

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

ON-THE-RECORD  
2000-D33

**PROVIDER -**  
Good Samaritan Hospital  
Suffren, New York

**DATE OF HEARING-**  
February 17, 2000

Provider No. 33-0158

Cost Reporting Period Ended -  
December 31, 1994

**vs.**

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

**CASE NO.** 97-2391

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ISSUE:

Were the Intermediary's adjustments to the reasonable compensation equivalent ("RCE") limits proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Good Samaritan Hospital is a 406 bed not-for-profit, general, short term, acute care hospital located in Suffren, New York. Originally, this appeal also included issues relating to the Provider's disproportionate share and DRG payments. However these issues have been resolved.<sup>1</sup> The Intermediary also disallowed portions of compensation paid to the Provider's Hospital Based Physicians (HBP), applying the RCE limits published in the Federal Register February 20, 1985, applicable to the cost years beginning on and after January 1, 1984. The Intermediary issued a Notice of Program Reimbursement wherein the impact of the application of the RCE limits was approximately \$100,000 in Medicare reimbursement. The Provider appealed the Intermediary determination to the Provider Reimbursement Review Board ("Board"), and has met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-.1841.

Initially, the Intermediary raised jurisdictional questions regarding the RCE issue. Subsequently, the Intermediary withdrew its jurisdictional objections,<sup>2</sup> and both parties agreed to have the RCE issue heard on the record.<sup>3</sup> The Provider's representative is Mr. Robert Jacobs of Health/ROI. The Intermediary is represented by Ms. Eileen Bradley, Esquire, Blue Cross and Blue Shield Association.

Medicare Statutory and Regulatory Background:

Congress enacted Section 108 of the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982 (Public Law 97-248, September 3, 1982) for the addition of a new Section 1887 of Title XVIII of the Social Security Act. This section deals explicitly with distinguishing between services to patients and services to providers in reimbursing provider-based physicians. (Commonly, physicians are considered "based" in a hospital or other provider if they receive compensation from the provider or another entity for services furnished in the provider.) The intent of Section 1887 was to give clear distinction between physician services which are reimbursed as Part A costs from those reimbursable as Part B based upon charge payment criteria. In particular, § 1887 (a)(2)(B) requires (once that portion of physician compensation has been determined to be related to services for the provider) the Secretary to establish through regulation "the reasonable compensation equivalent for any services."

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<sup>1</sup> Provider Letter Dated November 2, 1999.

<sup>2</sup> Intermediary's Letter Dated November 4, 1999.

<sup>3</sup> Intermediary's Letter Dated November 23, 1999.  
Provider Letter Dated November 2, 1999.

HCFA published a proposed rule on October 2, 1982 (47 Fed. Reg. 43586, October 2, 1982) designed to implement § 1887. In particular, it set forth HCFA's policy statement concerning the proper application of the RCE limits and the frequency with which the RCE limits would be updated:

(3) Updating the Limits. We propose to update the limits annually on the basis of the updated economic index data. (Emphasis added).

The final rule was published on March 2, 1983 (48 Fed. Reg. 8923). This final rule once again stressed both the "application of limits" and "updating of limits".

C. Updating the RCE Limits. The RCE limits will be updated annually on the basis of updated economic index data. When we do this without revising the methodology for computing the limits, we will publish a single general notice in the Federal Register, setting forth the new limits and their effective date.

Id. (Emphasis added).

HCFA published a new RCE limit table for provider's fiscal years beginning in 1984. In the preamble to the 1984 limits. (50 Fed. Reg. 7124, February 20, 1985). In the preamble to the 1984 limits, HCFA again acknowledged the limited applicability and annual nature of each year's RCE limits:

[O]n March 2, 1983, we published in the Federal Register the RCE limits . . . that are applicable to cost reporting periods beginning during 1982 and 1983.

Section 405.482 (f) requires that before the start of a period to which a set of limits will be applied, we will publish a notice in the Federal Register that sets forth limits and explains how they were calculated. If the limits are merely updated by applying the most recent economic index data without revising the methodology, then revised limits will be published without prior publication of a proposal or comment . . .

Thus, because we are calculating the 1984 limits using the same methodology that was used to calculate the limits published on March 2, 1983 . . . We are now publishing these revised limits in final.

Id.

#### PROVIDER'S CONTENTIONS:

The Provider contends that the RCE limits utilized by the Intermediary do not apply to the fiscal year at issue. The RCE limits set forth in HCFA Pub. 15-1 § 2182.6(f) are limited specifically to the years indicated, i.e. 1983 and 1984, as that section states. No RCE limits have been published, as required

by the regulations, for the years subsequent to 1984. Therefore, no RCE limits exist to apply to 1994, the fiscal year at issue. Further, the Provider contends that the regulations require HCFA to update the RCE limits on an annual basis. When the subsections of the applicable regulations, 42 C.F.R. § 405.482, are read together, as they must be, they show a clear intent that the RCE limits be updated annually based on the most recent economic index data and published in the Federal Register prior to the application of the limits to each cost reporting period.

The Provider argues that even if the regulations are ambiguous as to whether the RCE limits must be updated annually, the Board must look to HCFA's own interpretation of those regulations to determine how they should be implemented. The publications and statements that HCFA has made concerning the RCE limits show a clear understanding on the agency's part that it is required to update and publish the RCE limits on an annual basis. This interpretation is expressed clearly in the Federal Register preambles to both the proposed and final RCE limit regulations, in the Federal Register preamble to the published 1984 RCE limits and in HCFA Pub. 15-1 § 2182.6. Since HCFA has never modified this stated interpretation, it should be bound by its own publicly stated interpretation of the regulations and precluded from now claiming that it is not required to update the RCE limits on an annual basis.

The Provider points out that HCFA complied with the statute and updated the 1982 RCE limits for 1983, and the 1983 limits for 1984. In each case, the revisions resulted in an increase in the RCE limits, in accordance with data on average physician specialty compensation and updated economic index data. In that physicians' salaries were increasing across specialties and locations during the period in question, the Provider contends that at least some updated RCE limit would have been necessary to assure that reimbursement to providers under the Medicare program for Part A physician services would continue to be reasonable. HCFA did not produce any evidence to suggest that on a national or regional basis Part A physician costs were static during the year at issue in this appeal.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary applied the RCE limits that HCFA had published on February 20, 1985, and were effective for cost reporting periods beginning on or after January 1, 1984.( 50 Fed. Reg. 7124, 1985).<sup>4</sup> See also 42 C.F.R. § 405.482.<sup>5</sup> As it must, the Intermediary complied with existing applicable regulations that were in effect for the subject cost reporting period. However, the Provider maintains that the Medicare regulations at 42 CFR § 405.482 (b) and (f) require HCFA to update the RCE limits on annual basis. According to the Provider, the agency's failure to do so for the cost reporting period at issue should cause the Board to set aside the limits and the Intermediary's settlement of the cost report. The Provider believes that HCFA is in violation of its regulations and application of obsolete limits does not produce reasonable reimbursement to the Provider.

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<sup>4</sup> Exhibit I-18

<sup>5</sup> Exhibit I-10

The Intermediary contends that the Provider's argument relies on a fatally flawed misinterpretation of the regulation. Even though HCFA may have expressed its intent to issue annual updates when it put the original RCEs into effect and even though the regulation at 42 C.F.R. § 405.482(b) may reflect this aspiration, the rule contains no language compelling HCFA to do so. Moreover, HCFA has consistently interpreted its rule as not mandating annual updates.

If HCFA chooses to change the RCE limits before the start of a cost reporting period, the regulation provides that it will publish them in advance in the Federal register prior to their being put in to effect. See 42 C.F.R. § 405.482(f)(1). If HCFA elects to change the methodology for determining the RCE limits, the regulation provides that it will publish a notice with opportunity for public comment in the Federal Register. However, these two provisions plainly impose no obligation on HCFA to make annual updates. *Id.* at (f)(3). They simply set forth the steps that HCFA will follow if the agency elects to update the RCE limits or modify the formula for calculating them.

The Intermediary points out that in Good Samaritan Hospital and Health Center v. Blue Cross and Blue Shield Association/Community Mutual Insurance Co, PRRB Dec. No. 93-D30, April 1, 1993, Medicare & Medicaid Guide (CCH) ¶41,399; dec'd. rev. HCFA Admin. May 21, 1993, a Board majority found that 42 C.F.R. § 405.482 only established the notification procedure to be followed regarding the update of RCE limits and did not mandate annual updates.<sup>6</sup> Since that decision, as the Board itself has acknowledged, the Board has consistently held that HCFA is not mandated by regulation or statute to update the RCE limits each year.

The Intermediary cites the following cases in support of its position: Belmont Center for Comprehensive Treatment v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. 99-D53, June 29, 1999, Medicare & Medicaid Guide (CCH) ¶ 80,319<sup>7</sup>; dec'd. rev. HCFA Admin. August 25, 1999. Belmont Center for Comprehensive Treatment v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. No. 99-D5, November 11, 1998, Medicare & Medicaid Guide (CCH) ¶ 80,142;<sup>8</sup> dec'd. rev. HCFA Admin. January 8, 1999. Albert Einstein Medical Center v. Blue Cross and Blue Shield/Independence Blue Cross, PRRB Dec. No. 99-D26, February 26, 1999, Medicare & Medicaid Guide (CCH) ¶ 80,163; <sup>9</sup> dec'd. rev. HCFA Admin. April 13, 1999. Rush- Presbyterian-St. Luke Medical Center v. Blue Cross and Blue Shield Association, PRRB Dec. No. 97-D22, January 15, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,037,<sup>10</sup> remand HCFA Admin. November 13, 1998, Medicare & Medicaid Guide (CCH) ¶ 80,135.

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<sup>6</sup> Exhibit I-19

<sup>7</sup> Exhibit I-20

<sup>8</sup> Exhibit I-17

<sup>9</sup> Exhibit I-21

<sup>10</sup> Exhibit I-22

The Intermediary recognizes that an Illinois district court overturned the Board decision in Rush-Presbyterian.<sup>11</sup> However, the Board is not bound by the ruling of a district court. Indeed, the Board squarely rejected the district court's reasoning when it upheld the Intermediary in Albert Einstein Medical Center v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. No. 98-D9, December 5, 1997<sup>12</sup>; Medicare & Medicaid Guide (CCH) ¶ 45,907, decl'd. rev. HCFA Admin. January 14, 1998.

In further support of the Intermediary's position, the Board's decision in Los Angeles County RCE Group v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 95-D12, December 8, 1994, Medicare & Medicaid Guide (CCH) ¶ 42,983; decl'd. rev. HCFA Admin. January 12, 1995, was upheld by a California district court. That decision was affirmed on appeal without opinion by the United States Court of Appeals for the Ninth Circuit. County of Los Angeles v. Secretary of Health and Human Resources, 113 F.3d 1240 (9th Cir. 1997).<sup>13</sup> In this case, the court held that 42 C.F.R. § 405.482 does not unambiguously compel annual updates to the RCE limits.

The Intermediary contends that the Provider has not put forth any new arguments or interpretations of the Medicare statute/regulations which would cause the Board to abandon its long held position on this issue. Thus, the Intermediary's application of the most recent published RCE limits, at the time, was in accordance with the applicable regulations.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - Title XVIII -Social Security Act:

§1887 et. seq. - Payment of Provider-Based Physicians and Payment Under Certain Percentage Arrangements

2. Other Statutes:

Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)

§ 108 Public Law 97-248, September 3, 1982

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<sup>11</sup> Exhibit I-23

<sup>12</sup> Exhibit I-24

<sup>13</sup> Exhibit I-25

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

§ 405.482 et. seq - Limits on Compensation for Services of Physicians in Providers

§§ 405.1835-.1841 - Board Jurisdiction

4. Program Instructions-Provider Reimbursement Manual ( HCFA Pub. 15-1)

§ 2182.6 - Conditions of Payment for Costs of Physicians' Services to Providers

§ 2182.6F - Table I- Estimates of Full-Time Equivalency (FTE) Annual Average Net Compensation Levels for 1983 and 1984

5. Federal Register:

47 Fed. Reg. 43586 (October 2, 1982)

48 Fed. Reg. 8923 (March 2, 1983)

50 Fed. Reg. 7124 (February 20,1985)

6. Cases:

Good Samaritan Hospital and Health Center v. Blue Cross and Blue Shield Association/Community Mutual Insurance Co, PRRB Dec. No. 93-D30, April 1, 1993, Medicare & Medicaid Guide (CCH) ¶ 41,399; decl'd rev. HCFA Admin. May 21, 1993.

Belmont Center for Comprehensive Treatment v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. No. 99-D53, June 29, 1999, Medicare & Medicaid Guide (CCH) ¶ 80,319, decl'd. rev. HCFA Admin. August 25, 1999.

Belmont Center for Comprehensive Treatment v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. No. 99-D5, November 11, 1998, Medicare & Medicaid Guide (CCH) ¶ 80,142, decl'd rev. HCFA Admin. January 8, 1999.

Albert Einstein Medical Center v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. No. 99-D26, February 26,1999, Medicare & Medicaid Guide (CCH),¶ 80,163, decl'd. rev. HCFA Admin. April 13, 1999.

Rush-Presbyterian-St. Luke Medical Center v. Blue Cross and Blue Shield Association, PRRB Dec. No. 97-D22, January 15, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,037, remand HCFA Admin. November 13,1998, Medicare & Medicaid Guide (CCH) ¶ 80,135.

Albert Einstein Medical Center v. Blue Cross and Blue Shield Association/Independence Blue Cross, PRRB Dec. No.98-D9, December 5, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,907, decl'd rev. HCFA Admin. January 14, 1998.

Los Angeles County RCE Group v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 95-DI2, December 8, 1994, Medicare & Medicaid Guide (CCH) ¶ 42,983, decl'd rev. HCFA Admin. January 12, 1995.

County of Los Angeles v. Secretary of Health and Human Resources, 113 F. 3d 1240 (9th Cir. 1997).

#### 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 the Intermediary applied RCE limits published in the Federal Register on February 20, 1985, and effective with cost reporting periods beginning on or after January 1, 1984, to the Part A physicians' compensation paid the Provider for its year ended December 31, 1994. Additionally, the Board acknowledges the Provider's fundamental argument that this application was improper because the RCE limits were obsolete and not applicable to the subject cost reporting period, i.e., because HCFA failed to update the limits on an annual basis as required by the regulation.

The principle and scope of the enabling regulation, 42 C.F.R. § 405.482(a)(1), require HCFA to establish RCE limits on the amount of compensation paid to physicians by providers, and that such limits 'be applied to a provider's costs incurred in compensating physicians for services to the provider . . .'" (emphasis added). However, contrary to the Provider's contentions, the Board finds that this regulation does not mandate that the RCE limits be updated annually or on any other stipulated interval.

The Board agrees with the Provider that language used in Federal Registers and manual instructions indicate that HCFA had apparently intended to update the limits on an annual basis. However, the Board concludes that the pertinent regulation is controlling in this instance and, as discussed immediately above, it does not require annual updates.

The Board was not persuaded by the Provider's argument that physicians' salaries were increasing across specialties and locations during the period in question, in that evidence to support this assertion was not found in the record. The Provider also argued that no evidence was proffered to suggest that, on a national or regional basis, Medicare providers' Part A physician costs were static during the cost reporting period in question. However, the Board finds that HCFA is not required to produce evidence to support the Provider's contention.

The Board continues to find, as it has in the previous cases cited by the Intermediary, that the application of the 1984 RCE limits to subsequent period physician costs, until updated in 1997, was proper.

DECISION AND ORDER:

The Intermediary's application of the 1984 RCE limits to the Provider's 1994 physician costs was proper. The Intermediary's adjustments are affirmed.

Board Members Participating:

Irvin W. Kues  
Henry C. Wessman, Esq.  
Martin W. Hoover, Jr. Esq.  
Charles R. Barker  
Stanley J. Sokolove

Date **of Decision:** March 23, 2000

FOR THE BOARD:

Irvin W. Kues  
Chairman