HCFA Rulings

Department of Health and Human Services

Health Care Financing Administration

Ruling No. 87-2 Date: April, 1987

HCFA Rulings are decisions of the Administrator that serve as precedent final opinions and orders and statements of policy and interpretation. They provide clarification and interpretation of complex or ambiguous statutory or regulatory provisions relating to Medicare, Medicaid, Utilization and Quality Control Peer Review, and related matters.

HCFA Rulings are binding on all HCFA components, the Provider Reimbursement Review Board and Administrative Law Judges who hear Medicare appeals. These decisions promote consistency in interpretation of policy and adjudication of disputes.

This Ruling concerns the Medicare Hospital Insurance program. HCFAR 87-2, effective April 9, 1987, addresses a Provider Reimbursement Review Board jurisdiction issue that was also the subject of HCFAR 86-2. HCFAR 87-3, also effective April 9, 1987, relates to the inclusion of labor/delivery room days in the calculation of inpatient days.

HCFAR 87-2-1

MEDICARE PROGRAM

Hospital Insurance Benefits (Part A)

Provider Reimbursement Review Board Jurisdiction Over Challenges to the Application or the Validity of the Medicare Regulation Governing Apportionment of Malpractice Insurance Costs (42 CFR 413.56).

HCFAR 87-2

Purpose: This Ruling states HCFA policy that the Provider Reimbursement Review Board now has jurisdiction to hear a provider's challenge to the application or validity of 42 CFR 413.56 even if the provider has not received a Notice of Program Reimbursement (NPR). Other jurisdictional prerequisites would continue to apply.

Citations: Section 1878 of the Social Security Act (42 U.S.C. 1395oo); 42 CFR Part 405, Subpart R; 52 FR 13874.

Pertinent History: On April 1, 1986, a new regulation governing the allocation of malpractice insurance costs was published (51 FR 11142) to supersede a regulation on the same subject that had been issued in 1979. The new regulation (42 CFR

413.56 as redesignated at 51 FR 34790, 34808) applies to cost reporting periods beginning on or after July 1, 1979. The public was offered an opportunity to comment on the 1986 regulation. A response to those comments was published on March 27, 1987 (52 FR 9833).

The new regulation generally results in reimbursement to providers that is greater than under the superseded rule. Medicare's fiscal intermediaries have implemented the new regulation on an interim basis with respect to many providers by paying them the estimated amount that will be owed when a final determination is made. The intermediaries,

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however, have not yet made final determinations, and thus have not issued revised NPRs, in the case of most providers.

In HCFA Ruling 86-2, dated July 2, 1986, it was held that the Board has no jurisdiction to grant a hearing to a provider that wishes to challenge the application or the validity of the 1986 regulation with respect to a cost reporting period until such time as the intermediary issues to the provider an NPR or revised NPR reflecting application of that regulation. This Ruling reflected the provision of section 1878(a)(1)(A) of the Act, which requires receipt of the NPR before the Board has jurisdiction to consider a provider's appeal.

At the time that HCFA Ruling 86-2 was issued, it was anticipated that many providers would receive NPRs soon afterwards. Principally because of unexpected delays in issuing the final response to the many complex comments on the April regulation, however, the process of issuing revised NPRs also has been delayed.

A number of providers have indicated through court filings that they desire to challenge the validity of the 1986 regulation but have been frustrated in doing so by the absence of an NPR. It was not HCFA's intention to delay the availability of review. Nevertheless, we recognize that the unanticipated delays in issuing NPRs have made review unavailable.

Under section 1878(a)(1)(B) of the Act, a provider may obtain a Board hearing prior to receiving an NPR if it has not received the NPR "on a timely basis." Our regulations (42 CFR 405.1835(c)) define timeliness as

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receipt of an NPR within 12 months after the provider has submitted its cost report. Since we are not requiring the submission of an amended cost report in the case of the 1986 regulation, this regulation may not literally apply. Nevertheless, it has now been 12 months since issuance of the 1986 regulation, and the timeliness considerations reflected in the statute and regulation should govern. We conclude that, under the circumstances present here, providers desiring to challenge the 1986 regulation have not received an NPR on a timely basis within the meaning of section 1878(a)(1)(B) if they have not already received one. Accordingly, the Board

has jurisdiction to hear such cases if the other prerequisites for review have been satisfied. A provider may, of course, at its option await receipt of its NPR before seeking Board review.

Ruling: It is held that any provider seeking to challenge the 1986 malpractice rule has not received an NPR on a timely basis if an NPR has not yet been issued. Accordingly, the jurisdictional requirement of section 1878(a)(1) of the Act for Board review is satisfied.

Effective Date: April 9, 1987

DATED: April 9, 1987

William L. Roper, M.D.
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