



John Elias Baldacci
Governor

John R. Nicholas
Commissioner

Maine Department of Health and Human Services
11 State House Station
Augusta, Maine 04333-0011

Office of Administrative Hearings

TO: John Michael Hall, Deputy Commissioner
Department of Health and Human Services
221 State Street
11 State House Station
Augusta, ME 04333

In Re: Penobscot Bay Medical Center—Appeal of MaineCare Final Audit Settlements for Fiscal Years
Ending 3/31/98 and 3/31/99

RECOMMENDED DECISION

An administrative hearing was held on September 21, 2004, September 23, 2004, September 29, 2004, and September 30, 2004, at Augusta, Maine in the case of Penobscot Bay Medical Center before Michael L. LeBlanc, Administrative Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Health and Human Services.

ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated April 26, 2004, this matter was assigned by James D. Bivins, Esq., Chief Administrative Hearing Officer to the undersigned Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issues:

- (1) Was the Department correct in denying additional adjustments to the final settlement for fiscal year ending 3/31/98 to Penobscot Bay Medical Center referencing Medicaid Program Discharges; Third Party Liability and the Disproportionate Share Hospital Payment?*
- (2) Was the Department correct in denying additional adjustments to the final settlement for fiscal year ending 3/31/99 to Penobscot Bay Medical Center referencing Medicaid Program Discharges; Third Party Liability; the Disproportionate Share Hospital Payment and TEFRA target amount per discharge?*

By letter dated September 16, 2004 (Exhibit HO-12), Commissioner Jack R. Nicholas delegated final decision-making authority for this appeal to Deputy Commissioner John Michael Hall.

APPEARING ON BEHALF OF APPELLANT:

William H. Stiles, Esq.
Brett D. Witham, Esq.
Pete Heissenbuttel, Esq.
Heather Flickinger
Bonnie Miller
Roland Mercier

APPEARING ON BEHALF OF AGENCY:

Jane B. Gregory, AAG
Christopher L. Mann, AAG
Susan MacKenzie
Herbert F. Downs
William Perfetto

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Notice of Hearing, 8/5/04
- HO-2. Hearing Report, received 4/13/04; Request for Hearing, 10/30/03; Final Informal Review Decision, 10/14/03
- HO-3. Order of Reference, 4/26/04
- HO-4. Notice of pre-hearing conference, 5/18/04
- HO-5. Pre-hearing conference report, 6/29/04
- HO-6. Department's Motion to Amend Order of Reference, 7/23/04
- HO-7. Pen Bay's Response to Department's Motion to Amend, 8/5/04
- HO-8. Pen Bay's Motion to Amend Order of Reference, 7/23/04
- HO-9. Department's Response to Pen Bay's Motion to Amend, 8/6/04
- HO-10. Response to Attorneys Stiles & Gregory from Hearing Officer LeBlanc, 7/9/04; Letter to Hearing Officer LeBlanc from Attorney Stiles, 7/6/04; Letter to Hearing Officer LeBlanc from Attorney Gregory, 7/6/04
- HO-11. Letter to Hearing Officer LeBlanc from Attorney Gregory, 7/14/04
- HO-12. Letter to Attorneys Stiles & Gregory from Commissioner Nicholas, 9/16/04
- HO-13. Letter to Hearing Officer LeBlanc from Deputy Commissioner Hall, 9/16/04; Letter to Commissioner Nicholas from Hearing Officer LeBlanc, 8/16/04
- HO-14. Pen Bay's Pre-Hearing Brief, 9/14/04
- HO-15. Department's Pre-Hearing Brief, 9/14/04
- HO-16. Motion to Strike Witness
- HO-17. Opposition to Department's Motion to Strike Witness with Incorporated Memorandum of Law
- HO-18. Department's closing arguments
- HO-19. Pen Bay's closing arguments
- HO-20. Pen Bay's rebuttal arguments
- HO-21. Department's rebuttal arguments

Department Exhibits:

Binder #1

1. Provider/Supplier Agreement between Penobscot Bay Medical Center and DHS signed by Penobscot Bay Medical Center on 9/14/94
2. Audit Report Transmittal, dated 6/4/02, for Final Audit Settlement for period 4/1/98 through 3/31/99
3. Audit Report Transmittal for Pen Bay for fiscal year ending 3/31/98, with cover sheet dated 5/31/02, signed by John Bouchard
4. HCFA Medicare Part A Intermediary document to John Bouchard, dated 8/30/01, re: Cost report Transmittal, Pen Bay FYE 3/31/98
5. Division of Audit work Papers for Final Settlement for Penobscot Bay Medical Center 1999, includes: Audit Work Program; Medicaid Cost Report Final, with Tax; Medicaid Cost Report Final without Tax, etc.
6. Division of Audit work Papers for Final Settlement for Penobscot Bay Medical Center 1998, includes: Audit Work Program; Medicaid Cost Report Final, with Tax; Medicaid Cost Report Final without Tax, etc.
7. BMS Work Papers for Interim Settlement, Penobscot Bay Medical Center, 1999
8. BMS Work Papers for Interim Settlement, Penobscot Bay Medical Center, 1998
9. Letter dated 3/4/97 from Bruce Reuben, Maine Hospital Association to Chairs, Maine Appropriations and Financial Affairs Legislative Committee with attached DSH spreadsheet
10. HCFA UB-92 Form
11. CCH Medicare and Medicaid Guide, Issue No. 977, No. 972, Part 2, dated 9/4/97, PPS for Inpatient Hospital Services, Final 1998 Fiscal Year, 3 pages
12. CCH Medicare and Medicaid Guide, Issue No. 924, Number 922, dated 9/6/96, PPS for Inpatient Hospital Services, Final 1997 Fiscal Year
13. Division of Audit Spreadsheet Calculation of Disproportionate Share Calculation for TEFRA 16 (9/26/98 – 8/31/99)

Binder #2

1. "Medicare Cost Report without Tax," Pen Bay FY 3/31/99
2. "Medicare Cost Report with Tax," Pen Bay FY 3/31/99
3. HCFA, Medicare Part A Intermediary document, to John Bouchard, dated 8/30/01, re: Cost Report Transmittal, Pen Bay, FYE 3/31/99
4. "Provider as Filed Cost Report with Tax," Pen Bay, FY 3/31/99
5. "Provider as Filed Cost Report without Tax," Pen Bay, FY 3/31/99
6. Penobscot Bay Medical Center, Fiscal Year 3/31/98, 3/31/98, Provider AS Filed Cost Report Without Tax
7. Penobscot Bay Medical Center, Fiscal Year 3/31/98, Medicare Cost Report Without Tax
8. Penobscot Bay Medical Center, Fiscal Year 3/31/98, Medicare Cost Report With Tax
9. Penobscot Bay Medical Center, Fiscal Year 3/31/98, Provider As Filed Cost Report With Tax

Binder #3

1. Maine Medical Assistance Manual, Chapter II, Sec. 45, effective 7/1/95 (with cover sheet dated 6/2/95)
2. Maine Medical Assistance Manual, Chapter III, Sec. 45, effective 7/1/95
3. Maine Medical Assistance Manual, Chapter II, Sec. 45, effective 4/1/98 (with cover sheet dated 3/19/98)
4. Maine Medical Assistance Manual, Chapter III, Sec. 45, effective 4/1/98

5. Maine Medical Assistance Manual, Chapter I, Sec. 1, effective 2/1/99
6. Maine Medical Assistance Manual, Chapter I, Sec. 1, effective 11/6/96
7. Federal Medicaid Third Party Liability (TPL) Statute, 42 U.S.C.A. §1396(a)(25)
8. Federal Medicaid Third Party Liability (TPL) Regulations, 42 C.F.R. §433.135 et seq.
9. 22 M.R.S.A. §14
10. Title 22 §3174-O
11. 42 C.F.R. §412.4
12. 42 C.F.R. §413.40

Non-Binder

- NB-1. Withdrawn
- NB-2. Memo to Hilary Fleming from Barb Scott, 11/26/90
- NB-3. Report of Hospital Discharges, Run date 1/10/03
- NB-4. Summary of Hospital Discharges, Run date 9/10/98; Take Back Request for Adjustment Unit, 4/10/98
- NB-5. Summary of Hospital Discharges, Run date 9/3/99; Medicaid Reimbursement Forms
- NB-6. Withdrawn
- NB-7. Prospective Cost Settlement FY 3/31/00

Appellant Exhibits:

- PBMC-1. FY 1998 Request for Informal Review with Appendices
- PBMC-2. FY 1998 Outpatient TPL Listing
- PBMC-3. FY 1998 Inpatient Account Information
- PBMC-4. Summary and Report of Hospital Discharges for FYE 3/31/98
- PBMC-5. FY 1999 Request for Informal Review with Appendices
- PBMC-6. FY 1999 Outpatient TPL Listing
- PBMC-7. FY 1999 Inpatient Account Information
- PBMC-8. Summary and Report of Hospital Discharges for FYE 3/31/99
- PBMC-9. Manual, Chapters II & III, Section 45 (1998)
- PBMC-10. Manual, Chapter I
- PBMC-11. National Uniform Billing Data Element Specifications as Developed by the National Uniform Billing Committee and Approved by the State of Maine Uniform Billing Committee
- PBMC-12. MaineCare General Hospital Training Manual (May 2002) supplied by the Maine DHS, Bureau of Medical Services
- PBMC-13. Maine Medicaid UB92 Highlights
- PBMC-14. Sue MacKenzie letter to Steven Allen dated 4/10/00
- PBMC-15. 42 C.F.R. §412.4 (1998)
- PBMC-16. Bill Perfetto's Informal Review File
- PBMC-17. Excerpts from Medicare Hospital Manual
- PBMC-18. Department's Final Informal Review Decision for FY 1998
- PBMC-19. Department's Final Informal Review Decision for FY 1999
- PBMC-20. 42 C.F.R. §447.15; 55 FR 1423
- PBMC-21. Profile of charges and payments for Patient #10

RECOMMENDED FINDINGS OF FACT:

A. Background

1. Notice of these proceedings was given timely and adequately. Penobscot Bay Medical Center (“Pen Bay”) made timely appeal.
2. Pen Bay is a medical center located in Rockport, ME, and is a contractual provider of hospital services to Medicaid eligible patients. Pen Bay’s fiscal year is from April 1st through March 31st. At issue in this appeal are the fiscal years ending March 31, 1998 and March 31, 1999.
3. The Maine Medicaid program is currently known as MaineCare,¹ and is administered by the Department of Health and Human Services, formerly known as the Department of Human Services (the “Department”).
4. The system used by the Department to reimburse provider hospitals for services provided to MaineCare eligible patients consists of three steps:
 - (a) First, at the beginning of each fiscal year the Department estimates the total amount of MaineCare reimbursement that it will ultimately be liable to pay the hospital for that year, and pays that amount to the provider hospital through 52 equal weekly periodic interim payments (“PIP”).
 - (b) Second, upon receipt of the provider’s As Filed (but un-audited) Medicare Cost Report, the Department issues an Interim MaineCare Settlement based on the Medicare Cost Report and MaineCare claims information accumulated by the Department over that fiscal year. The Medicare Cost report must be filed by the provider hospital five months after the close of its fiscal year. When the Department issues its Interim MaineCare Settlement, the difference between the PIP and the interim settlement amount is settled.
 - (c) Third, the Medicare program audits the cost report submitted by the provider hospital and issues a Medicare Notice of Program Reimbursement and audited cost report to the provider and to the Department. At this point, the Department issues a Final MaineCare Settlement Report, settling any differences between the final amount due and the interim settlement amount paid. The cost to charge ratio that is used to determine the MaineCare liability for non-routine inpatient charges and outpatient charges comes from the Medicare report.
5. On or about May 31, 2002, the Department issued its Final MaineCare Settlement Report to Pen Bay for FY 1998, indicating an overpayment of MaineCare payments in the amount of \$28,637.00 for the period April 1, 1997 through March 31, 1998.
6. On or about June 25, 2002, Pen Bay filed a Request for Informal Review of the Final MaineCare Settlement Report for FY 1998. Three issues were raised: Whether the number of MaineCare program discharges were correctly reported by the Department; whether the Department correctly stated the Third Party Liability (“TPL”); and whether the Disproportionate Share Hospital Payment (“DSH”) was correctly calculated by the Department.

¹ In reviewing the evidence and arguments of the parties, and throughout this recommended decision, the terms “Medicaid” and “MaineCare” are understood to refer to one and the same program.

7. On or about June 4, 2002, the Department issued its Final MaineCare Settlement Report to Pen Bay for FY 1999, indicating an underpayment of MaineCare payments in the amount of \$26,726.00 for the period April 1, 1998 through March 31, 1999.
8. On or about June 25, 2002, Pen Bay filed a Request for Informal Review of the Final MaineCare Settlement Report for FY 1999. Four issues were raised: Whether the number of MaineCare program discharges were correctly reported by the Department; whether the Department correctly stated the TPL; whether the DSH was correctly calculated by the Department; and whether the Department correctly determined the TEFRA Per Discharge amount.
9. On or about October 14, 2003, the Department issued Final Informal Review Decisions for FY 1998 and FY 1999, affirming the Final MaineCare Settlement Reports for those fiscal years.
10. On or about October 30, 2003, Pen Bay filed requests for administrative appeals of the Department's Final Informal Review Decisions for FY 1998 and FY 1999.

B. MaineCare Discharges

1. As part of its Final Audit Settlement, the Division of Audit determines the appropriate number of discharges for the provider hospital for each fiscal year. The number of discharges credited to the hospital is important because it is one of the components that determine the amount that MaineCare will pay for routine hospital charges. The formula is explained more fully in Section E below. The Division of Audit begins with the number of discharges for each fiscal year as reported by the Bureau of Medical Services on a report entitled: Summary of Hospital Discharges, which is produced through the Maine Management Information System ("MMIS"). The patients whose discharge is included in the Summary of Hospital Discharges are itemized in an MMIS report entitled: Report of Hospital Discharges. The Division of Audit then manually adjusts this number of discharges. At issue is whether the Division of Audit correctly adjusted the number of discharges contained in the Summary of Hospital Discharges.
2. For Pen Bay's FY 1998, the Division of Audit adjusted the number of discharges as follows:

a.	726	Number of discharges per the Summary of Hospital Discharges
b.	-1	Discharge and admission on same date
c.	+5	Prior year discharges processed after cutoff date
d.	<u>-2</u>	Take backs
e.	728	Adjusted number of discharges for FY 1998
3. For Pen Bay's FY 1999, the Division of Audit adjusted the number of discharges as follows:

a.	706	Number of discharges per the Summary of Hospital Discharges
b.	-4	Discharge and admission on same date
c.	+9	Prior year discharges processed after cutoff date
d.	<u>-11</u>	Take backs
e.	700	Adjusted number of discharges for FY 1999
4. Although there is no agreement on the method or definition used by the Department in determining that a discharge must be removed because a patient was discharged and readmitted on the same date, for purposes of this appeal Pen Bay has elected not to dispute the removal of the one (1) discharge in FY 1998 and the four (4) discharges in FY 1999. Therefore, no findings are made on this issue.

5. No dispute was ever raised on the correctness of the addition of the five (5) discharges for FY 1998 and the nine (9) discharges for FY 1999 for prior year discharges processed after cutoff date. Therefore, no findings are made on this issue.
6. According to the Division of Audit's Hospital Audit Supervisor, Susan MacKenzie, a "take back" is defined as a claim adjustment that has come through the claims adjustment unit, but which is too late to be processed through the claims system, i.e. are greater than 24 months old. The claims system is purged after 24 months, so these claims must be manually adjusted. It is therefore possible that the claim "taken back" was originally processed and counted as a discharge in a fiscal year prior to the fiscal year in which it was "taken back."
7. The two (2) "take backs" for FY 1998, were both for patient [REDACTED], whose dates of service were for [REDACTED], 1997 through [REDACTED], 1997, and [REDACTED], 1997 through [REDACTED], 1997. The respective pay order dates were July 17, 1997 and December 4, 1997. See, Department's Exhibit NB-4. Therefore, the dates of service as well as the pay order dates fell within Pen Bay's FY 1998 (April 1, 1997 through March 31, 1998). However, [REDACTED] is not included in the Report of Hospital Discharges, which purports to contain all patients with discharge dates between [REDACTED], 1997 and [REDACTED], 1998, and with pay dates between April 1, 1997 and August 31, 1998. See, Department's Binder #1, Exhibit #6, Tab #9 and/or Pen Bay's Exhibit PBMC-4. It is concluded that patient [REDACTED] was never included as a discharge, and therefore should never have been "taken back."
8. Nine (9) of the eleven (11) "take backs" for FY 1999, were for patient [REDACTED], pay order date December 10, 1998; patient [REDACTED], with pay order date May 28, 1998; and patient [REDACTED] (7 take backs), with pay order dates between May 7, 1998 and November 20, 1998. The other two (2) take backs were for patient [REDACTED], with pay order date September 11, 1997; and patient [REDACTED] with pay order date July 3, 1997. See, Department's Exhibit NB-5. None of the nine (9) are contained in the Report of Hospital Discharges, which purports to contain all patients with pay order dates between April 1, 1998 and August 31, 1999.² See, Department's Binder #1, Exhibit #5, Tab #10 and/or Pen Bay's Exhibit PBMC-8. Both [REDACTED] and [REDACTED] are included in the Report of Hospital Discharges for FY 1998. See, Department's Binder #1, Exhibit #6, Tab #9 and/or Pen Bay's Exhibit PBMC-4. It is concluded that nine (9) of the eleven (11) were never included as discharges and therefore should never have been "taken back." It is further concluded that two (2) of the eleven (11) were included as a discharge for FY 1998, and appropriately "taken back" during FY 1999.

C. Third Party Liability

1. Third party liability ("TPL") is defined by the MaineCare Benefits Manual §1.07-1(B) as: "*[A]ny individual, entity or program that is or may be liable to pay all or part of the medical cost of injury, disease, or disability of an applicant or recipient, excluding the Maine Medical Assistance Program...*" See, Department's Binder 3, Exhibits 5 & 6.
2. Although MaineCare pays a hospital on a PIP basis, with applicable adjustments made at the time of the Interim and Final Cost Settlements, the hospital files "claims" with the Department throughout its fiscal year. Those claims are used by the Department to identify whether the patient is indeed covered by MaineCare, and to collect data about the services rendered, the charge for those services, matching charges with rate of reimbursement, and the amount of any TPL.

² The name of patient [REDACTED] is included, but not for pay order date December 10, 1998.

3. The hospital is required to first bill any third party who may be liable before submitting a claim to MaineCare. If the hospital submits a claim to MaineCare without including a TPL amount, and the Department is aware of the possibility of a third party who may be liable, the Department is required to reject the claim and inform the hospital of the possible third party, instructing the hospital to first bill that third party.
4. When the hospital bills a third party, that hospital actually receives the amount of TPL from that third party.
5. The hospital is not required to submit any claim to the Department when it furnishes services to a MaineCare eligible patient. It is Pen Bay's custom to not submit a claim to the Department whenever TPL covers 100% of its charges. It is Pen Bay's custom to submit claims to the Department whenever TPL is less than 100% of its charges.
6. For MaineCare eligible inpatients, MaineCare pays for routine hospital costs at the lower of the hospital's Target Amount Computation ("TAC") or cost, or charges, as explained in Section D below. Ancillary and other charges associated with an inpatient stay are paid on a cost to charge ratio basis. Although the hospital knows the amount that MaineCare will pay for routine costs, it does not know the exact amount that MaineCare will pay for ancillary and other charges until it receives the Final Cost Settlement report.
7. For MaineCare eligible outpatients, MaineCare pays on a cost to charge ratio basis. The hospital does not know the exact amount that MaineCare will pay for outpatient services until it receives the Final Cost Settlement report.
8. During the Interim and Final Cost Settlements, the Department determines the amount of MaineCare liability for the total claims filed for eligible MaineCare recipients, and subtracts the amount of TPL paid for those MaineCare recipients. The total TPL is deducted from the total PIP for the fiscal year in determining the amount of any underpayment or overpayment.
9. There are two separate and distinct issues regarding the TPL offset by the Department in its Final Cost Settlements: Whether the Department offset the correct TPL amount inclusive of claims in which the TPL exceeded the MaineCare liability; Whether the Department should have removed the claims in which the TPL exceeded the MaineCare liability.
10. Inclusive of claims in which the TPL exceeded MaineCare liability, for FY 1998 the Department offset the PIP by \$217,734 for inpatient TPL, and \$84,522 for outpatient liability. The Department has not produced any itemized list of patients included in its figures.
11. Inclusive of claims in which the TPL exceeded MaineCare liability, for FY 1999 the Department offset the PIP by \$286,005 for inpatient TPL, and \$79,115 for outpatient liability. The Department has not produced any itemized list of patients included in its figures.
12. There is no dispute that the total TPL offsets by the Department for both fiscal years includes individual claims in which the amount of TPL exceeded the amount of MaineCare liability or MaineCare allowed amount. In other words, for certain claims the Department recovered more money for the claim than it paid out to the hospital.
13. It is undisputed that Medicare primary patients should not be included in the TPL offset amount, nor that at least one Medicare primary patient has been included in the TPL offset amount for FY 1999.

Pen Bay represents that there are eleven (11) more Medicare primary patients included in the TPL offset amount for FY 1999.

D. Disproportionate Share Hospital Payment

1. In its Pre-Hearing Brief, Pen Bay presents that: *The Department improperly offset the Provider's Disproportionate Share Hospital ("DSH") payment by \$166,590 (FY 1998) and \$31,880 (FY 1999), the amount of hospital tax allegedly reimbursed through the Medicaid cost Report. See, Exhibit HO-14.*
2. While neither admitting nor denying the correctness of the above allegation, and for purposes of this appeal only, the Department stipulates to Pen Bay's position on this issue as stated above.

E. TEFRA Target Amount Per Discharge

1. The MaineCare program reimburses provider hospitals for routine inpatient services at the lower of the Target Amount Computation ("TAC") or cost, or charges, in accordance with the Tax Equity and Fiscal Responsibility Act ("TEFRA"). The payment amount is paid for each MaineCare discharge within each fiscal year.
2. There is no dispute that the TAC was determined for each hospital's "base fiscal year" and then inflated for each subsequent fiscal year by an inflation figure published each year in the Federal Register.
3. There is no dispute that the correct TAC for Pen Bay's FY 1998 is \$2,531.72.
4. The inflation factor for the Federal FY 1998, which undisputedly corresponds to Pen Bay's FY 1999, as published in the Federal Register is 0%.
5. Based on an inflation factor of 0%, the correct TAC for Pen Bay for FY 1999 is \$2,531.72, which is the figure used by the Department in its Final Cost Settlement for FY 1999. Pen Bay now appears to be in agreement with this finding.

RECOMMENDED DECISION:

The Department **was not correct** in denying additional adjustments to the final settlement for fiscal year ending 3/31/98 to Penobscot Bay Medical Center referencing Medicaid Program Discharges; Third Party Liability and the Disproportionate Share Hospital Payment.

The Department **was not correct** in denying additional adjustments to the final settlement for fiscal year ending 3/31/99 to Penobscot Bay Medical Center referencing Medicaid Program Discharges; Third Party Liability; the Disproportionate Share Hospital Payment and TEFRA target amount per discharge.

It is further recommended that this case be remanded to the Department to do the following:

- a. Add back the two (2) "take backs" to the total discharges for FY 1998.
- b. Add back nine (9) "take backs" to the total discharges for FY 1999.
- c. Add back the \$166,590 for FY 1998 and the \$31,880 for FY 1999 that was deducted from the DSH.
- d. Remove all Medicare crossover claims.

- e. Remove all claims in which the TPL exceeds the MaineCare allowed amount.
- f. Produce, and provide to Pen Bay, an itemized patient list, outpatient and inpatient, for each fiscal years showing the MaineCare allowed amount and the TPL amount.
- g. Produce a new Settlement cost report with the above provisions.

If the parties disagree on the new TPL offset amounts for each fiscal year or if there is further dispute about Medicare crossover claims, it is recommended that the hearing record be reopened to hear further evidence on those disputes only.

REASON FOR RECOMMENDATION:

I. MaineCare Discharges

The only remaining dispute regarding this issue is the correct number of "take backs." The Department argues that all thirteen (13) "take backs" were appropriate. Pen Bay argues that they were all inappropriate. There was no dispute that in order to adjust a claim greater than 24 months old, that is the adjustment takes place 24 months after the claim is entered into the MMIS system, it must be manually adjusted. For a claim to be adjusted, it must be already included in the system, unless the adjustment is to add a claim that should not have been previously excluded, which is not at issue here. In any dispute whether the Department correctly "takes back" any claims, it is the Department's burden to show that the claim was previously included, the fiscal year of the claim's inclusion, and the reason why that claim should not have been included.

The two (2) "take backs" asserted by the Department for FY 1998 were for claims for services within that fiscal year. In other words, both must have been included as claims in the Report of Hospital Discharges for FY 1998, or there would be no claim to "take back." Neither was included in the Report of Hospital Discharges for FY 1998. It is concluded that either the claims were once included but already adjusted by the Bureau of Medical Services during the 24-month period when adjustment could be made through the system, or that they were never included. Under either alternative, the manual adjustment through "take back" was in error.

Nine (9) of the eleven (11) "take backs" for FY 1999 were for claims for services within that fiscal year. None of those eleven (11) were included as claims in the Report of Hospital Discharges for FY 1999. Consistent with the above reasoning, manual adjustment through "take back" was in error.

The remaining two (2) "take backs" for FY 1999 were for claims included in the Report of Hospital Discharges for FY 1998, the appropriate fiscal year for the dates of service. Therefore, presuming that there was legitimate reason for adjusting the claims, of which Pen Bay raised no dispute, it was appropriate to adjust them both through "take back."

Pen Bay also raised the issue of whether it is appropriate to make adjustments by "take back." The basis for argument against "take backs" is that the TEFRA target rate per discharge is generally adjusted upward each fiscal year. Therefore, the TEFRA target rate paid for the discharge during the fiscal year when it was included as a claim would be less than the amount adjusted by the Department through "take back." However, in the instant case the TEFRA target rate per discharge was the same for both FY 1998 and FY 1999. Therefore, the amount adjusted was identical to the amount paid for the claim. Because of this, it is not necessary to reach a conclusion on the merits of this argument.

II. Third Party Liability

The Department never submitted a list of patients and the respective TPL amounts to support its claim that the TPL amounts, for inpatient and outpatient, offset in each of the fiscal years at issue are correct. Rather, the Department argues, *"It's not up to the Department to present a list. This is [Pen Bay's case]. Our case is that the Department did the offset properly, so we didn't have to put in evidence on that point."* This argument is rejected. In order to present a prima facie case that it did the TPL offset properly, it is the Department's burden to not only present the dollar amount of the TPL it represents is the correct amount to offset, but to also present an itemized list of the patients and their respective TPL amounts included in its TPL offset. The Department has not met its burden. Because of this, it is possible to reach a conclusion that the Department was not correct in offsetting any amount of TPL for the two fiscal years in question. If the Department continues to refuse to produce the itemized list, it is recommended that the Deputy Commissioner reach such a conclusion. However, because Pen Bay represents that it is appropriate to offset a TPL amount; because the issue of whether it is appropriate to offset a TPL amount for an individual patient where that TPL amount exceeds the MaineCare liability should be decided; and because it is appropriate from a protocol point of view that the Department share an itemized TPL list, it is not recommended that the TPL amounts be totally removed, unless the Department continues its failure to produce the itemized lists.

The Department agrees that at least one Medicare crossover claim was erroneously included in the TPL offset. It neither agrees nor disagrees with the remaining claims that Pen Bay represents are also Medicare crossover claims. The Department represented it would be willing to check its records for the patient names submitted by Pen Bay. On remand, it is recommended that the Department be ordered to do so, and to present to Pen Bay its reasons for any remaining disagreement.

With respect to the TPL exceeding the MaineCare liability issue, the Department argues that it looks at the aggregate amount of claims for each fiscal year and, in the aggregate, the MaineCare liability is greater than the TPL amount. The Department further argues that Pen Bay can decide whether or not to file a claim with MaineCare, but that if it chooses to file a MaineCare claim Pen Bay has agreed to accept MaineCare as full payment even if the MaineCare payment is less than the TPL. The Department bases the latter argument in part on the premise that Pen Bay is in the best position to know prior to filing any claim with MaineCare whether the TPL will exceed the MaineCare payment. However, the Department also agrees that Pen Bay cannot know the exact amount of MaineCare payment for inpatient services other than routine services, and for outpatient service until the Final Cost Report is issued; and that the deadline for filing a MaineCare claim has lapsed prior to the issuance of any Final Cost Report.

MaineCare Benefits Manual §1.07-3 provides in relevant part:

Determination of the Department's liability for payment of claims submitted to Medicaid for services provided to individuals enrolled in a health maintenance organization or managed care plan or those who have other available third party resources, shall be made in conjunction with relevant State and Federal rules and regulations regarding such issues. The Medical Assistance Program is the payor of last resort. It is the responsibility of the provider to ascertain from each recipient if there are any other resources ... that are available from the recipient or third party for payment of the rendered service, and to accomplish that which may be necessary and within the provider's ability (e.g. accept assignment, enrollment, participation) to receive payment from such resources prior to billing the Medical Assistance Program ...

The Federal Medicaid TPL regulations are contained in 42 CFR §433.135 et seq. 42 CFR §433.139(b)(1) provides:

If the agency has established the probable existence of third party liability at the time the claim is filed, the agency must reject the claim and return it to the provider for a determination of the amount of liability. The establishment of third party liability takes place when the agency receives confirmation from the provider or a third party resource indicating the extent of third party liability. When the amount of liability is determined, the agency must then pay the claim to the extent that payment allowed under the agency's payment schedule exceeds the amount of the third party's payment.

There is no dispute that the Department rejects claims that do not list third party liability but for which the Department is aware of probable third party liability. There is also no dispute that the Department pays the difference between what the third party resource paid and the MaineCare limit. There is also no real dispute that the Department must not pay any amount for a claim when the TPL exceeds the MaineCare limit for that claim. When viewing the process on a per claim basis, it is very straightforward. However, the Department does not pay on a per claim basis. It pays through the PIP, which is later adjusted by, among other things, deducting the TPL. Although the Department does not pay claims on a per claim basis, it is concluded that the Department's liability for payment of each claim must be determined on a per claim basis. That is, if the Department determines that it has no liability for a claim because the TPL exceeds the MaineCare limit, then that claim should be backed out of the system.³ Therefore, it is recommended that the Deputy Commissioner order this be done on remand.

III. Disproportionate Share Hospital Payment

There is no longer any dispute because, for purposes of this appeal, the Department agrees with Pen Bay's position.

IV. TEFRA Target Amount Per Discharge

The evidence shows that the adjustment amount between Pen Bay's FY 1998 and FY 1999 as published in the Federal Register was 0%. Therefore, the Department correctly used the same amount for each fiscal year.

V. Additional Comments

It is concluded that reopening the record of this appeal to hear any remaining TPL offset or Medicare crossover disputes after the remand instructions are followed is the most economical way to resolve any remaining issues.

This appeal was made more cumbersome than necessary because of the Department's failure to produce certain records, specifically records documenting which discharges it removed, which discharges it "took back," and the list of patients and their TPL amount included in the TPL offset. It is suggested that those records should be produced along with the Final Cost Report. Without the records, a provider cannot determine whether it agrees with the Department on these issues. Because of this, the provider can only insure that its interests are protected by filing an appeal on these issues, an appeal that could perhaps be avoided if the provider had the records to review. In the alternative, at the point of appeal, during the Informal Review, it is reasonable to expect that a sharing of these documents would occur, along with an informal discussion of the issues perhaps. Unfortunately, that is not the case. The

³ Interestingly, as recent as April 10, 2000, the backing out of claims where the TPL exceeded the MaineCare limit was done by the Division of Audit upon request from the provider. See, Pen Bay's Exhibit PBMC-14. The change in the Department's position on this was not through any policy change.

Department did not produce the above referenced documents until the administrative hearing was actually in progress. And some of the documents have yet to be produced.

Because this is the first of several hospital audit recommended decisions, and because most of the same issues will be heard in the remaining cases, the parties have requested and the undersigned Hearing Officer urges that the Deputy Commissioner render the final decision on this appeal on an expedited basis. The parties have been advised of their right, and may so request, that the period for filing exceptions and responses be shortened.

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. THE DEPUTY COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

Dated: December 3, 2004

Signed: _____
Michael L. LeBlanc
Administrative Hearing Officer

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