

**PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION
ON THE RECORD
2016-D27**

PROVIDER – H. Lee Moffitt Cancer Center

DATE OF HEARING –
April 29, 2016

Provider No.: 10-0271

Cost Reporting Periods Ended –
June 30, 2011
June 30, 2012

vs.

MEDICARE CONTRACTOR –
First Coast Service Options, Inc.

CASE NOs.: 13-1119 & 14-2753

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ISSUE

Did the Medicare Contractor properly calculate the cancer center's payment-to-cost ratio ("PCR") for both fiscal years ("FYs") under appeal?¹

DECISION

The Provider Reimbursement Review Board ("Board") finds that it does not have jurisdiction over Moffitt's appeals of the 1996 PCR issue from its FY 2011 and 2012 cost reports because the 1996 PCR issue is a predicate fact issue that first arose and was determined for an earlier cost reporting period and for which a claim of dissatisfaction cannot be validly asserted in a future cost reporting period.

INTRODUCTION

H. Lee Moffitt Cancer Center ("Provider" or "Moffitt") is one of eleven comprehensive cancer centers in the country as identified in 42 U.S.C. § 1395ww(d)(1)(B)(v). The Medicare Contractor for Moffitt is First Coast Service Options ("Medicare Contractor").² Moffitt appealed the notices of program reimbursement ("NPRs") issued for its FY 2011 and 2012 cost reports. The Board held a hearing on the record at the request of the parties. Moffitt represented itself. The Medicare Contractor was represented by Edward Lau, Esq. of Federal Specialized Services.

STATEMENT OF THE FACTS

In 1997, Congress passed the Balanced Budget Act of 1997.³ Section 4523 of the new law amended 42 U.S.C. § 1395l, adding subsection (t) which required the Secretary to establish a prospective payment method for designated hospital outpatient services effective January 1, 1999. In 1999, Congress further amended § 1395l(t)⁴ to establish a hold harmless provision for outpatient services furnished by cancer hospitals. Under its provisions, cancer hospitals are entitled to payment of the greater of : (1) the amount that normally would be paid under the hospital outpatient PPS fee schedule; or (2) the product of the hospital's reasonable cost of services furnished in the current year multiplied by the 1996 PCR (the ratio of the provider's Medicare payments to the provider's cost for outpatient services furnished in the 1996 cost reporting year).

Moffitt claims that the Medicare Contractor erred in the calculation of the 1996 PCR because it failed to apply two cost reduction factors of 10 percent and 5.8 percent as required under 42 U.S.C. § 1395x(v)(1)(S).⁵ As a result, when calculating the reasonable cost of the hospital's

¹ The Board issued an earlier decision granting Expedited Judicial Review of a second issue which claimed the implementation date of the OPPI Payment Adjustment for Certain Cancer Hospitals (required under § 3138 of the Affordable Care Act) violated the Social Security Act.

² Fiscal Intermediaries ("FIs") and Medicare Administrative Contractors ("MACs") will be referred to as "Medicare contractors."

³ Pub L. No. 105-33, 111 Stat. 251 (1997).

⁴ Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999, Pub. L. No. 106-113-Appendix F, § 202, 113 Stat. 1501A-321, 1501A-342 (1999) (adding, among other provisions, 42 U.S.C. § 1395l(t)(7)(D)(ii)).

⁵ 42 U.S.C. § 1395x(v)(1)(A)(ii).

outpatient services, the Medicare Contractor artificially inflated the denominator and thus deflated the PCR under the hold harmless provision resulting in lower reimbursement for both years.⁶

DISCUSSION, FINDING OF FACT, AND CONCLUSIONS OF LAW

The Board finds that it does not have jurisdiction over the appeal of Moffitt's FY 2011 and 2012 cost reports because its appeal is based on the calculation of its 1996 PCR. This issue is a "predicate fact" and, by regulation, Moffitt is barred from claiming dissatisfaction with a predicate fact that was established in an earlier fiscal period. Without a valid claim of dissatisfaction, the Board has no jurisdiction.

Responding to the District of Columbia Circuit Court decision in *Kaiser Found. Hosps. v. Sebelius* ("Kaiser"),⁷ the Secretary promulgated revisions to 42 C.F.R. § 405.1885 in the final rule published on December 10, 2013 ("2013 Final Rule").⁸ These revisions barred reopening of a contractor determination with respect to specific findings or factual determinations, *i.e.*, "predicate facts" that were made in a different fiscal period than the cost reporting period under review and, once determined, was used to determine an aspect of the provider's reimbursement for one or more later cost reporting periods.⁹

In the preamble to the 2013 Final Rule,¹⁰ the Secretary explained that, when the specific matter at issue is a predicate fact that first arose in (or was determined for) an earlier fiscal period, "our longstanding interpretation and practice is that the pertinent provisions of the statute and regulations provide for review and potential redetermination of such predicate fact *only by a timely appeal* or reopening of: (1) [t]he NPR for the cost reporting period in which the predicate fact first arose or was first determined; or (2) the NPR for the period for which such predicate fact was first used or applied by the intermediary to determine reimbursement."¹¹ The Secretary further explained that reimbursement for a given provider's cost report should not be based on one determination regarding the predicate fact in the base period and a different determination about the same predicate fact in a later cost reporting period.¹² The Secretary concluded that, "[u]nder our longstanding interpretation and practice, once the 3-year reopening period has expired, *neither the provider nor the intermediary is allowed to revisit a predicate fact* that was not changed through the appeal or reopening of the cost report for the fiscal period in which such predicate fact first arose or for the fiscal period for which such fact was first determined by the intermediary."¹³ Accordingly, the Board concludes that the regulatory change precludes a provider from appealing a predicate fact in a fiscal year subsequent to when it first arose or was

⁶ See Provider's Final Position Paper at 20-24.

⁷ 708 F.3d 226 (D.C. Cir. 2013). In *Kaiser*, the D.C. Circuit found that the Board had jurisdiction to hear an appeal of predicate facts. Specifically, the D.C. Circuit found that the providers could appeal predicate facts even though such predicate facts were not timely appealed or reopened for the periods where they first arose or were first applied to determine the providers' reimbursement.

⁸ 78 Fed. Reg. 74826 (Dec. 10, 2013).

⁹ 42 C.F.R. § 405.1885(a)(1)(iii).

¹⁰ 78 Fed. Reg. 74826 (Dec. 10, 2013).

¹¹ *Id.* at 75163-74 (emphasis added).

¹² *Id.* at 75164.

¹³ *Id.* at 75164 (emphasis added).

first determined by a Medicare contractor and that the Board lacks jurisdiction and is without authority to review predicate facts in such instances.

The Secretary specified that the changes to 42 C.F.R. § 405.1885 were effective for appeals or reopening requests pending on or after the effective date of the 2013 Final Rule even if the Medicare contractor's determination preceded the effective date of the rule, January 27, 2014.¹⁴ The Secretary also stated that, if the revisions to § 405.1885 were deemed retroactive, she would consider the retroactive application necessary to comply with the statutory requirements and failing to take such action would be contrary to the public interest.¹⁵

In this case, Moffitt appeals its PCR for 1996 in connection with its FYs 2011 and 2012. The Board finds that this 1996 PCR is a predicate fact because the 1996 PCR was established in a prior cost reporting period and it was used to determine an aspect of Moffitt's later cost report years. Therefore, in accordance with the regulation at 42 CFR § 405.1885, the Board concludes Moffitt has no appeal rights relative to that predicate fact and, accordingly, the Board lacks jurisdiction over Moffitt's appeals of its 1996 PCR.

DECISION

The Board finds that it does not have jurisdiction over Moffitt's appeals of the 1996 PCR issue from its FY 2011 and FY 2012 cost reports because the 1996 PCR issue is a predicate fact that first arose and was determined for an earlier cost reporting period for which the Provider is barred by regulation from asserting a claim of dissatisfaction.

BOARD MEMBERS PARTICIPATING

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FOR THE BOARD

/s/
Clayton J. Nix, Esq.
Board Member

DATE: September 29, 2016

¹⁴ *Id.* at 75195.

¹⁵ *Id.*