PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2002-D26

PROVIDER –
Mount Clemens General Hospital
Mount Clemens, Michigan

Provider No. 23-0227

vs.

INTERMEDIARY –
Blue Cross and Blue Shield Association/
United Government Services, LLC

DATE OF HEARING
January 28, 2002

ESRD Window Closing:
April 27, 1994

CASE NO. 96-0623

INDEX

ISSUE:

Whether the Provider's renal dialysis exception request (the "Exception Request") should be deemed to have been approved, pursuant to 42 U.S.C. §1395rr(b)(7), where the Centers for Medicare and Medicaid Services ("CMS") rendered the determination within sixty days but neither the Intermediary nor the Provider received notice of the determination within sixty working days.

FACTS:

Mt. Clemens General Hospital ("Provider") filed a renal dialysis exception request with its Intermediary, Health Care Services ("HCS"), by letter dated April 27, 1994. In that request the Provider sought additional payment for outpatient maintenance dialysis services, Continuous Ambulatory Peritoneal Dialysis ("CAPD") training and CAPD home support costs. Based on that review, HCS recommended that the exception request be approved, and sent the request and supporting documentation to CMS for its determination.

The exception request was transmitted to CMS by HCS on May 4, 1994, seven days after it had been filed. On July 21, 1994, CMS made a determination to deny the Provider's requested exception. The basis for this determination was set out in the July 21, 1994, letter from CMS to HCS.

United Government Services, the current intermediary ("Intermediary"), asserted jurisdictional grounds upon which the Board was precluded from hearing the matter. In response to the Intermediary's jurisdiction challenge, the Board issued a decision dated October 18, 2001 holding that the Board had jurisdiction over the appeal.

The parties have stipulated to the material facts as follows:

1. On April 27, 1994, the Provider filed (the Exception Request) with the then intermediary, HCS. The Exception Request sought additional payment for outpatient dialysis services, CAPD training and CAPD home support costs. (The cover letter to the Exception Request is attached to the Stipulation as Exhibit 1).

2 On or about May 4, 1994, the Intermediary forwarded its review and recommendation (the "Intermediary's Recommendation") regarding the Exception Request to CMS (formerly the Health Care Financing Administration). (Exhibit 2).

3. By letter dated July 21, 1994, CMS notified the Intermediary of the determination, which approved additional payments for CAPD training but approved no other relief (the "Determination"). (Exhibit 3).

4. As evidenced by the Affidavit of Janet Lindstrom attached as Exhibit 4 to the Stipulation, the Provider asserts that prior to September 11, 1995, the Provider did not receive notice of the Determination either in written form or otherwise, and that the Provider was not notified by either the Intermediary or CMS regarding the status of or any other aspect of the Exception Request.

5. Neither CMS nor the Intermediary has any factual basis to rebut the assertion of the Provider set forth in Paragraph 4, and accept the Affidavit as being accurate.

6. On October 18, 1995, the Provider appealed the Determination to the Board, i.e., within 180 days of the Provider's receipt of notice of the Determination.

The Provider was not satisfied with the Intermediary's determination and requested a hearing before the Provider Reimbursement Review Board ("Board"). The Board reviewed the Provider's request and found that it did have jurisdiction under 42 C.F.R. §§ 405.1835-.1841 and § 413.170 et seq. The amount in contention was approximately $722,471.

The Provider was represented by Kenneth R. Marcus, Esquire, and the Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that after it timely filed its exception request, the burden shifted to the Intermediary and CMS to act within the time frame specified in 42 U.S.C. § 1395rr(b)(7) and CMS Pub. 15-1 § 2720 et. seq. The Medicare Act imposes a duty on the Intermediary and CMS to render a determination within 60 days of the Provider's submission of the exception request. "Each application for such an exception shall be deemed to be approved unless the Secretary disapproves it by not later than 60 working days after the date the application is filed." 42 U.S.C. § 1395 rr(b)(7). This requirement is mirrored in CMS Pub. 15-1 § 2720 et seq. Subsequent to the cost reporting period on appeal in the instant case, this requirement was codified at 42 C.F.R. § 413.180(h).

The Provider contends that in the stipulation of the parties and during the hearing, the Intermediary has acknowledged that the Provider timely submitted the Exception Request to the Intermediary, thereby satisfying the burden of the Provider. The Exception Request was dated April 27, 1994, although the Intermediary has submitted evidence that it was received by the Intermediary on April 28, 1994. Thereafter, the burden shifted to the Intermediary and CMS to act within the time frame specified in 42 U.S.C. 1395rr(b)(7) and CMS Pub. 15-1 § 2720 et seq.

The Provider points out that the Determination was dated July 21, 1994, and the Intermediary has submitted evidence that the Determination was not, in fact, approved for

release until July 22, 1994. July 21, 1994 was the 60th working day after the date that the Exception Request was filed. The Determination apparently was sent via first class United States mail, as there was no indication in the record of any form of electronic or expedited delivery. Accordingly, neither the Intermediary nor the Provider could have possibly received notice of the Determination by the 60th working day. The Provider further points out that as stipulated by the parties and as acknowledged by the Intermediary during the hearing, that the Provider did not receive notice of the Determination until more than a year later, on September 11, 1995. The Provider contends that the Board's jurisdictional ruling establishes the law of the case that the burden of providing notice was on CMS, and not the Provider.

The Provider points out that in previous Board decisions the Board held that an exception request must be deemed approved if the provider did not receive actual notice of the determination within the statutorily prescribed 60 working day period. Charlotte Hungerford Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Connecticut, PRRB Dec. No 96-D64, September 11, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,647, rev'd HCFA Administrator Decision, November 8, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,978. Tri-State Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of Washington/Alaska, PRRB Dec. No. 2000-D25, March 6, 2000 Medicare and Medicaid Guide (CCH) ¶ 80,402, rev'd HCFA Administrator Decision, May 8, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,642.

The Provider contends that CMS requires actual notice within the required deadline when a provider files an exception request. CMS Pub. 15-1 § 2720.2 states that:

> [a]n exception request with all required documentation must be filed with the intermediary by the 180th day. Delivery of the request must be accomplished through a method which documents the date of receipt during the intermediary's regular business hours. A postmark or other similar mark does not serve as documentation of the date of receipt. Failure by a facility to submit its exception request within 180 days results in the exception request being denied. In addition, neither HCFA nor intermediaries may extend the 180-day time frame for filing an exception. Therefore, if the intermediary returns a facility's exception request for any reason, the facility must resubmit its request to the intermediary within the 180-day time frame.

CMS Pub. 15-1 § 2720.2.

The Provider argues that during the hearing it cited the case of The Children's Hospital of Buffalo v. Shalala, No. 00-6187 (2nd Cir. (2001), U.S. App. Lexis 979 (January 24, 2001), (2001 Transfer Binder), Medicare and Medicaid Guide (CCH) ¶ 300,620 ("The Childrens's Hospital of Buffalo"), which demonstrates that CMS interprets and enforces compliance with the Provider's filing requirement for an exception request based on receipt of notice.[1]

It is insufficient that an exception request is timely dated. Rather, CMS deems an exception request to be automatically denied if it is not in fact received within the prescribed time frame. It is entirely inconsistent for CMS not to impose the same notice requirement upon its Determination. The Provider argues that CMS can not have it both ways. If, as required by CMS, and as held in The Children's Hospital of Buffalo, actual notice of an exception request is required, then actual notice of an exception request Determination must be required.

The Provider further argues that the failure to provide actual timely notice does not come under the rubric of "no harm, no foul." To the contrary, the Intermediary freely acknowledges that the Provider suffered adverse consequences as a result of the failure of CMS to timely furnish notice.

At the hearing a Board Member asked the Intermediary whether the delay in notifying the Provider of the Determination disadvantaged the Provider, because earlier notification would have enabled the Provider to opt out of the program.[2] In response, the Intermediary acknowledged that "the breakdown in the normal flow of communications. . . "deprived the Provider of the decision to opt out of the program from the time it should have received it under the normal course of business . . . 1 guess that's an unfortunate circumstance"[3]

The Provider maintains that there may be cases where the notice is received on the 61st or the 62nd day, and perhaps in such cases the Board would find that CMS has substantially complied with the statutory requirements. In the instant case, however, actual notice was not received until 14 months later, thereby prejudicing the Provider's rights.

Accordingly, under such circumstances the Board should determine that CMS failed to comply with the requirements of 42 U.S.C. § 1395rr(b)(7).

INTERMEDIARY' S CONTENTIONS:

The Intermediary argues that the statute underlying the issue is 42 U.S.C. 1395rr(b)(7), which states in part that:

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[1] Provider Exhibit 5.
[2] Tr. at 42-43.
[3] Tr at 47.

> [t]he Secretary shall provide for such exceptions to such methods as may be warranted by unusual circumstances (including the special circumstances of sole facilities located in isolated, rural areas and of pediatric facilities). Each application for such an exception shall be deemed to be approved unless the Secretary disapproves it by not later than 60 working days after the date the application is filed.

(emphasis added.)

The Intermediary points out that the act of disapproval took place on the 60th day, and the Provider, through its staff, did not physically receive a copy of the denial until 14 months later. However, the Intermediary argues that the completion of the decisional process was done on time. The statutory condition precedent to a forfeit has not been satisfied.

The Intermediary contends that the gap between the new composite rate and what the Provider was seeking was substantial. If not getting an exception or a minimal exception was critical to continuing in the dialysis business, more aggressive behavior by the Provider should have been elicited. While sitting back or communicating only with the Intermediary was within the Provider's rights, pursuing answers more aggressively to CMS would have been in its business interests. This behavior would be consistent with the need to make a decision to continue furnishing dialysis treatments.

The Intermediary maintains that in spite of the communication breakdown on the transmittal of the Determination to the Provider, it has not established grounds to be paid at a higher rate than the composite rate. Therefore, the exception request should not be deemed approved.

CITATIONS OF LAW, REGULATIONS AND PROGRAM INSTRUCTION:

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

§ 1395rr(b)(7)	-	End Stage Renal Disease Program

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

§§ 405.1835-.1841	-	Board Jurisdiction
§ 413.170 et seq.	-	Payment for End-Stage Renal Disease Services
§ 413.180(h)	-	Approval of an

3. Program Instructions - CMS Pub. 15-1:

§ 2720 et seq.	-	General Instructions for Processing Exceptions Under Composite Rate Reimbursement System

4. Cases:

Charlotte Hungerford Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Connecticut, PRRB Dec. No. 96-D64, September 11, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,647, rev'd HCFA Administrator Decision, November 8, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,978.

Tri State Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of Washington/Alaska, PRRB Dec. No. 2000-D25, March 6, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,402, rev'd HCFA Administrator Decision, May 8, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,642.

The Children's Hospital of Buffalo v. Shalala, No. 00-6187 (2d. Cir. 2001), U.S. App. Lexis 979 (Jan. 24, 2001) (2001 Transfer Binder) Medicare and Medicaid Guide (CCH) ¶ 300,620.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board's majority, after consideration of the facts, parties' contentions, evidence presented and the testimony elicited at the hearing and post-hearing briefs, finds and concludes that the Provider's exception request should be deemed to be approved, pursuant to 42 U.S.C. § 1395rr(b)(7), where CMS rendered the determination within sixty working days but neither the Intermediary nor the Provider received notice of the determination within sixty working days.

The Board majority finds that the facts in the case are undisputable. Both parties stipulated to the following facts:

1. On April 27, 1994, the Provider filed the Exception Request with the Intermediary, Health Care Service Corporation. The Exception Request sought additional payment for outpatient dialysis services, CAPD training and CAPD home support costs.

2. On or about May 4, 1994, the Intermediary forwarded its review and recommendation regarding the Exception Request to the CMS.

3. By letter dated July 21, 1994, CMS notified the Intermediary of the determination which approved additional payments for CAPD training but approved no other relief.

4. The Provider did not receive notice of the Determination either in written form or otherwise, before Sept. 11, 1995.

5. On October 18, 1995, the Provider appealed the determination to the Board, i.e., within 180 days of the Provider's receipt of notice of the Determination.

The Board majority finds that the Provider did not receive notice of the CMS decision until fourteen months after the CMS decision. The Board majority finds that the Provider's rights were prejudiced by the failure of CMS to provide actual notice of the Determination in a timely manner, because, as acknowledged by the Intermediary during the hearing, the Provider would have had the opportunity to opt out of the program.

The Children's Hospital of Buffalo, supra, involving time limits for the exception request process, established that CMS may strictly enforce time limits applicable to providers making an exception request. The Board majority concludes that the same strict enforcement is applicable to time limits for CMS determinations found in the same regulation and in the statute that CMS must submit to notice requirements regarding the statutory obligations to which it is subject.

The Board majority finds that upon the Intermediary's receipt of the Provider's timely filed Exception Request, the burden shifted to CMS to act within the requisite 60 working day time period set forth in 42 U.S.C. § 1395rr(b)(7). The Board's majority further finds that it is insufficient for purposes of 42 U.S.C. § 1395rr(b)(7) that CMS rendered the determination within the requisite 60-day period but did not furnish to the Provider actual notice of its determination until 14 months later. To interpret the statute so as to permit CMS to notify the Provider 14 months after the determination is rendered would be to render meaningless the 60-day requirement of the statute. Therefore, under the Board majority's interpretation of the statute, actual notice of the decision is required to be given within the 60-day period.

DECISION AND ORDER:

As a result of the failure of CMS to notify the Provider of the Determination within 60 working days as required by 42 U.S.C. § 1395rr(b)(7), the Provider's Exception Request is deemed approved.

BOARD MEMBERS PARTICIPATING:

Irvin W. Kues
Henry C. Wessman, Esquire (Dissenting Opinion)
Stanley Sokolove
Gary Blodgett, DDS
Suzanne Cochran, Esquire

Date of Decision: July 09, 2002

FOR THE BOARD:

Irvin W. Kues
Chairman

Dissenting Opinion of Henry C. Wessman, Esq.

I reluctantly dissent.

As much as the PRRB would like to believe that the decisions we render are always fair and equitable, we are limited, as an administrative law tribunal, to interpreting statutes and promulgated regulations within the four corners of the document. We do not have the luxury of equity; by design, that is left to the judiciary.

Despite the Majority's reading to the contrary, I find nothing in 42 U.S.C. § 1395rr(b)(7), CMS Pub. 15-1 § 2720 et seq, or 42 C.F.R. § 413.180(h) that would suggest that the appealing Provider must receive notice by 60 days after the date the application has been filed.

I do find this: "Each application for such an exception shall be deemed to be approved unless the Secretary disapproves it by not later than 60 working days after the date the application is filed". 42 U.S.C. § 1395rr(b)(7)

In the instant case, such a timely disapproval did occur. It is inexcusable that the Provider did not receive notification until some fourteen (14) months after the decision, but that is not the administrative law question before the PRRB. That is a question for a court of equity.

I recognize that this is a reversal of my vote with the Majority in the Tri-State Memorial Hospital decision (PRRB Dec. 2000-D25), but I believe my instant opinion to be the correct administrative law interpretation of the stark reality of deadlines imbedded in statute.

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Henry C. Wessman
Senior Board Member