

**DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Medicare & Medicaid Services**

Decision of the Administrator

IN THE CASE OF:	*	MGCRB Case No. 25C0560
	*	
Beebe Medical Center	*	
	*	
Provider No. 08-0007	*	
	*	Date: January 23, 2024
	*	
	*	

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision entered by the Medicare Geographic Classification Review Board (MGCRB). The review is during the 90-day period in § 1886(d)(10) of the Social Security Act (Act), as amended.¹ The Hospital requested that the Administrator reverse the MGCRB’s denial of its reclassification application. Accordingly, this case is now before the Administrator for final agency review.

ISSUE AND MGCRB DECISION

The issue involves whether the MGCRB properly denied the Hospital’s request for redesignation. The Hospital, geographically located in the urban Salisbury, Maryland-Delaware (MD-DE) Core-Based Statistical Area (CBSA), requested redesignation to the urban Ocean City, New Jersey (NJ) CBSA, for purposes of using the area’s wage index to determine its payment rate under the Medicare inpatient prospective payment system (IPPS) for the Federal Fiscal Years (FFY) 2025 through 2027. The MGCRB denied the Hospital’s request. The MGCRB noted that requested area is required to be no farther than 15.00 miles under the proximity requirements; and in this case, the distance was measured to be 140.0 miles.

HOSPITAL’S COMMENTS

The Hospital commented, requesting review by the Administrator.² The Hospital stated that it had demonstrated a close proximity to the Ocean City, NJ CBSA by providing map evidence of a route from the Hospital to the edge of the Ocean City, NJ CBSA via Savannah Road, Cape Henlopen Drive, and the overwater ferry route on U.S. Route 9. The Hospital noted that it established via approved mapping software that the distance from the Hospital to the Ocean City, NJ CBSA was 10.6 miles, which is less than the 15 miles required.³

¹ 42 U.S.C. § 1395ww(d).

² Request for Administrator Review (Feb. 5, 2024).

³ *Id.* at 2.

The Hospital stated that the MGCRB has consistently treated travel by ferry route as travel over improved roads, despite the fact that the regulations and MGCRB rules are silent with respect to how travel by ferry boat should be treated. The Hospital noted that the MGCRB has granted redesignation based on the exact same route that is at issue in this case five other times, allowing the Hospital to redesignate to the Ocean City, NJ CBSA for the better part of the last twenty years.⁴

The Hospital pointed out that for reasons that are unclear, beginning in 2017, the MGCRB began disregarding years of precedent without any apparent change in policy, and denying requests for redesignations that relied on ferry travel. The Hospital noted that the Administrator reversed these MGCRB decisions⁵, including at least two such denials that related to this very Hospital and involved the exact same issue: in 2018, the MGCRB denied the Hospital's request for redesignation for fiscal years 2019 to 2021 because it relied on the Cape May-Lewes Ferry. In that instance, the Administrator overturned the MGCRB, concluding, consistent with historic interpretation of the regulations, that because "the ferry is owned by a government entity, open to the public, and available year-round, it is consistent with past decisions to allow ferries to be considered for purposes of the MGCRB reclassification process."⁶ In 2021, the Administrator overturned the MGCRB's denial on the same grounds.⁷ On at least five other occasions, the Hospital stated, the Administrator has similarly reversed MGCRB decisions to deny a hospital's request for redesignation on the basis of an overwater ferry route.⁸ Most recently, in 2020, the Administrator overturned the MGCRB's denials of requests from Backus Hospital ("Backus") and Windham Comm Memorial Hospital ("Windham") for redesignation on the basis of an overwater ferry route for fiscal years 2021 through 2023.⁹

The Hospital further pointed out that although the MGCRB has updated its guidance since it began denying requests for redesignation based on overwater ferry routes in 2017, it has not revised the definition of "improved road" or otherwise excluded ferries from being used to satisfy the proximity criteria. Specifically, the MGCRB updated its MGCRB Rules in December 2023, and did not make any revisions to the interpretation of "improved road" or the proximity criteria, or provide any further statements of position on the use of ferries to demonstrate proximity. Moreover, the MGCRB's Frequently Asked Questions for the FY 2025 Application Cycle, which is released annually, solely references the MGCRB's historical guidance regarding what constitutes an "improved road," and it does not offer any additional commentary regarding its applicability to ferries. In other words, the Hospital averred, despite several opportunities to alter its policy related to overwater ferry routes, the MGCRB has not done so.

The Hospital argued that the MGCRB's historic treatment of ferry travel as travel over "improved roads" is the correct and logical policy based on the underlying rationale for permitting a hospital to seek redesignation, which is to address certain inequities in the labor market. The Hospital

⁴ See MGCRB Case Nos. 99C0452, 04C0067, 07C0055, 13C0156, and 16C0088.

⁵ See Administrator's decisions in Case Nos. 18C0076 and 18C0195.

⁶ See Administrator's decision in Case No. 19C0212.

⁷ See Administrator's decision in Case No. 22C0296.

⁸ See Administrator's decisions in Case Nos. 18C0195, 18C0076, 19C0277, 21C0293, and 21C0294. In addition, in its decision in Case No. 19C0277, the Administrator noted that the Board had, on two occasions, previously permitted the hospital (Adirondack Medical Center) to use ferry service in redesignation requests brought under Special Access rules.

⁹ See Administrator's decisions in Case Nos. 21C0293 (Backus) and 21C0294 (Windham).

noted that CMS devised the distance criteria on the premise that these were reasonable distances that people would travel to work, and if people are using ferry boats to get to work, it is appropriate to consider this in the distance assessment.¹⁰ Additionally, the Hospital stated, MGCRB Rules and Instructions have consistently made clear that the term “improved road” includes “any road that is maintained by a local, state, or federal government entity and available for use by the general public.” The Hospital noted that the Cape May-Lewes Ferry that is at issue in this appeal is operated by the Delaware River and Bay Authority, which is a governmental entity; it can carry automobiles and passengers; it is open to the public; and it is operated year-round. Thus, the Hospital argued, it should be treated as analogous to a bridge, which would clearly be considered an “improved road”. Finally, the Hospital pointed out that the ferry route in this case is actually considered part of U.S. Route 9, based on Google Maps.

Finally, the Hospital noted that the MGCRB is obligated to apply its regulations and policies in a consistent manner and treat similarly situated hospital the same way.¹¹ As the MGCRB previously accepted ferry travel, it cannot apply a different policy or interpretation of its own rules in this case, and doing so would be arbitrary and capricious, and would violate the Administrative Procedures Act.

DISCUSSION

The entire record furnished by the MGCRB has been examined, including any correspondence, position papers, exhibits, and subsequent submissions. All comments received timely are included in the record and have been considered.

Section 1886(d)(10) of the Act provides for the MGCRB to consider the application of any subsection (d) hospital requesting that the Secretary change the hospital’s geographic classification for purposes of determining for a fiscal year its wage index. Further, § 1886(d)(10)(D)(i)(I) requires the Secretary to publish guidelines for comparing wages, taking into account to the extent the Secretary determines appropriate, occupational mix in the area in which the hospital is classified and the area in which the hospital is applying to be classified.”

With respect to MGCRB reclassification, the Medicare regulations at 42 C.F.R. § 412.230 *et seq.*, set forth the criteria an individual hospital seeking redesignation to another rural or urban area must meet for purposes of using that area’s wage index. Except for sole community hospitals (SCHs) and rural referral centers (RRCs), which have the option of applying under special access rules, an individual hospital must meet the proximity criteria at 42 C.F.R. § 412.230(a)(2), which states:

¹⁰ The Hospital cited an article, “NJ Ranks No. 4 in Commuting by Ferry” in the *Home News Tribune* (Sept. 3, 2008).

¹¹ The Hospital cited *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedure requires an agency to treat like cases alike.”), *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 776-77 (D.C. Cir. 2005) (“An agency must provide an adequate explanation to justify treating similarly situated parties differently. Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence on the record, its action is arbitrary and capricious and cannot be upheld.”), and *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (“if [an] agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”).

Except as provided in paragraph (a)(3)^[12] of this section, to be redesignated to another rural area or an urban area, a hospital must demonstrate a close proximity to the area to which it seeks redesignation by meeting the criteria in paragraph (b) of this section, and submitting data requested under paragraph (c) of this section.

In addition, paragraph (a)(5)(i) provides “Limitations on redesignation”, including that:

An individual hospital may not be redesignated to another area for purposes of the wage index if the pre-reclassified average hourly wage for that area is lower than the pre-reclassified average hourly wage for the area in which the hospital is located. An urban hospital that has been granted redesignation as rural under § 412.103 is considered to be located in the rural area of the state for the purposes of this paragraph (a)(5)(i).

The proximity criteria at 42 C.F.R. § 412.230(b) provides that:

A hospital demonstrates a close proximity with the area to which it seeks redesignation if one of the following conditions applies:

- (1) The distance from the hospital to the area is no more than 15 miles for an urban hospital and no more than 35 miles for a rural hospital.
- (2) At least 50 percent of the hospital’s employees reside in the area.

To demonstrate proximity, 42 C.F.R. § 412.230(c) requires that a hospital submit appropriate data relating to its proximity to an area. To demonstrate proximity to the area, the hospital must provide evidence of the shortest route over improved roads to the area and the distance of that route.

In addition, hospitals must meet certain wage criteria at 42 C.F.R. § 412.230(d)(1) supported by wage data that is consistent 42 C.F.R. § 412.230(d)(2)(ii) in order to be redesignated. 42 C.F.R. § 412.230(d) sets forth the wage criteria which must be met, stating:

d) Use of urban or other rural area’s wage index—(1) Criteria for use of area’s wage index. Except as provided in paragraphs (d)(3) and (d)(4) of this section, to use an area’s wage index, a hospital must demonstrate the following:

- (i) The hospital’s incurred wage costs are comparable to hospital wage costs in an urban or other rural area;
- (ii) The hospital has the necessary geographic relationship as specified in paragraphs (a) and (b) of this section;
- (iii) One of the following conditions apply:

¹² The regulation at 42 C.F.R. § 412.230(a)(3) provides special access rules for SCHs and RRCs.

(C) With respect to redesignations for Federal fiscal year 2006 and subsequent years, the hospital's average hourly wage is, in the case of a hospital located in a rural area, at least 106 percent and in the case of a hospital located in an urban area, at least 108 percent of the average hourly wage of all other hospitals in the area in which the hospital is located;

iv) One of the following conditions apply:

(E) With respect to redesignations for fiscal year 2011 and later fiscal years, the hospital's average hourly wage is equal to, in the case of a hospital located in a rural area, at least 82 percent, and in the case of a hospital located in an urban area, at least 84 percent of the average hourly wage of hospitals in the area to which it seeks redesignation.

(2) *Appropriate wage data.* For a wage index change, the hospital must submit appropriate wage data as follows:

(ii) For redesignations effective beginning FY 2003:

(A) For hospital-specific data, the hospital must provide a weighted 3-year average of its average hourly wages using data from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes. However, for the limited purpose of qualifying for geographic reclassification based on wage data from cost reporting periods beginning prior to FY 2000, a hospital may request that its wage data be revised if the hospital is in an urban area that was subject to the rural floor for the period during which the wage data the hospital wishes to revise were used to calculate its wage index.

(B) For data for other hospitals, the hospital must provide a weighted 3-year average of the average hourly wage in the area in which the hospital is located and a weighted 3-year average of the average hourly wage in the area to which the hospital seeks reclassification. The wage data are taken from the CMS hospital wage survey used to construct the wage index in effect for prospective payment purposes.

The regulation at 42 C.F.R. § 412.230(d)(3) provides that an exception for hospitals that were "ever" an RRC:

(3) *Rural referral center exceptions.* (i) If a hospital was ever approved as a rural referral center, it does not have to demonstrate that it meets the average hourly wage criterion set forth in paragraph (d)(1)(iii) of this section.

(ii) If a hospital was ever approved as a rural referral center, it is required to meet only the criterion that applies to rural hospitals under paragraph (d)(1)(iv) of this section, regardless of its actual location in an urban or rural area.

Thus, a hospital that was “ever” approved as an RRC does not have to meet the 106/108 percent of the AHW of hospital in the area in which the hospital is located, and only has to meet the 82 percent of the AHW of hospitals in the area to which it seeks redesignation.

In this case, the Hospital showed it was at one time designated as an RRC and supplied the 2024 IPPS impact file showing it is currently designated as an RRC. The Hospital requested redesignation to the urban Ocean City, NJ CBSA under the proximity rules. The MGCRB found that the Hospital met all of the criteria to be reclassified to the urban Ocean City, NJ CBSA, except for the 15-mile proximity requirement. The MGCRB found that the Hospital was measured to be 140.0 miles from the requested area.

The MGCRB and the Administrator have both allowed the use of ferries in the proximity criteria in previous MGCRB cases, including cases involving this Hospital.¹³ The Cape May- Lewes Ferry is operated by the Delaware River and Bay Authority, a bi-state government agency that was created by the legislatures of the States of Delaware and New Jersey, and by an Act of the U.S.¹⁴ As the ferry is owned by a government entity, open to the public, and available year-round, it is consistent with past decisions to allow ferries to be considered for purposes of the MGCRB reclassification process.¹⁵

As noted by the Hospital, the purpose of the MGCRB reclassification process is to allow Hospitals to compete with neighboring labor markets. Based upon the Hospital’s designated public access route to the county line, the Hospital meets the 15-mile proximity requirement.

Because the Hospital is an RRC, it is not required to meet the rural 106 percent wage comparison threshold of 42 C.F.R. § 412.230(d)(1)(iii)(C). Additionally, as it is designated an RRC, it needs only to meet the 82 percent wage comparison threshold of 42 C.F.R. § 412.230(d)(iv)(E). As the Hospital meets all the criteria for redesignation, the Administrator approves the Hospital’s request, to reclassify to the Ocean City, NJ CBSA for purposes of using the area’s wage index to determine

¹³ The Administrator notes that as the Hospital cited in its comments, the MGCRB found that the Hospital was less than 15 miles from the Cape May County line and allowed the Hospital to reclassify to the Ocean City, NJ CBSA in five previous cases. The Hospital has been redesignated to the requested Ocean City, NJ CBSA going back more than 20 consecutive years.

¹⁴ See www.drba.net/AbouttheDRBA/Compact.aspx.

¹⁵ See “DOT support for improved ferry service boosts another transportation option”, published Feb.5, 2013. Available online at <http://usdotblog.typepad.com/secretarysblog/2013/02/dot-support-for-improved-ferry-service-boosts-another-transportation-option.html>. As noted by the U.S. Department of Transportation, “Ferry boats offer a valuable option for people living near waterways across the nation traveling to jobs, schools, medical services, grocery stores, and other important destinations.”

its payment rate under the Medicare inpatient prospective payment system (IPPS) for the Federal Fiscal Years (FFY) 2025 through 2027.

DECISION

The Administrator reverses the MGCRB's decision in accordance with the foregoing opinion.

**THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE
SECRETARY OF HEALTH AND HUMAN SERVICES**

Date: March 15, 2024

/s/

Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services