

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2004-D13

PROVIDER –
Hunterdon/Somerset 2001 Wage Index
Group

Provider No. Various

vs.

INTERMEDIARY –
Riverbend Government Benefits
Administrator

DATE OF HEARING:
August 11, 2003

Federal Fiscal Year - 2001

CASE NO. 01-0881GE

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Issue

This case arises from Hunterdon Medical Center's and Somerset Medical Center's (Providers') dissatisfaction with having a closed hospital's wage data included in the Providers' Metropolitan Statistical Area (MSA) wage index and the exclusion from the wage index data of providers that have been reclassified by the Medicare Geographic Classification Review Board (MGCRB). The question addressed by the decision is whether expedited judicial review (EJR) is appropriate because the Board cannot grant the remedy sought by the Providers: a change to the Secretary's policies used to calculate wage indices.

Providers' Representative: Michael F. Berkey, Esq.

Intermediary's Representative: Bernard M. Talbert, Esq.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Procedural History

The Provider Reimbursement Review Board (Board), as part of its prior analysis of jurisdiction, notified the parties in this case that it was considering whether EJR was proper under 42 C.F.R. § 405.1842. The parties had addressed EJR in their jurisdictional briefs with the Providers opposing EJR. The Board notified the parties that it would consider EJR on its own motion and invited further comments, but the parties declined. The Board's decision to grant EJR in this case is set forth below.

Background

The Medicare statute, 42 U.S.C. § 1395ww(d)(3)(E), requires that, as part of the methodology for determining prospective payments to hospitals, the Secretary must adjust the standardized amounts for area wages based on the geographical location of the hospital compared to the national average hospital wage level. The Secretary defines hospital labor market areas based on the Metropolitan Statistical Area (MSA), Primary MSA or New England County Metropolitan Area issued by the Office of Management and Budget. 65 Fed. Reg. 47026, 47070 (August 1, 2000).

Beginning October 1, 1993, the statute required the Health Care Financing Administration (HCFA, which is now the Centers for Medicare & Medicaid Services (CMS)) to update the wage index annually. HCFA based the annual update on a survey of wages and wage-related costs, and, when calculating the wage index, took into account the geographic reclassification¹ of hospitals in accordance with 42 U.S.C. §§ 1395ww(d)(8)(B) and

¹ The MGCRB considers applications by hospitals for geographic reclassification for purposes of payment under the inpatient prospective payment system. Hospitals can elect to reclassify for the wage index or the standardized amount, or both, and as individual hospitals or as groups. Generally, hospitals must be proximate to the labor market area to which they are seeking reclassification and must demonstrate

1395ww(d)(10). Id. The 2001 wage index was based on 1997 wage data. 66 Fed. Reg. 22646, 22673 (May 4, 2001).

In preparation for publishing the wage indices for Federal fiscal year (FFY) 2001, HCFA instructed intermediaries to inform prospective payment hospitals of the availability of a wage data file, as well as the process and timeframe for requesting revisions to their wage index calculations. The wage index correction process is described as evaluating data specific to the provider's own operations. Providers were notified that they could request changes to their wage index calculation by submitting a request to their intermediary. The intermediary then sent approved changes to HCFA. After the publication of the proposed wage index, providers who failed to request corrections were not afforded a later opportunity to correct their wage data calculation unless there was an error that the provider could not have known about. 66 Fed. Reg. 22646, 22681-22682 (May 4, 2001). The Federal Register authorizes an appeal to the Board of denials of wage data revisions made as a result of the Agency's wage data correction process. 64 Fed. Reg. 41490, 41513 (July 30, 1999).

The Providers timely filed this appeal from the publication of the final wage indices in the August 1, 2000 Federal Register (65 Fed. Reg. 47054 (August 1, 2000)). The reimbursement effect is approximately \$799,155. In this case, the Providers made a request for a wage data correction but stated that this determination is not the subject of this appeal.² The Providers were dissatisfied with the inclusion of wages and hours of a closed hospital, Memorial Medical Center of South Amboy ("South Amboy"), in the computation of the wage index for the MSA in which the Providers are located.

The Providers explain that the MSA in which they were included (MSA #5015) consisted of seven hospitals from the three counties of Hunterdon, Somerset and Middlesex. In June of 1999, South Amboy, a Middlesex County hospital, closed. In August of 1999 the four remaining Middlesex County hospitals filed an appeal with the Medicare Geographic Classification Review Board (MGCRB) to be reclassified to the Monmouth-Ocean County, New Jersey MSA (MSA #5190). South Amboy was not included in the reclassification request. The Providers, Hunterdon and Sommerset Medical Centers (Hunterdon and Sommerset), were not notified of and had no right to participate in that administrative proceeding. See 42 C.F.R. § 412.234. As a result of the MGCRB decision to assign the four Middlesex County hospitals to another MSA, the FFY 2001 wage indices for MSA # 5015 were computed based only on the wages of the hospitals remaining therein: Hunterdon, Somerset and South Amboy.³

characteristics similar to hospitals located in that area. Hospitals must apply to the MGCRB for reclassification. The MGCRB usually issues decisions for reclassification in February to become effective for the following federal fiscal year. 68 Fed. Reg. 27157, 27192 (May 19, 2003). The Provider Reimbursement Review Board hears appeals of providers that are dissatisfied with the intermediary's or CMS's determination regarding their requests to correct the wage data that is used to calculate the wage index. See, 65 Fed.Reg. 26282, 26301-26302 (May 2, 2000).

² See March 7, 2001 letter from Richard DeLuca.

³ CMS states that it has "always maintained, subject to limited exceptions, that any hospital that is in operation during the data collection period used to calculate the wage index should be included in the data base, since the hospital's data reflect conditions occurring in that labor market during the period surveyed

The Providers contend that the inclusion of South Amboy in the wage index computation resulted in the understatement of Hunterdon and Sommerset's wage indices. When the Providers filed their position paper, the issue was identified as follows:

Was it proper for CMS to include the wages of a Middlesex County, NJ hospital in calculating the wage index for Providers, while excluding the wages for all other hospitals in the same county as a result of a successful group appeal to the MGCRB?⁴

On July 15, 2003, the Board determined that it had jurisdiction over the appeal because the Providers filed their appeal within 180 days after the publication of the wage data in the Federal Register,⁵ and the amount in controversy exceeded the \$50,000 threshold for Board jurisdiction over a group appeal under 42 U.S.C. § 1395oo(a) and 42 C.F.R. §§ 405.1835-405.1841. Even though the appeals process discussed in the Federal Register seems to contemplate appeals based solely on a provider's own wage data, the Board also relied on the HCFA Administrator's decision in District of Columbia Hospital Wage Index Group Appeal, Medicare and Medicaid Guide (CCH), HCFA Adm. Dec. January 15, 1993, ¶ 34,423. There, the District of Columbia (D.C.) providers wage index was calculated using wage data from hospitals in Maryland and Virginia in addition to hospitals located in D.C. Providers asserted that they were entitled to a wage index based solely on the D.C. labor market. The Administrator reversed the Board's determination that it lacked jurisdiction. The basis for the Board's denial was that the publication of the

(59 FR 45353)." 67 Fed. Reg. 49982, 50023 (August 1, 2002). South Amboy was operating in 1997, the year wage data was collected for the 2001 wage index which is the subject of this appeal.

⁴ In the August 1, 2001 Federal Register, CMS explained that currently "the wage index value for an urban area is calculated exclusive of the wage data for hospitals that have been reclassified to another area". 66 Fed. Reg. 39828, 39865 (August 1, 2001). Consequently, the wage data for the reclassified Middlesex County facilities was excluded from the Providers' wage index calculation for 2001.

⁵ When the prospective payment system regulations were promulgated in 1983, the HCFA believed the only document that was considered a final determination was a Notice of Program Reimbursement. See, Health Care Financing Administration Ruling 84-1, Medicare & Medicaid Guide (CCH) ¶ 33, 990 (May 29, 1984) (only an NPR determines the "total amount of payment due the hospital" as required by the regulation for PRRB review). However, in Washington Hospital Center v. Bowen, 795 F.2d 139 (D.C. Cir. 1986), the Court held that the Secretary's position that an NPR was the only final determination was inconsistent with the statutory scheme. Subsequently, in the District of Columbia Hospital Wage Index Group Appeal, the HCFA Administrator held that:

"[C]ontrolling case law clearly holds that Congress did not intend for a PPS hospital to wait until the issuance of an NPR before it can appeal a final determination of the Secretary as to the amount of payment under subsection (b) or (d) of Section 1886 [PPS]. The publication of the wage index is the only formal notice, other than the NPR that these Providers received regarding their DRG prospective rate under Section 1886(d) of the Act. Therefore, . . .the Administrator determines that publication of the wage index in the Federal Register constitutes a "final determination of the Secretary" for purposes of Section 1878(a)(1)(A)(ii) of the Act."

Medicare and Medicaid Guide (CCH), HCFA Adm. Dec. January 15, 1993, ¶ 34,423.

wage index in the Federal Register was not a ‘final determination’ triggering jurisdiction and the scope of the Board’s authority was not discussed. The Administrator’s reversal does illustrate the Secretary’s view that the Board’s jurisdiction encompasses more than just the propriety of a calculation derived from the appealing provider’s own wage data.

The correction process described does not encompass a remedy to alter the impact of other facilities’ data on the final wage index calculation for the geographical area in which the requesting provider is located. The Board notified the parties that it would consider, on its own motion, whether EJR was appropriate. EJR is available where the Board has jurisdiction, material facts are not in dispute, but the Board lacks authority to decide an issue.

INTERMEDIARY’S POSITION REGARDING EJR

The Intermediary asserts that the Providers’ arguments are premised on the rule-making process for the wage index which produces published policies and applications having the force of regulation. The Intermediary believes that, in order to prevail, the Providers need to do any one of the following:

- Reverse CMS’s policy on the treatment of closed hospitals;
- Apply a later period policy change which would permit a recalculation of the relevant MSA’s wage index as if a reclassification of certain hospitals did not occur;
- Examine or second-guess the decision made in the MGCRB appeal of the Middlesex hospitals.

The Intermediary contends that these three matters are an inherent part of the authoritative environment for the 2001 wage index process. Consequently, it believes that the Board lacks the authority to change the published wage index for MSA # 5015.

PROVIDER’S POSITION REGARDING EJR

The Providers respond that the Intermediary has characterized every challenge involving the wage index as a challenge to the regulations. The result, the Providers believe, would effectively prohibit any opportunity to approach the Board for a hearing on any wage index matter. The Providers explain that, in one sense, they are not challenging the proposed wage index, but the availability and appropriateness of an exception to the wage index process. The Providers argue that there has been no exception process promulgated and it is, therefore, a folly to argue that their claim before the Board constitutes an attack on a regulation. (Providers’ Reply Br. on Jurisdiction at 15).

The Providers also list a number of questions that they insist are within the authority of the Board to decide before it considers whether EJR is appropriate.⁶

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION

The Board clearly has authority to determine whether the denial of a wage data revision made as a result of the Agency's wage data correction process is correct. 64 Fed. Reg. 41490, 41513 (July 30, 1999). The Providers in this case are not seeking correction of their own wage data. Rather, they are seeking to have the wages of a closed facility excluded from the wage index calculation and/or wage indices for reclassified facilities included in their wage index calculation. The remedies that the Providers are seeking are not provided for, nor are they addressed in the statute or regulations governing the 2001 FFY under dispute. It is undisputed, however, that for the 2002 FFY, HCFA changed its policy to allow one of the remedies the Providers are seeking for FFY 2001.⁷

The MGCRB's jurisdiction permits it to affirm or change a hospital's geographic designation for purposes of payment under the inpatient prospective payment system. 42 U.S.C. § 1395ww(d)(10) and 42 C.F.R. § 412.274. Parties to an MGCRB proceeding are limited to the hospital or group of hospitals requesting a change in geographic designation. 42 C.F.R. § 412.258(a). Undisputed in this case is the fact that the Providers had no standing to participate in the MGCRB proceeding involving a group appeal seeking reclassification to a new MSA. Nor were they able to challenge the CMS policy of not allowing reclassified hospitals' wage index data to be used in the wage index calculation of its original MSA or the policy of including a closed hospital's wage data in the calculation of the wage indices.⁸

The Board finds that the facts material to the issue are not in dispute. The questions posed by the Providers as requiring Board resolution are questions regarding how CMS's policy is made. The Board has no authority to dictate or fashion CMS policy or to retroactively apply policy changes. The Board concludes that it is without authority to direct CMS to exclude the wages of a closed Middlesex County, NJ hospital in calculating the wage index for the Providers or to include the wages for all other hospitals that were reclassified by the MGCRB in the Providers' wage index.

DECISION

Accordingly, the Board, on its own motion, finds that the issue properly falls within the provisions of 42 U.S.C. § 1395oo(f)(1) and 42 C.F.R. § 405.1842(f), and the Providers

⁶ See Providers' Reply Brief on Jurisdiction at 11-14.

⁷ In the August 1, 2001 Federal Register, the Secretary noted that "[c]urrently, the wage index value for an urban area is calculated exclusive of the wage data for hospitals that have been reclassified to another area. For the FY 2002 wage index, we include the wage data for a reclassified urban hospital in both the area to which it is reclassified and the MSA where the hospital is physically located. We believe this improves consistency and predictability in hospital reclassification and wage indexes, as well as alleviates the fluctuations in the wage indexes due to reclassifications." 66 Fed. Reg. 39828, 39865 (August 1, 2001). See also footnote 3 regarding inclusion of wage data for facilities that later close.

⁸ 64 Fed. Reg. 49982, 50023 (August 1, 2002); See also footnote 3.

are entitled to expedited judicial review. The Providers have 60 days from the date of this decision to institute an action for judicial review. See, 42 U.S.C. § 1395oo(f)(1) and 42 C.F.R. § 405.1842(h). Since there are no other matters for the Board to consider, the case is hereby closed.

Board Members Participating

Suzanne Cochran, Esq.
Martin W. Hoover, Esq.
Gary B. Blodgett, DDS
Elaine Crews Powell, CPA

Date of Decision: Apr 14 2004

FOR THE BOARD:

Suzanne Cochran, Esq.
Chairman

Enclosure: 42 U.S.C. § 1395oo(f)