PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2000-D43

PROVIDER –
Loma Linda University Medical Center
Loma Linda, California

Provider No. 05-0327

vs.

INTERMEDIARY –
Blue Cross and Blue Shield Association/
Blue Cross of California

DATE OF HEARING-
July 31, 2001

Cost Reporting Period Ended -
June 30, 1985

CASE NO. 89-1522R

INDEX

ISSUE:

Was the Provider's computation of the self-disallowance amount of investment income offset against interest expense proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Loma Linda University Medical Center ("Provider") is a voluntary, non-profit, short-term hospital located in Loma Linda, California. The Provider is affiliated with the Adventist Health Systems.

The Provider timely filed its cost report for the fiscal year ending ("FYE") June 30, 1985 offsetting investment income to the full extent of the incurred interest expense in the amount of $2,451,790. Blue Cross of California ("Intermediary") performed an audit accepting this offset and made no adjustment.

The Intermediary issued the original Notice of Program Reimbursement ("NPR") on September 14, 1988 and issued two subsequent revised NPRs on November 30, 1990 and February 28, 1991 respectively. The Provider timely filed two appeal requests to the Provider Reimbursement Review Board ("Board") appealing the Intermediary's original NPR and the second revised NPR of February 28, 1991, and has met all of the jurisdictional requirements of 42 C.F.R. '' 405.1835-.1841. The Provider added several issues after the initial hearing requests were received under the regulatory provision at 42 C.F.R. ' 405.1841, including the interest expense issue. Except for the "interest expense" issue and the "outlier" issue which was expedited for judicial review, all other appealed issues have either been withdrawn or resolved between the parties. The amount of Medicare reimbursement in dispute for the interest expense issue is approximately $329,000.

The Provider requested the interest expense issue be added to the appeal on May 6, 1996. The Intermediary contested the Board's jurisdiction for this issue because there was no Intermediary determination or adjustment since the Provider self-disallowed the amount in dispute. The Board accepted jurisdiction on August 8, 1996 holding that an intermediary adjustment was not a prerequisite to Board jurisdiction. Rather, a provider may appeal an issue if it is dissatisfied with the final determination of the fiscal intermediary. See 42 U.S.C. ' 1395oo (a)(1). Further, the Board found that a provider was not required to add an issue to a properly pending appeal within 180 days of the issuance of the NPR.

On September 7, 1998, the Board issued a decision on the substantive issue. The Board found that the Intermediary=s determination of the amount of allowable cost was incorrect due to the understatement of interest expense in the amount of $1,029,279 and ordered the Intermediary to include this amount in the Provider=s total allowable cost.

On November 17, 1998, the Health Care Financing Administration (HCFA) Administrator, now the Centers for Medicare and Medicaid Services (ACMS@), remanded the case to the Board and ordered that a copy of the Provider=s September 14, 1998 NPR and cost report be included in the record. The Administrator opined that this information was needed for the Board to reach a decision on the jurisdiction issue. Further, the Administrator ordered the Board to issue a new decision in this matter. The Provider was represented by Eytan R. Ribner of Blumberg Ribner, Inc. The Intermediary's representative was Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

Stipulations

The parties' representatives made the following stipulations:

1. The only issue in dispute is whether the Provider incurred allowable interest expense in FYE June 30, 1985.

2. The Notice of Program Reimbursement for FYE June 30, 1985, was issued on September 14, 1988.

3. A timely appeal was filed with the PRRB on March 7, 1989. For reasons specified in the following paragraphs, the interest issue referenced above was not part of the appeal request.

4. The Provider's "as filed" cost report did not present any claim for reimbursement for interest expense incurred in FYE June 30, 1985.

5. In FYE June 30, 1985, the Provider incurred interest expense of $2,451,790 on loans between unrelated parties that satisfied financial needs of the Provider and were used for purposes reasonably related to patient care. Therefore, the loans met the definition of "proper," as per 42 C.F.R. ' 413.153(b)(3) and the first two tests of the definition of "necessary," as per 42 C.F.R. ' 413.153(a)(2)(1)(i) and (ii).

6. In FYE June 30, 1985, the Provider earned interest income of $3,454,072.

7. Noting that interest income exceeded interest expense, no interest expense was claimed on the FYE June 30, 1985 cost report based upon the Provider's application of the investment income offset required by the regulation at 42 C.F.R. ' 413.153(b)(2)(iii).

8. Subsequently, the Provider discovered that a substantial portion of its investment income did not need to be offset. In fact, $2,216,664 in interest income was earned on funded depreciation accounts and exempt from offset. In reviewing the Provider's interest calculation, the Intermediary identified an additional $208,121 that should have been offset.

9. The correct income offset should have been $ 1,425,511.

10. If the correct income offset had been used in the FYE June 30, 1985, cost report, allowable interest expense would have been $ 1,029,279.

11. The Provider never sought to correct the erroneous overstatement of its interest income through a reopening request pursuant to the regulation at 42 C.F.R. ' 405.1885.

12. The three year reopening period under the regulation at 42 C.F.R. ' 405.1885 lapsed on or about September 19, 1991.

13. On May 6, 1996, the Provider requested the PRRB to add its complaint about incorrect interest reimbursement, as a "self-disallowed" adjustment.

14. After jurisdictional briefs were filed by the Provider and the Intermediary, the PRRB on August 8, 1996, accepted jurisdiction. See August 8, 1996 PRRB letter.

15. While the Provider and the Intermediary respectfully acknowledge that they cannot dictate to the PRRB what its decision should be, the mutual reasonable expectation is that the PRRB will issue a written decision as required by regulation 42 C.F.R. ' 405.1871 in favor of the Provider based upon this STIPULATION. This decision will enable the Intermediary to request Administrator review pursuant to regulation 42 C.F.R. ' 405.1875.

Medicare Statutory and Regulatory Background:

The Medicare law establishes that health care providers furnishing services to Medicare patients are to be reimbursed the reasonable cost ("RC") of providing such services. The Medicare law defines RC, at 42 U.S.C. ' 1395x(v)(1)(A), as "the costs actually incurred, excluding therefrom any part of incurred costs found to be unnecessary in the efficient delivery of needed health services and shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included...." Id.

Congress authorized the Secretary of Health and Human Services ("Secretary") to promulgate regulations to implement the RC statutory provision. The foregoing principles are further explained in the Medicare regulations in part at 42 C.F.R. '' 413.9 and 413.53. The regulations at 42 C.F.R. ' 413.9(b)(2) define "necessary and proper" costs as costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. 42 C.F.R. ' 413.153 (b)(2)(ii) explains that necessary and proper interest on both current and capital indebtedness is an allowable cost assuming it was "[i]ncurred on a loan made to satisfy a financial need and for a purpose reasonably related to patient care.@ Interest determined to be unnecessary is not allowable. Another requirement is that "necessary" interest be:

> (iii) Reduced by investment income except if such income is from gifts or grants, whether restricted or unrestricted, and that are held separate and not commingled with other funds. Income from funded depreciation that meets the requirements of 42 C.F.R. ' 413.134 or a provider's qualified pension fund is not used to reduce interest expense.

42 C.F.R. ' 413.153(b)(2)(iii) (emphasis added).

PROVIDER=S CONTENTIONS:

The Provider=s original jurisdictional brief dated July 17, 1996 contended that the Board had jurisdiction over issues for which there was no audit adjustment because they were matters covered by the cost report as required by 42 U.S.C. ' 1395oo(a)(1). Further, the Provider argued that 42 C.F.R. ' 405.1841 (a)(1) provides for the addition of issues to a pending appeal.

The Provider=s most recent jurisdictional brief dated July 2, 1999 argued at greater length that there was no requirement that there be an adverse finding by the Intermediary for the Board to have jurisdiction over the appeal. The Provider contends that, under the provisions of 42 C.F.R. ' 405.1841(a)(2), an intermediary determination is the total amount of payment due the provider pursuant to 42 C.F.R ' 405.1803. Thus, the Provider asserts that the interest expense issue is an aspect of the Intermediary determination. The Provider also argues that the futility principle set forth in Bethesda Hospital Association v. Bowen, 108 S. Ct. 1255 (1988) (a provider could complete its cost report in full compliance with the Secretary=s instructions; however, the claim for cost would have been futile because, under the Secretary=s instructions, the intermediary would be required to disallow the costs) applies. The Provider contends that because the Intermediary made an adjustment offsetting its investment income from its funded depreciation account in previous years it would have been futile for the Provider to claim interest expense as an allowable cost.

The Provider reasons that the Board has the power to decide issues with respect to all matters covered by the cost report regardless of whether such matters pertain to intermediary adjustments. The Provider believes that 42 U.S.C. ' 1395oo(d) makes it clear that the Board=s power extends to all matters covered by a cost report before the Board, including matters that were not considered by the intermediary in making its final determination.

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that under 42 C.F.R. ' 405.1835 and ' 405.1841(a)(1), the Provider does not have a right to a hearing before the Board on the interest issue because the Intermediary did not make a determination or adjustment to the cost, nor did the Provider request a hearing within 180 days of the NPR. The Intermediary contends that the proper administrative remedy for the issue is to request a reopening.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - United States Code ("U.S.C.") 42 U.S.C.:

'1395x(v)(1)(A)	-	Reasonable Cost
'1395oo et seq.	-	Provider Reimbursement Review Board

2. Regulations - Code of Federal Regulations ("C.F.R.") 42 C.F.R:

405.1801 et seq	-	Provider Reimbursement Determinations and Appeals
405.1803	-	Intermediary Determination and Notice of Amount of Program Reimbursement
' 405.1835-.1841 et seq.	-	Board Jurisdiction
' 405.1885	-	Reopening a Determination or a Decision
' 405.1871	-	Board Hearing Decision and Notice
' 405.1875	-	Administrator's Review
' 413. 9 et seq.	-	Cost Related to Patient Care
' 413.53	-	Determination of Cost of Services to Beneficiaries
' 413.134 et seq.	-	Depreciation- Allowance for Depreciation Based on Asset Costs

'413.153 et seq. - Interest Expense

3. Cases

Bethesda Hospital Association v. Bowen, 108 S.Ct. 1255 (1988).

FINDINGS OF FACT. CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, finds and concludes that:

1. In accordance with the Administrator=s November 17, 1998 remand, the Board obtained a copy of the Provider=s Medicare cost report for the June 30, 1985 fiscal year, as well as the NPR dated September 14, 1988. After reviewing that information, the Board finds that its original jurisdiction determination of August 8, 1996 is reaffirmed and incorporated as part of this decision.

2. The Provider's offset of the entire amount of interest income was in error as evidenced by the parties' stipulation #8. The Provider erroneously offset earnings from its funded depreciation account ("FDA") that was specifically excluded by the regulations at 42 C.F.R. ' 413.153(b)(2)(iii). The Intermediary determined the amount of the interest income offset and that no interest expense was reimbursable due to the offset. Thus, the Intermediary incorrectly determined the Provider's total reimbursable cost which was understated by the exclusion of the interest expense.

1. Jurisdiction:

Findings of Facts, Conclusions:

The Board makes the following findings of facts and conclusions:

1. That PRRB jurisdiction over this issue is appropriate under the statutory provision at 42 U.S.C. ' 1395oo(a) and the regulation at 42 C.F.R. ' 405.1841(a)(1).

2. That jurisdiction could also be achieved under the statutory provision at 42 U.S.C. '139oo (d).

3. An intermediary audit adjustment ("AA") is not a prerequisite for an appeal or as a determination. Clearly an AA is a determination.

4. An intermediary can make determinations without the impact of an AA.

5. The Intermediary's review and acceptance of the offset amount constituted a reviewable determination.

6. The Intermediary determined the amount of the interest income offset and that no interest expense was reimbursable due to the offset. Thus, the Intermediary incorrectly determined the Provider's total reimbursable cost which was understated by the exclusion of the interest expense.

7. The self-disallowance of interest expense in this case was accomplished on and through the cost report. Thus, both the amount of the offset and the interest expense amount was covered on the cost report.

8. A self-disallowance does not automatically signify that the Provider erroneously forgot to include or inadvertently omitted the costs from the cost report.

Discussion:

The Board finds that it properly accepted jurisdiction over the interest expense issue and hereby reaffirms and incorporates the jurisdiction determination of August 8, 1996. That determination was made pursuant to the statutory provision at 42 U.S.C ' 1395oo(a) and the regulation at 42 C.F.R. ' 405.1841(a)(l).

A provider may appeal to the Board if it meets three statutory criteria stated as follows:

(1) . . . is dissatisfied with a final determination of the . . . intermediary . . .as to the amount of total program reimbursement due the provider for the items and services furnished. . .

(2) the amount in controversy is $10,000 or more, and

(3) such provider files a request for a hearing within 180 days after notice of the intermediary's final determination

42 U.S.C. ' 1395oo(a).

After the Board has jurisdiction of an appeal, the regulations authorize a provider to add other issues. The regulation states:

(a)(l) . . . Prior to the commencement of the hearing proceedings, the provider may identify in writing additional aspects of the intermediary's determination with which it is dissatisfied and furnish any documentary evidence in support thereof

42 C.F.R. ' 405.1841(a)(1).

The parties' stipulation #3 acknowledges that the third criteria of a timely appeal was met and the second criteria of more than $10,000, although disputed, was met through other appealed issues as well as the original issue. The key factor advanced by the Intermediary is that there was no Intermediary determination made regarding the interest expense issue, and due to the selfdisallowance there was no claim for interest on the cost report.

The Board disagrees with all the Intermediary's primary contentions that the Board lacks jurisdiction because there was: (i) no Intermediary audit adjustment; (ii) thus, no Intermediary determination; and (iii) since the Provider self-disallowed the entire interest expense cost, there was no claim for interest expense.

The Intermediary's position is flawed from several legal avenues. First, there is no statutory or regulatory provision that makes an audit adjustment a prerequisite for either an appeal or as a determination. The regulations state an intermediary determination is:

(1) . . .a determination of the amount of total reimbursement due a provider.

42 C.F.R. ' 405.1801(a)(1).

The Board finds that the Intermediary determined that no interest expense was reimbursable due to the amount of the reviewed interest income offset. Therefore, the Provider's total reimbursable cost was understated by the exclusion of the interest expense.

Second, the Board concludes that the absence of an AA does not signify that the Intermediary made no determination. Although an AA is clearly a determination, an intermediary can make determinations without the impact of an AA. As in this case, there was, in fact, a determination made by the Intermediary. The Intermediary stated in the Jurisdiction Brief[1] prepared by the Blue Cross and Blue Shield Association ("BCBSA") and in a letter from BCBSA dated December 5, 1996, that "during the audit, the Intermediary accepted this interest income offset based on the auditor's review of the Provider's documentation, and consequently did not make any adjustment to these costs." The Board finds that under these circumstances, the Intermediary did make a determination regarding the offset amount which eliminated the entire interest expense incurred by the Provider. Therefore, the Intermediary determined both the amount of offset and that no interest expense was reimbursable, i.e., excluded from the total amount of reimbursement due the Provider.

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[1] Intermediary=s Jurisdiction Brief, Exhibit 1-2, Intermediary=s workpapers affirming Provider=s offset.

Finally, the Board concludes that the interest expense incurred was initially shown as part of the cost report and the self-disallowance was accomplished through the cost report by a worksheet A-8 adjustment. Thus, both the interest expense incurred and the amount of the offset were on the cost report which was admittedly reviewed by the Intermediary's auditor. Moreover, the Provider made a clear and obvious error when making the mandatory offset [self-disallowance] which had even been reviewed by the Intermediary's auditor and should have been corrected at that time.

The Board also recognizes the statute grants authority and power to the Board to review other matters covered by the cost report that may not have been considered by the intermediary.

(d) . . .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 . . . even though such matters were not considered by the intermediary in making such final determination.

42 U.S.C. ' 1395oo(d).

The Board's jurisdiction could be based solely on this provision since both the offset amount and the incurred interest expense were covered by the cost report even if the Intermediary had not considered the matter. However, the Board believes this basis is unnecessary since jurisdiction has been achieved on a conventional basis.

Interest Expense:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION

The Board makes the following findings of facts and conclusions:

1. The offset amount and the incurred interest expense were covered on the cost report.

2. The interest expense incurred was reasonable and necessary per stipulation # 5.

3. As evidenced by stipulation # 8, the Provider=s offset of the entire amount of interest income earned which included earnings from its FDA was in error. FDA earnings were specifically excluded from the offset requirement by the regulation at 42 C.F.R. ' 413.153 (b)(2)(iii).

4. The Provider made a clear and obvious error in calculating the amount of offset which was reviewed and determined by the Intermediary to be acceptable.

5. The erroneous amount offset eliminated all interest expense incurred by the worksheet A-8 adjustment. Thus, there was no amount claimed for reimbursement per stipulation # 4.

6. The proper amount of interest expense allowable should have been $1,029,279 pursuant to stipulation # 10.

7. The interest expense was properly added to the appeal under the provisions of 42 C.F.R. ' 405.1841 (a)1.

Discussion:

The Board concludes that the clear and obvious error of offsetting the earnings from the FDA was improper and not in accordance with Medicare regulation. FDA earnings were specifically excluded from the offset requirement as provided by the regulation at 42 C.F.R. ' 413.153(b)(2)(iii). The Board finds that the Intermediary >s determination that the amount of the offset was acceptable was improper. Thus, the Intermediary determined the amount of the interest income offset and that no interest expense was reimbursable due to the amount of the offset.[2] The Board concludes that the Intermediary incorrectly determined the Provider=s total reimbursable cost because it was understated due to the exclusion of the interest expense. The stipulated (#10) amount of $1,029,279 for allowable interest expense should be included in the Provider=s total allowable reimbursable cost.

DECISION AND ORDER:

The Intermediary=s determination of the amount of allowable reimbursable cost is incorrect due to the understatement of interest expense in the amount of $1,029,279. The Intermediary is ordered to include $1,029,279 in the Provider=s total allowable reimbursable cost.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esquire
Stanley J. Sokolove

Date of Decision: August 30, 2001

FOR THE BOARD

Irvin W. Kues
Chairman

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[2] The erroneous amount offset eliminated all interest expense incurred by a worksheet A-8 adjustment resulting in no interest expense claimed for reimbursement.