PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2011-D42

PROVIDER –
Memorial Hermann – Memorial City Hospital
Houston, Texas

Provider No.: 45-0610

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
TrailBlazer Health Enterprises, LLC

DATE OF HEARING -
December 18, 2008

Cost Reporting Periods Ended -
June 30, 1994; June 30, 1995; June 30, 1997;
June 30, 1999

CASE Nos.: 98-2219; 98-2218; 01-2534
and 03-1358

INDEX

ISSUE:

Does the Board have jurisdiction over the issue of whether the Provider is entitled to be reimbursed for the interest implicit in the capital lease of the hospital facilities and equipment?

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

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

The Medicare program was established to provide health insurance to the aged and disabled. *See* 42 U.S.C. §§ 1395 *et seq*. The Centers for Medicare & 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 to organizations known as fiscal intermediaries (FIs) and Medicare administrative contractors (MACs). FIs and MACs[1] determine payment amounts due the providers under Medicare law, regulation and interpretative guidelines published by CMS. *See* 42 U.S.C. § 1395h, 42 C.F.R. §§ 413.20 and 413.24.

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

At issue in this appeal are capital related costs pertaining to a virtual purchase (also referred to as a capital lease) which are limited under 42 C.F.R. § 413.130. A virtual purchase is defined at 42 C.F.R. § 413.130(b)(8) as a lease meeting any one of the following conditions:

(i) The lease transfers title of the facilities or equipment to the lessee during the lease term.

(ii) The lease contains a bargain purchase option.

(iii) The lease term is at least 75 percent of the useful life of the facilities or equipment. This provision is not applicable if the lease begins in the last 25 percent of the useful life of the facilities or equipment.

(iv) The present value of the minimum lease payments (payments to be made during the lease term including bargain purchase option, guaranteed residual value, and penalties for failure to renew) equals at least 90 percent of the fair market value of the leased property. This provision is not applicable if the lease begins in the last 25 percent of the useful life of the

[1] FIs and MACs are hereinafter referred to as intermediaries.

> facilities or equipment. Present value is computed using the lessee's incremental borrowing rate, unless the interest rate implicit in the lease is known and is less than the lessee's incremental borrowing rate, in which case the interest rate implicit in the lease is used.

Allowable rental costs for a "virtual purchase" lease are limited to the "cost of ownership", or the amount the provider would have included in capital-related costs if it had legal title to the asset. The "cost of ownership" includes straight-line depreciation, insurance, and interest, however, may not include accelerated depreciation. 42 C.F.R. § 413.130(b)(9).

STATEMENT OF CASE AND PROCEDURAL HISTORY:

This appeal consists of four consolidated cases: Case Nos. 98-2219 (FYE 06/30/1994), 98-2218 (FYE 06/30/1995), 01-2534 (FYE 06/30/1997), and 03-1358 (FYE 06/30/1999). All four hearing requests were timely filed, and identified multiple issues when initially filed. The parties resolved all issues prior to hearing except for the question of the Board having jurisdiction over the issue of whether the Provider is entitled to be reimbursed for the interest implicit in the capital lease of the hospital facilities and equipment.

The parties agreed to the following stipulations, that in pertinent part state:[2]

1. The lease of the hospital known as Memorial Hermann Memorial City Hospital ("Lease") was entered into effective January 1, 1994, between Memorial Hospital System ("MHS") and Memorial City General Hospital Corporation ("MCGHC"), a subsidiary of Metro National Corporation. After the lease transaction became effective, the lease between MHS and MCGHC was assigned by MCGHC on January 14, 1994, to another Metro affiliate, Memorial City Properties L.P. For convenience, the lessor will be referred to as "Metro."

2. Certain non-provider assets (professional office buildings) were also leased for the same term. Together, the stated base rent payable under the leases for provider and non-provider assets totaled $280 million over a ten year period, or $28 million per year.

3. The Parties agree that the lease of the provider assets is a capital lease or virtual purchase (those two terms are being used synonymously) and was treated as such by both the Provider and the Fiscal Intermediary for Medicare cost reporting purposes. Lease payments in the amount of $26.1 million ($13.05 million for the short 1994 cost year), which were originally included in the costs shown on Worksheet A, were offset on Worksheet A-8. Depreciation costs based on those of the prior owner (Metro) were added by a Worksheet A-8 adjustment. There is no dispute between the Parties about the accuracy of the depreciation or other figures in the audited cost reports.

[2] Exhibit P-21.

4. The Parties agree that imputed interest is a reimbursable cost of ownership pursuant to 42 C.F.R. § 413.130(b)(9) and PRM-I, § 110.B when a lease is considered to be a capital lease or virtual purchase.

5. The Parties stipulate and agree that a reasonable market based rate of interest to apply at the outset of the lease transaction at issue in this appeal is 10.83% per annum.

6. The Parties agree that to calculate the allowable interest attributable to the lease (virtual purchase) of Provider assets the interest costs should be allocated and limited as follows:
    a. The portion of interest attributable to the lease of non-provider assets must be eliminated from the calculation;
    b. Pursuant to DEFRA (Pub. L. 98-369, § 2314, as codified at 42 U.S.C. § 1395x(v)(1)(O)), interest costs attributable to the lease (virtual purchase) of hospital and SNF assets must be limited in accordance with the terms of DEFRA;
    c. There must be a reasonable allocation of interest between assets covered by DEFRA (hospital and SNF assets) and assets that are not limited by DEFRA (e.g., the rehabilitation, psychiatric and home health subproviders).

7. The Provider contends that excess lease costs and related implicit interest cost should be deferred until the termination of the lease or return of all or part of the assets to the lessor, and at such time may be claimed as an allowable cost. The Intermediary takes no position regarding this contention. The Parties agree that no event has occurred in the 1994, 1995, 1997, or 1999 cost years that would trigger a recognition of deferred costs in those cost years. Nothing in this Stipulation shall prevent the Provider from seeking to obtain reimbursement for deferred lease costs in other cost years.

8. The Parties agree that the calculations set forth in the Provider's Exhibits P-7, P-8, P-9, P-14 and P-15 constitute a reasonable methodology for determining the imputed interest for purposes of capital reimbursement to the Provider for the lease; provided that on Line 6 of Exhibit P-7, Non-DEFRA Asset Portion, the allowable interest is reduced by multiplying each figure on Line 6 by a factor of .54, and such reduced figures are used for the ensuing calculations (Lines 7-9) on Exhibit P-7.

INTERMEDIARY'S POSITION:

The Intermediary challenges jurisdiction on the grounds that the appeal involves an allowable cost that was not included on the cost report (unclaimed cost). The Intermediary asserts that because the Provider failed to claim the financing cost as an allowable cost, there was no disallowance from which to appeal. The Provider could have requested a reopening, but when the 3-year reopening window ended, the opportunity to correct the error on the cost report was lost.

The Intermediary contends that the Provider's explanations presented at the hearing as to why it did not claim all the lease costs as allowable on its cost report would offer no mitigating explanations under the court's analysis in Little Company of Mary Hospital and Health Care Centers v. Shalala, 165 F.3d 1162 (1999) (Little Company). In Little Company the provider failed to include loss on sale of land as a deduction from investment income on its cost report. The court reasoned that because the provider changed its position on the issue, it did not give the intermediary "a first shot at the issue," and it therefore could not obtain a Board review of the fiscal intermediary's determination. The provider in Little Company argued that it could not have presented the issue to the intermediary, but the court noted that the provider failed to provide any "alternative theories for why it was entitled to a larger reimbursement."[3] Had the provider done so, it would have exhausted its remedies by giving the intermediary a first shot at considering the provider's alternative grounds on the issue.

The Intermediary disagrees with the Provider's complaint that the under-reimbursement is due to the Intermediary forcing specific cost reporting treatment on the Provider. It points out that there is no proof of that in the case record. The cost report outcome that is sought to be undone was presented by the Provider in its cost reports. Only in the appeal context was the argument made that the Provider was somehow forced to not claim certain costs.

PROVIDER'S POSITION:

The Provider contends that the Board has jurisdiction over the appeal under the provisions of 42 U.S.C. § 1395oo(a), asserting that the Supreme Court's decision in Bethesda Hospital Association v. Bowen[4] establishes that an adverse determination is not a prerequisite to Board jurisdiction. The Provider states that it is not required to have a specific claim on the cost report for the precise item in question as well as an audit adjustment disallowing that claim, before it can be dissatisfied with the total amount of program reimbursement. The Provider cites to Loma Linda University Medical Center v. Leavitt, 492 F.3d 1065 (9th Cir. 2007) and UMDNJ-University Hospital v. Leavitt, 539 F. Supp. 2d 70 (D.D.C. 2008) in support of this contention.

The Provider notes that allowable rental costs for a virtual purchase are limited to the cost of ownership which include "straight-line depreciation, insurance and interest."[5] The Provider asserts it claimed rental costs on its as-filed cost report on Worksheet A,[6] and that 42 U.S.C. § 1395oo(a) allows correction of the rental costs claimed on the cost report regardless of whether there was a specific claim made for imputed interest.

The Provider acknowledges that the cost of ownership at issue may not have been accurately claimed,[7] but explains that the cost was reported and claimed pursuant to the Intermediary's erroneous instruction. The Provider claims the Intermediary directed that only the depreciation costs of the prior owner be included when computing the cost of ownership limitation on rental

[3] Id at 1166.
[4] 108 S.Ct. 1255 (1988).
[5] 42 C.F.R. §413.130(b)(9)(i).
[6] Hearing Transcript, p. 35-37 and Providers Post Hearing Brief, p. 21.
[7] Hearing Transcript, p. 138.

costs, and made no mention of the interest costs that were implicit in the lease. The Provider states that the Intermediary made audit adjustments to costs of ownership, and it now seeks to have those costs of ownership computed correctly to include imputed interest.

FINDINGS AND CONCLUSIONS:

After consideration of the Medicare law and guidelines, the parties' contentions and the evidence presented, the Board majority finds that the Provider does have a right under 42 U.S.C. § 1395oo(a) to a hearing. The Board's jurisdiction is established under 42 U.S.C. § 1395oo(a). It provides, in relevant part:

> Any provider of services which has filed a required cost report within the time specified in the regulations may obtain a hearing with respect to such cost report by a Provider Reimbursement Review Board … if –
>
> > (1) such provider
> >
> > (A)(i) is dissatisfied with a final determination of the organization serving as its fiscal intermediary pursuant to section 1395h of this title as to the amount of total program reimbursement due the provider for the items and services furnished to individuals for which payment may be made under this subchapter for the period covered by this report.

Bethesda Hospital Association v. Bowen, 485 U.S. 399 (1988), dealt with the Board's authority to hear appeals of matters without their having been included in the cost report or having an adverse intermediary determination. In Bethesda, the provider failed to claim a cost because a regulation dictated that it would be disallowed. In those circumstances, the Court found the plain meaning of section 1395oo(a) to resolve the question of whether the Board had jurisdiction. It stated:

> [U]nder subsection (a)(1)(A)(i), a provider's dissatisfaction with the amount of its total reimbursement is a condition to the Board's jurisdiction. It is clear, however, that the *submission of a cost report in full compliance with the unambiguous dictates of the Secretary's rules and regulations does not, by itself, bar the provider from claiming dissatisfaction with the amount of reimbursement allowed by those regulations*. No statute or regulation expressly mandates that *a challenge to the validity of a regulation* be submitted first to the fiscal intermediary. Providers know that, under the statutory scheme, the fiscal intermediary is confined to the mere application of the Secretary's regulations, that the intermediary is without power to award reimbursement except as the regulations provide, and that any attempt to persuade the intermediary to do otherwise would be futile. (emphasis added; footnotes omitted).

Id. at 404.

Although its finding that the Board had jurisdiction was based on the express language of section 1395oo(a), the Supreme Court found further support for its conclusion in the language of 1395oo(d). Section (d) provides that:

> [A] decision by the Board shall be based upon the record made at such hearing, which shall include the evidence considered by the intermediary and such other evidence as may be obtained or received by the Board, and shall be supported by substantial evidence when the record is viewed as a whole. The Board shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) even though such matters were not considered by the intermediary in making such final determination.

The Supreme Court commented that subsection (d):

> … allows the Board, once it obtains jurisdiction pursuant to subsection (a), to review and revise a cost report with respect to matters not contested before the fiscal intermediary. The only limitation prescribed by Congress is that the matter must have been "covered by such cost report," that is, a cost or expense that was incurred within the period for which the cost report was filed, even if such cost or expense was not expressly claimed.

Id. at 406.

The weight of authority holds that the Board has discretion to hear such appeals pursuant to 42 U.S.C. § 1395oo(d) once jurisdiction is invoked under section 1395oo(a), but that it is not required to do so. MaineGeneral Medical Center v. Shalala, 205 F.3d 493 (1st Cir. 2000); Loma Linda Univ. Medical Center v. Leavitt, 492 F.3d 1065 (9th Cir. 2007); HCA Health Services of Oklahoma v. Shalala, 27 F.3d 614 (D.C. Cir. 1994); UMDNJ v. Leavitt, 539 F. Supp. 2d. 70 (D.D.C. 2008). Those cases also find support in Bethesda.

MaineGeneral Medical Center v. Shalala, 205 F.3d 493 (1st Cir. 2000) involved hospitals that listed zero for reimbursable bad debts on their cost reports and did not discover the mistake until after the NPRs had been issued. The Providers appealed several items adjusted by the NPRs but also included a claim for the bad debts. The Board dismissed the bad debts claim for lack of jurisdiction because they had not been claimed on the cost report despite there being no legal impediment to doing so. MaineGeneral relied on a pre-Bethesda First Circuit decision, St Luke's Hospital v. Secretary, 810 F.2d 325 (1st Cir. 1987) in which costs were self-disallowed, not inadvertently omitted. However, it found that the St. Luke's court had nevertheless addressed the question of whether the Board has the power to decide an issue that was not first raised before the intermediary and held that it does, but that the power is discretionary. The St. Luke's Court expressly rejected the provider's assertion that the court should order the Board to hear the case, stating, "The statute [1395oo(d)] does not say that the Board must consider matters not considered by the intermediary. But, it does say the Board may, it can, it has the 'power' to do so." St. Luke's at 327-328.

Because St. Luke's was on point and had not been overruled by Bethesda, the First Circuit found it was bound by it and held that the Board had "statutory jurisdiction" to hear MaineGeneral's claim, but that it was not required to hear it. 205 F.3d. at 497. The First Circuit advised that the Board could adopt a policy of hearing such claims or refusing to hear them, or it could opt to decide on a case-by-case basis. The court further noted that "a rule of consistently refusing to hear inadvertently omitted claims would be rational, given the ability of providers to request the intermediary to reopen an NPR up to three years after it has been issued." Similarly, St. Luke's opined that even though the Board has legal power to consider matters not specifically raised before the intermediary, whether to exercise that power is for the Board to decide and, like many similar powers of courts and agencies, should be exercised only sparingly. St. Luke's at 329.

In Loma Linda Univ. Med. Ctr. v. Leavitt, 492 F.3d 1065 (9th Cir. 2007), the Ninth Circuit "joined" the First Circuit's view as expressed in MaineGeneral and St. Luke's. It held that "once the Board acquires jurisdiction pursuant to 42 U.S.C. § 1395oo(a) over a dissatisfied provider's cost report on appeal from the intermediary's [NPR], it has discretion under 1395oo(d) to decide whether to order reimbursement of a cost or expense … even though that particular expense was not expressly claimed or explicitly considered by the intermediary." 492 F.3d at 1068.

In Loma Linda the provider had inadvertently zeroed out reimbursable interest expense in the cost report and filed it without any claim for reimbursement. The NPR did not include any adjustments for interest. Loma Linda appealed six other items adjusted on the cost report and, when it discovered the error later, added the interest expense issue to its pending appeal. The Ninth Circuit stated, "There is no dispute that 1395oo(a) is the gateway provision for Board jurisdiction" but the question that remained was what "dissatisfaction" with a final intermediary determination meant. "Loma Linda was undoubtedly 'dissatisfied' with [the intermediary's] final determination of 'the total program reimbursement due,' for it appealed …. At this point, the Board had jurisdiction for a hearing that, according to the clear language of the text, was 'with respect to … the cost report.' This being so, 1395oo(d) kicked in. … So, once jurisdiction over the … cost report attached … Loma Linda could identify additional aspects of the intermediary's determination that were covered in the cost report, and the Board had authority to deal with them." Loma Linda at 1070. "[T]he Board had discretion to receive evidence and take action in accord with 1395oo(d) on this matter even though the interest expense was not expressly claimed and had not been explicitly considered by the intermediary." Id at 1073. The Court responded to the Secretary's concerns regarding the prospect of increased, time-consuming and complicated appeals, skirting available remedies and time limits, and gamesmanship by saying, "Congress chose to give the Board wiggle room to decide matters … which were not explicitly presented to, or considered by, the intermediary." The Court found that the Board could address these concerns through its authority in 1395oo(e) to make rules and establish procedures necessary to carry out the provisions of 1395oo. Id. at 1073.

In UMDNJ v. Leavitt, 539 F. Supp. 2d. 70 (D.D.C. 2008), the District Court reached the same conclusion as the First and Ninth Circuits. As in MaineGeneral and Loma Linda, the provider filed its appeal based on several intermediary adjustments to its cost report claims with which it was dissatisfied but it also included costs for its clinical medical education programs omitted entirely from the cost report. Though not directly on point, the D.C. District Court found

guidance in the decision in HCA Health Services of Oklahoma v. Shalala, 27 F.3d 614 (D.C. Cir. 1994) because it dealt with the "fundamental, jurisdictional difference between an appeal predicated upon an original NPR and one that is predicated on a revised NPR." 539 F.Supp. 2d at 77. The HCA Court explained that 1395oo(d) "allows the Board, once it obtains jurisdiction pursuant to subsection (a), to review and revise a cost report with respect to matters not contested before the fiscal intermediary." 27 F.3d at 617. Relying on HCA, the D. C. District Court concluded that the provider had obtained jurisdiction under section 1395oo(a) by claiming dissatisfaction with the total amount of reimbursement determined in the NPR, after which any expense incurred in the cost report period was "fair game for a challenge by virtue of subsection (d)." 539 F. Supp. 2d at 77. The Court refused the provider's request for it to order the Board to hear the claim inadvertently omitted, saying "the Board may adopt a policy of hearing claims not initially presented to the fiscal intermediary or of refusing to hear them, or it may decide on a case by case basis." Id. at 79.

In summary, the Bethesda decision firmly establishes that not only does the provider have a right under § 1395oo(a) to appeal any item claimed on the cost report and adjusted by the intermediary, it also has a right to appeal those items not specifically claimed but which are pre-determined by the agency to be disallowed. The circuit and district court cases discussed above further establish that, once the Board obtains jurisdiction under subsection (a), then the Board has *discretion* under § 1395oo(d) to consider any matter covered by the cost report, i.e. any expense incurred within the fiscal period, but it is not required to do so.

It is undisputed that the Provider reported and claimed a total of $26.1 million in capital lease payments on its as-filed cost report. *See* Stipulations at ¶ 3. The Provider then made adjustments on its cost report to limit the amount of rental costs to reflect the allowable costs of ownership. The Intermediary does not dispute that it reviewed the Provider's claim for allowable rental costs, as reflected by the Provider's calculation of the cost of ownership limitation. The limitation as computed by the Provider only included the depreciation component of the permissible costs of ownership. The parties agree that imputed interest is a reimbursable cost of ownership pursuant to 42 C.F.R. § 413.130(b)(9). *See* Stipulations at ¶ 4.

The Board finds the facts as noted above establish that the Provider made a claim for rental costs associated with its capital lease as a virtual purchase. The error was in the calculation of the cost of ownership limitation which determines what the allowable rental costs would be. The Board finds it has jurisdiction over the issue under 42 U.S.C. § 1395oo(a) since the Intermediary reviewed the reported rental costs and adjusted the cost of ownership.

The Board majority finds that having obtained jurisdiction under 42 U.S.C. § 1395oo(a), it has the discretion to exercise jurisdiction in accord with § 1395oo(d) on this matter, even though the interest expense was not expressly claimed and had not been explicitly considered by the Intermediary.

In deciding whether or not to exercise discretion under 42 U.S.C. § 1395oo(d), the Board majority considers the following. The Provider states that the Intermediary's instructions to the Provider were erroneous at worst and incomplete at best. (Tr. 21, lines 9-10). The Intermediary disputes that statement and points out that there is no proof of that in the case record.

(Intermediary's Consolidated Position Paper, p. 7). The Intermediary states that the Provider claimed only the asset cost, namely depreciation, but never claimed the financing cost. (Tr. 27, lines 12-15). The Intermediary adds it can not see a good reason why that wasn't done. (Tr. 27, lines 20-21).

It is further noted that when the Provider's witness was asked if she could recall asking the Intermediary the question, "… [c]an we include a financing or implicit or imputed interest cost? Do you remember that question being asked?," the Provider's witness replied, "No, I do not." (Tr. 122, lines 23-25, Tr. 123, lines 1-2). In a followup question by the Provider's attorney, the witness stated that she could not recall any discussion related to the topic of interest. (Tr. 126, lines 21-23). Also, the witness admitted that the Provider had previously used a protested item mechanism to express its dissatisfaction with reimbursement treatment, but did not use it on this issue because of the conversation with the Intermediary. (Tr. 124, lines 4-6). When asked if the conversation with the Intermediary was reflected in any type of correspondence, the witness replied there was none that she had been able to locate. (Tr. 124, lines 8-11).

Considering the totality of the circumstances in this appeal, the Board majority declines to exercise discretion to take jurisdiction under 42 U.S.C. § 1395oo(d).

DECISION AND ORDER:

The Provider has a right to a hearing under 42 U.S.C. § 1395oo(a), but the Board majority declines to exercise discretion to take jurisdiction under 42 U.S.C. § 1395oo(d) over the issue of whether the Provider is entitled to be reimbursed for the interest implicit in the capital lease of the hospital facilities and equipment.

BOARD MEMBERS PARTICIPATING:

Yvette C. Hayes (dissenting as to Jurisdiction)
Keith E. Braganza, C.P.A.
John Gary Bowers, C.P.A.

FOR THE BOARD:

Keith E. Braganza, C.P.A.
Board Member

DATE: August 11, 2011

Dissenting Opinion of Yvette C. Hayes (as to Jurisdiction)

I respectfully dissent with the Board majority's decision to decline to exercise its "discretionary" powers under 42 U.S.C. § 1395oo(d) to take jurisdiction over the issue of whether the Provider is entitled to be reimbursed for the interest implicit in the capital lease of the hospital facilities and equipment.

The Board found that the Provider does have a right to a hearing under 42 U.S.C. § 1395oo (a), but the Board majority is exercising – what it defines as its - discretionary authority under § 1395oo (d) to refuse to hear this particular issue under appeal.

In Bethesda Hospital Association v. Bowen, 485 U.S. 399 (1988)[8], the Supreme commented that language in subsection (d):

> … allows the Board, *once it obtains jurisdiction pursuant to subsection (a)*, to review and revise a cost report with respect to matters not contested before the fiscal intermediary. The only limitation prescribed by Congress is that the matter must have been "covered by such cost report," that is, a cost or expense that was incurred within the period for which the cost report was filed, even if such cost or expense was not expressly claimed.

Bethesda at 406.

The Supreme Court plainly held that before subsection (d) can be applied, the Board must have jurisdiction under subsection (a). In addition, it held that the matter at issue does not have to be contested (or adjusted) by the Intermediary.

Although the Supreme Court has not had an opportunity to squarely address whether the provider has a right to a Board hearing on a cost [or reimbursement] unclaimed through inadvertence rather than futility, I find that the weight of authority holds that the once the Board has statutory jurisdiction pursuant to 42 U.S.C. § 1395oo (a), it has the power to decide an issue that was not first raised before the intermediary under § 1395oo (d), but that [the Board] is not required to do so. (MaineGeneral Medical Center v. Shalala, 205 F.3d 493 (1st Cir. 2000); Loma Linda Univ. Medical Center v. Leavitt, 492 F.3d 1065 (9th Cir. 2007); UMDNJ v. Leavitt, 539 F. Supp. 2d. 70 (D.D.C. 2008).

In MaineGeneral Medical Center v. Shalala, 205 F. 3d 493 (1st Cir. 2000), the Court found it was bound by St. Luke's Hospital v. Secretary of HHS, 810 F.2d 325 (1st Cir. 1987) decision because it was "on point and remains good law." The Court also concluded that the Supreme Court

[8] In Bethesda, the US Supreme Court held that the Board may not decline to consider a provider's challenge to a regulation of the Secretary on the ground that the provider failed to contest the regulations validity in the cost report submitted to its fiscal intermediary. It found the plain language of § 1395oo(a) demonstrates that the Board had jurisdiction to entertain this action and that there was no merit to the Secretary's contention that a provider's right to a hearing before the Board extends only to claims presented to a fiscal intermediary because the provider cannot be "dissatisfied" with the Intermediary's decision to award the amounts requested in the provider's cost report. The Court found this *strained interpretation* offered by the Secretary to be inconsistent with the express language of the statute.

decision in Bethesda, taken as a whole, does not undermine the holding of St. Luke's. Therefore, in accordance with St. Luke's, the First Circuit held that the Board has statutory jurisdiction to hear MaineGeneral's claims, but that it is not required to hear it. 205 F.3d at 497. In other words, the Board has the power to decide the question at issue even though it was not first raised before the intermediary, but that power is discretionary.[9]

The First Circuit's advice or instructions to the Board on how to make the case for "refusing to hear inadvertently omitted claims" by establishing a "rule of consistency" was described as a rational approach in light of the fact that providers have the ability to request a reopening from its intermediary (or that the providers still have another recourse to correct for omitted claims) up to 3 years after NPR is issued. This rationale fails to acknowledge that the intermediary has complete discretion as to if it will or will not reopen a cost report, or that the intermediary could also adopt its own policy to not reopen for claims of omission and its decisions would be final with no administrative or judicial review. *See* Your Home Visiting Nurse Servs. Inc. v. Shalala, 119 S. Ct. 930, 933-934 (1999).

As of the July 2009 update of the Board's rules and instructions, the Board had not established such a policy regarding unclaimed costs or reimbursement. The Board is currently deciding this matter on a case-by-case basis which means there is no final resolution to the question – whether the Board will hear an issue not first raised before the intermediary, even if it has the power to do so. At present, the decision to hear or not hear a provider's claim may vary depending on the very composition of Board members which would serve to undermine the principle of consistency the courts were cognizant of.

> This "discretionary" power that the courts have found the Board has could be used as a means to cut off a provider's statutory right so exercised. The appeals process is the only avenue available to providers where they are the moving party and have some say or some assurance that the matter may be heard on the merits versus refused or denied for lack of interest or limited resources. If the only recourse a provider has is to request a reopening via amended cost report or other correspondence, then that is no recourse at all, in light of the potential of the Intermediary to exercise its unreviewable discretion to not reopen.
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> In Loma Linda Univ. Med. Ctr. v. Leavitt, 492 F.3d 1065 (9th Cir. 2007), the Ninth Circuit "joined" the First Circuit's view as expressed in MaineGeneral and St. Luke's. The Court noted that 42 U.S.C. § 1395oo(a) is the gateway provision for Board jurisdiction and held that:
>
> Section 1395oo(a) plainly says that a provider … may obtain a Board hearing with respect to the cost report when it is dissatisfied with the intermediary's final determination of the amount of *total reimbursement*. Id. at 1070.

[9] The Magistrate Judge in the U.S. District Court for the District of Maine went even further and held that "the Board's decision to review the claims is clearly discretionary under § 1395oo(d), and it was well within its authority to refuse to hear the claims." (as quoted from MaineGeneral). The decision of the district court was vacated and the case remanded to the Provider Reimbursement Review Board.

The dispute in Loma Linda concerns what § 1395oo(a) means when it allows a Board hearing for a provider who is "dissatisfied" with a final determination of its intermediary. The Secretary's position is that a provider cannot be "dissatisfied" with respect to costs for which it could have claimed reimbursement from its intermediary but did not. The Provider's position is that its "dissatisfaction" was established "when it filed an appeal from [the Intermediary's] final determination, and that the PRRB thereafter had power under § 1395oo(d) to make revisions to matters covered by that cost report regardless of whether such matters were considered by the intermediary." Id.

The Court held that [the Provider] was "undoubtedly 'dissatisfied' with [the Intermediary's] final determination of the 'total program reimbursement due, *for it appealed*. Its appeal was on time and the amount [in dispute] exceeded the jurisdictional minimum." It found all threshold jurisdictional requirements were met "for a hearing that, according to the clear language of the [statute], was 'with respect to the cost report.' This being so, § 1395oo (d) kicked in." Id. at 1071. (emphasis added.)

As the Supreme Court put it, § 1395oo(d) "sets forth the powers and duties of the Board once its jurisdiction has been invoked." Bethesda Hosp., 485 U.S. at 405. Those powers and duties are to base its decision on the record, which is to include the evidence considered by the intermediary and such other evidence as may be obtained or received by the Board"; to affirm, modify or reverse a final determination "with respect to a cost report"; and to make other revisions "on matters covered by such cost report [10] … even though such matters were not considered by the intermediary in making such final determinations." Thus, § 1395oo(d) squarely allows the Board to modify a final determination based on evidence that was not considered by the intermediary, and to make revisions on a cost or expense incurred during the year being reported even though the cost wasn't claimed and the matter wasn't considered by the intermediary. Congress could not have intended an *absolute exhaustion rule* in the face of this explicit power. To the contrary, it found that the Congress spoke quite directly to the precise question and opted for Board discretion to go beyond the record adduced for, and considered by, the intermediary. Id. (emphasis added)

I agree with the Loma Linda Court's reasoning that if Congress' intent was to *limit* the Board's review to just the matters adjusted[11] for by the intermediary or to just the evidence explicitly presented to, or considered by the intermediary at the time of its determination, it could have expressly done so. Congress did exactly the opposite, it gave the Board expanded powers to decide matters covered by a cost report that is properly before it and to address and revise as necessary any issue that may arise during the conduct of such hearing.

The Loma Linda Court also noted its interpretation of the interplay between §§ 1395oo(a) and (d) as conferring discretion on a Board with jurisdiction over a cost report under § 1395oo(a) to base its decision on:

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[10] A "matter covered by such cost report" is "a cost or expense that was incurred within the period for which the cost report was filed, even if such cost or expense was not expressly claimed." Id at 406; Adams House Health Care v. Bowen, 862 F.2d 1371, 1375 (9th Cir. 1988) (adopting the Bethesda Hospital definition).

[11] As described by the Secretary/CMS/FI as an "adverse audit adjustment."

> evidence or costs and expenses not claimed by the provider or considered by the intermediary if the cost or expense were incurred within the period for which the cost report was prepared. [12]

Id. at 1072.

The Ninth Circuit's view that the Board's jurisdiction is *discretionary* was further explained as:

> What we did in [Adams House] was explain that the discretionary language in St. Luke's does not describe the Board's power to *accept* or *reject* appeals; rather, "it describes the Board's options once an appeal is filed."[13]

The Loma Linda Court stated that it was guided by this construct in holding that once jurisdiction has been obtained over a cost report because of a provider's dissatisfaction with the intermediary's final determination of the total reimbursement amount due, the Board then has discretion to consider evidence that was not before the intermediary; to affirm, modify or reverse the final determination; and to revise matters covered in the cost report that the intermediary did not consider.

I agree with the Board majority that, in UMDNJ v. Leavitt, 539 F. Supp. 2d. 70 (D.D.C. 2008), the District Court reached the same conclusion as the First and Ninth Circuits. The D.C. Circuit found that the plaintiff was clearly "dissatisfied" with the fiscal intermediary's determination of total reimbursement for it appealed multiple issues in each NPR. As in Loma Linda, at this point, the Board had jurisdiction for a hearing that according to the clear [and unambiguous] language of the statute, was with respect to the provider's cost reports for the years in question. Loma Linda, 492 F. 3d at 1071.

The D.C. District Court also agreed with the First and Ninth Circuit's view that:

> The Board may adopt a policy of hearing claims not initially presented to the fiscal intermediary or of refusing to hear them, or it may decide on a case by case basis.

MaineGeneral, 205 F. 3d at 501.

In summary, Bethesda firmly establishes that not only does the provider have a right under section 1395oo (a) to appeal any item claimed on the cost report and [/or] adjusted by the

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[12] *See* Bethesda Hosp., 485 U.S. 405-06 (finding that its conclusion was required by § 1395oo(a) but was supported by the design of the statute as a whole as well as by § 1395oo(d), and observing of § 1395oo(d) that it "allows the Board, once it obtains jurisdiction pursuant to subsection (a), to review and revise a cost report with respect to matters not contested before the fiscal intermediary" so long as the matter is covered by the cost report).

[13] *See* Adams House Health Care v. Bowen, 862 F.2d 1371, 1375 (9th Circuit 1988) (Emphasis added). The court went further and held " [t]he Board has no discretion to reject an appeal, for as 42 U.S.C. § 1395oo(a) provides,[a]ny provider of services which has filed a required cost report within the time specified in regulations *may* obtain a hearing with respect to such cost report by a Provider Reimbursement Review Board. … The word "may" in the emphasized language connotes not contingency, but entitlement. Id. at 1375-76.

intermediary, [the provider] also has a right to appeal those items not specifically claimed but which are pre-determined by the agency to be disallowed. Furthermore, the circuit and district court cases discussed above clearly conclude that, once the Board obtains jurisdiction under subsection (a), then *subsection (d) sets forth the powers and duties of the Board [to decide a matter under appeal]*.[14]

In conclusion, I find once a provider has met the jurisdictional requirements to a Board hearing under § 1395oo (a), it has the right to be heard on the merits of its case, the Board's authority to decide the matter and the scope of its review is governed under § 1395oo (d). Section 1395oo(d) does not convey discretion on the Board to refuse to hear an appeal or a matter at issue in an appeal, in effect cutting off a provider's statutory right to a Board hearing.

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Yvette C. Hayes

[14] See Bethesda Hosp., 485 U.S. at 405.