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**FEDERAL COURT RULES IN TWO MORE CASES THAT AGENCY  
DECISIONS AFFIRMING QUALITY REPORTING PROGRAM PENALTIES  
WERE ARBITRARY AND CAPRICIOUS**

On the heels of the first court decision against the agency in a Medicare quality reporting program (QRP) case,<sup>1</sup> the United States District Court for the District of Columbia vacated the Provider Reimbursement Review Board (PRRB) decisions in two more QRP cases.<sup>2</sup> We represent the hospitals in these three cases. The court granted summary judgment in part for the hospitals and remanded the cases to the Department of Health and Human Services (HHS) to reconsider the penalties using the court's opinion. In Judge Trevor McFadden's opinion, the court decided that the PRRB decisions violated the Administrative Procedure Act (APA) because the PRRB applied the wrong rules in evaluating whether the CMS reconsiderations were arbitrary and capricious.

In each case, the provider actually reported its quality data on all of the required quality measures by the applicable deadlines but was still penalized. Both hospitals received a form letter stating that the hospital was not in compliance with the Long-Term Care Hospital Quality Reporting Program. The hospitals appealed to CMS and proved that all of their quality data were reported timely, but in more form letters, the agency refused to reverse the penalties on reconsideration. We then represented the providers in their appeals before the PRRB. After significant briefing, documentary evidence, and a hearing, the PRRB decided that even if the hospitals reported their quality data by the applicable deadlines, the two percent penalty was appropriate because, for at least some months and measures, the hospitals data were not sent from the reporting system (NHSN) to CMS. In one case, it was determined that two digits of the hospital's provider number (CCN) were transposed. In the other case, the data in question was entered into the reporting system but technical issues with that system occurred. The PRRB concluded that the hospitals did not "submit data in the form and manner, and at a time, specified by the Secretary," using the vague language of the statute and regulation. But when the PRRB considered the validity of the previous CMS appeal decisions on reconsideration, the PRRB applied the wrong rules with outdated standards of review. We then took the hospitals' cases to court.

Like the previous decision, the court's opinion is a strongly worded rebuke of the "labyrinth of Medicare regulations" the agency created in the LTCH QRP, which the court calls "Kafkaesque", and the agency's failure to navigate it themselves. The court faulted the agency for being "perplexed by its own regulations" as it "misapplied its rules in denying the appeals, overlooking one of [the hospitals'] main arguments in the process." The court characterized the hospital's alleged mistakes as "typographical errors," and faulted the agency for not alerting the hospital to the problem.

The court found that the agency misapplied the procedures it enacted at every level of agency review. In reversing the PRRB decisions, the court said that the PRRB misapplied the regulation and focused on requirements that did not apply—whether there were extraordinary circumstances beyond the control of the hospital that resulted in noncompliance, or a justifiable excuse for noncompliance. These were the wrong standards of review. The court explained that "[o]ne thing no agency can do is apply the wrong law to citizens who come before it." These errors by the PRRB deprived the hospitals and the court of meaningful consideration of whether the hospitals' payment penalties should have been reversed by CMS.

As we discussed in our briefs to the PRRB and the court, the proper standard of review is "extenuating circumstances." The court helpfully explains that this is both different and a lower threshold than extraordinary circumstances and justifiable excuse.

The court concluded that "[t]he Board's misapplication of CMS rules was prototypically arbitrary and capricious." At a minimum, the PRRB and CMS had to consider the relevant factors governing these appeals. But the PRRB "entirely failed to consider an important aspect of the problem," and even after we identified the error, the agency "declined to step in to correct the Board's 'clear error of judgment.'" Because the PRRB relied on the incorrect regulation and standards to affirm CMS's reconsideration decisions, the court held that the hospitals were entitled to summary judgment.

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<sup>1</sup> *Pam Squared at Texarkana, LLC v. Azar*, No. 1:18-CV-2542, 2020 WL 364782 (D.D.C. Jan. 22, 2020). For a discussion of this case, see our previous [Legal Alert, Vol. 6, No. 2 \(Jan. 2020\)](#).

<sup>2</sup> *Landmark Hospital of Salt Lake City v. Azar*, No. 1:19-CV-1227, and *Landmark Hospital of Savannah*, No. 1:19-CV-1228, 2020 WL 999454 (D.D.C. March 2, 2020).

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