

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

98-D34

PROVIDER -
Infuction Rehabilitation Services, Inc.
Acworth, Georgia

DATE OF HEARING-
December 9, 1997

Provider No. 11-6670

Cost Reporting Period Ended -
September 30, 1995

vs.

INTERMEDIARY -
Mutual of Omaha Insurance Company

CASE NO. 97-1914

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ISSUES:

1. Did the Intermediary properly adjust Medicare charges?
2. Did the Intermediary properly adjust Medicare deductibles, co-insurance and payments?
3. Did the Intermediary properly adjust physical therapy salary equivalency limits?
4. Was the Intermediary's adjustment to legal and accounting costs and other offset items proper?
5. Was the Intermediary's adjustment to other self-disallowed costs proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Infunction Rehabilitation Services, Inc. ("Provider") is a rehabilitation agency located in Acworth, Georgia. Mutual of Omaha ("Intermediary") made the adjustments at issue in the Provider's fiscal year ended ("FYE") September 30, 1995 cost report. The Provider filed a timely appeal with the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835-.1841 and has met the jurisdictional requirements of those regulations. The Medicare reimbursement effect exceeds \$10,000.

The Provider was purchased on September 20, 1995, only ten days before the end of its fiscal year. Due to the uncertainty of the extent of self-disallowances and adjustments that would result from the cost report, the previous and new owners entered in an agreement to adjust the payments to be made by the current owner to the previous owner in the event that adjustments were made in the final cost report. The sales agreement also contained the following clause:

"any sums recouped by Medicare for [FYE 1995]; provided however, that before the Buyer may recover such sums, the Buyer shall appeal each audit adjustment before the Provider Reimbursement Review Board ("PRRB") and receive a determination that the adjustment by the fiscal intermediary was correct"

Stock Purchase Agreement, Article I, § 1.2(c)(vi).¹

The current owner of the Provider has appealed its self-disallowances and adjustments to the Board in order to avail itself of the offset of payments due the previous owner. At the hearing on December 9, 1997, the parties presented the facts concerning each of the self-disallowance costs and adjustments so the Board could determine if they were proper.

The Provider was represented by James P. Kelly, Esquire, of the Kelly Law Firm, P.C. The Intermediary was represented by Tom Bruce, Senior Consultant, of the Mutual of Omaha

¹ See Provider Exhibit 4, at 2.

Insurance Company.

Issue 1 - Adjustments to Medicare Charges:

Facts:

The Intermediary made adjustments to the charges for speech therapy from \$26,820 to 28,980 and for occupational therapy from \$183,454 to \$198,124. The adjustment were made to make the charges reflect those on the Intermediary 's PS and R for the FYE at issue for all claims processed through December 31, 1996.

PROVIDER'S CONTENTIONS:

The Provider does not dispute that the adjustments made by the Intermediary accurately adjust the charges to its PS and R. The Provider does not have any proof that the PS and R is incorrect and indicates that a reconciliation of client logs and the PS and R is not available for the period.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that HCFA Pub. 13-2 § 2242.A addresses the use of the PS and R in the cost settlement process. It states that the Intermediary should "[u]se information about charges, Medicare patient days, coinsurance, etc., from the provider [PS and R] summary report in the cost settlement process unless the provider furnishes proof that inaccuracies exist." Id.

The Intermediary contends that the Provider must submit a claim by claim reconciliation to the PS and R report before it can conclude that it is inaccurate. More specifically, the Provider would have to identify all claims for which it was paid by the Intermediary that did not appear on the PS and R. The Provider has indicated that no such reconciliation exists.²

Issue 2 - Adjustments to Medicare Deductibles, Co-Insurance and Payments:

Facts:

The Intermediary made adjustments to the Provider's cost report to reflect the amounts on its PS and R for the service period October 1, 1994 to September 30, 1995 for all claims processed through December 31, 1996. The adjustments increased the coinsurance amounts from \$68,866 to \$72,232 and the interim payments from \$213,439 to \$223,874, and, as a consequence, decreased the Provider's reimbursement by \$13,801.

² See Stipulation, ¶ 1.

PROVIDER'S CONTENTIONS:

The Provider does not dispute that the adjustments made by the Intermediary accurately adjust the charges to its PS and R. The Provider does not have any proof that the PS and R is incorrect and indicates that a reconciliation of client logs and the PS and R is not available for the period.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that HCFA Pub. 13-2 § 2242.A addresses the use of the PS and R in the cost settlement process. It states that the Intermediary should “[u]se information about charges, Medicare patient days, coinsurance, etc., from the provider [PS and R] summary report in the cost settlement process unless the provider furnishes proof that inaccuracies exist.” Id.

The Intermediary contends that the Provider must submit a claim by claim reconciliation to the PS and R report before it can conclude that it is inaccurate. More specifically, the Provider would have to identify all claims for which it was paid by the Intermediary that did not appear on the PS and R. The Provider has indicated that no such reconciliation exists.³

Issue 3 - Adjustment of Physical Therapy Salary Costs:Facts:

The Provider furnished physical therapy services through a contractual arrangement with a supplier of services. The Provider did not initially complete a Supplemental Worksheet Form A-8-3 for determining the reasonable cost of physical therapy services furnished by outside suppliers. The Provider's accountant submitted the form on February 6, 1997.⁴ The calculation on Form A-8-3 resulted in a reduction in allowable costs for physical therapy services by outside suppliers by \$13,904 and reduced the Provider's Medicare costs by approximately \$10,000. The Intermediary adjustment merely reflects the data on Form A-8-3.⁵

PROVIDER'S CONTENTIONS:

The Provider indicates that there is no evidence that the hours reflected on the Intermediary

³ See Stipulation, ¶ 2.

⁴ See Intermediary Exhibit 3.

⁵ See Intermediary Exhibit 17.

audit adjustment are incorrect. The Provider also indicates that the rate calculations were done in conformance with Medicare guidelines.⁶

INTERMEDIARY'S CONTENTIONS:

The regulations at 42 C.F.R. § 413.106(a) require that the reasonable cost of services of a physical therapist furnished under arrangement may not exceed an amount equivalent to the prevailing salary plus additional costs that would reasonably have been incurred by the Provider had such services been performed by such person in an employment relationship. The manual provisions regarding this matter are at HCFA Pub. 15-1, Chapter 14. The Supplemental Worksheet Form A-8-3 takes the provider through the necessary calculation to determine the amount of reasonable costs. The Provider's accountant submitted the complete form to the Intermediary. The Intermediary has reviewed the computation of the Adjusted Hourly Standard Equivalency Amount and the Standard Travel allowance and concluded that they are accurate. The Intermediary has also checked the figures on the Form A-8-3 and concluded that they match the Provider's records for total number of weeks worked, number of unduplicated days on which the therapist was on site, and total hours worked by the therapist.

The Intermediary contends that its adjustment to the cost report to reflect the submission of Form A-8-3 was proper and in accordance with 42 C.F.R. § 413.106(a) and HCFA Pub. 15-1, Chapter 14.

Issue 4 - Adjustment to Legal and Accounting Costs and Other Offset Items:

Facts:

On the Provider's cost report it self-disallowed \$8,392 of costs. See Intermediary Exhibit 5. The following represent the individual items self-disallowed.

1. \$2,660 in legal fees incurred as a result of the sale of the facility.
2. \$229 in tax penalty expenses.
3. \$15 in contributions.
4. \$60 in investment expenses.
5. \$3,500 in depreciation recapture.
6. \$23 in vending machine income.
7. \$255 in interest income.
8. \$200 in advertising.
9. \$1,450 in related party costs.

⁶ See Provider Stipulation, ¶ 3 and Provider's Accountant's Affidavit, Provider Exhibit 6, at ¶ 6.

PROVIDER'S CONTENTIONS:

The Provider indicates that it self-disallowed all of these costs because they were not allowable under various Medicare rules.

Legal fees related to sale are not permitted under HCFA Pub. 15-1 § 2176. Tax penalties are not permitted under HCFA Pub. 15-1 § 2122.1. HCFA Pub. 15-1 §§ 2102.3 and 2139 does not allow charitable contributions because they are not related to patient care. The broker fee associated with the investments is not related to patient care under HCFA Pub. 15-1 § 1218.2. The recaptured depreciation as a result of a gain on sale of the assets is required. It is appropriate to offset income from the vending machines against allowable costs. HCFA Pub. 15-1 § 2136.2 does not allow advertising to increase utilization. Finally, the \$1,450 represent a related party interest.⁷

The Provider presented an affidavit from its accountant explaining the nature of all of the self-disallowances and indicates that the Intermediary agreed that they were necessary.

INTERMEDIARY'S CONTENTIONS:

The Intermediary indicates that HCFA Pub. 15-1 § 2176 states that "legal fees and related costs incurred in the sale of a facility . . . are not allowable." The Intermediary believes that the Provider's self-disallowance was proper.

The Intermediary points out that HCFA Pub. 15-1 § 2122.1 states, in part, that "[t]ax expenses should not include fines or penalties." Since the Provider identified the costs as late payroll tax penalties, their self-disallowance of the costs was correct. See Provider Exhibit 6, Affidavit, ¶ 7.b.

The Intermediary states that under HCFA Pub. 15-1 §§ 2102.3 and 2139, both charitable and political contributions are specifically listed as costs not related to patient care. The Intermediary asserts that the Provider properly self-disallowed these costs.

The Intermediary indicates that investment expenses are broker fees associated with the Provider's investments, and is not related to patient care.⁸ The Provider's costs identified as investment costs are therefore properly self-disallowed.

⁷ See Provider Exhibit 1 at A-3, line 13.

⁸ See Tr. at 11 and HCFA Pub.15-1 § 1218.2.

The Intermediary notes that the Provider recaptured depreciation as a result of a gain on sale of the assets.⁹ The Intermediary has no reason to dispute the Provider's treatment of these costs.

The Intermediary notes that the Provider offset the income from vending machines against allowable costs. The Intermediary agrees with the Provider treatment of the income as recovered costs was proper.

The Intermediary points out that HCFA Pub. 15-1 § 2136.2 does not allow advertising to increase utilization. Since the Provider indicated that the advertisement was to increase utilization, they properly self-disallowed the advertising costs.

The Intermediary notes that the \$1,450 is a related party transaction between the Provider and Phillip O'Conner, and is appropriately self-disallowed.

Issue 5 - Other Self-Disallowed Costs:

Facts:

The Provider self-disallowed the difference between the amount of interim payments received in the FYE September 30, 1995 and the amount of reimbursement shown on the Provider's September 30, 1995 cost report.

PROVIDER'S CONTENTIONS:

The Provider notes that it self-disallowed these costs because it could not claim costs above that which it incurred in the fiscal year in question.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the difference between the interim payments paid by the Intermediary to the Provider for services to Medicare beneficiaries during the fiscal year and the reimbursable costs for these services to the Provider may not be included in allowable costs.

CITATIONS OF LAWS, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Laws - 42 U.S.C.:

§ 1395x(v)(1)(A) - Reasonable Cost

⁹ See Provider Exhibit 5 at 5 (Category 6120).

2. Regulations - 42 C.F.R.:

- § 413.9 - Cost Related to Patient Care
- § 413.106 - Reasonable Costs of Physical and Other Therapy Furnished Under Arrangements

3. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

- § 1218.2 - Invested Funds
- § 1400 et seq. - Reasonable Cost of Therapy and Other Services Furnished by Outside Suppliers
- § 2102.3 - Costs Not Related to Patient Care
- § 2122.1 - Taxes- General Rule
- § 2136 et seq. - Advertising Costs - General
- § 2139 - Political Contributions
- § 2176 - Administrative Costs Incurred After Provider Terminates Participation in Program

4. Other:

HCFA Pub. 13-2 § 2242.A - Intermediary Use of PS&R System Reports in Cost Settlement Process

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, testimony elicited at the hearing, and post hearing brief, finds and concludes as follows:

Issue 1 - Adjustments to Medicare Charges:

The Board finds that the PS and R is to be used in the cost settlement process unless the Provider

can furnish evidence that it is incorrect. See HCFA Pub. 13-2 § 2242.A. The Provider acknowledges that no evidence exists that the PS and R report was incorrect.¹⁰ The Intermediary's adjustments to the PS and R are affirmed.

Issue 2 - Adjustments to Medicare Deductibles, Co-Insurance and Payments:

The Board finds that the PS and R is to be used in the cost settlement process unless the Provider can furnish evidence that it is incorrect. See HCFA Pub. 13-2 § 2242.A. The Provider acknowledges that no evidence exists that the PS and R report was incorrect.¹¹ The Intermediary's adjustments to the PS and R are affirmed.

Issue 3 - Adjustment of Physical Therapy Salary Costs:

The Board notes that cost of physical therapy services provided by outside suppliers are limited by regulation. 42 C.F.R. § 413.106(a) and HCFA Pub. 15-1, Chapter 14. The record indicates that the Provider did not initially submit the Form A-8-3 required to determine the limitations on reasonable costs. The Provider subsequently submitted the required report and the Intermediary's adjustment merely reflects the data as submitted by the Provider on the form. There is no disagreement between the parties as to the accuracy of the data submitted on the form. The Board finds that the Intermediary's adjustment to the cost report, based upon the submission of the required form, was proper.

Issue 4 - Adjustment to Legal and Accounting Costs and Other Offset Items:

The Board notes that both the Provider and Intermediary agree that it was appropriate to self-disallow each of the costs under the various HCFA rules. The Board also finds that it was appropriate for the Provider to self-disallow all of these costs for the reasons stated.

Issue 5 - Other Self-Disallowed Costs:

The Board agrees with both the Intermediary and Provider that the Provider must self-disallow interim payment costs it received that exceeded its incurred costs in the FYE in question. The Provider's self-disallowance was proper.

¹⁰ See Stipulation, ¶ 1.

¹¹ See Stipulation, ¶ 2.

DECISION AND ORDER:

Issue 1 - Adjustments to Medicare Charges:

The Board finds that the Intermediary's use of the PS and R was proper. The Intermediary's adjustments are affirmed.

Issue 2 - Adjustments to Medicare Deductibles, Co-Insurance and Payments:

The Board finds that the Intermediary's use of the PS and R was proper. The Intermediary's adjustments are affirmed.

Issue 3 - Adjustment of Physical Therapy Salary Costs:

The Board finds that the Intermediary's adjustment to physical therapy costs was proper. The Intermediary adjustments are affirmed.

Issue 4 - Adjustment to Legal and Accounting Costs and Other Offset Items:

The Provider's self-disallowance of these costs was proper.

Issue 5 - Other Self-Disallowed Costs:

The Provider's self-disallowance of costs was proper.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esquire

Date of Decision: March 24, 1998

FOR THE BOARD:

Irvin W. Kues
Chairman