

**PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION
HEARING ON THE RECORD**

2023-D08

PROVIDER –
St. Vincent Randolph Hospital, Inc.

RECORD HEARING HELD:
October 18, 2022

PROVIDER NO. –
15-1301

FISCAL YEAR END –
2004 through 2009

vs.

MEDICARE CONTRACTOR –
Novitas Solutions, Inc. – (J-H)

CASE NOS. –
06-1843
07-1701
08-1543
10-0786
10-1178
11-0530

INDEX

	Page No.
Issue Statement	2
Decision	2
Statement of the Facts and Procedural History	2
Statutory and Regulatory Background: Loan Interest Expense	6
Discussion, Findings of Facts, and Conclusions of Law	8
Decision and Order	10

ISSUE STATEMENT:

Was the Medicare Contractor's disallowance of the interest expense proper for St. Vincent Randolph Hospital ("St. Vincent Randolph" or Provider) for the fiscal years ("FYs") 2004 through 2009?¹

DECISION:

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board" or "PRRB") finds that the Medicare Contractor improperly disallowed all of St. Vincent Randolph's claimed allocated interest expense associated with the loans at issue for FYs 2004 through 2009 and that St. Vincent Randolph is due 95.69 percent of that claimed allocated interest expense for each of those fiscal years.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

The Board held a hearing on these consolidated cases on February 11, 2014,² and issued PRRB Dec. No. 2015-D02 on February 5, 2015.³ The Board found that the cost issue in these cases is allowable loan interest expense and, as a result, ruled in favor of St. Vincent Randolph. However, the CMS Acting Deputy Principal Administrator reversed the Board's decision.⁴ St. Vincent Randolph then proceeded to the federal court, and ultimately the case was remanded back to the agency for further proceedings consistent with the decision of the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit") in *St. Vincent Randolph Hosp., Inc. v. Price*, 869 F. 3d 510, 514 (7th Cir. 2017).

On June 11, 2018, the Board reopened PRRB Dec. No. 2015-D02 pursuant to an order issued by the CMS Administrator.⁵ With the reopening, the Board ordered the parties to submit any additional arguments and exhibits to support their respective positions with regard to the interest expense issue in these cases. The Board further ordered the parties to file position papers within 60 days and, if either party elected to submit information previously relied upon in PRRB Dec. 2015-D2, that party was ordered to resubmit the information as an exhibit in its new position paper.⁶ While FY 2009 was not part of the original decision, the Board consolidated the hearing for FY 2009 with that for FYs 2004 through 2008.⁷

¹ This issue statement comes from the Board's original decision for FYs 2004 to 2008 under PRRB Dec. No. 2015-D02 (Feb. 5, 2015). The Board restates this issue statement because this matter is before the Board on remand from the Administrator with directions to further develop the record for FYs 2004 through 2008. Further, the Board consolidated FY 2009 with the other fiscal years as it involves the same issue.

² The PRRB hearing included PRRB Case No. 04-0953 addressing fiscal year end June 30, 2002, however, the Provider subsequently withdrew this appeal and it was not included in the Board's February 5, 2015 decision.

³ *St. Vincent – Randolph Hosp. v. WPS/BCBS Assoc.*, PRRB Dec. 2015-D2 (Feb. 5, 2015).

⁴ *CMS Administrator Dec.* (Apr. 1, 2015).

⁵ Medicare Contractor's Final Position Paper (hereinafter "Medicare Contractor's FPP") at 5 (Oct. 9, 2018). *See also* Exhibit (hereinafter "Ex.") C-1 at 1-2.

⁶ Ex. C-1 at 15-16.

⁷ The Board does not consolidate individual provider appeals for the same provider. Rather, the Board may, at its discretion, hold consolidated hearings for individual appeals involving the same provider.

During 2018 and 2019, the Board scheduled these cases for hearing several times, and the parties requested postponement. The Board held a prehearing conference on May 22, 2019. On December 31, 2019, the Medicare Contractor issued proposed Administrative Resolutions which included reimbursement of almost all of the loan interest expense being sought by the Provider. However, these proposed Administrative Resolutions did not include an award of litigation interest which, following remand, St. Vincent Randolph had requested pursuant to 42 U.S.C. § 1395oo(f)(2).

In 2022, after the passage of a significant amount of time with no final Administrative Resolutions executed in these cases, the Board again scheduled the cases for hearing. A second pre-hearing conference was held on August 15, 2022, during which the parties stated that an agreement was reached to tentatively resolve the substance of the appealed matter – reimbursement of the loan interest expense. However, as the matter is on remand from the U.S. Court of Appeals for the Seventh Circuit, St. Vincent Randolph continues to maintain that it is also due an award of litigation interest on the amount in controversy pursuant to 42 U.S.C. § 1395oo(f)(2). The Medicare Contractor argues it does not have the authority to grant such an award of interest.

On September 8, 2022, the parties filed a Joint Stipulations of Fact and Proposed Disposition which also included a request for a Hearing on the Record. On October 6, 2022, the Board sent a Request for Information to the parties asking for updated Stipulations. The Board asked the parties to either confirm whether it is undisputed that the Provider is only entitled to 95.69 percent of the claimed allocated interest expense for fiscal years 2004 through 2009, or to clarify what remains in dispute regarding the claimed allocated interest expense.

On October 11, 2022, the parties filed an Amended and Updated Joint Stipulation of Fact and Proposed Disposition which reiterates the parties request for a Hearing on the Record. The Parties have stipulated as follows:

1. This Consolidated Appeal was originally brought before the Board on St. Vincent's Request for Hearing on June 9, 2006. The case involved St. Vincent's claim for reimbursement of interest expense on loans incurred by St. Vincent for the construction of a new hospital for fiscal years 2004 through and including 2008.⁸ The claim was denied by WPS.
2. Following a hearing held on February 11, 2014, the Board reversed the decision of WPS and issued an order in favor of St. Vincent on February 5, 2015. In its decision, the Board determined that WPS's disallowance of the interest expense for St. Vincent for fiscal years 2004 – 2008 was improper.
3. The Board's decision was reviewed by the Administrator ("Administrator") of the Centers for Medicare and Medicaid Services ("CMS"). In a decision dated April 1, 2015, the Administrator reversed the Board's decision finding that WPS's disallowance of St. Vincent's claimed

⁸ While the same issue was the basis of the appeal for fiscal year 2009, that appeal for Case No. 11-0530 was not addressed or covered by the hearing, Board Decision 2015-D2, Administrator Review, or the subsequent proceedings before the District Court for the Southern District of Indiana and the United States Circuit Court of Appeals for the Seventh Circuit.

interest expense for fiscal years 2004 – 2008 was proper. The decision of the Administrator was appealed by St. Vincent to the United States District Court for the Southern District of Indiana on May 14, 2015.

4. Following the briefing by the parties on cross-Motions for Summary Judgment, the District Court entered an order (“District Court Order”) upholding the decision of the Administrator for fiscal years 2004 – 2008 and issued judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure on September 26, 2016.

5. St. Vincent appealed the District Court Order to the United States Court of Appeals for the Seventh Circuit on November 18, 2016. Following briefing by the parties, the Seventh Circuit heard oral arguments on April 11, 2017. The Seventh Circuit issued an opinion on August 22, 2017 vacating the District Court Order and remanded the case back to the District Court with instructions to remand the case for fiscal years 2004 – 2008 back to the Secretary for proceedings consistent with the Seventh Circuit’s opinion.

6. Pursuant to the remand by the District Court, the cases for fiscal years 2004 – 2008 were reopened pursuant to the April 25, 2018 order in which the Principal Deputy Administrator vacated the PRRB’s decision 2015-D2 and remanded the cases for fiscal years 2004 – 2008 to the Board (“Administrator’s Remand Order”). The Administrator’s Remand Order directed the PRRB as follows:

That the Administrator’s Decision in *St. Vincent Randolph Hospital, Inc.*, PRRB Dec. No. 2015-D2, dated February 5, 2015, is hereby vacated and the case is remanded to the PRRB consistent with 42 C.F.R. § 405.1877(g) to allow for the further development of the record; and

That the PRRB shall take actions necessary to reinstate the appeal and notify the Provider of the action taken by the Court; and

That pursuant to the Circuit Court August 22, 2017 opinion, the PRRB will permit further record development of the record by the parties and reconsider the matter consistent with the August 22, 2017 opinion; and

That the PRRB will reconsider St. Vincent Randolph Hospital, Inc.’s claim for reimbursement and allow St. Vincent Randolph the opportunity to submit additional documentation to explain the differences in the principal amounts of the two loans, and

That the PRRB will prohibit the Medicare Administrative Contractor from reasserting the “taint” theory as discussed in the August 22, 2017 opinion; and

That upon remand to the PRRB and subject to the instructions herein, the PRRB has the authority and discretion to determine how best to proceed with respect to supplemental briefings or whether to conduct of an oral hearing consistent with the procedures set forth at 42 C.F.R., Part 405, Subpart R and consistent with the Seventh Circuit's August 22, 2017 decision; and

That the decision of the Board is subject to the provisions of 42 C.F.R. [§] 405.1875.⁹

7. Following the reopening, while the cases pended before the Board, St. Vincent and WPS reached an agreement on the amount of recoverable interest expense on the loans incurred by St. Vincent for the construction of the new hospital. WPS issued proposed Administrative Resolutions ("AR") for each appeal covering fiscal years 2004 through and including 2009 on December 31, 2019. (*See* Exhibits 1 through 6). The proposed ARs included proposed reimbursement of the loan interest in the amount of 95.69 percent of the amounts claimed by St. Vincent. St. Vincent agreed and accepted the reduction to its claimed interest expense. Thus the parties reached an agreement on the amount of recoverable claimed interest and the parties now stipulate that it is undisputed that St. Vincent is owed 95.69 percent of the claimed allocated interest expense for FYs 2004 through 2009 as reflected in the proposed ARs. However, the ARs did not include an award of litigation interest, which had been requested by St. Vincent.

8. The parties stipulate that there remain no issues in dispute regarding the claimed allocated interest expense outside of the litigation interest issue. The parties stipulate that the record is complete and there is no additional briefing required on the allocated interest expense for FYs 2004 through 2009 as reflected in the proposed ARs or any other issues.

9. WPS takes the position that Administrator's Remand Order did not include any authority for the Board to consider an award of litigation interest. WPS further posits that neither it nor the Board has the authority to address matters, such as litigation interest pursuant to the statute, which are not raised or addressed in the Notice of Program Reimbursement ("NPR") nor the Administrator's Remand Order.

[10.] St. Vincent does not dispute the position of WPS with respect to its lack of authority to address issues such as the litigation interest claimed by St. Vincent. However, St. Vincent will not sign the ARs for any of the appeal covering fiscal years 2004 through and including 2009 that do not address and provide for the recovery of litigation interest it asserts is due and owing on the recoverable amounts pursuant to §1395oo(f)(2).

⁹ *See also* Ex. C-1 at 2.

[11.] St. Vincent requests that this matter be placed before the appropriate authority to resolve the current impasse between St. Vincent and WPS. St. Vincent seeks an order granting its request for reimbursement of the litigation interest it asserts is due and owing pursuant to §1395oo(f)(2).

On October 14, 2022, the Board granted the Record Hearing Request and issued the Notice of Hearing on the Record.

On November 11, 2022, the Provider filed in each of these cases a Request for Expedited Judicial review (“EJR”) pertaining to the “litigation interest” alleged to be due the Provider for FYs 2004 through 2009.

On December 1, 2022, the Board denied the Provider’s request for EJR over the “litigation interest” issue for all 6 cases. With regard to the 5 cases before the Board on remand (i.e., Case Nos. 06-1843, 07-1701, 08-1543, 10-0786, and 10-1178), the Board denied the EJR request primarily because “under the terms of the Remand Orders, the Board is not able to reach or consider whether that it lacks the authority of decide the ‘litigation interest’ question based upon the criteria required in 42 C.F.R. § 405.1842(f)(2).”¹⁰ For Case No. 11-0530, the Board denied EJR primarily because “any potential consideration of litigation interest for this case would be premature under the clear terms of 42 U.S.C § 1395oo(f)(2)” since this case has never reached federal court.¹¹ The Board then noted that St. Vincent Randolph could pursue its appeal rights for these 6 cases and, once it reaches federal court, may seek to have that statutory provision applied for an award of interest, *as relevant and appropriate*.

STATUTORY AND REGULATORY BACKGROUND: LOAN INTEREST EXPENSE

Generally, “necessary and proper” interest expense is allowable when it is incurred on “indebtedness established with lenders or lending organizations not related through control, ownership, or personal relationship to the borrower.”¹² Specifically, Medicare regulations at 42 C.F.R. § 413.153 state, in pertinent part:

(a)(1) *Principle*. Necessary and proper interest on both current and capital indebtedness is an allowable cost.

(c) *Borrower-lender relationship*. (1) Except as described in paragraph (c)(2) of this section, to be allowable, interest expense must be incurred on indebtedness established with lenders or lending organizations not related through control, ownership, or personal relationship to the borrower. Presence of any of these factors could affect the ‘bargaining’ process that usually

¹⁰ Board Denial of EJR Request at 9 (Dec. 1, 2022). For purposes of brevity, the Board does not restate all of the reasons why it denied the EJR request for these 5 cases.

¹¹ *Id.*

¹² See 42 C.F.R. § 413.153.

accompanies the making of a loan, and could thus be suggestive of an agreement on higher rates of interest or of unnecessary loans. Loans should be made under terms and conditions that a prudent borrower would make in arm's length transactions with lending institutions. The intent of this provision is to assure that loans are legitimate and needed, and that the interest rate is reasonable. Thus, interest paid by the provider to partners, stockholders, or related organizations of the provider would not be allowable. . . .

(2) **Exceptions to the general rule** regarding interest on loans from controlled sources of funds are made in the following circumstances. Interest on loans to providers by partners, stockholders, or related organizations made prior to July 1, 1966 is allowable as cost, provided that the terms and conditions of payment of such loans have been maintained in effect without modification subsequent to July 1, 1966. If the general fund of a provider "borrows" from a donor-restricted fund and pays interest to the restricted fund, this interest expense is an allowable cost. The same treatment is accorded interest paid by the general fund on money "borrowed" from the funded depreciation account of the provider or from the provider's qualified pension fund. **In addition, if a provider operated by members of a religious order borrows from the order, interest paid to the order is an allowable cost.**¹³

Thus, if a Medicare provider is operated by members of a religious order and borrows from the order, the interest is allowable as explained at the end of (c)(2) of the regulation.¹⁴ This exception is referred to as the "Motherhouse" exception. Section 220 of the Provider Reimbursement Manual, CMS Pub. No. 15-1 ("PRM 15-1") expands on the Motherhouse exception by stating:

Providers owned and operated by members of religious orders often obtain funds through loans from the Mother House or Governing Body of the religious order. Where there is a contractual agreement for the payment of interest and for the eventual repayment of the loan, the interest expense is allowable as cost provided the interest is applicable to the period after the certification of the institution as a provider. Interest expense incurred during a reporting period must be paid within the succeeding reporting period.

PRM 15-1 § 202.1 further defines interest and what is required for it to be allowable. This section states:

¹³ (Bold and underline emphasis added.)

¹⁴ See 42 C.F.R. § 413.153(c)(2).

Interest.—Interest is the cost incurred for the use of borrowed funds, generally paid at fixed intervals by the user. Interest on current indebtedness is the cost incurred for funds borrowed for a relatively short term, usually for 1 year or less. Current borrowing is usually for purposes such as working capital for normal operating expenses. Interest on capital indebtedness is the cost incurred for funds borrowed for capital purposes, such as the acquisition of facilities, equipment, and capital improvements. Generally, loans for capital purposes are long-term loans.

Interest is usually expressed as a percentage of the principal. Sometimes, it is identified as a separate item of cost in a loan agreement. Interest may be included in finance charges imposed by some lending institutions or it may be a prepaid cost or discount in transactions with those lenders who collect the full interest charges when funds are borrowed. Reasonable finance charges and service charges together with interest on indebtedness are includable in allowable cost.

To be allowable under the Medicare program, interest must be:

- o Supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required;
- o Identified in your accounting records;
- o Related to the reporting period in which the costs are incurred; and
- o Necessary and proper for the operation, maintenance, or acquisition of your facilities.

To support the existence of a loan, have available a signed copy of the loan contract which contains the pertinent terms of the loan such as amount, rate of interest, method of payment, due date, etc. Where the lender does not customarily furnish a copy of the loan contract, correspondence from the lender stating the pertinent terms of the loan such as amount, rate of interest, method of payment, due date, etc., is acceptable.

DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

These cases are back before the Board on remand from a Seventh Circuit, U.S. Court of Appeals opinion. Pursuant to the Court remand, as well as the resulting remand order from the Principal Deputy Administrator, these cases were reopened by the Board. The Administrator's remand order vacated the Board's original decision in these cases, and directed the Board to permit

further development of the record and ultimately reconsider this matter. The issue in these appeals remains whether the Medicare Contractor's disallowance of St. Vincent Randolph's interest expense associated with the loans at issue for FYs 2004 through 2009 was proper. After the cases were remanded and the Board reopened the appeals, St. Vincent Randolph and Medicare Contractor reached an agreement in principle on the amount of recoverable interest expense on the loans incurred by St. Vincent Randolph for the construction of the new hospital. Accordingly, the Medicare Contractor drafted proposed administrative resolutions ("ARs") for each appeal covering fiscal years 2004 through and including 2009 on December 31, 2019 reflecting this agreement in principle.¹⁵ However, St. Vincent Randolph declined to agree to the proposed ARs because it did not include any litigation interest in accordance with 42 U.S.C. § 1395oo(f)(2). As a result, the parties agreed to stipulations and, in particular, stipulated that it is undisputed that St. Vincent is owed 95.69 percent of the claimed allocated interest expense for FYs 2004 through 2009 as reflected in the proposed ARs.

Consistent with 42 C.F.R. § 413.153 and PRM 15-1 § 202.1, *and* based on the decision of the Court of Appeals opinion in *St. Vincent Randolph Hosp., Inc. v. Price*, 869 F.3d 510, 514 (7th Cir. 2017), the Administrator's remand, the parties' stipulations, *and the record before the Board*, the Board accepts the stipulation that the Provider is due 95.69 percent of the claimed allocated interest expense for FYs 2004 through 2009. In particular, based on its review of the record, the Board agrees with the allowance rate of 95.69 percent and notes that it is consistent with the fact that the 2003 refinancing of the original loan needed to take into account the small portion of the original 2002 principal amount that had been paid as reflected on the amortization table.¹⁶ Accordingly, the Board finds that the Medicare Contractor improperly disallowed all of St. Vincent Randolph's claimed allocated interest expense associated with the loans at issue for FYs 2004 through 2009 and that St. Vincent Randolph is due 95.69 percent of that claimed allocated interest expense for each of those fiscal years.

As discussed above, St. Vincent Randolph has raised a new issue on remand that is beyond the scope of that remand, namely whether it is due litigation interest in accordance with 42 U.S.C. § 1395oo(f)(1). In this regard, the Board notes that, when a provider seeks judicial review of a final Board decision pursuant to 42 U.S.C. § 1395oo(f)(1), then:

The amount in controversy shall be subject to annual interest beginning on the first day of the first month beginning after the 180-day period as determined pursuant to subsection (a)(3) and equal to the rate of interest on obligations issued for purchase by

¹⁵ Ex. P-1 – P-6 (Oct. 11, 2022).

¹⁶ *See* Ex. C-2 at 1-2 (Amortization table for original 2002 construction loan showing original construction loan amount of \$15,281,928.18 and scheduled balance for the June 2003 period as \$14,887,079.30); Ex. C-3 at 8 (showing St Vincent Randolph claiming \$15,568,979.88 as the amount of the 2003 loan); 869 F.3d at 513-14 (stating "The Secretary's appellate brief makes the final argument: the second loan is larger than the first. The Hospital borrowed approximately \$15.3 million from its fraternal corporation and refinanced with a loan of some \$15.6 million from Ascension Health. But during 2002 and 2003 it should have paid down some indebtedness on the 2002 loan; that's what the amortization table provided. So the amount of credit needed to refinance in 2003 should have been lower than the principal amount of the 2002 loan. Instead, the new loan was higher. This suggests – though it does not show – that Ascension Health provided the Hospital with some working capital as well as a refinancing of the 2002 loan. The cost of working capital may or may not be compensable under the Medicare program, see 42 C.F.R. § 413.130(i), but the documents in this case file (and arguments of counsel) do not shed light on this issue.").

the Federal Hospital Insurance Trust Fund for the month in which the civil action...is commenced, ***to be awarded by the reviewing court*** in favor of the prevailing party.¹⁷

Accordingly, as the Board noted in its December 1, 2022 EJR decision, St. Vincent Randolph could pursue its appeal rights for these 6 cases subsequent to this decision, and once it reaches federal court, may seek to have that statutory provision applied for an award of interest, *as relevant and appropriate*.

DECISION AND ORDER

After considering Medicare law and regulations, arguments presented, and the evidence admitted, the Board finds that the Medicare Contractor improperly disallowed all of St. Vincent Randolph's claimed allocated interest expense associated with the loans at issue for FYs 2004 through 2009 and that St. Vincent Randolph is due 95.69 percent of that claimed allocated interest expense for each of those fiscal years.

BOARD MEMBERS PARTICIPATING:

Clayton J. Nix, Esq.
Gregory H. Ziegler, CPA
Robert A. Evarts, Esq.
Kevin D. Smith, CPA
Ratina Kelly, CPA

FOR THE BOARD:

2/17/2023

X Clayton J. Nix

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

¹⁷ (Emphasis added.)