PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

99-D16

PROVIDER -Dallas-Ft. Worth Hospital Council Wage Index Group Appeal

Provider No. See Appendix I

vs.

INTERMEDIARY -See Appendix I

DATE OF HEARING- May 8, 1998

Cost Reporting Period Ended - See Appendix I

CASE NO. 92-1962G

INDEX

ISSUE:

Should the revised Dallas-Ft. Worth wage indexes be effective October 1, 1991?

STATEMENT OF CASE AND PROCEDURAL HISTORY:

The Providers in this group appeal are hospitals located in their respective Metropolitan Statistical Area ("MSA") for Dallas and Ft. Worth, Texas. As members of the Dallas-Ft. Worth Hospital Council ("Council"), the Providers are appealing the application of the wage indexes that were published in the Federal Register on August 30, 1991, and which became effective on October 1, 1991.[1] After the October wage indexes went into effect, certain errors originally made by Blue Cross and Blue Shield of Texas ("Intermediary") in determining those wage indexes were later corrected by the Health Care Financing Administration ("HCFA") and the Intermediary. As a result, revised wage indexes based on the correction of these errors became effective for discharges occurring on or after January 11, 1992.[2] Based on the computation of the changes in the wage indexes from October 1, 1991 to January 11, 1992, the Providers estimate the total dollar impact for their appeal to be approximately $2,180,000 for both MSAs.[3]

Under the prospective payment system ("PPS") set forth under 42 C.F.R. § 412.63, the rates at which providers are reimbursed for inpatient services are based on a nationwide average of operating expenses for inpatient hospital services. Pursuant to the statutory provisions of 42 U.S.C. § 1395ww(d)(3)E, those rates are weighted according to diagnosis related groups ("DRG"), with each DRG assigned a number by which the national rate is multiplied. In order to implement the statutory requirement that the federal rate be adjusted to reflect geographical differences in labor costs, HCFA calculates a wage index to account for geographical differences in cost and wages. This wage index is applied to the weighted rates to arrive at the specific rate at which providers will be reimbursed for a particular service.

Prior to January 1, 1991, the wage indexes were calculated based on wage survey data for 1984. Effective for discharges after January 1,1991, wage survey data from 1988 were employed to establish the applicable wage indexes. For the Dallas and Ft. Worth MSAs, there was a reduction from the 1984 to 1988 wage indexes. Due to concerns over this reduction, the Council on behalf of its member hospitals retained MWC Consulting Services ("MWC") in April of 1991 for the purpose of gathering and submitting revised data to the Intermediary for incorporation into the revised wage indexes. In May of 1991, MWC developed a structured organized work paper package which was submitted to the

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1 See Providers Exhibit P-1.

2 See Providers Exhibit P-2.

3 See Providers Exhibit P-6.

Intermediary and HCFA for their review. Neither the Intermediary nor HCFA found the package to be incorrect or unacceptable. In June and July of 1991, MWC submitted revised data for approximately 40 hospitals in the Dallas and Ft. Worth MSAs to the Intermediary's representative. Throughout July and August of 1991, MWC kept in contact with the Intermediary's representative either through visits or telephone conversations. Except for minor requests for documentation, the submitted data were found acceptable with only a few minor exceptions.

After the Intermediary reviewed the data, the wage survey package was forwarded to HCFA and MWC maintained contact with HCFA personnel on a weekly basis to determine the status of the data. Although MWC was continually informed that there were only a few minor changes, it was later discovered that the Intermediary's representative had made substantial changes to the revised data which would result in a sizeable reduction in reimbursement to the Dallas-Ft. Worth hospitals. These disallowances included such areas as revised wages, total paid hours, home office hours and wages, and various items of fringe benefits. While the Intermediary's representative was unsure of how to handle several of the issues, many of the adjustments were made without any contact with HCFA.

On August 30,1991, a notice of revised wage index values was published in the Federal Register effective for discharges occurring on or after October 1, 1991.[4] Almost simultaneously, HCFA also implemented changes to the wage indexes for the Dallas and Ft. Worth MSAs which went into effect on August 31, 1991, and would stay in effect until October 1, 1991.[5] Both the August 31 and October 1 wage indexes were based on the data submitted by MWC in June and July, and both indexes were significantly lower than expected based on the revised data submitted.

On September 23, 1991, MWC sent a letter to the Director of the Office of Reimbursement Policy of HCFA which recounted the above events and requested a second review of the submitted data.[6] Subsequent to a meeting held with HCFA and MWC on September 27, 1991, HCFA informed the Intermediary's representative that another review needed to take place which resulted in subsequent meetings and discussions between representatives from the Intermediary and MWC. During this second review, only the data originally submitted to the Intermediary by MWC back in June and July of 1991 were utilized, and no new issues were raised. The outcome of the second review was submitted to HCFA for final review and approval, which resulted in the reversal of many of the Intermediary's original disallowances. The wage index changes resulting from the second review were set forth in a HCFA

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4 See Providers Exhibit P-1.

5 See Providers Exhibit P-37.

6 Providers Exhibit P-4.

memorandum dated January 11, 1992,[7] and a summary of the salary and hourly variances between the October 1, 1991 and January 11, 1992 wage indexes is presented in Providers Exhibit P-6. Pursuant to HCFA's memorandum, the revised wage indexes that were determined based on the corrected data utilized for the second review were made effective for discharges occurring on or after January 11, 1992.

On April 16, 1992, the Providers appealed the application of the October 1, 1991 wage indexes to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R §§ 405.1835 -.1841, and have met the jurisdictional requirements of these regulations. The Providers were represented by Dan M. Peterson, Esquire, of Fulbright & Jaworski, LLP. The Intermediary's representative was Bernard M. Talbert, Esquire, Associate Counsel for the Blue Cross and Blue Shield Association.

PROVIDERS' CONTENTIONS:

The Providers contend that the relief they seek in this appeal is not a retroactive modification, but a straight forward correction of erroneous wage indexes that went into effect on October 1, 1991, which should have been corrected prospectively. Since both the Intermediary and HCFA have admitted that the October 1 wage indexes were erroneous because of the Intermediary's improper disallowances in the summer of 1991, the merits of these issues have already been determined with the reversal of the previous disallowances. The only matter in dispute is whether the corrections should be applied prospectively beginning with the October 1, 1991 wage indexes forward until the errors were corrected on January 11, 1992, which is approximately a three and a half month period. The Providers assert that the appeal was timely taken on April 16, 1992, from the PPS rate notices reflecting the revised wage indexes effective October 1, 1991, and fully complies with jurisdictional requirements of 42 C.F.R. §§ 405.1835.1841. Accordingly, the situation is the same as if an appeal had been taken from the October 1 wage indexes, and the Intermediary had admitted at the hearing that those wage indexes were in error. If an appeal from a wage index could not be applied prospectively from the effective date of that wage index, there would be no such event as a wage index appeal. However, since HCFA has clearly indicated that it intends that wage indexes may be appealed, the Providers believe that they should prevail in this case, and that the errors made in the calculation of the wage indexes should be applied prospectively from the effective appeal date of October 1, 1991.

Contrary to the Intermediary's contentions, the Providers argue that this appeal does not seek a retroactive correction of the wage indexes and, thus, is not governed by the Circuit Court decision in Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225 (D.C. Cir. 1994)

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[7] Providers Exhibit P-2.

("Methodist").[8] First, the Providers point out that the Methodist case involved a situation where the wage index was published in September of 1983, to be effective on January 1, 1984. After the publication and effective date of the wage index, it was discovered that data submitted by a certain hospital were in error. The correct data were presented to the state on April 13, 1984, and later submitted by the state to the federal government on July 10, 1984. On August 10,1984, HCFA published the revised wage index. While the providers in Methodist sought a retroactive correction back to the date the wage index was initially published (at which time no revised data had been submitted), the Circuit Court rejected this approach and held that retroactivity of this type was not mandated by Medicare statutes. The Providers assert that this is not the case in the present appeal. If the present appeal sought a retroactive correction such as was sought in Methodist, the Providers would be seeking a correction back to the original effective date of January 1, 1991, based upon later submission of revised data in June and July of 1991. By contrast, the argument in this case is fully consistent with the prospective policy of wage index corrections. If the Intermediary had acted properly on the corrected data submitted in June and July of 1991, the changes would have gone into effect prospectively from October 1, 1991.

Second, the Providers point out that the Methodist decision was careful to note that the parties did not dispute that the wage indexes published in September of 1983 made use of the most reliable data available at the time of publication. The opposite situation occurred in the instant appeal in that accurate data were submitted in the summer of 1991, and the Intermediary erroneously disallowed certain items in submitting that data to HCFA. Accordingly, the August 31 and October 1 wage indexes established in 1991 were not based on the most reliable data available because they were unilaterally altered by the Intermediary contrary to Medicare principles and were later rectified.

Third, unlike the Methodist decision, the Providers note that the basis for their appeal is not due to errors by hospitals discovered after the date of the wage indexes for which correction is sought by an appeal to the Board. The errors that transpired in this case were made by the Intermediary and occurred before the wage indexes went into effect. The Providers believe they have presented a number of facts to show that the Intermediary's handling of the data was clearly incorrect, and that the errors by the Intermediary apparently resulted from lack of training, lack of guidance and standards, insufficient staff resources, lack of knowledge, poor communication, and other factors. This is different than the modifications sought in Methodist where errors made by providers were brought to the government's attention after the effective date of the wage indexes.

As a fourth argument, the Providers contend that, if the relief requested in this appeal were to be held as a case of "retroactivity," then there would be no such thing as the ability to appeal a wage index. If the "second review" and publication of the January 11, 1992 corrections had not transpired, an appeal clearly could have been taken from the October 1 wage indexes.

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[8] Providers Exhibit P-45.

Any error relating to the wage indexes could be asserted in such an appeal, and any correction of such error would be applied prospectively from the October 1 effective date. The only errors in the October 1 wage indexes being asserted in this appeal are those that were confirmed in the "second review." Rather than arguing the merits of each individual disallowance, this appeal relies on the fact that by reversing these disallowances in the "second review," HCFA and the Intermediary have already conclusively determined that the original disallowances were incorrect. That reliance, however, does not turn this into a "retroactivity" case. The Providers insist that there is nothing in the governing law which states that, if a hospital seeks a modification of a wage index, it gives up its existing ability to appeal that wage index.

In further support of its position, the Providers cite the Court of Appeals decision in Sarasota Memorial Hospital v. Shalala, 60 F.3d 1507 (11th Cir. 1995) ("Sarasota").[9] In that case, the hospitals appealed the erroneous exclusion of FICA taxes from a 1982 wage index. The Court held that exclusion of the employer-paid FICA taxes was inconsistent with the mandate of 42 U.S.C. § 1395ww(d)(3)(E), and that such action was arbitrary and capricious. Since the Secretary of Health and Human Services ("Secretary") had stipulated that retroactive relief would be available to appellants if the Court of Appeals held against the Secretary, the case was remanded to allow relief for the hospitals.

Finally, the Providers contend that, even if the corrections requested in this case were considered retroactive, there is no necessary conflict between making revisions to a wage index and the principles of a prospective payment system. In Methodist, the Court agreed that retroactive corrections to inaccurate wage data are not necessarily inconsistent with the PPS system. Although the Methodist Court did not find a Congressional intent to mandate changes to wage indexes, the Providers insists that this case does not involve retroactive change. However, there is intent on the part of Congress and HCFA to permit prospective wage index appeals. The Methodist Court dismissed reliance on the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No.101-239 as not relevant because the statute was not passed until after the cost year at issue in that case. However, OBRA was passed immediately preceding the cost year at issue in this appeal, and did require retroactive effect for certain wage index errors. Moreover, the Intermediary itself implemented certain retroactive changes to the wage index for the Dallas MSA as required by Congress pursuant to § 6003 (h)(5) of OBRA.[10] Accordingly, the Intermediary incorrectly maintains that a retroactive correction of an error would run counter to the law's intent. More importantly, the Providers conclude that based on the facts and arguments presented in this case, the corrections sought are not retroactive but prospective.

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[9] Providers Exhibit P-43.

[10] See Providers Exhibit P-38.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its adjustments to the wage index data submitted by the Providers were made based on its best professional judgement, the application of Medicare laws and regulations, and were in conformance with policy directives received from HCFA. The Intermediary consulted with HCFA on many issues, and maintains that its adjustments were not erroneous but were based on the best information available at the time in question. Furthermore, the Intermediary states that its adjustments were communicated to MWC before submission to HCFA.

The Intermediary further argues that the Circuit Court's decision in Methodist is the governing authority in this case, and should control the outcome of the Board's decision. In that case, the wage index error resulted from erroneous data submitted by a third party and not the providers. In that case, HCFA relied on the regulatory provisions of 42 C.F.R. § 412.1 (a) which state in pertinent part:

> Under the prospective payment system, payment for the operating costs of inpatient hospital services furnished by hospitals subject to the system ... is made on the basis of prospectively determined rates and applied on a per discharge basis

42 C.F.R. § 412.1(a).

The Intermediary contends that under PPS, the intent is to pay providers a predetermined amount and, therefore, a retroactive correction of an error would run counter to the law's intent. This opinion was upheld in the Methodist decision in that the Circuit Court held that: (1) the statute did not require retroactive application; (2) the Secretary could adopt policy that corrections would not be made retroactive; and (3) the manner of adoption of policy did not violate the Administrative Procedure Act.

The Intermediary maintains that the underlying problem in this appeal, as in the Methodist case, is that the original data submitted by the hospitals were incorrect for purposes of computing the initial wage indexes that were published for January 1,1991. Accordingly, the Providers in this group appeal are not as innocent as they portray themselves as to the submission of accurate data, and the reality is that it took a lengthy period of time to wade through the various components of information to get to the right answer. While the Providers' initial wage index data were understated, the corrected data submitted in the summer of 1991 were overstated, and it took the efforts of two reviews spanning a period of over six months before a more favorable wage index for the Providers was ultimately established. Once the data were fully evaluated and adjusted to assure the proper calculation of wage indexes, the results were implemented on a prospective basis. Accordingly, the

Intermediary concludes that the facts in this appeal are very similar to the events that occurred in the Methodist case which should be applied in deciding the outcome of this dispute.[11]

CITATION OF LAW, REGULATION AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.:

§ 1395ww (d)(3)(E)	- Adjusting for Different Area Wage Levels

2. Regulations- 42 C.F.R.:

§ 405.1835-.1841	- Board Jurisdiction
§ 412.1 (a)	- Prospective Payment Systems for Inpatient Hospital Services - Purpose
§ 412.63 et seq. (1990/1991)	- Federal Rates for Fiscal Years after Federal Fiscal Year 1984

3. Cases:

Methodist Hospital of Sacramento v. Shalala, 38 F.3d 1225 (D.C. Cir. 1994).

Sarasota Memorial Hospital v. Shalala, 60 F.3d 1507 (11th Cir. 1995).

FINDINGS OF FACT CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration and analysis of the controlling law and regulations, the facts of the case, documentary evidence, parties contentions, testimony elicited at the hearing, and post-hearing submissions, finds and concludes that the revised wage indexes at issue in this appeal should not be made effective October 1, 1991. The revised Dallas - Ft. Worth wage indexes set forth in HCFA's memorandum dated January 11, 1992,[12] for discharges occurring on or after that date, were properly implemented by the Intermediary in accordance with the applicable law and regulations in effect for the fiscal years in contention.

The record shows that the survey data submitted by the Dallas - Ft. Worth Providers in this appeal included erroneous information when the initial wage indexes were established for

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[11] Tr. at 139-142.

[12] Providers Exhibit P-2.

discharges occurring on or after January 1, 1991. The process of correcting the disputed data commenced with the Providers' submission of revised data during July and August of 1991, and continued through the span of two reviews over a period of approximately six months. Although interim wage indexes based on the revised data were instituted for discharges occurring on or after October 1, 1991, a second review of the revised data was necessary before wage indexes acceptable to all parties could be established. The changes to the wage indexes resulting from the second review culminated with HCFA's issuance of corrections to the 1988 wage survey data applicable for discharges occurring on or after January 1, 1992.

The Board finds that the wage-index adjustment procedure employed by HCFA and the Intermediary fully complied with the requirements set forth under the governing statutory and regulatory authorities which implemented the Medicare program's PPS system. The statutory provisions of 42 U.S.C. § 1395ww(d)(3)(E) provide for the adjustment of different area wage levels as follows:

> The Secretary shall adjust the proportion, (as estimated by the Secretary from time to time) of hospitals' costs which are attributable to wages and wage-related costs, of the DRG prospective payment rates computed under subparagraph (D) for area differences in hospital wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the hospital compared to the national average hospital wage level.

42 U.S.C. § 1395ww(d)(3)E.

The regulatory implementation of the statute is set forth in 42 C.F.R. § 412.63 (1) (1990)[13] which states in part:

> (l) Adjusting for different area wage levels. (1) HCFA adjusts the proportion (as estimated by HCFA from time to time) of Federal rates computed under paragraph (j) of this section that are attributable to wages and labor-related costs for area differences in hospital wage levels by a factor (established by HCFA based on survey data) reflecting the relative level of hospital wages and wage-related costs in the geographic area (that is, urban or rural area as determined under the provisions of paragraph (b) of this section) of the hospital compared to the national average level of hospital wages and wage-related costs.

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[13] In 1991, the regulation was redesignated as 42 C.F.R. § 412.63 (p).

> (2) If an error is discovered in the survey data that results in a change to the wage index value for an area, the revised wage index value is effective prospectively from the date the change to the wage index is made.

42 C.F.R. § 412.63 (l).

The Board acknowledges that the Providers have advanced persuasive arguments for the full implementation of the corrected wage indexes effective for discharges occurring on or after October 1, 1991. However, the Board is bound by the governing law and regulations which support the actions taken by HCFA and the Intermediary in this case.

DECISION AND ORDER:

The revised Dallas -Ft. Worth wage indexes should not be made effective October 1, 1991. The Intermediary's determinations are affirmed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esquire
Martin W. Hoover, Jr., Esquire
Charles R. Barker

Date of Decision: December 08, 1998
FOR THE BOARD

Irvin W. Kues
Chairman