

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

99-D19

PROVIDER -

Bradford Regional Medical Center
Bradford, PA

Provider No. 39-0118

vs.

INTERMEDIARY -

Blue Cross and Blue Shield Association
Blue Cross of Western Pennsylvania
(Veritus)

DATE OF HEARING-

September 10, 1998

Cost Reporting Period Ended -
June 30, 1993

CASE NO. 95-1242+
95-1242C

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ISSUE:

Was the Intermediary's determination regarding the Provider's prospective payment system capital rate proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Bradford Hospital d/b/a Bradford Regional Medical Center ("Provider") is a general acute care hospital located in Bradford, Pennsylvania. The Provider is subject to the prospective payment system for Medicare capital cost reimbursement (Capital PPS"). The two cases at issue relate to the Provider's attempt to have obligated capital costs included as old capital costs for purposes of redetermining the Provider's capital prospective payment system hospital specific rate ("Capital PPS HSR") to a "hold-harmless" status for the Medicare cost reporting period ending June 30, 1993.

The Provider's Capital PPS base year was determined to be June 30, 1990.¹ As part of the required audit of the Provider's Capital PPS Base Year, the Intermediary instructed the Provider that documentation regarding "obligated" capital costs should be made available during the audit.² During that audit, which occurred in June 1992, the Provider supplied the Intermediary with documentation regarding the construction of the Provider's East Wing project.³ That project began in the late 1980's and was completed and opened for patient use in late Spring, 1992.⁴ By letter dated September 29, 1992, the Provider submitted additional documentation regarding the East Wing project, claiming the cost of other items as obligated capital.⁵ Upon completion of the Capital PPS Base Year audit, the Provider was advised that it would be reimbursed under a "fully prospective" PPS capital methodology; meaning that the Provider would receive a blended payment for discharges after July 1, 1992.⁶

When filing its cost report for FY 93, the Provider requested that its Capital PPS reimbursement status be changed from fully prospective to hold-harmless, in recognition of the obligated capital assets that had been placed in use.⁷ In the same letter accompanying the

¹ Intermediary Exhibit 2.

² Provider Exhibit 30.

³ Provider Exhibits 31-34.

⁴ Tr. 9-10-98 at 48-49.

⁵ Provider Exhibit 7.

⁶ Intermediary Exhibit 2.

⁷ Provider Exhibit 9.

cost report, the Provider also noted its ongoing attempts to obtain a revised Capital PPS HSR.⁸ At the Intermediary's request, the Provider submitted (on August 30, 1994) an estimate of the redetermined Capital PPS HSR for FY 1993.⁹ On September 8, 1994, the Intermediary denied the Provider's redetermination request as untimely.¹⁰ On March 6, 1995, the Provider's timely appeal of that decision was docketed as Case No. 95-1242C.¹¹

On March 3, 1995, the Intermediary also issued a Notice of Program Reimbursement ("NPR") for the FY 93 cost report year.¹² In that cost report, the Provider was reimbursed using the fully prospective, rather than the sought after hold-harmless Capital PPS rate. On August 30, 1995, the Provider filed a timely appeal which was docketed as Case No. 95-1242+.¹³ Both appeals were filed pursuant to 42 C.F.R §§ 405.1835-.1841 and the Provider has met the jurisdictional requirements of those regulations. The Medicare reimbursement effect in dispute is approximately \$ 493,000.¹⁴

The Provider was represented by David W. Thomas, Esquire, of Nash & Co. The Intermediary was represented by Bernard M. Talbert, Esquire, Blue Cross and Blue Shield Association.

Due to the related nature of the above referenced appeals, the Board agreed to hear both appeals on the same date.¹⁵ At the September 10, 1998 Board hearing, both parties agreed that the Statement of Issue in this case should be: Was the Intermediary's determination regarding the Provider's prospective payment system capital rate proper?

Medicare Statutory and Regulatory Background:

The structure of Capital PPS and obligated capital costs is explained through a summary of the applicable regulations and the process involved in establishing a Capital PPS HSR.

⁸ Id.

⁹ Provider Exhibit 10.

¹⁰ Provider Exhibit 11.

¹¹ Intermediary Exhibit 5.

¹² Provider Exhibit 1.

¹³ Provider Exhibit 2.

¹⁴ Tr. at p. 62.

¹⁵ Provider Exhibit 19.

Initial Determination Of The Capital PPS HSR

By statute, HCFA was required to establish a mechanism for Capital PPS beginning with the 1991 federal fiscal year as per 42 U.S.C. § 1395ww(g). The regulations provide for a ten-year transition period to phase in Capital PPS payments per 42 C.F.R. § 412.324(a). Capital reimbursement during this ten-year transition period is determined, in large part, by the provider's Capital PPS HSR. Id.

A hospital's Capital PPS HSR is ordinarily based on its capital cost-per-discharge during its 1990 cost-reporting period. See 42 C.F.R. § 412.328. The Intermediary first determines the hospital's Capital PPS HSR on an interim basis; a final determination then follows. See 42 C.F.R. § 412.328(g)(1)-(2). If a hospital's base year cost-per-discharge, and thus its Capital PPS HSR, is less than the Capital PPS Federal Rate, the hospital is reimbursed under the fully prospective payment methodology during the ten-year transition period. See 42 C.F.R. § 412.324(a). If a hospital's base year cost-per-discharge, and thus its Capital PPS HSR, exceeds the Federal Rate, the hospital is reimbursed under the hold-harmless payment methodology during the ten-year transition period. Id.

B. Obligated Capital Costs

Obligated capital costs are previously committed capital costs, attributable to assets that will not come on-line until after the PPS base year. If there are obligated capital costs, those costs should be included in calculating the Capital PPS HSR for the period in which the corresponding assets are put to patient use. See, e.g., 42 C.F.R. §§ 412.302(c)(1) and 412.328(f).

To have projects recognized as obligated capital, a provider must fulfill certain obligations.
Costs

can only be claimed as obligated capital if the provider had contractually committed to the project by December 31, 1990; there must be a binding written agreement that commits the provider to the project. See 42 C.F.R. § 412.302(c)(1)(I)(A). In addition, the project must come on-line, i.e. the assets must be placed into patient use, by October 1, 1994. See 42 C.F.R.

§ 412.302(c)(1)(B). A provider must submit to its intermediary, by the later of October 1, 1992 or 90 days after the start of its first cost-reporting period that began after October 1, 1991, documentation regarding the projects claimed as obligated capital costs. See 42 C.F.R. § 412.302(c)(1)(v). The documentation must include the written agreement(s), a project description, and an estimate of the total costs, prepared no later than December 31, 1990. The intermediary is to review the documentation, submitted by the provider, claiming that certain projects should be treated as obligated capital. See 42 C.F.R. § 412.302(c)(1)(vii)(A).

The intermediary decides whether it will recognize the claimed obligated capital costs as old capital, and if so, how much of those obligated capital costs will be so recognized. *Id.* The intermediary must notify the provider of the decision to recognize or reject obligated capital "by the later of the end of the hospital's first cost reporting period subject to the capital prospective payment system or 9 months after receipt of the hospital's [obligated capital cost documentation]." 42 C.F.R. § 412.302(c)(1)(vii)(B).

C. Capital PPS HSR Redetermination Requests

Merely submitting the documentation regarding obligated capital costs and obtaining the intermediary's decision to recognize those costs as old capital does not, in and of itself, entitle the provider to an increased Capital PPS HSR. Rather, for the cost-reporting period in which the assets are put to patient use, the provider must request a redetermination of its Capital PPS HSR.

See 42 C.F.R. § 412.328(f) The provider's redetermination request must be filed no later than the date of the cost report for the period in which the assets are put to patient use, must accompany that cost report, and must include an estimate of the redetermined Capital PPS HSR. See 42 C.F.R. § 412.328(f)(1)(ii).

PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary's failure to comply with the regulation at 42 C.F.R. § 412.302(c)(1)(vii) is the cause of this entire dispute. The regulatory process through which obligated capital items are recognized as old capital and used to redetermine a provider's Capital PPS HSR consists of three steps. The Provider must timely notify the Intermediary of the obligated capital cost claim. See 42 C.F.R. § 412.302(c)(1)(v). The Intermediary reviews that documentation, decides which, if any, of the claimed obligated capital costs will be recognized as old capital, then informs the Provider of that decision. See 42 C.F.R. § 412.302(c)(1)(vii). Finally, the Provider uses that information to estimate the redetermined Capital PPS HSR when filing its cost report for the period in which the obligated assets are put to patient use. See 42 C.F.R. § 412.328(f). The Provider contends that the record clearly demonstrates that the Intermediary never performed the second step, thereby preventing the Provider from timely completing the third step. The Provider asserts that all documentation necessary to establish that the East Wing project qualified as obligated capital was timely submitted to the Intermediary. ¹⁶These documents demonstrate a binding commitment on behalf of the Provider, were in writing, described the project, contained estimates of the project costs, and were prepared prior to December 31, 1990. Thus, the Provider contends that all the requirements of 42 C.F.R. § 412.302(c)(1)(I) and (v) were met.

¹⁶ Provider Exhibits 31-35.

The Provider points out that the Intermediary admits that it never complied with the requirements of 42 C.F.R. § 412.302(c)(1)(vii). The Provider contends this regulation is binding on the Intermediary and HCFA; therefore the admitted violation is unlawful. See 42 C.F.R. § 421.100(h) (Intermediary must comply with the regulations); also Marshall v. Lansing, 893 F.2d 933, 943 (3d Cir. 1988) (agency bound, as a matter of law, by regulations it promulgates).

Therefore, the Provider contends the Intermediary's failure to complete the second step of the process (recognizing certain obligated capital costs as old capital) prevented the Provider from timely and accurately estimating the redetermined Capital PPS HSR for FY 1993.

The Provider states that a redetermined rate consists of two elements, the current capital cost of assets that were in use as of December 31, 1990 and the capital costs of obligated capital projects that have now been put to patient care use. Both the Provider's and the Intermediary's witnesses agreed that these are the components necessary to estimate the redetermined Capital PPS HSR.¹⁷ However, the second component requires the Intermediary's decision as to which of the obligated capital items claimed by the Provider would be recognized as old capital and how much of the claimed costs would be so recognized. The Provider also points out that HCFA, when promulgating the obligated capital regulations, stated that the intermediaries would inform providers, "**in advance**" of the obligated capital decision. See 56, Fed. Reg. 43,358, 43,394 (Aug. 30, 1991) (emphasis added).

Further, the Provider contends its concerns are supported by the record. The Provider and the Intermediary agree that the portion of the East Wing project debt incurred to refinance unnecessary borrowing should not be recognized as old capital.¹⁸ Without the Intermediary's determination as to how much of the claimed obligated capital costs would be disallowed as unnecessary borrowing, the Provider could not properly estimate the redetermined Capital PPS HSR, as requested by the Intermediary.

The Provider submits that the admission of the Intermediary's witness, at the hearing, demonstrates the fallacy in the Intermediary's position. Under cross examination, the Intermediary's witness admitted that the Intermediary's position is accurately summarized as follows:

Even though the Intermediary withheld the information necessary for the Provider to submit a complete redetermination request by the due date for the FY 1993 cost report, the Provider loses because it did not submit a complete request by the due date for the FY 1993 cost report.¹⁹ Thus, the Intermediary

¹⁷ Tr. at 38 & 56.

¹⁸ Id. at 82 & 114-115.

¹⁹ Id. at 122.

improperly asserts that the Provider must pay the price for the Intermediary's regulatory violation. The Provider contends that neither the law nor the Board should make the Provider bear the brunt of the Intermediary's admittedly unlawful conduct.

Alternatively, the Provider argues that the Intermediary's failure to comply with 42 C.F.R. § 412.302(c)(1)(vii) should be deemed to equitably toll the deadline for filing a redetermination request. See City of New York v. Bowen, 106 S.Ct. 2022, 2029-31 (1986). Thus, the Provider's August 30, 1994 submittal, which includes the estimate of the redetermined rate, should be deemed timely.

The Provider does not agree with the Intermediary's argument that the letter which accompanied the FY 1993 cost report does not constitute a redetermination request.²⁰ The plain language of that letter clearly requested a change to hold-harmless Capital PPS status.²¹ Further, the Intermediary admitted that the only thing missing from that letter was an estimate of the redetermined rate and that the Intermediary had awarded a redetermined rate for the following year, based on a similar letter that included such an estimate.²²

Finally, the Provider contends that the Intermediary's suggestion that the Board apply the "last clear chance" doctrine of negligence law is improper. The Intermediary theorizes that the Provider could have assumed earlier that 100% of the obligated capital costs would be recognized as old capital and thus submitted a timely estimate; because it did not do so, the Provider is purportedly "at fault." Specifically, the Intermediary argues that the Provider filed its FY 1993 cost report as fully prospective but switched to the hold-harmless method for the FY 1994 cost report, upon assuming that all obligated costs would be recognized as old capital. The Intermediary believes that the Provider should have used that same assumption and submitted a timely estimate for FY 1993. The Provider believes this argument should be rejected for any one of the following four reasons.

First, as explained at the hearing (when this argument was first raised), the witness explained the potential exposure associated with assuming that all the claimed obligated costs would be recognized as old capital. In discussing why he filed the FY 1993 cost report as fully prospective, rather than hold-harmless, the witness stated:

[I]f I had filed the cost report as hold-harmless instead of fully prospective, my reimbursement would have been \$693,000 higher. Had I not received approval for that, I would not want to

²⁰ Id. at 103-104.

²¹ Provider Exhibit 9.

²² Tr. at 111.

put the hospital at risk for filing a fraudulent cost report, knowing that we did not receive those items from the Intermediary as obligated costs.²³ The witness further explained that, because the Intermediary still had not rendered its mandatory obligated capital decision by September 30, 1994, he had no choice but to assume that all obligated capital costs would be recognized as old capital and estimate the redetermined rate in accordance with that assumption.²⁴ If the witness had not made that assumption, the Provider would have again been improperly reimbursed at a fully prospective, rather than hold-harmless, Capital PPS HSR for the 1994 fiscal year.

Second, negligence law, which varies from state to state, does not and should not apply here. The law requires that the Intermediary comply with the regulations, including 42 C.F.R. § 412.302(c)(1)(vii). To introduce negligence concepts creates the danger that different reimbursement principles would apply, based solely on the location of the provider and intermediary in a given case. Third, assuming that the last chance doctrine could apply, it was the Intermediary, not the Provider that had the last chance to rectify this situation. The Intermediary received the redetermination request and could have processed it by examining the Worksheet D information without the estimate (which was missing only because the Intermediary withheld the information necessary for the Provider to complete the estimate). Finally, Pennsylvania has replaced the last clear chance doctrine through the adoption of a comparative negligence statute per 42 PA. C.S.A. § 7102. Under this statute, the plaintiff's own negligence does not preclude recovery; rather damages are apportioned according to the parties' responsibility for the incident. The Provider contends that the Intermediary is 100% responsible for the issue in the instant case. However, in an attempt to counter-balance its own admitted violation of the regulation, the Intermediary improperly asserts that the Provider was negligent in failing to expose itself to potential false claim liability.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Provider did not provide obligated capital information to its Intermediary in a timely manner. 42 C.F.R. § 412.302 (c)(1)(v) reads that "[t]he hospital must submit to its intermediary the binding agreement and supporting documents that relate to the obligated capital expenditure by the later of October 1, 1992, or within 90 days after the start of the hospital's first cost reporting period beginning on or after October 1, 1991. This documentation must include a project description (including details of any phased construction or financing) and an estimate of costs that were prepared no later than December

²³ Tr. at p. 78.

²⁴ Id at p. 77.

31, 1990.”²⁵ The Provider supplied the Intermediary with documentation regarding allegedly obligated capital on September 29, 1992.²⁶ However, the Intermediary contends these documents do not pertain to “obligated capital” according to the stricter confines of 42 C.F.R. § 412.302(c)(1).

The Intermediary further contends that the September 30, 1993 correspondence²⁷ submitted with the Provider’s FY 1993 cost report should not be deemed a redetermination request. Although that correspondence does seek hold-harmless- status and references ongoing concerns regarding the prior obligated capital submittal, it does not expressly use the term “redetermination.”²⁸ In addition, that same correspondence did not include an estimate of the redetermined rate, a mandatory element of a redetermination request required by 42 C.F.R. § 412.328(f)(1)(iii). Those failures lead to the Intermediary’s conclusion that the correspondence should not be deemed a redetermination request.

The Intermediary notes that the Provider’s estimate of the redetermined Capital PPS HSR for FY 1993 was not submitted until August 30, 1994.²⁹ The Intermediary contends that submittal was the first time that the Provider expressly informed the Intermediary that it sought redetermination of the FY 1993 Capital PPS HSR and included all the elements necessary for such a request. However, that request was submitted approximately 11 months after the deadline specified on 42 C.F.R. § 412.328(f)(1)(iii). Therefore, the Intermediary contends that regardless of its own failure to provide the obligated capital information required by 42 C.F.R. § 412.302(c)(1)(vii), the Provider was still required to submit its redetermination request no later than the FY 1993 cost report.³⁰

Finally, at the hearing, the Intermediary asserted that the Provider had the last clear chance to correct the situation. The Intermediary acknowledged that the Provider needed to know which obligated capital items would be recognized as old capital to estimate the redetermined Capital PPS HSR.³¹ However, the Provider assumed that all of its obligated capital cost should be recognized as old capital when timely requesting a redetermined rate for the

²⁵ Intermediary Exhibit I-7.

²⁶ Intermediary Exhibit 12.

²⁷ Provider Exhibit 9.

²⁸ Id. See also Tr. at p. 103-104.

²⁹ Provider Exhibit 10.

³⁰ Intermediary Exhibit 13.

³¹ Tr. at p. 119.

subsequent (FY 1994) cost reporting period and admits that it had all the information necessary to make the same assumption for FY 1993.³² Therefore, the Intermediary contends that the Provider should be required to make that assumption to meet the deadline imposed by 42 C.F.R. § 412.328(f)(1)(iii). Since the Provider had the last clear chance to avoid the denial of the redetermination request, but failed to do everything in its power to avoid that decision, the Intermediary contends the Board should apply the last clear chance concept to find that the Provider bears the ultimate responsibility.

CITATIONS OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law 42 U.S.C.:

§ 1395 ww(g) inpatient	-	Capital-related costs for hospital services
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2. Law - Other

42 PA C.S.A. § 7102

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

§ 405.1835-.1841	-	Board Jurisdiction
§ 412.302 (c) <u>et seq.</u>	-	Obligated Capital Costs- General Rule
§ 412.324 (a)	-	General Description
§ 412.328 <u>et seq.</u>	-	Determining and Updating the Hospital Specific Rate
§ 421.100 (h)	-	Other Terms and Conditions

4. Cases:

Marshall v. Lansing, 893 F. 2d 933 (3d. Cir. 1988)

City of New York v. Bowen, 106 S. Ct. 2022 (1986)

5. Other:

56 Fed. Reg. 43,358 (1991)

³² Tr. at p. 106.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration 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 as follows:

The Board finds that the Provider timely submitted the required documentation, relative to the East Wing project, to its Intermediary for obligated capital review purposes in accordance with 42 C.F.R. § 412.302(c)(1)(v). Specifically, the Board notes that the initial submission was made in June, 1992 during the PPS capital base year audit and supplemental information was provided in September, 1992. Both parties agreed that a portion of the East Wing project costs attributable to refinancing an unnecessary borrowing would need to be excluded from the obligated capital costs that were to be recognized as "old capital." The Board also finds that the amount of obligated capital costs that will be recognized by the Intermediary as old capital is information that it necessary for the Provider to have in order to submit a redetermined Capital PPS HSR estimate.

The Board finds that the regulations set forth very specific deadlines for both the Provider and the Intermediary regarding the submission, review and approval of obligated capital information, as well as for the request and approval of redetermined capital rates. In the instant case, the Board finds that, given the prior Provider submissions, the Provider letter accompanying its fiscal year 1993 Medicare cost report constitutes a request for a redetermined capital PPS HSR. At the most, only an estimate of a redetermined rate was missing from that request.

The Board also finds that HCFA, in describing the obligated capital system, stated that the intermediary's decision to reject or recognize obligated capital costs was essential to the provider's ability to fulfill its obligation under the regulations. "So that hospitals will know **in advance** whether a project be recognized as old capital and the limitation on the total project cost that will be recognized, the intermediary will advise the hospital of its determination before the close of the hospital's first 12 month cost-reporting period under the capital prospective payment system." (56 Fed. Reg. 43,358 & 43,394 August 30, 1991). In this particular case, the Intermediary did not fulfill its responsibility. The Board notes the Intermediary's own witness testified that the information submitted by the Provider was sufficient for the Intermediary to review and rule on the Provider's claimed obligated capital costs. Thus, the Board finds that the Intermediary's failure to comply with the regulations at 42 C.F.R. § 412.302(c)(1)(vii)(B) led to the Provider's incomplete redetermination request.

Based on the above, the Board is not persuaded by the Intermediary's attempt to view this case in the context of negligence law (by espousing that the Provider was negligent for not making the same capital related assumptions for the year at issue that it made for its subsequent year (FY 1994) cost report). The Board finds that an intermediary's performance of its Medicare functions is governed by the regulations. See 42 C.F.R. § 421.100(h). This is

supplemented by the rationale set forth in Marshall v. Lansing, which holds that an agency and its representatives are bound by the regulations they promulgate. Therefore, the Board finds that the Intermediary violated the regulations by not supplying the information needed by the Provider to meet its regulatory deadline.

Finally, The Board notes that where an agency fails to supply the information for a claimant to meet a deadline, that deadline is equitably tolled. See City of New York v. Bowen. Accordingly, the Board finds that in this instance the Intermediary's failure to supply the necessary information equitably tolls the regulatory deadline set forth in 42 C.F.R. 412.328(f)(iii) for submitting the estimate of a redetermined rate, thus rendering the Provider's August 30, 1994 submission timely.

DECISION AND ORDER:

The Intermediary erred by not providing the Provider the information necessary to submit a timely Capital PPS HSR redetermination. The Intermediary is directed to process the Provider's redetermination request applicable to the June 30, 1993 Medicare cost report.

Board Members Participating:

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

Date of Decision: January 07, 1999

FOR THE BOARD

Irvin Kues,
Chairman