PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2002-D18

PROVIDER -
Home Health Services of Metro Denver, Inc.
Denver, CO

Provider No. 06-7032

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/ Cahaba Government Benefit Administrators (Formerly Wellmark Blue Cross and Blue Shield)

DATE OF HEARING-
April 16, 2001

Cost Reporting Periods Ended -
September 30, 1993 and
May 9, 1994

CASE NOS. 96-1254 and 96-1443
(Respectively)

INDEX

ISSUES:[1]

1. Was the Intermediary's disallowance of administrative salaries proper? (For Cost Reporting Period Ended September 30, 1993 - Case No. 96-1254)

2. Was the Intermediary's disallowance of legal fees proper? (For Cost Reporting Period Ended May 9, 1994 - Case No. 96-1443)

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Home Health Services of Metro Denver, Inc. ("Provider") is a Medicare certified home health agency located in Denver, Colorado. For the cost reporting periods in contention, the Provider claimed costs relating to the above-stated issues which were disallowed by Cahaba Government Benefit Administrators ("Intermediary") based on its determination that the costs were not related to patient care. The Provider appealed the Intermediary's determinations to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835 -.1841 and has met the jurisdictional requirements of those regulations. The amount of Medicare reimbursement in controversy is approximately $10,000 for Issue No. 1 and $23,000 for Issue No. 2. The Provider was represented by Elizabeth Zink Pearson, Esquire, of Pearson & Bernard, PSC. The Intermediary's representative was Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

Background:

Based on the evidence in the record and the testimony presented at the hearing, the Provider was founded by Dr. Sam Fishman as a non-profit home health agency. Dr. Fishman managed the operations of the agency along with an Administrator, Laurence Lillo. In 1993 , Dr. Fishman determined that the agency needed new management and solicited the assistance of Vinod Bhasin and his wife, Constance Bhasin. The Bhasins owned and operated another home health agency in the Denver area at that time. Mr. Bhasin was appointed to the Provider's Board of Directors and was also appointed Chief Executive Officer ("CEO"). Mrs. Bhasin was appointed the Chief Financial Officer of the agency. The Bhasins were charged with making the agency more efficient, organizing the operations, and assisting with the billing of many unpaid services. The record further indicates that Dr. Fishman and Mr. Bhasin also entered into an agreement, dated March 1, 1993, which was entitled "Agreement for Change of Management and

[1] All other issues appealed for Case Nos. 96-1254 and 96-1443 have been administratively resolved or withdrawn by the Provider.

Ownership Control of Home Health Services of Metro Denver, Inc." ("Agreement for Change").[2]

[2] See Provider Exhibits P-11 and P-13 (Case No. 96-1443).

Over a period of time, operational changes were instituted which displeased Dr. Fishman and Mr. Lillo. In the fall of 1993, Mr. Lillo left the Provider and accepted employment with a competitor agency. Dr. Fishman remained as a member of the Provider's Board of Directors and unilaterally appointed Mr. Lillo to the Board. This action, coupled with other disruptive conduct by Dr. Fishman and Mr. Lillo, caused Mr. Bhasin to obtain legal advice and to initiate a lawsuit against Dr. Fishman. Ultimately the parties entered into a Settlement Agreement dated May 10, 1994.[3]

Issue 1 - Administrative Salaries:

The initial adjustment concerning administrative salaries concerned an adjustment covering a number of employees. However, all controversies relating to the adjustment were later resolved, except for the payments of $6,000 to Mr. Bhasin and $4,000 to Mrs. Bhasin for the month of February, 1993. The Intermediary's workpapers relating to the Bhasins' salaries stated the following:[4]

> The only non-allowable cost found was $10,000 in salary for Vinnie and Connie Bhasin. They did not take over until March of 1993 and received salary for February, so we will adjust to remove the appropriate salary.

Accordingly, the Intermediary allowed the Bhasins only seven months of accrued wages for the fiscal year ended September 30, 1993.

PROVIDER'S CONTENTIONS:

The Provider contends that both Mr. and Mrs. Bhasin worked exclusively for the Provider starting in February, 1993 with initiating the reorganization of the company. Although their appointment to executive positions was pended until formal approval at the Board of Director's meeting in March of 1993, the Bhasins began providing their services in February under an oral agreement with Dr. Fishman. The Provider acknowledges that the Bhasins' names were not added to the list of employees and logged into the payroll data until March, 1993. Their employment was based on a general agreement with Dr. Fishman that their pay as employees would not start until the approval of their hiring by the Board of Directors. However, Dr. Fishman promised payment for their services in the month of February as consultants to the

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[3] See Provider Exhibit P-13 (Case No. 96-1443).

[4] See Intermediary Exhibit I-1, page 15 (Case No. 96-1254).

Agency.

The Provider notes that the Intermediary initially disallowed the Bhasins' compensation on the assumption that they were not employed in February of 1993. However, prior to the hearing before the Board, the Intermediary changed its rationale for the disallowance to the lack of proof that any services provided by the Bhasins benefitted patient care. Since the Intermediary's revised position was not raised until mid-April, 2001, it was impossible at that time to obtain documentation of actual services performed because of a devastating snowstorm in Denver which prevented access to the storage facility where the records were located. The Provider noted in its post-hearing brief that the Board clearly instructed the parties that the time for submission of evidence had passed. Therefore, the Provider did not submit any documentation of services provided.

The Provider points out that the Bhasins both testified at length as to the services provided during February, 1993 which included: review of operations and financials; patient chart reviews; troubleshooting; initiating new policies and procedures; reviewing utilization of services; and assisting with billing many unpaid claims. Both worked full time and received no compensation from their other home health agency during that period. The Provider insists that the Bhasins provided credible testimony concerning the services furnished during the month of February and the rationale for their exclusion from the payroll records for that month.

Finally, the Provider asserts that payroll checks were written for the compensation paid to the Bhasins, and no allegation was made that the compensation was substantially out of line. Accordingly, the Provider has met the documentation requirements set forth in 42 C.F.R. § 413.102. Since compensation amounts paid to administrative personnel are allowable costs related to the provision of patient care services under 42 C.F.R. § 413.9, the Provider concludes that payments to the Bhasins are fully reimbursable under the Medicare program.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the disallowance of the Bhasins' compensation for the month of February, 1993 was made in accordance with the regulatory and manual provisions which deal with the adequacy of documentation. The regulations at 42 C.F.R. § 413.20 et seq. require in pertinent part:

> The principles of cost reimbursement require that providers maintain sufficient financial records and statistical data for proper determination of costs payable under the program.

42 C.F.R. § 413.20(a).

> The provider must furnish such information to the intermediary as may be necessary to - (i) Assure proper payment by the program. . .

42 C.F.R. § 413.20(d)(1).

In further defining the adequacy of cost data, the regulations at 42 C.F.R. § 413.24 et seq. state the following:

> Providers receiving payment on the basis of reimbursable cost must provide adequate cost data. This must be based on their financial and statistical records which must be capable of verification by qualified auditors.

42 C.F.R. § 413.24(a)

> Adequate cost information must be obtained from the provider's records to support payments made for services rendered to beneficiaries. The requirement of adequacy of data implies that the data be accurate and in sufficient detail to accomplish the purposes for which it is intended. Adequate data capable of being audited is consistent with good business concepts and effective and efficient management of any organization, whether it is operated for profit or on a nonprofit basis. It is a reasonable expectation on the part of any agency paying for services on a cost-reimbursement basis.

42 C.F.R. § 413.24(c).

Further clarification as to the adequacy of cost information is set forth in the Provider Reimbursement Manual ("HCFA Pub 15-1") which states:

> Cost information as developed by the provider must be current, accurate, and in sufficient detail to support payments made for services rendered to beneficiaries. This includes all ledgers, books, records and original evidences of cost (purchase requisitions, purchase orders, vouchers, requisitions for materials, inventories, labor time cards, payrolls, bases for apportioning costs, etc.) which pertain to the determination of reasonable cost, capable of being audited.

HCFA Pub. 15-1 § 2304.

It is the Intermediary's position that the Provider bears the burden of proving that it had the necessary documentation to support the claimed costs at issue. The Provider has failed to meet this burden and, thus, has not complied with the above-stated policy requirements.

The Intermediary further contends that the Agreement for Change did not become effective until

March 1, 1993 and, thus, the Bhasins had no official status at the Provider prior to that date. Accordingly, it would be a fair interpretation of the facts that any time spent at the Provider prior to March 1 was simply related to the Bhasins' decision to execute the Agreement for Change. In summary, the Intermediary believes its adjustment is supported by both the lack of hard evidence of what the Bhasins did prior to March 1, and the totality of the circumstances that leads to a conclusion that they were not employees or pseudo employees prior to March 1, 1993.

Issue 2 - Legal Fees:

In its as-filed Medicare cost report, the Provider claimed legal fees which were associated with a lawsuit against Dr. Fishman, the prior owner of the agency. The Intermediary identified approximately $29,000 of such legal fees which it determined were not related to patient care and removed that amount from total overhead expenses. The details of the nonallowable legal fees are set forth in Intermediary Exhibit I-6 (Case No. 96-1443).

PROVIDER'S CONTENTIONS:

The Provider contends that the legal fees at issue were appropriate and necessary to maintain the operation of patient care services, and that such costs are allowable and reimbursable in accordance with the rules set forth under 42 C.F.R. § 413.9 and HCFA Pub. 5-1 § 2183. The Provider does not dispute that the legal actions taken were against a then-existing member of the Provider's Board of Directors. However, the dispute involved issues directly related to the disruption of patient care services, including the solicitation of employees, which created a shortage of staff, and the solicitation of patients. The Provider insists that without the wrongful acts of solicitation by Dr. Fishman and Mr. Lillo, the lawsuit would not have been necessary.

The Provider points out that its operational problems became severe when Dr. Fishman appointed Mr. Lillo, the terminated former Administrator, to the Board of Directors, causing a deadlock on the Provider's Board. Without the ensuing litigation, Dr. Fishman and Mr. Lillo would have jeopardized patient care severely. The substance of the lawsuit was necessarily characterized as a dispute between Board members but also included claims of fraud, civil conspiracy, and breach of contract.[5] Additionally, the underlying issues presented in the lawsuit included claims of unfair competition, interference with business relations, theft, and breach of fiduciary duty by Dr. Fishman and Mr. Lillo. Since these actions address the claims of patient interference and employee disruption which plagued the agency, the Provider avers that the legal fees incurred were to maintain the viability of the agency and its ability to care for patients.

The Provider argues that Dr. Fishman's patient disruption was ongoing and ultimately led to a patient suffering a stroke shortly after settlement of the case. Other disruptive conduct by Dr. Fishman included: countermanding the orders of Mr. Bhasin; conducting secret employee meetings; holding the Provider's 401K plan hostage; and soliciting patients to transfer to Mr.

[5] See Provider Exhibit P-11 (Case No. 96-1443).

Lillo's new employer. The Provider contends that the solicitations rose to the level of coercion, as Dr. Fishman forced the patients to choose the new home health care provider or lose their physician. Dr. Fishman's ongoing disruptive conduct culminated with the solicitation of several employees as well as patients.

The Provider is aware of the Board's decision in Florida Medical Center,[6] which the Intermediary cites to support its disallowance of the legal fees. However, the Provider states that the facts in the instant case indicate specific acts threatening patient care and not a simple dispute over stockholder rights. In addition, the characterization of the dispute as one concerning ownership is fundamentally incorrect as the Provider is a not-for-profit entity. There are no stockholders who could claim ownership as existed in Florida Medical Center. The dispute in the Provider's litigation involved acts of interference and disruption by the former owner and administrator that were creating chaos and damaging the agency's ability to care for patients.

The Provider believes the basis for its litigation expenses is similar to the Board's rationale in In Home Health Inc. v. Blue Cross and Blue Shield Association , et. al, PRRB Dec. No. 97-D56, May 5, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,227, rev'd, HCFA Administrator, July 7, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,558. In that case, the Board recognized that stock maintenance costs, including legal fees, should be allowable costs because they were required by law and necessary for the maintenance of the provider. In contrast, the legal fees in the instant case arose not solely out of concern for the maintenance of the Provider but to force a cessation of direct acts which threatened patient care. In addition, the Provider contends that a portion of the accrued legal fees ($4,867.50) involved the dismantling of the Provider's 401K plan which was upended by Dr. Fishman's wrongful acts. Accordingly, the Provider submits that the legal fees incurred for the litigation process at issue were related to patient care and appropriate for maintaining its operation of patient care services and, thus, are fully allowable Medicare costs under 42 C.F.R. § 413.9.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the legal fees at issue clearly relate to the dispute between the Bhasins and Dr. Fishman/Mr. Lillo as to who was in charge of the Provider and the associated financial implications. The centerpiece of the litigation initiated by the parties was the "Agreement for Change" dated March 1, 1993. Since the object of the "Agreement for Change" was the management and control of the Provider's operation, this document was a critical component of the ensuing litigation. When the "Agreement for Change" was executed, Mr.

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[6] Florida Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Florida, PRRB Dec. No. 93-D48, June 23, 1993, Medicare and Medicaid Guide (CCH) ¶ 41,573, aff'd, Florida Medical Center Inc. v. Shalala No. 94-7026 - CIV - KLR (S.D. FL January 23, 1996), Medicare and Medicaid Guide (CCH) ¶ 44,690 ("Florida Medical Center").

Bhasin was President and CEO of another home health agency in the Denver area which was organized as a for-profit corporation. The Intermediary contends that Mr. Bhasin viewed the control of the Provider's organization as a means for increasing the patient base of his for-profit home health agency.

The Intermediary believes the essence of the litigation can be determined from: (1) the Complaint filed by Mr. Bhasin ("Plaintiff") against Dr. Fishman/Mr. Lillo ("Defendants");[7] (2) The Hearing Brief filed by the Defendants, who counter-sued the Plaintiff;[8] and (3) the Settlement Agreement and Mutual Release which resolved the matter.[9] The Intermediary points out that the general allegations set forth in the Complaint characterize the nature of the lawsuit. Of particular relevance, the Intermediary cites paragraphs 7, 8 and 9 which state the following:

> 7. In February 1993, Bhasin and Fishman entered into discussions concerning the transfer of control over Metro to Bhasin. To facilitate these discussions, Fishman provided Bhasin with certain information concerning the operations and financial condition of Metro.
>
> 8. In reliance upon the information provided to Bhasin by Fishman, Bhasin and Fishman entered into an Agreement for Change of Management and Ownership Control of Home Health Services of Metro Denver, Inc., dated March 1, 1993 (the "Agreement"), a copy of which is attached as Exhibit 1 and incorporated by reference. The Agreement provided, in part, for Bhasin's assumption of management and ownership control of Metro.
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> 9. On March 3, 1993, a meeting of the Metro Board of Directors was held. At this meeting, the Metro Board of Directors approved the Agreement and endorsed the spirit and intent of the Agreement. As a result, Bhasin became the sole member of Metro. Bhasin was also elected to the Metro Board of Directors and appointed president and chief executive officer of Metro. Thereafter, Bhasin assumed management and ownership control of Metro as provided for in the Agreement. A copy of the minutes of the March 3, 1993 Metro Board of Directors meeting is attached as Exhibit 2 and incorporated by reference.

The Intermediary further points out that the Complaint has four separate claims for relief which can be summarized as follows:

First Claim (Fraud)

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[7] See Provider Exhibit P-11 (Case No. 96-1443).

[8] See Provider Exhibit P-12 (Case No. 96-1443).

[9] See Provider Exhibit P-13 (Case No. 96-1443).

Fishman induced Bhasin to enter the "Agreement for Change" with false and misleading financial information about Metro Denver's financial condition.

Second Claim (Breach of Contract)

Fishman falsely asserted, contrary to the "Agreement for Change", that he was a member of Metro Denver and had authority.

Third Claim (Civil Conspiracy)

Fishman and Lillo conspired to usurp Bhasin's corporate authority at Metro Denver.

Fourth Claim (Declaratory Judgement)

Fishman guaranteed lines of credit of Metro Denver. Bhasin was seeking judicial intervention to hold Fishman to the guarantees.

The Intermediary notes that the Hearing Brief filed on behalf of Dr. Fishman has a different slant on the underlying problem. However, page 2 of the Hearing Brief filed in the District Court does recognize the conflicting claims of control as follows:

> Specifically, Fishman and Metro bring this claim based on the actions of the new Board of Directors of Metro. The Board seeks return of the personal property of Metro, which is in the possession of Bhasin or the Third Party Defendants (or some of them). Demand has been made for return of the property (Exhibit 1), but no response has been received and the property has not been returned.
>
> To determine this issue, this Court will have to determine who is the Board of Directors of Metro. If the Board is composed as Fishman suggests, the decision will be for Fishman. If the Court determines the Board is composed as suggested by Bhasin, then the decision will be for him.

The Intermediary believes that the Settlement Agreement and Mutual Release present the best evidence of what is actually in dispute. The following reflects the highlights of the Agreement:

> Paragraphs 1-7: Mr. Bhasin to make direct payments to Dr. Fishman/Mr. Lillo and to pay off existing loans of Metro Denver in the aggregate sum of approximately $280,000.

Paragraphs 8-10: Mutual release of cross-claims and transfer of all Metro Denver property rights to Mr. Bhasin.

Paragraphs 11-13: Mr. Bhasin to indemnify Dr. Fishman/Mr. Lillo for IRS or Medicare assertions.

Paragraph 15: Free and open competition for patients and employees.

Paragraphs 16-19: Dr. Fishman and Mr. Lillo to sever themselves from Metro Denver. Of particular note is paragraph 19 which states:

> Dr. Fishman and Mr. Lillo will cooperate with Mr. Bhasin to effect an orderly transfer of Metro corporate authority to Mr. Bhasin. All parties will cooperate to submit all Medicare reimbursable expenses and receivables for all time periods that all parties have been involved with Metro, for the benefit of Metro.

The Intermediary contends that the operative provisions of the Settlement Agreement, when read in relation to the Complaint and Hearing Brief response, establish the underlying conflict over who was in control of the Provider. The Intermediary acknowledges that its initial characterization of the dispute as a fight for ownership was not correct inasmuch as the Provider was a non-profit corporation. Further adding to the confusion was the title of the document which brought the Bhasins into the Provider and was at the heart of the lawsuit (i.e., the March 1, 1993 Agreement for Change of Management and Ownership Control of Home Health Services of Metro Denver, Inc.). The Intermediary views the misleading reference to ownership by all parties as harmless.

When the history and legal documents are examined, the Intermediary believes it is indisputable that the legal fees were incurred to support the Bhasins in a battle over money and power. The driving force behind the litigation was the Bhasins' efforts to secure control over the Provider's operation. Securing control over a non-profit organization put the Bhasins in the same position as ownership of a for-profit entity. The settlement of the lawsuit gave the Bhasins the power to dissolve the Provider and consolidate its operation into their existing for-profit home health agency.

The Intermediary recognizes that the battle over control may have had a negative impact on the Provider's day-to-day activities and caused disruption with the agency's staff. However, the Intermediary contends that this reality does not transform the efforts to eliminate Dr. Fishman's

and Mr. Lillo's control of the Provider into a patient benefiting cost. The legal fees incurred were not related to patient care as required by 42 C.F.R. § 413.9. In further support of its position, the Intermediary cites the analysis set forth in the decision rendered by the Board and the District Court in Florida Medical Center.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Regulations - 42 C.F.R.:

§§ 405.1835 - .1841	-	Board Jurisdiction
§ 413.9 et seq.	-	Cost Related to Patient Care
§ 413.20 et seq.	-	Financial Data and Reports
§ 413.24 et seq.	-	Adequate Cost Data and Cost Finding
§ 413.102	-	Compensation of Owners

2. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

§ 2183	-	Legal Fees and Other Related Costs
§ 2304	-	Adequacy of Cost Information

3. Case Law:

Florida Medical Center v. Blue Cross and Blue Shield Association/ Blue Cross and Blue Shield of Florida , PRRB Dec. No. 93-D48, June 23, 1993, Medicare and Medicaid Guide (CCH) ¶ 41,573, aff'd, Florida Medical Center, Inc. v. Shalala, No. 94-7026 - CIV - KLR (S.D. FL January 23, 1996), Medicare and Medicaid Guide (CCH) ¶ 44,690.

In Home Health Inc. v. Blue Cross and Blue Shield Association, et. al., PRRB Dec. No. 97-D56, May 5, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,227, rev'd, HCFA Administrator, July 7, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,558.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties contentions, evidence presented, testimony given at the hearing and post-hearing briefs, finds and concludes as follows:

Issue 1 - Administrative Salaries:

The Board finds that the Provider has failed to present any specific supporting documentation which would validate that the Bhasins were employed in some capacity during the month of February, 1993, or that the services rendered by the Bhasins related to the provision of patient care services. Moreover, the Provider acknowledges that, other than the testimony of the Bhasins, there is no record of actual services rendered during the time period at issue.[10] Accordingly, the Board holds that the Provider has not complied with the requirements of 42 C.F.R. §§ 413.20 and 413.24 which establish basic cost reimbursement principles for the maintenance of adequate supportable documentation that is verifiable and capable of being audited.

The burden of maintaining adequate record keeping and documentation to support its administrative salaries clearly rests with the Provider. In this case, the Provider has not met its obligation to support the claimed salaries at issue. In the absence of any factual data, the Board finds the Intermediary's determination to be in compliance with the documentation criteria set forth under 42 C.F.R. §§ 413.20 and 413.24.

Issue 2 - Legal Fees:

The Board finds that the evidence in the record clearly reveals that the legal fees at issue pertained to the dispute between the Bhasins and Dr. Fishman/Mr. Lillo over the control and operation of the Provider and the protection of the Bhasins' interest in the non-profit organization. Based on its review of the attorney billing records,[11] the Board found only negligible amounts which may be tangentially related to the Provider's patient care operations. Given the totality of the legal events and documentation associated with the major purpose of the litigation,[12] the Board believes any relationship of the legal fees to patient care services can only be deemed incidental to the primary reason for the litigation. Moreover, the Board found no documentation in the record to support the Provider's allegations that the legal fees were associated with the disruption of patient care services or the dismantling of the Provider's 401K pension plan.

The regulation at 42 C.F.R. § 413.9(b)(2) states in part: "Necessary and proper costs are costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. They are usually costs that are common and accepted occurrences in the field of the provider's activity." It is the Board's conclusions that the legal costs incurred by the Provider concerned the Bhasins' efforts to secure control over the non-profit home health

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[10] Tr. at 17.

[11] See Provider Exhibit P-7 and Intermediary Exhibit I-6 (Case No. 96-1443).

[12] See Provider Exhibits P-11, P-12 and P-13 (Case No. 96-1443).

agency, and that the settlement of the lawsuit did, in fact, give the Bhasins the power to control the Provider's operations. Accordingly, the Board finds that the legal fees claimed by the Provider for the protection of the Bhasins' interest in the Provider's operations are not costs related to patient care under 42 C.F.R. § 413.9 and, therefore, are not allowable under the Medicare program.

DECISION AND ORDER:

Issue 1 - Administrative Salaries:

The Intermediary's disallowance of administrative salaries was proper and is affirmed by the Board.

Issue 2 - Legal Fees:

The Intermediary properly disallowed the legal fees claimed by the Provider. The Intermediary's determination is affirmed.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esquire
Stanley J. Sokolove
Gary B. Blodgett, D.D.S
Suzanne Cochran, Esquire

Date of Decision: April 17, 2002

FOR THE BOARD

Irvin W. Kues
Chairman