**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 SUPPLEMENTAL BRIEF ON THE EFFECT OF THE FINAL RULE ON DEFENDANT'S MOTION TO DISMISS**

In the Second Amended Complaint, Plaintiffs challenge an interim administrative ruling, CMS Ruling 1455-R, that they contend (a) bars them from rebilling their denied-but-unappealed Medicare Part A claims under Medicare Part B and (b) violates the Medicare Act insofar as it limits the services that are reimbursable when rebilled under Part B. After the close of briefing on Defendant's motion to dismiss, CMS issued a final rule that superseded Ruling 1455-R. See Medicare Program: Payment Policies Related to Patient Status, 78 Fed. Reg. 50,496 (Aug. 19, 2013) (to be codified at 42 C.F.R. §§ 413-19, 424, 482, 485, 489). Pursuant to the Court's order of August 8, 2013, Defendant submits this supplemental brief addressing the effect of the final rule on the pending motion to dismiss.

The issuance of the final rule removes one ground for dismissal of this case, ripeness, but provides another, mootness. Because Ruling 1455-R is no longer in effect, it does not harm Plaintiffs — if it ever did — and an order setting aside that interim administrative ruling would provide them no relief.

Because the statutory and regulatory background is already set forth in Defendant's motion to dismiss, we recite here only those facts necessary to explain the effect of the final rule. For ease of reference, the discussion below tracks the arguments presented in Defendant's motion to dismiss and reply.

## I. The Court Should Dismiss Counts I–V of the Second Amended Complaint for Lack of Subject Matter Jurisdiction under Rule 12(b)(1).

The Plaintiff hospitals received unfavorable Recovery Audit Contractor ("RAC") determinations on claims for payment under Medicare Part A because it was not "reasonable and necessary" to provide treatment on an inpatient, rather than an outpatient, basis. 42 U.S.C. § 1395y(a). 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). Although they 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 an effort to revive these expired claims, Plaintiffs have both (a) asked Medicare contractors to "reopen" and adjust their Part A claims and (b) resubmitted their denied Part A claims as "new" Part B claims. At about the same time, they filed this suit. In Counts I–V of the Second Amended Complaint, Plaintiffs ask the Court to declare the allegedly expected rejection of these administrative requests to be arbitrary and capricious (or, alternatively, to estop the Secretary from applying the one-year statutory limitation period for Part B claims, or to equitably toll that deadline).

**A. Plaintiffs have failed to exhaust administrative remedies and, regardless, the Court lacks jurisdiction to review the agency actions that they challenge.**

In our motion to dismiss, we explained that the Court lacks jurisdiction over Counts I–V for three independent reasons. First, Plaintiffs have not exhausted their administrative remedies, as required by the Medicare statute. Def.'s Mot. to Dism. ("Def.'s Mot.") 17-20; Def.'s Reply 5-14. Indeed, at the close of briefing, those efforts were ongoing and, as Plaintiffs have acknowledged, had met with some success, as some of their Part B claims had in fact been paid. Pls.' Opp'n 15 n.6; Def.'s Reply 8.[1] Second, the discretionary decisions whether to reopen a Part A payment determination or to extend the statutory limitation period for an untimely Part B claim are not "final decision[s] of the [Secretary] . . . made after a hearing" that are subject to judicial review under 42 U.S.C. § 405(g). Def.'s Mot. 24-30; Def.'s Reply 18-28. The issuance of the final rule does not affect either of these two arguments.

**B. In light of the final rule, Defendant no longer presses the argument that Counts I–V are unripe.**

In light of the final rule, however, Defendant no longer presses its third ground for dismissal: that Plaintiffs' challenge is unripe. In our motion to dismiss, we argued that Counts I–V were unripe because both Ruling 1455-R and the proposed rule that accompanied it were plainly tentative, and the final rule could either (a) give Plaintiffs relief or (b) at least provide the Secretary's considered response to commenters like Plaintiffs who believe that the Secretary should permit hospitals to resubmit denied-but-unappealed Part A claims as Part B claims by relaxing the one-year statutory limitation period. Def.'s Mot. 20-23; Def.'s Reply 14-18.

[1] Plaintiffs' surprise at this development and expectation that it will not last, see Pls.' Opp'n 15 n.6 (citing Trachok Decl. ¶ 12; Lauer Decl. ¶ 14), does not render futile their so-far successful efforts to exhaust the administrative process. Indeed, it underscores the wisdom of Congress's decision to require exhaustion before suit may proceed in federal court under 42 U.S.C. § 405(g).

In the final rule, the Secretary addressed these issues, but ultimately declined to create an exception to the one-year statutory limitation period for filing Part B claims. She explained that the existing exceptions to this requirement were created to address situations where Medicare providers, "through no fault of their own, would be disadvantaged by strict application of the 1-calendar year timely filing requirement." 78 Fed. Reg. 50,923. Here, by contrast, "it is the responsibility of providers to correctly submit claims to Medicare by coding services appropriately" and "determining whether the submission of a Part A or Part B claim is appropriate within the applicable timeframe." Id. at 50,922-23. Hospitals thus "have the ability to avoid being disadvantaged by the 1-calendar year time limit to file claims and by any subsequent RAC audit if they bill correctly" in the first instance. Id. at 50,923. Moreover, hospitals remain free to "self-audit" to "correct this type of Part A billing error," and may rebill under Part B "as long as that Part B claim is filed within 1-calendar year after the date of service." Id. at 50,926.

Because the Secretary's position on these issues is no longer tentative, Defendant no longer presses the argument that Plantiffs' challenge is unripe.

**C. Plaintiffs' challenge to Ruling 1455-R, which never affected them, is now moot.**

To the extent that Plaintiffs challenge Ruling 1455-R, however, the issuance of the final rule provides an additional ground for dismissal: mootness. Because Ruling 1455-R is no longer in effect, it does not harm them — if it ever did — and an order setting aside that interim administrative ruling would provide Plaintiffs no relief.

Beset by jurisdictional hurdles, Plaintiffs have attempted to reframe the "agency action" that they challenge. Rather than the discrete decision whether to "reopen" a particular Part A claim, or to extend the statutory filing deadline for a "new" Part B claim, Plaintiffs argue that

Counts I–V instead raise a facial challenge to a "systemwide CMS policy of general applicability." Pls.' Opp'n 30. That policy, they contend, was CMS Ruling 1455-R. Specifically, Plaintiffs argue 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.

As we have explained, that is 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 at 19-21 & n.8. It had no effect on Plaintiffs' expired claims, as to which it left the status quo in place. A comparison of the timing requirements of prior law with the proposed rule, Ruling 1455-R, and the final rule makes this clear:

Prior law. "[U]nder Medicare's longstanding policy," where a Part A claim was denied because inpatient treatment was not reasonable and necessary, a hospital could rebill under Part B "within the usual timely filing requirements," 78 Fed. Reg. 16,633-34 — that is, within "1 calendar year after the date of service," 42 U.S.C. § 1395n(a)(1).

Proposed rule. Under the proposed rule, a hospital could rebill under Part B "provided the statutorily required timeframe for submitting claims is not expired," 78 Fed. Reg. 16,635 — that is, within "1 calendar year after the date of service," 42 U.S.C. § 1395n(a)(1).

Ruling 1455-R. Under the interim administrative ruling, Part B claims would not be denied as untimely if not rebilled within a year of service, so long as the original Part A claim was itself timely and was denied either:

- while the interim ruling was in effect (3/18/2013 to 10/1/2013); or
- before the interim ruling took effect, if an appeal was pending or there was still time to appeal. 78 Fed. Reg. 16,616.

Final rule. Under the final rule, Part B claims will not be denied as untimely if not rebilled within a year of service, so long as the original Part A claim was itself timely and was denied either:

- while the interim ruling was in effect (3/18/2013 to 10/1/2013); or
- before the interim ruling took effect, if an appeal was pending or there was still time to appeal; or
- after the interim ruling expired, if the patient was admitted before that date. 78 Fed. Reg. 50,924.

Thus, Ruling 1455-R, like the final rule, set forth a limited category of claims that hospitals could rebill despite the ordinary one-year time limit on Part B claims. But as to Plaintiffs' Part A claims that were denied but not timely appealed, Ruling 1455-R had no effect. See Def.'s Reply at 19-21 & n.8. The same is true of the final rule.

But even if Plaintiffs were correct to argue that it was Ruling 1455-R — rather than the preexisting statutory and regulatory timely filing requirements — that had stood in the way of their attempts to revive their claims, that challenge is now moot. Because Ruling 1455-R is no longer in effect, it does not harm them, if it ever did, and an order setting aside that interim administrative ruling would provide Plaintiffs no relief. See, e.g., S.W. Bell Tel. Co. v. FCC, 168 F.3d 1344, 1351 (D.C. Cir. 1999) (challenge to "interim" decision that "is no longer in effect" is rendered moot for want of "two of the elements necessary for our assertion of jurisdiction — redressability and a present, continuing injury-in-fact"); Oceana Inc. v. Locke, 831 F. Supp. 2d 95, 124 (D.D.C. 2011) ("Where a regulation has been superseded, a challenge to the earlier rule is moot."). And Plaintiffs cannot show that Ruling 1455-R is likely to be revived. Cf. Beethoven.com LLC v. Librarian of Cong., 394 F.3d 939, 951 (D.C. Cir. 2005) (to avoid mootness under the "capable of repetition" exception, plaintiff has burden to demonstrate "a

reasonable expectation that [it] would be subjected to the same action again"). Thus, to the extent that Plaintiffs frame this case as a facial challenge to Ruling 1455-R, rather than to the allegedly anticipated denials of their requests to "reopen" their Part A claims or submit "new" Part B claims out of time, this Court lacks jurisdiction for the additional reason that any such claim is moot.

## II. In the Alternative, the Court Should Dismiss Counts IV and V for Failure to State a Claim under Rule 12(b)(6).

In Counts IV and V, Plaintiffs ask the Court to estop the Secretary from applying the one-year statutory limitation period for new Part B claims, or to equitably toll that deadline. In our motion to dismiss, we explained that because the Court lacks the power to grant either request, both Count IV and Count V fail to state a claim. Def.'s Mot. 30-31; Def.'s Reply 28-30. The issuance of the final rule does not affect this argument.

## III. The Court Should Dismiss Count VI for Lack of Subject Matter Jurisdiction under Rule 12(b)(1).

In Count VI, Plaintiffs challenge Ruling 1455-R insofar as it limits the services that are reimbursable when rebilled under Part B. See 2d Am. Compl. ¶¶ 179-184.

### A. Plaintiffs have failed to exhaust or, indeed, to demonstrate standing.

In our motion to dismiss, we explained that the Court lacks jurisdiction over Count VI because Plaintiffs failed to exhaust administrative remedies — or even to establish standing by filing Medicare claims affected by this aspect of Ruling 1455-R — before filing suit. See Def.'s Mot. 31-32; Def.'s Reply 30-32. The issuance of the final rule does not affect either of these two arguments.

**B. In light of the final rule, Defendant no longer presses the argument that Count VI is unripe.**

In light of the final rule, Defendant no longer presses the argument that Count VI is unripe, for reasons similar to those discussed above for Counts I–V.

**C. Plaintiffs' challenge to Ruling 1455-R is now moot.**

The issuance of the final rule also renders Count VI moot, for reasons similar to those discussed above for Counts I–V. In Count VI, Plaintiffs contend that "Ruling 1455-R is . . . invalid under the APA because it violates the Medicare Act." 2d Am. Compl. ¶ 184. But because Ruling 1455-R is no longer in effect, it does not harm them — if it ever did — and an order setting aside that interim administrative ruling would provide Plaintiffs no relief. See, e.g., S.W. Bell Tel. Co., 168 F.3d at 1351; Oceana, 831 F. Supp. 2d at 124. Thus, in light of the final rule, Count VI is now moot and the Court lacks jurisdiction over it.

## CONCLUSION

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

Dated: October 28, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 28, 2013, 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*
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