PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2005-D16

PROVIDER
Hospital Corporation of America ("HCA")
Providers with Late Notices of Program Reimbursement

Provider No.: Various
(See Attached List)

vs.

INTERMEDIARY
BlueCross BlueShield Association/
Various Intermediaries (See Attached List)

DATE OF HEARING
August 4, 2004

Cost Reporting Period Ended
Various - See Attached List

CASE NO. Various - See Attached List

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ISSUE:

What relief is available through appeal to the Provider Reimbursement Review Board (Board) for failure of the Intermediaries to timely settle the Providers' cost reports, especially where prejudice will result from the failure to settle such cost report?

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

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

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the proportion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Board within 180 days of the issuance of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835. A provider may also request a hearing before the Board if the fiscal intermediary does not render a determination within12 months after the provider submitted its cost report and the delay was not caused by the provider. 42 C.F.R. §405.1835(c). The dispute in these cases arises out the Intermediaries' failure to issue a final determination within 12 months after receipt of the Providers' cost report. The regulation states:

> Notwithstanding the provisions of paragraph (a)(1) of this section, the provider also has a right to a hearing before the Board if an intermediary's determination concerning the amount of reasonable cost reimbursement due a provider is not rendered within 12 months after receipt by the intermediary of a provider's perfected cost report or amended cost report . . . provided such delay was not occasioned by the fault of the provider.

Id.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The Providers,[1] as represented by Chippenham/Johnston/Willis Medical Center have filed their

[1] Pursuant to an agreement between the Providers and the Intermediaries, the Board held a consolidated hearing on

Medicare cost report and the Intermediaries, as represented by United Government Services, have issued tentative settlements but have not issued final determinations for the Providers' cost reports.

The Providers and Intermediaries agree that the delay in processing the cost reports is the result of a backlog of provider audits that was caused by the implementation of the outpatient prospective payment system and that the Providers were not at any fault in the delay. See Tr. at 23:4-13.

Although the regulation does not require a provider to show specific harm as a result of the Intermediaries' failure to issue a timely determinations, these Providers assert that among other problems, they will be seriously prejudiced in the amount of reimbursement they are entitled to receive if the NPRs are not issued by December 31, 2004.[2] In Section 713 of the Medicare Modernization Act of 2003 (MMA §713), Congress enacted a moratorium in effect during the one year period beginning January 1, 2004 and ending December 31, 2004, that requires the Medicare program to allow reimbursement for teaching hospitals that might not otherwise be available. CMS' implementation[3] permits application of legislation to those cost reports finally settled during calendar year 2004.[4] CMS' notice cautions intermediaries not to deviate from normal procedures in the scheduling of audits. Accordingly, if the Intermediary fails to settle the Provider's cost report by December 31, 2004, the Provider will be barred from counting such residents and will suffer significant prejudice in terms of lost reimbursement.

The Providers were represented by John R. Hellow, Esquire, of Hooper, Lundy and Bookman, Inc. The Intermediaries were represented by Bernard M. Talbert, Esquire, of the Blue Cross Blue Shield Association.

August 4, 2004 for 57 Hospital Corporation of America Providers, all of whom received late Notices of Program Reimbursement. At the hearing, Chippenham/Johnston-Willis Medical Center, Provider Number 49-0112, PRRB Case No. 04-1204, served as the representative for the Providers. All the Intermediaries for the Providers are licensees or subcontractors of Blue Cross Blue Shield Association and were represented by Bernard Talbert, Esquire, of the Blue Cross Blue Shield Association.

A list of all 57 Providers in the current hearing is on pages 2 and 3 of the Provider supplemental position paper. Since the hearing, the intermediaries have issued NPRs for a number of the Providers and they have withdrawn their appeals. The remaining Providers with active appeals to whom this decision applies are included in a list attached to this decision.

[2] The Providers also refer to Board rules concerning group appeals that require groups to be completed within 12 months from the date of the group hearing request. See Board Instructions, Part I, Section VII. Since the Providers represented in this case are owned and operated by various HCA subsidiaries, issues can result that are common issues for which groups may be formed. If an HCA provider does not receive a timely settlement, it can jeopardize its ability to participate in the group.

[3] The moratorium was implemented through a One Time Notification, CMS Pub. 100-20 One Time Notification, Trans. No. 61 (March 12, 2004).

[4] Eight Providers involved in this consolidated hearing operate Graduate Medical Education programs affected by the One-Time Notification.

PARTIES' CONTENTIONS:

The Providers points out that, although Section 1395oo(a)(1)(B) and (C) allow for a hearing before the Board when there has not been a timely determination by the Intermediaries, the statute and regulation are silent regarding any remedy. The Providers contend that because the Board has the power to "affirm, modify or reverse and to make any other revisions on matters covered by such cost reports . . .", 42 U.S.C. §1395oo(d), and because all appeals under 42 U.S.C. §1395oo(a) involve payment the Board, therefore, can determine what the Providers are entitled to in terms of payment under the applicable statutes and regulation, including the moratorium in MMA §713. The Providers assert that, in enacting MMA §713, Congress intended hospitals to benefit from increased Graduate Medical Education (GME) payments; it did not intend for providers to forfeit Medicare reimbursement due to backlogs at the Intermediaries.

The Intermediaries argue that because neither the statute nor the regulation specify remedies for an untimely NPR, the Board cannot exercise injunctive powers over Intermediaries and that the Board is limited to acknowledging that the determination is untimely and not the Providers' fault. The Intermediaries further contend that the accelerated interest provision in the statute at 42 U.S.C. §1395oo(f)(2) is the only remedy available to the Board.

The Providers disagree with the Intermediaries that interest is the only remedy under the statute for a late determination. The Providers note that 42 U.S.C. §1395oo(f) addressing interest does not refer to 42 U.S.C. §1395oo(a)(1)(B) or (C) hearings for late determinations. The Providers argue that the Board can order the Intermediary to issue a determination that deems the cost report settled for purposes of MMA §713.

With respect to prejudice the Providers will suffer under MMA §713, the Intermediaries point out that the statute did not state, but could have, that providers would be entitled to relief for NPRs that are issued or should have been issued within the 2004 calendar year. In addition, the Intermediaries believe it is premature for the Board to consider the impact of an untimely NPR until it is issued and the Providers appeal a specific adjustment or protested item such as the MMA §713 claim on a cost report that should have been issued within one year.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

It is undisputed that the Providers submitted their cost reports over a year ago and that no NPRs have been issued, that the Providers are entitled to a hearing when the NPRs have not been issued for a 12-month period and the Providers are not at fault. 42 C.F.R. §405.1835(c). The Board also finds that the Providers may be disadvantaged as a result of a late determination in their ability to claim GME costs under MMA §713 if a determination is not issued within

the 2004 calendar year.

Since the facts in this case establish that the determination is late and not the fault of the Providers, the Board must decide what relief it may provide to a provider for an intermediary's failure to issue a determination. The Board notes that, other than the regulations, there is no guidance or prior cases concerning hearings on late determinations. Therefore, this is a case of first impression. The Providers argue that the Board can order the Intermediaries to issue a final determination that deems the cost report settled for purposes of MMA §713. The Intermediaries contend that the only remedy is for the Board to decide that the determination is late and not the fault of the Provider, and that this will permit the Providers to claim accelerated interest if the case proceeds to court.

The Board finds that the Intermediaries' determinations are late, that the late determinations are not the fault of the Providers and remands the matter to the Intermediaries to issue a final determination. The Board concludes that it is premature to specify what, if any, type of payment should be permitted, only that the untimely determination be issued without delay so that the Providers will not be prejudiced under MMA §713. Therefore, the Board directs the Intermediaries to issue determinations before the end of the 2004 calendar year. The Board recognizes that the Intermediaries may claim that they are disadvantaged by having to make immediate determinations without time for complete review of the cost reports. The Board notes however that the Intermediaries can settle the cost reports and immediately reopen for further consideration under 42 C.F.R. §405.1885.

With respect to the Intermediaries' argument that only an interest remedy exists under the statute, the Board finds that there is no direct link between the interest provision in 42 U.S.C. §1395(f) and the late determination provision in 42 U.S.C. §139500(a)(1)(B) or (C). The Board also notes that interest applies to a debt owed by Medicare, and since there is no determination, there is nothing on which interest may be determined. Therefore, an interest remedy is not a logical remedy for a late determination.

DECISION AND ORDER:

The Board finds that the determination is late and not the fault of the Provider and remands the matter to the Intermediary to issue a determination before the end of the 2004 calendar year.

Board Members Participating:

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

FOR THE BOARD:

DATE: December 27, 2004

Martin W. Hoover, Jr.
Board Member