PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2000-D87

PROVIDER -
Mercy General Hospital - SNF
Sacramento, CA

Provider No. 05-0017

vs.

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

DATE OF HEARING-
August 20, 1999

Cost Reporting Period Ended -
March 31, 1989

CASE NO. 95-0634

INDEX

ISSUE:

Was HCFA=s denial of the Provider=s routine cost limit exception request proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Mercy General Hospital (AProvider@), operates a 76 bed hospital-based Medicare certified skilled nursing facility (ASNF@) in Sacramento, California. The Provider received an initial Notice of Program Reimbursement (ANPR@) for fiscal year ended (AFYE@) March 31, 1989, in which the routine cost limits (ARCLs@) were applied, on May 17, 1991. The Provider filed an exception to the RCLs on December 6, 1991. Although Blue Cross of California (AIntermediary@) recommended that an exception be granted, the request for an exception was denied by the Health Care Financing Administration (AHCFA@) because the request was not timely filed, that is, within 180 days of the NPR. The Provider did not appeal this determination to the Provider Reimbursement Review Board (ABoard@). On December 31, 1992, the Intermediary issued a revised NPR to reclassify malpractice costs.[1] The Provider filed an exception request to the RCLs from the revised NPR.[2] This request for an exception included the same services and items as its previous request which was denied by HCFA due to untimely filing, in addition to malpractice insurance.[3]

On October 4, 1993, the Intermediary forwarded their recommendation to HCFA and recommended a total exception in the amount of $26.83.[4] A segment of the recommendation concerned an adjustment of $2.36 for malpractice insurance. On July 11, 1994, the Intermediary received notification that HCFA was approving only the malpractice portion of the exception request.[5] In their letter, HCFA stated that it was their policy that when a revised NPR is issued, only those specific issues affected by the revised NPR are subject to appeal.[6] Since the revised cost report only concerned reclassification of malpractice costs, HCFA only granted approval for the malpractice portion of the request. The

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[1] Provider Exhibit 4.

[2] Provider Exhibit 6.

[3] Id.

[4] Intermediary Exhibit 2.

[5] Intermediary Exhibit 3.

[6] Id.

Intermediary communicated HCFA=s decision to the Provider on July 26, 1994.[7] A revised NPR was issued for the exception on August 23, 1994.[8]

The Provider timely appealed the partial denial from the revised NPR within 180 days and has met the jurisdictional requirements of 42 C.F.R. '' 405.1835-.1841. The amount of Medicare reimbursement in dispute is approximately $895,395.[9]

The Provider was represented by Frank P. Fedor, Esquire, of Murphy, Austin, Adams and Schoenfeld, L.L.P. The Intermediary was represented by James R. Grimes, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER=S CONTENTIONS:

The Provider makes four arguments that HCFA=s denial of the June 11, 1993 exception request was arbitrary, capricious, an abuse of discretion, and not in accordance with law. First, the Provider asserts that HCFA failed to follow its own written guidelines in denying the exception. Second, the Provider claims that the policy announced in HCFA=s July 11, 1994 letter, denying the exception request, was a change in policy and was impermissibly applied retroactively. Third, the Provider contends that the Board has jurisdiction to consider the Provider=s June 11, 1993 exception request because the Intermediary and HCFA each reopened the cost report on the issues affected by the exception request. And fourth, the Provider requests that the time period, in which it could file an exception request, be equitably tolled so as to make the June 11, 1993 exception request timely, due to its excusable ignorance of HCFA=s policy, HCFA=s conduct of distributing guidelines and then changing its policy without notice, and the absence of any prejudice to HCFA in requiring it to determine the exception now.

The Provider argues that in denying the Provider=s exception request on July 11, 1994, HCFA failed to follow its own policy and practice in effect at the time the June 11, 1993 exception request was made. This policy and practice was that a provider could submit an exception request within 180 days of the Afinal@ NPR. According to the Provider, Afinal@ meant the latest and most recent NPR issued. If the initial NPR was also the only NPR, then it was the Afinal@ NPR. However, if other revised NPRs followed the initial NPR, they would each in turn become the new Afinal@ NPR.

The Provider points out that the governing regulation, 42 C.F.R. ' 413.30, does not specify which NPR starts the running of the 180 day time limit for the submission of the exception request. It merely states

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[7] Intermediary Exhibit 4.

[8] Intermediary Exhibit 5.

[9] See Intermediary Position Paper at 1.

that a provider=s exception request Amust be made to its fiscal intermediary within 180 days of the date on the intermediary=s notice of program reimbursement.@ Id. Without such specification, the more reasonable interpretation is that the time period begins to run from any NPR.

The Provider points out that when faced with precisely this question in two cases involving exceptions to the limits established by the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248 (ATEFRA@) and in the regulations at 42 C.F.R. ' 413.40, the Board came to the same conclusion as the Provider. See Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Dec. No. 95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) &43,222, rev=d, HCFA Administrator, May 5, 1995, Medicare and Medicaid Guide (CCH) &43,510 (ACare Unit@) and Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No 95-D28, March 8, 1995, Medicare and Medicaid Guide (CCH) & 43,228, rev=d, HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) & 43,538, aff=d, No. CV95-4674 KIN (C.D.N.C. January 2, 1997), Medicare and Medicaid Guide (CCH) & 45,249, aff=d, Foothill Presbyterian Hospital v. Shalala, 152 F.3d 1132 (9th Cir. 1998), Medicare and Medicaid Guide (CCH) & 300,028 (AFoothill@).

The Provider also argues that the regulation at 42 C.F.R. ' 405.1889 does not contradict this analysis. It addresses four specific rights and none of these affects the right to submit an exception request. That right is governed exclusively by 42 C.F.R. ' 413.30. That is exactly the analysis the Board made in Care Unit and Foothill.

The Provider emphasizes that this is not a case which sets new policy. The Provider does not dispute the HCFA Administrator=s authority to interpret the time limit in 42 C.F.R. ' 413.30 to apply only to an initial NPR. Rather the Provider argues that this was clearly not the policy of HCFA at the time the Provider filed its exception request on June 11, 1993. At that time, the rules applied to exception requests were stated in the HCFA Guidelines.[10] These rules had been in effect since 1983, had been distributed to intermediaries, and were the source to which intermediaries were directed when questions arose. The guidelines clearly stated that the time period in which to submit an exception request began to run from the Afinal@ NPR, thus removing the ambiguity contained in 42 C.F.R. ' 413.30. AFinal@ NPR was consistently interpreted by the Intermediary to mean the most recent NPR. Such interpretation was manifested not only through the oral advice given the Provider and its representative, but also through the Intermediary=s conduct in consistently recommending the approval of SNF exception requests submitted from revised NPRs which did not address the items for which an exception was requested. AFinal@ NPR was also consistently interpreted by HCFA to mean the most recent NPR until July 1994, the month the new rules in HCFA Transmittal No. 378 were issued, HCFA had consistently approved exception requests submitted from revised NPRs which did not address the items for which an exception was requested.

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[10] Provider Exhibit 17.

The Provider also argues that HCFA failed to follow its HCFA Guidelines when it refused to acknowledge that under the HCFA Guidelines the Provider=s exception request had been automatically granted due to HCFA=s failure to act on the request within 180 days of the Intermediary=s recommendation. The HCFA Guidelines state in relevant part:

> HCFA must advise the intermediary of its decision, or request additional development, within 180 days from the date the request is received. If no response is made within 180 days after receipt of the request, HCFA will recognize the intermediary=s recommendation as a HCFA decision.[11]

The Provider points out that the Intermediary made its recommendation to HCFA to partially approve the Provider=s exception on October 4, 1993. HCFA did not take any action on the exception until July 11, 1994, a period of 277 days. Thus, by its own HCFA Guidelines, the Intermediary=s recommendation for approval became HCFA=s decision, and the Provider=s exception was granted to the extent recommended by the Intermediary.

The Provider also argues that HCFA impermissibly applied its change in policy retroactively. Retroactive application of new rules is not permitted under the Administrative Procedure Act, 5 U.S.C. ' 551 et seq. and Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).

The Provider focuses on the undisputed evidence presented at the hearing which demonstrates that HCFA=s Apolicy@ of only permitting an exception from a revised NPR on issues affected by that revised NPR was first communicated to the Provider by HCFA=s July 11, 1994 letter to the Intermediary denying the atypical services and unusual labor exception requests. This was also the month in which HCFA released HCFA Transmittal No. 378, which set out the new rules for the administration of SNF exception requests. The Intermediary presented no evidence that this Apolicy@ had been in effect at the time the Provider made its second exception request or at any other time before July 1994. Neither did the Intermediary present any evidence that this Apolicy@ had been published or communicated in any other manner before HCFA=s July 11, 1994 letter.

The Provider also argues that the Board has the authority to decide its appeal because the Intermediary and HCFA reopened the cost report regarding the issues for which exceptions were requested. In Edgewater Hospital, Inc. v. Bowen, 857 F.2d 1123 (7th Cir. 1988) (AEdgewater@), the court found that the Board had jurisdiction to review all matters the fiscal intermediary had re-examined in reopening the cost report. In Edgewater, the intermediary issued the original NPR and the provider was dissatisfied with four issues and asked the intermediary to reconsider them. The intermediary disagreed

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[11] Provider Exhibit 17.

with the provider on three of the issues, but agreed on the fourth and issued a revised NPR. The court held that under the broad definition of Areopening@ contained in HCFA Pub. 15-1 ' 2931 all of the issues considered by the intermediary, including those where the intermediary did not grant the provider any of the relief requested, could be appealed. Thus, while the revised NPR dealt with only one of the four issues raised in the request for reconsideration, the intermediary must have reconsidered all four, and thus all four issues could be appealed from the revised NPR. The Ninth Circuit, within whose jurisdiction the Provider lies, stated in French Hospital Medical Center v. Shalala, 89 F.3d 1411, 1420 (9th Cir. 1996) that it agreed with the holding of Edgewater.

The Provider contends that in this case the Intermediary also reopened the issues decided when the Provider=s initial exception request was denied by re-examining those same issues when they were raised in the Provider=s second exception request. The Provider points out that HCFA=s definition of Areopening@ is very broad.

> A. Reopening. - For the purposes of this section, the term "reopening" means an affirmative action taken by an intermediary, an intermediary hearing officer, the PRRB, the Health Care Financing Administration, or the Secretary, to reexamine or question the correctness of a determination or decision otherwise final.

HCFA Pub. 15-1 ' 2931 (emphasis added).

The Provider argues that this broad definition of reopening applies to the facts of this case. The Provider submitted its second exception request on June 11, 1993. In response to this written request of the provider, the Intermediary Atook affirmative action to re-examine or question the correctness@ of the earlier denial of the initial exception request.

First, the Intermediary requested additional information by letters of June 24, 1993 and July 23, 1993. By this later letter, the Intermediary requested an analysis of the percentage of time that the director of nursing spends on direct patient care functions, an issue only relevant to the portion of the exception request seeking the atypical services exception which had initially been denied in total. Second, on October 4, 1993 the Intermediary recommended to HCFA that an exception be approved in the amount of $26.83 per diem, which included amounts for both the atypical services and unusual labor exceptions. Thus, the facts of this case fit closely with the facts in Edgewater upon which the court held that the Board had jurisdiction to hear the provider=s appeal. As in Edgewater, the Provider sought an adjustment to reimbursement under the cost report. The Provider=s request was initially rejected. The Provider asked for the adjustment again. In response to this second request, the intermediary clearly Atook affirmative action.. . to reexamine or question the correctness of a determination or decision otherwise final@ as it affected the full relief requested by the Provider. The cost report was then reopened, although only part of the relief requested was granted.

Indeed, the facts of this case are actually stronger than the facts supporting the holding in Edgewater. In Edgewater, the provider asked the intermediary to reconsider four issues, and the intermediary favorably adjusted only one issue. Because the intermediary reopened the cost report to provide relief on this one issue, and because of HCFA=s broad definition of Areopening,@ the court assumed that the intermediary had taken affirmative action to re-examine or question the three issues which the intermediary did not adjust. In this case no such assumption is necessary. The October 4, 1993 letter from the Intermediary to HCFA recommended that the relief which was initially denied in response to the first exception request now be approved. This is clear and unequivocal direct evidence that the Intermediary did take affirmative action to re-examine and question a determination which was otherwise final regarding the request for atypical services and unusual labor cost exceptions. Indeed the Intermediary did more than just re-examine or question that otherwise final determination, it actually went on record that it disagreed with that determination and recommended that it be changed.

The Provider also argues that HCFA independently reopened the cost report on the issues for which an exception was requested when HCFA denied the exception request in its letter of July 11, 1994. As explained above, under the HCFA Guidelines which then controlled exception requests, HCFA=s failure to act on the Intermediary=s recommendation within 180 days of its receipt resulted in the Intermediary=s recommendation automatically becoming the decision of HCFA. The Provider questions the authority of HCFA to then deny the exception request which had been granted by operation of the HCFA Guidelines. Nevertheless, if HCFA did have such authority to deny the exception request, such a denial constituted yet another reopening within the broad definition of HCFA Pub. 15-1 ' 2931.

The Provider=s final argument is that the period within which to submit an exception request should be equitably tolled until the time the Provider made its second exception request.

The doctrine of equitable tolling A>focuses primarily on the plaintiff=s excusable ignorance= and >is not available to avoid the consequences of one=s own negligence.=@ Cedars-Sinai Medical Center v. Shalala, 177 F.3d 1126,1130 (9th Cir. 1999). The Provider argues that the law on the time limit within which to submit an exception request was at a minimum unclear, that it acted reasonably and that its failure to submit its exception within 180 days of the initial NPR was not due to an absence of due diligence, that the affirmative conduct of the Intermediary and HCFA misled the Provider, and that there is no prejudice to HCFA by equitably tolling the time period in which to submit the exception.

The Provider first points to the lack of clarity in the law to excuse its ignorance of HCFA=s Apolicy@ first communicated in July of 1994. The lack of clarity in the law is sufficient to justify the equitable tolling of a statute of limitations. Capital Tracing, Inc. v. United States, 63 F.3d 859, 862-863 (9th Cir. 1995). The Provider begins by focusing on the ambiguity in the time limitation stated in 42 C.F.R. ' 413.30 with its lack of specification of which NPR begins the running of the 180 day time limitation. The Provider again points out that the Board twice interpreted identical language in neighboring 42 C.F.R. ' 413.40 to include a revised NPR. See Care Unit and Foothill. The Provider next points to the evidence it introduced at the hearing: the HCFA Guidelines identified the Afinal@ NPR as the point from

which the 180 day time limit was counted. AFinal@ NPR is a greater specification than that contained in the regulation. AFinal@ NPR was interpreted by the Intermediary and by HCFA to mean the latest and most recent NPR. Both the Intermediary and HCFA acted consistently with this interpretation as they respectively recommended approval and approved seven exception requests made from seven revised NPRs which did not address the issues for which an exception was requested.

The Provider also argues that the evidence shows that it acted reasonably and with due diligence. The Provider made reasonable efforts to determine what the time limit was and how it was interpreted. The Provider followed the advice it was given by the Intermediary and by HCFA.

The Provider also points to the Intermediary=s conduct and HCFA=s conduct as misleading. The Provider does not contend that the Intermediary or HCFA acted with the intent to mislead the Provider, but their conduct did result in the Provider being misled. If it actually was the policy of HCFA to permit exceptions from revised NPRs only on issues which the revised NPR addressed, HCFA could have included this policy in the HCFA Guidance, could have informed its intermediaries of this policy, and otherwise disseminated it. If this really was the policy of HCFA, it should not have approved the seven exception requests from revised NPRs and misled the Provider.

Finally, the Provider points out that HCFA will suffer no prejudice from equitably tolling the time in which to submit the Provider=s exception request. HCFA or the Intermediary can determine the Provider=s exception request as well now as they could then.

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that the regulation at 42 C.F.R. ' 413.30 allows HCFA to establish certain limitations on providers costs that are recognized as reasonable. The regulation also discusses the rules that govern exceptions to the limitations that HCFA has made in consideration of special circumstances.

The regulation at 42 C.F.R. ' 413.30(f)(1) discusses the individual situations under which an upward adjustment may be made to the limits for atypical services. This section states that the provider must show that:

> (i) The actual cost of items or services are furnished by a provider exceeds the applicable limit because such items or services are atypical in nature and scope, compared to the items or services generally furnished by providers similarly classified; and
>
> (ii) The atypical items or services are furnished because of the special needs of the patients treated and are necessary in the efficient delivery

of needed health care.

42 C.F.R. ' 413.30(f)(1).

The exception process is straightforward. An exception request must be filed within 180 days of the intermediary=s NPR. The process includes the intermediary making a recommendation to HCFA on the provider=s request. HCFA then renders a decision within 180 days from the date HCFA receives the intermediary=s recommendation. The intermediary then notifies the provider of HCFA=s decision.

According to the Intermediary=s review, a calculation of a $23.31 per diem was determined as opposed to a per diem of $42.76, which was calculated by the Provider. In their evaluation of atypical nursing services, the Intermediary eliminated certain functions that were not directly related to patient care. The elimination was based on job descriptions furnished by the Provider. The functions related to productive hours for transporter, clerical and environmental personnel. In addition, the Intermediary eliminated 100 percent of the management and supervision hours, which the Provider could not support in terms of time spent in administrative versus direct patient care functions.

The Intermediary also made several changes that the Provider had identified as unusual labor costs. As indicated in the October 4, 1993 letter to HCFA, the Intermediary revised the calculation of the Revised Published Non-Labor portion of the calculation. The Intermediary calculated a $1.16 per diem for unusual labor costs. This calculated to a reduction of $3.85 for unusual labor costs.

Finally, the Intermediary revised the exception for malpractice insurance expense. The Intermediary revised the Provider=s calculation from a requested amount of $2.58 per diem to a per diem of $2.36, which was approved by HCFA.

The Intermediary recommended that the Provider be granted a total exception of $26.83 and forwarded the findings to HCFA. HCFA approved an increase to the RCL of $2.36, which was specific to the revised NPR, issued on December 31, 1992. HCFA indicated that the only appealable issue concerned the malpractice insurance portion of the request that was the subject of that revised NPR.

The initial NPR is dated May 17, 1991. The Intermediary is thereby contending that the Provider=s filing of its exception request on October 4, 1993, was beyond the 180 day filing requirement specified under 42 C.F.R. ' 413.30, which states that the Aprovider=s request must be made to its fiscal intermediary within 180 days of the date on the intermediary=s notice of program reimbursement.@

The Intermediary contends that the Board only has jurisdiction over the malpractice portion of the exception request raised in the Provider=s October 4, 1993 appeal request. In appealing from a revised NPR, 42 C.F.R. ' 405.1889 states that:

> [w]here a revision is made in a determination or decision on the amount of program reimbursement after such determination or decision has been reopened as provided in ' 405.1885, such revision shall be considered a separate and distinct determination or decision to which the provisions of '' 405.1811, 405.1835, 405.1875 and 405.1877 are applicable.

Thus, an appeal by a provider on a revised NPR is limited to those issues revised in the NPR and it is those revised items that are subject to further appeal. Only those issues revised on the reopening may be appealed. Since the revised NPR did not address the issue pertaining to atypical nursing services and unusual labor costs, the Intermediary contends that the Board does not have jurisdiction over these issues and the Provider does not have a right to a Board hearing for these issues under 42 C.F.R. ' 405.1841.

The Board has previously ruled under similar circumstances, that a provider's appeal request should be denied on jurisdictional grounds for the same reasons that this Provider has stated. In this case, the Board stated:

> A revised NPR does not reopen the entire cost report to appeal. It merely reopens those matters adjusted by the revised NPR. Similarly, a revised NPR does not extend the appeal period for the cost report, rather only those issues revised on the reopening may be appealed.[12]

The HCFA Administrator similarly ruled on this issue. In Care Unit, supra, the Administrator reiterated that Aa revised NPR neither reopens the entire cost report to appeal nor extends the 180-day appeal period of an earlier NPR.@

Similarly, the Board has recognized the distinction in HCFA Pub. 15-1 ' 2926.6, Appendix A, which states that the Aaudit adjustments included in the revised notice of program reimbursement are appealable to the Board. A revised NPR may not be used to appeal audit adjustments from other NPRs or self-disallowed costs because revised NPRs are issue specific, pursuant to 42 CFR '405.1889.@

The Intermediary requests the Board rule that HCFA=s determination respecting the request for an exception to the RCL is proper and should be affirmed.

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[12] The letter was not included in the record.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

' 1395oo et seq.	-	Provider Reimbursement Review Board

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

'' 405.1835-.1841 et seq.	-	Board Jurisdiction
' 405.1885 et seq.	-	Reopening a Determination or Decision
' 405.1889	-	Effect of a Revision
' 413.30 et seq.	-	Limitations on Reasonable Costs
' 413.40	-	Ceiling on the Rate of Increase in Hospital Inpatient Costs

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

' 2926.6, Appendix A	-	Board Jurisdiction
' 2931	-	Reopening and Correction

4. Cases:

Anaheim Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 2000-D72, July 3, 2000, Medicare and Medicaid Guide (CCH) & 80,527, pending rev., HCFA Administrator

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)

Capital Tracing, Inc. v. United States, 63 F.3d 859 (9th Cir. 1995)

Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Dec. No. 95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) &43,222, rev'd, HCFA Administrator, May 5, 1995, Medicare and Medicaid Guide (CCH) &43,510

Cedars-Sinai Medical Center v. Shalala, 177 F.3d 1126 (9th Cir. 1999)

Edgewater Hospital, Inc. v. Bowen, 857 F.2d 1123 (7th Cir. 1988)

Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No 95-D28, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,228, rev=d, HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,538, aff=d, No. CV95-4674 KIN (C.D.N.C. January 2, 1997), Medicare and Medicaid Guide (CCH) ¶ 45,249, aff=d, Foothill Presbyterian Hospital v. Shalala, 152 F.3d 1132 (9th Cir. 1998), Medicare and Medicaid Guide (CCH) ¶ 300,028

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

Stanislaus Medical Center v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Case No. 98-D79, July 30, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,042, rev=d, HCFA Administrator, September 29, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,127.

5. Other:

TEFRA, P.L. 97-248

HCFA Ruling 89-1

HCFA Transmittal 378, July 1994

Administrative Procedure Act, 5 U.S.C. § 551 et seq.

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 Board finds that the Provider was denied an exception from its initial NPR because it was filed too late. The Board finds that the Provider filed a timely exception request from the revised NPR, but that the reopening regulation limits the Provider to the issue in the revised NPR and its affect on the RCL. The Board finds that the Intermediary reopening was for the limited purpose of correcting reimbursement for malpractice. The Board finds that even though the Intermediary processed the entire RCL request, HCFA correctly determined that only the malpractice portion was involved in the revised NPR and granted that portion of the request. The Board notes that this was not a Aprovider requested@ reopening and therefore the principles in Edgewater, supra, would not apply. The Board finds the

evidence in the record does not conclusively indicate that it was HCFA=s policy and practice to accept RCL exception requests from revised NPRs. Finally, the Board notes that it does not have equitable tolling powers and finds that its other authorities, to excuse late filing and to reopen its decisions, do not apply to the present case.

The Board notes that the Provider received an initial NPR in which the RCLs were applied on May 17, 1991. The Board notes that the Provider filed an exception request from the initial NPR on December 6, 1991.[13] The Board notes that the exception request was denied by both the Intermediary and HCFA because it was not filed within 180 days of the NPR.[14] The Board notes that the denial of the Provider=s exception request from its initial NPR due to timeliness appears proper and is not in dispute. Rather, the Provider has refiled its exception request from an Intermediary initiated revised NPR to correct the reimbursement for malpractice associated with HCFA Ruling 89-1, issued on December 31, 1992.[15] The Board notes that it has previously found that a provider may file an exception request based on a revised NPR, but that the reopening rules at 42 C.F.R. '' 405.1885-.1889 limit the provider to the issues adjusted in the revised NPR. See Stanislaus Medical Center v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Case No. 98-D79, July 30, 1998, Medicare and Medicaid Guide (CCH) & 80,042, rev=d, HCFA Administrator, September 29, 1998, Medicare and Medicaid Guide (CCH) & 80,127. The Board finds that the Intermediary reopening was for the limited purpose of correcting reimbursement for malpractice. The Board further finds that HCFA correctly limited the relief granted to the Provider in its exception request to the malpractice issue addressed in the revised NPR.

The Board notes that the Provider argues that the RCL issue was reopened when the Intermediary reexamined its second exception request. The Provider indicates that the decision in Edgewater, supra, supports its position that where an Intermediary reexamines an issue it has been reopened even if the Intermediary determines not to grant that relief. The Board finds that the facts in the instant case are not similar to those in Edgewater. In Edgewater, the court found that the provider requested a reopening on number of issues and that the Intermediary had accepted that request even though it only granted relief related to one issue. In the instant case, the Board finds that the Intermediary reopened the cost report for the narrow purpose of correcting the reimbursement for malpractice costs. The Board does not equate the Provider=s resubmission of its RCL exception request as a request for reopening. Rather, the Board finds that the Provider believed that it was HCFA=s policy and practice to accept exception requests from the Alatest and most recent NPR.@[16]

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[13] Provider Exhibit 1.

[14] See Provider Exhibits 2 and 3.

[15] Intermediary Exhibit 1.

[16] See Provider=s Post Hearing Brief at 8.

The Board notes that it was appropriate for the Intermediary to consider an exception request from the Provider to a revised NPR. Even though the Board finds that the Intermediary should not have considered the Provider=s entire exception request and recommended its approval to HCFA, it does not find that this action constituted a reopening of the entire RCL issue. HCFA correctly determined that the only relief that could be granted was limited to the revised NPR. The Board also finds that the Provider received all of the relief to which it was entitled under the revised NPR and is not entitled to any additional relief due to the delay in HCFA=s decision.

The Board notes that the Provider argues that it was HCFA=s policy and practice to accept exception requests from the latest and most recent NPR issued. The Board first notes that it has found that a provider may submit an exception request from any NPR but that revised NPRs are limited by the reopening rules to the issues that are reopened. The Board notes that the Provider presented evidence to support its contention that exception requests had been accepted from revised NPRs.[17] The Board has carefully reviewed the record and cannot determine with certainty whether HCFA has granted general exception relief from a revised NPR where that revised NPR did not affect the RCLs. In addition, the Board believes that considerable additional evidence would be needed for it to find that allowing exceptions from any Afinal@ NPR was HCFA Apolicy and practice.@

Finally, the statutes and regulations that delineate the Board=s authority, 42 U.S.C. ' 1395oo et seq. and 42 C.F.R. Subpart R, do not include equitable tolling powers. See Anaheim Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 2000-D72, July 3, 2000, Medicare and Medicaid Guide (CCH) & 80,527, pending rev., HCFA Administrator. The Board has regulatory authority to permit late appeals to the Board and late reopenings of its decisions under 42 C.F.R. '' 405.1841(b) and 405.1885(d), however, the Board finds these provisions are not applicable to the instant case.

In summary, the Board finds that the Provider was entitled to file an exception request from its revised NPR but that HCFA=s determination limiting RCL relief to the scope of the revised NPR was proper.

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[17] See Provider Exhibits 21-42.

DECISION:

The Board finds that HCFA=s determination limiting RCL relief to the scope of the revised NPR was proper. HCFA=s determination is affirmed.

Board Members Participating:

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

Date of Decision: September 22, 2000

FOR THE BOARD:

Irvin W. Kues
Chairman