PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON THE RECORD
2001-D7

PROVIDER -
Elmhurst Extended Care Center, Inc.
Elmhurst, IL

Provider No. 14-5111

vs.

INTERMEDIARY -
Aetna Life Insurance Company AdminaStar Federal/ Blue Cross and Blue Shield Association

DATE OF HEARING-
November 8, 2000

Cost Reporting Period Ended -
July 31, 1993

CASE NO. 97-2509

INDEX

ISSUE:

Was the Intermediary's adjustment to the routine cost limit proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Elmhurst Extended Care Center, Inc. ("Provider") is a proprietary, partially participating skilled nursing facility located in Elmhurst, Illinois. Aetna Life Insurance Company ("Intermediary") received a memorandum from the Health Care Financing Administration dated May 3, 1996[1], advising it to reopen all cost reports that may be reopened under 42 C.F.R. ' 405.1885 for revisions to the routine cost limits. The Intermediary reopened the Provider's cost report to reflect the revisions in that memorandum. Subsequently Aetna Life Insurance Company left the Medicare program and its responsibilities were taken over by AdminaStar. They both will be referred to as "Intermediary."

The May 3, 1996 memorandum advised all fiscal intermediaries of the revisions to the previously published SNF cost limits that were effective October 1, 1989 and October 1, 1992, and the update to the cost limits effective October 1, 1995.[2] On December 13, 1996, the Intermediary informed the Provider of its intent to reopen the cost report based on HCFA's published final rates. The purpose of the reopening was to implement the May, 1996 Bulletin which stated in part: "to reflect the HCFA revisions to the previously published FY 1990 and FY 1993 routine cost limits as a result of substantial differences between the projected rates of increase in the SNF market basket and the final rates of increase." The Intermediary subsequently reopened and revised the Provider's 1993 cost limits.

The Provider disagreed with the Intermediary's adjustment and filed an appeal with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. ''1835-.1841 and has met the jurisdictional requirements of those regulations. The Medicare reimbursement amount in contention is approximately $23,847.

The Provider was represented by James M. Ellis Esq., of Holleb & Coff. The Intermediary was represented by Bernard Talbert, Esq., of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary's reopening violated the three year time limitation per 42 C.F.R. ' 405.1885. That regulation states in part:

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[1] See Exhibit I-1.

[2] See Exhibit P-3.

> "A determination of an intermediary.. .may be reopened with respect to findings on matters at issue in the determination. Any such request to reopen must be made within 3 years of the date of the notice of the intermediary determination." 42 C.F.R. ' 405.1885(a)

The Provider points out that its 1993 cost report was for the period ended July 31, 1993. The cost report was filed on November 2, 1993, which was the date the Intermediary issued a tentative settlement. The Notice of Program Reimbursement ("NPR") was issued on December 29, 1994. The Original NPR did not contain an adjustment or finding involving the Provider's cost limits. On July 27, 1995, the Intermediary reopened the Provider's 1993 cost report and issued a Notice of Correction-Program Reimbursement (NOCPR). It did not contain an adjustment to, or finding on, the Provider's cost limits.

The Provider points out that on December 13, 1996, the Intermediary issued its notice of intent to reopen the 1993 cost report to implement HCFA's May 3, 1996 Medicare Bulletin which stated in part: "to reflect the HCFA revisions to the previously published FY 1990 and FY 1993 routine cost limits as a result of substantial differences between the projected rates of increase in the SNF market basket and the final rates of increase." The Intermediary informed the Provider that the reopening was needed to "revise our initial determination on the amount of program reimbursement contained in our Notice of Correction-Program Reimbursement ("NOCPR") dated July 27, 1995."

The Provider argues that its Intermediary's reopening is improper, because the NOCPR did not contain any findings with respect to the 1993 cost limits. Accordingly, the Intermediary's reopening violated the requirements set forth at 42 C.F.R. ' 405.1885.

The Provider argues that even if the Intermediary properly reopened the 1993 cost report, HCFA's adjustment factor improperly overstates the difference between the projected and actual rates for the Provider's 1993 cost limits. Based on the Intermediary's reopening and application of HCFA's adjustment factor, the Provider's cost limits for 1993 were reduced from $109.65 to $103.70, an adjustment of nearly 6 percent. Based on HCFA's May 3, 1996 Medicare Bulletin, however, the adjustment should have been either 1.5 percent (based on the 1991 Federal Register) or 0.8 percent (based on the 1992 Federal Register). The Provider maintains that even if the retroactive adjustment was proper, the cost limits should have been reduced by the difference between the 1992 projected rate and the 1992 final rate; or either 1.5 percent or 0.8 percent.

The Provider contends that by applying the cumulative effect of the 1990, 1991, and 1992 rates to its 1993 cost limits, HCFA essentially reopened the 1990, 1991 and 1992 cost reports. Applying the cumulative effect of the differences in the 1990, 1991 and 1992 rates was improper, because it violates the 3-year reopening provision set out in 42 C.F.R. '405.1885. Therefore the Intermediary was prohibited from applying the cumulative effect of the difference between the projected and final rates for the 1990, 1991 and 1992 fiscal years to the Provider's 1993 cost year limits.

The Provider contends that applying the cumulative effect of prior cost years rates to its 1993 cost year limits is contrary to the 1991 and 1992 Federal Registers. Both the 1991 and 1992 Federal Registers state:

> Following the end of each year that the limits are in effect, we will determine the actual rate of increase or decrease in the market basket for that year. The data necessary to make this determination are usually available in the second quarter of the following year. If the forecasted market basket rate differs from the actual rate by at least 0.3 of one percentage point, we will notify the Medicare intermediaries of the actual rate of increase or decrease and advise them to adjust each SNF cost limit retroactively.

56 Fed. Reg. 13,321; 57 Fed. Reg. 46,179.

The Provider points out that the Federal Registers do not permit HCFA to apply the cumulative effect of prior year rate changes to a single cost year. The Intermediary was only authorized to apply the difference between the projected and actual rate applicable to the Provider's 1993 cost year limits.

The Provider contends that although the 1991 and 1992 Federal Registers provide that retroactive adjustments may be made to each SNF cost limit, the cost limits must have been determined "following the end of each year that the limits are in effect...." 57 Fed. Reg. 46,179. HCFA failed to determine the actual cost limits following the end of each year as required by the Federal Registers, and instead applied the revised rates nearly four years after the Provider's 1993 cost year end. HCFA's failure to determine the actual rates following the end of each year violates the requirements set forth in the Federal Register, and, its failure to determine the actual rates every 2 years violated the 2 year requirement set out in the Omnibus Reconciliation Act of 1990 ("OBRA 1990") Pub. Law No. 101-508.

The Provider maintains that the 1992 Federal Register does not apply to the Provider's 1993 cost report. The Provider's cost year began on August 1, 1992, prior to the October 1, 1992 effective date for the 1992 Federal Register. Any adjustment to the Provider's 1993 cost year based on the 1992 Federal register is improper and not supported by law.

The Provider further contends that applying the 1992 Federal Register to its 1993 cost year constitutes improper retroactive rulemaking. Retroactivity is not favored in the law. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) (AGeorgetown@). Although the Supreme Court in Georgetown recognized that the Medicare Act permits some form of retroactive action, the Court held that it does not provide authority for the retroactive promulgation of cost limit rules. Id. at 209. Allowing

the Intermediary to retroactively adjust the Provider's 1993 cost limits based on a rule effective October 1, 1992, would constitute improper retroactive rulemaking under Georgetown.

The Provider maintains that the Intermediary failed to follow HCFA's requirements for issuing revised cost limit adjustments. HCFA's May 3, 1996 Medicare Bulletin instructed the Intermediary that "revised final settlements for SNFs affected by these changes should be accomplished as soon as possible; however, all revised settlements should be implemented by December 31, 1996." The Intermediary issued its revised settlement for the 1993 cost year on January 16, 1997, beyond HCFA's deadline for issuing such revised final settlements. Therefore, the Intermediary should be prevented from applying the revised final settlement to the 1993 cost year.

The Provider contends that adjusting the SNF market basket contradicts the original intent behind setting cost limits, which was to help providers determine their cost limits prior to the beginning of each cost reporting period. The Medicare Act at 42 U.S.C. ' 1395x(v)(l)(A), authorizes the Secretary to promulgate cost-reimbursement regulations, including regulations that set limits on allowable costs. Pursuant to 42 U.S.C. '1395yy, the Secretary is authorized to set limits on per diem inpatient routine service costs for SNFs.

The Provider points out that the cost limit regulations are intended to give providers help in determining their cost limits prior to the beginning of each cost reporting period. The type of retroactive adjustment at issue in this case contradicts the original intent behind setting the cost limits because the actual limits for the 1993 cost year were not published until 1996.

The Provider maintains that HCFA recognized that retroactive adjustments to cost limits are improper. In an October 1, 1997 proposed rule, HCFA advocated the elimination of retroactive adjustments. 62 Fed. Reg. 51,551. Although the October 1, 1997 Proposed Rule was intended to apply prospectively only, HCFA outlined the problems associated with retroactive adjustments. HCFA stated:

> In some case, the retroactive adjustment was made to cost reports that had been settled for Medicare reimbursement purposes for more than 2 years. We believe the original intent behind setting cost limits was to help providers determine their cost limits prior to the beginning of the affected cost reporting period... We believe that this retroactive adjustment has not served a useful purpose based on past experience. Accordingly, we believe it is administratively feasible to propose the elimination of this provision....

Id.

The Provider argues that following the publication of the 1991 and 1992 Federal Registers, HCFA failed to determine the actual rate of increase or decrease for the 1993 SNF market basket following the end of the 1993 cost year. Instead, HCFA waited nearly 4 years, in violation of the requirements set out in OBRA 1990, before publishing the actual rates in a 1996 Medicare Bulletin. HCFA has now recognized that such action is improper and contrary to the original intent behind setting cost limits.

INTERMEDIARY'S CONTENTIONS:

The Intermediary points out that SNFs are subject to routine cost limits under 42 C.F.R. '413.30. Rates effective October 1, 1989 were previously published in the Federal Register. Projected rates of increase were published in the Federal Register notice dated April 1, 1991 (56 Fed. Reg. 13,317). The notice provided for retroactive adjustments to the cost limits if a projected rate of increase differed from the actual rate by more than 0.3 of one percentage point. Per the Memorandum from HCFA, there were substantial differences between the projected rates and the actual rates for 1990, 1991, and 1992. HCFA's Memorandum instructed intermediaries to reopen all applicable cost reports to reflect the actual rates of increase. The adjustment factor to apply to the limit effective October 1, 1989 if the period starts August 1, 1992 is 1.12396. This is the update factor used by the Intermediary in the revised cost limit.

The Intermediary contends that the limits effective October 1, 1989 and the cost limit update factors provided in the May 3, 1996 HCFA memorandum were the sources for the Intermediary's adjustment. This is contrary to the Provider's contention that the Intermediary used the October 7, 1992 Federal Register, 57 Fed. Reg 46,177, cost limit adjustment factors.

The Intermediary contends that the Provider's argument that the adjustment reduces the original routine cost limit by nearly 6 percent, whereas the difference between the 1993 projected rate (5.20) and the 1993 final rate (3.7) is only 1.5 percent, is not correct. The Intermediary argues that the Provider's contention ignores the cumulative effect of the differences in the 1990, 1991 and 1992 rates. Since the beginning rates's effective date is October 1, 1989, the differences in rates for each succeeding year will affect the Provider's cost limit for its period beginning August 1, 1992.

The Intermediary argues that the October 1, 1997 proposed rule in the Federal Register 62 Fed. Reg. 51,551 in which HCFA proposed the elimination of it retroactive change to routine cost limits based on actual changes in the market basket index, does not affect the cost reporting period under appeal. HCFA states:

> If, based on our analysis of public comments we receive, we finalize the elimination of this adjustment, the effect of that elimination will be made on a prospective basis.

Id.

CITATION OF LAW, REGULATION AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.

'1395x(v)(1)(A)	-	Reasonable Costs
'1395yy	-	Payment to Skilled Nursing Facilities for Routine Service Costs

2. Regulations - 42 C.F.R.

''405.1835-.1841	-	Board Jurisdiction
'405.1885	-	Reopening a Determination or Decision
'413.30	-	Limitations on Reimbursable Costs

3. Cases:

Bowen v. Georgetown University Hospital 488 U.S. 204,208 (1988)

4. Other:

56 Federal Register 13,321 (April 1, 1991).

57 Federal Register 46,179 (October 7, 1992).

62 Federal Register 51,551 (October 1, 1997).

Omnibus Reconciliation Act of 1990 - Public Law No. 101-508

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION:

The Board, after considering the law, regulations, program instructions, facts, parties= contentions and evidence in the record, finds and concludes that the Intermediary properly adjusted the Provider=s Routine Cost Limit.

The Board finds that for the cost reporting period ended July 31, 1993, the Intermediary issued a Notice of Program Reimbursement on December 29, 1994. On July 27, 1995 the Intermediary

reopened the cost report and issued a Notice of Correction-Program Reimbursement (ANOCPR@), and on December 13, 1996, the Intermediary issued a notice of intent to again reopen the cost report.

The Board concludes that the Intermediary reopened the cost report within the three year limitation period as prescribed by 42 C.F.R. '405.1885. The three year limitation period for reopening began on December 29, 1994, the date of the NPR. Had there been no other adjustments the three year period would have ended on December 29, 1997. The Intermediary=s issuance of the NOCPR on December 13, 1996 started a new three year period for any adjustment made on the NOCPR. That period ended on December 13, 1999. Based on the above findings the Board concludes that the Intermediary properly and in accordance with the applicable Medicare regulations reopened the Provider=s 1993 cost report.

The Board finds that the Intermediary used the April 1, 1991 Federal Register 56 Fed. Reg. 13,317-01, to update the RCL. The Intermediary used the October 1, 1989 RCL and update factors for 1990 and 1991 and 1992 to adjust the Provider=s 1993 RCL. The Board disagrees with the Provider=s contention that by using the update factors violates the three year reopening provision of 42 C.F.R ' 405.1885. The Board concludes that the Intermediary properly reopened and made the appropriate adjustment in accordance with the Federal Register and 42 C.F.R. '413.30.

The Board does not agree with the Provider=s argument that HCFA=s failure to determine the actual rates following the end of each year violates the requirements set forth in the Federal Register and its failure to determine the actual rates every two years violates the two year requirement set out in OBRA 1990. The Board concludes that the Intermediary properly applied the revised cost limits to the 1993 cost report as the Provider was put on notice of the changes via the Federal Register dated April 1, 1991, 56 Fed. Reg. 13,317. That notice provided for retroactive adjustments to the cost limits if a projected rate of increase differed from the actual rate by more than 0.3 of one percentage point.

The Board finds that the proposed rule in the October 1, 1997 62 Fed. Reg. 51,551 in which HCFA proposed the elimination of its retroactive change to routine cost limits does not effect the year at issue. The proposed rule is that the adjustment or change will be on a prospective basis.

DECISION AND ORDER:

The Intermediary=s adjustment to the routine cost limit was proper. The Intermediary=s adjustment is upheld.

BOARD MEMBERS PARTICIPATING:

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

Date of Decision: January 11, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman