PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON-THE-RECORD
98-D81

PROVIDER -Greenville Hospital Center
Greenville, South Carolina

Provider No. 42-T078

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross and Blue Shield of South Carolina

DATE OF HEARING-
June 30, 1998

Cost Reporting Period Ended -
September 27, 1987,
September 25, 1988 and
September 30, 1989

CASE NO. 92-2398

INDEX

ISSUE:

Was HCFA's denial of the Provider's request for an adjustment to its TEFRA target rate for certain costs proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Greenville Hospital Center is a voluntary not-for-profit general short term acute care facility located in Greenville, South Carolina. It is a part of a network of acute care and specialty institutions that serve as a regional referral center for upstate South Carolina and parts of Western North Carolina, and Northeastern Georgia. The facility involved in this appeal is certified to operate as a distinct part rehabilitation unit called "Roger C. Pace".

During the fiscal years ended September 29, 1985, September 27, 1987, September 25, 1988 and September 30, 1989, Greenville Hospital Center operated a 50-bed distinct part rehabilitation unit called the Roger C. Pace Rehabilitation Unit (RCP) which is subpart 11 on the hospital's cost report. Both the hospital and the RCP are collectively and individually referred to herein as the ("Provider"). Blue Cross and Blue Shield of South Carolina ("Intermediary") is the fiscal Intermediary.

The Provider's services include inpatient rehabilitation for patients who have disabilities arising primarily from strokes, traumatic brain injuries, spinal cord injuries, amputations and neurological and orthopedic disorders. It has been accredited by the Commission on the Accreditation of Rehabilitation Facilities ("CARF") since prior to 1983. It has been excluded by HCFA from PPS since FYE 1985.

The Provider's base year for purposes of determining its allowable Medicare reimbursement, its TEFRA target limit, is its FYE 1985, its first year of exclusion from PPS. FYEs 1987, 1988 and 1989 are the Provider's target years. The Provider's TEFRA base year rate was $5,999.70 per discharge.

The Provider timely submitted to its Intermediary a request for an adjustment to its TEFRA target limit.[1] The Intermediary recommended to HCFA approval of all the adjustments requested. But, HCFA granted only partial relief. It granted all of the relief requested except for that relief associated with an increase in the Provider's Average Length of Stay ("ALOS") in FYEs 1988 and 1989.[2] The Provider also requested in its August 21, 1992 letter to the Intermediary, a reconsideration of HCFA's denial of an adjustment for the increased cost associated with medical direction. HCFA denied this request.

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1 Exhibit p-7.

2 Exhibit p-9.

The Provider's ALOS increased between FYE 1985 and each of the years at issue, FYEs 1987,1988, and 1989. The ALOS for each of the relevant years is:

FYE	ALOS
1985	20.974 (5,642 Medicare days/269 discharges)
1987	22.987 (5,425 Medicare days/236 discharges)
1988	21.004 (5,818 Medicare days/277 discharges)
1989	22.586 (6,166 Medicare days/272 discharges)[3]

One of the factors attributable to the longer ALOS is a decrease in multiple admissions, Multiple admissions are patients admitted to the Provider, discharged to an acute care facility due to medical complications, and then readmitted to the Provider when their medical conditions permit the resumption of rehabilitation services. Each multiple admission represents two medical discharges for purposes of calculating the Provider's TEFRA reimbursement. A higher number of multiple admissions in a year would decrease the ALOS by causing one patient's stay to be treated as two shorter stays rather than one longer length of stay. This lowers the ALOS for that year. The higher incidence of multiple admissions in the base year versus the target years resulted in an increase in the ALOS in the target years. Patient infections resulted in medical complications which also contributed to longer lengths of stay. The number of patients with infections was higher in the target years than in the base year.

Stroke patients required an increased length of stay in the target years over the base year. Over fifty percent of the patients treated were stroke patients in the base year and target years. An increase in the length of stay of stroke patients in the target years contributed to the overall ALOS in the target years. The ALOS of spinal cord patients in FYE 1987 was almost twice that of its spinal cord patients in the base year.

HCFA granted the requested ALOS adjustment for FYE 1987 in the amount of $138,167.[4] It denied the requests for FYE 1988, in the amount of $2,442, and for FYE 1989, in the amount of $128,765. HCFA stated:

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[3] Provider Position Paper at 6.

[4] Exhibit p-9.

> The reason for this denial is that the changes in length of stay from the base year to fiscal year 1988 and fiscal year 1989 were very small and therefore do not justify a TEFRA adjustment for these years.[5]

As a result of a CARF survey conducted in October of 1983, CARF recommended that the Provider improve its program evaluation system. As a result of the recommendations one FTE was added for Admissions Coordinator/Program Evaluator and one FTE was added for a social worker. The Admissions Coordinator/Program Evaluator position was filled in April of 1986. This position did not provide services to any other part of the hospital.

In response to the 1989 CARF survey, the Provider hired an additional social worker. This person's duties were restricted solely to the Provider. HCFA denied the Provider's request for an adjustment for the addition of both the Admissions Coordinator/Program Evaluator and the social worker because HCFA asserted that the two positions benefited the entire hospital. HCFA also asserted that there was already a fully qualified social worker on staff and HCFA questioned actions made in 1989 on the basis of a 1983 survey as grounds for justifying an adjustment.

The Provider began a new program in the Spring of 1988 called the Brain Injury Rehabilitation Program. Two directorship positions were added for the Brain Injury Rehabilitation program, a Medical Director and a Program Director. The Medical Director was paid $26,731 for FYE 1988 and $43,093 for FYE 1989. The Program Director was paid $47,833 for FYE 1988 and $67,949 for FYE 1989. HCFA denied the request for an adjustment to the increased costs for medical direction.

During the target years when there were shortages in nursing and physical therapy personnel, the Provider was forced to increase the compensation paid to both nurses and physical therapists. The Provider's average hourly wages for all employees increased at a significantly higher rate in each of the target years than was accounted for in the TEFRA update factor for those years. HCFA denied the request for additional compensation for nursing and physical therapist FTEs.

The Provider disagreed with the Intermediary's adjustments and filed a timely appeal with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 1835-.1841 and has met the jurisdictional requirements of those regulations. The Medicare reimbursement is approximately $1,327,361.

The Provider was represented by Carel T. Hedlund, Esq. and Leslie Demaree Goldsmith, Esq. of Ober, Kaler, Grimes & Shriver. The Intermediary was represented by Bernard M. Talbert, Esq. of the Blue Cross and Blue Shield Association, Chicago.

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[5] Exhibit p-11.

PROVIDER'S CONTENTIONS:

The Provider contends that it is entitled to an adjustment to its TEFRA Target Limit due to a longer ALOS in its target years. The HCFA Pub. 15-1 § 3004.1B provides specifically for an adjustment to a provider's TEFRA target rate limit due to a higher ALOS in the target year over the base year. Pursuant to those provisions, HCFA granted the Provider's request for a adjustment due to its increased ALOS for FYE 1987 in the amount of $138,167. However, HCFA denied the request for FYEs 1988 and 1989, asserting that the denial was because the increases in the ALOSs for those years were very small. The increased ALOS for 1988 would result in a $2,442 adjustment and a $128,765 adjustment for 1989.

The Provider argues that there is no threshold change in ALOS for awarding an adjustment. A Provider's costs only must exceed its TEFRA ceiling: "A hospital may request an adjustment to the payment allowed under the rate of increase ceiling if its costs exceed the ceiling. . . ." HCFA Pub. 15-1 §3004.1. The Provider points out that an adjustment request is limited only by the amount by which a provider's costs exceed its TEFRA target limit due to the increased ALOS.

> The amount of the adjustment (for ALOS) is limited to the lesser of the difference between the ceiling based on the per discharge target amount and one based on the per diem target amount of the operating costs that exceed the ceiling based on the per discharge target amount.

HCFA Pub. 15-1 § 3004.1B

Therefore, the Provider points out that a small increase in ALOS would serve only to limit the amount of the adjustment, not whether an adjustment should be considered or not.

The Provider argues that it is entitled to an adjustment to its TEFRA target limit due to the hiring of additional staff to meet accreditation requirements. The Provider was required by CARF to hire two staff personnel to provide additional services. The two additional staff were an Administrative Coordinator/Program Evaluator and a social worker. The addition of these staff members resulted in increased costs incurred in the target years, that were not incurred in the base year. The additional services and costs in the target years created a lack of comparability between the target years and the base year. Such a lack of comparability requires an adjustment in the Provider's TEFRA amount for the target years pursuant to 42 C.F.R. § 413.40(g)(3)(i).

The Provider asserts that in denying the requested adjustment, HCFA did not disagree that an adjustment to compensate for additional staff required by an accrediting agency is appropriate. Rather, HCFA denied the adjustment for factual reasons, all of which were inaccurate. The three factual bases for HCFA's denial were:

(1) the positions benefited the entire hospital and not just the Provider;
(2) the 1989 hiring of the social worker was in response to a 1983 survey;
(3) the hiring of one FTE social worker went beyond the (1983) survey recommendation which indicated the expansion of a part-time position to a full time position.[6]

The Provider asserts that HCFA erred because the positions benefited only the Provider, not the hospital. This is clearly demonstrated by the position descriptions which identify the location of both positions at the Provider and not the hospital. Further, both positions report directly to the Provider's Administrator, specifically, to the Assistant Administrator, the Program Director of the Brain Injury Program and the Associate Director of the Provider's Social Services. There is nothing to support HCFA's assertions that these positions provided any benefit to the hospital.

The Provider points out that HCFA further erred because the hiring of a FTE social worker was not in response to a 1983 survey. The social worker was hired in response to the CARF recommendations in 1989. Therefore, the hiring in 1989 in response to a 1989 survey cannot be considered untimely.

The Provider also points out that HCFA's assertion that the hiring went beyond the survey's recommendation was based on its erroneous belief that the hiring was made in response to the 1983 survey, which called for the expansion of a part-time social worker position to a full-time position. The hiring was made on the basis of the 1989 survey.[7] The 1989 survey called for the additional social work staff, not limiting the addition to an additional .5 FTE. Therefore, the hiring did not go beyond the recommendation of the 1989 survey, which prompted the hiring. The Provider contends that since HCFA was factually incorrect on the grounds of its denial, the Provider is entitled to the adjustment relief requested.

The Provider contends that it is entitled to an adjustment to its TEFRA target limit due to the hiring of two director positions for the new Brain Injury Program.[8] The Brain Injury Program opened in the spring of 1988. The program required the addition of two directorship positions, the Medical director who was responsible for overseeing physical rehabilitation and the Program Director who was responsible for overseeing cognitive rehabilitation. These positions did not exist in the base year. The addition of these two positions resulted in increased costs incurred in the FYE 1988 and 1989 target years, that were not incurred in the base year.

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6 Provider Position Paper p-17.

7 Exhibit p-15.

8 Exhibit p-18.

The Provider points out that the additional services and costs in the target years created a lack of comparability between the target years and the base year. Such a lack of comparability requires an adjustment in the Provider's TEFRA target amount for the target years pursuant to 42 C.F.R.
§ 413.40(h)(1)(iii).

The Provider argues that it is entitled to an adjustment to its TEFRA target limit due to the increased salaries for nursing and physical therapy FTEs. Due to shortages in nursing and physical therapy personnel the Provider contends that it was forced to pay higher salaries than in its base year. This caused a distortion between the base year and the years under appeal. Such a distortion is grounds for an adjustment in the Provider's target years pursuant to 42 C.F.R.
§ 413.40(g)(2)(3).

The Provider points out that HCFA recognized a new category for an adjustment where a hospital's wages have increased. However, when HCFA created this new adjustment for wages, 42 C.F.R. § 413.40(g)(4) and HCFA Pub. 15-1 P 3004.1E (effective for cost reports beginning on or after April 1, 1990) it also indicated that providers that do not fall within the qualifications of the new category are nonetheless eligible for an adjustment due to a significant wage increase in their compensation to all employees pursuant to the lack of compatibility provision at 42 C.F.R. 413.40(g)(3). The lack of compatibility provision has existed since 1982, codified at 42 C.F.R. 405.463(h)(1). Therefore, this provision can be used to grant adjustments for wage increases for cost years beginning prior to those beginning on or after April 1, 1990. This provision is applicable to cost years prior to those beginning on or after April 1, 1990.

HCFA has stated:

> A hospital that does not qualify for an adjustment based on significant wage increases may still request consideration of an adjustment to its target amount under § 4l3.40(g)(3) (Adjustments due to lack of compatibility between cost reporting periods formerly codified at § 413.40(h) if there is a significant distortion in the hospital's costs between the base year and the current year). However, no adjustment will be given for increases in salaries for specific classes of employees, such as therapists, without the hospital documenting that its average hourly increase for all employees is significantly higher than the increase that is accounted for in the update factor.[9]

56 Fed. Reg. 43,234 (Aug. 30,1981)

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[9] Exhibit p-41.

The Provider points out that its average hourly increase in wages for all of its employees is significantly higher than the increase in the update factor. Accordingly, the Provider is entitled to an adjustment for the increased costs pursuant to 42 C.F.R. 413.40(g)(3).

The Provider asserts that HCFA has previously granted adjustments for cost years beginning prior to April 1, 1990, where providers incurred higher contract wage costs by hiring temporary agency nurses required during the nursing shortage. The Provider did not hire agency nurses or contract physical therapists. Instead it decided to pay increased salaries to attract permanent staff. This resulted in less costs than hiring temporary nurses and therapists.

Since the Provider's additional costs were due to shortages in the industry for which HCFA has granted adjustments, the Provider should also be granted an adjustment for the same reasons. In addition the statute requires that an adjustment be provided where a provider, experiences events beyond its control that result in a cost distortion.

> The Secretary shall provide for an . . . exception and adjustment to the (TEFRA target limit) method. . . where events beyond the hospital's control . . . create a distortion in the increase in costs.

42 U.S.C. § l395ww(b)(4)(A).

The statute mandates an adjustment "if required by the Constitution or the objectives of the Medicare statute, which are to permit hospitals to care for patients effectively and, at the same time, to avoid excessive financial burdens on the Medicare program caused by unnecessary or inflated costs." RYE Psychiatric Hospital 846 F. Supp. 1171, 1182 (S.D.N.Y. 1994), appeal. docketed, No. 94-6172 (2nd Cir., June 27, 1994).

Therefore, the Provider contends that an adjustment for the increased costs per nursing and physical therapists FTEs is mandated because the events causing the increased cost were beyond the Provider's control,the additional costs are necessary to permit the Provider to care effectively for patients, and the costs are neither unnecessary nor inflated.

The Provider argues that the TEFRA methodology violates the Equal Protection Clause of the Fifth Amendment of the Constitution, guaranteeing due process. The TEFRA reimbursement methodology results in disparate treatment of providers based solely on the arbitrary criteria of how long they have been excluded from the PPS system. The longer a provider has been excluded from the system, the lower the providers reimbursement. This is because the limit on reimbursement is set using the provider's costs in the earliest years. The Provider points out that it is limited to the costs it incurred in 1985. While a provider who enter the program in 1991 is limited to the base year of 1991. The 1991 base year costs include higher nursing and physical therapy costs, which costs have been denied to the Provider. Therefore a new provider has a monetary and operational advantage over an older provider.

INTERMEDIARY'S CONTENTIONS:

The Intermediary points out that HCFA allowed the Provider an adjustment for ALOS for 1987 but denied the Provider's requests for adjustments for 1988 and 1989. The reason for the denial was that the increases were slight. The mere fact that an adjustment was warranted in one year does not automatically result in adjustments for subsequent years.

The Intermediary argues that to obtain an adjustment for an increase in the ALOS in a particular cost reporting period as compared to the base year, the Provider must be able to fully document the reasons contributing to the length of stay increase. The provider must be able to prove that the increase is caused by, for example, an increase in the acuity or types of patients served, changes in admission policy, etc. The Provider has not shown that the slight increase in the ALOS for 1988 and 1989 were attributed to a significant change in the severity of the patients that were admitted or treated.

HCFA denied the Provider's request for an adjustment to the target rate due to the increased salaries of nursing and therapy personnel. The Intermediary argues that for the years under appeal the regulations do not recognize significant increases in wages as a basis for an adjustment to the target amount. Wage increases were taken into consideration by applying the update factor to the target amount. Effective October 1, 1991, Congress enacted a provision for taking increases in wages into consideration in deciding whether to assign a new base period. Because of Congress' action, HCFA decided to provide for a limited adjustment under 42 C.F.R. § 413.40(g) for significant increases in salaries that are above the hourly wage rate considered in the update factor. The regulation addressing the assignment of a new base period, or rebasing, is effective for cost reporting periods beginning on or after April, 1990. Since HCFA's decision is founded on Congress' rebasing regulation, the same time period applies. Providers could not qualify for adjustments due to wage increases prior to a cost reporting period beginning before April 1, 1990.

The Intermediary points out that HCFA denied the Provider's request for an adjustment to the target rate for the expansion of positions for medical direction because the costs could not be verified in the cost report. The Provider subsequently furnished documentation to HCFA verifying the costs. However, in order to calculate an accurate adjustment amount, HCFA requested additional information from the Provider on February 22, 1994. The Provider needed to provide the number of hours related to medical direction costs for each year under appeal, in addition to the base year. The necessary documentation has not been furnished. An adjustment for medical direction costs should not be considered until the additional documentation is furnished by the Provider.

The Intermediary points out that HCFA denied the Provider's request for adjustment of the TEFRA rate due to additional staff needed to meet accreditation requirements for the following reasons:

1. A 1983 survey cited as the impetus for hiring a program evaluator and social service counselor;

2. No date was given for when the program evaluator was hired;

3. The social service counselor was not hired until 1989;

4. The positions benefit the entire hospital, not just the Provider.[10]

The Intermediary points out that on June 11, 1992 the Provider informed the Intermediary of computational errors in HCFA's adjustments for longer than average lengths of stay, but no mention was made that information concerning accreditation had been erroneously interpreted. Also, on August 21, 1992, the Provider submitted a request based on the medical direction costs. Again, there was no mention of the misinterpretation of information regarding the FTEs added to meet accreditation requirements.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.:

§ 1395ww(b)(4)(A)	-	Payments to Hospitals For Inpatient Hospital Services

2. Regulations - 42 C.F.R.:

§ 405.463(h)(1) (Redesignated as 413.40 et seq.)	-	Ceiling on the Rate of Increase in Hospital Inpatient Costs

3. Program Instructions - Provider Reimbursement Manual, Part I, (HCFA Pub. 15-1):

§ 3004.1B	-	Increase In Average Length of Stay of Medicare Patients
§ 3004.1E	-	Significant Wage Increases

4. Cases:

Rye Psychiatric Hospital Center Inc. v. Shalala, 846 F. Supp. 1171 (S.D.N.Y. 1994), appeal docketed No. 94-6172 (2nd Cir., June 27,1994).

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[10] Exhibit Int. PP page 11.

5. Other:

56 Fed. Reg. ¶ 43,234 August 30, 1981

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions and evidence presented finds and concludes as follows: the Provider is entitled to an adjustment of its TEFRA target limit due to a longer ALOS in its target years. HCFA's denial of the Provider's request for the FYE 1988 and 1989 is reversed. The Board finds that HCFA's denial of the Provider's request due to the fact that the increases in the ALOS were too small is unfounded. There is no regulation or manual section that would deny a provider an increase due to the fact that the increase was too small.

The Board finds that the Provider is entitled to an adjustment to its TEFRA target limit due to the hiring of additional staff to meet accreditation requirements. The Board finds that the Provider was required by CARF to hire two additional staff members. The two additional staff members were an Administrative Coordinator/Program Evaluator and a social worker. These additional staff members caused the Provider's cost of operations to increase during the target years. Since these staff members were not part of the base year costs, there was a lack of comparability between the TEFRA years and the base year. This requires an adjustment for the target years pursuant to the Medicare regulation at 42 C.F.R. 413.40(g)(3)(i). The Board also finds that the positions benefited only the Provider and not the hospital.

The Board finds that the Provider is entitled to an adjustment of its TEFRA rate due to the additional cost incurred for the new Brain Injury Rehabilitation Program. Since the cost of the two directorship positions; Medical Director and Program Director, were not in existence during the base year period, there is a lack of comparability between the TEFRA years and the base year. Therefore, the target years should be adjusted.

The Board finds that the Provider is entitled to an adjustment of its TEFRA rate due to the additional cost for nursing and physical therapy personnel. The Board finds that there was a shortage of nursing and physical therapy personnel during the years under appeal. The Board finds that in order for the Provider to obtain qualified personnel, the Provider was forced to pay higher wages due to the shortage of those types of personnel. The Board also finds that the Provider acted properly in hiring these types of personnel rather than using contract labor. The hiring of full time personnel insured that the Provider would have an adequate staff for future development.

The Board is not persuaded by the Provider's contention that the TEFRA methodology violates the equal protection clause of the fifth ammendment of the constitution, guaranteeing due process. The Board finds that although the time a provider starts the TEFRA program may effect reimbursement, this is not an issue for this forum.

DECISION AND ORDER:

The Provider is entitled to an adjustment of its TEFRA target limit due to a longer ALOS in the target years, the hiring of additional staff to meet accreditation requirements, the additional cost of the Brain Injury Rehabilitation program, and the additional cost of nursing and physical therapy staff. The Intermediary's adjustments are reversed.

The Provider's due process argument is not an issue for this forum.

Board Members Participating:

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

Date of Decision: August 07, 1997

FOR THE BOARD:

Irvin W. Kues
Chairman