PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2003-D42

PROVIDER –
VNA of Rhode Island, Inc.
Providence, Rhode Island

Provider No. 41-7001

vs.

INTERMEDIARY – Blue Cross Blue Shield Association/Associated Hospital Service

DATE OF HEARING -
July 9, 2003

Cost Reporting Period Ended
September 30, 1997

CASE NO. 02-1198

INDEX

ISSUE:

Was the Intermediary's disallowance of the Provider's Spanish and Portuguese interpreter expenses proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

VNA of Rhode Island, Inc. ("Provider") is a proprietary home health agency located in Providence, Rhode Island. For its cost reporting period ended September 30, 1997, the Provider claimed $80,520 for Spanish interpreter services and $46,213 for Portuguese language services from a company named Viva Brasil. Associated Hospital Service ("Intermediary") disallowed these costs because the Provider was unable to produce a copy of its contract with this contractor. The Intermediary maintained that the contract was necessary to verify charges, costs, and actual delivery of services attributed to Viva Brasil and to insure that the Provider was in compliance with Medicare's "access clause" requirements found at 42 C.F.R. §§420.300-420.302. These regulations require that when a contract for services results in payment of more than $10,000 in a twelve month period, the Providers must include a clause in the contract providing for access to the contractor's records.

On September 28, 2001, the Intermediary issued a Notice of Program Reimbursement reflecting the subject disallowances of interpreter services. On March 18, 2002, the Provider appealed the adjustments to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§405.1835-405.1841 and met the jurisdictional requirements of those regulations. The amount of Medicare funds in controversy is approximately $84,000.[1]

The Provider was represented by Lawrence W. Vernaglia, Esq., of Hinckley, Allen & Snyder LLP. The Intermediary was represented by Eileen Bradley, Esq., Associate Counsel, Blue Cross Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that it maintained records regarding its transactions with Viva Brasil, including fees paid and services rendered, and shared this information with the Intermediary. Since the Intermediary never attempted to gain access to Viva Brasil's records, the Provider asserts that it met the intent of Medicare's access provisions.[2]

The Provider cites the Board's decision in The Arlington Hospital v. Blue Cross Blue Shield Association Blue Cross and Blue Shield of Virginia, PRRB Dec. No. 97-D79, July 8, 1979, Medicare & Medicaid Guide (CCH)¶45,493, aff'd in part and rev'd in part, HCFA Administrator Dec., September 8, 1997 ("Arlington Hospital"), as follows:

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[1] Provider Position Paper at 2. Intermediary Position Paper at 4.

[2] Provider Position Paper at 8.

> [T]he Board is not persuaded by the Intermediary's argument concerning the applicability of the Access Clause. The Board finds that the Provider's provision of information concerning its collection contract in response to the Intermediary's discovery request meets the spirit and goals of the access to records provision. 42 U.S.C. §1395x(v)(I)(i).

Arlington Hospital (emphasis added).[3]

The Provider also cites to the preamble of 42 C.F.R.§420 Subpart D (Access to Books, Documents, and Records of Subcontractors), which states in part:

> We [HCFA] believe that Congress intended that the provision [42 U.S.C. 1395x(v)(1)(I)] should be used to provide access to contracts, books, documents, and records when necessary and not to penalize providers that inadvertently omit the required provision from a covered contract, but which nevertheless permit access of the required materials in a timely and otherwise satisfactory manner.

47 Fed. Reg. 58260, 58263 (Dec. 30, 1982)(emphasis added).[4]

The Provider asserts that the Intermediary's denial of reimbursement associated with the subject costs when there is no allegation that the services were not provided as claimed and when the Intermediary never desired to review the subcontractor's records, is arbitrary and capricious.

The Provider disputes the Intermediary's argument that the pertinent regulations allow no discretion to reimburse providers where a required access clause has been omitted.[5] The Provider again cites to 47 Fed. Reg. 58260, 58263, stating in part: ". . . we proposed that when we discover that a contract subject to the requirements lacks the access provision, we would not automatically deny reimbursement of the costs of the subject contract." Id. Moreover, the Provider cites Medicare's Provider Reimbursement Manual, Part I ("HCFA Pub. 15-1")§2441, which states:

> [i]f a provider demonstrates satisfactorily that the decision not to include the clause was made in good faith with a reasonable basis, but cannot amend the contract because the contractor is no longer in business, the intermediary will make a determination as to the reasonableness of the costs of the subcontractor's services using available information.

HCFA Pub. 15-1§2441.

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[3] Exhibit P-4.
[4] Exhibit P-2.
[5] Provider Position Paper at 9.

The Provider argues that in its prior year cost reporting period, Viva Brasil's services were used to much less extent than during FYE 9/30/97. Most of its interpreter services had been provided by a different vendor (International Institute). Thus, it is understandable why the Provider failed to anticipate the need for an access clause the following year when the use of Viva Brasil's services expanded. The Provider claims that its situation is nearly identical to the examples presented in PRM 15-1§2441 meriting reimbursement absent an access clause. When the need to seek an access clause was discovered, the attempt was unsuccessful because Viva Brasil was out of business.[6] The Provider was, therefore, unable to amend its agreement with the vendor and add an access clause, but the failure to do so was understandable and made in good faith.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Provider was unable to produce a copy of its contract(s) with Viva Brasil, even though it appears the Provider used Viva Brasil's services in 1996, 1997, and part of 1998. The Intermediary asserts, therefore, that the Provider's charges, costs, and actual delivery of services applicable to Viva Brasil could not be verified as required by Medicare's Accounting Records and Reports requirements at 42 C.F.R.§§413.20 and 413.24. The Intermediary explains that invoices, although available, are insufficient to reach a fair determination of the Provider's costs [7]

The Intermediary contends that the Provider's inability to produce a copy of its contract(s) with Viva Brasil also means that it is out of compliance with Medicare's statute and regulations pertaining to the access to the books and records of subcontractors. Medicare law at 42 U.S.C.§1395x(v)(1)(I) specifically prohibits program payments from being made pursuant to a contract between a provider and subcontractor (where costs exceed $10,000 in a 12-month period) that does not contain a clause making the subcontractor's books and records available for review (an "access clause").[8]

Pursuant to 42 C.F.R.§420.300ff, the implementing regulations, the access clause requirements apply both to the Provider, a home health agency, as well as Viva Brasil, a subcontractor. Moreover, the relationship between the Provider and Viva Brasil was a covered contract arrangement. In support of its position on these matters, including Medicare's acceptance of "letters of understanding" when there is an oral contract, the Intermediary references the discussions contained in the preambles to the Proposed Rule, the Final Rule With Comment Period, and the Final Rule promulgating 42 C.F.R. 420 §420.300ff.

The Intermediary contends that the Provider's reliance upon the Board's decision in Arlington Hospital misapprehends the facts and regulations supporting its adjustments. The Intermediary asserts that the Board's decision in that case shows that the access

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[6] Provider Position Paper at 10.
[7] Intermediary Position Paper at 5 and 22.
[8] Intermediary Position Paper at 7, 9 and 24. Exhibit I-4.

clause factor had little bearing on the Arlington case which pertained to the adequacy of bad debt collection activities.[9]

The Intermediary disputes the Provider's argument that it could not obtain an access clause because Viva Brasil had gone out of business. The Intermediary contends that the Provider must have known of its access clause responsibilities considering it has been in existence since 1972. The statute was effective in 1980 and three Federal Register publications had addressed the implementing regulations.[10]

The Intermediary also disputes the Provider's argument that it had a "good faith" reason for not obtaining an access clause at the initiation of its relationship with Viva Brasil. The fact that the Provider had entered into a relatively new relationship with Viva Brasil argues more for the need of an access clause than not for having one.

Finally, the Intermediary contends there is no relevance to the fact that it did not actually request access to Viva Brasil's books and records or to the Provider's argument regarding this matter. The Intermediary asserts that the statute and regulations are clear; Medicare will not reimburse provider costs for services furnished under an affected contract that does not contain an access clause.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of Medicare law and guidelines, the parties' contentions and evidence presented, finds and concludes that the Intermediary properly disallowed costs claimed by the Provider for Spanish and Portuguese interpreter services.
It is undisputed that the Provider acquired interpreter services from outside contractors. The Intermediary disallowed the costs claimed by the Provider with respect to one contractor because the Provider could not produce a copy of its contract(s) with that company. The Intermediary argued that without a copy of the contract(s) it could not validate the services acquired or the cost of those services as claimed by the Provider. The Intermediary found that without a contract the Provider was not in compliance with Medicare's "access clause" requirements, and all costs claimed with respect to that contractor must be disallowed.

The Board finds that the Intermediary's argument regarding its inability to validate the subject costs is without merit. The record indicates that the Provider was able to produce copies of the subject contractor's invoices and maintained the proper accounting data to show payments made for those services. The Intermediary acknowledged in its position paper at page 23 that these records reflected performance, price, units and types of service at specific times to specific patients. This is exactly the type of information typically relied upon by intermediaries during their audits of provider costs.

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[9] Intermediary Position Paper at 26.
[10] Intermediary Position Paper at 27.

However, the Board also finds that regulations at 42 C.F.R.§420.300, Medicare's access clause requirements, clearly prohibit payment of the subject costs. In part, 42 C.F.R. §420.302 (b) states:

> *Requirement*. Any contract meeting the conditions of paragraph (a) of this section must include a clause that allows the Comptroller General of the United States, HHS, and their duly authorized representatives access to the subcontractor's contract, books, documents and records until the expiration of four years after the services are furnished. . . .

42 C.F.R.§420.302 (b).[11] Moreover, 42 C.F.R.§420.302(c) states, in part:

> *Prohibition against Medicare reimbursement*. If a contract subject to the requirements of this subpart does not contain the clause required by paragraph (b) of this section, HCFA will not reimburse the provider for the cost of the services furnished under the contract and will recoup any payments previously made for services under the contract.

With regard to the Provider's position that the Medicare Manual does not require strict compliance provided it meets the criteria, the Board concludes that it is bound by the regulations' prohibition on payment.

The Board also disagrees with the Provider's arguments that it met the Manual exception for compliance. The Provider refers to program instructions at HCFA Pub.15-1§2441, entitled Access Clause Not In Contract, which state in part:

> [I]f a provider demonstrates satisfactorily that the decision not to include the clause was made in good faith with a reasonable basis, but cannot amend the contract because the subcontractor is no longer in business, the intermediary will make a determination as to the reasonableness of the costs of the subcontractor's services using available information.

The Provider asserts that it did not expect to need an access clause because of the low volume of services it acquired from the subject contractor in its prior cost reporting period and, further, that it could not obtain an access clause when the need surfaced during the Intermediary's audit because the contractor had gone out of business. The Board finds that, regardless of the volume of services the Provider may have obtained

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[11] Paragraph (a) of 42 C.F.R. §420.302 explains that the access clause requirements apply to contracts entered into after December 5, 1980, that have a cost or value of $10,000 or more over a 12-month period. It is undisputed that these conditions were met in the instant case. Moreover, the contractor whose services are at issue meets the definition of a "subcontractor" as referenced herein (42 C.F.R. §420.301). Finally, it is noted that the access clause requirements apply to oral contracts as well as written contracts by directing providers to obtain a "letter of understanding," when necessary, to allow access to their subcontractor's books and records (HCFA Pub. 15-1 §2440.4 D).

from the contractor in the prior year, it did acquire in excess of $10,000 in services from the contractor in the first month of the subject cost reporting period. This volume of services should have immediately prompted the Provider to obtain the required access document.

The Board also disagrees with the Provider's reliance upon the Board's decision in Arlington Hospital. In that case, the Board found that the provider met the spirit and goal of the access clause provisions even though it did not have a written contract with a subcontractor. However, the access clause requirements were far removed from the heart of that case which dealt with bad debt collection practices. Furthermore, in Arlington Hospital, the subcontractor was still in business and the provider was able to assure the Intermediary access to the contractor's records despite lack of an access clause.

In conclusion, the Board does not question that the Provider obtained interpreter services from the subject contractor and recorded the cost of those services in its accounting records. However, the Board is bound by Medicare regulations. It is undisputed that the Provider had no contract or letter of understanding with an access clause pertaining to Viva Brasil's services. Therefore, in accordance with the explicit terms of 42 C.F.R. §420.300, the costs of the contractor's services are not reimbursable.

DECISION AND ORDER:

The Intermediary's disallowance of the Provider's Spanish and Portuguese interpreter expenses was proper. The Intermediary's adjustments are affirmed.

Board Members Participating:

Suzanne Cochran, Esq.
Dr. Gary B. Blodgett
Martin W. Hoover, Jr., Esq.
Elaine Crews Powell, C.P.A

Date: October 6, 2003

FOR THE BOARD:

Suzanne Cochran, Esq.
Chairman