**W**hether CMS acted outside its authority, or otherwise arbitrarily and capriciously, when it excluded the average hourly wage of Southwestern Medical Center from the Tulsa CBSA in calculating the wage index for Federal Fiscal Years (“FYs”) 2015 through 2018.

1. **Facts**

The Providers in this appeal are all acute hospital reimbursed under IPPS. As part of this reimbursement methodology for determining the prospective payments, the Medicare statute requires that the wage portion of the diagnostic related group (“DRG”) be adjusted by a factor reflecting the relative hospital wage level in the geographical location of the hospital compared to the national hospital wage level. A wage index is established for each Core Based Statistical Area (“CBSA”) and for each statewide area that is not within a CBSA. Beginning October 1, 1993, the statute required CMS to update the wage index annually. The Centers for Medicare and Medicaid (“CMS”) bases the annual update on a survey of wages and wage-related costs taken from Worksheet S-3 of the Medicare cost reports filed annually by each hospital paid under IPPS.

The Providers contend that “CMS acted outside its authority or otherwise arbitrarily and capriciously, when it excluded the average hourly wage of Southwestern Medical Center from the Tulsa CBSA in calculating the wage index for Federal Fiscal Years (“FY”) 2015 through 2018”.

In their appeal requests and preliminary papers for the consolidated cases, the Providers refer to “Southwestern Regional Medical Center”, DBA name as “Cancer Treatment Center (CTC) (Provider no. 37-0190) as the “excluded” hospital. The Provider tied out on June 1,2021. See **Exhibit C-3.**

In their consolidated final position paper, the Providers refer to the hospital whose wage information was deleted as “aberrant” as Southwestern Medical Center (SMC). On page 4 of their final Paper, the Provider number is mistakenly listed as 37-0097. The correct number is 37-0190 for Southwestern Regional Medical Center (SRMC) which is confirmed in the MAC exhibits for this case.

In the development of the consolidation of the four FFYs appeals (see above), the hospital in question (37-0190) was identified as Cancer Treatment Center (CTC) in each of the appeals impact calculations. See **Exhibit C-4**. Objectively, a reviewer can see the significant difference in the wage data between CTC and the other hospitals in Tulsa CBSA (#46140).

The Provider in question, (37-0190) SRMC attempted to better its Medicare reimbursement by arguing that it should be exempted from IPPS (subject to its wage index) and paid reasonable cost as a specialty cancer hospital. In spite of arguing that it had atypically high costs because of its patients. In PRRB Decision 2008-D44 (see **Exhibit C-5**), its effort for exemption was unsuccessful and it continued to be paid as an IPPS hospital.

1. **Argument**

**CMS properly disallowed Southwestern Regional Medical Center’s Wage Data for**

**the FYs 2015-2018 Wage Index**

The crux of the Providers’ argument is that CMS “excluded” SRMC’s 2014 average hourly wage ("AHW") index from the data file to construct the FYs 2015-2018 wage index and ultimately reduced the reimbursement for the hospitals listed in the consolidated appeal cases (See above). The Provider’s argument fails because CMS has consistently constructed the wage index per Section 1886(d) of the Social Security Act. In the FFY 2016 Final Rule (80 FR 49489-49491), CMS responded to similar comments as those made by the Providers in this case (*See* **Exhibit C-2**) by stating that the MACs and CMS “evaluate the accuracy and reasonableness of hospitals’ wage index data” each year and “revise or verify data elements that result in specific edit failures”. CMS has historically exercised its discretion in developing a wage index that reflects a relative measure of the value of the labor provided to a typical hospital in a particular labor market area. *Id.*

In the 2016 final rule, CMS agreed that SRMC’s wage data was "properly documented" but noted that the hospital "did not merely have the highest average hourly wage in the CBSA; its average hourly wage was extremely and unusually high, significantly higher than the next highest average hourly wage in that CBSA and in the surrounding areas".

CMS added "we do not believe that the average hourly wage of this particular hospital accurately reflects the economic conditions in its labor market area during the FY 2012 cost reporting period. Therefore, its inclusion in the wage index would not ensure that the FY 2016 wage index represents the labor market area's current wages as compared to the national average of wages."

CMS properly exercised their discretion to remove SRMC’s wage data from the 2016 FY wage index.

**CMS acted consistently in the construction of the 2018 Wage Index determination**

The Providers argue that CMS acted “arbitrarily and capriciously” and outside its authority” for the disallowance of SRMC’s wage data. The Provider also claims that the “CMS’s Decision to Excluded” SRMC’s wage index was “Procedurally Invalid”. The MAC contends this vague argument is meritless since the method used to construct the FY 2018 wage index has been consistently used in previous years as noted. CMS had included SRMC’s "data in the wage index in previous years because the hospital’s average hourly wage was lower and more reasonable relative to its labor market area in the prior years.” (*See* **Exhibit C-2**) 80 FR 49489-49491. As noted above, SRMC’s FFY 2014 "AHW" was deemed significantly “higher" than previous years to which the Providers have agreed. The MAC asserts there were no substantial changes in the rule regarding this issue which would require a "notice to hospitals".

The Providers claims that “CMS had not held the wage data of other hospital to the same standard as it held SMC in FYs 2015 through 2018” and refers to “other hospitals” with “atypically high average hourly wages” which were included in the wage index calculation. ( see Provider’s Final paper, page 8 & Exhibit P-3). The MAC maintains that the “55 instances” in the Providers misguided comparison (see Provider Exhibit P-3) are facilities listed in various different CBSAs than SRMC’s CBSA (“46140”- Tulsa, OK). The MAC contends that the comparison of the Providers in these different CBSA’s, which have very different geographic locations and labor markets, is impractical and does not support the Providers argument for the issue in this case.

**Challenge of Another Provider’s Wage Index Data**

The basis of the Providers’ argument is that another provider’s wage index data ultimately affects the reimbursement of other providers in the CBSA. The goal of the Provider’s argument in their final paper is to “reverse CMS’s exclusion” of SRMC’s wage data from the Tulsa CBSA’s wage index for the FY’s in question.

The MAC asserts that the Providers in this appeal are challenging the wage index of another Provider which is not directly in this appeal.

The Board, District Court and Circuit Court have encounter circumstances where a provider or providers have attempted to challenge the wage index data of another provider in the CBSA.

PRRB Case Nos. 15-1522, 15-1527, 15-1528 and 15-1564[[1]](#footnote-1) concerned the collateral effect of a lower wage index for the Abilene CBSA for FFY 2015 due to uncorrected wage index data for a provider that was not part of any of the cases[[2]](#footnote-2). Upon the Board’s own motion, it found that while it did have jurisdiction it was bound by the wage index published in the federal register and granted expedited judicial review (EJR). *See* **Exhibit C-6**.

The ensuing judicial review at district court yielded a summary judgement in favor of the Secretary on grounds that its calculation of the 2015 wage index was consistent with the statute, supported by substantial evidence, and reasonable. The district court further determined that nothing in the statute or the Secretary's regulations allowed the Hospitals to challenge another provider's (Hendrick's) wage index data outside of the Secretary's established wage data correction process.

In the factual discussion, the MAC has presented to the Board the nature of the Provider whose wages were found to be aberrant and removed from establishing the Tulsa area wage index for the four FFYs under Appeal. The arithmetic aberrant is obvious irrespective of whether the Provider is referred to as Cancer Hospital of America - Tulsa or Southwestern. The data demonstrates on an objective basis that the exclusion was appropriate.

Finally, in the case *Anson General Hospital; Continue Care Hospital at Hendrick Medical Center; Stamford Memorial Hospital; Southern Oaks Healthcare, Incorporated, doing business as Wisteria Place v. Azar*[[3]](#footnote-3)*,* the Fifth Circuit Court of Appeals found:

Although it is indisputable that the Hospitals were adversely affected by the negligence of Hendrick, the statute simply does not provide relief in this context. The D.C. Circuit Court explained the parameters of the statute in *Anna Jacques Hospital v. Burwell*:

*The text of the Medicare Act largely leaves the process of defining geographic boundaries and computing the wage index to the Secretary's reasoned judgment.* The Act requires the Secretary to adjust the standard prospective payment rate by "a factor (established by the Secretary)" that "reflect[s]" the relative wage level "in the geographic area of the hospital compared to the national average hospital wage level." 42 U.S.C. § 1395ww(d)(3)(E)(i). The statute provides some general guidance as to how the Secretary must calculate the wage "factor," by requiring that the wage index be updated at least annually "on the basis of a survey conducted by the Secretary (and updated as appropriate) of the wages and wage-related costs of [participating] hospitals in the United States." Id. In addition, any adjustment "shall be made in a manner that assures that the aggregate payments \* \* are not greater or less than those that would have been made in the year without the adjustment." Id.

*That is it. On all other aspects of the wage-index calculation,*

*the statute is silent. The statute "merely requires the Secretary to develop a mechanism to remove the effects of local wage differences': it "does not specify how the Secretary should construct the index" and, in fact, "Congress through its silence delegated these decisions to the Secretary." [Methodist Hosp. of Sacramento v. Shalala,* 38 F.3d 1225, 1230 (D.C. Cir. 1994).]

797 F.3d at 1164 (emphasis in original).

In other words, **there is no statutory support for the notion that one healthcare provider can challenge another healthcare provider's wage index data outside of the established wage data correction process.** (Emphasis added)

Exemplified in the progression of the Abilene CBSA cases, from administrative review through judicial review to circuit court decision, is that the foundation of the Providers’ appeal, namely, a provider challenging another provider’s wage index data outside of the established wage data correction process, is unsupported by statute.

The MAC also notes, in a departure from the Abilene CBSA cases, the excluded provider (Southwestern Regional Medical Center, aka Cancer Treatment Center, Provider No. 37-0190), which is also serviced by the present MAC, has not appealed its exclusion from the wage index calculation for CBSA 46140 for any federal fiscal year end, including the one at issue here. Additionally, the present group participants offer no evidence that either they or Southwestern Regional Medical Center (SRMC) attempted to utilize the established wage index correction process, which, according to the Fifth Circuit, is the exclusive means to challenge another provider’s wage index data.

Based on the reasoning above, the MAC encourages the Board to follow the precedent established in previous wage index cases of this nature and conduct an own motion review to consider expedited judicial review.

1. **Conclusion**

Should this case proceed to hearing, the MAC requests that the Board affirm the disallowance of the wage data for Southwestern Regional Medical Center from the FY 2016 wage index.

**LAW, REGULATIONS, AND INSTRUCTIONS**

Laws:

Section 1886(d);42 U.S.C. 1395ww(d)

Federal Register:

80 FR 49489-49491(August 17, 2015)

**EXHIBITS**

C-1 Schedule of Providers

C-2 80 FR 49489-49491 (August 17, 2015)

C-3 Southwestern Regional Medical Center, LLC, tie out notice

C-4 Tulsa CBSA (#46140) Wage data

C-5 PRRB Decision 2008-D44 (June 17,2008)

C-6 Board Own Motion EJR decision for Case Nos. 15-1522, 15-1527, 15-1528 and 15-1564, dated 11/30/2017

C-7 *Anson General Hospital; Continue Care Hospital at Hendrick Medical Center; Stamford Memorial Hospital; Southern Oaks Healthcare, Incorporated, doing business as Wisteria Place v. Azar*, No. 19-10470 (5th Cir. 2020)

1. The providers in these cases were Stamford Memorial Hospital, Provider No. 45-0306, PRRB Case No. 15-1522 Anson General Hospital, Provider No. 45-0078, PRRB Case No 15-1527 Wisteria Place Retirement Living, Provider No. 67-5593, PRRB Case No. 15-1528 Continue Care Hospital at HMC. Provider No. 45-2019, PRRB Case No 15-1564 [↑](#footnote-ref-1)
2. Hendrick Medical Center, Provider No. 45-0224, was the provider with the incorrect wage index data and filed PRRB Case No. 15-1081 which the Board later did not accept jurisdiction and dismissed [↑](#footnote-ref-2)
3. See **Exhibit C-7** [↑](#footnote-ref-3)