

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

98-D67

PROVIDER -Norristown State Hospital
Norristown, Pennsylvania

DATE OF HEARING-
July 11, 1995

Provider No. 39-4001

Cost Reporting Periods Ended -
June 30, 1986, June 30, 1987
and June 30, 1988

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross of Western Pennsylvania

CASE NOS. 94-1389E,
94-1390E, 94-1525E

INDEX

	Page No.
Issue	2
Statement of the Case and Procedural History	2
Provider's Contentions	3
Intermediary's Contentions	4
Citation of Law, Regulations & Program Instructions	5
Findings of Fact, Conclusions of Law and Discussion	6
Decision and Order	7

ISSUE:

Did the Intermediary err in reopening the Provider's cost reports to calculate Graduate Medical Education reimbursement?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

On September 30, 1986 Norristown State Hospital ("Provider") filed its fiscal year 1986 cost report with Independence Blue Cross ("Intermediary"). After auditing the cost report the Intermediary issued a Notice of Program Reimbursement ("NPR") dated July 12, 1988. GME costs were not claimed and reimbursed under retrospective cost reimbursement principles, as the regulations and program instructions implementing the new GME methodology had not yet been issued.

The regulations implementing the new GME methodology were issued in final form on September 29, 1989. HCFA issued implementing instructions on February 22, 1990, June 22, 1990, and November 9, 1990. These instructions ordered intermediaries to reaudit and recalculate base year GME costs and number of interns and residents for all affected providers, than reopen the cost reports for subsequent years to use that new average per resident amount to make payment to those providers for GME costs, adjusting previous payments as necessary. Congress enacted special rules on how and when to recover any overpayments due from providers as a result of any retroactive adjustments. Omnibus Budget Reconciliation Act of 1990 ("OBRA 90")) Pub. L 101-508, section 4004(a).

The Intermediary notified the Provider of the required reaudit of fiscal year 1985, and worked with the Provider during most of 1990 and 1991 to arrive at both an average per resident amount for fiscal 1985 and the appropriate number of residents for fiscal year 1986. On February 27, 1991, the Intermediary issued the NAPRA. The Provider did not appeal that determination.

Effective with the cost reporting period beginning July 1, 1986, responsibility for handling all intermediary duties for the Provider was transferred to Blue Cross of Western Pennsylvania. However, responsibility for issuing the NAPRA based on fiscal year 1985 information and for computing the correct number of fiscal year 1986 residents remained with Independence Blue Cross. The NAPRA was issued on February 27, 1991 and the notification to the Provider of a final Intern and Resident count for fiscal year 1986 was made on May 20, 1991. Implementation of the new GME methodology for all subsequent years, including fiscal year 1986, was transferred to Blue Cross of Western Pennsylvania.

Blue Cross of Western Pennsylvania ("Intermediary") did not issue a written notice of reopening for the fiscal year 1986 cost report until August 2, 1993. This was followed by revised NPRs dated August 5, 1993 and August 12, 1993 implementing the new GME methodology for fiscal year 1986 and setting forth a repayment schedule for the resulting

overpayment. Pursuant to the first revised NPR, the Provider owed the Medicare program \$717,159 in GME costs for fiscal year 1986. The second revised NPR partially offset this amount by some corresponding increased PPS and other payments of \$98,771 for the same year. Overall, the Intermediary proposed to recoup \$618,388 of Medicare payments as a result of implementing the new GME methodology. The Intermediary also adjusted the Provider's 6/30/87 cost report in the amount of \$494,464, and the 6/30/88 cost report in the amount of \$743,575.

On January 26, 1994, the Provider appealed, claiming the Intermediary had violated 42 C.F.R.

§ 405.1885 by reopening the Provider's cost report too late, that is, more than three years after the July 12, 1988 NPR for the 6/30/86 cost report, more than three years after the September 18, 1989 NPR for the 6/30/87 cost report, and more than three years after the January 8, 1990 NPR for the 6/30/88 cost report. The Provider disagreed with the Intermediary's reopening and filed a timely appeal with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835-.1841 and has met the jurisdictional requirements of those regulations. The Medicare reimbursement effect is approximately \$1,856,575.

The Provider was represented by Jason W. Manne Esq. of Pennsylvania Department of Public Welfare. The Intermediary was represented by Michael Berkey Esq. of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider argues that the Intermediary's actions did not constitute a timely reopening. In promulgating the regulations governing GME costs, HCFA was extremely explicit in stating that it would not reopen fiscal years that had been settled for more than three years. In the September 29, 1989 Federal Register, HCFA was very clear on this point. HCFA stated:

We would like to reiterate that payments will not be affected for the cost reports that have been settled for more than three years. Rather we propose that cost reports settled for more than three years could be re-examined for the purposes of modifying the hospital's target amount or HSR in subsequent years subject to reopening. (Emphasis added).

54 Fed. Reg. 40302, (Sept. 29, 1989).

The Provider asserts that the Intermediary's arguments that various actions, short of the notice of reopening, should be deemed a reopening is without merit. The procedure for reopening a settled year is set forth in HCFA Pub. 15-1 § 2932 and requires timely notice to the provider.

The Provider points out that in prior PRRB hearings, Shallowford Community Hospital v. Mutual of Omaha, PRRB Dec. No. 91-D62, August 21, 1991, Medicare and Medicaid Guide

(CCH)

¶ 39,568, the Board held that compliance with the notice requirements of the PRM is a prerequisite to an effective reopening. Therefore, the Provider argues that since the Intermediary did not comply with the notice requirements until after the three year period had run, it did not effect a timely reopening.

The Provider contends that the Intermediary's argument that the three year rule is inconsistent with the statute is likewise without merit. This argument was effectively rejected by the District of Columbia Court of Appeals in Administrators of Tulane Educational Fund v. Shalala, 987 F. 2d 790 (D.C. Cir. 1993). That case expressly held that the statute is ambiguous regarding retroactive adjustments to implement the GME changes. As a result, HCFA policy embodied in the Federal Register controls.

INTERMEDIARY'S CONTENTIONS:

The Intermediary argues that its revised NPRs were issued timely. It points out that the GME regulations and program instructions constituted notification to the Intermediary pursuant to 42 C.F.R. § 405.1885(b) that its original NPR, reimbursing GME costs based on cost reimbursement, no longer complied with the law and regulations applicable to GME payment. Under COBRA, such costs were to be reimbursed under a new methodology. Because the regulations and notices to the Intermediary were all issued before July 12, 1991, the three year requirement in 42 C.F.R. § 405.1885(b) was met.

The Intermediary points out that as soon as it reviewed the GME regulations and implementing instructions, it decided to follow them and to reopen the GME post base year cost reports to implement the new regulations and instructions. Therefore, the decision to reopen came well within the three year period in 42 C.F.R. § 405.1885(a). The Intermediary contends that there is no time limit imposed by the regulations on notifying a provider of a reopening as per 42 C.F.R. § 405.1887.

The Intermediary argues that the NAPRA, issued on February 27, 1991, constituted a timely reopening under 42 C.F.R. § 405.1885(a) for fiscal year 1986, as to GME costs, because of its reference to the law and regulations requiring reopening of cost reports subsequent to the GME base year to implement the new GME payment methodology. The Intermediary asserts that through NAPRA the Provider was told that its subsequent year cost reports were being reopened for GME payment revisions. Otherwise, there would be no reason to issue the NAPRA, as it did not affect any Medicare reimbursement by itself.

The Intermediary points out that throughout the GME base year audit, it discussed with the Provider the new GME payment methodology as it would be applied to years subsequent to fiscal year 1985. Therefore, the Provider was notified prior to July 12, 1991 that fiscal years

subsequent to 1985 were being reopened pursuant to 42 C.F.R. § 405.1885(a) to implement the new GME payment methodology.

The Intermediary argues that there is a hefty volume of correspondence between the Intermediary and the Provider between early 1990 and early 1991 discussing various aspects of the GME base year audit and its implementation for years subsequent to that base year, particularly fiscal year 1986. That correspondence constitutes a timely reopening of the fiscal year 1986 cost report under 42 C.F.R. § 405.1885(a), as all of it preceded July 12, 1991.

The Intermediary contends that the reopening regulations do not strictly apply where Congress has effectively ordered the Intermediary to settle all cost reports beginning on or after July 1, 1986 using a new GME payment methodology. Any regulation that would, if strictly read, stand in the way of such a congressional mandate must be considered subservient to such mandate, and instead must be read in harmony with the intent of Congress, if at all possible. Accordingly, the Intermediary argues that 42 C.F.R. § 405.1887 may not be applied to subvert the will of Congress. A statute holds more weight than a regulation.

CITATIONS OF LAWS, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Laws - 42 U.S.C.:
 - § 1395x(v)(1)(A)(1) - Reasonable Cost
2. Regulations - 42 C.F.R.:
 - §§ 405.1835-.1841 - Board Jurisdiction
 - § 405.1885 - Reopening a Determination or Decision
 - § 405.1887 - Notice of Reopening
3. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):
 - § 2932 - Notices (Including Notices of Refusal) Related to Reopening and Correction
4. Cases:

Shallowford Community Hospital v. Mutual of Omaha Insurance Company, PRRB Decision No. 91-D62, August 21, 1991, Medicare and Medicaid Guide (CCH) ¶

39,568.

Administrators of Tulane Educational Fund v. Shalala, 987 F. 2d 790 (D.C. Cir. 1993).

Regions Hospital Petitioner v. Shalala, Secretary of Health and Human Services, 118 S.Ct. 909 (1998).

5. Other:

54 Fed. Reg. 40302 (September 29, 1989).

Omnibus Budget Reconciliation Act of 1990 (“OBRA 90”) (Pub. L. 101-508, section 4004(a)).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties’ contentions evidence presented, and testimony elicited at the hearing, finds and concludes that the Revised Notice of Program Reimbursement was not sent to the Provider within the prescribed three-year time period as required by 42 C.F.R. §§ 405.1885 and .1887.

The Board finds that the regulations dealing with the reopening of a determination or decision, 42 C.F.R. § 405.1885, require that no determination or decision may be reopened after three years from the date of the notice of the Intermediary’s determination. The regulation dealing with a notice of reopening, 42 C.F.R. § 405.1887, requires that all parties to any reopening shall be given written notice of the reopening. (Emphasis added).

The Board finds that the sole issue in this case revolves around a proper notice of reopening prior to the three year deadline. The Intermediary argued that the Board should accept substance over form in this case, arguing that the Provider had in actuality been given notice of reopening. The Board notes that a formal written notice of reopening was not sent until August 2, 1993. Therefore, the Intermediary did not give the final notice of reopening until after the three year period had elapsed. The Board finds that while a prior notice to the Provider indicated that an adjustment might be made, it was also told that an adjustment would be made if necessary. The Board finds that this is not an acceptable notice of reopening.

The Board finds that the regulations at 42 C.F.R. § 405.1885 and 1887 are a cornerstone of the appeal process and must be strictly adhered to. Since the Intermediary did not send the notice of reopening as required by these regulations the Board finds that the Intermediary cannot reopen the cost reports.

The Board notes that in Regions Hospital Petitioner v. Shalala, Secretary of Health and

Human Services, 118 S.Ct. 909 (1998), the Supreme Court held that there should be no recoupment of funds where proper notice - three year rule - was not timely. The court's intent was to correct any open year and future cost reports which contained incorrect graduate medical education costs. Therefore, the Board finds that the Intermediary improperly reopened the provider's cost reports.

DECISION AND ORDER:

The revised NPR's for 1986, 1987, and 1988, that were a result of the reopening notice of August 2, 1993, are declared null and void. The Intermediary's adjustments on the revised NPR's are reversed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esquire

Date of Decsion: June 19, 1998

FOR THE BOARD:

Irvin W. Kues
Chairman