

# Update on NAHC Lawsuit over PDGM

Source: NAHC, April 29, 2024

In July of 2023, the National Association for Home Care & Hospice (NAHC) filed litigation against the United States Department of Health and Human Services (HHS) in federal court in Washington, D.C., challenging the Centers for Medicare & Medicaid Services' (CMS) implementation of the Home Health Patient-Driven Groupings Model (PDGM) "Budget Neutrality Adjustment." CMS has applied payment rate reductions of 3.925 percent and 2.89 percent in 2023 and 2024 respectively, using the challenged budget neutrality adjustment. Future rate cuts are expected under that adjustment authority.

The NAHC lawsuit challenged the methodology CMS applied in calculating the PDGM budget neutrality adjustments mandated by Congress. The primary claim in our lawsuit is that the methodology violated the plain language of the Medicare law. The lawsuit also argues that CMS instituted the rate reductions in a manner that considered the change in volume of therapy visits, a violation of the requirement that CMS eliminate use of therapy thresholds.

The Court ruling addresses a combination of the NAHC arguments and the defenses presented by the U.S. Department of Justice on behalf of CMS. DOJ argued that the Court did not have the power to hear any challenge to the PDGM budget neutrality adjustment methodology, that NAHC failed to exhaust all administrative appeal steps, and that the challenged methodology was in compliance with the law.

In its ruling issued in the evening of April 26, 2024, the court dismissed the case on the procedural grounds that NAHC had not exhausted the administrative appeal rights available to health care providers, specifically the "Request for Expedited Judicial Review" step. Notably, however, the Court ruled in NAHC's favor on a crucial element of the case, rejecting DOJ's argument that all judicial review was precluded on anything related to the PDGM system. The Court specifically held that NAHC could challenge the budget neutrality adjustment methodology once administrative remedies are exhausted. Of further note, the Court did not rule on or evaluate the merits of the NAHC claim that the methodology violated Medicare law.

NAHC filed the lawsuit knowing that administrative appeals had not been exhausted by any home health agency, as the full panoply of appeal steps generally takes an extended period, possibly years and providers are struggling with the rate cuts today. Existing case law recognizes the difficulties caused by extended administrative appeals and permits courts to waive the exhaustion of

those steps when such would be futile and risk irreparable harm to the provider. It is clear those appeals would be futile because the decision maker at each must apply CMS rules and has no authority to consider whether the rule is invalid. However, the Court held that NAHC must demonstrate that it would be futile to pursue the expedited judicial review step.

#### *WHAT THIS MEANS*

What this all means is that the Court ruling delays consideration of the merits of NAHC's challenge to the CMS budget neutrality methodology rather than stopping that challenge overall. Currently, NAHC is evaluating its options on next steps. One option is to appeal the Court's ruling on exhaustion of administrative appeals. An alternative approach is to simply pursue a request for expedited judicial review with CMS. It is highly likely that CMS will grant such review given CMS's frequently repeated view that its methodology is a valid interpretation of the law. In the event that judicial review is expedited, NAHC would then essentially refine the same lawsuit. As referenced earlier, the Court did not rule on the merits of NAHC's claims that it had violated Medicare laws. As such, a lawsuit can be pursued once the administrative steps are completed. It is possible for expedited judicial review to be authorized in just weeks or a couple of months.

"We are disappointed with the court's ruling. However, it is a minor setback that we can readily overcome," said **William A. Dombi**, NAHC President and one of the legal counsel to NAHC in the lawsuit. "Often justice delayed is justice denied. Here, we will have our day in court. This battle is far from over."

NAHC continues its congressional advocacy on PDGM relief concurrently with the litigation efforts. A bill is pending in both the Senate and House of Representatives that would eliminate CMS's authority to impose any budget neutrality-based rate cure. Two weeks ago, NAHC held a highly successful fly-in combined with a virtual lobbying day that led to dozens of meetings with members of Congress along with tens of thousands of messages sent by to their congressional delegations. The messages are having an impact and NAHC encourages the home care community to keep them coming.

The Court's opinion is [HERE](#) and the Court's order is [HERE](#).