

**PROVIDER REIMBURSEMENT REVIEW BOARD  
HEARING DECISION**

ON THE RECORD  
2002-D10

**DATE OF HEARING-**  
December 12, 2001

**PROVIDER -**  
Alexander's Home Health of Colorado,  
Inc  
Denver, Colorado

Cost Reporting Period Ended -  
December 31, 1995

Provider No. 06-7199

**vs.**

**CASE NO.** 97-3094

**INTERMEDIARY -**  
BlueCross BlueShield Association/  
Cahaba Government Benefit  
Administrators

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ISSUE:

Was the Intermediary's adjustment disallowing yellow page advertisement expense proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Alexander's Home Health of Colorado, Inc. ("Provider") is a freestanding home health agency located in Denver, Colorado. During its cost reporting period ended December 31, 1995, the Provider incurred \$11,590 in yellow page advertising costs which it claimed for Medicare reimbursement. Cahaba Government Benefit Administrators ("Intermediary") reviewed the Provider's cost report and concluded that the yellow page advertising expense was unallowable. Accordingly, the Intermediary perfected an adjustment disallowing this cost.

On September 18, 1997, the Intermediary issued a Notice of Program Reimbursement containing the subject adjustment. On September 24, 1997, the Provider appealed the adjustment to the Provider Reimbursement Review Board ("Board") pursuant to 42 C.F.R. §§ 405.1835-.1841 and met the jurisdictional requirements of those regulations. The amount of Medicare funds in controversy is approximately \$11,100.<sup>1</sup>

The Provider was represented by Eric Thomas, Senior Accountant, Service Master Home Health Care. 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 adjustment is improper. The Provider asserts that the Intermediary incorrectly found that its yellow page advertisement "appears to seek increased patient utilization" pursuant to Medicare's Provider Reimbursement Manual, Part I ("HCFA Pub. 15-1") § 2136.<sup>2</sup>

The Provider explains that yellow page advertising is an allowable expense pursuant to HCFA Pub. 15-1 § 2136.1 "if the listings are consistent with practices that are common and accepted in the industry." *Id.* Respectively, the Provider contends its advertisement is purely informational in nature and is clearly consistent in size and print with other displays in the applicable section of the yellow pages as shown in Exhibit P-3.

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<sup>1</sup> Intermediary Position Paper at 3 and 5. Provider Position Paper at 1.

<sup>2</sup> Provider Position Paper at 1. Exhibit P-1.

The Provider contends that its position is affirmed by the Board's decision in Visiting Health Services of New Jersey v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Wisconsin, PRRB Dec. No. 93-D102, September 29, 1993, Medicare and Medicaid Guide (CCH) ¶ 41,765, decl'd rev., CMS Administrator, November 1, 1993, ("Visiting Health Services").<sup>3</sup> The Provider explains that in this case the intermediary argued that the displays in question were unallowable due to the fact that they were larger than the others noted in the yellow pages. The intermediary interpreted this as patient solicitation. The Board's decision was to overturn this adjustment because the record indicated that most home health agencies in the area had display type yellow page ads. The Board also noted that using a display type yellow page ad was a common and acceptable practice among home health agencies and was meant to inform the public about their service rather than an attempt to increase patient utilization.

The Provider also cites the Board's decision in Superior Home Health Care of Middle Tennessee v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of South Carolina, PRRB Dec. No. 96-D45, August 2, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,537, rev'd., CMS Administrator, October 3, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,955, ("Superior"), where the relationship of the subject ad in comparison to others in the yellow pages was at issue.<sup>4</sup> The Board overturned the adjustment made by the intermediary to disallow this cost. The Board noted that there are no specific guidelines which instruct the intermediary as to what constitutes reasonable size for yellow page advertisements. The only instructions available explain that ads, to be allowable, must be consistent with practices that are common and accepted occurrences in the industry, as noted above.

Finally, the Provider rejects the Intermediary's reliance upon the CMS Administrator's reversal of the Board's decision in Superior.<sup>5</sup> In reviewing the Administrator's decision it's noted that the Board was overturned based upon the argument that the subject ad was done in such a way as to make it stand out in comparison to the other ads. However, as noted in the yellow pages presented, this is not an issue with respect to the instant case. The subject ad is consistent with, if not smaller than, others noted.

#### INTERMEDIARY'S CONTENTIONS:

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<sup>3</sup> Exhibit P-5.

<sup>4</sup> Exhibit P-6.

<sup>5</sup> Exhibit P-7.

The Intermediary contends that its adjustment disallowing the subject yellow page advertising expense is proper pursuant to HCFA Pub. 15-1 § 2136, Advertising Costs - General, which states:

[t]he allowability of advertising costs depends on whether they are appropriate and helpful in developing, maintaining, and furnishing covered services to Medicare beneficiaries by providers of services. In determining the allowability of these costs, the intermediary should consider the facts and circumstances of each provider situation as well as the amounts which would ordinarily be paid for comparable services by comparable institutions. To be allowable, such costs must be common and accepted occurrences in the field of the provider's activity.

HCFA Pub. 15-1 § 2136.

Moreover, HCFA Pub. 15-1 § 2136.1 states:

[c]osts of informational listings of providers in a telephone directory, including the "yellow pages," or in a directory of similar facilities in a given area are allowable if the listings are consistent with practices that are common and accepted in the industry.

HCFA Pub. 15-1 § 2136.1.

Respectively, the Intermediary contends that the cost of the Provider's yellow page advertisement is unallowable. The Provider purchased a display-type advertisement which was a quarter-page in size, included eye catching graphics, logos and boldface type and was not listed in alphabetical order. The intent of this ad was to be more than just informational. The Intermediary determined that this ad was designed to stand out from the other home health agency listings and, as a result, to increase patient utilization. Notably, HCFA Pub. 15-1 § 2136.2 states: "(c)osts of advertising to the general public which seeks to increase patient utilization of the provider's facilities are not allowable." Id.

The Intermediary rejects the Provider's reliance upon the Board's decision in Visiting Health Services. The Intermediary notes that in Superior, a more recent decision, the CMS Administrator determined display-type ads to be nonallowable, as follows:

[t]he Act requires that providers of services to Medicare beneficiaries be reimbursed for "reasonable cost" of providing such services. The Intermediary's disallowance of home health agency's yellow page advertising costs was supported by clear policy guidance. Intermediary Letter No. 79-22 . . . states that if

an entry in the yellow pages is in boldface type or is in some way set apart from other entries so as to increase patient utilization, the cost of the additional space or of the special type is unallowable. In addition, the cost of any information appearing out of the normal alphabetical listing in a directory is an unallowable cost of advertising.

Superior at Medicare and Medicaid Guide (CCH) ¶ 44,955.

The Intermediary concludes that the factors cited by the CMS Administrator in Superior as rendering the ad unallowable, such as boldface type and a non-alphabetical listing are also applicable to the subject case.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

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

§§ 405.1835-.1841 - Board Jurisdiction

2. 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

3. Case Law:

Visiting Health Services of New Jersey v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Wisconsin, PRRB Dec. No. 93-D102, September 29, 1993, Medicare and Medicaid Guide (CCH) ¶ 41,765, decl'd rev., CMS Administrator, November 1, 1993.

Superior Home Health Care of Middle Tennessee v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of South Carolina, PRRB Dec. No. 96-D45, August 2, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,537, rev'd., CMS Administrator, October 3, 1996, Medicare and Medicaid Guide (CCH) ¶ 44,955.

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 Provider incurred \$11,590 in yellow page advertising costs which it claimed for Medicare reimbursement. The Intermediary reviewed these expenses and determined that they were unallowable. In general, the Intermediary found that the Provider's ads were designed to stand out from those listed by other home health agencies in order to increase the Provider's patient utilization. The Intermediary noted that the ads were large and contained bold-faced type and eye catching logos and graphics.

Program rules addressing this matter are found at HCFA Pub. 15-1 § 2136ff. In pertinent part they state: “[c]osts of informational listings of providers in a telephone directory, including the ‘yellow pages,’ . . . are allowable if the listings are consistent with practices that are common and accepted in the industry. . . . Costs of advertising. . . which seeks to increase patient utilization. . . are not allowable.” HCFA Pub. 15-1 §§ 2136.1 and 2136.2 (emphasis added).

A comparison of the ad placed by the Provider to ads placed by other home health agencies in the same yellow page directory shows that the Intermediary's disallowance was improper. The comparison specifically shows that the Provider's ad is consistent with the advertisements placed by other agencies and that there are no particular graphics, logos or bold-faced type distinguishing the Provider's ad from many of the others. Moreover, there are no indications that the Provider's ad is designed to increase patient utilization. Rather, the ad contains general information on the types of services offered by the Provider, the locations where services can be obtained, hours of service, and the Provider's telephone number. See Exhibits P-3 and I-1 at 3. Although the Intermediary argues that the Provider's ad is designed to increase the Provider's business, the Intermediary offered no evidence that any such increase occurred.

The Board acknowledges but rejects the Intermediary's argument that the Provider's ad was excessively large. As discussed immediately above, the Provider's ad was consistent with the practices common among home health agencies in the Provider's location, including the size of the ad. The Board also notes that there are no specific guidelines which instruct the Intermediary as to what constitutes a reasonable size for a yellow page advertisement.

In conclusion, the Board finds the Intermediary's disallowance of Provider's yellow page advertising costs to be subjective in nature. The advertisement was not shown to be inconsistent with practices that are common and accepted in the industry or designed to stand out from other home health agency listings in order to increase patient utilization. Notably, the Provider explains that the Intermediary performed an audit of its previous year's Medicare cost report and did not question the propriety of its yellow page advertising expense.

DECISION AND ORDER:

The Intermediary's adjustment disallowing the Provider's yellow page advertising expense is improper. The Intermediary's adjustment is reversed.

Board Members Participating:

Irvin W. Kues  
Henry C. Wessman, Esq.  
Stanley J. Sokolove  
Dr. Gary Blodgett

Date of Decision: March 05, 2002

FOR THE BOARD:

Irvin W. Kues  
Chairman