

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

ON-THE-RECORD
2001-D41

PROVIDER -
Newman Memorial County Hospital
Emporia, Kansas

Provider No. 17-0001

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
Blue Cross and Blue Shield of Kansas,
Inc.

DATE OF HEARING-
May 15, 2001

Cost Reporting Period Ended -
December 31, 1989

CASE NO. 96-0102

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ISSUE:

Did HCFA properly determine that the SNF routine cost limits exception request was not timely filed?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

During the fiscal year at issue, Newman Memorial County Hospital (“Provider”), a general short term acute care hospital, operated an eighteen bed Medicare certified hospital-based skilled nursing facility (“SNF”) in Emporia, Kansas. On November 13, 1991, Blue Cross and Blue Shield of Kansas, Inc. (“Intermediary”) finalized the settlement of the FYE 12/31/89 cost report and issued its Notice of Amount of Medicare Program Reimbursement (NPR). The Intermediary reopened this cost report on July 29, 1992, and on January 21, 1993. The first reopening, dated July 29, 1992, addressed the bad debts adjustments. The second reopening, dated January 21, 1993, was made to adjust the capital related costs for the Provider.¹ On July 16, 1993, the Provider filed a skilled nursing facility Routine Cost Limits (RCL) exception request for atypical services based upon the reopened cost report.² The Intermediary forwarded the Provider's July 16, 1993 request to the Health Care Financing Administration (“HCFA”) recommending that the request be denied because it was not timely filed.³ HCFA responded on April 21, 1995, and agreed with the Intermediary that the Provider's exception request was not timely filed.⁴

The Provider appealed HCFA’s denial of its exception request from the revised January 21, 1993 NPR to the Provider Reimbursement Review Board (“Board”) and has met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-.1841.

The Provider was represented by Frank P. Fedor, Esquire, of Murphy Austin Adams and Schoenfeld, L.L.P. The Intermediary was represented by Bernard M. Talbert, Esquire, of the

¹ Provider Exhibit P-1, internal exhibit 1; Intermediary Exhibit I-2,

² Provider Exhibit P-1, Intermediary Exhibit I-2.

³ Intermediary Exhibit I-2, letter dated July 27, 1994.

⁴ Id., letter dated April 21, 1995.

Blue Cross and Blue Shield Association.

BACKGROUND:

On February 26, 1993 the Provider retained the firm of Carlson, Price, Fass & Company (“CPFC”) to submit an exception request under 42 C.F.R. §413.30 for the fiscal year ending (“FYE”) 1989. The Provider explains that CPFC had begun to represent providers in submitting SNF exception requests in 1990. In preparing to provide such representation, CPFC researched the rules governing SNF exception requests.⁵ The Provider notes that CPFC became familiar with 42 C.F.R. §413.30 which states in relevant part that a provider’s exception request “must be made to its fiscal intermediary within 180 days of the date on the intermediary’s notice of program reimbursement,” but does not specify whether the NPR must be the initial NPR, or may also be a subsequent NPR.⁶

The Provider further explains that CPFC sought additional guidance from Blue Cross of California, a HCFA intermediary. CPFC was informed that written guidelines existed governing SNF exception requests which HCFA had directed the intermediaries to follow.⁷ According to the Provider on the issue relevant to the instant appeal, Blue Cross of California orally notified CPFC, that the written HCFA guidelines which intermediaries were required by HCFA to follow, stated that a SNF exception request could be filed “within 180 days of a final notice of program reimbursement.” The Provider asserts that Blue Cross of California explained that “final notice of program reimbursement” meant the latest or most recent NPR which had been issued.⁸

The Provider submitted into evidence a copy of these written HCFA Guidelines (“HCFA

⁵ The Provider contends that the instant case, has the identical issue, supported by the same underlying facts, that was presented to the Board in a live hearing on August 20, 1999, in the matter of Mercy General Hospital-SNF v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 2000-D87, September 22, 2000, Medicare & Medicaid Guide (CCH) ¶ 80,572, HCFA Adm. Declined Rev., (“Mercy”) After the Provider received approval to have the instant case heard “On the Record”, it supplemented the record with the live Board hearing transcript of “Mercy”. (See Provider Exhibit P-15) Also, the Provider supplemented the record with a transcript of a deposition of HCFA employee Joseph Menning which was taken by CPFC for the “Mercy” case. (See Provider Exhibit P-16) References to “Transcript” (Tr.) and “Deposition” (“Depo”) in the instant case refer to these two Provider Exhibits.

⁶ Provider Exhibit P-15, “Mercy” transcript (“tr.”) 21:4-22.

⁷ Tr. 21:23 - 23:3.

⁸ Tr. 23:4 - 24:4.

Guidelines”) regarding the procedures for a SNF exception request.⁹ The HCFA Guidelines state:

For cost reporting periods beginning on or after July 1, 1979, the provider must submit its request to the intermediary no later than 180 days from the intermediary’s final notice of program reimbursement.

Provider Exhibit P-17, Pg. 2-10 (Emphasis added)

⁹

Provider Exhibit P-17.

Although CPFC had seen written guidelines from HCFA on SNF exception requests before, this particular exhibit was given to CPFC in response to a deposition subpoena duces tecum of HCFA employee Joseph Menning.¹⁰ The Provider notes that CPFC had requested that Mr. Menning bring to his deposition (in the “Mercy” case) all HCFA policies and procedures governing SNF exception requests which preceded HCFA Transmittal No. 378. The HCFA Guidelines were produced in response to this subpoena.¹¹

The Provider also introduced into evidence the transcript of the deposition of Mr. Menning at which he testified in the “Mercy” case about the HCFA Guidelines.¹² During his deposition, Mr. Menning testified that the HCFA Guidelines were written in approximately 1983 and that he used them to evaluate SNF exception requests.¹³ The HCFA Guidelines were sent out to intermediaries.¹⁴ Mr. Menning stated that if an intermediary ever expressed uncertainty about how to handle a SNF exception request, HCFA would give that intermediary a copy of the HCFA Guidelines and direct the intermediary to follow them.¹⁵ HCFA stopped using the HCFA Guidelines in July 1994 when the new guidelines in HCFA Transmittal No. 378 were issued.¹⁶

¹⁰ See Provider Exhibit P-16.

¹¹ Tr. 20:4-17; 24:19 - 25:12.

¹² Provider Exhibit P-16. (“Depo”)

¹³ Depo. 24:10-21

¹⁴ Depo. 27:21 - 28:3.

¹⁵ Depo. 28:16 - 29:1.

¹⁶ Depo. 25:1-7.

The Provider contends that this understanding that a SNF exception request could be filed from a revised NPR was also supported by the practice of HCFA. The Provider introduced evidence of seven contemporaneous SNF exception requests made from several providers' revised NPRs in which HCFA approved the exceptions.¹⁷ The Provider notes that between December 12, 1992 and April 20, 1993, HCFA granted the exception requests for each of these seven fiscal years in which an exception request had been submitted from a revised NPR.¹⁸ The Provider's exception request in the instant case was filed on July 16, 1993.

On July 11, 1994 CPFC received a letter from HCFA in a matter concerning another provider. This letter announced that "[i]t is HCFA's policy that when a revised NPR is issued, only the specific issues affected by the revised NPR are subject to appeal."¹⁹ This was the first time CPFC learned of this new "policy". The Provider contends that this announcement of HCFA's policy was obviously made well after the Provider's initial opportunity to file an exception request from the original November 13, 1991 NPR. The Provider believes that this policy was inconsistent with the Intermediary's and HCFA's practice in the seven previous exception requests submitted from revised NPRs which had been granted; in none of these had HCFA limited the exception to "the specific issues affected by the revised NPR."²⁰ The Provider notes that this "policy" of HCFA was also inconsistent with the HCFA Guidelines which Mr. Menning had testified governed HCFA's administration of SNF exception requests through July, 1994.²¹

The Provider contends that this July 11, 1994 letter was also sent the same month that the new written rules for the submission of SNF exception requests were issued in the form of HCFA Transmittal No. 378. (See Provider Exhibit P-18) The Provider notes that HCFA Transmittal No. 378 did change the rules for the submission of SNF exception requests by removing the modifier "final" from the reference to the NPR as the measuring point of the 180 day deadline for the submission of an exception request. However, HCFA Transmittal No. 378 was to become effective only for SNF exception requests filed after July 20, 1994. (Note: Provider's exception request was filed July 16, 1993) By its own terms it was not to be applied retroactively.²²

¹⁷ These seven exceptions, their recommended approval by the intermediary, and their actual approval by HCFA are summarized in a time line and included as evidence in Provider Exhibit P-49.

¹⁸ See Provider Exhibits P-5, P-32, P-36, & P-37.

¹⁹ Provider Exhibit P-11; Provider Exhibit P-15, transcript 46:2-20.

²⁰ Tr. 46:21 -47:15.

²¹ Tr. 47:16 - 48:3.

²² Provider Exhibit P-18; Tr. 48:23 -50:8

HCFA demonstrated its recognition that it could not apply the provisions of HCFA Transmittal No. 378 retroactively by the way it continued to treat some of the other seven exception requests submitted from revised NPRs. The Provider contends that in September 1995, HCFA agreed to a settlement of the appeals for two providers, even though all of the exceptions for these four fiscal years had been made from revised NPRs.²³

The Provider notes that HCFA took no action on its exception request until April 21, 1995 when HCFA sent a letter to the Intermediary denying the Provider's atypical services exception request for FYE 1989. HCFA's April 21 letter explained that the basis for HCFA's denial was that the exception request "was not submitted timely". The Provider contends that this April 21 letter was written by the same Joseph Menning who later produced the written HCFA Guidelines in discovery for the "Mercy" case.

PROVIDER'S CONTENTIONS:

The Provider makes four arguments that HCFA's denial of the July 16, 1993 exception request was arbitrary, capricious, an abuse of discretion, and not in accordance with law. First, HCFA failed to follow its own written HCFA Guidelines in denying the Provider's exception. Second, HCFA violated the Administrative Procedure Act when it significantly revised its definitive interpretation of its governing regulation without following notice and comment rule making. Third, the policy announced in HCFA's July 11, 1994 letter denying the Provider's exception request was a change in policy and was impermissibly applied retroactively. And fourth, the Provider requests that the time period in which it could file an exception request be equitably tolled so as to make the July 16, 1993 exception request timely, due to its excusable ignorance of HCFA's policy, HCFA's conduct of distributing guidelines and then changing its policy without notice, and the absence of any prejudice to HCFA in requiring it to determine the exception now.

The Provider argues that in denying its exception request on April 21, 1995, HCFA failed to follow its own policy and practice in effect at the time that the July 16, 1993 exception request was made. This policy and practice was that a provider could submit an exception request within 180 days of the "final" NPR. According to the Provider, "final" meant the latest and most recent NPR issued. If the initial NPR was also the only NPR, then it was the "final" NPR. However, if other revised NPRs followed the initial NPR, they would each in turn become the new "final" NPR.

The Provider points out that the governing regulation 42 C.F.R. § 413.30 does not specify which NPR starts the running of the 180 day time limit for the submission of the exception request. It merely states that a provider's exception request "must be made to its fiscal intermediary within 180 days of the date on the intermediary's notice of program reimbursement." Without such

²³

See Provider Exhibits P-28 & P-38; Tr. 50:9- 51:20.

specification, the more reasonable interpretation is that the time period begins to run from any NPR.

The Provider points out that when faced with precisely this question in two cases involving exceptions to the limits established by the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248 (“TEFRA”) and in the regulations at 42 C.F.R. § 413.40, the Board came to the same conclusion as the Provider. See Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Dec. No. 95-D26, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶43,222, rev’d, HCFA Administrator, May 5, 1995, Medicare and Medicaid Guide (CCH) ¶43,510 (“Care Unit”) and Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No 95-D28, March 8, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,228, rev’d, HCFA Administrator, May 15, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,538, aff’d, No. CV95-4674 KIN (C.D.N.C. January 2, 1997), Medicare and Medicaid Guide (CCH) ¶ 45,249, aff’d, Foothill Presbyterian Hospital v. Shalala, 152 F.3d 1132 (9th Cir. 1998), Medicare and Medicaid Guide (CCH) ¶ 300,028 (“Foothill”).

The Provider also argues that the regulation at 42 C.F.R. § 405.1889 does not contradict this analysis. It addresses four specific rights and that none of these affects the right to submit an exception request. That right is governed exclusively by 42 C.F.R. § 413.30. That is exactly the analysis the Board made in Care Unit and Foothill.

The Provider emphasizes that this is not a case which sets new policy. The Provider does not dispute the HCFA Administrator’s authority to interpret the time limit in 42 C.F.R. § 413.30 to apply only to an initial NPR. Rather, the Provider argues that this was clearly not the interpretation of HCFA at the time the Provider filed its exception request on July 16, 1993. At that time, the rules that applied to exception requests were stated in the HCFA Guidelines.²⁴ These rules had been in effect since 1983, had been distributed to intermediaries, and were the source to which intermediaries were directed when questions arose. The guidelines clearly stated that the time period in which to submit an exception request began to run from the “final” NPR, thus removing the ambiguity contained in 42 C.F.R. § 413.30. The Provider asserts that “final” NPR was consistently interpreted by the Intermediary to mean the most recent NPR. Such interpretation was manifested not only through the oral advice given the Provider and its representative, but also through the Intermediary’s conduct in consistently recommending the approval of SNF exception requests submitted from revised NPRs which did not address the items for which an exception was requested. “Final” NPR was also consistently interpreted by HCFA to mean the most recent NPR until July 1994, the month the new rules in HCFA Transmittal No. 378 were issued. HCFA had consistently approved exception requests submitted from revised NPRs which did not address the items for which an exception was requested.²⁵

²⁴ Provider Exhibit P-17.

²⁵ Provider’s Post Hearing Brief at 4.

The Provider also argues that the HCFA Guidelines with its statement that an exception request could be made from a “final notice of program reimbursement”, and the conduct of HCFA in granting exception requests made from revised NPRs, constituted HCFA’s definitive interpretation of the ambiguous statement contained in 42 C.F.R. § 413.30 that a provider could make an exception request “to its fiscal intermediary within 180 days of the date on the intermediary’s notice of program reimbursement”, without specifying which NPR triggered the right to request an exception.

“Those regulated by an administrative agency are entitled to ‘know the rules by which the game will be played’”. Alaska Hunters v. Federal Aviation Administration, 177 F.3d 1030, 1035 (D.C. Cir. 1999). In the instant case before the Board, the Provider contends that HCFA changed its interpretation of its regulation without notice to the Provider. In doing so, the Provider asserts that HCFA violated section 551 of the Administrative Procedure Act because it changed its definitive interpretation of its regulation without notice and comment rule making:

“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.” We therefore [Paralyzed Veterans of America v. D.C. Arena, 117 F.3d 579 (D.C. Cir. 1997)] explained why an agency has less leeway in its choice of the method of changing its interpretation of its regulations than in altering its construction of a statute. “Rule making,” as defined in the APA, includes not only the agency’s process of formulating a rule, but also the agency’s process of modifying a rule. 5 U.S.C. § 551(5). See Paralyzed Veterans, 117 F. 3d at 586. When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.

Alaska Hunters, 177 F.3d at 1033-34. Based on the above, the Provider believes that HCFA’s new policy of requiring exception requests to be made from the initial NPR, whether stated in a letter or in Transmittal No. 378, is invalid for its failure to be adopted pursuant to notice and comment rule making.

The Provider also argues that HCFA impermissibly applied its change in policy retroactively. Retroactive application of new rules is not permitted under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. and Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, CCH Medicare and Medicaid Guide ¶37,541 (1988).

The Provider argues that the undisputed evidence presented at the “Mercy” hearing demonstrates

that HCFA's "policy" of only permitting an exception from a revised NPR on issues affected by that revised NPR was first communicated to the Provider by HCFA's July 11, 1994 letter. This was also the month in which HCFA released HCFA Transmittal No. 378, which set out the new rules for the administration of SNF exception requests. The Provider asserts that neither the Intermediary nor HCFA presented any evidence that this "policy" had been in effect at the time the Provider made its exception request or at any other time before July 1994. Neither did the Intermediary or HCFA present any evidence that this "policy" had been published or communicated in any other manner before HCFA's July 11, 1994 letter.

Finally, the Provider contends that the Board should exercise its power to apply the doctrine of equitable tolling and toll the period within which the Provider could submit an exception request until the time it made its second exception request.

The Provider notes that the doctrine of equitable tolling "focuses primarily on the plaintiff's excusable ignorance" and "is not available to avoid the consequences of one's own negligence." Cedars-Sinai Medical Center v. Shalala, 177 F.3d 1126, 1130 (9th Cir. 1999). The facts of this case show that the law on whether the 180 day time limit ran from the initial or a revised NPR was either unclear and inconsistently applied or abruptly changed in HCFA's July 11, 1994 denial letter. Indeed, the Provider believes that the affirmative conduct of the Intermediary and HCFA misled the Provider. In the context of this confusion or change of policy, the Provider contends that it acted reasonably and with due diligence.

The Provider believes that the lack of clarity in the law is sufficient to justify the equitable tolling of a statute of limitations. Capital Tracing Inc. v. United States, 63 F.3d 859, 862-863 (9th Cir. 1995). The Provider also believes that the time limitation stated in 42 C.F.R. § 413.30 was at best ambiguous with its lack of specification of which NPR begins the running of the 180 day time limitation. The Provider points out that the Board twice interpreted identical language in neighboring 42 C.F.R. § 413.40 to include a revised NPR. See Care Unit and Foothill Presbyterian, cited above. The HCFA Guidelines identified the "final" NPR as the point from which the 180 days time limit was counted. "Final" NPR is more distinct than the absence of any specification in the regulation. "Final" NPR was interpreted by the intermediaries and by HCFA to mean the latest and most recent NPR. Both intermediaries and HCFA acted consistently with this interpretation as they respectively recommended approval and approved seven exception requests made from seven revised NPRs which did not address the issues for which an exception was requested.

The Provider believes that if HCFA's policy was truly as stated in its July 11, 1994 letter, then its conduct, and that of its intermediaries, was misleading. The Provider asserts that if it actually was the policy of HCFA to permit exceptions from revised NPRs only on issues which the revised NPR addressed, HCFA could have included this policy in the HCFA Guidelines, could have informed its intermediaries of this policy, and otherwise disseminated it. If this really was the policy of HCFA, it should not have approved the seven exception requests from revised NPRs and misled the Provider.

The Provider contends that HCFA will suffer no prejudice from equitably tolling the time in which to submit the Provider's exception request. HCFA or the Intermediary can determine the Provider's exception request as well now as they could then.

In conclusion, the Provider contends that HCFA's denial of the Provider's exception request was arbitrary, capricious, an abuse of discretion and not in accordance with law. HCFA failed to follow its own written guidelines, it illegally changed its definitive interpretation of its regulation without complying with the notice and comment rulemaking requirements of the Administrative Procedure Act, it illegally applied a change in policy retroactively, and the facts demonstrate the propriety of equitably tolling the time in which the Provider may have submitted its exception request so as to make its submission timely.

The Provider urges the Board to reverse HCFA's denial of its exception request and to remand the exception request to HCFA for determination.

INTERMEDIARY'S CONTENTIONS:

It is the Intermediary's position that the issue in this case pertains to the Intermediary's denial of the Provider's request for an exception to its SNF RCL because the request was filed more than 180 days from the original NPR. Specifically, the Intermediary contends that the crux of the issue is when the 180-day time frame for filing the SNF RCL request begins. Does the 180-day time frame begin from the date of the original NPR or the revised NPR?

The Intermediary contends that it has properly denied the Provider's request because the Provider did not file the request within 180 days from date of the original NPR dated November 13, 1991. The Intermediary further contends that it did not arbitrarily or capriciously make its determination. Pursuant to 42 C.F.R. § 413.30(c), the regulations state in part:

(c) Provider requests regarding applicability of cost limits. Except for the per-beneficiary limitation that applies to HHAs, a provider may request a reclassification, exception, or exemption from the cost limits imposed under this section. In addition a hospital may request an adjustment to the cost limits imposed under this section. The provider's request must be made to its fiscal intermediary within 180 days of the date on the intermediary's notice of program reimbursement. The intermediary will make a recommendation on the provider's request to HCFA, which makes the decision. HCFA responds to the request within 180 days from the date HCFA receives the request from the intermediary. The intermediary notifies the provider of HCFA's decision. The time required for HCFA to review the request is considered good cause for the granting of an extension of the time limit to apply for a Board

review, as specified in §405.1841 of this chapter. HCFA's decision is subject to review under Subpart R of Part 405 of this chapter.

42 C.F.R. § 413.30(c).

The Intermediary points out that the original NPR date is the date it used to make its initial and final determination of the SNF limits. The Intermediary contends that this is the NPR that should have triggered the Provider's request for an adjustment to its SNF limits.

The Intermediary argues that the revised NPR dated January 21, 1993, does not create a new 180-day period for a SNF limit adjustment request, as each NPR is a separate and distinct determination in accordance with 42 C.F.R. § 405.1889. The Intermediary points out that the revised NPR dated January 21, 1993, resulted in adjustments for capital related costs. Furthermore, the Intermediary notes that this Provider's cost report was also reopened on July 29, 1992. Once again, the Intermediary did not reopen for an issue related to the SNF RCL, but this reopening was for bad debt adjustments.

The Intermediary contends that the HCFA Administrator and the courts have affirmed similar fiscal intermediaries' determinations in the following decisions:

- Mission Community Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, HCFA Admin. Dec., Aug. 20, 1991, Medicare and Medicaid Guide (CCH) ¶ 39,534.
- Simi Valley Adventist Hospital v. Blue Cross of California, HCFA Admin. Dec., October 6, 1991, Medicare and Medicaid Guide (CCH) ¶ 39,610.
- Care Unit Hospital of Dallas v. Mutual of Omaha, HCFA Admin. Dec., May 5, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,510.
- Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, HCFA Admin. Dec., May 15, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,538,
- Delaware County Memorial Hospital v. Sullivan, U. S. District Court, Eastern District of Pennsylvania, No. 89-7151, June 27, 1991, Medicare and Medicaid Guide (CCH) ¶ 39,506
- Foothill Presbyterian Hospital v. Shalala, U.S. District Court, Central District of California, No. CV 95-4674, January 2, 1997

The Intermediary argues that the Board should consider the HCFA Administrator's and courts' findings in these decisions. For example, in vacating the PRRB's decision in the case of Care

Unit, the HCFA Administrator stated in part as follows:

Thus, if a specific reimbursement matter is reopened and revised, a provider's appeal rights are limited to the particular matter that was revised, and do not extend to other matters that were finalized in the initial NPR, but not subsequently reopened or revised. To hold otherwise, i.e., to permit appeal of issues not considered in the reopening that could have been appealed within 180 days of the original NPR, would be contrary to the plain meaning of the limitations period in section 1878(a)(3) of the Act.

Id.

Also, the Provider cannot resurrect the lapsed rights to challenge its "dissatisfaction" with the original NPR through the revised NPR. For example, in the U.S. District Court, Central District of California, No. CV 95-4674, January 2, 1997, Foothill Presbyterian Hospital v. Shalala, the court found as follows:

If Plaintiff were allowed to reopen the 1983 TEFRA limits under these circumstances, the 180-day deadline for appeals under the Medicare statutory and regulatory framework would be rendered meaningless. As the Ninth Circuit in (*French Hospital Medical Center v. Shalala*, 89 F.3d 1411) (9th Cir. 1986) explained, "allowing the provider to appeal any issue in a revised NPR would nullify the 180-day deadline for appealing the initial NPR. If provider were able to call into question anything in the entire cost report, with each adjustment to the bottom line, no matter how unrelated, they would thwart the policy of finality embodied in the appeal deadline.

The Ninth Circuit in *French Hospital* explained that the case before it "does not require us to decide the reviewability of a revised NPR that addresses a narrow issue but that indirectly affects other matters contained in the initial NPR." Id. At 1420 n.12. This, however, is the exact question before the Court in this case. Although for this reason *French Hospital* is not controlling here, the principles set forth in *French Hospital* concerning the interrelationship between initial and subsequent NPRs and the deference that must be afforded by the Court to statutory interpretations and decisions made by the HCFA Administrator provide the Court with the necessary framework for evaluating the motions currently before it. . .

Id.

The Intermediary also refers to the following law, regulations and program instructions which support its position:

42 U.S.C. §1395oo states in part as follows:

. . . (e) The Board shall have full power to make rules and establish procedures not inconsistent with the provisions of this title or regulations of the Secretary. . .

42 C.F.R. § 405.1867 states as follows:

In exercising its authority to conduct the hearings . . . the Board must comply with all the provisions of Title XVIII of the Act and regulations issued thereunder, as well as HCFA rulings issued under the authority of the Administrator of the Health Care Financing Administration . . .

The Intermediary also notes that HCFA Pub. 15-1 shows similar provisions to those noted immediately above. The Intermediary contends that the above regulations and program instructions, and HCFA Administrator's and court decisions, support its determination. Accordingly, the Intermediary asks the Board to uphold and affirm its arguments.

CITATIONS OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§ 1395oo et seq. - Provider Reimbursement Review Board

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

§§ 405.1835-.1841 - Board Jurisdiction

§ 405.1867 - Sources of Boards Authority

§ 405.1885 et seq. - Reopening a Determination or Decision

§ 405.1889 - Effect of a Revision

§ 413.30 et seq. - Limitations on Reasonable Costs

§ 413.40 - Ceiling on the Rate of Increase in Hospital

Inpatient Costs

3. Cases:

Anaheim Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 2000-D72, July 3, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,527, HCFA Admin. Declined Rev.

Mercy General Hospital-SNF v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 2000-D87, September 22, 2000, Medicare & Medicaid Guide (CCH) ¶80,572, HCFA Adm. Declined Rev.

Stanislaus Medical Center v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Case No. 98-D79, July 30, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,042, rev'd, HCFA Administrator, September 29, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,127.

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).

Cedars-Sinai Medical Center v. Shalala, 177 F.3d 1126 (9th Cir. 1999).

Care Unit Hospital of Dallas v. Mutual of Omaha, PRRB Dec. No. 95-D26, March 8, 1995, Medicare & Medicaid Guide (CCH) ¶43,222, rev'd, HCFA Administrator, May 5, 1995, Medicare & Medicaid Guide (CCH) ¶43,510.

Foothill Presbyterian Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No 95-D28, March 8, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,228, rev'd, HCFA Administrator, May 15, 1995, Medicare & Medicaid Guide (CCH) ¶ 43,538, aff'd, No. CV95-4674 KIN (C.D.N.C. January 2, 1997), Medicare & Medicaid Guide (CCH) ¶ 45,249, aff'd, Foothill Presbyterian Hospital v. Shalala, 152 F.3d 1132 (9th Cir. 1998), Medicare & Medicaid Guide (CCH) ¶ 300,028.

Mission Community Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, HCFA Admin. Dec., Aug. 20, 1991, Medicare & Medicaid Guide (CCH) ¶ 39,534.

Simi Valley Adventist Hospital v. Blue Cross of California, HCFA Admin. Dec., October 6, 1991, Medicare & Medicaid Guide (CCH) ¶39,610.

Delaware County Memorial Hospital v. Sullivan, U. S. District Court, Eastern District of Pennsylvania, No. 89-7151, June 27, 1991, Medicare & Medicaid Guide (CCH) ¶39,506.

Alaska Hunters v. Federal Aviation Administration, 177 F.3d 1030 (D.C. Cir. 1999).

Capital Tracing Inc. v. United States, 63 F.3d 859 (9th Cir. 1995).

4. Other

Administrative Procedure Act, 5 U.S.C. Sections 551, et seq.

HCFA Transmittal No. 378

TEFRA 1982 P.L.97-248

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 Provider exceeded the routine cost limits on its original filed cost report and on its original NPR dated November 13, 1991²⁶. In addition, the Board notes that there is no evidence in the record to indicate the Provider was dissatisfied with the November 13, 1991 determination until the Provider filed an exception request on July 16, 1993. The Board also finds that the Intermediary reopening of January 21, 1993 was for the limited purpose of adjusting capital related costs of the Provider. The Board further finds that succeeding revised NPRs did not impact the amount by which the Provider exceeded the cost limits. Therefore, the Board finds that the Provider did not file a timely exception request within 180 days of the NPR dated November 13, 1991. 42 C.F.R. § 413.30 (c).

The Board next addresses the Provider's arguments. The Provider argued that in denying its exception request on April 21, 1995, HCFA failed to follow its own policy and practice in effect at the time that the July 16, 1993 exception request was made. The Board notes that the Provider is referring to HCFA guidelines in its Exhibit P-17, # 5 which mentions a "final" NPR. The Board, however, points to the regulations. The Board notes that it has previously found that a provider may file an exception request based on a revised NPR, however the reopening rules at 42 C.F.R. §§ 405.1885-.1889 limit the provider to the issues adjusted in the revised NPR. See Stanislaus Medical Center v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Case No. 98-D79, July 30, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,042, rev'd, HCFA Administrator, September 29, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,127. The Board finds that the Intermediary reopenings in the instant case were for the limited purposes of correcting reimbursement for capital related costs and bad debts.

²⁶ See Intermediary Exhibit I-1.

Regarding the Provider's argument that HCFA violated section 551 of the Administrative Procedure Act because it changed its definitive interpretation of its regulation without notice and comment rule making, the Board finds a lack of evidence in the record to support the Provider's claim.

Turning to the Provider's argument that HCFA impermissibly applied its change in policy retroactively, the Board finds that if HCFA and the Intermediary are using regulations to make a decision, there is no retroactivity involved.

Finally, the statutes and regulations that delineate the Board's authority, 42 U.S.C. § 1395oo et seq. and 42 C.F.R. Subpart R, do not include equitable tolling powers. See Anaheim Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 2000-D72, July 3, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,527, HCFA Admin. Declined Rev. The Board has regulatory authority to permit late appeals to the Board and late reopenings of its decisions under 42 C.F.R. §§ 405.1841(b) and 405.1885(d), however, the Board finds these provisions are not applicable to the instant case.

In summary, the Board finds that the Provider was entitled to file an exception request from its revised NPR, however RCL relief is limited to the scope of the adjustment in the revised NPR. Since the Provider did not file its exception request within 180 days of its original NPR, the Board concludes that the request was not timely filed.

DECISION:

The Board finds that the Provider's exception request was not timely filed. HCFA's determination is affirmed.

Board Members Participating:

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

Date of Decision: August 20, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman