PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON-THE-RECORD
99-D5

PROVIDER -Belmont Center for Comprehensive Treatment
Philadelphia, PA

Provider No. 39-4023

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/ Independence Blue Cross and Blue Shield

DATE OF HEARING-
September 18, 1998

Cost Reporting Period Ended -
June 30, 1991

CASE NO. 94-2470

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ISSUE:

Was the Intermediary's use of the reasonable compensation equivalent ("RCE") limits from 1984 to reduce the amount of reimbursable compensation paid to its hospital-based physicians ("HBPs") for fiscal year ended ("FYE") 1991 proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Belmont Center for Comprehensive Treatment ("Provider") is a not for profit medical center located in Philadelphia, Pennsylvania. On its FYE 1991 cost report, the Provider claimed costs for its HBPs. Independence Blue Cross and Blue Shield ("Intermediary") applied RCE limits from 1984 to calculate the Provider's HBPs' Medicare Hospital Insurance Program ("Part A") compensation. The Provider filed a timely appeal with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835-.1841. The Medicare reimbursement effect is approximately $30,000.[1]

Compensation paid to physicians by a hospital for services which benefit patients generally, are reimbursed under Part A. For the year under appeal, all physician services subject to reimbursement under Part A that are allocable to a distinct part psychiatric unit, outpatient department, skilled nursing unit or home health agency are reimbursed on a reasonable cost basis subject to certain limits. 42 U.S.C. § 1395xx(a). The Medicare statute authorizes the Health Care Financing Administration ("HCFA") to establish limits on the allowable compensation for services furnished by physicians to providers generally under Part A. 42 U.S.C.
§ 1395xx(a)(2)(B). These limits are known as the RCE limits. Under these RCE limits, reimbursement is determined based on the lower of (1) the actual allowable costs of the physicians' services to the provider or (2) the validly established RCE limits applicable to the physicians' respective specialty in a given year. Id.

HCFA updated the 1982 RCE limits for 1983, and the 1983 RCE limits for 1984. In each case, application of the prescribed methodology resulted in an increase in the RCE limits in accordance with data on average physician specialty compensation and data on updated economic index. 48 Fed. Reg. 8901, 8923 (Mar. 2, 1983) and 50 Fed. Reg. 7123, 7125 (Feb. 20, 1985). HCFA did not update the RCE limits from 1984 until 1997, and when calculating the Provider's Medicare reimbursement for its Part A physician compensation for FY 1991, the Intermediary applied the 1984 RCE limits.[2] As a result of applying those limits, $77,520 of the Provider's costs were disallowed.[3]

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[1] See Provider Position Paper at 2.

[2] See Intermediary Exhibit 1.

[3] Id.

The Provider was represented by Carel T. Hedlund, Esquire, and Jillian Wilson, Esquire, of Ober, Kaler, Grimes and Shriver. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider asserts that it is clear from HCFA's Federal Register discussions, its own actions in initially setting and then updating the RCE limits on an annual basis for three consecutive fiscal years and then thirteen years later, in its Provider Reimbursement Manual ("HCFA Pub. 15-1")
§§ 2182.6C and 2182.6F, and three HCFA intra-agency memoranda, that the RCE limits were intended to, and should have been updated annually. The RCE limits published by HCFA were specifically limited to the years indicated, i.e., fiscal years commencing in 1982, 1983, 1984 and 1997, respectively. They therefore do not apply to FY 1991. Without providing any notice or opportunity for comment and without offering any explanation for departing from its consistent prior practice of annually updating the RCE limits, HCFA abruptly stopped doing so for a period of 13 years. HCFA failed from 1984 through 1997 to make any upward revisions to these limits and thereby failed to abide by its own regulations. The Provider contends that an agency may not violate its own regulation. HCFA failed to abide by its own regulation by failing to update the RCE limits for FY 1991 in accordance with its prescribed methodology. By failing to annually update the RCE limits in accordance with the available updated economic index data, HCFA also failed to comply with Congress' mandate that HBP services be fully reimbursed, limited only by a "reasonableness" standard. 42 U.S.C. § 1395x(v)(1)(A). This failure resulted in a Congressionally-prohibited "cost-shifting." See 42 C.F.R. § 413.5. Since no valid RCE limits apply to the Provider's fiscal year in issue, the Provider should be reimbursed for its actual Part A physicians' costs so long as they are otherwise reasonable. In the alternative, the 1984 RCE limits should be updated for FY 1991, by using the same methodology used by HCFA to update the RCE limits for fiscal years 1983, 1984 and 1997.

The Provider asserts that the Intermediary's application of the 1984 RCE limits violates the plain language of the applicable regulation requiring that the RCE limits be updated annually.

The regulation governing the RCE limits, 42 C.F.R. § 405.482, provides:

> (b) HCFA will establish a methodology for determining reasonable annual compensation equivalents, considering average physician incomes by specialty and type of location, to the extent possible using the best available data.
>
> . . .
>
> (f)(1) Before the start of a cost reporting period to which limits established under this section will be applied, HCFA will publish a notice in the Federal

> Register that sets forth the amount of the limits and explains how the limits were calculated.
>
> (f)(2) Revised limits updated by applying the most recent economic index data without revision of the limit methodology will be Published in a notice in the Federal Register without prior publication of a proposal or public comment period.

Id. (emphasis added).

The plain language of the regulation clearly requires that the RCE limits be updated annually in order to incorporate the most recent economic index data, i.e., the best available data, as the regulation expressly requires. The Intermediary thus improperly disallowed portions of the compensation paid by the Provider to its HBPs for the fiscal year at issue because its adjustment was based on obsolete data, i.e., on the RCE limits applicable only to the 1984 cost year.

The RCE limits used by the Intermediary were not updated from 1984 through 1997. 62 Fed. Reg. 24483-85 (May 5, 1997). Thus, the last update prior to the year at issue, FYE 1991, was for 1984. The Intermediary's application of the 1984 RCE limits to the Provider's FYE 1991 costs constitutes a violation of the RCE regulation, 42 C.F.R. §§ 405.482(b) and (f)(3), because HCFA was required, but failed, to update these limits on an annual basis, using the most recent available data.

The Provider claims that if the regulation is found to be ambiguous, it must be construed to require annual updates of the RCE limits. HCFA's interpretation of its own regulation requires annual updating of the RCE limits on the basis of updated economic index data. HCFA stated this in the Federal Register documents published at the time the RCE limit regulations were proposed. 47 Fed. Reg. 43577, 43586 (October 1, 1982). HCFA reiterated this when the RCE regulations were finally adopted. 48 Fed. Reg. 8901, 8923 (Mar. 2, 1983). HCFA implemented this interpretation when it updated the limits for 1982, 1983 and 1984. Id. at 892 and 50 Fed. Reg. 7123, 7124 (February 20, 1985). The consistency of HCFA's interpretation of its regulation is further evidenced by a Proposed Rule published in 1989, but never in final, which suggested that the regulations be changed. 54 Fed. Reg. 5946, 5956 (February 7, 1989).

Recently, HCFA revised the RCE limits for 1997. 62 Fed. Reg. 24483-85. HCFA stated that "we are calculating the 1997 [RCE] limits . . . we are able to produce an array of estimated 1997 average annual FTE compensation levels for nine specialty categories by type of location." Id. at 24484. Using the same methodology as it used for the last updates provided in 1985 for FYE 1984, HCFA increased the total RCE limits for 1997 by 56.21 percent for non-metropolitan areas and metropolitan areas less than one million, and by 59.50 percent for metropolitan areas greater than one million. By increasing the limits for 1997, HCFA

acknowledged that Part A physician costs have significantly increased since 1984, an increase which the Medicare program has not borne due to its failure to increase the RCE limits for 1985 through 1996 and, in particular, for the fiscal year at issue.

The Provider points out that in HCFA Pub. 15-1 § 2182.6, HCFA interpreted the regulation to require annual update of the RCE limits. Not only did HCFA set the RCE limits for the 1982, 1983, and 1984 cost years, it also clearly indicates in its manual that the last published RCE limits prior to the year at issue, i.e., the 1984 RCE limits, apply only to providers' cost reporting periods beginning in 1984. HCFA Pub. 15-1 § 2182.6F, which sets forth the RCE limit tables and is entitled "Estimates of FTE Annual Net Compensation Levels for 1983 and 1984," provides: "[t]he following compensation limits apply in the years indicated." (emphasis added). The only years indicated in the table are fiscal years commencing in 1983 and 1984. The manual provision on its face does not apply to FY 1991. In addition, HCFA Pub. 15-1 § 2182.6C states, in pertinent part: "[t]he RCE limits are always applied to the hospital's entire cost reporting year, based on the calendar year in which the cost reporting year begins."

These manual provisions are indicative of HCFA's interpretation of the regulation. Referring to HCFA, the United States Court of Appeals for the Seventh Circuit stated:

> [a]s the Administration is an arm of HCFA, the [Provider Reimbursement] Manual is best viewed as an administrative interpretation of regulations and corresponding statutes, and as such it is entitled to considerable deference as a general matter.

Davies County Hospital v. Bowen, 811 F.2d 338 (7th Cir. 1987). See also Shalala v. Guernsey Memorial Hospital, 115 S.Ct. 1232 (1995).

Finally, the Provider notes that three internal HCFA memoranda[4] substantiate HCFA's repeatedly expressed interpretation of its regulation as requiring annual updates.

The Provider asserts that HCFA's failure to update the RCE limits violates the Congressional mandate of the enabling statute that the reasonable costs services be reimbursed. While it is true that Congress has mandated that HCFA may not recognize as "reasonable" those Part A provider costs that exceed the RCE limits, this does not mean that any limit will automatically suffice just because it has been set by HCFA. The RCE limit must be valid and reasonable. The application of median data from 1984 to cost reporting periods as much as 13 years later is not reasonable. Any conjecture that no upward revisions were necessary to assure reasonable compensation after 1984 is completely refuted by the following:

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[4] See Provider Exhibit 19 a, b and c.

1. Information compiled by the American Medical Association ("AMA") clearly demonstrates that a rapid escalation of physicians' salaries across specialties and locations occurred during the latter half of the 1980s and early 1990s.[5] For example, in 1983, the mean physician net income (in thousands of dollars) of all physicians was 104.1. This amount increased to 164.4 in 1990. It is simply inconceivable that HCFA not be required to update the RCE limits after 1984 in order to ensure that a provider is reasonably reimbursed for Part A physician costs in the face of more than a 50 percent increase in physician net income.

2. HCFA has updated Part B physician screens available for Part B payments to physicians every year since 1983, except for 1985. These fee screens are based on the Medical Economic Index which is both readily available and used by HCFA. See 51 Fed. Reg. 42007 (November 20, 1986). An update of Part B physician compensation without a concomitant update of Part A physician compensation is, per se, proof of unreasonableness.

3. HCFA itself established the particular RCE methodology that was to be used to update the RCE limits - a methodology that requires updating the RCE limits with a corresponding Consumer Price Index ("CPI") increase. HCFA's stated rationale for implementing this particular methodology was that in its view, the CPI is the best estimate of the increases in physician income and should thus be accounted for in setting the RCE limits. 48 Fed. Reg. 8901, 8923 (March 2, 1983).[6] The CPI increased from 1984 through 1991. For example, the CPI for all urban consumers for all items in 1980, was 82.4. In 1985, it increased to 107.6. In 1991, the CPI soared to 136.2.[7]

4. HCFA finally increased the RCE limits for 1997, acknowledging a greater than 50 percent increase in HBP compensation costs between 1984 and 1997. 62 Fed. Reg. 24483, 24484 (May 5, 1997).[8]

HCFA thus had annual economic data relating to physician compensation increases and physician fee increases which it used to increase Part B physician compensation screens but failed to utilize them to update the Part A RCE limits. It is indefensible for HCFA to have failed to take these increases into account and to have not updated the RCE limits from 1984 through 1997. In its own manual, HCFA declares that the "best available data are [to be] used

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[5] See Provider Exhibit 10.

[6] See Provider Exhibit 5.

[7] See Provider Exhibit 9.

[8] See also Provider Exhibit 15 - 1984 and 1997 RCE Limit Comparison Chart.

. . . [and] [t]he RCE limit represents reasonable compensation for a full-time physician." HCFA Pub. 15-1 § 2182.6C.

The failure to update the 1984 RCE limits during a period of almost unprecedented inflation in health care costs violates Congressional intent that reimbursement of physician Part A costs be reasonable.

The dissenting opinion in a recent Board decision noted:

> Clearly, physicians' salaries were increasing during the periods in question and at least some updated RCE limit would have been necessary to assure that reimbursement to providers under the Medicare program for Part A physician services would continue to be reasonable. The Intermediary proffered no evidence to the contrary, including any evidence which could have suggested that, on a national or regional basis, Medicare providers' Part A physician costs were static during the cost reporting periods in question in this appeal.

Los Angeles County RCE Group Appeal v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 95-D12, December 8, 1994, Medicare and Medicaid Guide (CCH) ¶ 42,983, declined rev., HCFA Administrator, January 12, 1995, aff'd, Case No. CV 95-0163 L9B (SHx) (C.D. Cal. 1995) (Dec. 13, 1995) aff'd, 113 F.3d 1240 (9th Cir. 1997) ("Los Angeles County").

Furthermore, 42 C.F.R. § 413.9(c)(1) requires that payment to providers be "fair." Thus, the Secretary's failure to update the RCE limits in the face of such inflation effectively violates this regulatory requirement as well. In addition, the Provider maintains that since no valid RCE limits have been established for FY 1991, the Provider must be reimbursed for its actual Part A physicians' costs. See Abington Memorial Hospital v. Heckler, 750 F.2d 242, 224 (3rd Cir. 1984) (if a particular rule or method of reimbursement is held not to apply, the prior method of reimbursement must be utilized). Alternatively, the 1984 RCE limits should be updated for FY 1991, by using the same methodology used by HCFA to update the RCE limits for fiscal years 1983, 1984 and 1997.

The Provider contends that HCFA's failure to apply annual CPI updates violates the Administrative Procedure Act, 5 U.S.C. § 553 et seq. ("APA"), and the RCE regulation. Before HCFA may establish a legal standard, the APA requires that a notice of the proposed standard be published in the Federal Register and that interested persons be afforded the opportunity to participate by means of written comment or oral presentation. A final rule can only be adopted after consideration of public comment. 5 U.S.C. § 553. HCFA, in compliance with the APA's notice and comment rulemaking requirement, established the methodology that was to be applied in annually updating the RCE limits. This methodology outlined five steps that were to be followed in the annual update. 48 Fed. Reg. 8901, 8919. (Mar. 2, 1983).

One of these steps requires an estimation of the national average income for all physicians. This data is extrapolated from the AMA Periodic Survey of Physicians. The second step requires the projection of future year incomes to "account for changes in net income levels occurring after the period for which we have data." Id. HCFA, after considering alternative methods for doing this, determined that "we can achieve more accurate projections by using the historical relationship ... between physician incomes and the CPI, and projecting this using forecasts of the CPI for future years." Id.

HCFA complied with this methodology and set the RCE limits for the 1982, 1983 and 1984 cost years. For each year, application of this methodology resulted in an increase in the RCE limits in accordance with data on average physician specialty compensation and updated economic index data. However, without providing any notice or opportunity for comment, and without offering any explanation for departing from its prior practice of annually updating the RCE limits in compliance with the published methodology, in 1984, HCFA abruptly stopped updating the RCE limits even though inflationary changes mandated an update. It did not resume updating the limits until 1997, thirteen years later. HCFA's failure to apply its published methodology for the year at issue constitutes a change in the methodology. This change is invalid for noncompliance with the APA.

The Provider asserts that the language of the applicable regulation, on its face, clearly requires the RCE limits to be updated annually. Even if it can plausibly be argued that the language in the regulation is ambiguous and that the Secretary, in exercising her rulemaking authority, interpreted the regulation as not requiring annual updating of the limits, the regulation cannot be defended from attack. The Secretary's rulemaking process was deficient. Under the APA, the public must be given notice of new rules and an opportunity to comment. HCFA misrepresented to the public its intention to annually update the RCE limits in its preambles. HCFA failed to give adequate notice of what the rule would do. It also deprived the public of a meaningful opportunity to comment on the timing of the updating process.

In Morton v. Ruiz, 415 U.S. 199, 235 (1974), the Supreme Court noted that an agency must comply with its own procedures. The regulation at 42 C.F.R. § 405.482(a)(2) provides as follows:

> If HCFA proposes to change the methodology by which payment limits under this section are established, HCFA will publish a notice, with opportunity for public comment, to that effect in the Federal Register. The notice would explain the proposed basis for setting limits, specify the limits that would result, and state the date of implementation of the limits.

Id. (Emphasis added).

HCFA, by mandating notice and an opportunity for public comment where there is a proposed methodology change, thereby acknowledges the fact that any change in the methodology for

setting the RCE limits constitutes a substantive change requiring compliance with the APA's notice and comment provisions. HCFA's change in methodology was not preceded by prior notice and opportunity for public comment.

The Provider claims that the failure to update the RCE limits violates Congress' prohibition against cost shifting. Congress has stated that HCFA must assure through regulations that Medicare providers' costs of providing Medicare services are reimbursed and that "the necessary costs of efficiently delivering covered services to individuals covered by the insurance programs established by this title will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by such insurance programs, . . ." 42 U.S.C. § 1395x(v)(1)(a) and 42 C.F.R. § 413.5. If the Medicare program does not pay its fair share of a provider's allowable HBP costs for Medicare patients, these Medicare costs will be borne by individuals not so covered. This violates the cost-shifting prohibition.

The Provider notes that the Board has consistently ruled that the regulations do not require that the RCE limits be updated annually. Los Angeles County, supra; Pomerado Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 96-D19, March 13, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,071, declined rev. HCFA Administrator, May 1, 1996; Pomerado Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 96-D20, March 13, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,072, declined rev. HCFA Administrator, May 1, 1996; Palomar Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 96-D21, March 13, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,073, declined rev. HCFA Administrator, May 1, 1996; and Rush-Presbyterian-St. Lukes Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Illinois, PRRB Dec. No. 97-D22, January 15, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,037, declined rev. HCFA Administrator, February 25, 1997, rev'd, Rush-Presbyterian-St. Luke's Medical Center v. Shalala, No. 97C 1726 (E.D. IL. filed Aug. 27, 1997), appeal docketed.

Although acknowledging that the Board's decisions have been upheld by the United States Court of Appeals for the 9th Circuit, the Provider indicates that the court did not give sufficient consideration to the datedness of the RCE limits or HCFA's discussion of the RCE updates promulgated in 1989, 54 Fed. Reg. 5956 (Feb. 7, 1989); and was not aware of the three intra-agency memoranda proffered by the Provider that clearly demonstrate HCFA's commitment to annually update the RCE limits.

Since HCFA has failed to publish valid RCE limits applicable to the Provider's FYE 1991, the Board should order the Intermediary to reimburse the Provider for its actual Part A HBP costs. Alternatively, the 1984 RCE limits should be updated for FY 1991 by using the same methodology used by HCFA to update the RCE limits for fiscal years 1983, 1984 and 1997.

INTERMEDIARY'S CONTENTIONS:

The Intermediary notes that in compliance with the statute, 42 U.S.C. § 1395xx(a)(2)(B), HCFA first published RCE limits in 1983. 48 Fed. Reg. 8901 (March 2, 1983). Subsequently the RCE limits were updated in 1985. 50 Fed. Reg. 7123 (February 20, 1985). The Intermediary indicates that it used the existing regulations contained in 42 C.F.R. § 405.480(c) and 42 C.F.R. § 405.482 to calculate the Provider's reimbursement for physician compensation for FYE 1991.

The Intermediary refers to the same decisions cited by the Provider, in which the Board ruled that the language of the regulations does not require annual updates and that the intermediaries have properly applied the existing regulations. The Intermediary in particular notes that the 9th Circuit Court of Appeals has affirmed the Board's decision in Los Angeles County, supra. Since HCFA has chosen not to revise the RCE limits, the already published limits are applicable and remain in effect for FYE 1991.

The Intermediary's adjustments, which applied the 1984 RCE limits to the Provider's FYE 1991 costs, are in accordance with the existing regulations and should be affirmed in this appeal.

CITATION OF LAWS, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Laws:

5 U.S.C. § 553 et seq.	-	Administrative Procedure Act
42 U.S.C. § 1395x(v)(1)(A)	-	Reasonable Cost
42 U.S.C. § 1395xx et seq.	-	Payment of Provider-Based Physicians and Payment under Certain Percentage Arrangements

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

§ 405.480 et seq.	-	Payment for Services of Physicians to Providers: General Rules
§ 405.482 et seq.	-	Limits on Compensation for Services of Physicians in Providers
§§ 405.1835-.1841	-	Board Jurisdiction

§ 413.5 - Cost Reimbursement: General

§ 413.9 et seq. - Cost Related to Patient Care

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

§ 2182.6C - Reasonable Compensation Equivalents (RCEs)

§ 2182.6F - Table I - Estimates of Full Time Equivalency (FTE) Annual Average Net Compensation Levels for 1983 and 1984

4. Cases:

Abington Memorial Hospital v. Heckler, 750 F.2d 242, 224 (3rd Cir. 1984).

Davies County Hospital v. Bowen, 811 F.2d 338 (7th Cir. 1987)

Good Samaritan Hospital and Health Center v. Blue Cross and Blue Shield Association/ Community Mutual Insurance Co., PRRB Dec. No.93-D30, April 1, 1993, Medicare and Medicaid Guide (CCH) ¶ 41,399, declined rev. HCFA Administrator, May 21, 1993.

Los Angeles County RCE Group Appeal v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 95-Dl2, December 8, 1994, Medicare and Medicaid Guide (CCH) ¶ 42,993, declined rev. HCFA Administrator, January 12, 1995, aff'd, County of Los Angeles v. Shalala, Case No. CV 95-0163 LGB (SHx) (C.D. Cal. 1995), aff'd, County of Los Angeles v. Secretary of Health and Human Services, 113 F.3d 1240, (9th Cir. 1997).

Morton v. Ruiz, 415 U.S. 199 (1974).

Pomerado Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 96-D21, March 13, 1996, Medicare and Medicaid Guide (CCH)
¶ 44,073, declined rev. HCFA Administrator, May 1, 1996.

Pomerado Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 96-D20, March 13, 1996, Medicare and Medicaid Guide (CCH)
¶ 44,072, declined rev. HCFA Administrator, May 1, 1996.

Palomar Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 96-D21, March 13, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,073, declined rev. HCFA Administrator., May 1, 1996.

Rush-Presbyterian-St. Lukes Medical Center v. Blue Cross and Blue Shield Association/ Blue Cross and Blue Shield of Illinois, PRRB Dec. No.97-D22, January 15, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,037, declined rev. HCFA Administrator, February 25, 1997, rev'd. Rush-Presbyterian-St. Luke's Medical Center v. Shalala, No. 97C 1726 (E.D. IL. filed Aug. 27, 1997).

Shalala v. Guernsey Memorial Hospital, 115 S.Ct. 1232 (1995).

5. Other:

47 Fed. Reg. 43577 (October 1, 1982).

48 Fed. Reg. 8901 (March 2, 1983).

50 Fed. Reg. 7123 (February 20, 1985).

51 Fed. Reg. 42007 (November 20, 1986).

54 Fed. Reg. 5946 (February 7, 1989).

62 Fed. Reg. 24483 (May 5, 1997).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

The Board finds that the Intermediary applied RCE limits published in the Federal Register on February 20, 1985, and effective with cost reporting periods beginning on or after January 1, 1984, to the Part A physicians' compensation paid the Provider for its FYE June 30, 1991. Additionally, the Board acknowledges the Provider's fundamental argument that this application was improper because the RCE limits were obsolete and not applicable to the subject cost reporting period, i.e., because HCFA failed to update the limits on an annual basis as required by the regulation.

The principle and scope of the enabling regulation, 42 C.F.R. § 405.482(a)(1), require HCFA to establish RCE limits on the amount of compensation paid to physicians by providers, and that such limits "be applied to a provider's costs incurred in compensating physician for service to the provider. . ." Id. (emphasis added). However, contrary to the Provider's

contentions, the Board finds that this regulation does not mandate that the RCE limits be updated annually or on any other stipulated interval.

The Board acknowledges that the Provider presented evidence of data from the AMA,[9] as well as increases in CPI,[10] which clearly indicate increases in net physician income throughout the period beginning 1984 through the fiscal year in contention. The Board also notes the considerable increase in the RCE limits, when HCFA did update them in 1997. 62 Fed. Reg. 24483, 24484.[11] While the Board finds this argument persuasive in demonstrating that the subject RCE limits may have been lower than actual market conditions would indicate, the Board is bound by the governing law and regulation.

The Board continues to find, as it has in the previous cases cited by the Provider, that the application of the 1984 RCE limits to subsequent period physician costs, until updated in 1997, was proper.

DECISION AND ORDER:

The Intermediary's application of the 1984 RCE limits to the Provider's FYE 1991 HBP costs was proper. The Intermediary's adjustments are affirmed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.

Date of Decision: November 16, 1998

FOR THE BOARD:

Irvin W. Kues
Chairman

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[9] Provider Exhibit 10.

[10] Provider Exhibit 9.

[11] See Provider Exhibit 15.