PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

98-D4

PROVIDER -
St. Anthony Hospital Systems
Denver, Colorado

Provider No. 06-0015

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
New Mexico Blue Cross and Blue
Shield, Inc.

DATE OF HEARING-
October 11, 1994

Cost Reporting Period Ended -
June 30, 1988

CASE NO. 91-1441

INDEX

ISSUE:

Was the Intermediary's adjustment reclassifying air ambulance lease rental payments from capital costs to operating expenses proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

St. Anthony Hospital Systems ("Provider") is a 535 bed acute care hospital located in Denver, Colorado. The Provider operates its hospital on two campuses, St. Anthony Hospital Central and St. Anthony Hospital North. Although the Provider operates on two separate campuses, it is a single entity, under common ownership, having one accounting system.[1]

The Provider operated an emergency airborne ambulance service since 1972. The name of the service, which is registered with the United States Office of Patents and Trademarks, is "Flight For Life".[2] Flight For Life takes calls from emergency service agencies such as fire departments, law enforcement agencies, and ground ambulance crews. In response, Flight For Life transports medical crews to emergency sites, and then transports patients from the sites to an appropriate hospital destination. Approximately 60 percent of patients serviced by Flight For Life are transported to the Provider's facilities, while approximately 40 percent are transported to other area hospitals.[3]

As part of its Flight For Life program, the Provider obtained two Alouette 316B helicopters through an agreement dated October 31, 1983, with Rocky Mountain Helicopters, Inc. ("RMH"). Pursuant to the agreement, the two helicopters were painted in the color scheme of the Provider, prominently displayed the Provider's Flight For Life logo, and were available to the Provider on a 24-hour per day basis.[4]

For its Medicare cost reporting period beginning January 1, 1988 and ended June 30, 1988, the Provider incurred $470,687 in expenses related to aircraft. These expenses included $329,365 in helicopter aircraft base charges, $102,393 in helicopter flight hour per diem charges, and $38,929 in fixed wing charges.[5] For the purpose of Medicare cost finding, the Provider reclassified these expenses from an operating cost center on its Medicare cost report to the capital-related costs-movable equipment cost center. In effect, the Provider claimed

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1 Intermediary's Position Paper at 3.

2 Provider's Position Paper and Exhibits at 4 and Exhibit A.

3 Post-Hearing Brief of Provider at 1.

4 Provider's Position Paper and Exhibits at 4 and Exhibits B and C.

5 Post-Hearing Brief of Provider at 2.

cost-based reimbursement for the aircraft expenses as capital-related pass-through costs under Medicare's prospective payment system. The Provider's claim was made based upon the provisions of 42 C.F.R. § 413.130 which, in part, govern the classification of "lease" costs as capital-related costs.

New Mexico Blue Cross and Blue Shield ("Intermediary") audited the Provider's cost report

for the subject reporting period and made an adjustment reversing the Provider's aircraft expense reclassification. The Intermediary based the adjustment on its determination that the Provider had actually purchased aircraft services rather than having leased capital assets.[6]

On September 28, 1990, the Intermediary issued a Notice of Program Reimbursement reflecting its adjustment to the air ambulance costs. On March 22, 1991, the Provider appealed the adjustment to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R.
§§ 405.1835-.1841, and has met the jurisdictional requirements of those regulations.[7]

The Provider's appeal initially challenged the entire amount of the Intermediary's adjustment or $470,687, as described above. Subsequently, the Provider modified its appeal to contest only that $303,953 of the helicopter aircraft base charge should not have been adjusted by the Intermediary and should remain classified as capital-related costs. The Provider determined this amount by reducing the helicopter aircraft base charge of $329,365, discussed above, by $21,000 applicable to pilot costs and by $4,412 applicable to a Consumer Price Index adjustment. The estimated amount of Medicare reimbursement in controversy based upon this modification is $100,000.

The Provider was represented by Diane M. Signoracci, Esquire, of Bricker & Eckler. The Intermediary was represented by David B. Smyth, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the monthly aircraft base charge paid to RMH is properly classified
as capital-related costs pursuant to Medicare regulations.[8]

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6 Provider's Position Paper and Exhibits at 7. Intermediary's Position Paper at Exhibit F.

7 Provider's Position Paper and Exhibits at 2.

8 Post-Hearing Brief of Provider at 11.

The capital-related nature of a cost under Medicare is determined pursuant to 42 C.F.R. § 413.130(a)(3), which provides that "leases and rentals, including license and royalty fees, for the use of depreciable assets or land, as described in paragraph (b) of this section" are included among allowable capital-related costs. In part, 42 C.F.R. § 413.130(b) states:

> [s]ubject to the qualifications of paragraphs (b)(2) and (4) of this section, leases and rentals, including licenses and royalty fees, are includable in capital-related costs if they relate to the use of assets that would be depreciable if the provider owned them outright. The terms "leases" and "rentals of assets" signify that a provider has possession, use, and enjoyment of the assets.

42 C.F.R. § 413.130(b).

With respect to the provisions of 42 C.F.R. § 413.130(b), the Provider asserts that the agreement it entered with RMH ("Helicopter Agreement")[9] clearly constitutes a lease of capital assets rather than a purchase of helicopter services. The Helicopter Agreement gives the Provider sole possession, use and enjoyment of the two helicopters at issue. The helicopters were painted in the Flight For Life colors and carried the Flight For Life logo. At all times during the term of the agreement, the helicopters were dedicated solely to the use of the Provider's Flight For Life program, under the Provider's singular control and direction. When not in use transporting patients pursuant to the Provider's instructions, the helicopters were based at facilities either owned by, or affiliated with, the Provider. The Provider alone dispatched and controlled the use of the helicopters. The Provider alone staffed the helicopters with its emergency medical personnel, and the pilots and mechanics provided by RMH were subject to the Provider's direction and control. The Provider also insured the helicopters under its professional liability and excess liability policies.

In addition, the Provider asserts that it assumed the financial risk for the use of the helicopters. The provider was responsible for paying the aircraft base charge, which amounted to $51,288 per month, regardless of the number of actual flights made. Accordingly, payments made by the Provider for aircraft base charges pursuant to the agreement fall within the regulatory definition of lease and rental payments, and therefore qualify as capital-related costs.

The Provider also contends that the monthly aircraft base charge is properly classified as capital-related costs pursuant to previous Board findings. The Board, in interpreting 42 C.F.R. § 413.130(b), has applied two tests to determine whether or not a provider had possession, use and enjoyment of an asset. In Keokuk Area Hospital v. Blue Cross and Blue Shield

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[9] Provider's Position Paper and Exhibits at Exhibit B.

Association, PRRB Dec. No. 92-D22, Medicare & Medicaid Guide (CCH) ¶ 40,119 ("Keokuk")[10]; St. Vincent Memorial Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 92-D31, Medicare & Medicaid Guide (CCH) ¶ 40,277 ("St. Vincent")[11]; and Bethany Methodist Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 89-D22, Medicare & Medicaid Guide (CCH) ¶ 37,658 ("Bethany")[12], the Board applied a financial risk test. In The Public Hospital of the Town of Salem v. Blue Cross and Blue Shield Association, PRRB Dec. No. 90-D30, Medicare & Medicaid Guide (CCH) ¶ 42,255 ("Salem")[13], the Board applied a control test. The Provider asserts that the facts in the instant appeal establish that the Provider's arrangement for the Flight For Life helicopters satisfies both tests.

In Keokuk, St. Vincent, and Bethany the hospitals contracted for computerized tomography ("CT") scanner services on a fee for service basis. If no procedures were performed, the hospital owed no payments to the owner of the CT scan equipment. The Board decided in these cases that the contract between the parties was not a lease but a service agreement because the hospital invested no cash and assumed no risk for the costs of the equipment. In the instant case, the Provider pays an aircraft base rent of $51,228.00 per month and $13.00 per helicopter per day for the two helicopters regardless of actual usage. The Provider thereby makes a substantial investment and assumes a substantial risk for the costs of the helicopters. In the event that there is no demand for the services of the Flight For Life helicopters, or insufficient demand, the Provider alone is at risk of losing an investment made in the assets. In return, the Provider receives total possession, use, enjoyment and control of the helicopters. The Helicopter Agreement, therefore, is clearly distinguishable from the CT scanner service agreements found by the Board to constitute purchased services agreements. The Helicopter Agreement creates a definite obligation on the Provider's behalf to pay for its possession, use and enjoyment of the helicopters, and that obligation constitutes a capital-related cost.

The Board's decision in St. Vincent was reversed by the United States District Court in St. Vincent Memorial Hospital v. Shalala, No. 92-3144, Medicare & Medicaid Guide (CCH) ¶ 41,556 (C.D. Ill., June 29, 1993).[14] In this decision, the Court also rejected the Board's reasoning in Keokuk and Bethany. The District Court found that "the proper test to determine whether an asset is "capital-related" is whether the provider has "possession, use and control"

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[10] Provider's Position Paper and Exhibits at Exhibit I.

[11] Provider's Position Paper and Exhibits at Exhibit J.

[12] Provider's Position Paper and Exhibits at Exhibit K.

[13] Provider's Position Paper and Exhibits at Exhibit S.

[14] Provider's Position Paper and Exhibits at Exhibit L.

of the asset. The District Court determined that the Board relied on the following "alternative test:"

> [s]ince IAI [equipment supplier] purchased the assets and was fully responsible for operation, maintenance, and liability associated with the use of the equipment [and] the ownership costs and risk of ownership were borne solely by IAI the agreement the provider entered into was not a capital lease. . .

The District Court rejected this "alternative test" as inconsistent with the controlling regulations.
The Court concluded that:

> "possession" does not require a heightened ownership interest in the property (e.g., title, insurance, assuming the risks associated with the asset). Rather, "possession" is found where the possessee has "control" and a "qualified right" in some asset.

Following the District Court's decision in St. Vincent, the Board decided Salem. In that case, the provider contracted with United States Medical Management, Inc. ("USMM") for a CT scanner and related services. The contract between the hospital and USMM provided that: (1) the CT scanner will be located on the premises of the hospital; (2) USMM would train provider personnel in the operation of the CT scanner; (3) the hospital would provide all medical supplies, facilities and personnel to provide emergency medical care to patients; (4) the hospital would provide physicians to inject patients with contrast solution and radiologists to interpret the CT scans; (5) USMM would reimburse the hospital for the cost of insurance coverage with respect to the CT scanner unit; (6) USMM and the hospital are independent contractors; (7) USMM would provide all maintenance and glassware for the scanner; (8) USMM would improve the space where the CT scanner is to be located; (9) USMM had the exclusive right to provide CT scanner services to the hospital; and (10) the hospital paid USMM $285 per scan, and an additional charge of $5 per slice--the fee per scan was subject to adjustment for volume discounts, and USMM reimbursed the hospital $15.00 per scan for technical personnel time, film and supplies.

The Board found that these factors established that the provider met the possession, use and enjoyment criteria of 42 C.F.R. § 413.130(b)(2). The Provider asserts that the factors in the Flight For Life situation present facts of equal or greater weight for meeting this test. The helicopters are located on premises owned or arranged for by the Provider, the Provider's medical staff and personnel provide all patient care services to Flight For Life patients, RMH maintains the equipment, and the Helicopter Agreement referred to the parties as independent contractors.

The Provider asserts that the following factors, which distinguish the instant case from Salem, lend greater support to its argument that it had possession, use and enjoyment of the Flight

For Life helicopters: (1) the Provider furnished all fuel used in Flight For Life operations; (2) the Provider constructed and maintained the helipads and heliports; (3) the Provider was responsible
for the cost of malpractice and excess insurance coverage on the Flight For Life helicopters; (4) the Provider had exclusive use of the Flight For Life helicopters even though the Helicopter Agreement did not give RMH the exclusive right to provide helicopters to Flight For Life; and (5) the Provider paid a monthly aircraft base rental regardless of helicopter usage.

The only other relevant distinguishing factor is that in Salem the provider employed the technicians that operated the CT scanner, and the Provider in the instant case did not employ the pilots that flew the helicopters. The Provider asserts, however, that it did employ all dispatching, medical and administrative personnel that directed and staffed the helicopters. Furthermore, it is common practice for hospital-based air ambulance services to lease pilots, and that this single factor does not alter the conclusion that the Provider had possession, use and enjoyment of the Flight For Life helicopters.[15]

In summary, the Provider asserts that "possession" is not an issue in this case. The evidence establishes that the helicopters were at all times, when not on a transportation run, located on one of the Provider's campuses or on a more centrally located site under arrangement with the Provider. In fact, the Intermediary has agreed that the Provider had "possession" of the helicopters.[16]

As to "use", the evidence establishes that only Flight For Life patients were transported on the helicopters, and that they were transported under the direction and care of the Provider's dispatchers and Flight For Life medical crew. Furthermore, the flight records of the Flight For Life helicopters are the property of the Provider,[17] and RMH had no authority to direct the use of the helicopters or to direct who the passengers would be. In fact, RMH was precluded by contract from substituting the helicopters. During the term of the Helicopter Agreement, only the Provider had the right to use the helicopters.

Finally, as to "enjoyment," the evidence demonstrates that the Provider alone set the charges for Flight For Life services and collected all revenues. The Provider alone directed the activities of the helicopters. RMH had no rights with respect to the helicopters other than to receive the aircraft base charge and per diem and hourly fees from the Provider. The Provider adds that the Intermediary conceded to the Provider's compliance with the "enjoyment"

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15 Transcript ("Tr.") at 116.

16 Tr. at 154 and 184.

17 Tr. at 124-125. Provider's Position Paper and Exhibits at Exhibit P.

criterion.[18]

The Provider also contends that the Intermediary inappropriately relied upon guidelines issued by the Health Care Financing Administration ("HCFA") in reaching its decision that the agreement with RMH represented purchased helicopter services rather than an actual lease of capital assets. In the August 30, 1991 Federal Register,[19] HCFA listed factors that weigh in favor of treating a particular agreement as a lease. The Provider asserts the Intermediary's reliance upon these factors is misplaced for two reasons.[20] First, the guidelines were published well after the subject cost reporting period ended and, therefore, cannot be applied retroactively to the Provider's agreement with RMH. Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).[21]
Secondly, even if the factors are applied, they support the capital nature of the agreement entered with RMH. The individual factors that weigh in favor of treating an agreement as a lease, as published in the Federal Register, and the corresponding response applicable to the Helicopter Agreement, are as follows:

Factor 1: The equipment is operated by personnel employed by the provider or an organization related to the provider within the meaning of § 413.17,

Response: The helicopters are staffed by the Provider's medical flight crew, and dispatched by the Provider's central dispatch system. Over eighty percent (80%) of the Flight For Life crew was employed by the Provider.

Factor 2: The physicians who perform the services with or interpret the tests from the equipment are associated with the provider,

Response: All medical services and tests are performed and interpreted by Provider-based physicians and Provider employees.

Factor 3: The agreement is memorialized in one document rather than in two or more documents, (for example, one titled a "Lease Agreement" and one titled a "Service Agreement"),

Response: The agreement, as amended, is memorialized in a single document.

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18 Tr. at 187.

19 Provider's Position Paper and Exhibits at Exhibit G.

20 Post-Hearing Brief of Provider at 17.

21 Post-Hearing Brief of Provider at Exhibit 8.

Factor 4: The document memorializing the agreement is titled a lease agreement. If one or more of the documents memorializing the agreement are titled "Service agreements," this would indicate a purchase of services,

Response: The agreement is titled "Helicopter Agreement," and the Provider's financial statements and the Flight For Life historical profile refer to the agreement as a lease.

Factor 5: The provider holds the certificate of need (CON) for the services being furnished with the equipment,

Response: No certificate of need was required in the State of Colorado to provide emergency airborne ambulance services;[22] the Provider, however, has registered the trade name Flight For Life with the United States Patent Office, and holds accreditation for Flight For Life.

Factor 6: The basis for determining the lease payment is units of time, and is not volume sensitive (for example, numbers of scans),

Response: The lease payment includes a fixed monthly aircraft base charge, which is not related to the volume of patient transports.

Factor 7: The provider attends to such matters as utilization review, quality assurance, and risk management with respect to the services involving the equipment,

Response: The Provider alone attends to such matters as utilization review, quality assurance, and risk management with respect to Flight For Life services.

Factor 8: The provider schedules the patients for services involving the equipment,

Response: The Provider alone schedules the patients for Flight For Life transportation through its central dispatch system.

Factor 9: The provider furnishes any supplies required to be used with the equipment,

Response: The Provider furnishes the fuel and any medical equipment and supplies used in connection with the Flight For Life helicopters.

Factor 10: The provider's access to the equipment is not subject to interruption without

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[22] Tr. at 41.

notice or on very short notice.

Response: The Provider has sole and immediate access to the Flight For Life helicopters on a 24-hour per day basis.

56 Federal Register 43387(August 30, 1991).

The Provider asserts that the above factors overwhelmingly weigh in favor of treating the Helicopter Agreement as a lease of capital equipment. Additionally, the Provider disagrees with the Intermediary's contentions that the agreement does not satisfy some of the factors.

Specifically, the Intermediary contends that the Provider does not meet the first factor listed above because RMH employees flew the helicopters. In response, the Provider argues that the
pilots took their directions from the Provider's dispatchers and medical personnel. The pilots alone could not operate the helicopters in a Flight For Life transportation run. Furthermore, the Provider has made a business decision that it is more prudent for safety and liability reasons to lease pilots from an aviation company rather than employ them directly.

The Intermediary contends that the fourth factor is not met because the document memorializing the agreement is not specifically titled "lease agreement". The Provider argues that the document in this case is entitled Helicopter Agreement and is referred to in other Provider records and financial reports as a lease.

The Intermediary contends that the sixth factor is not met because the agreement contains per hour payments based on flight time. The Provider notes, however, that it is only claiming the monthly aircraft base fee as capital-related costs, and it is not volume-sensitive.

Finally, the Provider argues that even if it is assumed that it has failed to meet the first and fourth factors, it is important to note that HCFA's guidelines state that agreements have a "wide variation" and that "[b]ecause no single factor is necessarily determinative. . ., the intermediary will examine all aspects of an agreement." In this arrangement, the Intermediary has erred in focusing too heavily on the employer of the pilots to the exclusion of all other factors.

Notwithstanding the Intermediary's misapplication of HCFA's guidelines, the Provider contends that the Intermediary's decision regarding the classification of the monthly aircraft base charge is arbitrary and unreasonable. The Intermediary testified that it would permit capital-related treatment of a helicopter that was owned by a hospital but piloted by a leased pilot.[23] The Intermediary also would permit capital-related treatment when a hospital leases

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[23] Tr. at 157.

the helicopter from one vendor and the pilots from a second vendor.[24] The Intermediary, however, will not recognize the capital nature of a helicopter if the hospital leases both the helicopter and pilots from a single vendor.

The Provider contends that the Intermediary's reliance upon HCFA's capital-related cost Questions and Answers ("Qs&As") is also misplaced in deciding the aircraft base charges paid to RMH are not capital-related costs. On June 5, 1992, HCFA issued its compilation of Qs&As to assist in the implementation of the capital-related cost prospective payment system.[25] Question number 10 of the Qs&As sets forth an arrangement whereby a teaching hospital contracted with two firms to provide medically equipped aircraft for emergency medical services. The aircraft suppliers paid all costs of employing all medical and aviation personnel, and all costs of insuring the aircraft. The aircraft suppliers also indemnified the hospital against all loss or liability arising out of the use of the aircraft. No personnel or equipment of the hospital were used. The aircraft was located off hospital premises and was available on an as-needed, on-call basis. The pilot was in total control of the aircraft. In the present case, the Provider has provided both the medical and radio equipment for the helicopter, as well as all supplies and fuel. All medical personnel are employees of the Provider. The Provider furnishes malpractice and excess liability coverage for the helicopters, and there is no indemnification provision. The helicopters are based at the Provider's facilities and are available 24-hours per day whether or not needed. Finally, the Provider and not the pilot controls when, where and who to fly in the helicopters. Clearly, the Q&A does not support the Intermediary's position.

Finally, the Provider contends there are no other provisions of 42 C.F.R. § 413.130(g) relating to the costs of supplying organizations, which support the Intermediary's adjustment. Regulations at 42 C.F.R. § 413.130(g)(2) state:

> If the supplying organization is not related to the provider within the meaning of § 413.17, no part of the charge to the provider may be considered a capital-related cost (unless the services, facilities, or supplies are capital-related in nature) unless--
>
> (i) The capital-related equipment is leased or rented (as described in paragraph (b) of this section) by the provider;
>
> (ii) The capital-related equipment is located on the provider's premises, or is located offsite and is on real estate owned, leased or rented by the provider; and

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[24] Tr. at 187.

[25] Intermediary's Position Paper at Exhibit E.

(iii) The capital-related portion of the charge is separately specified in the charge to the provider.

Initially, the Provider contends that the provisions of 42 C.F.R. § 413.130(g)(2) are intended to apply to supplying organizations that offer hospitals such services as laundry, laboratory, or computer services. See 49 Federal Register 234 (January 3, 1984).[26] In such arrangements, the supplying organization controls the provision of services, and the provision of services is the predominate aspect of the transaction. The regulation is not intended to apply to arrangements such as the Helicopter Agreement in the instant case, that provide the hospital with major items of movable equipment solely for the hospital's use and control.

Nevertheless, the Provider contends that the subject agreement with RMH effectively satisfies each of the requirements of 42 C.F.R. § 413.130(g)(2). First, the helicopters are clearly leased for the sole possession, use and enjoyment of the Provider. Secondly, the helicopters are located on the Provider's premises. And last, the capital-related portion of the charge has been separately specified in the RMH invoices as the "aircraft base charges" throughout the subject cost reporting period.[27]

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its adjustment reclassifying the Provider's Flight For Life air ambulance costs from capital-related costs to operating expenses is proper. The Intermediary contends that the Provider's agreement with RMH fails to meet the requirements of 42 C.F.R. § 413.130(g)(2), which govern the capital-related classification of charges from unrelated organizations.

With respect to 42 C.F.R. § 413.130(g)(2), the Intermediary asserts that payments made by the Provider to RMH may not be treated as capital-related costs because the Provider's transaction with RMH is not a lease or rental of equipment but is, in effect, an agreement to purchase aircraft services. Furthermore, the capital-related portion of RMH's charges to the Provider is not separately specified or identifiable, which is also required if any of the payments made to RMH are to be treated as capital-related costs.

Regarding the nature of the Provider's agreement, the Intermediary contends that factors published by HCFA[28] to help distinguish a lease from purchased services indicate that the Provider clearly purchased helicopter services from RMH rather than having leased or rented

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26 Provider's Position Paper and Exhibits at Exhibit H.

27 Provider's Position Paper and Exhibits at Exhibit D.

28 Intermediary's Position Paper at Exhibit D at 31.

the equipment.[29] According to the first factor, the equipment, which in this case is helicopters, would be operated by the Provider pursuant to a lease. However, the pilots who flew the helicopters were employed by RMH. None of the pilots were employed by the Provider.

According to the fourth factor, the document memorializing the agreement would be titled "lease agreement" if it were, in fact, a lease. The agreement in the instant case, however, is not titled lease agreement but is rather titled "Helicopter Agreement". Furthermore, nowhere in the agreement is the term "lease" used, while reference to "services" is clearly made in an addendum to the agreement entered into by the parties on September 10, 1986.[30] Specifically, the addendum is titled "Addendum to Master Agreement for Emergency Air Transport Services," and the last sentence on page 1 of the addendum states "[w]ritten notice shall include a request for SHS to include RMH in a bid process for services to be rendered after November 1, 1987". (Emphasis added.) The Intermediary adds that it is irrelevant that the Helicopter Agreement is described as an operating lease in the Provider's financial statements. That classification was made based upon Generally Accepted Accounting Principles which are distinguished from Medicare's principles of reimbursement.[31]

The sixth and final factor influencing the Intermediary's determination regarding the nature of the Provider's agreement with RMH explains that the basis for determining payments pursuant to a lease is generally units of time, and is not volume sensitive. In the instant case, the Intermediary explains that a portion of the payments made by the Provider to RMH is based upon hours of service. See Article VII of Helicopter Agreement.[32]

The Intermediary concludes that an overall examination of HCFA's factors demonstrates that the Provider's agreement with RMH is not a lease. There are ten factors in all. Three of the factors, specifically numbers 2, 5, and 7, which pertain to reading medical test results, Certificate of Need, and utilization review, respectively, do not apply to the subject agreement. Therefore, there are seven applicable factors and the Provider, as discussed above, failed to meet three of them.[33]

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29 Tr. at 147.

30 Intermediary's Position Paper at Exhibit B at 25. Intermediary's Posthearing Brief at 4. Tr. at 149.

31 Provider Reimbursement Manual, Part I ("HCFA Pub. 15-1") § 2806.1.c .

32 Intermediary's Position Paper at Exhibit B.

33 Tr. at 150-151.

Finally, the Intermediary contends that even if the Provider's agreement with RMH is construed to be a lease, its adjustment disallowing capital-related cost treatment of the Provider's Flight For Life costs is still substantiated. As stated above, 42 C.F.R. § 413.130(g)(2)(iii) requires the capital-related portion of RMH's charge to the Provider to be separately specified in order for those charges to be classified as capital-related costs for Medicare reimbursement. This information, however, is not available from either the Helicopter Agreement or from the actual invoices paid by the Provider.[34]

Article VII of the Helicopter Agreement describes the compensation to be made to RMH. The article is silent with respect to capital-related charges. The invoices used by RMH [35] require payment of an aircraft base charge, a seventh pilot charge, and a maintenance/pilot and miscellaneous charge. However, the make-up of these charges is unknown, and it would be improper to make an assumption that any particular part of the charges is capital-related. For example, it is uncertain if there are any pilot costs in the aircraft base charge, or perhaps in the hourly rate charge which is in addition to the aircraft base charge. Regardless, the information provided in the Helicopter Agreement or the invoices paid by the Provider fails to meet the regulatory requirement that the capital-related portion of RMH's charge be separately identified.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§ 1395x(v)(1)(A)	-	Reasonable Cost

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

§ 405.1835-.1841	-	Board Jurisdiction
§ 413.130	-	Introduction to Capital-Related Costs
§ 413.130(b)	-	Leases and Rentals
§ 413.130(g)(2) Related (Recodified at § 413.130(h)(2))	-	Supplying Organizations Not to the Provider

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

§ 2806	-	Capital-Related Costs

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[34] Intermediary's Posthearing Brief at 7-8. Tr. at 154.

[35] Provider's Position Paper at Exhibit D.

4. Case Law:

Keokuk Area Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 92-D22, March 6, 1992, Medicare & Medicaid Guide (CCH) ¶ 40,119.

St. Vincent Memorial Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 92-D31, April 30, 1992, Medicare & Medicaid Guide (CCH) ¶ 40,277, declined rev. HCFA Admin., June 5, 1992.

St. Vincent Memorial Hospital v. Shalala, U.S. District Court for the Central District of Illinois, No. 92-3144, June 29, 1993, Medicare & Medicaid Guide (CCH) ¶ 41,556.

Bethany Methodist Hospital v. Blue Cross and Blue Shield Association, PRRB Dec. No. 89-D22, February 15, 1989, Medicare & Medicaid Guide (CCH) ¶ 37,658, aff'd by HCFA Admin. Dec., April 17, 1989, Medicare & Medicaid Guide (CCH) ¶ 37,828.

The Public Hospital of the Town of Salem v. Blue Cross and Blue Shield Association, PRRB Dec. No. 90-D30, April 21,1994, Medicare & Medicaid Guide (CCH) ¶ 42,255, rev'd by HCFA Admin. Dec., June 20, 1994, Medicare & Medicaid Guide (CCH)
¶ 42,558.

The Public Hospital of the Town of Salem v. Shalala, 83 F.3d 173 (7th Cir.1996).

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).

5. Other:

56 Fed. Reg. 43387 (August 1991).

49 Fed. Reg. 234 (January 1984).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, testimony elicited at the hearing, and post-hearing briefs, finds and concludes as follows:

The Provider entered an agreement with RMH on October 31, 1983, in order to obtain two Alouette 316B helicopters for its air ambulance service known as Flight For Life. The Provider claimed that $303,953 paid to RMH for "aircraft base charges" should be classified

as capital-related costs for the purpose of Medicare reimbursement.[36] The Intermediary rejected the Provider's claim contending that payments made to RMH did not comply with 42 C.F.R.
§ 413.130(g)(2), which governs the capital-related cost treatment of charges from supplying organizations not related to a provider.

Contrary to the Intermediary's contentions, the Board finds that the terms and conditions of the Provider's agreement with RMH fully meet the requirements of 42 C.F.R. § 413.130(g)(2). Therefore, payments made by the Provider to RMH for aircraft base charges are properly classified and reimbursed as capital-related costs.

Medicare regulation 42 C.F.R. § 413.130(g)(2) provides for the charges of an unrelated supplying organization, as in the instant case, to be classified as capital-related costs if:

> (i) The capital-related equipment is leased or rented (as described in paragraph (b) of this section) by the provider;
>
> (ii) The capital-related equipment is located on the provider's premises, or is located offsite and is on real estate owned, leased or rented by the provider; and
>
> (iii) The capital-related portion of the charge is separately specified in the charge to the provider.

42 C.F.R. § 413.130(g)(2).

With respect to the first requirement of 42 C.F.R. § 413.130(g)(2), the Board finds that the Provider's agreement with RMH is factually a lease of capital equipment as opposed to a service agreement as proposed by the Intermediary. Pursuant to 42 C.F.R. § 413.130(b), the term "lease" signifies that a provider has possession, use, and enjoyment of an asset. In the instant case, the subject helicopters were in the Provider's possession and under its direct control 24 hours a day throughout the term of the agreement. The individual articles of the agreement clearly specify that the Provider alone dispatched and controlled the use of the helicopters, that the pilot complement was sufficient to keep the helicopters operational 24 hours a day and, when the helicopters were not in use transporting patients they were based at the Provider's facilities.

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[36] As discussed in the Statement of the Case and Procedural History section of this decision, the Provider initially claimed capital-related cost treatment for all payments made to RMH during the subject reporting period, or $470,687. The Provider modified its appeal at the time of its hearing before the Board to contest only the treatment of the aircraft base charge.

In addition, the Provider assumed a significant financial risk by entering the agreement which also signifies a lease. The initial term of the agreement was for 2 years. During the first 18 months of this period the Provider was obligated to pay RMH a fixed fee of $24,125.00 per helicopter per month in addition to a separate charge for each hour the helicopters were flown. For the last 6 months of the initial term, the Provider was obligated to pay the fixed monthly charge per helicopter updated by a more current Consumer Price Index adjustment factor. The Board notes that a fixed fee based upon a specified period of time, as the fixed monthly aircraft base charge in the instant case, is indicative of a lease. In contrast, payments made pursuant to a service agreement are typically based upon volume such as the number of copies made or pounds of laundry cleaned.

The Board disagrees with the Intermediary's argument that the agreement with RMH is not a lease based upon the factors published by HCFA to help distinguish a lease of capital equipment from a purchase of services. Specifically, the Intermediary contends that if the agreement was in fact a lease the equipment would be operated by the Provider instead of RMH. Furthermore, payments made pursuant to the agreement would not be volume sensitive, and the agreement would be titled "Lease Agreement".

The Board finds the Intermediary's argument regarding HCFA's factors irrelevant. The equipment in the instant case is not a computerized tomography scanner or magnetic resonance imaging machine or similar item whose operation is typically associated with health care providers. Rather, the equipment is helicopters whose operation is highly specialized requiring persons with unique skills and training traditionally foreign to health care personnel. The Board agrees with the Provider that it was more prudent with respect to safety and liability for it to have obtained pilots from an aviation company rather than to employ them directly.

The Intermediary's argument that payments made pursuant to the agreement are volume sensitive is also without merit. While a portion of the payments made are based upon the number of hours the helicopters are flown, over 75 percent of the payments are attributable to the fixed monthly aircraft base charge, which notably is the only portion of the payments being claimed by the Provider as capital-related costs.

With respect to the Intermediary's last argument regarding HCFA's factors, the Board finds no significance in the fact that the Provider's agreement with RMH is not titled "Lease Agreement". The Intermediary concludes that because the subject agreement is not titled Lease Agreement that it is an agreement to purchase services. The Board disagrees. The agreement in the instant case is neither titled Lease Agreement or Service Agreement but is titled "Helicopter Agreement" which, in and of itself, has no particular meaning with respect to its nature as a lease of equipment or a purchase of services.

The Board wishes to point out that HCFA's factors are essentially guidelines. They must be viewed as a whole, and applied to the specific characteristics of any particular agreement in

order to determine whether or not a lease exists. Therefore, even if the Helicopter Agreement in the instant case failed to comply with any one or more of HCFA's factors, it would not necessarily be indicative that the agreement is not a lease. In pertinent part, HCFA states:

> the terms of each agreement must be examined to determine whether or not the agreement qualifies as a lease of equipment or as a purchase of services. . . Because no single factor is necessarily determinative of the nature of a given agreement (capital-related or operating cost), the intermediary will examine all aspects of an agreement in determining whether the arrangement constitutes a lease of equipment or a purchase of services. . . .

56 Fed. Reg. 43388 (August 30, 1991).

The Board also notes that HCFA's factors were not published until August 30, 1991, which is approximately 3 years after the close of the subject cost reporting period and almost 1 year after the Provider's cost report was final settled.

The Board finds that the second requirement of 42 C.F.R. § 413.130(g)(2), which requires the capital-related equipment to be located on the provider's premises or on real estate owned, leased or rented by the provider in order to be classified as capital-related cost, is not an issue in this case. The terms of the Helicopter Agreement clearly base the helicopters solely at the Provider's facilities throughout the term of the agreement. The Intermediary also testified to the Provider's compliance with this requirement.[37]

Finally, the Board finds that the capital-related portion of RMH's charges to the Provider is separately identified thereby fulfilling the third and final requirement of 42 C.F.R. § 413.130(g(2).
Article VII of the Helicopter Agreement describes the compensation to be paid by the Provider to RMH. In part, Article VII provides for a fixed charge "for each helicopter supplied" and for a separate hourly obligation based upon the number of hours the helicopters are flown. In effect, the agreement specifies the payment amounts attributable to the capital-related portion of the lease-specifically, the helicopters. The Board notes that RMH also billed the Provider separately for each of the aforementioned charges.[38]

The Board acknowledges the Intermediary's argument that the composition of RMH's charges is not precisely stated. However, the Board finds support for its position that the fixed charge, or aircraft base charge, reflects capital-related costs. As discussed above, the Board believes the language of Article VII and the separate billings employed by RMH clearly indicate charges applicable to the physical helicopters. In addition, the Board relies

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[37] Tr. at 184.

[38] Provider's Position Paper and Exhibits at Exhibit D.

upon the Provider's testimony regarding this matter[39] and its accounting practices.

With respect to the Provider's accounting practices, the Board finds that the Provider recorded the aircraft base charges under the individual account title "Helicopter" in its trial balance of expenditures.[40] This indicates an expense for capital assets as opposed to an operating expenditure. In addition, an independent accounting firm audited the Provider's financial records for the subject reporting period. They also classified payments made to RMH pursuant to the Helicopter Agreement under the term "Leases", and refer to "[r]ental payments on certain aircraft for the Flight for Life Program". The Board emphasizes that leases and rentals are capital-related costs in accordance with 42 C.F.R. § 413.130 (b) which, in pertinent part, states:

> *Leases and rentals.* (1) Subject to the qualifications of paragraphs (b)(2) and (4) of this section, leases and rentals, including licenses and royalty fees, are includable in capital-related costs if they relate to the use of assets that would be depreciable if the provider owned them outright."

42 C.F.R. § 413.130 (b).

DECISION AND ORDER:

The Intermediary's adjustment reclassifying the Provider's payments for aircraft base charges from capital-related costs to operating expenditures is improper. The Intermediary's adjustment is reversed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Teresa B. Devine
Henry C. Wessman, Esquire

FOR THE BOARD:

Irvin W. Kues
Chairman

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39 Tr. at 32.

40 Provider's Position Paper and Exhibits at Exhibit D.