PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON - THE - RECORD
99-D47

PROVIDER -
Brookwood Medical Center
Homewood, Alabama

Provider No. 01-0139

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association
Blue Cross and Blue Shield of Alabama

DATE OF HEARING-
February 11, 1999

Cost Reporting Period Ended -
December 31, 1992

CASE NO. 95-0931

INDEX

ISSUE:

Was the Provider's request for an exception to its TEFRA target rate proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Brookwood Medical Center (Provider) is a general, acute-care hospital located in Homewood, Alabama. During the cost reporting period at issue, the Provider was affiliated with American Medical International, Inc. (AMI). During a subsequent cost reporting period, the Provider was acquired by Tenet Healthcare Corporation, which is pursuing this appeal.

The Provider has a subprovider psychiatric unit based within its facility, which is subject to the ceiling on rate of hospital cost increases promulgated under the authority of 42 C.F.R. § 413.40. These cost limits are also known as the TEFRA target rate limits.

By letter dated August 15, 1994, Blue Cross and Blue Shield of Alabama ("Intermediary") sent the Provider its Notice of Program Reimbursement ("NPR") for the fiscal year ended 12/31/92. The Provider received the NPR on August 24, 1994. By letter dated February 13, 1995, the Provider requested a hearing before the Provider Reimbursement Review Board with respect to several Intermediary adjustments.

The Provider submitted to its Intermediary an application for adjustment to the TEFRA target rate. The cover letter transmitting the application was dated February 3, 1995. The Federal Express commercial carrier service shipping label, indicated that the application was placed with the courier on February 13, 1995, for next day delivery. The application was received by the Intermediary on February 14, 1995, which is the 183rd day after the August 15, 1994 Notice of Program Reimbursement ("NPR"). 42 U.S.C. §416(j) states that “if a period of limitations ends on a Saturday, Sunday or legal holiday, that period of limitations is deemed to end on the next regular business day.” The 180th day after the date on the NPR was February 11, 1995, which was a Saturday. Thus, the significant date for purposes of this case is Monday, February 13, 1995. The issue in this case is whether the Provider timely filed by mail its TEFRA exception request on February 13, 1995 or whether the Intermediary must have had that request in its possession on February 13, 1995.

The Intermediary determined that the Provider's application for an adjustment to the TEFRA target rate was untimely made and it was returned without either a review or a decision. The Provider claims that it timely made its application to the Intermediary as authorized under the provisions in 42 C.F.R. § 413.40(e).

The Provider disagreed with the Intermediary's determination and filed an appeal with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R.§§ .1835-.1841 and has met the jurisdictional requirements of those regulations. The Medicare reimbursement in contention is approximately $ 483,898.

The Provider was represented by Jon P. Neustadter, Esq. of Hooper, Lundy & Bookman, Inc.. The Intermediary was represented by Bernard M. Talbert, Esq.of the Blue Cross and Blue Shield Association, Chicago.

PROVIDER'S CONTENTIONS:

The Provider argues that mailing a TEFRA adjustment request on the 180th day after the date of the NPR fully complies with the regulation in effect. The Provider points out that in February, 1995 the relevant Medicare regulation stated:

> (e) Hospital requests regarding adjustments to the payment allowed under the rate-of-increase ceiling--(1) Timing of application: A hospital may request an adjustment to the rate-of-increase ceiling imposed under this section. The hospital's request to its fiscal intermediary may be made upon receipt of the intermediary's notice of amount of program reimbursement (NPR) and must be made no later than 180 days after the date on the intermediary's NPR for the cost reporting period for which the hospital requests an adjustment.

42 C.F.R. § 413.40(e)(1) 1993

Neither HCFA nor the Intermediary provided any further formal or informal guidance regarding the timing of a TEFRA adjustment request. Prior to and including the month of February 1995, neither HCFA nor the Intermediary even hinted, directly or indirectly, in the Federal Register, an Intermediary letter, a program memorandum, or a letter to the Provider itself, that a TEFRA adjustment must be received by an intermediary on or before the 180th day after the date of the NPR. If the regulation truly required an intermediary to receive a request by the 180th day, then HCFA or the intermediary had an obligation to clearly inform the provider community.

The Provider points out that the word "made" in Black's Law Dictionary means "filed" Black's 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 had regarding when a document or request is "made" is that a request is made or filed upon mailing.

Furthermore, HCFA has interpreted the word "made" to mean date of mailing in at least one context. HCFA has interpreted the word "made" in the reopening regulation to mean that mailing a reopening request on the due date is timely. Therefore, under the applicable regulation, it is reasonable for the Provider to believe that a TEFRA request mailed on the 180th day would also be considered timely. HCFA never provided specific guidance to overcome the natural meaning of “making” a request which is date of mailing.

The non-legal dictionary definition of “to make” is to “cause to happen.” Webster’s 3d Int:1 Unabridged Dictionary. Mailing in a request certainly causes it to happen.

The Provider contends that a rare and potentially harsh date of receipt rule would certainly need to be clearly set forth and it was not. A date of receipt requirement is very rare in the Medicare program and can produce very harsh results. A date of receipt requirement is rare in the Medicare program, in part, because the regulations governing Board procedure specifically define "date of filing" and "date of submission" of materials to mean date of mailing. 42 C.F.R. §405.1801 (a). Such a rule makes sense because it is easier for a provider to make certain that a document is mailed on a particular day (and properly date stamped) than to make certain that a document is received on a particular day by an intermediary that can be hundreds or thousands of miles from the provider.

A date of mailing rule allows a provider to maximize the time in which to comply with the deadline. This time is especially important when deadlines run from the date of a letter from the Program, because a provider immediately loses a few days, depending upon how long it takes to receive the letter from the Program. Although inconsistent with the general appeal rules, the TEFRA adjustment deadline runs from the date of the NPR, no matter when received by a provider.

The Provider points out that in a recent case a provider mailed an End Stage Renal Disease (“ESRD”) composite rate exception request with the United State Postal Services’ Express Mail, guaranteed for delivery on the 180th day, Pocatello Regional Medical Center, Pocatello, Ida. v. Blue Cross and Blue Shield Assn. Blue Cross and Blue Shield of Orgeon, PRRB Dec. No. 96-D-42, July 11, 1996, Medicare and Medical Guide (“CCH”) § 44.525. Rev’d HCFA Adm. Dec. September 6, 1996 Medicare And Medical Guide (“CCH”) § 44.587. The package was delivered a day late by the postal service and the HCFA Administrator still strictly enforced what it held to be a date of receipt rule. Because a guaranteed delivery service failed the provider in the Pocatello case, the provider was unable to have its intermediary or HCFA reach the merits of its exception request.

The Provider points out that the regulations do not clearly state that a TEFRA adjustment request must be received by the intermediary within 180 days. The Provider argues that the opposite is connoted; a provider must have made the request to the intermediary within 180 days. A provider makes a request to the program by mailing that request to the intermediary by the deadline. A date of mailing rule is more common in Medicare and governs the most important and typical filings by a provider; the cost report and the appeal from determinations made about that cost report.

The Provider argues that HCFA knew how to use the clear term "received" when it meant that date of receipt controls timeliness. However, the fact that HCFA did not use the term "receive" as it did in other provisions is a strong indication that date of receipt was not required by the TEFRA regulation in existence at the time of the Provider's adjustment. See

Taracorp, Inc, v. N.L. Indus. Inc, 73 F.3d 738, 744 (7th Cir. 1996) (“when interpreting statutes to determine the intent of legislatures: we assume that the same words (sic) have the same meaning in a given act and that the choice of substantially different words to address analogous issues signifies a different approach,”) United States v. Barial, 31 F. 3d 216, 218 (4th Cir, 1994) (“where Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect”). Just as different words have different meanings, the same words have the same meaning.

The Provider contends that since the date of receipt requirement was never communicated in any form to the Provider and that a date of mailing rule is more typical in the Medicare program, the Board should liberally construe the procedural rule in favor of reaching the merits and hold that date of mailing is fully consistent with the applicable regulations at the time the Provider mailed in its TEFRA adjustment request. The Provider requests that the Board liberally construe the word "made" in the procedural TEFRA regulation to mean that date of mailing is acceptable. Such a construction would certainly conform to the general concept that the law favors reaching the merits, and it would also specifically conform to Congress' intention that providers obtain justifiable relief from the TEFRA limits.

The Provider argues that there is no support in the statutory or regulatory background of the TEFRA limits for a strict date of receipt rule for provider requests for a TEFRA adjustment. Congress made it clear that the Secretary of the Department of Health and Human Services :

> shall provide for an exemption from, or an exception and adjustment to, the method under this subsection for determining the amount of payment to a hospital where events beyond the hospital's control or extraordinary circumstances, including changes in the case mix of such hospital, create a distortion in the increase in costs for a cost reporting period (including any distortion in the costs for the base period against which such increases is measured).

42 U.S.C.§ 1395ww(b)(4)(A)(1)

The only relevant deadline set forth by Congress in the TEFRA statute is that the Secretary "shall announce a decision on any request for an exemption, exception, or adjustment under this paragraph not later than 180 days after receiving a completed application from the intermediary for such exemption, exception. or adjustment..... 42 U.S.C.§ 1395ww (b)(4)(A)(I). The Provider points out that Congress was more concerned with providers expeditiously receiving justified relief from the TEFRA limits, rather than with imposing technical procedural barriers to providers.

The Provider argues that it is particularly unseemly for an agency which routinely defies the Congressional mandate to respond within 180 days, thereby greatly prejudicing providers

with delays in obtaining adjustments, to at the same time reject the Provider's adjustment request because its request was mailed to the intermediary on the 180th day rather than received by the 180th day.

The Provider points out that the TEFRA limit regulation set forth at 42 C.F.R.§ 413.40 was promulgated pursuant to 42 U.S.C.§ 1395ww(b) of the Medicare statute. The regulation, setting forth the timeliness rule at issue in this case, was promulgated as an interim final rule in 47 Fed. Reg. 43,282 (Sept. 30, 1982). Nowhere in the preamble to the September 30, 1982 interim final rule did HCFA elaborate upon what it meant by the regulation, except to state that the "hospital must make the request for an exemption or exception to its fiscal intermediary no later than 180 days from the date on the intermediary's notice of program reimbursement."

The Provider points out that not until June 2, 1995, in a proposed regulation, did HCFA actually inform anyone that to have "made" an adjustment is to have it received at the intermediary. In the final regulation adopted pursuant to the June 2, 1995 proposal, HCFA altered the TEFRA timing regulation to read:

> A hospital may request an adjustment to the rate-of-increase ceiling imposed under this section. The hospital's request must be received by the hospital's fiscal intermediary no later than 180 days after the date on the intermediary's initial notice of amount of program reimbursement (NPR) for the cost reporting period for which the hospital requests an adjustment.

60 Fed. Reg. § 45,778, § 45949-50 (Sept. 1, 1995)

The Provider argues that if the pre-1995 version of the regulation were clear or if HCFA had set forth anywhere its so-called "consistent" interpretation of the regulation to mean date of receipt controlled timeliness, intermediaries across the country would not have been inconsistently applying the pre - 1995 version of the regulation. In adopting the TEFRA statute and adopting the regulations at issue in this case, neither Congress nor HCFA expressed an intent to require providers to make certain that their intermediary received a TEFRA adjustment request by the 180th day. Instead Congress focused on providers' substantive rights and imposed only one deadline: 180 days for HCFA to respond to an intermediary recommendation. Further, HCFA promulgated a regulation that is ambiguous at best without even hinting, in three different preambles during 1982 and 1983, that date of receipt was the requirement.

The Provider contends that the September 1, 1995 change in the TEFRA adjustment timing regulation was not a clarification of previously existing policy, The TEFRA adjustment timing regulation was substantially amended on September 1, 1995, and the new regulation may not apply retroactively. Until the June 2, 1995 proposed change and the corresponding

September 1, 1995 final change to the TEFRA regulations, providers were not made aware of any requirement that an intermediary must receive a TEFRA adjustment request by the 180th day. Yet, in both the June 2 and September 1, 1995 preambles to the TEFRA regulatory change, HCFA asserts that “(w)e have consistently interpreted the word “made” to mean “received by the fiscal intermediary” since the original regulation was promulgated...” 60 Fed. Reg. at 29,245 and 45,840.

The Provider points out that in the 1995 preambles, HCFA did not cite even one example in which it internally or publicly interpreted the word “made” in the TEFRA regulation to mean “received by the intermediary”; HCFA did not so cite because it cannot.

The Provider argues that it can cite one example in which HCFA expressly interpreted the word “made” to mean date of mailing rather than date of receipt. The reopening regulation states that any request for reopening "must be made within 3 years of the date of the notice of the intermediary or Board decision..... 42 C.F.R.§ 405.1885(a). In a HCFA Administrator decision dated April 24, 1995, HCFA commented on the timeliness of a reopening request mailed on January 28, 1988 and received on February 1, 1988, for an NPR dated January 30, 1985. Iredell Mem'l Hosp. v. Blue Cross and Blue Shield Ass'n/Blue Cross and Blue Shield of North Carolina, HCFA Admin. Dec. April 24, 1995 Medicare and Medicaid Guide ("CCH") § 43,263. The reopening request in Iredell was mailed 3 years after the date on the NPR but was received later than three years by the intermediary. Even though the reopening regulation requires a request to be “made” within three years, just like the TEFRA regulation, the HCFA Administrator noted that "the Provider's request to reopen was timely..... Id.at 43,263.

Therefore, the Provider argues that there is no support for HCFA's assertion in changing the TEFRA regulation that the word "made" has always been interpreted to mean received. This is true in both the TEFRA regulatory scheme and others, as demonstrated by the Iredell HCFA Administrator decision. HCFA cannot substantially alter a regulation and assert, without any evidence (and with evidence to the contrary), that the change is merely a clarification of consistent policy. HCFA's attempt in 1995 to revise history in a preamble, by converting a clearly ambiguous regulation that was not clarified through interpretive materials such as the Provider Reimbursement Manual, into a regulation that has always meant "date of receipt" cannot be given any weight whatsoever by the Board.

The Provider argues that if there were a date of receipt interpretive policy, then it was completely unknown to the provider community and is therefore void and without effect. To the extent that the Board is inclined to believe that HCFA has consistently interpreted the word "made" in the TEFRA regulation to mean "received," that interpretation is void as unpublished. 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 the agency's requirement as a guide for their conduct," D&W Foods Ctrs,. Inc, v. Block, 786 F.2d 751, 757 (6th Cir. 1986). A rule "required to be published which is not published is void, and may

not be enforced against a non-complying party," 5 U.S.C. § 552(a)(1).

The Provider points out that the relevant federal statute requiring publication of certain interpretive rules reads as follows:

> Each agency shall make available to the public information as follows:
>
> (1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;....

5 U.S.C. § 552 (a)(1)(D).

The Provider further contends that an interpretation is not of general applicability if " (1) only a clarification or explanation of existing laws is expressed, and (2) the interpretation results in no significant impact on any segment of the public" D&W Foods Ctrs., 786 F .2d at 757; Anderson v. Butz, 550 F.2d 459, 463 (9th Cir. 1977). Importantly, the label attached to an interpretation by the agency is not controlling. Anderson, 550 F.2d at 463.

The Provider argues that even if the Board believes that HCFA had previously expressed an interpretation of the word "made" in the TEFRA regulation, that interpretation, if existent, certainly results in a significant impact on the provider community. A date of receipt rule, is more difficult for providers and much less common. Further, violation of the rule adversely impacts a providers ability to have the government reach the merits of an adjustment request.

The Provider contends that because an interpretation of the TEFRA regulation as requiring receipt within 180 days significantly impacts the provider community, the interpretation was of general applicability and needed to be timely published. 5 U.S.C. § 552(a)(1)(D). The interpretation that "made" really means "received" was not published until June 2, 1995, and therefore cannot adversely impact a provider prior to June 2, 1995.

The Provider contends that the September 1, 1995 change to the TEFRA rule cannot apply retroactively. The Provider points out that it has shown that the change from “made” to “received” effectuated by the September 1, 1995 final rule, was substantive and not a clarification of any prior, consistent interpretation. The new date of receipt rule is substantive because it significantly impacts the provider community’s ability to have the government reach the merits of its TEFRA adjustment request and provides for a rare rule in the Medicare program. The new date of receipt rule is not based on any previously stated interpretation of the word “made.” HCFA has interpreted "made" to mean date of mailing in the reopening context.

The Provider points out that the law generally disfavors retroactive application of rules because the date of receipt rule is not simply a restatement of a prior interpretation of the regulation, it may not apply retroactively. The Provider points out that the Pocatello HCFA Administrator Decision does not support the application of a date of receipt rule in the TEFRA context. In Pocatello the HCFA Administrator, in reversing the Board, held that an ESRD exception request must be received by the due date. However, there are a variety of facts that greatly distinguish the ESRD regulations and manual provisions from the TEFRA regulation.

First, there were ESRD manual provisions that appeared to indicate that date of receipt controlled timeliness. No manual provisions suggested a date of receipt timeliness rule for a TEFRA adjustment request during 1994 or 1995. Second, an Intermediary Program Memorandum ("IPM") clearly stated that an intermediary must receive an ESRD exception request by the 180th day. No such similar guidance was provided in the TEFRA adjustment context. Third, when the intermediary notified Pocatello of it's ESRD composite rate, its notice expressly stated that any exception request must be received no later than a certain date. No such specific notice was provided to the Provider about its TEFRA adjustment request.

The Provider points out that the HCFA Administrator in Pocatello was able to rely upon published agency interpretations of the ESRD regulation in order to support its view that date of receipt controlled. In fact in its concluding paragraph, the HCFA Administrator seems to emphasize that the Provider had actual notice of this date policy. The same cannot be said in the TEFRA context. There were no published interpretations of the TEFRA regulation or actual notices to providers that the HCFA Administrator can use to support application of a date of receipt policy in the TEFRA context.

The Provider points out that the Board has recently held that a TEFRA adjustment request is timely so long as it is mailed on or before the 180th day after the NPR is issued. Deaconess Medical Ctr. v. Mutual of Omaha Ins. Co., PRRB Dec. No. 98-D43 (April 22, 1998). The Provider therefore contends that consistent with Deaconess and Pocatello the mailing of a TEFRA adjustment on the 180th day is timely under the TEFRA regulation.

The Provider contends that the government's inconsistent application and enforcement of a date of receipt rule is arbitrary and capricious. Not only is a date of receipt rule void for being unpublished and invalidity being applied retroactively to the Provider, but it has been inconsistently enforced and therefore is void as arbitrary and capricious. If there was a date of receipt rule for TEFRA adjustment requests prior to the 1995 regulatory change, it certainly has not been fairly or consistently enforced by intermediaries.

The Provider contends that its TEFRA exception request is timely under the Boards appeal rules. The Provider argues that even if the TEFRA exception request must be received by the 180th day, the 180 day deadline should not even begin to run until the Provider has received

the NPR. It is arbitrary and inconsistent for two appeals from its NPR, both of which were mailed on February 13, 1995, to be treated differently with respect to timeliness.

The Provider argues that its appeal from its NPR to the PRRB, mailed on February 13, 1995, is timely for two reasons. First, it was mailed on the 180th day after the date of the NPR, (42 C.F.R.§ 405.1801(a)). Furthermore, the Boards appeal rules expressly allow a provider an additional five days to appeal when an NPR is mailed, even though HCFA's regulations state that a request for a board hearing "must be filed in writing with the Board within 180 days of the date the notice of the intermediary's determination was mailed to the provider....." HCFA Pub. 15-1 §2920.A2, 2926.D. Thus, according to the HCFA manual the Provider had until February 16, 1995 to mail its request for a Board hearing, However, its request for relief from the TEFRA limit, the effect of which is only set forth in the NPR, is considered untimely by HCFA when mailed on February 13, 1995 and received on February 14, 1995.

The Provider asserts that the TEFRA exception request is the functional equivalent of a Board appeal, except that HCFA has created the intermediate step of appealing the effect of the TEFRA limit to the Intermediary. The Provider argues that Congress made it clear in the TEFRA statute that providers are entitled to seek exceptions to the TEFRA limit, it did not specify details about the exception process. Rather Congress likely anticipated that providers would seek relief from the Board under the Board's appeal process. Congress specified that the deadline for an appeal to the Board should not run until the provider has notice of the intermediary's determination. 42 U.S.C.§ 1395oo(a). Therefore, for an appeal from an NPR, both Congress and HCFA have indicated that the deadline appropriately runs from the date of the receipt of notice on the NPR. There is no rational basis for having a different timeliness standard for appealing the effect of the TEFRA limit, which is established within the very same NPR.

The Provider points out that HCFA Pub. 15-1 is an interpretation of HCFA's own regulations, which expressly interprets 42 C.F.R.§ 415.1841(a) to mean that the deadline runs from the date of receipt of the NPR. This interpretation has been set forth in the HCFA Manual even though the regulation clearly states that the deadline for appealing runs from the date of the NPR. The only indication of HCFA's interpretation of the timeliness standard is not that the Provider's TEFRA exception request in this case would have been untimely, but rather that the Provider's TEFRA exception request was timely under its very own interpretative materials as set forth in the HCFA Manual.

The Provider points out that HCFA has a duty to act with reasonable consistency. American Fed'n of Gov't Employees. AFL-CIO, Local 3090 v. Federal Labor Relations Auth. , 777 F.2d 751, 760 (D.C. Cir. 1985) (Scalia, J. concurring) ("It is the agency's responsibility to behave in a rational (and hence reasonably consistent) fashion...").Because the wording of the Board appeal regulation, and the TEFRA exception regulation, with respect to when the deadline begins to run, is substantially identical, and both actions involve the same notice, the Provider asserts that HCFA in this case, in denying the Provider's TEFRA exception request

as untimely, is acting in an inconsistent, irrational, and therefore illegal manner.

The Provider contends that both HCFA and the Intermediary's deadlines for responding to a Provider's TEFRA exception request run from the date they receive the request. 42 C.F.R. §413.40(e)(2),(3). Having the deadline run from the date of receipt makes perfect sense, because it maximizes HCFA and the intermediary's time to review the material. Likewise, it makes perfect sense to have the deadline for appealing the effect of the TEFRA limit, as set forth in the NPR, run from the date of receipt of the NPR, so that a provider too may maximize its time to review the NPR, put together its documentation, and calculate bases for an exception or adjustment.

The Provider asserts that the Board should exercise discretion and waive strict compliance with the procedural timeliness regulation, to the extent that the regulation in any way would prevent the Board from reaching the merits of the Provider's TEFRA exception request. The regulatory deadline is merely a procedural rule, and is not set forth in the Medicare statute. The Board has authority to waive strict compliance with HCFA's procedural rule to promote the ends of justice.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Provider's application for adjustment to the TEFRA target rate for its subprovider psychiatric unit has been untimely filed under the provision in 42 C.F.R. §413.40(e). This regulation states in part:

> Hospital requests regarding applicability of the rate-of-increase ceiling (1) Timing of application. A hospital may request an exemption from, or adjustment to, the rate of cost increase ceiling imposed under this section. The hospital's request must be made to its fiscal intermediary no later than 180 days after the date on the intermediary's notice of amount of program reimbursement.

Id.

42 U.S.C. § 1395ww(b)(4)(A) of the Act, provides the Secretary of Health and Human Services ("the Secretary") the authority to grant exceptions to the TEFRA target rate. However, this statute does not specify requirements with regard to timely filing of an adjustment application. Accordingly, the Intermediary believes it is appropriate to examine 42 U.S.C. § 1395oo for guidance on filing timeliness. That section addresses timely filing of a hearing request with the Board. Such a request with the Board, like an adjustment application involves a provider seeking reimbursement in addition to that set forth in its notice of program reimbursement. For that reason the Intermediary contends that it is appropriate

that HCFA's policy regarding timely filing of an adjustment application should be consistent with § 1395oo.

The Intermediary points out that § 1395oo (a)(3) of the act states that if a provider files a request for a hearing within 180 days after the notice of the intermediary's final determination, the provider can obtain a hearing with the Board. Black's Law Dictionary defines the term file as follows:

> To deposit in the custody or among the records of a court. To deliver an instrument or other paper to the proper office or official for the purpose of commencing an action or other proceeding...

The Intermediary points out that in this case the proper office for custody of the TEFRA target rate adjustment application would be the intermediary. The action that would commence is a review and decision on the application.

The Intermediary points out that the actual wording in the relevant regulation states that the application must be "made to the intermediary." The Intermediary believes the terminology "received by the Intermediary" is a permissible interpretation of the regulatory wording, and is a reasonable application of HCFA's policy that only the actual date of receipt by the intermediary constitutes custody. Merely placing the TEFRA target rate application within the custody of either the United States Postal Service or a commercial courier for subsequent delivery does not constitute a filing with the intermediary. Accordingly, HCFA's policy of requiring use of the date received by the intermediary to determine timely filing of a TEFRA target rate adjustment application is a reasonable interpretation and application of its regulation at 42 C.F.R.§ 413.40(e)(1).

The Intermediary argues that 42 C.F.R.§ 413.40(e)(1) has been reworded to eliminate further confusion on the TEFRA target rate adjustment application filing requirements. In the September 1, 1995 Federal Register HCFA makes the following comments:

> We proposed to revise 413.40(e)(1) to clarify that a request for a payment adjustment must be received by a hospital's fiscal intermediary no later than 180 days from the date of the notice of program reimbursement(NPR). Currently, this section states that a request must be "made" rather than "received."" We have consistently interpreted the word "made" to mean "received by the fiscal intermediary" since the original regulation was promulgated (47 FR 43282, September 30, 1982). However, use of the word "made" in 413.40 (e)(1) has resulted in varying interpretations of the timely filing requirement by hospitals and their intermediaries. In the interest of a uniform and consistent

> application of our policy, we proposed to clarify the regulation by substituting "received by the hospital's fiscal intermediary" for "made" in 413.40(e)(1).

Id.

The Intermediary explains that the wording in the 10-1-95 edition of the Code of Federal Regulations is as follows:

> (e) Hospital requests regarding adjustments to the payment allowed under the rate-of-increase ceiling.
>
> (1) Timing of application. A hospital may request an adjustment to the rate-of increase ceiling imposed under this section. The hospital's request must be received by the intermediary no later than 180 days after the date on the intermediary's initial notice of amount of program reimbursement (NPR) for the cost reporting period for which the hospital request an adjustment.

42 C.F.R. § 413.40 (e)(1).

The Intermediary contends that it properly refused to accept the provider's TEFRA target rate adjustment application as untimely filed. Accordingly, the Provider is not entitled to a review or decision on the application.

CITATIONS OF LAW,REGULATIONS, AND PROGRAM INSTRUCTIONS:

1. Law - 5 U.S.C.

§552(a)(1) et seq.	-	Public Information, agency rules opinions, orders, records and proceedings

Law - 42 U.S.C.:

§416(j)	-	Periods of limitation ending in nonwork days
§1395oo et seq.	-	Provider Reimbursement Review Board
§1395ww et seq.	-	Payment to Hospitals for Inpatient Hospital Services

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

§405.1801 et seq.	-	Introduction
§405.1885 et seq.	-	Reopening a determination or decision
§405.1841 et seq.	-	Time place form, and content of request for Board hearing
§413.40 et seq.	-	Ceiling on rate of hospital cost increases

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

§2920.A2	-	Right to Board hearing
§2926D	-	Expedited Judicial Review process- time limits

4. Cases:

Taracorp, Inc. v. N.L. Indus. Inc., 73F.3d 738 (7th Cir. 1996).

United States v. Barial, 31F.3d. 216 (4th Cir. 1994).

D&W Food Ctrs. Inc. v. Block, 786 F2d. 751 (6th Cir 1986).

Iredell Mem'l Hosp. v. Blue Cross and Blue Shield Assn/Blue Cross and Blue Shield of North Carolina, HCFA Admin. Dec. April 24, 1995 Medicare and Medicaid Guide ("CCH") §43,263.

Anderson v. Butz, 550 F.2d 459 (9th Cir. 1977).

Deaconess Medical Ctr. v. Mutual of Omaha Ins. Co., PRRB Dec. No 98-D43, April 22, 1998.

American Fed'n of Gov't Employees AFL-CIO, Local 3090 v. Federal Labor Relations Auth., 777 F.2d 751, (D.C. Cir. 1985) (Scalia, J. concurring).

Pocatello Regional Medical Center, Pocatello, Ida. v. Blue Cross and Blue Shield Assn/Blue Cross and Blue Shield of Orgeon, PRRB Dec. No. 96-D42, July 11, 1996 Medicare and Medicaid Guide ("CCH") § 44,525 Rev'd HCFA Admin Dec. September 6, 1996 Medicare and Medicaid Guide ("CCH") § 44,587.

5. Other:

60 Fed. Reg. 45,778, 45,949-50 (September 1, 1995).
60 Fed. Reg. 29,245, 45 840 (June 2, 1995).
47 Fed. Reg. 43,282 (September 30, 1982).
Blacks Law Dictionary 950 (6th ed 1990).
Webster's 3d Int'l Unabridge Dictionary.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the controlling law and regulations, the facts in the case, documentary evidence, and parties' contentions, finds and concludes that the Provider did submit its TEFRA request within the 180 requirement of the regulations and is therefore entitled to a review of it's exception request.

The Board finds that the Provider "made" its request for an appeal once it placed its request with the commercial carrier. This initiated a chain of irreversible events once the request was placed in the hands of a legally recognized agent. The regulation at 42 C.F.R. §413.40 states:

> (e) A hospital may request an exemption from, or adjustment to, the rate of cost increase ceiling imposed under this section. The Hospital's request must be made to its fiscal intermediary no later than 180 days from the date on the intermediary's notice of program reimbursement (NPR). The intermediary notifies the hospital of the decision. The time required to review the request is considered good cause for the granting of an extension of the time limit to apply for review. . . by the Provider Reimbursement Review Board, as specified in §405.1841(b) of this chapter.

42 C.F.R. 413.40 (e)(1), (e)(4), (e)(5).

The Board concludes that the text of the regulation at 42 C.F.R. § 413.40(e) does not expressly state that a TEFRA exception request must be received by the Intermediary within 180 days from the NPR. Rather the regulation specifies that "the hospital request must be made to its fiscal intermediary no later than 180 days from the date on the intermediary's notice of program reimbursement." The Board opines that "made" means that a provider must initiate its exception request by mailing or by other delivery method, on or before the 180-day limitation period. The regulatory language is void of any reference requiring that an intermediary must actually receive the exception request prior to the 180 day deadline. The Provider sent its exception request to the Intermediary via delivery service on February 13, 1995. Which was 182 days from the date of the NPR. However, the Board finds that the 180th day , which was February 11, 1995, was a Saturday. Since the regulation at 42 U.S.C. § 416(j) states that if a period of limitations ends on a Saturday, Sunday or legal holiday, that

period of limitations is deemed to end on the next regular business day. The next regular business day was Monday February 13, 1995. Therefore based on the cited regulation the Board finds that the Provider did send its TEFRA request to the Intermediary on the 180th day as required by the Medicare regulations.

The Board also reasons that there is no way for an exception applicant to use all time allotted to it by the regulation if it must depend on an intermediary's actual receipt of an exception submission. When or how an intermediary receives or documents its receipt of an item could vary among intermediaries due to modification of internal mail control procedures. The Board concludes that a standard which employs a commercial carrier or the United States Postal Service that requires an item to be date stamped or postmarked the day it is accepted for delivery is a fair and equitable means to document the tender of TEFRA exception requests by applicants.

The Board also avers that in ruling as to whether exception requests mailed or otherwise submitted for delivery on or before the last day of the 180 day limitation period are timely, HCFA is not deprived of the time it has to perform its statutory obligation to approve or deny a request. See 42 U.S.C. §1395rr(b)(7). The Board opines that the statutory sixty day limitation period would not begin to run until an exception request is "filed." Id. With the exception of the regulations at 42 C.F.R. §405.1801(a) governing submissions to the Board, the plain meaning of the term 'filed' with respect to submitting documents to an adjudicatory body, is "received," e.g., filed with the clerk of the court. Accordingly, the Board finds its interpretation of the regulation consistent with the statute in that it does not deny HCFA the statutory time period to which it is entitled for reviewing TEFRA exception requests.

The Board finds that the Intermediary's use of the regulation at 42 C.F.R. §413.40(e)(1), (e)(4) [1995] is not relevant to the case at hand. The cost report before the Board was a calendar year ended 1992. The 1995 revision does not apply.

DECISION AND ORDER:

The Provider timely filed its TEFRA exception request. The Board remands the case to the Intermediary to review the case on its merits. The Intermediary's determination is reversed.

Board Members Participating:

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

Date of Decision: May 06, 1999

FOR THE BOARD:

Irvin W. Kues
Chairman