# PROVIDER REIMBURSEMENT REVIEW BOARD
# HEARING DECISION

2001-D33

**PROVIDER** -
Alden Town Manor Nursing Center
Cicero, Illinois

Provider No.: 14-5736

**vs.**

**INTERMEDIARY** -
Blue Cross and Blue Shield Association/
AdminaStar Federal, Inc.

**DATE OF HEARING-**
February 27, 2001

Cost Reporting Period Ended -
December 31, 1996

**CASE NO.** 00-1745

## INDEX

ISSUE:

Was the Intermediary's denial of the Provider's request for an exception to the cost limits relating to the provision of atypical services that were necessary for the efficient delivery of needed health care services proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Alden Town Manor Nursing Center (the "Provider") is a 249 bed skilled nursing facility ("SNF"), with 37 Medicare certified beds, located in Cicero, Illinois. The Provider filed a request for an exception to the routine cost limits ("RCLs") for its cost year ending December 31, 1996. Adminastar Federal of Illinois (the "Intermediary") denied the request as not timely filed within 180 days of the date of the NPR for the cost year. The amount of Medicare reimbursement at issue is approximately $310,000.

The Notice of Program Reimbursement ("NPR") for the Provider's 1996 cost year was issued by the Intermediary on Friday, August 13, 1999. The NPR was sent by registered mail and tendered to the U.S. Post Office after the close of business on Friday, August 13, 1999. The Provider received the 1996 NPR on Monday, August 16, 1999. The Provider filed its request for an exception to the RCLs on February 12, 2000 when its request was placed with a commercial carrier.

The Provider Reimbursement Review Board conducted a hearing on February 27, 2001.

The Provider was represented by Charles F. Mackelvie, Esquire, of MacKelvie and Associates, P.C. The Intermediary was represented by James R. Grimes, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider indicates that the NPR for the cost year under appeal was issued on August 13, 1999. The Provider received that NPR on August 16, 1999. The Provider filed its request for an exception to the routine cost limits on February 12, 2000 when the request was placed with a commercial carrier. The Provider believes the 180-day period for filing an exception request should begin to run upon receipt of the NPR by the Provider. Therefore, using the August 16,1999 date, the filing of the request on February 12, 2000 was within the 180 day period. As a result, the request was timely filed under the terms of 42 C.F.R. § 413.30(c), and the Provider is entitled to relief from imposition of the cost limits. The Providers then argued it qualified for an exception for the provision of atypical services.

The Provider indicates that on August 5, 1999, the Health Care Financing Administration ("HCFA") issued a Final Rule in the Federal Register, 64 FR 42610.[1] The rule indicates that it is

[1] See Provider's Post Hearing Brief, Appendix 1.

effective as of September 7, 1999. In that Final Rule, HCFA revised the procedures for granting exceptions to the cost limits for SNFs. It changed the existing regulation at 42 C.F.R. § 413.30(c) to indicate that a provider (SNF or home health agency) must make its request to its fiscal intermediary "within 180 days of the date on the intermediary's notice of program pay." (Emphasis added). That phraseology appears in both the Federal Register and the regulation itself. Previously, prior to August 5, 1999, the pertinent section of the regulation indicated that a provider must make its request, for an exception to the RCLs, to its fiscal intermediary within 180 days of the date on the NPR, the language the Intermediary kept referring to at the Board hearing and in its post hearing brief. The Intermediary repeatedly, but incorrectly, argues that according to 42 C.F.R. § 413.30(c), a SNF, and for that matter a home health agency, as of February 2000 must make its request for an exception to the cost limit to its fiscal intermediary within 180 days of the date on the NPR. That is not, however, what either the Federal Register or the current regulation mandates.

The Intermediary also argued that Maria Manor Nursing Care Center v. Blue Cross and Blue Shield Association/Blue Cross of Florida, PRRB Decision No. 97-D60, May 26, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,265, HCFA Administrator declined review, July 7, 1997 ("Maria Manor") is controlling over this fact scenario. In that decision, the Board indicated that it "does not have the authority to superimpose its regulatory appeal process over the regulatory procedures specifically established for filing exception requests to HCFA for purposes of appealing the applicability of the routine cost limits." Id. at 53,997. It should be pointed out that Maria Manor was decided in 1997, at which time the pertinent regulation read "within 180 days of the date on the notice of program reimbursement." That case is not binding on this fact situation since HCFA changed the wording of the regulation relating to exception requests to the RCLs effective August 5, 1999, prior to the time of the Intermediary's actions in this fact scenario.

The Provider contends that at the time it filed its request for an exception to the RCLs, both the applicable regulation and the Federal Register, which introduced and explained the regulation, read:

> (c) Requests regarding applicability of cost limits. For cost reporting periods beginning before July 1, 1998, . . . the SNF or HHA must make its request to its fiscal intermediary, within 180 days of the date on the intermediary's notice of program pay.

(Emphasis Added.)

After September of 1999, a proper interpretation of the dates discussed in 42 C.F.R. § 413.30(c) would be guess work at best, because a "notice of program pay" has no meaning in Medicare parlance. The language "notice of program pay" does not exist and never has existed since the Medicare program was enacted in 1966. As a regulation is drafted or amended to give notice of HCFA's requirements to the industry, layman and the general public, no one could possibly understand what the regulation meant vis-a-vis filing deadlines. The phraseology that HCFA adopted "180 days of the date on the intermediary's notice of program pay" is not a mistake since the August 5, 1999 Federal Register uses the exact same language after it informed the provider

industry it was making changes to how to interpret requests for exceptions to routine cost limits. Moreover, HCFA has not changed or corrected 42 C.F.R. § 413.30 since August 1999. The general instruction at HCFA Pub. 15-1 § 2531.1 which was amended in October 1999, contains different language than that of the regulation. Thus, the Intermediary's treatment of the filing deadline as relating to the NPR date is merely its own arbitrary interpretation.

It is a truism of administrative law that an interpretation of a regulation, when ambiguous, is always construed against the draftsman. Applicable federal law requires an "agency pronouncement to be published if it is of such a nature that knowledge of it is needed to keep parties informed of an agency's requirements as a guide for their conduct." D & W Food Ctrs, Inc. v. Block, 786 F.2d 751 (6th Cir. 1986). A rule "required to be published which is incorrectly published is void, and may not be enforced against a non-complying party." 5 U.S.C. § 552(a)(1).

Because within 180 days of the date of the intermediary's notice of program pay is indiscernible, a reasonable provider would seek guidance as to how l80 days is commonly defined. Otherwise, 180 days could be pushed to when the intermediary internally decided what was due and owing to (from) the provider, but far prior to the time that determination was transmitted to the provider. Since HCFA's regulatory directions in 42 C.F.R. § 413.30(c) are ambiguous as to when an exception request to the RCLs must be filed, one would then turn to the commonly accepted definition of when the 180-day period commences. A subsection of 42 C.F.R. § 413.30(c) mandates that 180 days begins on the date HCFA receives the request from the Intermediary. See 42 C.F.R. § 413.30(c)(1).

When one seeks guidance from the statutory intent about what "180 days" means, Congress was silent as to when the time frame begins to run. The only relevant deadline set forth by Congress is in the Tax Equity and Fiscal Responsibility Act of 1982, P.L. 97-248 ("TEFRA") statute, which became what is now 42 C.F.R. § 413.40. That statute indicates that "[t]he Secretary shall announce a decision on any request for an exemption, exception or adjustment not later than 180 days after receiving a completed application from the intermediary." 42 U.S.C. § 1395ww(b)(1)(4)(a)(l). Congress was more concerned with providers' expeditiously receiving justified relief from the TEFRA limits, rather than with imposing technical procedural barriers to providers. In Alacare Home Health Services v. Sullivan, Medicare and Medicaid Guide (CCH) ¶ 38,357 (1990), the Eleventh Circuit Court of Appeals, after characterizing the legislative history that has been adopted by almost all courts, indicated that:

> [a]ny provider of services, which has filed a timely cost report, may appeal an adverse final decision of the fiscal intermediary with respect to the period covered by such report to the Board. The appeal must be filed within 180 days after the fiscal intermediary's final determination.' (Quoting H.R. Rep. No. 231, 92d Cong., 2d Sess.).

It is particularly unseemly for an agency which routinely defines congressional time mandates to respond within 180 days, thereby greatly prejudicing providers with delays in obtaining adjustments, to at the same time attempt to impose a 180 rule from the date on the face of the

NPR when HCFA's regulation itself does not mandate that.

Pursuant to 42 U.S.C. § 1395oo(a)(3), a provider may obtain a hearing with the Board if it files a request within 180 days after notice of the intermediary's final determination. Since a provider does not have notice until it receives the final determination, the statute indicates the 180-day appeal period begins with the provider's receipt of that notice. While the governing regulations at 42 C.F.R. § 405.1841(a)(l) suggests that the 180-day period begins as of the date of the NPR, the regulation has been consistently construed and applied to mean that the date of the provider's receipt triggers the beginning of the 180-day period. In the Provider Reimbursement Manual ("HCFA Pub. 15-1") § 2920.A.2 it states that the hearing request must be "filed with the Board no later than the l80th calendar day following the date of receipt by the provider of the final determination." This manual section references Chapter 29, Appendix A, Subsection D, which states:

> Time limits — the request for a board hearing must be filed in writing with the board within 180 days after the provider receives notice of the final determination, pursuant to 42 U.S.C. § 1395oo(a)(3). The provider is deemed to have received notice of the final determinations within five days of the date of issuance of the final determination.

HCFA Pub 15-1, Chapter 29, Appendix A, Subsection D.

The Board has consistently followed the policy prescribed by the Manual. See Forest City Nursing Home v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Western Pennsylvania, PRRB Decision No. 95-D50, August 18, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,595, HCFA Administrator declined review, September 27, 1995. In that case, the Board upheld the timeliness of an appeal filed 181 days after the applicable NPR was issued, and the HCFA Administrator acquiesced to the Board's determination. There can be no doubt that the Provider's filing would have been timely if the Provider had been filing an appeal request with the Board.

The Provider contends that an exception request is the functional equivalent of the appeal to the Board. Pursuant to the Social Security Amendments of 1972, the Medicare statutes were revised to create the Board appeal process and authorized HCFA to establish the RCLs. Whereas Congress made it clear that providers would be entitled to seek exceptions to the cost limits, it did not create a separate exception process. A separate process was not devised because Congress anticipated that providers would seek relief from the Board under the established appeal process that authorizes an appeal if a provider is dissatisfied with a final determination of its intermediary. However, when the cost limit regulations at 42 C.F.R. § 405.460 (redesignated § 413.30) were issued in 1974, HCFA established the intermediate step of requiring providers to file exception requests with their intermediary, subject to review by HCFA, prior to seeking relief from the Board.

There is no question of HCFA's authority to establish an intermediate step. However, it is

important to recognize that an exception filed with the intermediary serves as the mechanism by which a provider expresses its dissatisfaction with the application of the cost limits in the NPR. Practically, it is only after a provider receives a NPR that it works through the cost report to determine the effects of the cost limits and whether it will seek a cost limit exception. That process serves as a substitute for, or the functional equivalent of, what would otherwise be the procedure established by the statute (i.e. a direct appeal to the Board). As the functional equivalent of an appeal to the Board, it follows that the same timeliness standard must apply. Accordingly, the receipt of the NPR, which occurred exactly 180 days before the Provider filed its exception request, triggered the 180-day period.

All administrative agencies have a duty to act with reasonable consistency. See Supreme Court Justice Scalia's concurring opinion in American Federation of Government Employees, AFL-CIO Local 3090 v. FLRA, 777 F.2d 751 (D.C.Cir. 1985).

> I do not think it to be true, as counsel for the FLRA was in effect urging that an agency is free to take inconsistent positions so long as one of the two is unlawful. It is the agency's responsibility to behave in a rational (and hence reasonably consistent) fashion, and the wrong of inconsistency is not righted by the further wrong that one of the two inconsistencies is in addition unlawful.

Id. at 760.

The Board would be behaving in an irrational and inconsistent fashion if it held that the Provider's exception request was untimely. It would be neither rational nor reasonably consistent to hold that the 180 day period begins to run from the date of receipt of the NPR for appeal requests, but that the 180 day period begins to run from the date of the issuance of the NPR for exception requests, taking into consideration the ambiguous wording of the regulation itself. Since the wording of the two regulations is substantively identical and both actions involve the same notice, the NPR, the Provider considers that an inconsistency of this magnitude would be clearly arbitrary and capricious.

The regulation containing the timeliness standard for cost limit exception requests also contains a timeliness standard for HCFA to decide such requests. With respect to HCFA's timeliness standard, the regulation provides that "HCFA responds to the request within 90 days for SNFs and within 180 days for HHAs from the date HCFA receives the request from the intermediary." See 42 C.F.R. § 413.30(c). It would neither be rational nor reasonably consistent to have two deadlines in the same paragraph commencing as of a different date, and it certainly would not be fair to allow HCFA, at least since September 7, 1999, 180 days from the date of receipt of a request but to deny the Provider the same right. The document, which triggers a provider's right to seek redress, is called a "notice of program reimbursement," and such a document does not achieve its purpose of notification until the provider actually receives it. Thus, both common sense and governing precedents mandate that the 180-day period for filing a cost limit exception request begins to run as of the date of the provider's receipt of the notice.

Assuming that the Board believes that a provider run by lay administrators should have searched the past case law and determined that a notice or program pay and a notice of program reimbursement are synonyms and that every Medicare provider should understand that fact, the PRRB should at least exercise its discretion to waive such a rigid application of the regulatory rule, even if the Intermediary's construction of the timeliness standard applicable to cost limit exception requests was correct. Assuming arguendo that a cost limit exception request is not the functional equivalent of a Board appeal, there is no statutory basis for the 180-day deadline for filing cost limit exception requests. The deadline is merely a "procedural rule" of the agency, and the Board has the authority to waive strict compliance with the agency's "procedural rules to promote the ends of justice." See American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970). In that decision, the Supreme Court stated "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it."

Thus, an unyielding application of the Intermediary's mere interpretation of the vague timeliness standard for cost limit exception requests would defeat the ends of justice. Accordingly, even if the Intermediary's construction of the timeliness standard in the regulation were correct and even if the Board disregarded that the language in 42 C.F.R. § 413.30(c) is indiscernible, this would be an appropriate case for the Board to exercise its discretion to waive strict compliance with a procedural rule to ensure that the ends of justice are served.

The Provider notes that the Intermediary indicated that the Provider's exception request was not received until February 14, 2000, which is after 180 days from the time the Provider received the NPR. The Board has held that a TEFRA adjustment request is timely so long as it is mailed on or before the 180th day after the NPR is received. Deaconess Medical Center v. Mutual of Omaha Insurance Company, PRRB Decision No. 98-D43, April 12, 1998, Medicare and Medicaid Guide (CCH) ¶ 46,269, rev'd, HCFA Administrator, June 19, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,054. Since the statute at 42 U.S.C. § 416(j) states that if a "filing deadline" ends on a Saturday, Sunday or legal holiday, that deadline is deemed to extend to the next regular business day. Herein, the next regular business day was Monday February 14, 2000. Therefore, based on the cited statute, the Provider did send its cost limit exception to the Intermediary on the 180th day as required by the Medicare regulation.

Contrary to the Intermediary's arguments, the Board should give great weight to its own decision in Brookwood Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Alabama, PRRB Dec. No. 99-D47, May 6, 1999, Medicare and Medicaid Guide (CCH) ¶ 80,187, rev'd, HCFA Administrator, July 9, 1999, Medicare and Medicaid Guide (CCH) ¶ 80,313, appeal restated, HCFA Administrator, April 20, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,553 ("Brookwood") wherein the Intermediary received the provider's TEFRA exception request on the 183rd day after the NPR was mailed. The Provider notes that while the HCFA Administrator reversed the Brookwood decision, that decision was subsequently overturned in court. The provider in Brookwood pointed out, and the PRRB adopted, that the word "made" in Black's Law Dictionary means "filed." Blacks Law Dictionary 950 (6th ed. 1990). The word filed has been interpreted by HCFA to mean date of mailing. Thus, the only official guidance providers have had regarding when a document request is "made" is that a request is

made or filed upon filing.

The Board stated in the Brookwood decision that the text of 42 C.F.R. § 413.40(e), which parenthetically contained the identical wording to the language in § 413.30(f) before August 5, 1999 does not expressly state that an exception request must be received by the intermediary within 180 days from the NPR. Rather, the Board concluded that the regulatory language is void of any reference requiring that an intermediary must actually receive an exception request prior to the 180-day deadline. The Board concluded that the exception request could be received within 5 days of mailing or within 185 days of the NPR.

Using the Board rationale from both Brookwood and the Board's own instructions and since there is an ambiguity as to when the 180 days commences, the earliest the Intermediary could have expected the Provider's request for an exception and still stay within the Board guidelines was February 14, 2000, the exact date the Intermediary received the request. If the 180 days means date of receipt of the NPR, as the Board instructions seem to indicate (180th calendar day after receipt of the determination in dispute), the Provider could have mailed it request on February 14, 2000. However, given the Board's five day mailing rule interpreting the 180-day rule, receipt of the request by the Intermediary was not required until February 21, 2000, exactly seven days after the Intermediary received the Provider's exception request.

If the date of mailing is the criteria for determining the timeliness of a request for exception on the RCLs (which would require the Board to correct HCFA's regulatory mistake), relying on the Brookwood decision since the NPR (following the Intermediary's standard business practices) was not placed with the United States Post Office until the business day of August 13 ended, leaves 137 calendar days in 1999; Saturday and Sunday were the weekend. Thus, the Provider received (and the effective date of mailing) is the same day, August 16th, February 12 is the 43rd day of the year 2000, and August 16 is 228th day of 1999, leaving 137 days in 1999.

According to most statutory construction, one does not count the day of mailing as the commencement of the 180-time period, but rather the commencement of the time frame starts the next calendar day. Thus, in this scenario it was exactly 180 calendar days from mailing the NPR to the "mailing" of the Provider's request for exception. Using that rationale and the 5-day mailing rule, the Intermediary could have received the Provider's request for exception on February 17th and the Provider would still have complied with any rational reading of the time frame. Accordingly, any way one interprets this scenario, unless one corrects HCFA's "mistake" and adopts the old literal meaning of Regulation Section 413.30(c) before it was amended on August 5, 1999, the Provider's request for an exception to the RCLs was timely made. That is why the request for exception should be judged on its merits.

The Provider points out that 42 C.F.R. § 413.30(c) was amended on August 5, 1999 to clarify the procedures to receive a cost limit exception. That action, given the language change in 42 C.F.R. § 413.30(c), may have been a change in policy. According to 42 C.F.R. § 405.1863:

> Where a party to a Board hearing puts into issue an administrative policy, which is interpretative of the law or regulations, the Board

> will promptly notify to the Health Care Financing Administration. (sic).

The Intermediary should have called a witness from HCFA to explain what the phraseology notice of program pay meant and whether the August 5, 1999 change introduced a new policy. Moreover, a HCFA witness should have been present to explain why HCFA changed the 180-day language in the regulation. However, not a single witness was presented.

The regulation at 42 C.F.R. § 405.1867 requires that the Board comply which all provisions of the Medicare regulations. As the language in the existing regulation is ambiguous, the Board cannot, with additional evidence, which is not currently in the record, deem that a notice of program pay is a synonym to notice of program reimbursement.

The Provider indicates that the Intermediary did not meet its burden of proof. It is axiomatic that once an intermediary makes an adjustment or in this case denies a cost limit exception request; it must explain the basis of its adjustment at the Board. On February 27, 2001, at the Board hearing the Intermediary chose not to present any witnesses. Such a trial tact is contrary to the Board's own rules since a PRRB hearing is adversarial in nature. Consequently, the Provider was deprived of the opportunity to cross-examine an Intermediary witness as to what the language in 42 C.F.R. § 413.30(c) means or whether the 1996 NPR was tendered to the United States Post Office subsequent to August 13, 1999.

Moreover, the Intermediary was unable to challenge the Provider's exception request on its merits. In virtually all-trial settings, such a trial tact means that the Intermediary accepts that the Provider would be entitled to a cost limit exception on its merits.

The Provider contends that the board should not have permitted the Intermediary to attend the hearing without a witness. By their very nature, Board hearings are adversarial in nature. The legislative history behind P.L. 92-603, the legislation that established the Board, indicates that a Provider has an absolute right to explore the basis for an intermediary's adjustment and be able to confront intermediary representatives about the basis of its (their) positions. Here, the Intermediary has tacitly agreed that the Provider's cost limit exception request is meritorious.

However, the Intermediary is relying on the jurisdictional arguments that the Provider's exception request was not timely filed. The basis of the Intermediary's position is one case, Maria Manor, supra, that was decided under the pre-amendment to 42 C.F.R. § 413.30. The Provider should have had a right to cross-examine an Intermediary witness.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the only issue before the Board was whether or not the Provider had timely filed a request for an exception to its RCLs. The Intermediary indicates that the regulations at 42 C.F.R. § 413.30(c) clearly answered the question. It states that a SNF "must make its request to its fiscal intermediary within 180 days of the date on the intermediary's notice of program reimbursement."

In this case, the NPR was dated August 13, 1999. Under the terms of the regulation, 180 days from the date of the NPR would mean the last day for the Provider to request an exception to the RCLs was February 9, 2000. However, the Provider took no action until February 12, 2000, 183 days after the date on the NPR, when it placed a request for exception with a commercial carrier. The Intermediary received that request on February 14, 2000, some 185 days after the date on the NPR.

The Provider argues that the 180 day period should begin, not with the date on the NPR as regulation requires, but with the date of receipt of the NPR by the Provider. In support of that position, the Provider relies on Brookwood, supra. That case concerned a provider's request for an exception to its TEFRA target rate, and turned on regulatory language essentially identical to 42 C.F.R. § 413.30(c). A request for an exception to the TEFRA target rate must be made "no later than 180 days after the date on the intermediary's NPR . . ." 42 C.F.R. § 413.40(e)(1). The Board found that Brookwood met the requirements of the regulation when it placed its exception request with the commercial carrier within 180 days of the date on the NPR. The Board concluded that it did not matter that the intermediary did not receive the request until after the 180th day, as long as the request was mailed within the proper time frame.

The Intermediary contends that Brookwood does not help the Provider in this case. The Intermediary believed that, to be timely, the request had to be received by the Intermediary within the 180 day period. However, even if one excepts the Brookwood decision as controlling, the Provider did not come within the 180 day limit because it placed its exception request with the commercial carrier some 183 days after the date on the NPR, and thereby missed the regulatory requirement for timely filing.

To get around the fact that even the Brookwood decision does get the Provider's exception request within the requirements of 42 C.F.R. § 413.30(c), the Provider then asked the Board to start the 180 day period, not at the date of the NPR, but upon the receipt of the NPR by the Provider. In support of this position, the Provider attempted to rely on the PRRB's procedures for filing a request for hearing. Those instructions found in Transmittal No. 416, dated June 1, 2000, require that a provider must file a request for hearing within 180 calendar days after the date of receipt of the determination being appealed. The Board presumes the provider will have received the final determination within five days of the date of issuance. The Provider, then argued that a request for an exception pursuant to 42 C.F.R. § 413.30(c), is a "functional equivalent" of a request for a Board hearing and therefore, the same filing deadlines should apply to a request for an exception to the routine cost limits as apply to a request for a Board hearing.

The Intermediary pointed out that the Board has already rejected this very argument in the case of Maria Manor, supra. In that case, the Board found that "the governing regulation at 42 C.F.R. § 413.30(c), sets forth explicit procedures with which a provider must comply in making a timely request to HCFA for an exception to the routine cost limits." The Board further found "that it has no basis for treating the Provider's exception request as the functional equivalent of a Board appeal request which is governed by the regulations at 42 C.F.R. § 405.1841. Irrespective of the

reasonableness or fairness of a Provider's position, the Board does not have the authority to superimpose its regulatory appeal process over the regulatory procedures specifically established for filing exception requests to HCFA for purposes of appealing the applicability of the routine cost limits."

The Intermediary argues that the applicable regulation is clear. The Provider had 180 days from the date of the NPR in which to file an exception request under 42 C.F.R. § 413.30(c). The Provider did not meet that requirement, and as a result, is not entitled to relief from the RCLs in the year under appeal.

CITATIONS OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

| | | |
|---|---|---|
| § 416(j) | - | Additional Definitions; Periods of Limitations Endings on NonWork Days |
| § 1395oo et seq. | - | Board |
| § 1395ww(b)(1)(4)(a)(l) | - | Computation of Payment; Definitions; Exemptions; Adjustments |

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

| | | |
|---|---|---|
| §§ 405.1835-.1841 | - | Board Jurisdiction |
| § 405.1863 | - | Administrative Policy at Issue |
| § 405.1867 | - | Sources of Board Authority |
| § 413.30 et seq. (Formerly § 405.460) | - | Limits on Cost Reimbursement |
| § 413.40 et seq. | - | Ceiling on the Rate of Increase in Hospital Inpatient Costs |

3. Program Instructions- Provider Reimbursement Manual (HCFA Pub. 15-1 ):

| | | |
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| § 2531.1 | - | General Requirements |
| § 2920.A.2 | - | Right to a Board Hearing |

Chapter 29, Appendix A, Subsection D - Board Jurisdiction; Time Limits

4. Cases:

Alacare Home Health Services v. Sullivan, Medicare and Medicaid Guide (CCH) ¶ 38,357 (1990).

American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970).

American Federation of Government Employees, AFL-CIO Local 3090 v. FLRA, 777 F.2d 751 (D.C.Cir. 1985).

Brookwood Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Alabama, PRRB Dec. No. 99-D47, May 6, 1999, Medicare and Medicaid Guide (CCH) ¶ 80,187, rev'd, HCFA Administrator, July 9, 1999, Medicare and Medicaid Guide (CCH) ¶ 80,313, appeal restated, HCFA Administrator, April 20, 2000, Medicare and Medicaid Guide (CCH) ¶ 80,553.

D & W Food Ctrs, Inc. v. Block, 786 F.2d 751 (6th Cir. 1986).
Deaconess Medical Center v. Mutual of Omaha Insurance Company, PRRB Decision No. 98-D43, April 12, 1998, Medicare and Medicaid Guide (CCH) ¶ 46,269, rev'd, HCFA Administrator, June 19, 1998, Medicare and Medicaid Guide (CCH) ¶ 80,054.

Forest City Nursing Home v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Western Pennsylvania, PRRB Decision No. 95-D50, August 18, 1995, Medicare and Medicaid Guide (CCH) ¶ 43,595, HCFA Administrator declined review, September 27, 1995.

Maria Manor Nursing Care Center v. Blue Cross and Blue Shield Association/Blue Cross of Florida, PRRB Decision No. 97-D60, May 26, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,265, HCFA Administrator declined review, July 7, 1997.

5. Other:

Administrative Procedure Act, 5 U.S.C. § 552(a)(1) - Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings.

TEFRA, P.L. 97-248.

Social Security Amendments of 1972, P.L. 92-603.

Blacks Law Dictionary 950 (6th ed. 1990).

64 Fed. Reg. 42610 (August 5, 1999).

HCFA Transmittal 416.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the law, regulations, program instructions, testimony from the hearing and parties' contentions, finds and concludes as follows:

The Board finds the following facts in this case. The date of the NPR was August 13, 1999. The regulation provides that the Provider must request an exception to the RCLs within 180 days from the date of the NPR. In this case, 180 days from the date of the NPR would mean the last day for the Provider to request an exception to the RCLs was February 9, 2000. The Provider took no action until February 12, 2000, when it placed a request for exception with a commercial carrier. This was 183 days after the date on the NPR. The Intermediary received that request on February 14, 2000, some 185 days after the date on the NPR. The Board finds that the Provider did not file the request for an exception within 180 days of the date of the NPR as required by the regulation and therefore, the Intermediary's denial of the Provider's request for not being timely was proper. The Provider argues that the Board interpret the regulation to mean that the 180 days begins with a provider's receipt of the NPR, as it is permitted for appeals to the Board. The Board notes that it has previously found that there is no basis for treating these requests in a similar manner and no authority to superimpose its regulatory appeal process on the process for RCL exceptions. See Maria Manor, supra.

The Provider also suggests that the Board exercise its discretion in its favor because the terminology in the regulation is unclear. The Board finds that the language requires that the exception be filed within 180 of the date of the notice. The Board also notes that it does not have discretion to ignore HCFA regulations. See 42 C.F.R. § 405.1867.

The Board finds that the Provider's request for an exception to the RCLs was not filed within 180 days after the date on the NPR. The Intermediary's determination is affirmed.

DECISION AND ORDER:

The Board finds that the Provider's request for an exception to the RCLs was not filed timely. The Intermediary's determination is affirmed.

Board Members Participating:

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

Date of Decision: June 26, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman