

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE AMERICAN HOSPITAL
ASSOCIATION, et al.,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official
capacity as Secretary of Health and Human
Services,

Defendant.

Civil Action No. 12-1770 (CKK)

DEFENDANT’S REPLY TO PLAINTIFFS’ SUPPLEMENTAL BRIEF

Defendant respectfully replies to Plaintiffs’ supplemental brief regarding (1) mootness and (2) the status of Plaintiffs’ claims for payment.

I. The Court lacks jurisdiction over the agency actions that Plaintiffs challenge, however framed.

In their supplemental brief, Plaintiffs offer the latest iteration of their ever-shifting theory of the case. Plaintiffs volunteer to dismiss Count VI, effectively conceding that, to the extent they rely on CMS Ruling 1455-R, their claims are now moot. Pls.’ Supp. Br. 3 n.1 [Doc. No. 51]. Yet they contend that Counts I–V are not moot because those counts do not really rely on Ruling 1455-R, which Plaintiffs now agree had no effect on their claims for payment, id. at 2, as we have long argued. Instead, Plaintiffs contend, Counts I–V actually challenge a “timely payment policy” that predates Ruling 1455-R and remains in effect. Id. at 2, 4. Regardless of how Plaintiffs frame their challenges, however, the Court lacks jurisdiction.

The Plaintiff hospitals received unfavorable Recovery Audit Contractor (“RAC”) determinations on claims for payment under Medicare Part A. In our motion to dismiss, we

explained that Plaintiffs had the right to appeal those determinations administratively, and ultimately to district court, but forfeited that right by declining to file an appeal within 120 days, as the Medicare statute and regulations require. 42 U.S.C. § 1395ff(a)(3)(C)(i); 42 C.F.R. § 405.942(a). And although Plaintiffs now seek payment for those claims under Medicare Part B, the Medicare statute requires that such claims be filed within “1 calendar year after the date of service,” 42 U.S.C. § 1395n(a)(1), a deadline that has also passed.

In their opposition to our motion to dismiss, Plaintiffs, beset by jurisdictional hurdles, attempted to reframe the “agency actions” that they challenge. Rather than the discrete decisions whether to “reopen” a particular Part A claim, or to extend the statutory filing deadline for a “new” Part B claim, Plaintiffs argued that Counts I–V instead raise a facial challenge to a “systemwide CMS policy of general applicability.” Pls.’ Opp’n 30. That policy, they contended, was Ruling 1455-R. Specifically, Plaintiffs argued that, “In Ruling 1455-R, CMS . . . ruled that hospitals cannot rebill under Part B unless the RAC Part A denials that stripped away the original payments are newly-issued or live on appeal.” *Id.* at 17. Indeed, the Second Amended Complaint is replete with references to the alleged effects of Ruling 1455-R. *See* 2d Am. Compl. ¶¶ 59, 61, 62, 63, 67, 68, 79, 82, 92, 95, 103, 105, 111, 116, 126, 127, 131, 137, 157, 164, 179-84.

In our reply brief, we explained that Plaintiffs’ view was incorrect. Ruling 1455-R did not say that hospitals “cannot rebill”; rather, it announced a limited category of claims that hospitals could rebill. *See* Def.’s Reply 19-21 & n.8. But it had no effect on Plaintiff’s expired claims, as to which it left the status quo in place. *See id.*

Remarkably, Plaintiffs now agree. In their supplemental brief, they acknowledge that “Ruling 1455-R did not even apply to [their] claims.” Pls.’ Supp. Br. 2. The same is true of the

proposed rule and the final rule. See Def.’s Supp. Br. on Effect of Final Rule 5-6 [Doc. No. 48]. In other words, none of those provisions had any effect on the viability of Plaintiffs’ claims for payment.

Now, Plaintiffs shift the focus of their attack away from the so-called “payment denial policy” and toward what they have labeled the “time limit policy.” Pls.’ Supp. Br. 2. Because the “time limit policy” predates Ruling 1455-R and remains in effect, the argument goes, their challenge to it could not be moot. See id. at 2, 4. But, by Plaintiffs’ own telling, the “time limit policy” is nothing more than “the general rule prohibiting Part B payment if requested more than one year after the care was provided,” id. at 1 — that is, the deadline set forth in the Medicare statute itself, 42 U.S.C. § 1395n(a)(1).

That brings us full circle. There is no “systemwide CMS policy of general applicability” barring Plaintiffs’ claims for payment, as they have suggested. See Pls.’ Opp’n 30. There are only the preexisting statutory and regulatory timely filing requirements, which Plaintiffs have never before purported to challenge. Thus, Plaintiffs’ claims in this case are best understood as challenges to the discrete decisions whether to “reopen” a particular Part A claim, or to extend the statutory filing deadline for a “new” Part B claim, as we have explained. See Def.’s Mot. 24-28. And the Court lacks jurisdiction over those claims for the reasons set forth in our opening and reply briefs. See Def.’s Mot. 24-28; Def.’s Reply 18-28.

II. Plaintiffs’ further success in pursuing administrative remedies demonstrates that exhaustion is not futile.

In our motion to dismiss, we argued that the Court lacks jurisdiction over Counts I–V because, among other reasons, Plaintiffs had not exhausted their administrative remedies, as required by the Medicare statute. Def.’s Mot. 17-20. Although Plaintiffs urged the Court to waive exhaustion as futile, they acknowledged that their administrative efforts were ongoing and,

in fact, had met with some initial success: As of June 2013, Medicare contractors had either paid, or designated for payment, several of Plaintiffs' Part B claims. See Def.'s Reply 2, 8 (citing Robinson Decl. ¶ 17; Lauer Decl. ¶ 14; Trachok Decl. ¶¶ 11-12). And while Plaintiffs expressed surprise at this development and suggested that it would not last, see Pls.' Opp'n 15 n.6, that sort of conjecture could not render futile Plaintiffs' successful attempts to exhaust, as we argued in reply. Def.'s Reply 7-8.

In their supplemental brief, Plaintiffs again urge the Court to waive exhaustion as futile, asserting that "some" of their claims have not been processed. Pls.' Supp. Br. 1.¹ What Plaintiffs do not say — but is clear from their recitation of facts — is that their administrative efforts with Medicare contractors have actually met with further success. First, since June 2013, several more of Plaintiffs' Part B claims have been paid. See Pls.' Supp. Br. at 6, 7 ("[a]s of March 7, 2014, the Medicare contractor has . . . paid Lancaster General"); id. at 10 ("[a]s of March 7, 2014, . . . four requests for Part B payment were paid" and "CMS has not yet recouped the payment for any of the four paid claims"). Second, contrary to Plaintiffs' professed expectations, all of the claims that were paid as of June 2013 stand paid today. See id. at 6 ("the claim was paid . . . on June 20, 2013" and "[a]s of March 7, 2014, CMS has not yet recouped this payment"); id. at 6, 7 ("[a]s of March 7, 2014, the Medicare contractor has . . . paid Lancaster General");² id. at 9 ("The Medicare contractor made the Part B payment . . . on June 28, 2013. As of March 7, 2014, CMS has not yet recouped this payment.").

¹ The new facts asserted in Plaintiffs' supplemental brief are not supported by declarations, in contrast to the facts previously set forth in Plaintiffs' opposition to the motion to dismiss.

² Plaintiff Lancaster General has two claims, one in each category, but it is unclear which is which. The relevant declaration notes that, as of June 2013, "one of Lancaster General's two requests for payment under Part B was still under review" and the "other ha[d] been designated

As an initial matter, Plaintiffs' reliance on these developments is misplaced because, as noted in our reply brief, the relevant date for assessing the Court's subject matter jurisdiction is the date that suit was filed. See Def.'s Reply 8 (citing Grupo Dataflux v. Atlas Global Group, 541 U.S. 567, 570 (2004) ("It has long been the case that 'the jurisdiction of the court depends on the state of things at the time of the action brought.'") (citation omitted)). Moreover, even if there were jurisdiction in the first place, this case would be moot as to any paid claims, as also noted in our reply brief. See id. Regardless, Plaintiffs' continued success in pursuing administrative remedies demonstrates that exhaustion is hardly futile. Indeed, it underscores the wisdom of Congress's decision to require exhaustion before suit may proceed in federal court, as required by 42 U.S.C. § 405(g).

CONCLUSION

For the foregoing reasons, in addition to those set forth in Defendant's opening, reply, and previous supplemental briefs, the Court should dismiss this case in its entirety.

Dated: March 21, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

SHEILA M. LIEBER
Deputy Director

/s/ Eric Beckenhauer
ERIC B. BECKENHAUER
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Tel: (202) 514-3338

for payment." Lauer Decl. ¶ 14. Plaintiffs' supplemental brief asserts that both of these claims stand paid as of March 7, 2014. Pls.' Supp. Br. 6, 7.

Fax: (202) 616-8470

E-mail: Eric.Beckenhauer@usdoj.gov

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2014, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be served electronically on Plaintiffs' counsel of record.

/s/ Eric Beckenhauer
ERIC B. BECKENHAUER