

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

2000-D66

PR OVIDER -
Lloyd Nolan Hospital
Fairfield, Alabama

Provider No. 01-0068

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross and Blue Shield of Alabama

DATE OF HEARING-
May 4, 2000

Cost Reporting Periods Ended -
June 30, 1991; June 30, 1992;
June 30, 1995; June 30, 1996;
October 31, 1996

CASE NOS. 92-0209; 94-2362;
98-0428; 99-0130; 99-0131

ISSUE:

INDEX

	Page No.	
Issue.....		2
Statement of the Case and Procedural History.....		2
Provider's Contentions.....		2
Intermediary's Contentions.....		10
Citation of Law, Regulations & Program Instructions.....		11
Findings of Fact, Conclusions of Law and Discussion.....		12
Decision and Order.....		13

Was the Intermediary's adjustment disallowing portions of compensation paid to physicians based on the application of the 1984 reasonable compensation equivalents proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Lloyd Nolan Hospital ("Provider") is a 216 bed, general, short term hospital located in the city of Fairfield, Jefferson County, Alabama. During the Fiscal Years ended June 30, 1991, June 30, 1992, June 30, 1995, June 30, 1996, and the fiscal period ended October 3, 1996, the Provider paid its Hospital-Based Physicians ("HBPs") for Medicare Part A services. Blue Cross and Blue Shield of Alabama ("Intermediary") disallowed a portion of the payment by applying 1984 RCE limits to the Provider's HBP Part A costs.

The Provider filed a timely appeal with 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 Medicare reimbursement amount in controversy for FYE June 30, 1991 is approximately \$83,000, the amount for FYE June 30, 1992 is approximately \$114,755, the amount for FYE June 30, 1995 is approximately \$162,000, the amount for FYE June 30, 1996 is approximately \$179,000, and the amount for the fiscal period ended October 3, 1996 is approximately \$277,000. The total amount in controversy is approximately \$815,755. The Provider was represented by Leslie Demaree Goldsmith, Esq. of Ober, Kaler, Grimes & Shriver. The Intermediary was represented by Bernard M. Talbert, Esq. of the Blue Cross and Blue Shield Association, Chicago.

PROVIDER'S CONTENTIONS

The Provider contends that the Intermediary's application of the 1984 RCE Limits violates the plain language of the applicable regulation requiring that the RCE Limits be updated annually. That regulation 42 C.F.R. ' 405.482 (1990,1991) provides:

(b) HCFA will establish a methodology for determining reasonable annual compensation equivalents, considering average physician incomes by specialty and type of location, to the extent possible using the best available data.

(f)(1) Before the start of a cost reporting period to which limits established under this section will be applied, HCFA will publish a notice in the Federal Register that sets forth the amount of the limits and explains how the limits were calculated.

(f)(3) Revised limits updated by applying the most recent economic index data without revision of the limit methodology will be published in a notice in the Federal Register without prior publication of a proposal or public comment period.

Id.

The Provider contends that the plain language of the regulation clearly requires that the RCE limits be updated annually in order to incorporate the most recent economic index data, i.e., the best available data, as the regulation expressly requires. The Intermediary improperly disallowed portions of the compensation paid by the Provider to its HBPs for the FYs at issue because its adjustment was based on obsolete data, i.e., on the RCE limits applicable only to the 1984 cost year.

The Provider points out that the court in Rush-Presbyterian-St.Lukes Medical Center v. Shalala, Case No. 97 C1726, (1997-2 Transfer Binder) Medicare and Medicaid Guide (CCH) &45,687 at &55,716 (N.D. Ill. Aug 27, 1997). ruled that the Secretary's application of the 1984 RCE limits to hospital's 1988 HBP costs violated the Administrative Procedure Act's (APA) proscription against arbitrary and capricious agency action.¹ The court found that the RCE regulations "require some periodic increase in RCE limits," and that "at the very least.. .the regulations require the Secretary to establish RCE limits that are based on physicians costs using the most accurate information." Id.

The Provider argues that the RCE limits used by the Intermediary were not updated from 1984 through 1997 as required by 62 Fed. Reg. &24,483-85, May 5, 1997.² Therefore, the last update prior to the years at issue, was for 1984. The Intermediary's application of the 1984 RCE limits to the Provider's HBP costs in contention thus constitutes a violation of the RCE regulation at 42 C.F.R. ' ' 405.482(b) and (f)(3)(1990,1991), because HCFA was required, but failed, to update these limits on an annual basis, using the most recent available data.³

The Provider contends that if the regulation is found to be ambiguous, it must be construed to require annual updates of the RCE Limits. HCFA's own interpretation of its own regulation requires annual updating of the RCE limits on the basis of updated economic index data. HCFA stated this in the Federal Register documents published at the time the RCE limit regulations were proposed. HCFA reiterated this when the RCE regulations were finally adopted. HCFA implemented this interpretation when it updated the limits for 1982 and 1983. In 1982 HCFA stated "[w]e propose to update the RCE limits annually on the basis of updated economic index data" 47 Fed. Reg. &43,577, &43,586 October 1, 1982. In adopting the final regulation in 1983, HCFA affirmed this, by advising "[t]he RCE limits will be updated annually on the basis of updated economic index data." 48 Fed. Reg. &8901, &8923, Mar. 2, 1983.⁴

The Provider points out that HCFA complied with its own regulations and annually updated the initial RCE limits for the first two fiscal years following their establishment. In each case the

¹See Exhibit P-11.

²Exhibit-P-11

³Exhibit-p-8

⁴ExhibitP-5

revisions resulted in an increase to the RCE limits in accordance with the data on average physician specialty compensation and updated economic index data. 48 Fed. Reg. at &8923 Mar. 2, 1983⁵, 50 Fed. Reg. &7125 Feb. 20, 1985.⁶

The Provider contends that HCFA's language evidences a clear intention and course of practice that the published RCE limits will apply only to the years specified in the 1982 and 1983 notice, and that they are to be updated annually for each successive year. HCFA published a new and revised RCE limit update table for providers' fiscal years beginning in 1984. 50 Fed. Reg. &7124, Feb. 20, 1985. In the preamble to the notice of the 1984 limits, HCFA again acknowledged the limited applicability and annual nature of each year's RCE limits. 50 Fed. Reg. &7124 Feb. 20, 1985. Nowhere in this preamble does HCFA state or imply that the 1984 limits would or could apply to any cost reporting period other than one beginning during the 1984 calendar year.

The Provider argues that the consistency of HCFA's interpretation of its own regulation is further evidenced by a proposed rule published in 1989. In the preamble of this proposed rule, HCFA indicates that it no longer wishes to annually update the RCE limits. However, HCFA itself recognized that in order to discontinue annually updating the RCE Limits, it would have to amend the RCE regulation in order to effectuate its intent to only update the RCE limits if a significant change to the limits is warranted.

The Provider argues that HCFA has not properly increased the RCE limits for the period 1985 through 1996. This is evidenced by HCFA's revised RCE limits for 1997. HCFA published in the 62 Fed. Reg. &24,483-85 at &24,484: "[W]e are calculating the 1997 [RCE] limits...we are able to produce an array of estimated 1997 average annual compensation levels for nine specialty categories by type of location."⁷ Using the same methodology as it used for the last updates provided in 1985 for FY 1984, HCFA increased the total RCE limits for 1997 by 56.21% for nonmetropolitan areas and metropolitan areas less than one million, and by 59.50% for metropolitan areas greater than one million. By increasing the limits for 1997, HCFA acknowledged that Part A physician costs have significantly increased since 1984: an increase which the Medicare program has not borne due to its failure to increase RCE limits for 1985 through 1996, and for the year at issue.

The Provider maintains that HCFA implemented in its HCFA Pub. 15-1 its interpretation that the regulation requires it to annually update the RCE limits. Not only did HCFA set the RCE limits for the 1982, 1983, 1984 cost years, it also clearly indicates in HCFA Pub. 15-1 that the last published RCE limits prior to the year at issue, i.e. the 1984 limits, apply only to providers' cost reporting periods beginning in 1984. The Provider points out that the HCFA Pub. 15-1 provisions are indicative of HCFA's interpretation of the regulation. Referring to HCFA, the Seventh Circuit

⁵ExhibitP-5

⁶Exhibit-6

⁷Exhibit P-11

stated:

As the Administration is an arm of HCFA, the [Provider Reimbursement] Manual is best viewed as an administrative interpretation of regulations and corresponding statutes, and as such it is entitled to considerable deference as a general matter.

Davies County Hospital v. Bowen, 811 F.2d 338 (7th Cir. 1987)⁸

The Provider points out that three internal HCFA memoranda⁹ also substantiate HCFA's repeatedly expressed interpretation of its regulation as requiring annual updates. One document, dated October 7, 1983, indicates that HCFA will publish annually an update of the RCE limits and that the regulation "provides that HCFA will publish a notice in the Federal Register setting forth the amounts of reasonable compensation equivalents (RCE) for hospital cost reporting periods beginning in the following calendar year."¹⁰ Another document clearly suggests that HCFA was aware of its requirement that RCE limits be updated annually and that updated limits be published even if the RCE limit setting methodology is unchanged.¹¹ HCFA recognizes the fact that providers, in negotiating physician contracts, rely on the Secretary's expressed acknowledgment of her duty to update the RCE limits on an annual basis.¹²

The Provider contends that HCFA's Failure to update the RCE limits violates the Congressional mandate of the enabling statute that the reasonable costs of HBP services be reimbursed. When Congress directed HCFA to establish RCE limits, it did not give HCFA unlimited authority to simply set any limits. Congress specifically required that services furnished by physicians be fully reimbursed, limited only by a reasonableness standard, 42 C.F.R. ' 1395xx(a)(l),(2). The application of median data from 1984 to cost reporting periods as much as 13 years later is not reasonable. HCFA had annual economic data relating to physician compensation increases and physician fee increases which it used to increase Part B physician compensation screens but failed to utilize to update the Part A RCE limits.

The Provider argues that the failure to update the 1984 limits during a period of almost unprecedented inflation in health care costs, violates Congressional intent that reimbursement of physician Part A costs be reasonable. It is arbitrary and capricious to base physician reimbursement for the FYs under appeal on the now-invalid 1984 RCE limits. Application of the

⁸Exhibit P-16

⁹Exhibit P-17

¹⁰Exhibit P-17

¹¹Exhibit P-17

¹²Exhibit P-17

1984 RCE limits deprives the Provider of reasonable and allowable physician compensation reimbursement. Furthermore, 42 C.F.R. ' 413.9(c)(l)(1990,1991) requires that payment to providers be "fair."¹³ Therefore, the Secretary's failure to update the RCE limits in the face of such inflation effectively violates this regulatory requirement.

The Provider argues that there are no valid RCE limits for the FYs under appeal. Consequently, the Provider must be reimbursed for its actual Part A physicians' costs. Abington Memorial Hosp. v. Heckler, 750 F.2d 242, 244 (3rd Cir. 1984) (if a particular rule or method of reimbursement is held not to apply, the prior method of reimbursement must be utilized). Alternatively, the 1984 RCE limits should be updated for fiscal years in contention by using the same methodology used by HCFA to update the RCE limits for FYs 1983, 1984 and 1997.

The Provider contends that HCFA's failure to apply annual CPI updates violates the Administrative Procedures Act and the RCE regulation. HCFA set the RCE limits for the 1982, 1983 and 1984 cost years. For each of those years application of the update methodology resulted in an increase in the RCE limits in accordance with data on average physician specialty compensation and updated economic index data. However, without providing any notice or opportunity for comment, and without offering any explanation for departing from its prior practice of annually updating the RCE limits in compliance with the published methodology, HCFA abruptly stopped updating the RCE limits even though inflationary changes mandated an update. HCFA's failure to apply its published methodology for the year at issue constitutes a change in the methodology. This change is invalid for noncompliance with the APA.

The Provider maintains that the Secretary's rulemaking process was deficient. Under the APA, the public must be given notice of new rules and an opportunity for comment. HCFA misrepresented to the public, its intention to annually update the RCE limits. HCFA failed to give adequate notice of what the rule would do. It also deprived the public of a meaningful opportunity to comment on the timing of the updating process.

The Provider contends that HCFA's change in methodology was not preceeded by prior notice and opportunity for public comment. HCFA's failure to update the RCE limits in compliance with its published methodology constitutes a change in methodology which is invalid because it violates the express requirements of 42 C.F.R. ' 405.482(f)(2).

The Provider argues that HCFA's failure to update the RCE limits violates Congress' prohibition against cost shifting. Congress has stated that HCFA must assure through regulations that Medicare providers' costs of providing Medicare services are reimbursed and that:

the necessary costs of efficiently delivering covered services to individuals covered by the insurance programs established by this title will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by such

¹³Exhibit P-24

insurance programs,...

42 U.S.C. ' 1395x(v)(l)(a)¹⁴ 42 C.F.R. 413.5(1990, 1991).¹⁵

The Provider contends that application of the 1984 RCE limits to the Provider's 1995 fiscal year will not result in reasonable reimbursement. As the court in Rush-Presbyterian, "[the Secretary] does not dispute that physicians' costs increased between 1984 and 1988[the year at issue]. She decided to leave those limits intact over that period. She does not attempt to justify that decision..." The court ruled in favor of the provider, holding that the Secretary's failure to update the RCE limits for the provider's FYE 1988 violated the APA. The court found that the Secretary acted arbitrarily and capriciously in not updating the limits in light "of the fact that physician costs did increase over the period at issue here, and that the language of the regulations appears to require some periodic increase in RCE limits as a result." The court therefore concluded that the Secretary's application of the 1984 RCE limits unlawful. [1997-2 Transfer Binder] Medicare and Medicaid Guide (CCH) &45,687 at &55,716. The Secretary appealed the district court decision to the Seventh Circuit Court of Appeals Case No. 97-3723, Oct, 24, 1997. The Secretary subsequently withdrew her appeal, thus choosing not to contest the District Court's decision. Consequently, the Seventh Circuit dismissed the appeal with prejudice on January 26, 1998, and the case was subsequently remanded to the HCFA Administrator with orders to update the RCE limits to be applicable to the fiscal year at issue on that appeal.

The Provider maintains that HCFA's failure to continue updating the RCE limits from 1984 through 1997 has caused Medicare providers to be under reimbursed for their Medicare Part A physicians' costs for those years. HCFA has acknowledged that these costs increased by a greater than fifty percent increase in the RCE limits when it finally updated them from 1997. 62 Fed. Reg. &24,485;¹⁶ 1984 and 1997 RCE Limit Comparison Chart.¹⁷ This failure to update the RCE limits consequently resulted in non-Medicare patients bearing the increased Part A physician costs which should have been borne pro rata by the Medicare program. This is contrary to the direct instructions of Congress at 42 U.S.C.A. ' 1395x(v)(l)(a).

The Provider maintains that the case law to date is not applicable because it is unpersuasive and distinguishable. The issue of whether or not HCFA is bound to annually update the RCE limits has, to date, been raised in a number of appeals. In Good Samaritan Hospital & Health Center v. Blue Cross & Blue Shield Association/Community Mutual Ins. Co., PRRB Dec. No. 93-D30, Medicare and Medicaid Guide (CCH) &41,339 April 1, 1993,¹⁸ the Board concluded that the RCE

¹⁴See Exhibit P-3.

¹⁵See Exhibit P-27.

¹⁶Exhibit P-11

¹⁷Exhibit P-14

¹⁸Exhibit P-28

regulation promulgated by HCFA did not mandate that the RCE limits be updated annually. The Board plurality came to the same conclusion in Los Angeles County RCE Group Appeal v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 95-D12, Medicare and Medicaid Guide (CCH) &42,983, Dec. 8. 1993.¹⁹ The Board plurality, while conceding that HCFA was not required to annually update the RCE limits, stated: "The Board majority fully considered the physician compensation study published by the American Medical Association which illustrates undisputed increases in mean physician net income spanning the period from 1984 to the fiscal year in contention. While the majority of the Board finds the Provider's argument persuasive in demonstrating that the applied RCEs may be reasonable in light of the increased compensation during this time period, the Board majority is bound by the governing law and regulations." Id.

The Board plurality determined that the regulation merely required publication of the RCE limits at any time before the beginning of the cost reporting period. In reaching this determination, the plurality appears indifferent to the fact that the RCE limits were published many years before the beginning of the cost reporting period.

The Provider points out that in the above mentioned cases the HCFA Administrator declined to review the Board's decisions. The Providers on the Los Angeles case appealed to the District of Central California, County of Los Angeles v. Shalala, Case No. CV 95-0163 LGB (SHx)(C.D. Cal, 1995).²⁰ The district court, in an unpublished decision, ruled in favor of the Secretary. The Ninth Circuit affirmed the decision of the district court in an opinion not designated for publication. County of Los Angeles, d/b/a LAC/USC Medical Center, et al. v. Secretary of Health and Human Services, 113 F.3d 1240 (9th Cir. 1997).²¹ The Ninth Circuit acknowledged that both the regulation and the PRM clearly contemplate yearly updates of the RCE limits. The court opined that the RCE regulation is ambiguous in that it is not clear whether or not the regulation mandates annual updating of the RCE limits. The court nevertheless deferred to the Secretary's contention that she had never interpreted the RCE regulation to require annual updating.

The Provider contends that the RCE regulation is not ambiguous and even if it is, it should be interpreted in a way that is consistent with the Secretary's publicly stated intention to update the RCE limits annually, an intention stated at the time the RCE regulation was enacted.

The Provider contends that the issue in all of the cases cited, was whether or not the regulation promulgated by HCFA, bound it to annually update the RCE limits. The Board majorities, the district court and the Ninth Circuit did not consider:

¹⁹Exhibit P-21

²⁰Exhibit P-22

²¹Exhibit P-23

- (1) Whether HCFA, by failing to annually update the RCE limits, acted contrary to the Congressional mandate that only costs found to be reasonable by virtue of application of valid RCE limits may be disallowed.
- (2) Whether HCFA's misrepresentation to the public regarding its intention to annually update the RCE limits, and its failure to give the public a meaningful opportunity to comment on the timing of the updating process, renders the RCE regulation void for noncompliance with the notice and comment requirements of the APA.
- (3) Whether or not HCFA's failure to annually update the RCE limits resulted in Congressionally-prohibited "cost-shifting."
- (4) The relevancy of the language in the preamble to HCFA's Proposed Rule, 54 Fed.Reg. &5956, (Feb. 7, 1989)²². In this preamble, HCFA expressly acknowledges its intent to annually update the RCE limits. HCFA also expressly acknowledges its obligation to amend the regulation if it decides not to give effect to this intent any longer. If HCFA does not consider its pre-1989 statement of intent to annually update the RCE limits as binding, why should it feel legally obligated to effect a statutory amendment if it changes its intent?
- (5) The relevancy and the amount by which the RCE limits were increased by HCFA in 1997. 62 Fed. Reg. &24,483 (May 5, 1997).²³
Having not considered these challenges to the Secretary's failure to update the RCE limits between 1984 and 1997, the Board should depart from its earlier determination of this issue.

The Provider maintains that the RCE limits published to date by HCFA were specifically limited to the years indicated, i.e. fiscal years commencing in 1982, 1983, 1984 and 1997, respectively. They therefore do not apply to the fiscal years in contention. Without providing any notice or opportunity for comment and without offering any explanation for departing from its consistent prior practice of annually updating the RCE limits, HCFA abruptly stopped doing so. HCFA has failed from 1984 through 1997 to make any upward revisions to the limits and thereby failed to abide by its own regulations. The Supreme Court has long held that an agency may not violate its

²²Exhibit P-13

²³Exhibit P-11

own regulation. Morton v. Ruiz, 415 U.S. 199, 235 (1974).²⁴ In view of the fact that HCFA failed to abide by its own regulation, by failing to update the RCE limits from 1984 to 1997 in accordance with its prescribed methodology, no valid RCE limits apply to the Provider's fiscal years in issue. The Provider should be reimbursed for its actual Part A physicians' costs so long as they are otherwise reasonable.

The Provider requests that the Intermediary or HCFA be ordered to update the RCE limits for the cost years at issue using the methodology established in 1982 and 1983 Federal Registers for updating RCE limits, and adopted by the Secretary to update the RCE limits for 1983, 1984 and 1997, and apply the newly updated RCE limits to the Provider's HBP costs at issue in this appeal.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the regulatory provisions of 42 C.F.R. ' 405.482(b)²⁵ allow HCFA to establish a methodology for determining RCEs on the amount of compensation paid to physicians by providers. The Intermediary's adjustment implements the regulatory provisions of 42 C.F.R. ' 405.482 as they existed at the time the established RCE limits were applied to physicians' compensation reported by the Provider. Paragraph (b) of the regulation grants HCFA the authority for determining reasonable compensation equivalents by taking into consideration average physician incomes by specialty type and location, and using the best available data to the extent possible. If a change in methodologies and payment limits is proposed by HCFA, paragraph (f) sets forth the notification procedures which will be followed to execute such changes. With regard to the notification procedures, the regulation at 42 C.F.R. ' 405.482(f)(3) states that:

- (3) Revised limits updated by applying the most recent economic index data without revision of the limit methodology will be published in a notice in the FEDERAL REGISTER without prior publication of a proposal or public comment period.

The Intermediary argues that contrary to the Provider's contentions, this regulation does not mandate that the RCEs used to limit allowable physician compensation be updated annually, but merely establishes the notification procedure to be followed. Accordingly, the Intermediary is correct in using the latest RCEs published by HCFA, and that the limits must be applied to all

²⁴Exhibit P-27

²⁵Exhibit I-3

physician compensation not paid under the prospective payment system (PPS) as required by 42 C.F.R. ' 405.482(a)(2).

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

' 1395xx et seq. - Payment of Provider Based
Physicians and Payment Under
Certain Percentage Arrangements

' 1395x(v)(1)(a) - Reasonable Cost

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

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

' ' 405.1835-.1841 - Board Jurisdiction

' 413.9(c) et seq. - Cost Related to Patient Care

' 413.5 et seq. - Cost Reimbursement General

3. Cases:

Abington Memorial Hospital v. Heckler, 750 F. 2d 242 (3rd Cir. 1984).

Davies County Hospital v. Bowen, 811 F.2d 338 (7th Cir 1987).

Good Samaritan Hospital and Health Center v. Blue Cross and Blue Shield Assoc./
Community Mutual Insurance Co., PRRB Dec. No. 93-D30 Medicare and Medicaid
Guide (CCH) &41,339, April 1, 1993.

Rush-Presbyterian-St. Lukes Medical Center v. Shalala, Case No. 97 C1726, (1997-2
Transfer Binder) Medicare and Medicaid Guide (ACCH@ &45,687 at &55,716 (N.D.)
(Aug. 27, 1997); Case No. 97-3723, Oct. 24, 1997 Seventh Circuit CA (withdrawn by

Secretary)

Los Angeles County RCE Group Appeal v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 95-D12, Medicare and Medicaid Guide (CCH) &42,983, Dec. 8, 1993.

County of Los Angeles v. Shalala, CV 95-0163, LGB (SH)(C.D. Cal, 1995).

Morton v. Ruiz, 415 U.S. 199 (1974).

County of Los Angeles. d/b/a/ LAC/USC Medical Center et.al. v. Secretary of Health and Human Services, 113 F. 3d 1240 (9th Cir. 1997).

4. Other:

47 Fed. Reg. &43,577, &43,586, October 1, 1982.

48 Fed. Reg. &8901, &8923, March 2, 1983.

50 Fed. Reg. &7124-7125, February 20, 1985.

54 Fed. Reg. &5956, February 7, 1989.

62 Fed. Reg. &24,483-85, May 5, 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 Intermediary applied RCE limits effective with cost reporting periods beginning on or after January 1, 1984, to the Part A physicians= compensation paid by the Provider for the fiscal years ended June 30, 1991, June 30, 1992, June 30, 1995, June 30, 1996, and October 3, 1996. The Provider=s fundamental argument regarding this application is that the limits were obsolete and not applicable to the subject cost reporting periods, i.e. because HCFA failed to update them on an annual basis as required by the enabling 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 cost 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 the language used in the Federal Register notices, internal HCFA memoranda, and program instructions indicate that HCFA had 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.

Finally, the Board acknowledges the Provider's argument that net physician income clearly increased throughout the period spanning 1984 through the fiscal years in contention. While the Board finds this argument persuasive in demonstrating that the subject RCE limits may be lower than actual market conditions would indicate for the subject cost reporting periods, the Board concludes that it is bound by the governing law and regulations.

In sum, the Board continues to find, as it has in previous cases, that the application of the 1984 RCE limits to subsequent cost reporting periods is proper.

DECISION AND ORDER:

The Intermediary's adjustment disallowing portions of compensation paid to physicians based on the application of the 1984 reasonable compensation equivalents 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

Page 15
0131

CNs:92-0209, 94-2362, 98-0428, 99-0130, 99-

Stanley J. Sokolove

FOR THE BOARD:

Irvin W. Kues
Chairman