IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HOSPITAL ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 14-CV-851-JEB
ALEX M. AZAR, in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,	)	
Defendant.	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Secretary's brief in opposition to Plaintiffs' motion for summary judgment rests on two fundamental flaws. First, the Secretary treats his brief as if the Court is considering for the first time whether to impose mandamus. It is not. The D.C. Circuit has already held that the Court "thoughtfully and scrupulously weighed the equities" in "concluding that the scales tipped in favor of mandamus." *American Hosp. Ass'n v. Price*, 867 F.3d 160, 162 (D.C. Cir. 2017) (*AHA II*). The only thing that the D.C. Circuit remanded for the Court to do is to resolve the Secretary's contention that it is impossible for him to comply with the mandamus order that the Court entered. *Id.* at 168, 170. In trying to relitigate—explicitly, at points—whether mandamus should issue at all, the Secretary concedes just how weak his impossibility case is.

Second, the Secretary continues to confuse "impossible" with "prefer not to." The Secretary bemoans that further restricting the Recovery Audit Contractor (RAC) program, expanding settlement efforts, or tolling interest payments or suspending repayment obligations might cost the government money. So it might. But the Secretary's failure to resolve Administrative Law Judge-level appeals in 90 days is costing providers money, too. And the D.C. Circuit has held that in failing to resolve ALJ-level appeals in 90 days, the Secretary had violated a "clear duty." *American Hosp. Ass'n v. Burwell*, 812 F.3d 183, 190-192 (D.C. Cir. 2016) (*AHA I*). As between the two, "congressionally imposed mandates and prohibitions trump discretionary decisions," including discretionary decisions that might save the government money. *Id.* at 193. The Secretary *can* restrict RACs, more-aggressively pursue settlement, and develop a demonstration program that tolls interest recoupment and repayment obligations. And because it is not impossible to do these things, the Secretary must do them to try to resolve the backlog—even if he'd prefer not to.

The other arguments the Secretary advances in favor of impossibility fare no better. The Secretary does not deny that changes to the RAC program will keep the backlog from getting worse, only that changing the RAC program will not completely eliminate the backlog. True enough—it may be that no one remedy can fully address the backlog. But several solutions, working together, can. So the Secretary tries to change the subject, arguing that restricting RAC appeals further would be costly. But, again, the question before the Court is what is *possible*. And because the Secretary does not even claim that it would be *impossible* to winnow additional RAC appeals into the system, he must do so in order to combat the backlog.

The Secretary argues that issuing a mandamus order would inhibit settlements by causing providers to hold out. But declining to issue a mandamus order would give the *Secretary* an incentive to slow-walk or low-ball settlement offers, presenting providers with a take-it-or-leave-it option. And the experience of inpatient-rehabilitation hospitals confirms those fears. When they presented the Secretary with a settlement offer, the Secretary rejected it with no counter. Without a mandamus order, the Secretary can similarly delay or force down the settlement value of all claims amenable to settlement in the queue, including those in the expanded Settlement Conference Facilitation (SCF) program.

The Secretary also cannot explain why he cannot toll interest on backlogged claims or suspend recoupment, which would alleviate some of the injury that the backlog inflicts on providers like Plaintiffs. He says that Plaintiffs have not presented him with a plan, but that—again—gets the burdens backwards. And although the Secretary once more protests the cost of interest tolling and suspension of recoupment, he again gives no weight to the countervailing burdens on Plaintiffs—burdens the Court found decisive in ordering mandamus in the first place.

That brings the Court to the remedy. Because the Secretary has not shown it is impossible to clear the backlog—minus, perhaps, some claims with serious program-integrity concerns—within five years, the Court should require him to do so. At the very least, the Court should direct specific relief designed to get the backlog down as far as possible. But the Court should not allow Secretary to place his own convenience over Plaintiffs' clear rights.

Plaintiffs' cross-motion for summary judgment should be granted.

ARGUMENT

I. THE SECRETARY HAS NOT PROVED THAT IT IS IMPOSSIBLE TO ELIMINATE THE BACKLOG OR TO TAKE FURTHER STEPS TO REDUCE IT.

A. The Secretary Can Lawfully Further Curtail The RAC Program.

Plaintiffs explained that the Secretary can slow the accumulation of new appeals in the backlog by further restricting the RAC program. Pls.' MSJ 6-9. In particular, the Secretary can further limit the issues that RACs can review, shift additional issues from the RAC program to different quality-assurance programs, or further narrow the look-back period that RACs use for claims. *Id.* at 7.

The Secretary does not deny that he can do these things. Rather, he argues that he should not have to because it would not (in his view) make a significant dent in the number of appeals added to the backlog. *See* Sec'y Reply 18-21. But the Secretary understates the appeals in the system. By the Secretary's own estimate, RAC appeals are still 12.2% of new appeals and 14% of the entire backlog. *See id.* at 18. And that translates into a substantial number of appeals: over 13,700 new appeals each year and over 70,200 appeals in the backlog. *See* ECF No. 75-2 at 2 (estimating 112,933 new appeals in Fiscal Year 2017); ECF No. 75-1 ¶ 4 (there are approximately 501,700 appeals currently pending at the Office of Medicare Hearings and Appeals (OMHA)). Reducing new RAC appeals by half or three-quarters would make a

difference for Plaintiffs and others providing care to Medicare patients. Each appeal represents money for actual care rendered to a Medicare patient for which the provider is not being paid. And the denial of those funds can make the difference between affording and forgoing necessary maintenance and repairs. *See AHA II*, 867 F.3d at 172 (Henderson, J., dissenting) (emphasizing the "real-world problems" created by the backlog).

What might be a "relatively small" number of appeals to the Secretary (Sec'y Reply 18) is real money to Plaintiffs and other providers. The Secretary complains that his current cutbacks in RAC review have cost the government hundreds of millions, with recoupment down to $141 million from $1.6 billion clawed back at the peak of Fiscal Year 2014. *See id.* at 20 n.19. That statistic is risible. The RACs clawed back $1.6 billion in Fiscal Year 2014 only by engaging in the indiscriminate, erroneous denials that in turn gave rise to the huge surge in providers' backlogged appeals. That the RACs clawed back so much money in Fiscal Year 2014 is emblematic of the problems that forced Plaintiffs to bring this suit, not a hallmark of RAC success. *See AHA I*, 812 F.3d at 188 (citing AHA's statistic that hospitals prevailed on 66% of RAC denials and the Secretary's concession that providers prevail on 43% of all ALJ appeals).

But the costs and other concerns identified by the Secretary are ultimately beside the point. The question is not whether the Secretary has made a "dramatic improvement" in RAC appeals (Sec'y Reply 20), whether the Secretary has "struck the right balance" (*id.* at 21), or whether trimming new RAC appeals further would cost the government money. The question is whether a further reduction in RAC appeals is *impossible* and whether the Secretary has "*done all he can* to reduce RAC-related appeals." *See AHA II*, 867 F.3d at 162, 166 (emphasis added). Because the Secretary *can* exercise his discretion to further reduce RAC appeals—he does not

argue that a further-straitened RAC program, for instance, would violate the statute—he must do so.

The Secretary can also do more than restrict the universe of claims that RACs review. He can also create incentives for accurate RAC determinations by penalizing RACs that are frequently overturned at the ALJ level. *See* Pls.' MSJ 7-8. The Secretary contends that such penalties are illegal (Sec'y Reply 19), but Plaintiffs have already explained why that is not so. *See* Pls.' MSJ 7-8; ECF No. 43 at 9-10. Reduced payments for RACs that have high overturn rates are not penalties for breach of contract; they would be only an aspect of the RACs' contractually mandated payments. *See* Pls.' MSJ 7-8. And the Secretary's assertion (Sec'y Reply 19) that the accuracy-related bonuses are sufficient to ensure RAC accuracy defies both common sense and the available evidence. True, a RAC that is overturned on appeal gets nothing for the time spent reviewing the claim and associated overhead costs. *See id.* But because RACs are paid solely on a contingency-fee basis, a RAC that reviews a claim and determines it was properly made *also* gets nothing for the time spent reviewing the claim and associated overhead costs. That creates a temptation to deny claims: A RAC has the incentive to deny a claim in hopes that the provider will not bother to appeal it (which can take years to resolve) or that the denial might be upheld on appeal. *See* Pls.' MSJ 8.

These incentives make a difference. As Plaintiffs pointed out, appeals fell when the Secretary transitioned patient-status-claim review from a contingency-fee RAC to a flat-rate contractor. *Id.* (citing Mills Dep. Tr. 44-45). In other words, removing the contingency-fee

element appears to have changed the denial rate for these claims. The Secretary has no explanation for this powerful evidence.[1]

Out of answers, the Secretary resorts to innuendo, accusing Plaintiffs of being solely focused on the RAC program rather than the elimination of the backlog. *See* Sec'y Reply 21. But Plaintiffs' focus on the RAC program is no great mystery. It is a piece of the backlog that has inflicted significant injuries on Plaintiffs in the past and that the Secretary has broad discretion to curtail. The Secretary has not shown he has "done all he can do" to reduce RAC-related appeals. *See AHA II*, 867 F.3d at 166.

B. The Secretary Can Do More To Settle Outstanding Cases.

The Secretary can also do more to settle cases in the backlog. The Secretary does not really disagree; but he argues instead for more time, contending that his new Low-Volume Appeals (LVA) and expanded SCF programs "should be given a chance to work." Sec'y Reply 17. But the Secretary has already been out of compliance with the 90-day deadline for ALJ appeals for years. An open-ended delay to allow programs that have not even begun to "work" (and the Secretary does not say what would constitute "work") is inconsistent with the D.C. Circuit's requirement that the Secretary make all possible efforts to come into compliance with the 90-day ALJ deadline. *See AHA II*, 867 F.3d at 166-167.

Perhaps recognizing as much, the Secretary tries to flip the burden of proof, arguing that Plaintiffs have not shown that "a mandamus order would be the only means to promote serious settlement negotiations." Sec'y Reply 17. But the Court has already determined that mandamus

[1] The Secretary argues the proper comparator for accuracy is RAC denials overturned by first-level reviewers rather than ALJs because RACs are bound by Medicare policy statements and ALJs are not. *See* Sec'y Reply 19 n.17. But a high affirm rate at the first level of appeal is more consistent with reviewers acting as a rubber stamp for RACs; the ALJ level is the first *independent* level of review. The Secretary does not, for instance, try to show how many ALJ reversals are due to disagreement with Medicare policy statements.

is the appropriate remedy; the question is whether a mandamus order that requires (either implicitly or explicitly) the Secretary to settle pending claims would require something the law forbids. *See AHA II*, 867 F.3d at 167-168.

It would not. The Secretary has abandoned any argument that the Medicare statute and regulations require him to assess settlement on a claim-by-claim basis, admitting that he can settle appeals without individual assessment of their merit. *See* Sec'y Reply 11-12. And the Secretary does not contend that he lacks the regulatory authority to settle the vast majority of claims that do not present program-integrity issues. *See id.*

Instead, the Secretary advances a parade of horribles: If the Court requires elimination of the backlog, that will require mass settlements, which would induce providers to appeal every denial and hold out for unreasonable sums, which would require the Secretary to either violate the Court's mandamus order or settle claims out of all proportion to their actual value. *See id.* at 13-16. The problem with the Secretary's train of logic is that it has next-to-no evidence to support it. The Secretary appeals to "common sense," but there is no obvious reason why providers would engage in that kind of brinksmanship with the Secretary—apparently in hopes of holding him in contempt should the backlog not be fully eliminated—when reasonable, merits-based settlements are readily available.

The only evidence the Secretary offers is that providers with 40,000 to 50,000 short-stay appeals did not settle during the last round of the Hospital Appeals Settlement Process on the same terms as providers with 380,212 other short-stay appeals. *See id.* at 13. But the Secretary says nothing about *why* these 40,000 to 50,000 claims did not settle, including whether the providers did not submit their claims for settlement; whether the providers held out for more money; and, if the providers did hold out for more money, what their settlement demands were

and whether any demands were reasonable given the holdouts' historical success rates. *See id.* Without more information, the fact that approximately 10 percent of short-stay appeals did not settle says nothing about whether the Secretary will have success settling the appeals currently in the backlog. And more fundamentally, as the Secretary concedes, the Hospital Appeals Settlement Process did not occur while the Secretary was under the mandamus order. *Id.* The Secretary's assumption that a mandamus order "would assuredly have led to many more holdouts" is just that—an unsupported assumption. *See id.*

There is also a flip side: As Judge Henderson pointed out, the ongoing delay in adjudicating the backlog hurts providers and gives *the Secretary* unfair settlement leverage. *AHA II*, 867 F.3d at 177 (Henderson, J., dissenting). And in sharp contrast to the Secretary's equivocal evidence of provider intransigence, there is ample reason to believe that the Secretary will not work as hard as he can to settle pending cases without a mandamus order. For one, the Secretary refuses to settle the outstanding inpatient rehabilitation hospital claims even though the hospitals are clamoring to settle. *See* Pls.' MSJ 11. The Secretary asserts that the hospitals' offer was unreasonable without providing any information necessary to back the assertion up. *See* Sec'y Reply 17 n.16. And although the Secretary contends that he is "continu[ing] to negotiate in good faith with the [inpatient rehabilitation hospitals]," he provides no details about what he considers good-faith negotiations. *See id.* The Secretary's staff admitted that the Secretary rejected the inpatient rehabilitation hospitals' offer without counter. *See* Mills Dep. Tr. 149-151. The hallmark of negotiating in good faith is the give-and-take of offer and counteroffer and the Secretary has not done it.

Moreover, under the threat of the previous mandamus order, the Secretary came up with the LAV and expanded SCF programs—even though he had earlier claimed that there was

literally nothing more he could have done. *See AHA II*, 867 F.3d at 165. With a new mandamus order, the Secretary may become even more creative. Indeed, the Secretary's assurance that the settlement programs will work if given a chance rings hollow given that the SCF and LVA appeals programs have not yet started and the SCF program has not been explained beyond the broadest outlines. *See* Sec'y Reply 16 (explaining that expanded SCFs will provide "tailored settlement opportunities"—whatever that means). And the LVA program, which is at least better defined, will not help inpatient hospitals like Plaintiffs, whose claims are often worth more than $9,000. *See id.* at 15-16. At the very least, the Court should be dubious that *this* set of programs is finally and truly the absolute best that the Secretary can do.

Even if the Court were to think that the evidence of the parties' settlement behavior in the face of a mandamus order is a wash, the tie goes to Plaintiffs. The D.C. Circuit noted that even though how providers would behave under a mandamus order is "difficult to test," the "*Secretary* bears the 'heavy burden to demonstrate the existence of an impossibility.' " *AHA II*, 867 F.3d at 168 (emphasis added and citation omitted). That burden means that the Secretary's speculation about whether providers would accept reasonable settlement offers is not enough to ward off a new mandamus order.

C. The Secretary Can Delay Repayment And Toll Interest Accrual.

Finally, the Secretary could delay providers' obligations to repay denied claims and toll the accrual of interest on claims for all periods for which an appeal is pending beyond the statutory maximum. *See* Pls.' MSJ 12-16. The Secretary argues that Plaintiffs' proposal that he use his expansive demonstration authority to achieve these goals is "lawless" because Plaintiffs have not proposed a particular project that falls within the Medicare statute's demonstration-program provisions. Sec'y Reply 22.

But the Secretary has the burden to show impossibility; it does not fall to Plaintiffs to craft an entire demonstration project for the Secretary. *See AHA II*, 867 F.3d at 168. In any case, Plaintiffs have explained how delaying recoupment and tolling interest accrual would meet the goals of the demonstration projects. *See* Pls.' MSJ 14. Allowing hospitals to retain capital needed for purchasing equipment and offering services would "improve the coordination, quality, and efficiency of health care services." 42 U.S.C. § 1315a(a)(1). A delay in repayment would save the Secretary from paying interest on categories of claims frequently overturned by an ALJ, which might boost the "efficiency and economy of health services." *Id.* § 1395b-1(a)(1)(A). The Secretary has discretion in interpreting ambiguous provisions of the Medicare statute, *see HCA Health Servs. of Okla., Inc. v. Shalala*, 27 F.3d 614, 617 (D.C. Cir. 1994), and the demonstration-program provisions are sufficiently capacious to accommodate Plaintiffs' proposed projects.

The Secretary raises two other insubstantial objections to recoupment and interest tolling. *See* Sec'y Reply 22-23. First, the Secretary speculates that interest tolling and delayed recoupment could lead providers to flood the system with meritless appeals in search of an interest-free loan. He offers no support for his assumption. *See id.* Second, the Secretary argues that delayed recoupment and tolling of interest will cost the government money if providers declare bankruptcy or go out of business during the appeal process. *See id.* at 23. But the Secretary already requires that providers not have filed for bankruptcy or expect to file for bankruptcy to be eligible for the expanded SCF program. U.S. Dep't of Health & Human Servs., *Settlement Conference Facilitation*, https://goo.gl/wCmscT (Jan. 11, 2018). The Secretary can require similar financial soundness for participants in a delayed-recoupment and interest-tolling demonstration project. It is no reason to reject the demonstration projects out-of-hand.

II. THE COURT SHOULD REIMPOSE ITS PREVIOUS MANDAMUS ORDER (WITH PERHAPS SOME ALLOWANCE FOR PROGRAM-INTEGRITY CONCERNS), OR DIRECT THE SECRETARY TO TAKE ADDITIONAL, CONCRETE STEPS TO RESOLVE THE BACKLOG.

Unable to seriously argue that there is *nothing* he can do to further ameliorate the backlog, the Secretary continues to argue that the Court should re-weigh the equities and relieve him from the mandamus remedy. *See* Sec'y Reply 25-27. But the Court's prior weighing of the equities—endorsed by the D.C. Circuit—is now law of the case and not open to re-examination absent extraordinary circumstances. *See* Pls.' MSJ 17. The Secretary has no response to that principle; instead he persists in arguing as if the Court's previous holdings never happened.

The only real obstacle the Secretary identifies to eliminating the backlog are claims submitted by providers with serious program-integrity concerns. *See* Sec'y Reply 8-10. But the Secretary likely overstates the extent of the program-integrity problems confronting him. For one, the Secretary's staff admitted that even some claims from providers with False Claims Act suits resolved in the last five years might be amenable to settlement. *See* Mills Dep. Tr. 159-160. Furthermore, even among providers with active False Claims Act or other investigations, it is not clear that *all* claims from the provider are categorically off-limits for settlement. For instance, if one hospital procedure is currently under False Claims Act scrutiny, claims involving other services furnished by the hospital can still be settled.

To the extent claims from providers with active program-integrity concerns pose a problem, the Court need not throw out the mandamus baby with the program-integrity bathwater. The Court can excise the claims with program-integrity concerns from any targets it sets. *See* Pls.' MSJ 19. That is, the Secretary can be commanded to resolve set percentages of backlogged claims that do not present serious program-integrity concerns each year until the entire backlog minus the program-integrity claims is eliminated. With the program-integrity claims removed

from the denominator, the bulk of the Secretary's objections to a target-date elimination remedy evaporate.

Even if the Court does not require the backlog to be eliminated by a date certain, it should order the Secretary to do all he can, including specific, concrete steps. *See id.* at 19-20. Plaintiffs have responded to the Secretary's criticism of these potential remedies above (*supra* 3-10) and will not rehash those responses here, except to rebut the Secretary's "be-careful-what-you-wish-for" response to Plaintiffs' request that the Court require the Secretary to make settlement offers. *See* Sec'y Reply 18-19. Plaintiffs do not assert that the Secretary must use *only* historical overturn rates; rather, their proposal requires the Secretary to base settlements on a reasonable assessment of a provider's success rate at the ALJ level. *See AHA II*, 867 F.3d at 176-177 (Henderson, J., dissenting) (proposing a method to calculate settlements). In addition, requiring the Secretary to keep track of settlement-related negotiations and the data underlying settlement offers does not—as the Secretary asserts without citation—intrude on any privilege. *See* Sec'y Reply 28-29. It merely ensures that the Secretary is negotiating in good faith and basing his settlement offers on the available evidence—evidence that is often uniquely within the Secretary's hands.

In all events, the Court should reject the Secretary's anemic proposal that—rather than take any further steps to reduce the still-growing backlog—he just file status reports every 90 days. *See id.* at 30. Status reports would only document Plaintiffs' and others' continuing injuries; they would not require the Secretary to actually *do* anything. The Court should not stand idly by while the Secretary violates Plaintiffs' right to a timely ALJ hearing in perpetuity.

CONCLUSION

For the foregoing reasons and those in Plaintiffs' prior brief, the Secretary's summary-judgment motion should be denied and Plaintiff's summary-judgment motion granted.

Respectfully submitted,

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Dated: February 15, 2018.

CERTIFICATE OF SERVICE

I certify that on February 15, 2018, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all counsel, who are registered users.

/s/ Catherine E. Stetson