contractor asserts that Henry County failed to show the cited issues specifically impacted discharges, and stated “[f]our consecutive years of declines in discharges indicates a continuing and ongoing decline that is not an unusual situation.”²⁶

The Board finds that Henry County failed to provide any proof that the decrease in discharges were *due to circumstances beyond its control*. The Provider provided no evidence to substantiate

¹⁷ *Id.*

¹⁸ Provider’s Responsive Brief at 1-2.

¹⁹ *Id.* at 4. *See also* Exhibit P-14.

²⁰ Provider’s Responsive Brief at 4. *See also* Tr. at 9.

²¹ Tr. at 15.

²² *Id.* at 19, 21.

²³ *Id.* at 21-23.

²⁴ Medicare Contractor’s FPP at 9.

²⁵ *Id.*

²⁶ *Id.* at 11.

what, if any, options it considered to mitigate the continuing decreases in discharges.²⁷ For example, Henry County did not document, in the record, its efforts to recruit physicians or to cut costs prior to or during FY 2012.²⁸ The first mention in the record of Dr. Stevenson moving in 2011 to an outpatient-only practice was during the hearing.²⁹ Henry County hired hospitalists, who were employed by St. Vincent as early as 2008, and expanded the use of those hospitalists upon Dr. Stevenson's departure.³⁰ Henry County's witness also testified that the St. Vincent-affiliated hospitalists gradually began transferring more patients outside of Henry County, presumably because the larger hospitals had specialists that could better care for the patients, whereas Henry County had no specialty physicians.³¹ Henry County submitted no documentation to support its recruitment efforts prior to or during FY 2012 to increase its *employed* physicians and eliminate the need for the St. Vincent-affiliated hospitalists.³²

The Board also notes that part of the reason Henry County could not recruit physicians was the requirement that the physician live within 30 minutes of the hospital. The witness testified it was for the safety of the patients, and they were following the industry standard of ensuring on-call physicians could be on-site with 30 minutes.³³ Although the 30-minute requirement did in fact impede Henry County's hiring ability, it was a requirement imposed by Henry County and *not beyond its control*.³⁴

Finally, the Board recognizes that Henry County cited to events and documentation from as far back as 2004 as reasons for the decrease in discharges in FY 2012 - the only fiscal year under dispute. However, those citations were generic without explaining how those events impacted FY 2012 or its efforts prior to or during FY 2012 to minimize the impact of those events on FY 2012.³⁵ The language of 42 C.F.R. § 412.108(d) is clear that a provider must prove that the greater than 5 percent decrease in discharges (in comparison to the prior year) is "due to

²⁷ Unfortunately, Henry County seemed to rely on prior grants of VDAs in certain years *prior to* FY 2012 to justify its VDA request for FY 2012. *See* Tr. at 50-51. While those prior grants may have some relevance, they do *not* establish that, *for FY 2012*, the 5 percent decrease was beyond its control. At the hearing, there was witness testimony of certain alleged efforts occurring in 2011 and 2012 to mitigate the decrease in patient volume; however, those alleged efforts were *not* previously discussed in the record and there is no documentary evidence to support those alleged efforts. *See* Tr. at 49-50 (witness confirming that there is nothing in the record regarding the following alleged efforts: "We were constantly trying to figure out another option as to having St. Vincent. We had meetings on a weekly basis or a monthly basis going over transfers trying to figure out how to bring the transfers that were happening, recruiting. We had a contract with St. Vincent. I'm not sure what that contract was at this point, but we were locked into them for a certain number of years, and so we eventually moved away from St. Vincent, and when we had more time to recruit, we were able to do that, but the short notice in '08 that we got from our physician group, we were not able to get the recruiting done. We had some experience with the hospitalist program at that point even though it was -- through St. Vincent. We were able to have more experience with that model versus our experience in the past just in the inpatient/outpatient model only, so we felt more comfortable recruiting later on and bringing in our own hospitals on. We didn't and were not able to in '08 or '11."); *id* at 50 (the witness responding "I don't believe so" in response to the follow up question from Board Chair Nix: "Yes. But what you were describing there, that's not -- and there's nothing about that in the record or documenting that in the record?").

²⁸ Tr. at 49-50. *See supra* note 27.

²⁹ Tr. at 33-34. Indeed, the Board notes that Exhibit P-14 is one-page showing the physicians in the physicians-family practice group and the difference in their discharges between 2011 and 2012. However, Dr. Stevenson is not included in this exhibit and no information is provided in the record on how many discharges he had in 2011 to assess the impact of his departure. *See* Tr. at 33-34.

³⁰ Tr. at 29-30.

³¹ *Id.* at 31-32.

³² *Id.* at 47-50.

³³ *Id.* at 27-28.

³⁴ *Id.*

³⁵ *See supra* note 27.

circumstances *beyond the hospital's control.*³⁶ Henry County failed to submit any evidence addressing factors beyond its control *for FY 2012*, the year under appeal.³⁷ As such, Henry County has failed to prove that the decrease in discharges from FY 2011 to FY 2012 were due to an unusual event or circumstances beyond its control.

DECISION

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board finds that the Medicare Contractor properly denied the request of Henry County for a VDA payment for FY 2012.

BOARD MEMBERS:

Clayton J. Nix, Esq.
Gregory H. Ziegler, CPA
Robert Evarts, Esq.
Kevin D. Smith, CPA
Ratina Kelly, CPA

FOR THE BOARD:

9/22/2022

X Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: PIV

³⁶ (Emphasis added.)

³⁷ See *supra* note 27.