

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2009-D22

**PROVIDER –**  
Mercy Hospital of Pittsburgh (n/k/a  
University of Pittsburgh Medical Center  
(UPMC))

Provider No.: 39-0028

**vs.**

**INTERMEDIARY –**  
BlueCross BlueShield Association/  
Highmark Medicare Services (formerly  
Blue Cross of Western Pennsylvania)

**DATE OF HEARING -**  
June 27, 2008

Cost Reporting Period Ended -  
June 30, 1985

**CASE NO.:** 99-1340

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ISSUE:

Whether interest is due on the continuing underpayments that exist as a result of the fiscal Intermediary's 10 year delay in implementing the PRRB's case number 91-2673.

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 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. §1395h, 42 C.F.R. §§413.20 and 413.24.

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 portion 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.

42 U.S.C §1395g(d) provides for the accrual of interest on the balance of overpayment or underpayment as follows:

[w]henever a final determination is made that the amount of payment made under this part to a provider of services was in excess of or less than the amount of payment that is due, and payment of such excess or deficit is not made (or effected by offset) within 30 days of the date of the determination, interest shall accrue on the balance of such excess or deficit not paid or offset. . .

42 C.F.R. §405.378 provides the rules under which interest will be paid on underpayments to providers. The regulation states:

- (a) Basis and purpose. This section, which implements sections 1815(d) and 1833(j) of the common law and Act, and authority granted under the Federal Claims Collection Act, provides for the charging and payment of interest on overpayments and underpayments to Medicare providers, suppliers, HMOs,

competitive medical plans (CMPs), and health care prepayment plans (HCPPs)

(b) Basic Rules.

- (1) CMS will charge interest on overpayments, and pay interest on underpayments, to providers and suppliers of services (including physicians and other practitioners), except as specified in paragraphs (f) and (h) of this section.
- (2) Interest accrues from the date of the final determination as defined in paragraph (c) of this section, and either is charged on the overpayment balance or paid on the underpayment balance for each full 30-day period that payment is delayed.

(c) Definition of final determination.

- (1) For purposes of this section, any of the following constitutes a final determination:
  - (i) A Notice of Amount of Program Reimbursement (NPR) is issued, as discussed in §§405.1803, 417.576, and 417.810, and either—
    - (A) A written demand for payment is made; or
    - (B) A written determination of an underpayment is made by the intermediary after a cost report is filed.
  - (ii) In cases in which an NPR is not used as a notice of determination (that is, primarily under Part B), one of the following determinations is issued—
    - (A) A written determination that an overpayment exists and a written demand for payment;
    - (B) A written determination of an underpayment; or . . .

42 CFR §405.1803 discusses the requirements for an NPR after receipt of a cost report. Subsection (a) provides that the written notice must reflect “the intermediary’s determination of the total amount of reimbursement due the provider” and must also “relate this determination to the provider’s claimed total program reimbursement due to the provider for this period.” There is no explicit reference to underpayments; however, subsection (c) explicitly provides for the notice to be used as the basis for Intermediary recoupment of overpayments.

This case involves the propriety of assessing interest where the fiscal intermediary delays implementation of a Board decision.

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY:**

The University of Pittsburg Medical Center (UPMC) (formerly known as Mercy Hospital of Pittsburgh and hereinafter Provider) is a not-for-profit, acute care, teaching hospital located in Pittsburgh, Pennsylvania. Blue Cross Blue Shield of Western Pennsylvania (d/b/a Highmark Medicare Services and hereinafter Intermediary) completed a reaudit of the Provider’s GME base year, pursuant to the requirements of the Omnibus Budget

Reconciliation Act of 1986,<sup>1</sup> and issued an adjusted “average per resident amount” (APRA) on February 26, 1991. The Provider appealed the APRA and obtained a favorable decision from the PRRB on January 28, 1998 (PRRB Dec. No. 98-D26). The Intermediary subsequently recalculated the amount due the Provider and paid the Provider on September 21, 1998. However, the Provider challenged the Intermediary’s implementation of the PRRB’s decision and filed a second appeal (CN 99-1340). On January 28, 2008 the Provider added to this appeal the issue of whether it was entitled to interest under 42 CFR §405.378, citing the ten year delay in the final implementation of the Board’s original decision.<sup>2</sup> On February 8, 2008 the parties administratively resolved 2 of 3 issues in this appeal. The basis for the interest claim is that the agreement provided for calculation of the Provider’s APRA consistent with what the Provider maintained in its second appeal was required by the Board’s decision on the first appeal. The only issue remaining unresolved is that of the interest.<sup>3</sup>

The Provider’s appeal meets the jurisdictional requirements of 42 C.F.R. §§405.1835-405.1841. The Provider was represented by Stephen P. Nash, of Holme Roberts and Owen, LLP. The Intermediary was represented by Bernard M. Talbert, Esquire, of Blue Cross Blue Shield Association.

The single issue before the Board is whether interest is due the Provider under 42 C.F.R. §405.378. The estimated amount in dispute is approximately \$9,000,000.

#### PROVIDER’S CONTENTIONS:

The Provider contends that it is due interest as a result of the lengthy delay in the final implementation of the Board’s Decision Number 98-D26. The Provider argues that, while the interest regulations at 42 C.F.R. §405.378 define “final determination” to include an issued notice of program reimbursement where a written demand for payment is made or a written determination of an underpayment is made by the intermediary after a cost report is filed, an NPR is not the exclusive form of final determination. The courts have interpreted “final determination” to include a number of administrative determinations including a determination “made by the PRRB in an appeal of a fiscal intermediary’s NPR”<sup>4</sup> and a determination “by the Secretary upon review of the PRRB’s Decision.”<sup>5</sup> Accordingly, the Provider contends that a final PRRB decision should be deemed a “final determination” that triggers the imposition of interest if it is not timely and properly implemented. Further, the Provider argues that the courts have uniformly concluded that the statute at 42 U.S.C. §1395g(d) does not require the calculation of an amount of the underpayment to trigger interest, but merely a determination that the provider has been underpaid.<sup>6</sup> The Provider contends that PRRB Decision No. 98-D26 was a final determination that indicated there was an underpayment to the Provider and

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<sup>1</sup> Pub. L. No. 99-272, 42 U.S.C. §1395 ww(h).

<sup>2</sup> See, Provider’s Exhibit P-22.

<sup>3</sup> See, Provider’s Exhibit P-24. Provider’s Post-Hearing Brief at 16.

<sup>4</sup> National Medical Enterprise, Inc., v. Sullivan, 960 F.2d. 866, 869 (9<sup>th</sup> Cir. 1992).

<sup>5</sup> Id.

<sup>6</sup> United States v. Idaho Falls Assocs., 81 F.Supp.2d 1033, 1041 (D. Idaho 1999).

that gave clear instructions to the Intermediary on how to recalculate the Provider's GME base year costs. That determination should have generated prompt payment by the Intermediary and, absent such payment, interest should accrue from the date of the final determination as prescribed at 42 C.F.R. §405.378(b)2.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary argues that the regulation at 42 C.F.R. §405.378 makes clear that only the issuance of an NPR that establishes a sum certain and remains unpaid for at least 30 days will trigger interest. The Intermediary contends that a PRRB decision is not the equivalent of an NPR under 42 C.F.R. §405.1803 and, further, 42 U.S.C. §1395(o) includes no express or implied time limits on implementation of decisions. It states in pertinent part:

The Board shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) even though such matters were not considered by the intermediary in making such final determination.

The Intermediary argues that PRRB Decision No. 98-D26 was a modification of an earlier final decision that could only be implemented through a revised NPR. The PRRB's decision did not trigger the accrual of interest and the underpayment amount determined by the NPR that was generated in response to the PRRB decision was promptly liquidated. Further, the Intermediary disputes the applicability of cases relied on by the Provider as authority for a Board decision to be considered a final determination for interest purposes.<sup>7</sup> While the language suggests that there are circumstances when a PRRB decision could identify an underpayment that might qualify as a final determination, PRRB Decision No. 98-D26 did not determine the amount of an underpayment and, in fact, left a considerable amount of work to be done before an underpayment amount could be established through a revised NPR.

#### FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and guidelines, the evidence and the parties' arguments, the Board finds and concludes as follows:

42 C.F.R. § 405.378 addresses interest charges on underpayments to providers. The regulation requires that a written determination of an underpayment be made by the intermediary after the cost report is filed before interest can be assessed.<sup>8</sup> Interest accrues from the date of the final determination and is paid on the underpayment balance for each full 30-day period that payment is delayed.<sup>9</sup> In this case, the Intermediary revised the cost report in accordance with what it determined to be required by PRRB Decision No.

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<sup>7</sup> See footnotes 4, 5, 6.

<sup>8</sup> 42 C.F.R. §405.378(c).

<sup>9</sup> 42 C.F.R. §405.378(b)(2).

98-D26 and generated an NPR. The Board acknowledges that the language of its decision was awkward and subject to slightly different interpretations. The liability per the revised NPR issued by the Intermediary was promptly paid and, therefore, no interest is due the Provider.

Interest does not begin to accrue until there is a final determination of a sum certain through the cost report process and that amount remains unpaid for 30 days or more as stated in 42 C.F.R. §405.378(b). Although the Board identified specific amounts for reallocation in its decision, the final determination of the amount due could only be determined by the intermediary via revisions to the cost report and a revised NPR. Once identified, the amount due is the principal amount upon which interest may be assessed if the intermediary fails to pay the provider within 30 days.<sup>10</sup> It is undisputed that the Intermediary initially paid based upon its interpretation of PRRB Decision No. 98-D26 and that the second appeal (Case No. 99-1340) was resolved and paid as well. The Board acknowledges that 10 years to effect settlement is excessive. However, the Board can find no event that triggers the accrual of interest. The Board is bound by the regulations and cannot impose an interest remedy that, while equitable, goes beyond the boundaries of the regulations. Accordingly, the Board finds that interest may not be awarded.

DECISION AND ORDER:

The written determination of the underpayment was paid within 30 days. Under 42 C.F.R. §405.378(b) interest may not be awarded.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire  
Yvette C. Hayes  
Michael D. Richards, C.P.A.  
Keith E. Braganza, C.P.A.

FOR THE BOARD

Suzanne Cochran, Esquire  
Chairperson

DATE: May 8, 2009

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<sup>10</sup> 42 C.F.R. §405.378(b).

## Attachment 1

Index of Providers  
&  
Fiscal Years (FYs) Included in Appeal

| <u>Provider #</u> | <u>Provider Name</u>                  | <u>FYs</u> |
|-------------------|---------------------------------------|------------|
| 33-0030           | Newark-Wayne Community Hospital       | 12/31/03   |
| 33-0030           | Newark-Wayne Community Hospital       | 12/31/04   |
| 33-0037           | Lakeside Memorial Hospital            | 12/31/03   |
| 33-0037           | Lakeside Memorial Hospital            | 12/31/04   |
| 33-0068           | Geneva General Hospital               | 12/31/03   |
| 33-0068           | Geneva General Hospital               | 12/31/04   |
| 33-0074           | F.F. Thompson Hospital                | 12/31/03   |
| 33-0074           | F.F. Thompson Hospital                | 12/31/04-  |
| 33-0125           | Rochester General Hospital            | 12/31/03   |
| 33-0125           | Rochester General Hospital            | 12/31/04   |
| 33-0164           | Highland Hospital of Rochester        | 12/31/03   |
| 33-0164           | Highland Hospital of Rochester        | 12/31/04   |
| 33-0226           | Park Ridge Hospital                   | 12/31/03   |
| 33-0226           | Park Ridge Hospital                   | 12/31/04   |
| 33-0238           | Nicholas H. Noyes Memorial Hospital   | 12/31/03   |
| 33-0238           | Nicholas H. Noyes Memorial Hospital   | 12/31/04   |
| 33-0265           | Clifton Springs Hospital & Clinic     | 12/31/03   |
| 33-0265           | Clifton Springs Hospital & Clinic     | 12/31/04   |
| 33-0285           | Strong Memorial Hospital of Rochester | 12/31/03   |
| 33-0285           | Strong Memorial Hospital of Rochester | 12/31/04   |