United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5112 **September Term, 2011**

FILED ON: MAY 14, 2012

BAPTIST MEMORIAL HOSPITAL, INC.,
APPELLANT

v.

KATHLEEN SEBELIUS, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES,
APPELLEE

Consolidated with 11-5113

Appeals from the United States District Court
for the District of Columbia
(No. 1:07-cv-02245-RCL)

Before: SENTELLE, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and GINSBURG, *Senior Circuit Judge*

JUDGMENT

This appeal was considered on the record from the district court and on the briefs and the oral arguments of the parties. Although the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See Fed. R. App. P. 36; D.C. Cir. Rule 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the orders of the District Court, granting summary judgment to the Secretary of Health and Human Services and upholding the Secretary's denials of reimbursement to the Hospital, be affirmed. *See Baptist Mem'l Hosp. v. Sebelius*, 765 F. Supp. 2d 20 (D.D.C. 2011); *Baptist Mem'l Hosp. v. Sebelius*, 768 F. Supp. 2d 295 (D.D.C. 2011).

In its 1999 Program Memorandum A–99–62, what is now called the Centers for Medicare

and Medicaid Services (CMS) clarified that a hospital is not entitled to receive reimbursement as part of its disproportionate share hospital (DSH) payment, *see* 42 U.S.C. § 1395ww(d)(5)(F), for costs attributable to inpatient days for patients covered by a state's "expansion" Medicaid program but not otherwise covered by Medicaid. The Program Memorandum also announced, however, a Hold Harmless Policy, according to which the CMS would nonetheless reimburse for such "expansion waiver days" any hospital that filed a "jurisdictionally proper appeal to the [Program Reimbursement Review Board (PRRB)] on the issue of the exclusion of these types of days from the Medicare DSH formula before October 15, 1999[.]" *See also Cookeville Reg'l Med. Ctr. v. Leavitt*, 531 F.3d 844, 848–49 (D.C. Cir. 2008) (concluding CMS's policy not to reimburse hospitals for expansion waiver days did not violate relevant statutes).

Baptist Memorial Hospital claims the district court erred in determining its 1998 administrative appeal did not relate to the fiscal intermediary's exclusion of expansion waiver days from the Hospital's cost report. *See Baptist Mem'l Hosp.*, 765 F. Supp. 2d at 28. The Hospital's request for an appeal noted "[t]he Intermediary incorrectly calculated the Disproportionate Share adjustment[,]" which the request identified as "[A]udit [A]djustment ... #49." It argues that request for an appeal was sufficient under the Hold Harmless Policy because a document it attached to the request, as well as worksheets that document cited, allegedly indicated that "Audit Adjustment #49" reflected the fiscal intermediary's exclusion of expansion waiver days from the Hospital's reimbursed costs, and the Hospital's appeal of the adjustment obviously concerned the exclusion of those days.

On its face, the Program Memorandum does not entitle a Hospital to benefit from the Hold Harmless Policy unless, as relevant here, it filed an appeal "on the issue of the exclusion of these types of days[.]" Audit Adjustment #49, however, excluded from the Hospital's reimbursed costs several categories of patient days in addition to expansion waiver days. Although the Hospital asserts it would not have appealed the exclusion of any patient days other than the expansion waiver days, that assertion alone does not establish that the CMS lacked substantial evidence in determining the Hospital's request for an appeal gave no such indication.

Because the Hospital's generally worded appeal of Adjustment #49 did not necessarily relate to the exclusion of expansion waiver days, and because the Hospital's valuation of "[the challenged] adjustment [at] approximately $75,000" in that appeal bore no obvious relation to the excluded expansion waiver days, the CMS's determination that the Hospital's 1998 appeal was not "on the issue" of the excluded expansion waiver days was reasonable. Indeed, at least two federal courts of appeals have upheld as supported by substantial evidence similar determinations of the CMS regarding the Program Memorandum at issue in this case. *See Phoenix Mem'l Hosp. v. Sebelius*, 622 F.3d 1219, 1228 (9th Cir. 2010) ("a blanket appeal of the DSH calculation before October 15, 1999 is not sufficient to preserve appellate rights on this issue"); *Rush Univ. Med. Ctr. v. Leavitt*, 535 F.3d 735, 740 (7th Cir. 2008) ("The problem is not the omission of magic words but the fact that there were no synonyms for the right words, or even similes or metaphors").

Moreover, under the CMS's interpretation of its own Memorandum, "a general DSH appeal that does not specifically address the ... [expansion] days claim" does not qualify under the Hold Harmless Policy, *Baptist Mem'l Hosp.*, CMS Case No. 2007-D43, at 11 (Aug. 29, 2007), and

neither the request for appeal nor the adjustment it cited "specifically address[ed]" the excluded expansion waiver days. "[W]e give substantial deference to an agency's interpretation of its own regulations, according the agency's interpretation thereof controlling weight unless it be plainly erroneous or inconsistent with the regulation," *St. Luke's Hosp. v. Sebelius*, 611 F.3d 900, 904 (D.C. Cir. 2010) (internal quotation marks and citation omitted), and Baptist Memorial has alleged no such error or inconsistency with respect to the agency's interpretation.

In all other respects, we affirm the judgments for the reasons stated by the district court.

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk