PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2018-D7

PROVIDER –
Montgomery General Hospital

Provider No.: 51-1318

vs.

MEDICARE CONTRACTOR –
Palmetto GBA c/o National Government Services

DATE OF HEARING –
July 20, 2016

Cost Reporting Period Ended –
December 31, 2007

CASE NO.: 10-0033

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ISSUE STATEMENT

Whether the Medicare Contractor improperly calculated and adjusted Montgomery General Hospital's ("Montgomery" or "Provider") defined benefit pension plan contribution cost that the Provider claimed on its fiscal year 2007 cost report.[1]

DECISION

After considering the Medicare law and regulations, the evidence presented, and the parties' contentions, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor properly calculated and adjusted the Provider's defined benefit pension plan contribution cost on the Provider's fiscal year 2007 cost report.

INTRODUCTION

Montgomery is a critical access hospital located in Montgomery, West Virginia. During fiscal year 2007, the year at issue here, Montgomery made a contribution to its defined benefit pension plan in the amount of $1,096,520, which related to funding obligations that were incurred during 2005, 2006, and 2007. Palmetto GBA c/o National Government Services, Inc. ("Medicare Contractor")[2] determined that for 2007, Montgomery's normal costs were zero and the actuarial value of the plan's assets exceeded the actuarial accrued liabilities.[3] As such, the Medicare Contractor disallowed Montgomery's defined benefit pension cost in its entirety.

Montgomery timely appealed and met the jurisdictional requirements for a hearing before the Board. The Board conducted a live hearing on July 20, 2016. Daniel J. Hettich of King & Spalding, LLC represented the Provider. Edward Lau, Esq. of Federal Specialized Services represented the Medicare Contractor.

STATEMENT OF FACTS

As a critical access hospital, Medicare pays Montgomery on a reasonable cost basis for services provided to Medicare patients.[4] The Provider Reimbursement Manual ("PRM") 15-1 § 2142.5 (1996) describes the two types of pension costs that Medicare recognizes as reimbursable as follows:

> A. Actuarial Accrued Liability. - The actuarial accrued liability is that portion of pension costs, actuarially determined, that is not provided for by

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[1] Transcript ("*Tr.*") at 6.

[2] The term "Medicare Contractor" refers to the Fiscal Intermediary or Medicare Administrative Contractor, as relevant.

[3] In calculating the allowable pension cost, the Medicare Contractor used the actuarial accrued liabilities discounted to present value using an interest rate of 8.25 percent. This was the actuarial accrued liability valuation and interest rate from Montgomery's revised 2007 IRS Schedule B Form 5500 line 1c(2)(b) and line 6e, respectively. (Note: Montgomery revised its IRS Schedule B Form 5500 on October 7, 2008 to reflect that Montgomery did not make its pension contribution until October 15, 2007.) *See* Exhibit I-1 for Montgomery's original IRS Schedule B Form 5500, pg 2, #3(a), pg 3, #6(e) and Exhibit I-2 for Montgomery's revised IRS Schedule B Form 5500.

[4] 42 C.F.R. § 413.70(a)(1); 42 U.S.C. § 1395f(*l*).

> current and future normal costs. Actuarial accrued liabilities as well as any increases or decreases in actuarial accrued liabilities must be amortized ratably over a minimum of 10 years, or such shorter period prescribed by ERISA for particular actuarial liability adjustments, subject to the payment requirements in §2142.6A.
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> B. <u>Normal (Current Service) Costs</u>. - Normal (current service) cost is that portion of pension costs, actuarially determined, which is allocated to the current year, exclusive of any payment toward the unfunded actuarial accrued liability. Provider payments of a pension plan liability for normal costs are allowable in the year accrued, provided the payment requirements in §2142.6A are met.

PRM 15-1 § 2142.6, which imposes additional requirements on the allowability of the pension payments, states in part:

> A. <u>Payment Requirements</u>. -- The provider must make payment of its current liability for both normal costs and actuarial accrued liability costs to the fund established for the pension plan in accordance with the provisions covering liquidation of liabilities established in §2305. The instructions require full liquidation of the liability within 1 year after the end of the cost reporting period in which the liability is incurred. An extension, not to exceed 3 years beyond the end of the cost reporting year in which the liability was incurred, may be granted by the intermediary for good cause if the provider, within the 1-year time limit, furnishes to the intermediary sufficient written justification (based upon documented evidence) for non-payment of the liability.
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> C. <u>Excessive Payments</u>. -- Where the payment made is more than the lesser of the tax deductible maximum or the total normal cost plus ratable amortization of the unfunded actuarial accrued liability, the excess may be carried forward and considered as payment against the liability to the fund of the future period.

Montgomery has an ERISA-qualified[5] defined benefit plan to provide retirement benefits for its qualifying employees. Montgomery did not pay any pension contributions in 2005 or 2006 and did not claim any pension amount on its 2005 or 2006 cost reports.[6] On July 27, 2007, the Pension Benefit Guaranty Corporation imposed a lien on the Provider. On October 15, 2007, the Provider paid $1,096,520 into its defined benefit pension plan and the lien was released.[7] The Medicare Contractor disallowed the pension expense removing Medicare's share of those costs. The Provider disagrees with this disallowance.

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[5] The Employee Retirement Income Security Act of 1974 is referred to as "ERISA."
[6] *See* Stipulations dated May 9, 2016 at 2.1 and 2.2.
[7] *See* Stipulations at 2.3 and 2.4.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Montgomery argues that it was required by law to contribute to its defined benefit plan during its cost reporting period ending December 31, 2007 and Medicare should fully reimburse it for a share of these costs.[8] The Provider's actuary prepared a 2006 Actuary Valuation Report which showed that the minimum funding necessary to be compliant with the ERISA requirements as modified by Retirement Protection Act of 1994 ("RPA") was $1,096,524.[9] Unable to pay this liability in 2006, Montgomery paid it in 2007.[10] In determining the amount by which its pension plan was underfunded, the Provider chose the highest possible interest rate within the permissible range (i.e., the interest rate that would yield the lowest possible pension funding). The rate the Provider chose was the interest rate for RPA current liability as reflected on IRS Schedule B Form 5500 line 6(a) and on page 13 of the Actuary Valuation Report.[11]

Montgomery contends that the 2007 pension payment was both "necessary and proper" and that Medicare should fully reimburse this cost. The Provider points out the pension costs were "necessary" insofar as they were clearly required and "proper" because the pension payments were imposed by Congress.[12] Montgomery claims the actuarial report and the IRS Form 5500 both clearly show the RPA provisions applied to the Provider. Under this statutory calculation, using an interest rate established by law, if the plan's assets were less than 90 percent of its liabilities, then the plan must make a "deficit reduction contribution." The Provider points out that the deficit reduction contribution is not dependent upon "current liability for both normal costs and actuarial accrued liability costs" as prescribed by the PRM. Rather, it requires the use of a statutorily mandated rate of return to determine the deficit reduction contribution.[13]

Further, Montgomery points out that ERISA requires that it pay any deficiency from prior plan years, plus interest on that deficiency, and on late quarterly contributions. These payments are in addition to paying any normal cost or amortization of unfunded liability as stated in PRM § 2142.5. The Provider argues that these payments should be included in the Provider's cost report because the PRM is outdated and does not take into account the additional funding requirements that Congress had established through ERISA statutory amendments.[14]

Lastly, Montgomery argues that it was required under all standards to make a payment related to its 2005 accrued liability. At a minimum, the Board should allow the contributions made by the Provider related to 2005. The Provider notes that the Medicare Contractor's witness agreed that in 2005 there was an unfunded liability and this would have been allowable had it been claimed in 2005.[15]

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[8] Provider's Final Position Paper at 9.
[9] Exhibit P-2 at 2.
[10] As there was an additional required contribution for 2007 attributable to interest and a credit of $545,388, the Provider believes the Medicare share should be based on a contribution of $1,087,884. *See* Provider's Final Position Paper at 8-9.
[11] *Id.* at at 6-7, Exhibit P-5 line 6a, and Exhibit P-2 at 13 (IRS Current Liability columns).
[12] Provider's Final Position Paper at 10-11.
[13] *Id.* at 12.
[14] Provider's Post-Hearing Brief at 15.
[15] *Id. at* 18.

For its part, the Medicare Contractor explains that this appeal is really a dispute as to which method of calculating Montgomery's pension liability (PRM versus ERISA) is the correct one to use when calculating Medicare's payment to Montgomery. The Medicare Contractor points out that the PRM formula relies on the IRS Schedule B Form 5500 and the Provider's actuarial report to obtain the actuarial value of assets and the actuarial accrued liability to determine the amount of any of unfunded liability. The Provider's IRS Schedule B Form 5500 and its actuarial report indicate that Montgomery's 2007 actuarial value of assets exceed its actuarial accrued liabilities.[16] Based on the PRM, when the actuarial value of assets is greater than the actuarial accrued liability there is a surplus and no unfunded liability for the cost year.[17] Therefore, the Medicare Contractor asserts that it correctly eliminated pension costs from the Provider's 2007 cost report.

Further, the Medicare Contractor points out that the Provider wants it to use the RPA Current Liability as reported on Line 1d(2)(a) of Form 5500 to determine if there is an unfunded liability. However, ERISA defines the RPA Current Liability separate and distinct from the actuarial accrued liability and, based on the PRM requirements, cannot be used to determine the amount that can be reimbursed on the Medicare cost report. The Medicare Contractor asserts that there is no legal justification to use the RPA Current Liability concept instead of the formula in the PRM; nor can the Provider unilaterally elect to use a method which produces a more advantageous result.[18]

The Board's review of the PRM finds that it makes no mention of the concept of the RPA Current Liability. The Board notes the RPA Current Liability assumes that the Provider is "going out of business" and must pay off every plan participant on that day. It is based on a published interest rate that is intended to closely replicate the price the Provider would have to pay to transfer the liability for all plan benefits accrued to a third party as of the valuation date.[19] Although the RPA provisions may have required a pension contribution by the Provider, the Board finds that the pension contribution calculation based on the RPA is not relevant to the calculation of Medicare allowable pension costs based on the PRM. While the Board is not bound by PRM program instructions, it notes that the RPA is not referenced nor incorporated into the PRM.

The Board supports this finding by referencing PRM 15-1 § 2142.6 A which states "[t]he provider must make payment of its current liability for both normal costs and actuarial accrued liability costs to the fund established for the pension plan." Further PRM 15-1 § 2142.6 C addresses *excessive* payments stating "[w]here the payment made is more than the lesser of the tax deductible maximum or the total normal cost plus ratable amortization of the unfunded actuarial accrued liability, the excess may be carried forward and considered as payment against the liability to the fund of the future period."

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[16] Medicare Contractor's Post Hearing Brief at 2.
[17] PRM 15-1 § 2142.6 (C).
[18] Medicare Contractor's Post Hearing Brief at 4.
[19] *Tr.*at 78-81.

The Board points out the Provider's 2007 IRS Form 5500 Schedule B and its actuarial report both show the normal cost[20] and the unfunded actuarial accrued liability as zero.[21] As such, based on PRM 15-1 § 2142.6 C, the Board finds Montgomery's allowable pension cost for 2007 is zero. Since none of the payment costs were allowed, as they exceeded the lesser of the tax deductible maximum or the normal costs plus ratable amortization of the unfunded amortization, they can be carried forward and applied against the liability to fund future periods.

The Board recognizes that the Pension Guaranty Benefit Corporation imposed a lien on Montgomery's assets and Montgomery made a payment in the amount of $1,096,520 on October 15, 2007, resulting in the release of the lien. However, as this payment was made in 2007 when there was no unfunded actuarial accrued liability, the amount paid is considered an excess payment and may be carried forward to a future period.[22]

The Board's position in this case is consistent with its decision in *DMC Hospitals FFY 2010 Wage Index Pension Group v. BlueCross BlueShield Association/National Government Services*, PRRB Dec. No. 2011-D47, 2011 WL 4843196 (September 28, 2011), which found the PRM consistent with the Medicare regulations and the use of other ERISA policy inconsistent with CMS policy.

With respect to Montgomery's argument that the Board should allow the contributions made by the Provider related to 2005, the Board rejects the argument and finds that this appeal involves pension costs only on Montgomery's 2007 cost report.[23] As this case does not involve an appeal of Montgomery's 2005 cost report, the Board cannot make a finding related to the 2005 cost report.

DECISION:

After considering the Medicare law and regulations, the evidence presented, and the parties' contentions, the Board finds that the Medicare Contractor properly calculated and adjusted the Provider's defined benefit pension plan contribution costs on the Provider's fiscal year 2007 cost report.

BOARD MEMBERS PARTICIPATING:

L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
Gregory H. Ziegler, CPA, CPC-A

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[20] *See* Montgomery's revised 2007 IRS Schedule B Form 5500 line 9b (Exhibit I-2). *See also* Montgomery's 2007 revised actuarial report (Exhibit I-5 at 4). Montgomery had its reports revised as it did not make the $1,096,520 payment until October 15, 2007.
[21] Based on Montgomery's 2007 revised actuarial report, the actuarial value of the assets is $4,351,972, which is greater than the accrued liability of $4,262,943, and therefore there is no unfunded liability. *See* Exhibit I-5 at 1.
[22] PRM 15-1 § 2142.6 C.
[23] *Tr.* at 6.

FOR THE BOARD:

/s/
L. Sue Andersen
Chairperson

DATE: November 29, 2017