

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2003-D18

**PROVIDER –**  
Spalding Rehabilitation Hospital  
Englewood, Colorado

Provider No. 06-3027

**vs.**

**INTERMEDIARY –**  
Mutual of Omaha Insurance Company

**DATE OF HEARING -**  
January 16, 2002

Cost Reporting Periods Ended  
October 31, 1995

**CASE NO.** 99-0321

## INDEX

	<b>Page No.</b>
<b>Issue.....</b>	<b>2</b>
<b>Statement of the Case and Procedural History.....</b>	<b>2</b>
<b>Provider's Contentions.....</b>	<b>3</b>
<b>Intermediary's Contentions.....</b>	<b>9</b>
<b>Findings of Fact, Conclusions of Law and Discussion.....</b>	<b>11</b>
<b>Decision and Order.....</b>	<b>13</b>
<b>Dissenting Opinion of Henry C. Wessman.....</b>	<b>14</b>

ISSUE:

Did the Intermediary incorrectly determine that the Provider was not entitled to a new provider exemption from the application of the skilled nursing facility for its provider-based skilled nursing facility?

STATEMENT OF CASE AND PROCEDURAL HISTORY:

Spalding Rehabilitation Hospital, Provider Number 06-3027 (Provider/Spalding Colorado) is a rehabilitation hospital located at 900 Potomoc Street, Aurora, Colorado. Spalding Rehabilitation Hospital entered an agreement to lease space from HealthOne dba Swedish Medical Center to establish an off-site skilled nursing facility (SNF) on the campus of Swedish Medical Center on December 7, 1994. The off-site SNF was certified to participate in the Medicare program on December 28, 1994 under Provider Number 06-5334.<sup>1</sup>

Spalding Colorado also furnished rehabilitation services by leasing beds in the following locations:

1. Thirty beds at Swedish Medical Center (Spalding-South) in the southern Denver suburb of Englewood, Colorado;
2. Twenty beds at Lutheran Hospital (Spalding-West) in the western Denver suburb of Wheat Ridge;
3. Fifteen beds at Longmont United Hospital (Spalding-North), which is approximately thirty miles north of Denver;
4. Twenty-four beds at Presbyterian/St. Luke's Medical Center (Spalding Downtown), which is located in Denver;
5. Twenty beds at Bethesada Christian Hospital (Spalding-Central) which is also located in Denver.

All of the Provider's beds in Colorado were certified under provider number 06-3027. The SNF had a separate subprovider number 06-5334.

Since February 7, 1991, the Spalding Rehabilitation Hospital operated a skilled nursing facility in Cheyenne, Wyoming. This skilled nursing facility (Spalding Wyoming) was separately certified under the Medicare program and assigned number 53-5044.

On March 18, 1997, Spalding Colorado requested a new provider exemption to the skilled nursing facility routine cost limit. The Intermediary forwarded the request to the Health Care Financing

---

<sup>1</sup> See Intermediary Exhibit I-11.

Administration (HCFA), now the Centers for Medicare and Medicaid Services (CMS), on May 12, 1997, with a recommendation that Spalding Colorado be approved for the new provider exemption. HCFA denied Spalding Colorado's request in a letter dated June 12, 1998. HCFA's rationale for the denial was that the Provider had already operated a skilled nursing facility – Spalding Wyoming, provider number 53-5044, since February 7, 1991. The denial stated that the Medicare program instructions at HCFA Pub. 15-1 § 2533.1G state that eligibility for a new provider exemption is determined based upon an examination of the entire institution or institutional complex operations in the three years prior to its certification as a Medicare skilled nursing facility. If the institution or institutional complex operated as a skilled nursing facility or its equivalent for three or more years prior to its certification under past or present ownership, the newly certified skilled nursing facility will not qualify for a new provider exemption. Since the Provider had operated Spalding Wyoming since February 7, 1991, HCFA determined that Spalding Colorado did not qualify for a new provider exemption for its cost reporting period ended October 31, 1995 (FY 95).

On August 20, 1998, the Intermediary notified Spalding Colorado that it did not qualify for an exemption to the routine cost limit. The Provider appealed the Intermediary's notice on October 30, 1998. The Provider's filing meets the jurisdictional requirements of 42 C.F.R. §§ 405.1835-.1841. The Provider is represented by Laurence D. Getzoff, Esquire, of Hooper, Lundy & Bookman, Inc. The Intermediary is represented by Mr. Tom Bruce of Mutual of Omaha.

#### PROVIDER'S CONTENTIONS:

The Provider contends that the issue is clear. If Spalding-Colorado is found to be a separate and distinct hospital from a commonly owned Spalding Rehabilitation Hospital (Spalding-Wyoming) that is located about 125 miles away in Cheyenne, Wyoming, Spalding-Colorado is entitled to a new provider exemption. If, on the other hand, Spalding-Wyoming, with a completely separate hospital license from a different state, a completely separate Medicare certification, provider agreement and number, is part of the same hospital or institution as Spalding-Colorado, the Intermediary is correct. The Provider argues that Spalding-Colorado and Spalding-Wyoming were not part of the same hospital, institution or even institutional complex. Thus, they must each be accorded their separate provider status, and the SNF Reasonable Cost Limit (RCL) new provider exemption sought by Spalding-Colorado for the first time in FY 95 should be granted.

The Provider contends that Spalding-Colorado, including each of its units at the above five campuses, was treated as one distinct freestanding rehabilitation hospital.<sup>2</sup> Spalding Colorado was licensed by the Colorado Department of Health as a freestanding rehabilitation hospital, located entirely in the Denver, Colorado area.<sup>3</sup> The Spalding-Colorado license clearly refers to a hospital located completely within Colorado, does not reference any licensed facility in Wyoming, nor permits or enables in any manner Spalding-Colorado to operate a facility, including a skilled nursing facility, in Cheyenne, Wyoming, or anywhere else in Wyoming.<sup>4</sup>

The Provider indicates that Spalding-Wyoming was licensed as a freestanding rehabilitation hospital located entirely in Cheyenne, Wyoming in FY 95 and for at least three years prior to that, as well as after 1995.<sup>5</sup> The State of Wyoming Department of Health license does not authorize Spalding-Wyoming to operate a transitional care unit or SNF at any location other than on East 18th Street in Cheyenne. This license indicates that Spalding-Wyoming and its SNF have no relationship whatsoever for licensure purposes to Spalding-Colorado and its SNF.

The Provider next indicates that Spalding-Colorado was certified as a separate, freestanding rehabilitation hospital by CMS and was assigned Medicare Provider No. 06-3026. This certification was issued by the Denver Regional Office of CMS.<sup>6</sup> The Provider adds that the same CMS Regional Office separately certified Spalding-Wyoming as a distinct, freestanding rehabilitation hospital, with a completely separate provider number (No. 53-3026) from the certification and provider number of Spalding-Colorado. Moreover, in 1994 the Provider indicates that this same CMS Regional Office separately certified Spalding Wyoming as a separate SNF unit and issued a separate provider number for SNF Wyoming (Provider No. 53-5044).<sup>7</sup>

Subsequently, that same Denver CMS Regional Office separately certified SNF Colorado on December 28, 1994, as a distinct part SNF provider to Spalding-Colorado.<sup>8</sup>

---

<sup>2</sup> Transcript (Tr.) at 35 and 36

<sup>3</sup> Tr. at 58 and 59 and Provider Exhibit P-10.

<sup>4</sup> See Exhibit Provider P-10 and Tr. at 60 and 61.

<sup>5</sup> Tr. at 59 and 60 and Provider Exhibit P-10.

<sup>6</sup> Tr. at 184.

<sup>7</sup> Tr. at 40, 38 and 184.

<sup>8</sup> Tr. at 38, 18 and 144.

The Provider contends that as a part of any certification process, a lengthy application is completed by a provider. That application shows all related organizations, the ownership structure and the organizational structure.

It is highly unlikely that the CMS Regional Office in Denver, Colorado would not have known or did not know that both Spalding-Colorado and Spalding-Wyoming existed as separate facilities, even though each was owned by a common corporation, or that the Colorado SNF and the Wyoming SNF, respectively, were anything other than located in separately certified, freestanding rehabilitation hospitals, located in different states.

The Provider contends that the operations of Spalding-Colorado (including Colorado SNF) and Spalding-Wyoming (including Wyoming SNF) were separate. Spalding-Colorado and Spalding-Wyoming each had its own medical director throughout the relevant period.<sup>9</sup> While the individuals filling these positions at these two hospitals did change over the years, and in some cases even from year to year, the Provider indicates that a single individual, and a different individual, was responsible for all final medical determinations at Spalding-Colorado and Spalding-Wyoming, respectively. Similarly, the Provider indicates that at all times, Spalding-Colorado and Spalding-Wyoming had a separate chief of the medical staff responsible only for each respective hospital, and not the other. At all relevant times, the Provider indicates, Spalding-Wyoming and Spalding-Colorado were run by separate "Administrators," functioning as the chief executive officer of each respective hospital.

The Provider indicates that other aspects of the Spalding-Colorado and Spalding-Wyoming Providers' respective operations were completely separate. For example, the medical staff membership of the two facilities was separate. Spalding-Colorado physicians did not automatically, or in most cases at all, have clinical privileges at Spalding-Wyoming. Likewise, Spalding-Wyoming physicians did not automatically hold (or hold at all) clinical privileges at Spalding-Colorado. Each hospital's staff physicians held privileges that were specific to that hospital, and not privileges that would be transferable to the other hospital, unless a separate application for membership and clinical privileges was submitted.<sup>10</sup>

The Provider indicates that Spalding-Colorado and Spalding-Wyoming each had separate nursing directors,<sup>11</sup> their own nursing policies and procedures,

---

<sup>9</sup> See Provider Exhibit P-7 and Tr. at 50 and 52.

<sup>10</sup> Tr. at 113, 122 and 123.

<sup>11</sup> Tr. at 62-64.

and separate nursing staff.<sup>12</sup> Neither Spalding-Colorado nor Spalding-Wyoming received specific clinical services from the other. The Provider also argues that there was no significant overlap between patients served by the Wyoming SNF and the Colorado SNF. The Provider shows that in FY 95, fewer than five percent of the Wyoming SNF patients came from Northern Colorado, and probably none from the Denver, Colorado metropolitan area.<sup>13</sup>

The Provider contends that its use of the Spalding-Colorado Medicare cost report as a source for generally allocating costs to Spalding providers did not make Spalding-Colorado and Spalding-Wyoming part of the same institution or institutional complex. As separate Medicare providers, Spalding-Colorado and Spalding-Wyoming were required to file and actually did file completely separate Medicare cost reports. The Provider explained that there was one audited financial statement for Spalding Rehabilitation Hospital Corporation.<sup>14</sup> This was a corporate financial statement, not a financial statement specifically prepared for either Spalding-Colorado or Spalding-Wyoming, i.e., the two hospitals. The Provider's witness stated that the structure of Spalding Rehabilitation Hospital Corporation was very similar to a chain organization.<sup>15</sup> He explained that the allocation and reporting methodology that Spalding-Colorado and Spalding-Wyoming used was accurate.<sup>16</sup>

The Provider contends that based on these facts and circumstances, Spalding-Colorado and Spalding-Wyoming are neither part of the same institution nor part of the same institutional complex. Further, the Provider indicates that the plain language of 42 C.F.R. § 413.30 clearly does not apply the tests for determining whether or not to grant a new provider exemption to an institutional complex but rather applies such tests to each provider. Nowhere in the regulation is the new provider exemption limited to situations where an institutional complex has operated a similar type of provider for less than three years. Rather, so long as a provider has not operated as the same type of provider for at least three full years, the provider should qualify for the exemption.

The Provider contends that even if the new provider exemption were applied to institutional complexes instead of providers, Spalding-Colorado would

---

<sup>12</sup> Tr. at 117.

<sup>13</sup> Tr. at 67 and 68; Provider Exhibit P-11.

<sup>14</sup> See Intermediary Exhibit I-61.

<sup>15</sup> Tr. at 44 - 45.

<sup>16</sup> Id.

still quality. The Provider points out that the term “institutional complex” as defined in HCFA Pub. 15-1 § 2533.1, refers to a complex or aggregation of

providers and units within some geographical boundary or relationship. If Spalding-Colorado and Spalding-Wyoming were one institutional complex, and thus one provider, SNF-Wyoming and SNF-Colorado would have to constitute one distinct-part SNF unit. Yet, such a result cannot be supported under the Medicare program’s SNF Manual § 201.1 or the Intermediary Manual § 3020.1.

The Provider contends that the Intermediary’s insistence on treating Spalding-Colorado and Spalding-Wyoming as one provider because there is one Spalding Corporation is mistaken. The Provider indicates that an institutional complex does not mean one corporation or vice-versa. The two terms have nothing to do with one another. Spalding Corporation had corporate executives and officers who oversaw all aspects of its constituent provider operations. However, such a structure does not make the corporation an institutional complex. Many chain organizations are one corporation. However, many of these chains include two, six, fifty or over one-hundred providers, each of which is accorded separate certification status and is not considered part of one institutional complex. Otherwise, the Provider contends, no provider in a chain organization could ever be granted a new provider exemption.

The Provider contends that the facts and circumstances of the case cannot possibly support a finding that Spalding-Colorado and Spalding-Wyoming somehow constitute one multi-facility hospital. The Intermediary is completely wrong in stating that Spalding-Colorado and Spalding-Wyoming should not have been certified under Medicare as separate providers. Contrary to the Intermediary’s assertions, the Provider contends, Spalding-Colorado and Spalding-Wyoming independently met the Conditions of Participation (Conditions) for Medicare under 42 C.F.R. § 482. In particular, the Provider points out that each Spalding had its own administrator who qualified as the required chief executive officer under the Conditions at 42 C.F.R. § 482.12. The Provider argues further that both CMS and the Joint Committee of Hospital Organization have expressly acknowledged the interchangeability of the terms administrator and chief executive officer. Also, the Provider points out that the fact that the two Spalding hospitals sharing one governing board does not violate the Conditions of Participation at 42 C.F.R. § 482.12.

Likewise, the Provider contends that under no interpretation, no matter how liberal, can Spalding-Colorado and Spalding-Wyoming be deemed to be one multi-campus hospital under State Operations Manual § 2024. The Provider contends and the Intermediary and CMS agree that all of the required joint

certification criteria must be satisfied and present in order to jointly certify two campuses as one multi-campus hospital. Yet, the Provider contends that

Spalding-Colorado and Spalding-Wyoming had separate chief executive officers, separate chief medical officers and did not have totally integrated medical staff. Indeed, as the Provider contends, each of the two Spaldings had separate physicians and a separate chief of staff. There was no automatic cross-privileging between Colorado and Wyoming; separate applications were required. Thus, there was no total integration. Since all of the criteria are not met, Spalding-Colorado and Spalding-Wyoming could not be jointly certified.

Finally, the Provider contends that granting the new provider exemption to Spalding-Colorado and its new provider SNF would be consistent with the intent of the exemption. The plain language of the pertinent regulation outlining limits on Medicare reimbursable costs, 42 C.F.R. § 413.30, provides that new providers may seek exemption from the application of the RCL.

The Provider observes that the CMS Administrator, as recently as June, 2001, expressly acknowledged that a single corporation can operate multiple provider hospitals under that same corporation, yet have the hospitals deemed to be separate Medicare providers. In Baptist Memorial Medical Center v. Blue Cross/Blue Shield Associations/Blue Cross and Blue Shield of Arkansas, HCFA Administrator Decision, June 4, 2001 Medicare and Medicaid Guide Transfer Binder ¶ 80,720, (Baptist Memorial), the HCFA Administrator, while overturning a Board decision on completely unrelated grounds, nevertheless acknowledged that Baptist Health, Inc. was a single corporation which operated four distinct hospital providers. In the record of Baptist Memorial, the facts clearly show that Baptist Health, Inc. was a single corporation for which there was one board of trustees and one chief.

The Provider observes that SNF-Colorado and SNF-Wyoming are not part of one multiple-facility hospital. The idea that Spalding-Colorado and SNF-Wyoming are part of one multiple-facility hospital (i.e., part of the same Medicare provider) also is not supported by the relevant Manual provision. HCFA Pub. 15-1 § 2336 suggests that a multiple-facility hospital is a hospital operated by a single administrative entity but which has several different types of services. Such multiple-facility hospitals must be evaluated in their entirety for compliance with the conditions of participation and must be certified as a single provider of service. CMS and the Intermediary suggest that because attributes of corporate management were shared and certain home office type administrative expenses shared by SNF-Wyoming and SNF-Colorado were first included on the cost report for Spalding-Colorado in a non-reimbursable cost center and subsequently in a reimbursable cost

center on the cost report of Spalding-Wyoming, Spalding-Wyoming and Spalding-Colorado should be considered part of one multiple-facility hospital. However, as HCFA Pub. 15-1 § 2336 illustrates, a multiple-facility hospital is much more than a hospital

that utilizes certain step-down cost allocations. In the present case, SNF-Spalding and SNF-Wyoming are not part of a multiple-facility hospital. These two facilities are located in two different states, more than 100 miles apart, in completely separate health service areas. They are not components of one single hospital that offers different types of services. Furthermore, despite the fact that Spalding-Colorado and SNF-Wyoming were owned by the same corporate entity during FY 95, they have not been operated as a single administrative entity. By separately certifying Spalding-Colorado, Spalding-Wyoming, SNF-Colorado and SNF-Wyoming, moreover, the Medicare program has affirmatively signaled its approval for treating these providers as separate entities, and not separate cost centers with a single executive officer.

#### INTERMEDIARY CONTENTIONS:

The Intermediary contends that, despite their separate licensure and Medicare certification, Spalding-Colorado and Spalding-Wyoming are part of the same institutional complex; namely, the Provider, Spalding Rehabilitation Hospital. Since the Provider had operated Spalding SNF-Wyoming since February 7, 1991, Spalding SNF-Colorado did not qualify for a new provider exemption for its cost reporting period ended October 31, 1995. In defining an institutional complex, the Intermediary believes it is most appropriate to use the guidance provided by HCFA Pub. 7 § 2024.<sup>17</sup> The first indicator that two or more hospitals should be certified as a single institutional complex is a single governing body that is responsible for the operational decisions of the entire hospital enterprise. The Intermediary asserts it is a fact that Spalding-Colorado and Spalding-Wyoming shared a common governing board.<sup>18</sup> The Intermediary also asserts the regulation at 42 C.F.R. § 482.12 governing the conditions of participation for Medicare providers requires each separately certified hospital to have a separate board of directors.<sup>19</sup>

The Intermediary notes that a second indicator is that a single chief medical officer reports directly to the governing board and is responsible for all medical staff activities of all components or hospitals. The Intermediary contends Spalding-Colorado and Spalding-Wyoming shared a chief medical

---

<sup>17</sup> See Intermediary Exhibit I-65

<sup>18</sup> Tr. at 162 and 163 and Intermediary Exhibits I-54 and I-55

<sup>19</sup> Tr. at 164 and 165.

officer with the title of President of the Medical Staff.<sup>20</sup> The Intermediary disagrees with the Provider's contention that Spalding-Colorado and Spalding-Wyoming each had an independent chief of medical staff. Spalding-Colorado

and Spalding-Wyoming each had a separate medical director. However, the Intermediary contends these medical directors reported to the Provider's President of the Medical Staff.<sup>21</sup> One of the duties of the President of the Medical Staff of the Provider is to "communicate and represent the opinions, policies, concerns, needs and grievance of the Medical Staff to the Board, the President and other officials of the Hospital."<sup>22</sup> This duty defines the Chief Medical Officer in HCFA Pub. 7 § 2024B. The Intermediary contends the President of the Medical Staff, not the Spalding-Colorado and Spalding-Wyoming medical directors, is the Provider's Chief Medical Officer.

The Intermediary observes that the third indicator is a totally integrated medical staff. The Intermediary concedes the Spalding-Colorado and Spalding-Wyoming medical staffs are not totally integrated in the sense that the Colorado physicians have privileges at Spalding-Wyoming and vice versa. However, the Spalding-Colorado and Spalding-Wyoming medical staffs are significantly integrated. There is no dispute that Spalding-Colorado and Spalding-Wyoming share a common set of medical staff bylaws.<sup>23</sup> The bylaws reflect the standing committees (Medical Executive, Pharmacy, Quality Improvement, Utilization Review, and Nominating). The Intermediary contends these committees have authority over the medical staff operations of both Spalding-Colorado and Spalding-Wyoming.<sup>24</sup>

The Intermediary argues that the fourth and last indicator that two or more hospitals should be certified as a single institutional complex is a single Chief Executive Officer who exercises control over all administrative activities at the hospitals. The Intermediary contends the President of the Provider served as the Chief Executive Officer of both the Spalding-Colorado and Spalding-Wyoming programs.<sup>25</sup> The Intermediary rejects the Provider's position that the Spalding-Wyoming program manager had the responsibilities of a chief executive officer. Toward the end of the cost

---

<sup>20</sup> Tr. at 166, 167, 168, 169 and 170 and Intermediary Exhibits I-58, I-59, and I-64.

<sup>21</sup> Tr. at 187, 188-191 and 192; the duties of the Provider's President of the Medical Staff are detailed in Intermediary Exhibit I-64.

<sup>22</sup> See Intermediary Exhibit I-64.

<sup>23</sup> Tr. at 136, and Intermediary Exhibit I-64.

<sup>24</sup> Tr. at 135 and 136

<sup>25</sup> Tr. at 163 and 164 and Intermediary Exhibits I-53, I-54 and I-57 to I-59.

reporting period under appeal, this program manager reported to the director of inpatient operations for the Provider.<sup>26</sup> Prior to this time, the program manager apparently reported to the Provider's President.<sup>27</sup> The fact that the Spalding-Wyoming program manager reported directly to an officer of another provider, Spalding Rehabilitation Hospital, is inconsistent with the Provider's claim that this

manager was the Chief Executive Officer of Spalding-Wyoming. Further, there is no dispute that the revenues and expenses for both Spalding-Colorado and Spalding-Wyoming were reported on the Provider's financial statements. The Intermediary contends this is additional evidence that Spalding-Colorado and Spalding-Wyoming were part of a single institutional complex.

The Intermediary disagrees with the Provider's repeated argument that the Provider simply served as a home office for Spalding-Wyoming. HealthOne is the home office for both Spalding-Colorado and Spalding-Wyoming.<sup>28</sup> HealthOne has the home office provider number; Spalding Rehabilitation Hospital does not. HealthOne files a home office cost report; Spalding Rehabilitation Hospital does not. Rather than a home office, the Provider, Spalding Rehabilitation Hospital, is a Medicare certified provider who furnishes some of the administrative services that a home office commonly furnishes to one of its chain components. It also furnishes a substantial volume of the operational services an institutional complex furnishes to its components.<sup>29</sup>

#### FINDINGS OF FACT, CONCLUSION OF LAW AND DISCUSSION:

The majority of the Board (majority) after reviewing the Medicare law, regulations, program instructions, facts, parties' contentions, evidence submitted, and post-hearing briefs finds and concludes that Spalding Colorado is entitled to a new provider exemption under 42 C.F.R. § 413.30.

The following facts are undisputed:

- (1) Spalding Colorado and Spalding Wyoming are located in Colorado and Wyoming, respectively.
- (2) The above two providers are 125 miles apart.

---

<sup>26</sup> Tr. at 136 and 137 to 140.

<sup>27</sup> Tr. at 140.

<sup>28</sup> Tr. at 86, 203 and 204-207.

<sup>29</sup> Tr. at 88.

- (3) Each is separately licensed by its respective state licensure board.
- (4) Each is separately certified by the Medicare program.
- (5) Spalding Colorado became operational in December, 1994
- (6) Spalding Wyoming became operational in February, 1991.
- (7) One corporation (Spalding Rehabilitation Hospital, Inc.) operated two separate providers (Spalding-Colorado and Spalding-Wyoming).

The majority observes that the Intermediary's primary argument is that Spalding-Wyoming and Spalding-Colorado operate as one institutional complex as described in HCFA Pub. 7 § 2024 (Medicare State Operations Manual). It cites such factors as shared governing board, single Chief Medical Officer who reports directly to the governing board, integrated medical staff and Chief Executive Officer as the foundation for considering both providers to be considered as multiple components of a single hospital.

The majority also notes the Intermediary's argument that a component of CMS inappropriately determined that the two facilities (Spalding-Colorado and Spalding-Wyoming) were separate providers and their operating independent of each other. Finally, the majority observes that the Intermediary initially allowed Spalding-Colorado to be exempted as a new provider; however, CMS overruled the Intermediary and denied the exemption.

The majority cannot ignore the fact that Medicare's State Operations<sup>30</sup> component of CMS considered the two SNFs to be two independently operating facilities. Further, it is inappropriate for the Board to question the propriety of separate state licenses and CMS certifications over which the Board has no authority. Since the licensing by the individual states and State Operations component of CMS apply their regulatory and program instruction requirements to various provider situations, the Board rejects the above Intermediary contentions that Spalding-Colorado and Spalding-Wyoming are part of one multiple facility complex. Their analyses of shared governing board, single medical officer, etc., essentially conflict with the extensive certification process performed and reviewed by expert state and CMS staff and contractors. The majority finds the Intermediary's arguments to be not convincing in light of these CMS determinations. It is inappropriate and inconsistent for CMS to treat two separately determined

---

<sup>30</sup> The State Operations component of CMS is responsible for certifying providers to participate in the Medicare program. It has its own policies and procedures which are state in HCFA Manual Publication 7.

providers for general reimbursement and operational purposes one way and then a different way for exemption determination purposes.

The majority further finds that even if an institutional complex exists, HCFA Pub. 15-1 § 2533.1 (Request Regarding New Provider Exemption) states that geographic location and population serviced are material factors. These requirements were essentially ignored by the Intermediary. The two facilities were 125 miles apart and patient populations minimally overlapped. The majority notes that Spalding-Colorado had an occupancy rate of 72%. This

reflects a start-up entity operation. Finally, the majority observes that the Intermediary's treatment of the Wyoming and Colorado facilities as a single complex essentially denies any large corporation from forming several independent facilities under its corporate umbrella. This precludes a provider from operating in a manner which it deems to be most efficient.

DECISION AND ORDER:

Spalding-Colorado is a new provider for which the RCL exemption applies. The Intermediary's adjustment is reversed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esq.  
Henry C. Wessman, Esq. (Dissenting)  
Gary B. Blodgett, DDS  
Stanley J. Sokolove, CPA

DATE OF DECISION: March 7, 2003

FOR THE BOARD:

Suzanne Cochran  
Chairman

Dissenting Opinion of Henry C. Wessman, Esquire

I dissent, and file the following brief narrative.

To Spalding Rehabilitation Hospital's credit, unlike the majority of past "new provider exemption" cases, they did not come before the PRRB with a scheme that had as its singular theme a ploy to circumnavigate their State's SNF bed moratorium with a goal of enhancing their ability to maximize DRG payment via quick patient discharge to their own conveniently attached TCU or Sub-Acute Unit, in turn assuring high occupancy for that Unit. What they do, unfortunately, is to run directly up against 42 C.F.R. § 413.30(e), regulatory promulgation in response to 42 U.S.C. § 1395x(v)(1)(A) "reasonable costs", and further promulgations at HCFA Pub. 15-1 § 2533 et seq , "Request for Exemption From SNF Cost Limits." I do not see any way around § 2533, particularly § 2533.1(B) which denies a new provider exemption to any "institution or institutional complex" that has operated as a SNF for more than three (3) years. It is clear that Spalding Rehabilitation Hospital ( a not-for-profit corporation) had consistently operated SNF beds going back to 1991, some four (4) years prior to the FYE 95 under appeal.

It is uncontroverted that Spalding Rehabilitation Hospital is an institution or institutional complex. This is evidenced by the singular Financial Statements of the entity (Intermediary Position Paper, Exhibits I-60; I-61; I-62); the various Organizational Charts of the entity (Provider Supplemental Exhibit P-12; Intermediary Position Paper, Exhibits I-52, I-53, I-54), and the state licenses for the entity (Provider Supplemental Exhibits P-10, P-11), all of which identify the same not-for-profit Spalding Rehabilitation Hospital as the owner or licensee.

There are several elements in the new provider exemption request mechanism. Each element is as important as the other, each must be satisfied in order to qualify for a new provider exemption. Neither the Board Majority, nor I, can "pick and chose" which criteria to accept, and which to ignore. In this case, Spalding can not meet § 2533.1(B), and is not eligible for the exemption. The Provider could have cured this shortcoming via simple corporate structure realignment. But the entity is not a "chain", as defined within its own bylaws or financial statements, or by Medicare; nor has it sought that status (Intermediary Position Paper at 31) that would have

allowed “home office” considerations. Further, I do not believe that the Baptist case is on point, and the Provider’s reliance on that case is not helpful to their cause. Finally, it would have been helpful if the Provider would have documented some benchmark factors, such as “low start-up census”, or other indicators, of a need for a new provider exemption.

For the most basic reasons cited above, I believe that 42 U.S.C. § 1395x(v)(1)(A) Reasonable Costs, as promulgated in 42 C.F.R. § 413.30(e), controls in this case. The Provider has failed to overcome the “institution or institutional complex” criteria of HCFA Pub. 15-1 §2533.1(B), and thus was rightly denied a new provider exemption for SNF cost limits. The CMS/FI decision denying a new provider exemption to Spalding Rehabilitation Hospital (a singular not-for-profit corporation) should be upheld.

---

Henry C. Wessman, Esq.  
Senior Board Member