PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2001-D26

PROVIDER -
University Medical Center of Southern Nevada
Las Vegas, Nevada

Provider No. 29-0007

vs.

INTERMEDIARY -
Mutual of Omaha Insurance Company

DATE OF HEARING-
September 19, 2000

Cost Reporting Periods Ended -
June 30, 1993; June 30, 1994;
and June 30, 1995

CASE NOS. 96-1477**,** 97-1703,

INDEX

ISSUE:

Was the Intermediary's determination that the Provider was not eligible for Medicare reimbursement for the disproportionate share adjustment under Section 1886(d)(5)(F)(i)(II) of the Social Security Act proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

University Medical Center of Southern Nevada (AProvider@) is a not-for profit general short-term teaching facility located in Las Vegas, Nevada. The Provider operates 505 acute beds with a 68-bed rehab unit. Aetna Life Insurance Company was the Medicare Fiscal Intermediary for this Provider's cost reporting periods under this appeal. However, Aetna terminated their services as a Medicare intermediary effective September 30, 1997. This Provider chose Mutual of Omaha Insurance Company as their new fiscal intermediary. Mutual of Omaha Insurance Company ("Intermediary") is the Intermediary for the cost report appeal.

The Intermediary issued a Notice Of Program Reimbursement (NPR) for the Fiscal Year Ended (FYE) 6-30-93 on September 30, 1995; for FYE 6-30-94 on September 16, 1996 and for FYE 6-30-95 on February 28, 1997. The Provider filed timely appeals with the Provider Reimbursement Review Board (ABoard@) pursuant to 42 C.F.R. '' 405.1835-.1841 and has met the jurisdictional requirements of those regulations. The Medicare reimbursement amount in contention is approximately $6,800,000.

Edith Marshall Esq. of Powers, Pyles, Sutter and Verville, P.C represented the Provider. John Maguire Esq. of the Mutual of Omaha Insurance Company represented the Intermediary.

FACTS:

The Medicare statute establishes two alternative tests for determining qualification as a Disproportionate Share Hospital (ADSH@). Under one test, a hospital may qualify for DSH status if a certain percentage of its inpatient days are attributable to Medicaid patients who qualify for Supplementary Security Income (ASSI@). 42 U.S.C. ' 1395ww(d)(5)(F)(i)(ii) and (vi) of the Act. For urban hospitals with more than 100 beds the disproportionate percentage must be 15 percent or more to qualify. 42 U.S.C. '1395ww(d)(5)(F)(V). A hospital=s DSH payment is based on a formula, which takes into account the hospital=s DSH patient percentage. 42 U.S.C. ' 1395(d)(5)(F)(vi). The Provider will refer to this DSH test as the AAlternative Test.@

Under another test commonly known as the Pickle Amendment, a hospital may qualify based on net inpatient care revenues received from the state and local government sources for indigent care. Specifically, the Pickle Amendment provides for a DSH adjustment to a PPS hospital which is:

> located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to this title (Medicare) or State plans approved under title XIX (Medicaid), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period 42 U.S.C. '1395ww(d)(5)(F)(i)(II). A hospital which qualifies as a DSH under both tests is entitled to whichever DSH adjustment produces the greater add-on.

DSH Medicare program reimbursement is developed by calculating the ratio of Medical Assistance program days to total patient days and adding this ratio to the Medicare SSI percentage to arrive at the percentage of services offered to low-income (indigent) patients. This amount is then compared to a "threshold" amount and the resulting percentage is applied against Medicare federal payments to arrive at the DSH payment for the Provider.

DSH Medicare program reimbursement under the APickle Amendment@ is based on the relationship of net inpatient care revenues from state and local government sources (excluding any such revenues attributable to this title (Medicare) or State plans approved under title XIX (Medical Assistance) to the total of such inpatient care revenues. If this relationship exceeds 30 percent, the Provider is eligible and entitled to receive the additional Medicare reimbursement generated by applying the calculated percentage against Medicare Federal payments.

The Provider and the Intermediary agree and have so stipulated before the Board, that if the Pickle Amendment fraction is calculated by including Medicaid and Medicare revenues in the denominator of the fraction, the Provider does not qualify for the APickle@ DSH adjustment. If, however, as the Provider contends, Medicare and Medicaid revenues are properly excluded from the denominator of the Pickle amendment equation, the Provider does qualify for the adjustment under '1886(d) (5) (F)(i)(II), and is entitled to a greater amount of program reimbursement than the Intermediaiy paid for each of the three cost years at issue.

PROVIDER=S CONTENTIONS:

The Provider points out that it treats more indigent patients than any other hospital in the state of Nevada.[1] The Provider claimed entitlement to a DSH adjustment on its cost reports. The Intermediary allowed a DSH payment based on 42 U.S.C. ' 1395ww (d)(5)(F)(i)(I) rather than the Pickle Amendment under 42 U.S.C. ' 1395ww(d)(5)(i)(II).

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[1] See Exhibit P-13-2.

The Provider argues that the exclusion in the statute for net inpatient care revenues attributable to Medicare and Medicaid applies to both the numerator and the denominator of the fraction used to establish the qualification fraction, while the Intermediary argues that the exclusion applies only to the numerator.

The Provider maintains that if the Board determines that the Intermediary is correct and the Provider does not qualify for a Pickle Amendment DSH payment, then the Provider contends that the Intermediary did not calculate the DSH payment correctly under 42 U.S.C. '1395 ww(d)(5)(i)(I).

The Provider points out that the United States District Court for the District of Columbia recently decided that the denominator in the Pickle method of determining eligibility for DSH payments should not include net inpatient care revenues that are attributable to Medicare and Medicaid. North Broward Hospital District d/b/a Broward General Medical Center et al v. Shalala, 997 F. Supp. 41 (D.D.C. 1998); The Cambridge Hospital v. Shalala, 95-1310, Medicare and Medicaid Guide (ACCH@) &300,002. Accordingly, the court agreed with the hospital's interpretation of the Pickle Amendment. The PRRB had reached the same conclusion in Dec Nos. 95-D64 and 95-D65.

The Provider points out that a PPS hospital qualifies as a Pickle Amendment DSH hospital if it:

> Is located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to this title (Medicare) or state plans approved under title XIX (Medicaid), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period.

42 U. S.C. 1395ww(d)(5)(F)(i)(II) of the Act (emphasis added).

The Provider maintains that the Intermediary's inclusion of Medicare and Medicaid net inpatient care revenues in the denominator clearly contravenes the plain wording of the Pickle Amendment. The Intermediary's construction ignores the words Aof such.@ If the Intermediary were correct, the final words in the Pickle Amendment would be Aits total net inpatient care revenues during the period.@ But Congress inserted two words of critical importance. The actual final words are: Aits total of such net inpatient care revenues during the period.@ Thus, the denominator must consist not of all net inpatient care revenues,@ as the Intermediary contends, but only Aof such@ net inpatient care revenues previously referred to. There is only one prior reference to Anet inpatient care revenues.@ That reference is to Anet inpatient care revenues (excluding any of such revenues attributable to this title or State plans approved under title XIX).@ Thus the words Aof such@ plainly mandate exclusion of Medicare and Medicaid revenues from the denominator.

The Provider argues that the Intermediary=s construction of the law is fundamentally flawed, because it reads the word Asuch@ completely out of statute. The Intermediary reads the law to require that the Provider=s total net inpatient care revenues, including Medicare and Medicaid revenues be used as the denominator of the "Pickle" fraction. This would, of course, be the meaning of the statute if the word Asuch@ were removed; but the word Asuch@ is undeniably present in the statute and must, under well-settled cannons of statutory construction, be accorded some significance and meaning.

The Provider points out that the proper construction of this statute must be guided by a Afundamental canon that statutory interpretation begins with the language of the statute itself.@ Pennsylvania Dep=t of Public Welfare v. Davenport, 495 U.S. 552, 557-88(1990,). Moreover, Acourts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning.@ Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 390, 388 (1993). The common usage of the word Asuch@ is to connote something Aidentical with, being the same as what has been mentioned.@ The word such represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent.@ Black's Law Dictionary, 1432-6th ed.1990.

The Provider argues that if Asuch@ is accorded its Aordinary, contemporary, common meanings@ in the Pickle Amendment, the proper construction of the provision is clear. By using the phrase Atotal of such net inpatient care revenues,@ Congress could only have been referring to the antecedent phrase Anet inpatient care revenues,@ as modified by the parenthetical that follows the only prior occurrence of those same four words. The parenthetical phrase (requiring exclusion of Medicare and Medicaid revenues) Aparticularizes@ the initial statutory reference to Anet inpatient care revenues,@ so that the word Asuch before the next reference to those revenues represents the object Aas already particularized@--that is, net inpatient care revenues with Medicare and Medicaid revenues excluded.

The Provider contends that the Intermediary's construction of the Pickle Amendment produces absurd results. The Intermediary=s construction also violates another important rule, the principle that statutes are not construed so as to produce absurd results. South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 346 (1998); United States v. Granderson, 511 U.S. 39, 56 (1994), In re: Chapman, 166 U.S. 661,667 (1897). The Provider asserts that as construed by the Intermediary, application of the Pickle Amendment could, in a given case, produce a kind of "Ping-Pong Ball" effect. Because, under the Intermediary=s interpretation, increased Medicare revenues diminish the Pickle percentage, a hospital=s qualification for the alternative DSH adjustment and the attendant, additional Medicare payment would have the effect of disqualifying the hospital for DSH status and the payment, which would result in the hospital again qualifying as a DSH, and so on, ad infinitum.

The Provider points out that under the Intermediary=s construction of the law, a higher patient population of indigent Medicaid and Medicare beneficiaries would decrease or destroy a hospital's likelihood of qualifying as a DSH under the Pickle Amendment. This anomaly is difficult to reconcile with any

comprehensible theory of congressional intent.

The Provider maintains that the legislative history of the Pickle Amendment clearly establishes that Congress after careful consideration, concluded that the magnitude of an urban hospital's Medicaid eligible patient (including SSI-related Medicare beneficiaries) provides the best Aproxy@ measure of the indigence factor requiring a DSH adjustment. (H. Rept. No. 99-241 at 17). The alternative DSH test under the Pickle Amendment was developed because Congress feared the conventional DSH test might understate the indigent population of some hospitals genuinely serving a disproportionate share of indigent patients. See Id. at 18.

The Provider points out that the analysis it and the Intermediary performed, at the Board=s request, illustrate the point that the Intermediary=s interpretation produces this absurd result. The parties were asked to analyze how application of the Pickle Amendment would be affected if the Provider=s Medicare and Medicaid revenues accounted for 80% of its total inpatient care revenues and, alternatively demonstrates,[2] if Medicare and Medicaid accounted for only 20% of the total inpatient care revenues. The analysis, under the Provider=s methodology, assuming all other data (including the amount of revenues attributable to state and local government for indigent care) remains constant, the hospital=s Pickle percentage would be significantly higher if 80% of its revenues were attributable to Medicaid and Medicare patients and significantly lower if Medicare and Medicaid revenues comprised only 20% of the hospital=s total net inpatient care revenues.

Upon application of the Intermediary=s statutory interpretation, by contrast, the Pickle percentage remains unchanged, and the hospital does not qualify for the DSH adjustment, irrespective of whether Medicare and Medicaid patients account for 20%, 50% or 80% of the Provider=s revenues. By including Medicare and Medicaid revenues in the total net inpatient care revenues comprising the denominator of the salient fraction, the Intermediary=s methodology of calculating the Pickle percentage effectively fails to take cognizance of what proportion of the hospital=s patients are indigent Medicaid and/or Medicare beneficiaries. This result is contradictory to the central purposes of Congress in establishing a DSH payment.

The Provider further points out that the Intermediary=s somewhat different analysis of the two scenarios about which the Board inquired[3] provides an illustration of this contradiction. According to the Intermediary=s calculations based on the Provider=s 1994 data, an 80% Medicare and Medicaid population would have lowered the Pickle percentage to 9.23%, far below the point at which the hospital might qualify for a DSH adjustment under the Pickle Amendment. A much lower Medicare and Medicaid patient percentage of 20%, however, would result in a 41.91% Pickle percentage, easily

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[2] See Exhibit P-4.

[3] See Exhibits I-3, I-4 Post Hearing.

qualifying the hospital for a DSH adjustment. Under the Intermediary=s methodology, serving a higher proportion of indigent patients who are Medicaid eligible or beneficiaries of Medicare, would lower the hospital's chances of qualifying for a DSH adjustment. Conversely, under this methodology, a hospital is more likely to qualify as a DSH if it serves a very low proportion of these patients, while treatment of these very patients in a disproportionately high share is supposed to define the very concept of ADSH@.

The Provider maintains that its straightforward construction of the plain language of the Pickle Amendment avoids this irrational result, and produces an alternative DSH test that gives proper effect to increases in a hospital=s service to indigent patients who may be Medicaid and Medicare eligible, as well as those whose care is funded solely by state and local government sources.

The Provider points out that in North Broward, PRRB Dec. Nos. 95-D64 and D-65, Medicare & Medicaid Guide & 43,625; & 43,944, the Board accepted the construction of the Pickle Amendment advocated by the Provider. However, the decision was reversed by the HCFA Administrator and the Administrator's decision was ultimately upheld by a United States Court of Appeals. See North Broward Hospital District v. Shalala, 172 F.3d 90(D.C. Cir. 1999) Cert. denied 528 U.S. 1022 (1999). Nevertheless, the reasoning of the D.C. Circuit in North Broward is incomplete or defective in several respects, and should not be followed.

The Provider contends that the appellate opinion does not adequately reconcile its construction of the word Asuch@ in the Pickle Amendent with the rule of construction requiring each word of the statute to be given meaning and effect. Although the court suggested an alternative, Asimple referential@ construction of the word that arguably gave it some hypothetical, if rather far fetched meaning, the court=s strained interpretation still failed to give the word any effect in the statute.[4] The court=s decision did not even address the Provider=s point that the government=s construction of the Pickle Amendment renders the parenthetical reference to Medicare, as well as the word Asuch@ in the final clause, entirely superfluous.

The Provider further contends that the North Broward court=s construction of the law relied heavily on the principle of deference to an agency=s construction of a statute it is responsible to administer, as articulated in the Supreme Court=s decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984) (AChevron@).[5] Since this case was decided in April of 1999, however, the Supreme Court has further clarified the permissible scope of deference under Chevron. In Christensen v. Harris County, 120 S.Ct. 1655 (2000) (AChristensen@), decided after North Broward, the Supreme Court made it clear that deference under Chevron to an administrative agency=s statutory construction applies only when the agency=s interpretation of law is contained in a duly promulgated

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[4] 172 F.3d at 95-96.

[5] 172 F.3d at 93-95, 99.

regulation. 120 S.Ct. at 1663. In the absence of such a regulation, as here, the agency=s interpretation is not entitled to any special deference beyond that which it ordinarily commands through its power to persuade.

The Provider points out that the Intermediary=s and the Secretary=s construction of the Pickle amendment regarding the calculation of the denominator of the alternative DSH test fraction is not set forth in the regulations, as the HCFA Administrator agreed.[6] Accordingly, after Christensen, the legal underpinnings of the D.C. Circuit's North Broward decision are very much in doubt, and the court=s opinion has little persuasive effect here.

The Provider concludes that the plain language of the Pickle Amendment dictates that the denominator of the fraction calculated under that provision as an alternative test for qualification for a DSH adjustment must exclude revenues for the inpatient care of Medicare and Medicaid beneficiaries. Any other conclusion renders certain language of the statute superfluous, in violation of well-settled principles of statutory construction, and also leads to absurd and illogical results. The Provider therefore qualifies for a DSH adjustment under 42 C.F.R. '1395ww(d)(5)(F)(i)(II) for each of its FYEs 1993, 1994 and 1995.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that it is in compliance with the HCFA Administrator=s interpretation of the language of the statute, and that the correct interpretation of the language and intent of the statute is to include net inpatient Medicare and Medicaid revenues in the denominator of the formula to determine eligibility.

The Intermediary points out that in North Broward Hospital District d/b/a Broward General Medical Center v. Blue Cross and Blue Shield of Florida/ Blue Cross and Blue Shield Association, PRRB Dec. No. 94-D64, September 13, 1995, the Board ruled in favor of the Provider=s position that the denominator of the formula should exclude net inpatient Medicare and Medicaid revenue. This decision was reviewed and subsequently reversed by the HCFA Administrator.[7] In reversing the Board=s decision, the Administrator ruled that: HCFA's interpretation of the statute, revenues from the Medicare and Medicaid programs are excluded from the denominator of the fractional calculation of the Pickle Amendment. Although, the statute, implementing regulation, and legislative history are ambiguous, they do not specify the exclusion of the revenues at issue from the DSH calculation and HCFA's statutory construction is, therefore supportable. Accordingly, the agency's interpretation was neither arbitrary nor capricious and was accorded deference.

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[6] 42 C.F.R. ' 412.106. Decision of the Administrator of November 16, 1995 reviewing PRRB Dec. NO. 95-D64 and 95-D65 at 12.

[7] HCFA Administrator=s decision Nov. 16, 1995.

The Intermediary contends that the Provider=s contention that the term Aany such revenues@ precludes inclusion of Medicare and Medicaid inpatient revenues in the denominator, is not correct. The Administrator noted that the parenthetical phrase, Aexcluding any such revenues attributable to Medicare and Medicaid for indigent care from State and local government sources...@ appears only within the description of the numerator of the equation, and does not redefine the term Anet inpatient care revenues,@ which is used later in describing the denominator of the fraction. Thus, the parenthetical phrase refers to the term, Anet inpatient care revenues,@ setting forth an additional condition pertinent only to the numerator. The later reference in the statute to Asuch net inpatient care revenues logically refers to the same antecedent, Anet inpatient care revenues.@

The Intermediary maintains that the HCFA Administrator further asserted that the use of the word Atotal@ in the denominator indicates that the term "such net inpatient care revenues is unrestricted in its application in the denominator of the fractional DSH calculation, although the term Anet inpatient revenues@ is restricted in its application in the numerator.[8]

The Intermediary contends that the Provider interpreted Congressional intent on the implementation of this statute to be in agreement with their position. The Provider stated during the hearing that

> the Congress is not assumed to have used unnecessary language. There=s an enormous string cite of cases that could be cited for the proposition that every word in a statute is to be given some meaning, some effect, if possible. Well, here it is possible to give the word Asuch@ meaning and effect. The only meaning that it can possibly have under the natural usage of the English language is that when it says such net inpatient care revenues it means those net inpatient care revenues that we just talked about, the one that exclude Medicare and Medicaid revenues.[9]

The Intermediary contends that the HCFA's Administrator=s decision in North Broward, supports HCFA's policy. The DSH adjustment at issue was enacted as section 9105 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (ACOBRA@). The conference report on the COBRA explained that Athe Secretary would be required to make DSH payments where a hospital can demonstrate that more than 30 percent of its net inpatient care revenues is provided by local or State government for inpatient care for low-income patients not otherwise reimbursed by Medicare or Medicaid.@ The HCFA Administrator observed that Congress had ratified HCFA's interpretation.

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[8] See Transcript 33 at 5-14.

[9] See Transcript 152-16.

The Intermediary points out that in the Omnibus Budget Reconciliation Act of 1987 (AOBRA@), Congress clarified that the denominator of the DSH fractional calculation did not encompass, Agross inpatient care revenues@, i.e. Athe revenues the hospital would receive if all patients paid the hospital full charges,@ but only included Anet inpatient revenues@, i.e. gross revenues minus bad debts, contractual allowances, and charity care. Congress however did not exclude all revenues from Medicare and Medicaid in defining net inpatient care revenues.

The Intermediary points out that the Administrator=s decision and interpretation was overturned by the U.S. District Court for the District of Columbia. The district court ruled that Afollowing a Plain-language analysis of the statute, the court determined that the word Asuch@ in the description of the denominator clearly incorporates the Medicaid and Medicare exclusion from the numerator=s parenthetical phrase.@ The court further ruled that Abecause there is no clearly expressed legislative intent contrary to this clear language that would require any administrative interpretation, the plain meaning of a statute must control the interpretation.@ The district court refused to defer to the Administrator=s interpretation on this issue.

The Intermediary also points out that the U.S. Court of Appeals for the District of Columbia Circuit reversed the district court=s ruling. In reversing the district court=s decision, the. court held that Athe language establishing DSH adjustments was ambiguous and that the Secretary=s interpretation, which posited that Medicare and Medicaid program revenues are included in the denominator of the formula for DSH adjustments was a permissible construction of the statute.@ The court further ruled that Aif a statute is ambiguous, then the court must defer to an agency=s interpretation if it is reasonable.@[10]

The Intermediary contends that the legislative history on the challenge to the interpretation of this statute concludes with the Appeal Court decision that the court must defer to the agency=s interpretation. It is this interpretation that the Intermediary followed in determining that the provider was not eligible for DSH reimbursement under the terms of the APickle Amendment.@

The Intermediary argues that the exclusion of Medicare and Medical Assistance net inpatient revenues from the denominator of the equation indicates that the Provider has failed to meet the minimum eligibility requirement (30% threshold). The correct application of the eligibility criteria in the formula indicates that this Provider's ratio of indigent care from state and local government sources is approximately 16%.

The Intermediary contends that the conventional method for determining DSH eligibility recognizes those hospitals that serve a disproportionate number of low-income patients. Those hospitals that qualify under the conventional method receive additional Medicare revenue (based on DGR revenues not

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[10] North Broward Hospital District d/b/a Boward Medical Center v. Shalala, 172 F. 3d 90 (D.C. Cir. 1999).

including DSH payments). To qualify for this additional reimbursement, an urban hospital with over 100 beds must realize a disproportionate share percentage of 15% or more. For the three years under appeal, the Provider received approximately seventeen million dollars of DSH revenue.

The Intermediary points out that the passage of the APickle Amendment@ was not intended to replace the conventional method, but to subsidize those facilities that serve an inordinately large indigent patient care population, a population much larger than required under the conventional

method. In order to determine this inordinately large indigent patient care population, the Secretary is correct in the interpretation that the denominator in the calculation must include Medicare and Medical Assistance net inpatient revenues in order to determine this eligibility.

The Intermediary argues that if the Provider were correct in assuming that congressional intent was to exclude the Medicare and Medical Assistance net inpatient revenues from the denominator, then one can assume that the majority of hospitals receiving reimbursement under the conventional method would qualify for the provisions of the APickle Amendment@ since Medicare and Medical Assistance revenues is such a large percentage of total revenues. With the conventional DSH reimbursement mechanism already law, the Intermediary argues that the inevitable deference to APickle@ was not the intent of Congress.

CITATION OF LAW, REGULATION AND PROGRAM INSTRUCTIONS:

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

'1395ww(d)(5)(F)(i)(II) and (vi) (Social Security Act 1886 (d)(5)(F)(i)(II)	-	Payments to Hospitals for Inpatient Hospital Services
'1395 ww(d)(5)(F)(v)	-	Payments to Hospitals for Inpatient Hospital Services
' 1395ww(d)(5)(F)(vi)	-	Payments to Hospitals for Inpatient Hospital Services
' 1395ww(d)(5)(F)(i)(I)	-	Payments to Hospitals for Inpatient Hospital Services

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

'' 405.1835-1841	-	Board Jurisdiction

' 412.106 et seq. - Special Treatment: Hospitals that serve a disproportionate share of low income patients

3. Cases:

North Broward Hospital District v. Blue Cross and Blue Shield Association/ Blue Cross of Florida, PRRB Dec. Nos. 95-D64, 95-D65, Sept. 13, 1995, Medicare and Medicaid Guide (CCH) & 43, 625 , & 43,641, HCFA Admin. Dec. Nov. 16, 1995, Medicare and Medicaid Guide & 43, 944; North Broward Hospital District v. Shalala, 997 F. Supp. 41 (D.D.C. 1998), Rev. 172 F.3d 90 (D.C. Cir. 1999), cert. denied 528 U.S. 1022 (1999).

The Cambridge Hospital v. Shalala, 95-1310, Medicare and Medicaid Guide ("CCH") & 300,002.

Pennsylvania Dep=t of Public Welfare v. Davenport, 495 U.S. 552, 557-88(1990)

Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 390,388 (1993).

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998)

United States v. Granderson, 511 U.S. 39,56 (1994); In re: Chapman, 166 U.S. 661 (1897)

Chevron, U.S.A., Inc. V. Natural Resources Defense Council, Inc., 467 U.S. 837(1984)

Christensen v. Harris County, 120 S.Ct. 1655(2000)

4. Other

Blacks Law Dictionary, 1432 - 6th ed. 1990.

H.Rept. No. 99-241.

Consolidated Omnibus Budget Reconviliation Act of 1985(ACOBRA@) section 9105.

Omnibus Budget Reconciliation Act of 1987(AOBRA@).

FINDINGS OF FACT. CONCLUSIONS OF LAW, AND DISCUSSION:

The Board after consideration of the facts, parties= contentions, documentary evidence presented, and testimony elicited at the hearing, finds and concludes as follows.

The parties entered into and the Board accepted a stipulation regarding the facts and arguments at issue. That stipulation provides:

1. The Provider claims that it is entitled to a disproportionate share hospital (DSH) adjustment under the Pickle Amendment (Section 1886(d)(5)(F)(i)(II) of the Social Security Act).

2. The parties agree on the methodology for determining qualification for the Pickle amendment DSH adjustment with one significant exception. The Intermediary contends that net inpatient care revenues attributable to Medicare and Medicaid must be included in the net inpatient care revenues used for the denominator of the fraction used to determine the Hospital's eligibility for the Pickle amendment adjustment under '1886(d)(5)(F)(i)(II) of the Social Security Act, 42 U.S.C. '1395ww(d)(5)(F)(i)(II). The provider contends that net inpatient care revenues attributable to Medicare and Medicaid must be excluded from the net inpatient care revenues used for the denominator.

3. To qualify for a Pickle Amendment DSH adjustment, a hospital's Pickle Amendment percentage must exceed 30%. The parties stipulate and agree that if the net inpatient care revenues attributable to Medicare and Medicaid are excluded from the net inpatient care revenues used for the denominator of the Pickle Amendment calculation, the Provider qualifies for the Pickle Amendment adjustment for its Fiscal Year Ending June 30, 1993.

4. The controlling question in this case is whether net inpatient care revenues attributable to Medicare and Medicaid are properly included in the denominator of the Pickle Amendment computation. If the answer to this question is yes, the Provider is not entitled to Pickle amendment DSH adjustments. If the answer to this question is no, the Provider is entitled to Pickle amendment DSH adjustments.

The Board notes that the stipulations in this case completely define the issue. The stipulation also states that there is no dispute as to the facts in this case. The issue is whether to include or exclude Medicare and Medicaid revenues in the denominator of the fraction.

The Board notes that a similar case with the issue has been through the district and circuit courts. The Board notes that the circuit court decision in North Broward Hospital District d/b/a Broward General Medical Center, et al v. Shalala, 172 F. 3d 90 (D.C. Cir. 1999) addressed all issues and sub-issues in the present case. The Board is persuaded by the arguments and conclusions of the circuit court decision. The circuit court found that the denominator of the fraction should include all Medicare and

Medicaid revenues. This conclusion is further supported by the Board's analysis of the legislative history of the issue.

The Board finds that the legislative history states in part:[11]

> The Secretary would be required to include all such inpatient care payments in determining whether a hospital meets the threshold for the exceptions.... The Committee further intends that the denominator of this equation, net inpatient care revenue, be defined according to the general accepted accounting principles in the hospital industry; i.e., this factor should represent gross patient care revenues less deductions from revenue (other than contractual allowances), as those terms are generally used.

The Board notes that there is no apparent intent to exclude Medicare and Medicaid revenues from the denominator of the fraction.

The Board finds that the Pickle amendment was intended to be a limited exception and not to replace the original DSH amounts. It was an alternative method of reimbursement for only a limited number of hospitals. This finding is substantiated by the legislative history at 596 and the Medicare regulation at 42 C.F.R. ' 412.106(c)(2).

The legislative history states:

> Because of concern that this proxy measure of low-income patients in some hospitals, most particularly public hospitals in states where the Medicaid eligibility standards are stringent, this provision also includes a limited exceptions process for such hospitals.

The regulation states:

> A hospital is classified as a Adisproportionate share@ hospital under any of the following:
>
> (2) The hospital is located in an urban area, has 100 or more beds, and can demonstrate that, during its cost reporting period, more than 30 percent of its net inpatient care revenues are derived from State and

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[11] 99th Congress Second Session 1986 Volume 3, Public Laws 99-591 to 99-664 [Stat. Pages 3341 to 4309] legislative History Public Laws 99-272. P. 596-597.

> Local government payments for care furnished to indigent patients.

The Board notes that the DSH calculation should be revised. At the hearing the Intermediary stated:

> When the Provider submitted to the Board and the Intermediary their appeal of the Medicare reimbursement determination on the fiscal years in question the initial appeal was based on the fact that the report did not include all eligible Medicaid days. The Intermediary agreed with the Provider's contentions. In addition, the Provider submitted as part of the DSH appeal the request that the Intermediary review the Provider's financial information specifically net revenue information in order to make a determination as to whether or not this Provider was subject to reimbursement under what we=re now commonly referring to as the Pickle Amendment. . .[12]

The Board concludes that the Intermediary properly included Medicare and Medicaid revenues in the denominator of the fractional calculation of the Providers= DSH adjustments and, therefore, properly computed the Providers= DSH adjustments.

DECISION AND ORDER:

The Intermediary properly included Medicare and Medicad revenues in the denominator of the fractional calculation the Providers= DSH adjustment. The Intermediary=s adjustment is upheld.

BOARD MEMBERS PARTICIPATING:

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

Date of Decision: May 10, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman

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[12] See Tr. at 29-30.