

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2006-D7

PROVIDER –
Chicago 98-00 MSA Wage Index Group

Provider Nos.: Various

vs.

INTERMEDIARY –
Mutual of Omaha Insurance Company

Federal Fiscal Year 1999

CASE NO.: 99-3690G

INDEX

	Page No.
Issues.....	2
Medicare Statutory and Regulations Background.....	2
Facts of the Case.....	4
Parties' Contentions.....	5
Decision of the Board.....	6
Decision and Order.....	9

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Intermediary: Terry Gouger, Mutual of Omaha, Omaha Nebraska

Issues

- (1) Did Michael Reese Hospital (Reese) fail to exhaust its administrative remedies for a correction to its wage data during the February –March 1998 window for correcting wage data?
- (2) Did Reese Hospital nevertheless meet the criteria for a correction in the mid-year correction process as a data entry or tabulation error?
- (3) Can other hospitals in the same Metropolitan Statistical Area (MSA) seek a correction to the wage data for Reese Hospital?

Background

The Medicare statute establishes a Prospective Payment System (PPS) as the method of payment for most inpatient hospital services that are rendered to Medicare beneficiaries. 42 U.S.C. §1395ww(d). The Medicare statute further 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 wage index is calculated by dividing the average hourly wage paid by hospitals in that area by the national average hourly hospital wage. Under this formula, the higher the wage index for the area in which the hospital is located, the more reimbursement the hospital will receive.

The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), is the operating component of the Department of Health and Human Services (DHHS) charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and under interpretive guidelines published by CMS. See, 42 U.S.C. §1395(h), 42 C.F.R. §§413.20(b) and 413.24(b).

CMS is required to update the wage index annually. CMS bases the annual update on a survey of wages and wage related costs taken from cost reports filed by each hospital paid under PPS. 42 U.S.C. §1395ww(d)(3)(E). Based on the substantial amount of time that is needed for the provider to compile and submit cost reports and for the intermediary to then review these reports, there is generally a four-year lag between the

date upon which the provider reports the wage data and the date when the wage index is published.

This case involves the wage data for Reese Hospital that was used to calculate the federal fiscal year (FFY) 1999 wage index for the Chicago Metropolitan Statistical Area (MSA). Eighty-one other hospitals that are reimbursed under the prospective payment system for inpatient hospital services and that are located in the Chicago MSA have also appealed the Reese Hospital's wage data (Reese and the other appellants are collectively referred to as "Providers.") All these Providers are seeking to have Reese's total paid hours used in the Chicago MSA's wage index calculation reduced from approximately 6.4 million hours to approximately 4.9 million hours. A reduction in the hours used for Reese Hospital will have the effect of raising the wage index and, consequently, Medicare payments to all the hospitals in the MSA.

The Wage Data Correction Process for FFY 1999

The FFY 1999 wage index was calculated using cost report data filed by the hospitals for 1995. However, the Secretary provided a process through which hospitals could correct data used for the wage data calculation. In the August 29, 1997 Federal Register, the Secretary published a final rule with comment period announcing the proposed timetable for submission of wage data corrections for FFY 1999. Intermediaries were to complete desk reviews of the 1995 wage data by mid-November 1997. Hospitals could request a revision to the wage data through mid-December 1997, and intermediaries would then notify providers of changes to their wage data or notify the providers of the reasons requested changes were not accepted. The wage data was then forwarded to HCFA. 62 Fed. Reg. 45966, 45990-45991 (August 29, 1997).

On February 5, 1998, HCFA notified all intermediaries to advise all PPS hospitals of the availability of the public use file containing the edited preliminary FY 1995 wage data and the process and time frame for making corrections to the wage data. Individual hospitals' proposed corrections were to be submitted to the intermediary by March 9, 1998, and the intermediary had to submit approved corrections to HCFA by April 6, 1998. The intermediaries were to notify hospitals whose corrections were not accepted.

Upon the May 8, 1998 publication of the proposed wage index, HCFA stated that the only corrections HCFA would accept after the publication were ones that hospitals could not have known about during the March 1998 correction process window. In particular, it would not accept (1) wage data corrections that were filed too late to be submitted to the Agency by the April 8, 1998 deadline; (2) requests for corrections that could have been identified by the March 1998 correction process deadline but were not or requests to revisit factual determinations; or (3) policy interpretations made by the intermediary or HCFA. 63 Fed. Reg. 25576, 25589-25590 (May 8, 1998). The final wage index was published on July 31, 1998. 63 Fed. Reg. 40954 (July 31, 1998).

Then, on November 19, 1998, HCFA announced that it was opening a mid-year correction process for FFY 1999 for providers to request revisions to their 1995 wage data, but only if they met one of the following criteria:

- The hospital's wage data in the May 1998 public use file was recorded as zero on line 28 of Worksheet S-3, Part III (wage related costs).
- The hospital's data in the May 1998 public use file was recorded as zero in either column 3 or 4 (but not both), with non-zero data in the other column, for Lines 2, 4, 6, or 33 of Worksheet S-3, Part III.
- The hospital properly requested a wage data revision by March 9, 1998, the fiscal intermediary approved a revision (as reflected in a revised Worksheet S-3), but the fiscal intermediary or HCFA made a data entry or tabulation error.

Providers could seek a mid-year correction from November 19, 1998 through December 3, 1998. The mid-year corrections were published in the February 25, 1999 Federal Register. See, 64 Fed. Reg. 9378 (February 25, 1999).

Facts of the Case

When Reese filed its cost report for FYE 1995, it reported total hours paid of 4,935,791 on Line 1 of Column 4 of Worksheet S-3 of its cost report. As part of the required desk review of the Provider's cost report prior to the construction of the 1999 wage index, the Intermediary sent the Provider an August 27, 1997 letter requesting information about, among other things, total hours. The parties agree that Reese Hospital did not respond to this inquiry. On October 27, 1997, the Intermediary faxed the Provider another request for wage data information, including total hours, and requested a response by November 3, 1997. Again, Reese did not respond to the request for wage data.

The repeated requests for wage data are alleged to have been made because Reese's average wage changed more than 10% from 1994 to 1995. This was deemed by HCFA to constitute a material variance requiring the Intermediary to verify the reported wage data for accuracy. As a result of the variance and the lack of response from the Provider, the Intermediary used cafeteria statistics to adjust the total paid hours to 6,491,307.¹ Reese was notified of the change on November 6, 1997. This notice included copies of amended Worksheet S-3 and an adjustment report that specifically identified the changes to total hours. The Provider was advised to notify the Intermediary of any disagreement with the findings.² It is undisputed that the Provider did not respond to the notice.

On March 6, 1998, as part of the review of the public use file containing preliminary wage data from the FY 1995 cost reports, Reese requested that Part A physician fees and

¹ Providers' Position Paper at 2-5.

² Intermediary's Jurisdictional Brief Ex. I-5.

hours be included in contract labor and hours on Worksheet S-3, Line 33.³ Reese states that, at the time it made the request for a correction to physician fees, it knew that there was something wrong with its wage index, but it had not identified the exact nature of the problem.⁴ On March 25, 1998, the Intermediary notified Reese that it agreed with the Provider's proposed adjustments to contract labor, and it made adjustments to Worksheet S-3.⁵ On July 31, 1998, HCFA published the final wage index information in the Federal Register and there is no dispute that Reese's wage data relating to contract labor was incorporated as requested into the wage index calculation.

On November 30, 1998, after HCFA's notice of the availability of a mid-year correction to the wage index, Reese made a mid-year correction request under the data or tabulation entry errors criteria.⁶ For the first time, Reese requested a correction to total paid hours. The Intermediary recommended that HCFA deny the request because Reese had not requested a correction to total paid hours during the wage index correction process in March of 1998 and the change requested was not due to a data entry or tabulation error.⁷ HCFA released the mid-year correction without changing the wage data for Reese.⁸

Positions of the Parties

The Intermediary asserts that the Board lacks jurisdiction over the appeal because Reese failed to exhaust its administrative remedies in that it did not seek a correction to its total paid hours before the March 9, 1998 deadline for the submission of wage data corrections for FFY 1999. The Intermediary maintains that the correction to total hours is not a data entry or tabulation error eligible for alteration through the mid-year correction process during FFY 1999. The Intermediary explains that because of the limitation on the types of corrections that HCFA would entertain through the mid-year correction process, Reese was barred from seeking a correction of a newly discovered error.

Reese admits that it did not include a specific request to adjust total paid hours in its March 6, 1998 request for a wage data correction.⁹ Reese believes it could nevertheless request a mid-year correction because it had filed a wage data correction by March 9, 1998, albeit not the correction it now seeks, and there was a data entry or tabulation error when Reese's total paid hours were increased to 6,491,301. Reese asserts that the Intermediary's initial increase to total hours on Worksheet S-3 was clearly erroneous.

All of the participating hospitals in the group appeal urge the Board to decide the question of whether Reese qualifies for a change to total paid hours as a tabulation error or data entry error as a substantive matter, rather than a jurisdictional question of failing

³ Providers' Position Paper Ex. P-10.

⁴ Providers' Position Paper at 10.

⁵ Providers' Position Paper Ex. P- 11.

⁶ Providers' Position Paper Ex. P-13.

⁷ Providers' Position Paper Ex. P-15.

⁸ See, 64 Fed. Reg. 9378 (February 25, 1998)

⁹ Providers' Jurisdictional Brief at 3.

to exhaust administrative remedies. The Providers believe that whether the change to total hours is a tabulation error goes to the substance of the case.

The 81 Providers other than Reese argue that they should not be denied a hearing because their wage index calculation was impacted as a result of the “error” on Reese’s cost report. The 81 Providers assert that they did not have an opportunity to contest Reese’s wage data,¹⁰ and they have filed this appeal in accordance with the Administrator’s decision in the District of Columbia Hospital Association Wage Index Group Appeal, (D.C. Hospitals Group Appeal) (HCFA Adm. Dec. January 15, 1993) Medicare & Medicaid Guide ¶ 41,025. In that case, the Administrator held that the publication of the wage index in the Federal Register is a final determination which can be appealed to the Board.

Decision of the Board

Jurisdiction over the Appeal of Michael Reese Hospital

The Board concludes that it lacks jurisdiction over the appeal of the wage data correction for Reese Hospital. The Board finds that Reese failed to exhaust its administrative remedies when it did not ask the Intermediary to adjust its total hours during the initial wage index correction process available to it in November 1997 through March 9, 1998. Further, the change made to total hours was not a data entry or tabulation error that gave rise to the right to seek a mid-year correction.

Under 42 U.S.C. § 1395oo(a) of the Medicare Act and the regulations at 42 C.F.R §405.1835, a provider receiving payments in amounts computed under PPS has the right to a hearing before the Board with respect to such payments provided other jurisdictional criteria are met. The “amount of payment” for PPS hospitals is defined in §1395oo(d) to include the wage index. However, the Secretary has established specific administrative processes for correction of wage data used to compute the wage index. As the Secretary explained in the May 8, 1999 Federal Register, deadlines are necessary to allow sufficient time to review and process the data so that the final wage index calculation can be completed for development of the final prospective payment rates. 63 Fed Reg. 25590 (May 8, 1999). The prospective nature of the rate is central to the Medicare payment scheme. The Court in W.A. Foote Memorial Hospital v. Shalala, 2001 U.S. Dist. Lexis 24981 (E.D. Mich. 2001) (Foote) found the data correction processes¹¹ published in the Federal Register to be properly promulgated under the APA rulemaking requirements. The Foote Court further found that where a provider fails to seek a correction within the time frame established by the Secretary, it has failed to exhaust its administrative remedies.

¹⁰ Id. at 13

¹¹ The Foote case involved the 2000 wage index which was based on data from the provider’s 1996 cost report.

In this case, Reese had two opportunities to request a change to total hours before the proposed wage index was published on May 8, 1998, but failed to avail itself of either opportunity. The first opportunity for a correction occurred when the Intermediary notified the Provider that it had completed its review of the wage data on the 1995 cost report on November 6, 1997, and indicated that if there was a disagreement with the amended data to notify the Intermediary immediately. The adjustment report¹² accompanying this notice clearly identified the change in total hours. The second opportunity occurred in February of 1998 when the Intermediary notified the Provider of the availability of its wage data in the public use file and that it had until March 9, 1998 to submit corrections. The Provider sought only one change during this correction period: a correction for contract physician costs. It did not seek a correction nor did it ever question the component it now seeks to change: total hours.

The mid-year correction process was limited to three very specific criteria. The Provider filed its request for a correction under the “tabulation or data entry” error criteria. This criteria is premised on there first having been a timely request for correction and the intermediary’s approval of that correction. The Providers’ position is that the “request for correction” prerequisite does not need to be related to the “tabulation or data entry” criteria. We disagree. The tabulation error that offers another opportunity for correction must arise from the specific request and approval. There is no such relationship here.

The change that was requested and approved did not impact the total hours computation now in dispute. Contract Physicians Part A costs and total costs are separate and independent cost report line items on Worksheet S-3. The 1995 cost report instructions¹³ explain that the amount on Line 32 of Worksheet S-3 represents the accumulation of labor costs incurred by a hospital (exclusive of contract physician Part A costs). Line 33, on the other hand, reports only one element of cost—Contract Physician Part A cost. HCFA began collecting this data separately in 1995 for the express purpose of deciding whether these costs should be included in the wage index computation.¹⁴ Any change made to line 33 does not impact the labor costs captured on line 32 from which the wage index is calculated, i.e., there is no flow-through from line 33, contract physician costs, to line 32, labor costs.

Moreover, the change to total hours made during the Intermediary’s November 1997 wage data review was not the entry of incorrect numbers on the audit adjustment report. The Intermediary made a purposeful change to Worksheet S-3 as the result of the Provider’s failure to respond to a request for information regarding total hours on August

¹² Intermediary’s Jurisdictional Brief at I-5.

¹³ Provider Reimbursement Manual (HCFA Pub.15-2) § 2806.3 (Transmittal No. 6, May 1995)

¹⁴ 63 Fed. Reg. 40967 (July 31, 1998). In discussing changes to the wage index, the Secretary noted that she analyzed data for, among other things, Physician Part A costs for the first time in the 1995 cost reports and this was a separately reported matter. This Federal Register contains an summary of the Agency’s study of the impact of including physician Part A costs in the wage index and noted that the costs would be included in the 1999 wage index calculation.

27, 1997¹⁵ and October 27, 1997.¹⁶ The Intermediary's determination was accurately recorded on Worksheet S-3 that contained the Provider's wage data used to calculate the wage index for the MSA. The new mid-year correction process therefore does not afford a new opening for appeal based on the Intermediary's intentional reduction of hours in its November 1997 review.

The 81 Providers Participating in this Group Appeal Other Than Reese

The Providers Request for Hearing states:

The common issue before the Board will be: A challenge to the Chicago Metropolitan Statistical Area (MSA) Wage Index applicable to the Federal Fiscal Year 1999 as improperly established under the Medicare Prospective Payment System. The final determination being appealed is the notice of the hospital wage index published by the Federal Register issued on February 25, 1999 (64 Fed. Reg. 9378-9399(1999)) wherein the U.S. Department of Health and Human Services published the Final Rule revising the wage index for the Chicago MSA, but failed to make the data entry adjustment applicable to Michael Reese Hospital which would have corrected the Chicago MSA Wage Index to properly reflect the relative hospital wage level in that geographic area. (emphasis added).

There is no doubt that the 81 other Providers in the Chicago MSA were adversely affected by the Reese Hospital wage data determinations. In the May 7, 1999 Federal Register, the Secretary stated that once the final wage index was published in the Federal Register

hospitals are entitled to appeal any denial of a request for a wage data revision made as a result of HCFA's wage data correction process to the [Board]. . . . [A]ny subsequent reversal of a denial of wage revision request that results from a hospital's appeal to the [Board] will be given effect by paying the hospital under a revised wage index that reflects the revised wage data at issue.

64 Fed. Reg. 41490, 41513 (July 30, 1999). The Board does not find any authority in this statement for a hospital to challenge another hospital's wage data in the data correction administrative process, and the hospitals do not claim to have such rights. The Board does not question the Secretary's authority to establish an administrative process consistent with the statute that requires exhaustion of those remedies as a prerequisite to Board review. But, unlike Reese, the other 81 hospitals do not have any administrative remedies to exhaust.

¹⁵ Intermediary's Jurisdictional Brief Ex. I-3

¹⁶ Id. Exhibit I-4

Under 42 U.S.C. §1395oo(a) and the regulations at 42 C.F.R §405.1835, a provider receiving payments in amounts computed under PPS has the right to a hearing before the Board with respect to such payments provided other jurisdictional criteria are met. The “amount of payment” for PPS hospitals is defined at § 1395oo(d) to include the wage index.

In D.C. Hospitals Group Appeal, the Administrator relied on this statutory provision to reverse the Board’s finding of no jurisdiction and held that the publication of the wage index in the Federal Register is a final decision which can be appealed to the Board. The Providers in the D.C. Hospital Association Group Appeal were not seeking to correct an individual facility’s wage data. Rather, the D.C. providers challenged the validity of the wage index, claiming that the Secretary’s policy that used MSAs to define the geographical boundaries for the labor market used to calculate wage indices was inconsistent with the Medicare statute. They contended that they were legally entitled to a wage index based on hospital wages exclusively within the District of Columbia rather than the Washington-Maryland-Virginia MSA.

Here the dispute revolves around a single provider who failed to pursue an administrative remedy created specifically to address an individual hospital’s wage data. However, the administrative process described in the July 30, 1999 Federal Register fails to provide a remedy for other hospitals in the same MSA which are harmed by the hospital that failed to furnish correct data. The Board concludes that it does have jurisdiction over the 81 Providers other than Reese, but lacks the authority to grant the remedy sought: update of the Chicago MSA wage index with Reese Hospital corrected data. The Board has reviewed the parties’ comments regarding whether the Board should grant expedited judicial review on its own motion as permitted by 42 U.S.C. § 1395oo(f)(1) and 42 C.F.R. §405.1842(c) for the 81 remaining Providers. Because there remains a disputed fact issue regarding whether the Reese wage data was incorrect, the case is not appropriate for expedited judicial review. Although it creates an anomalous result, the Board, therefore, must resolve the fact issue even though it has no authority to grant a remedy.

DECISION AND ORDER

The appeal of Michael Reese Hospital is dismissed for lack of jurisdiction. Review of this determination is available under the provisions of 42 U.S.C. §1395oo(f) and 42 C.F.R. §§405.1875 and 405.1877.

The Board has jurisdiction of the claims of the 81 Providers in the Chicago MSA other than Michael Reese. The case will be scheduled for a hearing to resolve the fact issue of whether the wage data for Michael Reese Hospital used to determine the Chicago Wage Index is correct.

Board Members Participating

Suzanne Cochran, Esq.
Gary B. Blodgett, DDS
Elaine C. Powell, CPA

FOR THE BOARD:

Suzanne Cochran, Esq.
Chairman

Date: December 15, 2005

Enclosure: 42 U.S.C. § 1395oo(f) and 42 C.F.R. §§405.1875 and 405.1877