

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

ON-THE-RECORD

99-D65

PROVIDER -

Capital Home Health-Marksville
Marksville, Louisiana

DATE OF HEARING-

July 22, 1999

Provider No. 19-7317

Cost Reporting Period Ended -
September 30, 1991

vs.

INTERMEDIARY -

Blue Cross and Blue Shield of Iowa

CASE NO. 94-3026

INDEX

	Page No.
Issue.....	2
Statement of the Case and Procedural History.....	2
Provider's Contentions.....	2
Intermediary's Contentions.....	4
Citation of Law, Regulations & Program Instructions.....	7
Findings of Fact, Conclusions of Law and Discussion.....	8
Decision and Order.....	10

ISSUE:

Was the Intermediary's adjustment to Worksheet A-8-3 proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Capitol Home Health-Marksville ("Provider") is a freestanding home health agency located in Marksville, Louisiana. The Provider is owned and operated by Baton Rouge Health Care Corporation, a chain organization with its home office in Baton Rouge. In its as-filed cost report for the fiscal year ending September 30, 1991, the Provider claimed cost for providing 1,713 physical therapy patient visits of which 1,537 were covered Medicare beneficiary patient visits.¹ Employees who provided physical therapy service were compensated on a fee for service basis (i.e., per visit). The Provider did not complete Worksheet A-8-3 of the Medicare cost report. Blue Cross and Blue Shield of Iowa ("Intermediary") reviewed the Provider's compensation of the salaried physical therapists and concluded that the compensation of 92 percent of the Provider's physical therapists is subject to the physical therapist guidelines. The Intermediary used Worksheet A-8-3 to compare the costs of the Provider's physical therapist employees to the Average Hourly Salary Equivalent Amount ("AHSEA") for physical therapists and determined the excess cost over the limitation was \$12,024.² The Provider contends that the Intermediary made the adjustment based on unequivocal comparisons concerning salary equivalents for FICA paid employees. Specifically, the Intermediary compared the costs of the Provider for physical therapy visits (which included base salary plus benefits) to the AHSEA limits.

The Intermediary issued a Notice of Program Reimbursement on February 25, 1994 which included this reduction in cost. On June 28, 1994, the Provider timely appealed the Intermediary's adjustment to the Provider Reimbursement Review Board ("Board") and has met the jurisdictional requirements of 42 C.F.R. §§405.1835-1841. The approximate amount of Medicare reimbursement in controversy is \$11,173.³ The Provider is represented by Katherine Karker-Jennings, P.A., and the Intermediary is represented by Bernard Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider argues in its preliminary and final position papers that the Intermediary's adjustment was based on unequivocal comparisons of its physical therapist FICA paid employees to the AHSEA physical therapist limits established for outside supplier physical therapists. The Provider contends that when the Intermediary compared the costs of its employees to the AHSEA limits, it should have

¹ Intermediary Position Paper at 8; See also Intermediary Exhibit I-3.

² Id.

³ Provider's Position Paper at 2, Intermediary Position Paper at 5.

included a reasonable fringe benefit add-on to the AHSEA rates.⁴ The Provider acknowledges that there is a diminimus add-on included in the AHSEA rates, but it is not sufficient to cover the Provider's reasonable costs.

The Provider refers to the Provider Reimbursement Manual, Part I § 1401.1 (HCFA Pub. 15-1) which states as follows:

Fringe Benefit and Expense Factor

The fringe benefit and expense factor is an allowance that compensates an outside supplier for fringe benefits and for the expenses of a nonemployee therapist or other health-related specialist. In addition to a regular salary, an employee of a provider generally receives certain fringe benefits which may include vacation and sick pay, holidays, personal leave, insurance premiums, pension payments, allowances for job-related training, meals, severance pay, bonuses, etc.

An outside supplier may have some incidental expenses in connection with furnishing services to a provider at a provider site, such as maintaining an office to make the necessary arrangements with the provider. These expenses include office space, telephone, bookkeeping, billing and accounting fees, an answering service or a secretarial service, and professional costs, as well as appropriate insurance. Although the amount of these expenses may vary, a standard fringe benefit and expense factor is used to take both fringe benefits and nonemployee expenses into account. The factor is expressed as a percentage of the prevailing salary. This percentage is determined on a periodic basis by type of therapy.

HCFA Pub. 15-1 § 1401.1

The Provider argued that there were two solutions to this inequitable situation.⁵ The Intermediary should have added a reasonable fringe benefit factor to its calculated salary equivalents, or deducted the Provider's benefit factor from its cost or expense before comparing it to the base salary AHSEA. The Provider asserts that either correction would have resulted in a reversal of the adjustment.

⁴ Provider Position Paper at 2.

⁵ Id.

The Provider notes that the Intermediary did not address the Provider's proposed solutions in its position paper but rather just argued that per-visit compensated employees should be included on worksheet A-8-3 and be subject to non-employee limits.

In addressing the Intermediary's position directly, the Provider refers to a case that categorically reverses the Intermediary's position on treating per-visit employees as non-employees and subject to inclusion on worksheet A-8-3. The Provider notes that in In Home Health, Inc. v. Shalala, U.S. District Court, District of Minnesota, Civ. No. 97-2598/RHK/FLN, (June 16, 1998),⁶ the Court held that non-salaried physical therapists employed by a home health agency on a fee-for-service basis are not subject to the salary equivalency guidelines. The Provider contends that this case clearly supports its position and should be binding on the decision in the instant case. Accordingly, the Provider respectfully requests that the Intermediary's audit adjustment be reversed.

INTERMEDIARY'S CONTENTIONS:

It is the Intermediary's position that the audit adjustment which added the compensation and statistics of the Provider's physical therapists paid on a per visit basis to Worksheet A-8-3 of the Medicare cost report was made in accordance with the provisions of Medicare regulations 42 C.F.R. § 413.9 - Cost Related to Patient Care, 42 C.F.R. § 413.106 - Reasonable Cost of Physical and Other Therapy Services Furnished Under Arrangements, and the Program Instructions at HCFA Pub. 15-1, §§ 1400-1403 and §§ 2100-2103.⁷

More specifically, the Intermediary contends that its audit adjustment is correct for the following reasons:

The Intermediary refers to HCFA Pub.15-1, § 1403, pg. 14-8, fourth paragraph which states in part:

"In situations where compensation, at least in part, is based on a fee-for-service or on a percentage of income (or commission), these arrangements will be considered nonsalary arrangements and the entire compensation will be subject to the guidelines in this chapter."

Id. (Emphasis added.)

The Intermediary points out that the chapter referred to above is entitled Reasonable Cost of Therapy and Other Services Furnished by Outside Suppliers. The Intermediary asserts that the compensation of the physical therapists in question in the current case was based solely on a fee-for-service basis.

⁶ See Provider Exhibit P-1.

⁷ Intermediary Position Paper at 9.

Therefore, it is the Intermediary's position that the compensation of these therapists must be treated as "nonsalary arrangements," the same as outside suppliers, and compared to the physical therapist guidelines in HCFA Pub. 15-1, Chapter 14. The Intermediary contends that its adjustment complies with this section of the manual.

The Intermediary also argues that there are no time records available in support of compensation paid to the physical therapists paid on a per visit basis.⁸ The Intermediary contends that in order to determine the reasonableness of this compensation, information such as hourly rates and hours paid (productive and nonproductive hours) is needed. Since hours and rates based on hours were not available, the Intermediary asserts that it had to resort to a different methodology for determining reasonableness. The Intermediary is referring to the methodology on physical therapist guidelines in HCFA Pub.15-1, Chapter 14. The Intermediary further asserts that the use of the guidelines in this case would conservatively overstate reasonable compensation in that the guidelines include an amount for office expense normally incurred by outside suppliers. The salaried employees in this case would not incur this type of expense.

The Intermediary also refers to the HCFA Administrator's second decision reversing the Board in In Home Health D/B/A Home Health Plus v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 96D-16, February 27, 1996, Medicare & Medicaid Guide (CCH) ¶ 44,065, rev'd HCFA Adm. April 29, 1996, Medicare & Medicaid Guide (CCH) ¶ 44,595, remanded to DHHS by USDC Minn. March 5, 1997, Medicare & Medicaid Guide (CCH) ¶45,129, again reversing PRRB Dec.96-D16, HCFA Adm., October 28, 1997, Medicare & Medicaid Guide (CCH) ¶45,942, ("In Home").⁹ The Intermediary points out that in In Home , the HCFA Administrator ruled that the intermediary properly applied the Salary Equivalency Guidelines per HCFA Pub. 15-1, Chapter 14 to the "per visit" compensated physical therapists. The Intermediary contends that the facts in that decision are similar to the facts and circumstances in this appeal.¹⁰

The Intermediary also refers to Community Memorial Hospital and W.S. Hundley Annex Group Appeal v. Blue Cross and Blue Shield Association/Blue Cross of Virginia, PRRB Dec. No. 84D-118, May 11, 1984, Medicare & Medicaid Guide (CCH) ¶34,099, ("Community").¹¹ The Intermediary points out that in Community , the Board ruled that a physical therapist who is a salaried employee and compensated on the basis of gross charges of the physical therapy department is subject to the physical therapist guidelines contained in HCFA Pub. 15-1, Chapter 14. The Intermediary believes that the facts in that decision are similar to the facts and circumstances in the current case. In both cases, the

⁸ Id.

⁹ Intermediary Exhibit I-4.

¹⁰ Intermediary Position Paper at 10.

¹¹ Intermediary Exhibit I-5.

issue pertains to compensation of provider employees. In comparing the two cases, the Intermediary notes that in Community, the compensation was based on 45 percent of gross charges less salaries paid by the provider to other therapists and therapist aides, whereas in the current case, the compensation is based on a rate per patient visit times the number of patients treated (patient visits).¹² The Intermediary also notes that in both cases, the providers did not maintain records of hours of service performed. Finally, the Intermediary asserts that in Community, the provider expressed an interest in obtaining an exception to the physical therapy guidelines. In the instant case, the Provider neither requested nor did the Intermediary approve an exception to the guidelines in HCFA Pub.15-1, Chapter 14.

The Intermediary asserts that there are several situations in which compensation of a salaried physical therapist would be subject to the limitation in Chapter 14. The Intermediary notes that on Page 14-8, the third paragraph of this section reads in part,

the costs of the services of a salaried employee who was formerly an outside supplier of therapy or other services, or any new salaried employment relationships will be closely scrutinized to determine if an employment situation is being used to circumvent the guidelines. Any costs in excess of an amount based on the going rate for salaried employee therapists must be fully justified.

HCFA Pub. 15-1, §1403, Pg. 14-8, 3rd paragraph.

The Intermediary believes that HCFA realized that certain salaried employment relationships would effectively circumvent the guidelines and provided for this circumvention in Section 1403.¹³ It is the Intermediary's position that there is no question in that HCFA Pub.15-1, Chapter 14 applies to certain salaried employment relationships. Accordingly, in this appeal, the Intermediary correctly identified salaried employment relationships, which are subject to the guidelines in Chapter 14.

The Intermediary also contends that the amounts the Provider paid for physical therapy services were not prudent and in accordance with the regulations and program instructions. To support this contention, the Intermediary refers to the regulations at 42 C.F.R. § 413.106(c)(5) which states in part, "[u]ntil a guideline is issued for a specific therapy or discipline, costs are evaluated so that such costs do not exceed what a prudent and cost conscious buyer would pay for the given service." *Id.* The Intermediary points out that this regulation is implemented by HCFA Pub. 15-1, §1403, page 14-8, fifth paragraph, which reads in part, "[u]ntil specific guidelines are issued for the evaluation of the reasonable costs of other services furnished by outside suppliers, such costs will continue to be

¹² Intermediary Position Paper at 10.

¹³ Intermediary Position Paper at 11.

evaluated under the Medicare programs requirement that only reasonable costs be reimbursed." Id. The Intermediary maintains that the relevancy of the above quotes is that HCFA Pub. 15-1, § 1403 is in effect specific guidelines for application of the prudent buyer principle. The Intermediary contends that this position is supported by HCFA and is offered as support that the audit adjustment in dispute is in accordance with Medicare regulations 42 C.F.R. § 413.9 - Cost Related to Patient Care and HCFA Pub.15-1, § 2103- Prudent Buyer.

In summary, it is the Intermediary's position that Medicare regulations and Program instructions, in regard to compensation paid to physical therapists based on a fee-for-service, clearly provide for the disallowance of those costs which exceed a reasonable level (i.e., costs in excess of the physical therapist guidelines are not prudent). The Intermediary, therefore, requests the Board to affirm its adjustment.

CITATION OF LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS:

1. Law-42 U.S.C.:
 - U.S.C. §1395x(v)(5)(A) - Reasonable Cost
2. Regulations - 42 C.F.R.:
 - § 413.9 - Cost Related to Patient Care
 - § 413.106 et seq. - Reasonable Cost of Physical and Other Therapy Services Furnished Under Arrangements
 - §§ 405.1835-.1841 - Board Jurisdiction
2. Program Instructions-Provider Reimbursement Manual, Part 1(HCFA Pub. 15-1):
 - Chapter 14 et seq. - Reasonable Cost of Therapy and Other Services Furnished by Outside Suppliers
 - § 2100 - Costs Related to Patient Care
 - § 2103 - Prudent Buyer
3. Cases:

In Home Health D/B/A Home Health Plus v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 96D-16, February 27, 1996, Medicare &

Medicaid Guide (CCH) ¶ 44,065, rev'd HCFA Adm. April 29, 1996, Medicare & Medicaid Guide (CCH) ¶ 44,595, remanded to DHHS by USDC Minn. March 5, 1997, Medicare & Medicaid Guide (CCH) ¶45,129, again reversing PRRB Dec.96-D16 , HCFA Adm., October 28, 1997, Medicare & Medicaid Guide (CCH) ¶45,942.

In Home Health, Inc. v. Shalala, U.S. District Court, District of Minnesota, Civ. No. 97-2598/RHK/FLN, (June 16, 1998), Medicare & Medicaid Guide (CCH) ¶300,005.

Community Memorial Hospital and W.S. Hundley Annex Group Appeal v. Blue Cross and Blue Shield Association/Blue Cross of Virginia, PRRB Dec. No. 84D-118, May 11, 1984, Medicare & Medicaid Guide (CCH) ¶34,099.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, and evidence presented, finds and concludes that the Intermediary improperly applied the physical therapy guidelines in Chapter 14 of HCFA Pub. 15-1 ("Guidelines") to the Provider's employee physical therapists resulting in an improper adjustment to the Provider's cost report.

The Board finds that the issue in this case is the application of the physical therapist guidelines to the wages paid to the Provider's employee physical therapists. Based on the evidence in the record, the Board also finds that the physical therapists in dispute are in fact bona fide employees of the Provider.¹⁴

Regarding the Intermediary's argument that the amounts the Provider paid for physical therapy services were not prudent, the Board applauds the Intermediary's effort to examine the prudence of physical therapy costs. However, while the Intermediary argued the prudent buyer concept, the Board finds a lack of an appropriate methodology and evaluation. It is the Board's opinion that the Intermediary should have used a method other than comparing the costs of Provider employee therapists to the guidelines in Chapter 14. Instead, the Intermediary should have determined whether the Provider's costs were "substantially out of line" by comparing the Provider's costs to other similarly situated providers. 42 C.F.R. §413.9

The Board refers to the U.S. District Court case for In Home, dated June 16, 1998, in which the court pointed out that:

the Act clearly states that physical therapy services performed "under arrangement" do not include services performed by a physical therapist

¹⁴ The Board notes that the Intermediary did not argue that the physical therapists in dispute were not Provider employees.

in an employment arrangement with the provider. 42 U.S.C. §1395x(v)(5)(A) reads:

Where physical therapy services...are furnished under an arrangement with a provider of services or other organization...as the reasonable cost of such services (as furnished under such arrangements) shall not exceed an amount equal to the salary which reasonably have been paid for such services...to the person performing them if they had been performed in an employment relationship with such provider or other organization (rather than under such arrangement).

The language of the Act distinguishes between services that are performed by employees of a provider and services that are performed “under an arrangement,” and it indicates that services performed by a physical therapist in an employment relationship with the provider are different from those services performed “under an arrangement.” The Guidelines, therefore, do not apply to employee physical therapists who are paid on a fee-per-visit basis.¹⁵

The Board finds that 42 U.S.C. §1395x(v)(5)(A) and 42 C.F.R. §413.106 provide no basis for the application of the Guidelines to the employee physical therapists. Both the legislative and regulatory history of the Guidelines indicate that their purpose was to curtail and prevent perceived abuse in the practices of outside physical therapy contractors. The Board also notes that the term “under arrangement” is commonly referred to and used interchangeably with the term “outside contractor.”

The Board agrees with the Intermediary’s position that the facts in this case are similar to the facts and circumstances in In Home.¹⁶ Therefore, based on its original decision in In Home, and on the District Court’s June 16, 1998 decision affirming the Board’s In Home decision, the Board concludes that the Intermediary’s adjustment in the current case was improper. Further, the Board points to the District Court’s conclusion in In Home, which states:

the Secretary’s interpretation of 42 U.S.C. §1395x(v)(5)(A) to include In Home’s employee therapists who are paid on a fee-per-visit basis and to apply the Guidelines to these physical therapists is contrary to the language of the Act, therefore, the Court will grant In Home’s

¹⁵ See In Home Health, Inc. v. Shalala, U.S. District Court, District of Minnesota, Civ. No. 97-2598/RHK/FLN, (June 16, 1998), Medicare & Medicaid Guide (CCH) ¶300,005.

¹⁶ Intermediary Position Paper at 10.

motion to set her decision aside.

In Home Health, Inc. v. Shalala, U.S. District Court, District of Minnesota, Civ. No. 97-2598/RHK/FLN, (June 16, 1998)

DECISION AND ORDER:

The Intermediary's adjustment applying the physical therapy Guidelines to the Provider's physical therapist employees was improper. The Intermediary's adjustment is reversed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Henry C. Wessman, Esquire
Martin W. Hoover, Jr., Esquire
Charles R. Barker

Date of Decision: August 27, 1999

For The Board

Irvin W. Kues
Chairman