

CENTERS FOR MEDICARE & MEDICAID SERVICES

Decision of the Administrator

In the case of:

Community Hospital of the Monterey Peninsula

Provider

vs.

**Blue Cross Blue Shield Association/
United Government Services, LLC-CA**

Intermediary

Claim for:

**Provider Cost Reimbursement
Determination for Cost Reporting
Period Ending: 12/31/93**

Review of:

**PRRB Dec. No. 2006-D13
Dated: January 19, 2006**

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision of the Provider Reimbursement Review Board (Board). The review is during the 60-day period in §1878(f) (1) of the Social Security Act (Act), as amended (42 USC 1395oo (f)). The Center for Medicare Management (CMM) submitted comments, requesting dismissal of the case for lack of jurisdiction. Accordingly, the parties were notified of the Administrator's intention to review the Board's decision. The Provider submitted comments requesting that the Administrator affirm the Board's decision. All comments were timely received. Accordingly, this case is now before the Administrator for final agency review.

ISSUE AND BOARD'S DECISION

The issue is whether the Board properly accepted jurisdiction of the Provider's request for a hearing on the issue of whether it was entitled to additional disproportionate share (DSH) reimbursement for inpatient hospital days for which patients were eligible for Medicaid but were not paid by Medicaid (hereafter referred to as "Medicaid unpaid days").

A majority of the Board held that it had jurisdiction over the Medicaid unpaid days issue because Medicaid unpaid days are a component of the DSH settlement which was the basis for the revised Notice of Program Reimbursement (NPR). As the Board majority found it had jurisdiction, it adopted the parties' stipulation as to the number of DSH days that should be included in the calculation. The parties' agreed that Medicaid unpaid days should be increased to a total of 6,058 days and that the DSH payment amount should be increased from \$925,191 to \$1,138,376.

One member of the Board dissented holding that the Board did not have jurisdiction over the inclusion of Medicaid unpaid days in the DSH payment computation. Specifically, the dissenting Board member held that, since the Intermediary made no determination regarding Medicaid unpaid days in the revised NPR, the Board did not have jurisdiction over the inclusion of Medicaid unpaid days in the DSH payment computation.

SUMMARY OF COMMENTS

CMM commented requesting that the Administrator overturn the Board's decision. Specifically, CMM disagreed with the determination that the Board had jurisdiction over the inclusion of Medicaid eligible days in the DSH payment computation. CMM argued that the Provider did not meet the first criteria under the regulations at 42 C.F.R. §405.1835(a). Under this provision, an Intermediary must have made a determination on the issue. In this case, the Intermediary did not make a determination pursuant to the revised NPR on the issue of Medicaid-eligible or Medicaid-eligible but unpaid days. Therefore, neither issue was open on the cost report.

CMM pointed out that Medicaid paid days and Medicaid unpaid days are not synonymous. A Medicaid paid day is a day of inpatient care furnished to a patient eligible for inpatient benefits under a State Medicaid plan and for which the hospital received payment from Medicaid. A Medicaid-eligible day is a day of inpatient care furnished to a patient eligible for inpatient benefits under a State Medicaid plan whether or not Medicaid actually paid for that day of care.

CMM further stated that pursuant to the regulations applicable for the cost reporting period under dispute, Medicaid-eligible but unpaid days were not included in the Medicare DSH calculation. Rather, Medicaid-eligible but unpaid days were added to the Medicare DSH calculation in the Ninth Circuit prospectively as of January 23, 1997 and only to cost years that were still open or for those that had received a NPR

and the provider had filed a timely appeal of the issue. Additionally, Intermediaries were instructed to deny any request for reopening on this issue for fiscal periods in which final payment had been made. By not appealing the issue of Medicaid eligible but unpaid days within the time frames specified in the regulations, the Provider's appeal rights on this issue has expired. In sum, CMM stated that the Provider did not seek inclusion of Medicaid unpaid days in its as-filed cost report, nor at any time prior to filing an appeal with the Board on May 4, 2001, nearly six years after the initial NPR was issued, nor did the Provider seek reopening and submit a listing of Medicaid unpaid days to the Intermediary.

The Provider commented requesting that the Administrator affirm the Board's decision. The Provider argued that it filed a jurisdictionally proper appeal before the Board because the appeal was filed within 180 days of receipt of the revised NPR and the disputed amount of reimbursement exceeded \$10,000. The Provider argued that it claimed Medicaid eligible but unpaid days along with paid eligible days in its original cost report and that the Intermediary, through audit adjustment number 4, eliminated all of the unpaid eligible days because it wrongly interpreted 42 C.F.R. §412.106. Next, the Provider argued that HCFA Ruling 97-2 did not prohibit appeals of revised NPRs. The Provider contended that the issue was raised in the Provider's reopening request because the DSH payment amount was understated and calculated in a manner inconsistent with 42 C.F.R. §412.106. As such, the issue of Medicaid-eligible but unpaid days was properly before the Board as a determination at issue in the revised NPR.

In addition, the Provider relying on the holding in *Legacy Emanuel Hospital and Health Center v. Shalala*, 97 F. 3d 1261, 1266, argued that, all eligible days for hospitals such as the Provider residing within the Ninth Circuit are to be recognized whether paid or unpaid. The Provider argued that it was precluded from including Medicaid unpaid days in its reopening request based on instructions from CMS to the Intermediary. The Provider did not request Medicaid unpaid days in its reopening request and to now deny their claim is unreasonable.

DISCUSSION

The entire record, which was furnished by the Board, has been examined, including all correspondence, position papers, and exhibits. The Administrator has reviewed the Board's decision. All comments received timely are included in the record and have been considered.

Section 1878(a) of the Act and the regulations found at 42 C.F.R. §405.1835 set forth the requirements for Board jurisdiction. A provider may obtain a hearing before the Board with respect to its fiscal intermediary's determination of its cost report, inter alia, only if: the provider is dissatisfied with a final determination of its fiscal intermediary as to the amount of reimbursement due the provider for the period covered by such report; there is \$10,000 or more in controversy; and the provider filed a request for a hearing within 180 days after the notice of the intermediary's final determination.¹

The regulation at 42 C.F.R. §405.1885(a) allows for the reopening of a determination or decision if "made within 3 years of the date of the notice of the intermediary determination [i.e., the NPR]...." When a reopening pursuant to 42 C.F.R. §405.1885 results in the issuance of a revised NPR, the regulation at 42 CFR §405.1889 controls the scope of Board jurisdiction with respect to the revised NPR. The regulation provides that:

Where a revision is made in a determination or decision on the amount of program reimbursement after such determination or decision has been reopened as provided in §405.1885, such revision shall be considered a separate and distinct determination or decision to which the provisions of §§405.1811, 405.1835, 405.1875 405.1877 are applicable.

This provision is also set forth in §2932B of the Provider Reimbursement Manual. This section likewise refers to a revised NPR as a "separate and distinct determination" which gives a right to a hearing on the matters corrected by such determination. Thus, a revised NPR does not reopen the entire cost report to appeal. It merely reopens those specific matters adjusted by the revised NPR.

By notice dated November 7, 2000, the Intermediary issued a revised NPR, which reflected a DSH adjustment. The related "Explanation of Audit Adjustment Report" states that the adjustment to DSH was "to revise the audited DSH adjustment to include patient days on remittance advices after the medical audit."² On May 4, 2001, the Provider appealed the determination of the Medicare DSH calculation of the revised NPR.

The Administrator, after reviewing the record and the relevant law, regulations, and governing criteria, finds that the Board improperly accepted jurisdiction. The Administrator finds that 42 C.F.R. §405.1889 bars the Provider from using the

¹ The Board may also take jurisdiction of late-filed appeals "for good cause shown" (42 C.F.R. §405.1841(b)).

² Intermediary's Exhibit 1.

revised NPR as the basis for appeal of Medicaid unpaid days. The regulation at 42 C.F.R. §405.1889 provides that “such revision shall be considered a separate and distinct determination” for purposes of appeal. In this case, the Intermediary did not make a determination in the revised NPR on the issue of Medicaid unpaid days. The revised NPR was limited to Medicaid paid days.³ Thus the only Medicare DSH issue decided pursuant to the revised NPR and thus open for appeal was the issue of Medicaid paid days. Thus, the Provider’s appeal on this issue was not properly before the Board and must be dismissed for lack of jurisdiction.

The Administrator disagrees that Medicaid-paid and Medicaid-unpaid days are one issue under DSH. The Administrator finds that for the cost reporting period in dispute CMS historically treated Medicaid paid and Medicaid unpaid days as separate and distinct issues for purposes of the DSH calculation. The Provider also contended in its comments that it omitted Medicaid eligible but unpaid days from its request because HCFAR 97-2 specifically provided that intermediaries were prohibited from issuing “reopening for unpaid eligible Medicaid days for NPRs settled prior to February 27, 1997.” However, the Provider had the opportunity to appeal that issue through its original NPR. The issuance of a revised NPR to include “patient days on the remittance advice” in the DSH calculation does not extend the time period for requesting review of Medicaid unpaid days, nor can it be used to expand the scope of Board jurisdiction under 42 CFR 405.1889.

³ The Provider acknowledged that it only raised the Medicaid paid days in its reopening request. However, the original reopening request and notice of reopening were not made part of the record.

DECISION

According, the Administrator vacated the Provider Reimbursement Review Board decision.

**THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF
THE SECRETARY OF HEALTH AND HUMAN SERVICES**

Date: 3/15/06

/s/
Leslie V. Norwalk, Esq.
Deputy Administrator
Centers for Medicare & Medicaid Services