

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

ON - THE - RECORD
99-D23

PROVIDER -
Sarasota Palms Hospital
Sarasota, Florida

DATE OF HEARING-
November 25, 1998

Provider No. 10-4013

Cost Reporting Period Ended -
May 31, 1988
May 31, 1989
May 31, 1990

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association
Blue Cross and Blue Shield of Florida

CASE NOS. 93-0178
93-0518
92-1084

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ISSUE:

Was the Provider entitled to an adjustment to the TEFRA rate of increase ceiling for the cost report periods ended May 31, 1988, May 31, 1989, and May 31, 1990?

STATEMENT OF THE CASE,

Sarasota Palms hospital ("Provider") is a 116 bed psychiatric care hospital located in Sarasota, Florida. It is a wholly owned subsidiary of Tenet Healthcare Corporation. The Provider's operating costs exceeded the TEFRA rate of increase ceiling for the 1988, 1989 and 1990 fiscal years due to several factors, including the fact that the Provider had necessarily incurred expenses associated with the Florida Indigent Care Tax during those fiscal years. The Florida Indigent Care Tax assessment was imposed by the State of Florida effective for fiscal years ending after May 18, 1984. The annual tax assessment was based on a percentage of a hospital's net operating revenues, with the assessment equaling one percent for the initial fiscal year and one and a half percent for all subsequent years. Significantly, the tax was not in effect during the Provider's TEFRA base year, and thus, the Provider did not have to incur these costs during the TEFRA base year.

Blue Cross and Blue Shield of Florida ("Intermediary") issued a Notice of Program Reimbursement ("NPR") for the Provider's 1988, 1989, and 1990 fiscal years indicating that the costs incurred by the Provider exceeded the allowable rate of increase ceiling for that year. The Provider timely requested an exception to the rate of increase ceiling for those fiscal years. One of the grounds for the exception was that the imposition of the Indigent Care Tax caused the Provider to incur operating costs during the 1988, 1989, and 1990 fiscal years which it did not have to incur, and thus were not included, in the TEFRA target amount calculated for the Provider's base year. The Provider requested an exception/adjustment to the TEFRA rate of increase ceiling under 42 C.F.R. §§ 413.40(g) and 413.40 (h), which permit HCFA to adjust a hospital's operating costs upward or downward as appropriate. The Intermediary forwarded the Provider's request to HCFA for its determination.

The Intermediary informed the Provider on June 24, 1994 that while HCFA granted some relief from the TEFRA ceiling, HCFA refused to grant relief based on the costs for the Indigent Care Tax because the Indigent Care Tax did not cause the Provider to exceed the TEFRA rate of increase ceiling in the 1985 and 1986 cost reporting periods. HCFA concluded that the payment of the Indigent Care Tax could not be a contributing factor for the Provider exceeding the rate of increase ceiling in 1988, 1989, and 1990.

The Provider timely filed a request for a hearing with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 1835-.1841 and has met the Jurisdictional requirements of those regulations. The Medicare reimbursement effect for the period ended 5/31/98 is approximately \$41,309. The reimbursement effect for the period ended 5/31/89 is

approximately \$44,881, and the reimbursement effect for the period ended 5/31/90 is approximately \$59,692.

The Provider was represented by Patric Hooper, Esq. of Hooper, Lundy & Bookman, Inc.. The Intermediary was represented by Bernard M. Talbert, Esq. of the Blue Cross and Blue Shield Association, Chicago.

PROVIDER'S CONTENTIONS:

The Provider points out that it was required to incur expenses associated with the Florida Indigent Care Tax during the 1988, 1989, and 1990 fiscal years. The Provider also points out that tax expenses are an allowable operating expense. The tax was not imposed until the 1984 fiscal year. Therefore, the tax was not an expense included in the costs for its TEFRA base year which was the fiscal year ended May 31, 1983.

The Provider contends that HCFA's decision not to grant an exception was based exclusively on the proposition that because the Provider apparently did not exceed the TEFRA rate of increase ceiling for certain previous years during which it was required to incur the tax expenses, the Indigent Care Tax expenses must be considered not to be a contributing factor to the Provider incurring expenses in excess of the TEFRA rate of increase ceiling for the 1988, 1989 and 1990 fiscal years. The Provider argues that HCFA's contention makes no sense.

The Provider points out that while HCFA granted some relief for the 1990 fiscal year based upon certain factors not involved in this appeal, HCFA did not grant full relief, and thus the Provider incurred a TEFRA penalty for 1990. If the tax expense is removed from the calculation of the Provider's cost per discharge or if it is added to the case year calculation, the Provider's TEFRA penalty for 1990 will be reduced. Therefore, the Provider contends that the tax is a contributing factor to the Provider exceeding the target rate for 1990. The Provider also contends that for the fiscal years 1988 and 1989 the same situation occurred.

The Provider argues that under the regulations at 42 C.F.R. §§ 413.40(g) and (h), HCFA is authorized to adjust a hospital's operating costs upward or downward, as appropriate or grant other relief, under circumstances specified elsewhere in the Medicare regulation, including 42 C.F.R. Section § 413.40(g)(2), pertaining to extraordinary circumstances which cause a hospital to incur "unusual" costs. The circumstances for which relief is to be granted include those unusual occurrences which are beyond the control of a provider and have a substantial cost effect on a hospital.

The Provider argues that the Florida Indigent Care Tax had a significant impact on the Provider's allowable operating costs for fiscal periods subsequent to the fiscal year ending May 31, 1983, the Provider's base year. The tax was not established or imposed until after the

base year. The Provider could not avoid the tax expense. Therefore, the Provider argues an adjustment or other form of relief is necessary.

The Provider points out that the circumstances in this situation are similar to those in which the Secretary's regulations expressly allow an adjustment to base period costs to include taxes that were not incurred during a base year but were incurred subsequent to a base year period. The Provider points out that the Medicare regulation at 42 C.F.R. § 413.40(h)(1)(i) indicates that a factor which could result in a significant distortion in the operating costs of inpatient hospital services is the assessment of FICA taxes during a particular period if the hospital did not incur such taxes during its base year. This regulatory example is directly on point here and must be followed to allow an adjustment.

The Provider contends that there is nothing in the governing regulations that limits the granting of TEFRA exceptions or adjustments for a particular fiscal period to circumstances which cause the Provider to exceed the TEFRA rate of increase ceiling for previous fiscal years. The only limitation in the regulations is that which purports to limit granting of a TEFRA exception to fiscal years in which a hospital's operating costs exceed the rate of increase ceiling imposed during a particular fiscal year. In this case, the Provider incurred operating expenses during the 1988, 1989 and 1990 fiscal years which exceeded the rate of increase ceiling imposed under the regulations. Thus, the Provider is entitled to an adjustment or an exception to the rate of increase ceiling regardless of whether it exceeded the TEFRA limits for previous fiscal years' cost reports.

The Provider points out that this is not the first case in which the Florida Indigent Care Tax expense incurred by a hospital caused the hospital to exceed certain Medicare rate ceilings. In a leading case involving a group of Florida hospitals which were subject to the Florida Indigent Care Tax, the court denied the hospitals' request to adjust payment rates during the PPS transition period for the hospitals due to expenses incurred under the Florida Indigent Care Tax Act. Hillsborough County Hospital Authority v. Shalala, 49 F.3d 1516 (11th Cir. 1995). ("Hillsborough")

However, in refusing to grant relief from the PPS transition year rates for the hospitals in the Hillsborough case, the court implicitly acknowledged that the relief requested would be granted under the TEFRA rate of increase ceiling. The court concluded that the relief which would be available under the TEFRA rate of increase ceiling was not available to providers under the Prospective Payment System, because the statutory basis for the TEFRA rates is different than the statutory basis for the PPS Transition Year rates.

In this case the Provider was subject to the Medicare TEFRA rate of increase ceiling for all relevant fiscal periods, including the fiscal year ended May 31, 1990. Therefore, unlike the hospitals which were involved in the Hillsborough case which was challenging their PPS rates, adjustments and exceptions to the TEFRA rate of increase ceiling are, in fact required for the Provider.

The Provider concludes that it is entitled to an exception or an adjustment to the TEFRA rate of increase ceiling for the 1988, 1989, and 1990 fiscal years, because it was required to incur certain allowable tax expenses which it was not required to incur, and which it did not incur, during its TEFRA base year.

INTERMEDIARY'S CONTENTIONS:

The Intermediary points out that under the Medicare regulation at 42 C.F. R. § 413.40(g):

HCFA may adjust a hospital's operating costs (as described in paragraph (b)(1) of this section) upward or downward, as appropriate, under circumstances as specified in paragraphs (g)(2) and (3) of this section. HCFA makes an adjustment only to the extent that the hospital's operating costs are reasonable, attributable to the circumstances specified, separately identified by the hospital, and verified by the intermediary. HCFA may grant an exception only if the hospital's operating costs exceed the rate of increase ceiling imposed under this section.

Id. The Intermediary also points out that under 42 C.F.R. § 413.40(h)(1)(i):

HCFA may adjust the amount of the operating costs considered in establishing cost per case for one or more cost reporting periods, including both periods subject to the ceiling and the hospital's base period, to take into account factors that could result in a significant distortion in the operating costs of inpatient services. The adjustments include, but are not limited to, adjustments of the base period costs to include explicitly FICA taxes (if the hospital did not incur costs for FICA taxes in the base period), and services billed under Part B of Medicare during the base period, but paid under Part A during the subject cost reporting period.

Id. The Intermediary points out that on May 18, 1994, it approved the portion of the Provider's request for adjustment due to increased program services costs. However, the portion related to the Florida Indigent Care tax was denied. HCFA stated "as explained in our letter authorizing previous adjustments, we do not find that an adjustment for FICT is warranted." Id. The reference to previous approvals is at Intermediary Exhibit 2. HCFA's letter of October 20, 1992 for the 1987, 1988, and 1989, periods' requests states:

Neither the home office costs nor the indigent care tax provide sufficient justification for an adjustment ... It is our understanding that the indigent tax for which SPH is requesting

an adjustment was enacted in 1985. Since the indigent tax did not result in the hospital exceeding the limitation in 1985 and 1986, the tax could not be the contributing factor for the hospital exceeding the rate of increase ceiling in 1987, 1988, and 1989.

Therefore, the Intermediary agrees with HCFA and requests that the Board uphold HCFA's determination.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Title XVIII of the Social Security Act:

§ 1886(b)(4)(A) - Payment to hospitals for inpatient Hospital Services

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

§405.1835 - .1841 - Board Jurisdiction

§413.40(g) et seq. - Ceiling on Rate of Hospital Cost Increases - Exceptions

§413.40(h) et seq. - Ceiling on Rate of Hospital Cost Increases -
Adjustments

3. Cases:

Hillsborough County Hospital Authority v. Shalala, 49F.3d. 1516.

FINDINGS AND CONCLUSIONS OF LAW:

The Board finds that the Provider is entitled to an adjustment of its TEFRA rate of increase, due to the imposition of the Florida Indigent Care Tax. The Board finds that the Florida Indigent Care Tax is an allowable operating cost. The Board finds that the Florida Indigent Care Tax was imposed on the Provider effective after May 18, 1984. This was after the Provider's TEFRA base year was established. Therefore, the cost of the Florida Indigent Care Tax did in the years in the instant case, cause the Provider to exceed its TEFRA base year costs, and therefore the Provider is entitled to an adjustment of its costs.

The Board disagrees with the Intermediary's finding that the indigent tax did not result in the hospital exceeding the limitation in 1985 and 1986, and therefore the tax could not be the contributing factor for the hospital exceeding the rate of increase ceiling in 1988, 1989, and 1990. The Board concludes that HCFA must make a separate cost determination for each cost reporting period, and just because the Provider did not exceed its limit in one year, due to the

Indigent Care tax, does not automatically make all subsequent years ineligible for relief.

The Board notes that the regulations allow an adjustment to base period costs to include taxes that were not incurred during the base year but were incurred subsequent to the base year period. The Medicare regulation at 42 C.F.R. § 413.40(h)(1)(i) indicates that a factor which could result in a significant distortion in the operating costs of inpatient hospital services is the assessment of FICA taxes during a particular period if the hospital did not incur such taxes during its base year. Also Section 1886(b)(4)(A) of the Social Security Act permits adjustment to base year costs for “events beyond the hospital's control or extraordinary circumstances.” The Board finds that the Florida Indigent Care Tax causes an increase in costs in the same manner as the imposition of the FICA tax.

The Board concludes that the Provider did exceed its TEFRA rate of increase for the years in contention, and that the increase was due in part to the imposition of the Florida Indigent Care Tax which it did not incur, during its TEFRA base year. Therefore, the Provider is entitled to an adjustment to its TEFRA rate of increase for the cost report periods ended 5/31/88, 5/31/89, and 5/31/90.

DECISION:

The Provider is entitled to an adjustment to its TEFRA rate of increase for the cost reporting periods ended 5/31/88, 5/31/89, and 5/31/90. The Intermediary's adjustments are reversed.

Board Members Participation:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker

Date of Decision: February 18, 1999

For The Board

Irvin W. Kues
Chairman