PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2023-D29

PROVIDER –
Brigham and Women's Hospital

HEARING DATE –
May 25, 2021

PROVIDER NO. –
22-0110

YEARS –
FYEs 2010, 2011, 2012

vs.

MEDICARE CONTRACTOR –
National Government Services, Inc. – (J-K)

CASE NOS. –
15-0359, 15-0909, 16-1527

INDEX

ISSUE STATEMENT

Whether Brigham and Women's Hospital ("Brigham and Women's" or "Provider") timely claimed the $316,565 at issue in the initial fiscal year ("FY") 1989 cost report and, if timely claimed, whether those expenses included Ultrasound and Nuclear Medicine Clinical training costs.

After allowing Brigham and Women's the opportunity to present further relevant evidence as to the question of the programs' licensing for FY 1989, determine whether the non-provider operated Ultrasound and Nuclear Medicine programs at issue were approved in FY 1989.[1]

DECISION

After considering Medicare law and regulations, the arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board") finds that:

1. Brigham and Women's timely claimed the $316,562 at issue in the initial FY 1989 cost report, and these expenses included Ultrasound and Nuclear Medicine clinical training costs;
2. The non-provider operated Ultrasound and Nuclear Medicine programs at issue were approved and licensed in and during FY 1989.

Accordingly, the Board affirms its prior decision, issued under PRRB Dec. No. 2020-D05, that the Medicare Contractor improperly disallowed Brigham and Women's reasonable costs for the Ultrasound Allied Health Clinical Training Program and the Nuclear Medicine Allied Health Clinical Training Program, both of which are considered non-provider operated programs; and Brigham and Women's meets the criteria for reimbursement of clinical training costs of non-provider operated programs set out in the statute and in the regulations at 42 C.F.R. § 413.85(g).

INTRODUCTION

Brigham and Women's is an acute care hospital located in Boston, Massachusetts.[2] The Medicare contractor assigned to Brigham and Women's is National Government Services, Inc. ("Medicare Contractor").[3] The Medicare Contractor made adjustments to Brigham and Women's FY 2010, FY 2011 and FY 2012 cost reports to disallow the pass-through costs for the Ultrasound and Nuclear Medicine Allied Health Clinical Training Programs because it determined that Brigham and Women's failed to document that these costs were claimed and paid as pass through costs on the cost report for the most recent cost reporting period that ended on or before October 1, 1989.[4]

The Provider timely appealed the disallowance of these costs and met the jurisdictional requirements for a Board hearing. The Board conducted a telephonic hearing on November 8, 2018.

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[1] Transcript ("Tr.") at 6-7 (May 25, 2021).
[2] Provider's Post Hearing Brief (hereinafter "Provider's PHB") at 3 (July 29, 2021).
[3] CMS' payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries ("FIs"), but these functions are now contracted with organizations known as Medicare administrative contractors ("MACs"). The term "Medicare contractor" refers to both FIs and MACs as appropriate and relevant.
[4] Medicare Contractor's Initial Final Position Paper ("Medicare Contractor's Initial FPP") at 7, 12 (Aug. 30, 2018).

On February 24, 2020, the Board issued PRRB Dec. No. 2020-D05. The Administrator reviewed this decision and rendered its order to reverse the Board's decision on April 27, 2020. In its order, the Administrator summarized the Board's decision in 2020-D05 as follows:

> The Board held that the [Medicare Contractor] improperly disallowed the Provider's reasonable costs for the Ultrasound Allied Health Clinical Training Program and the Nuclear Medicine Allied Health Program for the cost reporting periods in dispute. In reaching this determination the Board determined that the Ultrasound and Nuclear Medicine Allied Health Programs existed in fiscal year 1989 and that each of the programs were included in the Provider's paramedical costs for its submitted fiscal year 1989 cost report. Accordingly, the Board concluded that the Provider met the criteria for reimbursement of clinical training costs of non-provider operated programs set out in the statute and in the regulations at 42 C.F.R. § 413.85(g).[5]

The Administrator's discussion of the issue continued, stating:

> In addition, the Board determined that the [Medicare Contractor's] prior determination that the Provider's [FY] 1989 "as submitted" cost report claimed paramedical education for the Ultrasound and Nuclear Medicine programs met the definition of "predicate fact" in 42 C.F.R. § 405.1885(a)(1)(ii), as it was a finding of fact that was used to determine the Provider's reimbursement from FY 1989 through FY 2009. The Board noted that for 20 years, the MAC both accepted the fact that the Provider claimed on its as filed FY 1989 cost report, paramedical educations for Ultrasound and Nuclear Medicine programs, and reimbursed the Provider its reasonable cost for these programs under the grandfather clause of 42 C.F.R. § 413.85(g)(2)(ii). Moreover, the regulations at 42 C.F.R. § 405.1885(a)(1) bars a Medicare contractor from reopening a "predicate fact" unless it is within the three year window to reopen the original determination that established the predicate fact. Accordingly, the [Medicare Contractor] is precluded from revisiting that "predicate fact" – whether through reopening, modification or a course correction – because the three year reopening has expired.[6]

In its analysis and discussion, the Administrator found that:

> [r]emand would be appropriate to allow the Provider to obtain necessary documentation to demonstrate whether the programs were approved in [FY] 1989, ***without deciding***, at this time, *whether the [Medicare Contractor's] prior determination*, that the Provider's [FY] 1989 "as submitted" cost report claimed

[5] Administrator's Remand Decision at 2 (April 27, 2020).
[6] *Id*. at 2-3.

> paramedical education cost for Ultrasound and Nuclear Medicine programs, *is excluded from the definition of a "predicate fact" as outlined in the regulation at 42 C.F.R. § 405.1885(a)(1)(iii)*.[7]

Accordingly, the Administrator vacated the Board's decision and remanded the cases for further clarification and development of the record and findings as follows:

- On whether the $316,562, was timely claimed in the initial cost report and, if timely claimed, included the expenses of the Ultrasound and Nuclear Medicine clinical training (*see e.g*. P-8); and

- After allowing the Provider the opportunity to present further relevant evidence as to the question of the programs' licensing for FY 1989, determine whether the non-provider operated Ultrasound and Nuclear Medicine programs were approved in [FY] 1989; and

- A new Board decision subject to 42 CFR 405.1875.[8]

On October 19, 2020, the Board issued a Notice of Reopening, pursuant to the Administrator's Remand decision, ordering the parties to provide the information sought by the decision, in anticipation of a new hearing and decision by the Board.[9]

Brigham and Women's and Medicare Contractor both prepared additional filings, submitted them to the Board, and on May 25, 2021, the Board and parties held a live video hearing, subject to the inquiries put forth by the Administrator's Remand.[10] Additionally, the parties submitted post-hearing briefs in support of their arguments, and specifically, to address the following issues put forth by the Board:

- How the [Medicare Contractor] can revisit a reasonable cost determination made after three years, particularly if there's no new information not considered in prior determination or this new determination; and

- What's the [Medicare Contractor's] obligation under 42 C.F.R. § 405.1853(a) to provide the record underlying its determination and how does the fact that the [Medicare Contractor] has failed to produce the complete record affect each party's burden of proof in this case.[11]

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[7] *Id*. at 15 (emphasis added).
[8] *Id*. at 16.
[9] Notice of Reopening and Board Order Incident to a Remand (Oct. 19, 2020).
[10] The position papers and exhibits from the original hearing in these cases remain part of the record in this hearing on remand and are considered in the Board's final decision.
[11] Provider's PHB at 5; Tr. at 140-41.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The Parties agree that both the Ultrasound and Nuclear Medicine programs at issue are non-provider operated allied health programs and, therefore, these programs are subject to the criteria of 42 C.F.R. 413.85(g).[12] With respect to the Ultrasound Allied Health Program, the Medicare Contractor argues that Brigham and Women's failed to include Ultrasound as paramedical pass-through costs on its submitted (also referred to as the "as-filed") cost report for FY 1989.[13] While the Medicare Contractor acknowledges that Ultrasound paramedical cost was included on Brigham and Women's settled/reopened FY 1989 cost report, the Medicare Contractor argues this is irrelevant because 42 C.F.R § 413.85(g)(2)(ii)(B) requires that "the provider claimed the clinical training costs as pass-through costs when the cost report for the most recent cost reporting period ending on or before October 1, 1989 was *initially submitted*, if the NPR for this cost reporting period was not issued by November 5, 1990.[14] The Medicare Contractor points out that Brigham and Women's FY 1989 NPR was not issued until September 16, 1991. Therefore, Brigham and Women's had to have claimed the Ultrasound program on its as-filed cost report, which the Medicare Contractor asserts Brigham and Women's did not do.[15]

As noted earlier, the Administrator vacated the Board's previous decision and remanded the cases for further clarification and development of the record and findings as follows:

- On whether the $316,562, was timely claimed in the initial cost report and, if timely claimed, included the expenses of the Ultrasound and Nuclear Medicine clinical training (*see e.g*. P-8); and

- After allowing the Provider the opportunity to present further relevant evidence as to the question of the programs' licensing for FY 1989, determine whether the non-provider operated Ultrasound and Nuclear Medicine programs were approved in [FY] 1989; and

- A Board decision will be subject to 42 CFR 405.1875.[16]

Regarding claims of the costs on the initial FY 1989 cost report, there were numerous documents admitted into the record that demonstrate that Brigham and Women's timely claimed these costs on the initial cost report.

The Board finds that Brigham and Women's records from FY 1989 show that it reported, on its FY 1989 as-filed cost report, the costs which it incurred for the clinical training of students in the ultrasound program.[17] Brigham and Women's states that:

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[12] Medicare Contractor's Initial FPP at 7; Provider's Initial Final Position Paper ("Provider's Initial FPP") at 1 (Jul. 27, 2018).
[13] Medicare Contractor's Initial FPP at 10.
[14] *Id*.
[15] *Id*. at 10-11.
[16] Administrator's Remand Decision at 16.
[17] Provider's Exhibit ("Ex.") P-7, at CR-22.

> [U]ltrasound Training Program costs were reclassified erroneously on the cost report from radiology-diagnostic to the radiology-diagnostic paramedical cost center, when the Provider should have re-classified the costs to the ultrasound paramedical cost center. The Provider reported a total of $316,562 on the radiology-diagnostic paramedical line (including ultrasound allied health education program costs, such as salaries of supervisors, and educational coordinators) on the [FY] 1989 cost report.[18]

The Provider's as-filed FY 1989 cost report further includes detail of the submitted Paramedical Education Program reclasses listed with specific amounts.[19] Additionally, Exhibit P-8 includes several documents, detailing amounts claimed on the FY 1989 cost report, which support the position that Brigham and Women's reported the costs of the Ultrasound Training Program in the radiology diagnostic paramedical education cost center (Line 24.04) on its FY 1989 cost report, and the Medicare Contractor allowed such costs.[20] Specifically enumerated on the FY 1989 as-filed report are Paramedical education costs, including radiology, X-ray and ultrasound.[21] Thus, the Board finds that, as required, these programs existed and were claimed on the FY 1989 as-filed cost report. Further, the Board notes that the reconciliation of Paramedical Education costs included in Exhibit P-8, at page 1, shows that the Medicare Contractor increased the as-filed costs of $316,562 in the Paramedical Radiology-Diagnostic cost center (Line 24.04), to a total of $351,086 in the final cost report ("NPR") for FY 1989.[22] Per review of Exhibit P-8, the NPR is reconciled to the total Paramedical Education and Training costs, which clearly include Education Coordinator salaries for both the Ultrasound and the Radiology Diagnostic Programs. The final NPR amount of $351,086 supports the argument that the Medicare Contractor adjusted the Paramedical costs to include the total costs listed in Exhibit P-8, which clearly include Ultrasound costs.[23] While it may be that the additional cost reclassed on the NPR is related to the Ultrasound Coordinator, it is clear that Coordinators' salaries are ***not*** the only costs for such a program, and the Provider has consistently contended that the student and supervisor costs reported reflect *both* programs. All of these student and supervisor costs were included on the as-filed FY 1989 cost report, not reclassed as part of the NPR.

The Medicare Contractor argues that the originally as-filed $316,562 cannot be reconciled to Exhibit P-8. Yet, after the Medicare Contractor's audit adjustment to increase the costs on Line 24.04, the total of $351,086 reconciles to Exhibit P-8 with no variance. The Medicare Contractor's Final Position Paper clearly indicates that $351,086 is the amount of the "[s]ettled worksheet A-6 reclassification. . ."[24] The Medicare Contractor also states that "[m]ore importantly, the Provider has failed to document that the Ultrasound Clinical Training Program was an approved program in FY 1989 in accordance with 42 CFR § 413.85(g)(1)."[25] The approvals for these programs are addressed later in this decision, and are verified in Exhibits P-17, P-18, and P-19. The Medicare

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[18] Provider's Initial FPP at 10; Provider's Ex. P-7 at CR-22.
[19] Provider's Ex. P-7 at CR-28 (PARA MED Reclass).
[20] Provider's Ex. P-8 at 1, 3, 8.
[21] *Id*. at 1.
[22] *Id.*
[23] *Id.* at 3-4.
[24] Medicare Contractor's FPP at 8.
[25] *Id.*

Contractor's arguments are weakened both by the letters verifying the approval of the programs and the fact that the final FY 1989 costs on line 24.04, as adjusted by the Medicare Contractor itself, reconcile exactly to Brigham and Women's original workpapers at Exhibit P-8.

Over the next 20 years, the Medicare Contractor *consistently* found the costs associated with the programs at issue as allowable. For example, in auditing FY 2008 (a year not at issue in this consolidated appeal), the Medicare Contractor initially determined that the costs of several clinical training programs, including the Ultrasound Training Program, should be disallowed because the Provider could not verify that the program costs were claimed and paid on the as-filed FY 1989 cost report.[26] However, the auditor ultimately acknowledged that the Provider *did* demonstrate through a spreadsheet that the Ultrasound Training Program *was* included in the Paramed Radiology Diagnostic cost center on the FY 1989 base year cost report, and that the Ultrasound Training Program costs were allowed by the auditor in that year.[27] Specifically, the Medicare Contractor's FY 2008 workpaper provides further guidance in its analysis and notes. The workpaper states that its sources for analysis include, specifically, the as-filed FY 1989 cost report:[28]

- Note B within the workpaper remarks and confirms that: "Ultrasound also existed in FYE 1989. The cost center was reported on line 24.04 along with Radiology Diagnostic."[29]

- Note C remarks that the "[p]rovider needed to show that the percentage of the cost attributable to clinical training did not exceed the percentage of total allowable cost attributable to clinical training in the most recent [cost report] ending on or before 10/1/89. . ."[30] The same note states that the worksheet uses the FY 1989 as-filed cost report for its data.

- Note D remarks on confirmed programs, noting "[t]hat as long as the provider does not exceed the initial base year percentage, there by [*sic*] increasing their reimbursement, it is okay to have a program that may not have been in place in FYE 1989. There is only one such program in the current year that fits this and that is speech therapy…."[31] Further, the note remarks that the overall Medicare expenditure in fact decreased.

- Finally, the conclusion determines that the four Nursing programs should be allowed and specifically identifies them as "Nuclear Medicine, Occupational Therapy, Ultrasound, and Speech Therapy."[32]

The Conclusion of the Medicare Contractor's FY 2008 workpaper allowed the costs after auditing, explaining that the two original adjustments that related to the issue would be excluded, and thus, confirmed this amount was in the as-filed FY 1989 cost report.[33] Even without the FY 2008 workpapers, the Board has sufficient evidence to find that the training amounts were

[26] Provider's Ex. P-11 at 5 (Conclusion: Note 2).
[27] Provider's Ex. P-11 at 5-6 (Conclusion: Notes 3-6).
[28] *Id*. at 1.
[29] *Id*. at 2.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id.*

included in the as-filed FY 1989 cost report. For example, the stipulations agreed upon for this case establish a number of key facts as undisputed, including:

1. "The Provider was the clinical training site for both the ultrasound and nuclear medicine programs during FY 1989."[34]

2. "The costs for the both programs [*i.e.*, the ultrasound and nuclear medicine programs] *were claimed* on the Provider's as filed cost report for FY 1989 (Exhibit P-7) as part of the diagnostic radiology cost center. They were not properly reclassed to a paramedical education center."[35]

Further, it is undisputed that FY 1989 was not the first year Provider served as a clinical training site for the ultrasound and nuclear medicine programs, but rather, it had been a clinical training site for both programs for "many years" prior to FY 1989.[36]

The Board ponders, if these FY 2008 workpapers were not available, could the same amounts be confirmed on the FY 1989 cost report, as if a *de novo* review was done of FY 1989. The Board finds that, even with a *de novo* review of FY 1989, the Board can reach the same conclusions.

For FY 1997, the Nuclear Medicine training program first appeared on a separate line in the cost report.[37] While the program did not exist as a stand-alone program prior to FY 1997, it was included in the FY 1989 cost report.[38] However, the Auditor interpreted it as a *new* program *as of 1997* in its audit of the provider's FY 2010 cost report and disallowed the costs as noted in Note C in Exhibit P-12.[39] However, the cost on the separate Nuclear Med Paramed line of the Provider's FY 2010 cost report was being reclassed from radiology into radiology paramedical, and the audit should not have required any additional information to come to that conclusion. Further, the Medicare Contractor itself acknowledges, in the Stipulated Facts, that "[t]he Provider also has been the clinical training site for many years, starting prior to [FY] 1989, for a nuclear medicine educational training program operated by the Massachusetts College of Pharmacy."[40] The Provider's Exhibit P-9 analyzes the as-filed and settled (per NPR) costs of the various paramedical education programs from FY 1982 to FY 2011. Brigham and Women's notes that Nuclear Medicine was "incl[uded] in Xray Diag" in FY 1989.[41] Starting in FY 1997, the settled NPRs showed allowed cost for the Nuclear Medicine Program consistently until FY 2009, and further, that they contained no adjustments to the as-filed costs from FYs 2006 to 2009.[42] The Medicare Contractor's analysis of Paramedical Education costs during the audit of FY 2008 is included as Exhibit P-11. In this Exhibit, the Medicare Contractor identified that the Nuclear Medicine Paramed program was reported on line 24.09 of the FY 2008 cost report, and Note C includes the following discussion on the review of several of the paramedical programs:

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[34] Stipulated Facts ("Stip.") at ¶ 3 (Nov. 1, 2018).
[35] *Id*. at ¶ 4 (emphasis added).
[36] *Id*. at ¶¶ 1-2.
[37] *See Id*. at ¶ 7.
[38] Provider's Initial FPP at 13.
[39] Ex. P-12 at 2.
[40] Stip. at ¶ 2.
[41] Ex. P-9 at 1.
[42] *Id.* at 4.

> Based on the initial review that was completed on the Nursing and Allied Health several of the nursing programs were disallowed as they were not legal operator of the program and it was determined that they did not meet the six criteria to obtain NAH costs as the non legal operator…Only one of the six criteria from the initial review was in question. The provider needed to show that the percentage of the cost attributable to clinical training did not exceed the percentage of total allowable cost attributable to clinical training in the most recent [cost reporting period] ending on or before 10/1/89. . .[43]

Per the Medicare Contractor's FY 2008 workpaper, the "only" criteria in question of the six required to obtain pass-through reimbursement of NAH costs as a non-legal operator of the program was the verification that the total clinical training costs (as a percentage of total costs) in FY 2008 did not exceed the total clinical training costs (as a percentage of total costs) in the cost reporting period ending on or before October 1, 1989.[44] As the Medicare Contractor's final conclusion was that this criteria was met, it is clear that, as of the FY 2008 audit, the Medicare Contractor found that all six required criteria were "met."

In response to the Secretary's second point, the determination of whether the Ultrasound and Nuclear Medicine programs were licensed/approved in FY 1989, Brigham & Women's has provided additional Exhibits which prove this fact. Exhibit P-17 is a letter from the Commission on Accreditation of Allied Health Education Program ("CAAHEP") which states that "[t]he Diagnostic Medical Sonography General concentration program at Middlesex Community College, Bedford, MA, was awarded initial accreditation on January 17, 1986 and remains accredited as of the date of this letter [February 22, 2021] with no lapses in accreditation."[45] Similarly, Exhibit P-18 is another letter from CAAHEP, also dated February 22, 2021 which indicates that a similar Diagnostic Medical Sonography General concentration program, this one at Seattle University in Seattle, WA, "[w]as awarded initial accreditation on January 21, 1983 and remains accredited as of the date of this letter with no lapses in accreditation."[46] Finally, Exhibit P-19, is a letter, dated February 22, 2021, from the Joint Review Committee on Educational Programs in Nuclear Medicine Technology ("JRCNMT") which "[c]onfirms that the nuclear medicine technology program at MCPHS University, formerly known as Massachusetts College of Pharmacy and Allied Health Sciences, has been accredited by the JRCNMT from October 1983 to the present date. There have been no lapses in accreditation during this time period."[47] These three letters put to rest the question of whether the programs were in operation, and approved, in FY 1989.

As in its previous decision (*i.e.*, PRRB Dec. No. 2020-D05), the Board finds that both the Ultrasound and Nuclear Medicine Allied Health programs existed during FY 1989 (as stipulated by the Parties)[48] and that both programs were included in paramedical costs in Brigham and Women's ***submitted*** FY 1989 cost report. This finding is supported by workpapers prepared by

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[43] Ex. P-11 at 2.
[44] *Id.*
[45] Ex. P-17.
[46] Ex. P-18.
[47] Ex. P-19.
[48] *See* Stip. at ¶¶ 1-4.

the Medicare Contractor in its review of Brigham and Women's FY 2008 clinical training costs.[49] In those workpapers, the Medicare Contractor states that Brigham and Women's FY 1989 "as filed" cost report is the source of the base year information, and concludes that, based on its "review, it has been determined that [Brigham and Woman's] four nursing programs (Nuclear Medicine, Occupational Therapy, Ultrasound, and Speech Therapy) should be allowed."[50] Additionally, the FY 2008 workpapers show $316,562 as the FY 1989 line 24.04 -Radiology diagnostic costs consistent with the Medicare Contractor's findings in the FY 2008 workpapers.[51] Although the Board does not have a complete breakdown of the $316,562 expenses at issue, the Provider's A-6 reclassification worksheet for FY 1989 indicates this amount includes Ultrasound and Nuclear Medicine as line 24.04 is described as "Paramed Ed Xray Diag & Ultrasound" with a footnote stating: "Xray Diagnostic & Ultrasound costs were included together and reclassified from Xray Diagnostic. Ultrasound costs should have been reclassified from Ultrasound and a separate Paramed Ultrasound Medicare line should have been set up."[52] Considering the age of the documentation (now approximately 30 years old), and the Medicare Contractor's FY 2008 audit findings, the Board finds this information sufficient to conclude that both the Ultrasound and Nuclear Medicine programs were included as paramedical costs on Brigham and Women's FY 1989 submitted cost report. Thus, Brigham and Women's meets the criteria for payment of pass through costs for its Ultrasound and Nuclear Medicine Clinical Training Programs.

Additionally, the Board notes that the Medicare Contractor's rationale in denying the FYs 2010--2012 paramedical education cost for Ultrasound was faulty. Specifically, the Medicare Contractor maintains that the Ultrasound cost were not claimed in paramedical education in FY 1989 because it did not see a reclassification from the Ultrasound line to the Radiology diagnostic paramedical line 24.04 in FY 1989.[53] However, Brigham and Women's witness testified that Ultrasound cost was included in Radiology diagnostic costs in FY 1989[54] and, therefore, a separate reclassification would not have been necessary. This testimony is supported by the FY 1989 A-6 reclassification workpapers showing $316,562 from the "as filed" cost report being reclassified to Radiology diagnostic-paramedical on line 24.04 with a footnote stating: "Xray Diagnostic & Ultrasound costs were included together and reclassified from Xray Diagnostic."[55]

Finally, in response to the Board's questions regarding revisiting a reasonable cost determination made after three years, and the Medicare Contractor's obligation under 42 C.F.R. § 405.1853(a) to provide the record underlying its determination,[56] the Medicare Contractor does not appear able to offer any valid responses. Rather, it simply reiterated its previously presented arguments, noting that "Provider was unable to demonstrate, at the hearing, that either Ultrasound or Nuclear Medicine were claimed in the [FY] 1989 cost report. . ."[57] and that no documentation was produced showing that the

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[49] *See* Ex. P-11.
[50] *Id.* at 2.
[51] *Id.* (Note B stating that "Ultrasound also existed in FYE 1989 . . . was reported on line 24.04 along with Radiology Diagnostic").
[52] Ex. P-8 at 2.
[53] *See* Ex. P-12, P-13, P-14 at Note F.
[54] Tr. at 33.
[55] Ex. P-8 at 2.
[56] *See also infra* notes 62, 63, and 64.
[57] Medicare Contractor's Post-Hearing Brief at 3 (July 9, 2021).

allied health programs were on its FY 1989 cost report.[58] Further, the Medicare Contractor asserts again that "[P]rovider is still unable to meet its burden of demonstrating that the Ultrasound and Nuclear Medicine programs were claimed in [FY] 1989 or that the $316,562 claimed includes the ultrasound and nuclear medicine programs."[59] The Board finds that the Medicare Contractor failed to comply with its obligation under § 405.1853(a) if it is asserting that it made the wrong determination for FY 1989 but fails to provide the relevant record upon which that determination was made.[60]

Regarding the Administrator's discussion on predicate facts, she proposed that 42 C.F.R. § 405.1885(a)(1)(iii) is:

> [c]onsistent with longstanding practice, specifically excludes reasonable cost determinations from the definition of a predicate fact and the related three-year limitation on reopening as reasonable cost determinations are made annually. In contrast, the three-year limitation is applicable to those predicate facts, defined as "once determined" and that are used in one or more subsequent cost reporting periods to determine payment. In addition, in response to commenters, the clarification promulgated pursuant to the 2013 regulation, at 42 C.F.R. §405.1885(b)(2)(iv), also affirmed that the three-year limitation for a "predicate fact" was not applicable to provider's request for reopening with respect to reasonable cost payment determinations assuring symmetry in the process.[61]

The Board notes that, while the Administrator vacated the Board's previous decision, she specifically declined to address "at this time" the Board's finding on predicate facts. Accordingly, the Board reiterates its previous findings, that, ***for 20 fiscal years***, the Medicare Contractor accepted the fact that Brigham and Women's claimed paramedical education costs for Ultrasound and Nuclear Medicine programs on its as-filed FY 1989 cost report, *and* reimbursed Brigham and Women's its reasonable cost for these programs under the grandfather clause of 42 C.F.R. § 413.85(g)(2)(ii). In this regard, § 405.1885(a)(1) bars a Medicare Contractor from reopening a predicate fact unless it is within the three-year window to reopen the original determination that established the predicate fact. Thus, the Board concludes, pursuant to § 405.1885(a)(1), that the Medicare Contractor is precluded from revisiting that predicate fact – whether through reopening, modification or a course correction – because the 3 year reopening timeframe has expired relative to both FYs 1989 and 2008.[62] The Board notes that its application of § 405.1885(a)(1) is

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[58] *Id*. at 4.
[59] *Id*. at 3.
[60] *See also infra* notes 62, 63 and 64.
[61] Administrator's Remand at 11.
[62] The NPRs at issue for FY 2010, 2011, and 2012 were issued on October 7, 2014, December 1, 2014, and April 27, 2016 respectively. As a result, ***all*** of the NPRs at issue were issued after the December 2013 regulatory change codifying the Secretary's "***longstanding*** policy not to revisit predicate facts more than 3 years after the predicate fact arose or was determined in a final intermediary determination." 78 Fed. Reg. 74826, 75167 (Dec. 10, 2013) (emphasis added). Further, as noted in PRRB Dec. No. 2020-D05 at 10 n.42: "The Board recognizes that the FY 2008 audit occurred prior to the predicate fact regulation. However, following the implementation of the predicate fact regulation [*see id.* at 75162-69], this determination itself would have become subject to the predicate fact regulation and, in this regard, the Board notes that the Medicare Contractor did not reopen the FY 2008 NPR within the three year window for review of the reaffirmation of the predicate facts at issue."

consistent with the 2018 decision of U.S. Court of Appeals for the District of Columbia in *Saint Francis Med. Ctr. v. Azar*[63] and that the very facts of this case highlight why the predicate fact regulation exists, particularly when it has been *over 30 years* since FY 1989 closed/ended.[64]

DECISION AND ORDER:

After considering Medicare law and regulations, the arguments presented, and the evidence admitted, the Board finds that:

1. Brigham and Women's timely claimed the $316,562 at issue in the initial FY 1989 cost report, and these expenses included Ultrasound and Nuclear Medicine clinical training costs;
2. The non-provider operated Ultrasound and Nuclear Medicine programs at issue were approved and licensed in and during FY 1989.

Accordingly, the Board affirms its prior decision, issued under PRRB Dec. No. 2020-D05, that the Medicare Contractor improperly disallowed Brigham and Women's reasonable costs for the Ultrasound Allied Health Clinical Training Program and the Nuclear Medicine Allied Health Clinical Training Program, both of which are considered non-provider operated programs; and Brigham and Women's meets the criteria for reimbursement of clinical training costs of non-provider operated programs set out in the statute and in the regulations at 42 C.F.R. § 413.85(g).

Board Members Participating:

Clayton J. Nix, Esq.
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For the Board:

8/21/2023

X Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: PIV

[63] 894 F.3d 290, 296-97 (D.C. Cir. 2018) (reviewing the predicate fact regulation confirming its application is limited to *reopenings* made by Medicare contractors and does not apply to provider appeals).

[64] The record for these cases highlights the challenges of revisiting 30+ year old events because: (1) the Medicare Contractor has been unable to locate its *complete* file for either the FY 1989 or the FY 2008 cost report audits notwithstanding its obligations under 42 C.F.R. § 405.1853(a)(3) to produce the relevant portions of those files for the record; and (2) for purposes of instant appeals, the Medicare Contractor has *not* presented any *new* material evidence that was not considered during those audits that would otherwise raise questions or issues with the findings in those audits on the predicate facts at issue. In other words, it does not make sense to reopen and revise a well-settled determination on the predicate facts at issue when: (1) the documentation upon which that determination was made is not available (here the relevant predicate fact determinations are from *both* FY 1989 *and* FY 2008); and (2) there is *not* any ***new*** material evidence not previously considered. *See also* Stip. at ¶¶ 5-6 (highlighting the Provider challenges with finding *30+-year-old records*). This conclusion is particularly true when that determination was applied for 20+ years and was reaffirmed by the Medicare Contractor as part of the FY 2008 audit, thereby creating predicate fact issues for *both* FY 1989 *and* FY 2008.