

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

98-D24

**PROVIDER** -The Brattleboro Retreat  
Brattleboro, Vermont

**DATE OF HEARING-**  
November 5, 1996

Provider No. 47-4001

Cost Reporting Period Ended -  
June 30, 1985-1988

vs.

**INTERMEDIARY** -  
Blue Cross and Blue Shield Association/  
Blue Cross and Blue Shield of New  
Hampshire - Vermont

**CASE NO.** 92-0662

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ISSUE:

Did the Health Care Financing Administration (“HCFA”) correctly conclude that the Provider’s requests for adjustment to its Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”) limits were not timely filed and were therefore improper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Brattleboro Retreat (“Provider”) is a private not for profit psychiatric hospital located in Brattleboro, Vermont. The Provider requested an adjustment to its TEFRA limits for the fiscal year ended (“FYE”) cost reporting periods June 30, 1985 through 1988. HCFA refused to consider the requests because it determined that the requests were not timely filed. The Provider filed a timely appeal with the Provider Reimbursement Review Board (“Board”) pursuant to 42 C.F.R. §§ 405.1835-.1841. The Medicare reimbursement effect for all of the years at issue is approximately \$408,000.<sup>1</sup>

As a psychiatric facility, the Provider is exempt from the Medicare prospective payment system (“PPS”), and instead is reimbursed in accordance with the cost per discharge limits initially established by TEFRA, P.L. 97-248, 42 U.S.C. § 1395ww(b). Under TEFRA, provider costs are limited by a ceiling on the rate of increase, referred to as the target amount or target rate. The initial target amount is determined by multiplying a provider’s allowable Medicare operating cost per discharge in its base year by an applicable target rate percentage. Thus, an adjustment to the base year would affect subsequent year target rate limits (“limits”). TEFRA also established a means by which providers could obtain relief from the limits. See 42 U.S.C. § 1395ww(b)(4)(A) and 42 C.F.R. § 405.463(g) and (h), (redesignation 42 C.F.R. § 413.40(g)).

The Provider initially sought relief from its limits in FYE 1983, its TEFRA base year. On November 7, 1984, within 180 days of receipt of its Notice of Program Reimbursement (“NPR”), it sought an exception for atypical service costs.<sup>2</sup> The Provider also received an initial NPR for each of its FYEs 1985 through 1988. Although the Provider exceeded its limits in each of these years, it did not file an exception request within 180 days of any of the initial Notices of Program Reimbursement (“NPRs”) for FYEs 1985 through 1988.<sup>3</sup>

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<sup>1</sup> See Intermediary Position Paper at 3.

<sup>2</sup> See Provider Exhibit 19 - Chart of dates of events.

<sup>3</sup> Tr. at 28.

On December 20, 1988, HCFA ruled that the Provider was entitled to most, but not all, of the exception relief it sought for the base year.<sup>4</sup> The relief granted by HCFA was for a variety of atypical costs. At that time, the Provider had already received its initial NPRs for FYE 1985 on August 3, 1988 and for FYE 1986 on August 29, 1988. The effect of the ruling was that the Provider's base year limit would be adjusted and that FYEs 1985 and 1986, as well as subsequent FYE TEFRA limits would be adjusted. In January 1989, the Provider requested that the Intermediary reopen FYEs 1985 and 1986 and amend the FYEs 1987 and 1988 cost reports for which NPRs had not yet been issued.<sup>5</sup> In May of 1989, the Provider requested that HCFA reconsider its decision to grant only partial relief for the base year adjustment request.

Subsequently, the Provider received its NPRs for FYE 1987 on June 22, 1989 and the FYE 1988 on September 19, 1989. At the time the FYEs 1987 and 1988 NPRs were issued, they were not modified to comport with the HCFA ruling granting partial relief in December of 1988. On August 30, 1990, HCFA granted the Provider additional exception relief, again for atypical costs, for the base year.<sup>6</sup>

The Intermediary reopened the FYEs 1985 through 1988 cost reports and issued revised NPRs for each on February 8, 1991. The purpose of the revised NPRs was to roll forward the recalculation of the FYE 1983 costs. In each of the FYEs, a new higher TEFRA limit was permitted.

On June 11, 1991, less than 180 days after the issuance of the revised NPRs, the Provider sent the Intermediary requests for adjustments from its FYEs 1985 through 1988 limits pursuant to 42 C.F.R. § 405.463(e), (redesignated § 413.40(e)).<sup>7</sup> The requests were premised upon increases the Provider had experienced in the average length of stay ("LOS") of its patients since FYE 1983 and the resulting non-comparability of its costs-per-discharge between its TEFRA base year and its TEFRA payment years. See 42 C.F.R. § 405.463(g)(3).

The Intermediary treated the Provider's requests as untimely. The Intermediary did not initially refer the requests to HCFA but notified the Provider that an adjustment request, in order to be timely, had to be submitted "no later than 180 days from the [original] Notice of Program Reimbursement."<sup>8</sup> The Provider appealed the Intermediary decision on February 3,

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<sup>4</sup> See Provider Exhibit 1.

<sup>5</sup> See Provider Exhibit 3.

<sup>6</sup> See Provider Exhibit 2.

<sup>7</sup> See Provider Exhibits 5 through 8.

<sup>8</sup> See Provider Exhibit 9.

1992.<sup>9</sup> On June 19, 1992, the Intermediary submitted the Provider's request for TEFRA exceptions to HCFA for confirmation of its determination that they were not submitted timely.<sup>10</sup> On June 30, 1992, HCFA agreed with the Intermediary and ruled that the Provider's June 11, 1991 exception requests were not timely filed and indicated that the revised NPR rules at 42 C.F.R. § 405.1889 were applicable.<sup>11</sup> The Provider appealed HCFA's determination to the Board on November 25, 1992.<sup>12</sup>

The Provider was represented by Mark Borreliz, Esquire, of Choate, Hall and Stewart. The Intermediary was represented by Michael Berkey, C.P.A., Associate Counsel for the Blue Cross and Blue Shield Association.

#### PROVIDER'S CONTENTIONS:

The Provider contends that the question in this case is whether a request for adjustment to the TEFRA limits, filed under 42 C.F.R. § 405.463(e), can be undertaken within 180 days of receipt of a revised NPR that, for the first time, determine the actual TEFRA rates for the cost years in question. The Provider refers to two recent cases in which the Board has held that TEFRA adjustment requests filed within 180 days of a revised NPR were proper. See Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Case No. 95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,222, rev'd HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,510 ("Care Unit"), and Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB case No. 95-D28, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,228, rev'd HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,538, aff'd No. CV 95-4674 KN, (C.D. Ca. January 2, 1997), Medicare and Medicaid Guide (CCH) ¶ 45,249 ("Foothill"). The Board in Foothill pointed out that, in requiring that TEFRA adjustment requests be filed within 180 days of an NPR, 42 C.F.R. § 405.463(e) "does not distinguish between an original and a revised NPR." Foothill, Medicare and Medicaid Guide (CCH) ¶ 43,228, at 44,169. The Provider indicates that the regulation was subsequently changed after notice and comment rulemaking to specify that the request must follow 180 days of the "initial" NPR. The Provider observes that a revised NPR, as much as an original one, submits the Provider anew to the TEFRA target limit.

The Intermediary relies on the HCFA Administrator's position in Care Unit and Foothill, supra, which is that the rule limiting appeals from revised NPRs, 42 C.F.R. § 405.1889,

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<sup>9</sup> See Intermediary Exhibit 10.

<sup>10</sup> See Intermediary Exhibit 15.

<sup>11</sup> Intermediary Exhibit 16 and 17.

<sup>12</sup> Intermediary Exhibit 18.

applies equally to the filing of exception requests. The Provider asserts that to do so in the instant case would preclude it from filing a request for exception from what were effectively the first actual determinations of its TEFRA cost limits for FYEs 1985 through 1988.

The Provider contends that it may appeal from the revised NPR because (1) the regulations did not preclude it in 1991, (2) the reopening regulation cannot be applied to the right to seek exception relief; and (3) the exception request in the instant case relates directly to the subject matter of the revised NPRs.

The Provider contends that the regulation, 42 C.F.R. § 405.463(e), in 1991 did not restrict exception requests to an initial NPR. The Provider indicates that in the instant case the revised NPR was the first time it knew what its TEFRA limit would be for FYEs 1985 through 1988 due to its substantial base year exception request. The TEFRA limits in the initial NPRs could not be regarded as final. HCFA granted the base year request shortly after the NPRs for the FYEs 1985 and 1986 were issued and, according to the Provider, the Intermediary agreed to keep open the cost years, so that the corrected TEFRA limit calculations for those years could be implemented by way of revised NPRs.

The Provider further indicates that 42 C.F.R. § 405.1889 deals with appeals to the Intermediary, Board, HCFA Administrator, and judicial review; but does not address in any way a request for TEFRA exceptions. Since the Board only reviews an exception request after a HCFA determination, the reopening regulation, which deals with Board review, cannot be intended to prevent the Provider from seeking exception relief from HCFA. The Provider argues that a provider may have no operating costs exceeding its limit in the initial NPR, however, as a result of a reopening, costs could be reclassified from capital to operating cost center and cause the provider to suffer a TEFRA limit disallowance. Under the Intermediary's interpretation of 42 C.F.R. § 405.1889 the provider would not be permitted to file an exception request from the revised NPR. The Provider would be without recourse to the TEFRA adjustment relief intended under the statute. See 42 U.S.C. § 1395ww(b)(4)(A)(I).

The Provider maintains that the revised TEFRA limits imposed following the reopening were understood by the parties to constitute the first TEFRA limit determinations. The Provider states that the Intermediary, HCFA, and itself, were all clear that the TEFRA limits that were applied in the initial NPRs for FYEs 1985 through 1988 were essentially preliminary. They had to be recalculated due to the increase in allowable operating costs for its base year which would result from the base year exception request. These base year cost increases would be rolled forward and thus the limits in the revised NPRs were not simple refinements of the initial cost report limit, but derived from the base year adjustment. There is no reason under 42 C.F.R. § 405.463 not to grant a provider who receives a final determination of its target limit in a revised NPR, the same right to go back to HCFA to request an adjustment. The revised NPRs in the instant case are a ministerial means of adjusting the settled cost reports

and trending forward the TEFRA relief. It is the revised TEFRA limits that the Provider seeks relief from, not the stale issues that 42 C.F.R. § 405.1889 was meant to cut off.

The Provider maintains that even if the provisions of 42 C.F.R. § 405.1889 did apply, its exception request falls within the scope of the subject matter of the revised NPRs. The aspect of the FYE 1985 through 1988 cost reports that was revised was the target amount limit to be applied each year. The Provider's adjustment request goes directly to the issue of whether the recalculated limits should hold, or whether it has an appropriate basis under 42 C.F.R. § 405.463 to have the limits adjusted. The Intermediary imposed "de novo" reimbursement limits on the Provider and thus the Provider's right to seek relief from those limits under 42 C.F.R.

§ 405.463(e) is specifically given effect.

In Foothill and Albert Einstein Medical Center v. Sullivan, 830 F.Supp. 846 (E.D. Pa. 1992), aff'd 6 F.3d 788 (3d Cir. 1993), ("Einstein") cited by the Intermediary, the facts are not the same as in the instant case. In Foothill the revised NPR only affected malpractice costs and did not effect the TEFRA rate for the cost year. In addition, the provider in Foothill requested an adjustment for the precise amount disallowed on the initial cost report. In the instant case the reopening was to enter the final target rates following the roll-forward. According to the Provider, it did not just tack on an unrelated final determination that could have been protested earlier. The revised NPRs were the first opportunity that the Provider had to know its actual rate and request an adjustment. The decision in Einstein is not applicable because that provider had not filed an initial appeal and sought to appeal self-disallowed costs after a HCFA reopening for malpractice.

The Provider asserts that the initial TEFRA target rate was just a "place holder," and the parties agreed to reopen the cost years at issue to implement the roll forward. It would not have made sense for the Provider to request an exception from the meaningless rates on its initial cost reports.

The Provider also argued that its TEFRA target rate was specifically adjusted in the revised NPR and thus, it met the restrictive language of 42 C.F.R. § 405.1889, requiring the appeal to be related to the revision.<sup>13</sup> The Provider cites the cases of Foothill and Anaheim Memorial Hospital v. Shalala, 1996 WL 282147 (C.D.Cal), aff'd 130 F.3d 845 (9th Cir. 1997) ("Anaheim") where distinctions were made between cases where the revisions have no effect on a limit (in that case a Routine Cost Limit) or no reimbursement effect and those that change the limit. In the present case, the TEFRA rate was completely recalculated but not

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<sup>13</sup> Tr. at 18.

due to any one cost.<sup>14</sup> The revised NPR set the TEFRA rate for the first time; all parties knew that the initial NPR TEFRA rates were just place holders and would later be revised.<sup>15</sup>

The Provider argues that it could have filed from its initial NPRs in the FYEs 1985 through 1988 NPRs but assert that they are appealing the rates set in the revised NPRs which is allowed under 42 C.F.R. § 405.463.<sup>16</sup>

For the above reasons, the Provider asserts that its request for an adjustment was timely filed, under 42 C.F.R. § 405.463(e), within 180 days of the NPR and should be remanded to HCFA for substantive review and determination.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Provider's June 11, 1991 requests for adjustment to its TEFRA rates for FYEs 1985 through 1988 were not filed timely because they were required by the regulation to be filed within 180 days of the initial NPRs.

The HCFA determinations to grant per diem exception relief for FYE 1983 in 1988 and 1990 was the basis for revising each of the NPRs for FYEs 1985 through 1988. The Provider is seeking to use this specific revision of the NPRs to raise for the first time requests for relief from the TEFRA limits for the subsequent years on a different basis of a higher length of stay ("LOS"). Since the LOS issue was present and could have been raised under the initial NPRs for these FYE periods, the Provider was required to raise them in response to the initial NPR. In addition, the Provider is limited in a reopening to raising objections that are related to the issue being modified and cannot reopen old issues that could have been raised earlier and for which there should be administrative finality.

The Intermediary points out the HCFA Administrator in Foothill, *supra*, dismissed the Provider's appeal for lack of jurisdiction. The HCFA Administrator held that 42 C.F.R. § 405.463(e) should not be read in isolation, but must be considered in the context of other relevant regulations, and cited the reopening provisions of 42 C.F.R. § 405.1885 and 405.1889. The Intermediary asserts that the facts in the instant case are similar to Foothill. The Intermediary refers to the following points from Foothill:

[T]he regulation at 42 C.F.R. § 405.1885 allows for a cost report to be reopened under certain limited circumstances. The effects of reopening and revising an NPR are addressed at Section 405.1889, which states that:

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<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Tr. at 36.

[w]here a revision is made in a determination or decision on the amount of program reimbursement after such determination or decision has been reopened as provided in § 405.1885, such revision shall be considered a separate and distinct determination or decision to which the provisions of Sections 405.1811, 405.1835, 405.1875, and 405.1877 are applicable.

Thus, if a specific reimbursement matter is reopened and revised, a provider's appeal rights are limited to the particular matter that was revised, and do not extend to other matters that were finalized in the initial NPR, but not subsequently reopened and revised. To hold otherwise, i.e., to permit appeal of issues not considered in the reopening that could have been appealed within 180 days of the original NPR, would be contrary to the plain meaning of the limitation period in Section 1878(a)(3) of the [Social Security] Act.

In this case, pursuant to the original NPR, dated February 28, 1985, the Intermediary disallowed over \$400,000 as a result of the application of the TEFRA limits. The Intermediary subsequently reopened the Provider's cost report, pursuant to HCFA Ruling 89-1, and issued a revised NPR, dated October 21, 1991, which resulted in increased reimbursement for malpractice costs. Further, the October 21, 1991 revised NPR resulted in no additional disallowance of costs under the TEFRA limits. However, the Provider filed its request for an adjustment to its TEFRA limits on January 16, 1992. The adjustment request was for the amount disallowed on the initial NPR pursuant to the TEFRA limits. HCFA denied the Provider's request for an adjustment as untimely, by letter dated February 10, 1993.

A review of the record demonstrates that the Provider did not file its adjustment request within 180 days of the initial NPR, but rather filed the request within 180 days of the revised NPR. Thus, although the Board found that 42 C.F.R. § 405.1889 does not have to be considered in this case, the record demonstrates that had there been no reopening of the Provider's FYE 1983 cost report and a revised NPR issued, all of the Provider's appeal rights would have been extinguished. Because the Provider's only possible right (sic) a determination on its exception request and subsequent Board review is as a result of a reopening and the issuance of a revised NPR, the reopening regulations at [§] 405.1889, in addition to the regulation at 42 C.F.R. § 413.40(e), are directly applicable to this case.

In this case, the matter revised on the NPR involved malpractice costs and did not result in any additional disallowances under the TEFRA limit. In contrast, the Provider requested an adjustment for the amount disallowed under the

TEFRA limits pursuant to its original NPR, based on atypical services. Thus, the circumstances for which the Provider is requesting an adjustment to its TEFRA limits, atypical services, is not related to the subject of the revised NPR, Malpractice costs, and the revised NPR did not result in the TEFRA disallowances for which the Provider is requesting an adjustment. Accordingly, the Provider's request for an adjustment to its TEFRA limits was not related to matters revised on the NPR.

The Administrator finds that, in this case, the Provider's appeal rights are limited to the particular matter that was revised on the revised NPR and does not extend to matters that were finalized in the initial NPR. Thus, the Board improperly found jurisdiction over this matter. To hold otherwise, i.e., to permit appeal of issues not considered pursuant to the revised NPR that could have been appealed within 180 days of the original NPR, would be contrary to the plain meaning of the limitation period in the statute and regulations.

Foothill, Medicare and Medicaid Guide (CCH) ¶ 43,538, at 45,534-5.

In the instant case, the Provider requested and received cost limit exceptions under numerous bases in connection with the original FYE 1983 NPR. The revised NPRs for FYEs 1985 through 1988 only implemented those exceptions with respect to those TEFRA rate years, and resulted in no additional TEFRA disallowances for which the Provider is presently seeking relief, i.e., atypical LOS. The revised NPRs increased the Provider reimbursement.

The Provider had 180 days from the dates of the initial FYE 1985 through 1988 NPRs to file exceptions based on atypical Medicare LOS in accordance with 42 C.F.R. § 405.463(e), but did not do so, waiting instead until June 11, 1991. As in Foothill, the Board should find the Provider's requests untimely and dismiss the appeal. See also Einstein, *supra*.

The Intermediary also argued that the Provider is not correct in its assertion that the FYEs 1985 through 1988 NPR were not final; or that all parties knew they were placeholders for the final revised TEFRA rates resulting from the FYE 1983 request for relief.<sup>17</sup> The Intermediary also denies responding in any way to the Provider's request to reopen the FYEs 1985 through 1988 cost reports but instead acted on its own.<sup>18</sup> The Intermediary states that there is no

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<sup>17</sup> Tr. at 22 and 29.

<sup>18</sup> Tr. at 25.

evidence that this is true and the NPRs in question indicate that they are final.<sup>19</sup> The Intermediary also notes that the LOS request could have been made from those NPRs.<sup>20</sup>

The Intermediary points out that a number of court cases stand for the proposition that one cannot appeal issue A when issue B is revised in a revised NPR. See French Hospital Medical Center v. Shalala, 89 F.3d 1411 (9th Cir. 1996)(“French”), HCA Health Services of Oklahoma v. Shalala, 27 F.3d 614 (D.C. Cir. 1994)(“HCA”).<sup>21</sup> The French case in particular dispels the argument that merely recalculation of the limit is a reconsideration of it in a revised NPR. In addition, the Intermediary cites a case where the HCFA Administrator affirmed a Board dismissal of an appeal in which the provider attempted to appeal an issue in the same cost center as the revision, but not specifically related to the purpose of the revised NPR. See Providence Hospital v. Blue Cross of California, HCFA Administrator, October 29,1991, Unreported (“Providence”) and Tr. at 33.

The Intermediary also disputes the Provider’s claim that the LOS relief request had anything to do with the revised NPR. The change in LOS between 1983 and subsequent years was evident as soon as the FYE 1985 NPR was issued and was in no way affected by the revised NPR for FYE 1985 which carried through relief for atypical services adjustments.<sup>22</sup> It is not relevant that the new TEFRA target rate was created in the revised NPR because the appeal is for LOS adjustment which was present in the original NPR.<sup>23</sup> Also, the Provider was subject to the TEFRA limit in the first NPR and received additional reimbursement in the revision.<sup>24</sup>

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

- § 1395x(v)(1)(A) - Reasonable Cost
- § 1395ww(b) - Rate of Increase in Target Amounts for Inpatient Hospital Services

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<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Tr. at 24.

<sup>22</sup> Tr. at 26.

<sup>23</sup> Tr. at 27.

<sup>24</sup> Tr. at 28.

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

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|---|---|---|
| § 405.463(e)<br>(redesignated § 413.40(e))          | - | Hospital Requests Regarding<br>Applicability fo the Rate of<br>Increase Ceiling |
| § 405.463(g) and (h)<br>(redesignation § 413.40(g)) | - | Exceptions; Adjustments   |
| § 405.1885  | - | Reopening a Determination or<br>Decision  |
| § 405.1889  | - | Effect of a Revision  |

3. Cases:

Albert Einstein Medical Center v. Sullivan, 830 F. Supp. 846 (E.D. Pa. 1992), aff'd 6 F.3d 788 (3d Cir. 1993).

Anaheim Memorial Hospital v. Shalala, 1996 WL 282147 (C.D.Cal), aff'd 130 F.3d 845 (9th Cir. 1997).

Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Case No. 95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,222, rev'd HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,510.

Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB case No. 95-D28, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,228, rev'd HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) ¶43,538, aff'd No. CV 95-4674 KN, (C.D. Ca. January 2, 1997), Medicare and Medicaid Guide (CCH) ¶ 45,249.

French Hospital Medical Center v. Shalala, 89 F.3d 1411 (9th Cir. 1996).

HCA Health Services of Oklahoma v. Shalala, 27 F3d 614 (D.C. Cir. 1994).

Providence Hospital v. Blue Cross of California, HCFA Administrator, October 29,1991, Unreported.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, and testimony elicited at the hearing, finds and concludes as follows:

The Board finds that the Provider's requests for TEFRA relief for FYEs 1985 through 1988 were not timely filed. The Board notes that the Provider filed its requests for TEFRA relief from revised NPRs issued by the Intermediary. The Board finds that the only issues that the Provider can appeal from a revised NPR are those that were part of the reopening and revision. The Board finds that the revision dealt with the pass-through of TEFRA relief granted to the Provider for its base year, FYE 1983. The Board further finds that although the TEFRA limit itself was changed, the Provider is seeking relief from TEFRA on completely different grounds than the nature of the reopening and revision. The Board finds no evidence in the record to support the Provider's assertion that the TEFRA limits in FYEs 1985 through 1988 were understood to be provisional and that it was appropriate for the Provider to wait until 1983 base year relief was granted before they could apply for any additional TEFRA relief. In addition, the Board notes that the specific issue for which the Provider now seeks relief, LOS, was an issue at the time the initial NPRs were issued and should have been appealed at that time.

The Board notes that the Provider did not file any TEFRA exception requests within 180 days of their initial NPRs for FYEs 1985 through 1988. Rather, the Provider filed its TEFRA requests within 180 days of the revised NPRs issued for FYEs 1985 through 1988. The Provider states that the regulation at 42 C.F.R. § 405.463(e) does not distinguish between NPRs and revised NPRs as a basis for requesting TEFRA relief. The Provider further indicates that the limitations of 42 C.F.R. § 405.1889 are not applicable in the present case. The Board observes that the weight of recent court decisions indicates that appeals from revised NPRs are subject to the provisions of 42 C.F.R. § 405.1899, that limit appeals to the issues reopened and revised in the revised NPRs. See Anaheim, HCA, French, and Foothill, supra.

The Provider also claims that even if the provisions of 42 C.F.R. § 405.1889 are applicable to a request for TEFRA relief, that it meets the requirements of that regulation because its TEFRA rate was specifically modified as a result of the reopening and revision of its NPRs. The Board notes that the purpose of the reopening and revision of the FYEs 1985 through 1988 NPRs was to pass-through relief granted for atypical costs in the Provider's base year. Even though the TEFRA rate was adjusted, the Provider is not appealing the issue that caused the reopening and revision, atypical costs, but instead is seeking relief for changes in LOS. The Board has previously held that a provider is restricted in appealing a revised NPR to the very issue that led to the reopening and revision and cannot appeal issues under the same cost center, See Providence, supra, or in this case, TEFRA relief for an unrelated issue.

The Provider further states that there was an understanding that the TEFRA limits in the initial NPRs for FYEs 1985 through 1988 were provisional and would be changed by the relief that the Provider and Intermediary expected from the Provider's base year exception request. The Board did not find any evidence in the record to support the Provider's contention that the TEFRA limits in the initial NPRs were not final TEFRA rates and that the Provider could delay appeal of those limits until base year relief was granted. The Board also notes that the

Provider was affected by the limits in the initial NPRs and that the type of relief the Provider sought, for LOS changes, would have been evident at the time the initial NPRs were issued and that relief would have been in addition to that granted for the base year.

In summary, the Board finds that the Provider was required to submit its TEFRA requests from its initial NPRs and that revised NPR appeals are limited to the issues raised in the revisions. The Board also finds that the relief sought by the Provider was not related to the revised NPRs but to the initial NPRs and should have been appealed within 180 days of those NPRs. The Provider's TEFRA requests are therefore untimely.

DECISION AND ORDER:

HCFA's determination that the Provider's TEFRA request was untimely was correct. The Provider's appeal is dismissed.

Board Members Participating:

Irvin W. Kues  
James G. Sleep  
Teresa B. Devine  
Henry C. Wessman, Esquire

FOR THE BOARD:

Irvin W. Kues  
Chairman