

FEDERAL JUDGE SAYS SITE-NEUTRAL CUTS OUTSIDE CMS' AUTHORITY

A federal judge recently said CMS lacked authority to impose deep reimbursement cuts for clinic visits at certain off-campus facilities. Federal D.C. District Court Judge Rosemary Collyer vacated the cuts in the 2019 hospital outpatient payment final rule, and said her ruling shouldn't be too complicated for CMS to implement because the agency's site-neutral payment reductions were not put in place in a budget-neutral way.

"CMS believes it is paying millions of taxpayer dollars for patient services in hospital outpatient departments that could be provided at less expense in physician offices. CMS may be correct. But CMS was not authorized to ignore the statutory process for setting payment rates in the Outpatient Prospective Payment System (OPPS) and to lower payments only for certain services performed by certain providers," Collyer said.

The American Hospital Association and Association of American Medical Colleges had sued CMS after the final 2019 hospital outpatient rule established a new payment rate for off-campus hospital outpatient clinic visits that was equivalent to what those visits would be paid under Medicare's Physician Fee Schedule. The affected providers had been exempted from the Bipartisan Budget Act of 2015's site-neutral provisions for off-campus hospital facilities. CMS planned to phase-in the payment reductions over a two-year period, and said it intended to continue down that path in its proposed 2020 hospital outpatient pay rule.

Hospitals said the policy violated Congress' intent to treat hospital off-campus departments that were exempted from site-neutral pay cuts in the Bipartisan Budget Act of 2015 differently than those subject to the law's site-neutral policy. The Bipartisan Budget Act of 2015 lowered the payment for new hospital off-campus facilities to the level paid to physicians. However, that bill exempted off-

campus facilities that were already open and were paid the higher hospital rates. A later exemption also applied to hospitals that were mid-build when the Bipartisan Budget Act of 2015 passed.

Judge Collyer noted the possible complications of vacating one part of the 2019 hospital outpatient payment rule. However, the rule is less than a year old and these cuts weren't budget neutral, so Collyer said that should make it easier for CMS to reconsider the policy. Still, she said the court will require a report from both sides by October 1st to see whether additional briefings on remedies are needed.

"The ruling, which will allow hospitals to maintain access to important services for patients and communities, affirmed that the cuts directly undercut the clear intent of Congress to protect hospital outpatient departments because of the many real and crucial differences between them and other sites of care. Now that the court has ruled, it is up to the agency to put forth remedies for impacted hospitals and the patients they serve," AHA and AAMC said in a statement.

CMS Administrator Seema Verma last month defended the site-neutral policy, as well as controversial cuts to pay for 340B drugs, and told reporters the policies are necessary to help address distortions in the system that have hurt competition.

When asked what CMS' back-up plan is to tackle consolidation if the courts decided against the agency in the lawsuits over 340B and site-neutral policies, an agency spokesperson last month said CMS intends to "vigorously pursue its appeal rights within the D.C. Circuit Court of Appeals," and if it needs to CMS will evaluate all its options available under the Medicare statute. ■