PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON-THE-RECORD
98-D2

PROVIDER -St. Cloud Hospital
St. Cloud, MN

Provider No. 24-0036

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Blue Cross and Blue Shield of
Minnesota

DATE OF HEARING-
September 29, 1997

Cost Reporting Periods Ended -
June 30, 1988 and 1989

CASE NOS. 91-1163E & 92-0895

INDEX

ISSUE:

Was the Intermediary's adjustment excluding from capital-related costs the Provider's payments for the rental of a mobile magnetic resonance imaging ("MRI") unit proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

St. Cloud Hospital ("Provider") is a 350-bed, non-profit, tax-exempt hospital located in St. Cloud, Minnesota. In 1986, the Provider began considering the feasibility of providing MRI services, taking into consideration projected patient utilization, estimated cost, and potential changes in technology.[1] Ultimately, it concluded that the most efficient and economical manner for offering the MRI service was through a mobile shared service arrangement with two other hospitals in the area. In July of 1987, the Provider entered into a three-year arrangement with LifeSpan, Inc. ("LifeSpan")[2], an unrelated party, to lease the MRI equipment.[3] Under the agreement, LifeSpan agreed to lease an MRI system that would be mounted on a dedicated mobile van, and made available for use at the Provider's site one day each week and every third Saturday. LifeSpan was responsible for the maintenance, transportation and operation of the MRI unit, and also agreed to furnish certain management services, including training of staff and various educational and support services for the hospital.

The Provider's responsibilities under the agreement included the preparation of the parking location for the mobile MRI unit, and supplying the necessary electrical and telephone hookups. In addition, the Provider was responsible for scheduling, delivering and retrieving its patients for the performance of MRI procedures, which were supervised by a hospital physician who was responsible for reading and interpreting the results of the procedures. The Provider was also required to maintain patient medical records relating to the use of the MRI unit, furnish all consumable supplies, and was solely responsible for billing patients and third party payors for the MRI services. LifeSpan and the participating hospitals were jointly responsible for procuring professional liability insurance, and maintaining quality assurance, risk management and operating protocols through a Medical Advisory Committee.

In return for the use of the MRI unit, the Provider agreed to pay LifeSpan a minimum guaranteed payment of $4,300 for each eight hours of services reserved for the hospital

---

1 Provider Exhibit 1.

2 Although the contracting party was LifeSpan, the operation of the mobile MRI unit was performed by TwinScan, a company affiliated with LifeSpan. Accordingly, documents relating to the arrangement refer to LifeSpan and TwinScan interchangeably.

3 Provider Exhibit 2.

regardless of the number of patients utilizing the MRI unit. The Provider further agreed to pay for any overtime service in excess of the eight hour period at a rate of $150 per overtime hour. Upon completing construction of the pad where the MRI unit was located, the Provider began providing MRI services to its patients in November, 1987. In May of 1988, the agreement with LifeSpan was amended to increase the rate of payment for overtime services to $500 per hour.[4] The agreement was further amended in February of 1989, to make the MRI unit available to the Provider three days per week and two out of every three Saturdays.[5]

For the fiscal years in contention,[6] the Provider claimed approximately 72 percent of the amounts paid to LifeSpan for leasing the MRI unit as capital related costs ($211,908 - Fiscal Year 1988 and $556,909 - Fiscal Year 1989). On audit of the Provider's Medicare cost report, Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Minnesota ("Intermediary") made adjustments to exclude these amounts from capital-related costs which reduced Medicare reimbursement by approximately $19,000 and $44,000 for fiscal years 1988 and 1989, respectively. The Provider appealed the Intermediary's determinations to the Provider Reimbursement Review Board ("Board") in accordance with 42 C.F.R. §§ 405.1835-.1841, and has met the jurisdictional requirements of those regulations. The Provider's representative was Mary Susan Philp, Esquire, of Powers, Pyles, Sutter & Verville, P.C., and the Intermediary was represented by Esther M. Peterson, Consultant, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the regulations at 42 C.F.R. § 413.130 allow for the inclusion of costs incurred for the lease or rental of equipment as capital related costs. Specifically, the provisions of 42 C.F.R. § 413.130(b)(1) state that:

> . . . 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)(1).

The regulations further provide that, where the supplying organization is not related to the

---

4 Provider Exhibit 6.

5 Provider Exhibit 7.

6 Fiscal Year Ended June 30, 1988 - Case No. 91-1163E.
Fiscal Year Ended June 30, 1989 - Case No. 92-0895.

provider, the following three requirements must be met for the costs to be classified as capital-related:

> (i) The capital-related equipment is leased or rented (as described in [42 C.F.R. § 413.130(b)] by the provider;
>
> (ii) The capital-related equipment is located on the provider's premises, or is located off-site 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(h)(2) (Previously 413.130(g)(2).

The Provider contends that its agreement with LifeSpan with respect to the MRI unit meets all three of the above requirements and, therefore, the costs incurred qualify as capital-related costs. With respect to the first requirement, the Provider notes that the Medicare regulations do not define the terms "lease" or "rental." However, the regulations state that those terms signify that the provider has "possession, use and enjoyment" of the assets in question. 42 C.F.R.
§ 413.130(b)(1). As to "possession, use and enjoyment," both the courts and the Board have focused on the commonly understood meaning of those terms. The Provider cites the decision rendered in St. Vincent Memorial Hospital Corp. v. Shalala, 827 F.Supp 517 (C.D. Ill. 1993) ("St. Vincent") wherein the Court cited Black's Law Dictionary for the following definitions of "possession:"

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name.

Black's Law Dictionary 1047 (5th ed. 1979).

In the St. Vincent decision, the Court concluded that "'possession' is found where the possessee has 'control' and a 'qualified' right in some asset."

St. Vincent, 827 F.Supp 517 (1993); see also Public Hospital of the Town of Salem v. Blue Cross and Blue Shield Association, et. al., PRRB Dec. No. 94-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 ("Salem").

The Provider asserts that it had "possession, use and enjoyment" of the MRI unit under its agreement with LifeSpan. Initially, the agreement guaranteed that the unit would be available for its sole use and enjoyment one day per week. Later, it was available to the Provider three days per week, plus certain Saturdays. During these time periods, the Provider unquestionably had a "qualified right" and "control" with respect to the use of the MRI unit. The Provider also notes that prior decisions rendered by the Board and the HCFA Administrator focused on whether the provider carried the "risks of ownership" in assessing whether a lease existed. Where payment was based on units of service rather than a fixed rate, the element of risk was not present and, thus, the agreement was not a lease that could be treated as capital-related costs.

The Provider asserts that it clearly bore substantial financial risk under its agreement with LifeSpan. Initially, the Provider incurred over $282,000 in capital expenditures to construct a pad and make other improvements to accommodate the MRI unit. Additionally, the Provider was obligated to pay a fixed daily fee for use of the MRI unit, which was calculated without regard to the number of scans performed. Since the obligation to pay this amount existed even if no MRI services were performed, the financial risk of under-utilization was squarely born by the Provider. Further, this obligation was effective for at least the three-year term of the lease, and the Provider had no right to terminate the agreement or reduced its scheduled use of the MRI unit prior to the end of the term. Accordingly, the financial risk born by the Provider was substantial and would qualify the agreement as a lease under the rationale set forth in prior decisions rendered by the Board and HCFA Administrator.

In further support of its position that the agreement with LifeSpan is a lease, the Provider refers to the preamble to the final prospective payment regulations for capital costs.[7] In the preamble, HCFA identified several factors which would weigh in favor of treating an agreement as a lease. The Provider argues that a vast majority of the listed factors are present in the existing case as follows:

- The agreement is memorialized in a single document;
- The MRI scans are ordered and interpreted by the Provider's physicians;
- The lease payments are determined on the basis of units of time rather than number of scans;
- The Provider schedules patient use and furnishes required supplies;
- The Provider's access to the equipment is not subject to interruption;

---

[7] 56 Fed. Reg. 43,358 43,388, Aug. 30, 1991 - (Provider Exhibit 12).

- The Provider obtained the necessary state authorization for performing the procedure; and

- In conjunction with the Medical Advisory Committee, the Provider is responsible for quality assurance, utilization review, and risk management with respect to performance of the MRI procedure.

Of the ten factors identified by HCFA, the Provider notes that only two are not present:

(1) The MRI unit was operated by LifeSpan personnel, and

(2) The contract is entitled as an "Agreement for Purchase of MRI Services."

Accordingly, the Provider concludes that its agreement with LifeSpan for the MRI unit constitutes a lease and, therefore, meets the first requirement of 42 C.F.R. § 413.130(h)(2).

Regarding the second regulatory requirement that the equipment be located on the provider's premises, or off-site on real estate owned, leased or rented by the provider, the Provider contends that it met this requirement with respect to its MRI unit. The MRI unit was located on the Provider's property while it was being utilized for hospital patients. The Provider again notes that over $282,000 in capital expenditures were spent to construct a pad and make other necessary improvements to locate the MRI unit at its facility. Thus, the MRI equipment was located on the Provider's premises satisfying this requirement for capital-related cost treatment.

As to the third and final requirement for classification as capital-related costs, the Provider contends that it met the condition that the capital-related portion of the charge be separately specified in the charge to the provider. In a letter dated February 14, 1991,[8] LifeSpan advised the Provider that the capital-related portion of its charges for the use of the MRI unit was 60 percent for 1987, 73 percent for 1988, and 71 percent for 1989. In response to a request for additional information, LifeSpan provided a break-down of its expenses for the operation of the MRI unit in a letter dated March 23, 1992.[9] This break-down of expenses showed specific amounts attributable to LifeSpan's lease of the equipment, insurance and transportation (i.e., the capital-related portion). The Provider believes that this documentation satisfies the third requirement, and notes that the Board found similar documentation to be sufficient in the Salem decision. In that decision, the Board stated that "the regulation does not require each bill submitted to a provider to include the capital-related charge portion." The Board found that this requirement could be met through other documentation, including a

---

[8] Provider Exhibit 10.

[9] Provider Exhibit 11.

letter. Accordingly, the Provider concludes that the letters from LifeSpan identifying the capital-related portion of its charge are sufficient in meeting this third regulatory requirement.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the agreement between the Provider and LifeSpan does not qualify as a lease of equipment under 42 C.F.R. § 413.130(b)(1) because it did not convey to the Provider the possession, use and enjoyment of the asset. It is the Intermediary's position that the agreement with LifeSpan constitutes a purchase of MRI scanning services.

The Intermediary argues that the dictionary meaning of the term "possess" means to own or to keep control over. In the instant case, the Provider did not own the MRI unit, and a review of the agreement shows that LifeSpan controlled the assets, not the Provider. The MRI unit was purchased, insured and maintained by LifeSpan, and the transportation and operation of the scanner was also provided by LifeSpan. In addition, LifeSpan scheduled regular visits and additional visits were handled on a first come first serve basis. Even when the MRI unit was parked on the Provider's premises, LifeSpan maintained control over the equipment because it was operated by LifeSpan personnel. The Provider's personnel interpreted the results of the scans and merely functioned in a support capacity. Since the use of the MRI unit was determined by LifeSpan through its scheduling responsibility and operation of the unit, the Provider did not have control or unrestricted use of the MRI unit.

In further support of its position, the Intermediary refers to the preamble of the prospective payment system regulations which includes a discussion of an agreement for mobile computerized-axial tomography ("CT") scanning services which is pertinent to the situation in this case.[10] In the example given in the preamble, the hospital did not have use and enjoyment of the equipment even though it was located on the hospital's premise when services were being rendered. The use and possession of the equipment was with the supplying organization, not the hospital. The Intermediary also refers to the Board's decision in St. Olaf Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Minnesota, PRRB Dec. No. 89-D38, April 26, 1989, Medicare & Medicaid Guide (CCH) ¶ 37,844.[11] In that decision, the Board ruled in favor of the Intermediary in a situations similar to the one in the instant case.

In spite of the fact that the Provider obtained letters from LifeSpan identifying the capital-related portion of the monthly charge, and that the agreement with LifeSpan is based on a set monthly fee, the Intermediary finds these factors irrelevant since the Provider did not have possession, use and enjoyment of the MRI unit. The Intermediary also notes that the contract between the Provider and LifeSpan is entitled "Agreement for Purchase of MRI Scanning

---

[10] 49 Fed. Reg. 267, Jan. 3, 1984 - (Intermediary Exhibit I-4).

[11] Intermediary Exhibit I-5.

Services." This implies that the agreement is for the purchase of services and not a lease of equipment. Accordingly, the Intermediary respectfully requests that the Board uphold its adjustments based on the supporting regulations and program instructions.

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) (Recodified at § 413.130(h)(2))	-	Supplying Organizations Not Related to the Provider

3. Case Law:

St. Vincent Memorial Hospital Corp. v. Shalala, 827 F.Supp 517 (CD Ill. 1993).

Public Hospital of the Town of Salem v. Blue Cross and Blue Shield Association, et. al., PRRB Dec. No. 94-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.

St. Olaf Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Minnesota, PRRB Dec. No. 89-D38, April 26, 1989, Medicare & Medicaid Guide (CCH) ¶ 37,844.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties contentions, and evidence in the record, finds and concludes that the agreement between the Provider and LifeSpan,[12] and amendments thereto, is not a lease/rental agreement. Accordingly, none of the payments

---

[12] Provider Exhibit 2.

made by the Provider under the agreement may be treated as capital-related costs under the provisions of 42 C.F.R.
§ 413.130.

The regulation at 42 C.F.R. § 413.130(a)(3) provides that payments under leases and rentals for the use of a depreciable asset are allowable as capital-related costs. In further defining such costs, the regulation states that:

> . . . 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 "rental of assets" signify that a provider has possession, use, and enjoyment of the assets.

42 C.F.R. § 413.130(b)(1).

Where a provider incurs capital related costs under a service arrangement with a supplying organization that is not related to the provider, the regulations set forth the following specific requirements which must be met in order for charges to the provider to qualify as capital related costs:

> . . .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
>
> (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).

The Board finds that the record in this case clearly demonstrates that the intent and purpose of the agreement entered into between the Provider and LifeSpan was a service agreement for the provision of MRI scanning services. First, the Board notes that the agreement itself is entitled "Agreement for Purchase of MRI Scanning Services." Second, the underlying purpose and intent of the arrangement is further set forth in the first two clauses of the agreement which state:

> WHEREAS, Hospital desires to provide magnetic resonance imaging services ("scanning services") for its patients; and
>
> WHEREAS, LifeSpan desires to provide scanning services to the Hospital, and to certain other hospitals, subject to all the terms and conditions hereinafter set forth.

Provider Exhibit 2.

Third, in its Section 1122 request to the State Health Planning and Development Agency,[13] the Provider stated that it planned to provide MRI services by purchasing this service on a daily basis from a mobile service that would also be utilized by two other local hospitals. The letter further advised that at the end of its three-year contract for mobile services, it potentially would have the volume needed to justify a fixed site installation at its facility. The Board finds that each of these factors materially illustrate that the Provider entered into a service contract with LifeSpan to obtain MRI scanning services.

Based on its review of the Provider's contractual arrangement with LifeSpan, the Board notes that the agreement includes numerous contractual provisions covering the required resources and the respective responsibilities of the parties with regard to personnel, equipment, space accommodations, training, repairs and maintenance, supplies, physician supervision, insurance, billing and administrative support. While the agreement is comprehensive in denoting the obligations of the parties to assure that the necessary personnel, technical support and equipment are available to furnish the required MRI scanning services, the Board finds it noteworthy that the agreement is void of any provision which would support the existence of a lease/rental agreement for the MRI equipment by the Provider. Moreover, the agreement states that LifeSpan will lease a magnetic resonance imaging system which would be mounted on a dedicated mobile van, and would be responsible for moving the mobile unit to and from the Provider and other participating hospitals in order to provide scanning services for patients of all the hospitals. Further, LifeSpan would be responsible for obtaining all licenses and permits for the transportation and operation of the equipment and mobile unit, and all automobile, fire, theft and casualty insurance for the mobile unit.

In addition to providing the equipment and the required maintenance thereof, LifeSpan was also responsible for providing the necessary technical personnel to operate the equipment. This included the training of personnel, provision of worker's compensation insurance and insurance covering the performance of its employees and independent contractors in the operation of the equipment and mobile unit. Given the expressed terms and conditions set forth in the Provider's agreement with LifeSpan, the Board finds that the Provider could not exercise control over the MRI unit to the exclusion of others. Accordingly, the Provider lacked the possession, use and enjoyment of the MRI unit required for a finding that the agreement was a lease agreement for purposes of Medicare reimbursement.

---

[13] Provider Exhibit 3.

Regarding the second regulatory requirement that the capital-related equipment be located on the Provider's premises, or on real estate owned, leased or rented by the Provider, the record shows that the MRI unit provided by LifeSpan was mobile and was regularly moved from the Provider's site in order to serve other facilities. While the MRI unit was physically located on the Provider's premises when it was being utilized for the hospital's patients, the Board finds this argument by the Provider to be irrelevant. Under the terms of the agreement, LifeSpan was responsible for moving the mobile unit to the various participating hospitals in accordance with an established schedule. Where an interruption of the schedule occurred, the parties were bound by the provisions of Article VII, paragraph 7.2 of the agreement which state as follows:

> 7.2 Interruption of Schedule. (Interruption of schedule does not pertain to scheduled maintenance downtime.) If at any time, and for any reason, the Mobile Unit shall not be available to Hospital for all or part of a scheduled period of use, the Mobile Unit, when it does become available for such use, shall report to the Hospital scheduled for use at the time of such availability. All subsequent use shall be in accordance with the Schedule. If the Hospital is deprived of scheduled use, it may request equivalent use during the next available unscheduled time period (including evenings, Saturdays, Sundays and holidays). The Hospital will determine (within reason) when it would like to reschedule its service and LifeSpan will exert every reasonable effort to accommodate the Hospital's revised schedule. No other compensation will be made to the Hospital on account of the Hospital being deprived of scanning services as a result of the failure of the Equipment or other circumstances beyond LifeSpan's reasonable control. All scheduled maintenance will be provided for by contractual agreement with the Equipment vendor. Scheduled maintenance will be performed in the evenings and on Sunday in order to maximize utilization and patient convenience. Hospital will be provided with a maintenance schedule and be notified as soon as possible should there be any change in the Schedule.

Based on the specific conditions set forth under the agreement and the facts presented in this case, the Board finds that the MRI unit at issue was not always located on the Provider's premises, or on real estate owned, leased or rented by the Provider as required under 42 C.F.R.
§ 413.130(g)(2). Clearly, the MRI unit was not compelled to reside on the Provider's premise. Furthermore, the terms of the agreement imply that ultimate control of the equipment rested with LifeSpan who had the final authority under certain circumstances with respect to the location of the mobile unit.

Finally, the Board finds that the Provider did not meet the third requirement of 42 C.F.R. § 413.130(g)(2) which requires the capital-related portion of the charge to be separately specified in the charge for the services. The record shows that there were no contemporaneous billings by LifeSpan for capital expenditures incurred by the Provider.

With respect to the letters submitted by LifeSpan in 1991 and 1992,[14] the Board finds these belated attempts to comply with the separate charge provision of the regulation to be grossly inadequate. While these letters portend to depict the exact amount of capital-related expenditures incurred by the Provider nearly two to three years earlier, the Board finds such documentation without legal standing and unsupportable. There is no provision in the agreement which formalized a capital-related component of the MRI services. Further, the Provider has presented no supporting documentation or corroborative calculation showing how the alleged capital-related portion was determined. In the absence of any evidence which would establish the Provider's compliance with the provisions of 42 C.F.R. § 413.130(g)(2), the Board concludes that the MRI scanning services rendered by LifeSpan to the Provider were not capital-related in nature.

DECISION AND ORDER:

The Intermediary properly excluded from capital-related costs the Provider's payments for the rental of a mobile magnetic resonance imaging ("MRI") unit. The Intermediary's adjustment is affirmed.

Board Members Participating:

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

FOR THE BOARD:

Irvin W. Kues
Chairman

---

[14] Provider Exhibits 10 and 11.