PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

ON-THE-RECORD
99-D60

PROVIDER -
Bamna Home Health Care, Inc

Provider No. 23-7141

vs.

INTERMEDIARY -Blue Cross and Blue Shield United of Wisconsin

DATE OF HEARING-
June 17, 1999

Cost Reporting Period Ended -
December 31, 1993

CASE NO. 96-2056

INDEX

ISSUES:

1. Was the Intermediary's adjustment to interest expense relating to employment taxes proper?

2. Was the Intermediary's adjustment to interest expense relating to property taxes proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Bamna Home Health Care, Inc. ("Provider") is a Medicare certified, free standing, proprietary home health agency located in Detroit, Michigan. The Provider is owned by CEV Care Management, Inc. ("CEV"). CEV submits a Home Office Cost Statement in which costs are allocated to the Provider and one other non-certified component.[1]

Blue Cross and Blue Shield United of Wisconsin ("Intermediary") audited CEV's home office costs and the Provider's costs for the Medicare cost reporting period ended December 31, 1993. The Intermediary found that the Provider had claimed interest expense for assessments made as the result of the Provider not paying its employment taxes. The Provider had incurred $47,769 of Michigan Employee Security Act assessments, $6,998 of FUTA related interest expense, and $69,179 of Internal Revenue Service ("IRS") interest and abatements for a total of $123,946. The Intermediary disallowed this entire amount for the purpose of program reimbursement.[2]
In addition, the Intermediary found that the Provider received funds to pay the property taxes on a building owned by CEV. The Provider, however, did not pay the property taxes but used the funds to offset a payable to the owner. The interest expense related to the property taxes was claimed by the Provider on its Medicare cost report and was disallowed by the Intermediary.[3]
The amount disallowed was $3,829.[4]

On September 26, 1995, the Intermediary issued a Notice of Program Reimbursement reflecting its adjustments to the interest expenses claimed by the Provider. On March 20, 1996, the Provider appealed the Intermediary's adjustments to the Provider Reimbursement Review Board ("Board")

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[1] Intermediary's Position Paper at 1.

[2] Intermediary's Position Paper at 3.

[3] Intermediary's Position Paper at 5.

[4] Provider's Position Paper at 6.

pursuant to 42 C.F.R. §§ 405.1835-.1841, and has met the jurisdictional requirements of those regulations.[5] The amount of Medicare reimbursement in controversy is approximately $105,529.[6]

The Provider was represented by Katherine Karker-Jennings, P.A. The Intermediary was represented by Bernard M. Talbert, Associate Counsel, Blue Cross and Blue Shield Association.

Issue No. 1-Interest Expense Relating to Employment Taxes .

PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary's adjustment is improper. The workpapers supporting the adjustment conclude that the interest expense is unnecessary since the Provider's employment taxes should have been paid timely. This conclusion, however, does not take into account the particular facts impacting the Provider during the subject cost reporting period.[7]

The Provider asserts that it was a member of a plaintiffs' class action from 1991 through 1993, initialed by the National Association for Home Care ("NAHC") against the Health Care Financing Administration ("HCFA"). This action arose from the uniform disallowance of nearly all home health aide visits by Blue Cross and Blue Shield of Michigan, the Provider's then intermediary, against all provider contractors. The plaintiffs in the class action prevailed on the merits and the Provider was awarded $147,052 in settlement monies. Exhibit P-1. However, while NAHC was successfully litigating this case, the Provider found itself in a negative cash flow situation. Therefore, it hired legal counsel to reach settlement agreements and repayment plans with the IRS and the state for past due employment taxes. These repayment plans included interest expense and penalties.[8] Notably, the interest expense at issue did not arise from poor financial planning as asserted by the Intermediary.

The Provider also contends that the interest expense at issue, i.e., interest stemming from a repayment plan, is no different than a situation where a loan would have been secured from a lending institution.[9] Moreover, several attempts were made to secure such a loan. However, due to the Provider's negative cash flow, it received multiple rejections over several months. See Exhibit P-2.

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5 Intermediary's Position Paper at 1.

6 Provider's Position Paper at Introduction.

7 Provider's Position Paper at 2.

8 The Provider notes that it did not claim penalty expenses for the purpose of program reimbursement since that would be inconsistent with Medicare policy.

9 Provider's Position Paper at 3.

The Provider cites Guaynabo Home Health Care, Inc. v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Wisconsin, PRRB Dec. No. 97-D62, June 4, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,417, decl'd rev. HCFA Admin. July 7, 1997 ("Guaynabo"),[10] where the Board found that IRS assessed interest on the repayment of delinquent taxes is not a necessary cost if the provider could have secured an institutional loan. In part, the Board states:

> [i]t appears that the Provider had enough collateral to obtain a loan and could have attempted to do so. Since the Provider did not obtain a loan, the interest paid to both the federal and local authorities is considered to be a penalty and is not reimbursable by the Medicare program (emphasis added).

Guaynabo, Medicare & Medicaid Guide (CCH) ¶ 45,417.

The Provider notes that the agency in Guaynabo failed on the interest argument because it had the resources to qualify for a conventional loan. With respect to the instant case, however, the Provider unquestionably did not qualify - its repeated attempts to obtain a loan were all rejected. The only avenue available to the Provider was to negotiate a deal with the state and IRS directly, or lose its business altogether.

The Provider rejects the Intermediary's argument that a loan could have been secured if the Provider had not spent $14,000 on "luxury items" such as company parties and picnics, owner travel and professional memberships, in addition to paying the owners a salary.[11] The Provider argues that spending $14,000 on allowable company events which boost employee morale and productivity is hardly a luxury and certainly did not financially prevent a bank loan. Moreover, the so called luxury items and compensation levels were all adjusted by the Intermediary during audit.

The Provider also contends that Medicare recognizes that there may be times when providers do not have sufficient financial resources to pay all financial obligations in a timely manner.[12] Instructions contained in the Provider Reimbursement Manual, Part I ("HCFA Pub. 15-1") § 2305 has provisions for circumstances when a provider is unable to pay short term liabilities within 12-months after the end of its cost reporting period. These instructions provide guidance as to the cost report period in which the costs associated with the liability may be reimbursed, i.e., the period in which the liability was incurred or when it was paid.

In summary, the Provider maintains that it was experiencing cash flow problems due to an inappropriate intermediary disallowance of cost later adjudicated in the Provider's favor. The Provider was unable to

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[10] Exhibit P-3.

[11] Provider's Position Paper at 4.

[12] Provider's Position Paper at 5.

secure a conventional loan for delinquent tax payments, and entered into repayment plans with the state and IRS; to do otherwise would have driven the Provider out of business. Accordingly, the interest on the repayment plans mirror interest that would have been paid on a conventional loan and allowed by the Intermediary.

Further, there are no requirements for providers to pay their obligations timely. This is evidenced by the provision allowing costs associated with short term liabilities to be liquidated within 12 months after the end of the cost reporting period in which they were incurred. Consequently, the interest incurred for the past due employment taxes are allowable under Medicare regulations.

INTERMEDIARY’S CONTENTIONS:

The Intermediary contends that its adjustment is proper since interest incurred on assessments and abatements are not “reasonable costs” pursuant to 42 C.F.R. § 413.9.[13] In part, the regulations explain that reasonable costs include all costs that are “necessary and proper” in furnishing services, subject to principles relating to specific items of revenue and cost. The regulations define "necessary and proper costs" as:

> Costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. They are usually costs that are common and accepted occurrences in the field of the provider's activities.

42 C.F.R. 413.9(b) (emphasis added).

The Intermediary asserts that costs associated with the late payment of taxes are not a common occurrence in the Provider's field of activity. The disallowed costs are the result of poor financial planning on the part of the Provider, which should not result in an extra burden to Medicare beneficiaries.

The Intermediary also contends that the Provider’s financial condition is not a factor in this case and does not justify the interest assessments.[14] During the subject cost reporting period the Provider spent approximately $14,000 on items such as employee parties, picnics, owners travel and club memberships. Also, the three owners were paid in excess of $265,000. The payment of payroll taxes should take priority over these types of costs. The Medicare program should not share in penalties and interest associated with payroll taxes while the Provider incurs these types of luxury items.

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[13] Intermediary’s Position Paper at 3.

[14] Intermediary’s Position Paper at 4.

In conclusion, the Intermediary asserts that it properly disallowed interest and penalties associated with the late payment of employment taxes. These costs are not reasonable and necessary especially given the fact that other luxury type cash outlays were made by the Provider in the same year.

Issue No. 2: Interest Expense Relating to Property Taxes

PROVIDER'S CONTENTIONS:

The Provider contends that the facts and arguments surrounding this issue are the same as those discussed under Issue No. 1 above, except that they apply to property taxes rather than employment taxes. Accordingly, the Provider incorporates the text of its arguments for Issue No. 1 in full for the issue at hand. In general, the Provider explains that the Intermediary adjusted the subject interest expense because the Provider should have paid its property taxes on time. However, the Intermediary did not take into consideration the particular facts impacting the Provider's financial condition. [15]

In addition, the Provider rejects the Intermediary's argument that payment of a related party obligation is not reimbursable under 42 C.F.R. § 413.9. The Provider asserts that 42 C.F.R. § 413.17 requires the cost of services, facilities and supplies furnished to a provider by a related organization to be included in the provider's costs at the cost to the related organization. The property taxes and related interest are attributable to a facility used by the Provider and owned by a related party. Therefore, any arguments relevant to the related party arrangement are unwarranted. The substance of the issue at hand is whether or not the subject interest expense is a necessary and proper cost according to 42 C.F.R. § 413.9.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its adjustment is proper since interest expense related to obligations of a related party are not within the guidelines set forth in 42 C.F.R. § 413.9.[16] In part, the regulations state:

> [a]ll payments to providers of service must be based on the reasonable cost of services covered under Medicare and related to the care of beneficiaries. Reasonable costs include all necessary and proper costs incurred in furnishing the services, subject to principles relating to specific items of revenue and cost.

42 C.F.R. § 413.9 (emphasis added).

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15 Provider's Position Paper at 7.

16 Intermediary's Position Paper at 5.

Clearly, the payment of a related parties' delinquent obligations that should have been paid without the occurrence of any interest expense for the same reasons presented in Issue No. 1 above, is not a benefit to Medicare beneficiaries. The program should not share in costs resulting from poor financial planning.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.:

§ 1395x(v)(1)(A)	-	Reasonable Cost

2. Regulations - 42 C.F.R.:

§ 405.413.9 et seq.	-	Cost Related to Patient Care
§ 405.413.17	-	Cost to Related Organizations
§§ 405.1835-.1841	-	Board Jurisdiction

3. Program Instructions-Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

§ 2305	-	Liquidation of Liabilities

4. Case Law:

Guaynabo Home Health Care, Inc. v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Wisconsin, PRRB Dec. No. 97-D62, June 4, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,417, decl'd rev. HCFA Admin. July 7, 1997.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

Issue No. 1-Interest Expense Relating to Employment Taxes

The Provider did not pay its employer and employee related taxes. To satisfy these liabilities the Provider entered into extended repayment plans with the IRS and the Michigan State Government, which required the payment of both interest and penalties. The Provider did not charge payments made for penalties to the Medicare program but did claim the interest payments which were disallowd by the Intermediary. Significantly, the Intermediary asserts that costs associated with the late payment of taxes do not meet the program's definition of "necessary costs" since they are not: "usually costs that are common and accepted occurrences in the field of the provider's activities." 42 C.F.R. § 413.9.

The Provider argues that the interest expense should be allowed because its failure to pay the employment taxes and incur the interest was the fault of its previous intermediary. The Provider explains that the previous intermediary illegally withheld payments for home health aide visits creating cash flow problems for its operations. Ultimately, the issue was settled in a law suit where the Provider was awarded just over $147,000.

There is little evidence available, however, to determine whether or not the improper withholdings of the previous intermediary were the cause of the Provider's cash flow problems in the subject cost reporting period. While the record shows the Provider was unable to borrow funds from a lending institution during 1991 and 1992, it also shows that the Provider received its court settlement for the unpaid home health aide visits prior to March 22, 1992, which is prior to the beginning of the subject 1993 cost reporting period. Moreover, the record indicates that the interest assessed by the IRS relates to the non-payment of taxes for the years 1987-1990, which is prior to the years disputed in the court action.

The Intermediary did not address the court settlement and argue that the Provider had the necessary funds to pay the outstanding taxes. Rather, the Intermediary argues that the Provider did not have the money to pay the taxes due to poor planning. However, there is no evidence in the record to indicate that the Provider mismanaged its operations. Also, there is no evidence in the record showing that the Provider attempted to work with the Intermediary to help maintain a secure cash position.

Based upon these facts, the Board concludes that the Intermediary's adjustment is proper. The interest payments made by the Provider for unpaid employment taxes are not necessary costs pursuant to 42 C.F.R. § 413.9. These costs are not common and accepted occurrences in the Provider's operation. The Board notes, however, that had the evidence clearly shown that the Provider was unable to pay its taxes or secure a loan from a lending institution due to an inappropriate action by an agent of the federal government, it may have found differently. The Board believes that under unique circumstances such interest payments could be considered reasonable costs under program rules and regulations.

Issue No. 2: Interest Expense Relating to Property Taxes

Essentially, the parties enter the same arguments and contentions presented for Issue No. 1 above, as their positions for this issue. Respectively, there is no evidence indicating that the Provider was experiencing cash flow problems during the subject cost reporting period, albeit, from poor management or an improper withholding of payments by an agent of the federal government. Rather, the record shows that a factoring company advanced the Provider funds to pay a variety of expenses including property taxes. The Provider, however, diverted the funds provided for property taxes to some other use. As a result, the Intermediary disallowed a portion of the total interest charged by the factoring company equal to the ratio of the amount of funds provided for property taxes divided by the total amount of funds provided. This calcultion and resulting disallowance are proper.

DECISION AND ORDER:

The Intermediary's adustments disallowing interest expenses relating to unpaid employment taxes and property taxes are proper. The Intermediary's adustments are affirmed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker

Date of decision: August 19, 1999

Date of Decision:
FOR THE BOARD:

Irvin W. Kues
Chairman