PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2005-D23

PROVIDER –
High Country Home Health Care, Inc.
Laramie, Wyoming

Provider No.: 53-7025

vs.

INTERMEDIARY –
Blue Cross Blue Shield Association/
Cahaba Government Benefit
Administrators

DATE OF HEARING -
July 26, 2004

Cost Reporting Period Ended -
June 30, 1998

CASE NO.: 01-3385

INDEX

ISSUES:

1. Whether the Intermediary's disallowance of a portion of the fiscal year 1998 accrued compensation for the Provider's Administrator and Assistant Administrator was proper.

2. Whether the Intermediary's disallowance of a portion of the fiscal year 1998 payroll taxes and other withholdings required by the government was proper.

3. Whether the Intermediary's adjustment removing a portion of claimed consulting, accounting and legal fees was proper.

STATEMENT OF THE CASE AND STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare payments to a health care provider.

The Medicare program provides health insurance to aged and disabled persons. 42 U.S.C. §§1395-1395cc. The Secretary of the Department of Health and Human Services (Secretary) is authorized to promulgate regulations prescribing the health care services covered by the program and the methods of determining payments for those services. The Centers for Medicare & 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 the program's administration. CMS has entered into contracts with insurance companies known as fiscal intermediaries to maintain the program's payment and audit functions. Intermediaries determine payment amounts due providers of health care services (e.g., hospitals, skilled nursing facilities, and home health agencies) under Medicare law and under interpretative guidelines issued by CMS.

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

High Country Home Health Care, Inc. (Provider) is a home health agency located in Laramie, Wyoming. Cahaba Government Benefit Administrators (Intermediary) reviewed the Provider's cost report for its fiscal year ended June 30, 1998 and made adjustments disallowing certain owners' compensation costs and certain legal and accounting fees that the Provider had accrued at the close of the accounting period. Specifically, the Intermediary determined that the Provider had not liquidated these accrued expenses within the time requirements imposed by the Medicare program.

With respect to owners' compensation, the Intermediary found that the Provider had accrued $99,948 payable to its two owners at year's end. Although the Provider had issued checks to its owners on September 13, 1998 to liquidate these expenses, the checks did not clear the Provider's bank until September 23, 1998, which is more than 75 days after the close of the cost reporting period.[1] Medicare program rules regarding the proper liquidation of accrued owners' compensation are as follows:

42 C.F.R. §413.100(c)(2)(iv)

> *Compensation of owners.* Accrued liability related to compensation of owners other than sole proprietors and partners must be <u>liquidated</u> within 75 days after the close of the cost reporting period in which the liability occurs. (Emphasis added).

Provider Reimbursement Manual, Part I (HCFA Pub. 15-1) §906.4, amended February 1996 (Transmittal No. 391)

> [t]he compensation of stockholder-employees and individuals described in §901 (other than sole proprietors and partners) is included for a cost reporting period if earned within the period, even if not paid until after the close of the period. However, payment must be made (whether by check or other negotiable instrument, cash or legal transfer of assets such as stocks, bonds, real property, etc.) within 75 days after the close of the period. <u>Where payment is made by check or other negotiable instrument (e.g., a promissory note), these forms of payment must be liquidated through an actual transfer of the provider's assets within 75 days after the close of the period in order to meet the requirements of this section</u>. If payment, including the liquidation of negotiable instruments, is not made within the cost reporting period, or within 75 days thereafter, the unpaid compensation is not includable in allowable costs either in the period when earned or in the period when actually paid. (Emphasis added).

With respect to legal and accounting fees, the Intermediary found that the Provider had accrued $89,554 in costs that had not been liquidated as of June 30, 1999.[2] Program rules regarding these types of accrued expenses state:

42 C.F.R. §413.00(c)(2)(i)(A)

> Except as provided in paragraph. . . of this section, a short-term liability. . ., must be liquidated within 1 year after the end of the cost reporting period in which the liability is incurred.

HCFA Pub. 15-1 §2305.A

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[1] Intermediary's Position Paper at 4.

[2] Initially this issue included disallowances applicable to consulting fees; however, the Provider conceded to the Intermediary's position. <u>See</u> Transcript (Tr.) at 19.

> A short-term liability must be liquidated within 1 year after the end of the cost reporting period in which the liability is incurred, subject to the exceptions specified in §§2305.1 and 2305.2. Liquidation must be made by check or other negotiable instrument, cash or legal transfer of assets such as stocks, bonds, real property, etc. Where liquidation is made by check or other negotiable instrument, these forms of payment must be redeemed through an actual transfer of the provider's assets within the time limits specified in this section. Where the liability (1) is not liquidated within the 1-year time limit, or (2) does not qualify under the exceptions specified in §§2305.1 and 2305.2, the cost incurred for the related goods and services is not allowable in the cost reporting period when the liability is incurred, but is allowable in the cost reporting period when the liquidation of the liability occurs.

The Provider appealed the Intermediary's adjustments to the Board pursuant to 42 C.F.R. §§405.1835-405.1841 and met the jurisdictional requirements of those regulations. The amount of Medicare funds in controversy is approximately $184,000.

The Provider was represented by Charles F. MacKelvie, Esq., of The MacKelvie Law Firm. The Intermediary was represented by James R. Grimes, Esq., Associate Counsel, Blue Cross Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that it is improper to rely upon the "transfer of assets" provision contained in Transmittal No. 391. That provision represents a substantive change in program rules that can only be promulgated through a change in the pertinent regulation. Pursuant to 42 U.S.C. §1395hh, such changes require publication in the Federal Register allowing for public review and comment prior to implementation (or, at a minimum, the change must be listed in the Federal Register). Prior to Transmittal No. 391, CMS allowed providers more than 75 days to liquidate accrued owners' compensation, and an allowance should also be permitted in this case.[3] Additionally, the Provider notes that the Internal Revenue Service recognizes that a debt is considered liquidated at the time a check is issued.[4]

The Provider contends that $41,788 of the Intermediary's adjustments to accrued owners' compensation is actually the employees' portion of Federal and State employment taxes; and that it transferred assets to liquidate these taxes on September 18, 1998, which was the first day for the payment of these taxes based upon the September 13, 1998 issuance of payroll checks to its owners.[5] The Provider asserts, therefore, that accrued payroll

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[3] See , e.g. , Exhibit I-9 at 6 of 9, CMS Administrator's discussion Review of: PRRB Case No. 2000-D38.

[4] Provider's Post-Hearing brief at 7.

[5] Transcript at 13.

taxes must be liquidated within one year after the end of a cost reporting period pursuant to 42 C.F.R. §413.00(c)(2)(i)(A) as opposed to 75 days as required for owners' compensation.

Finally, the Provider contends that a significant portion of the accrued legal and accounting fees disallowed by the Intermediary was actually liquidated during the Provider's 1998 and 1999 cost reporting periods and that the remainder of the accrued legal fees was paid by June 30, 2001, pursuant to court orders.[6] Also, the Provider requested an extension to the one-year liquidation rule found at HCFA Pub. 15-1 §2305.1, which would have recognized its 1998 costs liquidated through June 30, 2001.[7]

INTERMEDIARY'S CONTENTIONS

The Intermediary contends that the Medicare program's rules regarding the liquidation of owners' accrued compensation are clear. To meet the requirements of 42 C.F.R. §413.100(c)(2)(iv) and HCFA Pub. 15-1 §906.4, cash must be transferred from the Provider's bank account to its owners within 75 days after the end of the cost reporting period. The Intermediary cites Continue Care Home Health II, Inc. v. Blue Cross Blue Shield Association, PRRB Dec. No. 01-D48, September 17, 2001, Medicare and Medicaid Guide (CCH)¶ 80,744, decl'd rev., CMS Administrator, November 1, 2001, where the Board found that an owner's accrued bonus was an unallowable cost because the check issued to liquidate the accrual did not clear the bank within 75 days after the end of the cost reporting period.[8]

The Intermediary contends that 42 C.F.R. §413.100(c)(2)(iv) and HCFA Pub. 15-1 §906.4 apply the 75-day rule to the gross amount of owners' compensation and not to the amount of compensation net of employment taxes. Accordingly, the Provider's arguments that employee withholding taxes are allowable costs that should be treated as short-term liabilities are without merit.

With respect to accrued accounting and legal fees, the Intermediary contends that the Provider was reimbursed for these expenses through its fiscal year 1999 and 2000 Medicare cost reports, which are the periods in which these expenses were actually paid. HCFA Pub.15-1 §2305.A. The Intermediary also contends that the Provider's request for an extension to the one-year rule for liquidating short-term liabilities was denied because it was not submitted timely and did not include documentary evidence required by 42 C.F.R. §100(c)(2)(i)(B).

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[6] Provider's Post-Hearing Brief at 11.

[7] Tr. 148.

[8] Intermediary's Position Paper at 6.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

Issue No. 1- Owners' Accrued Compensation

Program instructions at HCFA Pub. 15-1 §906.4 require that owners' accrued compensation be liquidated within 75 days after the close of a provider's cost reporting period in order to be included in allowable costs. These instructions also require that where payment of such compensation is made by check (or other negotiable instrument) an actual transfer of the provider's assets must occur within the 75-day period.

In the instant case, the Provider accrued owners' compensation at the close of its fiscal year ended June 30, 1998 and issued checks to liquidate the accrued liabilities on September 13, 1998. However, the checks did not clear the bank, representing an actual transfer of the Provider's assets, until September 23, 1998, which is beyond the allowable 75-day period. Accordingly, the Intermediary's adjustments disallowing these costs were proper.

It is undisputed that the owners' checks did not clear the bank until September 23, as the Provider's witness testified that she had held the checks in her desk drawer waiting for a loan to be approved by the bank.[9] Rather, the Provider argues that it was unaware of the transfer of assets requirement implemented by Transmittal No. 391; that the transfer of assets requirement is improper because it was not published in the Federal Register as a substantive rule pursuant to 42 U.S.C. §1395hh; and, that the issuance of checks represents a proper liquidation of debt that should be recognized by the program.

The Board finds the Provider's arguments without merit. The transfer of assets requirement contained in Transmittal No. 391 was in effect for more than 2 ½ years before the Provider accrued the subject compensation. In addition, the Provider had employed the services of a Medicare consultant during the subject cost reporting period. Clearly, the Provider is responsible for complying with the transfer of assets requirement contained at HCFA Pub. 15-1 §906.4.

Also, the transfer of assets requirement contained in Transmittal No. 391 does not represent a significant change in program rules that would have warranted publication in the Federal Register prior to implementation. At one time, the regulation at 42 C.F.R. §405. 426(d) required that owners' accrued compensation be liquidated within 75 days after the close of a provider's cost reporting period to be included in allowable costs. Then, in 1983, CMS stated that this requirement did not need to be in incorporated in the regulations and that program instructions at HCFA Pub. 15-1 §2305 were sufficient to safeguard against abuse. 48 Fed. Reg. 39752 (Sept. 1, 1983). Notably, HCFA Pub. 15-1 §2305, which pertains to short-term liabilities, requires that where liquidation is made by check or other negotiable instrument, payment must be made "through an actual transfer

[9] Tr. at 48.

of the provider's assets within the time limits specified." Accordingly, Transmittal No. 391 essentially reiterated existing policy.[10]

Finally, the issuance of a check does not represent an actual transfer of assets as argued by the Provider; as the recipient of a check may never cash it, or there could be insufficient funds in a provider's account to cover it.

Issue No. 2- Employee Withholding Taxes

The Board disagrees with the Provider's argument that the portion of the disallowed owners' compensation represented by Federal and State employment taxes should be treated as short-term liabilities subject to the one-year liquidation rule.

The Board finds that the program's rules regarding owners' accrued compensation apply to the total amount of the salary expense included in a provider's cost report. This expense or compensation is the gross amount earned by an owner and claimed for program reimbursement and not the amount paid directly to the owner net of withholding taxes. The Board also finds that the issuance of a check to an owner, and the clearance of that check through the banking system, controls Medicare's treatment of these expenses. When the check clears the bank, there is a transfer of the provider's assets directly to the individual and a transfer of the provider's assets to an account where the individual's funds are held for later disposition to the taxing authorities. Accordingly, the State and Federal portion of owners' accrued compensation expense is subject to the same 75-day liquidation rule as the portion paid directly to the individual.

Issue No. 3- Accrued Legal and Accounting Fees

Program rules require accrued short-term liabilities to be liquidated within one year after the end of a provider's cost reporting period in order for the associated costs to be included in that year's Medicare cost report. 42 C.F.R. §413.100(c)(2)(i)(A). An extension to the one-year limit may be granted for good cause under 42 C.F.R. §413.100(c)(2)(i)(B), where providers may have up to three years to liquidate short-term liabilities and have the costs included in the cost reporting period in which they were accrued.

In the instant case, the Provider requested an extension for its accrued legal fees on November 10, 1999, which is 17 months after the close of the subject June 30, 1998 cost reporting period. It is undisputed that the Provider had not liquidated all of its accrued short-term liabilities within the one-year limit. Moreover, since the Provider's request was denied, the Intermediary's decision to reimburse these accrued expenses in the reporting period in which they were paid, as opposed to the Provider's 1998 cost reporting period, was proper. HCFA Pub. 15-1§ 2305.A.

[10] The Board notes the Provider's argument that, at a minimum, Transmittal No. 391 should have been listed in the Federal Register in accordance with 42 U.S.C. 1395hh(c)(1). However, no evidence was presented whether the transmittal was or was not listed.

A provider's request for an extension to the one-year rule must be submitted to its intermediary within the same time limit prescribed by 42 C.F.R. §413.100(c)(2)(i)(A), or within one year after the end of the pertinent cost reporting period. As noted above, the Provider's request was submitted well beyond June 30, 1999, or long after the one-year limit. Accordingly, the Intermediary's decision to deny the Provider's request was also proper.

Finally, the Board notes the Provider's argument that it paid a significant amount of legal and accounting fees by June 30, 1999. However, the Provider produced no substantive evidence supporting these payments or evidence relating them to the Intermediary's adjustments.

DECISION AND ORDER:

Issue No. 1- Owners' Accrued Compensation

The Intermediary's adjustments disallowing owners' accrued compensation not liquidated within 75 days after the end of the Provider's cost reporting period were proper. The Intermediary's adjustments are affirmed.

Issue No. 2- Employee Withholding Taxes

The Intermediary's adjustments disallowing the employees' share of payroll taxes applicable to unallowable owners' accrued compensation was proper. The Intermediary's adjustments are affirmed.

Issue No. 3- Accrued Legal and Accounting Fees

The Intermediary's adjustments disallowing certain accrued legal and accounting fees that were not liquidated within one year after the end of the Provider's cost reporting period were proper. The Intermediary's adjustments are affirmed.

Board Members Participating:

Suzanne Cochran, Esq.
Dr. Gary B. Blodgett
Martin W. Hoover, Jr., Esq.
Elaine Crews Powell, C.P.A
Anjali Mulchandani-West

FOR THE BOARD:

DATE: January 13, 2005

Suzanne Cochran, Esq.
Chairman