PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON-THE-RECORD
2001-D23

PROVIDER -
Francis A. Bell Memorial Hospital
Ishpeming, Michigan

Provider No. 23-0001

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
United Government Services

DATE OF HEARING-
April 10, 2001

Cost Reporting Periods Ended -
June 30, 1996

June 30, 1990 and June 30, 1991

INDEX

ISSUE:

Whether the Provider is entitled to interest under 42 U.S.C. ' 1395g(d) for any amounts paid by the Intermediary relating to the Provider=s 1990 and 1991 fiscal years, and if so, for what period of time?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Francis A. Bell Memorial Hospital (AProvider@) is a 69-bed, rural, not-for-profit, tax-exempt facility located in Ishpeming, Michigan. On January 21, 1993, the Provider made a request pursuant to 42 C.F.R. ' 412.92(e) for additional payments for its June 30, 1990 fiscal year as a result of a significant volume decrease.[1] The Provider made a similar request on July 16, 1993 for its July 30, 1991 fiscal year.[2] These requests were denied by the Intermediary on July 20, 1993,[3] and the Provider filed a timely appeal to the Provider Reimbursement Review Board (ABoard@) on January 12, 1994.[4] On January 12, 1999, the eve of the scheduled Board hearing, the parties agreed to stay the proceedings.[5] On March 19, 1999, the parties jointly requested HCFA to grant the Provider=s certification as a sole community provider, and approve the additional payments requested as a result of a significant volume decrease.[6]

HCFA responded on July 14, 1999 by instructing the Intermediary to process the request for a volume adjustment.[7] Between July 14, 1999 and December 9, 1999, the Intermediary processed the request and granted the Provider=s request for a volume adjustment. On December 9, 1999, the Intermediary issued two Notices of Reopening.[8] Revised Notices of Program Reimbursement (ANPRs@) were issued on February 25, 2000,[9] and payment was made to the Provider on March 7, 2000.[10]

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1 See Provider Exhibit P-4.

2 See Provider Exhibit P-5.

3 See Provider Exhibit P-6.

4 See Provider Exhibit P-8.

5 See Provider Exhibit P-11.

6 See Provider Exhibit P-12.

7 See Provider Exhibit P-13.

8 See Provider Exhibit P-14 & P-15.

9 See Provider Exhibit P-16 & P-17.

With the underlying issue in the Provider=s appeal resolved, without a Board hearing, the Board advised the Provider that it did not have the authority to award the interest and costs sought by the Provider.[11] The Board advised that the award of interest is not a matter covered by the Medicare cost report. (The authority of the Board is established by the statute which grants the Board the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report. 42 U.S.C. ' 1395oo(d)).

The Provider exercised its right of review from the Board=s determination and filed a complaint with the United States District Court for the Western District of Michigan, Case No. 2:99-CV-26. Attorneys for the Secretary responded by filing a Petition for Remand, taking the position that the Board did, in fact, have the authority to consider the Provider=s claim for interest. The court dismissed the matter by granting the Petition for Remand and remanded the case to the Secretary for the Department of Heath and Human Services.[12] The Secretary was directed to instruct the Board to address the following issue:

> Is the provider (plaintiff) entitled to interest under 42 U.S.C. ' 1395g(d) for any amounts paid by the fiscal intermediary relating to the provider=s (plaintiff=s) 1990 and 1991 fiscal years, and if so, for what period of time?

On December 15, 2000, the Board issued a Notice of Reopening[13] pursuant to the Acting Administrator=s Order for Remand and directed the Intermediary and Provider to submit position papers addressing the issue stated above, as well as the following questions posed by the court.

> 1. When did the Secretary make her final determination within the meaning of 42 U.S.C. ' 1395g(d) and 42 C.F.R. ' 405.378, whether allegedly through the January 12, 1999 agreement or otherwise?
>
> 2. What was the amount of payment made to the Provider, if any? What is the correct amount of payment to be made to the Provider for the fiscal year ends 1990 and 1991?
>
> 3. Was the payment of any deficit made to the Provider within 30 days of the final determination as required by 42 U.S.C. ' 1395g(d))?

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[10] See Provider Exhibit P-18.

[11] See Provider Exhibit P-20.

[12] See Provider Exhibit P-1.

[13] Provider Reply to Intermediary Position Paper, February 21, 2001, Exhibit 22.

Both parties have complied with the Board Order by submitting the requested position papers. The Provider is represented by Jacqueline D. Scott, Esq. of Vamum, Riddering, Schmidt and Howlett, LLP. The Intermediary is represented by James Grimes, Esq., of the Blue Cross and Blue Shield Association.

PROVIDER=S CONTENTIONS:

The Provider contends that the information used to resolve the sole community hospital volume adjustment issue in 1999 was available to the Intermediary in 1993, with the filing of its initial exception request. The Provider asserts that the ultimate determination by the Intermediary was not a situation where the Intermediary required 6 years to review the information and reach a decision. Rather, the Provider contends that the Intermedairy failed to process the Provider=s request in compliance with the regulations, which required the Intermediary to inform HCFA of its initial decision. It was not until 6 years elapsed and the parties entered into a pre-hearing settlement agreement that HCFA received the needed information. The Provider believes that had HCFA received the Provider request on a timely basis the HCFA instruction to Aprocess the request A would have been given in 1993 instead of 1999.

Specifically, the Provider contends that it applied for Sole Community Hospital status on July 19, 1991, and was approved with an effective date of August 18, 1991. The Intermediary advised, in a letter dated July 20, 1993, that the first reporting period for which the Provider could qualify for additional payments due to a significant volume decrease would be the fiscal year ended June 30, 1992.[14] However, the Provider points out that the regulations at 42 C.F.R. ' 412.92(f) (in effect for the relevant time period) included a provision that would permit additional payments to Aother hospitals experiencing significant volume decrease.@ To receive payments under subsection (f), the provider must establish that it qualified as a Sole Community Hospital during the cost reporting period even though it was not designated as such, and was not receiving payment as a Sole Community Hospital. The Provider contends that the Intermediary erred by not considering the Provider=s request in connection with subsection (f), and by not submitting the Provider=s documentation to HCFA for a determination on the Sole Community Hospital status (which would have qualified the Provider for the low volume adjustment payments).

The Provider contends that 42 C.F.R. 405.378(c)(1)(i)(A) applies in this case in that the Provider made a written demand for payment at the time it filed its appeals (January 21, 1993 for the 1990 fiscal year, and July 16, 1993 for the 1991 fiscal year). The Provider is seeking interest from those dates until March 10, 2000, the date it received payment for the principal amount of the underpayments.

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[14] See Provider Position Paper at P-6.

The Provider also contends that the Intermediary=s reliance on National Medical Enterprises, Inc. v. Sullivan, 60 F.2d 866 (9th Cir. 1992) (ANME II@) is without merit, in that the facts in the instant case differ. Unlike NME II , the Provider=s delay in receiving payment was not the result of a genuine dispute, which was finally resolved by the courts. The Provider contends that there has never been a dispute, or even a good faith argument that the Provider was not entitled to the principal underpayments under 42 C.F.R. ' 412.92(f). Consequently, unlike NME II , in this case there was no period of time taken to determine that an error had been made. Thus, interest should begin to accrue from 1993.

Finally, in response to the issue and questions posed by the District Court and the Board via its Remand Order the Provider responds as follows:

Issue: Is the Provider entitled to interest under 42 U.S.C. ' 1395g(d) because payment of amounts owed to the Provider was not made within 30 days of the final determination of the amount owed to the Provider.

Answer to First Question: The Secretary=s final determination for FYE June 30, 1990 was made on January 21, 1993, in that an NPR had been issued and there had been a written request for payment, thereby satisfying the conditions set forth in 42 C.F.R. ' 405.378 (c)(1)(i). Similarly, the final determination for the fiscal year ended June 30, 1991 occurred on July, 16, 1993.

Answer to Second Question: On March 10, 2000, the Provider received payment for the principal amount of the underpayments for the fiscal years in question by check dated March 7, 2000, in the amount of $279,411 for FYE 1990 and $ 1,098,722 for FYE 1991(less a lump sum adjustment applicable to FYE 1990). The Provider does not contest the correctness of those amounts. Rather, the Provider=s position is that it is owed interest on those amounts because the payments were not timely made. The Provider asserts that the total amount of interest due and owing is $1,259,764.63.

Answer to Third Question: Payment to the Provider was not made within 30 days of the final determination, as required by 42 U.S.C. ' 1395g(d).

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that the Provider is not entitled to interest under 42 U.S.C. ' 1395g(d) because the underpayment was paid within 30 days of the final determination that payment was due. In the case at hand, the Provider=s request for additional volume payments as a sole community hospital required the furnishing of information so as to determine the amount to be paid. This information was initially provided to the Intermediary in January and July 1993. Based on that information the Intermediary denied the request. Pursuant to the parties joint request for reconsideration dated March 19, 1999, HCFA issued the July 14, 1999[15] instruction to the Intermediary. That instruction stated:

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[15] See Intermediary Position Paper, Exhibit 13.

> Therefore, we find that Francis A. Bell Hospital=s request for a volume adjustment pursuant to 42 C.F.R. ' 412.92(f) should be processed and the upcoming action before the PRRB . . . be avoided. Please note that this request applies to a volume adjustment only, not full community hospital status. In addition, we find that the request should be processed by the Intermediary, not automatically granted . . . .

Following this directive, the Intermediary processed the Provider=s information and granted the request. The cost reports were then reopened and a Afinal determination@ as to the amount of the underpayment due the Provider was determined. A final settlement of the cost reports was made via Notices of Program Reimbursement dated February 25, 2000, and payment was made on March 7, 2000. Accordingly, since the underpayment was paid within 30 days of final settlement, the Intermediary contends that no interest is payable.

The Intermediary also points to the decision in NME II wherein the court stated:

> Congressional intent was not, as NME contends, that providers receive interest for the years it takes to resolve disputes over Medicare reimbursement.

In response to the issue and questions posed by the District Court and the Board via its Remand Order, the Intermediary responds as follows:

Issue: The Provider is not entitled to interest under 42 U.S.C. ' 1395g(d) because the underpayment was paid within 30 days of the final determination that payment was due.

Answer to First Question: A final determination in accordance with 42 U.S.C. ' 1395g(d) was made upon the issuance of the revised Notices of Program Reimbursement issued on February 25, 2000. The cost reports for FYEs 1990 and 1991 were finalized and settled upon the issuance of the original NPRs in September 1992 and April 1993, respectively. However, these cost reports were reopened on December 9, 1999, pursuant to HCFA instruction, to include additional volume payments to the Provider. The reopening of the cost reports and subsequent issuance of NPRs in February 2000 constituted the final determination of the Secretary within the meaning of the statute. A separate right of appeal for the Provider arose upon the issuance of the revised NPRs.

Answer to Second Question: The amount of payment made to the Provider is that amount set forth in the revised Notices of Program Reimbursement issued on February 25, 2000. The amount stated therein is the total amount due the Provider. There is no dispute by the Provider as to this amount.

Answer to Third Question: There was only one payment ever made to the Provider with respect to their request for additional volume payments. That payment was made upon final settlement of the reopened cost reports on February 25, 2000 and was paid on March 7, 2000. Therefore, there was no deficit that was unpaid for a period greater than 30 days. The interest payment section of 42 U.S.C. ' 1395g(d) is not applicable in this case.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

' 1395 g (d)	-	Payment to Providers of Service
' 1395oo	-	Provider Reimbursement Review Board

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

' 405.376 et seq.	-	Interest Charges on Overpayments and Underpayments to Providers (Redesignated as 405.378 in 1996)
' 412.92 (e)	-	Additional Payments to Sole Community Hospitals Experiencing A Significant Volume Decrease
' 412.92 (f)	-	Additional Payments to Other Hospitals Experiencing A Significant Volume Decrease

3. Cases:

National Medical Enterprises, Inc. v. Sullivan, 60 F.2d 866 (9th Cir. 1992)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the facts, parties: contentions, law, and regulations finds and continues to conclude that it does not have the authority to hear this issue. The authority of the Board is established by statute which grants the Board the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report. (42 U.S.C. ' 1395oo(d)). In the instant case, the parties, prior to the scheduled Board hearing, resolved the underlying issue. The only issue remaining in the case concerns the payment of interest by the United States government through its Intermediary. That interest is covered by 42 C.F.R. ' 405.378 and is not part of the determination relating to the cost report. The above regulation concerns interest paid when a provider is not reimbursed amounts due

from an intermediary 30 days after an NPR is issued. This regulation application is not subject to Board review.

The Board fully recognizes its responsibility to respond to the questions posed by the United States District Court. In this regard, the Board has analyzed the position papers submitted by both parties and offers the following:

While not making a determination as to the applicability of interest, the Board finds that the applicable statute is 42 U.S.C. 1395g(d) which provides that:

> [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 determination, interest shall accrue on the balance of such excess or deficit not paid or offset . . .

The Secretary=s regulation implementing this statute defines Afinal determination@ as the NPR issued by the fiscal intermediary which notifies the provider that amounts are due and specifies the actual amount of overpayment or underpayment.
42 C.F.R. ' 405.376 (1990).

With respect to the three questions posed by the District Court, the Board respectfully responds as follows:

Answer to First Question- Applying the statute and regulation referenced above, the Secretary made her final determination on February 25, 2000, when revised NPRs were issued.

Answer to Second Question- On March 7, 2000, the Provider was paid $1,118,253.29. This reflected the amounts applicable to the FYE 1990 and 1991 reopenings of $1,378,253.29 less a prior lump adjustment owed to the Medicare program of $260,000.[16] Both parties agree that these underlying payments are accurate.

Answer to Third Question B Applying the statute and regulation referenced above, the response is yes payment was made within 30 days of the final determination. The final determination was made February 25, 2000 and the payment to the Provider was made on March 7, 2000.

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[16] See Provider Position Paper, Exhibits P-18 & P-19.

DECISION AND ORDER:

The Board dismisses this case as it lacks the authority to hear the issue.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker
Stanley J. Sokolove

Date of Decision: May 3, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman