

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LUTHERAN MEDICAL CENTER,

Plaintiff,

-against-

MEMORANDUM & ORDER

14-CV-731 (FB) (RML)

14-CV-732 (FB) (RML)

SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services

Defendant.

Appearances:

For the Plaintiff:

ROY W. BREITENBACH

COURTNEY A. ROGERS

Garfunkel Wild, P.C.

111 Great Neck Road

Great Neck, NY 11021

For the Defendant:

ROBERT L. CAPERS

United States Attorney

Eastern District of New York

271 Cadman Plaza East

Brooklyn, New York 11201

By: KATHLEEN A. MAHONEY
Assistant United States Attorney

BLOCK, Senior District Judge:

Lutheran Medical Center (the “Hospital”), a not-for-profit, general hospital, brings these actions against Sylvia Mathews Burwell, in her capacity as Secretary of the Department of Health and Humans Services, to challenge decisions of the Provider Reimbursement Review Board (“PRRB”) that it did not have jurisdiction to consider certain issues. Both parties move for judgments on the pleadings; the Secretary’s motions are granted and the Hospital’s are denied.

I

2 Pursuant to the Medicare program, established under Title XVIII of the Social
3 Security Act, medical providers are reimbursed for services they supply to eligible
4 patients. 42 U.S.C. § 1395 *et seq.* Medicare also reimburses approved teaching
5 hospitals, such as Lutheran Medical Center, for various costs associated with graduate
6 medical education, including the salaries and benefits for residents and interns. *See* 42
7 C.F.R. § 413.75. The amount of the reimbursement relating to graduate medical
8 education is based, in part, on the number of resident and intern Full-Time Equivalents
9 (“FTEs”) in the hospital’s training program. *See* 42 U.S.C. § 1395ww(d)(5)(B)(ii); 42
10 C.F.R. § 413.79. The FTE count “is equal to the average of the weighted FTE count
11 for the payment year cost reporting period and the preceding two cost reporting
12 periods.” 42 C.F.R. § 413.79(d)(2) & (3).

13 A provider’s cost reports are audited by a Medicare Administrative Contractor
14 (“MAC”). *See* 42 U.S.C. § 1395kk-1. Upon completion of an audit, the MAC
15 determines the total payment due to the provider for the cost year and issues a Notice
16 of Program Reimbursement (“NPR”), which states the amount due, identifies any
17 adjustments, states the amount of any Medicare overpayment and reimbursement owed
18 to the Medicare program, and the reasons for the determination. 42 C.F.R.
19 §§ 405.1803(a)-(b). If a provider is dissatisfied with the MAC’s final determination as
20 to the amount of reimbursement due for a particular cost reporting period, it may appeal

1 to the PRRB. 42 U.S.C. § 1395oo(a); 42 C.F.R. § 405.1835.

2 The Secretary and the PRRB, consistent with their statutory authority, have
3 promulgated rules and regulations that govern the procedures for hospitals to bring
4 claims before the PRRB. *See* 42 U.S.C. § 1395oo(e); 42 C.F.R. § 405.1835 et seq. The
5 PRRB conducts adversary hearings at which the provider and the MAC may submit
6 testimony and documents, examine witnesses, and present argument. *See* 42 C.F.R.
7 §§ 405.1851, 405.1855, 405.1859, 405.1861. The PRRB's decision is final and
8 binding on the parties to the hearing unless it is reversed, affirmed, modified, or
9 remanded by the Secretary within sixty days. 42 U.S.C. § 1395oo(f)(1); 42 C.F.R.
10 § 405.1871.

11 A provider may obtain judicial review of an adverse PRRB decision, which is a
12 final decision of the Secretary, by initiating a civil action in district court, 42 U.S.C.
13 § 1395oo(f)(1); 42 C.F.R. § 405.1877; a district court's review is limited to setting
14 aside only agency actions that are "arbitrary, capricious, an abuse of discretion, or
15 otherwise not in accordance with the law." *Thomas Jefferson Univ. v. Shalala*, 512
16 U.S. 504, 512 (1994).

17 **II**

18 The MAC calculated that the Hospital had been underpaid \$646,868 and
19 \$643,750 for fiscal years 2001 and 2002, respectively. The Hospital filed separate
20 hearing requests for both fiscal years. At the time the hearing requests were filed, the

1 Hospital's hearing request for fiscal year 2000 was also pending before the PRRB. In
2 its 2000 challenge to the NPR, the Hospital disputed, among other things, the MAC's
3 FTE calculation.

4 In its fiscal year 2001 hearing request, the Hospital identified five issues for the
5 PRRB to consider. The first three issues related to the MAC's calculation of
6 disproportionate-share adjustments.¹ The other two issue statements alleged: "The
7 [MAC] incorrectly calculated the number of intern and resident full-time equivalents
8 for graduate medical education purposes," and, "[t]he [MAC] improperly calculated the
9 Medicare settlement data." AR 36.²

10 In its fiscal year 2002 hearing request, the Hospital identified four issues for the
11 PRRB to consider. The first three issues related to the MAC's calculation of
12 disproportionate-share adjustments. The other issue statement provided: "The [MAC]
13 improperly calculated the Medicare settlement data." AR2 34.³

14 On August 30, 2007, the Hospital filed its final position paper for fiscal year
15 2001. Regarding the FTE-count issue, the Hospital argued that the MAC counted time
16 interns and residents spent at "non-provider settings." AR 25. With respect to

¹ Medicare providers are entitled to an adjustment to their reimbursement based on the disproportionate share of low-income patients that they serve. *See* 42 U.S.C. § 1395ww(d)(5)(F).

² Citations to "AR" refer to the Administrative Record for 14-CV-731.

³ Citations to "AR2" refer to the Administrative Record for 14-CV-732.

1 Medicare settlement data, the Hospital lumped this issue with its discussion of
2 disproportionate share adjustments, and did not specifically identify what Medicare
3 settlement data was at issue outside its arguments related to disproportionate share
4 adjustments.

5 On December 26, 2007, the Hospital filed its final position paper for fiscal year
6 2002. While it again identified the Medicare settlement data, the entirety of its
7 substantive argument related to disproportionate share adjustments. AR2 139-143. The
8 Hospital did not identify specific Medicare settlement data with which it took issue.

9 The PRRB eventually scheduled separate hearings for each fiscal year in late
10 2013. Prior to the hearings, the Hospital submitted a letter to the MAC setting forth its
11 “major points.” AR 208, AR2 229. The Hospital argued for both fiscal years 2001 and
12 2002 that the FTE count should be adjusted based on the outcome of their appeal for
13 fiscal year 2000 (“FTE Carryover Issue”).

14 The MAC filed jurisdictional challenges with the PRRB as it related to the FTE
15 Carryover Issue for both 2001 and 2002. It argued that the PRRB lacked jurisdiction
16 over the issue because it was “not properly and timely briefed in a Position Paper.” AR
17 142, AR2 186. The PRRB agreed. It issued decisions for both fiscal years that
18 referenced the Secretary’s and PRRB regulations that required the Hospital to “identify
19 the aspects of the [NPR] with which it is dissatisfied,” and “precisely identify the
20 component of the . . . issue that is in dispute.” AR 98, AR2 4. Because the Hospital

1 did not identify the FTE Carryover Issue in the hearing requests or position papers, the
2 PRRB found it did not have jurisdiction over it. With respect to fiscal year 2001, the
3 PRRB specified—because the Hospital had identified the other FTE-Count issue—that
4 its consideration of FTE issues was “limited to what the [Hospital] specifically briefed
5 in its Final Position Paper, namely the current year FTE counts as they relate to . . .
6 residents who rotated to non-provider settings.” AR 99.

7 The MAC subsequently filed additional jurisdictional challenges to the PRRB
8 related to, among other things, the Medicare settlement data issues. The MAC argued
9 with respect to both appeals for fiscal years 2001 and 2002 that the Hospital “did not
10 specifically state which Settlement Data Adjustments were in dispute,” and therefore,
11 the issue was not properly preserved. AR 33, *see also* AR2 28. The PRRB again
12 agreed; because “there was no specificity in the [Hospital]’s appeal request” as it
13 related to the “settlement data issue,” the PRRB found “it d[id] not have jurisdiction
14 over the settlement data issue.” AR 527-28, AR2 417-18.

15 The Hospital now appeals to this Court the PRRB’s decisions dismissing for lack
16 of jurisdiction the FTE Carryover and settlement data issues. It seeks a remand to the
17 PRRB for consideration of those issues on the merits.⁴

18 **III**

⁴ Although the appeals for fiscal years 2001 and 2002 are separate actions, the Court considers them together due to the identical legal issues presented.

1 “Congress vested in the Secretary large rulemaking authority to administer the
2 Medicare program,” *Sebelius v. Auburn Reg’l Med. Ctr.*, 133 S. Ct. 817, 826 (2013),
3 and the PRRB has the “full power and authority to make rules and establish procedures,
4 not inconsistent with the [Medicare Act] or regulations of the Secretary,” which are
5 necessary or appropriate,” 42 U.S.C. § 1395oo(e), to administer its “immense
6 caseload,” *High Country Home Health, Inc. v. Thompson*, 359 F.3d 1307, 1310 (10th
7 Cir. 2004). The PRRB’s “[s]trict procedural requirements . . . help manage a docket
8 both by encouraging timely filing and by allowing [it] to ignore late or improperly
9 presented claims.” *Id.* Various courts have upheld applications of the PRRB’s
10 stringent rules because they “are reasonable and necessary to the smooth functioning
11 of the agency appellate process, and therefore cannot be considered arbitrary and
12 capricious or an abuse of agency discretion.” *UHI, Inc. v. Thompson*, 250 F.3d 993,
13 996-97 (6th Cir. 2001); *see also Kaiser Found. Hosps. v. Sebelius*, 649 F.3d 1153, 1158
14 (9th Cir. 2011) (“The position paper requirements assist in narrowing the issues on
15 appeal and efficiently managing the Board’s caseload.” (citation omitted)); *High*
16 *Country Home*, 359 F.3d at 1313 (“The Board’s two-stage process helps ensure that the
17 parties clearly identify the precise nature of their dispute, and gives the Board the
18 benefit of adversarial testing to expose flaws in superficially sound arguments on either
19 side of the controversy.”).

20 At the time the Hospital filed its hearing request, the Secretary’s regulations

1 required that an appeal request “must identify the aspects of the [MAC’s] determination
2 with which the provider is dissatisfied, explain why the provider believes the
3 determination is incorrect in such particulars, and be accompanied by any documenting
4 evidence the provider considers necessary to support its position.” 42 C.F.R.
5 § 405.1841(a)(1) (2006). Additionally, the PRRB Rules provided:

6 You must identify the specific issues, findings of fact and conclusions of
7 law with which the affected parties disagree; and you must specify the
8 basis for contending that the findings and conclusions are incorrect. If
9 you use an acronym, you must define it first. You must clearly and
10 specifically identify your position in regard to the issues in dispute. For
11 instance, if you are appealing an aspect of the disproportionate share
12 (DSH) adjustment factor or calculation, do not define the issue as “DSH”.
13 You must precisely identify the component of the DSH issue that is in
14 dispute.

15 2002 PRRB Rules, Part I § B.II.a.

16 The Hospital’s hearing requests and final position papers did not identify the
17 FTE Carryover issue. This issue first appeared in the Hospital’s major-points letter to
18 the MAC, nearly seven years after it filed its hearing requests. The Hospital thus failed
19 to identify in its hearing requests the FTE Carryover issue as an “aspect of the [MAC’s]
20 determination with which [it] was dissatisfied,” 42 C.F.R. § 405.1841(a)(1) (2006), and
21 did not “clearly and specifically identify [its] position” with regards to that issue, 2002
22 PRRB Rules, Part I § B.II.a. Accordingly, the PRRB was authorized to dismiss the
23 issue for lack of jurisdiction.

24 The Hospital argues, nonetheless, that dismissal of the FTE Carryover issue was

1 unwarranted because the Secretary’s regulations provide that any change to the FTE
2 count for fiscal year 2000 should “automatically adjust” the count for fiscal years 2001
3 and 2002 as well. Indeed, the Secretary’s regulations provide: “the hospital’s weighted
4 FTE count is equal to the average of the weighted FTE count for the payment year cost
5 reporting period and the preceding two cost reporting periods.” 42 C.F.R.
6 § 413.79(d)(2). However, even assuming that the Hospital would prevail if the FTE
7 Carryover issue was considered on the merits, the Hospital failed to comply with the
8 strict requirements set forth in the Secretary’s regulations and the PRRB rules to put the
9 issue properly before the PRRB. *High Country Home*, 359 F.3d at 1315 (“The Board
10 could have heard all of High Country’s complaints about the Intermediary’s procedural
11 and substantive mistakes if they had been timely presented, and when they were not,
12 the Board was under no obligation to consider the merits before dismissing the claims
13 on procedural grounds.”). Because such regulations and rules “are reasonable and
14 necessary for the smooth functioning of the PRRB’s agency appellate process,” *UHI*
15 250 F.3d at 996-97, their strict application to the Hospital was not arbitrary, capricious,
16 an abuse of discretion, or contrary to law.

17 With respect to the settlement data issue, the Hospital identified the issue in its
18 hearing requests, but failed to provide any specifics on what data it was referring to or
19 how it was miscalculated. Without more, the hearing requests were deficient and
20 provided the PRRB sufficient bases to exercise its authority to dismiss. 42 C.F.R.

§ 405.1841(a)(1) (2006); 2002 PRRB Rules, Part I § B.II.a.

The Hospital argues that its final position papers provided five pages of argument specific to the settlement data issue, and therefore, the settlement data issue was properly before the PRRB. After reviewing those pages, the Court disagrees. The pages to which the Hospital refers include only the Hospital’s discussions of disproportionate share adjustments. However, the Hospital did not reference any particular medicare settlement data nor include any of the PRRB’s requirements for position papers as it related to the issue. *See* 2002 PRRB Rules, Part II § B.IV.b (“[T]he description of an issue must include a summary of the pertinent facts and circumstances and cite the relevant statutory provisions, regulations, CMS Rulings, and other controlling authorities. You must identify the monetary amount, and explain its computation, for each item in dispute.”). Accordingly, the Court will not disturb the PRRB’s decisions to dismiss the issues.

IV

The Secretary's motions for judgment on the pleadings are granted and the Hospital's motions are denied.

SO ORDERED.

/S/ Frederic Block
FREDERIC BLOCK
Senior United States District Judge

Brooklyn, New York
July 13, 2016