PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

ON THE RECORD
2001-D20

PROVIDER -
Lifeline Home Health Services, Inc.
Garland, TX

Provider No. 45-7751

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/
IASD Health Services Corporation

DATE OF HEARING-
October 5, 2000

Cost Reporting Period Ended -
January 31, 1994

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ISSUES:

1. Was the Intermediary=s disallowance of subscription and publication costs proper?

2. Did the Intermediary properly disallow a portion of the owner=s compensation?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Lifeline Home Health Services, Inc.(AProvider@) is a closely held proprietary corporation located in Garland, Texas. The Provider furnishes home health care to patients located in and around the Dallas-Ft. Worth, Texas area.

IASD Health Services Corporation (AIntermediary@) audited the Provider=s Medicare cost report for its fiscal year ended January 31, 1994. Based upon its audit, the Intermediary determined that the Provider had claimed subscription and publication costs that were not related to patient care. Accordingly, the Intermediary made an adjustment disallowing these costs for the purpose of program reimbursement. In addition, the Intermediary made an adjustment disallowing a portion of the compensation paid to the Provider=s Assistant Administrator and Chief Financial Officer (ACFO@), for the purpose of program reimbursement. This adjustment included disallowances for time spent by the subject individual performing nonallowable activities, and for costs considered to be in excess of reasonable compensation levels based upon the Michigan Survey, and for time spent by the individual performing non-agency activities.[1] The specific disallowances made to the Assistant Administrator=s compensation, which total $39,844, are as follows:[2]

Total Compensation Claimed	$ 86,823
(1) Less costs related to nonallowable activities - 5%	$ 4,341
Compensation related to allowable activities-	$82, 482
(2) Reasonable Compensation (Michigan Survey)	$ 72,275
(3) Percentage of time spent on agency duties -	65%

Hours Worked at Church 1,085 (35%)
Hours Worked at Agency 1,973 (65%)

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1 Provider=s Position Paper at 1-2.

2 Intermediary=s Position Paper at 7.

Total Hours Worked	3,058 (100%)
Total Allowable Compensation	$ 46,979

On September 28, 1995, the Intermediary issued a Notice of Program Reimbursement reflecting the aforementioned adjustments. On March 11, 1996, the Provider appealed the adjustments to the Provider Reimbursement Review Board (ABoard@) pursuant to 42 C.F.R. '' 405.1835.-1841, and met the jurisdictional requirements of those regulations. The amount of program funds in controversy is approximately $39, 414 ($1,114 attributable to disallowed subscription and publication costs, and $38,300 attributable to disallowed owner=s compensation).[3]

The Provider was represented by J. Scott McDearman, Esq., of Grant, Konvalinka & Harrison, P.C. The Intermediary was represented by Bernard M. Talbert, Esq., Associate Counsel, Blue Cross and Blue Shield Association.

ISSUE No. 1- Subscriptions and Publications Costs

PROVIDER=S CONTENTIONS:

The Provider contends that the Intermediary=s adjustment is improper. The Provider explains that the Intermediary disallowed printing and distributing costs associated with a brochure entitled About Home Health Care Under Medicare.[4] This brochure was furnished to the Provider=s patients to educate them about the availability of services under the Medicare program. The Provider argues that these are allowable costs pursuant to Medicare rules and regulations.

Specifically, the Provider cites Medicare=s Provider Reimbursement Manual, Part I (AHCFA Pub. 15-1@) ' 2136.1, which states in part: A[a]dvertising costs incurred in connection with the provider=s public relations 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.@Id. Moreover, the Provider asserts that the manual also allows costs for advertising for any purpose related to patient care so long as they are reasonable. Respectively, the Provider argues that it distributed its brochure to various senior citizens groups and church groups, etc., purely to educate those individuals about home health services available for reimbursement under the Medicare program. The Provider explains that the brochure contains separate sections on services covered by Medicare, how an individual qualifies for Medicare, the advantages of the home setting for a patient, as well as other information. The Provider notes that promotional copy concerning its operation is conspicuously absent from the brochure; the only mention

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[3] Intermediary=s Position Paper at 3.

[4] See Exhibit P-1.

of the Provider is in a relatively generic message from its president.[5]

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that its adjustment disallowing the costs incurred by the Provider to print and distribute a brochure is proper. The Intermediary asserts that the brochure was used by the Provider to solicit patients and increase its utilization, and that costs associated with these efforts are clearly unallowable under Medicare rules.[6]

The Intermediary cites 42 C.F.R. ' 413.9(b)(2), which states:

> [n]ecessary and proper costs are 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 activity.

42 C.F.R. ' 413.9(b)(2).

Also, HCFA Pub. 15-1 ' 2136.2, which states in part:

> [c]osts of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable. Situations may occur where advertising which appears to be in the nature of the provider's public relations activity is, in fact, an effort to attract more patients. An analysis by the intermediary of the advertising copy and its distribution may then be necessary to determine the specific objective. . ., general advertising to promote an increase in the patient utilization of services is not properly related to the care of patients.

HCFA Pub. 15-1 ' 2136.2.

Respectively, the Intermediary explains that the Provider purchased 1,000 brochures on at least two different occasions, but had only 341 patients. As the number of brochures purchased was more than five times the number of patients, the Intermediary concludes that the primary use of the brochure was a referral source for the general public. The Intermediary maintains that the brochure is not related to patient care, and was used for the purpose of promoting the agency and increasing its patient utilization.

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[5] Provider=s Position Paper at 3.

[6] Intermediary=s Position Paper at 5.

ISSUE No. 2 - Owner=s Compensation

PROVIDER=S CONTENTIONS:

The Provider contends that the Intermediary=s adjustment to its controller=s compensation is improper for two reasons. First, the Intermediary relied upon a set of guidelines designed for occupational and physical therapy provider owners/administrators located in Michigan as opposed to a home health agency located in Texas. And, second, the Intermediary determined that 35 percent of the controller=s compensation should be denied after applying the Michigan guidelines because of his ministerial services at his church. This adjustment disregards the fact that the controller worked over 2000 hours for the Provider during the subject cost reporting period.[7]

The Provider contends that Medicare law and regulations require the reimbursement of a reasonable allowance of compensation for providers' owners, provided that services are actually performed and are necessary functions. Regulations at 42 C.F.R. ' 413.102 define compensation as including salary amounts paid for managerial, administrative, professional and other service, as well as amounts paid by the provider for the personal benefit of the proprietor and deferred compensation. The regulation further requires the compensation to be reasonable and necessary. Notably, the Intermediary has not questioned the necessity of the functions performed by the Provider=s controller.

The Provider contends that the regulation also defines reasonableness as requiring that the compensation allowance: Abe such an amount as would ordinarily be paid for comparable services by comparable institutions.@ 42 C.F.R. ' 413.102. The regulation further explains that reasonableness depends upon the facts and circumstances of each case.

Respectively, the Provider asserts that the Intermediary failed to comply with the pertinent regulation, and its adjustment should therefore be reversed. Specifically, program guidelines at HCFA Pub. 15-1 ' 902.2 and ' 902.3, refer to comparable services by comparable institutions as a standard for determining reasonable compensation. The Intermediary, however, determined that the controller=s salary was excessive based solely upon Michigan physical therapy owner guidelines. Nowhere in the Intermediary=s work papers are any references to any entity similarly situated to the Provider. The Intermediary failed to compare the controller=s salary with that of any provider within the Dallas-Ft. Worth area or anywhere else in Texas.

Moreover, the Provider contends that the Intermediary failed to comply with the program=s rules regarding a comparison to similar institutions. In particular, the Provider explains that HCFA Pub. 15-1

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[7] Provider=s Position Paper at 4.

' 904.1 lists four factors that are to be considered by auditors in determining comparability of providers. Those factors include (1) the size of an institution; (2) classification of institution by type and range of services offered; (3) number and types of personnel employed; and (4) geographical location of the provider. The Provider asserts, however, that a review of the Intermediary=s work papers reveal that the auditors considered only one of the factors required by the manual, i.e., size of the institution. Accordingly, the Intermediary=s adjustment should be reversed.

The Provider cites Midwest Speech and Hearing Associates, Inc. v. Aetna Life and Casualty Company, PRRB Dec. No. 85-D39, April 23, 1985, Medicare and Medicaid Guide (CCH) 34,649, decl=d rev., HCFA Admin., June 4, 1985, where the Board reversed the intermediary's denial of owner=s compensation of a speech pathology provider. Specifically, the Board found that the intermediary's use of respiratory therapy and physical therapy guidelines as a basis for determining reasonable compensation was improper. Similarly, in Total Care, Inc. (Charlotte, NC) v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of South Carolina, PRRB Dec. No. 91-D65, August 22, 1991, Medicare and Medicaid Guide (CCH) 39,588, decl=d rev., HCFA Admin., October 8, 1991 (ATotal Care, Inc.@), the Board reversed the intermediary's partial disallowance of a home health agency owner=s compensation due to the intermediary's failure to obtain valid comparisons. According to the Provider, the intermediary in that case had utilized studies that failed to consider salary amounts paid by comparable institutions, and therefore ignored market factors. Likewise, the Intermediary here ignored market factors in determining the reasonableness of the controller=s compensation.[8]

The Provider contends that the Board has recently rejected the Michigan Survey as a legitimate methodology for determining allowable owner's compensation. See Call-A-Nurse v. Blue Cross Blue Shield of Iowa and Blue Cross Blue Shield of Illinois, PRRB Dec. No. 98-D50, May 20, 1998, Medicare and Medicaid Guide (CCH) 46,331, rev=d., HCFA Admin., July 7, 1998, Medicare and Medicaid Guide (CCH) 80,060 (ACall-A-Nurse@), where the Board determined that the Michigan Survey: Adoes not produce results that are representative of the provider's organization and, therefore, cannot serve as the basis for a cost disallowance.@Id. Further, the Board found: Athere is no assurance that the compensation data contained in the Michigan Survey is representative of the compensation levels paid by health care organizations in the provider's geographical location. In addition, the Michigan survey was designed for OPT owners / administrators rather than Home Health care owners/administrators.@Id.

The Provider contends that the Intermediary=s adjustment limiting the controller=s compensation to 65 percent of the amount resulting from the application of the Michigan Survey and the time allocation of the controller to non-agency activities should also be reversed.[9] The basis for the Intermediary's

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[8] Id.

[9] Provider=s Position Paper at 7.

adjustment is the fact that the controller worked as a minister for approximately twenty hours per week during the subject cost reporting period. However, the Intermediary also does not dispute the fact that the controller worked full time for the Provider during this same period. Notably, the Provider=s time records show that the controller worked 2,085 hours, over forty hours per week, for the Provider.

In conclusion, the Provider explains that despite the fact that the controller worked full time for the Provider, he was penalized because he worked additional hours at his church. The Intermediary based its adjustment on the controller=s total hours worked as opposed to hours worked for the Provider. The Provider asserts that had the controller devoted 20 to 30 hours per week to the Provider, the Intermediary's adjustment would be logical. Here, however, the controller was unquestionably a full time employee devoting more than 40 hours per week to the Provider=s operations. Had the controller chose not to work at the church the Intermediary would not have made its adjustment. Notably, the time the controller devoted to his church was not time away from his services to the provider but time in addition to those services. If the controller had devoted 20 hours per week to charity in addition to working 40 hours per week for the Provider, the Intermediary would have made no adjustment. If he did nothing other than work for the Provider, the Intermediary would have made no adjustment. Clearly, this adjustment is erroneous and should be reversed.

INTERMEDIARY=S CONTENTIONS:

The Intermediary contends that its adjustment reducing owner=s compensation was proper based upon program rules at 42 C.F.R ' 413.9, Cost Related to Patient Care, 42 C.F.R ' 413.102, Compensation of Owners, and HCFA Pub. 15-1 ' 900ff, Compensation of Owners.[10] The Intermediary explains that the employee in question is the owner's spouse and is therefore subject to the regulations and manual instructions concerning owner's compensation.

The Intermediary contends that regulations at 42 C.F.R. ' 413.102(b)(1) and (2) state:

> (1) *Compensation*. Compensation means the total benefit received by the owner for services he furnishes to the institution. . .
>
> (2) *Reasonableness*. Reasonableness requires that the compensation allowance--
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> (i) Be such an amount as would ordinarily be paid for comparable services by comparable institutions; and
>
> (ii) Depend upon the facts and circumstances of each case.

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[10] Intermediary=s Position Paper at 7.

42 C.F.R. ' 413.102(b)(1) and (2).

The Intermediary further contends that 42 C.F.R ' 413.102(c)(2) allows it to determine reasonable compensation by Aother appropriate means.@ Specifically, the regulation states:

> [o]rdinarily compensation paid to proprietors is a distribution of profit. However, if a proprietor furnishes necessary services for the institution. . ., reasonable compensation for these services is an allowable cost. If services are furnished on less than a full-time basis, the allowable compensation should reflect an amount proportionate to a full-time basis. Reasonableness of compensation may be determined by reference to, or in comparison with, compensation paid for comparable services and responsibilities in comparable institutions, or it may be determined by other appropriate means. (Emphasis added.)

42 C.F.R ' 413.102(c)(2).

The Intermediary adds that its use of other means to determine the reasonableness of the subject owner=s compensation is further supported by HCFA Pub. 15-1 ' 902.3, which defines reasonable compensation as the fair market value of services rendered by an owner in connection with patient care. Fair market value is determined by supply and demand factors of the open market. Respectively, however, the Intermediary argues that there is no open market for positions like the owner=s spouse, or Assistant Administrator and Chief Financial Officer (ACFO@). Therefore, Aother appropriate means@ must be used to determine reasonableness.

In accordance with the aforementioned rules, the Intermediary explains that it used the Michigan Survey method as Aother appropriate means@ to determine the reasonableness of the compensation paid to the Provider=s CFO. Moreover, the Intermediary contends that the Michigan Survey method yielded a proper end result.

The Intermediary explains that the Michigan Survey method includes salaries and fringe benefits from 16 home health agencies located in Michigan.[11] The survey includes annual compensation ranges (i.e., low and high) for four common key administrative positions: Administrator/Director, Assistant Administrator/Assistant Director, Controller and Business Manager/Office Manager. To place an employee within a salary range, a point system is used. The relative weights or points used in the survey are as follows :

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[11] Exhibit I-7.

Category	Maximum Points	Points Awarded
Education	20	15
Experience	20	14
Volume	30	10
Job Duties	20	12
Geographic Location	10	10
Total	100	61

The Intermediary also explains that the Michigan Survey includes compensation ranges for years 1975 through 1980. However, adjustment factors furnished by HCFA were used to update the survey data to the Provider's fiscal year as required by Medicare=s Part A Intermediary Manual, Part 2 (AHCFA Pub. 13-2") ' 2120, Compensation of Owners. Notably, the purpose of the adjustment factors is to adjust for changes in the fair market value of services rendered and, in general, to reflect changing economic conditions.[12]

The specific application of the Michigan Survey method to the subject employee/CFO is as follows:

> Education - Maximum points 20. Points awarded 15 (5 points for a Bachelors Degree, plus 5 points for Added Experience, plus 5 points for Special Courses).
>
> Experience - Maximum points 20 (two points per year as a practicing controller/accountant up to a maximum of 10 years). Experience as a practicing controller in excess of 10 years is a substitute for education - Masters Degree in Business Administration at 1/2 point per year for an additional 10 years of experience (i.e., maximum of 5 points). Points awarded 14.
>
> Volume - Maximum points 30 with a minimum of 5 points for less than 10,000 patient visits. 10 points awarded based on 25,111 patient visits.
>
> Job Duties - Maximum points 20, depending on the level of personal involvement and responsibility. Points awarded 12 (2 points for External/Professional Relations plus 10 points for Budget/Monetary). Assignment of points based on job descriptions, Key Personnel and Compensation Questionnaires, Exhibit I-4, and organizational structure, i.e., the extent to which key employees, such as controller, assistant administrator and office manager are employed.

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[12] See Exhibit I-8 for a listing of HCFA=s adjustment factors.

> Geographic Location - A maximum of 10 points is allowed for a provider located in a metropolitan area with a population exceeding 200,000. The minimum points are 5 for a provider located in a rural area with a population of less than 20,000. The Provider was awarded 10 points for an urban area with a population between 20,000 and 200,000.

The Intermediary explains that Exhibit I-9 contains an explanation of the geographic location of the providers included in the Michigan Survey. The Intermediary notes that the majority of providers surveyed were located in high wage cost areas such as Detroit. The Intermediary believes that salaries from the high wage area of Detroit and comparable areas resulted in the establishment of the high side of the salary range. Respectively, the Intermediary asserts that the Provider has not demonstrated that the wage levels in the Michigan Survey are not comparable to salaries in the Dallas, Texas area, the location of the Provider.

The Intermediary also explains that it measured the reasonableness of the subject owner=s compensation using the Michigan Survey=s data for home health agency controllers, i.e., the top-level financial position. The Intermediary asserts that the duties and responsibilities of the subject employee, Assistant Administrator/CFO, are comparable to those of the controllers in the survey. Moreover, the Intermediary notes that the Provider has not submitted documentation that would indicate that the services are not comparable.

The Intermediary rejects the Provider=s argument that the Michigan Survey fails to follow program rules for determining reasonable compensation. Recently the HCFA Administrator reversed the Board=s decision in High Country Home Health Care, Inc. v. Blue Cross and Blue Shield Association. et al., PRRB Dec. No. 98-D33, March 18, 1998, Medicare and Medicaid Guide (CCH) 46,172, rev=d., HCFA Admin., May 22, 1998, Medicare and Medicaid Guide (CCH) 80, 057 (AHigh Country Home Health Care@) finding that the Michigan Survey methodology is an appropriate means to determine the reasonableness of owner's compensation as provided by the regulations. The Intermediary asserts that its position is also supported by another recent decision issued by the HCFA Administrator reversing the Board=s decision in Call-A-Nurse. In that case, the HCFA Administrator again found that the intermediary's use of the Michigan Survey was an appropriate means for determining reasonable owner's compensation.

The Intermediary also rejects the Provider=s argument that the salary of its Assistant Administrator/CFO was not compared to the salaries paid to individuals in comparable positions within the Dallas/Ft. Worth area, or anywhere else in Texas. The Intermediary explains it corroborated the results of the Michigan Survey through a comparison of data contained in the Home Care Salary & Benefits Report 1994-1995, Exhibit 1-12. This report identifies the low, median, and high salary levels for the top level financial director position for a for-profit home health agency in Region 7 as $38,883, $50,000, and $62,889, respectively. The Intermediary asserts that the results of the Michigan Survey are consistent with this data as follows:

1994-1995 Home Care Survey-Top Level	
Financial Director, Region 7	$62,889
Inflation Factor for 1994	2.60%
Adjusted Salary	$61,295[13]
Nonstatutory Fringe Benefits	20.64%
Adjusted Compensation	$73,946
Michigan Survey/Method	$72,275
Variance	$ 1,671

The Intermediary asserts that the results of the Michigan Survey are also comparable to the data contained in Home Care Survey data based upon gross revenues. Based upon the Provider=s total revenue of $2,318,774, the average compensation for a for-profit agency top level financial director is as follows:

1994-1995 Home Care Survey (Revenue	
Range - $1,000,000 to $2,999,999)	$57,575
Inflation Factor for 1994	2.60%
Adjusted Salary	$56,116
Nonstatutory Fringe Benefits	20.64%
Adjusted Compensation	$67,698
Michigan Survey/Method	$72,275
Variance	($ 4,577)

The Intermediary also explains that the Home Care Report identifies a high salary for the Dallas/Ft. Worth area at $77,000 for a top-level financial director, and the high salary for the state of Texas of

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[13] The Board notes an apparent error in the Intermediary=s calculation. The Adjusted Salary amount shown here should be $61,254 instead of $61,295. The effect of this error on the bottom line Variance is inmaterial.

$63,018. When adjusted for inflation, these salaries equate to $75,049 and $61,421, respectively.

In all, the Intermediary asserts that other surveys are consistent with/and support the Michigan Survey. Accordingly, it has fulfilled its responsibility to determine reasonableness. It has obtained, by survey, a range of compensation levels for comparable institutions and applied these to the Provider=s owner=s compensation.

Moreover, if the Provider wishes the Board to disregard the Michigan Survey and the supporting surveys noted above, it has the burden to produce some evidence of the reasonableness of the claimed compensation levels. In the instant case, the Provider did not submit any alternative surveys or evidence that it sought the advice of any consultants or experts in the field of compensation. Instead, the Provider's main argument is that the Michigan Survey was not appropriate. In the absence of better data, the Intermediary contends that the Michigan Survey, updated with HCFA inflation factors, provides the best available evidence for objectively determining reasonable compensation levels in this case. Notably, the Provider refers to Total Care, Inc, where the Board determined that the provider=s compensation was reasonable and reversed the intermediary's adjustment. However, there is a significant difference between that decision and the instant case. In Total Care, Inc. the provider submitted its own compensation study which determined a reasonable compensation range.

The Intermediary contends that its adjustment further reducing the subject owner=s compensation for nonallowable duties performed while working at the Provider=s site is also proper.
A review of the Provider=s time studies showed that the subject individual spent 112 hours on nonallowable activities including Chamber of Commerce and community awareness/education. Since this represents about 5 percent of the individual=s time working at the Provider=s site, an adjustment to disallow $4,341 of his compensation is appropriate. Notably, the Provider does not appear to dispute this portion of the adjustment.[14]

Finally, the Intermediary contends that the portion of its adjustment resulting from the allocation of the subject owner=s compensation based upon total hours worked is also proper.[15]

According to HCFA Pub. 15-1 ' 904.2, if an owner is engaged in another activity he or she could not ordinarily render full-time services for the provider. Therefore, it is appropriate to use a base of 3,058 hours to allocate the subject owner=s compensation between the activities performed since the Provider's time studies documented that the Assistant Administrator/CFO worked in excess of 2,080

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[14] Intermediary=s Position Paper at 13.

[15] Id.

hours for the Provider and approximately twenty hours per week for the church. By using total hours worked, the Intermediary hopes to establish the reasonable compensation for the position itself. The Intermediary explains that salaried employees (or owners) are not paid an hourly rate, but are compensated for the job itself. Therefore, when owners are engaged in activities outside of the agency, the Intermediary must look at the total time spent by the owner in order to properly account for the portion of his/her time spent on agency business. The Intermediary asserts that hours worked is the only method available to determine this allocation. The Intermediary finds support for its position citing Home Health Concepts. Inc. v. Blue Cross and Blue Shield Association, et al., PRRB Dec. No. 93-D58, July 19, 1993, Medicare and Medicaid Guide (CCH) 41,607, decl=d rev., HCFA Admin., September 9, 1993 (AHome Health Concepts@).

Specifically, the Intermediary explains that in Home Health Concepts the owner reported that he worked 40 hours per week for the agency and 15 to 20 hours per week at a pharmacy. He did not maintain time studies. The Board found that the owner's time was divided between the home health agency and the pharmacy and recommended a disallowance based upon the time the owner worked at the pharmacy in relation to the overall hours worked. In the instant case, the owner split his time between performing pastoral duties and his duties as CFO for the Provider. He maintained time studies for his time spent on church activities and was able to document that he spent approximately twenty hours per week at the church. The Provider=s time studies (Exhibit 1-4) indicate that considerable time was spent on church activities nearly every day, not solely on weekends. The Intermediary also cites the HCFA Administrator's decision reversing the Board in High Country Home Health Care concluding that the Intermediary properly adjusted the provider's compensation based upon a percentage of total hours worked.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

   '' 405.1835.-1841 - Board Jurisdiction

   ' 413.9 et seq. - Cost Related to Patient Care

   ' 413.102 et seq. - Compensation of Owners

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

   ' 900 et seq. - Compensation of Owners

   ' 2136 et seq. - Advertising Costs

3. Program Instructions-Part A Intermediary Manual, Part 2 (HCFA-Pub.13-2):

' 2120 - Compensation of Owners

4. Case Law:

Midwest Speech and Hearing Associates, Inc. v. Aetna Life and Casualty Company, PRRB Dec. No. 85-D39, April 23, 1985, Medicare and Medicaid Guide (CCH) &34,649, decl=d rev., HCFA Admin., June 4, 1985.

Total Care, Inc. (Charlotte, NC) v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of South Carolina, PRRB Dec. No. 91-D65, August 22, 1991, Medicare and Medicaid Guide (CCH) &39,588, decl=d rev., HCFA Admin., October 8, 1991.

Call-A-Nurse v. Blue Cross Blue Shield of Iowa and Blue Cross Blue Shield of Illinois, PRRB Dec. No. 98-D50, May 20, 1998, Medicare and Medicaid Guide (CCH) &46,331, rev=d., HCFA Admin., July 7, 1998, Medicare and Medicaid Guide (CCH) &80,060.

High Country Home Health Care, Inc. v. Blue Cross and Blue Shield Association. et al., PRRB Dec. No. 98-D33, March 18, 1998, Medicare and Medicaid Guide (CCH) &46,172, rev=d., HCFA Admin., May 22, 1998, Medicare and Medicaid Guide (CCH) &80,057, rev=d., U.S. District Ct. Wy., No. 98-CV-184-J, March 25, 1999, Medicare and Medicaid Guide (CCH) &300,173.

Home Health Concepts. Inc. v. Blue Cross and Blue Shield Association, et al., PRRB Dec. No. 93-D58, July 19, 1993, Medicare and Medicaid Guide (CCH) &41,607, decl=d rev., HCFA Admin., September 9, 1993.

5. Other :

Provider Brochure-About Home Health Care Under Medicare.

Michigan Survey

Home Care Salary & Benefits Report 1994-1995

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- Subscriptions and Publications Costs

The Intermediary disallowed costs incurred by the Provider to have a brochure printed and distributed to its patients, senior citizen groups, and church groups. The Intermediary concluded that the costs were incurred by the Provider to increase patient utilization rather than for purposes pertaining to public relations. The Intermediary=s conclusion is founded upon the fact that the Provider purchased at least 2,000 brochures but had only 341 patients.

The Intermediary=s adjustment is, however, improper. A review of the actual brochure shows that it is clearly designed to educate the public on home health care under the Medicare program. There is only one small passage contained in the brochure which refers to the Provider, and its intent is easily attributed to enhancing the Provider=s public image rather than patient solicitation; it does not, for example, display the Provider=s phone number or the name of a contact person.
In addition, there is no relevance to the Intermediary=s argument regarding the number of brochures ordered by the Provider. The record shows that the Provider purchased its brochure in quantities of 1,000 copies per order from its printer. This pattern has no significance since it is often cost effective to purchase printing copies in large quantities and, notably, many printers have minimum ordering requirements.

ISSUE No. 2 - Owner=s Compensation

There are three components to the Intermediary=s adjustment. First, the Intermediary disallowed 5 percent of the Assistant Administrator/CFO=s compensation for time spent by the individual performing activities not related to patient care. Second, the Intermediary reduced the remaining compensation to an amount it deemed reasonable by applying the Michigan Survey. And third, the Intermediary allocated the then remaining compensation between the Provider and a church where the individual also worked.

Respectively, the Board finds as follows:

The Provider did not dispute the 5 percent reduction made to its Assistant Administrator/CFO=s compensation for time spent by the individual performing Chamber of Commerce and community awareness/education activities. Accordingly, this portion of the Intermediary=s adjustment is deemed proper.

The second part of the Intermediary=s adjustment is also proper. As noted above, the Intermediary used the Michigan Survey to determine the reasonableness of the subject owner=s compensation. The Michigan Survey is a methodology that can be used for that purpose pursuant to 42 C.F.R. ' 413.102(c)(2), which states in part: A[r]easonableness of compensation may be determined by reference to, or in comparison with, compensation paid for comparable services and responsibilities in

comparable institutions, or it may be determined by other appropriate means. Id. (Emphasis added.)

The Board wishes to emphasize that it has been especially critical of the Michigan Survey in certain other cases finding that its application did not produce sound results. The Board points out, however, that in each of those other cases substantive evidence was presented to support a different or greater compensation amount. With respect to the instant case, the Michigan Survey is the best data placed into evidence regarding reasonable compensation levels. While the Provider argues that the Michigan Survey should not be used to evaluate its owner=s compensation, the Provider furnished no evidence to support the reasonableness of the amount claimed. Contrastingly, the Intermediary corroborated the results it produced using the Michigan Survey with data contained in the Home Care Salary & Benefits Report 1994-95, prepared by John R. Zabka Associates, Inc.

The Board concludes by finding that the third part of the Intermediary=s adjustment to the subject owner=s compensation is improper. The Intermediary found contemporaneous time records maintained by the Provider showing that its Assistant Administrator/CFO worked in excess of 2080 hours for the Provider during the subject cost reporting period. Because the time records also showed that the individual worked an additional 20 hours per week for the church, the Intermediary disallowed 35 percent of the remaining compensation by allocating it to church activities based upon total hours worked, i.e., the number of hours worked for the Provider plus the number of hours worked at the church. In reaching this decision, the Intermediary relied upon program instructions at HCFA Pub. 15-1 ' 904.2.D.2, which state:

> [i]f an owner is engaged in another activity, such as an owner administrator also having a private medical practice, he ordinarily could not render full-time services as administrator of the institution.

HCFA Pub. 15-1 ' 904.2.D.2 (emphasis added).

Clearly, the Intermediary erred by disregarding its own finding that the Provider=s Assistant Administrator/CFO actually worked a full-time number of hours for the Provider.

The Board notes that a more complete reading of the manual indicates that once an owner has in fact worked a full-time number of hours for a provider, as in the instant case, that an allocation or apportionment of his or her salary for time spent doing other activities is unwarranted. Specifically, program instructions at HCFA Pub. 15-1 ' 904.2.C.1 state:

> [i]nformation as to the owner=s actual duties, responsibilities, hours, and days regularly worked, etc., should be obtained. Compensation for Afull-time@ service requires that at least 40 hours per week be devoted to the duties of the position for which compensation is requested. Owners devoting less than 40 hours per week to the position will be

> compensated on a proportionate basis, with 40 hours per week considered to be the full-time basis for such proportionate compensation.

HCFA Pub. 15-1 ' 904.2.C.1 (emphasis added).

Finally, the Board rejects the Intermediary=s reliance upon the decision it rendered in Home Health Concepts, and the Administrator=s decision in High Country Home Health Care to help support its position. In both of these cases, as distinguished from the instant case, there were no substantive records supporting the providers= claims that the subject individuals worked full-time for their facilities. Moreover, in Home Health Concepts, it was unclear as to how the subject compensation was generated since the provider also owned the pharmacy where the owner worked. Notably, in the instant case, the Intermediary=s records show that the subject owner was compensated by the church for the time he spent working there. Exhibits I-4-10 and I-4-21. In addition, the Board notes the District Court=s decision reversing the Administrator in High Country Home Health Care, Medicare and Medicaid Guide (CCH) &300,173.

DECISION AND ORDER:

Issue No. 1- Subscriptions and Publications Costs

The Intermediary=s adjustment disallowing costs incurred by the Provider to have a brochure entitled About Home Health Care Under Medicare printed and distributed to its patients, senior citizen groups, and church groups is improper. The Intermediary=s adjustment is reversed.

Issue No. 2 - Owner=s Compensation

The portion of the Intermediary=s adjustment based upon time spent by the Provider=s Assistant Administrator/CFO performing activities not related to patient care is proper. Similarly, the portion of the Intermediary=s adjustment resulting from the application of the Michigan Survey to determine reasonableness is proper. The portion of the Intermediary=s adjustment based upon an allocation using total time worked is, however, improper. Therefore, the Intermediary=s adjustment is modified.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esq.
Martin W. Hoover, Jr. Esq.
Charles R. Barker
Stanley J. Sokolove

Date of Decision: Apr. 26, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman