Fiscal Intermediaries Do Not Have Authority to Make or Change Agency Policy

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With fiscal intermediaries doing so much of the heavy lifting for the federal government in the administration of the Medicare program, it is natural for providers to become somewhat confused as to the boundaries and parameters of a fiscal intermediary’s authority when it comes to speaking on the Secretary’s behalf. Providers may question whether they can safely rely on a fiscal intermediary’s instructions, even if those instructions run a bit contrary to the Secretary’s policy.

The simple answer is that “a fiscal intermediary can neither definitively interpret regulations nor make policy pronouncements” and that relying on an intermediary’s instructions, especially ones which run afoul of the Secretary’s established rules, “misapprehends the nature of the relationship between the Fiscal Intermediary and the Secretary.” Monongahela Valley Hospital, Inc. v. Sullivan, 945 F.2d 576, 589 (3d Cir. 1991). Fiscal intermediaries are “confined to the mere application of the Secretary’s regulations.” Bethesda Hosp. Ass’n, 485 U.S. 399, 404 (1988). “Intermediary interpretations are not binding on the Secretary, who alone makes policy.” County of LA v. Leavitt, 521 F.3d 1073, 1079 (9th Cir. 2008).

Where providers have mistakenly relied on the advice of a fiscal intermediary rather than obtaining a policy answer from the Secretary, the courts have gone so far as to admonish the providers for their reliance. In Heckler v. Community Health Services, 467 U.S. 51 (1984), the provider received oral advice from a fiscal intermediary regarding cost reports, but was told later by the Secretary that such advice was erroneous. When the providers attempted to argue that their reliance was reasonable, the Supreme Court showed little sympathy. “As the recipient of public funds well acquainted with the role of a fiscal intermediary, respondent knew [the fiscal intermediary] only acted as a conduit; it could not resolve policy questions.” Id. at 64. The Court even criticized the provider, as it had “made no attempt to have the question resolved by the Secretary; it was satisfied with the policy judgment of a mere conduit.” Id. at 65.

Courts consistently hold that stipulations entered into between the provider and the fiscal intermediary before the Provider Reimbursement Review Board (PRRB) do not bind the Secretary, which is not a party to the hearing. Howard Young Med. Ctr., Inc. v. Shalala, 207 F.3d 437, 443 (7th Cir. 2000). As one court stated in its opinion, “the intermediary’s position is not the Secretary’s” and statements made by intermediaries or their counsel in board proceedings do not constitute a representation of “an authoritative departmental position.” Appalachian Reg’l Healthcare, Inc. v. Shalala, 131 F.3d 1050, 1053 n. 4 (D.C. Cir. 1997).

No one can effectively modify or create policy except the Secretary herself, and any attempt by the fiscal intermediaries to instruct providers otherwise will be deemed invalid by the courts. Thus, where the Secretary has not created a rule or policy to support the instruction of an intermediary, a provider should seek clarification from the Secretary. Also, when planning evidence to present before the PRRB, present evidence of the facts you need to prove by documents or testimony instead on relying upon stipulations of fact.

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