PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD

2006-D37

PROVIDER -
Lawrence & Memorial Hospital
New London, Connecticut

Provider No.: 07-0007

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
Empire Medicare Services

DATE OF HEARING -
February 6, 2006

Cost Reporting Period Ended -
September 30, 1997

CASE NO.: 02-0140

INDEX

ISSUE:

Whether the Intermediary's adjustment to disallow the Connecticut Sales Tax was proper.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the proper amount of Medicare reimbursement due a provider of medical services.

The Medicare program provides health insurance to aged and disabled persons. 42 U.S.C. §§1395-1395cc. The Secretary of the Department of Health and Human Services (Secretary) is authorized to promulgate regulations prescribing the health care services covered by the program and the methods of determining payments for those services. The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), is the operating component of the Department of Health and Human Services (DHHS) charged with the program's administration. CMS has entered into contracts with insurance companies known as fiscal intermediaries to maintain the program's payment and audit functions. Intermediaries determine payment amounts due providers of health care services (e.g., hospitals, skilled nursing facilities, and home health agencies) under Medicare law and interpretative guidelines issued by CMS.

At the close of its fiscal year, each provider submits a cost report to its intermediary showing the costs it incurred during the period and the portion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider, and notifies the Provider in a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's determination may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

42 U.S.C. §1395x(v)(1)(A) mandates that for a payment to be considered a reimbursable cost under Medicare, the payment must be the cost actually incurred and should exclude any cost found to be unnecessary. 42 C.F.R §413.9 states that payments to providers must be based on the reasonable cost of services covered under Medicare and defines reasonable cost to include all necessary and proper costs. Necessary and proper costs are further defined as costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities and are costs which are common and accepted occurrences in the field of the provider's activities.

The Provider Reimbursement Manual (PRM), in accordance with the foregoing principles, contains a general rule that taxes assessed against a provider are allowable costs. PRM §2122.1 reads:

> The general rule is that taxes assessed against the provider, in accordance with the levying enactments of the several

> States and lower levels of government and for which the provider is liable for payment, are allowable costs. Tax expense should not include fines and penalties.

PRM 15-1 §2122.2 then details certain taxes which are levied on providers that are not allowable costs. PRM 15-1 §2122.2G specifically states the following taxes are not allowable:

> Taxes, such as sales taxes, levied against the patient and collected and remitted by the provider.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Lawrence & Memorial Hospital (Provider) is a 191 bed acute care facility located in New London, Connecticut. For the fiscal year ended September 30, 1997, the Provider paid $4,146,803 in Connecticut sales tax to the state of Connecticut. The Provider did not include this expense on its as-filed cost report, as the Provider claims that Empire Medicare Services (Intermediary) has a long-standing policy to remove this cost as non-allowable. The Provider, in its appeal request, requested that the Intermediary allow the $4,146,803 of sales tax as an Administrative & General (A&G) cost on its cost report. The Intermediary challenged jurisdiction on this issue, claiming the Board did not have jurisdiction because the Provider did not claim the cost on the as-filed cost report. The Board accepted jurisdiction on January 12, 2005, as it was determined that the Provider was barred by the Intermediary from claiming the cost on its as-filed cost report. The disallowance of the sales tax expense resulted in a reduction of Medicare reimbursement of approximately $345,000.

The Provider was represented by Murray J. Klein, Esquire, of Reed Smith LLP. The Intermediary was represented by Arthur E. Peabody, Jr., Esquire, of Blue Cross Blue Shield Association.

PARTIES' CONTENTIONS:

The Provider contends that Connecticut Sales Tax is a reimbursable Medicare expense. The Provider claims that it has met the three criteria identified by the Board in Regions Hospital v. Blue Cross and Blue Shield Association/Noridian Government Services PRRB Dec. No. 2000-D64, June 22, 2000, that a tax must meet to be deemed an allowable cost for Medicare. The Provider asserts that the tax is imposed on all retailers in the state of Connecticut[1] and, therefore, meets the first criterion that the tax be levied and imposed uniformly on all providers. The Connecticut General Statute prescribes monetary penalties and interest as the sanction for non-payment of the tax,[2] which the Provider asserts meets the second criterion that the tax was a liability subjecting the Provider to severe sanction for non-payment. Lastly, the Provider asserts that the tax is an ordinary and necessary business expense which all hospitals in Connecticut were

[1] See Provider's position paper, page 3 and Exhibit S1, C.G.S.A §12-408(1)
[2] See Provider's position paper, page 4 and Exhibit S4, C.G.S.A §12-428

required to pay in the ordinary course of their operations by filing monthly and yearly returns,[3] which meets the third criterion that the cost be an ordinary and necessary business expense.

The Provider further asserts that although the expense is labeled a "sales tax" by the state, the expense is not levied on the patient as is a typical sales tax, but instead is levied against the Provider. The Provider argues that the calculation of the tax, which is based on a percentage (6%) of the Provider's gross cash revenues, is further evidence that the tax is imposed on the Provider and not the patient. The Provider also identifies Connecticut Pricemaster Law[4] as evidence that the tax could not be imposed on the patient, so therefore, it must be imposed on the hospital. The Provider claims that Connecticut law bars the hospital from itemizing the tax on its bill and, thereafter, from taking any action against the patient to recover the tax. The Provider also contends that the Connecticut Sales Tax is not "remitted" by the hospital on behalf of the patient but instead is remitted based upon its own direct liability for the tax.

The Provider additionally asserts that CMS has found the Gross Earnings Tax (GET) a gross revenue tax which was imposed on hospitals and calculated in a similar manner as the Connecticut Sales Tax, to be an allowable cost The Provider asserts that since CMS has deemed the GET a cost of doing business for hospitals and has found that the GET is levied on the hospitals and not the patients, the Connecticut Sales Tax should be regarded in the same manner.

The Intermediary argues that PRM 15-1 §2122.2G specifically identifies sales taxes which are levied against the patient and collected and remitted by the provider as non-allowable costs. The Intermediary asserts that the hospital is acting as the "collecting" agent for the sales tax included in the patient's payments for services, similar to other retailers acting as the collecting agent of sales tax on items they sell. The Intermediary states that Connecticut law[5] which imposes the sales tax on the hospital is the same law that imposes the sales tax on other retailers. The Intermediary also asserts that the Provider's argument relating to the hospital's responsibility for non-payment of the funds, including criminal penalties, applies to any retailer that collects sales taxes from a consumer and does not turn them over to the state government. The fact that the hospital may face penalties if it fails to remit the collected taxes to the state does not, in itself, make the taxes an expense of the Provider.

The Intermediary distinguishes the Connecticut Sales tax from those taxes that the Board found to be allowable in St. Joseph's Hospital v. Blue Cross and Blue Shield of Minnesota, Dec. No. 2000-D47, April 20, 2000 and First PPS Year v. Blue Cross and Blue Shield Association, Dec No. 1990-D61, September 20, 1990. In both cases, neither tax statute required the tax to be collected from the consumer. In addition, the sole purpose of both statutes was to collect funds to afford services to indigent individuals in need of medical care.

---

[3] See Provider's position paper, page 4 and Exhibit S5, C.G.S.A §12-414
[4] See Provider's position paper, Exhibit S14, C.G.S.A §19a-681
[5] See Provider's position paper, Exhibit S1, C.G.S.A. §12-408(1)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and program instructions, evidence and the parties' contentions, the Board finds and concludes as follows:

The Connecticut Sales Tax Statute at C.G.S.A Sec.12-408 states:

> For the privilege of making any sales, as defined in subdivision (2) of section 12-407, at retail, in this state for a consideration, a tax is hereby imposed on all retailers at the rate of six percent of the gross receipts of any retailer from the sale of all tangible personal property sold at retail or from the rendering of any services constituting a sale in accordance with subdivision (2) of section 12-407. . . .

PRM 15-1 §2122.2 clearly states that sales taxes levied against the patient and collected and remitted by the provider are not allowable costs. The Provider has attempted to demonstrate to the Board that the Connecticut sales tax is not a "true" sales tax as is described above, but a tax which is incurred by the Provider. However, the Board finds that C.G.S.A Sec. 12-408 applies to all retailers in the state of Connecticut and the Provider has made no distinction between hospitals and other retailers in the state.

The Provider claims that a state statute prohibits hospitals from collecting the sales tax by either itemizing the tax on a patient's bill or taking action against the patient to recover the tax, therefore, the hospital bears the burden of the cost of the tax. The Board finds that Connecticut Pricemaster Law at C.G.S.A 19a-681 only bars hospitals from identifying the tax on the bill; it does not bar them from collecting the tax from the patient. On the contrary, C.G.S.A §19a-681(a) states, "Each hospital shall include all applicable taxes in the price of each item in its pricemaster for each charge." Therefore, hospitals were not precluded from collecting the taxes but were instructed to include the taxes in the total price of each item. Hospitals were only precluded from identifying the tax separately on the bill.

The Provider argues that severe penalties would be levied on the hospital if the taxes were not paid to the state. The Board finds that although penalties would be levied on the Provider for non-remittance of the taxes to the state, these same penalties would apply to all retailers if the taxes were not remitted. The Provider has made no distinction between hospitals and other retailers.

The Provider argues that the Connecticut Sales Tax is identical to the Gross Earnings Tax (GE Tax) which has been deemed an allowable cost by CMS in states such as Florida and Minnesota. The Board finds, however, that the Florida Indigent Care Tax and the Minnesota Care Tax are assessed against health care providers and used to fund indigent care, but the Connecticut Sales Tax is not assessed in this manner or used for this purpose. Rather, the sales tax is imposed on retail sales transactions, collected from consumers by retailers and remitted to the state for deposit in its General Fund.

Furthermore, the Board finds that the Provider's statement that the GE Tax also exists in Connecticut negates its argument that the taxes are identical, as they are separate taxes, funded in a different manner and used for a different purpose. The sole similarity is that both are based on a percentage of the Provider's gross revenue. The Board finds that this similarity does not make the taxes identical and that under the principles of Medicare reimbursement, they are not afforded the same treatment.

DECISION AND ORDER:

The Connecticut Sales Tax is not a reimbursable cost under Medicare law and program instructions. The Intermediary properly denied reimbursement for the cost of the Connecticut Sales Tax. The Intermediary's adjustment is affirmed.

BOARD MEMBERS PARTICIPATING

Suzanne Cochran, Esquire
Gary B. Blodgett, D.D.S.
Elaine Crews Powell, C.P.A. (dissenting as to jurisdiction)
Anjali Mulchandani-West
Yvette C. Hayes

FOR THE BOARD:

DATE: July 26, 2006

Suzanne Cochran
Chairperson

Dissenting Opinion of Elaine Crews Powell

The Board majority accepted jurisdiction over this case. I respectfully dissent.

It is undisputed that the Provider failed to claim the Connecticut Sales Tax as cost on its as-filed cost report. The Provider contends that it knew the Intermediary would not allow the costs because of the Intermediary's state-wide policy and a letter from CMS to its intermediaries instructing them to disallow sales tax costs if claimed by providers. The Provider believes that the facts in this case are analogous to those in Bethesda Hospital Association v. Bowen, 180 S. Ct. (1988) (Bethesda) and that Bethesda is dispositive. The Intermediary counters that the futility doctrine of Bethesda does not apply in this case since there is no statute or regulation that expressly bars Medicare reimbursement for state sales tax costs. Moreover, CMS' letter to it intermediaries was dated after the date the Provider submitted the cost report in dispute.

The Board majority granted jurisdiction citing Adams House Health Care v. Bowen, 862 F.2d 1391 (9th Cir. 1988). The 9th Circuit, in applying the Supreme Court's analysis in Bethesda to the instructions in the Provider Reimbursement Manual (PRM), concluded that submission of a cost report in compliance with the instructions in the PRM does not bar a provider from claiming dissatisfaction with the amount of reimbursement allowed by those instructions. I disagree.

There was no statute or regulation that prevented the Provider from claiming the Connecticut Sales Tax as cost; therefore, the facts in this case differ materially from those in Bethesda. The fact that the Provider thought the cost would not be allowed by the Intermediary is an insufficient reason for not claiming the cost. I believe that the Provider was required to request reimbursement for the costs to which it believed it was entitled. The Provider could have filed its cost report in compliance with the PRM and then protected its appeal right by simply protesting the treatment of the cost.

Regarding the merits of the case, I agree with my colleagues.

_____