

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

99-D46

PROVIDER -
Crestview Convalescent Ctr.
Wyncote, PA

DATE OF HEARING-
December 12, 1998

Provider No. 39-5481

Cost Reporting Period Ended -
May 31, 1992

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association
Independence Blue Cross

CASE NO. 95-1043

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ISSUE:

Was the Intermediary's determination that the transportation costs for services provided by Today's Staffing Services Incorporated were not reasonable necessary or related to patient care, proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Crestview Convalescent Center ("Provider") is a skilled nursing facility located in Wyncote, Pennsylvania. During the fiscal year ended 5/31/92, the Provider was owned by Geriatric and Medical Centers, Inc ("Geri-Med"). Today's Staffing Services, Inc. ("TSS") provided employee transportation services to the Provider and to seven other nursing facilities located in Pennsylvania. TSS was managed by Geri-Med. Geri-Med is related to TSS and that fact is reported on the Provider's cost report. Only the transportation costs of TSS were claimed on the Provider's cost report.

TSS utilized several vans over four major routes in the Philadelphia area to transport employees from inner city Philadelphia to the facilities located in the suburbs. The vans picked up employees in various designated locations within the city, not from the employees homes. TSS charged the facilities only the costs incurred in providing transportation. These cost were: depreciation, gasoline, repairs, insurance, and minor administrative expenses. The transportation service was generally used by entry level employees, primarily Certified Nursing Assistants (CNA's). The entry level employees and CNA's were generally the lower salaried and lower compensated employees.

In the audit of the Provider's cost report for the fiscal year ended 5/31/92, Independence Blue Cross and Blue Shield ("Intermediary") disallowed all of the employee transportation costs claimed. The Intermediary offset a total of \$86,914 from Nursing Administration as a result of a review conducted at the Provider's home office. The home office was claiming expenses related to the cost of services being supplied by TSS. The services included the transporting of staff to and from the workplace. These same expenses were then statistically allocated to various facilities including the Provider. During the review of the home office, the home office was requested to provide documentation showing the necessity of the transportation costs being claimed. Since no documentation was received, the transportation costs were disallowed. The Intermediary's sole witness at the hearing did not audit the 5/31/92 cost report. However, the witness did audit the 5/31/96 cost report. The transportation expense claimed for the 5/31/96 cost report was the same type of expense claimed on the 5/31/92 cost report. The transportation expense was not disallowed on the 5/31/96 cost report.

The Provider disagreed with the Intermediary's determination and filed an 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 amount in contention is approximately \$86,914.

The Provider was represented by John N. Kennedy, Esq. of Latsha Davis & Yohe, P.C.. The Intermediary was represented by Bernard M. Talbert Esq. of the Blue Cross and Blue Shield Association, Chicago.

PROVIDER'S CONTENTIONS:

The Provider argues that the transportation costs incurred were necessary and proper costs. The Medicare regulations define necessary and proper costs as follows:

Necessary and proper costs are costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. They are usually costs that are common and accepted in the field of the provider's activity.

42 C.F.R. § 413.9(b)(2)

The Provider also maintains that the Provider Reimbursement Manual HCFA Pub. 15-1 § 2105.6 recognizes that costs of employee travel as generally allowable.

The Provider points out that the problem caused by the reverse commute to suburban areas is a nationwide crisis. The Federal Government passed legislation in May, 1998 entitled the Transportation Equity Act. The statute sets aside hundreds of millions of dollars in an effort to jump-start a process to facilitate inner city residents' commute to the suburban areas for employment.

The Provider also points out that its expert transportation witness identified numerous problems with staffing nursing homes located in suburban areas of various cities, including Philadelphia. Even where the transportation is available, a major problem is the cost of commuting to the suburbs. The public transportation costs of commuting from Philadelphia to the Provider's location can be as much as \$13.20 per day. For an individual making approximately \$6.00 to \$7.00 an hour, this is a significant factor in deciding whether to take a position in the suburbs.

The Provider points out that time is also a serious problem.. It may take up to four hours for a round trip to and from Philadelphia to the suburban areas using public transportation. The amount of travel time may be a negative factor in an inner city resident's decision to take employment in a suburban area.

The Provider also points out that another major problem is the availability of the transportation service. Public transportation does not operate 24 hours a day. Around the clock transportation is required in order to adequately staff a health facility that operates

several shifts to cover 24 hours a day. Faced with these transportation problems, the Provider sought to remedy the staffing issue by utilizing the employee transportation service.

The Provider argues that the transportation costs were necessary and proper. The Provider utilized the employee transportation service only after analyzing other proposed alternatives to solve its staffing problem. The Provider points out that a nursing home must have enough employees to operate the facility and provide quality care to the residents. The transportation service was selected to remedy the staffing problem only after addressing and analyzing whether any of the following alternatives existed:

- 1-public transportation
- 2-obtaining employees from the area in which the facility is located
- 3-use of external nurse pools to staff the facility
- 4-purchasing a van for each facility to pick-up/drop off employees from the closest public transportation
- 5-increasing employee salaries.

The Provider contends that there was no adequate public transportation available for the employees to commute from Philadelphia to its facility. The closest public transit site from the Provider's location was one and one half to two miles distant. The employees could not reasonably be expected to walk that distance. The Intermediary's witness expected that the Provider's employees could walk through the rain and snow from the closest public transportation to the Provider's facility.

The Provider further contends that the train was not available on weekends to meet the needs of all shifts. The Provider also points out that it was illegal to walk along the road from the public transportation site to the Provider's facility. Pedestrian traffic was restricted by the local government to reduce the amount of people injured walking along the road.

The Provider argues that it was not able to obtain employees from the local suburban area. The Provider performed various labor market studies and determined that they could not recruit adequately, if at all, from the affluent suburbs. The jobs available generally paid from \$6.00 to \$7.00 per hour. The lower paying positions in a nursing home, particularly CNA's are very difficult jobs to perform. Some of the studies conducted actually resulted in zero individuals from the suburban areas being willing to work at these positions.

The Provider contends that the use of external pool nursing to staff the facility was not economically viable. The hourly wage of an external pool nurse ranged from \$12.00 to \$18.00 an hour. The facility was paying their employees that utilized the transportation service \$6.00 to \$7.00 an hour. The cost of the transportation service as compared to the external nurse pool cost was considered a bargain.

The Provider argues that the cost of providing transportation service to its lower paid employees was cheaper than raising the salaries of the employees to a point where they could afford to own their own transportation. In order for an employee to purchase their own transportation, the Provider would have had to increase the hourly wage from \$6.00 to approximately \$14.00. That higher cost would have been prohibitive and probably disallowed by the Intermediary.

The Provider points out that the Intermediary's witness contradicted himself when he agreed that simply because a cost is unusual, it is not automatically disallowed. The witness admitted transportation expenses are reasonable. The witness also admitted that based on a computation performed at the hearing, transportation cost of from \$11,000 to \$15,000 would be allowable.¹ The witness also admitted that his prior computations were erroneous, and that the amount of allowable transportation costs could be higher than he estimated.² The witness admitted that there may be a legitimate reason for the facility to incur \$86,000 worth of transportation expense.³ The witness also admitted that it was possible that the transportation costs at issue in the instant case have actually been claimed by other providers and have been allowed for other providers similarly situated.⁴ The Provider points out that the identical transportation costs were allowed for other facilities and for the Provider on its 5/31/96 cost report.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the transportation expenses are unnecessary and not related to patient care. The regulation at 42 C.F.R. § 413.9(b)(2) states:

Necessary and proper costs are costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. They are usually costs that are common and accepted occurrences in the field of the provider's activity.

Id.

The Intermediary argues that it is not customary for an employer to transport its employees from their homes to their places of work, especially since public transportation is available.

¹ Tr. at 187.

² Tr. at 213.

³ Tr. at 217.

⁴ Tr. at 185.

An employee's acceptance of a position should be contingent upon that individual's ability to travel to and from the workplace. Since the Provider was unable to supply documentation supporting the necessity of this expense, the burden of reimbursement should not be placed on the Medicare program.

The Intermediary argues that the costs are not directly related to patient care since the costs do not aid in the operation of the facilities and its activities. The transportation costs are indirectly related to the costs of patient care since the temporary nursing staffs, who are directly related to patient care, utilize the company's van service. However, since the nursing staffs could utilize other forms of transportation such as public transportation, the nursing staffs do not need to rely or depend on the company supplied service. Therefore, to transport the nursing staff is not imperative to the operations of any facility or its activities.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§ 405.1835-1841

- Board jurisdiction

§ 413.9 et seq.

- Necessary and proper costs

2. Program Instructions-Provider Reimbursement Manual (HCFA Pub. 15-1):

§ 2105.6

- Costs of Employee Travel

3. Other:

Transportation Equity Act

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after reviewing the facts in the case, the pertinent law and regulations, testimony elicited at the hearing and the Provider's post hearing brief, finds that the Intermediary improperly denied the Provider's transportation costs.

The Board finds that the transportation costs expended to transport the Provider's lower paid worker to the facility were necessary and proper costs within the meaning of 42 C.F.R. § 413.9(b)(2) which states in part;

necessary and proper costs are costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities. They are usually costs that are common and accepted in the field of the provider's activity.

Id.

The Board notes that the workers who were transported to the facility had virtually no other means of getting to the facility. The facility was located in a area which was not served by public transportation twenty four hours a day, seven days a week. The employees were low wage earners, with an average salary of \$6.50 an hour; they were unable to purchase their own means of transportation. The Board finds that even using public transportation when available, employees were required to walk at least one mile to the facility, and that there were restrictions on some of the roads which did not allow them to walk on legal walkways from public transportation to the facility.

The Board also finds that if the Provider had obtained the services of external pool nursing the employee cost would have been between \$12.00 and \$18.00 an hour. The employees utilizing the Provider's transportation services were paid \$6.00 to \$7.00 an hour. Therefore, the Board finds that the Provider acted prudently in using the transportation services rather than hiring higher wage external pool nursing.

The Board finds that at the time of the Intermediary audit there was not sufficient documentation to substantiate the Provider's claim for the transportation costs. However, at the hearing the Provider submitted detailed information such as transportation schedules, maps, wage information and testimony by the Intermediary's own witness which established the necessity and reasonableness of the transportation cost.

The Board finds that the transportation cost was related to patient care. The Board finds that without the transportation cost, the Provider would be unable to employ the necessary help to care for its patients. By providing the transportation service to its low paid, inner-city dwelling workers, the suburban Provider was assured that its staffing was adequate to care for its patients.

DECISION AND ORDER:

The Provider is entitled to the employee transportation costs. The Intermediary's adjustment is reversed.

BOARD MEMBERS PARTICIPATING:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker (recused himself under 42 C.F.R. § 405.1847)

Date of Decision: May 05, 1999

FOR THE BOARD:

Irvin W. Kues
Chairman