

# CENTERS FOR MEDICARE AND MEDICAID SERVICES

## *Decision of the Administrator*

**In the case of:**

**University of California,  
Davis Medical Center**

**Provider**

**vs.**

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

**Intermediary**

**Claim for:**

**Provider Cost Reimbursement  
Determination for Cost Reporting  
Period(s) Ending: June 30, 1992**

**Review of:**

**PRRB Dec. No. 2008-D25  
Dated: April 17, 2008**

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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 Section 1878(f)(1) of the Social Security Act (Act), as amended (42 USC 1395oo(f)). The parties were notified of the Administrator's intention to review the Board's decision. Subsequently, the Provider submitted comments requesting that the Administrator affirm the Board's decision. Accordingly, this case is now before the Administrator for final administrative review.

### **ISSUE AND BOARD DECISION**

The issue before the Board was whether the Intermediary properly corrected the Provider's reported payments, more than three years after the date of the original Notice of Program Reimbursement (NPR).

The Board concluded that the Intermediary improperly adjusted the Provider's fiscal year ending (FYE) June 30, 1992 Medicare cost report. The Board found that it did have jurisdiction over the appeal. The Board noted that the issue in dispute was not a recoupment of an overpayment, but rather a timely filed appeal of a revised NPR which adjusted the reimbursement in dispute.

The Board found that the facts in the case did not support the Intermediary's adjustment to recoup Medicare Part A interim payments of \$837,600, as part of its revised NPR, dated January 6, 2005. That revised NPR was issued to incorporate the administrative resolution of PRRB Case No. 97-2438. The Board reasoned that the adjustment at issue was not related to the items in dispute in that resolution. It was undisputed that the Intermediary's error in recording interim payments was made in the original NPR.

The Board reasoned that the normal reopening procedures, under 42 C.F.R. §405.1885, applied to this interim payment adjustment, which allows a reopening of an NPR for an issue within three years from the date of the NPR. Since the original NPR was issued on September 9, 1994, the Board calculated that the Intermediary had until September 9, 1997, to issue a revised NPR, or a notice of reopening, to correct the interim payment error. The Board found no evidence that a reopening notice was issued regarding this matter. Rather, the Intermediary issued a revised NPR on January 6, 2005, well after the three-year reopening period had expired. The Board relied on CMS Pub. 15-1 §2930 entitled "Finality" introducing the section that contains the three year reopening limit. The only exception to this finality is when "fraud or similar fault" is found. The Board reasoned that fraud, or similar fault, was not alleged in this case, and as a result, the Intermediary's adjustment of the Provider's Medicare Inpatient Part A interim payments, made as a part of the revised NPR, dated January 6, 2005, was improper.

### **SUMMARY OF COMMENTS**

The Provider commented, requesting that the Board's decision be affirmed. The Provider noted that the Intermediary alleged that an interim payment error existed on the Provider's original NPR, dated September 9, 1994. The Provider argued that to correct the error, the Intermediary should have issued a Notice of Reopening to correct interim payments within three years from the date of the original NPR. The Provider alleged that, because such a reopening was never issued, the Intermediary is prohibited from making the adjustment under 42 C.F.R. §405.1885.

The Provider also noted that the Intermediary incorporated an adjustment to correct interim payments on the revised NPR, dated January 6, 2005. The Provider argued that the sole purpose of this revised NPR was to implement an administrative resolution for PRRB Case No. 97-2438, and did not include an issue with the interim payments. The Provider claimed that it was inappropriate for the Intermediary to incorporate a "new adjustment" within this revised NPR.

The Provider argued that CMS has taken the position that only the specific matters at issue, within a revised NPR, can be addressed through the administrative appeals

process. The Provider noted that, since none of the revised NPRs adjusted Part A interim payment, it cannot be a “matter at issue” within these revised NPRs as defined by CMS. Lastly, the Provider argued that to allow the Intermediary to correct an alleged error 11 years after it supposedly occurred is contrary to program policy and regulations, pursuant to 42 C.F.R. 405.1885 and CMS Pub. 15-1 §2930.

### **DISCUSSION**

The entire record furnished by the Board has been examined, including all correspondence, position papers, exhibits, and subsequent submissions. Comments timely submitted have been included in the record and have been considered.

The regulations at 42 C.F.R. §405.1835(a) set forth that a provider has a right to a hearing before the Board, if an intermediary determination<sup>1</sup> has been made with respect to the provider; and the provider has filed a written request for a hearing before the Board under the provisions described in §405.1841(a)(1) within 180 days of the date the notice of the intermediary’s determination (also referred to as the notice of program reimbursement or NPR) was mailed to the provider.

In addition, the regulation allows for a Board hearing for matters at issue on a revised NPR pursuant to §405.1889. Section 405.1889 provides the instructions for the effect of the revision:

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 Sec.405.1885, such revision shall be considered a separate and distinct determination or decision to which the provisions of Sec. 405.1811, 405.1835, 405.1875 and 405.1877 are applicable. (See Sec.405.1801(c) for applicable effective dates.)

With respect to the determination of the intermediary, the regulation at 42 C.F.R. §405.1803, specifically requires an intermediary determination pursuant to a notice of program reimbursement and allows the use of the notice of program reimbursement as a basis for recoupment of overpayments. Subsection (c) states:

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<sup>1</sup> According to 42 C.F.R. §405.1801(a)(1), an “intermediary determination” is defined as: a determination of the amount of total reimbursement due the provider, pursuant to §405.1803 following the close of the provider’s cost reporting period, for items and services furnished to beneficiaries for which reimbursement may be made on a reasonable cost basis under Medicare for the period covered by the cost report.

The intermediary's determination contained in its notice is the basis for making the retroactive adjustment... to any program payments made to the provider during the period to which the determination applies, including recoupment under §405.373 from ongoing payment to the provider identified in the determination. Recoupment is made notwithstanding any request for hearing on the determination the provider may make under §§405.1811 or 405.1835.”

The regulation at 42 C.F.R. §405.301 *et seq.*, sets forth the policies and procedures for handling incorrect payments and recovery of payments. 42 C.F.R. §405.371(a) states that:

Medicare payments to providers and suppliers, as authorized under this subchapter (excluding payments to beneficiaries), may be – (2) offset or recouped, in whole or part, by an intermediary..., if the intermediary... has determined that the provider... to whom the payments are to be made has been overpaid.

Paragraph (b) provides the steps necessary for suspension of payment, offset and recoupment, and states that the “intermediary... offsets or recoups payments only after it has complied with the procedural requirements set forth at §405.373. The regulation at 42 C.F.R. §405.373 sets forth the “Proceedings for offset or recoupment.” The procedural requirements in paragraph (b) state that:

Paragraph (a) of this section does not apply if the intermediary, after furnishing a provider a written notice of the amount of program reimbursement in accordance with §405.1803, recoups payments under paragraph (c) of §405.1803.

In this case, the Provider's original NPR was issued on September 9, 1994.<sup>2</sup> Subsequently, the Intermediary issued a revised NPR to recalculate the disproportionate share hospital (DSH) calculation on December 16, 1996.<sup>3</sup> The revised NPR was appealed to the Board on June 12, 1997.<sup>4</sup> On March 6, 2001, the Intermediary issued another revised NPR (identified as revision three) “to revise settlement data based on the updated Provider Statistical and Reimbursement Report (PS&R) run of May 19, 2000.”<sup>5</sup> That revised NPR shows that, as a result of the

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<sup>2</sup> See Provider Exhibit P-2.

<sup>3</sup> See Provider Exhibit P-3.

<sup>4</sup> See Provider Exhibit P-4.

<sup>5</sup> See Provider Exhibit P-6. The adjustment report indicates that this was the third revised settlement. The record does not contain the second revised NPR.

revised Medicare settlement data, the issue of the interim payments for both Part A and Part B and the sub-provider unit was revisited.<sup>6</sup> Notably, the Provider timely appealed the March 6, 2001 revised NPR. Relevant to this case, the Provider's August 13, 2001 request for a hearing of the March 6, 2001 revised NPR stated that the issue on appeal was the "Medicare settlement data—Adjustment Nos. 1-18." An examination of the adjustment report shows that, *inter alia*, the appeal of Adjustment Nos. 5, 14 and 17 involved the interim payments and the appeal of Adjustment Nos. 17 and 18 involved the tentative settlements that had been made to the program. This appeal were incorporated into PRRB Case No. 97-2438. Subsequently, PRRB Case No. 97-2438 was administratively resolved. The Intermediary issued a revised NPR (identified as revision four), dated January 6, 2005, *inter alia*, implementing the administrative resolution.<sup>7</sup> This revised NPR also included the re-determination of the interim payments, which increased Medicare Inpatient Part A interim payments by \$837,600. The Provider challenged the Intermediary's re-determination of the interim payments made more than three years beyond the original NPR date of September 1994.

The Administrator finds that the Intermediary acted within its authority when adjusting the interim payments pursuant to the January 6, 2005 revised NPR. Applying the regulation at 42 CFR 405.1889, the Administrator finds that the March 6, 2001 revised NPR was the subject of a reopening to revise the Medicare "settlement data." The revision of settlement data necessarily involves the re-determination of interim payments, as shown in the related adjustment report and the re-determination of the tentative settlement payments. Subsequently, the Provider specifically appealed to the Board the "Medicare settlement data" and the specific adjustments that involved, *inter alia*, the interim payments and the tentative settlement payments. The appeal kept open the issue of Medicare settlement data/interim payments/tentative settlement payments. Contrary to the Provider's allegations, the record shows that the Intermediary was correct that the issue of interim payments was included in the appeal of the March 6, 2001 revised NPR, which was incorporated as part of PRRB Case No. 97-2438. As the issue of the interim payments was within the scope of the March 6, 2001 revised NPR and, subsequently, specifically made part of the Provider's appeal of that revised NPR, the provisions of 42 CFR 405.1889 did not prohibit the further adjustment of the interim payments pursuant to the January 6, 2005 revised NPR.<sup>8</sup>

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<sup>6</sup> See e.g. Provider Exhibit P-6. pp.3, 5 and 7.

<sup>7</sup> See Provider Exhibit P-10.

<sup>8</sup> The Administrator notes that the Provider does not argue that the Intermediary erred on the merits of its re-determination of the interim payments.

**DECISION**

The Administrator reverses the decision of the Board in accordance with the foregoing opinion.

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

Date: 6/20/08

/s/  
Herb B. Kuhn  
Deputy Administrator  
Centers for Medicare & Medicaid Services