

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DEPARTMENTAL APPEALS BOARD

DECISION OF MEDICARE APPEALS COUNCIL
Docket Number: M-2010-279

In the case of

Maxxim Care, EMS
(Appellant)

(Beneficiaries)

TrailBlazer Health
Enterprises, LLC
(Contractor)

Claim for

Supplementary Medical
Insurance Benefits (Part B)

(HIC Numbers)

(ALJ Appeal Number)

The Medicare Appeals Council has decided, on its own motion, to review the Administrative Law Judge's (ALJ's) decision dated September 30, 2009, because there is an error of law material to the outcome of the case and because the decision is not supported by the preponderance of the evidence in the record. See 42 C.F.R. § 405.1110.

The ALJ's decision concerned an overpayment assessed against the appellant following a post-payment audit of claims for ambulance transport services provided to Medicare beneficiaries on various dates of service from August 18, 2003, through September 30, 2006. TriCenturion, a Program Safeguard Contractor (PSC), audited a random sample of thirty claims (involving ninety-two line items), filed by the appellant for Medicare coverage of ambulance services provided to seventeen beneficiaries. Based on the audit results, TriCenturion calculated a 100-percent error rate and extrapolated its findings to the universe of 3,941 claims, resulting in a projected overpayment of \$1,051,325.92. The ALJ found that the appellant had been overpaid with respect to twenty-five of the thirty sampled claims. The ALJ further found that the sampling plan and methodology used by the PSC were unreliable and invalid. For these reasons, the ALJ "set aside" TriCenturion's "overpayment

estimation." However, the ALJ further determined that TriCenturion was not "precluded from taking corrective action to refigure the overpayment estimation" consistent with the options provided at section 3.10.9 of the Medicare Program Integrity Manual (MPIM) (CMS Pub. 100-08). See Dec. at 18-19; see also Attachment A to the ALJ Decision.

Where coverage was denied, the ALJ indicated that the denials were based upon section 1861(s)(7) of the Social Security Act (Act), i.e., coverage was not available because the appellant had not demonstrated that other methods of transportation were contraindicated. Consequently, the ALJ reasoned that "the waiver of liability" (waiver of recoupment of an overpayment) provisions in section 1870 of the Act did not apply to the appellant. Thus, the appellant remained liable for the costs of the non-covered services. Dec. at 19.

The Council has considered the record before the ALJ, as well as the memorandum from the Centers for Medicare & Medicaid Services (CMS) dated November 20, 2009, and the appellant's response to the CMS memorandum, dated December 17, 2009. The Council has admitted the CMS memorandum and the appellant's response to the memorandum into the record as Exhs. MAC-1 and MAC-2.

As explained below, the Council concludes that the ALJ erred by invalidating the sampling methodology used by the PSC. Accordingly, we reverse the ALJ's decision as to this issue. CMS did not seek Council review of the ALJ's findings regarding Medicare coverage of the sampled claims at issue; therefore, we do not disturb the ALJ's findings on coverage of the sampled claims or the appellant's liability for those overpayments. See Exh. MAC-1, at 1 and 10.

BACKGROUND AND PROCEDURAL HISTORY

By letter dated June 11, 2007, the PSC first notified the appellant of the overpayment. ALJ Master File, Exh. 2A¹ at 99. The PSC indicated that it had extrapolated the results of its

¹ The ALJ Master File is accompanied by two Exhibit Lists identified as "Description - Master File." The first Exhibit List consists, entirely, of an Exhibit 1, identified as "Procedural Documents" with a 162-page range. The second Exhibit List consists of an Exhibit 2A, and Exhibits 2B-11. Exhibit 2A is, evidently, the Procedural Documents in the original Exhibit 1. The citations in the ALJ decision and in the Council's decision are to the second list.

review of 30 sampled claims to a universe of 3,941 claims and calculated an overpayment of \$1,051,325.92. ALJ Master File, Exh. 2A at 99. The Medicare carrier requested repayment of the overpayment by letter originally dated June 27, 2007.² ALJ Master File, Exh. 2A at 85. The carrier upheld the overpayment in a redetermination dated October 15, 2007. *Id.* at 62. On June 3, 2008, the Qualified Independent Contractor (QIC) issued an unfavorable decision on reconsideration. *Id.* at 21. The appellant filed a timely request for an ALJ hearing.

Before the ALJ, the appellant was represented by counsel, as it has been throughout the appeals process. The ALJ conducted a pre-hearing telephone conference on May 19, 2009. At the conclusion of the conference, the ALJ permitted the appellant an opportunity to file a brief. Dec. at 12; see also ALJ Master File, Exh. 6. On July 16, 2009, the ALJ conducted a hearing, also by telephone, during which Dr. Will Yancey, the appellant's former President³ and a statistician, testified for the appellant. The successor to TriCenturion, Health Integrity, LLC⁴ (Health Integrity), represented by attorney Jeffrey Craig, offered the testimony of its statistician, Dr. Greg Dobbins. Additionally, the ALJ retained an independent statistician, Dr. Mansfield W. Williams, who submitted a written report on the audit (see Exh. 2B) and testified at the hearing. The statisticians' testimony addressed the sampling methodology employed by TriCenturion. Dec. at 1-2.

During the course of the hearing the ALJ discovered that the appellant did not have the statistical information necessary to properly review the statistical issues presented in this case. Health Integrity agreed to provide that information to the appellant, on encrypted discs.⁵ The ALJ permitted each expert an

² The carrier's letter has an original typed date of "June 27, 2007." Above this date is the handwritten notation "Remailed 7-12-07." Other handwritten notations on the letter indicate changes to the typed address and the FedEx Number. See ALJ Master File Exh. 2A at 85.

³ The appellant is apparently no longer in business. Pre-Hearing CD (May 19, 2009).

⁴ Health Integrity, LLC, is the Zone 4 Program Integrity Contractor (ZPIC). Health Integrity assumed the work of the PSC effective February 1, 2009. See Exh. MAC-1 at 2, n.1; ALJ Hearing CD (July 16, 2009) at approx. minutes 8 to 12.

⁵ Because the ALJ did not enter the discs into the record, the Council has entered them into the record as Exh. MAC-3. They are retained in the ALJ Master File.

opportunity to submit post-hearing written comment on the sampling methodology based upon their review of this information. Dr. Williams and Dr. Yancey each made comments, which are found at ALJ Master File, Exh. 8.

On September 30, 2009, the ALJ issued a decision partially favorable to the appellant. Based on the applicable Medicare coverage criteria for ambulance services, the ALJ first found that the appellant had been properly reimbursed with regard to five of the thirty claims in issue, but overpaid for the remaining twenty-five claims.⁶ Dec. at 10-11 and 20-29; see also ALJ Decision, Attachment A. The ALJ reasoned that the "waiver of liability" provisions at section 1870 of the Act did not apply to the appellant. Thus, the appellant remained liable for the costs of the non-covered services associated with the twenty-five claims. Dec. at 19.

The ALJ couched his consideration of the sampling question as a due process issue. The ALJ indicated that he was required to ensure that the sampling methodology "withstood scrutiny under Amendment V of the United States Constitution." Relying upon *Matthews v. Eldridge*, 424 U.S. 319 (1976), the ALJ reasoned that he had to balance three factors in assessing due process:

(1) the private interest . . . affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Dec. at 12.

The ALJ first noted that TriCenturion⁷ had failed to address the appellant's contention regarding the authority to reopen the initial determination and redetermination pursuant to 42 C.F.R. § 405.980. Dec. at 17. The ALJ determined that the sampling in issue was "not sufficiently reliable to withstand scrutiny under a due process analysis." Dec. at 19. The ALJ recounted the testimony of the three statistical experts. Dec. at 13-17.

⁶ CMS erroneously identified the number of claim overpayments found by the ALJ as twenty-seven. Compare Exh. MAC-1 at 3 and ALJ Decision, Attachment A.

⁷ The ALJ referred to TriCenturion, and not Health Integrity, as the PSC.

Both the independent expert and the appellant's expert questioned the validity of an extrapolation of the sample data, primarily because they did not find the thirty-claim sample to be representative of the larger universe of claims. *Id.* at 13-14 and 16-17; see also ALJ Master File, Exh. 2B at 3 and Exh. 8 at 2-7.

The ALJ then indicated that he was:

not confident that the sampling is representative and reliable enough to adequately protect any due process concerns. The fact that the study was unable to be replicated by the appellant's expert or the independent expert, leads . . . [to the conclusion] that there is a sufficient risk of erroneous deprivation to trigger due process protections.

Dec. at 17.

The ALJ concluded that the overpayment determination was invalid because the thirty-claim sample was not representative of the population of claims. *Id.* at 18.

However, the ALJ then reasoned that, pursuant to section 3.10.9 of the MPIM, TriCenturion had three options for revising the estimated overpayment. Generally, those options were revising the overpayment after correcting the sampling methodology; recovering the amount actually overpaid and initiating a new review (eliminating the recovered sampling units from any new sample); and not recovering any of the current overpayment in the sampled claims and conducting a new review for the same time period using a valid sampling methodology. *Id.*

CMS referred this case for the Council's own motion review. CMS argues that the ALJ's conclusion that the statistical sampling and extrapolation were invalid is not supported by a preponderance of evidence in the record. Exh. MAC-1 at 1. Generally, CMS asserts that the appellant's, and the ALJ's, due process concerns were remedied by the PSC's post-hearing provision of the statistical sampling information to the appellant. Further, CMS asserts that TriCenturion conducted a statistically valid random sample in accordance with CMS instructions. Exh. MAC-1 at 14.

In response, the appellant asserts that, based upon a preponderance of the evidence, the ALJ correctly found that the

sample was invalid. Further, the appellant contends that the ALJ did not make his determination based on "due process" such that "due process" could be remedied by the PSC submission of the sampling information. Rather, the appellant argues that if "the sample does not represent the universe, then the appellant is not afforded due process, the process due in ensuring the contractor performs a 'proper' sample calculation and extrapolation. Without **this** due process, any old number will do for the sample, and for the extrapolation." Exh. MAC-2 at 1-2 (emphasis in original).

LEGAL AUTHORITIES

Reopening Initial Determinations

The regulation at 42 C.F.R. § 405.980 provides a stratified structure for reopening. A CMS contractor may reopen an initial determination or redetermination. 42 C.F.R. § 405.980(a)(1)(i). An ALJ's or the Council's authority to reopen is limited, respectively, to a revision of ALJ hearing decisions and hearing and Council decisions (by the Council). 42 C.F.R. §§ 405.980(a)(1)(iii) and (iv). Notably, neither the ALJ, nor the Council, has any authority to reopen or revise an initial determination or redetermination.

The regulation at 42 C.F.R. § 405.926 sets forth actions that are not initial determinations and not appealable. Included among them is a "contractor's . . . decision to reopen or not reopen an initial determination." 42 C.F.R. § 405.926(1). This lack of jurisdiction extends to whether the contractor met good cause standards for reopening in 42 C.F.R. § 405.980(b)(2). The regulation at 42 C.F.R. § 405.980(a)(5) further states that "[t]he contractor's, QIC's, ALJ's, or [the Council's] decision on whether to reopen is final and not subject to appeal."

The regulation at 42 C.F.R. § 405.980(b) establishes the time frame for reopening initial determinations and redeterminations initiated by a contractor. Section 405.980(b) provides, in part:

A contractor may reopen and revise its initial determination or redetermination on its own motion -

- (1) Within 1 year from the date of the initial determination or redetermination for any reason.

(2) Within 4 years from the date of the initial determination or redetermination for good cause as defined in § 405.986.

(3) At any time if there exists reliable evidence as defined in § 405.902 that the initial determination was procured by fraud or similar fault as defined in § 405.902.⁸

The regulation addressing good cause for reopening, 42 C.F.R. § 405.986, provides, in part:

(a) Good cause may be established when -

(1) There is new and material evidence that -

(i) Was not available or known at the time of the determination or decision; and

(ii) May result in a different conclusion; or

(2) The evidence that was considered in making the determination or decision clearly shows on its face that an obvious error was made at the time of the determination or decision. . . .

When conducting a post-payment review of claims, contractors must adhere to reopening rules. MPIM, Ch. 3, § 3.6.B. However, neither the ALJ, nor the Council, has jurisdiction to review that aspect of the contractor's action. A contractor's decision on whether to reopen is final and not subject to appeal. 42 C.F.R. §§ 405.926(1); 405.980(a)(5). This restriction extends regardless of whether the contractor met the good cause standards for reopening set forth in 42 C.F.R. § 405.980(b)(2).

In the Final Rule, effective January 8, 2010, CMS stated:

Contractors are required to follow Federal laws, regulations and manual instructions . . . our regulations require that contractors abide by the good

⁸ "Similar fault" is defined in 42 C.F.R. § 405.902, in part, as "to obtain, retain, convert, seek, or receive Medicare funds to which a person knows or should reasonably be expected to know that he or she or another for whose benefit Medicare funds are obtained, retained, converted, sought, or received is not legally entitled."

cause standard for reopening . . . CMS conducts audits and evaluations of contractor performance in order to assess compliance with Medicare policies. Thus, the necessary monitoring and enforcement mechanisms are . . . in place.

74 Fed. Reg. 65,296, 65,312 (Dec. 9, 2009).

Statistical Sampling

CMS (formerly HCFA) Ruling 86-1 describes the agency's policy on the use of statistical sampling to project overpayments to Medicare providers and suppliers. The Ruling also outlines the history and authority, both statutory and precedential, for the use of statistical sampling and extrapolation by CMS in calculating overpayments. We incorporate that discussion by reference here. The Ruling provides, in part:

Sampling does not deprive a provider of its rights to challenge the sample, nor of its rights to procedural due process. Sampling only creates a presumption of validity as to the amount of an overpayment which may be used as the basis for recoupment. The burden then shifts to the provider to take the next step. The provider could attack the statistical validity of the sample, or it could challenge the correctness of the determination in specific cases identified by the sample (including waiver of liability where medical necessity or custodial care is at issue). In either case, the provider is given a full opportunity to demonstrate that the overpayment determination is wrong. If certain individual cases within the sample are determined to be decided erroneously, the amount of overpayment projected to the universe of claims can be modified. If the statistical basis upon which the projection was based is successfully challenged, the overpayment determination can be corrected.

CMS Ruling 86-1-9 & 86-1-10.

CMS's sampling guidelines are found in chapter 3 of CMS's Medicare Program Integrity Manual (MPIM), Pub. 100-08, section 3.10. The guidelines reflect the perspective that the time and expense of drawing and reviewing the claims from large sample sizes and finding point estimates which accurately reflect the estimated overpayment with relative precision may

not be administratively or economically feasible for contractors performing audits. Instead, the guidelines allow for smaller sample sizes and less precise point estimates, but offset such lack of precision with direction to the carriers to assess the overpayment at the lower level of a confidence interval - generally, the lower level of a ninety-percent one-sided confidence interval. This results in the assumption, in statistical terms, that there is a ninety-percent chance that the actual overpayment is higher than the overpayment which is being assessed, thus giving the benefit of the doubt resulting from any imprecision in the estimation of the overpayment to the appellant, not the agency. As a result of the above policy decision, the question becomes whether the sample size and design were sufficiently adequate to provide a meaningful measure of the overpayment, and whether the provider/supplier is treated fairly despite any imprecision in the estimation.

The MPIM provides guidance to contractors in conducting statistical sampling for use in estimating overpayment amounts. The instructions are intended to ensure that a statistically valid sample is drawn and that statistically valid methods are used to project overpayments where review of claims indicates that overpayments have been made. The MPIM describes the purpose of its guidance as follows:

These instructions are provided so that a sufficient process is followed when conducting statistical sampling to project overpayments. Failure by the PSC or the ZPIC BI unit or the contractor MR unit to follow one or more of the requirements contained herein does not necessarily affect the validity of the statistical sampling that was conducted or the projection of the overpayment. An appeal challenging the validity of the sampling methodology must be predicated on the actual statistical validity of the sample as drawn and conducted. **Failure by the PSC or ZPIC BI units or the contractor MR units to follow one or more requirements may result in review by CMS of their performance, but should not be construed as necessarily affecting the validity of the statistical sampling and/or the projection of the overpayment.**

MPIM, Ch. 3, § 3.10.1.1 (emphasis added).

The MPIM further provides that a contractor may employ any sampling methodology that results in a "probability sample."

The MPIM explains:

[The contractor] shall follow a procedure that results in a probability sample. For a procedure to be classified as probability sampling the following two features must apply:

- It must be possible, in principle, to enumerate a set of distinct samples that the procedure is capable of selecting if applied to the target universe. Although only one sample will be selected, each distinct sample of the set has a known probability of selection. It is not necessary to actually carry out the enumeration or calculate the probabilities, especially if the number of possible distinct samples is large - possibly billions. It is merely meant that one could, in theory, write down the samples, the sampling units contained therein, and the probabilities if one had unlimited time; and
- Each sampling unit in each distinct possible sample must have a known probability of selection. For statistical sampling for overpayment estimation, one of the possible samples is selected by a random process according to which each sampling unit in the target population receives its appropriate chance of selection. The selection probabilities do not have to be equal but they should all be greater than zero. In fact, some designs bring gains in efficiency by not assigning equal probabilities to all of the distinct sampling units.

For a procedure that satisfies these bulleted properties it is possible to develop a mathematical theory for various methods of estimation based on probability sampling and to study the features of the estimation method (i.e., bias, precision, cost) although the details of the theory may be complex. **If a particular probability sample design is properly executed, i.e., defining the universe, the frame, the sampling units, using proper randomization, accurately measuring the variables of interest, and using the correct formulas for estimation, then assertions that the sample and its resulting estimates are "not**

statistically valid" cannot legitimately be made. In other words, a probability sample and its results are always "valid." Because of differences in the choice of a design, the level of available resources, and the method of estimation, however, some procedures lead to higher precision (smaller confidence intervals) than other methods. A feature of probability sampling is that the level of uncertainty can be incorporated into the estimate of overpayment as is discussed below.

MPIM, Ch. 3, § 3.10.2 (emphasis added). The MPIM recognizes that a number of sampling designs are acceptable, including: simple random sampling, systematic sampling, stratified sampling, and cluster sampling, or a combination of these. MPIM, Ch. 3, at § 3.10.4.1. Stratified sampling is a design that "involves classifying the sampling units in the frame into non-overlapping groups or strata. The objectives are to "define the strata in a way that will reduce the margin of error in the estimate below that which would be attained by other sampling methods, as well as to obtain an unbiased estimate or an estimate with an acceptable bias." MPIM, Ch. 3, § 3.10.4.1.3. This section continues providing that "the independent random samples from the strata need not have the same selection rates." *Id.*

The MPIM provides the following guidance with respect to selecting the sample size:

The size of the sample (i.e., the number of sampling units) will have a direct bearing on the precision of the estimated overpayment, but it is not the only factor that influences precision. The standard error of the estimator also depends on (1) the underlying variation in the target population, (2) the particular sampling method that is employed (such as simple random, stratified, or cluster sampling), and (3) the particular form of the estimator that is used (e.g., simple expansion of the sample total by dividing by the selection rate, or more complicated methods such as ratio estimation). It is neither possible nor desirable to specify a minimum sample size that applies to all situations. A determination of sample size may take into account many things, including the method of sample selection, the estimator of overpayment, and prior knowledge (based on experience) of the variability of the possible overpayments that

may be contained in the total population of sampling units.

In addition to the above considerations, real-world economic constraints shall be taken into account. As stated earlier, sampling is used when it is not administratively feasible to review every sampling unit in the target population. In determining the sample size to be used, the PSC or ZPIC BI unit or the contractor MR unit shall also consider their available resources. That does not mean, however, that the resulting estimate of overpayment is not valid, so long as proper procedures for the execution of probability sampling have been followed. **A challenge to the validity of the sample that is sometimes made is that the particular sample size is too small to yield meaningful results. Such a challenge is without merit as it fails to take into account all of the other factors that are involved in the sample design.**

MPIM, Ch. 3, § 3.10.4.3 (emphasis added).

The MPIM further provides that:

If the decision on appeal upholds the sampling methodology but reverses one or more of the revised initial claim determinations, the estimate of overpayment shall be recomputed **and a revised projection of overpayment issued.**

MPIM, Ch. 3, at § 3.10.9.2 (emphasis added).

DISCUSSION

After consideration of the evidence, the ALJ's reasoning and the parties' arguments, the Council finds that - the audit-sample upon which this overpayment was based was methodologically valid; the appellant had an opportunity to review and comment upon the PSC's sampling information, which resolved any due process concerns; and the appellant did not demonstrate that the sample was invalid.

As an initial matter, we note that the ALJ acknowledged, but did not directly address, the appellant's contention that CMS had not demonstrated "good cause" for the reopening and that "TriCenturion's representatives failed to address the issue."

See Dec. at 13 and 17; see also ALJ Master File, Exh. 6 at 12. The ALJ apparently treated this contention as a due process concern, finding that the defects in the sample compromised the appellant's due process rights. As a point of clarification, a contractor's decision on whether to reopen is final and not subject to administrative review. 42 C.F.R. § 405.980(a)(5). Moreover, the parallel regulation at 42 C.F.R. § 405.926(l) states that a contractor's determination to reopen or not to reopen is not an initial determination, and is, therefore, not appealable. Therefore, neither the ALJ, nor the Council, has the authority to review a contractor's decision to reopen the determination. The restriction against reviewing the contractor's decision whether to reopen an initial determination extends to whether or not the contractor met the good cause standards for reopening set forth in 42 C.F.R. § 405.980(b)(2).

The Council need not find that CMS or its contractor undertook statistical sampling and extrapolation based on the most precise methodology that might be devised in order to uphold an overpayment extrapolation based on that methodology. Rather, as the above-quoted authorities make clear, the test is whether the methodology is statistically valid. The ALJ found that the statistical sample was invalid because he was "not confident that the sampling is representative and reliable enough to adequately protect any due process concerns." Dec. at 17. CMS argues that applicable guidance, including CMS Ruling 86-1 and the MPIM, establishes that the reasons cited by the ALJ in support of his decision to invalidate the sampling methodology in this case do not, in fact, demonstrate that the methodology was invalid. See Exh. MAC-1 at 14. CMS further argues that the ALJ erred in placing the burden on TriCenturion to demonstrate that the sampling methodology was appropriate, and not the appellant, to demonstrate that the methodology was invalid. Exh. MAC-1 at 9.

The Council finds CMS's arguments well-founded. As stated in CMS Ruling 86-1, the use of statistical sampling "creates a presumption of validity as to the amount of an overpayment which may be used as the basis for recoupment." The Ruling goes on to state that "the burden then shifts to the provider to take the next step." Thus, the provisions of CMS Ruling 86-1 establish that the burden is on the appellant to prove that the statistical sampling methodology was invalid, and not on the contractor to establish that it chose the most precise methodology. Therefore, the ALJ erred to the extent that he concluded that TriCenturion's sampling methodology and

extrapolation were invalid based on TriCenturion's failure to explain why it did not select a larger sample size or undertake stratified sampling.⁹

The appellant's argument, before considering the information underlying TriCenturion's statistical methodology, in essence, was that the sample was not drawn as the appellant would have drawn it. The appellant's position did not change after considering this information. This argument, alone, does not provide a basis for the Council to find the sample invalid. The appellant failed to offer any affirmative evidence demonstrating that TriCenturion's sampling methodology did not comport with the guidelines established by CMS Ruling 86-1 and the MPIM.

Based on the foregoing, we conclude that the ALJ erred in finding the PSC's sampling methodology and overpayment extrapolation invalid.

LIABILITY

As noted above, with regard to the overpaid claims, the ALJ reasoned that section 1870 did not apply to waive the appellant's liability for the overpayment assessed for the non-covered services. Dec. at 19. As the ALJ appears to have conflated the limitation on liability provision in section 1879 of the Act and the waiver of recoupment provision in section 1870 of the Act, the Council addresses the distinction between these sections, below.

Limitation on Liability - Section 1879

Section 1879 of the Act limits a provider's liability where it did not know, and could not reasonably be expected to know, that Medicare would not cover the services at issue. However, as a provider participating in the Medicare program, the appellant is

⁹ During the ALJ hearing, the appellant's expert raised a concern that the sampled ambulance services did not accurately account for the various types of services provided. Additionally, the appellant's expert noted that the financial scope of the overpayment associated with mileage was disproportionate to the financial scope of the overpayment associated with the transport services. The independent expert expressed similar concerns in his written submission. ALJ Master File, Exh. 8 at 2-5. There is no merit to this position, as the mileage payment for a transport service is derivative of the transport service. The audit review otherwise concerned the appellant's claims for Medicare coverage for ambulance services over a period. There has been no demonstration that the sample is not reflective of the claimed services provided by the appellant during the period at issue.

considered to have constructive knowledge of CMS manual instructions, bulletins, contractors' written guides, and directives. Medicare Claims Processing Manual (MCPM), CMS Pub. 100-04, Ch. 30, §§ 40.1, 40.1.1. The ALJ determined that coverage would be denied because other means of transport were not contraindicated. This is a denial under section 1861(s)(7) of the Act and, for this reason, section 1879 of the Act does not apply to waive the appellant's liability for the non-covered costs.

Waiver of Recoupment of Overpayment - Section 1870

Section 1870 of the Act allows for a waiver of recoupment of an overpayment to a provider if it is without fault in incurring the overpayment. A provider is without fault if it exercised reasonable care in billing and accepting Medicare payment. Medicare Financial Management Manual (MFMM), CMS Pub. 100-06, Ch. 3, § 90. The MFMM further explains that the provider should have known about a policy or rule if the policy or rule is in the provider manual or in the regulations. *Id.* at 90.1. In this case, there is no evidence that the appellant was without fault in creating the overpayment. As the appellant was not "without fault" in creating the overpayment, no waiver of recoupment of the overpayments is warranted.

FINDINGS

- The ALJ determined, correctly, that the claims identified in Attachment A to the Council's decision **are not covered** by Medicare. *See also* ALJ Decision, Attachment A.
- The ALJ determined, correctly, that the claims identified in Attachment B to the Council's decision **are covered** by Medicare. *See also* ALJ Decision, Attachment A.
- The appellant's had an opportunity to review and comment upon, post-hearing, TriCenturion's sampling methodology, which resolved any due process issues raised at the ALJ hearing.
- The appellant was not without fault in creating the overpayments. Consequently, no waiver of recoupment of the overpayments is warranted under section 1870 of the Act.
- The sampling methodology employed by TriCenturion was valid.
- Mechanically, the overpayment was correctly calculated.

- The overpayment must be recalculated to reflect the ALJ's findings that the claims identified in Attachment B to the Council's decision **are covered** by Medicare.

DECISION

It is the decision of the Medicare Appeals Council that the ALJ erred in finding the PSC's sampling methodology and overpayment extrapolation invalid. The appellant failed to prove that the statistical sampling and overpayment extrapolation methodology employed by the PSC in this case was invalid. We therefore reverse that part of the ALJ's decision holding that no extrapolated overpayment amount may be assessed. We affirm the ALJ's coverage findings as to the sampled claims and the appellant's liability for the overpayment.

MEDICARE APPEALS COUNCIL

/s/ Susan S. Yim
Administrative Appeals Judge

/s/ M. Susan Wiley
Administrative Appeals Judge

Date: February 25, 2010