

**PROVIDER REIMBURSEMENT REVIEW BOARD  
HEARING DECISION**

ON-THE-RECORD  
2000-D31

**PROVIDER -**  
Cabarrus County Home Health Agency  
Concord, North Carolina

**DATE OF HEARING-**  
February 22, 2000

Provider No. 34-7021

Cost Reporting Period Ended -  
June 30, 1994

**vs.**

**INTERMEDIARY -** Palmetto Government  
Benefits Administrator

**CASE NO.** 96-2587

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ISSUE:

Was the Intermediary's adjustment disallowing Provider's employee recruitment expense proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Cabarrus County Home Health Agency ("Provider") is a public, county owned and operated facility located in Concord, North Carolina.<sup>1</sup> During its cost reporting period ended June 30, 1994, the Provider claimed Medicare reimbursement for certain advertising costs that it believed were allowable program expenses pertaining to employee recruitment. Palmetto Government Benefits Administrator ("Intermediary") audited the Provider's cost report and disallowed \$46,198 of the advertising costs based upon its determination that the costs were incurred to increase the Provider's patient utilization rather than to recruit personnel.<sup>2</sup>

On April 19, 1996, the Intermediary issued a Notice of Program Reimbursement reflecting its adjustments to the Provider's advertising/employee recruitment costs. On September 19, 1996, the Provider appealed the Intermediary's adjustments to the Provider Reimbursement Review Board pursuant to 42 C.F.R. §§ 405.1835.-1841, and met the jurisdictional requirements of those regulations.<sup>3</sup> The amount of program funds in controversy is approximately \$39,900.<sup>4</sup>

The Provider was represented by Jo Ann Reed, RN, MSN, Director, Cabarrus County Home Health Agency. The Intermediary was represented by Bernard M. Talbert, Associate Counsel, Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary's adjustments are improper. The Provider maintains that the advertisements at issue in this case were for the purpose of recruiting employees; the Intermediary's allegations that the advertisements were directed to the general public in order to increase patient utilization are incorrect.<sup>5</sup>

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<sup>1</sup> Provider Position Paper at 1. Intermediary Position Paper at 1.

<sup>2</sup> Provider Position Paper at 2-4. See also Intermediary Position Paper at 2 and Provider's request for a Board hearing.

<sup>3</sup> Intermediary Position Paper at 1.

<sup>4</sup> Estimated based upon Provider's Medicare utilization rate of 86.4 percent.

<sup>5</sup> Provider Position Paper at 4.

The Provider contends that the facts in this case are essentially the same as those presented in Central Health Services 92 Employee Recruitment and Home Office Costs Group v Aetna Life Insurance Company, PRRB Dec. No. 97-D74, March 12, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,462, decl'd rev. HCFA Administrator, August 4, 1997, ("Central Health"), where the Board reversed the intermediary's adjustments. The Provider relies upon the arguments put forth in Central Health by entering Exhibits P-2 and P-3. Moreover, the Provider adds that Central Health Services is also its management company and, as in the Central Health case, the Provider engaged the services of Barnhardt & Walker to develop its recruitment campaign.<sup>6</sup>

The Provider contends that the purpose and objective of an advertisement are the key factors to determine whether or not the costs of such an advertisement are an allowable or unallowable program cost. The Provider notes that the Provider Reimbursement Manual, Part I (HCFA Pub. 15-1) § 2136.1 explains that the costs of advertising to recruit patient care personnel are allowable. Likewise, HCFA Pub. 15-1 § 2136.2 states that the costs of advertising "which seeks to increase patient utilization" is not allowable and that an analysis of the advertising copy and distribution may be necessary "to determine the specific objective." Id. The Provider notes that the Board has also held that the primary purpose of an advertisement determines whether it is reimbursable. See Chestnut Hill Mental Health Center, Inc. v. Blue Cross and Blue Shield of South Carolina, PRRB Dec. No. 92-D29, April 8, 1992, Medicare & Medicaid Guide (CCH) ¶ 40,238, decl'd rev. HCFA Administrator, May 18, 1992, where the Board held that a radio advertisement designed to improve a psychiatric hospital's public image was allowable, stating that, "[t]he primary purpose of the ad dictates its allowability . . . ."<sup>7</sup>

Respectively, the Provider asserts that the subject advertisement expenses were unquestionably incurred for recruitment purposes. The Provider explains that more than 87 percent of its services were furnished to Medicare patients, which must be ordered by a physician to be allowable. 42 C.F.R. § 484.14(c). Accordingly, the Provider maintains that advertisements aimed at the general public to increase patient utilization would render it little value since an individual cannot simply contact a home health agency to receive Medicare services.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its adjustments disallowing certain Provider advertising costs are proper because the purpose of the advertisement was to increase patient utilization.<sup>8</sup>

The Intermediary notes that according to HCFA Pub. 15-1 § 2136, "the allowability of advertising costs depends on whether they are appropriate and helpful in developing, maintaining, and furnishing covered services to Medicare beneficiaries . . . ." Also, "[a]dvertising costs incurred in connection

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<sup>6</sup> Provider Position Paper at 3.

<sup>7</sup> Provider Position Paper at 4.

<sup>8</sup> Intermediary Position Paper at 3.

with the provider's public relations activities are allowable if the advertising is primarily concerned with the presentation of a good public image and directly or indirectly related to patient care." HCFA Pub. 15-1 § 2136.1. And, "[c]osts of advertising for the purpose of recruiting medical, paramedical, administrative and clerical personnel are allowable if the personnel would be involved in patient care activities or in the development and maintenance of the facility." *Id.* However, "[c]osts of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable. Situations may occur where advertising which appears to be in the nature of the provider's public relations activity is, in fact, an effort to attract more patients. An analysis by the Intermediary of the advertising copy and its distribution may then be necessary to determine the specific objective. While it is the policy of the Health Care Financing Administration and other Federal agencies to promote the growth and expansion of needed provider facilities, general advertising to promote an increase in the patient utilization of services is not properly related to the care of patients." HCFA Pub. 15-1 § 2136.2.

With respect to the costs at issue, the Intermediary contends that the Provider attempted to disguise newspaper and radio advertising aimed to increase patient utilization by including a few lines aimed at recruiting employees within the same advertising copy, as follows:<sup>9</sup>

Two invoices relate to newspaper advertising. Exhibit I-2. There is an April 19, 1994 invoice for \$10,905, and a May 25, 1994 invoice for \$4,362. These are full page (4 column x 11") advertisements placed in local newspapers. The name of the advertisement campaign is "Who Helped John Get Home Sooner." A close review of the actual copy (Exhibit I-3) shows a large picture of a grandfather holding his granddaughter with the question "Who helped John get home sooner after his stroke?" This picture takes up approximately 75 percent of the space. The first two paragraphs of print talks about the benefits of home care and how Cabarrus County Home Health can help patients come home sooner. The final paragraph indicates that the Provider is also looking for qualified staff for employment opportunities. The telephone number given to call is the general number of the agency and it is not only for individuals applying for a job. It states "You should learn more Call today."

The Intermediary agrees that recruitment is a small part of this advertisement. However, the Intermediary argues that the overall purpose of the ad is to increase patient utilization. The Intermediary believes that just looking at the picture gives the viewer a warm feeling, and serves as a testimonial to the care that is available from the Provider. Moreover, the captions almost instruct the audience to ask their doctor about the possibility of home care. After reading the entire ad, the last paragraph of the copy is almost an afterthought. The Intermediary maintains that the impact of this ad lies in the picture and the first two paragraphs.

Next, several invoices related to radio advertising (Exhibit 1-5). There is a March 31, 1994 invoice in the amount of \$1,883 for development of a radio recruitment spot. There is also a May 27, 1994 invoice in the amount of \$1,841 related to the placement of these spots. Finally, there are several

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<sup>9</sup> Intermediary Position Paper at 4.

invoices totaling \$27,207 for the actual air-time on various radio stations. The Intermediary asserts that a review of this advertising copy (Exhibit 1-6) shows that there are three voices included in this commercial, John - a former patient of the facility, John's nurse, and an announcer. The beginning of the commercial starts out with John talking about a stroke he had. John and his nurse then go on to explain how home care benefited John in his recovery. As a result of the care, John is now able to focus on "spoiling the grandkids." The announcer then comes in and states "Who helped John get home sooner after his stroke? Cabarrus County Home Health." Again, the Intermediary maintains that this entire section of the commercial is an oral testimonial talking about the quality care furnished by the Provider. At the end, the commercial does state that the Provider is looking for qualified staff to fill employment opportunities. However, the number that is given is again the general number of the agency and not a number set up specifically for job applications.

In summary, the Intermediary asserts that the radio commercials follow the same theme as the newspaper advertisements. The Intermediary does not dispute that a small portion of the advertisements are directed to recruiting personnel. The Intermediary maintains, however, that the content of the ads is clearly aimed at attracting patients. Reading through the commercials, one finds the most powerful message to be delivered by John. Thoughts of a grandfather being able to spend time with his grandchildren leaves a lasting image with the audience. The voice of the grandfather elicits a positive response in much the same way the picture in the newspaper does. In all, the message in this case tells the audience that if they are sick, the Provider can help them get well sooner so they can get back to the important things in life.

The Intermediary contends that the facts surrounding the subject advertising appear similar to those argued before the board in Upper Peninsula Home Nursing v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Wisconsin, PRRB Dec. No. 97-D28, January 30, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,062, decl'd rev. HCFA Administrator, March 7, 1997 ("Upper Peninsula"), where the Board determined that the Intermediary's adjustment to remove television and radio advertising was proper.<sup>10</sup> In its decision the Board states:

[b]ased on the evidence presented, the Board finds that there are definite indications of patient solicitation associated with the television and radio advertisement utilized by the Provider for the purpose of informing the public of the services offered by its home health agency. While the use of mass media in the current information age does not automatically imply that a provider is seeking to increase patient utilization of its facility, the character of such media announcements must make this point exceedingly clear to avoid any connotation of patient solicitation.

Id.

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<sup>10</sup> Intermediary Position Paper at 5.

The Intermediary rejects the Provider's reliance upon the Board's decision in Central Health.<sup>11</sup> The Intermediary explains that in that case a detailed analysis of the advertising copy was made. And, after evaluation, it was determined that the primary purpose of the advertisement was recruitment. Respectively, the Intermediary argues that the instant case is very much different. The Intermediary maintains that the advertising copy at issue clearly shows that the Provider is attempting to solicit patients. Notably, the Provider has not attempted to address the specific advertising copy at issue in this case.

The Intermediary also rejects the argument that the Provider would not advertise to increase patient utilization because its patient workload is 87 percent Medicare, i.e., the Provider's assertion that advertising to the general public would render it little value because Medicare requires home health services to be based upon a physician's order. Id. The Intermediary maintains, however, that given the uncertainty of Medicare many Providers made conscious efforts to increase the non-Medicare side of their businesses. Also, if a family member of a Medicare patient, or a future Medicare patient, hears the Provider's advertisements they are more likely to ask their doctor about the possibility of home care.

Concluding, the Intermediary asserts that a review of the subject advertising shows that the Provider is attempting to solicit patients, and that the Provider has attempted to disguise this solicitation as personnel recruiting. The Intermediary feels as the Board did in Upper Peninsula, that the character of such media announcements must make the message exceedingly clear to avoid any connotation of patient solicitation.<sup>12</sup>

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§ 1395(x)(v)(1)(A) - Reasonable Cost

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

§§ 405.1835.-1841 - Board Jurisdiction

§ 413.9 - Cost Related to Patient Care

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<sup>11</sup> Intermediary Position Paper at 6.

<sup>12</sup> Intermediary Position Paper at 7.

§ 484.14(c) - Condition of participation:  
Organization, services, and  
administration

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

§ 2136 - Advertising Costs-General

§ 2136.1 - Allowable Advertising Costs

§ 2136.2 - Unallowable Advertising Costs

4. Case Law:

Central Health Services 92 Employee Recruitment and Home Office Costs Group v Aetna Life Insurance Company, PRRB Dec. No. 97-D74, March 12, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,462, decl'd rev. HCFA Administrator, August 4, 1997.

Chestnut Hill Mental Health Center, Inc. v. Blue Cross and Blue Shield of South Carolina, PRRB Dec. No. 92-D29, April 8, 1992, Medicare & Medicaid Guide (CCH) ¶ 40,238, decl'd rev. HCFA Administrator, May 18, 1992.

Upper Peninsula Home Nursing v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Wisconsin, PRRB Dec. No. 97-D28, January 30, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,062, decl'd rev. HCFA Administrator, March 7, 1997.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, and evidence presented, finds and concludes as follows:

The Intermediary made adjustments to the Provider's as submitted cost report disallowing costs associated with certain radio and newspaper advertisements. The reason for the adjustments was the Intermediary's determination that the ads were placed to increase patient utilization rather than to recruit employees as argued by the Provider. There are no arguments regarding the reasonableness of the actual dollar amounts of the ads involved or the Provider's need to run the ads to recruit personnel.

The controlling authority for this matter is found at 42 C.F.R. § 413.9, which requires all payments to providers to be based upon the reasonable cost of services covered under Medicare, and related to the care of beneficiaries. While this regulation does not deal specifically with the subject of advertising costs, guidance regarding the determination of the reasonable costs of advertising is found at HCFA Pub. 15-1 § 2136.

In particular, instructions at HCFA Pub. 15-1 § 2136.1 identify advertising costs that are allowable for program reimbursement. In part, these instructions state:

[a]dvertising costs incurred in connection with the provider's public relations activities are allowable if the advertising is primarily concerned with the presentation of a good public image and directly or indirectly related to patient care.

Costs of advertising for the purpose of recruiting medical, paramedical, administrative and clerical personnel are allowable if the personnel would be involved in patient care activities or in the development and maintenance of the facility.

Costs of activities involving professional contacts with physicians, hospitals and similar groups and institutions. . . . to apprise them of the availability of the provider's covered services are allowable. Such contacts make known what facilities are available to persons who require such information in providing for patient care, and serve other purposes related to patient care, e.g., exchange of medical applicable to the provider's facility, administrative and medical policy, utilization review, etc.

Id. (Emphasis added).

Correspondingly, program instructions at HCFA Pub. 15-1 § 2136.2 specifically address advertising costs that are not allowable. These instructions include:

[c]osts of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable. Situations may occur where advertising which appears to be in the nature of the provider's public relations activity is, in fact, an effort to attract more patients. An analysis by the Intermediary of the advertising copy and its distribution may then be necessary to determine the specific objective. While it is the policy of the Health Care Financing Administration and other Federal agencies to promote the growth and expansion of needed provider facilities, general advertising to promote an increase in the patient utilization of services is not properly related to the care of patients.

Id. (Emphasis added).

The Board concludes that the Intermediary's adjustments are improper. As noted above, the propriety of the Intermediary's adjustments hinges upon the reason the subject advertisements were placed.

Based upon the Board's analysis of the actual text and copy employed in the ads (Exhibits P-3 and P-6), the Board finds that their fundamental purpose is to recruit personnel.

The Board rejects the Intermediary's argument that the advertisements are directed to the general public as a testimonial to the Provider in order to increase utilization. Specifically, the Intermediary argues that the most powerful message delivered by the ads is--if the audience is sick the Provider will help them get well sooner. The Intermediary helps tie this message to patient utilization by the fact that the ads employ the voice and/or vision of a grandfather who will get to spend more time with his grandchildren as a result of the quality of care rendered by the Provider.

The Board, however, finds the text and copy of the ads to portray the rewards a health care professional would experience through a career with the Provider. The Board also finds no fault with this approach to recruiting since it is designed to attract qualified health care professionals to the Provider's facility. Notably, it is often more difficult for smaller providers such as independent home health agencies to compete with financially stronger facilities such as hospitals and nursing homes for qualified personnel, and intangible rewards such as, work environment and a positive employer mission are important recruitment incentives.

Moreover, the Board notes that advertising costs incurred by a provider in connection with its public relations activities are also allowable. While the Board rests solely upon its finding that the purpose of the subject advertisements is to recruit personnel, the Board believes the same characteristics of the ads relied upon by the Intermediary, and leading to the Intermediary's disallowances, could just as well be construed as an effort by the Provider to present a good public image as part of its recruitment campaign.

#### DECISION AND ORDER:

The Intermediary's adjustments disallowing the Provider's advertising costs are improper. The Intermediary's adjustments are reversed.

#### Board Members Participating:

Irvin W. Kues  
Henry C. Wessman, Esq.  
Martin W. Hoover, Jr. Esq.  
Charles R. Barker  
Stanley J. Sokolove

**Date of Decision:** March 23, 2000

#### FOR THE BOARD:

Irvin W. Kues  
Chairman