No. 23-715

IN THE

Supreme Court of the United States

ADVOCATE CHRIST MEDICAL CENTER,

Petitioner,

v.

XAVIER BECERRA, SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF EMPIRE HEALTH FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER, ADVOCATE CHRIST MEDICAL CENTER

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PRELIMINARY STATEMENT

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Empire Health Foundation ("Empire") is a two-hospital health system located in Spokane, WA, comprised of Deaconess Medical Center and Valley Hospital. Empire was the non-governmental party in *Becerra v. Empire Health Foundation*, No. 20-1312 (decided June 23, 2022), in which this Court held that "entitled to benefits" under Part A of Medicare includes, for purposes of the denominator of the Medicare Fraction portion of the Medicare Disproportionate Share Hospital (DSH) payment calculation, individuals whose hospital stays were not paid for by Medicare but rather were paid for by private entities with Medicare Advantage contracts. Amicus Curiae wishes to see the Court adopt what it believes would be a consistent approach with respect to the language "entitled to supplementary security income [SSI] benefits," which appears in the same statutory subsection as "entitled to benefits under part A," namely, 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I). That is, Amicus Curiae's interest, as a DSH hospital, is to urge the Court to find that hospital stays for individuals who have been determined to be entitled to SSI are included in the numerator of the Medicare Fraction, regardless of whether such individuals actually received SSI payments for the months of such hospital stays.

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[1] In accordance with Rule 37.6, Amicus confirms that no party or counsel for any party authored this brief in whole or in part. The funding for this brief is made entirely by Quality Reimbursement Services, Inc., a national hospital consulting firm that is located in Acadia, California, and that specializes in assisting hospitals obtain Medicare reimbursement they are owed, and in particular Disproportionate Share Hospital reimbursement.

SUMMARY OF ARGUMENT

Amicus agrees with Petitioner that Respondent Secretary of Health and Human Services is not permitted to interpret the language "entitled to [SSI]" in a manner that is inconsistent with the language "entitled to benefits under part A" in the same statutory subsection, insofar as the Secretary requires an individual to be entitled to receive payment for the month(s) of his or her hospital stay in order for those days to be counted in the numerator of the Medicare Fraction portion of the Medicare DSH payment calculation. However, even if that interpretation were correct, it is unlawful for the Secretary to require that an individual actually *receive* SSI payment in order for the individual's inpatient days to be included in the numerator of the Medicare Fraction. There are multiple situations in which an individual who has been determined to be entitled to SSI, and who continues to meet the income and resources limitations for SSI, does not actually receive a check for SSI due to technical reasons. For example, the Social Security Administration (SSA) may not send a check to an SSI recipient because it does not have a current, valid address for the recipient (indeed, such individual may be homeless). SSA maintains payment status codes for such individuals and could include such individuals in the yearly data match with the Secretary's Centers for Medicare & Medicaid Services (CMS), but the latter directs or requests SSA to not include such individuals with such payment status codes in the yearly match. The Secretary has represented to this Court that CMS's policy is that entitlement to SSI benefits for a month does not depend on whether an individual actually receives an SSI payment in that month, and what matters is whether the individual was entitled to an SSI payment for the month, not the

timing of the actual receipt of such payment. But it is clear that that is *not* CMS's policy or, if it is, CMS is persistently refusing to follow its policy. The Secretary should be required to count in the numerator of the Medicare Fraction inpatient days belonging to individuals who are entitled to SSI but who did not actually *receive* a check for SSI for the month(s) of their stays due to technical reasons. The omission of such days is significant, causing DSH hospitals to lose much needed Medicare reimbursement, and causing some hospitals to fail to qualify as DSH hospitals or qualify under the 340B drug discount program.

ARGUMENT

Amici herein submit this Brief in support of the Petitioner to call the Court's attention to the Respondent Secretary's policy or practice of excluding from the numerator of the Medicare Fraction of the Disproportionate Share Hospital (DSH) payment calculation inpatient hospital days belonging to certain individuals who were eligible for SSI at the time of their hospital stay but who did not actually receive payment from the Social Security Administration (SSA) due to one or more reasons. Such individuals are assigned certain payment codes by SSA, but the Secretary's Center for Medicare & Medicaid Services (CMS) chooses not to receive such data from SSA and therefore wrongfully excludes patient days associated with such individuals from the DSH payment calculation.

The Petitioner in this case persuasively argues that the Secretary's policy and methodology of determining which patient days are to be included in the numerator of the Medicare Fraction (a/k/a the "SSI Fraction"[2]) is

[2] 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I).

erroneous and therefore invalid. That policy, which includes in the numerator of that Fraction only days associated with inpatients who were in Supplemental Security Income (SSI) **pay status** during the month(s) of their hospital admission, improperly excludes other eligible SSI patient days that should otherwise be included in the calculation. Amicus fully supports the Petitioner in this regard.

However, even if for the sake of argument the Secretary is correct to exclude individuals *not* categorically in SSI "payment status," the Secretary's policy or practice to exclude certain individuals who are in payment status is clearly erroneous. That is, the Secretary's policy or practice is to include only those individuals who were actually *paid* SSI for the month(s) of their stay, and to exclude individuals who were otherwise due payment and would have been paid but for the fact that payment could not be effectuated due to some reason that has nothing to do with their eligibility for SSI. As just one example, and as discussed in more depth below, inpatient days belonging to individuals who have been determined to be eligible for SSI, and who meet the income and resources criteria for SSI, but who are awaiting assignment of a representative payee, are not included in the numerator of the Medicare Fraction.

This policy or practice is contrary to the plain language of the statute ("entitled to supplemental security income"[3]), is illogical and yet, quite consequential for DSH hospital Medicare reimbursement allotment. Congress's intent in enacting the DSH statute was to compensate hospitals for their increased costs in providing care to the poorest of the poor, and

[3] *Id*.

in formulating the Medicare Fraction, it uses SSI eligibility and Medicaid eligibility as proxies for indigency. An individual who is found eligible for SSI and who continues to meet the income and resources criteria but who nevertheless does not physically receive a check for a given month due to any one of several circumstances beyond his or her control is just as poor (and now maybe even more poor) than she or he was the previous month when he/she did receive a check. When one examines the various rulemakings promulgated by the Secretary,[4] one cannot tell whether the Secretary is knowingly and purposefully omitting days associated with such individuals, or does not understand that such individuals exist, just as he did not understand the defects of his matching policy with SSA that were exposed in the *Baystate* litigation.[5]

To enable CMS to calculate the SSI Fraction, SSA sends CMS an annual "eligibility file" that includes information on all SSI recipients for whom SSA has assigned one of three payment status codes: C01 (current pay), M01 (forced pay), and M02 (forced due). Although SSA has dozens of additional payment status codes, CMS's policy or erroneous belief is that only C01, M01, and M02 indicate SSI entitlement for purposes of the numerator of the SSI Fraction. *See* 75 *Fed. Reg*. at 50,042, 50,280-282. Therefore, at CMS's request or direction to SSA, only those individuals with one of the three above-referenced payment status codes are listed on the "eligibility file."

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[4] *See, e.g*., 75 Fed. Reg. 50042, 50276-81 (Aug. 16, 2010); 51 *Fed. Reg*. 31,454, 31,460–61 (Sept. 3, 1986); 51 *Fed. Reg*. 16,772, 16,777 (May 6, 1986).

[5] *Baystate Medical Center v. Leavitt*, 545 F. Supp.2d 20 (D.D.C. 2008), discussed *infra*.

SSA includes in the "eligibility file" monthly indicators denoting which month(s) each person received SSI payments. *See id*. at 50,276; *see also* 51 Fed. Reg. 31,454, 31,459 (Sept. 3, 1986) (stating that the SSI file "lists all SSI recipients for a 3-year period and denotes the months during that period in which the recipient was eligible for SSI benefits").

CMS then computes the SSI fraction by matching individuals appearing in the SSA's eligibility file with its own Medicare inpatient data to identify a patient's entitlement to SSI benefits. *Pomona Valley Hosp. Med. Ctr. v. Azar*, No. 18-2763 (ABJ), 2020 WL 5816486, at *2 (D.D.C. Sept. 30, 2020), *aff'd* 82 F.4th 1252 (D.C. Cir. 2023) (citing 75 Fed. Reg. at 50,281). In other words, "CMS identifies the individuals appearing in both data sets to determine the number of patients, and the inpatient days for those patients at each hospital, for the applicable fiscal year to calculate the hospital's SSI numerator." *Id*.

But there are deep and consequential flaws in this matching process, which omits countless number of otherwise eligible SSI patients and inpatient days associated with them from the numerator of the SSI Fraction. As just one example: should a Medicare beneficiary be an inpatient in a Medicare certified short-term acute care hospital from April 29 through May 6, 2022 and, by the time the SSA eligibility file is constructed for that year, was, in SSA-speak, "due a check" for April but not for May, the days April 29 -30 would be counted in the numerator of the SSI Fraction, and the days May 1 through 6 would not be counted.

After the SSA-CMS data match is performed, CMS does not make adjustments to the Medicare/SSI Fraction based upon subsequent, retroactive corrections to the eligibility status of a Medicare beneficiary. Thus, in

the example in the paragraph above, if, after the data match was performed, SSA were to subsequently grant patient eligibility for the month of May, the days May 1 – 6 would nevertheless not be added to the numerator of hospital's SSI Fraction.

Regardless of whether CMS is acting appropriately to exclude days in the above type example (and the Petitioner argues persuasively that CMS is not acting appropriately and such days should be included), there are circumstances in which an SSI-eligible Medicare beneficiary is not, according to SSA's terminology, "due a check" for a particular month, but nevertheless is *entitled* to SSI for that month *and SSA knows that such individual is entitled to SSI at the time the match is performed with CMS*. For example, if, for a given month, an individual does not have a bank account, or is considered by SSA to need a representative payee but no payee has yet been designated and direct payment is prohibited under SSA policy, or SSA does not have a valid address for such individual, SSA will consider that individual to not be "due a check" for that month. For its own internal administrative reasons it may be fine for SSA to consider such an individual to not be "due a check," but it is irrational for CMS for purposes of administering the DSH program to exclude inpatient days belonging to such an individual from the SSI Fraction. Common sense dictates that those who qualify for SSI through a lack of income and resources may very well not have an address (and instead may be homeless) or not have a bank account, or not have the wherewithal to manage his or her funds (such as an individual who is eligible for SSI based on a mental disability) for "a given month."

SSA's Programs Operating Manual System (POMS) is sub-regulatory guidance published by and used by

SSA to implement the SSI program. Section SI 02301.201of the POMS is entitled "Description of SSI Post-Eligibility (PE) Events." The section entitled "Introduction" states that "[t]he term 'eligible' in this subchapter means that a recipient meets all eligibility requirements for part or all of a past or current month(s)." Section SI 02301.201B.2. is entitled "Stop Payment" and it explains that "[a] stop payment is an interruption in payment. It is not a loss of eligibility. Payments may be reinstated for past or current month(s) on a stop pay record regardless of the period in nonpay." Section SI 02301.201B.2. specifically mentions, as a "stop payment," the situation in which an SSI eligible individual needs a representative payee but the SSA field office has not appointed one and direct payment is prohibited under SSA policy. SSA assigns code S08 to this situation. *Id*. Where SSA does not have a valid address for an SSI recipient or a check is returned for a reason other than address, SSA assigns codes S06 and S07, respectively. *Id*.

According to the Secretary, "[c]odes beginning with the letter "S" reflect records that are in a "suspended" status and, according to SSA, do not represent individuals who are entitled to SSI benefits. 75 *Fed. Reg*. at 50281. But the Secretary provides no citation for SSA's alleged proclamation that individuals with "S" codes are not entitled to SSI benefits, and in any event the Secretary, and not SSA, is responsible for administering the DSH Statute and for interpreting the statutory language "entitled to [SSI]". Such individuals may not receive a check for a particular month because SSA does not want to send a check that may not be received or received by the wrong person (or by the SSI recipient who is unable to manage the funds responsibly), but that does not mean that such

individuals are not entitled to SSI benefits. They clearly are so entitled.

By excluding such individuals and patient hospital days from the DSH Medicare SSI Fraction, the Secretary is excluding from the DSH calculation the poorest of patients whose hospital care is undeniably the costliest to a hospital. Failure to include such days results in DSH hospitals not receiving all of the reimbursement to which they are entitled, and results in some hospitals not qualifying for DSH status or "340B" status in the first place.[6]

Notably, the Secretary has represented to this Court that if an individual is entitled to SSI payment for the month of his or her admission, his or her days will be counted:

> To the extent that petitioners suggest an "entitle[ment] to SSI benefits for a month depends on whether an individual actually "receive[s] an SSI payment in that month [citation to Hospital's brief] that is incorrect. What matters is whether the individual was entitled to an SSI payment for the month, not the timing of the actual receipt of such payment. See Gov't C.A. Br. 41-42. Nothing

[6] The federal so-called "340B" (after section 340B of the Public Health Service Act) drug discount program permits certain covered entities to purchase outpatient drugs at discounted prices, significantly reducing the costs of pharmaceuticals and enabling these hospitals to expand care to uninsured individuals. Medicare DSH hospitals with a DSH percentage of 11.75 or more (or 8 percent or more in the case of rural referral centers) qualify as 340B covered entities which can purchase discounted drugs. 42 U.S.C. § 256b(a)(4)(L).

> in the decision of the court of appeals concluded otherwise.

BIO at 16. But that is false. The Secretary includes in the Medicare Fraction only those days associated with individuals who are coded C01, M01, and M02.

This case is reminiscent of another case involving the SSI Fraction. In *Baystate Medical Center v. Leavitt*, 545 F. Supp.2d 20 (D.D.C. 2008), the Secretary was certain that he relied on the best data available to include all days in the Medicare Fraction belonging to patients who were entitled to SSI during their hospital stay. But the Secretary was proven wrong because he did not understand that the data SSA provided to him was incomplete, *id.* at 40-44, and nor did he understand that the data he used to match against SSA's eligibility file was also flawed, *id*. at 44-49. In *Baystate*, as here, "ignoring the existence of more reliable data that is available before the DSH adjustment is finally determined . . . simply cannot be reconciled with the standard of reasoned decisionmaking." *Id*. at 49.

For the above reasons, the Secretary's policy or practice of including only those individuals and their hospital patient days in the numerator of the Medicare SSI Fraction who were assigned payment status codes C01, M01, or M02 is arbitrary, and is violative of the terms and meaning of the Medicare Statute. It fails to capture a multitude of other relevant SSA assigned codes that describe patients who are eligible for SSI and who are so eligible at the time that SSA's eligibility file is composed and provided to CMS.

CONCLUSION

Regardless of whatever else the Court decides in this case, Amicus respectfully submits that the Respondent Secretary be directed to include in the numerator of the SSI Fraction days belonging to individuals who were entitled to SSI and who met the income and resources limitations but who in many instances did not receive a payment for the month(s) of their hospital stay because of some technical reason well outside their control. The wrongful exclusion of such days by itself has a significant, negative impact on hospitals that are treating the indigent and that need and deserve the DSH reimbursement Congress mandated they receive.

Respectfully submitted,

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