

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

99-D28

**PROVIDER -**  
Butler Memorial Hospital  
Butler, Pennsylvania

**DATE OF HEARING-**  
September 4, 1998

Provider No. 39-0158

Cost Reporting Period Ended -  
June 30, 1988

**vs.**

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

**CASE NO.** 94-0152

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**ISSUE:**

Was HCFA's denial of the Provider's request for an exception for its TEFRA target rate adjustment for its exempt psychiatric unit for the fiscal year June 30, 1988 due to untimely filing, proper?

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY:**

Butler Memorial Hospital ("Provider") is an acute care hospital located in Butler, Pennsylvania. The Provider operates a distinct part psychiatric unit ("Psych Unit") that is exempt from Medicare PPS and continues to be reimbursed under the TEFRA cost ceiling, or target rate system. Blue Cross of Western Pennsylvania ("Intermediary") audited the Provider's cost report for the fiscal year ending June 30, 1988 ("FY 1988") and issued the original Notice of Program Reimbursement ("NPR") for that cost-reporting period on January 22, 1990.<sup>1</sup>

The Provider did not file an application for an adjustment to the Psych Unit's FY 1988 TEFRA target rate within 180 days of the original FY 1988 NPR. The Provider did, however, seek and obtain such adjustments for the 1989 and 1990 cost reporting periods.<sup>2</sup> On January 22, 1993, the third anniversary of the original NPR date, the Provider requested that the Intermediary reopen the FY 1988 cost-reporting period for the express purpose of obtaining a TEFRA target rate adjustment.<sup>3</sup> The Provider's joint reopening request and TEFRA adjustment application for FY 1988 sought relief due to increased average length of stay, increased ancillary service usage and increased routine nursing and nursing administration. The Provider asserts that these were the same grounds which led to its TEFRA target rate adjustments for the 1989 and 1990 cost reporting periods.

On January 28, 1993, at the Provider's request, the Provider and the Intermediary met to discuss the Provider's reopening request and TEFRA adjustment application for FY 1988.<sup>4</sup> The parties dispute whether the Intermediary, at the January 28, 1993 meeting, agreed to reopen FY 1988 for the purpose of a TEFRA adjustment. On January 29, 1993, the Intermediary recommended that HCFA deny the Provider's TEFRA adjustment application as

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<sup>1</sup> Provider Exhibit 1.

<sup>2</sup> Provider Exhibit 10.

<sup>3</sup> Provider Exhibit 2.

<sup>4</sup> See Transcript ("Tr.") at 30-31, 48-48. See also Provider Exhibits 7, 8, 11 and 12.

untimely.<sup>5</sup> On May 6, 1993, HCFA, relying exclusively on 42 C.F.R. § 413.40(e)(1), denied the Provider's FY 1988 TEFRA target rate adjustment application as untimely filed.<sup>6</sup>

After receiving notice of HCFA's decision from the Intermediary, the Provider timely requested a hearing before the Provider Reimbursement Review Board ("Board") and has met the jurisdictional requirements of 42 C.F.R. § 405.1835-.1841.<sup>7</sup> The amount of Medicare reimbursement in controversy is approximately \$336,135.<sup>8</sup>

The Provider was represented by David W. Thomas, Esquire, of Nash & Company, P.C. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross & Blue Shield Association.

#### PROVIDER'S CONTENTIONS:

The Provider argues that the issue in this case requires two separate inquiries. First, the Provider asks whether there is a procedure through which a provider may properly file what would otherwise be an untimely TEFRA adjustment. And second, if such a procedure exists, did the Provider properly implement that procedure so as to render timely its otherwise untimely application for a TEFRA adjustment for FY 1988. The Provider acknowledges that its application for a TEFRA target rate adjustment was not filed within 180 days of the date of the original NPR for FY 1988.<sup>9</sup> In addition, the Provider does not dispute the fact that 42 C.F.R. § 413.40(e) provides that, in the ordinary case, TEFRA adjustment requests should be filed within 180 days of the NPR for the cost reporting period at issue.<sup>10</sup>

It is the Provider's position that: (1) cost reporting periods can be and are reopened for the purpose of making otherwise untimely adjustments to TEFRA target rates; (2) the Intermediary, at the January 28, 1993 meeting, agreed to reopen FY 1988 for the express purpose of such an otherwise untimely TEFRA adjustment relief; and (3) the Board has jurisdiction to review post-reopening refusals to revise reimbursement.

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<sup>5</sup> Intermediary Exhibit 5.

<sup>6</sup> Provider Exhibit 4.

<sup>7</sup> Provider Exhibit 6.

<sup>8</sup> Intermediary Position Paper at 3; Provider Position Paper at 34.

<sup>9</sup> Provider Post Hearing Brief at 4.

<sup>10</sup> Id.

### Cost Reporting Periods can be Reopened for Making Untimely Adjustments to TEFRA Target Rates

The Provider notes that the plain language of the regulations, as well as prior decisions by the Board and the HCFA Administrator establish that the reopening procedure can be and is used to make otherwise untimely TEFRA target rate adjustments. In this regard, the Provider notes that 42 C.F.R. §§ 405.1803 and 413.40(d) specify the NPR as the determination wherein the target rate is applied to the Psych Unit and all costs in excess thereof are disallowed. Further, 42 C.F.R. § 413.40(e)(1) specifies that the NPR triggers the 180-day TEFRA adjustment application period. The Provider submits that, as 42 C.F.R. § 405.1885 allows the Intermediary to reopen the NPR, the reopening procedure can be employed to reconsider the application of the TEFRA target rates and thus, trigger a new TEFRA adjustment application period.<sup>11</sup>

The Provider contends that administrative precedent supports its reading of the interplay between the reopening and TEFRA adjustment regulations. In rendering the decision denying the Provider's application as untimely, HCFA stated: "[t]he regulations at 42 C.F.R. § 413.40(e) are specific to the time allotted for submitting appeals to the TEFRA limitations." The Provider points out, however, that the Board has previously affirmed an intermediary's use of the reopening procedure to make an adjustment reducing a provider's TEFRA target rates more than 180 days after the original NPRs and thus beyond the time period specified in 42 C.F.R. § 413.40(e)(1). See Edgemont Hosp. v. Mutual of Omaha, PRRB Dec. No. 95-D35, April 6, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,264 ("Edgemont"). In addition the Provider points out that the HCFA Administrator has twice reversed the Board on decisions that relied exclusively on 42 C.F.R. § 413.40(e)(1) by claiming that, when there is a reopening, the reopening regulations, as well as the TEFRA adjustment regulation, are applicable. See Foothill Presbyterian Hosp. v. Blue Cross & Blue Shield Ass'n, PRRB Dec. No. 95-D28, May 8, 1995, Medicare & Medicaid Guide (CCH) ¶43,228, reversed HCFA Adm. May 15, 1995, Medicare & Medicaid Guide (CCH) ¶43,358, p. 45,533, ("Foothill"); Care Unit Hosp. v. Mutual of Omaha, HCFA Admin. Dec. May 5, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,510, ("Care").

The Provider also points out that in a recent decision, the HCFA Administrator made it clear that, on appeal from a revised NPR, a provider can seek a TEFRA adjustment of the basis of issues that had been revised or reopened. See Hurley Medical Ctr. v. Blue Cross & Blue Shield Ass'n, HCFA Adm. Dec., Aug. 7, 1998, Medicare & Medicaid Guide (CCH) ¶80,058. Finally, the Provider notes a decision in which HCFA ordered this same Intermediary to employ the reopening procedure to award what would otherwise be untimely TEFRA adjustments increasing the provider's target rates.<sup>12</sup>

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<sup>11</sup> Tr. at 9.

<sup>12</sup> Provider Exhibit 55.

The Provider submits that these administrative precedents demonstrate the error in HCFA's decision under review by the Board. The Provider contends that HCFA and the intermediaries use the reopening procedure to make what would otherwise be untimely adjustments that both decrease and increase TEFRA target rates. The Provider further contends that since neither HCFA nor the Intermediary offered any explanation as to why the reopening process could not be employed here, these administrative precedents are binding here. See Jewell Smokeless Coal Corp. v. Looney, 892 F.2d 366, 368 n.5 (4th Cir. 1989) ("As a general matter, [a]gencies are under an obligation to follow their own ... precedents, or provide an explanation for their departure"). See also Channel 51 of San Diego v. FCC, 79 F.3d 1187,1191 (D.C. Cir. 1996) (same); Butler County Memorial Hosp. v. Heckler, 780 F.2d 352, 355 n.3 (3d Cir. 1985) (same).

The Provider also notes that the Intermediary's attempts to distinguish these administrative precedents are unavailing. The Provider points out that in Edgemont, the Intermediary argues that the reopening occurred to reduce the target rate, a component of the NPR.<sup>13</sup> However, the Provider asserts that the TEFRA target rate is a component of every NPR for a TEFRA provider. Therefore, the Provider maintains that if reopening can be used to reduce that TEFRA target rate, there is no valid reason why reopening cannot be used to increase the target rate. The Provider argues that HCFA cannot so vary its regulatory interpretations based solely on the reimbursement impact. See Vista Hill Foundation, Inc. v. Heckler, 767 F.2d 556, 565-66 (9th Cir. 1985); Walter O. Boswell Mem. Hosp. v. Heckler, 749 F.2d 788, 799 (D.C. Cir. 1984).

The Provider also challenges the Intermediary's argument that it is taking Foothill, Care Unit and similar cases out of context.<sup>14</sup> However, in both those cases, the HCFA Administrator overturned Board decisions that relied exclusively on 42 C.F.R. § 413.40(e)(1) to analyze TEFRA adjustment applications made in conjunction with a reopening. See Foothill at ¶43,358 at p.45,533; Care at ¶ 43,510. In the instant case HCFA asserts that, despite the reopening request, 42 C.F.R. § 413.40(e) is the only regulation that applies to TEFRA adjustment applications. As this is the same position adopted by the Board, and rejected by the HCFA Administrator, in Foothill and Care, the Provider maintains that its citation to those decisions is in proper context.

Finally, the Provider argues that the Intermediary makes no attempt to distinguish the decision submitted as Provider Exhibit 55. In that decision, the Provider contends that HCFA ordered the Intermediary to use the reopening procedure to make otherwise untimely TEFRA adjustments that increased the provider's target rates. Therefore, the Provider contends that since neither HCFA nor the Intermediary explained why it is not entitled to similar relief, Exhibit 55 is binding precedent here.

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<sup>13</sup> Tr. at 74-75.

<sup>14</sup> Id. at 75.

The Intermediary, at the January 28, 1993 meeting, agreed to reopen FY 1988 for the express purpose of such an otherwise untimely TEFRA adjustment relief.

It is the Provider's position that once it is recognized that the reopening procedure can be used to obtain otherwise untimely TEFRA adjustments, the question becomes whether the Provider obtained such a reopening for the express purpose of considering a TEFRA adjustment. The Provider submits that the evidence establishes that the January 28, 1993 meeting resulted in just such a reopening.

The Provider notes that its reopening request, filed on the third anniversary of the original FY 1988 NPR, was timely. The Provider contends that as long as a reopening request is timely filed, the Intermediary can reopen the NPR after expiration of the three year period. See Providence Hosp. v. Blue Cross & Blue Shield Ass'n, PRRB Dec. No. 95-D22, Feb. 13, 1995, Medicare & Medicaid Guide (CCH) ¶43,081. ("the intent of the regulation was to allow an evaluation on the merits of all reopening requests submitted within the 3-year limitation period."), rev'd on other grounds, Medicare & Medicaid Guide (CCH) ¶ 43,263, HCFA Admin., April 4, 1995. The Provider contends that the HCFA Administrator noted that the "request to reopen was timely." Id.¶43,263 at p. 44,439 n.4.

Given a timely reopening request, the inquiry turns to the Intermediary's action on that request. The Provider refers to the January 28, 1993 meeting to discuss the reopening request. The Provider points out that its Vice President of Finance and its Controller both testified at the hearing that, at the January 28 meeting, the Intermediary's Vice President of Provider Reimbursement agreed to reopen FY 1988 if the circumstances asserted for a TEFRA adjustment were the same as those which led to adjustments for 1989 and 1990.<sup>15</sup> The Provider contends that there is no dispute that the Provider sought TEFRA relief for FY 1988 on the basis of the same factors that led to TEFRA relief for 1989 and 1990.<sup>16</sup> The Provider notes that the Intermediary's recommendation letter recognizes that the grounds for TEFRA relief were similar<sup>17</sup> and that on January 28, 1993, its counsel corresponded with the Intermediary's Vice President, thanking him for the reopening.<sup>18</sup>

The Provider also contends that the Intermediary reopened the FY 1988 cost report when it executed the list of issues.<sup>19</sup> In this respect, the Provider notes that the regulations define the

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<sup>15</sup> Tr. at 30-32 and 48-50.

<sup>16</sup> Provider Exhibit 2 and Provider Exhibit 10.

<sup>17</sup> Intermediary Exhibit at 5.

<sup>18</sup> Provider Exhibits 11 and 12.

<sup>19</sup> Provider Exhibit 14.

executed list of issues as a stipulation. See 42 C.F.R. § 405.1853(a). And, having thus stipulated to the fact of the reopening, the Provider argues that the Intermediary cannot now disavow that stipulation. The Provider also points out that since the regulation defines the list of issues as a stipulation, the Board may not disregard the facts as agreed to therein.<sup>20</sup>

The Provider asserts that the only person who attended the January 28, 1993 meeting to ever take the position that no reopening occurred was the Intermediary's Director of Provider Audit.<sup>21</sup> The Provider points out that in that same document, that individual admitted that he had no recollection or records as to what was discussed at the meeting or even who attended.<sup>22</sup> Accordingly, the Provider asserts his statement regarding the reopening decision is entitled to no weight. See, e.g., Fed.R.Evid. 608 (requiring personal knowledge as basis for statement); HCFA Pub. 15-1 § 2924.6 (providing that Board looks to Fed.R.Evid. for guidance).

The Intermediary also asserts that the absence of a notice of reopening is conclusive that no reopening occurred. However, the Provider submits that the Intermediary should not be permitted to raise its own failure to issue a notice as a bar to relief. The Provider points out that HCFA Administrator precedent dictates that, as long as the due process requirements of notice are met, any defect in the form or notice of reopening should be disregarded. See Grimm-Smith Hosp. & Clinic, Inc. v. Blue Cross & Blue Shield Ass'n, HCFA Adm. Dec., July 9, 1993, Medicare & Medicaid Guide (CCH) ¶41,670, p.37,167. Accordingly, since it received actual notice of the reopening, the Provider maintains that the absence of written notice from the Intermediary has no effect here.

In addition, the Provider points out that there is no Notice of Refusal to Reopen, a document mandated by HCFA Pub. 15-1 §2932.1, if the Intermediary in fact refused to reopen. Thus, the Provider contends that the absence of notices only proves that the Intermediary was not issuing proper notices and casts no light on the Intermediary's decision whether to reopen FY 1988.

Finally, the Provider asserts that it is clear that, despite the Intermediary's protests and despite HCFA's policy, the Board has the jurisdiction and power to review post-reopening refusals to correct reimbursement, as long as the issue was raised as part of the reopening. See, e.g., Edgewater Hosp., Inc. v. Bowen, 857 F.2d 1123, 1136-37, modified, 866 F.2d 288 (7th Cir. 1988); French Hosp. Medical Ctr. v. Shalala, 89 F.3d 1411, 1420 (9th Cir. 1996).

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<sup>20</sup> Provider Post Hearing Brief at 28.

<sup>21</sup> Provider Exhibit 17.

<sup>22</sup> Id.

INTERMEDIARY'S CONTENTIONS:

The Intermediary points out that it issued the initial NPR for the Provider's FYE 6/30/88 cost reporting period on January 22, 1990.<sup>23</sup> Medicare regulation 42 C.F.R. § 413.40(e) states as follows in pertinent part (Intermediary Exhibit 13):

(e) Hospital requests regarding applicability of the rate of increase ceiling. A hospital may request an exception from or exception to the rate of cost increase ceiling imposed under this section. The hospital's request must be made to its fiscal intermediary no later than 180 days from the date on the intermediary's notice of program reimbursement...

Id. (emphasis added).

The Intermediary points out that, while it can reopen an NPR, it is without authority to reopen the 180-day period specified in the TEFRA adjustment regulation.<sup>24</sup> The Intermediary contends that the Provider had 180 days from January 22, 1990 to file its exception in accordance with 42 C.F.R. § 413.40(e), but did not do so, waiting instead until January 22, 1993. The Provider admits that it did not seek a TEFRA adjustment within 180 days of the original NPR for FY 1988 and that failure conclusively establishes that the Provider's application was untimely.<sup>25</sup> Accordingly, the Provider's request for an adjustment to its FYE 6/30/88 TEFRA target rate is untimely. Based on this fact, the Intermediary maintains that the Board should affirm HCFA's May 6, 1993 exception determination.<sup>26</sup>

The Intermediary rejects the Providers assertions that it reopened the Provider's FYE 6/30/88 cost report for purposes of TEFRA exception relief for the Provider's psychiatric unit. The Intermediary acknowledges, however, that it did reopen the cost report and issue a revised NPR in connection with an unrelated matter on February 15, 1990.<sup>27</sup> The Intermediary contends that revised NPR is not germane to the issue presently before the Board in this appeal. The Intermediary also rejects the Provider's argument that as a result of the meeting held with certain Intermediary personnel on January 28, 1993, its FYE 6/30/88 cost report was reopened.

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<sup>23</sup> Intermediary Exhibit 2.

<sup>24</sup> Tr. at 74.

<sup>25</sup> Id. at 17-18.

<sup>26</sup> Intermediary Exhibit 6.

<sup>27</sup> Intermediary Exhibit 3.



The Intermediary contends that when the Provider realized that it had not filed a timely appeal for TEFRA exception relief as required by 42 C.F.R. §413.40(e), the Provider subsequently requested on January 22, 1993 that the Intermediary reopen its FYE 6/30/88 cost report, hoping to obtain a TEFRA adjustment by convincing the Intermediary that its TEFRA exception submittal met the requirements for reopening as set forth in HCFA Pub. 15-1 § 2931.2(Intermediary Exhibit 14). The Intermediary points out that the Provider's January 22, 1993 reopening request was made on the last possible day for such a request to be considered timely in accordance with 42 C.F.R. §405.1885(a), which states as follows in pertinent part:

Any such request to reopen must be made within 3 years of the date of the notice of the intermediary or Board hearing decision, or where there has been no such decision, any such request to reopen must be made within 3 years of the date of notice of the intermediary determination. No such determination or decision may be reopened after such 3-year period except as provided in paragraphs (d) and (e) of this section.

Id. (emphasis added) (Intermediary Exhibit 15).

Therefore, the Intermediary submits that in response to the Provider's January 22, 1993 reopening request, it did not reopen the Provider's cost report. The Intermediary contends that it did not issue a written notice of any reopening within 3 years of the January 22, 1990 NPR as required by the regulations in 42 C.F.R. §405.1887(a) (Intermediary Exhibit 18). The Intermediary further contends that the fact that it submitted the Provider's January 22, 1993 reopening request to HCFA for a determination on January 29, 1993 (Intermediary Exhibit 5), the day after the meeting with the Provider's representatives, is prima facie evidence that the Intermediary did not reopen the Provider's FYE 6/30/88 cost report.<sup>28</sup>

The Intermediary contends that the Provider's January 28, 1993 note to the Intermediary does not constitute a valid notice of reopening, because it does not meet the requirements of of HCFA Pub. 15-1 § 2932, which states as follows in pertinent part:

When any determination or decision is reopened ... notice of such reopening ... will be mailed to the provider or other parties to the determination or decision at their last known address. The notice of reopening will be issued by the intermediary, intermediary hearing officer, the PRRB, or the Secretary making the reopening as required by § 2931.1. The provider or other party will be advised in the notice as to the circumstances surrounding the reopening, i.e.

why it was necessary to take such action, and the opportunity to comment, object, or submit evidence in rebuttal....

Id. (Intermediary Exhibit 19)

The Intermediary points out that the January 28, 1993 note was issued by the Provider, more specifically counsel for the Provider, not the Intermediary, as Section 2932.A requires.

The Intermediary asserts that the Provider's January 28, 1993 note clearly does not meet the requirements prescribed above so as to constitute a valid reopening notice. The Intermediary points out that a provider cannot reopen an intermediary's NPR. See 42 C.F.R. §405.1885 (c) which states as follows (Intermediary Exhibit 15):

Jurisdiction for reopening a determination or decision rests exclusively with that administrative body that rendered the last determination or decision.

Id.

The Intermediary also points out that the note was not issued within 3 years of the January 22, 1990 NPR, as required by 42 C.F.R. § 405.1885(a). Thus, even if the Provider's note of January 28, 1993 could be considered a valid reopening notice, it is untimely, and therefore is of no effect. Additionally, the Intermediary contends that even if it had reopened the Provider's FYE 6/30/88 cost report, the Provider still has failed to overcome the requirements of 42 C.F.R. §413.40(e) for submission of a timely exception request.

The Intermediary also asserts that the Provider's reliance on the executed list of issues for this case is misplaced.<sup>29</sup> The Intermediary points out that the list of issues is merely a device of administrative convenience to assist in case development, not a stipulation.<sup>30</sup> It is the Intermediary's position that statements agreed to by its Vice President of Provider Reimbursement should not be binding on the Intermediary once the hearing is convened.<sup>31</sup>

In summary, the Intermediary submits that the Provider's reopening arguments are completely irrelevant to this appeal. The Intermediary contends they are irrelevant simply because the Provider failed to submit its request for exception relief within 180 days of the January 22, 1990 initial NPR as required by 42 C.F.R. § 413.40(e). It is the Intermediary's position that all of the Provider's other arguments as to whether the FYE 6/30/88 cost report was reopened cannot

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<sup>29</sup> Intermediary Exhibit 20.

<sup>30</sup> Tr. at 74.

<sup>31</sup> Id.

overcome that deficiency and are therefore unavailing. They should be rejected by the Board. Moreover, even if the Intermediary made a firm commitment after January 22, 1993 to reopen the FYE 6/30/88 cost report, which it did not, the Intermediary could not be bound to such a commitment because it flies in the face of the reopening regulation. The Intermediary asserts it has no power to change the 3 year reopening deadline specified in 42 C.F.R. § 405.1885(c), and an estoppel claim against the Intermediary and the government for such purpose may not lie in a Board proceeding. See Bon Secours Heartlands Home Health Agency v. Blue Cross and Blue Shield Association et al., HCFA Administrator dec., August 23, 1993 (Intermediary Exhibit 2 1) and Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990). Accordingly, the Provider's reopening arguments are a red herring. The Board should affirm HCFA's exception denial due to untimely filing.

#### CITATIONS OF LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS

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

- |                        |   |   |
|------------------------|---|---|
| § 405.1803             | - | Intermediary Determination and Notice of Program Reimbursement    |
| § 405.1835-.1841       | - | Board Jurisdiction  |
| § 405.1853             | - | Prehearing Discovery and Other Proceedings Prior to Board Hearing |
| § 405.1885             | - | Reopening a Determination or Decision                             |
| § 405.1887(a)          | - | Notice of Reopening   |
| § 413.40 <u>et seq</u> | - | Ceiling on the Rate of Hospital Cost Increases                    |

2. Program Instructions, Provider Reimbursement Manual, Part 1 (HCFA Pub. 15-1)

- |          |   |   |
|----------|---|---|
| § 2924.6 | - | Scope of Board's Authority                                    |
| § 2931.1 | - | Time Limits for Reopening-When Reopening Period Begins to Run |
| § 2931.2 | - | Reopening Final Determination                                 |

§ 2932 et seq - Notices (including Notices of Refusal)  
Related to Reopening and Correction

3. Cases:

Bon Secours Heartlands Home Health Agency v. Blue Cross and Blue Shield Association et al., HCFA Admin.Dec., August 23, 1993 Medicare & Medicaid Guide (CCH) ¶41,690.

Butler County Memorial Hosp. v. Heckler, 780 F.2d 352, 355 n.3 (3rd Cir. 1985).

Care Unit Hosp. v. Mutual Of Omaha, HCFA Adm. Dec., May 5, 1995, Medicare & Medicaid Guide (CCH) ¶43,510, p. 45,430.

Channel 51 of San Diego v. FCC, 79 F.3d 1187,1191 (D.C. Cir. 1996).

Edgemont Hosp. v. Mutual of Omaha, PRRB Dec. No. 95-D35, April 6, 1995, Medicare & Medicaid Guide (CCH) ¶43,264

Edgewater Hosp., Inc. v. Bowen, 857 F.2d 1123, 1136-37, modified, 866 F.2d 288 (7th Cir. 1988).

Foothill Presbyterian Hosp. v. Blue Cross & Blue Shield Ass'n., PRRB Dec. No. 95-D28, May 8, 1995, Medicare & Medicaid Guide (CCH) ¶43,228, reversed HCFA Adm. May 15, 1995, Medicare & Medicaid Guide (CCH) ¶43,358, p.45,533.

French Hosp. Medical Ctr. v. Shalala, 89 F.3d 1411 (9th Cir. 1996).

Grimm-Smith Hosp. & Clinic, Inc. v. Blue Cross & Blue Shield Ass'n, HCFA Adm. Dec., July 9,1993, Medicare & Medicaid Guide (CCH) ¶41,670, p. 37,167.

Hurley Medical Ctr. v. Blue Cross & Blue Shield Ass'n, HCFA Adm. Dec., Aug. 7,1998, Medicare & Medicaid Guide (CCH) ¶80,058.

Jewell Smokeless Coal Corp. v. Looney, 892 F.2d 366, 368n.5 (4th Cir. 1989).

Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990).

Providence Hosp. v. Blue Cross & Blue Shield Ass'n, PRRB Dec. No. 95-D22, Feb. 13, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,081, rev'd on other grounds, ¶ 43,263 HCFA Adm. Dec., April 4, 1995.

Vista Hill Foundation, Inc. v. Heckler, 767 F.2d 556,565-66 (9th Cir. 1985).

Walter O. Boswell Mem. Hosp. v. Heckler, 749 F.2d 788,799 (D.C. Cir. 1984).

4. Other:

Fed.R.Evid. 608

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 as follows:

The Board finds that the Provider's original NPR for FY 1988 was issued by the Intermediary on January 22, 1990. Three years later, on January 22, 1993, the Provider requested that the Intermediary reopen the FY 1988 cost-reporting period for the purpose of obtaining a TEFRA target rate adjustment. On January 29, 1993, the Intermediary recommended that HCFA deny the Provider's TEFRA adjustment application as untimely. On May 6, 1993, HCFA denied the Provider's FY 1988 TEFRA target rate adjustment application as untimely filed.

Based on the above dates, the Board finds that HCFA's denial of the Provider's request for an exception for its TEFRA target rate was proper because the Provider failed to request an exception within 180 days of the original NPR. According to the provisions of 42 C.F.R. § 413.40(e):

(e) Hospital requests regarding applicability of the rate of increase ceiling. A hospital may request an exception from or exception to the rate of cost increase ceiling imposed under this section. The hospital's request must be made to its fiscal intermediary no later than 180 days from the date on the intermediary's notice of program reimbursement....

Id. (emphasis added).

The Provider's argument centered on a position that a reopening of a cost report is grounds for another 180 day window in which to request a TEFRA exception. Based on this argument, the Provider contends that since it requested reopening within 3 years from the date of its original NPR, its cost report was reopened, and therefore, its TEFRA exception request was timely filed. The Board, however, finds that HCFA's denial of the Provider's TEFRA exception request as untimely, rather the Provider's arguments on reopening, is the main issue in this case.

The Board is not persuaded by the Provider's argument that a reopening of a cost report automatically opens up another 180 day window in which a provider can request an exception to its TEFRA target rate. The Board finds that one of the primary reasons for a reopening is for corrections to a cost report. The Board finds that there is no evidence in the record to indicate that the Provider was requesting a correction to its cost report. The Board concludes that an Intermediary can reopen a cost report for a TEFRA adjustment, but only in the context of corrections or new evidence, neither of which were in evidence in the record.

Additionally, the Board is not persuaded by the Provider's argument or evidence regarding its assertion that the Intermediary agreed to reopen the cost report to make a TEFRA adjustment at the January 28 meeting.

The Board concludes that the regulation at 42 C.F.R. § 413.40 (e), regarding the 180 day time limit for requesting an exception, rather than the reopening regulation(s), is the controlling regulation in this case. Accordingly, the Board concludes that since the Provider did not file its exception request in accordance with 42 C.F.R. § 413.40 (e), HCFA was correct in denying its request due to untimely filing.

In addition, contrary to the Provider's arguments, the Board does not find that Foothill or Care are germane or controlling in this case.

DECISION AND ORDER :

The Intermediary's denial of the Provider's request for an exception for its TEFRA target rate due to untimely filing was proper. The Intermediary's denial is affirmed.

Board Members Participating:

Irvin W. Kues  
James G. Sleep  
Henry C. Wessman, Esq.  
Martin W. Hoover, Jr., Esq.  
Charles R. Barker

**Date of Decision:** March 11, 1999

FOR THE BOARD:

Irvin W. Kues  
Chairman