

## Insights

### Judge Strikes Down Payment Cuts For Outpatient Department Evaluation and Management Services

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October 7, 2019

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In a decision dated September 17, 2019, a Federal judge invalidated a 2018 Centers for Medicare and Medicaid Services (“CMS”) regulation that attempted to align Medicare Part B payments for Evaluation & Management (“E&M”) services in hospital outpatient departments (“OPD”) with the lower rates paid to physician offices. See prior alert regarding this 2018 CMS regulation. The judge granted the healthcare providers’ motion for summary judgment, denied CMS’ cross-motion for summary judgment and remanded the matter back to CMS for further review and action consistent with the judgment. CMS is evaluating its options.

The CMS regulation at issue targeted E&M services in OPDs because payment rates for OPDs are generally higher than payment rates for the same services provided in physician offices. The reason is that OPD payments take into account the resources and payment methodologies applicable to inpatient hospitals even though the location is offsite. While Congress limited the creation of new OPDs after November 2, 2015, it did not address payments for OPDs specifically, and services at OPDs still increased after 2015. CMS attempted to incentivize the less costly physician office visits for E&M services by equalizing the payment rate for physician offices and OPDs.

The court determined that CMS lacked the authority to implement the new regulation. The statutory authority governing CMS’s rate setting process requires changes to payment rates to be budget neutral. Plaintiffs challenging the regulation argued that it was not budget neutral, but CMS attempted to justify its action as a “method” that was not subject to the budget neutral requirement. The court disagreed and remanded the matter back to CMS for further consideration. The court did *not* order CMS to pay affected providers the amount of payments improperly withheld under the regulation.

The effect of the ruling is still under consideration. The court ordered the parties to submit a status report in order to determine whether additional briefing on remedies is required and a CMS estimate as to the duration of further proceedings.

Please contact Brandon W. Shirley or Meghan M. Linvill McNab if you have questions about government reimbursement or compliance with provider-based billing requirements.