

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

THE AMERICAN HOSPITAL
ASSOCIATION, et al.,

Plaintiffs,

v.

SYLVIA M. BURWELL, in her official
capacity as Secretary of Health and Human
Services,¹

Defendant.

Civil Action No. 14-609 (RBW)

**MOTION TO STAY SUMMARY JUDGMENT BRIEFING
PENDING RESOLUTION OF DEFENDANT'S MOTION TO DISMISS**

Defendant Sylvia M. Burwell, in her official capacity as Secretary of Health and Human Services, respectfully moves the Court to stay briefing of Plaintiffs' motion for summary judgment pending resolution of Defendant's motion to dismiss. Defendant's motion to dismiss raises issues of standing, exhaustion, and ripeness that present threshold challenges to the Court's jurisdiction over this case in its entirety, and it is well established that the Court must resolve such jurisdictional issues before proceeding to the merits of a dispute. It would conserve the parties' and the Court's resources to avoid unnecessary briefing and argument on merits issues that, if Defendant's motion is granted, the Court will never have to decide.

That is reason enough to defer summary judgment briefing. But here, Plaintiffs' motion for summary judgment is particularly inappropriate given the complexity of the Medicare statute, including its unique jurisdictional provision that displaces the general federal question provisions

¹ Pursuant to Fed. R. Civ. P. 25(d), Sylvia M. Burwell is substituted for her predecessor as Secretary of Health and Human Services.

of 28 U.S.C. § 1331 and instead requires claimants to exhaust administrative remedies by appealing any denied Medicare claims and obtaining a “final decision of the Secretary” before bringing suit in federal court. 42 U.S.C. § 405(g)-(h). Indeed, the Supreme Court has repeatedly explained that this provision “demands the ‘channeling’ of virtually all legal attacks through the agency.” Shalala v. Ill. Council on Long Term Care Inc., 529 U.S. 1, 13 (2000). Here, Plaintiffs acknowledge that their appeals of any denied Medicare claims are still pending at the administrative level, Compl. ¶¶ 84-85, and thus that they have not exhausted their administrative remedies by obtaining a “final decision of the Secretary.”

Plaintiffs’ motion for summary judgment is also premature. Given that Plaintiffs have not obtained a “final decision of the Secretary” for any denied claims, the agency has not yet compiled and certified an administrative record for the Court to review. Although Plaintiffs cite to what they deem to be “administrative-record documents,” Pls.’ SJ Mem. 5 n.1 [ECF No. 10], this unofficial, Plaintiff-selected compilation does not and cannot substitute for what the agency would ultimately compile to justify the challenged agency actions, should that become necessary. As the Supreme Court has said, on arbitrary and capricious review, “[t]he task of the reviewing court is to apply the appropriate APA standard of review . . . based on the record the agency presents to the reviewing court.” Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) (emphasis added). Until the agency has provided its stated reasons through the production of a certified administrative record, summary judgment proceedings are premature.

For these reasons, the Court should stay briefing of Plaintiffs’ motion for summary judgment pending resolution of Defendant’s motion to dismiss. In the alternative, should the Court decline to stay summary judgment briefing, Defendant respectfully requests a 45-day

extension of time, from August 21 to October 6, 2014, to compile and certify an administrative record and to file an opposition to Plaintiffs' motion for summary judgment.

PROCEDURAL BACKGROUND

In this case, Plaintiffs challenge three rules or regulations governing Medicare payments to hospitals:

- First, Plaintiffs challenge a regulation providing that certain services are “generally appropriate for . . . inpatient hospital payment under Medicare Part A when the physician expects the patient to require a stay that crosses at least 2 midnights.” 42 C.F.R. § 412.3(e)(1); see Compl. ¶¶ 43-44.
- Second, Plaintiffs challenge a regulation providing that, for payment under Medicare Part A, a patient must be “formally admitted as an inpatient pursuant to an order for inpatient admission” that is “present in the medical record and . . . supported by the physician admission and progress notes.” 41 C.F.R. § 412.3(a); see Compl. ¶ 58.
- Third, Plaintiffs challenge an alleged policy requiring claims for payment under Medicare Part B to be filed within one year of the date of service, where a previous claim for payment for the same services under Medicare Part A has been denied by a Recovery Audit Contractor because it was not “reasonable and necessary” to provide treatment on an inpatient, rather than outpatient, basis. See Compl. ¶ 36 (citing 78 Fed. Reg. 16,639-40).

The third of these challenges is also the subject of an earlier lawsuit brought by the lead Plaintiff in this case. See Am. Hosp. Ass'n v. Burwell, No. 12-1770 (D.D.C.) (motion to dismiss for lack of jurisdiction pending).

Defendant has moved to dismiss this case in its entirety for lack of jurisdiction, raising issues of standing, exhaustion, and ripeness. See Def.'s Mot. to Dism. [ECF No. 8]. As explained at length in that motion, although Plaintiffs assert that the challenged rules have caused them to lose Medicare reimbursement to which they believe they are entitled, their complaint identifies no actual Medicare claim that has been denied on the basis of two of those rules. As for the third, while the complaint does identify a handful of allegedly denied claims, Plaintiffs acknowledge that their appeals of those determinations are still pending at the

administrative level. Compl. ¶¶ 84-85. Exhaustion of administrative remedies is a jurisdictional prerequisite to judicial review of claims arising under the Medicare statute, as the Supreme Court has repeatedly explained. See generally Def.’s Mot. to Dism. 15-18 (citing, *inter alia*, Heckler v. Ringer, 466 U.S. 602, 627 (1984) (“In the best of all worlds, immediate judicial access for all of these parties might be desirable. But Congress, in § 405(g) and § 405(h), struck a different balance, refusing declaratory relief and requiring that administrative remedies be exhausted before judicial review of the Secretary’s decisions takes place.”)).

No briefing schedule has been established in this case. In response to Defendant’s motion to dismiss, Plaintiffs filed both an opposition brief and a motion for summary judgment on August 4, 2014. See ECF Nos. 9, 10. The Court granted Defendant a three-week extension of time to file a reply in support of her motion to dismiss, which is currently due on September 4, 2014. See Minute Order (Aug. 11, 2014).² Defendant’s opposition to Plaintiffs’ motion for summary judgment is currently due on August 21, 2014. See LCvR 7(b); Fed. R. Civ. P. 6(a)(1)(C).

ARGUMENT

I. Deferring Summary Judgment Briefing Pending Resolution of Defendant’s Motion to Dismiss is the Most Logical and Efficient Way To Resolve this Case

This Court has the inherent authority to “control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” Landis v. N. Am. Co., 299 U.S. 248, 254 (1936). That broad discretion includes the “inherent power to control the sequence in which it hears matters on its calendar.” United States v. W. Elec. Co., 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995). In particular, when two parties present separate motions,

² The Court previously granted Defendant a 30-day extension of time to respond to the complaint.

the Court may first consider a motion that “addresses a specific and narrow issue” rather than a motion that “encompass[es] issues far broader.” United States v. W. Elec. Co., 158 F.R.D. 211, 220 (D.D.C. 1994), aff’d, 46 F.3d at 1207 n.7 (“[T]he [district] court’s explanation amply supports its exercise of discretion”). In this case, the threshold jurisdictional issues presented by Defendant’s motion to dismiss, as well as the interests of efficiency and judicial economy, make it appropriate for the Court to resolve Defendant’s motion to dismiss before beginning proceedings on Plaintiffs’ motion for summary judgment.

The “first and fundamental” question for any court is that of jurisdiction. Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 94 (1998). “The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exceptions.” Id. at 94-95 (internal quotation marks omitted). Thus, as the D.C. Circuit has recognized, “resolving a merits issue while jurisdiction is in doubt carries the courts beyond the bounds of authorized judicial action and violates the principle that the first and fundamental question is that of jurisdiction.” In re Papandreou, 139 F.3d 247, 253 (D.C. Cir. 1998) (internal citations and quotation marks omitted).

Defendant’s motion to dismiss raises issues of standing, exhaustion, and ripeness that challenge the Court’s jurisdiction over this case in its entirety. Until this Court rules on those jurisdictional issues, Defendant “should not be put to the trouble and expense of any further proceeding, and the time of the court should not be occupied with any further proceeding.” United Transp. Serv. Employees of Am., CIO v. Nat’l Mediation Bd., 179 F.2d 446, 454 (D.C. Cir. 1949). Neither the Court’s nor the parties’ time is well-served by engaging in a “struggle over the substance of the suit” when a dispositive jurisdictional motion is pending. Democratic

Rep. of Congo v. FG Hemisphere Assocs., LLC, 508 F.3d 1062, 1064 (D.C. Cir. 2007) (jurisdictional defenses should be raised at the outset to avoid unnecessary litigation).

Moreover, because Defendant's motion, if granted, would put an end to this litigation, to require the parties and the Court to address the substance of Plaintiffs' summary judgment motion at this time, including the preparation of opposition papers and oral argument, as Plaintiffs have requested, see Pls.' Mem. 47 [ECF No. 10], would be an inefficient use of resources. For this and related reasons, courts routinely defer consideration of motions for summary judgment while dispositive motions to dismiss remain pending. See, e.g., Freedom Watch v. Dep't of State, 925 F. Supp. 2d 55, 59 (D.D.C. 2013) ("Not needing more lawyers to spend more time on more briefs on more subjects in order to decide the motion to dismiss, the Court granted the motion to stay [summary judgment briefing.]"); Furniture Brands Int'l Inc. v. U.S. Int'l Trade Comm'n, No. 11-202, 2011 WL 10959877, at *1 (D.D.C. Apr. 8, 2011) ("[St]aying further briefing of the plaintiff's summary judgment motion will allow the parties to avoid the unnecessary expense, the undue burden, and the expenditure of time to brief a motion that the Court may not decide."); see also Daniels v. United States, 947 F. Supp. 2d 11, 15 (D.D.C. 2013) (noting that court stayed summary judgment briefing pending its ruling on motion to dismiss); Angulo v. Gray, 907 F. Supp. 2d 107, 109 (D.D.C. 2012) (same); Magritz v. Ozaukee Cnty., 894 F. Supp. 2d 34, 37 (D.D.C. 2012) (same); Ticor Title Ins. Co. v. FTC, 625 F. Supp. 747, 749 n.2 (D.D.C. 1986) (holding in abeyance plaintiff's motion for summary judgment "pending resolution of threshold questions of jurisdiction and justiciability").

Moreover, deferring summary judgment briefing would not prejudice Plaintiffs. To begin, as Plaintiffs acknowledge, their appeals of any denied claims are still pending at the administrative level, Compl. ¶¶ 84-85, and those appeals may well result in payment of any

initially denied claims. Regardless, if the Court ultimately denies the motion to dismiss, the parties can then turn to the merits issues raised in Plaintiffs' summary judgment motion and any cross-motion for summary judgment that Defendant would file. See Furniture Brands, 2011 WL 10959877, at *1 ("Because the Court must necessarily resolve the motions to dismiss before considering plaintiff's summary judgment motion, suspending briefing of the summary judgment motion pending the Court's resolution of the motions to dismiss will not prejudice plaintiff."). It is therefore more logical and practical for this Court to first resolve Defendant's motion to dismiss.

II. Plaintiffs' Motion for Summary Judgment Is Premature

A stay of summary judgment proceedings is also appropriate for the independent reason that Plaintiffs' motion for summary judgment is premature. It is well established that, in a case challenging agency action as arbitrary and capricious, the "focal point" of this Court's review is the administrative record compiled by the agency. Camp v. Pitts, 411 U.S. 138, 142 (1973); accord San Luis Obispo Mothers for Peace v. Nuclear Reg. Comm'n, 751 F.2d 1287, 1324 (D.C. Cir. 1984) ("In discharging their obligation to monitor agency action, courts review a record compiled by the agency."). Given that Plaintiffs have not obtained a "final decision of the Secretary" for any denied claims, the agency has not yet compiled and certified an administrative record for the Court to review. Rather, Defendant's motion to dismiss challenges the sufficiency of the complaint, relying only on allegations contained therein, documents incorporated by reference, and publicly available information.

Although in their summary judgment motion Plaintiffs cite to what they deem to be "administrative-record documents," Pls.' Mem. 5 n.1 [ECF No. 10], their assumptions about what the administrative record may contain, should one become necessary, cannot substitute for

the agency's compilation and certification of the record. See Fla. Power, 470 U.S. at 743-44 (reviewing court must “apply the appropriate APA standard review . . . based on the record the agency presents”) (emphasis added). Until the agency has compiled and certified an administrative record setting forth the basis for the challenged actions, then, a motion for summary judgment is premature. Cf. Conservation Force, Inc. v. Jewell, 733 F.3d 1200, 1202 (D.C. Cir. 2013) (“As tempting as it may be to consider an arbitrary and capricious claim in a case involving a goat, an array of justiciability problems — mootness, ripeness, and standing — require us to decline the opportunity.”)

III. Alternatively, Defendant Respectfully Requests an Extension of Time to Compile and Certify an Administrative Record and to Oppose Plaintiffs' Motion for Summary Judgment

In the alternative, if the Court should decline to stay summary judgment briefing, Defendant respectfully requests a 45-day extension of time, from August 21 to October 6, 2014, to compile and certify an administrative record and to oppose Plaintiffs' motion for summary judgment. As noted above, the agency has not yet compiled an administrative record, given that Plaintiffs have not obtained a “final decision of the Secretary” for any denied claims and that Defendant's motion to dismiss challenges the sufficiency of the complaint. Were a certified record to become necessary, however, the agency estimates that it would take at least 30 days to compile, particularly given that the complaint challenges three different Medicare rules or regulations. Once the contents of an administrative record were certified, additional time would then be needed for counsel to complete an opposition to Plaintiffs' summary judgment motion and any cross-motion for summary judgment that Defendant would file.

In addition, as noted in Defendant's previous papers, undersigned counsel has been on unanticipated medical leave since August 4, 2014. He has been largely unable to work during

that time, and is not yet sure when he will be able to return to work. While he hopes that treatment will enable him to work reduced hours as his condition improves, he will be unable to prepare a opposition to Plaintiffs' motion for summary judgment by the current deadline, particularly in light of the scope of this case and overlapping deadlines in other cases.³

Thus, under the circumstances, should the Court decline to stay summary judgment briefing, there is good cause for a 45-day extension of time, from August 21 to October 6, 2014, for Defendant to compile and certify an administrative record and to oppose Plaintiffs' motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Court should stay summary judgment briefing pending resolution of Defendant's motion to dismiss or, in the alternative, grant Defendant a 45-day extension of time to compile and certify an administrative record and to oppose Plaintiffs' motion for summary judgment.

Pursuant to Local Civil Rule 7(m), undersigned counsel conferred with counsel for Plaintiffs, who represented that Plaintiffs oppose the relief requested in this motion.

Dated: August 15, 2014

Respectfully submitted,

STUART F. DELERY
Assistant Attorney General

SHEILA M. LIEBER
Deputy Director

³ In addition, undersigned counsel's supervisor on this case will be on leave and unavailable from August 13 to 27, 2014. Likewise, undersigned counsel's principal contact at the Department of Health and Human Services for this case will be on leave and unavailable from August 25 to 29, 2014.

/s/ Eric Beckenhauer

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 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