

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

ON THE RECORD

2001-D6

PROVIDER -

Bryn Mawr Terrace Convalescent Center
Bryn Mawr, PA

Provider No. 39-5095

vs.

INTERMEDIARY -

Blue Cross and Blue Shield Association/
Veritus Medicare Services

DATE OF HEARING-

November 28, 2000

Cost Reporting Period Ended -
December 31, 1994

CASE NO. 97-0139R

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ISSUE:

Was the Intermediary's reclassification of employment taxes proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Bryn Mawr Terrace Convalescent Center (AProvider@) is a proprietary skilled nursing facility located in Bryn Mawr, Pennsylvania. The issue above came before the Provider Reimbursement Review Board (ABoard@) on October 14, 1998, in the form of a live hearing. Subsequent to the hearing, The Provider sought to add three exhibits to the record.¹ The Intermediary objected to the inclusion of those exhibits and the Board ruled not to accept them as evidence. On August 19, 1999, the Board issued decision No. 99-D59, ruling that the Intermediary's reclassification of employment taxes was proper. The Provider sought review of this decision by the HCFA Administrator. However, on October 5, 1999, the Administrator declined to review the Board's decision.

The Provider filed for judicial review with the U.S. District Court for the District of Columbia, and pursuant to a Stipulation of the parties entered before the Court, this matter was remanded to the Board for consideration of the specified exhibits. Specifically, by Order dated March 26, 2000, the Deputy Administrator remanded this matter to the Board for further proceedings, including consideration of Provider's Exhibits P-19, P-20, and P-21. The Board issued its Notice of Reopening and Order on May 22, 2000. Both parties have agreed to a Hearing AOn the Record .@

The Provider is represented by Louis J. Capozzi, Esquire, of Capozzi and Associates, P.C. The Intermediary is represented by James R. Grimes, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider notes that in the initial decision in this matter, the Board found that: Athe Intermediary's treatment of FICA employment taxes resulted in the proper allocation of those costs to the benefiting cost centers where the associated salaries were incurred.@ The Board applying 42 C.F.R. ' ' 413.9 and 413.24, concluded that:

AAAs a salary generated cost, the Board finds that the use of gross salaries as the allocation basis properly matches these expenses to the activities which benefited from the services rendered by the employees. Accordingly, it is the Board's conclusion that the Intermediary's

¹ Provider Exhibits P-19, P-20, and P-21.

reclassification adjustment produces the most accurate and equitable manner of allocation consistent with the governing regulatory provisions.@

The Provider contends that in Exhibit P-19, HCFA has advised in writing that payroll taxes, including FICA taxes, paid by nursing facility providers, are employment related taxes that are considered business expenses of the employer and not employee benefits. Therefore, they should be classified as administrative costs of the provider in accordance with HCFA Pub. 15-1 ' 2122.3.

The Provider points out that in the initial hearing in this matter, there was agreement that a cost is not required to be allocated to an employee benefit cost center simply because it is wage-related, and that HCFA permits some wage-related costs to be treated as Administrative and General costs and allocated on the basis of accumulated costs.² Additionally, the Board has determined that Workers Compensation costs, for example, which are wage-related, are properly treated as Administrative and General (AA&G@) and are to be allocated on the basis of accumulated cost. See Longwood Management Corporation 94-95 Workers= Compensation Group v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No. 99-D34, April 6, 1999, Medicare & Medicaid Guide (CCH) & 80,177, declined rev., HCFA Administrator, June 4, 1999.

The Provider notes that the Board's decision in Longwood is supported by decisional authority holding that the Secretary is not required by 42 U.S.C. ' 1395x(v)(1)(A)(ii) and 42 C.F.R. ' ' 413.9 and 413.24 to use the most accurate method to determine Reasonable costs.@ See National Medical Enterprises v. Shalala, 43 F. 3d 691, 696 (D.C. Cir. 1995), and Good Samaritan Hospital v. Shalala, 508 U.S. 402, 419-420 (1993). Further, the regulations permit, but do not require, providers to use the most accurate allocation method. See 42 C. F.R. ' 413.24 (d)(2)(ii).

The Provider also contends that its inquiry to its prior Intermediary and the resulting response³ was not a request for authorization pursuant to 42 C.F.R. 413.24(d)(2)(ii) to challenge allocation methods, but only a request for guidance. In the instant case, the Provider was advised that the taxes were properly treated as A&G costs and were to be allocated like other A&G costs.

The Provider also points to the treatment of employment-related costs in HCFA Pub. 13-2 ' ' 2045 and 2048 in which intermediaries are provided with instructions for the collection of cost report data. Part B of HCFA Pub. 13-2 ' 2045 states that:

² Tr. at p. 105.

³ Provider Exhibit P-6.

The intermediary, to maximize uniform reporting, should ensure the proper account classifications are maintained. To this end, grouping sheets are incorporated as part of these instructions.

HCFA Pub. 13-2 ' 2048 instructs intermediaries to group Payroll Taxes to the A&G cost center.

The Provider further contends that its method of allocating FICA taxes is consistent with the regulations and instructions established by the Secretary and has been confirmed by HCFA, in writing, as proper. Accordingly, the Provider contends there is no evidence in the record to support the Intermediary's treatment of these costs, and that the record as a whole, including the Exhibits now in evidence, fully supports the Provider's contentions. Therefore, the Provider contends that the Intermediary's redefinition and reclassification of its FICA costs is without merit.

INTERMEDIARY'S CONTENTIONS:

The Intermediary does not agree with the Provider's contention that Exhibit 19 represents HCFA's written position on the classification of employment related taxes. First, the Intermediary demonstrated that employment related taxes should be classified in the employee benefit cost center. HCFA Pub. 15-1 ' 2144.1 defines fringe benefits as:

... amounts paid to or on behalf of, an employee, in addition to direct salary or wages, and from which the employee, his dependents (as defined by the IRS), or his beneficiary derives a personal benefit before or after the employee's retirement or death. In order to be allowable, such amounts must be properly classified on the Medicare cost report, i.e., included in the costs of the cost center(s) in which the employee renders services to which the fringe benefit relates and, when applicable, have been reported to the IRS for tax purposes...

Clearly, employment related taxes are paid on behalf of an employee, based on his or her wages, and secure a benefit for the employee either before or after retirement.

Further, the instructions for completing the Skilled Nursing Facility Medicare Cost Report, at HCFA Pub. 15-2 ' 3517⁴ directs that workmen's compensation, social security taxes, and unemployment taxes are employee benefits expenses. The instructions make it clear that in those cases where such costs are reported in the administrative and general cost center, they should be reclassified to employee fringe benefit cost.

Finally, the Intermediary pointed to the instructions for completing the wage index at worksheet S-3, Part II of the HCFA Form 2552-96⁵, which lists employment related taxes as fringe benefits, as does the HCFA Form 339 questionnaire.⁶

The Intermediary contends that the Provider Exhibit 19 is not determinative of the issue. The Provider now points to one piece of correspondence from the HCFA Regional Office as support for the conclusion that HCFA's position as to the proper treatment of employment related costs is the opposite of that specified in all of the above described documents. The Intermediary believes it would be in error to rely on this evidence as an expression of HCFA policy. The correspondence in no way exhibits an intention to memorialize official policy. Exhibit 19 does not indicate the response was reviewed or approved by the HCFA Central office, nor does it indicate it was reviewed by senior staff at the Regional Office. At best, it represents the position of one HCFA Regional Office, or more likely, one employee within the Regional Office.

To the extent the HCFA Regional Office concluded that employment related taxes should be treated as administrative costs of the Provider, the Intermediary believes it is incorrect. First, Exhibit 19 ignores the provisions of the Provider Reimbursement Manual that relate to employment related costs, and to provisions in the cost report instructions cited above. Further, the correspondence refers to HCFA Pub. 15-1 ' 2122.3. The Provider in this case cited that provision as support for its position at the time of the initial hearing. The Intermediary argued that the provision related to Provider Based Physicians and was not applicable to the case at hand.⁷ As a result, the record reflects the fact that the PRRB has already considered the applicability of HCFA Pub. 15-1 ' 2122.3 and found it not determinative of the issue.

The Intermediary contends that the Board's initial decision in this case correctly concluded that employment related taxes should be allocated, through step-down, using the gross salary statistic. The fact that the Administrator declined to review the Board's decision is clear evidence that the Intermediary's reclassification is not contrary to HCFA policy. If it were, the Administrator would have reviewed and reversed the Board's decision.

Finally, the Intermediary contends that Provider Exhibits 19, 20 & 21 in no way change the outcome of this case. The Intermediary has always argued that the purpose of the step-down methodology of cost apportionment required under 42 C.F.R. ' 413.24 is to allocate cost in the most accurate method in order to reflect the way in which the cost was incurred. Wage related taxes were incurred as a result of the payment of wages to employees. Since the expense is derived from the payment of salaries, the

⁵ Intermediary Exhibit I-4.

⁶ Intermediary Exhibit I-5.

⁷ Tr. at p. 135-137.

most accurate allocation basis is gross salaries; as the allocation of wage related tax will then follow and reflect the wages paid within each cost center receiving the allocation.

CITATION OF LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS:

1. Law 42 U.S.C.
 - ' 1395x(v)(1)(A) et seq. - Reasonable Costs
2. Regulations 42 C.F.R.
 - ' ' 405.1835-.1841 - Board Jurisdiction
 - ' 413.9 - Cost Related to Patient Care
 - ' 413.24 et seq. - Adequate Cost Data and Cost Finding
 - ' 413.24(d)(2)(ii) - More Sophisticated Methods
3. Program Instructions - Medicare Intermediary Manual (HCFA Pub. 13-2):
 - ' 2045 - Input Instructions for Hospital Data Profiles
 - ' 2048 - Grouping Sheets
4. Program Instructions - Provider Reimbursement Manual Part 1 (HCFA Pub. 15-1):
 - ' 2122.3 - Employment-Related Taxes
 - ' 2144.1 - Definition of Fringe Benefits
 - ' 2144.2 - Purposes
5. Program Instructions - Provider Reimbursement Manual Part 2 (HCFA Pub. 15-2):
 - ' 3517 - Worksheet A-6 Reclassifications

6. Cases:

Longwood Management Corporation 94-95 Workers= Compensation Group v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. No.99-D34, April 6, 1999, Medicare & Medicaid Guide (CCH) & 80,177, declined rev. HCFA Admin., June 4, 1999.

National Medical Enterprises v. Shalala, 43 F.3d 691 (D.C. Cir. 1995).

Good Samaritan Hospital v. Shalala, 508 U.S. 402 (1993).

7. Other:

HCFA Form 2552-96

HCFA Form 339

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board finds the main issue in this decision centers around a reasonable and accurate cost allocation. Secondly, the Board finds that employment related taxes such as FICA and federal and state unemployment taxes are ~~A~~wage related costs,@ and should be allocated as part of the employee benefit cost center. This was noted in HCFA Pub. 15-1 ' 2144.1 which states:

Fringe benefits are amounts paid to, or on behalf of, an employee, in addition to direct salary or wages, and from which the employee, his dependent (as defined by IRS), or his beneficiary derives a personal benefit before or after the employee=s retirement or death.

Further, the Board notes that HCFA Pub. 15-1 ' 2144.2 states that:

Fringe benefits inure primarily to the benefit of the employee.

The Board also notes that the Provider cited HCFA Pub. 15-1 ' 2122.3 in support of its position. However, this section actually references employment related taxes applicable to provider-based physicians, rather than providers of service. The Provider also cited HCFA Pub. 13-2 ' ' 2045 and 2048. However, a review of theses guidelines revealed that they relate to instructions for intermediaries in dealing with the collection of cost report data. Neither of these sections are viewed as persuasive or supportive of the Provider=s position.

The Board further finds that the Provider's reliance on the Longwood case is without merit. The Board notes a distinction between Longwood and the instant case in that Longwood dealt specifically with workmen's compensation costs. Workmen's compensation costs are not directly associated with the worker's payroll, nor are they always determinative at the time wages are paid. In a sense, these costs are more closely related to those such as liability insurance. Conversely, FICA taxes are directly associated with the employee payroll, are paid on behalf of the employee and are paid to secure a right to a future benefit, i.e. social security or disability benefits.

Finally, the Board has closely examined Provider Exhibits 19 through 21. The key document presented was a letter from a HCFA Regional Office employee which offers an opinion that employment related taxes should be treated as administrative costs of the Provider. The Board notes that the correspondence references HCFA Pub. 15-1 ' 2122.3 as the basis for its assertion. The Board finds that the correspondence in question was not signed off at the Regional Office level, nor did the Provider seek advice through the HCFA Central Office. These factors indicate that the correspondence can not be viewed as official HCFA policy. In addition, the Board has already considered the application of HCFA Pub. 15-1 ' 2122.3, as discussed above, and found it not determinative of the issue. Exhibits 20 and 21 were also reviewed but in no way impact on the Board's decision.

The Board finds and concludes that the FICA and employment taxes should be reclassified to the employee benefit cost center. Additionally, as a salary generated cost, the Board finds that using gross salaries as the allocation basis properly matches these expenses to the activities which benefitted from the services rendered by the employees. Thus, the Intermediary's reclassification adjustment produces the most accurate and equitable manner of allocation.

DECISION AND ORDER:

The Intermediary's reclassification of employment taxes was proper and is affirmed.

Board Members Participating:

Irvin W. Kues

Henry C. Wessman, Esquire

Martin W. Hoover Jr., Esquire

Stanley J. Sokolove

Charles R. Barker (Withdrew from any participation in this
case in accordance with 42 C.F.R. ' 405.1847)

Date of Decision: January 10, 2001

For The Board:

Irvin W. Kues
Chairman