

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2005-D39

PROVIDER -

The Arthur G. James Cancer Hospital and
Richard J. Solove Research Institute
Columbus, Ohio

Provider No.: 36-0242

vs.

INTERMEDIARY -

BlueCross BlueShield Association/
AminaStar Federal - Ohio

DATE OF HEARING -

June 29, 2004

Cost Reporting Periods Ended -
June 30, 1996 and June 30, 1998

CASE NOs.: 99-2779 and 02-1243

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ISSUE:

Whether the Intermediary's adjustment to disallow the interest paid to the Ohio State University Hospitals was proper.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

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

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. 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).

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the proportion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the issuance of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The Arthur G. James Cancer Hospital and Richard J. Solove Research Institute (Provider) is a not-for-profit cancer care teaching hospital that is located on the campus of the Ohio State University (University). In 1992, the Provider borrowed \$34,125,000 from the Ohio State University Hospitals (OSUH). The loan financed the construction of the facility and the initial operations of the Provider. The portion of the loan designated for operating expenses (\$24 million) was subject to repayment over a 12-year period, with interest accruing from July 1, 1992. The Provider considered the interest outlays from that portion of the loan reimbursable under the reasonable cost provisions of 42 U.S.C. §1395(f)(b)(1) and claimed interest expense on its cost reports for 1996, 1997 and 1998.

¹ The University also made a no-interest loan to the hospital and contributed \$14 million.

² The 1997 cost report is the subject of PRRB Case No. 00-2812. The parties agreed that Case No. 00-2812 involves the identical issue of related party interest expense. However, that case also involves jurisdictional issues which prevented the case from being consolidated with Case Nos. 99-2779 (Fiscal 1996) and 02-1243 (Fiscal 1998).

Only 1996 and 1998 are at issue in this appeal.² The estimated reimbursement effect for the two years at issue in this case is \$370,673 and \$300,000, respectively.

AdminiStar Federal, Inc., (Intermediary) audited the cost reports for all three years. Based upon its review, the Intermediary considered the Provider and OSUH related parties and disallowed the interest expense claimed as related party interest under 42 C.F.R. §413.153(c). That regulation limits Medicare reimbursement for interest to amounts paid to unrelated persons.

The Provider appealed the determination to the Board and met the jurisdictional requirements of 42 C.F.R. 405.1835-1841. The Provider was represented by Ralph G. Blasey III, Esq. and Andrew J. Murray, Esq., of Baker and Hostetler LLP. The Intermediary was represented by Bernard M. Talbert, Esq., of Blue Cross and Blue Shield Association.

STIPULATIONS OF FACT:

Prior to the proceedings, the parties agreed to the following six stipulations that impacted the arguments presented for the Board's consideration of the interest expenses claimed.

- 1) Provider is not a separate legal entity.
- 2) Provider is a state cancer care and teaching medical facility.
- 3) In fiscal year 1992, Provider obtained a capital loan and an operating loan from OSUH pursuant to a Memorandum of Understanding (MOU) executed by representatives of Provider, OSUH and the University. Under the terms of the MOU, the Provider was required to make two interest payments annually beginning in 1992 and continuing until the operating loan was repaid in full, and a single principal payment annually beginning on June 30, 1996 and ending June 30, 2007 or until the operating loan was repaid in full.
- 4) The rate and amount of interest expense claimed by Provider on its cost report for 1996 was reasonable.
- 5) Provider claimed the interest described in Paragraph 1 above in its Medicare cost reports for the fiscal years ending June 30, 1993, June 30, 1994 and June 30, 1995, as part of its Administrative and General Cost Center. The Intermediary made no disallowance of said interest expense.
- 6) The PRRB does not have jurisdiction to review the constitutionality of 42 C.F.R. §413.153(c)(2), and the parties agree that the issue of constitutionality has not been waived and is preserved for judicial review.

PARTIES' CONTENTIONS:

The Provider asserts that its agreement with OSUH is not a related party transaction as defined under 42 C.F.R. §413.153(c). The Provider acknowledges that it is not a separate legal entity from OSUH or the University, but asserts that it is not owned by either. Rather, the Provider, characterizes its relationship, and that of OSUH and the University, as being institutions of the State of Ohio. Though not a separate legal entity, the Provider is a separate state teaching medical facility which is responsible for earning its own revenue and incurring its own costs. Further, the Provider is operated separately from the educational functions of the University and does not receive any money from the state for its operations. Although the University receives general funds from the state, the University's policies require the Provider to be self-supporting.

The Provider asserts that it cannot borrow money from outside the University because it is not a separate legal entity and is precluded from doing so by Ohio law. In addition, the Ohio constitution does not permit the incurrence of a debt to finance operating expenses.

The Provider also argues that its position is identical to that of Indiana University Hospitals in The Trustees of Indiana University (Indiana University Hospitals) v. United States, 618 F.2d 736 (Ct. Cl. 1980). There, the Court allowed reimbursement of interest expense by the Medicare program to a state university hospital for interest incurred under a loan from the University. Like the Provider, Indiana University Hospitals was a state teaching hospital that was part of Indiana University but received no money from the state for its operations. The Court held that since the hospitals are not separate legal entities, they cannot borrow from outside the University. The Court reasoned that if the Hospitals cannot support themselves through the fees they collect, they must borrow from the University itself. Noting that neither the hospital nor the university was operating under a profit motive or any of the other evils that the pertinent regulation addresses, the Court allowed reimbursement for the interest expense on the loan.

The Intermediary contends that OSUH and the Provider are ultimately owned by the University and that the University's common ownership makes the transaction between OSUH and the Provider a related party transaction that should be reviewed as an investment by the University to ensure the continued viability of the Provider.

The Intermediary contends that the limited control and lack of state appropriations in Indiana University should not be construed as being applicable to the subject appeal. The Ohio Revised Code §3335.10 states: "The board of trustees of the Ohio state university shall have general supervision of all lands, buildings, and other property belonging to the university, and the control of all expenses therefor..." The Intermediary argues that this section demonstrates that ample control does exist in the Provider's circumstances. The Intermediary further argues that the prohibition at 42 C.F.R. §413.153(c) against related party interest is absolute and the Board must apply it here.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of Medicare law and guidelines, the parties' contentions and stipulations, and the evidence presented at the hearing, finds and concludes as follows:

The collective record and the stipulations of the parties established the nature of the borrower-lender relationship between the Provider and OSUH as the single issue for the Board's consideration.

To determine the exact nature of that relationship, the Board conducted a comprehensive analysis of the testimony, the supporting documents, and pertinent excerpts from the Ohio Revised Code offered in support of the parties' positions. The Board's examination indicated that Ohio Revised Code §3335.10 placed the general supervision of the University's property and the control of all of its expenses with the Board of Trustees of the Ohio State University. Further, the affidavits of the Treasurer of the Ohio State University indicated that the Provider and OSUH are operating units of the University. For financial accounting purposes, the activities between operating units of the University are controlled by the financial policies of the University through its accounting system. Interest income and interest expenses are controlled and charged through the system that is under the direct supervision of the Treasurer.

The Board finds that the statutory mandate coupled with the accounting/financial control structure demonstrates that the Provider and OSUH are not separate entities but, rather, separate divisions within a single operating entity, i.e., the University. Consequently, the Board concludes that the transaction was not a related party transaction but, rather, an inter-entity transaction for which there is no separate lender or borrower. The Board finds further that interest expense between divisions of the same entity is not reasonable and necessary under 42 C.F.R. §413.153(c). The Board concludes that the Intermediary properly disallowed the amounts claimed as interest expense.

Because the transaction in the instant case is an inter-entity transaction rather than a related party transaction, the Board finds no reason to address the Provider's circumstances within the context of Indiana University.

DECISION AND ORDER:

The Intermediary's adjustment is affirmed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Gary B. Blodgett, D.D.S.
Martin W. Hoover, Jr., Esquire
Elaine Crews Powell, C.P.A.
Anjali Mulchandani-West

FOR THE BOARD:

DATE: May 11, 2005

Suzanne Cochran, Esquire
Chairperson