

\$36,7856. The anesthesia CF for this period will be \$17.05. Any information contained in this final rule related to the CY 2003 physician or anesthesia CFs takes the place of the information contained in the December 31, 2002, final rule. All other provisions of the December 31, 2002, final rule are unchanged by this final rule.

**DATES:** *Effective date:* This rule is effective on March 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Marc Hartstein, (410) 786-4539.

**SUPPLEMENTARY INFORMATION:**

**I. Provisions of the Final Rule**

In the physician fee schedule final rule with comment period published on December 31, 2002 (67 FR 80018), following notice and comment, we announced a 4.4 percent reduction in the physician fee schedule conversion factor (CF) for 2003. As explained in the December 31, 2002, final rule, we determined the 4.4 percent reduction to the CF using the formula specified in statute. We explained that the statute did not allow us to use later, after the fact, data to revise estimates that were used to determine the sustainable growth rates (SGRs) for fiscal year (FY) 1998 and FY 1999 for the purposes of determining future updates to the physician fee schedule. We further indicated our preference for revising these estimates and establishing a positive update to CY 2003 physician fee schedule rates, if the Congress changed the law to permit these revisions, and we requested comments on how physician fee schedule rates could and should be recalculated prospectively in the event that the Congress provided the Department with legal authority to revise estimates used to establish the SGRs for FY 1998 and FY 1999 and the MVPS for 1990 through 1996.

On February 13, 2003, the Congress enacted the Consolidated Appropriations Resolution of 2003 (CAR), (Pub. L. 108-7) that was signed into law by the President on February 20, 2003. Before enactment of section 402(a) of the CAR, section 1848(i)(1)(C) of the Social Security Act (the Act) precluded judicial review of "the determination of conversion factors under subsection (d)." Section 402(a) of the CAR amended section 1848(i)(1)(C) of the Act to preclude judicial review of "the determination of conversion factors under subsection (d), including without limitation a prospective redetermination of the sustainable growth rates for any or all previous fiscal years." We believe that with this amendment, section 1848, read as a whole, now permits revision

of all earlier fiscal year SGRs for the purposes of allowing prospective application of those revisions to future physician fee schedule updates (that is, to the CY 2003 physician fee schedule update). Thus, we are now revising the FY 1998 and FY 1999 SGRs for the purposes of determining future updates to the physician fee schedule including a new physician fee schedule update that will apply from March 1 to December 31, 2003.

As we noted in our final rule of December 31, 2002, CMS believes the estimates used to set the SGRs for FY 1998 and FY 1999 were 6.4 percent lower than if after-the-fact, actual data could have been used, with the greatest differences arising from fee-for-service enrollment in Medicare and real per capita growth in the gross domestic product (GDP). The reasons for the differences between these estimates and later, after-the-fact actual data for 1998 and 1999 are described in more detail below. We noted in our December 31, 2002, final rule that as a result of using estimates in determining the SGRs for FY 1998 and FY 1999, physicians would receive lower payments for their services than if the SGRs and allowed expenditures for those fiscal years were recalculated to reflect later, after-the-fact actual data.

Although the estimates used to set the SGRs for 1998 and 1999 may have been different from later, after-the-fact actual data, before the enactment of section 402(a) of the CAR, section 1848 of the Act did not permit the SGRs for these two fiscal years (1998 and 1999) to be revised later, once "actual" data, or better estimated data became available.

In addition to our final rule of December 31, 2002, we set forth this position in several of our annual notices in previous years in which we announced the CF for the coming year. ("We will not be able to make adjustments to the [1998 and 1999] SGRs based on later data." 64 FR 53394. *See also* 63 FR 69188.) These notices indicated that section 1848 of the Act did not provide the necessary authority to revise the original estimates used to establish the SGRs for FY 1998 and FY 1999 for the purposes of establishing physician fee schedule updates for future years. We believe that as amended by the recently enacted CAR, section 1848 as a whole now permits the prospective redetermination of SGRs for these two previous years.

Section 402(a) of the CAR added language to the "non-reviewability" provisions of section 1848(i) of the Act. Section 402(a) added the phrase "including without limitation a prospective redetermination of the

sustainable growth rate for any or all previous fiscal years" to a non-reviewability provision that already existed at section 1848(i)(1)(c). Use of the word "including" in statutory language is typically constructed to mean "including but not limited to." In other words, we believe that the Congress added the new language as a new, non-exclusive example of the instances of non-reviewability that already exist. The example in the added phrase refers to a "prospective redetermination of the sustainable growth rate for any or all fiscal years." (Emphasis added). Prior to the enactment of section 402(a) of the CAR, the substantive provisions of section 1848 of the Act provided only for the prospective redetermination of the SGR for one "fiscal year," that "fiscal year" being FY 2000. The Balanced Budget Refinement Act of 1999 (BBRA) amended section 1848(f)(3) of the Act to change the physician fee schedule to a calendar year system of calculating the SGR beginning in "calendar year" 2000. Thus, we believe that section 402(a) demonstrates the Congress's intent that section 1848 as a whole be read to permit a prospective redetermination of the SGRs for "any or all" "fiscal" years in the plural, to wit, fiscal years 1998 and 1999, in addition to fiscal year 2000. Section 402(a) of the CAR calls for a change in the agency's prior interpretation of section 1848 of the Act as precluding any revision of the SGRs for fiscal years 1998 and 1999 to permit prospective redetermination of SGRs for these "fiscal years" in addition to existing authority for fiscal year 2000. This reading of section 402(a) of the CAR is consistent with the congressional intent behind section 402(a). The Conference Report for the CAR notes that section 402(a) is intended to "[provide] legal protection for the Administration should they make corrections to data errors in the physician payment formula for past fiscal years." (House Rpt. 108-10).

These prospective redeterminations will not have, and are not intended to have, any effect on physician fee schedule payment rates for previous years. (We are making no further revisions to the FY 2000 SGR because section 1848(f)(3) of the Act expressly specifies that we were to make the final revisions to the FY 2000 SGR on the basis of the best data available to the Secretary as of September 1, 2001. Accordingly, we made our final revisions to the FY 2000 SGR in a final rule published in the **Federal Register** on November 1, 2001 (66 FR 55319).)

In this final rule, we are announcing that for the purposes of determining