PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2014-D25

PROVIDER –
The Memorial Hospital at North Conway
North Conway, New Hampshire

Provider No.: 30-1307

vs.

INTERMEDIARY –
National Government Services, Inc./
Blue Cross and Blue Shield Association

DATE OF HEARING -
November 29, 2012

Cost Reporting Period Ended -
June 30, 2007

CASE NO.: 09-1897

INDEX

ISSUE:

Whether the offset of "investment income" up to the amount of interest expense claimed by the Provider for the fiscal year ending June 30, 2007 was proper.[1]

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established under Title XVIII of the Social Security Act, as amended ("Act"), to provide health insurance to eligible individuals. Title XVIII of the Act was codified at 42 U.S.C. Chapter 7, Subchapter XVIII. The Center for Medicare & Medicaid Services ("CMS") formerly the Health Care Financing Administration ("HCFA") is the operating component of the Department of Health and Human Services ("DHHS") charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted to organizations known as fiscal intermediaries ("FIs") and Medicare administrative contractors ("MACs"). FIs and MACs[2] determine payment amounts due the providers under Medicare law, regulations, and under interpretive guidelines published by CMS.[3]

Providers are required to submit cost reports annually, with reporting periods based on the provider's accounting period. A cost report shows the costs incurred during the relevant fiscal year and the portion of those costs allocated to the Medicare program.[4] Each intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider, and issues the provider a Notice of Program Reimbursement ("NPR").[5] A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board ("Board") within 180 days of the receipt of the NPR.[6]

Critical Access Hospitals ("CAH") are rural community hospitals that receive cost-based reimbursement under the Medicare program.[7] To be designated a CAH, a rural hospital must meet defined criteria that are outlined in the conditions of participation for the Medicare program.[8] The regulations governing CAHs continue to require a CAH to file an annual cost report based on its accounting period.[9]

The Medicare regulations at 42 C.F.R. § 413.153(a) (2007) allow for an adjustment for interest expense as follows:

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[1] Transcript ("Tr.") at 5-6.
[2] FIs and MACs are hereinafter referred to as intermediaries.
[3] *See* 42 U.S.C. §§ 1395h, 1395kk-1; 42 C.F.R. §§ 413.20, 413.24.
[4] *See* 42 C.F.R. § 413.20.
[5] *See* 42 C.F.R. § 405.1803.
[6] 42 U.S.C. § 1395oo(a); 42 C.F.R. §§ 405.1835-1837.
[7] *See* 42 C.F.R. § 412.22.
[8] *See* 42 C.F.R. Part 485, Subpart F (regulations for Medicare conditions of participation for CAHs).
[9] *See* 42 C.F.R. §§ 412.22(b), 413.20.

> (a)(1) *Principle.* Necessary and proper interest on both current and capital indebtedness is an allowable cost. However, interest costs are not allowable if incurred as a result of –
> (i) Judicial review by a Federal Court (as described in 413.64(j));
> (ii) An interest assessment on a determined overpayment (as described in § 405.377 of this chapter); or
> (iii) Interest on funds borrowed to repay an overpayment (as described in § 413.64(j) or § 405.378 of this chapter), up to the amount of the overpayment, unless the provider had made a prior commitment to borrow funds for other purposes (for example, capital improvements.)
> (2) *Exception.* In those cases of administrative or judicial reversal, interest paid on funds borrowed to repay an overpayment is an allowable cost, in accordance with this section.[10]

Further, § 413.153(b) (2007) provides the following definitions for the terms "interest," "necessary" and "proper":

> (b) *Definitions*—(1) *Interest.* Interest is the cost incurred for the use of borrowed funds. Interest on current indebtedness is the cost incurred for funds borrowed for a relatively short term. This is usually for such purposes as working capital for normal operating expenses. Interest on capital indebtedness is the cost incurred for funds borrowed for capital purposes, such as acquisition of facilities and equipment, and capital improvements. Generally loans for capital purposes are long term loans.
>
> (2) *Necessary.* Necessary interest is interest that meets the following requirements:
> (i) It is incurred on a loan made to satisfy a financial need of the provider. Loans that result in excess funds or investments are not considered necessary.
> (ii) It is incurred on a loan made for a purpose reasonably related to patient care.
> (iii) It is reduced by investment income except income from –
> (A) Gifts grants and endowments, whether held separately or pooled with other funds;
> (B) Funded depreciation that meets the program's qualifying criteria;
> (C) The provider's qualified pension funds;
> (D) The provider's deferred compensation funds that meet the program's qualifying criteria; and
> (E) The provider's self-insurance trust funds that meet the program's qualifying criteria.

[10] (Emphasis in original) (copy included as Intermediary Exhibit I-9).

(iv) It is not reduced by interest received as a result of judicial review by a federal court (as described in §413.64(j)).

(3) *Proper.* Proper requires that the interest be—
(i) Incurred at a rate not in excess of what a prudent borrower would have had to pay in the money market existing at the time the loan was made; and
(ii) Paid to a lender not related through control or ownership, or personal relationship to the borrowing organization. However, interest is allowable if paid on loans from the provider's donor-restricted funds, the funded depreciation account, or the provider's qualified pension fund.

The Medicare program provides similar guidance on allowable interest expense in the Provider Reimbursement Manual, CMS Pub. No. 15, Part I ("PRM 15-1"), § 202.[11]

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The Memorial Hospital of North Conway ("Provider") is a not for profit acute care hospital that is located in North Conway, New Hampshire. The Provider participates in the Medicare Program as a CAH and has been so designated since 2004. The Provider's fiscal year ("FY") ends June 30th and the fiscal year at issue is FY 2007. During the time at issue, the Provider's designated intermediary was National Government Services, Inc. ("Intermediary").

In June 2006, in connection with the New Hampshire Health and Education Facilities Authority ("the Authority"), the Provider issued $20,955,000 of tax-exempt revenue bonds ("Series 2006"). The Provider used the proceeds of the Series 2006 bonds to refinance its outstanding mortgage notes payable and finance its planned expansion and renovation of the Provider's campus. The terms of the bond issue required that debt service reserve funds be established to cover the payment of principle and interest if the Provider failed to make its payments. The Provider's trustee held the funds, including the proceeds of the bond issue, in an interest bearing "Project Fund." Earnings from the Project Fund are retained in the Project Fund and are restricted in their use to project costs.

In FY 2007, the Provider claimed $796,315 of interest expense on it as-filed cost report. (after offsetting $93,061 of investment income). The Intermediary offset an additional $796,315 of investment income against allowable interest expense. .[12]

The Provider disputed the Intermediary's findings[13] and filed a timely appeal with the Board

[11] Copy included as Intermediary Exhibit I-8.
[12] Provider incurred a total of $889,376 of allowable interest expense. The Provider claimed $796,376 of allowable interest expense on its as-filed cost report (after offsetting $93,061 of investment income.) The Intermediary considered $914,629 of investment income to be available for offset. Since the total amount of investment income was greater that the total allowable interest expense the Intermediary offset an amount ($796,376) equal to the claimed interest expense. *See* Intermediary Exhibit I-2 at 2-3 (Intermediary workpaper discussing the investment income offset reflected in Adjustment No. 11).
[13] There is no dispute relative to the controlling statute or regulations. Rather the dispute centers on the application

pursuant to 42 C.F.R. §§ 405.1835-1841. The Provider met the jurisdictional requirements of those regulations.

The Provider was represented by Charles MacKelvie, Esq., of Krieg DeVault L.L.P. The Intermediary was represented by Arthur E. Peabody, Esq., of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the interest earned on the Project Fund is not "investment income" as that term is used by the Medicare regulations and interpretive rules. The Provider contends that all proceeds of the bond issuance went to the independent trustee who deposited all of the bond proceeds inclusive of any earned interest into the Project Fund where it remained until portions of the project had to be funded. The Provider had no actual/constructive control over the Project Fund and maintains that it is not an investment as that term is defined by Medicare guidance and Generally Accepted Accounting principles ("GAAP"). The Provider contends that, since the Project Fund is not an investment, it cannot generate investment income.

In support of its position, the Provider points to the Medicare regulations and PRM 15-1 provisions governing interest expense. The regulation at 42 C.F.R. § 413.153(b)(1) defines the term, "interest," as the cost incurred for the use of borrowed funds...". Interest on capital indebtedness is the cost incurred for funds borrowed for capital purposes, such as acquisition of facilities and equipment, and capital improvements." PRM 15-1 § 202.1 similarly includes almost verbatim the same definition for interest. PRM 15-1 § 202.2(C) in defining the term "necessary" for purposes of interest expense proffers that "[i]nvestment income resulting from investment of funds *not* generated from patient care activities is *not* subject to offset. In addition, if the funds invested in nonpatient care activities are borrowed, the interest expense is not allowable and the investment income is not subject to offset."[14] PRM 15-1 § 202.2(C) defines "Investment income for offset" as the "aggregate net amount realized from all investments of patient care funds in non-patient care related activities and may include interest, dividends, operating profits and losses, and gains and losses on sale or disposition of investments." Finally, 42 C.F.R. § 413.153(a) provides that "[n]ecessary and proper interest on both current and capital indebtedness is an allowable cost."

The Provider contends that since its Project Fund is separate from other accounts, is under the control of an independent trust, and is dedicated solely to paying for specific capital improvements on the hospital, it is not properly considered investment income. The Provider further argues that its Project Fund is not a reserve or a contingency fund. Rather, it is dedicated to paying for specific construction which was contemplated at the time that it was established. Disbursements from the fund are controlled by a trustee and are limited to particular purposes. Until such disbursements are made, the principle remains segregated in the fund, along with any interest earned. The interest is the result of the financing mechanism and never passes to the Provider. As such, it is not income from its patient care operations and should not be offset by interest expenses.

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of the statutes to the proper classification and treatment of costs.

[14] (Emphasis in original.)

In addition to the Medicare regulations and the interpretive rules, the Provider also argues that the interest on the bonds cannot be viewed as "investment income" under the Internal Revenue Code ("IRC") governing state and local bonds located in 26 U.S.C. § 148. The Provider contends that one of the rules that bond attorneys confront is properly "sizing" a tax-exempt bond issue so that it is not deemed to overburden the tax-exempt bond market. This concept is referred to in the Treasury Regulations as an "over-issuance" of bonds, one of the consequences of which is that, upon audit of the issue of tax-exempt bonds by the IRS, the bonds will likely be determined to be "taxable" (resulting in the holders thereof losing the right to claim the interest as being exempt from income tax). Current regulations at 26 C.F.R. § 1.148-10(a)(4) specify the factors evidencing an over-issuance of bonds whereby the proceeds are reasonably expected to exceed by more than a minor portion (as defined in 26 U.S.C. § 148(e)), the amount necessary to accomplish the governmental purposes of the issue, or that the proceeds of and issue are, in fact, substantially in excess of the amount of sale proceeds allocated to expenditures for the governmental purposes of the issue. In short, bond attorneys are required by the Treasury Regulations to "size" an issue of bonds so that: (1) the principal amount of the bonds plus (2) the interest earnings on the construction fund, are reasonably sized to accomplish the construction of the project, but not in excess thereof by more than a minor portion. Bond lawyers always budget interest earnings to be spent on the project and such earnings are not available to the borrower for any other purpose. Consequently, the Provider contends that it would not be appropriate to consider earnings on a construction fund created for a bond issuance, such as the Series 2006 Bonds, in the same vein as "investment income" on a brokerage or pass book saving account.[15]

The Provider contends that case law supports its position and that there is only one case that has similar facts and addresses a construction project fund which was controlled by a trustee – the 1981 decision of the U.S. District Court for the District of Columbia in *Illinois Central Community Hospital, Inc. v. Schweiker* (hereinafter "*Community*")[16] In *Community*, the provider placed the proceeds of its bond issuance into a construction fund account ("CFA") with the expectation that the earnings from the CFA would be necessary to pay for unforeseen expenses and concluded that interest in a project fund to pay for the costs of a project cannot be used to offset interest expense. The court found that the purpose of the regulation requiring the offset of "investment income" is to: (1) assure that a provider will not borrow at Medicare's expense when it has investment funds available that can be applied to fill the need for capital; and (2) guarantee that a provider will only borrow what is needed to fulfill capital requirements related to providing services to Medicare patients.[17] The Provider contends that neither of the listed concerns is at issue in this case. The court then found that:

> Offsetting interest expenses with interest earned on [the CFA] serves neither of these goals, and indeed may inhibit plaintiff's ability to complete the needed improvements. There is little danger of [the provider] gaining a 'windfall' as the intermediary feared. This is not a reserve or contingency Fund; it is dedicated to

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[15] *See generally* 26 C.F.R. § 1.148-10 (providing the anti-abuse rules and authority of IRS Commissioner).
[16] *See Illinois Cmty. Hosp, Inc. v. Schweiker,* Civ. Action No. 78-1989, slip op., CCH Medicare and Medicaid Guide 1981-1982 Transfer Binder ¶ 13,421 (D.D.C. July 10, 1981).
[17] *See id.*

> paying for specific remodeling which was contemplated at the time that the Fund was established.[18]

The Provider argues that, similar to *Community*, the Project Fund does not serve either of the goals of the offset rule and its application to the Project Fund would inhibit the Provider's construction project.

The Provider recognizes that the Intermediary has cited to the 1982 decision of the U.S. Court of Appeals for the First Circuit ("First Circuit") in *Cheshire Hosp. v. New Hampshire-Vermont Hospitalization Serv., Inc.*("*Cheshire*")[19] in support of its position. However, the Provider contends that *Cheshire* is not relevant because the *Cheshire* facts are markedly different and distinguishable. The sole issue in *Cheshire* was whether the interest earned by a debt service reserve fund ("DSRF"), established by borrowed funds, was subject to offset. The Court found that the hospital would ultimately benefit because the earned interest would be used to satisfy the financial obligation to the bondholders. Unlike the hospital in *Cheshire*, the Provider's DSRF was properly funded using funds from a funded depreciation account and most of the proceeds were deposited into the Provider's Project Fund which was controlled by a trustee and used solely for construction/remodeling and not to the direct benefit of the Provider in general. The issue of whether interest earned on a construction fund created in compliance with the IRC and Treasury regulations must be offset was not before the *Cheshire court.*

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the offset of investment income up to the amount of interest expense claimed by the Provider for FY 2007 was proper. The Intermediary found that the interest earned on the funds borrowed to fund capital construction and renovation at the hospital to be necessary and, as such, offset the income earned on the funds placed in interest bearing accounts. Per the Intermediary, necessary interest must be offset by investment income pursuant to 42 C.F.R. § 413.153(b)(2).

The Intermediary contends that here the interest was "necessary" under the Medicare program because it was incurred on a loan to satisfy the Provider's purpose related to patient care, namely the construction and renovation of the Provider's health care facilities. However, to meet the Medicare requirements of "necessary," the interest must be reduced by the investment income, unless the income falls within an exception. The Intermediary maintains that the Provider's interest income does not fall within any of the specified exceptions.[20] Accordingly, under the plain meaning of the regulation and PRM 15-1 § 202.2, the interest must be reduced by investment income.[21]

The Intermediary recognizes that the Provider cites to PRM 15-1 § 202.2(C) statement that "investment income *not* generated from patient care activities is *not* subject to offset." However, the Intermediary contends that this statement is intended to instruct providers as to the proper

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[18] *See id.*
[19] 689 F.2d 1112 (1st Cir. 1982) (copy included as Intermediary Exhibit I-10).
[20] *See* Tr. at 75.
[21] *Id.*

treatment of its activities which are not related to patient care; it is not intended to eliminate requirements in the regulation itself or otherwise in the PRM for interest to be considered "necessary". The Intermediary contends that this sentence simply distinguishes between other activities of the provider that are distinct from patient care activities. The Intermediary points to Example 2 in the applicable PRM section which supports the Intermediary's position that the interest here should be offset.

The Intermediary contends that the Provider's reliance on the 1981 decision in *Community* is misplaced because it is stale, outdated, and carries no weight as an unpublished district court decision.[22] The Intermediary explains that, in *Community*, the court ruled that expenses incurred by a bond issuance did not need to be offset by funds generated in a remodeling and improvement fund and found that the Secretary's reading of the regulation was too broad as it did not square with the rationale for the offset principle. Significantly, the court ignored the notion that a provider's ultimate reimbursement for costs associated with long term capital loans should be limited to the real cost of the borrowed funds. The Intermediary contends that this case provides the basis for the Provider's argument that the presence of a trustee to manage the borrowed funds, including their disbursement for construction purposes, the dedication of such funds for the purpose of construction, and segregation of the borrowed funds from other hospital funds shields any generated interest from the label "investment income."

The Intermediary contends that the First Circuit's decision in *Cheshire* is binding on the Provider as it is located in the First Circuit and it more thoughtfully addresses the scope and application of the offset rule. The First Circuit identified critical weaknesses in the *Community* court's ruling by pointing out that it failed to properly analyze the primary rationale behind the offset rule. Specifically, the offset rule ensures that Medicare reimburses providers only for those costs which they actually incur so that costs are not shifted from Medicare patients to non-Medicare patients and *vice versa*. Moreover, the Intermediary maintains, the *Cheshire* court had the benefit of the *Community* decision and clearly developed a better analysis-- an analysis that has not been questioned for many years.

Additionally, the Intermediary contends that other precedent supports the Intermediary's position here including the 1983 decision of the CMS Administrator in *Sacred Heart Hosp., Easton Hosp., & Muhlenberg Med. Ctr. Group Appeal*[23] and the 1985 decision of the CMS Administrator in *Mary Runton Hosp. v. Blue Cross and Blue Shield Ass'n.*[24] In these decisions, the CMS Administrator explicitly endorsed the result in *Cheshire*.[25] The Intermediary contends

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[22] The Intermediary contends that the Board should decline the Provider's invitation to follow *Community* because, under the rules of the D.C. Circuit, an unpublished decision has no precedential value. *See United States v. Project on Gov 't. Oversight,* 484 F. Supp. 2d 56 (D.D.C. 2007). Rather, the Board should follow the reasoning of Cheshire, a published decision that is binding precedent as the Provider is located in the First Circuit. *See* Intermediary Post Hearing Brief at 3.

[23] CMS Administrator Dec. (Nov. 14, 1983) (finding that offset was required because the funds placed in the DSRF came from borrowed funds, and did not constitute funded depreciation) (copy included as Intermediary Exhibit I-12), *aff'g*, PRRB Dec No. 1983-D145 (Sept. 15, 1983).

[24] CMS Administrator Dec. (Nov. 27, 1984) (copy included as Intermediary Exhibit. I-11), *aff'g* Issue No. 1 (offset of income from bond service reserve fund ("BSRF")), PRRB Dec. No. 1985-D05 (Oct. 1, 1984).

[25] *See also Bedford Med. Ctr. v. Heckler*, 766 F.2d 3211 326n.3 (7th Cir. 1985) (upholding offset, citing favorably to *Cheshire*, and stating "if we accepted the plaintiff's argument then ... the plaintiff would receive a windfall at the

that these cases show that there is almost uniform precedent, including Board decisions referenced in the cases discussed, that endorse the notion that the investment income earned on a provider fund established with borrowed monies must be offset against allowable interest expense which has been found to be necessary and proper. This principle is long standing and clearly applies to the facts in this case.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of Medicare law, regulations and guidelines, the parties' contentions and stipulations, and the evidence presented at the hearing, finds and concludes that the Intermediary's offset of investment income earned on the Provider's Project Fund against interest expense was proper.

The Board finds that offset is required. Here, funds generated by bonds issued by the Authority for capital construction and renovation at the Provider were placed in accounts generating "investment income."

In determining whether the investment income at issue must be offset, the Board turns to the Medicare regulation at 42 C.F.R. § 413.153 governing allowable interest.[26] The purpose of this regulation is to ensure that, when funds are borrowed and found "necessary," the Medicare program bears only the real cost of the borrowing. To this end, § 405.153(b)(2)(iii) sets forth the general rule that, in order to be "necessary," interest expense "is reduced by investment income" unless if falls within five exceptions.[27] The Provider's Project Fund's investment income does not fall into any of these exceptions because the Project Fund clearly is not a gift-/grant-/endowment-funded depreciation, a pension fund, a deferred compensation fund, or a self-

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expense of Medicare rather than reimbursement for its reasonable costs."); *Community Med. Ctr. Hosp. v. Blue Cross and Blue Shield Ass'n,* CMS Administrator Dec. (Jan. 30, 1986) (copy included as Intermediary Exhibit I-13), *aff'g* Issue No. 1 (offset of income from BSRF), PRRB Dec. No. 1986-D30 (Dec. 2, 1985).

[26] The Board recognizes that the Provider refers to the IRC and Treasury regulations regarding the IRS' treatment of investment income for income tax purposes. However, these rules are clearly not applicable here and do not govern their treatment for purposes of reasonable cost reimbursement under the Medicare program because the Secretary has promulgated her own regulations and rules governing such reimbursement.

[27] *See also* PRM 15-1 § 202.2. The Board rejects the Provider's narrow interpretation of the phrase "funds . . . generated from patient care activities" as used in the following sentence found in PRM 15-1 § 202.2(C):

> Investment income resulting from investment of funds *not* generated from patient care activities is *not* subject to offset. In addition, if the funds invested in nonpatient care activities are borrowed, the interest expense is not allowable and the investment income is not subject to offset.

(Emphasis in original.) The Board finds that this phrase refers back to the opening sentence of § 202.2(C) which states: "Patient care funds should be available for the provider's patient care purposes, enabling it to avoid interest expense attributable to unnecessary borrowing." This opening sentence in turn refers back to the following two sentences in § 202.2 where the first reference in § 202.2 is made to "patient care funds":

> *Patient care funds* should be available for the provider's patient care purposes, enabling it to avoid interest expense attributable to unnecessary borrowing. When a provider diverts *patient care related funds* to other uses, there is an impact on any subsequent borrowing.

(Emphasis added.) As such, the phrase cited by the Provider must be broadly interpreted to refer to any patient care related funds, including funds that a provider obtains through borrowing to fund patient care related activities such as construction and renovation.

insurance trust fund .[28] Accordingly, the Board finds that the interest earned on the Project Fund is investment income that must be offset.

The Board notes that reducing interest expense by investment income must occur in the year in which it is earned pursuant to Medicare rules governing adequate cost data. In this regard, 42 C.F.R. § 413.24(a) specifies that "[p]roviders receiving payment on the basis of reimbursable cost must provide adequate cost data" and that "[t]he cost data must be based . . . on the accrual basis of accounting." Pursuant to § 413.24(b)(2), "the term *accrual basis of accounting* means that revenue be "reported in the period when it is earned, regardless of when it is collected...."[29] Accordingly, the investment income earned on the Project Fund must be treated as investment income in the year in which it is earned, despite the fact that it may not be used for the Provider's benefit in that year.[30] In rejecting the Provider's arguments, the Board declines to follow the *Community* decision. First, as an unpublished district court decision, it is not constitute binding precedent on the Board. Second, and most importantly, the Board rejects it on substantive grounds because it failed to consider both the purpose of the offset rule, namely that providers are to be reimbursed only for costs incurred pursuant to the definition of "reasonable cost" in 42 U.S.C. § 1395x(v)(1)(A), and that the application of the offset rule in conjunction with the general Medicare requirement that providers report costs using the accrual basis of accounting.

Finally, the Board notes that its interpretation and application of the offset rule is consistent with the First Circuit's decision in *Cheshire* which is binding precedent as the Provider is located in the First Circuit and that as noted by the Intermediary, the CMS Administrator has explicitly endorsed the result in *Cheshire*.

DECISION AND ORDER:

The Intermediary's offset of "investment income" up to the amount of interest expense claimed by the Provider for FY 2007 was proper.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
J. Gary Bowers, C.P.A.
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.

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[28] The Board recognizes that PRM 15-1 § 202.2(C) includes additional exceptions (*e.g.*, interest earned arising from judicial review, nonallowable borrowing); however, the Project Fund clearly does not fall into any of these additional exceptions.

[29] (Emphasis in original.)

[30] The Board recognizes that the Provider has argued that the application of these regulations results in impermissible cost shifting from Medicare patients to non-Medicare patients; however, the Board has no authority to consider this issue as the Board must comply with these regulations pursuant to 42 C.F.R. § 405.1867. The Board further notes that the First Circuit addressed this issue in *Cheshire* and found no impermissible cost shifting under the offset rule. *See* 689 F.2d at 1120.

FOR THE BOARD:

Michael W. Harty
Chairman

DATE: SEP 11 2014