

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

ON-THE-RECORD
98-D25

PROVIDER -Saint Joseph Medical
Center Burbank, California

DATE OF HEARING-
January 5, 1998

Provider No. 05-0235

Cost Reporting Period Ended -
December 31, 1986

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross of California

CASE NO. 95-0308

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ISSUE:

Was the Intermediary's denial of the Provider's Routine Cost Limit exception proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Saint Joseph Medical Center ("Provider") is a general short-term hospital, located in Burbank, California. The Provider is operating as a voluntary, non-profit hospital which is affiliated with the Sisters of Providence Health System. The Provider was also certified as a Skilled Nursing Facility ("SNF") and a Home Health Agency. The Provider's cost report for the period ended December 31, 1986 indicated that its costs had exceeded the SNF Routine Cost Limit ("RCL"). However, the Provider did not request an exception to the RCL. Blue Cross of California ("Intermediary") issued a Notice of Program Reimbursement ("NPR") on August 22, 1989. On February 26, 1993, the Intermediary reopened the cost report and revised it to adjust for malpractice costs in accordance with Medicare Program Instructions. On August 19, 1993, the Provider filed a request for RCL exception for the SNF. On July 15, 1994, the request was denied by HCFA. On November 15, 1994, the Provider appealed HCFA's denial to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835-.1841, and has met the jurisdictional requirements of those regulations. The estimated amount in dispute is approximately \$267,000.

The Provider was represented by Eytan R. Ribner, of Blumberg Ribner, Inc. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that there was an incremental increase of actual cost in excess of the RCL. The Provider maintains that where there is an incremental increase of actual cost in excess of the RCL, as in the June 11, 1993 revised NPR, an exception to the RCL should be granted. In support of its decision the Provider cites the following Board decisions: St. Joseph Hospital v. Aetna Life Insurance Company, PRRB Dec. No 95-D56, August 30, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,584, Rem'd HCFA Admr. Dec. October, 27, 1995 Medicare and Medicaid Guide (CCH) 43,951; Care Unit Hospital Of Dallas (Fort Worth, Tex.) v. Mutual of Omaha, PRRB Dec. No.95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,222, Rem'd HCFA Admr. May 5, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,510 ("Care Unit").

In those cases the Board remanded the issue to the intermediary to consider the exception request on its merits. In the Care Unit decision, the Board ruled that the intermediary improperly denied the provider's exception request based on the intermediary's contention that the request was untimely because it was filed within 180 days of a revised, but not

original NPR. The Provider argues that the governing regulation at 42 C.F.R. § 413.30, does not distinguish between original and revised NPRs.

INTERMEDIARY'S CONTENTIONS:

The Intermediary argues that the basis for HCFA's denial of the Provider's request for an exception to the RCL was that the request was filed based on the revised NPR and not the original NPR. The 180 day filing parameter would not be a problem if the revised NPR was the basis for filing an exception request. The Intermediary points out that the costs exceeded the RCL subsequent to the finalization of the cost report. That allowed the Provider a basis on which to file for an exception request at that time. The Intermediary contends that the cost report was revised to implement the adjustment of malpractice costs, and did not create the Provider's RCL problems. The Intermediary argues that the RCL problem with costs in excess of the RCL limit existed prior to the revised NPR and thus had been appealed from the initial NPR.

The Intermediary argues that the Provider is attempting to file an exception request under 42 C.F.R. § 413.30(f)(1), for atypical services and 42 C.F.R. § 413.30(f)(2), for extraordinary circumstances relating to malpractice insurance. The Intermediary points out that applying malpractice as a basis for an exception request does not fit the intent of the Medicare regulations. Malpractice had no bearing in placing the Provider's costs in excess of the RCL limit. The Intermediary points out that the excess costs already existed back in 1989 when the cost report was finalized, and was not caused by the malpractice cost.

The Intermediary notes that the Medicare regulation at 42 C.F.R. § 413.30 (f)(1) states:

Atypical services. The provider can show that the-(i) Actual cost of items or services furnished by a provider exceeds the applicable limit because such items or services are atypical in nature and scope, compared to the items or services generally furnished by providers similarly classified; and (ii) Atypical items or services are furnished because of the special needs of the patients treated and are necessary in the efficient delivery of needed health care.

(2) Extraordinary circumstances. The provider can show that it incurred higher costs due to extraordinary circumstances beyond its control. These circumstances include, but are not limited to, strikes, fire, earthquake, flood, or similar unusual occurrences with substantial cost effects. . . .

Id.

The Intermediary argues that adjusting for malpractice under program instructions does not fall within the parameters of the above cited regulation. Malpractice costs did not create a situation which falls under the atypical or extraordinary guidelines.

The Intermediary points out that in HCFA's July 15, 1994, letter it stated: "[i]t is HCFA's policy that when a revised NPR is issued, only the specific issues affected by the revised NPR are subject to appeal."¹ Thus, the Intermediary contends that the only issue appealable from the revised NPR is the labor and delivery room days issue. The Provider's right to appeal the RCL issue expired when its right to appeal from the initial NPR expired.

CITATIONS OF LAWS, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§ 1395x(v)(1)(A) - Reasonable Cost

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

§ 405.1801 - Introduction

§ 405.1803 - Intermediary Determination and Notice of Amount of Program Reimbursement

§ 405.1835-.1841 - Board Jurisdiction

§ 413.30 - Limitations on Reimbursable Costs

§ 413.30(f)(1) - Atypical Services

§ 413.30(f)(2) - Extraordinary Circumstances

§ 413.30(c) - Provider Requests Regarding Applicability of Cost Limits

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

§ 2932.B - Effect of a Correction

4. Case Law:

St. Joseph Hospital v. Aetna Life Insurance Company, PRRB Dec. No. 95-D56, August 30, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,584, Rem'd HCFA Admr. Dec. October 27, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,951.

¹ Intermediary Exhibit I-1.

Care Unit Hospital of Dallas (Fort Worth, Tex) v. Mutual of Omaha Insurance Company, PRRB Dec. No. 95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,222. Rem'd HCFA Admr. May 5, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,510.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

The Board finds that HCFA's denial of the Provider's request for an exception to the RCL was proper because the Provider failed to request an exception within 180 days of the original NPR. According to the provisions of 42 C.F.R. § 413.30(c):

A provider may request a reclassification, exception, or exemption from the cost limits imposed under this section. In addition, a hospital may request an adjustment to the cost limits imposed under this section. The provider's request must be made to its fiscal intermediary within 180 days of the date on the intermediary's notice of program reimbursement. The intermediary makes a recommendation on the provider's request to HCFA, which makes the decision. HCFA responds to the request within 180 days from the date HCFA receives the request from the intermediary

Id. (emphasis added).

Since the Provider failed to make an exception request within the 180 days after the date of the original NPR, the Provider is barred from requesting an exception at a later date.

The Board finds that the Intermediary did reopen the Provider's cost report to implement the malpractice costs, and did issue a revised NPR for the malpractice costs. The Board finds that the malpractice issue is the only issue that the Provider can appeal from the revised NPR. This is in agreement with HCFA's letter of July 15, 1994 which states in part: "[i]t is HCFA's policy that when a revised NPR is issued, only the specific issues affected by the revised NPR are subject to appeal." Id. The Board's position is consistent with the HCFA Pub. 15-1 § 2932.B which states:

Where a correction is made by an intermediary in a determination on the amount of program payment which it has reopened, such a correction shall be considered a separate and distinct determination to which the hearing provisions of this chapter apply;. . . .

Id.

The Board finds that a revised NPR is a separate and distinct determination from that of an original NPR, a Provider can only request reopening for those matters at issue in the revised NPR. Therefore, the Provider in this case can only appeal the issue that was in the revised NPR, and in this case that issue is malpractice cost. The Provider cannot appeal the exception to the RCL from the revised NPR.

The Board finds that the NPR dated August 22, 1989 was a final determination as defined by 42 C.F.R. § 405.1801(a)(1) and described in 42 C.F.R. § 405.1803. The Board finds that under 42 C.F.R. § 413.30(c) the Provider must request a hearing within 180 days after the date of the NPR. Since the Provider did not request a hearing within 180 days it is now barred from requesting a hearing.

DECISION AND ORDER:

The Intermediary's denial of the Provider's routine cost limit exception was proper. The Intermediary's denial is affirmed.

Board Members Participating:

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

FOR THE BOARD:

Irvin W. Kues
Chairman