PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD
2016-D26

PROVIDER –
Toyon 1997-2001 Intern and Resident Research FTE Group

Provider Nos.: Various
(See Appendix)

vs.

MEDICARE CONTRACTOR –
Noridian Healthcare Solutions

DATE OF HEARING –
January 27, 2015

Cost Reporting Periods Ended –
December 31, 1997; December 31, 1998; December 31, 1999; December 31, 2000; December 31, 2001

CASE NO.: 09-1541G

INDEX

ISSUE STATEMENT

Did the Medicare Contractor properly reduce the Hospitals' Indirect Medical Education ("IME") Full Time Equivalent ("FTE") resident counts, for time spent by residents in research activities?[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions and the evidence submitted, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor properly reduced the Hospitals' IME FTE resident counts for time spent by residents in research activities for fiscal years ("FY") 1997 to 2001.

INTRODUCTION

Stanford University Hospital and UC Davis Medical Center (collectively "Hospitals") are teaching hospitals located in California. The Medicare contractor[2] assigned to the Hospitals was Noridian Administrative Services ("Medicare Contractor").

The Hospitals claimed Medicare reimbursement for IME on their cost reports for FYs 1997 to 2001. For these fiscal years, the Medicare Contractor disallowed the portion of the Hospital's IME reimbursement pertaining to medical students who performed research activities not directly related to patient care.[3]

The parties have stipulated to the number of IME research FTEs at issue in these appeals. The Hospitals satisfied the jurisdictional requirements for a hearing before the Board. The Board conducted a hearing on the record. The Hospitals were represented by Glenn S. Bunting of Toyon Associates, Inc. The Medicare Contractor was represented by Brendan G. Stuhan, Esq., of the Blue Cross and Blue Shield Association.

STATEMENT OF FACTS

The Medicare program pays these Hospitals for inpatient services provided to Medicare beneficiaries through the inpatient prospective payment system ("IPPS"). IPPS is adjusted based on a number of hospital specific factors. One of these adjustments, the indirect medical education payment, ("IME"), compensates teaching hospitals for higher-than-average operating costs associated with the presence of residents in the hospital and the intensity of their training.[4] The IME payment is not related to the actual costs of residents' instruction. Rather, it is based on the ratio of the hospital's full time equivalent interns and residents to inpatient beds.[5]

Subsequent to the adoption of IPPS, federal regulations have long allowed full-time equivalent residents to be counted for IME purposes if the resident is enrolled in an approved teaching

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[1] Medicare Contractor's Supplemental Final Position Paper at 3.
[2] The term "Medicare contractor" refers to both fiscal intermediaries and Medicare administrative contractors.
[3] Provider's Final Position Paper at 3.
[4] 42 U.S.C. § 1395ww(d)(5)(B).
[5] 42 C.F.R. §§ 412.105(a)(1), (b). Direct costs for graduate medical education are paid under 42 U.S.C. § 1395ww(h).

program and is assigned to work in the portion of the hospital that is paid under a prospective payment system, the hospital's outpatient department, or a non-hospital setting.[6] The IME regulation allowed for the time that residents spent in "patient care activities" but was silent on whether residents' time on non-patient care activities could also be counted. In 2001, CMS added subparagraph (iii)(B) to 42 C.F.R. § 412.105(f)(1)[7] to exclude any research time spent by a resident that was not associated with the treatment or diagnosis of a particular patient, stating that this change was simply a "clarification of longstanding policy."[8]

In §§ 5505(b) and 10501(j) of the Patient Protection and Affordable Care Act of 2010 ("PPACA"),[9] Congress revised the rules for counting resident time spent on didactic and scholarly activities when calculating IME payments. In particular, PPACA § 5505(b) added a new statutory section to exclude "time spent by an intern or resident in research activities that are not associated with the treatment or diagnosis of a particular patient."[10] This amendment applied to cost reporting periods beginning on or after October 1, 2001.

On November 24, 2010, CMS published a final rule ("November 2010 Final Rule")[11] implementing PPACA §§ 5505(b) and 10501(j), which again stated that the time spent by a resident in research that is not associated with the treatment or diagnosis of a particular patient is not countable.[12] Specifically, as part of this final rule, CMS revised § 412.105(f)(1) to state in subparagraph (iii)(C) the following:

> Effective for cost reporting periods beginning on or after January 1, 1983, except for research activities described in paragraph (f)(1)(iii)(B) of this section, the time a resident is training in an approved medical residency program in a hospital setting, as described in paragraphs (f)(1)(ii)(A) through (f)(1)(ii)(D) of this section, must be spent in either patient care activities, as defined in §413.75(b) of this subchapter, or in nonpatient care activities, such as didactic conferences and seminars, to be counted.[13]

The question in this case is whether federal law allows counting the residents' time spent doing research unrelated to patient care in a teaching hospital paid under IPPS.

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[6] 42 C.F.R. § 412.105(f).

[7] In 1997, this regulation had been re-designated from 42 C.F.R § 412.105(g) to §412.105(f). *See* 62 Fed. Reg. 45966, 46029 (Aug. 29, 1997).

[8] 66 Fed. Reg. 39828, 39898, 39933-39934 (Aug. 1, 2001).

[9] PPACA, Pub. L. No. 111-148, § 5505, 124 Stat.119 (2010). Shortly thereafter, on March 30, 2010, the Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. No. 111-152, 124 Stat. 1029 (2010) was enacted to amend certain provisions of PPACA. These two public laws are collectively generally known as the Affordable Care Act ("ACA"). 75 Fed. Reg. 71799, 71807 (Nov. 24, 2010). However, as none of the provisions in HERCA are applicable to this case, all citations will be to PPACA as enacted on March 23, 2010.

[10] PPACA § 55059b) added 42 U.S.C. § 1395ww (d)(5)(B)(x)(III).

[11] 75 Fed. Reg. 71800 (Nov. 24, 2010).

[12] 42 C.F.R. § 412.105(f)(iii)(B).

[13] 42 C.F.R. § 412.105(f)(1)(iii)(C) (2011) (as amended by 75 Fed. Reg. at 72142).

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The Hospitals contend that the Intermediary's disallowance of the research time is contrary to the statute and regulation and should be deemed improper.[14] Specifically, the Hospitals assert that, for the cost reporting periods at issue, neither the statute nor the regulation required that residents be involved in patient care activities. While 42 U.S.C. § 1395ww(d)(5)(B) provides specific instructions for calculating the IME adjustment, it does not disallow time spent by residents performing research activities.[15] The Hospitals assert that the statutory amendments and new regulations adopted subsequent to 2000 should not be applied retroactively to the cost years at issue.[16] In particular, the Hospitals assert that the CMS' August 1, 2001 revisions to the IME regulation[17] cannot be viewed as a clarification of existing policy because they establish a recording keeping requirement to identify the time spent by residents performing patient and non-patient care activities while assigned to a research rotation.

The Hospitals assert that the federal courts have repeatedly upheld prior Board decisions which found, prior to October 2001, the regulations did not require that only research time related to patient care activities is allowable in calculating the IME FTE count.[18] The Hospitals acknowledge that the 2008 First Circuit decision in the *Rhode Island Hosp. v. Leavitt* ("*R.I. Hospital*") upheld the Secretary's exclusion of IME research time from the FTE count prior to October 2001.[19] However, as discussed by the Seventh Circuit in 2010 in the *University of Chicago Med. Ctr. v. Sebelius* ("*University of Chicago*"), the First Circuit did not have the opportunity to consider the revised statutory provisions under PPACA as PPACA was enacted subsequent to its decision in the *R.I. Hospital*.[20] Specifically, in its 2010 decision for the *University of Chicago*, the Seventh Circuit found that PPACA § 5505(b)(c) was dispositive and concluded that, for the periods January 1, 1983 through October 1, 2001, the IME FTE count includes time residents spent conducting educational research unrelated to the care of Medicare patients.[21]

Finally, the Hospitals noted the 2014 Seventh Circuit decision in *Rush Univ. Med. Ctr. v. Burwell* ("*Rush*")[22] that concluded that IME research time was not allowable. However, the Hospitals contend that the Seventh Circuit decision is not applicable to them because they are not located in this circuit and, in any event, was wrongly decided.[23]

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[14] *Id.*at 5.
[15] *Id.* at 4.
[16] *Id.*
[17] *See* 66 Fed. Reg. 39828, 39933-39934 (Aug. 1, 2001) (where CMS amended 42 C.F.R. § 412.105(f)(1) to add subparagraph (iii)(B)).
[18] *See* Providers' Final Position Paper at 5-6. *See, e.g., Henry Ford Health Sys. v. Sebelius*, 680 F. Supp. 2d 799 (E.D. Mich. 2009), *rev'd in part and remanded*, 654 F.3d 660 (6th Cir. 2011), *cert. denied*, 133 S. Ct. 73 (2012) ("*Henry Ford* case"); *University of Chicago Med. Ctr. v. Sebelius*, 645 F. Supp. 2d 648 (N.D. Ill. 2009), *aff'd,* 618 F.3d 739 (7th Cir. 2010); *Rhode Island Hosp. v. Leavitt*, 501 F. Supp. 2d. 283 (D. R.I. 2007), *rev'd*, 548 F.3d 29 (1st Cir. 2008); *University Med. Ctr. Corp. v. Leavitt*, 2007 WL 891195 (D. Ariz. Mar. 21, 2007).
[19] 548 F.3d 29 (1st Cir. 2008).
[20] Providers' Final Position Paper at 6-7 (citing to *University of Chicago*, 618 F.3d at 744-745).
[21] Providers' Supplemental Final Position Paper at 7.
[22] *Rush Univ. Med. Ctr. v. Burwell*, 763 F. 3d 754 (7th Cir. 2014).
[23] Provider's Supplemental Final Position Paper at 4.

The Board does not agree with the Hospitals' dismissal of the Seventh Circuit's decision in *Rush*. The Hospitals' position with respect to the precedential deference due decisions issued by the Seventh Circuit is conflicted. The Hospital attempts to concurrently accept and reject the applicability of Seventh Circuit decisions by asserting that the Board should follow the Seventh Circuit's 2010 decision in *University of Chicago* but then reject the same Seventh Circuit's later analysis in 2014 in *Rush*. Such a position is contrary to a fair reading of these decisions as explained below.

A. SECRETARY'S DISCRETION

The Board finds in *Rush* a thorough and complete analysis of the statutory and regulatory developments of the IME research question. In particular, the Seventh Circuit relies on the statutory language of 42 U.S.C. § 1395ww(d)(5)(B)(x)(II), as added by PPACA § 5505(b). This language permitted the Secretary to define the term "non-patient care activities" and this is precisely what the Secretary did in the November 2010 Final Rule when she promulgated 42 C.F.R. § 412.105(f)(1)(C)(iii) to define that term. As discussed in the preamble to the November 2010 Final Rule, the Secretary distinguished between non patient care time which is countable and research time which is not allowable. Allowable time includes other "non-patient care activities, such as didactic conferences and seminars" per PPACA § 5505.[24] However, "research time that is not associated with the treatment or diagnosis of a particular patient" is not countable.[25]

In *Rush*, the Seventh Circuit further found that Congress delegated authority to the Secretary to determine whether pure research activities should be included in the IME cost formula for the years 1983 to 2001 and that the Secretary's determination was a reasonable interpretation of the statute.[26]

B. RETROACTIVE APPLICATION OF THE LAW

The Seventh Circuit also addressed in *Rush* the Hospitals' argument that PPACA and the November 2010 regulations should not be applied retroactively to fiscal years before 2010. Specifically, the Seventh Circuit held that, while retroactive application of statutes and regulations is generally disfavored, Congress explicitly adopted language in PPACA §§ 5505(c)(1) and 10501(j) to allow the Secretary to apply this regulatory definition retroactively to cost reporting periods beginning on or after January 1, 1983.

In contrast, the Seventh Circuit's 2010 decision in the *University of Chicago* case, upon which the Hospitals rely, did not have the benefit of the revisions to this statutory directive and the regulations issued in the November 2010 Final Rule implementing the PPACA provision.

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[24] 75 Fed. Reg. at 72144.

[25] *Id.*

[26] *Rush* at 762. The Board notes that the Sixth Circuit, in *Henry Ford Health System v. Dept. of Health and Human Services*, 654 F 3d 660 (6th Cir. 2011) also concluded that the ambiguity in the statutory language allowed the Secretary, considering cost years similar to those at issue in the present case, to adopt a regulation to clarify which non-patient care activities count in the IME calculation.

Consequently, the Board finds that the Intermediary's exclusion of research time from the IME FTE count was proper.

Further, the Board's decision in this case is consistent with the Board's 2013 decision in *BB&L 95-03 IME Research FTE Group v. BlueCross Blue Shield Association* ("*BB&L IME*").[27] The Board recognizes that this decision is not consistent with certain Board decisions issued prior to *BB&L IME* involving similar issues.[28] However, these earlier Board decisions were made prior to the enactment of PPACA and the November 2010 Final Rule implementing 42 U.S.C. § 1395ww(d)(5)(B)(x)(II) as amended by PPACA § 5505(b). The Board is required to comply with all Medicare statutory and regulatory provisions. Consequently, the Board is bound to apply PPACA §§ 5505(b), 5505(c), and 10501(j) and 42 C.F.R. § 412.105(f)(ii)(C), including their retroactive effect, to this case.

DECISION AND ORDER

After considering the Medicare law and regulations, the parties' contentions and the evidence submitted, the Board finds that the Medicare Contractor properly adjusted the Providers' IME FTE resident counts for time spent by residents in research activities.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Jack Ahern, MBA

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: September 29, 2016

[27] PRRB Dec. No. 2013-D16 (May 9, 2013).
[28] *See, e.g., University of Chicago Hosp. & Clinics v. BlueCross BlueShield Ass'n,* PRRB Dec. No. 2007-D57 (Aug. 8, 2007), *rev'd,* CMS Administrator (Oct. 5, 2007), *rev'd,* 645 F. Supp. 2d. 648 (N.D. Ill. 2009), *aff'd,* 618 F.3d 739 (7th Cir. 2010).

Model Form G: Schedule of Providers in Group

Case No.: 09-1541G
Group Name: Toyon 1997-2001 Intern and Resident Research FTE Group
Representative: Toyon Associates, Inc.
Lead Intermediary First Coast Service Options, Inc.
Issue: Intern and Resident Research FTE

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Date Prepared: 7/25/2013

#	Provider Number	Provider Name / Location (city, county, state)	FYE	Intermediary / MAC	A Date of Final Determination	B Date of Hearing Request / Add Issue Request	C No. of Days	D Audit Adj. No.	E Amount in Controversy	F Prior Case No(s).	G Date of Direct Add / Transfer(s) to Group
1	05-0441	Stanford Hospital and Clinics Palo Alto, Santa Clara County, CA	8/31/98	FCSO	9/25/02	3/21/03 8/19/08 (A)	177	70	$37,367	03-0425	5/6/09 (T)
2	05-0441	Stanford Hospital and Clinics Palo Alto, Santa Clara County, CA	8/31/99	FCSO	6/9/05	12/2/05 8/19/08 (A)	176	62	$916,779	06-0352	5/6/09 (T)
3	05-0441	Stanford Hospital and Clinics Palo Alto, Santa Clara County, CA	3/31/00	FCSO	11/23/05	5/18/06 8/19/08 (A)	176	83-88	$1,348,467	06-1774	5/6/09 (T)
4	05-0441	Stanford Hospital and Clinics Palo Alto, Santa Clara County, CA	8/31/00	FCSO	11/17/06	5/11/07 8/19/08 (A)	175	7, 47, 70, 71	$932,120	07-2152	5/6/09 (T)
5	05-0441	Stanford Hospital and Clinics Palo Alto, Santa Clara County, CA	8/31/01	FCSO	10/12/07	4/8/08 8/19/08 (A)	179	22, 23, 51, 54, 55, 56	$4,118,140	08-1750	5/6/09 (T)
6	05-0599	UC Davis Medical Center Sacramento, Sacramento County, CA	6/30/99	FCSO	9/29/03	3/15/04	168	83	$1,197	04-1279	4/15/10 (T)

Total Amount in Controversy for all Providers: $7,354,070