PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2004-D10

PROVIDER –
Preferred Home Health Care
Vincennes and Lafayette, Indiana

Provider Nos. 15-7193
15-7318

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
Palmetto Government Benefits
Administrator

DATE OF HEARING -
September 26, 2003

Cost Reporting Period Ended
December 31, 1996

CASE NOS. 00-2699; 00-2700

INDEX

ISSUE:

This case involves the propriety of reimbursing home health agencies (HHA) under the Medicare program for expenses that the HHA incurs to provide pastoral care to its patients.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Preferred Home Health Care – Vincennes and Preferred Home Health Care – Lafayette (Providers) are proprietary home health agencies that provide services within the State of Indiana. For the fiscal year ended 12/31/96, the Providers claimed expenses for the wages and benefits paid to their clergyman in the amounts of $17,751 (Vincennes) and $15,022 (Lafayette). The clergyman provided pastoral care to patients of both Agencies.

The Social Security Act ("the Act") requires that providers of services to Medicare beneficiaries be reimbursed the reasonable costs of those services. The Act defines reasonable costs as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services, and shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included, in determining such costs for various types or classes of institutions, agencies, and services." [1] The Act expressly limits provider's reimbursement to necessary costs incurred in the delivery of services to Medicare beneficiaries and delegates to the Secretary the authority for determining which items and services shall be considered necessary.[2]

The Secretary's payment and audit functions are delegated to contractors known as "fiscal intermediaries." Palmetto Government Benefits Administration (Intermediary) determined that the costs claimed for pastoral care were unallowable home health services. Both Providers appealed the Intermediary's determinations and each met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-1841. The estimated impact of the adjustments on Medicare reimbursement is $17,580 (Vincennes) and $12,904 (Lafayette).

Katherine Karker-Jennings, Esq., of Katherine Karker-Jennings, P.A., represented the Provider. Bernard M. Talbert, Esq., Associate Counsel, Blue Cross and Blue Shield Association represented the Intermediary.

PARTIES' CONTENTIONS:

The Intermediary contends that its adjustments are consistent with the decision reached by the HCFA Administrator in Visiting Nurses Association of Los Angeles. [3] The

[1] Social Security Act, §1861(v)(1)(A).
[2] Although the payment formula for home health agencies has been changed, payment of reasonable and necessary costs was the appropriate payment methodology for the year in issue here.
[3] Visiting Nurse Association of Los Angeles vs. Blue Cross and Blue Shield Association/Blue Cross of California, CMS Administrator, January 11,1996, Medicare and Medicaid Guide (CCH), ¶44,027.

Administrator relied on a 1980 letter to the Intermediary from HCFA's Acting Director of Bureau of Program Policy that states, "pastoral care services rendered by an HHA are not necessary to patient care and are therefore not allowable."[4] Based upon his reading of the letter, the Administrator concluded " the policy expressed in the 1980 letter to the Intermediary of not allowing pastoral costs for an HHA is a reasonable interpretation of the statutory and regulatory requirement of reimbursing only costs that are related to patient care."[5]

The Providers respond that the decision should be revisited because it overlooks two pivotal issues. First, the patient may be at home but he/she is homebound. Second, in a hospice setting where spiritual counseling is a requirement for program participation,[6] many patients are treated at home. The Providers point out that the regulations at 42 C.F.R. §413.5(b)(3) require that:

> … there be a division of the allowable costs between the beneficiaries of this program and the other patients of the provider that takes account of the actual use of services by the beneficiaries of this program and that is fair to each provider individually.

The Providers argue that it is a violation of 42 C.F.R. §413.5 to mandate pastoral care for individuals being treated at home by a hospice but to disallow all such care for similarly situated individuals who are receiving the same type of care from a home health agency. The Providers contend that this is clearly not fair to each provider individually. The Providers argue further that pastoral care is also an allowable cost at hospitals and skilled nursing facilities. They contend that the Administrator's position discriminates against home health agencies and, more importantly, against those individuals treated at home. The Providers contend that the discriminatory effect of the position requires that the Intermediary reverse its adjustments.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of Medicare law and Program instructions, the parties' contentions and the evidence presented, finds and concludes that the Intermediary properly disallowed the clergy expenses claimed by the Providers.

It is clear that the statute gives the Secretary the authority to determine the services and costs that are necessary in any delivery setting and to serve notice of those determinations through regulations. The Secretary promulgated regulations at 42 C.F.R. Part 413 and program instructions that address the proper reimbursement of various costs. It is undisputed that pastoral care as a home health service is not specifically addressed in these authorities however.

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[4] Id. at ¶47,928.
[5] Id.
[6] 42 C.F.R. §418.88.

The regulations at 42 C.F.R Part 484 itemize the specific services that home health agencies may provide under the Medicare program. Those services are part-time or intermittent skilled nursing services and at least one other therapeutic service (physical, speech or occupational therapy; medical social services; or home aide services). [7] These regulations, specific to home health care, also do not address pastoral care.

Payment of pastoral care in a home health setting was specifically addressed in a 1980 letter from HCFA's Acting Director of the Bureau of Program Policy. It states:

> In a home health setting, home visitations by clergy to patients have traditionally been performed by clergy who reside in and serve members of their community. For home health agencies to incur additional costs to provide the services of clergy when these services are available through the normal home setting is not necessary to the provision of home health services.[8]

The Board concludes that, because pastoral care is specifically allowed as a covered service in some provider settings, the silence of the regulations with regard to pastoral care furnished by HHAs is a cognitive omission of that service from Medicare coverage. The regulation's omission of pastoral care as a home health covered service, coupled with the Secretary's policy as articulated in HCFA's 1980 letter, requires the Board to conclude that pastoral services in a home health setting are not reimbursable services. The Intermediary's adjustment to disallow the expense of the clergy was correct.

The Board acknowledges the Providers' assertion that the Secretary's disallowance of pastoral care in the home health setting when such care is reimbursable in other delivery settings is discriminatory. However, the regulations' failure to provide for pastoral care in a home health setting versus reimbursing for such services in other settings is a matter that is beyond the jurisdiction of the Board.

DECISION AND ORDER:

Pastoral care services are not covered services within a home health setting and are not an allowable cost. The Intermediary's adjustments are affirmed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esq.
Gary B. Blodgett, D.D.S.
Martin W. Hoover, Jr., Esq.
Elaine Crews Powell, CPA

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[7] 42 C.F.R. § 484.14(a)

[8] Visiting Nurse Association of Los Angeles vs. Blue Cross and Blue Shield Association/Blue Cross of California, CMS Administrator, January 11,1996, Medicare and Medicaid Guide (CCH), p.44028.

FOR THE BOARD:

DATE: February 3, 2004

Suzanne Cochran
Chairman