

**PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION
ON THE RECORD
2003-D65**

PROVIDER –
Tenet Healthcare Corporation Group
Appeal/Application of the Lower of Cost or
Charges Limit

Provider Nos. See Appendix

vs.

INTERMEDIARY –
Mutual of Omaha Insurance Company

DATE OF HEARING -
July 17, 2003

Cost Reporting Periods Ended
May 31, 1992
May 31, 1993
May 31, 1994

CASE NOs. 95-2104G
95-1244G
96-2516G

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ISSUE:

Whether the Intermediary correctly applied the Medicare lower of cost or charges limit in determining the Medicare payments to the Providers.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

This case involves a challenge by three groups of related providers and involves the fiscal years ending May 31, 1992, 1993 and 1994. The Intermediary settled the Providers' Medicare cost reports by applying the Lower of Cost or Charges limit to the various Providers in the group(s). The Providers filed timely appeals with the Provider Reimbursement Review Board ("Board") contesting that action and have met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-405.1841. Initially, the Intermediary stated in its position paper that it believed the Board was without jurisdiction. However, the Intermediary ultimately opted not to pursue or brief that contention. The Intermediary's challenge to the Board's jurisdiction is without merit and the Board finds that it has jurisdiction to hear this case. The amount of Medicare funds in controversy is approximately \$4.5 million.

The Providers were represented by Patric Hooper, Esquire, of Hooper, Lundy and Bookman, Inc. The Intermediaries were represented by Marshall J. Treat, Senior Appeals Consultant, of the Mutual of Omaha Insurance Company.

Relevant Medicare Statutory and Regulatory Background:

As originally enacted in 1965, the Medicare program was required to reimburse providers of hospital services for the reasonable costs of providing inpatient and outpatient hospital services regardless of the charges for such services. In 1972, Congress amended the Medicare Act to impose a limit on such reimbursement by restricting the annual reimbursement to the lower of a provider's aggregate reasonable costs or its aggregate customary charges, the so-called "LCC Limit."

As reflected in the Legislative history of the 1972 amendment, Congress determined that it was inequitable for Medicare, Medicaid, and the child health programs to pay more for services than a provider charged to the general public. Thus, Congress intended the 1972 amendment to limit the aggregate reimbursement for services to the lesser of the provider's reasonable costs or customary charges. In 1982, Congress again amended the Medicare statute to expand the limits on Medicare reimbursement for hospital services, the so-called "routine cost limits," and to add a new limit known as the TEFRA rate of increase limit. Under the latter, a hospital's annual increase in its operating costs for inpatient services was limited to a "target amount" based upon market and inflation

factors. That amendment was in Public Law 97-248, codified at 42 U.S.C. § 1395ww(a) and (b).¹

The TEFRA rate of increase limit expressly provided that Medicare payment to a hospital for a cost reporting period subject to the provisions of § 1395ww(b), was to be computed in accordance with the provisions of § 1395ww(b) notwithstanding § 1395f(b) (the LCC limit). Congress expressly made all hospital cost reporting periods “beginning on or after October 1, 1982” subject to § 1395ww(b).²

The Secretary implemented the LCC limit in 1974 through 42 C.F.R. § 413.13 and implemented the TEFRA rate of increase limit in 1982 through 42 C.F.R. § 413.40. Under 42 C.F.R. § 413.13(c)(2), the LCC principle does not apply to payment for Part A inpatient hospital services which are “subject to the TEFRA rate-of-increase limits,” effective with cost reporting periods beginning on or after October 1, 1982.

PROVIDER’S CONTENTIONS:

The Provider contends that, under Public Law 97-248, the 1982 amendment establishing the rate-of-increase limit provisions “shall apply to cost report periods beginning on or after October 1, 1982.” Although the TEFRA rate-of-increase limit has been amended on several occasions, its effective date has never changed. It is applicable to cost reports beginning on or after October 1, 1982. Nor has the specific language of the statute relevant to this matter changed. For example, in the version of the statute that existed in 1992, subsection (b)(1) of § 1395ww continues to specify that “notwithstanding” § 1395f(b), Medicare payment for operating costs of inpatient hospital services must be determined by the provisions of § 1395ww(b).

Indeed, post-1982 amendments to § 1395ww confirm Congress’ intent that the LCC limit should not be applied to cost reporting periods for which subsection (b)(1) was in effect, i.e., cost reporting periods beginning on or after October 1, 1982. The clear implication from this revision to § 1395ww is that while subsection (b)(3) of § 1395(f) was to be applicable to certain hospital inpatient services after 1982, subsection (b)(1) of § 1395(f), which contains the LCC limit, was not applicable. Instead, subsection (b)(1) of § 1395ww shall continue to be the governing provision for calculating payment for hospital cost reporting periods beginning on or after October 1, 1982.

The Provider asserts that, despite this clear statutory language, the Intermediary has applied the LCC limit of 42 U.S.C. § 1395f(b)(1) to hospital cost reporting periods which are subject to the provisions of § 1395ww(b), i.e., Providers’ 1992, 1993 and 1994 cost reporting periods which began after October 1, 1982.

¹ Provider Exhibits C & B, respectively.

² See Section 101(b)(1) of Public Law 97-248 in Provider Exhibit B.

The Provider further contends that the Intermediary has ignored the plain language of § 1395ww(b) and has imposed requirements which are not a part of that section. Specifically, the Intermediary has applied the LCC limit to cost reports so long as the cost reports beginning after October 1, 1982, were not “affected” by the TEFRA rate of increase limit. Clearly, the plain language of § 1395ww(b)(1) makes the LCC limit irrelevant for calculating reimbursement for inpatient hospital services beginning with cost reporting periods starting on or after October 1, 1982, regardless of whether or not a provider is adversely affected by the TEFRA rate-of-increase limit during a particular cost reporting period. Therefore, the Provider contends that beginning October 1, 1982, Medicare payment for the operating costs of inpatient hospital services are subject to the expanded limits as provided in Section 223 of Public Law 92-603 and the TEFRA rate-of-increase limits, but not the LCC limit. Finally, the Provider asserts that since the language of the controlling statute is clear and unambiguous, there is no room for any interpretation by the Intermediary which is contrary to the plain meaning of the statute. It cites Legacy Emanuel Hospital Health Center v. Shalala, 97 F.3d 1261 (9th Cir. 1996), which incorporates the holding of the Supreme Court in Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), requiring strict adherence to the unambiguous language of a statute in spite of an agency’s effort to alter or restrict the statute’s plain meaning.

INTERMEDIARY’S CONTENTIONS:

The Intermediary refers to the TEFRA implementing regulations found in 42 C.F.R. § 413.40(b) which states in part:

Base period. Each hospital’s target rate amount is based on its allowable net inpatient operating costs per case from the cost reporting period of at least 12 months immediately preceding the first cost reporting period subject to the rate-of-increase ceiling established under this section.

That regulation implements the intent of Congress and the law to allow for a full 12-month base period prior to the first cost reporting period subject to the rate-of-increase ceiling. Shorter periods are not accepted as base periods.

The regulation at 42 C.F.R. § 413.40(b) states that:

[i]f the immediately preceding cost reporting period is a short reporting period (fewer than 12 months), the first period of at least 12 months subsequent to that short period is the base period.

The Intermediary asserts that the driving point of TEFRA is the base period. This is a full twelve-month cost reporting period used to establish a target amount per discharge

by which to implement the TEFRA reimbursement for the rate-of-increase ceiling. Since the base period is cost reimbursed, it is subject to the lower of cost or charges provisions. The Intermediary's analysis of the Providers in this case reveals that the years at issue are either base periods or periods of less than 12 months; thus the application of the LCC limitation is valid.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the Medicare law and guidelines, the parties' contentions and evidence presented, finds and concludes that the Intermediary properly applied the Lower of Cost or Charges provisions to the Providers' Medicare cost reports. It is recognized that Public Law 97-248, codified at 42 U. S. C. §1395ww(a) and(b), establishing the rate-of-increase provisions, states that it shall apply to cost reporting periods beginning on or after October 1, 1982. A subsequent statute that existed in 1992 also indicates that notwithstanding the LCC provisions, Medicare operating costs must be determined by the provisions of 42 U. S. C. § 1395ww. However, the Board also recognizes that the statute allows the Secretary to establish the method and means for interpreting the law.

In the instant case, the Providers are contending that they are immediately affected by the TEFRA rules (thus negating application of LCC), as the cost reporting periods in question fall after the October 1, 1982 TEFRA implementation date. While this is a literal interpretation of the law, it does not recognize the TEFRA implementation regulation at 42 C.F.R. § 413.40(b), which states in part that:

net operating costs per case from the cost reporting period of at least 12 months preceding the first cost reporting period subject to the rate-of-increase ceiling established under this section.

The Board notes that where providers incur less than twelve-month cost reporting periods prior to a twelve-month period, the short period is not recognized as a base period. Again, the regulation at 42 C.F.R. § 413.40 states that:

[i]f the immediately preceding cost reporting period is a short reporting period (fewer than 12 months), the first period of at least 12 months subject to that short period is the base period.

The Board finds that the Providers in this appeal either had a series of fiscal years that were less than 12 months or were in their first 12-month base period. As such, the Board finds that under the implementation regulations cited above, all twelve-month base periods and any preceding short periods are subject only to the reasonable cost rules, including the LCC provisions. The Board also notes that the Providers contend that if the Board decides that the LCC limits apply to the cost reporting periods at issue, there is a second issue of whether the Providers are entitled to some type of carry-

forward relief. This carry-forward relief was eliminated by the Secretary in an amendment to the Medicare regulations which became effective in 1988 and the Providers contend that this action by the Secretary was improper and invalid. However, the Board finds that the Medicare regulations at 42 C.F.R. § 413.13 limit the carry-forward to cost reporting periods beginning on or after January 1, 1974 but before April 18, 1988. Since all of the Providers' cost reports at issue are for periods later than 1988, the Board is bound by the regulation and does not have the authority to provide the relief sought by the Providers.

DECISION AND ORDER:

The Intermediary properly applied the lower of cost or charges provisions to the Providers' cost reports at issue. The Intermediary's adjustments are affirmed.

Board Members Participating:

Suzanne Cochran, Esq. (Recused)
Dr. Gary B. Blodgett
Martin W. Hoover, Jr., Esq.
Elaine Crews Powell, C.P.A.

DATE: m September 30, 2003

FOR THE BOARD:

Martin W. Hoover, Jr., Esq.