PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2005-D43

PROVIDER -
Pleasant Care 97/98 Payroll Tax Cost group

Provider Nos. -
Various (See Appendix)

vs.

INTERMEDIARY
Mutual of Omaha Insurance Company

DATE OF HEARING -
March 26, 2004

Cost Reporting Periods Ended -
July 31, 1996 through May 31, 1998

CASE NO.: 00-0909G

INDEX

ISSUE:

Should the Intermediary reclassify the Provider's Federal Insurance Contributions Act (FICA) tax expense from the Employee Benefits cost center to the Administrative and General cost center (A&G)?

STATEMENT OF THE CASE AND STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a health care provider.

The Medicare program provides health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. 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' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due providers under Medicare law and interpretative 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 NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

This case involves 23 skilled nursing facilities owned and operated by Pleasant Care Corporation (Provider). During the 38 cost reporting periods at issue, the Provider classified its employment related taxes (FICA, state and Federal unemployment taxes, and worker's compensation costs) in the Employee Benefits cost center[1] within their Medicare cost reports. All costs classified as employee benefits are allocated through Medicare's cost finding process (i.e., the process of allocating a provider's total costs to its revenue-producing cost centers where Medicare's share of those costs is ultimately determined) based upon gross salaries. The allocation base in this particular instance, gross salaries, can have a significant effect on a provider's reimbursement since many ancillary service cost centers, such as physical therapy, may have high Medicare utilization but little or no salaries because the services are furnished by outside contractors.

[1] The Employee Benefits cost center may also be referred to as the Employee Health and Welfare Cost Center (H&W).

Mutual of Omaha Insurance Company (Intermediary) reviewed each of the subject cost reports and allowed the Provider's employment related taxes to remain in the Employee Benefits cost center. However, after NPRs were issued, the Provider appealed to the Board requesting that its employment related taxes be reclassified to A&G. Administrative and general costs are allocated through the cost finding process based upon all costs accumulated in a revenue-producing cost center without regard to the type of costs.

Initially, the Board decided that it lacked jurisdiction to hear the Provider's appeal, and the Administrator of CMS declined to review the Board's decision. The Provider then sought judicial review in the United States District Court for the District of Columbia. The Board was directed by the court to issue a decision based upon the merits of the parties' arguments pursuant to a Stipulation of Settlement and Dismissal and Order of Remand.[2] Subsequently, the Intermediary agreed to revise the Provider facilities' cost reports by reclassifying unemployment taxes and workers' compensation costs to A&G. Therefore, the only issue remaining in this case is the Intermediary's refusal to reclassify FICA taxes.[3]

The Provider was represented by Paul R. Gulbrandson, Medicare Consultant. The Intermediary was represented by Matt Pleggenkuhle, Cost Report Appeals Consultant, Mutual of Omaha Insurance Company. The amount of Medicare funds in controversy is $829,367.[4]

PROVIDER'S CONTENTIONS:

The Provider contends that FICA taxes should be classified in A&G according to instructional letters issued by CMS. The Provider asserts that since no statute or regulation addresses the allocation of payroll costs, the CMS letters are authoritative and must be given "great weight."[5]

The Provider also contends that a number of CMS precedents have held that employment based taxes such as state and federal unemployment tax and worker's compensation should be classified in A&G because they are not "fringe benefits" as defined in Medicare's Provider Reimbursement Manual, Part I, (HCFA Pub.15-1) §2144.1.[6]

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[2] Exhibit P-22.

[3] Intermediary's Supplemental Position Paper at 5. Provider's Supplemental Position Paper at 3.

[4] Intermediary's Supplemental Position Paper at 3.

[5] Provider's Supplemental Position Paper at 6. Exhibits P-1 through P-4.

[6] Provider's Supplemental Position Paper at 7. See also , Longwood Management Corporation v. Blue Cross and Blue Shield Association/Blue Cross of California PRRB Dec. No. 99-D34, April 6, 1999, decl'd. rev. CMS Administrator, Medicare and Medicaid Guide (CCH) ¶80,177 and Extendicare 1996 Insurance Allocation Group v. Blue Cross and Blue Shield Association/United Government Services, PRRB Dec. No. 2000-D88, September 26, 2000, Medicare and Medicaid Guide (CCH) ¶80,573.

Moreover, the Provider asserts that there is no basis to distinguish FICA expense from these other taxes.

Finally, the Provider argues that classifying FICA taxes to A&G does not cause an improper shift in costs to the Medicare program; rather, improper cost shifting occurs when the cost reporting process fails to properly apportion costs between Medicare and non-Medicare payers.[7] While the Provider does not dispute that the change in classification of FICA taxes from employee benefits to A&G increases its Medicare reimbursement, it claims that it is Medicare's cost finding methodology that ultimately affects Medicare reimbursement.

INTERMEDIARY'S CONTENTIONS:

The Intermediary relies upon Bryn Mawr Terrace Convalescent Center v. Blue Cross Blue Shield Association/Veritus Medicare Services, PRRB Dec. No. 2001-D6, January 10, 2001, Medicare and Medicaid Guide (CCH) ¶80,636, decl'd. rev., CMS Administrator, February 26, 2001, where the Board found the intermediary's reclassification of FICA taxes from A&G to employee benefits was proper."[8] The Intermediary acknowledges the Provider's claim that certain CMS letters state that FICA taxes should be included in A&G. However, the Intermediary notes that a final CMS letter dated August 23, 1999, clarifies that payroll-related taxes should not be allocated through A&G, since that would result in less accurate cost finding methodology than either the directly assigning of these costs or allocating the costs as employee benefits.[9]

The Intermediary also contends that allocating FICA taxes on the basis of accumulated cost through A&G results in an improper shifting of costs to the Medicare program.[10] Regulations at 42 C.F.R. 413.24(d)(1) explain that the "step-down" method of cost finding, which is the method used by the Provider's facilities, requires all costs of nonrevenue-producing cost centers to be allocated to the cost centers that they serve. Since FICA taxes are payroll based, it is appropriate to allocate them as employee benefits only to those cost centers with payroll expenses as opposed to all cost centers as proposed by the Provider.

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:

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[7] Provider's Post-Hearing Brief at 10.

[8] Intermediary's Supplemental Final Position Paper at 7.

[9] Intermediary's Supplemental Final Position Paper at 8.

[10] Intermediary's Supplemental Final Position Paper at 11.

First, the Board finds that an employer's share of FICA taxes is an employee benefit that serves to secure a right to a future benefit, i.e., social security at retirement, disability or survivor's benefits. As such, FICA taxes meet the definition of fringe benefits set forth 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/her dependent (as defined by IRS), or his/her 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. . . .

Second, the Board finds that, as a fringe benefit, FICA costs should be classified in the Employee Benefits cost center. Since these costs are salary-generated, the use of gross salaries as the allocation basis properly matches these expenses to the activities which benefit from the services rendered by the employees. Using the cost report classification advocated by the Provider would result in the allocation of FICA taxes to cost centers that do not contain any employees or direct salary expense, and the Intermediary has demonstrated that the Provider's approach does in fact allocate costs to ancillary departments that have no employees.[11]

The Board also closely reviewed Provider Exhibits P-1 through P-4, which contained CMS letters stating that various types of payroll expenses should be allocated as A&G expenses. The Provider views these letters as authoritative guidance for its position. However, a subsequent CMS letter dated August 23, 1999, serves to clarify the earlier correspondence.[12] It states that, in terms of the various options for allocating payroll-related tax costs, the A&G allocation methodology would not be the most appropriate or accurate. However, the letters referenced in the instant case reflect inconsistent points of view by the same writer. Accordingly, the Board finds the CMS letters cited by the Provider are unpersuasive and entitled to no particular deference.[13]

The Board concludes that the primary consideration in this case is the payment of reasonable costs consistent with the regulation at 42 C.F.R. §413.24, which seeks the development and application of methodologies which yield the most accurate determination of actual costs incurred in the provision of health care services under the Medicare program. The Board finds that the most accurate and appropriate methodology is that of allocating FICA expenses only to those cost centers with salary expenses.

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[11] Intermediary's Supplemental Final Position Paper at 12.

[12] Exhibits P-3 and I-16.

[13] See Christensen v. Harris County , 529 U.S. 576, 587 (2000).

DECISION AND ORDER:

The Provider's FICA tax expenses should not be reclassified from the Employee Benefits cost center to A&G. The Intermediary's decision 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: June 10, 2005

Suzanne Cochran
Chairman