

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

2000-D65

PROVIDER -
Edgewater Hospital, Chicago, IL

Provider No. 14-0087

vs.

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

DATE OF HEARING-
May 4, 2000

Cost Reporting Period Ended -
January 21, 1989

CASE NO. 91-2887R

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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. (AProvider@), is a not-for-profit corporation located in Chicago, Illinois. The issue above was decided by the Provider Reimbursement Review Board (ABoard@) on April 6, 1999. On September 21, 1999 the Provider's representative, Thomas W. Coons, Esquire, of Ober, Kaler, Grimes and Shriver and the U.S. Government's representative, Donna Morros Weinstein, Esquire, Chief Counsel of the Office of the General Counsel, Region V, signed a settlement agreement which stated the following:

1. Foundation shall file a notice of dismissal pursuant to Fed. R. Civ. P. 41 (a)(1)(I) of the complaint in Edgewater Foundation v. Shalala, No. 99 C 3651 (N.D. Ill.).
2. The Secretary shall vacate the decision of the Provider Reimbursement Review Board (APRRB@) dated April 6, 1999, which dismissed for lack of jurisdiction the Hospital's administrative appeal in PRRB Case No. 91-2887. The administrative appeal in Case No. 91-2887 shall be reinstated, with the following instructions to the PRRB:
 - a. Within 60 days after reinstatement, the Hospital's appeal will be ready for decision.
 - b. The PRRB will make its best efforts to issue a decision on the merits of the Hospital's appeal promptly and expeditiously.

On December 3, 1999, the Attorney Advisor of the Health Care Financing Administration (AHCFA@) issued an Administrator's Order remanding the case to the Board. The Administrator ordered:

THAT, the decision of the PRRB, dated April 6, 1999, which dismissed for lack of jurisdiction is vacated and that case is remanded to the PRRB for further proceedings consistent with the Settlement Agreement.

THAT, consistent with the Settlement Agreement, the PRRB will reinstate Case No. 91-2887.

THAT, within 60 days after reinstatement, the Hospital's appeal will be ready for decision and that the PRRB will make its best efforts to issue a decision on the merits of the Hospital's appeal promptly and expeditiously.

THAT, the decision of the PRRB will follow the provisions of section 1878 of the Social Security Act [42 U.S.C. 1395oo] and 42 C.F.R. 405.1801 et seq.

On January 7, 2000, the Board issued a Notice of Reopening and Board Order implementing the Administrator's Order. On February 24, 2000, the Board held a record hearing in response to the Administrator's remand and parties' responses. It issued Decision 2000-D29 on March 3, 2000 again denying jurisdiction based on the facts and parties' contentions.

By order dated March 6, 2000, the Deputy Administrator issued a clarification to his original remand order for the subject Provider. The Deputy Administrator ordered that, having reinstated the Provider's appeal,

1. The PRRB will make a determination whether, under 42 C.F.R. ' 489.18, as discussed in the third paragraph of the Board's September 21, 1994 letter (Administrative Record at 103), the Intermediary made payment to the proper party when it offset the overpayment amounts determined for Edgewater Medical Center against the underpayment amounts determined to be due Edgewater Hospital;
2. The PRRB will make a determination whether, under the contract for the assignment of receivables at Intermediary Exhibit I-3 (Administrative Record at 1034), the Intermediary made payment to the proper party when it offset the overpayment amounts determined for Edgewater Medical Center against the underpayment amounts determined to be due Edgewater Hospital;
3. If the PRRB determines that the Intermediary paid the incorrect party:

The PRRB will make a determination whether a "final determination" of an underpayment, as defined at 42 C.F.R. ' 405.378(c) and Section 1815(d) of the Social Security Act, was issued to Edgewater Hospital and,

If the PRRB determines that a "final determination" of an underpayment was issued to Edgewater Hospital, the Board will then make a determination as to the date of such a final determination; and whether the underpayment was liquidated within thirty days of the "final determination."

On March 15, 2000, the Board issued Notice of Reopening Pursuant to Deputy Administrator's Amended Order for Remand and Board Order ("Board Order"). Pursuant to the Amended Order, the Board reopened and reinstated PRRB Case No. 91-2887. The Board also ordered the parties to submit briefs on the matters required to be determined by the Board in accordance with the Deputy Administrator's Amended Order.

On April 21, 2000 the Administrator of HCFA remanded Board Decision 2000-D 29 to the Board and ordered:

THAT PRRB Decision No. 2000-D 29 is vacated; and

THAT PRRB Decision No. 2000- D 29 is remanded to the Board for consolidation with PRRB Case No. 91-2887 for decision consistent with the Administrator's Amended Order.

PROVIDER'S CONTENTIONS:

The Provider contends that for the reasons set forth in its March 10, 2000 correspondence¹ to HCFA's Attorney Advisor, the Provider asserts the March 15, 2000 Board Order is improper. The Board should issue a decision on the merits of the Edgewater Hospital's appeal without regard to the three specified determinations identified by the Deputy Administrator. Without prejudice to this position, the Provider now argues each of the three issues that the HCFA Deputy Administrator has required the Board to determine, as required by the Board Order.

Edgewater Hospital notes that it relies on other documents filed previously with the Board, including, but not limited to, its original position paper, verified facts, and letters to the Board dated January 21,² January 24,³ March 10⁴ and March 22, 2000⁵ as support for its position that it should be paid interest.

¹ See Provider's Exhibit 65.

² See Provider's Exhibit 66.

³ See Provider's Exhibit 67.

Edgewater Hospital directs the Board's attention to the revised HCFA 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.⁶

The Provider contends that in the event that the Board decides that 42 C.F.R. ' 489.18 is relevant to this action, it should make a determination finding that, under that regulation, the Intermediary did not make payment to the proper party when it offset the overpayment amounts determined for Edgewater Medical Center against the underpayment amounts determined to be due Edgewater Hospital. Contrary to the implication of the March 15, 2000 Board's Order, 42 C.F.R. ' 489.18 was not discussed in the third paragraph or any other paragraph of the Board's letter of September 21, 1994. The Board's Order refers to the Administrative record at 103. The Provider has never been furnished with any Administrative record prepared in this matter. Moreover, there is no suggestion in any contemporaneous documentation that the Intermediary's offset of amounts owed by Edgewater Medical Center against amounts owed to Edgewater Hospital was based on that regulation (' 489.18 was not even referred to in the Intermediary's initial position paper in this matter). Accordingly, this regulation is irrelevant to this appeal; it can not be used as a basis to sustain the Intermediary's action. See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co., 103 S. Ct. 2856, 2870 (1983) (an agency's action must be upheld, if it all, on the basis articulated by the agency itself),⁷ Moret v. Karn, 746 F.2d 989, 992 (3rd Cir. 1984) (even if law and evidence would support agency's order on a different basis, court may sustain order based on agency's findings and stated reasons only).⁸

The Provider argues that neither the regulation itself nor the judicial interpretation of that regulation in United States v. Vernon Home Health, Inc., 21 F.3d 693 (5th Cir. 1994),⁹ (decided more than three years after the offset at issue was effected but relied on recently by the Intermediary) A Vernon Home Health provides for Medicare payments due to the seller of a hospital to be used to satisfy payments due to Medicare by the purchaser. See letter to Mr. Irvin W. Kues, January 24, 2000, which is

⁴ See Provider's Exhibit 65.

⁵ See Provider's Exhibit 68.

⁶ See Provider's Exhibit 61.

⁷ See Provider's Exhibit 69.

⁸ See Provider's Exhibit 70.

⁹ See Provider's Exhibit 71.

included as Provider's Exhibits 67 and is incorporated herein by reference. Such a policy would require turning successor liability principles directly on their head.

Sub-Issue 2-Contract or Assignment of Receivables

The Provider argues that the Board should make a determination finding that under the contract for the assignment of receivables, the Intermediary did not make payment to the proper party when it offset overpayment amounts determined for Edgewater Medical Center against the underpayment amounts determined to be due Edgewater Hospital. As discussed in the original position paper, Medicare interpretive regulations state that once an Intermediary has determined that a provider is due money based on an underpayment, payment must be made to that entity within 30 days or interest must be paid.¹⁰ There is nothing in the statutory provisions implemented in those regulations or the regulations themselves that provide an exception to this requirement based on the application of contract law principles to an agreement between private parties. In Vernon Home Health, the court stated:

Regardless of the result under state corporate law, federal law governs cases involving the rights of the United States arising under a nationwide federal program such as the Social Security Act The authority of the United States in relation to funds disbursed and the rights acquired by it in relation to those funds are not dependent upon state law.

21 F.3d at 695.

Medicare regulations require payment to be made to the entity advised of the underpayment; state contract law can not alter this requirement.

The Provider notes that the contract did not assign Edgewater Hospital's receivables to Edgewater Medical Center, the entity to which the Intermediary "made payment." As set forth in the verified facts, under the Agreement, Edgewater Medical Center did not receive an assignment of Edgewater Hospital receivables. Peter Rogan purchased Edgewater Hospital's receivables, "including any reverse recapture resulting from the consummation of transactions contemplated by [the] Agreement."¹¹ The Intermediary was advised by Edgewater Medical Center that it had no right to act on Edgewater Hospital's behalf, and that the Intermediary had acted incorrectly when it netted amounts allegedly owed to Medicare by Edgewater Medical Center from amounts due Edgewater Hospital from Medicare. Moreover, even if private contract laws were applicable, they would not permit Medicare to pay monies due Edgewater Hospital to any other person or entity, including the person to which Edgewater Hospital was actually

¹⁰ See Original Position Paper at 8-11.

¹¹ See Agreement, 1.3, Provider's Exhibits 35.

required to make payments. Payment by a debtor to its creditor's creditor does not constitute payment of a debt. Continental Oil Co. v. Zaring, 563 P.2d 964,968 (Cal. App. 1977).¹² See also Garcia v. Chase Manhattan Bank, N.A., 735 F.2d 645, 649 (2nd Cir. 1984) (a debtor's payment to a third party of a sum equal to that owed the creditors does not extinguish the original debt where debtor-creditor relationship created to ensure creditor's funds).¹³ In re Hudson Feather & Down Products, Inc., 22 B.R. 247, 253 (E.D.N.Y. 1982) (debtor had no right to deduct from amount owed to company an amount paid "voluntarily and gratuitously" to company's subagent).¹⁴

Sub Issue 3-Liquidation of "Final Determination" Within Thirty Days

The Provider argues that the Board should make a determination finding that a "final determination" was issued to Edgewater Hospital; the "final determination" was issued on March 5, 1991, and the underpayment was not liquidated within thirty days thereof. The Notice of Program Reimbursement dated March 5, 1991, constitutes the "final determination" of an underpayment for purposes of 42 C.F.R. ' 405.378(c) (codified at 42 C.F.R. ' 405.376(c) during the relevant cost year and ' 1815(d) of the Social Security Act). The NPR, issued after the Medicare cost report had been filed and audited, included a written determination of an underpayment in the amount of \$6,344,898. The NPR states that interest on any amount due HCFA will be assessed if payment is not made within 30 days of the NPR. Thus, the Intermediary recognizes that the NPR is the "final determination" for purpose of Medicare interest provisions.

The Provider notes that in the preamble to the relevant final rule, HCFA confirms that the NPR is the "final determination" for purposes of the interest requirements. HCFA states that since interest due on an overpayment is not charged if the overpayment is liquidated within 30 days of the NPR issuance date, the Intermediary need not pay interest if it pays the underpayment within the same time frame. 56 Fed. Reg. 31332, 31335 (1991).¹⁵ Similarly, in litigation involving a substantially similar issue, counsel for the Secretary of Health & Human Services asserted that, subject to certain stated exceptions (none of which are relevant here), "[u]nder the regulation implementing 42 U.S.C. ' 1395g(d), a determination is "final" when a Notice of Program Reimbursement ("NPR") is issued with respect to that determination." Defendant's Response to Plaintiff's Motion For summary Judgement, OSF Healthcare System v. Sullivan, Civil Action No. 92-1172 (Oct. 23, 1992).¹⁶ The court's decision does not

¹² See Provider's Exhibits 72.

¹³ See Provider's Exhibits 73.

¹⁴ See Provider's Exhibits 74.

¹⁵ See Provider's Exhibit 51.

¹⁶ See Provider's Exhibit 75.

address this particular issue. See OSF Healthcare System v. Sullivan, 820 F. Supp 390, 395 (C.D. I11. 1993).¹⁷ Finally, the United States Court of Appeals for the Ninth Circuit has stated: "[t]he Secretary's regulations implementing [42 U.S.C. ' 1395g(d)] define "final determination" as the NPR issued by the fiscal intermediary which notifies the provider that amounts are due and specifies the actual amount of overpayment or underpayment." National Medical Enterprises v. Sullivan, 960 D.2d 866, 868 (9th cir. 1992), Provider's Exhibits, 76.

Further, the Provider argues that the Medicare Intermediary Manual ("MIM") contains detailed instructions reflecting the expectation that Intermediaries will actively pursue overpayments through use of post-NPR demand letters. MIM ' 2219.5. An NPR may be sufficient without further documentation. ("NPR and/or written determination of an overpayment and demand letter may be combined in one document as (long as) the requirements . . . are included"). Even if ---contrary to all the authorities cited above---something after the NPR were required as a "final determination," the Provider's right to interest cannot be eliminated by the Intermediary's failure to issue such a document based on its incorrect determination that the underpayment due Edgewater Hospital was satisfied through making payment to another entity.

INTERMEDIARY CONTENTIONS:

The Intermediary relies on its contentions as addressed in PRRB Decisions 99-D33 and 2000-D 29 and are adopted in this decision be reference.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law: Title XVIII of the Social Security Act:

- ' 1815, et seq. - Payment To Provider of Services
- ' 1878 - Provider Reimbursement Review Board

Law: 42 U.S.C.:

- ' 1395oo - Provider Reimbursement Review Board
- ' 1395g(d) - Payment to Providers of Services

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

¹⁷ See Provider's Exhibit 40.

- ' 405.378(c) [Previously designated ' 405.376 (c)] - Definition of Final Determination
 - ' 405.1801, et seq. - Provider Reimbursement Determinations and Appeals
 - ' 489.18 - Change of Ownership on Leasing; Effect on Provider Agreement
3. Federal Register:
- 56 Fed. Reg. 31332, 31335 (1991) - Overpayments
4. Program Instructions: Medicare Intermediary Manual (HCFA Pub. 13-1):
- ' 2219.5 - Notification To Providers
5. Cases:
- Edgewater Foundation v. Shalala, No. 99C 3651 (N.D.Ill).
- Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983).
- Moret v. Karn, 746 F. 2d 989 (3rd Cir. 1984).
- United States v. Vernon Home Health, Inc., 21 F. 3d 693 (5th Cir. 1994).
- Continental Oil Co. v. Zaring, 563 P .2d 964, 968 (Cal. App. 1977).
- Garcia v. Chase Manhattan Bank, N.A., 735 F. 2d 645 (2nd Cir. 1984).
- Hudson Feather v. Down Products, Inc., 22 B.R. 247 (E.D.N.Y. 1982).
- OSF Healthcare System v. Sullivan, Civil Action No. 92-1172 (Oct. 23, 1992).
- OSF Healthcare System v. Sullivan, 820 F. Supp. 390 (C.D. Ill. 1993).
- National Medical Enterprises v. Sullivan, 960 D. 2d 866 (9th Cir. 1992).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the law, regulations, program instructions, facts and parties contentions finds and concludes that it does not have jurisdiction in this case. The Board notes that the HCFA Administrator recently remanded this decision to the Board and requested the Board to decide various aspects of this appeal. These are stated in the Statement of the Case and Procedural History. The Board finds the Administrator's request without foundation. All of the facts in this case are known, and they relate to Medicare payments, not to Medicare costs. This is specifically stated in the Administrator's remand. Issue No. 1 of the March 6, 2000 remand specifically addresses "payments" made by the Intermediary. Further, the Board notes that the remand addressed the use of 42 C.F.R. ' 489.18 in a Board letter dated September 21, 1994. That letter never addressed this regulation.

The Board notes that since it does not have jurisdiction, the findings of fact requested by the Administrator in the remand are moot. There is no need to answer any of the HCFA Administrator's questions since the Board has ruled this case is not properly before it. Further, the Board finds that the Administrator's request is addressing new issues, i.e., payment issues. The Board finds that improper. The only issues that can be addressed by the Board are cost reimbursement disputes. Thus, the Board concludes that it has no jurisdiction in this case and dismisses it.

DECISION AND ORDER

The Board reaffirms its original decision that it lacks jurisdiction in this case. The case is dismissed.

Board Members Participating

Irvin W. Kues
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker
Stanley J. Sokolove

Date of Decision: June 28, 2000

FOR THE BOARD

Irvin W. Kues
Chairman