PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON-THE-RECORD
2001-D24

PROVIDER -
Memorial Hospital for Cancer and Allied Diseases
New York, New York

Provider No. 33-0154

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/ Empire Medicare Services

DATE OF HEARING-
April 6, 2001

Cost Reporting Period Ended -
December 31, 1992

CASE NO. 97-1699

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ISSUE:

Was the Intermediary=s adjustment disallowing certain expenses of compensating hospital based physicians pursuant to the 1984 Reasonable Compensation Equivalency limits proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Memorial Hospital for Cancer and Allied Diseases (AProvider@) located in New York, New York, is one of the nation=s premier institutions devoted to cancer prevention, patient care, research and education. For purposes of Medicare reimbursement, the Hospital is a designated cancer hospital. 42 C.F.R. ' 412.23(f).

On November 4, 1997, Empire Blue Cross Blue Shield (AIntermediary@), issued a revised Notice of Program Reimbursement (ANPR@) relating to the Provider=s cost reporting period ending December 31, 1992, its latest NPR for that period. The Intermediary disallowed certain 1992 expenses compensating hospital-based physicians pursuant to the 1984 RCE limits, which are set forth at 50 Fed. Reg. 7123, 7126 (February 20, 1985). The Provider filed a timely appeal of this matter and has met the jurisdictional requirements of 42 C.F.R. '' 405.1835-.1841. The amount of Medicare reimbursement is greater than $10,000.

Statutory and Regulatory Framework

To be reimbursed under Medicare Part A, hospital costs for physician services must not exceed the Areasonable compensation equivalent for such services.@ 42 U.S.C. '1395xx. The Secretary sets the RCE limit for each specialty by regulation. Id. The relevant Medicare regulation provides that:

> HCFA establish reasonable compensation equivalency limits on the amount of compensation paid to physicians by providers. These limits are applied to a provider's costs incurred in compensating physicians for services to the provider, as described in ' 415.55(a). 42 C.F.R. ' 415.70 (a).

In accordance with this regulation, HCFA is supposed to publish the annual limits in the Federal Register.

HCFA issued the RCE limits which the Hospital was compelled to use in its 1992 cost report on February 20, 1985. 50 Fed. Reg. 7123 (February 20, 1985). These limits applied to cost reporting periods beginning on or after January 1, 1984. Despite the requirements of the regulations, HCFA did not update the 1984 RCE levels until May 1997. 62 Fed. Reg. 24483 (May 5, 1997). The Hospital had no choice but to use these outdated 1984 RCE limits in its 1992 cost report. See Exhibit A, Audit Adjustment Worksheet A-8-2.

Jurisdictional Arguments

The Intermediary challenged the Board=s jurisdiction in its letter dated August 7, 1998. The Intermediary indicates that there is no jurisdiction over the RCE limits because it does not involve an interpretation of law or regulation. The Intermediary indicates that it merely applied the RCEs as published. The Intermediary also indicated that the Provider failed to exhaust its administrative remedies under the regulation at 42 C.F.R. ' 405.482(e) by not applying for an exception to the RCEs.

The Provider submitted a memorandum in support of Jurisdiction, dated October 23, 1998. The Provider asserts that the it submitted its cost report in compliance with the RCE limits published in the Federal Register. The Provider points out that it is well established that a provider need not disregard Medicare rules in preparing its cost report in order to challenge those rules later. Bethesda Hospital Association et al. v. Bowen, 485 U.S. 399 (1988). The Provider indicated that the Board has previously determined that it has jurisdiction over this issue in many cases (citations omitted.) The Provider notes that the exception process does not apply to its challenge to the RCE limits. The Provider notes that the Board has previously rejected the exhaustion argument in this type of appeal. See Albert Einstein Medical Center v. Independence Blue Cross, PRRB Dec. No. 98-D9, December 5, 1997, Medicare and Medicaid Guide (CCH) & 45,907, declined rev. HCFA Administrator, January 14, 1998. The Provider also indicates that the use of the exception process is inconsistent with the basic principle of administrative law.

The Provider was represented by David H. Eisenstat, Esquire, David B. Palmer, Esquire, and Kimberly M. Stallings, Esquire, of Akin, Gump, Strauss, Hauer and Feld, L.L.P. The Intermediary was represented by Eileen Bradley, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER=S CONTENTIONS:

The Provider contends that applying the 1984 limits is arbitrary and capricious and contrary to law. HCFA=s failure to update the RCE limits violated the Administrative Procedure Act (AAPA@), which prohibits agency action which is Aarbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.@ 5 U.S.C. '551 et seq. (incorporated by the Social Security Act at 42 U.S.C. ' 1395oo(f)(l)). HCFA violated the APA when it (1) failed to justify the limits in adopting the Medicare reimbursement rules applicable to 1992, and (2) failed to annually update the 1984 RCE limits for application in later years, including 1992. These actions were in direct contravention of the agency's own regulations and the agency's stated intent when it promulgated the regulation. See Rush-Presbyterian-St. Luke's Medical Center v. Shalala, Case No. 97C 1726 (N.D.Ill. Aug. 27, 1997), appeal dismissed, Order of the United States Court of Appeals for the Seventh Circuit, January 26, 1998.[1] The appellant, Secretary of Health and Human Services, moved to dismiss the appeal. Because

[1] See Provider Exhibit B.

the application of the 1984 limits to 1992 physician compensation is unlawful, the costs disallowed pursuant to the outdated limits should be reinstated.

The Provider points out that regulations clearly require an annual update and use of current data. HCFA Aestablishes a methodology for determining annual reasonable compensation equivalency limits.@ 42 C.F.R. ' 415.70 (b)(emphasis added). In addition, A[b]efore the start of a cost reporting period to which limits under this section will be applied, HCFA publishes a notice in the Federal Register that sets forth the amount of the limits and explains how it calculated the limits.@ 42 C.F.R. ' 415.70 (f)(l). These provisions contemplate an annual update.

The regulations also require use of the best available data. Under 42 C.F.R. '415.70, HCFA is required to use the Abest available data,@ but the 1984 limits are based on outdated economic data. Initially, in order to establish the RCE levels, HCFA estimated a national average income for all physicians using an American Medical Association survey from 1979. 50 Fed. Reg. 7123, 7124 (February 20, 1985). HCFA then projected 1979 base income levels to a future year using the historical relationship between physician incomes and the Consumer Price Index for the years 1970 to 1980. Id. This data cannot be the Abest available data@ for 1992 as required by the regulation. 42 C.F.R. ' 415.70 (b). HCFA had easy access to the information it needed (the Consumer Price Index) to update the limits using its own methodology. It used that methodology when it finally updated the limits in 1997. 62 Fed. Reg. 24483 (May 5, 1997). The failure to update the limits for 1992 was clearly arbitrary.

The 1984 limits do not reflect the higher costs of physician services in 1992. The Provider=s actual compensation to physicians in 1992 was much higher than HCFA=s limits. See Provider Exhibit A. The market price of physician services has clearly increased, as HCFA recognizes. HCFA dramatically increased the RCE limits when it finally updated them in 1997. The following table shows the substantial increases in the limits set by HCFA from 1984 to 1997.

Physician specialty	1984 RCE limit	1997 RCE limit	Difference
General Practice/ Family Practice	76,800	120,000	43,200
Internal Medicine	91,800	143,400	51,600
Surgery	115,300	180,000	64,700
Pediatrics	77,900	121,700	43,800
OB/GYN	108,800	170,000	61,200
Radiology	124,900	195,000	70,100
Psychiatry	85,400	133,400	48,000
Anesthesiology	111,000	173,400	62,400
Pathology	119,500	186,700	67,200
Unspecified (aver.)	98,200	153,400	55,200

HCFA=s continued use of old data in setting limits was unjustified and impermissible under the RCE regulation.

The Provider contends that HCFA=s own statements demonstrate that it believed it was required to update the RCE limits annually. Deference should only be afforded to the ASecretary=s interpretation unless an >alternative reading is compelled by the regulation=s plain language or by other indications of the Secretary=s intent at the time of the regulation=s promulgation.=@ Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2386 (1994)(quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)). Here, the regulation=s plain language does in fact require that the regulation be interpreted to mean that the RCE limits were to be updated annually. Furthermore, there are ample indications that this interpretation was the Secretary=s intent at the time of the regulation=s promulgation.

HCFA=s statements contemporaneous with the promulgation of the regulation demonstrate HCFA=s view that annual updating was required. The RCE regulations were first published as a proposed rule in 1982; the preamble of which stated that Awe propose to update the RCE limits annually on the basis of updated economic data.@ 47 Fed. Reg. 43578, 43586 (Oct. 1, 1982). In addition, HCFA noted that Awe would apply Data Resources, Inc. [DRI] CPI forecasts for 1983 and subsequent years@ and that A[w]e propose to use these DRI forecasts and the methodology set out in the working paper to forecast physician net income for each forthcoming year.@ 47 Fed. Reg. at 43586 (emphasis added). The preamble to the final rule stated that Athe RCE limits will be updated annually on the basis of updated economic data.@ 48 Fed. Reg. 8902, 8923 (March 2, 1983). HCFA has also stated that

> before the start of a period to which a set of limits will be applied we will publish a notice in the Federal Register that sets forth the limits and explains how they were calculated. If the limits are merely updated by applying the most recent economic index data without revising the methodology, then the revised limits will be published without prior publication of a proposal or public comments period. 50 Fed. Reg. 7123, 7124 (February 20, 1985).

All these statements show HCFA=s initial commitment to announce new limits each year. HCFA cannot now disavow its intentions.

For these reasons, the Provider asserts that the application of the 1984 RCE limits to its 1992 physician compensation is unlawful, and the costs disallowed pursuant to the unlawfully applied limits should be reinstated.

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that a jurisdictional problem exists with the RCE limits; however, the Board has accepted jurisdiction of this issue. The Intermediary asserts that the RCE limits do not involve an intermediary interpretation of the regulation. Rather it applies HCFA=s limits to Part A physician costs, as indicated in the law. In addition, the Provider failed to exhaust an administrative remedy available to them under 42 C.F.R. ' 405.482(e). See Intermediary Exhibit 5, which allows an exception to the RCE limit under specific circumstances. In another PRRB case, Belmont Center for Comprehensive Treatment v. Blue Cross and Blue Shield Association/Independence Blue Cross and Blue Shield, PRRB Decision No. 99-D5, November 16, 1998, Medicare and Medicaid Guide (CCH) 80,142, declined rev. HCFA Administrator, January 8, 1999,[2] the issue argued before the Board was the reasonableness of the Intermediary=s use of RCE limits from 1984 to reduce the amount of reimbursable compensation to its hospital-based physicians for the fiscal year ended 1994. The Board found it was bound by the governing law and regulations, and the Intermediary=s application of the 1984 RCE limits to the Provider's fiscal year ended 1994 hospital-based physician costs was proper. See Id. at 200,543.

The Intermediary notes that the Board has determined that the Intermediary=s application of the RCE limits was required by law and did not involve an interpretation of the law. The Intermediary requests that the Board reach the same decision in this case.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - 5 U.S.C.:

' 551 et seq.	-	Administrative Procedure Act

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

' 1395oo(f)(1)	-	Provider Reimbursement Review Board
' 1395xx et seq.	-	Payment of Provider-Based Physicians and Payment Under Certain Percentage Arrangements

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

'405.482 et seq.(Redesignated as 415.70)	-	Limits on Compensation for Services of Physicians in Providers

[2] See Intermediary Exhibit 6

'' 405.1835-.1841	-	Board Jurisdiction
' 412.23(f)	-	Excluded Hospitals: Classifications: Cancer Hospitals
' 415.55(a)	-	General Payment Rules: Allowable Costs
' 415.70 et seq.	-	Limits on Compensation for Physician Services in Providers

4. Case Law:

Albert Einstein Medical Center v. Independence Blue Cross, PRRB Dec. No. 98-D9, December 5, 1997, Medicare and Medicaid Guide (CCH) & 45,907, declined rev. HCFA Administrator, January 14, 1998.

Belmont Center for Comprehensive Treatment v. Blue Cross and Blue Shield Association/Independence Blue Cross and Blue Shield, PRRB Decision No. 99-D5, November 16, 1998, Medicare and Medicaid Guide (CCH) 80,142, declined rev. HCFA Administrator, January 8, 1999.

Bethesda Hospital Association et al. v. Bowen, 485 U.S. 399 (1988).

Gardebring v. Jenkins, 485 U.S. 415 (1988).

County of Los Angeles v. Shalala, Case No. CV 95-0163 LGB (SHx) (C.D. Cal. 1995) aff=d. County of Los Angeles v. Secretary of Health and Human Services, 113 F.3d 1240 (9th Cir. 1997).

Rush-Presbyterian - St. Lukes Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Illinois, PRRB Dec. No. 97-D22, January 15, 1997, Medicare and Medicaid Guide (CCH) & 45,037, declined rev. HCFA Administrator., February 25, 1997, rev=d. Rush-Presbyterian - St. Lukes=s Medical Center v. Shalala, Case No. 97C 1726, (N.D. Ill. Aug.27, 1997), appeal dismissed.

Thomas Jefferson University v. Shalala, 114 S. CT 2381 (1994).

5. Other

47 Fed Reg. 43578 (October 1, 1982).
48 Fed. Reg. 8902 (March 2, 1983).
50 Fed Reg. 7123 (February 20, 1985).
62 Fed. Reg. 24483 (May 5, 1997).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties= contentions and evidence presented, finds an concludes as follows:

Jurisdiction:

The Board finds that it has jurisdiction over this issue and, as noted by the Provider,[3] has considered this issue in a number of previous decisions. The Board also finds that the Provider submitted its cost report in compliance with Medicare rules and is not required to disregard them in order to challenge those rules later. See Bethesda, supra. Finally, the Board finds that the exception process does not apply to a challenge of the RCE limits and the Provider was not required to apply for an exception in order to exhaust all administrative remedies in this appeal See Albert Einstein, supra.

RCE Limit Issue:

The Board finds that the Intermediary applied RCE limits published in the Federal Register on February 20, 1985, and effective with cost reporting periods beginning on or after January 1, 1984, to the Part A physicians= compensation paid by the Provider for its fiscal year ended December 31, 1992. Additionally, the Board acknowledges the Provider=s fundamental argument that this application was improper because the RCE limits were obsolete and not applicable to the subject cost reporting period, i.e., because HCFA failed to update the limits on an annual basis as required by regulation.

The principle and scope of the enabling regulation, 42 C.F.R. ' 405.482(a)(1), require HCFA to establish RCE limits on the amount of compensation paid to physicians by providers, and that such limits Abe applied to a provider=s costs incurred in compensating physicians for services to the provider. . .@ (emphasis added). However, contrary to the Provider=s contentions, the Board finds that this regulation does not mandate that the RCE limits be updated annually or on any other stipulated interval.

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[3] See Provider Jurisdiction Brief at 4 and 5.

The Board agrees with the Provider that language used in Federal Registers, internal memoranda and manual instructions indicate that HCFA had apparently intended to update the limits on an annual basis. However, the Board concludes that the pertinent regulation is controlling in this instance and, as discussed immediately above, it does not require annual updates.

The Board fully considered the Provider=s argument that data compiled by the American Medical Association, increases in the CPI, and increases in the RCE limits issued by HCFA for 1997, clearly illustrate undisputed increases in net physician income throughout the period spanning 1984 through the fiscal year in contention. While the Board finds this argument persuasive in demonstrating that the subject RCE limits may be lower than actual market conditions would indicate for the subject cost reporting period, the Board finds that it is bound by the governing law and regulations.

The Board also rejects the Provider=s argument that HCFA=s failure to update the RCE limits is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law, such that it violates the APA. The Board believes that the Secretary has presented her arguments for not revising the limits and that the court in County of Los Angeles v. Shalala, Case No. CV 95-0163 LGB (SHx) (C.D. Cal. 1995), and County of Los Angles v. Secretary of Health and Human Services, 113 F.3d 1240 (9th Cir.1997) have upheld the un-updated limits. The Board concludes, therefore, that the application of the 1984 RCE limits to subsequent period physicians= costs is proper.

DECISION AND ORDER:

The Intermediary=s use of the RCE limits for the Provider=s hospital-based physicians compensation was proper. The Intermediary use of the RCE limits 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: May 4, 2001

FOR THE BOARD

Irvin W. Kues
Chairman