

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

98-D43

**PROVIDER** -Deaconess Medical Center  
Spokane, Washington

**DATE OF HEARING-**  
October 10, 1997

Provider No. 50-0044

Cost Reporting Period Ended -  
December 31, 1988

**vs.**

**INTERMEDIARY** -  
Mutual of Omaha Insurance Company

**CASE NO.** 92-0033

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ISSUE:

Was the Intermediary's denial of the Provider's request for an adjustment to its TEFRA target rate for its rehabilitation unit proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Deaconness Medical Center ("Provider") is a general short-term hospital located in Spokane, Washington. The Provider had as part of its organization a rehabilitation unit that was not reimbursed by Medicare under its prospective payment system. It was reimbursed on a reasonable cost basis and was subject to the Tax Equity and Fiscal Responsibility Act ("TEFRA") target limits. The Provider sought exceptions to those target limits as permitted by the Medicare regulations at 42 C.F.R. § 413.40(g).

The following are jointly stipulated facts by the Provider and current intermediary, Mutual of Omaha.

1. The former intermediary, Aetna Life Insurance Company, issued a Notice of Program Reimbursement ("NPR") on September 19, 1991, in final settlement of its audit of the Provider's December 31, 1988 cost report.
2. The Provider requested an adjustment to the TEFRA target rate by letter dated and sent by certified mail on March 17, 1992, the 180th day after the date of the NPR.
3. On or about June 23, 1992, the Intermediary recommended approval of the Provider's request as detailed in the Intermediary's letter of said date to HCFA.
4. On or about April 29, 1993, by letter from Charles R. Booth to the Intermediary, HCFA refused to consider this request because the March 17, 1992 letter was received by the Intermediary on March 19, 1992.
5. On or about August 5, 1993, the Intermediary replied to Mr. Booth by letter, stating in pertinent part:

Insofar as the exception request for cost period ending December 31, 1988, I believe that although the request was not actually received in hand by my office until March 19, 1992, the request was constructively received March 17, 1992, the date of the U.S. Postal Service postmark. I believe that the guidelines for determining the timely receipt of a cost report or payment addressed in HCFA Pub. 13-2, § 2219.4(c) should apply.

6. All exhibits to the position papers are admissible.

The Provider's filing to the Provider Reimbursement Review Board ("Board") has met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-.1841. The Provider was represented by Thomas J. Weiss, Esquire of Seyfarth, Shaw et.al. The Intermediary was represented by Mr. Thomas Bruce of Mutual of Omaha.

#### PROVIDER'S CONTENTIONS:

The Provider contends that there is a single issue before the Board in these proceedings, i.e., whether it complied with the 180-day requirement of 42 C.F.R. § 413.40(e)(1) as it existed in March 1992 with respect to application for exemption or exception to the TEFRA target rate. That text stated that a hospital must make the request for an exemption or exception to its fiscal intermediary no later than 180 days from the date on the intermediary's NPR. In 1995, the regulation was altered to read that the hospital's request must be received by its fiscal intermediary no later than 180 days after the date on the intermediary's initial NPR for the cost reporting period for which the hospital requests an adjustment.<sup>1</sup>

The Provider argues that there is no evidence of any pre-1995 interpretation of the language of the regulation to mean in substance what it was amended to say in 1995. In the letter of the Bureau of Policy Development ("BPD") dated August 27, 1993 to the Intermediary,<sup>2</sup> concerning the untimeliness of the request, BPD interpreted the language of the regulation to mean that the hospital must file its exception request with its fiscal intermediary no later than 180 days from the date on the initial notice of program reimbursement. Thus, even as late as August 1993, BPD considered the term "made" as used in the regulation to be equivalent to "filed." At that time, according to Provider's Exhibit 5, the Intermediary also believed that the guidelines for determining the timely receipt of a cost report or payment addressed in HCFA Pub. 13-2, § 2219.4(c) could apply. That guideline, in brief, is the "postmark rule." Further, the same interpretation of the term "filed" appears at 42 C.F.R. § 405.1801(a), which says: "Date of filing, and date of submission of materials, mean the day of the mailing (as evidenced by the postmark) or hand delivery of materials, unless otherwise defined in this subpart." The term "date of receipt" is defined in that regulation as the date on the return receipt of return receipt requested, mail, unless otherwise defined in this subpart.

Accordingly, the Provider observes that the understanding of the Intermediary and the Provider as of March 1992, was consistent with the regulations and manual provision. Since it was also the understanding of BPD that "made" is equivalent to "filed," BPD's interpretation was also

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<sup>1</sup> See, Federal Register at 60 F.R. 45,778, 45,849-50 (September 1, 1995).

<sup>2</sup> See Provider's Exhibit 7.

consistent with that of the Provider and Intermediary. That conclusion is reinforced by the fact that when the Secretary amended the regulation, even the Secretary acknowledged that the use of the word “made” in 42 C.F.R. § 413.40(e)(1) has resulted in varying interpretations of the timely filing requirement by hospitals and their fiscal intermediaries. Given the undeniable concurrence among the Provider, BPD, and the Intermediary that as of March 1992, the requirement that the request be “made” was equivalent to a requirement that it be “filed,” it is appropriate to apply the regulatory definition of “filed” to that requirement. Accordingly, the Provider’s request for an exception to the TEFRA limit was timely and should be resubmitted by the Intermediary and be considered on its merits.

#### INTERMEDIARY’S CONTENTIONS:

The Intermediary contends that there really are no factual disputes in this case. The Provider mailed its request for an adjustment for a rate of increase ceiling on the 180th day from the date of the NPR, and Aetna, the original intermediary, received this request 182 days after the NPR. The regulation at 42 C.F.R. § 413.40(e)(1) states that the hospital's request must be made to its fiscal intermediary no later than 180 days after the date on the intermediary's notice of amount of program reimbursement. The question the Board has to answer is: what does the word “made” mean in this regulation? If it means placed in the mail, then the Provider's request was timely, and the Board should decide in the Provider’s favor. However, if “made” means received by the Intermediary, then the request is late, and the Board should decide in favor of the Intermediary.

The Intermediary notes that the Provider representative pointed out earlier that HCFA has already really answered the question of what “made” means. In the Federal Register, dated September 1995, HCFA issued what it termed a “clarification” to the existing regulations. This is not a retroactive application. The word “made”, according to HCFA, has always meant received by an intermediary, and it just wanted to issue a clarification.

Furthermore, the Intermediary observes that Black’s Law Dictionary (“Black’s”) defines “made” as filed. Black’s states, at least in part, that a paper is said to be filed when it is delivered to the proper officer and received by him and kept on file as a matter of record and reference. Therefore, applying Black’s definitions to the current case, it is clear that the request was not made until it was actually delivered to Aetna’s office on the 182nd day after the NPR date. Thus, Black’s supports HCFA's view that “made” means the request must be received by the hospital’s fiscal intermediary within 180 days of the NPR.

The Intermediary notes that the Provider’s representative had also referenced the governing regulations over reopenings and appeals at 42 C.F.R. § 405.1801. Had HCFA intended “made” or “filed” to mean placed in the mail, then it would have said so. These regulations governing appeals and reopenings again are located in Subpart R, clearly defined the date of filing for the purpose of that subpart only as the date of mailing. Further, 42 C.F.R. § 413.40, which was applicable to the Provider's request, makes no such statements. This discrepancy

was purposeful. It intended for the word “made” in the controlling 42 C.F.R. § 413.40 to take on its normal meaning, i.e., the meaning given by Black’s Law Dictionary that it is received. In contrast, if HCFA had intended the word “made” or “filed” in the reopening regulations to mean “mailed”, and it says this is not the normal meaning of the word, the regulation in Subpart R explicitly defines “filed” to mean mailed.

The Intermediary further notes that the Provider argues that Aetna approved the request for an adjustment. However, the controlling regulation at 42 C.F.R. § 413.40(e)(2) makes clear that unless HCFA has authorized an intermediary to grant an adjustment request, only HCFA has the authority to grant that request. Aetna had no such authorization.<sup>3</sup>

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law:

42 U.S.C. § 1395x(v) - Reasonable Cost

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

§ 405.1801 - Introduction

§§ 405.1835-.1841 - Board Jurisdiction

§ 413.40(e)[1987] - Hospital Requests Regarding  
Applicability of the Rate of  
Increase Ceiling

§ 413.40(e)(1)[1995] - Timing of Application

§ 413.40(e)(2)[1995] - Intermediary Recommendation

§ 413.40(e)(4)[1995] - Notification and Review

§ 413.40(g) - Adjustments

3. Program Instructions - Intermediary Manual (HCFA Pub. 13-2):

§ 2219.4(c) - Proof of Receipt

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

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board finds and concludes that the Provider properly applied 42 C.F.R. § 413.40. Thus, the Provider “made” its request for an appeal once it placed the request in the U.S. mail. This initiated a chain of irreversible events once the request was placed in the hands of a legally recognized agent, the United States Post Office. The regulation at 42 C.F.R. § 413.40 (1987) specifically states:

(e) Hospital requests regarding applicability of the rate of increase ceiling. A hospital may request an exemption from, or exception to, the rate of cost increase ceiling imposed under this section. The hospital’s request must be made to its fiscal intermediary no later than 180 days from the date on the intermediary’s notice of program reimbursement. The intermediary will notify the hospital of HCFA’s decision. The time required for HCFA to review the exception request is considered good cause for the granting of an extension of the time limit to apply for review by the Provider Reimbursement Review Board, as specified in § 405.1841(b) of this chapter. HCFA’s decision is subject to review under Subpart R of Part 405 of this chapter. (Emphasis added).

The Board concludes that the text of the regulation at 42 C.F.R. § 413.40(e) does not expressly state that a TEFRA exception request must be received by the Intermediary within 180 days from the Notice of Program Reimbursement. Rather, the regulation specifies that “the hospital request must be made to its fiscal intermediary no later than 180 days from the date on the intermediary’s notice of program reimbursement.” The Board opines that “made” means that a provider must initiate its exception request by mailing or by other delivery method, on or before the 180-day limitation period. The regulatory language is void of any reference requiring that an intermediary must actually receive the exception request prior to the 180 day deadline. Accordingly, the Provider’s tender of its request to the Intermediary, employing the U.S. Post Office on March 15, 1992 was timely submitted.

The Board also reasons that there is no way for an exception applicant to use all time allotted to it by the regulation if it must depend on an intermediary’s actual receipt of an exception submission. When or how an intermediary receives or documents its receipt of an item could vary among intermediaries due to modification of internal mail control procedures. The Board concludes that a standard which employs the United States Postal Service or other recognized means of delivery that requires an item to be date stamped or postmarked the day it is accepted for delivery is a fair and equitable means to document the tender of TEFRA exception requests by applicants.

The Board also avers that in ruling as to whether exception requests mailed or otherwise submitted for delivery on or before the last day of the 180 day limitation period are timely, HCFA is not deprived of the time it has to perform its statutory obligation to approve or deny

a request. See 42 U.S.C. § 1395rr(b)(7). The Board opines that the statutory sixty day limitation period would not begin to run until an exception request is “filed.” Id. With the exception of the regulations at 42 C.F.R. § 405.1801(a) governing submissions to the Board, the plain meaning of the term ‘filed’ with respect to submitting documents to an adjudicatory body, is “received,” e.g., filed with the clerk of the court. Accordingly, the Board finds its interpretation of the regulation consistent with the statute in that it does not deny HCFA the statutory time period to which it is entitled for reviewing TEFRA exception requests.

The Board finds that the Intermediary’s use of the regulation at 42 C.F.R. § 413.40(e)(1) - (e)(4) [1995] is not relevant to the case at hand. The cost report before the Board was calendar year ended 1988. The 1988 regulation applies, not the 1995 revision.

DECISION AND ORDER:

The Provider timely filed its TEFRA exception request. The Board remands the case to the Intermediary to review the case on its merits. The Intermediary’s determination is reversed.

Board Members Participating:

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

Date of Decision: April 22, 1998

FOR THE BOARD:

Irvin W. Kues  
Chairman