

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

2000-D62

PROVIDER -

Charlotte Memorial Hospital and
Medical Center
Charlotte, North Carolina

Provider No. 34-0113

vs.

INTERMEDIARY -

Blue Cross and Blue Shield Association/
Blue Cross and Blue Shield of North
Carolina

DATE OF HEARING-

April 25, 2000

Cost Reporting Period Ended -

September 30, 1982

CASE NO. 92-0668R

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ISSUE:

Did the Intermediary properly reopen the Provider's cost report and recoup an overpayment made to the Provider?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Charlotte Memorial Hospital and Medical Center ("Provider") is a 778-bed hospital facility located in Charlotte, North Carolina. The issue in this case concerns the recouping of an overpayment made by Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina ("Intermediary") for the fiscal year ended September 30, 1982 ("FYE 1982"). There is no dispute between the parties that an overpayment of \$298,914 was made to the Provider with the issuance of a Revised Notice of Program Reimbursement ("NPR") on December 10, 1985, and that the recouping of the overpayment occurred nearly five years and eight months later with another Revised NPR issued August 20, 1991. The Provider's Director of Reimbursement noted the overpayment error shortly after receiving the December 10, 1985 Revised NPR, and informed the Intermediary that a mistake had been made on Worksheet E-1 of the final cost report. However, no further action was taken by the Intermediary on this matter until an unrelated issue was resolved in 1991.

The Provider appealed the above issue to the Provider Reimbursement Review Board ("Board") and on March 18, 1999 the Board issued its decision (PRRB Dec. No. 99-D29)¹ ruling that it lacked jurisdiction over the overpayment recovery at issue in this appeal. The Board found that the issue in this appeal did not pertain to the reopening of the Provider's cost report, but concerned a payment issue that emanated from the Intermediary's recouping of an erroneous overpayment due to a clerical error during the payment reconciliation process. The Board noted that the overpayment could have been resolved through other collection procedures rather than the issuance of an NPR. However, the fact that the Intermediary utilized an NPR as a functionally acceptable alternative for recouping the overpayment did not transform such action into an appealable reimbursement determination under the statutory provisions of 42 U.S.C. § 1395oo and the controlling regulation at 42 C.F.R. § 405.1801ff. The Board concluded that the regulatory provisions of 42 C.F.R. § 405.1801(a)(4), § 405.374(j) and § 401.625 preclude a Subpart R appeal for the overpayment action effected by the Intermediary in this case, and that its manual instructions set forth in the Provider Reimbursement Manual ("HCFA Pub. 15-1"), Chapter 29, Appendix A, specifically state that the Board lacks jurisdiction over the intermediary's authority for recovering provider overpayments.

¹ Charlotte Memorial Hospital and Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina, PRRB Dec. No. 99-D29, March 18, 1999, Medicare & Medicaid Guide (CCH) §80,164, ~~rev-d~~ and ~~rem-d~~. HCFA Admin., May 17, 1999, Medicare & Medicaid Guide (CCH) §80,305.

On March 31, 1999, the Provider requested a review of the Board's decision pursuant to 42 C.F.R. ' 405.1875(b). In its review request, the Provider asserted that the Board's decision was legally incorrect, and that the Board does have jurisdiction over the Intermediary's overpayment determination as established and collected through the NPR received by the Provider for the fiscal year at issue. Citing the statute at 42 U.S.C. ' 1395oo(a) and the regulations at 42 C.F.R.

' 405.1801(a)(1) and ' 405.1835(a), the Provider stated that the Board is authorized only to review the intermediary determination which the provider appeals. The Provider did appeal the overpayment determination reflected and incorporated in its NPR. Accordingly, the fact that the overpayment was recouped via the NPR mechanism does give the Board jurisdiction over the issue. No comments were submitted by the Intermediary with respect to the Provider's requested review of the Board's decision.

On May 17, 1999, the Administrator of HCFA issued an Administrator's Order remanding the case to the Board for further proceedings. The Administrator ordered:

THAT, the Board's decision be vacated.

THAT, this case be remanded to the Board for a decision on whether the Intermediary properly recouped the subject overpayment pursuant to the August 20, 1991 Revised NPR.

THAT, the Board will render a decision in accordance with the applicable provisions of ' 1878 of the Act and 42 C.F.R. ' 405.1801, et seq.

The Administrator found that the Board has jurisdiction under 42 C.F.R. ' 405.1835 over a recoupment action effectuated pursuant to the Revised NPR. Consistent with the statutory language of 42 U.S.C. ' 1395oo, the regulation at 42 C.F.R. ' 405.1835(a) sets forth that a provider has a right to a hearing before the Board, if:

- (1) An intermediary determination has been made with respect to the provider; and
- (2) The Provider has filed a written request for a hearing before the Board under the provisions described in ' 405.1841(a)(1)

Under 42 C.F.R. ' 405.1841(a)(1):

the request for a Board hearing must be filed in writing with the Board within 180 days of the date the notice of the intermediary's

determination was mailed to the provider

According to 42 C.F.R. ' 405.1801(a)(1), an "intermediary determination" is defined as:

a determination of the amount of total reimbursement due the provider, pursuant to ' 405.1803 following the close of the provider's cost reporting period, for items and services furnished to beneficiaries for which reimbursement may be made on a reasonable cost basis under Medicare for the period covered by the cost report. (1998)

With respect to the determination of the intermediary, the regulation at 42 C.F.R. ' 405.1803 specifically requires an intermediary determination pursuant to a notice of amount of program reimbursement and includes the use of the notice as a basis for a recovery of overpayments. Subsection (c) states:

The intermediary's determination contained in its notice is the basis for making the retroactive adjustment ... to any program payments made to the provider during the period to which the determination applies, including recoupment under ' 405.373 from ongoing payments to the provider identified in the determination. Recoupment is made notwithstanding any request for hearing on the determination the provider may make under ' ' 405.1811 or 405.1835 (1998).

Accordingly, the Administrator concluded that under the regulatory scheme, the Board has jurisdiction over a provider's timely appeal of an NPR, including adjustments made pursuant to 42 C.F.R. ' 405.1803(c). However, the Administrator noted that the Board concluded that 42 C.F.R. ' 405.1801 (a)(4), ' 405.374(j)[redesignated, and hereafter referred to as ' 405.376(j)] and ' 401.625 would preclude a Subpart R appeal for the overpayment recoupment in this case. Relevant to this case, 42 C.F.R. ' 405.1801 (a) defines an intermediary determination. However, paragraph (a)(4) specifies that:

For purposes of ' 405.376 concerning claims collection activities, the term does not include an action by HCFA with respect to a compromise of a Medicare overpayment claim, or termination or suspension of collection action on an overpayment claim against a provider ... (1998) (Emphasis added).

Similarly, 42 C.F.R. ' 401.625 states, concerning the "Effect of HCFA claims collection decisions on appeals" that:

Any action taken under this subpart regarding the compromise of a claim or suspension or termination of collection action on a claim, is not an initial determination for purposes of HCFA appeal procedures.

The regulations at 42 C.F.R. ' 405.376 and ' 401.625 indicate that these provisions were adopted pursuant to the Federal Claims Collection Act. Thus, it is the compromise of a Medicare overpayment claim, or termination or suspension of collection action pursuant to the Federal Claims Collection Act, which falls outside of the Board's jurisdiction. However, a review of the record in this case indicates that the recoupment issue involved in this case does not involve the Federal Claims Collection Act. Instead, the regulation for recoupment in this case is set forth at 42 C.F.R. ' 405.371 and ' 405.373. Thus, the authorities cited by the Board do not support the Board's denial of jurisdiction.

The Administrator found further support for the proposition that the Board in fact had jurisdiction over this issue at 42 C.F.R. ' 405.371 and ' 405.373. Subpart C, 42 C.F.R. ' 405.301 et seq., sets forth the policies and procedures for handling incorrect payments and recovery of payments. 42 C.F.R. ' 405.371(a) states that:

Medicare payments to providers and suppliers, as authorized under this subchapter (excluding payments to beneficiaries), may be offset or recouped, in whole or part, by an intermediary ..., if the intermediary ... has determined that the provider ... to whom the payments are to be made has been overpaid. (1998)

Significantly, paragraph (b) states that: "Steps necessary for suspension of payment, offset and recoupment..... The intermediary ... offsets or recoups payments only after it has complied with the procedural requirements set forth at ' 405.373." The regulation at 42 C.F.R. ' 405.373 sets forth the "Proceedings for offset or recoupment." However, paragraph (b) states that:

Paragraph (a) of this section does not apply if the intermediary, after furnishing a provider a written notice of the amount of program reimbursement in accordance with ' 405.1803, recoups payments under paragraph (c) of ' 405.1803. (For provider's rights in this circumstance, see ' ' 405.1809, 405.1811, 405.1815, 405.1835 and 405.1843.) (1998) (Emphasis added).

Consequently, as provided under 42 C.F.R. ' 405.373(b), the Administrator found that the Board had jurisdiction, under ' 405.1835, over a recoupment action effectuated pursuant to the Revised NPR.

On July 27, 1999, the Board issued a Notice of Reopening, and Board Order implementing the

Administrator's Order for Remand, and ordered the parties to file position papers in accordance with established procedures. While neither party chose to submit position papers, the Provider did submit comments regarding the HCFA Administrator's decision. In its letter to the Board dated September 23, 1999, the Provider noted that the Administrator specifically ruled that the action in this case is "a recoupment action effectuated pursuant to the Revised NPR." Accordingly, the regulations at 42 C.F.R. ' 405.1885(a) and manual provisions under HCFA Pub. 15-1 ' 2931.1 govern the recoupment of overpayments and revised NPRs and specifically prohibit reopenings beyond three years. Pursuant to these authorities, the Intermediary's recoupment action is therefore barred because: (1) the Revised NPR was beyond the three-year reopening period; and (2) the Intermediary has never properly reopened the Provider's cost report to correct the error which forms the basis of the recoupment action.

The Provider also noted the Board's decision in Athens-Limestone Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Alabama, PRRB Dec. No. 99-D51, June 16, 1999, Medicare and Medicaid Guide (CCH) &80,317 (Athens - Limestone"), wherein the Board upheld the Intermediary's recoupment of an overpayment. The Provider states that the decision in Athens-Limestone is distinguishable from the instant case because the intermediary in that case properly reopened the provider's cost report within the three year period required by the regulation and manual provisions. The Provider believes this fact is critical and fatal to the Intermediary's position in this case and, thus, the Intermediary's determination must be reversed.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.:
 - ' 1395oo et seq.
(Section 1878 of the Act) - Provider Reimbursement Review Board
2. Regulations - 42 C.F.R.:
 - ' 401.625 - Effect of HCFA Claims Collection Decisions on Appeals
 - ' 405.301 et seq. - Recovery of Overpayments - Scope of Subpart
 - ' 405.371 et seq. - Proceeding for Suspension
 - ' 405.373 et seq. - Subsequent Action by Intermediary or Carrier
 - ' 405.374(j)

- [Redesignated as ' 405.376(j)] - Effect of Compromise or Suspension, or Termination of Collection Action
 - ' 405.1801 et seq. - Provider Reimbursement Determinations and Appeals - Introduction
 - ' 405.1803 et seq. - Intermediary Determination and Notice of Amount of Program Reimbursement
 - ' 405.1809 - Intermediary Hearing Procedures
 - ' 405.1811 - Right to Intermediary Hearing
 - ' 405.1815 - Parties to Intermediary Hearing
 - ' 405.1835 et seq. - Right to Board Hearing
 - ' 405.1841 et seq. - Time, Place, Form, and Content of Request for Board Hearing
 - ' 405.1843 - Parties to Board Hearing
 - ' 405.1875 et seq. - Administrator's Review
 - ' 405.1885 et seq. - Reopening a Determination or Decision
3. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):
- ' 2931.1 - Provider Payments, Determinations and Appeals Procedures - Time Limits for Reopening
 - Appendix A - Chapter 29 - Provider Reimbursement Review Board Jurisdiction
4. Case Law:

Charlotte Memorial Hospital and Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of North Carolina, PRRB Dec. No. 99-D29, March 18, 1999, Medicare & Medicaid Guide (CCH) &80,164, ~~rev=d.~~ and ~~rem=d.~~ HCFA Admin., May 17, 1999, Medicare & Medicaid Guide (CCH) &80,305.

Athens-Limestone Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Alabama, PRRB Dec. No. 99-D51, June 16, 1999, Medicare & Medicaid Guide (CCH) & 80,317.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After a complete review of the issue, full consideration of the statutory and regulatory analysis postulated in the Administrator's remand order, and re-examination of the controlling law, regulations, and manual guidelines, the Board stands by the findings of fact and conclusions of law set forth in its original decision (PRRB Dec. No. 99-D29). Pursuant to the regulatory provisions of 42 C.F.R. ' 405.1801(a)(4), ' 405.374 (j) and ' 401.625, and the Board's manual instructions set forth in HCFA Pub. 15-1, Chapter 29, Appendix A, the Board reaffirms its decision that it lacks jurisdiction to determine whether the Intermediary properly reopened the Provider's cost report to recoup an overpayment made to the Provider.

In finding that the Board has jurisdiction over the overpayment recoupment action effected by the Intermediary in this case, the Administrator cited the provisions of 42 C.F.R. ' 405.373(b) as a primary basis for this determination. In as much as the fiscal year in contention for this case concerns FYE 1982, and the pertinent Notice of Reopening and Revised NPR were issued on October 22, 1990 and August 22, 1991, respectively, the Board finds it noteworthy that the Administrator relied on a regulatory provision that did not become effective until December 2, 1996 as justification for the proposition that the Board had jurisdiction over the recoupment action at issue.

DECISION AND ORDER:

The Board reaffirms its original decision that it lacks jurisdiction to determine whether the Intermediary properly reopened the Provider's cost report to recoup an overpayment made to the Provider.

Board Members Participating:

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

FOR THE BOARD:

Irvin W. Kues
Chairman

Concurring Opinion of Henry C. Wessman, Esquire

I concur with the opinion of the Board. This case is clearly a recoupment of overpayment, and the PRRB does not have jurisdiction over recoupment pursuant to 42 C.F.R. ' 405.1801 (a) (4), ' 405.374(j), and ' 405.625. Further, HCFA Pub. 15-1, Appendix A specifically notes that the Board lacks jurisdiction over recoupment of overpayment to a provider.

But I write to express an even more compelling reason as to why this case should not exist. U.S. Code (18 U.S.C. ' 287 - false/fraudulent claims), case and common law (Lowery Hospital Ass'n. v. Blue Cross-Blue Shield of Tennessee D.C. Tenn. 1976, 415 F. Supp. 589; Mount Sinai Hospital of Greater Miami, Inc. v. Weinberger, 517 F. 2nd 329 (5th Cir. 1975); both speak to H.E.W. (Now D.H.H.S.) Secretary's common law right to recoup overpayments, while citing Social Security Act ' 1801 et seq and 42 U.S.C.A. ' 1395 et seq. Even more compelling, at least in my opinion, Judeo-Christian ethical law (Exodus 22: 7-15; Leviticus 6: 1-7, 19: 35-37; Micah 6: 10-11; Luke 3: 13-14; Hebrews 2: 6-8 - to paraphrase: return, in tact, what belongs to another) has crystal-clear plain meaning, and transcends any attempt by anyone to parse the law: if you come into possession of something that belongs to another, you return it, post-haste, intact.

Incompetence and nonchalance of the Intermediary's staff aside (Tr. at 31-32), the Provider purportedly knew (Provider Position Paper at 5; Exhibit 11) that a mistake had been made, and that overpayment funds had been mistakenly forwarded to the Provider by the Intermediary. Those funds should have been returned, post-haste, to the rightful owner, U.S. Taxpayers c/o The U.S. Treasury. End of story.

Henry C. Wessman, Esq.