PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2017-D7

PROVIDER –
Saint Alphonsus Regional Medical Center
Boise, Idaho

Provider No.: 13-0007

vs.

MEDICARE CONTRACTOR –
Noridian Healthcare Solutions, Inc.

HEARING DATE –
December 16, 2015

Cost Reporting Period Ended –
June 30, 2007

CASE NO.: 10-0896

INDEX

ISSUE:

Whether the Medicare Contractor's adjustments disallowing Saint Alphonsus' claimed reimbursement for GME and IME costs in the non-hospital setting, by reducing its FTE count because Saint Alphonsus shared these costs with another hospital, was proper.[1]

DECISION:

After considering the Medicare law and program instructions, the evidence presented and the parties' contentions, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor properly adjusted Saint Alphonsus' GME and IME payments for fiscal year ("FY") 2007 for interns and residents rotating to nonhospital settings.

INTRODUCTION:

Saint Alphonsus Regional Medical Center ("Saint Alphonsus" or "Provider") is an acute care hospital located in Boise, Idaho. Saint Alphonsus' assigned Medicare Contractor during the time at issue was Noridian Healthcare Solutions, LLC (referred to as the "Medicare Contractor").

In 2003, Saint Alphonsus and another hospital entered into an agreement with the Family Medicine Residency of Idaho ("FMRI"), to offer medical education to interns and residents of the hospitals at various nonhospital settings, as well as to provide the residents of the FMRI the opportunity to rotate through various departments of the hospitals.[2] For FY 2007, Saint Alphonsus incurred medical education costs in the non-hospital setting in connection with the FMRI.[3] The medical education costs of the FMRI were shared between Saint Alphonsus and another hospital.[4] As part of its FY 2007 cost report, Saint Alphonsus claimed a pro rata share of FTEs involved in the FMRI, corresponding to the portion of the FMRI costs that it bore.[5]

The Medicare Contractor reduced Saint Alphonsus' reimbursement for GME and IME for FY 2007 because Saint Alphonsus did not incur "all or substantially all" of the costs of the FMRI's nonhospital training program. Specifically, the Medicare Contractor adjusted the full-time equivalent hours ("FTEs") used to calculate Medicare's reimbursement for GME and IME, disallowing 4.38 FTEs related to the issue at appeal.[6] This adjustment reduced the Medicare program's GME/IME payment to Saint Alphonsus in excess of $150,000.[7]

Saint Alphonsus timely appealed the Medicare Contractor's final determination to the Board and met the jurisdictional requirements for a hearing. The Board conducted a telephonic hearing on December 16, 2015. Saint Alphonsus was represented by Geoffrey Raux of Foley & Lardner, LLP. The Medicare Contractor was represented by Scott Berends of Federal Specialized Services.

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[1] Transcript ("Tr.") at 5-6.
[2] *See* Provider Exhibit P-32 (Aff. of CFO for FMRI).
[3] *See* Stipulations at ¶ 2.
[4] *See id.* at ¶ 3.
[5] *See id.* at ¶ 4.
[6] *See id.* at ¶ 5.
[7] *See* Provider's Final Position Paper at 7.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

Saint Alphonsus argues that, in this case, the pertinent question is whether the statutes in place during the relevant cost reporting period were clear in terms of providing reimbursement to hospitals for medical residency costs incurred in connection with patient care activities in a nonhospital setting, even where such costs were shared among two or more hospitals. Saint Alphonsus contends that CMS misinterprets the governing statute to require a single hospital to incur all or substantially all of the costs in a nonhospital setting.[8]

In addition, Saint Alphonsus contends that it was contractually required to incur and did in fact incur all or substantially all of the costs of the FMRI. In this regard, Saint Alphonsus asserts that, as a factual matter, there has never been any dispute that: (1) it incurred medical education costs; (2) the costs it incurred were for, among other things, residents' salaries and fringe benefits; and (3) the total costs of the FMRI were borne by Saint Alphonsus and another hospital. Saint Alphonsus stresses that it actually did incur all of the costs claimed on its FY 2007 cost report through payments made to the FMRI. Specifically, Saint Alphonsus was contractually obligated to make these payments, and the FMRI was required to use those payments to cover the residents' salaries and fringe benefits and to cover faculty costs for teaching and supervision services.[9] Accordingly, Saint Alphonsus asserts that, because it incurred all or substantially all of the costs of the FMRI corresponding to the *pro rata* share claimed on its FY 2007 cost report, the Board should render a decision favorable to it in this case.

Finally, Saint Alphonsus asserts that, even if the Board does not adopt this argument, the Board should still issue a favorable decision based on Congress' enactment of § 5504 of the Patient Protection and Affordable Care Act of 2010 ("ACA").[10] Specifically, Saint Alphonsus maintains that Congress expressly revoked the single hospital policy through the enactment of ACA §§ 5504(a) and (b) and that Congress applied this revocation to all then-pending, jurisdictionally proper appeals through ACA § 5504(c). Saint Alphonus contends that this revocation should be applied to it because this appeal was pending when ACA was enacted. In support of its position, Saint Alphonsus directs the Board to its decision in *Eastern Maine Med. Ctr. v. Blue Cross Blue Shield Ass'n* ("*Eastern Maine*").[11]

Set forth below is the Board's findings with respect to each of these arguments.

FINDINGS RELATING TO THE REQUIREMENT FOR PAYMENT OF ALL OR SUBSTANTIALLY ALL OF THE GME PROGRAM COSTS

The Board disagrees with Saint Alphonsus' position that, because it incurred all or substantially all of the costs of the FMRI corresponding to the *pro rata* share claimed on its cost report, the Board should render a decision favorable to it in this case. For GME/IME reimbursement

[8] *See* Provider's Post Hearing Brief at 4-5.
[9] *See id* at 7-8.
[10] Pub. L. No. 111-148, 124 Stat. 119, 559-660 (Mar. 23, 2010). The Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010) amended certain ACA provisions; however, HCERA is not relevant to this case as it did not amend ACA § 5504.
[11] PRRB Dec. 2014-D10 (June 2, 2014), *rev'd* CMS Adm'r Dec. (July 23, 2014).

purposes, 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv) entitle a hospital to count the time its residents spend in patient care activities in non-hospital settings, if "the hospital incurs all, or substantially all, of the costs *for the training program* in that [nonhospital] setting."[12] During FY 2007, federal regulations located at 42 C.F.R. § 413.75(b) (2006) defined the term "all or substantially all of the costs for the training program in the nonhospital setting" to mean "the residents' salaries and fringe benefits (including travel and lodging where applicable) and the portion of the cost of teaching physicians' salaries and fringe benefits attributable to direct graduate medical education (GME)."

In this case, Saint Alphonus stipulated that the medical education costs it incurred in connection with the FMRI (*i.e.*, the training program) were shared between Saint Alphonsus and another hospital. The Board finds that this financial arrangement did not sufficiently comply with longstanding federal statute and regulation and that the Medicare Contractor's GME/IME adjustments for interns and residents rotating to nonhospital settings was proper.

In support of its finding, the Board references CMS' principle of GME/IME reimbursement that the impact of Medicare payment of these costs "does not redistribute costs and community support" for these programs. More specifically, CMS maintains that, by funding GME and IME costs, "Congress intended hospitals to facilitate training in nonhospital sites that would not have occurred *without the hospital's sponsorship*"[13] and that, unless the hospital incurs all or substantially all of the costs for the training program, it is possible that the nonhospital could simply be shifting costs of training residents in nonhospital sites that were previously funded from other community sources.[14] To that end, 42 C.F.R. § 413.78(e)(2) (2006)[15] specifies that a hospital cannot count the time residents spend in nonhospital settings, such as clinics, in its GME/IME FTE count, unless "*the hospital* . . . incur[s] all or substantially all of the costs *for the training program* in the nonhospital setting."[16] In this case, Saint Alphonsus admits that it shares the cost of the FMRI with another hospital. This proportional share does not meet the requirements of 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv) or 42 C.F.R. § 413.78(e)(2).

In 2013, the District Court for the District of Columbia held in *Borgess v. Sebelius*[17] that, since Congress did not specifically speak to the issue of whether the "all or substantially all" language precluded the sharing of costs between two or more hospitals, it was a proper exercise of CMS' authority to interpret the statutory language in the restrictive manner that it has prescribed. The Court further found that the Secretary adopted this interpretation as early as 1998.[18]

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[12] (Emphasis added.)
[13] *See* 68 Fed. Reg. 45346, 45444 (Aug. 1, 2003) (emphasis added).
[14] *See id.*
[15] This regulation was originally codified at 42 C.F.R. § 413.86(f)(4) and, with respect to cost reporting period on or after October 1, 2004, was redesignated as § 413.78(e) without any substantive changes pertinent to this appeal. *See* 69 Fed. Reg. 48916, 49111-49112, 49235-49236, 49254, 49258 (Aug. 11, 2004). 42 C.F.R. § 412.105(f)(1)(ii)(C) incorporates these GME requirements (as originally codified and later redesignated) into the IME requirements. *See id.* at 49244-49245.
[16] The Board further notes that 42 U.S.C. § 1395ww(d)(5)(B)(iv) similarly includes that condition that "*the hospital* incurs all, or substantially all, of the costs *for the training program* in that [nonhospital] setting." (Emphasis added.)
[17] 966 F. Supp. 2d 1 (D.D.C. 2013).
[18] *See id.* at 6-7 (citing language at 63 Fed. Reg. 40954, 40986 (July 31, 1998)).

FINDINGS RELATING TO THE APPLICATION OF ACA § 5504

ACA § 5504(a) amended 42 U.S.C. § 1395ww(h)(4)(E) to allow a hospital to count all the time that a resident trains in a nonhospital site so long as the hospital incurs the costs of the residents' salaries and fringe benefits for the time that the resident spends training in the nonhospital site. As part of this amendment, it removed the language requiring hospitals to have a written agreement with the non-hospital setting and the reference to compensation for supervisory teaching activities. ACA § 5504(b) made similar changes to 42 U.S.C. § 1395ww(d)(5)(B)(iv) to apply these changes to IME reimbursement as well. Both §§ 5504(a) and (b) specify that they are effective prospectively for cost reporting periods or discharges on or after July 1, 2010.[19]

ACA § 5504(c) addressed certain additional permissible and non-permissible applications of ACA §§ 5504(a) and (b) by stating the following:

> (c) The amendments made by this section shall not be applied in a manner that requires reopening of any settled hospital cost reports as to which there is not a jurisdictionally proper appeal pending as of the date of the enactment of this Act on the issue of payment for indirect costs of medical education under section 1886(d)(5)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(B)) or for direct graduate medical education costs under section 1886(h) of such Act (42 U.S.C. 1395ww(h)).[20]

As part of the final rule published on November 24, 2010 (the "November 2010 Final Rule"), CMS promulgated regulations at 42 C.F.R. §§ 413.78(g) and 412.105(f)(1)(ii)(E) to implement ACA § 5504.[21] In particular, 42 C.F.R. § 413.78(g)(6) echoes ACA § 5504(c) because it reads:

> The provisions of paragraph (g)(1)(ii), (g)(2), (g)(3), and (g)(5) of this section cannot be applied in a manner that would require the reopening of settled cost reports, *except* those cost reports on which there is a jurisdictionally proper appeal pending on direct GME or IME payments as of March 23, 2010.[22]

As part of the preamble to the final rule published on August 22, 2014 (the "August 2014 Final Rule"), CMS included a section entitled "Clarification of Policies on Counting Resident Time in Nonprovider Settings Under Section 5504 of the Affordable Care Act."[23] In this section, CMS discussed at length the "longstanding substantive standard" which allowed hospitals to count FTE's for residents' training time if the one single hospital which sponsored the residency and

[19] By its terms, ACA § 5504(a) was effective for GME for cost reporting periods on or after July 1, 2010 and ACA § 5504(b) was effective for IME for discharges occurring on or after July 1, 2010.
[20] ACA § 5504(c).
[21] 75 Fed. Reg. 71800, 72134-36 (Nov. 24, 2010).
[22] *Id.* at 72262 (emphasis added).
[23] 79 Fed. Reg. 49854, 50117 (Aug. 22, 2014).

then claimed GME and IME FTE's for the program also incurred all or substantially all of the costs for the training. CMS refers readers to final rules from 1998, 2003 and 2007.[24]

Regarding the retroactivity of newly granted latitude in claiming FTE's as per ACA §§ 5504(a) and (b), CMS stated: "The introductory regulatory language of 413.78(g) explicitly states that paragraph (g) governs only 'cost reporting periods beginning on or after July 1, 2010.' . . . [W]hereas earlier cost reporting periods are governed by other preceding paragraphs of 413.78."[25] Further, CMS explicitly clarified that retroactive application of the amendments was neither intended nor permitted to pending appeals before the Board:

> Accordingly, we believe that it is apparent that the provisions of sections 5504(a)(3) and (b)(2) of the Affordable Care Act are not to be applied prior to July 1, 2010, irrespectively of whether a hospital may have had a jurisdictionally proper appeal pending as of March 23, 2010 on an IME or direct GME issue from a cost reporting period occurring prior to July 1, 2010.[26]

In summary, CMS explicitly and clearly maintains through its recent regulatory clarification at 42 C.F.R. § 413.78(g)[27] that the changes made in ACA §§ 5504(a) and (b) only apply prospectively beginning July 1, 2010 and do not apply to any appeals that were pending as of March 23, 2010 and had a GME or IME issue from a cost reporting period beginning prior to July 1, 2010.

The Board concludes that ACA § 5504 is not applicable to the subject appeal because fiscal years at issue in this case began before July 1, 2010 and that this appeal was not filed until April 1, 2010.[28] While the Board recognizes that the decision in this case conflicts with its 2014 decision in *Eastern Maine Med. Ctr. v. Blue Cross Blue Shield Ass'n* ("*Eastern Maine*"),[29] the Board notes that CMS clarified the regulation subsequent to the Board's decision.

This legal conclusion is consistent with the Board's 2015 decision in *Lutheran Hosp. of Fort Wayne Indiana v. Wisconsin Physicians Servs.*[30] which relies on the 2015 decision of the U.S. Court of Appeals, Sixth Circuit in *Covenant Med. Ctr., Inc. v. Burwell* ("*Covenant*")[31] which upheld CMS' regulatory clarification precluding retroactive application of ACA § 5504 (a) and § 5504 (b) to fiscal years occurring prior to its issuance.[32]

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[24] *See id.* at 50117-50122.
[25] *Id.* at 50118.
[26] *Id*. at 50119.
[27] *Id*. at 50117-50112, 50119 (amending 42 C.F.R § 413.78(g)(6)).
[28] *See*: Provider's Final Position Paper, Exhibit P-2.
[29] PRRB Dec. No. 2014-D10 (June 2, 2014), *rev'd*, CMS Adm'r Dec. (July 23, 2014).
[30] PRRB Dec. No. 2015-D13 (Aug. 4, 2015), *declined review*, CMS Adm'r (Sept. 22, 2015). *See also Integris/Deaconess 2005 Non-Provider Setting IME/GME CIRP Grp. v. Novitas Solutions, Inc.*, PRRB Dec. No. 2016-D14 (June 7, 2016), *declined review*, CMS Adm'r (Aug. 1, 2016).
[31] 603 Fed. Appx. 360 (6th Cir. 2015) (involving FYs 1999 to 2006).
[32] *See id*.

DECISION AND ORDER

After considering the Medicare law and program instructions, the evidence presented and the parties' contentions, the Board finds that the Medicare Contractor properly adjusted Saint Alphonsus' FY 2007 GME and IME payments for interns and residents rotating to nonhospital settings.

BOARD MEMBERS PARTICIPATING:

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Clayton J. Nix, Esq.
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FOR THE BOARD:

/s/
L. Sue Andersen, Esq.
Chairperson

DATE: February 23, 2017