PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2018-D36

PROVIDER –
Covenant Medical Center, Inc.

Provider No.: 23-0070

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Service

DATE OF HEARING -
November 17, 2016

Cost Reporting Periods Ended -
June 30, 2007; June 30, 2008; June 30, 2009

CASE NOs.: 13-1575; 13-2481; 13-2518

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ISSUE STATEMENT:

"Whether, for purposes of the graduate medical education ("GME") payment and indirect medical education ("IME") adjustments for FYE's 06/30/2007, 06/30/2008 and 06/30/2009, the Provider is entitled to count full time equivalent ("FTE") residents training in the non-provider setting."[1]

DECISION:

After considering the Medicare law and regulations, the parties' contentions and the evidence presented, the Provider Reimbursement Review Board ("Board") finds that the Medicare Contractor properly adjusted Covenant Medical Center's fiscal years ("FY") 2007-2009 GME and IME payments for interns and residents rotating to nonhospital settings.

INTRODUCTION:

Covenant Medical Center, Inc. ("Covenant" or "Provider") is an acute care facility located in Saginaw, Michigan. Covenant's designated Medicare Administrative Contractor is Wisconsin Physicians Service ("Medicare Contractor"). The Medicare Contractor reduced Covenant's reimbursement for GME and IME for FYEs 06/30/2007 and 06/30/2008 because it believed Covenant did not incur "all or substantially all" of the costs of the training program as required by federal regulation.[2]

Covenant timely appealed the Medicare Contractor's adjustments to the Board, and met the jurisdictional requirements for a hearing. The Board conducted a telephonic hearing on November 17, 2016. Covenant was represented by Kenneth R. Marcus, Esq., of Honigman Miller Schwartz & Cohn. The Medicare Contractor was represented by Scott Berends, Esq., of Federal Specialized Services.

STATEMENT OF FACTS

For GME/IME reimbursement, federal statutes at 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv) entitle a hospital to count its residents' time spent in patient care activities in non-hospital settings, if "the hospital incurs all, or substantially all, of the costs *for the training program* in that [nonhospital] setting."[3] Federal regulations at 42 C.F.R. § 413.78(f)(2) (2008)[4] specify for cost reporting periods occurring on or after October 1, 2004 the time residents spend in non-provider settings, such as clinics, may be included in in the hospital's

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[1] *See* Parties' Stipulation of Fact ¶ 1.

[2] Medicare Contractor did not make an FTE adjustment for FYE 06/30/2009. However, FYE 06/30/2007 and 06/30/2008 have an impact on the 06/30/2009 three year rolling average.

[3] (emphasis added.)

[4] This regulation was originally codified at 42 C.F.R. § 413.86(f)(4), redesignated as § 413.78(e) without any substantive changes pertinent to this appeal. *See* 69 Fed. Reg. 48916, 49111-49112 (Aug. 11, 2004). The regulation was again redesignated as § 413.78(f) in 2007. See 72 Fed. Reg. 26870, 26995. (May 11, 2007). Federal regulation at 42 C.F.R. § 412.105(f)(1)(ii)(C) incorporates these GME requirements (as originally codified and later redesignated) into the IME requirements. *See id.* at 49244-49245.

number of FTE residents if "*the hospital* . . . incur[s] all or substantially all of the costs *for the training program* in the nonhospital setting(s)."[5]

The May 11, 2007 Federal Register states the following:

> "[u]nder the new definition of "all or substantially all," whether hospitals pay for the costs of a program at a nonhospital site on a concurrent basis, or if they have a written agreement, they must be able to document how they are paying for "all of substantially all" of the cost of a particular program at each nonhospital site. … Similarly, as under current policy, if two (or more) hospitals train residents in the same accredited program, and the residents rotate to the same nonhospital site(s), the hospitals cannot share the costs of that program at that nonhospital site (for example, by dividing the FTE residents they wish to count according to some predetermined methodology), as we do not believe this is consistent with the statutory requirement at section 1886(h)(4)(E) of the Act which states that the hospital incur *"all or substantially all, of the cost for the training program in that setting"* [6]

On July 3, 1968, Covenant and two other teaching hospitals established a Michigan nonprofit corporation named "Saginaw Affiliated Hospitals. For the relevant period, the name of this entity was Saginaw Cooperative Hospital's Inc. d/b/a Synergy Medical Education Alliance ("Synergy"). [7] For the years under appeal Synergy enrolled the interns and residents in their accredited graduate medical education programs and directly incurred the entire cost of compensation and benefits for these interns and residents. Synergy operated clinics where the residents received some of their training. Synergy also employed or contracted with the physicians who trained and supervised the interns and residents at the Synergy clinics.[8]

Covenant, St. Mary's and Synergy signed a Master Affiliation Agreement describing the resident training arrangement among the entities.[9] This agreement stated Covenant was responsible for paying "all or substantially all of the costs of training all Covenant Residents at Synergy and any of its non-Covenant settings." [10] Covenant and St. Mary's also entered into an annual Affiliation Agreement[11] by which Covenant and St. Mary's designated the number of GME and IME FTE caps that would be assigned to each hospital.[12] Additionally Covenant and St. Mary's signed a written funding agreement in the form of a budget which reflected each hospital's contribution. Covenant made payments and claimed intern and resident FTEs consistent with these agreements.[13]

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[5] The Board further notes that 42 U.S.C. § 1395ww(d)(5)(B)(iv) similarly includes the condition that "*the hospital* incurs all, or substantially all, of the costs *for the training program* in that [nonhospital] setting." (emphasis added.)
[6] 72 Fed. Reg. 26870, 26969 (May 11, 2007).
[7] Provider's Final Position Paper at 5-6. *See* Stipulations of Fact ¶¶ 8-9.
[8] *See* Stipulations of Fact ¶¶ 11-14.
[9] Provider's Final Position Paper at 6-7.
[10] *See* Stipulation of Fact ¶ 17.
[11] *See* 42 C.F.R. § 413.79(f).
[12] *See* Stipulations of Fact ¶¶ 17-18.
[13] *See id.* ¶¶ 19 and 20.

The Medicare Contractor disallowed the FTEs for residents that rotated to Synergy clinics because Covenant and St. Mary's hospital (St. Mary's") jointly funded the residents at the non-provider setting.[14] The dispute in this appeal is whether Covenant incurred all or substantially all of the cost of the "Covenant residency programs" (for this appeal the OB GYN, Emergency Medicine, Surgery and Family Practice Programs are collectively referred to as the "Covenant residency programs).

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

Covenant asserts that St. Mary's conducted and incurred all or substantially all of the costs of the Internal Medicine Program while Covenant conducted and incurred all or substantially all of the costs of the OB GYN, Emergency Medicine, Surgery and Family Practice Programs.[15] Covenant asserts that the Synergy Funding agreement evidences that Covenant funded the" Covenant residency programs" and that St. Mary's funded the Internal Medicine residency program.

Covenant recognizes that in the August 1, 2003 Federal Register, CMS created the "dual hospital funding prohibition" which prohibits a hospital from counting any FTE residents "if it incurs all or substantially all of the cost *for only a portion* of the FTE residents in that program training setting" Covenant states that CMS clarified this prohibition in the 2007 Federal Register, stating the hospital must incur *"*all or substantially all, of the cost for the training program *in that setting."*[16] Covenant asserts that the prohibition does not apply in this situation because it funded all or substantially all the cost of the OB GYN, Emergency Medicine, Surgery and Family Practice Programs.[17]

The Medicare Contractor disputes the Provider's position because Covenant and St. Mary's, in fact, are each affiliated with and fund Synergy through lump sum monthly payments that do not identify the payment by program. The Medicare Contractor points out that Covenant's witness, Mr. McBrayer, acknowledged that both Covenant and St. Mary funded Synergy with lump sum amounts on a pre-determined basis.[18] The Medicare Contractor contends that Covenant did not pay all or substantially all of the costs of the "Covenant residency programs" but only contributed to the overall cost of the Synergy resident training programs.

Further, the Medicare Contractor points out that the Master Affiliation Agreement does not specify or limit how Synergy will apply the funding.[19] Contrary to Covenant's claim, there is no evidence that Covenant or St. Mary had an obligation to fund specific programs.

Finally, the Medicare Contractor maintains that the May 11, 2007 Federal Register supports its adjustment because it states:

[14] Medicare Contractor's Final Position Paper at 7 and Stipulation of Facts ¶ 6.
[15] Provider's Final Position Paper at 7.
[16] 72 Fed. Reg. 26870, 26969 (May 11, 2007).
[17] Provider's Final Position Paper at 17-18.
[18] *Tr*. at 64-65.
[19] Medicare Contractor's Post-Hearing Brief at 7-8. Exhibit P-21.

> Global agreements with lump sum payment amounts, either for teaching physician costs or for nonhospital training in general, have not been sufficient under existing policy and would not be sufficient under the finalized policy. Similarly, as under current policy, if two (or more) hospitals train residents in the same accredited program, and the residents rotate to the same nonhospital site(s), the hospitals cannot share the costs of that program at the nonhospital site…"[20]

The Board reviewed the record and finds that Covenant failed to provide adequate proof that it solely funded the OB GYN, Emergency Medicine, Surgery and Family Practice Programs. Although Covenant prepared schedules for the hearing that showed expenses and funding by program, the record does not identify the source of this data. Furthermore, the record contains evidence that these schedules contain an amount for "Administration" and "Simulation" that appeared to be included so that identified expenses would balance to the contributions made by the hospital.[21]

The Board also finds that Master Affiliation Agreement does not designate funding by program. This agreement states that "Covenant agrees to fund … all or substantially all of the cost of training all of Covenants residents at Synergy". The agreement has a similar funding requirement for St. Mary's.[22] Additionally the GME Affiliation Agreements show that Covenant expected to include FTEs for all 5 programs including Internal Medicine for all years under appeal. The agreements allocated the Synergy clinic FTEs to both Covenant and St. Mary's based on the number of inpatient FTEs for each hospital. While the Board recognizes this schedule is only an estimate, this document failed to expressly distinguish between Covenant programs and St. Mary's programs. Based on this information the Board concludes that Covenant and St. Mary's did not fund separate and distinct programs but rather shared the cost of the various Synergy programs.[23]

Finally in 2013 the District Court for the District of Columbia in *Borgess v. Sebelius*[24] held that since Congress did not specifically speak to the issue of whether the "all or substantially all" language precluded the sharing of costs between two or more hospitals, it was a proper exercise of CMS' authority to interpret the statutory language in the restrictive manner. The Court stated that the Secretary had adopted this interpretation as early as 1998 and there was no change from its previous position. [25]

Based on the above the Board concludes that the financial arrangement between Covenant, St. Mary's, and Synergy did not sufficiently comply with longstanding federal statute and

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[20] *Id.* at 8; 72 FR 26969 (May 11, 2007).
[21] Exhibit P-23 and P-24. *Tr.* at 96-101. The Board also notes that in the schedules only St. Mary's shows an accounts receivable amount. See Exhibit P-23.
[22] Exhibit P-11 at 12 ¶5.
[23]The Board recognizes Covenant submitted a 2006 proposal for an Academic Internal Medicine program at St. Mary's with its post-hearing brief, however there is no evidence whether or when this proposal was implemented. See Exhibit P-30.
[24] 966 F. Supp. 2d 1 (D.D.C. 2013).
[25] *See id.* at 6-7 (citing language at 63 Fed. Reg. 40954, 40986 (July 31, 1998)).

regulation.[26] The Board finds the Medicare Contractor's GME/IME adjustments for interns and residents rotating to nonhospital settings was proper.

DECISION AND ORDER

After considering the Medicare law and regulations, the parties' contentions, and the evidence presented, the Board finds that the Medicare Contractor properly adjusted Covenant's FY 2007-2009 GME and IME payments for interns and residents rotating to nonhospital settings.

BOARD MEMBERS PARTICIPATING:

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

FOR THE BOARD:

/s/
L. Sue Andersen, Esq.
Chairperson

DATE: May 3, 2018

[26] 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv). Also see 42 C.F.R. § 413.78(f) (2007) and 42 C.F.R. § 413.78(e)(2) (2006). 42 C.F.R. § 412.105(f)(1)(ii)(C) incorporates these GME requirements (as originally codified and later redesignated) into the IME requirements.