# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD
2005-D32

**PROVIDER** –
CentraState Medical Center

Provider No.: 31-0111

**vs.**

**INTERMEDIARY –**
BlueCross BlueShield Association/
Riverbend Government Benefits
Administrator

**DATE OF HEARING** -
February 2, 2004

Cost Reporting Periods Ended -
December 31, 1992; December 31, 1993
and December 31, 1995

**CASE NOs.:** 94-3299; 96-0845 and
98-2163

**INDEX**

**ISSUE:**

Whether the Intermediary failed to properly classify certain projects as old capital.

**MEDICARE STATUTORY AND REGULATORY BACKGROUND**:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. The Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Financing Administration (HCFA)) is the operating component of the Department of Health and Human Services (DHHS) charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and under interpretive guidelines published by CMS. See, 42 U.S.C. §1395(h), 42 C.F.R. §§413.20(b) and 413.24(b).

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the proportion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the issuance of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

Effective October 1, 1991, Medicare changed the method by which it reimburses hospitals for certain capital expenditures. The Medicare program replaced its prior reasonable cost-based payment methodology for inpatient capital-related costs with a prospective payment system (PPS) and phased it in over a ten-year period. Under the phase-in, the classification of certain capital expenditures as "old" or "new" can have significant Medicare reimbursement consequences. The Medicare program recognized that there may be a lag of several years between the time a hospital obligates itself for a capital project and the time the assets are placed into service. Therefore, under Capital PPS, the Program provides for the treatment of obligated capital as old capital. 42 C.F.R. §412.304(c).

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY:**

CentraState Medical Center (Provider) is an acute care hospital located in Freehold, New Jersey. On its fiscal year ended (FYE) December 31, 1992, 1993 and 1995 cost reports, the Provider claimed costs related to two capital projects as "old" capital. Blue Cross and Blue Shield of New Jersey (Intermediary) reclassified these costs as "new" capital. The

Provider appealed the Intermediary's adjustments to the Board and met the jurisdictional requirements of 42 C.F.R. §405.1835-1841. The Medicare reimbursement at issue is estimated to be greater than $1 million. See Provider Position Paper at 3.

The Provider was represented by Murray J. Klein, Esquire, of Reed, Smith, Shaw and McClay, LLP. The Intermediary was represented by Eileen Bradley, Esquire, of the Blue Cross Blue Shield Association.

The Intermediary concedes that the Provider eventually submitted documentation to support the two projects as old capital. The Intermediary refused to reverse its prior determination, however, on the grounds that the Provider did not submit required documentation to demonstrate that the projects qualified as old capital within the regulatory deadline. An understanding of the Medicare requirements for qualification is necessary for the timeliness analysis.

The regulations recognize several methods of qualifying for obligated capital status. When an asset is put in use after December 31, 1990, there must be a binding agreement executed before December 31, 1990; the asset must be in use before October 1, 1994; and the hospital must so notify the intermediary. 42 C.F.R. §412.302(c)(i). Where there is no binding agreement before December 31, 1990, the regulations still allow hospitals to meet the "construction in progress" (CIP) criteria to qualify as obligated capital. The six criteria are:

(A) The hospital received any required certificate of need approval on or before December 31, 1990.
(B) The hospital's Board of Directors formally authorized the project with a detailed description of its scope and costs on or before December 31, 1990.
(C) The estimated cost of the project as of December 31, 1990 exceeds 5 percent of the hospital's total patient revenues during its base year.
(D) The capitalized cost that had been incurred for the project as of December 31, 1990 exceeded the lesser of $750,00 or 10 percent of the estimated project cost.
(E) The hospital began actual construction or renovation ("groundbreaking") on or before March 31, 1991.
(F) The project is completed before October 1, 1994.

42 C.F.R. §302(c)(3).

The Capital PPS regulations were published at 56 FR 43358 (August 30, 1991). Intermediary Exhibit 1. Medicare Bulletins RH-301, RH-307 and RH-319 concerning obligated capital were sent to providers on December 13, 1991, January 29, 1992 and June 24, 1992. The deadline for submission of documentation for old capital was extended to the later of October 1, 1992, or 90 calendar days after the hospital becomes

subject to Capital PPS. In the January 29, 1992 Bulletin, hospitals were notified to provide the following information.

1. A summary sheet detailing the costs that make up total obligated capital.
2. For each obligated capital expenditure, a copy of the approved Certificate of Need, if applicable, and a copy of the binding agreement and supporting documents that relate to each expenditure.
3. The documentation must provide a project description (including details of any phased construction or financing) and an estimate of costs that were obligated on or before December 31, 1990.

See Provider Exhibit 23.

The Provider claimed that its East Tower project and Day Care Center project both met the CIP criteria, and that the Day Care Center also met the general criteria because it was put in use in November 1990. The Provider submitted documentation of its obligated capital costs to the Intermediary on March 31, 1992. Provider Exhibit 9. The contents of this submission included: (a) amount invoiced to date; (b) contracted dollars; (c) total project costs to date; (d) budget; and (e) variance. Also included were depreciation schedules and Certificates of Need (CONs) for both the East Tower and Child Care Center project.

The Intermediary engaged the accounting firm of Figliozzi and Company to audit the projects the Provider claimed as obligated capital. During the audit the Provider presented evidence that the East Tower project was a candidate for treatment as obligated capital under the CIP criteria of the capital PPS regulations and the ground breaking had occurred. See Provider Exhibit 11. The auditor gave the Provider a document that listed the types of documentation needed to support its claim that the East Tower project met the definition of obligated capital. See Provider Exhibit 24.

The Provider submitted a supplemental package to the Intermediary on August 7, 1992 to support its request. Provider Exhibit 10. This package included: (a) 1990 capital activity summary; (b) 1990 gain/loss on disposal of assets; (c) 1990 capitalization policy; (d) a copy of the 1990 plant ledger with 1990 acquisitions highlighted; (e) copies of 1990 operating lease agreements; and (f) copies of loan agreements and bond indentures. Id.

The Intermediary issued a letter on December 31, 1992 denying old capital status for both projects. Provider Exhibit 15. With regard to the East Tower project, the Intermediary's denial indicated that the contract and financing agreement were both dated after the December 31, 1990 cutoff and that under the CIP criteria, the Intermediary could not determine the cost the Provider had incurred prior to 1990. Id. at 3. With regard to the Day Care Center project, the Intermediary determined that there was no documentation to indicate that there was a legally enforceable agreement in effect prior to January 1, 1991. Id.

In response to the Intermediary's denial, the Provider submitted a third package dated September 1, 1993. Provider Exhibit 16. A letter from the Intermediary dated January 10, 1994 indicates that although the additional data substantiated the claim that the criteria for obligated capital was met, the timeline for the criteria was not met; therefore, approval could not be granted. See Provider Exhibit 17.

**PARTIES' CONTENTIONS**:

The Provider points out that, given the Intermediary's admission that the projects met the obligated capital criteria, the Provider is being penalized because of the Intermediary's incorrect assertion that the documentation was not submitted by the deadline. The Provider presents a chart showing what it believes constitutes relevant CIP criteria sent with the March 31, 1992 submission which would have been within the deadline. See Provider Position Paper at 12 and 13. The Provider also asserts that the Intermediary was aware of the two projects and that the auditors even inquired about the "groundbreaking" date for the East Tower project. The additional documentation submitted on August 7, 1992 noted that construction was in progress and amounted to $4 million dollars during 1990. Provider Exhibit 10. This submission also included all the documentation noted in the Capital Audit Entrance Conference document provided by the auditor. Provider Exhibit 24.

The Provider further asserts that disagreement over what evidence was needed, was understandable due to the complexity of the transition to Capital PPS and lack of clarity of instructions. The Provider points out that some instructions came out after the due date for data submission. See Provider Exhibits 18-22 The Provider also points out that the first set of HCFA's Qs &As says that if a hospital submits a timely request with all of the required information but additional information is necessary to make the determination, the fiscal intermediary (FI) is to contact the hospital and request the additional documentation; however, the original request will be regarded as acceptable. Further, the note at the end of HCFA's answer to question number 17 reiterates that FIs should encourage hospitals to submit the appropriate data necessary to facilitate an obligated capital determination rather than deny the request without further communication. Additional guidance from the PPS Capital Base Year Hospital Audit Program indicates that intermediaries should encourage the hospitals to provide information at the time they are performing the base period field audit work. In the instant case, the Provider contends that neither the Intermediary nor the auditor engaged in the requisite communication with the Provider. Despite knowing full well that the Provider was attempting to have the two projects qualified as obligated capital under the CIP criteria, neither the FI nor the auditor indicated that the submitted documentation was insufficient.

The Provider asserts that flexibility was built into the obligated regulations. For example, although the general rule is that in order to qualify as obligated capital, a project must be completed and put into use for patient care before October 1, 1994, a hospital can be granted a discretionary extension of up to two years. 42 C.F.R § 412.302(c)(1)(iv).

Consequently, capital determinations can, by necessity, be made after the cutoff of October 1, 1992 and perhaps as late at September 30, 1996.

The Provider asserts that it did not ignore the filing deadline but made a good faith effort to comply, well in advance of the deadline, with information it reasonably thought was adequate for the determination. The Provider believed it did not get timely guidance from either the Intermediary or the auditor and therefore should be permitted to supplement the submission as the instructions envisioned.

The Intermediary contends that despite adequate warning in the Medicare bulletins, the Provider did not submit the correct documentation. The Intermediary notes that the documents that the Provider submitted in August 1992 related to the listed documents that needed to be present for the capital audit and did not relate to the CIP criteria published in the federal register. The Capital Audit Entrance Conference sheet also stated that "a hospital is required to submit the binding agreement and supporting documents that relate to the obligated capital expenditures . . ." which the Provider did not submit.

The Intermediary argues that, in both submissions, the Provider failed to document the Board of Directors' formal authorization of the capital projects with detailed description of their scope and cost on or before December 31, 1990. The Provider also failed to document that the capital cost that had been incurred for the projects as of December 31, 1990 exceeded the lesser of $750,000 or ten percent of the estimated project cost. The Provider documented the cost incurred as of January 1992, not December 1990, as required by the regulations. In order to qualify CIP as obligated capital, all of the above criteria must be met.

The Intermediary further points out that the Provider did not respond to the Intermediary's denial letter until 11 months after the final date for submission of data (October 1, 1992). The Intermediary, in accordance with the regulations, did not accept this data. The Intermediary notes that the Provider appealed directly to CMS, but CMS affirmed the Intermediary's decision not to accept additional data after the due date.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:**

The Board, after consideration of the Medicare law and guidelines, the parties' contentions, and evidence presented, finds and concludes as follows:

The regulations at 42 C.F.R. §412.302(c)(1)(v) specifically limit until October 1, 1992 the time that providers had to submit documentation. This regulatory deadline applies to applications under both the general rule at (c)(1) and (c)(3) related to construction in progress. See specifically (c)(3)(ii) applying (c)(1)(iv) through (viii) to CIP.

The Board, after careful examination of the Provider's multiple and voluminous submissions, prior to the deadline, finds that the Provider did not meet the regulatory criteria under either the general rule or under the construction in progress rule. To avoid

any possible misinterpretation of the information in the record, by letter dated July 25, 2003, the Board asked the Provider to resubmit the documentation and identify the individual pages where it claimed evidence was present that met each of the regulatory criteria.

With respect to the general rule, the Board did not find any evidence that there was a binding agreement for either the East Tower or the Day Care Center. With regard to the requirements for the CIP, the Board did not find the Board of Directors' formal authorization for either the East Tower or the Day Care Center project. The position paper acknowledges that "[w]hile no specific Board minutes were submitted, the Loan and Security Agreements in the submission stated that 'all necessary corporate action had been taken.' Further evidence of Board authorization could have been submitted but was never requested by Blue Cross." Provider's revised position paper at 12, No. 2. The Provider also acknowledges that requirements of estimated costs of the projects, the fact that the amount of capitalized costs incurred by 12/31/90 exceeded $750,000 or 10 percent of estimated budget, and documentation confirming that groundbreaking had occurred by March 31, 1992. could have been met but were not, because data was not requested by Blue Cross Id., No. 4.

The Provider indicates that the rules concerning the documentation were new and complex, that it provided voluminous amounts of information to the Intermediary, and that had the Intermediary more specifically told the Provider what to provide it could have done so. This is evidenced by the fact that the Provider ultimately, albeit many months later, did submit appropriate documentation that would have qualified it under the CIP for at least the East Tower Project. The Provider specifically cites the instructions that permit the Intermediary to review submissions by providers, and if there is enough time prior to the deadline, to advise them that information needed to approve projects is missing and that it can still be submitted. The Board recognizes that the Provider submitted considerable information in a timely manner, but the Board concludes that there is no provision in the regulations that permits the Provider to submit documentation after the deadline. Therefore, the Board finds that the Provider did not comply within the timeframe provided for in 42 C.F.R. §412.302.

## DECISION AND ORDER:

The Board finds that the Provider did not comply with the regulatory timeframes for having projects classified as old capital. The Intermediary's adjustments reclassifying the East Tower and Day Care Center projects as new capital are affirmed.

Board Members Participating:

Suzanne Cochran, Esquire
Gary B. Blodgett, D.D.S.
Martin W. Hoover, Jr., Esquire
Elaine Crews Powell, CPA
Anjali Mulchandani-West

FOR THE BOARD:

DATE: April 11, 2005

Suzanne Cochran, Esquire
Chairperson