

DC Circuit Rejects HHS Rule Barring Hospital Medicare Appeals Challenging Longstanding Erroneous “Predicate Facts”

On June 29, 2018, the DC Circuit ruled that HHS could not apply in PRRB appeals a 2013 “reopening” regulation, which purports to bar the adjudication of “predicate facts” beyond three years after the facts had been determined.

St. Francis Medical Center v. Azar (D.C. Cir. June 29, 2018). The court held that the agency’s reopening regulation, although stating that such predicate facts could not be considered outside the three-year window, applies only where agency decision makers revisit their *own* determinations and does not apply in appeals from one level of the agency to another. A concurrence by Judge Kavanaugh found further that, “it would seem to be the very definition of arbitrary and capricious for HHS to knowingly use false facts when calculating hospital reimbursements. That is particularly so when those erroneous facts cost hospitals hundreds of millions of dollars. That is real money.” This DC Circuit decision applies nationwide to restore hospital procedural rights to seek correction of baseline errors that may repeatedly cause underpayments years down the line.

Substantively, the *St. Francis* plaintiff hospitals are challenging the amount of their inpatient prospective payment system (IPPS) reimbursement during various recent fiscal years. The plaintiff hospitals contend that the “standardized amount” – which HHS established roughly 35 years ago and forms the baseline for the IPPS system rates – had been set too low using an erroneous method. Specifically, HHS had erroneously treated transfers of patients from one hospital to another as discharges. This overstated the number of discharges used to compute the average allowable operating costs per case and, consequently, understated the standardized amount. This original historical error has caused underpayments each and every subsequent fiscal year, including those at issue in *St. Francis*.

The hospital plaintiffs filed timely PRRB appeals of recent payments (e.g., those that had been made in fiscal year 2005), which were based on the erroneous standardized amounts. The PRRB dismissed the appeals, applying HHS’s 2013 amended regulation governing reopening of agency determinations, 42 C.F.R. § 405.1885. The regulation generally prohibits the reopening of “predicate facts” determined in a prior cost reporting period later than three years after the determination was received. The PRRB found that the predicate facts establishing HHS’s standardized amount had been determined in 1983 and were well outside of the three-year window.

The DC Circuit first noted that it had rejected HHS’s prior efforts to limit challenges to predicate facts in *Kaiser Foundation Hospitals v. Sebelius*, 708 F.3d 226 (D.C. Cir. 2013). The agency’s 2013 amendment to the reopening regulation was an effort to expressly limit the reopening of determinations of “specific findings on matter at issue,” including any “predicate fact.”

However, the DC Circuit held that HHS’s revised reopening regulation facially applies only to reconsideration by the entity that made the decision at issue, and does not apply to appeals of Medicare contractor decisions to the PRRB. Concurring with the opinion, Judge Kavanaugh found further that the regulation and policy employed by HHS to bar challenges to “false facts” was “the very definition of arbitrary and capricious.”

For more information about the bill, please contact one of the lawyers listed in this publication.

Contacts

Sven C. Collins

Partner, Denver
T +1 303 894 6370
E sven.collins@squirepb.com

Stephen P. Nash

Senior Partner, Denver
T +1 303 894 6173
E stephen.nash@squirepb.com

Mimi H. Brouillette

Senior Associate, Denver
T +1 303 894 6157
E mimi.brouillette@squirepb.com