PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2007-D47

PROVIDER -
Texas Senior Care
Dallas, Texas

Provider No.: 45-7789

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
Cahaba Government Benefit
Administrators

DATE OF HEARING -
March 30, 2006

Cost Reporting Period Ended -
July 31, 1999

CASE NO.: 05-0658

INDEX

ISSUES:

1. Whether the Intermediary properly allocated home office cost from the finalized home office cost statement to the Provider.
2. Whether the Intermediary's adjustment to the salaries, benefits and mileage of the program managers was proper.
3. Whether the Intermediary's adjustment to Dara Stewarts's salary and benefits was proper.
4. Whether the Intermediary's reopening 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. §1395h, 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 portion 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.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Texas Senior Care (Provider) is a Medicare-certified home health agency primarily located in Dallas, Texas with offices in other areas of Texas. Texas Senior Care Holdings Inc. (TSCH) was the home office of the Provider in 1999. The entities to which TSCH allocated costs were the Provider, Hallmark Home Care, TLC, Abba Home Health and Preferred Nursing Services. TSCH purchased Confidant Home Care, Inc. from Dara Stewart at the end of January, 1999. The Provider submitted its Medicare cost report for the fiscal year ended July 31, 1999 to its fiscal Intermediary, Cahaba

Government Benefit Administrators (Intermediary) on December 31, 1999.[1] The Intermediary issued a NPR on September 7, 2001 and a revised NPR on January 19, 2005. The revised NPR included adjustments for Program Managers' salaries, benefits and mileage; Dara Stewart's salary and benefits; and to incorporate home office costs from the finalized TSCH home office cost statement.[2]

The Provider appealed the adjustments to the Board and met the jurisdictional requirements of 42 C.F.R §§405.1835 - 405.1841. The Provider was represented by Charles F. MacKelvie, Esquire, of The MacKelvie Law Firm. The Intermediary was represented by Bernard Talbert, Esquire, of Blue Cross Blue Shield Association.

PARTIES' CONTENTIONS:

Issue 1: Home Office Costs

The Intermediary finalized TSCH's December 31, 1999 Home Office Costs Statement (HOCS) on July 12, 2001 and adjusted the Provider's cost report to reflect the allocable portion of the finalized HOCS costs. The total costs allocable to the Provider from the finalized HOCS was $267,999 and is attributable to the Provider's FY 1999 and 2000 cost reports. The issue in dispute lies not in the amount of allocable costs but in the allocation methodology employed by the Intermediary to allocate the costs between the FY 1999 and FY 2000 cost reports.

In order to determine the amount of home office cost attributable to each cost report, the Intermediary prorated the total allocable cost from the HOCS to the Provider by using a ratio of six months (February through July) out of eleven months in operation as depicted below:

Total allocation on Schedule H of HOCS	$267,999
Fraction for prorating cost for 7/31/1999	6/11
Portion to be included on 7/31/99 cost report	$146,181
Portion to be included on 7/31/00 cost report	$121,818

This methodology allocated an equal amount of cost per month. The Intermediary asserts that the allocation methodology it used to allocate the home office costs between the 7/31/99 cost report and the 7/31/00 cost report was made in accordance with applicable Medicare regulations and program instructions. Per the Intermediary, the Provider Reimbursement Manual (PRM) 15-1 §2150.3A requires that, "all activities and functions in the home office must bear their allocable share of home office overhead and general and administrative costs." The initial step in the home office cost allocation process is

[1] See, pages 19-20 of the transcript. As change of ownership was through a stock purchase, no terminating cost report was filed, and the new owner filed a full 12 month cost report.

[2] The Provider is a chain component of the home office Texas Senior Care Holdings, Provider No: 18-H024, which TSCH filed a home office cost statement for the period from February, 1999 through December 31, 1999.

the direct assignment of costs to chain components. Next, the allowable home office costs that have not been directly assigned to specific chain components are allocated on a functional basis to the chain components if applicable. Finally, the residual or pooled costs that have not been directly or functionally allocated are allocated to the chain components on the basis of total costs.

According to PRM 15-1 §2150.3G, "When the home office accounting period differs from the cost reporting period of a chain provider, the allowable home office costs of the provider for the period covered by the home office cost statement should be included in the provider's cost report as indicated above and then allocated through the cost finding process." The Intermediary asserts that the PRM goes on to give an example of allocating costs to the various providers' based on the number of months for which the providers' cost report period corresponds to the HOCS. The Intermediary argues that it used the same methodology in proposing the audit adjustment at issue.

The Provider asserts that when it filed the cost report for FY 1999, it utilized actual costs incurred during each month to allocate the home office costs between the FY 1999 and FY 2000 cost reports. The Provider asserts that during FY 1999, its first year of operations under TSCH, it grew dramatically in size and scope of services. Therefore, the Provider insists that the use of the prorated share of months, as suggested by the Intermediary, does not properly reflect the growth of the Provider over time and causes a disproportionate allocation of home office costs to the Provider for FY 1999. The Provider argues that using the actual cost methodology more accurately distributes the home office costs between the two periods and allocates more cost to the subsequent FY (FY 2000) when the size of the Provider and its services had increased significantly. The Provider argues that the Intermediary's attempt to use a less precise methodology to allocate the costs when a more accurate methodology is available is inconsistent with the PRM 15-1 §2150.3.

Issue 2: Program Managers salaries, benefits and mileage

The Provider asserts that the Intermediary incorrectly reclassified the salaries, benefits and mileage costs associated with three employees designated as Program Managers to a non-allowable costs center. The Provider argues that the Program Managers represented the Provider in activities involving professional contacts with physicians, hospitals and others. They advised physicians of the availability of Provider's services and participated in public education relative to the home health care services available. The Provider argues that PRM 15-1 §2136.1 allows the cost of activities to apprise physicians, hospitals, public health agencies and similar groups and institutions of availability of a provider's covered services. The Provider also cites PRM 15-1 §2113.4, which states that activities such as educating physicians concerning the range of home care services available are allowable costs.

The Provider argues that the Program Managers' position is not geared toward patient solicitation or referrals. In addition to their educational role, the Program Managers coordinated with physician offices to obtain signatures on orders in a timely manner. The

Program Managers also made recurring calls to physicians to apprise them of the availability of Provider's home care services and to follow up regarding coordination of care with those physicians who had active patients receiving services from the Provider.

The Intermediary states that it reclassified the salaries and benefits related to the Program Managers to a non-reimbursable cost center based on documentation it received from the Provider indicating that the job responsibilities of the Program Managers centered on marketing and obtaining referrals. According to PRM 15-1 §2136, advertising costs incurred in connection with a provider's public relation activities are allowable if the advertising is primarily concerned with the presentation of a good public image and directly or indirectly related to patient care. However, advertising to the general public which seeks to increase patient utilization of a provider's facilities is not allowable, as it is not related to the care of its current patients.

The Intermediary asserts that it obtained a job description for the Program Manager position but was unable to determine the duties of the Program Manager from the brief and general nature of the job description. The Intermediary, therefore, requested performance appraisals and time records/mileage logs for the Program Managers. The Intermediary asserts that the performance appraisals included references to marketing activities such as "expanded her referral base" and "seeking new opportunities to educate on services." The Intermediary also asserts that the Program Managers did not keep time records to differentiate between allowable time spent on patient related activities, such as getting orders signed by physicians, and non-allowable time spent on marketing activities. The Intermediary did obtain mileage logs which documented the Program Managers' destination, but not the purpose of each trip. The mileage logs indicated that the Program Managers visited 15 or more physicians in a single day, sometimes visiting a single physician more than once a day.

The Intermediary concedes that based upon the submitted documentation, a portion of the time spent by the Program Managers would be related to patient care. The Intermediary argues however, that the documentation supports the conclusion that a large portion of these employees' time is spent on marketing, and as the Provider does not have time records or any other documents to identify the portion of the Program Managers' time that is related to patient care, salaries and benefits related to those individuals should be classified as non-reimbursable. The Intermediary asserts that pursuant to 42 C.F.R. §413.20 and §413.24, it is the Provider's responsibility to maintain adequate financial and statistical records, capable of verification by qualified auditors, to document allowable costs.

Issue 3: Dara Stewart's salary and benefits

TSCH purchased Confident Home Care Inc., (Confident) from Dara Stewart in January 1999, and the Provider submitted her salary and benefits expenses on its as-filed cost report. A portion of that salary related to services prior to the stock purchase on January 27, 1999, and the remainder was paid by the Provider after the date of the purchase. The

Intermediary argues that based on a clause in the Stock Purchase Agreement[3] titled "Consulting Services; Bonus; Covenant Not to Compete," the Intermediary was not able to determine if the payment made to Ms. Stewart was related to the covenant not to compete, sale of the stock, reorganization costs, or for actual services performed. The Intermediary asserts that although the referenced agreement committed the Provider to pay Ms. Stewart for transitional consulting services in the form of continued payments of her salary, the contract did not provide details of what services would be performed by Ms. Stewart. Therefore, if the amount paid to Ms. Stewart was for "transitional consulting services," the cost would still not be allowable as the Intermediary is unable to determine if the services provided were related to patient care.

The Intermediary states that during the audit of the Provider's cost report it reviewed a payment in the amount of $12,500 and found it to be allowable based on documentation that the bonus paid to Ms. Stewart was for duties performed prior to the sale. However, based upon the signed affidavit by Ms. Stewart[4] dated March 22, 2006, the bonus was paid ". . . as part of my Covenant-Not-to-Compete with TSC and TSCH." The Intermediary, therefore, requests that the Board deem the payment of $12,500 non-allowable based upon Ms. Stewarts' signed affidavit which was not available to the Intermediary during the audit.

The Provider argues that the Intermediary improperly deemed the salary and benefits of Dara Stewart, as non-allowable. The Provider asserts that during the period of February 1, 1999 through June 30, 1999, Ms. Stewart performed numerous services for the Provider, including the following: worked on changing the names on the leases that were entered into by Confident to the new facility name; provided assistance with evaluating office personnel performance and long-term placement; worked with active vendors to change the name and address of the company; assisted in terminating the lease for the space in Hurst, Texas due to the relocation of the office to Fort Worth, Texas; managed the closing down of the Hurst office and assisted in the relocation or disposal of the office furniture, equipment and other items. These services were attested to by Ms. Stewart in her signed affidavit. The Provider also furnished documentation showing the number of meetings and telephone calls its President, Mark O'Brien, had with Ms. Stewart.[5]

The Provider argues that the compensation Ms. Stewart received for "transitional consulting services" during the period from February through June was distinct and separate from the Stock Purchase Agreement and the covenant not to compete. The Provider asserts that the cost related to the duties performed were not reorganization costs, but rather a necessary and required cost of an acquirer after an acquisition, and related to patient care. The Provider claims that the amount of compensation paid to Ms. Stewart for the services provided was reasonable and, therefore, the adjustment to remove Ms. Stewart's salary and benefits should be reversed.

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[3] See, Intermediary Position Paper, Exhibit I-8, page 6.
[4] See, Provider Position Paper, Exhibit P-31, page 1.
[5] See, Provider Post Hearing Brief, Exhibit B.

Issue 4: Propriety of Reopening

The Provider's original NPR for FYE 7/31/99 was issued by the Intermediary on September 7, 2001. On August 20, 2004, the Intermediary issued a Notice of Reopening along with proposed reopening adjustments for the Provider's FY 1999 cost report. The Intermediary then issued a revised NPR on January 29, 2005. The Provider asserts that pursuant to PRM 15-1 §2931.2, an Intermediary can reopen a final determination if ". . . new or material evidence has been submitted, or a clear and obvious error was made, or the determination is found to be inconsistent with the law, regulation, and rulings or general instructions." The Provider argues that the Intermediary did not discover new or material evidence, nor was there any indication in the audit performed by the Intermediary that there was a clear or obvious error in its cost report. The Provider, therefore, asserts that the reopening was improper.

The Provider argues that the Intermediary did not audit the Provider concerning the issues under appeal for FY 1999, rather, it relied on workpapers created in the audit of the FY 2000 cost report to validate its findings. The Provider asserts that the Intermediary violated several Generally Accepted Audit Standards (GAAS) in the performance of the audit. The Provider asserts that as the Intermediary did not comply with GAAS, the audit conclusions should be given no weight, and the adjustments should be reversed.

The Intermediary asserts that the reopening of the Provider's FY 1999 cost report was triggered by a CMS review of the Intermediary which led to an internal quality assurance review of the Intermediary's original audit.[6] The quality assurance review led to the proposed reopening audit adjustments, which led to the issuance of a revised NPR. The Intermediary argues that the reopening was timely (within the three-year window); the adjustments proposed and incorporated into the revised NPR were based on Medicare rules, policies and procedures; and the adjustments were communicated to the Provider as evidenced by modifications made to certain proposed adjustments prior to the issuance of the revised NPR. Therefore, the Intermediary asserts that the issue at hand is not how the Intermediary arrived at the adjustments, but whether the adjustments had merit, were accurate and should be upheld.[7]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and program instructions, the evidence and the parties' contentions, the Board finds and concludes as follows:

Issue 1: Home Office Costs

The parties have agreed that the allocable home office cost attributed to the Provider from the 12/31/1999 home office cost statement is $267,999. The issue in dispute is how the $267,999 should be allocated between the Providers' 7/31/1999 cost report and its 7/31/2000 cost report. While the Intermediary followed the allocation example in the

[6] See, Transcript, page 350.
[7] See, Transcript, pages 33-35.

Provider Reimbursement Manual, the Board finds that the PRM does not preclude the Intermediary from allocating the costs using a more precise methodology. The methodology utilized by the Provider in the as-filed cost report, is supported by Medicare reimbursement guidelines and, in particular, in accordance with PRM 15-1 §2150.3D2b, which states, "If evidence indicates that the use of a more sophisticated allocation basis would provide a more precise allocation of pooled home office costs to the chain components, such basis can be used in lieu of allocating on the basis of either inpatient days or total costs." Therefore, the Board remands this issue to the Intermediary to allocate the applicable amount of the revised home office cost for FY 1999 using the methodology proposed by the Provider.

Issue 2: Program Managers' salaries, benefits and mileage

The record reflects that while some duties of the Program Managers are related to patient care and, therefore, are an allowable cost, significant time spent by these employees is related to increasing referrals or patient solicitation which is not allowable. Medicare regulations require that a provider of services maintain sufficient records and data to ensure proper payment is made for services rendered. In particular, 42 C.F.R. §413.20(a) requires:

> (a) ***General.*** The principles of cost reimbursement require that providers maintain sufficient financial records and statistical data for proper determination of costs payable under the program. Standardized definitions, accounting, statistics, and reporting practices which are widely accepted in the hospital and related fields are followed.

42 C.F.R. §413.20(d), *Continuing provider recordkeeping requirements*, states:

> (1) The provider must furnish such information to the intermediary as may be necessary to
> - (i) Assure proper payment by the program, including the extent to which there is any common ownership or control (see §413.17(b)(2) and (3)) between providers or other organizations, and as may be needed to identify the parties responsible for submitting program cost reports;
> (ii) Receive program payments; and
> (iii) Satisfy program overpayment determinations.

42 C.F.R §413.24, Adequate cost data and cost finding, also requires:

> (a) ***Principle.*** 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.

> The cost data must be based on an approved method of cost finding and on the accrual basis of accounting. . . .

The Board finds that without adequate auditable documentation, it is unable to determine the amount of time spent by the Program Managers in allowable patient care activities. As the Provider has the burden to retain auditable documentation and failed to do so, the Board finds that the Program Managers' total salaries and benefits were properly reclassified to a non-reimbursable cost center by the Intermediary.

Issue 3: Dara Stewart's salary and benefits

Based on the documentation submitted by the Provider to substantiate the duties performed by Ms. Stewart subsequent to the sale of Confident Care to Texas Senior Care Holdings, the Board finds that the salary paid to Ms. Stewart was reasonable and related to the care of patients. The salary and benefits of Ms. Stewart are therefore reimbursable by Medicare as an allowable cost. In addition, the Board agrees with the Intermediary that new documentation was supplied to support that the bonus of $12,500 paid to Ms. Stewart was related to a covenant not-to-compete clause included in the sales agreement. The Board hereby finds that the bonus of $12,500 is non-reimbursable based upon PRM 15-1 §2135.4B and §2150.2.

Issue 4: Propriety of Reopening

The Board finds that the reopening was timely and procedurally valid and consistent with PRM 15-1 §2931.2 which requires that one of the following three criteria: new and material evidence has been submitted; a clear and obvious error was made; or the determination is found to be inconsistent with the law, regulations and rulings or general instructions; be met for an intermediary to reopen a final determination. Per this instance, the Intermediary reopened the cost report to a correct determination that was found to be inconsistent with prevailing regulations and instructions. As the Provider timely appealed the revised NPR, the Board has reviewed the merits of the audit adjustments under appeal.

DECISION AND ORDER:

Issue 1: Home Office Costs

The allocation methodology proposed by the Provider is more precise that the methodology used by the Intermediary and is supported by Medicare reimbursement guidelines. The issue is remanded to the Intermediary to compute the allocable amount of revised home office cost for FY 1999 using the methodology proposed by the Provider.

Issue 2: Program Managers' salaries, benefits and mileage

The Board finds that without adequate auditable documentation it is unable to determine the amount of time spent by the Program Managers in allowable patient care activities. Therefore, the salaries and benefits of the Program Managers are found to be non-allowable. The Intermediary's adjustment is affirmed.

Issue 3: Dara Stewart's salary and benefits

The salary and benefits of Ms. Stewart are related to patient care and, therefore, are an allowable cost. The Intermediary's adjustment is reversed. The bonus of $12,500 paid to Ms. Stewart is related to a covenant-not-to-compete and, therefore, should be disallowed by the Intermediary. This issue is remanded to the Intermediary to exclude the expense related to the bonus.

Issue 4: Propriety of Reopening

The Intermediary's reopening of the Provider's FY 1999 cost report was timely, procedurally valid and consistent with PRM 15-1 §2931.2. The Board, therefore, has reviewed the merits of the audit adjustments under appeal.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire (Recused)
Gary B. Blodgett, D.D.S.
Elaine Crews Powell, C.P.A.
Anjali Mulchandani-West
Yvette C. Hayes

DATE: July 12, 2007

FOR THE BOARD:

Elaine Crews Powell, C.P.A.