

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

2000-D61

PROVIDER -
Hurley Medical Center
Flint, Michigan

Provider No. 23-0132

vs.

INTERMEDIARY -
Blue Cross Blue Shield Association/ United
Government Services (formally BC/BS of
Michigan)

DATE OF HEARING-
May 11, 2000

Cost Reporting Period Ended -
June 30, 1988

CASE NO. 96-2534

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ISSUE:

Was the denial of the TEFRA exception request proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Hurley Medical Center (AProvider@) is a nonprofit, tertiary teaching hospital located in Flint, Michigan. The Provider operates a psychiatric unit which is exempt from the Medicare Prospective Payment System (APPS@) and continues to be reimbursed on the basis of reasonable cost. As such, the exempt unit is subject to cost limitations enacted by the Tax Equity and Fiscal Responsibility Act of 1982 (ATEFRA@). The Provider is appealing the TEFRA rate used for settlement of the PPS excluded psychiatric unit in the FYE 6/30/88 cost report.

On September 24, 1990, Blue Cross and Blue Shield of Michigan (AIntermediary@)¹ issued a Notice of Program Reimbursement (ANPR@) effectuating final settlement of the Provider's Medicare cost report for its fiscal year ended June 30, 1988.² On March 7, 1991, within 180 days of the date of the Intermediary's NPR, the Provider sent a letter to the Intermediary explaining that its psychiatric subprovider was substantially over its TEFRA per discharge limitation. The Provider went on to indicate that it believed this was due to reasons for which the Health Care Financing Administration (AHCFA@) would grant an exception to the TEFRA limit. The Provider also expressed its intent to file such an exception request and wished to protect its right to do so.

On August 11, 1993, the Provider re-submitted its TEFRA exception request to the Intermediary for fiscal year 1988 along with FYs 1990, and 1991.³

However, on December 20, 1994, HCFA instructed the Intermediary to deny the Provider's request for an exception for its FY 1988 cost reporting period based on the determination that the request dated August 11, 1993 was not filed within the required 180 days following the date of the applicable NPR. This letter also instructed the Intermediary to reverse the TEFRA exception it had previously granted for the Provider's 1990 cost reporting period based on an identical determination that the request was not filed within the required 180 days following the date of the applicable NPR.⁴

¹ United Government Services is the Provider's current Medicare fiscal intermediary. Blue Cross and Blue Shield of Michigan, the former intermediary, issued the original NPR involved in this case.

² Intermediary Position Paper at 3.

³ Provider Position Paper at Exhibit S.

⁴ Provider Position Paper at Exhibit T.

Subsequently, the Provider submitted a request for reconsideration, but HCFA did not change its position.⁵

On June 24, 1996, the Provider appealed the Intermediary's adjustment 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 amount of Medicare reimbursement in controversy is \$392,927.⁶

The Provider was represented by Kenneth R. Marcus, Esquire. The Intermediary was represented by Bernard M. Talbert, Associate Counsel, Blue Cross and Blue Shield Association.

BACKGROUND:

On October 7, 1999, the Provider submitted a request to the Board for a hearing on the record to decide the sole issue in this case, that being, HCFA's denial of the Provider's TEFRA adjustment request for FYE 6/30/88 because the request was received more than 180 days after the date of the original NPR. The Provider and HCFA have differing positions as to when the actual request for a TEFRA adjustment was received. It is the Provider's position that its March 7, 1991 letter to the Intermediary, which was within the 180 day limit, was actually a request for a TEFRA adjustment. HCFA, on the other hand, does not recognize the March 7, 1991 letter as a request, and instead recognizes the Provider's letter of August 11, 1993 (which also requested an exception for FYs 1990 & 1991) as its first request for a TEFRA adjustment. Because the August 11, 1993 letter was submitted more than 180 days after date of the NPR, September 24, 1990, HCFA denied the request for a TEFRA adjustment.

The Provider and the Intermediary have stipulated that the facts of this case are identical in every respect to the facts regarding the TEFRA adjustment request in the Provider's FYE 6/30/90 appeal,⁷

⁵ Provider Position Paper at Exhibit W.

⁶ Intermediary Position Paper at 2.

⁷ See Provider and Intermediary letters of October 7, 1999. The Provider submitted a letter, however, on March 24, 2000, indicating that there was one non-material difference between the two cases. The Provider points out that in PRRB Dec. No. 98-D62, (Case No. 94-3278, FYE 6/30/90), its TEFRA adjustment request was set forth in its March 19, 1992 correspondence to the Board and the Intermediary. In the instant case, the Provider asserts its TEFRA adjustment request was set forth in its March 7, 1991 letter to the Intermediary. Both requests were rejected as untimely in the December 20, 1994 correspondence from HCFA to the Intermediary.

Hurley Medical Center v. Blue Cross & Blue Shield of Michigan, PRRB Dec No. 98-D62, June 4, 1998 (Case No. 94-3278), Medicare & Medicaid Guide (CCH) ' 80,000, Rev-d HCFA Admin., August 7, 1998, Medicare & Medicaid Guide (CCH) ' 80,058. In that case, the Board conducted a hearing on the record regarding the timeliness of the TEFRA adjustment request, and issued a decision in favor of the Provider. The HCFA Administrator subsequently reviewed and reversed the Board's decision. This action constituted the final decision of the Secretary of the Department of Health and Human Services.

The Provider appealed the final decision of the Secretary on October 8, 1998 by commencing an action in the United States District Court for the Eastern District of Michigan, (Hurley Medical Center v. Donna E. Shalala, Secretary of the Department of Health and Human Services, Case No. 98-CV 60388-AA (E.D. Mich., February 17, 2000), (AHurley@). In this decision, the court reinstated the decision of the Board regarding the issue of timeliness of the Provider's TEFRA adjustment request in the Provider's FYE 6/30/90 appeal, PRRB Dec. No. 98-D62 (Case No. 94-3278).

PROVIDER'S CONTENTIONS:

The Provider contends that HCFA's denial of its request for an exception to the TEFRA cost limits is improper.⁸ The Provider asserts that contrary to the HCFA's argument, its request for an exception was, in fact, timely filed in accordance with Medicare regulations.

The Provider asserts that the governing regulation in effect as of September 24, 1990, the date of the initial NPR for its June 30, 1988 cost report, was 42 C.F.R. ' 413.40(e). In part, the regulation states:

[a] hospital may request an exception from, or adjustment 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 after the date on the intermediary's notice of amount of program reimbursement.

42 C.F.R. ' 413.40(e).

Respectively, the Provider asserts that it met the 180 day requirement because the letter it sent to the Intermediary was dated March 7, 1991, and the applicable NPR was issued on September 24, 1990. Thus, the Intermediary was notified within 180 days that the Provider was requesting an exception to the TEFRA limits for its fiscal year ended June 30, 1988.

The Provider emphasizes that the aforementioned regulation in effect when it filed its request did not require the entirety of supporting documentation to be submitted at that time. Rather, it merely required

⁸ See HCFA denial letter of December 20, 1994, Provider Exhibit T.

that the request be made to the Intermediary in a timely manner. In contrast, the Provider notes that many other Medicare regulations specify the contents of a request. For example, the requirement that a request for reclassification of misclassified graduate medical education costs must include certain supporting documentation, 42 C.F.R. ' 413.86(j), as does the requirement for submitting a request for obligated capital under the Medicare capital prospective payment system, 42 C.F.R. ' 412.302(c)(1)(v). Moreover, the provisions of the Provider Reimbursement Manual, Part I (AHCFA Pub. 15-1@) ' ' 2803.1 - 2803.6, 2803.62, and 2803.66 that were in force during the subject cost reporting period also did not require supporting documentation to be submitted with the request.

In conclusion, it is the Provider's position that its FY 1988 TEFRA adjustment request of March 7, 1991, is analogous in every respect to the March 19, 1992 request it made for a TEFRA adjustment for its FY 1990, which the court in Hurley ruled to be timely. HCFA's letter of December 20, 1994 did not acknowledge the above two letters; HCFA only recognized the Provider's August 25, 1993 letter⁹ as the Provider's request for a TEFRA adjustment in both years. Since the August 25, 1993 letter was filed more than 180 days after the NPR date for both FYs, HCFA denied the Provider's request for FY 1988 as untimely and also denied the Provider's request for FY 1990 as untimely.¹⁰

INTERMEDIARY'S CONTENTIONS:

The Intermediary argues that the Provider's request was denied as per 42 C.F.R. ' 413.40(e). The Intermediary points to the applicable section of this regulation which discusses the timing of the TEFRA exception request application. In part, the regulation states:

[a] hospital may request an exception from, or adjustment 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 after the date on the intermediary's notice of amount of program reimbursement.**

42 C.F.R. ' 413.40(e) (Emphasis added).

The Intermediary notes that the original NPR was dated September 24, 1990 and asserts that the Provider did not submit its TEFRA exception request to the Intermediary until August 11, 1993, or almost 3 years after the original NPR.¹¹ The Intermediary believes that the regulations clearly document

⁹ Provider letter is actually dated August 11, 1993; August 25 date referred to in HCFA's December 20 letter is apparently HCFA's receipt date: see Intermediary Exhibit I-1.

¹⁰ See HCFA letter of December 20, 1994, Provider Exhibit T, Intermediary Exhibit I-2.

¹¹ Intermediary Position Paper at 4.

the procedures for filing TEFRA exemption/exception requests. It is the Intermediary's position that the Provider, in this instance, did not follow the procedures set forth in the regulations. The Intermediary contends that its adjustment is in accordance with Medicare laws, regulations, and instructions and that it complied with HCFA's instructions.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

- ' ' 405.1835-.1841 - Board Jurisdiction
- ' 412.302(c)(1)(v) - Obligated Capital Cost-Notification to Intermediary
- ' 413.40(e) - Hospital Requests Regarding Applicability of the Rate of Increase Ceiling
- ' 413.86(j) - Adjustment of a Hospital's Target Amount or Prospective Payment Hospital-Specific rate-(1) Misclassified Operating Costs-(i) General Rule

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

- ' 2803 et seq. - Excluded Hospitals and Excluded Units

3. Case Law:

Hurley Medical Center v. Blue Cross & Blue Shield of Michigan, PRRB Dec No. 98-D62, June 4, 1998 (Case No. 94-3278), Medicare & Medicaid Guide (CCH) ' 80,000, Rev'd HCFA Admin., August 7, 1998, Medicare & Medicaid Guide (CCH) ' 80,058.

Hurley Medical Center v. Donna E. Shalala, Secretary of the Department of Health and Human Services, Case No. 98-CV 60388-AA (E.D. Mich., February 17, 2000).

4. Other:

Provider letter dated March 7, 1991.
 Provider letter dated March 19, 1992.
 Provider letter dated August 11, 1993
 HCFA letter dated December 20, 1994.
 Provider letter dated October 7, 1999

Intermediary Letter dated October 7, 1999.
Provider letter dated March 24, 2000

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, and analysis of the controlling laws and regulations, finds and concludes that the Intermediary's adjustment denying the Provider's exception request to the TEFRA cost limits for its 1988 cost reporting period was improper. The Board finds that HCFA directed the Intermediary to deny the adjustment to the TEFRA ceiling because the Provider did not submit a request for an exception within 180 days of the Intermediary's NPR, based upon HCFA's interpretation of 42 C.F.R. ' 413.40(e). However, the Board finds that the Provider's exception request letter of March 7, 1991 constitutes a timely and proper request under the governing regulations and HCFA should have accepted this letter written as a timely request. The Board points to the regulation at issue here, 42 C.F.R. ' 413.40(e), which states in part, "[t]he hospital's request must be made to its fiscal intermediary no later than 180 days from the intermediary's notice of program reimbursement. . . ." The Board finds that the record demonstrates that the Intermediary's NPR was dated September 24, 1990, therefore, the Provider's request of March 7, 1991 was within this 180 day time frame. The Board notes that the Provider subsequently filed an exception request on August 11, 1993 which was within 3 years of the original NPR date. The Board finds that HCFA did not examine the August 11 request on the merits or substance of that request, but instead chose to deny it on a timeliness issue because it was received more than 180 days from the NPR date.

The Board finds that the Provider and the Intermediary have stipulated that the facts of this case are identical in every respect to the facts regarding the TEFRA adjustment request in the Provider's FYE 6/30/90 appeal,¹² Hurley Medical Center v. Blue Cross & Blue Shield of Michigan, PRRB Dec No. 98-D62, June 4, 1998 (Case No. 94-3278), Medicare & Medicaid Guide (CCH) ' 80,000, Rev'd HCFA Admin., August 7, 1998, Medicare & Medicaid Guide (CCH) ' 80,058. In that case, the Board conducted a hearing on the record regarding the timeliness of the TEFRA adjustment request, and issued a decision in favor of the Provider concluding that the Provider's exception request to the Intermediary, dated March 19, 1992, was in fact a timely and valid exception request. The HCFA Administrator subsequently reviewed and reversed the Board's decision stating the Provider did not make a request to the Intermediary within 180 days and that the March 19 letter did not constitute a request for an exception.¹³

¹² See Provider and Intermediary letters of October 7, 1999.

¹³ See HCFA Administrator Decision in PRRB Dec. No. 98-D62, pg.15.

As noted earlier, the Provider appealed the final decision of the HCFA Administrator on October 8, 1998 to the United States District Court for the Eastern District of Michigan, (AHurley), and the court reinstated the decision of the Board regarding the issue of timeliness of the Provider's TEFRA adjustment request in the Provider's FYE 6/30/90 appeal, PRRB Dec. No. 98-D62. In this decision the court stated that A[t]he Hospital's March 19, 1992 letter constituted a timely and proper request under the governing regulations. HCFA's decision reversing the determination of the Board on the basis that the March 19, 1992 letter did not constitute a TEFRA Adjustment Request for fiscal year 1990 is therefore REVERSED.¹⁴

The Board opines that the Provider's exception request letter of March 7, 1991 has essentially the same content as the Provider's March 19, 1992 letter for the 1990 case, which the Board and the Court ruled was a valid, timely, exception request. Accordingly, the Board concludes that the March 7, 1991 letter, in the instant case, is also a valid, timely exception request. The Board also notes that in the 1990 case, the March 19, 1992 letter was sent to the Board, wherein the March 7, 1991 letter in the instant case, was sent directly to the Intermediary, as required by 42 C.F.R. ' 413.40(e).

DECISION AND ORDER:

HCFA's denial of the Provider's exception request was improper and is reversed. The Provider's exception request is remanded to HCFA for a determination based upon its merits.

Board Members Participating:

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

FOR THE BOARD:

Irvin W. Kues
Chairman

¹⁴ See AHurley at 16.