PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON-THE-RECORD
2003-D22

PROVIDER –
Central Maine Medical Center
Lewiston, Maine

Provider No. 20-0024

vs.

INTERMEDIARY –
Blue Cross Blue Shield Association/
Associated Hospital Services

DATE OF HEARING -
December 11, 2002

Cost Reporting Periods Ended
June 30, 1993, 1994 and 1995

CASE Nos. 96-1531
97-1417
98-1063

INDEX

	Page No.
Issue	2
Statement of the Case and Procedural History	2
Provider's Contentions	3
Intermediary's Contentions	5
Citation of Law, Regulations & Program Instructions	6
Findings of Fact, Conclusions of Law and Discussion	6
Decision and Order	9

ISSUE:

Is the Provider entitled to a TEFRA exception?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Central Maine Medical Center ("Provider") is a non-profit, general acute care teaching hospital located in Lewiston, Maine. The Provider's complex includes a 12-bed rehabilitation unit, which qualifies as a distinct part unit under Medicare regulations. Accordingly, the rehabilitation unit is subject to the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") cost per discharge reimbursement limit or target amount.

During the Provider's cost reporting period ended June 30, 1993, its rehabilitation unit incurred actual inpatient costs per discharge of $11,684.43. The unit's TEFRA target amount per discharge, however, was $8,319.33 (determined from a base year target amount of $6,130.55 rolled forward to 1993). As a result, the Provider incurred $316,319 of costs in excess of its cost per discharge limitation.

On March 22, 1995, the Provider requested an exception or adjustment to the target amount pursuant to 42 C.F.R. § 413.40. The Provider asserted that its higher costs were attributable to increased acuity related to secondary diagnosis, atypical nursing service costs, incremental costs associated with increased ancillary utilization, and increased non-passthrough overhead costs. The Provider also explained that the increased non-passthrough overhead costs were mostly attributable to a new tax assessed on hospitals by the State of Maine. In 1991, the Maine Legislature adopted 36 M.R.S.A. § 2801-A, which imposed a new tax on all Maine hospitals equal to 6 percent of their gross patient service revenue limit. As a result, the Provider was assessed $5,826,527 by the State for the subject cost reporting period, and $115,901 of this amount was allocable to its 12-bed rehabilitation unit.

On August 10, 1998, Associated Hospital Service ("Intermediary") granted a portion of the Provider's exception request and allowed an adjustment of $70,510 as compared to the Provider's request of $316,319. The Intermediary granted an adjustment of $37,882 relating to atypical nursing service costs, and $32,628 relating to incremental costs associated with increased ancillary resource utilization. The Intermediary refused, however, to grant an adjustment relating to incremental costs associated with increased non-passthrough overhead costs, and specifically, the Intermediary refused to grant an adjustment relating to the new hospital tax.[1]

On September 26, 1995, the Intermediary issued a Notice of Program Reimbursement reflecting its final determination regarding the Provider's TEFRA exception request. On March 22, 1996, the Provider appealed the Intermediary's determination to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835-.1841 and met the jurisdictional requirements of those regulations. Although the Provider's appeal

[1] Provider's Supplemental Position Paper at 2. Intermediary's Supplemental Position Paper at 4.

initially challenged different aspects of the Intermediary's determination, the Provider subsequently narrowed its appeal to the Intermediary's refusal to grant an adjustment to the TEFRA target rate for the State's new hospital tax. Accordingly, the amount of Medicare funds in controversy is $115,901.[2]

The Provider was represented by Michael R. Poulin, Esq., of Skelton, Taintor & Abbott. The Intermediary was represented by Bernard M. Talbert, Esq., Associate Counsel, Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider asserts[3] that 42 U.S.C. § 1395ww(b) and 42 C.F.R. § 413. 40 establish circumstances for adjustments to the amount of operating costs considered in establishing a provider's TEFRA target amount applicable to a specific cost reporting period. These circumstances include: (1) extraordinary circumstances such as strikes, fires, earthquakes, floods or similar unusual occurrences beyond the hospital's control; (2) a significant distortion in operating costs of inpatient hospital services between the base year and a later cost reporting period; and (3) a significant increase in wages occurring between the base period and a later cost reporting period. 42 C.F.R. § 413.40(g)(2)-(4). The Provider maintains that the subject tax represents a significant distortion between the costs considered in establishing its target amount and its current operating costs.

The Provider also explains that the aforementioned regulations set forth factors that may be considered when adjusting a target amount for "distortions" in cost. These factors include FICA taxes, malpractice insurance costs, increases in service intensity or length of stay, a change in services, and discharges. 42 C.F.R. § 413.40(g)(3)(ii). In response to the Intermediary's contention that the listed factors are exclusive, the Provider points to language of the regulation that "the adjustments described in paragraph (g)(3)(i) of this section include, but are not limited to, adjustments to take into account. . . ." 42 C.F.R. § 413.40(g)(3)(ii) (emphasis added).

The Provider argues that Medicare's Provider Reimbursement Manual, Part I ("HCFA Pub. 15-1") § 3004, Adjustments to Rate of Increase Ceiling, actually supports its position. In part, the manual states:

> [d]ue to a variety of circumstances, inpatient operating costs of a hospital or unit could exceed the ceiling in one or more cost reporting periods. If these excess costs are reasonable, justified, and directly related to patient care services, the

---

2 On October 10, 2002, the Provider and Intermediary agreed that the subject issue, including facts and parties' contentions, are identical to those applicable to the Provider's 1994 and 1995 cost reporting periods (PRRB Case Nos. 97-1417 and 98-1063, respectively). The parties further agreed that the outcome of the instant case shall be determinative of the outcome of those cases as well. The amount of Medicare funds in controversy is approximately $114,101 in the Provider's 1994 cost reporting period, and approximately $96,524 in 1995.

3 Provider's Supplement Position Paper at 3.

> provider may request an adjustment to the payment allowed under the rate of increase ceiling. . . .

HCFA Pub. 15-1 § 3004 (emphasis added).

The Provider also cites HCFA Pub. 15-1 § 3004.1, which states in part "[d]istortions in inpatient operating costs resulting in noncomparability of the cost reporting periods are generally the result of extraordinary circumstances or one or both of two factors." Id. (emphasis added). In this regard, the Provider notes that the use of the word "generally" indicates that factors are intended to be inclusive rather than exclusive.

The Provider cites Sarasota Palms Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 99-D23, Feb. 18, 1999, Medicare and Medicaid Guide ("CCH") ¶ 80,159, rev'd., CMS Administrator, April 20, 1999, Medicare and Medicaid Guide ("CCH") ¶ 80,196, rev'd., sub nom Sarasota Palms, Inc. v. Shalala,125 F.Supp.2d 1085 (M.D. Fla. 2000) ("Sarasota Palms"), where the court, in reversing the CMS Administrator, found that the hospital was entitled to an adjustment to its TEFRA target rate due to the imposition of the Florida Indigent Care Tax ("FICT"). Moreover, the Provider cites Tenet Healthsystems v. Shalala, 43 F.Supp.2d 1334 (M.D. Fla. 1999) ("Tenet Healthsystems"), where the court reasoned that the FICT qualified under the predecessor to § 413.40(g)(3). It stated that the "FICA tax mentioned in the statute merely provides an example of the types of cost which would trigger an adjustment." Id. at 1343. Furthermore, the court held that the hospital would also qualify under the predecessor to § 413.40(g)(2), thus explicitly rejecting the argument posited by the Intermediary in this appeal. The court found that the FICT:

> represents an "unusual cost" resulting from "unusual circumstances" beyond the Hospitals' control. The imposition of the FICT [after the Hospitals' TEFRA base period] was a tax that was not voluntary; it was a mandatory tax imposed on all of the hospitals in Florida. It was not within Plaintiffs' control and it is an unusual cost resulting from unusual circumstances, because the tax was not imposed in the Hospitals' base year . . .

Id. at 1343.

The Provider notes that the FICT in Sarasota is a state tax assessed on Florida hospitals. The amount of the FICT is a percentage of a hospital's annual net operating revenue and it is used to fund care for poor patients. The Provider asserts, therefore, that the FICT is nearly identical in nature to the new hospital tax at issue in this appeal, which is assessed as a percentage of a hospital's gross patient service revenue limit.[4]

In sum, the Provider contends that the Intermediary's argument that no applicable statute, regulation or manual provision supports a TEFRA target rate adjustment for the subject tax is a misinterpretation. As discussed above, elementary rules of construction demonstrate that the statute, regulations and manual do, in fact, support an adjustment as

[4] Exhibit P-15-G.

requested. The new hospital tax was incurred subsequent to the Provider's base year, and results in a significant distortion in operating costs between the base year and the fiscal year at issue. 42 C.F.R. § 413.40(g)(3).[5]

Finally, the Provider contends that the reasonableness of its proposed adjustment is supported by the fact that it requested and received a new TEFRA base period in accordance with provisions of the Balanced Budget Act of 1997.[6] Nevertheless, its TEFRA target amount still falls below the target amount cap set at the 75th percentile of target amounts nationally.

INTERMEDIARY'S CONTENTIONS:

The Intermediary asserts[7] there is no regulation or manual instruction that allows for an increase in a provider's target amount based solely upon an increase in overhead costs, including the subject hospital tax, and notes that it received an instruction from CMS substantiating this fact.[8]

The Intermediary argues that the Provider's reliance upon the Board's decision in Sarasota Palms, supra, is misplaced because the Administrator of CMS reversed the Board's decision in that case.[9] Specifically, the Administrator found that the tax imposed by the state did not constitute an "extraordinary circumstance" as defined in 42 C.F.R. § 413.40. The Administrator stated "Subsection (g)(2) equates 'extraordinary circumstances' with floods and other natural disasters, and strikes--all of which imply immediate and drastic consequences for the provider. This is in contrast to a tax of which the Provider had advance notice, . . . " Id.

The Intermediary also asserts there is no relevance to the fact that the Administrator's decision was ultimately reversed by the U.S. District Court in Tenet Healthsystems, supra, in that neither the Provider nor the Intermediary falls within the jurisdiction of the Florida District Court.

Finally, the Intermediary notes that CMS has provided specific instructions (regarding another Provider) not to allow a separate payment adjustment for the hospital tax levied by the State of Maine. In that instruction,[10] CMS' guidance mirrored the Administrator's decision in Sarasota Palms. CMS states that Maine's hospital revenue tax is not an

---

5 Exhibit P-15-C.

6 Exhibit P-15-I.

7 Intermediary's Supplemental Position Paper at 7.

8 Exhibit I-41

9 Exhibit I-42.

10 Exhibit I-43.

unusual event but instead "is a revenue enhancement for the state and a mechanism for the state to increase revenue related to federal matching funds."

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law – 42 U.S.C.:

§ 1395ww(b)	-	Rate of Increase in Target Amounts for Inpatient Hospital Services

2. Regulations – 42 C.F.R.:

§ 405.1835-.1841	-	Board Jurisdiction
§ 413.40 et seq.	-	Ceiling on the Rate of Increase in Hospital Inpatient Costs

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

§ 3004 et seq.	-	Adjustments to the Rate of Increase Ceiling

4. Case Law:

Sarasota Palms Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 99-D23, Feb. 18, 1999, Medicare and Medicaid Guide ("CCH") ¶ 80,159, rev'd., CMS Administrator, April 20, 1999, Medicare and Medicaid Guide ("CCH") ¶ 80,196, rev'd., Sarasota Palms, Inc. v. Shalala,125 F.Supp.2d 1085 (M.D. Fla. 2000).

Tenet Healthsystems v. Shalala, 43 F.Supp.2d 1334 (M.D. Fla. 1999).

5. Other:

Tax Equity and Fiscal Responsibility Act of 1982

Maine Legislature, 36 M.R.S.A. § 2801-A

Balanced Budget Act of 1997

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

Section 1886(b) of the Social Security Act (42 U.S.C. §1395ww) establishes a limitation on the amount of program payments that will be made for inpatient hospital services. The limitation applies to hospitals exempt from Medicare's prospective payment system, including hospital distinct part units. In accordance with the statute, the limitation is based upon each affected hospital's cost per case or target amount determined from its inpatient operating costs in a base period. In most instances, the hospital's base period is its cost reporting period ended immediately prior to the effective date of the limitation or cost reporting periods beginning on or after October 1, 1982.

The statute also provides for an adjustment or increase to a hospital's target amount under certain circumstances. In part, the law explains that an adjustment is warranted "where events beyond the hospital's control or extraordinary circumstances" create a distortion between the hospital's costs in a cost reporting period subject to the limitation and the hospital's base period.

Implementing regulations at 42 C.F.R. § 413.40(g) explain that CMS may adjust a target amount for "unusual costs" incurred by a hospital due to circumstances beyond its control. These circumstances "include, but are not limited to, strikes, fire, floods, or similar unusual occurrences." 42 C.F.R. § 413.40(g)(2)(emphasis added). Moreover, the regulations explain that CMS may adjust a hospital's target amount for "factors" that result in a "significant distortion" between its base period and a cost reporting period subject to the limitation. The factors "include, but are not limited to" FICA taxes, malpractice insurance costs, increases in service intensity, etc. 42 C.F.R. § 413.40(g)(3)(emphasis added).

With respect to the instant case, the Provider requested an adjustment to the target amount applicable to its distinct part rehabilitation unit. The basis for the Provider's request was the fact that the State of Maine imposed a tax on all Maine hospitals' patient care revenue which immediately increased the Provider's distinct part rehabilitation unit's costs approximately $100,000 a year. The State began assessing the tax in 1991, so its effect or cost was not present in the Provider's base period and is not reflected in its distinct part unit's target amount.

CMS denied an adjustment to the Provider's target amount, finding, in part, that Maine's new hospital revenue tax is not an unusual event warranting a target amount adjustment such as a fire or earthquake pursuant to 42 C.F.R. § 413.40(g)(2). CMS asserts that rather than being a patient care related service the tax is a revenue enhancement for the State; i.e., a mechanism by which the State can increase its revenue through federal matching funds. The Provider argues that its request should nevertheless be approved because the new hospital revenue tax results in a significant distortion between its base period costs and the costs incurred in the affected reporting periods.

The Board finds that CMS' denial of the Provider's request is improper. First, the Board finds there is no dispute regarding the nature of the subject hospital tax as an allowable cost. That is, Maine's hospital revenue tax is recognized as a reimbursable cost by the Medicare program. Next, the Board finds that the tax, having been imposed beginning in 1991, well after the Provider's base period, and amounting to approximately $100,000

annually, fits squarely within the context and intent of the pertinent statute and regulations.

With respect to the provisions of 42 U.S.C. § 1395ww, the Board finds that the subject tax is clearly an "event beyond the hospital's control" that created a distortion between its base period costs and the costs of the affected reporting periods. The tax is imposed by the State, and the Provider is required to pay it.

Regarding the regulatory provisions of 42 C.F.R. § 413.40(g)(3), the Board finds that a tax such as that at issue here and incurred after a provider's base period is a factor warranting an adjustments to a provider's target amount. The regulations list certain factors to be taken into account for target amount adjustments and specifically mention FICA taxes as one such factor. The Board finds no reason for the subject Maine hospital tax to be treated any differently than FICA taxes. In addition, the Board finds that the listing at 42 C.F.R. § 413.40(g)(3) is meant to be illustrative rather than all-inclusive since it uses general language "include, but are not limited to" with respect to factors to be taken into account for target amount adjustments.

The Board's position in this case is supported by the findings and conclusions of the Florida District Court reached in Tenet Healthsystems, supra. At the heart of that case was a mandatory revenue tax imposed on hospitals by the State of Florida, in essence, the same type of tax confronting the Provider in the instant case. More specifically, however, in Tenet Healthsystems the District Court noted that the plaintiff hospitals successfully defended the Florida State hospital revenue tax as an allowable program cost. The court found that the providers were entitled to an adjustment in their target amounts as a result of that tax because the tax was an "unusual cost" that resulted in a "significant distortion" in the providers' costs pursuant to the aforementioned statute and regulations. The court also likened the Florida State revenue tax to the FICA tax and noted that FICA was mentioned in the regulations merely as an example of the type of costs that would trigger a target amount adjustment.

The Board acknowledges the Intermediary's argument that the court's decision in Tenet Healthsystems is not precedent setting, as neither the Intermediary nor the Provider is within the jurisdiction of the Florida District Court. While the Board agrees that the Intermediary is technically correct regarding this matter, it is not persuaded that the Administrator's decision in other cases requires our acquiescence. Rather, the Board notes that it consistently held for the providers in Tenet Healthsystems as well as in Sarasota Palms, supra, another similar case involving the Florida hospital tax and its effect on the provider's target amount.

Finally, the Board acknowledges but rejects CMS' argument that Maine's hospital revenue tax should not be considered a factor warranting an adjustment to a provider's target amount because it is essentially a mechanism for the State to enhance revenues through federal matching funds. The Board notes that CMS became aware of hospital revenue taxes as early as 1991 through Florida's hospital revenue tax and the claim of providers to have their target amounts adjusted for that tax through Tenet Healthsystems.

CMS nevertheless failed to amend the regulation and guidelines to reflect its position that such taxes are not factors warranting target rate adjustments.

DECISION AND ORDER:

The Provider is entitled to have its TEFRA target amount adjusted (increased) to reflect the costs it incurred as a result of Maine's hospital revenue tax. The CMS failure to grant a TEFRA exception to Central Maine Medical Center for FYE '93, '94 and '95 is reversed.

Board Members Participating:

Suzanne Cochran, Esq.
Henry C. Wessman, Esq.
Stanley J. Sokolove
Dr. Gary B. Blodgett

Date of Decision: April 24, 2003

FOR THE BOARD:

Suzanne Cochran, Esq.
Chairman