PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON-THE-RECORD
99-D33

PROVIDER -Edgewater Hospital
Chicago, Illinois

DATE OF HEARING-
January 14, 1999

Provider No. 14-0087

Cost Reporting Period Ended -
January 21, 1989

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross and Blue Shield of Illinois

CASE NO. 91-2887

INDEX

ISSUE:

Was the Intermediary's netting of the balance due to Edgewater Hospital of liabilities owed to the
program by Edgewater Medical Center proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Edgewater Hospital, Inc. ("Provider"), is a not-for-profit corporation located in Chicago, Illinois. It sold its assets effective January 21, 1989. There were three Buyers, each of which purchased specifically defined assets from the Provider. The three Buyers were Peter Rogan ("Rogan"), Edgewater Property Company ("Property Company"), and Edgewater Operating Co. ("Operating Co."). As of the above date, Rogan was the sole shareholder of the two corporate purchasers, Edgewater Property Company and Edgewater Operating Co.

The Property Company purchased the Provider's building, land, and other real estate as stated in Agreement For Purchase And Sale of Assets of The Edgewater Hospital, Inc. ("Agreement").[1] The Operating Co. purchased most of the Provider's remaining tangible and intangible assets, including furniture and equipment, inventories, medical and employment records, software, contracts, licenses, etc.[2] Rogan purchased the Provider's receivables, including any reverse recapture resulting from the consummation of transactions contemplated by the Agreement.[3]

The Agreement did not provide the Buyers individually or jointly with general authority to act as the Provider's agent or attorney-in-fact. The Agreement provided only for the Provider to appoint the Buyers as its agent and attorney-in-fact to "take any action and to execute any instrument which Buyers may deem necessary or advisable to fulfill the [Provider's] obligations, rights or to accomplish the purposes of [the] Agreement."[4] The Agreement did not provide Operating Co. with any rights to Medicare payments due the Provider, or the right to use any such payments to satisfy its own debts to the Medicare program. The Intermediary was not specifically authorized by the Provider or any entity acting on the Provider's behalf to use Medicare reimbursements otherwise due the Provider to satisfy obligations of any other person or entity to the Medicare Program.

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1 See Provider Exhibit No. 35.

2 Id.

3 See Provider Exhibit No. 5.

4 Id.

Subsequent to the sale of its assets, the Provider ceased furnishing health care services. The Provider subsequently merged into Edgewater Foundation ("Foundation"), an Illinois not-for-profit corporation, as of June 28, 1989.

Health care services were furnished by one of the Buyers, a for-profit entity, Operating Co., doing business as Edgewater Medical Center ("Medical Center") using assets purchased from the Provider.

On March 23, 1989, the Health Care Financing Administration ("HCFA") notified The Medical Center that it had become aware of the change of ownership, effective January 22, 1989. HCFA stated that Medicare regulations required that providers notify HCFA when there was a change of ownership. HCFA also required Medical Center to enter into a new provider agreement.

The Intermediary found the sale of Provider assets to the Buyers, Rogan, Operating Co., and Property Company to be among unrelated parties and, as noted below, issued a Notice of Program Reimbursement (" NPR") dated March 5, 1991 reflecting the loss.[5]

The Provider filed its final Medicare cost report for the period ending January 21, 1989 on July 25, 1989. On March 5, 1991, the Intermediary issued its NPR to the Provider. The NPR indicated that Medicare reimbursement of $6,344,898 was due to the Provider. The NPR included "boilerplate" language applicable to situations where there had been an overpayment, requiring a provider to return monies due the Medicare program within 30 days or be assessed interest at an annual rate of 8%.

On the same day the Intermediary issued a Tentative Settlement for FYE December 31, 1989, and a Lump Sum Settlement for FYE December 31,1990 to the Operating Co. d/b/a Medical Center reflecting, in the aggregate, $3,932,229 due to the Medicare program.[6] This amount resulted from a desk audit of Medical Center's cost report for the cost year ending December 31, 1989 ($2,055,647), and adjustment of its interim payments for the 1990 cost year ($1,876,582) (adjustments of $1,399,775 and $476,807).[7]

On March 6, 1991, the Intermediary paid the Provider only $2,412,669 of the $6,344,898 it had identified previously as being due the Provider. The Intermediary offset against that

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5 See Provider's Exhibit 52.

6 See Provider's Exhibit 53.

7 Id.

amount $3,932,229 that the Intermediary alleged was owed to the Medicare program by Operating Co. d/b/a Medical Center.[8]

Through a letter dated April 25, 1991, from its legal counsel, the Provider demanded from the Intermediary payment of the $3,932,229 which the Intermediary had indicated was due to the Provider in the March 5, 1991 NPR.[9] In a letter dated June 14, 1991, legal counsel for the Provider advised an attorney in Office of General Counsel for the Department of Health and Human Services of the Provider's position that the Intermediary had acted erroneously and requested that a check payable to the Provider be immediately issued in the amount of $3,932,229.[10] The Intermediary was similarly advised that Operating Co. d/b/a Medical Center, one of the Buyers, had no right to act on the selling Provider's behalf.[11] Additionally, by letter dated March 12, 1991, Operating Co. d/b/a Medical Center advised the Intermediary that netting amounts it allegedly owed Medicare from amounts due the Provider was not correct.[12]

On July 31, 1993, the Intermediary made an additional adjustment to revise the Provider's cost report settlement amount for FYE 1/21/89 from $6,344,898 to $5,216,197[13] a decrease of $1,128,701, thereby reducing the Medicare payments due the Provider to $2,803,528 ($3,932,229 - $1,128,701).

As part of a revised settlement with the Provider dated February 16, 1996, the Intermediary paid the $2,803,528 remaining due to the successor corporation of Operating Co. d/b/a Medical Center, one of the buyers.[14] This occurred because Operating Co. d/b/a/ Medical Center was using the provider number used previously by the Provider. These funds, owed by Medicare to the Provider, were forwarded to a Provider representative. This resolved all outstanding issues except for the Provider's interest claim addressed herein.
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The Provider seeks interest on the amount withheld by the Intermediary, $3,932,229, from March 5, 1991 through July 31, 1993, computed at the rate of 8%, which amounts to

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8 See Provider’s Exhibit I c

9 See Provider’s Exhibit 54.

10 Id.

11 See Provider’s Exhibits 55.

12 See Provider’s Exhibits 56.

13 See Provider’s Exhibit 57.

14 See Provider’s Exhibits 58.

$831,049[15] and on $2,803,528 from August 1, 1993 to February 16, 1996, computed at the rate of 8%, which amounts to $629,687.[16] The total amount of interest claimed herein by the Provider is $1,460,736.

By letter dated September 21, 1994, the Provider Reimbursement Review Board ("Board") determined "that it has jurisdiction to review whether netting out the balance due to Edgewater Hospital, Inc. of alleged liabilities owed to the program by Edgewater Medical Center was proper."[17]

In May 1996, HCFA issued instructions to Medicare carriers clarifying that when Medicare makes payment within thirty (30) days of a "clean claim," but payment is issued to an incorrect provider resulting in the correct provider's receipt of payment more than thirty (30) days after the claim was filed, Medicare is required to pay the correct provider interest pursuant to Medicare's statutory prompt payment requirements.[18]

The Provider is represented by Robert E. Mazer, Esquire, of Ober, Kaler, Grimes & Shriver. The Intermediary is represented by Bernard M. Talbert, Esquire, of Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary had no basis to recoup the debts of one provider from amounts it owed to the other. The Medicare program cannot collect liabilities due one entity from another entity. See generally 42 C.F.R. § 489.18. There can be no doubt that the two entities, Edgewater Medical Center and Edgewater Hospital, are unrelated. Otherwise, the Intermediary could not have, and would not have, recognized the loss on the sale of depreciable assets between the two entities. Edgewater Medical Center continued to use the same provider number as Edgewater Hospital. However, that does not make them the same entity. Under the Medicare regulations, the existing provider agreement is automatically assigned to the new owner. See, generally, 42 C.F.R § 489.18.

The Provider further argues that on March 23, 1989, HCFA notified Edgewater Medical Center that it had become aware of the change of ownership, effective January 22, 1989. HCFA stated that the regulations required providers to notify HCFA when there is a change of ownership. It also required Edgewater Medical Center to sign a new provider agreement.

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15 See Provider's Exhibits 59.

16 See Provider's Exhibits 60

17 See Provider's Exhibits 61.

18 See Provider's Exhibits 61.

The potential problems were exacerbated because the assets of the not-for-profit Edgewater Hospital were reduced to offset liabilities of an unrelated for-profit business corporation. The Medicare program has promulgated detailed regulations and program instructions regarding changes in ownership of provider assets. Similarly, there are detailed rules that must be followed in collecting overpayments. There is no suggestion in any of these authorities that Medicare can recover debts of the purchaser of a facility from the seller or vice versa. The Intermediary's actions were totally unauthorized. Further, any contractual arrangement between the Purchaser and Seller of the facility regarding the disposition of reimbursement after it was paid to the correct provider by the Intermediary is irrevelant to the program's obligations under the Medicare statute and regulations.

The Provider argues that it is also entitled to interest on amounts due it from the date of the NPR, reflecting the Medicare program's liability to Edgewater Hospital until it received the amounts due. The regulation at 42 C.F.R. § 405.376(b) states that the basic rule is for HCFA to pay interest on underpayment to providers and suppliers of services. Under the regulation, interest accrues from the date of the final determination, in this case the initial NPR. See, 42 C.F.R. § 405.376(b)(2),(c).

The Provider notes that the Intermediary questions the Board jurisdiction since this issue does not involve a cost in controversy. The Intermediary makes no further jurisdictional argument and does not refer to any supporting authority. Indeed, the only case to address this issue, OSF Health Care System, d/b/a Saint James Hospital v. Sullivan, 820 F. Supp. 390 (C.D. 111. 1993) ("St. James Hospital") supports the Provider's position. In that case, St. James Hospital filed Medicare cost reports for its 1985 and 1986 fiscal years claiming that is was entitled to additional payments as a sole community hospital ("SCH"). In settling those cost reports and issuing NPRs, the intermediary denied SCH status to the provider. The provider then filed appeals with the Board. While the cases were pending before the Board, the intermediary changed its mind based on the Secretary's decision regarding St. James Hospital's status as an SCH in earlier fiscal years. It paid the provider the amounts it would be entitled to as an SCH for its 1985 and 1986 fiscal years. However, it did not pay interest on these amounts, which St. James Hospital claimed was due. The Board dismissed the St. James Hospital's appeal now including the claim for interest payments only, asserting that it did not have jurisdiction over the interest issue as interest is not income or cost for the purposes of determining reimbursement for Medicare services provided. St. James Hospital then sought judicial review.

The Provider notes that the United States District Court for the Central District of Illinois held that the Board erred by ruling that it did not have jurisdiction over the pending appeal involving the issue of whether St. James Hospital was entitled to interest accrued pursuant to the Secretary's finding that this provider was entitled to SCH status for fiscal years 1985 and 1986. The court noted the Board's broad decision making authority under 42 C.F.R. §

405.1869.[19] In addition, interest on cost reimbursement payments was not included among the issues which the regulations specified were not subject to review. See §§ 405.1804, 405.1873. By contrast, the Medicare statute and regulations provided specifically for payment of interest when payment of reimbursements due were not made within 30 days of the NPR. See, 42 U.S.C. § 1395g(d); 42 C.F.R. § 405-376, and 42 U.S.C. § 13951(j). If the Board did not have jurisdiction over such an issue, there would be no administrative review available for determinations regarding interest required to be paid under these provisions. Accordingly, the court held that the Board had jurisdiction over St. James Hospital's interest claim, and the case was remanded for consideration of that claim. The case was settled, with St. James Hospital receiving interest payments prior to any action being taken by the Board. Thus, the provider in this case argues that there is no question that the Board has jurisdiction over the Provider's claim that it is entitled to interest as a result of its failure to receive payments due in a timely fashion.

The Provider further contends that the Intermediary's arguments regarding its ability to repay itself for obligations owed by Edgewater Medical Center from amounts the Intermediary owed Edgewater Hospital should be rejected. Contrary to the statements in its position paper, the Intermediary previously recognized that the parties were unrelated. Rogan did not have the degree of overall control over Edgewater Hospital and Edgewater Medical Center which the Intermediary now asserts. As not-for-profit entities, neither Edgewater Hospital nor Edgewater Foundation could provide Rogan with unfettered control over its charitable assets which Rogan might use for his benefit. The agreement relied on by the Intermediary allowed Rogan to exercise limited "supervisory services" related to operation of Edgewater Hospital. Under Article III of the agreement, however, Edgewater Hospital was not required to implement any recommendation of Rogan which it did not believe was in its best interest. In addition, Rogan's authority under the agreement terminated when the hospital assets were sold, and the entity ceased to exist. Similarly, the option agreement did not provide Rogan with substantial control over or of Edgewater Hospital. Moreover, subject to making certain monetary payments, Edgewater Hospital could cancel the option within 15 days of Rogan's attempt to exercise it. The Power of attorney in the Purchase of Sale agreement was also limited and, in any event, might be used only in "Buyers' Discretion." Finally, the Intermediary has not cited and Edgewater Hospital is unaware of any regulation or manual instruction that authorizes the Intermediary to recoup monies owed to one provider to satisfy a debt of another, even assuming the two providers were related parties.

The Provider argues that the contractual arrangements between the two entities did not provide the Intermediary with a legal right to withhold money owed Edgewater Hospital to reduce the amount the Intermediary was owed by Edgewater Medical Center. To satisfy its own interests, the Intermediary effectively assumed that Edgewater Hospital would immediately upon receipt transfer the money it received from the Intermediary to Peter Rogan. This was Edgewater Hospital's decision to make, however. The Intermediary could

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[19] See Provider Exhibit 40.

not know and had no reason to know of any disputes between the parties relating to other aspects of their contract, as a result of which, Edgewater Hospital might have had a justifiable basis for withholding all or some part of the payment otherwise due Peter Rogan. Clearly, nobody would suggest that the Intermediary had the unilateral right to take money it owed Edgewater Hospital and pay it to one of Edgewater Hospital's creditors, for example, a supplier of prescription drugs. Edgewater Hospital's debt to its supplier would have no bearing on its right to receive payments to which it was entitled from the Intermediary. The Intermediary should not be able to engage in "self help" and treat itself more favorably than other creditors.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that this issue does not involve a specific audit adjustment but rather the payment of the balance due subsequent to the completion of the audit. The Intermediary questions the Board jurisdiction because this issue does not involve a cost in controversy. The Intermediary does not agree that Edgewater Hospital and Edgewater Medical Center are unrelated parties. Peter Rogan owns Edgewater Operating Company (d/b/a Edgewater Medical Center) and controls Edgewater Hospital which merged into Edgewater Foundation. Peter Rogan also has power of attorney for Edgewater Foundation.

The Intermediary notes that according to program regulations control exits where an individual or an organization has the power, directly or indirectly, significantly to influence or direct the actions or policies of an organization or institution. See, HCFA Pub. 15-1, § 1002.3. When the Option Agreement was signed by Rogan and the Hospital, the Hospital also entered into a management agreement with Rogan. This agreement provided that:

- Rogan shall co-ordinate and supervise all efforts of the management team to be retained by the Hospital.

- Rogan shall assist Hospital in identifying a management company and approve the hiring of such company.

Intermediary Exhibit No.5

Once executed, the Management and Option agreements gave Peter Rogan virtually total control of day to day operations at the Hospital. Few, if any, decisions were made without his approval. The agreement gave Rogan the authority to supervise the CEO and CFO, veto power over any decision, and mandated that the Provider use its best efforts to implement any proposals from him. In addition, Article XII of the Purchase Agreement gave the buyer irrevocable power of attorney to act for the seller.

The Intermediary further notes that Edgewater Foundation, the successor to Edgewater Hospital, had offices at 7 East Chestnut Street, the same address as Edgewater Operating

Company, Edgewater Property Company, and Interhealth Associates, a management company also owned by Rogan. The Foundation had the same phone number as Interhealth Associates. Therefore, the Intermediary concludes that Rogan and his companies are related to Edgewater Hospital and Edgewater Foundation through control as defined by HCFA Pub. 15-1 § 1002.3.

The Intermediary observes that the terms of the Purchase Agreement were essentially the same as the Option Agreement. According to Section 1.2 of Article I, the "Purchased Assets" include all receivables owing to seller as a result of seller's final cost report filed with the Medicare program... including any reverse depreciation recapture.[20]

Finally, the Intermediary argues that netting the underpayment for Edgewater Hospital against the overpayments for Edgewater Medical Center for the two succeeding cost report periods was proper because the two corporations are related as defined by Medicare regulations, and because the Buyer purchased the Medicare receivables due to Edgewater Hospital, the Seller. The Intermediary therefore requests the Board to affirm its position.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - Title XVIII of The Social Security Act:

§ 1861 (v) (1) (A)	-	Reasonable Cost

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

§ 1395 g (d)	-	Payment To Providers of Services (Interest)
§ 1395 l (j)	-	Payment of Benefits (Interest)

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

§ 405.376 et seq.	-	Interest Charges on Overpayments and Underpayment to Providers, etc.

[20] See Exhibit I-3

§405.1804	-	Matters Not Subject to Administrative and Judicial Review Under Prospective Payment
§ 405.1869	-	Scope of Board's Decision Making Authority
§ 405.1873	-	Board's Jurisdiction
§ 489.18	-	Change of Ownership or Leasing: Effect on Provider Agreement

4. PROGRAM INSTRUCTIONS- Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

§1002.3	-	Control

5. Cases:

OSF Health Care System, d/b/a Saint James Hospital v. Sullivan, 820 F. Supp. 390 (C.D. 111. 1993)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the facts, parties' contentions, evidence submitted, law, regulations, and program instructions finds and concludes that it does not have jurisdiction to hear this case and therefore dismisses it with prejudice. The Board notes that it previously granted this Provider jurisdiction to hear this issue.[21] However, after reviewing the entire record, including full briefs by both the parties, the Board has reconsidered its decision and is dismissing this case. The only issue remaining in this case concerns the payment of interest by the United States government through its Intermediary. That interest is covered by 42 C.F.R. §405.376. It is not part of the determination relating to the cost report and is not addressed in the NPR. The above regulation concerns interest paid when a provider is not reimbursed amounts due from an intermediary 30 days after an NPR is issued. This regulation application is not subject to Board review.

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[21] See Provider Exhibit 60.

DECISION AND ORDER:

The Board dismisses this case because it lacks jurisdiction to hear the issue.

Board Members Participating:

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

Date of Decision: April 06,1999

For the Board

Irvin W. Kues
Chairman