

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2014-D17

**PROVIDER –**  
Wyatt, Tarrant & Combs FFY 07 Occupational  
Mix Adjustment Group

Provider Nos.: 18-0038, 18-0130,  
18-0138, 18-0104, 18-0103, 18-0080

vs.

**INTERMEDIARY –**  
Blue Cross and Blue Shield Association/  
CGS Administrators, LLC

**DATE OF HEARING -**  
December 17, 2012

Cost Reporting Period Ended –  
September 30, 2007

**CASE NO.:** 07-1917G

## INDEX

	<b>Page No.</b>
Issues.....	2
Medicare Statutory and Regulatory Background.....	2
Statement of the Case and Procedural History.....	4
Providers' Contentions.....	10
Intermediary's Contentions.....	11
Findings of Fact, Conclusions of Law and Discussion.....	13
Decision and Order.....	16
Attachment A .....	18

ISSUES:

## ISSUE #1

Whether the inclusion of surgical technicians, mental health technicians, and heart center recovery technicians in the all-others category instead of the nursing aides, orderlies and attendants category in the provider's occupational-mix survey was correct.

## ISSUE #2

Does the fact that CMS and its intermediaries did not classify medical technicians uniformly and that some medical technicians are classified in nursing aides, orderlies and attendants category for some other hospitals, even while the Intermediary was excluding them from that category here, require that they be reclassified here as nursing aides, orders and attendants, and that the Providers' occupational mix adjustments be recalculated.<sup>1</sup>

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established under Title XVIII of the Social Security Act, as amended ("Act"), to provide health insurance to eligible individuals. Title XVIII of the Act was codified at 42 U.S.C. Chapter 7, Subchapter XVIII. The Centers for Medicare & 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 to organizations known as fiscal intermediaries ("FIs") and Medicare administrative contractors ("MACs"). FIs and MACs<sup>2</sup> determine payment amounts due the providers under Medicare law, regulation and interpretative guidelines published by CMS.<sup>3</sup>

Beginning in 1983, the operating costs of inpatient hospital services are reimbursed by Medicare primarily through the inpatient prospective payment system ("IPPS"). The IPPS statute contains a number of provisions that adjust reimbursement based on hospital-specific factors.<sup>4</sup> This case involves annual changes to the IPPS rates for hospital inpatient operating costs and the methodology for determining those rates.

42 U.S.C. § 1395ww(d)(3)(E) requires the Secretary from time to time to adjust the proportion of the hospitals' costs that are attributable to wages and wage-related costs of the DRG prospective payment rates for area differences in hospital wage levels. The wage adjustment factor (*i.e.*, the wage index) should reflect the relative hospital wage level in the geographic area of the hospital being compared to the national average hospital wage level. The wage index must be updated through a survey to measure earnings and paid hours of employment by occupational category.<sup>5</sup>

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<sup>1</sup> Transcript ("Tr.") at 5-6.

<sup>2</sup> FIs and MACs are hereinafter referred to as intermediaries.

<sup>3</sup> See 42 U.S.C. §§ 1395h, 1395kk-1; 42 C.F.R. §§ 413.20, 413.24.

<sup>4</sup> See 42 U.S.C. 1395ww(d)(5).

<sup>5</sup> See 42 U.S.C. § 1395ww(d)(3)(E)(i).

A provider who is dissatisfied with the Secretary's final determination of its wage index may file an appeal with the Provider Reimbursement Review Board ("Board") if it meets the following conditions: (1) the provider must be dissatisfied with a final determination of the Secretary as to the amount of the payment under subsection (b) or (d) of section 1395ww of this title; (2) the amount in controversy is \$10,000 or more, and (3) the provider files a request for a hearing within 180 days after receipt of notice of the Secretary's final determination.<sup>6</sup>

Section 304(c) of the Medicare, Medicaid and SCHIP Benefits Improvement and Protection Act of 2000<sup>7</sup> amended 42 U.S.C. § 1395ww(d)(3)(E) to require CMS to collect data every three years on the occupational mix ("OM") of employees for each acute care hospital participating in Medicare in order to construct an occupational mix adjustment ("OMA") to the area wage index beginning in October 1, 2004.<sup>8</sup> The purpose of the OMA is "to control for the effect of hospital's employment choices on the wage index" and "[t]he varying labor costs associated with these choices reflect hospital management decisions rather than geographic differences in the costs of labor."<sup>9</sup>

In September 2003, CMS issued a final notice of intent to collect data for purposes of implementing the OMA by October 1, 2004. CMS collected this data in early 2004. However, CMS partially implemented the OMA using a blended rate due to a lack confidence in the data collected and a desire to minimize the redistributive impact of the OMA. The blended rate was a blend of 10 percent of an average hourly wage, adjusted for occupational mix, and 90 percent of an average hourly wage, unadjusted for occupational mix.<sup>10</sup>

In 2006, in *Bellevue Hospital Center v. Leavitt*,<sup>11</sup> the Second Circuit ordered CMS to complete its data collections and to begin applying the OMA to 100 percent of the wage index effective for FY 2007 (*i.e.*, by October 1, 2006).<sup>12</sup> To comply with this order, CMS issued a Joint Signature Memorandum (JSM-06412) to FIs on April 12, 2006 setting new deadlines for hospitals to collect and submit new hours and wage data for employees for the first quarter of calendar year ("CY") 2006 by June 1, 2006 and for the second quarter of CY 2006 by August 31, 2006.<sup>13</sup>

The Memorandum also stated that CMS would shortly publish a notice in the Federal Register to announce the methodology that CMS proposes to use in calculating the FY 2007 OMA based on the survey data and the procedures for hospitals that are reclassifying. To this end, on May 17, 2006, CMS published a proposed rule which made several revisions requiring hospitals to include both the paid hours and wages paid associated with the employees in question and to use a subset of the occupational categories from the 2001 Bureau of Labor Statistics Occupational

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<sup>6</sup> See 42 U.S.C. § 1395oo(a).

<sup>7</sup> Pub. L. No. 106-554, Appendix F at § 304(c), 114 Stat. 2763A-495, 2763A-494 (2000).

<sup>8</sup> See also Form CMS-10079, Medicare Wage Index Occupational Mix Survey (2008) (available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS1210932.html>) (copy included at Provider Exhibit P-8 at 1-8).

<sup>9</sup> 71 Fed. Reg. 47870, 48006 (Aug. 18, 2006).

<sup>10</sup> See 69 Fed. Reg. 48916, 49034, 49052 (Aug. 11, 2004).

<sup>11</sup> 443 F.3d 163 (2nd Cir. 2006).

<sup>12</sup> *Id.*, at 173.

<sup>13</sup> (Available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS062033.html?DLPage=1&DLFilter=interim&DLSort=2&DLSortDir=ascending>.)

Employment Statistics survey based on its standard occupational categories. This new survey included the following categories and subcategories:

1. Registered nurses
  - a. Management personnel
  - b. Staff nurse/clinician
2. Licensed practical nurses
3. Nursing aides, orderlies and attendants
4. Medical assistants
5. All other occupations<sup>14</sup>

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The providers in this group appeal include Owensboro Medical Health System (“OMHS”), located in Owensboro, Kentucky and several Baptist Hospitals (“Baptist Hospitals”) including Baptist Hospital East in Louisville, Kentucky; Baptist Hospital Northeast located in LaGrange, Kentucky; Western Baptist Hospital in Paducah, Kentucky; Central Baptist Hospital located in Lexington, Kentucky, and Baptist Regional Medical Center in Corbin, Kentucky. OMHS and the Baptist Hospitals are referred to collectively as the “Providers” in this appeal. Each of the Providers is a Medicare participating, general acute care hospital.<sup>15</sup>

The Providers are challenging the National Government Services’ (“Intermediary”) grouping of surgical technicians, mental health technicians, and heart center recovery technicians (“medical technicians”) in the survey for the fiscal year ending September 30, 2007.<sup>16</sup> The Providers were required to submit their data on the survey (Form CMS-10079 (2006)) by June 1, 2006. The Intermediary then had until June 22, 2006, to audit the data and submit it to CMS. CMS then released the occupational mix data public use file on June 29, 2006. Providers were given until July 13, 2006, to submit requests for corrections to their respective Intermediary. The Intermediary then had to submit the final data to CMS by July 27, 2006. CMS made its survey file public on June 29, 2006 and published the final wage tables on the CMS website on October 6, 2006, and in the Federal Register on October 11, 2006.<sup>17</sup> The Providers appealed their fiscal year 2007 occupational mix adjustment to the wage indices to the Board pursuant to 42 CFR 405.1835-405.1841 and met the jurisdictional requirements of these regulations.

The Provider timely submitted its survey data and sent a letter to the Intermediary disagreeing with the reclassification of certain medical technicians<sup>18</sup> from the “Nursing aides, orderlies and

<sup>14</sup> See 71 Fed. Reg. 28644, 28646 (discussing the revised 2006 survey); Form CMS-10079, Medicare Wage Index Occupational Survey (2006) (available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS060037.html>) (excerpt included at Intermediary Exhibit I-2). See also 71 Fed. Reg. 7047 (Fed. 10, 2006) (notice of the submission of the revised OM survey form to OMB for approval); Provider’s Final Position Paper at 5 of 18 and Joint Stipulation at 2 of 9.

<sup>15</sup> Joint Stipulation at 1 of 9.

<sup>16</sup> As of October 17, 2011, CGS Administrators (“Intermediary”) replaced NGS as the primary contractor and is defending this appeal. See Provider’s Final Position Paper at 2 of 18.

<sup>17</sup> Joint Stipulation at 2 and 3 of 9; See also 71 Fed. Register, 59886.

<sup>18</sup> These include surgical technicians, mental health technicians and heart center recovery technicians.

attendants” occupational classification to a lesser “All other occupations” classification.<sup>19</sup> The Provider filed the request for a hearing within 180 days of the Secretary’s final publication of the wage data on October 11, 2006.<sup>20</sup> In addition to contesting the reclassification of medical technicians, the Provider also objected to the inconsistent application of the disputed classification between hospitals--allowing some hospitals to have their medical technicians classified in the nursing, aides and orderlies disproportionately adversely affecting the Provider.<sup>21</sup>

The parties in this case have reached the following pertinent stipulations for use in this hearing:

1. Owensboro Medical Health System ("OMHS") is a Medicare participating, general acute care hospital located in Owensboro Kentucky. It is in a one-hospital Core Based Statistical Area ("CBSA"). This means its Occupational Mix will not be deleted (sic “diluted”) by any other area hospitals. OMHS' wage index was reduced from 0.8923 to 0.8783 by the FI's reclassification at issue herein. OMHS estimates that this had the effect of reducing its reimbursement from \$40,275,000 to the audited amount of \$39,700,000 for an estimated variance of \$575,000. . . .

11. Vice President of Financial Services at OMHS [(“VP OMHS”)], wrote the Intermediary specifically requesting that the audit moving the adjustments to the Nursing Aides, Orderlies & Attendants wage information be reversed and the data included in OMHS' Occupational Mix Survey as originally submitted:

“Certified Surgical Tech Position -- The Certified Surgical Technician performs basic nursing functions and procedures. We ask you to include Certified Surgical Technicians with Nursing Aides, Orderlies and Attendants.”

“Mental Health Tech Position -- Mental Health Technicians perform duties consistent with those of a nursing assistant. This position's functions include providing basic patient care as well as collection of specimens and taking vital signs. We ask you to include Mental Health Technicians with Nursing Aides, Orderlies and Attendants.”

“Heart Center Recovery Tech Position (Cath Lab Technician) -- Heart Center Recovery Technician is responsible for prepping patients for procedures by taking patients' blood pressure and vital signs. This position also provides assistance in the delivery of direct patient cares [sic]. We ask you to include the Heart Center Recovery Technicians with Nursing Aides, Orderlies and Attendants as they

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<sup>19</sup> See Providers Final Position Paper, Exhibit P-1.

<sup>20</sup> Joint Stipulation at 9 of 9. .

<sup>21</sup> *Id.*

perform many of the same duties.”

12. The CMS instructions to the occupational mix survey (Form CMS 10079) describe the nursing aides, orderlies and attendants' positions as follows:

Nursing Aides, Orderlies & Attendants (SOC 31-1012) -  
Provide basic patient care under direction of nursing staff.  
Perform duties, such as feed, bathe, dress, groom, or move  
patients, or change linens. Examples: Certified Nursing  
Assistant, Hospital Aides; Infirmary Attendant.

13. [A] Health Insurance Specialist with CMS, e-mailed [the VP OMHS] in response to his July 10 Letter. In that e-mail she answered him as follows:

“I am the wage index contact for the state of Kentucky. I was informed that AdminaStar Federal in Kentucky has not been consistent with their treatment of surgical techs and paramedics for the occupational mix survey. Some of the AdminaStar Kentucky auditors are allowing the costs to be included with the nursing categories while other AdminaStar KY auditors are requiring the costs to be included in All Other Occupations. On or about May 25, 2006, I forwarded to each of my intermediaries supplemental instructions for the Medicare Occupational Mix Survey for the FY 2007 wage index. The instructions stated that “....surgical technicians and hospital-based paramedics may provide services that are similar to those provided by nursing personnel; however, on the occupational mix survey, these non-nursing occupations must be included in All Other Occupations. This is to ensure consistent reporting among hospitals.” Today I contacted AdminaStar Federal via email and requested that they immediately notify their auditors regarding the proper treatment of these employment categories for the occupational mix survey.”<sup>22</sup>

14. [The VP OMHS] replied thanking [the CMS Health Insurance Specialist] for her quick response but still expressed concern that OMHS would, in fact, be treated differently from other hospitals.<sup>23</sup>

15. [The CMS Health Insurance Specialist] assured [the VP OMHS] however, that the Intermediary's auditors would make any necessary corrections to other hospitals' occupational mix survey data no later than July 27, 2006.<sup>24</sup>

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<sup>22</sup> Provider Exhibit P-2 (CMS email dated July 17, 2006).

<sup>23</sup> Provider Exhibit P-3 (VP OMHS email dated July 17, 2006).

<sup>24</sup> Provider Exhibit P-4 (CMS email dated July 18, 2006).

16. On July 20, 2006, a Senior Auditor for the Intermediary also responded informing [the VP OMHS] that the Intermediary had received CMS clarifications, addressing surgical technicians which he believed "supports the inclusion of such position in the All Other Occupational Category." [The Senior Auditor] continued to state that "[i]t is [the Intermediary's] policy to include such positions in the All Other Occupational Category. Without knowing the specifics of the inconsistencies you are referring to, I am not able to comment further." He continued to state:

"It is my contention that Mental Health/Heart Center Recovery, and Surgical Technicians were properly included in the All Other Occupational Category on the Occupation Mix Survey in accordance with CMS instructions."<sup>25</sup>

17. Thus, it appeared from communications from both CMS and the Intermediary that the CMS policy was that all hospitals would be treated the same and that medical technicians would be uniformly assigned to the "All Other" Occupational category.

18. On October 11, 2006, CMS published in the Federal Register its final Occupational Mix Adjusted Wage Indices, hospital classifications, payment rates, and other related tables as a result of the application of the occupational mix adjustment to 100 percent of the wage index effective for fiscal year (FY) 2007.<sup>26</sup>

19. OMHS received detailed Audited Occupational Mix Survey information on forty-five hospitals in a Freedom of Information Act ("FOIA") request dated October 16, 2006. That information revealed that, despite assurances to the contrary, CMS and its Intermediaries did not classify medical technicians uniformly and that some medical technicians were classified in the "Nursing aides, orderlies and attendants" category for some other hospitals even while the Intermediary was excluding them from that category for the Providers here.

20. After reviewing the occupational mix data acquired by OMHS through its FOIA request and supplied to the Intermediary on a diskette, the Intermediary does not dispute that some medical technicians were included in the classification of nursing aides in the following instances (although in some cases medical technicians were included both in the Nursing aides, orderlies and attendants category and the All other category):

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<sup>25</sup> Provider Exhibit P-5 (Intermediary letter dated July 20, 2006).

<sup>26</sup> *Supra* note 11.

Provider #	Hospital	State	Med Techs Classified as Nursing Aids
	Kentucky		
18-0040	Jewish-St Mary's	Kentucky	Yes
	Indiana		
15-0075	Bluffton Regional Medical Center	Indiana	Yes
15-0102	Starke Memorial Hospital	Indiana	Yes
15-0090	St. Margaret Mercy-South	Indiana	Yes
15-0044	Floyd Memorial	Indiana	Yes
15-0051	Bloomington Hospital	Indiana	Yes
	Illinois		
14-0033	St. Therese Medical Center	Illinois	Yes
	Ohio		
36-0008	Southern Ohio Medical Center	Ohio	Yes
36-0218	Licking Memorial	Ohio	Yes
36-0170	Berger Hospital	Ohio	Yes

21. The Intermediary said that its Kentucky audit staff questioned CMS about such positions and consistently handled their classification in compliance with CMS instructions. National Government Services, which was the Intermediary that did the auditing and handled the classifications at issue here, admitted, however, that "[a]pparently, it did not become an issue at other National Government Services sites and in some instances; they were classified differently than those in Kentucky."<sup>27</sup>

22. By means of a letter sent December 1, 2006, [the OMHS VP] continued to notify the Intermediary that OMHS objected to the removal of its technicians to the All Other category; and that the Intermediary had applied this standard inconsistently. He stated, in part, as follows:

In reviewing Owensboro Medical Health System (OMHS) Occupational Mix Survey Data File posted by The Centers for Medicare and Medicaid Services(CMS) on October 6, 2006, we disagree with the adjustment made to the Nursing Aides, Orderlies, & Attendants wage information.

Through the AdminaStar audit, surgical techs, mental health techs and heart center recovery techs were excluded from the OMHS occupational

<sup>27</sup> Intermediary's Preliminary Position Paper at 7; Provider Exhibit P- 7.

mix survey. Per the Freedom of Information Act, we requested detailed occupational mix survey information for other providers of AdminaStar. Upon our review, we found that numerous other hospitals audited by AdminaStar included surgical techs as well as other techs in their occupational mix survey but did not have these positions excluded from their surveys during audit.

This inconsistency by AdminaStar has put OMHS at a disadvantage that will negatively impact the hospital. The occupational mix for the OMHS wage area is compared to the national average to produce an adjustment to the wage index. Because other hospitals were given the benefit of including their surgical techs and OMHS was not, the OMHS reported data is not a true reflection of their occupational mix. The error is compounded by the fact that OMHS is a one hospital CBSA whose occupational mix will not be diluted by other hospitals. The different treatment of the same survey data between hospitals had and will negatively impact OMHS Medicare reimbursement.

We request that the adjustments to remove the following tech positions be reversed and the data included in the OMHS occupational mix survey as originally submitted.<sup>28</sup>

23. In CMS' Occupational Mix Survey Instructions published for the July 1, 2007, to June 30, 2008 survey to be applied to the FY 2010 wage index; surgical technicians are included with Licensed Practical Nurses (LPNs) as a nursing category for reporting purposes. See Medicare Wage Index Occupational Mix Survey Instructions for Reporting Period 07/01/2007 -06/30/2008.<sup>29</sup>

27. In calculating the Occupational Mix Adjustment ("OMA") for FFY 2007, surgical technicians, mental health technicians and heart center recovery technicians were classified by the Fiscal Intermediary here as "All Other Occupations" while in certain hospitals elsewhere they were classified as "Nursing Aides, Orderlies and Attendants."

28. Because the OMA is budget neutral this difference in classifications may cause the Providers here to appear to have richer occupational mixes relative to other hospitals and markets and hence, act to reduce their reimbursements.

The Provider was represented by Stephen R. Price, Sr., Esq., of Wyatt, Tarrant & Combs, LLP. The Intermediary was represented by James Grimes, Esq., of the Blue Cross and Blue Shield Association.

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<sup>28</sup> Provider Exhibit P- 8 (VP OMHS letter dated Dec. 1, 2006).

<sup>29</sup> See Provider Exhibit P-9 at 5, 6.

PROVIDERS' CONTENTIONS:

The Providers emphasize that OMHS, one of the Providers in this appeal, is the only hospital in a Core Based Statistical Area ("CBSA") so the monetary effect on the OMA is magnified by the misclassification of occupations in the survey.<sup>30</sup> And, since the OMA is budget-neutral, the hospital is severely prejudiced if that one hospital is treated differently than other hospitals. Additionally, the Baptist Hospitals are scattered around Kentucky in other metropolitan statistical areas ("MSAs") and despite the Intermediary's best efforts in Kentucky and in other areas, other hospitals in the same MSAs were treated differently when it came to classifying medical technicians. Through a Freedom of Information request, the Providers reviewed records of 45 hospitals, and of those 45 hospitals, at least 10 of them were treated differently than OMHS was treated in their classifications of medical technicians.<sup>31</sup>

The Providers further assert that the two issues before the Board are not necessarily exclusive: if the Board were to decide the first issue in the hospital's favor, it doesn't necessarily need to decide the second issue. If the Board decides the first issue in the Intermediary's favor, the Providers contends that the second issue, *i.e.*, hospital staff classified differently between hospitals, needs to be rectified by changing the Providers' OMA.<sup>32</sup>

On the first issue, the Provider explains that the initial purpose of the average-wage index adjustment was to account for differences in wage costs from one region to another region, *i.e.*, one would expect it to be less costly to hire personnel in Owensboro, Kentucky, than in New York City. The purpose of OMA, on the other hand, is to account for differences in a hospital's management decisions that affect the efficiency and economy of a hospital. A Provider with a higher OM relative to other hospitals may be hiring higher-cost personnel rather than pushing some of that work down to lower-cost personnel. Using medical technicians at a lower wage rate to perform work that would otherwise be performed by higher level nursing personnel would reduce the overall cost of the hospital operations and would benefit the Medicare program. The Providers contend that by reclassifying the medical technicians to the "all other occupations" category on the survey, the Intermediary is effectively excluding these medical technicians from this hospital's OMA formula and penalizes the hospital for being more efficient than other hospitals.

The Providers further point to the fact that CMS changed its program instructions for the next year's survey and categorized medical assistants and surgical technologists as nursing employees for purposes of the occupational- mix survey.<sup>33</sup> The Providers maintain that, in making this change, CMS explicitly recognized that it intended to include these technicians in the nursing, aides and orderlies category, not in all other occupations category, as the Providers advocate in this appeal. The Providers argue that the Board should find that the classification of surgical technicians, mental health technicians, and heart center recovery technicians should have been in the nursing aides, orderlies and attendants category in the provider's

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<sup>30</sup>Provider's Final Position Paper at 10.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 17.

<sup>33</sup> *Id.* at 16.

occupational-mix survey in 2006.

On the second issue, the Providers rely on the decision in *Sarasota Memorial Hospital v. Shalala*<sup>34</sup> in which the court held that the agency's distinctions between wage data of different providers without any basis was arbitrary and capricious. This case is similar, the Providers assert, because the FOIA data showed that Intermediary classified the same job description in the different Occupational Categories for hospitals other than OMHS and the Baptist hospitals leaving the Provider at greater financial disadvantage. OMHS' reimbursement is impaired to an even greater degree because of the impact that the arbitrary misclassification has on the budget-neutrality process.

To fairly remedy this situation, the Intermediary needs to go back and audit all of the affected hospitals and make corrections nationwide or a correction needs to be made to the Providers' occupational mix as requested in this appeal. The Providers note that the Board has the authority through 42 C.F.R. § 412.64(k)<sup>35</sup> to order the Intermediary to make midyear corrections to the wage index.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary confirms that the appeal derives from the implementation of the 2007 Medicare OMA which required the Secretary to review and adjust the DRG payment rates to reflect the differences in hospital wage level that arise from the cost of labor, which is considered beyond the hospital's control.<sup>36</sup> However, in 2000, Congress instructed CMS to develop the OMA in order to remove the impact of the variation in the cost of care across hospitals resulting from inefficiencies due to the mix of professionals that are used to provide the care which is under the Provider's control. Thus, the goal of the OMA was to standardize the skill mix across the market so that the wage index only reflects the price differences of labor between the local market and the national average.

CMS' instructions for the occupational-mix survey<sup>37</sup> explained the basis for putting certain personnel in certain categories: the registered and licensed practical nursing categories required licensing or registration, for example, and should only be included in those categories. Nursing aides, orderlies and attendants, on the other hand, provide basic care under the direction of nursing staff and perform duties such as feeding, bathing, dressing, grooming or moving patients. The Intermediary argued that these personnel perform lower levels of patient care than surgical technicians, mental health technicians and heart center recovery technicians so it was inappropriate to classify these personnel in the Nursing aides, orderlies and attendants category. The only other category in which the Intermediary could classify these positions was to the "All other occupations" category.<sup>38</sup>

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<sup>34</sup> 60 F.3d 1507, 1513(11th Cir. 1995). *See also* Provider's Final Position Paper at 13.

<sup>35</sup> *See also* Group Representative Optional Reply at 3.

<sup>36</sup> Intermediary's Final Position Paper at 3.

<sup>37</sup> *See* Intermediary Exhibit I-2.

<sup>38</sup> Intermediary's Final Position Paper at 4, 5.

In late May of 2006, CMS issued supplemental instructions for the occupational-mix survey.<sup>39</sup> The supplemental instructions,<sup>40</sup> clarified which positions should be included in the Nursing aides, orderlies and attendants category. It goes on to say, surgical technicians and hospital-based paramedics are non-nursing occupations and must be included in the "All other occupations" category. In an email correspondence<sup>41</sup> with the Intermediary, CMS states: "While the supplemental instructions listed surgical technicians and paramedics, those are just examples and other technicians such as anesthesia techs, ER techs and mental health techs should also be included in the all other occupations category." Therefore, the Intermediary contends that the CMS policy on the classification of these tech positions for 2007 was clearly set out in the instructions and applied to all providers.

If any differences in the classifications were found between hospitals, the Intermediary asserts that they were simply done in error and few in number. The Intermediary believes that any errors were made in a rush to complete these reviews and not to a change in, or otherwise a disregard of CMS policy.

To illustrate, the Intermediary emphasizes that the Providers' FOIA request provided information on 45 different hospitals and found only one with misclassified tech wages and hours in Kentucky. Similarly in Illinois, the Providers demonstrated only one instance in which the Intermediary allowed the hospital to classify the medical technicians as aides, orderlies and attendants out of 100 hospitals in the state of Illinois. These statistics reveal only that one or two mistakes may have been made in classification and does not render all of the others incorrect. Certainly there is no basis to require the Intermediary go back and audit all of the providers' classifications in that year. These mistakes should not take precedent over the stated CMS policy. As to the Providers, the Intermediary applied the policy correctly to the Providers in this case.<sup>42</sup>

The Intermediary contends that the Providers' reliance on the 11th Circuit's decision in *Sarasota Memorial v. Shalala* is misplaced because that case concerns the inclusion of a portion of the FICA tax in gross pay. Although the court found that the uniformity of the wage index is compromised if the Secretary does not classify the same item of cost in the same way, the Intermediary argues that this issue is not the same issue that's on appeal before the Board. The Intermediary believes that it followed existing CMS policy at the time by classifying the medical tech positions in the "All other occupations" category and that the policy was applied consistently for all providers.

As for CMS' subsequent change in the classification, the Intermediary contends that the CMS employee email indicates only that the methods for implementing the occupational-mix survey were evolving over this period so it isn't surprising that the following year instructions were different. For the appeal year before the Board, the instructions were clear as to the treatment of medical technician positions for the occupational-mix survey. Those instructions were

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<sup>39</sup> See Provider Exhibit P-5 at 3.

<sup>40</sup> *Id.* at ¶ 4.

<sup>41</sup> See Intermediary Exhibit I-8 at 3.

<sup>42</sup> Provider Exhibit P-5.

implemented by the Intermediary and they were correctly applied to the Providers for this appeal.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board has reviewed and considered Medicare law and guidelines, the parties' contentions, and the evidence presented, including stipulations contained in the record. Set forth below are the Board's findings and conclusions.

The Board agrees with the Providers that the two issues that are before the Board are not necessarily exclusive, if the Board were to decide the first issue in the Providers' favor, then it does not necessarily have to proceed to the second issue, but if it decides the first issue in Intermediary's favor, then, the Board must also issue a decision on the second issue.

ISSUE #1

The CMS instructions for the 2007 survey clearly define the positions to be considered for the nursing category.<sup>43</sup> For registered nurses, these instructions state that licensing or registration is required. For licensed practical nurses, these instructions state that licensing is required after the completion of a state-approved practical nursing program. The Providers have not submitted into the record, that any of the medical technicians are actually licensed as registered nurses or licensed practical nurses. Another position on the survey which is categorized as nursing is the nursing medical assistants. These, personnel are defined as performing administrative and certain clinical duties under the direction of a physician. The Providers have not submitted into record that any of these technicians are under the direction of a physician. In addition, the position of nursing aides, orderlies, and attendants is defined by the CMS' survey as:

Provide basic care under direction of nursing staff. Perform duties, such as feed, bathe, dress, groom, or move patients, or change linens.

Finally, with respect to the "All other occupations" category, the instructions state that it should include non-nursing employees. The following positions are examples it gave of the types of employees that should be included in the "All other occupations" category: "[t]herapists and therapy assistants, equipment technologists and technicians, medical and clinical laboratory staff, pharmacists and pharmacy technicians, administrators (other than nursing), computer specialists, dietary, and housekeeping staff." CMS specifically instructs the intermediaries to strictly apply the definitions in order to ensure consistency among the hospitals:

Only nurses, nurses aids/orderlies/attendants, and medical assistants, *as defined on the survey*, can be included in the respective RNs-Management, RNs-Staff/Clinician, LPNs,

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<sup>43</sup> See Form CMS-10079, Medicare Wage Index Occupational Mix Survey (2006) (excerpt included at Intermediary Exhibit I-2). CMS used the 2006 instructions plus some supplemental instructions to conduct the 2007 Wage Index Occupational Mix Survey. See <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS064024.html>.

Aids/Orderlies/Attendants, and MAs categories. *Do not include other occupations that may provide similar services as nursing personnel. Instead, those occupations (if assigned to IPPS/OPPS areas of the hospital) must be included in the All Other Occupations category.* For example, surgical technicians and hospital-based paramedics may provide services that are similar to those provided by nursing personnel; however, on the occupational mix survey, these non-nursing occupations must be included in All Other Occupations. This is to *ensure consistent reporting among hospitals.*<sup>44</sup>

The Board concludes that the Intermediary, consistent with CMS policy at the time, came to the correct conclusion that the Provider's medical technicians must be classified in the "All other occupations" category. It is clear that CMS policy did not classify medical technicians under the nursing positions because of the training and licensing involved, and could not be classified as a nursing aide, orderly or attendant because the technicians performed a higher level of patient care than that of the aide, orderly, and attendant.

These facts appear to be undisputed between the parties: a surgical technician that works for the Provider is a graduate of an accredited surgical technologist program and must be certified as national surgical technologists within 6 months of hire. A surgical technician possesses the technical skills to act and function in the scrub role performing any task. The mental health technician in addition to aide-like duties, collects specimens, takes vital signs, orders labs and other tests, transcribes medication orders, and exhibits therapeutic psychiatric skills. The heart center recovery technician prepares the patient, supplies, and devices prior to the procedure; connects all heart and blood pressure monitoring equipment; monitors the waveforms, and readings; and monitors cardiac rhythm, recognizing and alerting the physician to various dysrhythmias.

The Board agrees that these medical technicians adhere to higher level of patient care than the aides, orderlies, and attendants and do not fall under any other nursing category. It was the CMS policy for the year under appeal that all these technicians must be included in "All other occupations" category even if they may provide services similar to those of nursing personnel. This policy is designed to ensure consistent reporting among hospitals. The Record reflects that the CMS policy was followed by the Intermediary.

## ISSUE #2

The Board does not agree with the Providers that the regulation, 42 C.F.R. § 412.64(k), gives the Board the authority as part of this appeal either to order the identification and correction of any errors in the classification of medical technicians for hospitals other than the Providers to ensure uniform classification of medical technicians, or to recalculate the Providers' OMA using an erroneous classification. The regulation states as follows:

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<sup>44</sup> Supplemental Instructions for the Medicare Wage Index Occupational Mix Survey (Form CMS-10079 (2006)) for the FY 2007 Wage Index (emphasis added) (available at: <http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Wage-Index-Files-Items/CMS064024.html>).

(k) *Midyear corrections to the wage index.* (1) CMS makes a midyear correction to the wage index for an area only if a hospital can show that—

(i) The intermediary or CMS made an error in tabulating its data; and

(ii) The hospital could not have known about the error, or did not have the opportunity to correct the error, before the beginning of the Federal fiscal year.

(2)(i) Except as provided in paragraph (k)(2)(ii) of this section, a midyear correction to the wage index is effective prospectively from the date the change is made to the wage index.

(ii) Effective October 1, 2005, a change to the wage index may be made retroactively to the beginning of the Federal fiscal year, if, for the fiscal year in question, CMS determines all of the following—

(A) The fiscal intermediary or CMS made an error in tabulating data used for the wage index calculation;

(B) The hospital knew about the error in its wage data and requested the fiscal intermediary and CMS to correct the error both within the established schedule for requesting corrections to the wage data (which is at least before the beginning of the fiscal year for the applicable update to the hospital inpatient prospective payment system) and using the established process; and

(C) CMS agreed before October 1 that the fiscal intermediary or CMS made an error in tabulating the hospital's wage data and the wage index should be corrected.

(l) *Judicial decision.* If a judicial decision reverses a CMS denial of a hospital's wage data revision request, CMS pays the hospital by applying a revised wage index that reflects the revised wage data as if CMS's decision had been favorable rather than unfavorable.<sup>45</sup>

This regulation limits the ability of the CMS, or the Board, to make prospective or retroactive “midyear” corrections to the following conditions: if the error is made to the provider's wage data or wage index that the provider did not know about before the beginning of the fiscal year, CMS may make a *prospective* midyear correction under subsection (1) and (2)(i). CMS may

<sup>45</sup> 42 C.F.R. § 412.64(k) (2006).

make a midyear *retroactive* adjustment under subsection (2)(ii) only if the intermediary made an error of which the provider was aware and requested correction and CMS agreed before October 1 that it was an error and should be corrected.

In the present case, neither the Intermediary nor CMS considered that an error had been made in the position classification for the Providers. Indeed, the evidence contained in the stipulation of facts verifies that the Intermediary followed the policy as CMS articulated it as it pertained to the Providers' classification.

The Board recognizes that, on December 1, 2006, the Providers received a response to their FOIA request and that this response revealed that some errors may have been made for other hospitals' classifications several months after the October 1, 2006 deadline stated in the regulation for retroactive application. However, the Board has no authority under the regulation to act on this information. In particular, the Board has no authority to require the Intermediary to review, identify and correct misclassifications made in any other hospital's wage data that is not part of this appeal. Pursuant to the regulation, the retroactive correction can only be initiated by the provider with the error.

Similarly, the Board has no authority to require the Intermediary to recalculate the Providers' OMA using an erroneous classification that appears to have been made for some but not all other hospitals. The Board does not have the authority under the regulation to require the Intermediary to act contrary to the stated CMS policy at the time. Providers' only potential remedy in this case appears to be through judicial review of the agency's action.

#### DECISION AND ORDER:

##### ISSUE #1

The Board finds the inclusion of surgical technicians, mental health technicians, and heart center recovery technicians in the "All other occupations" category instead of the nursing aides, orderlies and attendants category in the Providers' occupational-mix survey was correct and consistent with CMS policy at the time.

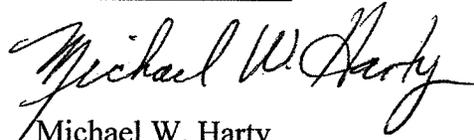
##### ISSUE #2

The Board finds that the Provider's OMA is not subject to correction under 42 C.F.R. § 412.64(k) because the regulation gives the Board no authority to require the Intermediary to classify surgical technicians, mental health technicians, and heart center recovery technicians in a manner that would be contrary to the CMS policy in effect during the time at issue. Similarly, the Board finds that 42 C.F.R. § 412.64(k) provides it with no authority to address any potential OMA errors made for any other provider that is not part of this appeal.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty  
John Gary Bowers, C.P.A.  
Clayton J. Nix, Esq.  
L. Sue Andersen, Esq.

FOR THE BOARD:

  
Michael W. Harty  
Chairman

DATE: JUL 25 2014

Attachment A:

Schedule of Providers in Group (Schedule A)

Group Name Wyatt, Tarrant & Combs FFY 07 Occupational Mix Adjustment Group Page No. 1 of 1

Representative Wyatt, Tarrant & Combs, LLP Date Prepared 7/1/08

Case No. 07-1917G

	A	B	C	D	E	F	G
Provider Number	Provider Name	Date of Final Determination	Date of Hearing Request	No. of Days	Adju. No.	Amount of Reimbursement	Original Case No. Add/Transf.
1.	Owensboro Medical Health System Owensboro, Davies County, KY	10/11/06 71 Fed. Reg. 59886	3/23/07	163	Occupational Mix Adj.	\$500,000	07-1626
2.	Baptist Hospital East Louisville, Jefferson County, KY	10/11/06 71 Fed. Reg. 59886	4/6/07	177	Occupational Mix Adj.	> \$50,000 in aggregate	07-1917G
3.	Baptist Hospital Northeast LaGrange, Oldham County, KY	10/11/06 71 Fed. Reg. 59886	4/6/07	177	Occupational Mix Adj.	> \$50,000 in aggregate	07-1917G
4.	Western Baptist Hospital Paducah, McCracken County, KY	10/11/06 71 Fed. Reg. 59886	4/6/07	177	Occupational Mix Adj.	> \$50,000 in aggregate	07-1917G
5.	Central Baptist Hospital Lexington, Fayette County, KY	10/11/06 71 Fed. Reg. 59886	4/6/07	177	Occupational Mix Adj.	> \$50,000 in aggregate	07-1917G
6.	Baptist Regional Medical Center Corbin, Whitley County, KY	10/11/06 71 Fed. Reg. 59886	4/6/07	177	Occupational Mix Adj.	> \$50,000 in aggregate	07-1917G