PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2000-D72

PROVIDER -
Anaheim Memorial Hospital
Anaheim, California

Provider No. 05-0226

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross of California

DATE OF HEARING-
May 26, 2000

Cost Reporting Periods Ended -
September 30, 1981 and 1982

CASE NOS. 93-1920 and 94-0007

ISSUE:

INDEX

Do equitable tolling principles apply as a matter of law to Provider Reimbursement Review Board (ABoard@) appeals under ' 1878 of the Social Security Act, codified at 42 U.S.C. ' 1395oo, and Board appeals under the regulations at 42 C.F.R. Subpart R?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Anaheim Memorial Hospital (AProvider@) is an acute care hospital located in Anaheim, California. Blue Cross of California (AIntermediary@) issued notices of program reimbursement (ANPRs@) for the cost years at issue on October 18, 1982, for fiscal year ended (AFYE@) 1981 and August 26, 1983, for FYE 1982. These NPRs reflected the application of the routine cost limits (ARCLs@), including the covered days of care adjustment (ACDCA@) factor, to the Provider=s reimbursement for each year. The Provider did not appeal the application of the RCLs and the CDCA factor to the Board within the 180 day period, nor did the Provider request an exception from the RCLs within the 180 day period, of the respective NPRs.

On September 10, 1993, the Intermediary issued revised NPRs for the cost years at issue. The revised NPRs reclassified the Provider=s malpractice insurance costs in accordance with HCFA Ruling 89-1. The Provider then, within 180 days of the revised NPRs, contested the validity of the CDCA factor in separate appeals to the Board. The Board considered those appeals and on April 4, 1995, found that it had jurisdiction to review the appeals, and granted expedited judicial review (AEJR@). On April 21, 1995, the Provider filed a complaint in district court, challenging the validity of the CDCA factor.

On May 22, 1995, the district court remanded the case to the Board for it to explain the basis for concluding that it had jurisdiction over the Provider=s appeals. The HCFA Administrator remanded the case to the Board on July 18, 1995. On September 21, 1995, the Board issued a decision reasserting jurisdiction.[1] In its decision, the Board found that the Intermediary issued revised NPRs to correct the RCLs to reflect the application of HCFA Ruling 89-1 and that the CDCA factor is part of the calculation that results in the RCLs. Because the RCLs were adjusted by the revised NPRs, the Provider was entitled to appeal all aspects of the RCLs, including the CDCA factor, within the 180 days of the revised NPRs.

On November 16, 1995, the HCFA Administrator vacated the Board=s decisions and dismissed the Provider=s appeals for lack of jurisdiction. See Anaheim Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, HCFA Administrator, November 16, 1995, Medicare and Medicaid Guide (CCH) & 43,949. The HCFA Administrator found that the Board lacked jurisdiction because the issue that was appealed, the validity of the CDCA factor, was not addressed in the Intermediary=s revised NPRs. Id. The Intermediary issued revised NPRs that reclassified the Provider=s malpractice insurance costs, which were calculated without regard to the RCLs, as instructed by HCFA. It was not necessary, therefore, for the Intermediary to revise the underlying computation of the CDCA factor, which is used to calculate the RCL. The HCFA Administrator found that because the Provider=s appeal rights under 42 C.F.R. ' 405.1889 were limited to matters that were reopened by the revised NPRs, the Board erred in assuming jurisdiction and granting the

[1] See Board Decisions Nos. 94-0007 and 93-1920.

Provider's request for EJR. Id.

The Provider appealed the HCFA Administrator decision to district court. The district court upheld the HCFA Administrator=s decision. See Anaheim Memorial Hospital v. Shalala, No. CV 95-365-LHM (Eex) (D.D.C. April 16, 1996), Medicare and Medicaid Guide (CCH) & 44,167. The district court reasoned that the NPRs had been reopened only on the subject of malpractice insurance costs and that the CDCA factor was not open for appeal. There had been no alteration of any component of the RCL, only a new decision on how to apply the RCL to certain reclassified costs. The Court of Appeals for the Ninth Circuit affirmed the decision of the district court with regard to scope of the reopening and its affect on the RCLs. See Anaheim Memorial Hospital v. Shalala,143 F.3d 845 (1997) Medicare and Medicaid Guide (CCH) & 45,775 (AAnaheim@). The Court of Appeals, however, noted that the Provider asserted that HCFA had intentionally concealed an error in the RCL affecting the CDCA factor and that, but for its concealment, it would have appealed the CDCA factor within the required time period. Thus, the Provider argued that it is entitled to equitable tolling of the time limit on its Board appeal, due to HCFA=s conduct. Neither the Board nor HCFA addressed the equitable tolling issue in their decisions. The Court of Appeals noted that Federal jurisdiction of Medicare reimbursement disputes are limited by 42 U.S.C. ' 1395oo, which requires there to be a final agency decision. Since the Board did not consider the equitable tolling issue, the court remanded the case to HCFA to address this portion of the Provider=s claim. On September 22, 1999, HCFA remanded the case to the Board to determine first whether equitable tolling principles apply as a matter of law to Board appeals under ' 1878 of the Social Security Act (ASSA@), codified at 42 U.S.C. 1395oo, and Board appeals under the regulations at 42 C.F.R. Subpart R. In the event that the final ruling on this matter determines that equitable tolling principles apply, the HCFA Administrator will then remand the case to the Board to decide on whether those principles are applicable under the specific facts of this case.

The Board held a record hearing on this matter on May 26, 2000. The Provider was represented by Mitchell R. Miller, Esquire. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER=S CONTENTIONS:

The Provider contends that the principles of equitable tolling apply, as a matter of law, to proceedings before the Board. The Provider indicates that case law, as set forth by the U.S. Supreme Court requires that the Board apply the principles of equitable tolling in making its decisions regarding the timeliness of appeals. In addition, the Provider asserts that the requirement for the agency to follow the principles of equitable tolling is incorporated into the regulations.

The Provider notes that in the leading case on the subject of equitable tolling, Bowen v. City of New York, 476 U.S. 467 (1986) (ABowen@), the United States Supreme Court held that where a government agency (in Bowen the Social Security Administration, at that time part of the Department of Health and Human Services) had willfully concealed from claimants a policy to deny them benefits, the statute of limitations on their rights to file a lawsuit claiming these benefits would be tolled until such time as the claimants had a reasonable opportunity to learn the facts concerning the cause of action.

> Where the Government=s secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action. Since in this case the full extent of the Government=s clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action notwithstanding the 60-day requirement. 742 F.2d, at 738 (citations omitted).

Bowen at 479-80.

The Provider asserts that the Supreme Court specifically held that such tolling applied to administrative appeals.

> At the outset, we note that by the time this lawsuit was filed, it was too late for a large number of class members to exhaust their claims, since expiration of the 60-day time limits for administrative appeals barred further access to the administrative appeals process. (Citations omitted.) For these claimants, we conclude that exhaustion is excused for the same reasons requiring tolling of the [m]embers of the class could not attack a policy they could not be aware existed, 578 F. Supp., at 1118; see Part III, supra, it would be unfair to penalize these claimants for not exhausting under these circumstances.

Bowen at 482.

It is significant to note that the agency activity complained of in Bowen was virtually the same as in this case, the denial of payments based on an illegal, unpublished internal policy. The Court=s quote from the Court of Appeal=s decision in that regard is highly instructive here:

> All of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government=s determination of ineligibility was the considered judgement of an agency faithfully executing the laws of the United States.

Bowen at 480 (emphasis added).

The Provider asserts that it permitted its administrative remedies to lapse because it believed, as it was entitled to believe, that the Government=s determination of the CDCA factor was the considered judgment of an agency faithfully executing the laws of the United States, not that of an agency which knew, and concealed, that there were substantial errors in the calculation.

The Provider notes that the Supreme Court upheld the remedy applied by the district court.

> Indeed, by ordering simply that the claims be reopened at the administrative level, the District Court showed proper respect for the administrative process. It did no more than the agency would have been called upon to do had it, instead of the District Court, been alerted to the charge that an undisclosed procedure was illegal and had improperly resolved innumerable claims.

Bowen at 485 (emphasis added).

This statement by the Supreme Court of what the agency is required to do demonstrates that the Administrator=s decision in Bradford Regional Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Washington and Alaska, PRRB Dec. No. 99-D19, March 12, 1999, Medicare and Medicaid Guide (CCH) & 80,176 (ABradford@), is clearly erroneous. The Provider contends that the Supreme Court explicitly held that the doctrine of equitable tolling applies to tolling the statute of limitations and waiving exhaustion at the administrative level, thus allowing the agency to consider the claims. That reasoning applies to the situation here, and was followed by the Ninth Circuit Court of Appeal in this case. The Court of Appeal, in its remand, ordered, that A[s]ince the Board never resolved the equitable tolling issue, we remand to the Secretary for a final decision on the merits of Anaheim=s equitable tolling claim.@ Anaheim at 853 (emphasis added).

The Provider notes that the Intermediary argues that while the Supreme Court has applied the general rule that principles of equitable tolling should apply to suits against the government, the same Ageneral rule@ should not apply to administrative actions. The Provider points out that in the seminal case of Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990) (AIrwin@), the Supreme Court held that Athe same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.@ Id. Nothing in that case indicates that this principle should not apply to administrative appeals or that some differentiation between administrative appeals and lawsuits which would compel such a reading.

The Provider notes that the Intermediary cites Bowen in support of its position, but the Provider asserts that the Supreme Court in Bowen explicitly affirmed the lower court=s holding that where claimants permit their administrative rights to expire because of what they thought was a legitimate agency decision, they are entitled to exercise those rights late by virtue of equitable tolling. The Supreme Court quoted following from the Court of Appeals= decision.

> All of the class members who permitted their administrative or judicial remedies to expire were entitled to believe that their Government=s determination of ineligibility was the considered judgement of an agency faithfully executing the laws of the United States. Though they knew of the denial or loss of benefits, they did not and could not know that those adverse decisions had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. Where the Governments= secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the

> facts concerning the cause of action. Since in this case the full extent of the Government=s clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action notwithstanding the 60-day requirement. 742 F.2d, at 738 (citations omitted).

Bowen at 479- 480 (emphasis added).

In this case, the Provider explicitly alleged to the Board that the government did not act properly, but concealed the error in the CDCA factor of the RCL until after Provider's time to appeal had expired. The Provider should be entitled to exactly the same relief as provided in Bowen.

The Provider notes that the Intermediary contends that because in an earlier Board appeal of the original NPR, the Board found no good cause for late filing, the Provider should be precluded, in this case, from seeking the same relief. The Provider states that even if one assumed that the earlier decision had some carryover effect to this appeal of the revised NPRs, the Board has yet to examine the allegations of the government=s Acomparable fault@ in concealing the CDCA error, which has been made by Provider in this appeal. Since the Board found that it had jurisdiction over the appeal by virtue of the adjustment in the revised NPRs, it had no occasion to do so. Thus, it is appropriate for the Court of Appeals to remand the matter to the Board for consideration of the equitable tolling/good cause for late filing question.

The Provider also notes that the Intermediary asserts that the Provider=s vague and unsubstantiated allegations that the Secretary deliberately concealed known defects in the CDCA factor cannot establish, as a matter of law, the inducement or trickery necessary for equitable tolling under Irwin. The Provider indicates that the administrative record (AAR@) contains specific, detailed and unrebutted evidence demonstrating that HCFA not only knew of the errors in the computation of the RCL but actively engaged in deceitful practices to cover-up and prevent public disclosure of those errors, so as to thereby deprive providers of the knowledge necessary to file appeals of the defective RCL computations.[2]

The Provider asserts that even to this day, the Secretary has never published in the Federal Register, or anywhere else, the fact that any error exists in the RCL, even though she has repeatedly paid many providers additional reimbursement by reason of such errors. The Provider claims that the Secretary carefully guarded the Adirty little secret@ of the defective RCL formula, and the Provider should not be prejudiced by such conduct.

Second, at this juncture in the case, it is not necessary that Provider prove in its contention that HCFA=s conduct was deceitful and gives rise to the application of equitable tolling. The District Court should have remanded the case to the Board for a determination on the facts and the applicability of

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[2] See Declarations of Joseph Saunders, AR 222-236, and Henry W. Zaretsky, AR 237-250, Appellant=s Supplemental Excepts of Record.

the doctrine of equitable tolling. The Provider prefers the Court of Appeals= finding, quoted by the Supreme Court, in Bowen.

> Since in this case the full extent of the Government=s clandestine policy was uncovered only in the course of this litigation, all class members may pursue this action notwithstanding the 60-day requirement.

Bowen at 480.

Finally, the Intermediary argues that because appeals of the CDCA factor were filed as early as 1980, and because the method of calculating the CDCA was published, equitable tolling does not apply. The Provider asserts that these matters are not related because the publication of regulations or filing of appeals against the general CDCA calculation says nothing with respect to HCFA=s deliberate concealment of an error in that calculation, which concealment is the basis for Provider=s claim that equitable tolling should apply. In addition, the Provider indicates that its cost report was audited in 1983. In the thirteen years since then, the Provider has remained underreimbursed. It is obvious and undeniable that the Secretary knew that the RCL computation was materially flawed. The Provider made repeated attempts to obtain the proper amount of reimbursement. It filed appeals, exception requests, lawsuits, and has pursued every legitimate avenue of appeal and review available to it. All without success, until the Intermediary actually adjusted the RCL in the revised NPR underlying this action.

The Provider has been harmed in an extraordinary way in this case. The Government knew that there was an error, and concealed that error to Provider=s detriment. The Provider is here because it has been hurt by the Secretary=s unfair and dishonest conduct of hiding the facts concerning the CDCA factor. This case is not a matter of hyper technicalities. Rather it is a matter of fundamental fairness and equity. The Secretary, and through her the United States government, should not be allowed to hide the truth and then profit by it at the expense of Provider. The Provider believes strongly that it has acted fairly and been harmed, whereas the Secretary has not.

The Provider believes it should have an opportunity to show that the government=s willful concealment of the CDCA error is a basis for finding Board jurisdiction on the basis of equitable tolling or good cause for late filing. For all the reasons stated, the Board should favorably consider the Provider='s request for equitable tolling/good cause late filing in this case.

The Provider also contends that equitable tolling also applies to cases before the Board by virtue of 42 C.F.R. ' 405.1885(d), which provides that, notwithstanding the normal three-year statute of limitations on requests to reopen, Aan intermediary determination or hearing decision, a decision of the Board, or a decision of the Secretary shall be reopened and revised at any time if it is established that such determination or decision was procured by fraud or similar fault of any party to the determination.@

Although Afraud or similar fault@ is not defined in the regulation, it is clear that it encompasses, among other things, fraud, which is defined as Athe intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to part with a legal

right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury.@ Black's Law Dictionary, Revised Fourth ed., West Publishing Co., at 788.

Indeed, since the regulation uses the terms Afraud or similar fault,@ the grounds for allowing a late reopening request must be even broader than only pure fraud.

By providing that a determination procured by fraud or other similar fault obviates the necessity for compliance with the statute of limitations, this regulation effectively incorporates the principles of equitable tolling, as set forth in Bowen into the regulations governing the filing of appeals with the Board.

In this case, the Provider contends that the intentional concealment of the error in calculating the CDCA factor caused the Provider to act in reliance upon the accuracy of the CDCA factor, failing to file its appeal of the factor within the normal statute of limitations, thereby parting with Provider's legal right of appeal, to Provider=s legal injury. These contentions are strikingly similar to that of the claimants in Bowen. The rule of law set forth in Bowen is that knowing government concealment of an unlawful and erroneous policy suspends the running of the statute of limitations on administrative or judicial appeals. This is the same principle, albeit in a broader form, enacted into the regulations by the Afraud or similar fault@ language of 42 C.F.R. ' 405.1885(d).

The government=s actions, if proved, come within the definition of Afraud or similar fault,@ thus permitting a reopening after the normal period of limitations has lapsed. Accordingly, the PRRB has jurisdiction and authority to consider evidence and make a determination as to whether Afraud or similar fault@ occurred.

Based on Bowen and 42 C.F.R. ' 405.1885(d), the Board should find that the principles of equitable tolling apply as a matter of law to Board appeals under Section 1878 of the SSA, codified at 42 U.S.C '1395oo, and Board Appeals under the Regulations at Subpart R.

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that the principles of equitable tolling do not apply as a matter of law to Board appeals under statute and regulation. Therefore the Provider's appeal should be dismissed for untimely filing.

The Intermediary adopts HCFA=s arguments in its brief before the U.S. Court of Appeals which include the following contentions.

The Intermediary contends that there is no basis to the Provider=s notion that the deadline for appealing the CDCA factor to the Board should be extended on equitable tolling grounds, due to HCFA=s purported concealment of errors in the calculation of the factor. The Intermediary notes that the Provider=s complaints in both the second and third lawsuits include no allegations regarding

equitable tolling. The issue did not surface until Provider=s motion for summary judgment on the merits of the CDCA factor, which included vague and unsubstantiated allegations that the Secretary developed the CDCA factor in a fraudulent manner. While the district court=s May 22, 1995 remand directed the Board to consider the equitable tolling doctrine, the Board did not address the issue in its September 21, 1995 post-remand decision because it found jurisdiction there under the reopening regulations.

The Provider suggests that the equitable tolling issue should be remanded to the Board a second time. The Intermediary contends that the equitable tolling doctrine has no conceivable applicability to the question of Board jurisdiction, and, in any event, the Provider cannot qualify for equitable tolling as a matter of law. Moreover, while the Medicare reopening regulations, 42 C.F.R. ' 405.1885(c) and (d), do provide for fiscal intermediary reopening for fraud, the Provider=s fraud allegations also do not qualify for reopening as a matter of law.
that it is clear that equitable tolling has no potential applicability to the Provider=s claims. In Irwin, supra, the Supreme Court departed from prior precedent, and held that Athe same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Id. at 95-96. However, the Supreme Court=s new Ageneral rule@ concerning the applicability of equitable tolling is limited to Aa suit against the Government,@ Id. (emphasis added), and does not extend to administrative appeals.

The decision in Bowen, supra, underscores the point. That case was a class action challenge to an internal agency policy that effectively denied disability benefits to two groups of claimants. The first group of claimants comprised those who Afailed to bring a court action within 60 days of a final decision of the Secretary.@ Id. at 478 (emphasis added). For them, the Supreme Court concluded that Aapplication of a >traditional equitable tolling principle= to the 60-day [civil action filing] requirement of [42 U.S.C.] ' 405(g) is fully >consistent with the overall congressional purpose= and is >nowhere eschewed by Congress.@ Id. at 480 (citations omitted).

The second subclass was claimants Awho failed to exhaust administrative remedies.@ Id. at 478. But, instead of entertaining an equitable tolling argument, the Court considered the propriety of waiving exhaustion of the second subclass >administrative remedies.= Id. at 482-86. Both the Bowen and Irwin decisions make plain, then, that equitable tolling principles potentially apply only to parties seeking judicial review of a final agency decision, not administrative review of interim agency action.

The Medicare statute, 42 U.S.C. ' 1395oo(a), provides that if a provider is dissatisfied with any aspect of the total program reimbursement set forth in the initial NPR, it may request a hearing before the Board if the amount in controversy is at least $10,000 and the hearing request is submitted within 180 days of the initial NPR. See also French Hospital, 89 F.3d 1411, 1416-17 (9th Cir. 1996) (AFrench@). However, 42 U.S.C. ' 1395oo(a) says nothing about provider suits against the Secretary or the Federal government. Thus, under the Irwin and Bowen civil action analysis of equitable tolling, that doctrine has no potential applicability to 42 U.S.C. ' 1395oo(a)(3)=s 180-day deadline for requesting Board review. By contrast, principles of equitable tolling may potentially apply to lawsuits seeking judicial review of a final agency decision of the Board or the Secretary brought under 42 U.S.C. ' 1395oo(f)(1). If a provider failed to satisfy 42 U.S.C. ' 1395oo(f)(1)=s 60-day limitations period for commencing a civil action, then Irwin establishes that equitable tolling could potentially excuse such

a failure. In the second lawsuit, however, plaintiff filed suit too early, not too late.

As this Court has previously recognized, the Board=s authority to extend the 180-day appeal deadline is limited to 42 C.F.R.' 405.1841(b), which gives the Board some discretion to extend the deadline for Agood cause shown.@ See Western Medical Enterprises v. Heckler, 783 F.2d 1376, 1381 (9th Cir. 1986) (AWestern@) . In the Provider=s case, however, the Board ruled that because the Provider=s first appeal in Case No. 92-2369 was not filed within three years of the two initial NPRs, and thus, the Provider did not qualify for a good cause extension under 42 C.F.R. ' 405.1841(b). Thus, neither the doctrine of equitable tolling nor the good cause regulation can redress Provider=s failure to appeal timely to the Board.

The Intermediary also notes that the Provider argued that the district court should review its fraud allegations. But the Intermediary asserts that the Board did not consider the fraud allegations, and exhaustion has not been waived, therefore, there is no 42 U.S.C. ' 1395oo(f)(1) jurisdiction on the issue. Heckler v. Ringer, 466 U.S. 602, 618 (1984). See also Pacific Coast Medical Enterprises, 633 F.2d 123, 137-38 (9th Cir. 1980).

Even if one assumed that principles of equitable tolling are potentially applicable to administrative appeals, Provider=s argument still must be rejected as a matter of law. In Irwin, the Supreme Court noted that the AFederal courts have typically extended equitable relief only sparingly.@ Id. at 96. See also Bowen at 482. (tolling is only appropriate Ain the rare case@) . Specifically, the Supreme Court has permitted equitable tolling only where: (1) Athe claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period,@ or (2) Athe complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.@ Irwin at 96 (footnotes omitted).

The Provider never alleged that it actively pursued its judicial remedies but filed a defective pleading. Irwin at 96. As to the other Irwin criterion, the Provider=s vague and unsubstantiated allegations that the Secretary deliberately concealed known defects in the CDCA factor cannot establish, as a matter of law, the inducement or trickery necessary for equitable tolling. Id. at 96.
First, it is indisputable that the CDCA factor for the RCLs was duly promulgated through informal rule-making published in the Federal Register. See 44 Fed. Reg. 31806, 31810 (June 1, 1979); 45 Fed. Reg. 41868, 41874 (June 20, 1980); and 46 Fed. Reg. 33637, 33639-40 (June 30, 1981). Thus, the CDCA factor was neither covertly established nor secretly applied. By contrast, in Bowen, the Supreme Court found that the equities weighed in favor of tolling the applicable statute of limitations for judicial review because the government had engaged in Asecretive conduct@ and had Aadopted an unlawful, unpublished policy.@ Id. at 473 and 477. Accord Bailey v. Sullivan, 885 F.2d 52, 64 (3rd Cir. 1989) (equitable tolling not available Aunless the government's clandestine actions have kept plaintiffs from appreciating the scope of their rights@); and Wong v. Bowen, 854 F.2d 630, 631 (2nd Cir. 1988) (equitable tolling Aallowed only . . . where the government has hindered a claimant's attempts to exercise her rights by acting in a misleading or clandestine way@).

Second, the Provider=s fraud allegations cannot overcome its constructive knowledge, derived from the foregoing Federal Register notices, of the methodology used to compute the CDCA factor for the RCLs, and the Provider=s ensuing failure to either challenge the validity of the CDCA factor with a

timely Board appeal from its initial NPRs pursuant to 42 U.S.C. ' 1395oo(a) or pursue exception relief from the RCLs pursuant to 42 C.F.R. ' 413.30(f). See French at 1414 n.2, 1422. As the United States Court of Federal Claims has ruled regarding the same fraud allegations, the hospital=s failure to timely appeal the CDCA factor to the Board from the two initial NPRs, or request RCL exception relief, can only be attributed to its own lack of due diligence, and not clandestine acts by the Secretary. French Hospital Medical Center v. United States, No. 91-1207C (Ct. Fed. Cl. March 26, 1993), aff=d, 9 F.3d 978 (Fed. Cir. 1993) (AFrench I@). But it is settled that equitable tolling is not available Awhere the claimant failed to exercise due diligence in preserving his legal rights.@ Irwin at 96 (citation omitted).

Third, other providers had no difficulty filing challenges to the RCLs and CDCA factor as early as 1980. See California Hospital Association v. Harris, Medicare & Medicaid Guide [CCH] & 30,593 (C.D. Cal. May 27, 1980) ; Eskaton Am. River Healthcare Center v. Schweiker, Medicare & Medicaid Guide [CCH] & 31,820 (E.D. Cal. Dec. 30, 1981), Medicare & Medicaid Guide [CCH] & 32,359 (E.D. Cal. Nov. 20, 1982). Such early appeals underscore Provider=s own culpability and failure to qualify for equitable tolling, for it is axiomatic that Aignorance of legal rights does not toll a statute of limitations.@ Larson v. Am. Wheel & Brake Inc., 610 F.2d 506, 510 (8th Cir. 1979).

Fourth, in the Federal Register publications that established the governing RCLs, the Secretary acknowledged that although the CDCA factor Aautomatically@ produced additional reimbursement for providers in affected states, the adjusted RCLs still might not account adequately for the unique circumstances of all providers. Therefore, the Secretary invited affected providers to seek exceptions to the RCLs, over and above the additional reimbursement relief automatically afforded by the CDCA factor itself. 44 Fed. Reg. at 31810 (characterizing 42 C.F.R. ' 405.460(f)(5) as authorizing RCL exception relief Ato any hospital which can demonstrate that lower utilization results in atypical costs beyond the level provided for in the automatic [CDCA factor] adjustment@). Given the availability of exception relief on top of the automatic relief afforded by the CDCA factor itself, it is implausible to suppose that there was any clandestine government policy or misconduct at work. See French I. Thus, it is clear as a matter of law that Aprinciples of equitable tolling . . . do not extend to what is at best a garden variety of excusable neglect@ by the Provider. Irwin at 96.

The Intermediary also contends that the Provider=s misplaced reliance on equitable tolling principles, the Medicare reopening regulations specifically recognize fraud as a potential basis for reopening. The regulations provide that the intermediary shall reopen specific findings in the initial NPR Aat any time if it is established that such determination . . . . was procured by fraud or similar fault.@ 42 C.F.R. ' 405.1885(d). See also 42 C.F.R.' 405.1885(c); and State of Oregon, 854 F.2d 346, 349 (9th Cir. 1988). In both Loma Linda University Medical Center v. Shalala, No. CV 93-4397-RG(JGx) (C.D. Cal. July 14, 1994, Medicare and Medicaid Guide (CCH) & 42,532 and the Board in plaintiff=s first appeal, previously concluded, regarding the very same allegations of agency fraud, that providers first must request intermediary reopening on such allegations before any review by the Board, the HCFA Administrator, or the Federal courts is potentially available. Contrary to the Provider=s suggestion, then, the reopening regulations require the Intermediary, not the Board, to resolve initially any factual issues concerning alleged fraud.

The Intermediary suggests that the Provider=s fraud allegations do not qualify for reopening under 42

C.F.R. ' 405.1885(d) for the same reasons the hospital cannot satisfy the requirements for equitable tolling. The Intermediary asserts that the Provider had constructive knowledge of the CDCA factor methodology, which was adopted through informal rule-making and buttressed by the potential for exception relief from the RCLs. Other providers managed early appeals of the CDCA factor to the Board. Thus, as the Court of Federal Claims concluded in French I, that a provider=s failure to timely appeal the CDCA factor to the Board or request an exception to the RCLs was due to the provider=s failure to exercise due diligence, not agency fraud.

The Intermediary also notes the recent decision in Bradford, supra, in which equitable tolling was addressed. It stated that:

> even assuming that equitable tolling could be applied within the context of an administrative proceeding, the Administrator finds that the Medicare law generally and within the context of the particular regulations at issue in this case, do not specify deadlines in language that would allow the reading of an Aimplicit@ equitable tolling exception as the provider argues. As the Supreme Court found, equitable tolling does not apply where the statute: >sets forth its limitations in a detailed and technical manner that, linguistically speaking, cannot be easily read as containing implicit language.=

Bradford at 200,766.

The Intermediary asserts that as in Bradford, the Provider in the instant case cannot blunt the effect of failing to take timely action.

The Intermediary requests that the Board find that the principles of equitable tolling do not apply as a matter of law to Board appeal under ' 1878 of the SSA, codified at 42 U.S.C. ' 1395oo, and 42 C.F.R. Subpart R.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

' 405(g)	-	Judicial Review of Commissioner=s Decision
' 1395oo et seq.	-	Provider Reimbursement Review Board

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

Subpart R	-	Provider Reimbursement Determinations and

		Appeals
'' 405.1841et seq.	-	Time, Place, Form, and Content of Request for Board Hearing
' 405.1885 et seq.	-	Reopening a Determination or Decision
' 405.1889	-	Effect of a Revision
' 413.30(f) et seq. (previously 405.460(f))	-	Exceptions

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

' 2921.1	-	Late filing of Request for Hearing
' 2931 et seq.	-	Reopening and Correction

4. Cases:

Anaheim Memorial Hospital v. Blue Cross and Blue Shield Association/Blue Cross of California, HCFA Administrator, November 16, 1995, Medicare and Medicaid Guide (CCH) & 43,949, aff-d sub nom., Anaheim Memorial Hospital v. Shalala, No. CV 95-365-LHM (Eex) (D.D.C. April 16, 1996), Medicare and Medicaid Guide (CCH) & 44,167, aff-d, 143 F.3d 845 (1997) Medicare and Medicaid Guide (CCH) & 45,775.

Bailey v. Sullivan, 885 F.2d 52 (3rd Cir. 1989)

Bowen v. City of New York, 476 U.S. 467 (1986)

Bradford Regional Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Washington and Alaska, PRRB Dec. No. 99-D19, March 12, 1999, Medicare and Medicaid Guide (CCH) & 80,176

California Hospital Association v. Harris, Medicare & Medicaid Guide [CCH] & 30,593 (C.D. Cal. May 27, 1980).

Eskaton Am. River Healthcare Center v. Schweiker, Medicare & Medicaid Guide [CCH] & 31,820 (E.D. Cal. Dec. 30, 1981), Medicare & Medicaid Guide [CCH] & 32,359 (E.D. Cal. Nov. 20, 1982).

French Hospital, 89 F.3d 1411 (9th Cir. 1996)

French Hospital Medical Center v. United States, No. 91-1207C (Ct. Fed. Cl. March 26, 1993), aff-d, 9 F.3d 978 (Fed. Cir. 1993)

Heckler v. Ringer, 466 U.S. 602 (1984)

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990)

Larson v. Am. Wheel & Brake Inc., 610 F.2d 506 (8th Cir. 1979)

Loma Linda University Medical Center v. Shalala, No. CV 93-4397-RG(JGx) (C.D. Cal. July 14, 1994, Medicare and Medicaid Guide (CCH) & 42,532

Pacific Coast Medical Enterprises, 633 F.2d 123 (9th Cir. 1980)

State of Oregon, 854 F.2d 346 (9th Cir. 1998)

Western Medical Enterprises v. Heckler, 783 F.2d 1376 (9th Cir. 1986)

Wong v. Bowen, 854 F.2d 630 (2nd Cir. 1988)

5. Other:

Black's Law Dictionary, Revised Fourth ed., West Publishing Co.

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44 Fed. Reg. 31806 (June 1, 1979).

45 Fed. Reg.41868 (June 20 1980).

46 Fed. Reg. 33637 (June 30, 1981).

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 it does not have general equitable powers and cannot grant equitable relief such as equitable tolling. The Board agrees with the Intermediary that administrative agencies, unlike courts, do not have general equity powers but rather only have the powers granted to them by statute and regulation. The Board notes that equitable tolling is a traditional equitable remedy that it does not have except to the extent it is granted to this Board under statute and regulation. The Board notes, however, that there are two places in the regulations where the Board is granted authority to waive time limitations on filing for relief to the Board. The Board has limited regulatory authority to permit a late request for hearing for Agood cause@ under 42 C.F.R. ' 405.1841 (b), and to reopen its decisions after

the 3 year time limit for reopenings for Afraud or similar fault@ under 42 C.F.R. ' 405.1885(d). In the interest of judicial economy, the Board notes that neither of these limited authorities pertain to the facts in this case.

The Board has limited regulatory authority to permit a late request for hearing under 42 C.F.R. ' 405.1841 dealing with the time, place, form and content of requests for Board hearings. It states, in pertinent part, the following:

> (a) General requirements. (1) The request for a Board hearing must be filed in writing within 180 days of the date the notice of the intermediary's determination was mailed to the provider . . .
>
> (b) Extension of time limit for good cause. A request for a Board hearing filed after the time limit proscribed in paragraph (a) of this section shall be dismissed by the Board, except that for good cause shown, the time limit may be extended. However, no such extension shall be granted by the Board if such request is filed more than 3 years after the date the notice of the intermediary's determination is mailed to the provider.

Id. (emphasis added).

The Board has issued a program instruction at HCFA Pub. 15-1 ' 2921.1 concerning the late filing of a request for hearing. It states that:

> [a] request for hearing delinquently filed with the Board is ordinarily dismissed by the Board. (See ' 2924.4.c.2.) However, where you submit an explanation with your request for hearing justifying or displaying good cause for late filing, and the reasons are found acceptable by the Board, the Board may extend the applicable 180 day calendar filing period described in '2920.A.2. Examples of such reasons are (1) unusual or unavoidable circumstances which demonstrate that you could not reasonably have been expected to file timely; and (2) destruction or other damage of your records. This is not an all-inclusive list and the Board decides based on factual situations presented. The time limit may not be extended, however, where the request for hearing is submitted to the Board more than 3 years after the date the intermediary=s NPR was received by you.

Id. (emphasis added).

The Board notes that the decision as to whether good cause has been shown is committed to the Board=s discretion and only if the Board has abused its discretion by acting arbitrarily and capriciously can the determination be reversed. See Western, supra, at 1381. The Board reasons that facts that could constitute grounds for granting equitable tolling, could also constitute grounds for finding Agood

cause@ for late filing. The Board notes, however, that the rule is limited and does not permit a finding of Agood cause@ where the request for hearing is submitted to the Board more than 3 years after the date of the intermediary's NPR. The Board further notes that in the instant case, the Provider did not file within the 3 year periods of either NPR.

The Board also has regulatory authority, under 42 C.F.R. ' 405.1885, to reopen its decisions. The regulation, in pertinent part, states that:

> [a] determination of an intermediary, a decision by a hearing officer or panel of hearing officers, a decision by the Board, or a decision by the Secretary may be reopened with respect to findings on matters at issue in such determination or decision by such intermediary officer or panel of hearing officers, Board, or Secretary, as the case may be, either on motion of such intermediary officer or panel of hearing officers, Board, or Secretary, or on the motion of the provider affected by such determination or decision to revise any matter in issue at such proceedings. Any such request to reopen must be made within 3 years of the date of the notice of the intermediary or Board hearing decision, or where there has been no such decision, any such request to reopen must be made within 3 years of the date of notice of the intermediary determination. No such determination or decision may be reopened after such 3-year period except as provided in paragraphs (d) and (e) of this section.
>
> . . .
>
> (c) Jurisdiction for reopening a determination or decision rests exclusively with that administrative body that rendered the last determination or decision.
>
> (d) Notwithstanding the provisions of paragraph (a) of this section, an intermediary determination or hearing decision, a decision of the Board, or a decision of the Secretary shall be reopened and revised at any time if it is established that such determination or decision was procured by fraud or similar fault of any party to the determination or decision.
>
> (e) [Pertains to cases prior to December 31, 1971]

42 C.F.R. ' 405.1855 (emphasis added).

The Board notes that a program instruction at HCFA Pub. 15-1 ' 2931 pertains to reopening and correcting determinations and decisions. It states, in pertinent part, the following.

> A. Reopening.CFor purpose of this section, the term Areopening@

means an affirmative action taken by an intermediary, an intermediary hearing officer, the PRRB, the Health Care Financing Administration, or the Secretary, to reexamine or question the correctness of a determination or decision otherwise final. Such action may be taken:

1. On the initiative of the appropriate authority within the applicable time period (' 2931.1); or

2. In response to a written request of the provider or other entity filed with the intermediary, the intermediary hearing officer, the PRRB (provider only), or the Secretary within the applicable time period (' 2931.1).

B. Correction.CFor the purpose of this section, the term Acorrection@ includes a revision (adjustment) in an intermediary=s determination or intermediary hearing officer=s decision, Board hearing decision, or Secretary decision, otherwise final, which is made after a proper reopening.

. . .

2931.1 Time Limits for Reopening.C

. . .

D. Reopening a PRRB Decision. B A decision of the PRRB otherwise final may be reopened by the Board within 3 years of the date of the notice of the PRRB decision to correct any matter in issue at the Board hearing. Issues which were not raised at the Board hearing may not be reopened by the Board.

. . .

F. Reopening at Any Time Because of Fraud.CNotwithstanding the provisions of paragraphs A, B, C, D, or E above, a determination or decision will be reopened and corrected at any time if it is found that such determination or decision was procured by fraud or similar fault by any party to the determination or decision.

HCFA Pub. 15-1 ' 2931 and 2931.1 (emphasis in original).

The Board notes that there is no time limit on reopenings for fraud or similar fault. The Board agrees with the Provider that facts that could be established to constitute grounds for granting equitable tolling could also constitute grounds for establishing that a determination or decision was procured by Afraud or similar fault@ under the reopening regulation. The Board notes, however, that the exclusive

jurisdiction for reopening a determination rests with the last administrative body that rendered the last determination or decision. 42 C.F.R. ' 405.1885(d). The Board notes that the Provider in the instant case did not appeal either of the initial NPRs in which the RCLs were applied. Furthermore, it is clear from the prior history of this case that the RCLs were not at issue in the reopening for malpractice. See Anaheim, supra. Therefore, the last administrative body to make a determination was the Intermediary when it issued the initial NPRs. Thus, the Board agrees with the Intermediary that the Provider would have to request a reopening under 42 C.F.R. ' 405.1885(d) from the Intermediary.

In summary, the Board finds that it does not have general equitable powers, but that it has limited regulatory authority to grant relief from time limits in factual situations that could constitute grounds for equitable tolling. The Board finds that the Provider is not entitled to relief under either of those limited authorities in the instant case.

DECISION AND ORDER:

The Board finds that it does not have general equitable powers. The Board finds that it has limited regulatory authority to grant relief from time limits in factual situations that could constitute grounds for equitable tolling but that the Provider is not entitled to relief under either of these authorities in the instant case.

Board Members Participating:

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

FOR THE BOARD:

Irvin W. Kues
Chairman