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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMPIRE HEALTH FOUNDATION, for Valley Hospital Medical Center, Plaintiff-Appellee, v. ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, Defendant-Appellant.	No. 18-35845 D.C. No. 2:16-cv-00209-RMP MEMORANDUM*

EMPIRE HEALTH FOUNDATION, for Valley Hospital Medical Center, Plaintiff-Appellant, v. ALEX M. AZAR II, Secretary of the United States Department of Health and Human Services, Defendant-Appellee.	No. 18-35872 D.C. No. 2:16-cv-00209-RMP

On Remand from the United States Supreme Court

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: M. SMITH and N.R. SMITH, Circuit Judges, and TUNHEIM,[**] District Judge.

On June 24, 2022, the Supreme Court issued its opinion reversing our decision in *Empire Health Foundation, for Valley Hospital Medical Center v. Azar*, 958 F.3d 873 (9th Cir. 2020), and remanded the case for further proceedings. We now address Empire's remaining challenge.

This case concerns the calculation of disproportionate share hospital (DHS) adjustment payments made to healthcare providers by the Department of Health and Human Services (HHS), specifically how the "Medicare fraction" is calculated. Empire challenged HHS's interpretation of "patient days … which were made up of patients who (for such days) were entitled to benefits under [Medicare]," and argued that the term must include days for which Medicare actually paid for a patient's care. *See* 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I). The Supreme Court disagreed, holding that the phrase included patient days for all patients who are statutorily eligible for Medicare, regardless of whether Medicare paid on a given day. *Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr.*, 142 S. Ct. 2354, 2362 (2022).

Neither the Supreme Court nor this panel addressed Empire's alternative

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[**] The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

argument challenging HHS's calculation of patient days for those patients "entitled to supplemental security income [(SSI)] benefits," which also factors into the Medicare fraction. *See* 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I). Under HHS policy, this figure includes patient days only when SSI benefits are paid to an individual on a given month, not merely when they are eligible for benefits. *See* Medicare Program, 75 Fed. Reg 50,042, 50,280–81 (Aug. 16, 2010). Empire argues that, if "entitled to benefits under [Medicare]" means all eligible patients, then HHS's interpretation of "entitled to SSI benefits," which requires that benefits are actually paid, is inconsistent and invalid.

At the district court, this argument was rejected for lack of subject-matter jurisdiction on the grounds that it was beyond the scope of the Provider Reimbursement Review Board's (PRRB) authorization of expedited judicial review. *See* 42 U.S.C. § 1395*oo*(f)(1) (allowing PRRB to authorize expedited judicial review of challenges to Medicare reimbursement that involve issues beyond PRRB's power to decide).

The district court's conclusion was error. Empire requested review of the "validity of … 42 CFR § 412.106(b)(2)," which encompasses the agency's interpretation of both phrases, and argued that the regulation is "arbitrary and capricious because [it] is not permitted to have two different meanings of 'entitled' within the … Fraction." Empire's request thus raises the *inconsistency* between

HHS's interpretations of "entitled to Medicare" and "entitled to SSI," not merely its interpretation of "entitled to Medicare." Accordingly, when the PRRB granted Empire's request, it framed the issue as "Whether the Secretary properly calculated the Provider's Disproportionate Share Hospital ('DSH')/Supplemental Security Income ('SSI') percentage," which encompasses the regulation's Medicare *and* SSI patient-days calculations. Likewise, Empire's Complaint challenges HHS's interpretation of "entitled to" in both parts of the regulation. Thus, Empire's alternative argument is within the scope of the PRRB's authorization for expedited judicial review and thus within the district court's jurisdiction.

Accordingly, we reverse with respect to subject-matter jurisdiction over Empire's alternative argument and remand for the district court to consider the argument in the first instance and to obtain supplemental briefing on the impact of the Supreme Court's ruling in this case. *See, e.g., Ctr. for Bio. Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1052–53 (9th Cir. 2019) (remanding for the district court to consider the merits of a claim in the first instance, where the district court improperly determined there was no jurisdiction). Empire's motion to consider the argument in the alternative and order supplemental briefing, Docket No. 65, is denied. The Secretary's motion to affirm the district court's dismissal of the plaintiff's alternative claim, Docket No. 67, is also denied.

REVERSED; REMANDED.