No. 10-56529

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PALOMAR MEDICAL CENTER,
Plaintiff/Appellant,

vs.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Defendant/Appellee.

SECOND *AMICUS CURIAE* BRIEF OF THE CALIFORNIA HOSPITAL ASSOCIATION IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL OF JUDGMENT

On Appeal From August 2, 2010 Judgment of the
United States District Court for the Southern District of California

The Honorable Roger T. Benitez, United States District Judge
U.S. District Court Case No. 09-cv-0605-BEN (NLS)

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AMICUS CURIAE DISCLOSURE STATEMENTS

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, the undersigned counsel for *amicus curiae* the California Hospital Association ("CHA") hereby certifies as follows:

- CHA is a non-profit corporation that has no issued stock and has no parent corporation or owners; and
- A party's counsel did not author *amicus curiae*'s brief in whole or in part; a party or a party's counsel did not contribute money that was intended to fund preparing or submitting *amicus curiae*'s brief; and no person – other than CHA, its members, or its counsel – contributed money that was intended to fund preparing or submitting *amicus curiae*'s brief.

DATED: April 13, 2012

Respectfully submitted,

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The California Hospital Association ("CHA") submits this *amicus* brief pursuant to the invitation in the Court's March 14, 2012 order. CHA has previously filed an amicus brief in this matter. That brief, however, focused on the critical importance of enforcing the time deadlines for reopening claims in light of the experience of California hospitals in the Recovery Audit Contractor ("RAC") demonstration project and did not address the questions posed by the Court in its March 12, 2012 order.

CHA addresses the Court's questions in the order presented by the Court.

I. Do the Regulations at 42 C.F.R. §§ 405.926(l) and 405.980(a)(5) Bar Administrative Review of a Contractor's Decision to Reopen a Medicare Claim, Including the Contractor's Compliance with the Good Cause Standard for Reopening Set Forth at 42 C.F.R. §§ 405.980(b)(2) and 405.986?

The answer is that "no," Sections 405.926(l) and 405.980(a)(5) plainly do not bar administrative review of a contractor's failure to comply with mandatory requirements for reopening a claim set forth in the Medicare regulations.

A. The Plain Language of the Regulations Permits Administrative Review

The language of the regulations is clear on this point. Section 405.926(l) states that an "initial determination" does not include "[a] contractor's . . . determination or decision to reopen or not to reopen an initial determination . . . ." Section 405.480(a)(5) (2005) states that "[t]he contractor's, QIC's, ALJ's, or MAC's decision on whether to reopen is final and not subject to appeal."

Nothing in the language of either regulation states that the question of whether a contractor reopened a claim on a timely basis, including showing good cause for reopening a claim between one and four years after it was initially paid, cannot be decided in an administrative appeal. Given the strong presumptions in favor of review, this should end the matter.

Section 405.926(l)'s statement that a decision to reopen or not to reopen a claim is not an initial determination precludes an appeal of precisely what it says, "the decision to reopen or not to reopen." Palomar Medical Center ("Palomar") does not seek review of the RAC's decision to reopen the claim at issue. Rather, Palomar seeks review of the question of whether the reopening was done on time.

Similarly, Section 405.980(a)(5) means what it plainly says, and no more. A contractor's decision on whether to reopen is final and not subject to appeal. Again, Palomar does not appeal the RAC's decision whether to reopen the claim at issue, only whether the reopening complied with the mandatory requirements of the reopening regulations.

CHA acknowledges that the question of whether a claim should be reopened is discretionary and insulated from appeal. This question could involve a variety of factors which the contractor has the discretion to balance, such as the extent to which the initial determination was erroneous, the amount at issue, the contractor's resources, whether the type of claim or issue is a priority of the contractor's or the

Medicare program to ensure correctness, and the solvency of the provider. However, the question of whether a contractor reopened a claim in a timely manner, including showing good cause where required, is not a matter of contractor discretion. Rather, Section 405.980(b) establishes mandatory rules for reopening that do not involve discretionary decisions. That these rules are mandatory is clear from the heading of the section, "Time frames and requirements for reopening initial determinations and redeterminations initiated by a contractor."

Thus, Section 405.980(b)(2) permits a reopening by a contractor after one year from the initial determination but within four years of the initial determination only "for good cause as defined in § 405.986." This requirement is mandatory and does not afford any discretion to the contractor. The contractor's compliance with these mandatory requirements is exactly the kind of question that is appropriate for administrative review as there is clear law to apply.

The regulations of the Secretary of Health and Human Services (the "Secretary") clearly establish the right to appeal from a revision to an initial determination that follows a reopening, and the Secretary does not dispute this point. Pursuant to 42 C.F.R. § 405.984(g), "A revised determination or decision is binding unless it is appealed or otherwise reopened."

Here, Palomar did just that. It appealed the revised determination of the RAC concerning the claim for reimbursement at issue. Having properly appealed

the revised determination, Palomar could raise all issues related to that revised determination that have not been expressly excluded from review, including whether the reopening and revision of the revised determination was timely and complied with the good cause requirement. *See*, *Cieutat v. Bowen*, 824 F.2d 348, 353 (5th Cir. 1987) (in which the Fifth Circuit noted that the basis for reviewing a denial of benefits following the reopening was not the decision respecting the reopening, but the decision denying benefits, and the review of that decision permitted review of the agency's compliance with the good cause limitation on reopening since the reopening forms the basis of the denial of benefits).

Thus, the reopening regulations' appeal bar does have significant effect. It prevents a party from challenging the discretionary decision of a contractor whether or not to reopen a claim and embroiling the administrative law judges, and ultimately the courts, in second guessing a contractor's balancing of the factors relevant to a reopening decision based on equitable or other similar grounds. It prevents a party from appealing until a revised determination of a claim is issued, so that a party cannot seek to prevent a redetermination from being issued after an initial determination has been reopened. This makes eminent sense, as there is no reason for an appeal of a reopening to go forward unless and until the payment determination is actually revised. But, the bar does not prevent a party from

obtaining administrative review of the contractor's compliance with the mandatory requirements for reopening a claim after a revised determination has been made.

B. Administrative Review is Consistent with Historical Agency Practice

Palomar discusses in detail relevant historical practices of the Secretary in interpreting and applying reopening language similar to that at issue here. To summarize, both the Social Security Administration ("SSA") and the Secretary have historically and consistently interpreted provisions similar to the reopening regulations at issue here to allow claimants to contest, upon appeal, the timeliness of reopening, including compliance with good cause requirements. Examples include:

1. The SSA Appeals Counsel permitted a party to raise the question of whether there was good cause for a reopening in an appeal of a revised decision following a reopening, and reversed the administrative law judge's decision that there had been good cause for the reopening. *Cole v. Barnhart*, 288 F.3d 149 (5th Cir. 2002). The Appeals Council applied a reopening provision that is almost identical to the regulations here.

2. The Secretary has repeatedly permitted Medicare providers to appeal the timeliness of the reopening of final determinations with respect to Medicare cost reports even though the applicable regulation (42 C.F.R. § 405.1885(a)(6)) states that a reopening decision "is not subject to further

administrative or judicial review." *See* Appellant Opening Br. 32-34 (citing administrative decisions).

3. The Medicare Appeals Council, in another decision involving Palomar, remanded an appeal to the ALJ for the purpose of hearing further evidence on the good cause issue raised by Palomar applying the very regulations that are at issue in this case. Such a remand would not have been made if the Secretary interpreted the regulations to preclude administrative review of the good cause issue.

C. Administrative Review of the Timeliness of Reopening is Consistent with the Policy Behind the Reopening Regulations

The Supreme Court has addressed the question of reopening prior determinations in *Califano v. Sanders*, 430 U.S. 99 (1977), and *Your Home Visiting Nurse Services, Inc. v. Shalala*, 525 U.S. 449 (1999). The issue in both cases was whether the denial of a reopening request was subject to review. The Court held it was not.

The policy underlying these decision speaks to administrative finality and avoiding end runs around the deadlines for appeal. If a denial of a reopening were appealable, a party who missed the deadline for appealing could simply request a reopening, and then appeal the denial. The Secretary noted in the preamble to the regulations in dispute that the reopening regulations are intended to promote administrative finality so that a party has a reasonable expectation as to the finality

of a decision. 70 Fed. Reg. 11,420, 11,453 (March 8, 2005). Similarly, the Supreme Court in *Your Home* cited as basis for its decision that the deadline to appeal a payment determination "would be frustrated by permitting requests to reopen to be reviewed indefinitely." 525 U.S. at 453-54.

These policies would be advanced and not frustrated by allowing administrative review of whether reopenings are made timely in an appeal of a revised determination. Ensuring that contractors are held to the time deadlines in the regulations for reopening claims would promote the finality of administrative determinations and allow interested parties to rely on these determinations. Rather, the Secretary's position frustrates the policy of administrative finality by essentially affording contractors the freedom to ignore the deadlines and good cause requirements of the reopening regulations, knowing that their decision to reopen after the deadline and without good cause cannot be appealed.

D. The Denial of Administrative Review Here Would Frustrate Congress' Intent

The enabling statute authorizes the Secretary to reopen or revise an initial determination "under guidelines established by he Secretary in regulations." 42 U.S.C. § 1395ff(b). The Secretary's regulatory guidelines establish clear time frames for reopening, including requiring good cause for reopening done between one and four years of the initial determination. Congress clearly intended that the Secretary could reopen only if consistent with her reopening regulations. By

precluding review of contractors' compliance with these regulations, the Secretary is encouraging contractors to ignore the time limits on reopening and the good cause requirement, and allowing contractors to reopen without complying with the Secretary's regulatory guidelines. This is clearly inconsistent with Congress' intent as reflected in Section 1395ff(b).

E. In View of the Foregoing, the Secretary's Interpretation of the Reopening Regulations Is Not Entitled to Deference

Deference is accorded an agency's interpretation of its own regulations if (1) the words of the regulation are reasonably susceptible to the agency's construction both on their face and in light of their prior interpretation and application, and (2) the agency's interpretation is consistent with and in furtherance of the purposes and policies embodied in the statute authorizing the regulation. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008).

Here, the Secretary's interpretation of the reopening regulations, which would preclude review of compliance with the good cause requirement, as discussed above, is inconsistent with the plain language of the regulations, is inconsistent with the Secretary's historical interpretation and application of provisions very similar to the reopening regulations involved in this case, and would frustrate Congress' intent of allowing reopening only in accordance with the Secretary's regulations. Accordingly, the Secretary's interpretation is not entitled to deference.

II. If the Regulations Bar Administrative Review of a Contractor's Decisions to Reopen, Do Federal Courts Have Jurisdiction To Enforce the Agency's Compliance with the Good Cause Standard for Reopening?

While CHA strongly believes the regulations do not bar administrative review, if the Court decides they do, the federal courts nevertheless have jurisdiction to enforce the Secretary's compliance with the good cause standard for reopening.

The Secretary concedes, as she must, that she does not have the authority to limit the federal courts' jurisdiction. Appellee Br. 49; *see also Miller v. FCC*, 66 F.3d 1140, 1144 (11th Cir. 1995). Accordingly, the Secretary could not foreclose federal court jurisdiction over the question of whether the reopening here complied with the good cause requirement even if she has foreclosed administrative review of this issue.

The Secretary's position would allow her to do indirectly what she is without power to do directly. The Secretary's position appears to be that she can deprive the federal courts of the jurisdiction to hear issues, in cases over which the courts have jurisdiction, by removing the issue from administrative review. If the Secretary is unable to limit federal court jurisdiction, she cannot effect a limitation through the device of limiting her own administrative review. Allowing the executive branch to limit federal court jurisdiction in this way would create significant separation of powers issues, as it would interfere both with the powers

of the judiciary branch and with the exclusive authority vested in Congress to limit federal court jurisdiction. U.S. Const. art. III, § 2.

Federal court jurisdiction to decide the case brought by Palomar is provided by 42 U.S.C. §§ 1395ff(b)(1)(A) and 405(g). Section 1395ff(b)(1)(A) states that judicial review of the Secretary's final decision concerning a Medicare claims appeal is as provided in 42 U.S.C. § 405(g). Section 405(g) provides that a party to an administrative hearing may obtain judicial review of the final agency decision by commencing a civil action.

The Supreme Court has made it clear that jurisdiction of the federal courts under Section 405(g) extends to all issues involved a matter, and not just to those contentions for which the Court has provided a hearing. In *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000), the court rejected the notion that Section 405(g) jurisdiction is issue specific, stating:

> "The fact that the agency might not provide a hearing for that particular contention, or may lack the power to provide one is beside the point because it is the 'action' arising under the Medicare Act that must be channeled through the agency. After the action has been so channeled, the court will consider the contention when it later reviews the action. And a court reviewing an agency determination under § 405(g) has adequate authority to resolve any statutory or institutional contention that the agency does not, or cannot, decide, including, where necessary, the authority to develop an evidentiary record."

Accordingly, the district court in this case had the authority to decide the good cause issue irrespective of the ability of Palomar to obtain administrative review of

the issue, as Palomar has channeled the relevant action (the appeal of the denial of the Medicare claim) through the agency resulting in a final decision.

There is a second line of cases that demonstrates the federal courts have jurisdiction to enforce the Secretary's good cause regulations. Pursuant to the "*Accardi* doctrine"[1] the federal courts always have the jurisdiction to enforce a federal agency's compliance with its own regulations in a case otherwise properly before the court. *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 n.48 (11th Cir. 1982), citing *Accardi*, 347 U.S. at 267; *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Mendez v. INS*, 563 F.2d 956, 959 (9th Cir. 1977); *Yee Dai Shek v. INS*, 541 F.2d 1067, 1069 (4th Cir. 1976). It is undisputed that the case here is properly before the federal courts. The courts, therefore, have the jurisdiction to enforce the Secretary's compliance with her own regulations, including the regulations requiring good cause for a reopening between one year and four years after an initial determination. *See* Federation of American Hospitals, *et al*. *Amicus Curiae* Br. 17-20 (discussing, in detail, the *Accardi* doctrine and its application here).

The Secretary relies on two Ninth Circuit decisions to contend that the jurisdiction of the federal courts is limited to the issues decided by the Secretary at

[1] This doctrine is named after the Supreme Court's decision in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

the administrative level: *Anaheim Memorial Hospital v. Shalala*, 103 F.3d 845 (9th Cir. 1997) and *Loma Linda Univ. Med. Ctr. v. Leavitt*, 492 F.3d 1065 (9th Cir. 2007). These decisions, however, are readily distinguishable.

Anaheim involved judicial review of a final decision of the Secretary concerning hospital reimbursement under 42 U.S.C. § 1395oo(f). The hospital asked the federal courts to decide an equitable tolling issue raised at the administrative level before the hearing body, the Provider Reimbursement Review Board, but not decided by that body. The Ninth Circuit decided it did not have the jurisdiction to review the issue because there was not a final agency decision addressing the issue. Thus, the Court remanded the matter to the Secretary for a final decision on the merits of the equitable tolling issue.

In *Loma Linda*, the hospital sought judicial review under Section 1395oo(f) of a final decision of the Secretary denying administrative jurisdiction to hear an issue concerning reimbursement of interest expense. The Court reversed the Secretary's determination concerning jurisdiction. The hospital asked the court to decide the substantive interest expense issue without a remand. The Court declined to do so, but instead remanded the matter to the Secretary for a final decision on the substantive merits. The Court stated that it did not have jurisdiction to decide the substantive issue since the Secretary had not decided that issue.

In both *Anaheim* and *Loma Linda* there was a final decision, but not a decision addressing the issue which the hospitals asked the court to decide. In each instance, the Court remanded the matter to the Secretary so that she could have the first opportunity to decide the issue. In the event the Secretary ruled against the hospital on remand, the hospital would then have the opportunity to obtain federal court review.

Here, in contrast, Palomar has received all of the administrative decision it will ever get concerning the good cause issue. The Secretary has issued a final decision concerning the good cause issue, and specifically denied the hospital's appeal of that issue, albeit because she decided the hospital did not have a right to appeal. The federal courts, therefore, have jurisdiction to decide the good cause issue pursuant to *Illinois Council*, and neither *Anaheim* nor *Loma Linda* compel a different result.

Further, neither *Anaheim* nor *Loma Linda* involved a claim seeking to enforce the Secretary's compliance with her own regulations. Thus, the *Accardi* doctrine was inapplicable to those two cases. Here, of course, Palomar seeks to require the Secretary to comply with her own regulations, bringing this case squarely within the *Accardi* line of cases.

III. Section 306(c) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 Provides Only Limited Waiver Authority to the Secretary and Does Not Affect the Issues in This Case

At oral argument, the Court inquired about the effect on this matter of Section 306(c) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. 108-173, 117 Stat. 2066 (Dec. 8, 2003) (hereinafter "MMA"). CHA does not believe that Section 306(c) has any effect at all on the resolution of this case, and does not understand the Secretary to take a different position.

The MMA provided the largest administrative overhaul of the Medicare program up to that point in time. Contained within the MMA was an authorization to the Secretary to: "conduct a demonstration project under this section (in this section referred to as the 'project') to demonstrate the use of recovery audit contractors under the Medicare Integrity Program in identifying underpayments and overpayments and recouping overpayments. . . ." MMA § 306(a). As part of Subsection 306(a), Congress authorized the Secretary to (1) pay contractors on a contingent basis, (2) retain a portion of recoveries for program management within CMS, and (3) examine the efficacy of the demonstration project.

The Court has questioned whether Subsection 306(c) of the MMA affects the obligations of the contractors created under Subsection 306(a) to follow existing Medicare regulations and manual instructions concerning claims

reopenings and audits. Subsection 306(c) provides: "The Secretary shall waive such provisions of title XVIII of the Social Security Act *as may be necessary to provide for payment for services under the project* in accordance with subsection (a)." (Emphasis added). Subsection (c) provides only a very limited waiver of Title XVIII requirements as to the payment of the recovery audit contractors on a contingency basis as described in Subsection (a)(1). Indeed, neither Subsections (a)(2) or (3), as noted above relate, at all to "payment for services under the project" as specified by the waiver. Additionally, nothing in Subsection (a) addresses the existing regulatory or sub-regulatory rules that govern the audits in question. Thus, given that Subsection (c) only applies to matters described in Subsection (a) and then only as to payment for services provided under Subsection (a), the waiver has no baring on the actual limitations on and conduct of audits.

IV. Conclusion

CHA urges this Court to reverse the decision of the district court and hold that Palomar could properly obtain administrative review of the question whether the contractor's reopening complied with the Secretary's good cause regulations. Alternatively, CHA asks this Court to hold that the federal courts may in the first

instance enforce the Secretary's good cause regulations regardless of whether administrative review is available.

DATED: April 13, 2012

Respectfully submitted,

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By: /s/
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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Ninth Circuit Rule 32-3(3) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2003, Times New Roman 14-point font, and contains 3489 words.

DATED: April 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lloyd A. Bookman, certify that on this 13th day of April, 2012, a copy of the foregoing Second *Amicus Curiae* Brief of the California Hospital Association in Support of Appellant's Request for Reversal of Judgment was served on all counsel of record by electronically filing it with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate ECM/ECF system, which automatically provides electronic notification to the following persons:

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