

New PRRB Appeal Rules Require “Under Protest” Procedure on Medicare Cost Reports in Providers’ Reimbursement Policy Disputes

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Significant Medicare Part A Appeal Development

Effective for cost reports that end on or after December 31, 2008, and as part of a major overhaul by CMS of PRRB appeal regulations, Medicare Part A providers must follow specific procedures when seeking to establish and preserve their appeal rights to Medicare payment when payment may not be allowable, or may not be in accordance with Medicare policy, in order to show legal dissatisfaction with Medicare treatment of the item.

PRRB Appeal Regulations

Effective August 21, 2008, the Centers for Medicare and Medicaid (CMS) published final regulations making major revisions to rules governing appeals of Medicare reimbursement determinations to the Provider Reimbursement Review Board (PRRB). The PRRB has authority to adjudicate Medicare reimbursement claims between providers and their fiscal intermediary where the provider has preserved a claim of dissatisfaction with the item at issue and the Medicare reimbursement in controversy is \$10,000 or more. Generally, appeals to the PRRB are by Medicare Part A providers that file cost reports and are dissatisfied with their reimbursement as a result of the intermediary’s disallowance of items on the filed cost report. Among providers that are eligible to appeal their dissatisfaction with Medicare reimbursement are hospitals, including teaching, critical-access and cancer hospitals, and skilled-nursing facilities. Decisions of the PRRB are subject to review by the CMS Administrator. The final agency decision of the PRRB or the Administrator, as applicable, is reviewable in federal district court in the District of Columbia, where the Department of Health and Human Services is located, or in the federal judicial district where the provider is located. The new rules speak to virtually every aspect of the PRRB appeal process and, while codifying many existing PRRB procedures, impose additional

and specific requirements for all such appeals.

CMS Requirement for Self-Disallowing Claims on the Medicare Cost Report and Filing “Under Protest” to Establish PRRB Appeal Issue

Of particular note for providers that file Medicare cost reports is the formalization of the procedure by which the provider expresses dissatisfaction with Medicare reimbursement where, specifically, the provider seeks payment that it believes may not be allowable or may not be in accordance with Medicare policy. It has been CMS’s longstanding policy that a cost report claim at variance with Medicare policy is not improper, provided that the claim is not intended to procure an intermediary determination by fraud or similar fault. To address this situation, CMS has had a policy, stated in the *Provider Reimbursement Manual*, for filing cost reports “under protest,” requiring the provider to follow the procedure for claiming the item on its cost report, and then self-disallowing the item on that cost report. According to CMS, this policy is an attempt “to strike a balance between . . . having providers present enough information so as to put the intermediaries on notice as to actual or potential reimbursement dispute, and, on the other hand, not making it unduly burdensome for providers to file cost reports.” (73 *Federal Register*, p. 30195.)

More specifically, given a reimbursement impact of \$10,000 or more, a provider has a right to a Board hearing for specific items claimed for a cost reporting period if the provider has preserved its right to claim dissatisfaction with the amount of Medicare payment for the item at issue by either (i) including a claim for specific items on its cost reports for the cost reporting period involved, seeking payment that it believes to be in accordance with Medicare policy; or (ii) effective with cost reporting periods that end on or after December

(continued on page 28)

(continued from page 27)

31, 2008, self-disallowing the specific item by following the applicable procedures for filing a cost report under protest, where **the provider seeks payment that it believes may not be allowable or may not be in accordance** with Medicare policy (for example, if the intermediary lacks discretion to award the reimbursement the provider seeks for the item). In following the self-disallowance procedure in order to establish a PRRB appeal issue, the provider must estimate the reimbursement effect of each disputed cost report item that is being claimed, and identify the disputed item in footnotes to the settlement worksheet, disclosing the fact that the cost report is filed under protest.

Lessons for Part A Providers Seeking to Preserve Appeal Rights on the Cost Report

The CMS rule, requiring that the provider follow the under protest rules when seeking payment of a claim potentially at variance with Medicare policy, places providers on notice that they must follow the prescribed procedure in order to preserve their PRRB appeal rights on the protested item.

In preparing and filing cost reports for periods on and

after December 31, 2008, where the provider seeks to preserve a claim of dissatisfaction with Medicare reimbursement for purposes of an appeal of that claim to the PRRB, the provider should carefully determine how it wishes to present the protested item on that cost report, since it will form the basis of the PRRB appeal on that claim. If the provider fails to preserve its rights by self-disallowing the item on the cost report for the year involved and by filing under protest, it will lack a legal basis to appeal the item to the PRRB, since it will have failed to demonstrate its dissatisfaction on the cost report for the year in issue. □

This article was first released as a McDermott Will & Emery "On the Subject". For more information, please contact Peter Leone at pleone@mwe.com, (617) 535-4058.

About the Author

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