PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON THE RECORD
2001-D3

PROVIDER -
The University of California, San Diego Medical Center, San Diego, CA

Provider No. 05-0025

vs.

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

DATE OF HEARING-
September 26, 2000

Cost Reporting Periods Ended -
June 30, 1989 and June 30, 1990

CASE NOs. 92-1220 and 93-0473

INDEX

ISSUE:

Was the Intermediary=s adjustment to the number of available beds for indirect medical education adjustment purposes proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The University of California, San Diego Medical Center (AProvider@) is a general-short term, acute care teaching hospital located in San Diego, California.[1] As such, it is reimbursed under Medicare=s prospective payment system (APPS@) for inpatient hospital services. In accordance with 42 U.S.C. '1395ww(d)(5)(B), hospitals under PPS with approved medical education programs, such as the Provider=s, are entitled to an additional payment for the indirect costs of medical education (AIME@). The amount of the IME adjustment is calculated using a formula based in part upon a provider=s ratio of full-time equivalent interns and residents to the number of its beds. 42 C.F.R. ' 412.105(b) (formerly 42 C.F.R. ' 412.118(b)).[2]

Blue Cross of California (AIntermediary@) audited the Provider=s cost reports for its fiscal years ended June 30, 1989 and June 30, 1990, and made an adjustment to the Provider=s bed size. Specifically, the Intermediary included 40 newborn intensive care unit beds in the total bed count used to determine the Provider=s IME adjustments.[3] The effect of the additional beds was a reduction to the Provider=s Medicare reimbursement estimated to be in excess of $10,000 in each period.[4]

On September 23, 1991, the Intermediary issued a Notice of Program Reimbursement (ANPR@) reflecting its adjustment to the Provider=s 1989 cost reporting period, and on June 30, 1992, it issued an NPR reflecting the adjustment to the Provider=s 1990 cost reporting period. On March 19, 1992, and December 21, 1992, respectively, the Provider appealed the Intermediary=s adjustments to the Provider Reimbursement Review Board (ABoard@) pursuant to 42 C.F.R. '' 405.1835.-1841, and met the jurisdictional requirements of those regulations.

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1 Intermediary Position Paper at 1.

2 Provider Position Paper at 3.

3 Id.

4 Initially, the Provider appealed the subject adjustments in combination with adjustments made to its intern and resident count. The record shows the reimbursement effect of these adjustments in aggregate totaling $2,360,732 in 1989 (Intermediary Position Paper at 2), and $1,886,069 in 1990 (Provider Position Paper dated April 3, 1996 at 6).

The Provider and Intermediary agreed to the relevant facts and description of the issue in these cases. Moreover, the parties agreed that since the issue is the same for each case, that both appeals may be addressed simultaneously. Accordingly, references contained herein pertain to the Provider=s position paper dated January 20, 1998, unless otherwise specified, and to the Intermediary=s position paper submitted for Case No. 92-1220.[5]

The Provider was represented by Robert Barnes, Esq., University Counsel, The Regents of the University of California. The Intermediary was represented by Bernard M. Talbert, Esq., Associate Counsel, Blue Cross and Blue Shield Association.

PROVIDER=S CONTENTIONS:

The Provider contends that the Intermediary=s adjustment to include 40 neonatal intensive care unit beds in the IME formula's bed count is improper.[6] The Provider argues that the Intermediary totally ignored the governing rule at 42 C.F.R. ' 412.105(b) which states:

> [d]etermination of number of beds. For purposes of this section, the number of beds in a hospital is determined by counting the number of available bed days during the cost reporting period, not including beds or bassinets in the healthy newborn nursery, custodial care beds, or beds in excluded distinct part hospital units, and dividing that number by the number of days in the cost reporting period.

42 C.F.R. ' 412.105(b).

Respectively, the Provider asserts that newborn intensive care unit beds are nursery beds, not neonatal bassinets, and as such, should not be included in the bed count for determining the IME adjustment, i.e., because the regulation not only excludes neonatal bassinets but also neonatal beds. The Provider adds that normal newborn accommodations are, in fact, bassinets. Therefore, the regulation's inclusion of both newborn bassinets and beds in its list of exclusions must have been a reference to neonatal intensive care unit beds.

The Provider notes that in August 1991, the Health Care Financing Administration (AHCFA@) arbitrarily revised 42 C.F.R. ' 412.105(b) to include the following language: Anot including nursery beds assigned to newborns that are not in intensive care areas. . . .@Id. However, the Provider also cites Sioux

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[5] See Provider Position Paper at 2 and Intermediary letter dated January 26, 1998 to Board Advisor.

[6] Provider Position Paper at 3.

Valley Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 92-D53, August 26, 1992, Medicare and Medicaid Guide (CCH) ¶ 40,747, rev'd. HCFA Administrator, October 26, 1992, Medicare and Medicaid Guide (CCH) ¶41,044 ("Sioux Valley Hospital"), where the Board found, prior to the regulation's revision, that all newborn beds were clearly excluded from the IME count.

The Provider rejects the Intermediary's reliance upon Provider Reimbursement Manual, Part I ("HCFA Pub. 15-1") § 2405.3G to support the subject adjustments. In relevant part, the manual states: "a bed is defined for this purpose as an adult or pediatric bed (exclusive of beds assigned to newborns which are not in intensive care areas. . . ." HCFA Pub. 15-1 § 2405.3G. However, the pertinent regulation quoted above says nothing about excluding neonatal beds found in intensive care areas. Notably, a manual provision cannot be upheld if it is contrary to the regulation it interprets. Daughters of Miriam Center for the Aged v. Matthews, et al, 590 F.2d 1250, 1255, 1258 (3d Cir. 1978).

The Provider also argues that even if the manual provision was found to be controlling, it would be inappropriate to apply it to the subject cost reporting periods. Specifically, HCFA's interpretation of the August 1991 regulation cannot be applied retroactively to the subject 1989 and 1990 cost reporting periods. See Georgetown University Hospital v. Bowen, 488 U.S. 204 (1988), where the United States Supreme Court ruled that retroactive changes to the methods used to compute costs are invalid.

Finally, the Provider cites the Board's decision in Pacific Presbyterian Medical Center San Francisco, CA v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 94-D55, July 19, 1994, rev'd., HCFA Administrator, September 9, 1994, Medicare and Medicaid Guide (CCH) ¶ 42,718 ("Pacific Presbyterian"), Hahnemann University Hospital Philadelphia, PA v. Aetna Life Insurance Company, PRRB Dec. No. 94-D53, July 14,1994, Medicare and Medicaid Guide (CCH) ¶ 42,639, rev'd., HCFA Administrator, September 9, 1994, Medicare and Medicaid Guide (CCH) ¶ 42,717 ("Hahnemann University Hospital"), as well as Sioux Valley Hospital, to support its position.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that it properly included the subject newborn beds in the Provider's IME bed count.[7] Program instructions at HCFA Pub. 15-1 § 2405.3(G), state in part:

> G. Bed Size.- A bed is defined for this purpose as an adult or pediatric bed (exclusive of beds assigned to newborns which are not in intensive care areas, custodial beds, and beds in excluded units) maintained for lodging inpatients, including beds in intensive care units, coronary care

[7] Intermediary Position Paper at 8.

> units, neonatal intensive care units, and other special care inpatient hospital units.

HCFA Pub. 15-1 ' 2405.3(G) (emphasis added).

The Intermediary asserts that this instruction clearly requires including neonatal or newborn beds in the intensive care areas of a hospital in the IME bed count. Moreover, even though HCFA released this instruction in August l988, it was not a new instruction; similar policy had been in effect since 1976 at HCFA Pub. 15-1 '' 2202.7(A) and 2510.5(A).

The Intermediary also asserts that when HCFA addressed the methodology for counting beds under PPS for the first time, it inadvertently failed to incorporate its long-standing policy in the regulations. Therefore, it revised the pertinent regulation in August 1991. The revised regulation, redesignated at 42 C.F.R. ' 412.105(b), states:

> [d]etermination of number of beds. For purposes of this section, the number of beds in a hospital is determined by counting the number of available bed days during the cost reporting period, not including nursery beds assigned to newborns that are not in intensive care areas, custodial care beds, and beds in excluded units. . .

42 C.F.R. ' 412.105(b)(emphasis added).

Finally, the Intermediary explains that the HCFA Administrator reversed the Board=s decision in each of the cases referenced by the Provider, i.e., Sioux Valley Hospital, Pacific Presbyterian, and Hahnemann University Hospital. The Intermediary requests, therefore, that the Board follow the Administrator=s analysis in those cases rather than its original approach.[8]

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

' 1395ww(d)(5)(B)	-	PPS Transition Period; DRG Classification System; Exceptions and Adjustments to PPS

[8] Intermediary Position Paper at 9. Intermediary letter dated January 26, 1998 to Board Advisor.

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

'' 405.1835.-1841	-	Board Jurisdiction
' 412.105(b) (Formerly ' 412.118(b))	-	Determination of Number of Beds

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

' 2202.7(A)	-	Requirements to Qualify as an Intensive Care Type Unit
' 2405.3G	-	Bed Size
' 2510.5(A)	-	Bed Size Definition

4. Case Law:

Sioux Valley Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 92-D53, August 26, 1992, Medicare and Medicaid Guide (CCH) & 40,747, rev=d., HCFA Administrator, October 26, 1992, Medicare and Medicaid Guide (CCH) & 41,044.

Pacific Presbyterian Medical Center San Francisco, CA v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 94-D55, July 19, 1994, rev=d., HCFA Administrator, September 9, 1994, Medicare and Medicaid Guide (CCH) & 42,718.

Hahnemann University Hospital Philadelphia, PA v. Aetna Life Insurance Company, PRRB Dec. No. 94-D53, July 14, 1994, Medicare and Medicaid Guide (CCH) & 42,639, rev=d., HCFA Administrator, September 9, 1994, Medicare and Medicaid Guide (CCH) & 42,717.

Daughters of Miriam Center for the Aged v. Matthews, et al, 590 F.2d 1250 (3d Cir. 1978).

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

Sioux Valley Hospital v. Shalala, 29 F.3d 628 (8th Cir. 1994).

Hahnemann University Hospital v. Shalala, No. 96-5191, 1997 WL 362672, at *1 (D.C. Cir. May 5) (per curiam).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties= contentions, and evidence presented, finds and concludes that the Intermediary properly included neonatal intensive care unit beds in the calculation of the Provider=s IME adjustments.

The Board acknowledges the Provider=s reliance upon decisions it has rendered in the past finding that neonatal intensive care unit beds should be excluded from the IME bed count. These earlier decisions were predicated on the Board=s literal interpretation of 42 C.F.R. ' 412.118(b) which states in part:

> [d]etermination of number of beds. For purposes of this section, the number of beds in a hospital is determined by counting the number of available beds days during the cost reporting period, not including beds assigned to newborns, custodial care, and excluded distinct part hospital units, and dividing that number by the number of days in the cost reporting period.

42 C.F.R. ' 412.118(b). (emphasis added).

More recently, however, the Board has revised its original position taking judicial notice of two U.S. circuit court decisions addressing the neonatal bed issue. See Sioux Valley Hospital v. Shalala, 29 F.3d 628 (8th Cir. 1994) and Hahnemann University Hospital v. Shalala, No. 96-5191, 1997 WL 362672, at *1 (D.C. Cir. May 5) (per curiam). Upon analysis, the Board finds the circuit courts= decisions persuasive and, therefore, gives deference to their interpretation of the pertinent regulations.

DECISION AND ORDER:

The Intermediary properly included neonatal intensive care unit beds in the calculation of the Provider=s IME adjustments. The Intermediary=s adjustments are affirmed.

Board Members Participating:

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

Date of Decision: November 01, 2000

FOR THE BOARD:

Irvin W. Kues
Chairman