

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

98-D86

**PROVIDER -**  
Catskill Dialysis and Renal Disease  
Center  
Monticello, New York

**DATE OF HEARING-**  
February 18, 1998

Provider No.           33-2546

**vs.**

**INTERMEDIARY -**  
Blue Cross and Blue Shield Association/  
Empire Blue Cross and Blue Shield

**CASE NO.**   94-3045

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ISSUE:

Was the Intermediary's denial of the Provider's request for an exception to its End-Stage Renal Disease ("ESRD") composite rate proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Catskill Dialysis and Renal Dialysis Center ("Provider") is a freestanding renal dialysis facility located in Monticello, New York. The Provider began providing services in December of 1992, and filed its first complete annual cost report under the Medicare program for the fiscal year ended December 31, 1993. On September 28, 1993, the Health Care Financing Administration ("HCFA") notified Empire Blue Cross and Blue Shield ("Intermediary") that it was reopening the process for providers seeking an exception to their ESRD composite rates, effective November 1, 1993.<sup>1</sup> Under HCFA's program instructions, all facilities had to file their ESRD composite rate exception request by April 29, 1994. In turn, the Intermediary notified the Provider on October 1, 1993 of the reopening exception process, as well as the due date of April 29, 1994 by which it had to receive the Provider's exception request.<sup>2</sup> On April 27, 1994, the Provider filed for an exception to its ESRD composite rate, which was received by the Intermediary on April 28, 1994.<sup>3</sup>

The Intermediary reviewed the Provider's request and found that the Provider failed to submit all of the required documentation pursuant to the instructions set forth under § 2725.3E of the Provider Reimbursement Manual ("HCFA Pub. 15-1").<sup>4</sup> The Intermediary identified four specific items which were not included with the exception request:

- (1) Provider's latest filed cost report;
- (2) A budget estimate for the next 12 months on cost reporting forms;
- (3) An explanation of unusual costs reported on the facility's actual or budgeted cost report; and
- (4) An explanation of any significant increases or decreases in budgeted costs and data compared to actual cost and data reported on the latest filed cost report.

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<sup>1</sup> Intermediary Exhibit I-1.

<sup>2</sup> Intermediary Exhibit I-2.

<sup>3</sup> Intermediary Exhibit I-3.

<sup>4</sup> Intermediary Exhibit I-4.

The Intermediary advised the Provider that the April 29, 1994 deadline for filing a complete exception request had expired, and that its returning of the request to the Provider did not extend the deadline for submission of an exception request with all required documentation.

Pursuant to the appeals procedures set forth under 42 C.F.R. § 413.170(h) and the regulatory provisions of 42 C.F.R. §§ 405.1835-.1841 governing the jurisdiction requirements of appeals before the Provider Reimbursement Review Board (“Board”), the Provider appealed the Intermediary’s denial of its exception request and has met the requirements of those regulations. The estimated Medicare reimbursement effect is approximately \$325,000.

The Provider was represented by Frank D. D’Errico, Esquire, of Frank N. D’Errico and Associates. The Intermediary’s representative was Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

#### PROVIDER’S CONTENTIONS.<sup>5</sup>

It is the Provider’s contention that the Intermediary improperly denied its request for an exception to the ESRD composite rate. Whereas the Intermediary claimed four documentary reasons for the rejection, the Provider argues that only the failure to file a cost report is relevant to the Intermediary’s determination in this case. With respect to the Provider’s failure to submit a budget estimate on cost reporting forms, the Provider insists that the Intermediary had such data, albeit not on cost reporting forms. The Provider submits that this insignificant discrepancy should not be the basis for denying its request, and that the information needed to make a determination concerning budget estimates was in the Intermediary’s possession. As to the failure to explain unusual costs or significant increases in budgeted costs, the Provider points out that these two alleged bases for rejection do not apply. The Provider’s request for an increase in no way related to an “unusual” occurrence, nor was there a “significant” or “unexpected” increase in budgeted costs.

The Provider believes that the sole issue before the Board is whether the Provider submitted a cost report as part of its documentation for the exception request.<sup>6</sup> On this dispositive issue, the Provider urges the Board to consider not only the evidence presented, but also the relevant evidence and testimony which the Intermediary could have, and should have, provided in the presentation of its case. The Provider submits that extensive evidence has been presented to substantiate its claim that the cost report (Provider Exhibit P-2) was in fact timely submitted on April 28, 1994 as part of the exception request package. In support of this declaration, the Provider refers to the testimony of its owner and operator who testified of his own personal

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<sup>5</sup> In its original position paper, the Provider stated that “[t]here is no argument that in April of 1994, the administration . . . failed to file some of the necessary documents in order to satisfy the needs of the exception review process.”

<sup>6</sup> Provider Exhibit P-2.

knowledge that the cost report was indeed part of the original exception submission.<sup>7</sup> He further testified that the Provider never received any notice of violation for failure to file a timely cost report.

The Provider points out that the Intermediary initially advised that it had no record of receiving the entire exception package. Upon further inquiry, the Intermediary admitted that it had received the exception request on April 28, 1994, but then took the position that the submission was incomplete. In rebuttal to this subsequent contention, the Provider refers to its appeal request to the Board wherein the Provider's chief executive officer noted that the Intermediary's representative revealed in a telephone conversation that the missing material had been retrieved from someone else's desk.<sup>8</sup> Given this scenario, the Provider argues that it can only be concluded that the Intermediary must have received both the exception request and supporting documentation which were submitted simultaneously. While the cost report data may not have been referred to in the table of contents and were separate and intact documents, such a procedure did not violate any applicable rule or regulation, and is not a circumstance that should be held against the Provider.

With respect to the Intermediary's presentation, the Provider observes that, while the Intermediary was prepared to rest on the record in this case, the Board chose to question the Intermediary's witness and allowed the parties' counsels the opportunity to also ask questions based on the Board's examination. In this regard, the Provider objected to the hearsay information furnished by the Intermediary's witness who had no direct knowledge as to the facts relating to the processing of the exception request. However, it was learned through the testimony of the Intermediary's witness that the Intermediary has a copy of the cost report in question for this case which was stamped to show the date it was received. Accordingly, the Provider respectfully submits to the Board that, if the Intermediary was in possession of a copy of the cost report showing when it was received, why not simply produce the document and end any speculation that the cost report was not timely filed. The Provider believes the only possible answer is that the Intermediary's own documents would prove that the Provider was correct.

In summary, the Provider contends that it has met its prima facie burden of proof through the testimony of its witness and the exhibits introduced into evidence. The Provider has established that the cost report was submitted on time with the other required documents. The Intermediary has produced no direct, competent evidence to the contrary, and its failure to produce a copy of the cost report showing its date of receipt should be viewed as fatal to the Intermediary's position on this issue. Given these glaring failures of proof, it would be unjust and unfair for the Board to find for the Intermediary on the basis of hearsay evidence onl

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<sup>7</sup> Tr. at 28-32.

<sup>8</sup> Provider Exhibit P-4.

y. As an isolated essential facility, as defined under 42 C.F.R. § 413.170(g)(2), the Provider should be retroactively granted the rate increase sought in its exception request which was timely filed with all of the required documentation.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its denial of the Provider's exception request to the ESRD composite rate fully conformed with the specific procedures set forth in the regulations and manual instructions for processing such requests. The regulations at 42 C.F.R. § 413.170(f)(5) and (f)(6) state the following:

(f)(5) The facility is responsible for demonstrating to HCFA's satisfaction that the requirements of this section, including the criteria in paragraph (g) of this section, are met in full. That is, the burden of proof is on the facility to show that one or more of the criteria are met, and that the excessive costs are justifiable under the reasonable cost principles set forth in this part. The burden of proof is not on HCFA to show that the criteria are not met, and that the facility's costs are not allowable.

(f)(6) If requesting an exception to its payment rate, a facility must submit to HCFA its most recently completed cost report as required under § 413.174, and whatever statistics, data, and budgetary projections are determined by HCFA to be needed to determine if the exception is approvable. HCFA may audit any cost report or other information submitted. . . .

42 C.F.R. § 413.170(f)(5) and (f)(6) (emphasis added).

As revealed in the table of contents of the Provider's exception request,<sup>9</sup> the Provider did not include its latest filed cost report, a budget estimate for the next 12 months on cost reporting forms, an explanation of unusual costs reported on the facility's actual or budgeted cost report, or an explanation of any significant increases or decreases in budgeted costs and data compared to actual cost and data reported on the latest filed cost report. The Intermediary further contends that the Provider did not supply convincing evidence that its per treatment costs, as well as future per treatment costs attributable to the criteria set forth at 42 C.F.R. § 413.170(g)(1) through (g)(6), are in excess of its composite payment rate. Since the Provider's "11th hour request" was received by the Intermediary on April 28, 1994, and since HCFA did not extend the filing deadline of April 29, 1994, the Provider did not have time to reapply for an exception to its ESRD composite rate pursuant to HCFA Pub. 15-1 § 2720.2.

In response to the Provider's disclosure at the hearing that a copy of the cost report was submitted as part of its exception request, the Intermediary notes that the Provider's original

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<sup>9</sup> Intermediary Exhibit I-3.

position paper was totally silent as to the complaint of whether the Intermediary was in possession of the cost report. Since the question of whether or not a cost report was received by the Intermediary did not surface until the day of the hearing, the Intermediary insists that this is a misdirection of what the real problem is in this case, and that the Intermediary should not be faulted for not reading the Provider representative's mind. Even if the Provider stretches the facts as far as possible, the Intermediary believes the exception request speaks for itself and there is no reference that a cost report was part of the submitted package.

While the Provider believes that the person responsible for processing the exception request at the Intermediary should have undertaken the additional burden of looking around the office for a copy of the cost report submitted as part of the annual cost settlement process, the Intermediary argues that the performance of this additional and exceptional procedure would not change the fact that the Provider's exception request was still incomplete. Inasmuch as the exception request does not sufficiently explain the variances between the target costs and what the Provider identified as its past and future costs, the Provider failed to meet the required standards which would entitle it to an exception to the ESRD composite rate.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§ 1395x(v)(1)(A) - Reasonable Cost

2. Regulations 42 C.F.R.:

§ 405.1835-.1841 - Board Jurisdiction

§ 413.170 et seq. - Payments for Covered Outpatient Maintenance Dialysis Treatments

§ 413.170(f) - Procedures for Requesting Exceptions to Payment Rates

§ 413.170(g) - Criteria for Approval of Exception Requests

§ 413.170(h) - Appeals

§ 413.174 - Recordkeeping and Cost Reporting Requirements for Outpatient Maintenance Dialysis

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

- § 2720.2 - Time Period for Requesting Exception
- § 2721 - Exception Requests - All Facilities
- § 2723 - Responsibility of Intermediaries
- § 2725.3E - Isolated Essential Facility

FINDINGS OF FACTS, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties contentions, evidence presented, testimony elicited at the hearing, and the Provider’s post-hearing brief, finds and concludes that the Intermediary correctly applied the procedures set forth in 42 C.F.R. § 413.170 et seq. and HCFA Pub. 15-1 § 2721 which establish the specific requirements for requesting an exception to the ESRD payment rates.

The regulation at 42 C.F.R. § 413.170(f) includes the following:

(5) The facility is responsible for demonstrating to HCFA’s satisfaction that the requirements of this section, including the criteria in paragraph (g) of this section, are met in full. That is, the burden of proof is on the facility to show that one or more of the criteria are met, and that the excessive costs are justifiable under the reasonable cost principles set forth in this part. The burden of proof is not on HCFA to show that the criteria are not met, and that the facility’s costs are not allowable.

(6) If requesting an exception to its payment rate, a facility must submit to HCFA its most recently completed cost report as required under § 413.174, and whatever statistics, data, and budgetary projections are determined by HCFA to be needed to determine if the exception is approvable. HCFA may audit any cost report or other information submitted. . . .

(7) HCFA will accept an exception request on the date that HCFA concludes that it has received all materials necessary to determine if the exception is approvable.

42 C.F.R. § 413.170(f)(5), (f)(6) and (f)(7).

The manual instructions at HCFA Pub. 15-1 § 2721 reiterate the facility’s burden of proof, and its responsibility for justifying and demonstrating to HCFA that the requirements of the

exception request are met in full. In addition to the submission of its most recently filed cost report, the manual provisions require the submission of a projected budget estimate and utilization trend through the exception rate period with supporting documentation for significant variances between budgeted and actual amounts for both costs and treatments.

In the instant case, the Board finds that the Provider has presented no evidence which indicates that its exception request included the submission of the following four specific items:

- (1) Latest filed cost report;
- (2) Budget estimates for the next 12 months;
- (3) An explanation of unusual costs on the actual or budgeted cost report; and
- (4) An explanation of significant increases or decreases between the actual and budgeted amounts.

Based on its review of the Provider's exception request,<sup>10</sup> the Board found no reference to the above-required material in either the table of contents or the documentary submission. In the absence of any evidence to the contrary, it is the Board's conclusion that the Provider has not met its burden of proof that a complete and appropriate exception request was submitted to the Intermediary in accordance with the submission standards set forth under the governing regulations and manual instructions.

#### DECISION AND ORDER:

The Intermediary properly denied the Provider's request for an exception to its ESRD composite rate. The Intermediary's determination is affirmed.

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<sup>10</sup> Provider Exhibit P-1.

Board Members Participating:

Irvin W. Kues  
James G. Sleep  
Henry C. Wessman, Esquire  
Martin W. Hoover, Jr., Esquire  
Charles R. Barker

Date of Decision: September 01, 1997

FOR THE BOARD:

Irvin W. Kues  
Chairman