

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-62034-CIV-DIMITROULEAS

AMERICAN COLLEGE OF CARDIOLOGY,
et al.,

Plaintiffs,

vs.

KATHLEEN SEBELIUS, in her official
capacity as SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Defendant.

**ORDER DENYING PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY IN AID
OF REQUEST FOR PRELIMINARY AND PERMANENT INJUNCTION AND MOTION
FOR PRELIMINARY INJUNCTION**

THIS CAUSE is before the Court upon the Plaintiff's Motion for Expedited Discovery in Aid of Request for Preliminary and Permanent Injunction [DE 2] and Motion for Preliminary Injunction [DE 5], filed on December 28, 2009, and Defendant's Request for Clarification of the Court's December 30, 2009 Order [DE 21, 28], filed on January 8, 2010. The Court has carefully considered the Motions, the Defendant's Responses [DE 15, 18], the Plaintiff's Replies [DE 22, 25, 26], and is otherwise fully advised in the premises.

I. BACKGROUND

Medicare, Title XVIII of the Social Security Act, is a federal health insurance program for

the aged and disabled. 42 U.S.C. §§ 1395 et seq. Part B of Medicare is a voluntary supplemental insurance program that covers payments for physicians' services and other healthcare services. §§1395j - 1395w-4. Physician payments are the lower of an amount according to a fee schedule, which is established each year, or the actual charge submitted by the physician. §1395w-4(a)(1),(b)(1). Payment amounts under the fee schedule are equal to the product of: (A) the relative value for the service, (B) the conversion factor for the year, and (C) the geographic adjustment factor. §1395w-4(b)(1). Three components comprise the relative value component of the payment amounts: a work component ("Work RVU"); a practice expense component ("PE-RVU"); and a malpractice component ("Malpractice RVU"). §1395w-4(c)(1). Two types of information are used in the PE-RVUs: direct expenses (e.g., clinical labor, medical supplies, and medical equipment), and indirect expenses (e.g., administrative labor and office rent). The Defendant established a methodology to calculate PE-RVUs, recently modified in 2007 physician fee schedule final rule. 71 Fed. Reg. 69624, 69630-42 (Dec. 1, 2006). Indirect expenses are calculated using physician specialty-specific surveys. Id. at 69632. Defendant proposed on July 13, 2009, using the Physician Practice Information Survey ("PPIS") to determine the indirect portion of the PE-RVU. 74 Fed. Reg. 33520, 33530 (July 13, 2009). Plaintiff American College of Cardiology submitted comments criticizing reliance on the PPIS data and noting that the PPIS data was not made available to the public. On November 25, 2009, the Defendant issued physician fee schedule relying on the PPIS data as a final rule. 74 Fed. Reg. 61738 (Nov. 25, 2009).

Plaintiffs, consisting of various associations of cardiologists, individual cardiologists, and patients, brought this action against the Defendant Secretary of the United States Department of

Health and Human Services (“Secretary”) to challenge the Defendant’s reliance on the PPIS data.

II. DISCUSSION

A. Subject Matter Jurisdiction

As a threshold matter, this Court must determine whether it has subject matter jurisdiction. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). A federal court without jurisdiction is “powerless to continue”, and thus we must determine whether we have jurisdiction first when it is in doubt. Amos v. Glynn County Board of Tax Assessors, 347 F.3d 1249, 1255 (11th Cir. 2003) (quoting Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999)).

Defendant argues that Congress has precluded judicial review of the determination of RVUs, and thus this Court has no jurisdiction over Plaintiffs’ claims. Plaintiffs argue that their claims do not seek review of the determination of relative value units, but instead challenge the Defendant’s reliance on PPIS data as a violation of Section 212 of the Balanced Budget Refinement Act of 1999 (“BBRA”). Pub. L. No. 106-113 (1999).

Congress has made judicial review of the determination of RVUs unavailable. 42 U.S.C. §1395w-4(i)(1) (“There shall be no administrative or judicial review under section 1869 or otherwise of . . . the determination of relative values and relative value units under subsection (c)”). There is a “strong presumption that Congress intends judicial review of administrative action.” Bowen v. Mich. Academy of Family Physicians, 476 U.S. 667, 670 (1986). That presumption may “only be overcome by “clear and convincing evidence” that Congress intended to preclude the suit.” Amgen Inc. v. Smith, 357 F.3d 103, 111 (D.C. Cir. 2004) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967)). That Congress intended to bar judicial

review of the determination of RVUs is clear and undisputed.

Several courts have held that Section 1395w-4(i)(1) bars judicial review of the factors the subsection lists, including RVUs. E.g., Am. Soc'y of Cataract & Refractive Surgery v. Thompson, 279 F.3d 447, 454 (7th Cir. 2002). In Thompson, the plaintiffs challenged a final rule promulgated by the Secretary, in which the Secretary established the new resource-based system for determining PE-RVUs and a formula to implement the new system in transition. Id. at 450. The court found that the district court did not have jurisdiction to review the formula for calculating PE-RVUs. Id. at 454. In Painter v. Shalala, the plaintiff filed suit alleging that the Secretary had violated Section 1395w-4(d)(1)(B) (the budget neutrality provision) by erroneously reducing the conversion factor. 97 F.3d 1351, 1355 (10th Cir. 1996). The Tenth Circuit found that Section 1395w-4(i) barred judicial review of the determination of conversion factors. Id. at 1356. The plaintiffs in American Society of Dermatology v. Shalala sought, inter alia, to have the Secretary enjoined from using a certain coding system of physicians' services. 962 F. Supp. 141, 145 (D.D.C. 1996). The court ruled that it did not have subject matter jurisdiction over the issue because Congress had prohibited judicial review of the establishment of the coding system. Id. at 146. The court in American Society of Anesthesiologists v. Shalala held that the plaintiffs' claims that the Secretary did not properly decide what types of expenses must be considered in determining relative values was barred by Section 1395w-4(i)(1). 90 F. Supp. 2d 973, 976 (N.D. Ill. 2000). The court found that an interpretation of Section 1395w-4(i) that did not bar judicial review of determination of that component of the PE-RVU determination would frustrate the congressional mandate against court intervention. Id.

We agree with the analysis in American Society of Anesthesiologists, and find that it is

analogous to this case. Plaintiffs here are attempting to characterize their claims as not being challenges on the determination of PE-RVUs because they only challenge the Defendant's reliance on certain data. However, Defendant's reliance on that survey data was part of her determination of the PE-RVU. A finding in Plaintiffs' favor would necessarily require the Defendant to recalculate the PE-RVU, which would frustrate Congress's mandate prohibiting judicial review of the RVU determination. Because the Defendant's determinations have to be budget-neutral according to Section 1395w-4(c)(2)(B)(ii), any change in the PE-RVU for would have to be offset by other changes in fee schedules already in effect; judicial review would run contrary to congressional intent that the Secretary's decisions be final, efficient, and within a tight time frame. Am. Soc'y of Cataract & Refractive Surgery v. Thompson, 279 F.3d 447, 454 (7th Cir. 2002).

Plaintiffs argue that finding that Section 1395w-4(i)(1) bars their claims would be ruling that Section 212 of the BBRA, which requires that the Defendant use a process consistent with sound data practices, has been preempted or superseded. Plaintiffs argue that Congress has not expressed that intent. United States v. Norquay, 905 F.3d 1157, 1160 (8th Cir. 1990) (“When resolving an apparent conflict between two federal statutes, we are mindful of our duty to regard each statute as effective wherever possible, absent a clearly expressed Congressional intent to the contrary.”). However, there is no apparent conflict here between Section 1395w-4(i)(1) and Section 212 of the BBRA that we need to resolve.

B. Plaintiffs Have Not Established a Substantial Likelihood of Success on the Merits

Preliminary relief requires the movant to satisfy the four traditional criteria: “(1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer

irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if the injunction issued, and (4) an injunction would not disserve the public interest.” N. Am. Med. Corp. v. Axiom Worldwide, Inc., 522 F.3d 1211, 1217 (11th Cir. 2008) (quotation omitted). Because a “preliminary injunction is an extraordinary and drastic remedy,” it is “not to be granted until the movant clearly carries the burden of persuasion as to the four prerequisites.” Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994) (quotations omitted).

As we find that this Court does not have subject matter jurisdiction over this case, we find that the Plaintiffs cannot establish a substantial likelihood of success. As subject matter jurisdiction is a threshold issue, the substantial likelihood of success criterion is particularly pressing in this case. Because Plaintiffs have not established this necessary element, they cannot show that they are entitled to a preliminary injunction.¹

III. CONCLUSION


Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant’s Request for Clarification of the Court’s December 30, 2009 Order [DE 21, 28] is hereby **GRANTED**;

¹ Though our finding against this Court having subject matter jurisdiction makes it unnecessary to consider all the criteria required for us to grant a preliminary injunction, we note that the equities may not support Plaintiffs’ claims for preliminary relief. Preliminary relief is equitable, and delay is an equity a court may consider. Nat’l Council of Arab Americans v. City of New York, 331 F. Supp. 2d 258, 265-66 (S.D.N.Y. 2004). Defendants have not disputed that they have had since October 30, 2009, to inspect the portion of the final rule that they now challenge. Though the final rule was promulgated on November 25, 2009, they filed this action over a month later and sought expedited discovery ahead of an emergency preliminary injunction hearing. As Defendant has pointed out, delays in seeking preliminary relief undercut the argument that there is any urgency. Id.

2. The hearing set for January 13, 2010 is hereby **CANCELLED**;
3. Plaintiffs' Motion for Preliminary Injunction [DE 5] is hereby **DENIED**;
4. Plaintiffs' Motion for Expedited Discovery in Aid of Request for Preliminary and Permanent Injunction [DE 2] is hereby **DENIED as moot**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this
12th day of January, 2010.


WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record