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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Health Net of Arizona, Inc.,)	
)	CV-13-1433-TUC-DCB
Plaintiff,)	
v.)	
)	
Sylvia Mathews Burwell, Secretary of)	ORDER
Health and Human Services,)	
)	
Defendant.)	
)	

This matter was referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1)(B) and the local rules of practice of this Court for hearing and a Report and Recommendation (R&R) on the Plaintiff's Motion for Summary Judgment. Before the Court is the Magistrate Judge's Report and Recommendation on the Plaintiff's Motion for Summary Judgment. The Magistrate Judge recommends, after conducting motion hearing, to the Court that the Motion for Summary Judgment should be denied. The Plaintiff has filed Objections to this R&R.

FACTUAL AND PROCEDURAL BACKGROUND

A. Judicial Review

The Complaint filed February 19, 2013, reads, as follows: "This is an action for judicial review of the final decision of the Secretary of the Department of Health and Human Services brought pursuant to 42 U.S.C. § 405(g). Health Net seeks review of the Secretary's determination that it is financially responsible to pay for court ordered mental health evaluations on the grounds that Medicare is not liable for payment of

1 services when the cost of such services are paid for directly or
2 indirectly by another government entity. 42 U.S.C. § 1395y(a)(3); 42
3 C.F.R. § 411.8." (Complaint at 2.) (Lead ALJ Appeal No. 1-719387785; Lead
4 Docket No. M-11-1371.)

5 Originally assigned to the United States District Court for the
6 District of Arizona, Phoenix Division, (CV-13-352-PHX-NVW.) Defendant
7 filed an Answer on July 31, 2013 and a scheduling conference was
8 conducted on September 27, 2013. Concerns were then raised that the
9 proper venue for this action was not Phoenix but Tucson. On October 21,
10 2013, this action was transferred to the Tucson Division and on October
11 23, 2013, the action was referred to the Magistrate Judge for pretrial
12 management and R&R.

13 On December 6, 2013, Plaintiff filed a Motion for Summary Judgment.
14 On January 28, 2014, Defendant filed a Response and on February 21, 2014,
15 Plaintiff filed a Reply. On June 24, 2014, the parties orally argued the
16 dispositive motion to the Magistrate Judge, who issued a Report and
17 Recommendation on July 11, 2014. On July 28, 2014, Plaintiff filed
18 Objections to the Report and Recommendation and on August 14, 2014,
19 Defendant filed a response to the Objections.

20 **B. Underlying Administrative Proceedings**

21 On April 20, 2012, the Medicare Appeals Council (MAC) issued a
22 consolidated decision on multiple Administrative Law Judge (ALJ)
23 decisions from August 13, 2010 and February 29, 2012. (ROA 000667.)
24 These decisions concerned coverage under the enrollees' various MA plans
25 offered by Health Net (HN) for inpatient hospitalization services
26 provided to the enrollees at University Physicians Health Care (UPH) from
27 April 11, 2008 through May 4, 2011 pursuant to court ordered evaluations.

1 The ALJs issued respectively forty-one (41) fully-favorable decisions for
2 UPH and ten (10) favorable decisions for Health Net. Each decision was
3 appealed. Because the decisions all arose from the same determinative
4 facts and involved common legal issues, the parties asked the Medicare
5 Appeals Council (MAC) to review the ALJ's actions and issue a
6 consolidated decision. Generally, the MAC applied the provisions of 42
7 C.F.R. §405, subpart I, to resolve these appeals. In a nutshell, the MAC
8 found that Health Net was required to pay for the inpatient hospital
9 services arising from the court ordered mental health evaluations (COEs)
10 in all of the appeals. 42 C.F.R. §411.8(b)(6).

11 "The council has reviewed the extensive memoranda and briefings in
12 this matter, from both UPH and Health Net. The voluminous exhibits and
13 materials attached to the appellants' submissions to the Council are
14 duplicative of the documentation that was in the records before the ALJs.
15 After reviewing the appellants' legal arguments and submission, the
16 Council concludes that the dispositive issues in this case are (1)
17 whether Pima County is obligated to pay for the in patient
18 hospitalizations arising out of the COEs, thus implicating the provisions
19 of 42 C.F.R. 411.8(a), and, if so, (2) whether the exception for services
20 paid for by a government entity under 42 C.F.R. 411.8(b)(6) applies to
21 UPH." (000672)

22 On June 14, 2012, Health Net filed a written Request for Reopening
23 the Consolidated Decision of the MAC. (000303.) On December 18, 2012,
24 the MAC denied the request. (000010). The MAC initial decision treated
25 the four prongs under 411.8 as the first two had been conceded by all
26 parties and then focused on the third and fourth prong to reach its
27 decision. Health Net asked to reopen the Consolidated Decision taking

1 the position that it had never conceded to the first two prongs of 411.8,

2 Services Paid for by a Government Entity:

3 a) Basic rule. Except as provided in paragraph (b) of this
4 section, Medicare does not pay for services that are paid
for directly or indirectly by a government entity.

5 (b) Exceptions. Payment may be made for the following:

6 * * *

7 (6) Services furnished by a public or private health
8 facility that--

9 (i) Is not a Federal provider or other facility
operated by a Federal agency;

10 (ii) Receives U.S. government funds under a Federal
11 program that provides support to facilities that
furnish health care services;

12 (iii) Customarily seeks payment for services not
13 covered under Medicare from all available sources,
including private insurance and patients' cash
14 resources; and

15 (iv) Limits the amounts it collects or seeks to
16 collect from a Medicare Part B beneficiary and others
on the beneficiary's behalf to:

17 (A) Any unmet deductible applied to the charges
related to the reasonable costs that the facility
18 incurs in providing the covered services;

19 (B) Twenty percent of the remainder of those
charges;

20 (C) The charges for noncovered services.

21 The MAC found no good cause to reopen the proceedings. 42 C.F.R.
22 405.980(e)(3), 405.986, Good Cause for Reopening:

23 a) Establishing good cause. Good cause may be established when--

24 (1) There is new and material evidence that--

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

27 (ii) May result in a different conclusion; or

1
2 (2) The evidence that was considered in making the
3 determination or decision clearly shows on its face that an
4 obvious error was made at the time of the determination or
5 decision.

6 (b) Change in substantive law or interpretative policy. A
7 change of legal interpretation or policy by CMS in a
8 regulation, CMS ruling, or CMS general instruction, or a
9 change in legal interpretation or policy by SSA in a
10 regulation, SSA ruling, or SSA general instruction in
11 entitlement appeals, whether made in response to judicial
12 precedent or otherwise, is not a basis for reopening a
13 determination or hearing decision under this section. This
14 provision does not preclude contractors from conducting
15 reopenings to effectuate coverage decisions issued under the
16 authority granted by section 1869(f) of the Act.

17 (c) Third party payer error. A request to reopen a claim
18 based upon a third party payer's error in making a primary
19 payment determination when Medicare processed the claim in
20 accordance with the information in its system of records or
21 on the claim form does not constitute good cause for
22 reopening.

23 The parties stipulated and agreed that the MAC decision not to
24 reopen is not subject to appeal or judicial review. *Palomar Med. Ctr.*
25 *V. Sebelius*, 693 F.3d 1151 (9th Cir. 2012).

26 **STANDARD OF REVIEW**

27 When objection is made to the findings and recommendation of a
28 magistrate judge, the district court must conduct a de novo review.
29 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

30 The Medicare Act provides for judicial review of a final decision
31 made by the Secretary of Health and Human Services regarding amounts paid
32 under Medicare. See 42 U.S.C. § 1395ff(b). The reviewing court may
33 affirm, modify or reverse the final decision of the Secretary. See 42
34 U.S.C. § 405(g) (incorporated by reference in 42 U.S.C. § 1395ff(b)).
35 However, the Secretary's decision will be disturbed only if it is not
36 supported by substantial evidence on the record as a whole or if it is

1 based on legal error. See *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th
2 Cir.1999). "If the evidence is susceptible to more than one rational
3 interpretation," a reviewing court is not entitled to substitute its
4 judgment for that of the agency. See *Bear Lake Watch, Inc. v. FERC*, 324
5 F.3d 1071, 1086 (9th Cir.2003). Substantial evidence is "more than a mere
6 scintilla but less than a preponderance," *Tackett*, 180 F.3d at 1098, and
7 it is "evidence as a reasonable mind might accept as adequate to support
8 a conclusion," *Richardson v. Perales*, 402 U.S. 389, 401 (1971). In making
9 its determination on review, a court "must consider the record as a
10 whole, weighing both evidence that supports and evidence that detracts
11 from the Secretary's conclusion." *Tackett*, 180 F.3d at 1098. An agency's
12 action is presumed valid and the burden is on the party challenging the
13 action to show that it is arbitrary and capricious. *Short Haul Survival*
14 *Comm. v. United States*, 572 F.2d 240, 244 (9th Cir.1978).

15 **PLAINTIFF'S OBJECTIONS**

16 Plaintiff objects to all of the legal conclusions contained in the
17 Report and Recommendation. Defendant objects that the Magistrate Judge's
18 R&R: (1) disregarded the consolidation stipulation setting forth the
19 procedures and added additional constraints on Health Net; (2) failed to
20 recognize Health Net's due process rights; (3) erred in concluding Health
21 Net was barred from raising a new issue at the Appeals Council level; (4)
22 erroneously found waiver; and (5) erroneously found Health Net's prior
23 concession was a judicial admission. Defendant argues that this Court
24 should reject the Magistrate Judge's R&R and grant Health Net's motion
25 for summary judgment to remand the action to the Medicare Appeals
26 Council.

1 Before addressing each objection in turn, this Court is compelled
2 to reiterate that none of the objections addressed in the motion to
3 reopen or the basis for the pending motion for summary judgment were
4 before the ALJs or the MAC for the original consolidated decision. "The
5 Council will limit its review of the ALJs' actions to the exceptions
6 raised by the parties in the requests for review...." (Consolidated
7 Decision at 668.) The parties agreed to a consolidation of all matters
8 between Health Net and UPH arising out of the same set of facts, "as only
9 a singular determination by the Council on these issues will be valuable
10 to the parties at this juncture." (CD at 671.)

11 After conducting a de novo review of the record, this Court agrees
12 with the Magistrate Judge's R&R that the issue concerning the second
13 prong was never taken up with the MAC: "The appellants do not dispute
14 the UPH satisfies the first two criteria..." (CD at 677; AR 34478.) Any
15 changes made but not specifically addressed to the MAC by Health Net do
16 not alter this conclusion. (R&R at 5 ¶¶8-20.) The April brief appears
17 to be a last minute markedly different change in Health Net's long term
18 concessions as to prong 2 that were never directly addressed to the MAC;
19 in fact, just the opposite. In addition, the newly proffered evidence
20 in support of its position was readily available to Health Net through
21 the proceedings. "The MAC pointed out that HN's revised legal position
22 was not that UPH received no federal funds, but that the sources of
23 federal funds UPH received did not qualify as "Federal program[s] that
24 [provide[] support to facilities that furnish health care services:
25 within the meaning of the Test." (R&R at 6 ¶¶ 21-25.) The Plaintiff's
26 entire basis for judicial review is that the MAC's Decision did not
27 specifically address Health Net's position in its April Brief that UPH

1 failed to satisfy Prong 2. Plaintiff seeks summary judgment arguing that:
2 "(1) The MAC violated HN's due process rights by ignoring an outcome-
3 determinative procedural rule; (2) the MAC's decision was not based on
4 substantial evidence; and (3) the MAC's decision was arbitrary and
5 capricious." (R&R at 8-9.) HN's failure to contest Prong 2 at the ALJ
6 level is especially fatal in light of the regulation governing MAC
7 review, which provides in pertinent part: "(1) ...the MAC limits its
8 review of the evidence to the evidence contained in the record of the
9 proceedings before the ALJ. However, if the hearing decision decides a
10 new issue that the parties were not afforded an opportunity to address
11 at the ALJ level, the MAC considers any evidence related to that issue
12 that is submitted with the request for review. (2) If the MAC determines
13 that additional evidence is needed to resolve the issues in the case and
14 the hearing record indicates that the previous decision-makers have not
15 attempted to obtain the evidence, the MAC may remand the case to an ALJ
16 to obtain the evidence and issue a new decision." 42 C.F.R. §
17 405.1122(a)(1),(2). (R&R at 10at ¶¶21-28.)

18 At the ALJ level "UPH submitted materials stating that it received
19 federal funds that satisfied Prong 2's requirements" (Response, p. 9)
20 (citing DSOF, ¶29), and HN conceded the point. Given HN's concession at
21 the ALJ level in every case including the cases at issue in the April
22 Briefs that UPH met Prong 2, the ALJ did not decide an issue that the
23 parties had not had an opportunity to address. HN had every opportunity
24 to challenge Prong 2 before the ALJ, and HN chose not to do so. Thus, on
25 this record, section 1122(a)(1) is clear that the MAC was limited to
26 reviewing the evidence that was before the ALJ. (R&R at 11 ¶¶ 5-12.) As
27 the Secretary points out, "[t]he result was that the MAC had briefs from

1 Health Net that both explicitly conceded that Prong 2 was satisfied, and
2 that denied the same proposition. Under the circumstances, the MAC was
3 left to decide what Health Net's position actually was on Prong 2."
4 (Response, pp. 10-11). The Secretary argues that in light of the fact
5 that HN did not repudiate its earlier concession, "[e]ven if the MAC [in
6 its Decisions] had noted Health Net's sudden attempted reversal, the
7 existing record and the Department's regulations would have inevitably
8 forced the same result." (*Id.* at p. 11). (R&R at 12 ¶¶18-24.)

9 Finally, this Court wholeheartedly agrees with the conclusion of
10 the R&R:

11 On the instant record, HN failed to properly raise its Prong
12 2 challenge during the administrative proceeding and, thus,
is not entitled to remand in order to do so now.

13 R&R at 13 ¶¶ 6-7.)

14 DISCUSSION

15 **1. R&R disregarded the consolidation stipulation setting forth the** 16 **procedures and added additional constraints on Health Net**

17 The objection is a mischaracterization of the R&R and the
18 consolidation stipulation. If Plaintiff was serious about the Prong 2
19 issue, it should have notified the MAC of its change of position and
20 explained the last minute drastic change of heart. Initially, the
21 conversation was started, as follows:

22 I invite you to a brief teleconference about the several
23 matters pending before the Medicare Appeals Council
24 involving requests for review of AU decisions regarding
25 Medicare payment for court-ordered mental health evaluations
26 in Pima County, Arizona. Specifically, in the interest of
27 administrative economy, we seek to ensure that we have
received and duly lodged all applicable submissions
(requests for review, requests for briefing, requests to
submit supplemental briefs, etc.), and that the Medicare
Operations Division of the DAB (the staff support arm of the
Council) responds to all outstanding requests. I trust that

1 with a few moments of your time we can streamline our
2 internal handling of these appeals and ensure thorough and
3 fair consideration of full, complete administrative records
4 in each case.

5 (47988)

6 The consolidation stipulation (AR 6449-6550) reads, in pertinent
7 part:

8 1.The parties, through counsel, wish all written argument
9 to be considered as part of the Council's review in each
10 case, to the extent relevant. The parties agree,
11 essentially, that the issues before the Council in these
12 cases are, in the main, not beneficiary-specific and
13 therefore wish their respective arguments to apply to all
14 of the above-listed appeals even where not specifically
15 designated by MAC docket number on the face of the
16 memorandum. Arguments submitted by each party will be copied
17 to each appeal without further request of the
18 parties.

19 2. One or both of the parties had additional cases coming
20 through the 3'd level (AU level) of appeals and wished to
21 extend their arguments to those cases. In addition, one or
22 both parties desired to submit additional briefs/memoranda.
23 We agreed that Health Net would submit any additional
24 material and argument on or before September 23, 2011, and
25 that UPH would submit any replies on or before September 30,
26 2011. Both Health Net's and UPH's arguments will be included
27 in the recently submitted appeals of AU Engelman's September
28 1, 2011 decisions.

1 3. The parties agreed that all outstanding procedural
2 issues, including requests for hearing/oral argument before
3 the Council, are considered resolved. Any such requests not
4 already responded to via letter were addressed during our
5 teleconference. As a general practice, the Council does not
6 hold oral argument. However, the Council will address such
7 specific requests in writing. In addition, the parties have
8 sent waiver of liability notices to all beneficiaries,
9 eliminating the need to copy each beneficiary individually
10 on correspondence and on the Council's decisions.

11 [AR 6449-6550]

12 During a September 13, 2011 teleconference, attorneys from Health
13 Net and UPH, and Christopher Randolph, Director of the Medicare
14 Operations Division ("MOD") (which provides administrative and staff

1 Health Net: M-11-704, M-11-1371, M-11-0060, M-11-805, M-11-1882, M-11-
2 2017, M-11-225[sic], M-11-2387 and the To Be Assigned MAC Docket Number
3 for ALJ Appeal Nos. 1-775058920, 1-775059778, 1-775080392, 1- 775079914
4 and 1-775074356." [AR 690 (emphasis added).] This list of docket numbers
5 corresponded to the list of specifically-identified docket numbers set
6 forth in the November 10, 2011 email. [AR 6449-6550]

7 Finally, the merger cases are not relevant to this analysis.

8 **2. R&R failed to recognize Health Net's due process rights**

9 Section 405(b) of Title 42 of the United States Code provides
10 litigants before an ALJ a right to "notice and opportunity for a
11 hearing." 42 U.S.C. § 405(b). Due process requires that a claimant
12 receive meaningful notice and an opportunity to be heard. *Udd v.*
13 *Massanari*, 245 F.3d 1096, 1099 (9th Cir. 2001). *Accardi v. Shaughnessy*,
14 347 U.S. 260 (1954) does not apply here. The Court finds no due process
15 violation. By the same token, the decision was not arbitrary, but well
16 reasoned and supported by substantial evidence in the record. *Tackett*,
17 180 F.3d at 1097.

18 **3. R&R erred in concluding Health Net was barred from raising a new issue 19 at the Appeals Council level**

20 Again, this objection is a mischaracterization of the R&R, as well
21 as the facts. Health Net submitted no new or additional evidence to the
22 MAC. 42 CFR §405.1122(a)(1) The Court agrees with the R&R analysis, as
23 follows:

24 The Secretary points out that HN "repeatedly conceded and
25 never once challenged, UPH's claim at the ALJ level that UPH
26 satisfied the first two prongs of the Test", and by doing
27 so, HN removed the issue from contention before the ALJ.
(Response, p. 7). Thus, according to the Secretary, HN's
position in the April Brief that no evidence had been
presented on Prong 2 "was specious in the extreme because
the very reason there was no evidence-beyond UPH's prior

1 submissions and Health Net's concessions—was that Health Net
2 had never put the question at issue, and had always conceded
3 that UPH met Prong 2. Health Net's acceptance of UPH's
4 position meant that there was never any reason or
5 requirement for UPH to further establish that it met Prong
6 2.

7 (Response, p. 10). The Secretary further points out that although HN
8 raised the Prong 2 issue in the April Brief, HN did not withdraw or
9 repudiate its prior statements, including statements in other briefs
10 pending before the MAC, conceding that UPH satisfied Prong 2.
11 (*Id.*).” (Doc. 49 at 9.)

12 There was no categorical ban on raising issues for the first time
13 in MAC appeals. The R&R correctly concluded that Health Net was required
14 to raise its Prong 2 objections at the appropriate time and manner
15 prescribed by the Department. See *Woodford v. Ngo*, 548 U.S. 81- 90-91.

16 **4. R&R erroneously found waiver**

17 The Court finds substantial evidence to support the conclusion that
18 Plaintiff waived the argument with reference to Prong 2. Cases cited by
19 Plaintiff are not persuasive otherwise, as resolved by both the R&R and
20 the response to the Objections. (Doc. 51 at 4-5.) The Magistrate Judge
21 properly applied *Mills v. Apfel*, 244 F.3d 1. (Doc. 49 at 10.)

22 **5. R&R erroneously found Health Net's prior concession was a judicial 23 admission**

24 This is a mischaracterization of the R&R. The R&R correctly
25 analyzed and applied *Christian Legal Soc. Chapter of the Univ. of Calif.*
26 *v. Martinez*, 561 U.S. 661 (2010) with reference to judicial admissions,
27 as follows:

28 It has been long-recognized that “[t]he power of the court
to act in the disposition of a trial upon facts conceded by
counsel is as plain as its power to act upon the evidence
produced.” *Christian Legal Soc. Chapter of the Univ. of
Calif. v. Martinez*, __ U.S. __, 130 S.Ct. 2971, 2983 (2010)

1 (quoting *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1881));
2 see also *Trinidad y Garcia v. Thomas*, 683 F.3d. 952, 982
3 (9th Cir. 2012) (concessions "have the effect of withdrawing
4 a fact from issue and dispensing wholly with the need for
5 further proof."). This is especially so to prevent parties
6 from "maintain[ing] a contention contrary to the agreed
7 statement,...or to suggest, on appeal that the facts were
8 other than as stipulated or that any material fact was
9 omitted.'" *Christian Legal Soc.*, __ U.S. __, 130 S.Ct. at
10 2983 (quoting 83 C.J.S., Stipulations § 93 (2000)). On this
11 record, HN is bound by its concession at the ALJ level. See
12 *Christian Legal Soc.*, __ U.S. __, 130 S.Ct. at 2983
13 (rejecting party's "unseemly attempt to escape from the
14 stipulation and shift its target....").

15 (Doc. 49 at 9-10.)

16 The Magistrate Judge properly held that Plaintiff was bound by its
17 repeated Prong 2 concessions.

18 **CONCLUSION**

19 The R&R concluded that "HN failed to properly raise its Prong 2
20 challenge during the administrative proceeding and, thus is not entitled
21 to remand in order to do so now." (R&R at 13.) This Court agrees.
22 Plaintiff has failed to establish that the Secretary's challenged
23 determinations were not supported by substantial evidence or were wrong
24 as a matter of law.

25 Accordingly, after conducting a de novo review of the record,

26 **IT IS ORDERED** that the Court **ADOPTS** the Report and Recommendation
27 (Doc. 49) in its entirety. The Objections (Doc. 50) raised by the
28 Plaintiff are **OVERRULED**.

29 //
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