

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2003-D46

PROVIDER –
Pioneer Home Health
Bishop, California

Provider No. 55-7008

vs.

INTERMEDIARY –
United Government Services/Blue Cross
Blue Shield Association

DATE OF HEARING -
January 30, 2002

Cost Reporting Period Ended
December 31, 1998

CASE NO. 00-1172

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ISSUE:

Whether the Provider is entitled to an exception to the visit cost limits in accordance with Medicare regulations?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Pioneer Home Health (the Provider) is a not-for-profit home health agency located in Bishop, California. The Provider submitted a request for an exception to the cost limits to Blue Cross of California (currently, United Government Services) (the Intermediary) on September 28, 1998. The basis of the exception request was atypical circumstances pursuant to 42 C.F.R. § 413.30(f)(ii). In its application, the Provider noted the atypical conditions related to its large service area in a remote area of the Sierra Nevada mountains. Due to the harsh terrain and distances, the Provider indicated that it incurred comparatively larger travel, supplies and salary expenses.¹ The Intermediary reviewed the Provider's request and forwarded its positive recommendation to HCFA on December 18, 1998.² The Provider's request was subsequently reviewed and denied by HCFA on August 9, 1999.³ HCFA indicated that to qualify for an atypical service exception one must demonstrate that the patient care services furnished are atypical in nature and scope, that the services are furnished because of the special needs of the patients treated, and that the costs associated with these patient care services resulted in the agency's costs exceeding the per-visit limitations. In its denial, HCFA noted that the Provider "documents costs it attributes to the geographic circumstances in which it operates. However, there is nothing in their application that demonstrates that the patient care services furnished are atypical and necessitated by the special needs of their patients."⁴

The Provider subsequently resubmitted the same request for an exception but changed the regulation under which it sought relief to 42 C.F.R. § 413.30(f)(2), pertaining to extraordinary circumstances.⁵ The Intermediary forwarded the new request to HCFA on September 3, 1999. HCFA denied the resubmitted exception request⁶ on the grounds that "extraordinary circumstances" was defined as strikes, fire, earthquake, or similar unusual circumstances. The Intermediary concluded that neither the nature of a geographic area nor the location of patient homes qualify as an extraordinary circumstance as defined in the regulation.⁷

The Provider timely appealed HCFA's determination under 42 C.F.R. §§ 405.1835-.1841. The Medicare reimbursement at issue is approximately \$90,350.⁸

The Provider was represented by Thomas E. Boyd, of Boyd and Nicholas, Inc. The

¹ Intermediary Exhibit 1 at 1.

² Intermediary Exhibit 2.

³ Intermediary Exhibit 3.

⁴ Id.

⁵ Intermediary Exhibit 4 at 3.

⁶ Intermediary Exhibit 5.

⁷ Id.

⁸ See Provider's Post Hearing Brief at 4.

Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Provider has not met the requirements for either exception.

With regard to atypical services, HCFA's letter of August 9, 1999 stated as follows:

The regulation, at Section (f)(1), allows an exception for atypical services. To qualify for an exception under this provision, the provider must demonstrate that the patient care services furnished are atypical in nature and scope, the services are furnished because of the special needs of the patient treated, and that the costs associated with these patient care services results in the agency's costs exceeding the per-visit limitations.

Pioneer Home Health Care (PHHC) documents costs it attributes to geographic circumstances in which it operates. However, there is nothing in its application that demonstrates that the patient care services are atypical and necessitated by the special needs of their patients.

Based on the documentation provided by PHHC, PHHC has failed to demonstrate that it meets the requirements of the regulation under 42 C.F.R. 413.30 (f)(1) and, therefore, the request for an exception to the per-visit cost limits is denied.

With regard to meeting the requirements for an extraordinary circumstances exception, HCFA's October 4, 1999 re-determination letter stated the following:

The regulation defines extraordinary circumstances as "... strikes, fire, earthquake, flood, or similar unusual occurrences" Neither the nature of the geographic area nor the location of patient homes could, under any reasonable interpretation, qualify as an extraordinary circumstance as defined in the regulation. Therefore, the request for an exception to the cost limits is denied.

The Intermediary asserts that HCFA's interpretation of its regulation is reasonable and should be affirmed.

PROVIDER'S CONTENTIONS:

The Provider contends that HCFA's interpretations of the regulations permitting exceptions is too narrow. The regulations do permit an allowance to be made for the

circumstances here: a large rural service area with a widely dispersed patient population which results in increased travel and staff costs.

To support its contentions regarding the unique nature of the area, the Provider notes that its service area qualifies as a frontier area with less than 7 persons per square mile, and that it includes a county with only 1.8 persons per square mile. The Provider also indicates that, out of the three hospitals in its area, two are classified as critical care access facilities and the other as sole community hospital, which further supports its claim that it serves a unique underserved area.

With respect to atypical services, the Provider contends that the exact words of the regulation do not support HCFA's interpretation that patient care services actually delivered in the home during the caregiver's visit must be atypical. The Provider contends that "services" may include oversight, administration and general costs, clinical supervision, travel, charting, billing, staff education, etc.

The Provider indicates that previous decisions of the Board indicate that one should consider the larger view of the whole service versus the narrow view of just clinical services as proposed by HCFA. The Provider cites North Coast Rehabilitation Center v. Aetna Life Insurance Company, PRRB Dec. No. 97-D47, April 10, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,173, HCFA Adm. declined rev., May 27, 1997 (granted exception for dietetic services while rejecting housekeeping, laundry and linen services cost solely because of documentation); Saratoga Place Convalescent Hospital v. Mutual of Omaha Life Insurance Company, PRRB Dec. No. 97-D21, December 21, 1996, Medicare and Medicaid Guide (CCH) ¶ 45,027, (housekeeping and medical records costs exception granted by intermediary and partially by Board), aff'd in part, rev'd in part, HCFA Adm., March 7, 1998, Medicare and Medicaid Guide (CCH) ¶ 45,178 (due to lack of documentation concerning overhead costs); and Rancho Los Amigos Hospital v. BCBSA/Blue Cross of California, PRRB Dec. No. 92-D4, January 21, 1992, Medicare and Medicaid Guide (CCH) ¶ 39,809, (atypical services exception granted for dietary, maintenance, utilities, linen and laundry, and social services), rev'd in part and aff'd in part, HCFA Adm., March 24, 1992, CCH ¶40,712 (aff'd atypical services exception and rev'd extraordinary circumstances).

The Provider also notes that in its September 3, 1999 letter to HCFA, the Intermediary concluded that "... the special needs of the patients treated ..." is the long distance delivery service needed by the patients because their homes are widely dispersed across two vast isolated rural counties in the rugged High Sierra Nevada Mountain ranges. Thus "... the efficient delivery of needed health care" is directly affected by the atypically large number of miles the Provider's staff must drive to deliver healthcare.

With regard to extraordinary circumstances, the Provider points out that HCFA did not quote the entire regulation, that the portion they left out indicated that "these circumstances include, but are not limited to," and HCFA's quote substituted the word "similar" for "other," which changes the meaning and importance of unusual

circumstances.⁹

The Provider presented an expert witness who testified that HCFA has granted extraordinary circumstances exceptions in cases beyond the narrow interpretation asserted by HCFA in this case.¹⁰ For example, the Provider's expert witness indicated that HCFA has previously given exceptions for home health agencies that had to pay higher wages due to labor market conditions in their area. Also noted were previous Court and Board decisions granting exceptions for reasons that would not fit within HCFA's narrow interpretation of the regulation. See Dominican Sisters Health Services dba St. Joseph's Hospital v. Heckler, Medicare and Medicaid Guide (CCH) ¶ 33,470 (W.D. WA 1983) (exception granted to rural hospital that experienced increased costs resulting from a reduced patient census caused by loss of physicians in the community through retirement, weather, and relocation); Guyan Valley Hospital v. Blue Cross and Blue Shield Association/Blue Cross of West Virginia, HCFA Adm. Dec, August 7, 1989, Medicare and Medicaid Guide (CCH) ¶ 37,988, (aff'd PRRB Dec. NO. 89-D43, exception granted because of reduced patient census occurring in anticipation of a change in ownership); Baptist Health Care Corp. dba Miami Baptist Hospital v. Harris, Medicare and Medicaid Guide (CCH) ¶ 31,611 (N.D. OK 1981) (allowed exception for costs resulting from remodeling); Boone County Community Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Nebraska, HCFA Adm. Dec. May 5, 1987, Medicare and Medicaid Guide (CCH) ¶ 3,350, (aff'd PRRB Dec. No. 87-D6, granting exception for increased costs resulting from an 80 percent loss of physicians).

In summary, the Provider asserts that the regulations do provide for relief from the Provider's circumstances in which it incurred higher travel and staff costs due to the attributes of its service area.

BOARD DECISION:

The Board majority notes that in establishing limits on reimbursable costs, HCFA classified providers by the type of provider and by other factors, including type of services furnished, nature and mix of services, and geographical area where services are furnished. 42 C.F.R. § 413.30(b)(i), (iv) and (ii), respectively.

The regulation at 42 C.F.R. § 413.30(f)(1) provides an exception to the limits for atypical services. It requires the provider to show that the actual cost of "items or services" furnished exceeds the applicable limit because such items or services are atypical in nature and scope. The Board majority finds that "items and services" have to do with the actual clinical treatment of patients in accordance with orders given by the patient's physician or authorized healthcare provider. The Provider made no attempt to show that its "items or services" were "atypical in nature and scope," and unusual travel expenses resulting from the remote location of its patient would not qualify the Provider for an atypical services exception to its cost limits.

⁹ In the regulation, the word used is similar, not other.

¹⁰ See Provider Exhibit 1 ¶ 16.

The Board majority, however, finds that the unique geographic characteristics of its service area qualifies the Provider for an extraordinary circumstances exception. 42 C.F.R. § 413.30(f)(2). That regulation provides for exceptions to the limits where “[t]he provider can show that it incurred higher costs due to extraordinary circumstances beyond its control. These circumstances include, but are not limited to, strikes, fire, earthquake, flood, or similar unusual occurrences with substantial cost effects.” (emphasis added).

The Board majority disagrees with CMS’ determination that “[n]either the nature of a geographic area nor the location of patient homes could, under any reasonable interpretation [of the regulation], qualify as an extraordinary circumstances.”¹¹

The regulation clearly states that extraordinary circumstances are not limited to the ones listed as examples.

The Board majority also finds it significant that CMS considers the geographic area where services are furnished to be important in the rate setting process. 42 C.F.R. §413.30(b)(1)(ii). It follows then that the unique geographic characteristics may potentially be an extraordinary circumstance affecting costs under the regulation. Other instances in which CMS has granted exception relief for extraordinary circumstances for less dramatic causes than natural disasters further weigh against HCFA’s narrow interpretation of the regulation in this case. These include significant loss of providers in the community and high local labor costs. For all of the above reasons, the Board majority finds that CMS’ determination that geographic characteristics of the Provider’s service area cannot be considered an extraordinary circumstance was incorrect, and the Provider’s exception request should be considered on its merits.

The Provider presented considerable evidence of the unique nature of its service area. The service area was extremely large and remote; equal in size to the State of Maryland.¹² It included harsh mountainous terrain, long distances separated by population centers, and it was considered (by a definition used by the National Association of Home Care) to be not just a “rural” area but a “frontier” area, with less than 7 persons per square mile.¹³ Prior to the Provider’s coming to the area, there were no home health services available,¹⁴ and other health care services are limited to just three hospitals; two of which are classified as critical care access hospitals and the other as a sole community provider. The Provider noted, however, that the regulations no longer provide for an exception for sole community provider for home health services.

The Board agrees with the Provider that it cannot control the location of its patients and how often they need to be seen and, therefore, it is limited in scheduling cases to improve the number of visits per day. It was noted that average productivity for a rural area was 5.3 visits per day for home health aides and 4.5 for nursing visits, whereas the

¹¹ See CMS Letter, October 4, 1999, Provider Exhibit 3.

¹² See also Dombi Affidavit ¶ 16, Provider Exhibit 1.

¹³ See Provider Exhibit 7.

¹⁴ Tr. at 55 and 81 and Provider Post Hearing Brief at 7.

productivity for frontier areas was between 2 and 3 visits per day, specifically 2.9 visits per day for the Provider. There is also considerable evidence in the record concerning efforts made by the Provider to cut costs within its control related to travel reimbursement and staff salaries. The Board majority also notes that the Provider had been audited in fiscal year 1998 and there was only one minor disallowance.

The Board majority finds that the Provider presented sufficient evidence to support its contention that its service area is extraordinary, the nature of its service area causes it to incur additional costs that it cannot control and, therefore, that relief from the visit limits should be granted.

DECISION AND ORDER:

The Board Majority finds that the Provider's unique service area constitutes an extraordinary circumstance for which relief from the per-visit limits should be allowed. HCFA's determination is reversed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire, Dissenting in part; Concurring in part
Henry C. Wessman, Esquire, Dissenting Opinion
Gary B. Blodgett, D.D.S.
Martin W. Hoover, Jr., Esquire, Dissenting Opinion
Elaine Crews Powell, Dissenting in part; Concurring in part

DATE: August 21, 2003

FOR THE BOARD:

Suzanne Cochran
Chairman

Pioneer Home Health

Separate opinion of Suzanne Cochran and Elaine Crews Powell.

We join in the majority opinion that Pioneer is entitled to an extraordinary circumstances exception from the cost limits due to the unique geographic characteristics of the service area. We dissent in that we would also grant the exception to the cost limits based on the atypical services exception.

Travel is an inherent and fundamental component of the “service” provided by home health agencies. Extraordinary travel expense, therefore, falls neatly within the regulatory exception at 42 CFR 413.30(f)(1) for “atypical” services.

The rate setting mechanism established in the same regulation in issue in this case clearly makes “geographical area where services are furnished” a factor in what should be considered in “establishing the limits.” 42 CFR 413.30(b)(1)(ii). The rate determined is based on areas having similar geographic characteristics. Because the provider has established that its geographic characteristics are not typical compared to those services generally furnished by HHAs similarly classified, its service is atypical. It was not disputed by the Intermediary or by HCFA that the excess cost is due to the patients’ remote location. Moreover the provider’s claims were all approved as necessary services and its costs were audited and found to be reasonable.

Suzanne Cochran, Esq.

Elaine Crews Powell, CPA

I respectfully dissent:

The applicable regulations are 42 C.F.R. 413.30(f)(1) and 42 C.F.R. 413.30(f)(2). The provider requested an exception to the cost limits under (f)(1) of the regulation. The Provider initially filed the request asserting that the cost exceeded the limits because the geographical location of the patients required the provider to travel extensively in making visits to the patients. CMS denied the request since the provider did not demonstrate that the patient care services furnished are atypical and necessitated by the special needs of the patient. The provider, after CMS denial, resubmitted the exception request under (f)(2) of the regulation. CMS denied the request asserting that neither the nature of the geographic area nor the location of patient homes could, under any interpretation, qualify as an extraordinary circumstance as defined in the regulation.

The regulation provides that atypical items or services are furnished because of the special needs of the patients treated and are necessary in the efficient deliver of needed health care. The provider provided no documentation that the services provided were atypical in nature. The geographic location of the provider and the extensive travel costs do not qualify for an exception to the limits under (f)(1) of the regulations. The denial by CMS of the Provider's request for an exception to the cost limits based on atypical services was proper.

The regulation also provides that an exception may be granted if the Provider can show that it incurred higher costs due to extraordinary circumstances beyond its control. The regulation under (f)(2) indicates that extraordinary circumstances includes, but are not limited to, strikes, fire, earthquake, flood or similar unusual occurrences with substantial cost effects. The key words in this section's application are "beyond its control" and "unusual occurrences". The intensive and extraordinary travel is not beyond the control of the provider. The provider chose a service area that required this type of travel costs. The regulation requires that the extraordinary costs be attributable to unusual occurrences. In order for the exception request costs to be allowed, it would be necessary to have a "triggering" event that caused the additional costs. In this case, the Provider's extraordinary cost was not caused by an unusual occurrence and did not meet the definition of extraordinary circumstances. The denial by CMS of the Provider's request for an exception to the cost limits based on extraordinary circumstances was proper.

Martin W. Hoover, Jr., Esq.