

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN HOSPITAL ASSOCIATION, *et al.*,

Plaintiffs,

v.

THOMAS E. PRICE, M.D., in his official capacity
as SECRETARY OF HEALTH AND HUMAN
SERVICES,

Defendant.

Civil Action No. 14-cv-00851 (JEB)

STATUS REPORT

The Court's Order granting a writ of mandamus instructed the Department of Health and Human Services (HHS) to "file status reports with the Court every 90 days." Order of Dec. 5, 2016 (ECF No. 47). This Court's accompanying Memorandum Opinion specified that these status reports should "communicate HHS's progress in reducing the backlog [of appeals pending before the Office of Medicare Hearings and Appeals] and should include updated figures for the current and projected backlog, as well as a description of any significant administrative and legislative actions that will affect the backlog." Memorandum Opinion of Dec. 5, 2016 at 7 (ECF No. 48). Defendant's appeal of the Court's Order is pending before the D.C. Circuit.

In accordance with this Order, Defendant Thomas E. Price, M.D., in his official capacity as Secretary of Health and Human Services,¹ provides the following status report.

The attached declaration of Norris Cochran, Acting Assistant Secretary for Financial Resources and Acting Chief Financial Officer of HHS, presents a table showing the impact of HHS's administrative initiatives on the total number of Medicare appeals pending before

¹ Pursuant to Fed. R. Civ. P. 25(d), Secretary Price is substituted in his official capacity as the defendant in this action.

OMHA. Cochran Decl., Ex. 1. The administrative initiatives are those previously described to the Court through the declarations of Ellen G. Murray, Mr. Cochran's predecessor, including: CMS hospital appeals settlements; OMHA settlement conference facilitations; Recovery Audit program modifications; prior authorization initiatives; expanded on-the-record adjudications; senior ALJ program; statistical sampling for increased efficiencies; QIC discussion demonstration; and settlement conference facilitation for state Medicaid Agencies. *See id.* ¶ 5; Murray May Decl. ¶¶ 19, 21 (ECF No. 30-1, May 25, 2016); Murray November Decl. ¶¶ 12-26 (ECF No. 41-1, Nov. 7, 2016).

Ms. Murray had also previously provided the Court with projections of the effect of certain legislative initiatives on the backlog. As Mr. Cochran explains, HHS is unable at this time to provide similar projections based on anticipated legislative actions, because the 114th Congress adjourned without taking actions that would impact the backlog, and the previous legislative proposals were from a prior Administration. Cochran Decl. ¶ 6. Mr. Cochran emphasizes, however, that the new Administration is committed to addressing the backlog of Medicare appeals while ensuring the integrity of the Medicare Trust Funds through reimbursing only those claims that are proper for payment, and that HHS intends to work closely with members of Congress to enact reforms to the Medicare appeals process. *Id.*

As of March 5, 2017, there are 667,326 pending appeals at the Office of Medicare Hearings and Appeals (OMHA). *Id.*, Ex. 1. HHS projects the number of pending appeals to be 687,382 by the end of FY 2017 (September 30, 2017), 714,347 by the end of FY 2018 (September 30, 2018), 788,493 by the end of FY 2019 (September 30, 2019), 882,437 by the end of FY 2020 (September 30, 2020), and 1,009,768 by the end of FY 2021 (September 30, 2021). *Id.*; *accord, id.* ¶ 5. HHS thus now projects a somewhat greater number of pending appeals in

the coming years than HHS had anticipated in the projections that it previously had submitted to the Court.

These revised projections are due to several factors. Notably, although HHS had reopened an administrative initiative for the settlement of hospital settlements, providers' interest in participating in this initiative has been significantly lower than what was expected. In addition, HHS's settlement discussions with one State Medicaid agency, which could have resolved a large number of pending appeals, have reached an impasse. Cochran Decl. ¶ 8. This reduction in the projected interest in these initiatives appears to be prompted in part by some providers' anticipation that the Court-ordered relief will result in larger payments to them. *See id.* ¶ 9.

Although the initiatives undertaken by HHS have significantly slowed the growth of the backlog, the significant annual reductions that this Court has directed are not possible given current funding and legislative authorities. As Defendant explained in seeking reconsideration of that order and as he explains in support of his pending appeal, OMHA cannot resolve on the merits the number pending claims necessary to meet the ordered reductions without substantial new resources and authorities, and OMHA would violate its statutory obligations if it were to resolve cases without deciding them on the merits. *See Cochran Decl.* ¶ 10; *see also* Def.'s Mot. for Reconsideration (ECF No. 49, Dec. 15, 2016); Br. for the Appellant, *AHA v. Price*, No. 17-5018 (D.C. Cir. Feb. 21, 2017). Likewise, HHS could not, consistent with its statutory responsibilities, resolve the backlog by settling claims without regard to the merits of those claims. *See id.* Nonetheless, HHS is committed to exercising its best efforts to reduce the backlog of Medicare appeals, including pursuing legislative solutions. Cochran Decl. ¶ 6.

March 6, 2017

Respectfully submitted,

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