PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2005-D13

PROVIDER
Terrebonne Home Care, Inc.
Houma, LA

Provider No.: 19-7585

vs.

INTERMEDIARY –
Blue Cross Blue Shield Association/
Palmetto Government Benefits
Administrators

DATE OF HEARING
October 12, 2004

Cost Reporting Period Ended -
July 31, 2000

CASE NO.: 02-0078

INDEX

ISSUE:

Whether the Intermediary's denial of the Provider's request for an exception to its per-visit cost limits was proper.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. The Centers for Medicare and Medicaid Services (CMS, formerly the Health Care Financing Administration (HCFA)) is the operating component of the Department of Health and Human Services (DHHS) charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and under interpretive guidelines published by CMS. See, 42 U.S.C. §1395(h), 42 C.F.R. §§413.20(b) and 413.24(b)

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the proportion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the issuance of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

Section 1861(v)(1)(A) of the Social Security Act permits the Secretary to establish limits on provider costs recognized as reasonable under the Medicare program. The Medicare regulations at 42 C.F.R. §413.30 implement the cost limits and impose a per-visit cost limit on home health agencies. The Medicare regulations at 42 C.F.R. §413.30(c) permit providers to request relief from the cost limits by requesting reclassification, exception or exemption.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Terrebonne Homecare, Inc. (Provider) is a home health agency (HHA) located in Houma, Louisiana. The Provider filed an exception request to its per-visit cost limits with its cost report for fiscal year ended (FYE) July 31, 2000. Palmetto Government Benefits Administrators (Intermediary) and CMS denied the Provider's request. The Provider timely appealed the denial to the Board pursuant to 42 C.F.R. §§405.1835-405.1841 and met the jurisdictional requirements of those regulations. The amount of program funds in controversy is approximately $107,871.

The circumstances under which exceptions to the cost limits may be made are delineated at 42 C.F.R. §413.30(e). The Provider identified extraordinary circumstances and fluctuating population as the reasons for its exception request. The regulations concerning those two circumstances are as follows.

> (e) *Exceptions*. Limits established under this section may be adjusted upward for a SNF or HHA under the circumstances specified in paragraphs (e)(1) through (e)(5) of this section. An adjustment is made only to the extent that the costs are reasonable, attributable to the circumstances specified, separately identified by the SNF or HHA, and verified by the intermediary.
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> (2) *Extraordinary circumstances*. The SNF or HHA can show that it incurred higher costs due to extraordinary circumstances beyond its control. These circumstances include, but are not limited to, strikes, fire, earthquake, flood, or other unusual occurrences with substantial cost effects.
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> (3) *Areas with fluctuating populations*. The SNF or HHA meets the following conditions:
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> > (i) is located in an area (for example, a resort area) that has a population that varies significantly during the year.
> > (ii) Is furnishing services in an area for which the appropriate health planning agency has determined does not have a surplus of beds or services and has certified that the beds or services furnished by the SNF or HHA are necessary.
> > (iii) Meets occupancy or capacity standards established by the Secretary.

42 C.F.R. §413.30(e)(2) and (3).

Two factual situations underlie the Provider's request for an exception to the cost limits. (See Exhibit P-12 - Provider representative's April 5, 2001 letter with documentation supporting the request.) The first situation concerns improper accounting advice the Provider received in filing its 1996 and 1997 cost reports. As a result of this advice, the Provider filed cost reports that were not in compliance with Medicare regulations. The Provider disclosed this fact to the Office of the Inspector General and the Intermediary and corrected the cost reports at issue. This caused the Provider to incur substantial legal and other professional expenses in FY 2000 to rectify the problem. Id. at Exhibits B and C. The Provider believes this situation constitutes an extraordinary circumstance under 42 C.F.R. §413.30(e)(2).

The second situation involves a substantial reduction in the number of patients served by the Provider due to competition from another HHA. The Provider charged that the only local hospital in the area was improperly referring all of its patients to its affiliated HHA. The Provider took legal action to stop this practice, on the grounds that it violated Medicare regulations, patient freedom of choice and Louisiana State Unfair Trade Competition laws. See Id. Exhibit E. The Provider indicated that this situation constituted an extraordinary circumstance under 42 C.F.R. §413.30(e)(2) or a fluctuation in population under 42 C.F.R. §413.30(e)(3).

The facts underlying the exception request are not in dispute; instead, the parties disagree as to whether they meet the regulatory requirements for an exception.

The Provider was represented by Marvin Easley, CPA, of M. H. Easley and Associates. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross Blue Shield Association.

PARTIES' CONTENTIONS:

42 C.F.R. §413.30(e)(2) provides for an exception to the cost limits if the HHA can show it incurred higher costs due to extraordinary circumstances beyond its control. Circumstances cited include strikes, fire, earthquake, floods and other unusual occurrences with substantial cost effects. The Provider acknowledges that the regulation appears to imply that the extraordinary circumstances must be related to an "act of God," but it notes that prior Board decisions have permitted exceptions based upon other unusual circumstances such as sudden physician relocation, hazardous structural defects in the provider's facility and reduction in patient census as a result of reduction in number of staff physicians. See Provider Position Paper at 2. The Provider asserts that the problems caused by receiving poor accounting advice and from improper competition were similar extraordinary circumstances beyond its control.

Although acknowledging that the population in its area did not vary significantly during the year, the Provider asserts that it lost 4600 visits due to unfair competition and that loss caused it to exceed its per-visit cost limits. The Provider asserts that it could not have foreseen such illegal activity or planned for its consequences by reducing costs. The Provider argues that if an exception can be granted for population fluctuations due to seasonal or migratory reasons, then an exception can be granted for a fluctuation in population served due to unfair competition.

The Intermediary counters that the circumstances relied on by the Provider are neither extraordinary or beyond the Provider's control. The Provider chose its cost report consultant and made the decision to follow the consultant's advice, then sought and received a remedy through civil litigation. Moreover, incurring legal costs is a normal cost of doing business. Likewise, competition between HHAs is a common occurrence and HHAs commonly open and close as a result of competition. The Provider sought and received relief from improper competition through civil litigation; therefore, an exception is not justified.

The Intermediary also contends that the Provider is not entitled to a fluctuating population exception because the population itself was not changing; only the Provider's patient population was changing, and it was declining solely from competition from another provider.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the Medicare law and guidelines, the parties' contentions, and evidence presented, finds and concludes as follows:

This case concerns whether the Provider met the exception requirements under the regulations at 42 C.F.R. §413.30(e)(2) for extraordinary circumstances or 42 C.F.R. §413.30(e)(3) for a fluctuating population. The Provider asserts that the legal and accounting fees it incurred as a result of the poor accounting advice it received in filing its 1996 and 1997 cost reports constituted an extraordinary circumstance. The Provider also asserts that unfair competition from a HHA associated with the only local hospital constitutes an extraordinary circumstance under 42 C.F.R. §413.30(e)(2), and that the resulting reduction in the population it served constitutes a fluctuating population under 42 C.F.R. §413.30(e)(3). For the reasons stated below, the Board finds that the additional legal and accounting fees do not fall within the extraordinary circumstances category and that the reduction in the population served by the Provider because of unfair competition did not constitute an extraordinary circumstance, nor was it due to the Provider being located in an area with a fluctuating population.

With respect to the legal and accounting fees incurred by the Provider, the Board finds that it is common for providers to hire and use accounting consultants and, unfortunately, problems may arise due to performance. The Provider successfully availed itself of civil remedies designed to rectify these circumstances. The Board concludes that it would be inappropriate for the Medicare program to permit exceptions to the cost limits based on these ordinary circumstances.

With respect to the Provider's fluctuation in the population it served due to unfair competition, the Board finds that it is common for providers to have changes in the populations they serve due to competition; therefore, this does not represent an exceptional circumstance under 42 C.F.R. §413.30(e)(2). Although the Provider asserts that its competitor used illegal competitive methods that required it to take legal action, the Provider successfully availed itself of civil remedies. Although the record is unclear whether the Provider recovered any damages, the Board concludes that competition does not constitute an extraordinary circumstance.

Finally, the Board notes that the specific regulatory exception concerning fluctuating populations at 42 C.F.R. §413.30(e)(3) refers to areas where the population varies significantly during the year and gives, as an example, a resort area. In the instant case, the Board finds that the population in the area had not fluctuated; instead, the population served by the Provider fluctuated due to competition. The Board does not believe that the

fluctuation of the population served by the Provider is what was envisioned in the regulation at 42 C.F.R. §413.30(e)(3).

DECISION AND ORDER:

The Board finds that the Provider did not meet the requirements for an exception due to extraordinary circumstances or a fluctuating population. The Intermediary's denial of the Provider's exception request is affirmed.

Board Members Participating:

Suzanne Cochran, Esquire
Gary B. Blodgett, D.D.S.
Martin W. Hoover, Jr., Esquire
Elaine Crews Powell, CPA
Anjali Mulchandani-West

FOR THE BOARD:

DATE: December 17, 2004

Suzanne Cochran, Esquire
Chairman