The Basics of Medicare Cost Report Appeals

HFMA Cost Report Training Bootcamp

Mark Polston
Partner
King & Spalding, LLP
Washington, D.C.
(202)626-5540
mpolston@kslaw.com

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Introduction to Medicare Cost Report Appeals
What is a Medicare Cost Report Appeal?

Avenue for seeking administrative review of a final determination of CMS or a Medicare Administrative Contractor (MAC) as to the amount owed under Medicare Part A.

Final determinations include:

- Notice of Program Reimbursement (NPR)
  - Issued by MACs to settle the amount owed for each cost reporting period

- CMS Rulemakings
  - IPPS rate setting rulemaking adopted each year

- Other final determinations
  - Example: volume decrease adjustment

Judicial review available after administrative review is exhausted.
What is not a Medicare Cost Report Appeal?

Not a reopening!

• An NPR can be reopened within 3 years of the date it is settled.
  – Can be initiated at the request of the provider or on the MAC’s own initiative

• Reopenings are entirely discretionary
  – MACs are not obligated to reopen upon request
  – There are circumstances in which MACs may not reopen (e.g., successful appeal on issue in later years)

• Providers are entitled to file cost report appeals as a matter of right
  – Provided for in the Medicare statute

Not a claims appeal

• E.g., was the care reasonable and necessary?
Why would you file Medicare Cost Report Appeal?

To challenge one or more specific reimbursement issues in a final determination

- **NPRs**
  - The number of FTEs the hospital may claim for IME or DGME reimbursement
  - The number of Medicaid eligible days to be included in the hospital’s DSH formula
  - The amount of allowable bad debt

- **CMS Rulemakings**
  - Adjustments to the IPPS rates
  - The wage index adjustment
Where do you file Medicare Cost Report Appeals?

The Provider Reimbursement Review Board ("PRRB")

- Established by statute at 42 U.S.C. § 1395oo
- Implemented in the regulations at 42 C.F.R. § 405 Part R
- Consists of five Board members
  - Mostly attorneys and accountants
  - Appointed for three-year terms
- Located in Baltimore, Maryland
PRRB Jurisdiction

What you need to get an appeal before the PRRB?
Requirements for PRRB Jurisdiction

Standard appeals

Three statutory requirements:

• Provider is dissatisfied with a final determination of CMS or the MAC
  – Dissatisfaction demonstrated by citations to specific audit adjustments, rulemaking language, etc.
  – Claim or protest

• The amount in controversy is at least
  – $10,000 for individual appeals
  – $50,000 for group appeals
  – Demonstrated by calculation

• The appeal is filed within 180 days of the final determination
  – 5-day mailbox rule
  – Rulemaking appeals – Begins to run from Federal Register date
Requirements for PRRB Jurisdiction

Untimely NPR appeals

Alternative requirements for “untimely NPR” appeals

• Provider has not received an NPR from the MAC on a timely basis
  – NPR is untimely if not received within 1 year of the latest cost report/amendment
  – Filing an amended cost report resets the 1-year deadline
  – Filing an amended cost report after the appeal is filed will invalidate the appeal

• The appeal is filed within 180 days after the anniversary of the date that the last cost report/amendment was filed
  – 5-day mailbox rule does not apply

• Same amount in controversy rule
  – $10,000 for individual appeals
  – $50,000 for group appeals

Filing an untimely NPR appeal does not prevent you from filing an NPR appeal once the NPR is issued
Claim or Protest Requirement

• CMS has created rules that say you won’t get paid for an item unless you claim or protest it on your cost report
  – Claiming item – Reporting the item on its designated cost report line to claim reimbursement
  – Protesting item – Reporting it in designated protest line (not a claim for reimbursement)

• Different rules apply to different periods

<table>
<thead>
<tr>
<th>Cost Reporting Periods</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ending before 10/1/2008</td>
<td>No protest requirement</td>
</tr>
<tr>
<td>Ending on or after 10/1/2008 and beginning on or before 10/1/2016</td>
<td>Must either claim or protest for PRRB jurisdiction (with big exceptions)</td>
</tr>
<tr>
<td>Beginning on or after 10/1/2016</td>
<td>Must either claim or protest for as a condition of reimbursement (no exceptions)</td>
</tr>
</tbody>
</table>
Claim or Protest Requirement

Periods ending on or after 10/1/2008 and beginning before 10/1/2016

- The claim or protest requirement applicable to this period was challenged in federal court.

- Ruling—Protest not required when challenging a regulation

- CMS capitulated in CMS Ruling 1727-R

<table>
<thead>
<tr>
<th>Condition</th>
<th>Rule</th>
</tr>
</thead>
<tbody>
<tr>
<td>MAC has no discretion to grant the requested relief (e.g., appeals challenging CMS regulations, etc.)</td>
<td>Need not claim or protest</td>
</tr>
<tr>
<td>MAC has discretion to grant the requested relief</td>
<td>Must either claim or protest</td>
</tr>
</tbody>
</table>

- Untimely NPR appeals do not have to meet this protest requirement
Claim or Protest Requirement

Periods **beginning** after 10/1/2016

- Must either claim or protest as a condition of reimbursement
- PRRB will not dismiss your appeal on jurisdiction for failing to claim or protest
- But in theory you won’t get paid if you win on an appeal for an item you neither claimed nor protested
- Even items appealed from rulemakings must be protested
- There are currently no exceptions to this rule
  - Must protest even if the MAC had no discretion to grant relief
  - Untimely NPR appeals must meet this requirement
Protesting

• When to protest an item
  – Protest whenever you believe that CMS or the MAC would take the position that you are not entitled to reimbursement for the item

• How to protest
  – Prepare a narrative describing the issue
  – Prepare an impact calculation and a narrative explaining how the impact was calculated
  – Enter the amount of the protest on the appropriate cost report line
    ➢ Line 75 of Worksheet E Part A for IPPS
Predicate Facts

• What are “predicate facts?”
  – Factual determinations made in earlier years that are relevant to the payment year at issue.
  – Examples: FTE Cap, Per resident amount, SCH and MDH base year amount, etc.

• CMS’ predicate facts rule (2013)
  – Factual findings from closed years cannot be revisited more than three years after they are closed.
  – Has prevented providers from appealing errors made in prior cost reporting periods that affect reimbursement in later years

• D.C. Circuit has interpreted predicate facts rule as not applying to cost report appeals. *St. Francis Medical Center v. Azar.*
  – By its terms, the predicate facts rule only applies to reopening requests.
PRRB Appeal Logistics and Documentation
How to File an Appeal with the PRRB

- Electronic submission
  - Office of Hearings Case and Document Management System (OH CDMS)
  - Must create account

- Paper submission
  - Mail/FedEx/UPS/courier to the PRRB

Provider Reimbursement Review Board
1508 Woodlawn Drive, Suite 100
Baltimore, MD 21207
Individual Appeals

• Standalone appeal filed from a final determination for a single provider

• Can appeal an unlimited number of Medicare reimbursement issues
  – Must describe each issue with particularly
  – Must demonstrate that the PRRB has jurisdiction over each issue (e.g., protest, etc.)
  – $10,000 amount in controversy applies to all issues in the aggregate

• Can add issues to the appeal up to 60 days after the 180-day appeal deadline

• Chain providers
  – May have to appeal certain issues in a group
  – Individual appeal is best suited for discrete issues affecting only the provider
Group Appeals

• Appeals filed on behalf of multiple providers appealing final determinations for reporting periods ending in the same calendar year

• Can appeal only one issue

• Providers can be added to the group as they receive final determinations

• Mandatory Groups
  – Chain providers appealing the same issue for reporting periods ending in the same calendar year must bring a group appeal
  – Group remains open as long as needed until last provider in the chain receives its final determination for the period

• Optional Groups
  – Non-chain providers may form a group to appeal the same issue
  – Group closes after 1 year
Model Forms

Providers submitting paper appeals are asked to complete model forms

- Model Form A – Individual appeals
- Model Form B – Group appeals
  - Model Form G – Schedule of Providers for Group Appeals
- Model Form C – Add issue requests (individual appeals only)
- Model Form D – Transfer requests
- Model Form E – Direct Add requests

Providers filing electronically fill out online versions of these forms
Final Determination and Audit Adjustments

• Must include a copy of the final determination under appeal in the initial appeal filing
  – NPRs – Just the cover letter
  – Rulemaking appeals – Relevant pages from the rulemaking
  – Untimely NPR – Evidence of the date the most recently-filed cost report was filed (delivery confirmation) and evidence it was accepted by the MAC (tentative settlement)

• Must include and cite to applicable audit adjustments for NPR appeals
  – Does not apply to untimely NPR and rulemaking appeals
Issue Statement

- Must include a statement that describes the issue (or issues for individual appeals) with sufficient particularity.

- What **not** to do
  - “I am appealing all things DSH.”

- What to do
  - “I am appealing the treatment of Part C days in the DSH calculation for the following reasons....”
  - “I am appealing the MAC’s disallowance of crossover bad debts for the following reasons....”
Letter of Representation

• A party before the PRRB must have a designated case representative
  – Can be anyone (outside counsel, consultant, or an employee of the provider)
  – There can be only designated representative per appeal

• The appeal request must include a representation letter even if the provider is appointing an internal representative.

• The letter must be printed on the provider’s letterhead and contain
  – the name, provider number and fiscal year end for the provider, and
  – the name, organization, address, telephone number and email address of the representative.

• The letter must not be specific to an issue unless it is for a group appeal
Impact Estimate and Protest Documentation

- The appeal must include an estimated reimbursement impact for each issue and a worksheet showing how it was calculated
  - Required to demonstrate amount in controversy
  - Not an exact science; does not act as a floor or ceiling to reimbursement

- The appeal must also include evidence that the issue(s) under appeal were properly protested in the cost report (if not claimed)
  - As-filed cost report
  - Supporting workpapers
Appeal filing checklist

✓ The appropriate model form(s)
✓ Final determination
✓ Audit adjustments (if applicable)
✓ Issue statement
✓ Letter of representation
✓ Impact estimate
✓ Protest documentation (if applicable)
Reinstatement Rules

- **Rule 47.2.2** – Reinstatement after MAC reneges on agreement to reopen (formerly Rule 46)
  - Provider must secure MAC’s agreement to reopen prior to withdrawing
  - Must be able to present evidence that the provider submitted a reopening request and the MAC agreed to reopen before the provider submitted its request to withdraw the issue/case

- **Rule 47.2.3** – Reinstatement after MAC denies reopening request (New)
  - Provider must withdraw the appeal in its entirety (all issues) at the time it is filed
  - All of the issues in the appeal must be resolvable through a reopening
  - Provider is not required to secure MAC’s agreement to reopen prior to withdrawing
After the Appeal is Filed
PRRB Acknowledgment, Final Schedule, and Position Papers
Acknowledgment and MAC Review

• PRRB will send an acknowledgment via email to the designated representative
  – Establishes various deadlines and due dates for the appeal
  – Missing a deadline will result in dismissal

• MAC will:
  – Review the appeal
  – Advise the PRRB whether there are any impediments to PRRB jurisdiction
  – Confer with provider regarding stipulations
Schedule of Providers
(Group Appeals Only)

• The representative of a group appeal must submit a schedule of providers to the PRRB after the group is fully formed
  – Mandatory groups – No deadline for the group to fully form
  – Optional groups – Group is closed 1 year after the appeal is filed

• The schedule of providers consists of
  – Model Form G - A document that lists each participating provider and relevant information and
  – the documentation supporting jurisdiction for each provider.

• The MAC must review the schedule of providers within 60 days of submission
## Appendix G:
### Model Form G – Schedule of Providers

**Case Number:** xx-xxxxG  
**Group Case Name:** King & Spalding 2016 Indigent Bad Debt Group  
**Group Representative:** Mark Polston  
**Lead MAC Name/Code:** Palmetto, GBA  
**Issue Title:** Indigent Bad Debt Group

<table>
<thead>
<tr>
<th>#</th>
<th>Provider Number</th>
<th>Provider Name/Provider Location (City, State)</th>
<th>Appealed Period (and impacted CRPs)</th>
<th>MAC Name/MAC Code</th>
<th>Date of Final Determination</th>
<th>Date of Appeal Request/Add Issue</th>
<th>Number of Days</th>
<th>Audit Adjustment Number</th>
<th>Amount in Controversy</th>
<th>Prior Case Number(s)</th>
<th>Date of Direct Add or Transfer</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>xx-xxxx</td>
<td>Provider A</td>
<td>12/31/2015</td>
<td>Palmetto</td>
<td>1/1/2017</td>
<td>1/8/2017</td>
<td>7</td>
<td>3</td>
<td>$100,000</td>
<td>NA</td>
<td>1/1/2017</td>
</tr>
<tr>
<td>2</td>
<td>xx-xxxx</td>
<td>Provider B</td>
<td>6/30/2015</td>
<td>Palmetto</td>
<td>5/1/2017</td>
<td>5/5/2017</td>
<td>4</td>
<td>7, 9</td>
<td>$300,000</td>
<td>NA</td>
<td>5/5/2017</td>
</tr>
<tr>
<td>3</td>
<td>xx-xxxx</td>
<td>Provider C</td>
<td>9/30/2015</td>
<td>Palmetto</td>
<td>8/1/2017</td>
<td>8/6/2017</td>
<td>5</td>
<td>30, 42</td>
<td>$53,000</td>
<td>NA</td>
<td>8/6/2017</td>
</tr>
</tbody>
</table>
Preliminary Position Paper

• The PRRB’s acknowledgment will contain a date for providers to submit a preliminary position paper
  – For group appeals, the preliminary position paper deadline is established after the group is fully formed

• The preliminary position paper is basically a brief explaining the basis for the appeal and why the provider is entitled to the relief requested

• The preliminary position paper must contain the following information
  – Identify all issues raised in the appeal that have been resolved
  – The material facts for each unresolved issue
  – The controlling authority for each unresolved issue
  – A conclusion applying the material facts to the controlling authority
Preliminary Position Paper
(cont.)

• Avoid waiving issues
  – Any issue that was included in the appeal but not briefed in the preliminary position paper is deemed abandoned

• Avoid waiving arguments
  – Latest iteration of PRRB rules says that arguments not included in the preliminary position paper may be excluded at the hearing
  – Applies to any appeal filed on or after August 29, 2018

• Exhibits
  – Latest rules also state that any documents not included in the preliminary position paper may be excluded from the hearing
  – Also applies to appeals filed on or after August 29, 2018
After the Preliminary Position Paper

• Final position paper
  – Mandatory for appeals filed before August 29, 2018
  – Optional for appeals filed thereafter
  – Generally the same rules as the preliminary paper
  – PRRB will establish a final position paper deadline after the preliminary position papers are exchanged

• Revised or Supplemental Position papers
  – May be submitted to further narrow the parties’ positions or apprise the court of new case law
PRRB Hearing and Decision
Pre-Hearing

- PRRB will establish a hearing date (usually in the same correspondence it establishes the deadline for the final position paper)

- Choose your witnesses
  - Must submit a witness list to the PRRB 30 days before the hearing date
  - For expert witnesses, must submit the expert’s resume and a report summarizing the expert’s anticipated testimony

- Discovery
  - Each side may request documents or interrogatories from the other
  - Depositions generally not allowed
  - May request subpoena from PRRB to enforce discovery

- Stipulations
  - The provider and the MAC must submit a list of undisputed facts prior to the hearing

- Choose type of hearing
  - In-person hearing – Appear before the PRRB in Baltimore
  - Telephonic and video hearings available upon request
  - Record hearing (decision on the briefs). Best suited for cases with limited facts in dispute
PRRB Hearing Sequence

• Opening statements
  – Each party provides a “road map” for its case

• Witness examinations
  – Witnesses will take questions from both sides and from the PRRB

• Closing arguments
  – Summarize how the legal authorities at issue apply to the evidence presented at the hearing

• Adjournment
  – The cut-off point. No further evidence may be submitted hereafter unless requested from the PRRB
Post-Hearing Brief

• A brief that follows the same structure as the closing argument
  – Cites key testimonial and documentary evidence presented
  – Apply the controlling legal authority

• May not contain new arguments or evidence

• No longer mandatory
What Authorities Must the PRRB Observe?

- PRRB is bound by and must issue rulings consistent with:
  - The Medicare statute
  - Any regulation issued by CMS pursuant to its authority to implement the Medicare program

- PRRB is **not** bound by but must give great weight to:
  - Manual guidance
  - Interpretive rules
  - General statements of policy
  - Rules of agency organization
  - Practices established by CMS
Scope of PRRB’s Authority in Rendering a Decision

- If the PRRB has jurisdiction over an issue in the appeal, it may
  - Affirm, modify or reverse CMS/the MAC’s finding, and
  - Make additional revisions on specific matters regardless of whether CMS or
  the MAC considered the matters in issuing its final determination

- The PRRB may not
  - Rule on issues that were not timely appealed
  - Rule on issues over which it has no jurisdiction
Administrator and Judicial Review and EJR
Administrator Review of a PRRB Decision

- CMS Administrator is authorized to affirm, reverse or modify a PRRB decision

- Procedure
  - Administrator review can be requested within 15 days after receiving a PRRB decision
  - Administrator can also elect to review on its own initiative

- Administrator will notify each party if it decides to review a PRRB decision

- Each party will get an opportunity to make written submissions to the Administrator before it makes its decision

- Administrator must render its decision within 60 days of the PRRB decision
Judicial Review

- Providers can challenge a PRRB decision or decision of the Administrator in federal court

- Availability of judicial review
  - Within 60 days after the date of receipt of a PRRB decision, if the Administrator declines review
  - Within 60 days after the date of receipt of a decision of the Administrator
  - Within 60 days after the date the Administrator decision was due if not rendered timely

- In what court do you bring a case challenging a PRRB or Administrator decision?
  - D.C. District Court is available to all providers, regardless of location
  - Alternatively,
    - For individual appeals, must file in the federal venue where the provider is located
    - For group appeals, must file in the federal venue where most of the providers are located
Expedited Judicial Review (EJR)

• Mechanism for moving a PRRB appeal directly to federal court
  – Can bypass nearly all proceedings before the PRRB (e.g., position papers, PRRB hearing, etc.)
  – But for group appeals, must first submit final schedule of providers

• Why would you want EJR?
  – When the PRRB lacks the authority to decide the legal question at issue (i.e., regulation)
  – PRRB proceedings are expensive, so best to avoid if they would be futile anyway

• Requirements for EJR
  – The PRRB has jurisdiction over the appeal
  – The PRRB does not have authority to decide the legal question at issue

• The PRRB must grant or deny EJR within 30 days of the request

• The Administrator can review an EJR decision
  – But only as to whether the PRRB had jurisdiction over the appeal
PRRB Outcome Statistics

Based on analysis performed in 2017 using 2 years of PRRB decision data

• Average time from PRRB hearing to PRRB decision is 1.28 years

• About 46% of PRRB decisions are at least partially favorable to providers

• About 70% of all full or partially favorable PRRB decisions are reversed by the Administrator

• About 14% of all Medicare cost report appeals end up favorable for the provider after the PRRB and Administrator review
  – Does not account for judicial review
Trending Appeal Issues and Worksheet S-10
Trending Appeal Issues

- DSH Issues
- Understated standardized amount
- Fellow penalty
- Indigent bad debts
- Crossover bad debts
- NAH legal operator question
- NAH treatment of tuition income
Worksheet S-10

- Providers report uncompensated care on Worksheet S-10

- Worksheet S-10 data is used to determine how much uncompensated care (UCC) a hospital will receive in later years

- The Medicare statute bars providers from challenging the estimates that CMS uses to calculate UCC payments

- *DCH Regional Medical Center v. Azar*
  - Provider challenged its share of uncompensated care payments in FY 2015
  - In FY 2015, CMS based UCC payments in Medicaid days from FY 2012 that were tied to each hospital’s provider number
  - Provider merged with another hospital after FY 2012. CMS would not credit the provider for the Medicaid days of the hospital it had acquired.
  - Holding: Cannot review CMS’s method of estimating UCC payments without reviewing the estimate itself.

- Does not necessarily foreclose all future UCC challenges
Questions?

Mark Polston
+1 202 626 5540
mpolston@kslaw.com