Department of Health and Human Services
DEPARTMENTAL APPEALS BOARD
Appellate Division

City of Auburn
Docket No. A-12-59
Decision No. ER5
June 22, 2012

DECISION

City of Auburn (Plan Sponsor) appeals from an adverse reimbursement determination, issued on March 5, 2012, by the Centers for Medicare & Medicaid Services (CMS) under the Early Retiree Reinsurance Program (ERRP). Specifically, CMS determined that the plan participant listed on the Plan Sponsor's Early Retiree List Response File did not qualify as an early retiree during the plan year and, therefore, denied reimbursement for that participant.

For the reasons discussed below, I uphold CMS's adverse reimbursement determination.

Applicable Regulations and Guidance

Established by the Patient Protection and Affordable Care Act (Affordable Care Act), the ERRP provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees. Affordable Care Act, Pub. L. No. 111-148, § 1102, 124 Stat. 143-145 (2010) (Affordable Care Act); *see also* 45 C.F.R. Part 149. In pertinent part, the ERRP regulations define an early retiree as:

> [A] plan participant who is age 55 and older who is enrolled for health benefits in a certified employment-based plan, who is not eligible for coverage under title XVIII of the [Social Security] Act [the Medicare statute]. . . .

45 C.F.R. § 149.2. The Social Security Act explains that an individual who has attained the age of 65 is eligible for benefits under Part A. *See* The Social Security Act, § 226, 42 U.S.C. § 426 (2007), *incorporated by reference at* § 1811, 42 U.S.C. § 1395c. In addition, individuals who have not attained the age of 65, but who are entitled to disability benefits under the Social Security Act for the requisite period of time, or who are medically determined to have end stage renal disease, may be eligible for Medicare. The Act § 1811(2)-(3), 42 U.S.C. § 1395c(2).

Case Background and Analysis

In December 2010, the Plan Sponsor submitted an early retiree list and accompanying reimbursement request. The Plan Sponsor's early retiree list was comprised of only one individual, the plan participant at issue in this case. At that time, CMS issued a favorable reimbursement determination and remitted a check for the reimbursement amount to the Plan Sponsor.

In February 2012, as required by ERRP's filing requirements, the Plan Sponsor submitted a claims list to substantiate the ERRP reimbursement paid for the 2010 plan year. On March 5, 2012, CMS notified the Plan Sponsor that the plan participant did not qualify as an early retiree during the 2010 plan year. Accordingly, CMS initiated procedures for recoupment of the funds paid to the Plan Sponsor for the 2010 plan year. On March 19, 2012, the Plan Sponsor filed a timely appeal.

The Plan Sponsor contends that the plan participant was not Medicare-eligible during the relevant plan year. The Plan Sponsor goes on to state that it did not consider whether the plan participant was qualified for secondary payments by Medicare "because it had concluded that [the plan participant] was not eligible for Medicare due to her age and because the [Plan Sponsor] was aware that a lengthy 30 month waiting period for Medicare eligibility would apply due to [the plan participant's] specific health condition." Request for Appeal at 2. Finally, the Plan Sponsor contends that even if the plan participant was eligible for Medicare as a secondary payer, it had incurred significant expenses related to the plan participant's health costs. Thus, according to the Plan Sponsor, it would be contrary to the intent of the ERRP to deny reimbursement for the significant costs paid by the Plan Sponsor.

CMS does not deny that it initially issued a favorable reimbursement determination, nor does CMS provide an explanation for its initial determination. CMS simply states that its later determination that the plan participant did not qualify as an early retiree in the 2010 plan year due to Medicare eligibility is correct. In support of its contention, CMS submitted evidence from the Medicare Beneficiary Database (MBD). The evidence submitted from the MBD indicates that the plan participant became Medicare-eligible on January 1, 2010 and the enrollment reason is indicated as "renal disease not reason for entit prior to 65 or 25th mo of disability." CMS Response at 4, 8.

I find that the evidence submitted by CMS demonstrates that the plan participant was entitled to Medicare during the 2010 plan year. The MBD is CMS's system of records "that reflects individual Medicare and Medicaid health insurance coverage . . . [and is] CMS's singular, reliable and authoritative data source, from which all systems can retrieve current, standard, valid and timely data necessary for Medicare Program administration." 66 Fed. Reg. 63,392 (Dec. 6, 2011). Accordingly, I find that the evidence submitted from the MBD is accurate and authoritative.

I also find that the Plan Sponsor's request for appeal offers no basis for changing CMS's adverse determination. According to the Plan Sponsor, it was aware of the plan participant's medical condition, but believed that a 30-month waiting period for Medicare eligibility applied. However, the Social Security Act provides that eligibility begins on the third month after the month in which a regular course of renal dialysis is initiated or the month in which the individual receives a kidney transplant. The Act at § 226A(b)(1)(A)-(B), 42 U.S.C. § 426-1(b)(1)(A)-(B). The 30-month waiting period to which the Plan Sponsor refers is the Medicare Secondary Payer provision, also known as the coordination period. 42 C.F.R. § 411.162(a). During the coordination period, Medicare is the secondary payer to any group health plan. The Medicare Secondary Payer provision, however, does not affect the date of Medicare eligibility. Under the ERRP regulations, the key factor in determining whether an individual qualifies as an early retiree is Medicare *eligibility*, and not whether Medicare is the primary or secondary payer. Affordable Care Act (a)(2)(C). Accordingly, because the plan participant became Medicare-eligible on January 1, 2010, the plan participant did not satisfy the definition of early retiree during the 2010 plan year.

Similarly, there is no authority to reverse CMS's adverse determination based on the Plan Sponsor's alternative argument that it would be unfair to deny reimbursement in light of CMS's initial favorable determination, as well as the significant health costs the Plan Sponsor paid on behalf of the plan participant. The law provides that reimbursement shall be based on the actual amount expended by the Plan Sponsor for the health benefits provided to an early retiree. Affordable Care Act § 1102(c)(1)(B). In this case, the plan participant was not an early retiree during the 2010 plan year because the plan participant was Medicare-eligible. Therefore, under the ERRP regulations, there is no basis on which the Plan Sponsor may be reimbursed for the costs associated with the plan participant during the 2010 plan year.

Conclusion

Based on the foregoing, I uphold CMS's adverse reimbursement determination.

/s/
Constance B. Tobias
Chair, Departmental Appeals Board