

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2003-D53

PROVIDER –
Pleasant Care – Good Samaritan
Stockton, California

Provider No. 05-5039

vs.

INTERMEDIARY –
Mutual of Omaha Insurance Company

DATE OF HEARING -
September 25, 2002

Cost Reporting Period Ended
September 30, 1996

CASE NO. 99-2359

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ISSUES:

1. Was the Intermediary's adjustment to advertising costs proper?
2. Was the Intermediary's adjustment to tax penalties proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Pleasant Care - Good Samaritan ("Provider") is a Medicare certified skilled nursing facility with 98 beds and is located in Stockton, California. Mutual of Omaha ("Intermediary") adjusted the Provider's costs of advertising and tax penalties for the fiscal year ended September 30, 1996. The Intermediary's adjustments reduced the advertising cost by approximately \$2,488 and the tax penalties cost by approximately \$29,474. The Provider disagreed with the Intermediary's adjustments and requested a hearing before the Provider Reimbursement Review Board ("Board"). The Provider met the jurisdictional requirements of the Medicare regulations at 42 C.F.R. §§ 405.1835-.1841.

The Provider was represented by Paul Gulbrandson, CPA. The Intermediary was represented by Tom Bruce, C.P.A. and Matt Pleggenkuhle.

ISSUE 1 - ADVERTISING COSTS:

The Provider contends that the advertising costs were legitimate and proper costs of delivering patient care to Medicare beneficiaries. The Provider notes that the Board has heard similar cases and found similar advertising costs to be allowable and that the Medicare regulations do not prohibit advertising as an allowable expense. The Provider maintains that the Intermediary's audit adjustment was based on speculation and conjecture and did not consider the available facts. It asserts that the Intermediary is bound by certain rules of audit procedure and audit technique, commonly referred to in the industry as the "Yellow Book."¹ The Provider argues that the Intermediary's efforts to obtain evidence sufficient to support the proposed audit adjustment were overly burdensome. The Provider's witness claims that the Intermediary's auditors had the opportunity to review such records if they came to the Provider's office. The Provider also claims that the Intermediary did not make a request for records until a month prior to the hearing.²

The Provider also urged the Board to disregard part of the Intermediary's evidence. The Intermediary work papers reflected that an employee of the Provider admitted in a telephone interview with the Intermediary's desk auditor that the advertising costs were for an unallowable expense. The Provider asserted that the employee was not an appropriate representative and that his purported comment that the advertising was for patient solicitation should not be considered credible evidence.³

¹ Government Auditing Standards.

² Tr. at 41:10-42:2.

³ Tr. at 38:17-39:23 and Exhibit I-2.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Provider has not documented with sufficient supporting evidence that the advertising expense claimed was an allowable cost. The Intermediary points out that the Medicare regulations make it the responsibility of the Provider to furnish support for the allowability of the claimed expense.⁴ The evidence presented by the Provider was inadequate to show the nature of the claimed expense and the Provider failed to respond to the Intermediary's repeated written and telephone requests for additional documentation.⁵ Moreover, during the desk review by an Intermediary auditor, the auditor conducted a telephone interview with an employee of the Provider's home office who stated that the advertising expense was "used for advertising for soliciting of patients,"⁶ an unallowable expense.

In response to the Provider's claim that the Intermediary was required to conduct an audit at the Provider's office to comply with the "Yellow Book," the Intermediary points out that the Provider failed to make any specific reference to procedures or techniques it claims were violated. The Intermediary indicates it conducted a desk audit.

ISSUE 2 - TAX PENALTY EXPENSE:PROVIDER'S CONTENTIONS:

The Provider contends that the tax penalties cost is a legitimate and proper cost of delivering patient care to Medicare beneficiaries. The Provider argues that the Intermediary's efforts to obtain evidence sufficient to support the proposed audit adjustment were very onerous and that the Provider's effort was justified to the extent of the information requested.

INTERMEDIARY'S CONTENTIONS:

The Intermediary points out that the tax penalty cost consisted of penalties assessed by the Internal Revenue Service due to late filing of the Provider's payroll tax returns. The Intermediary argues that since these were penalties, they are not reimbursable under the Medicare program.

The Intermediary relies on the Medicare regulation at 42 C.F.R. § 413.9(b)(2). It provides that, to be allowable, costs must be "[n]ecessary and proper costs." The Intermediary also relies on CMS Pub. 15-1 § 2122.1 which states in part "[t]ax expense should not include fines and penalties."

⁴ Providers receiving payment on the basis of reimbursable cost must provide adequate cost data. 42 C.F.R. § 413.24.

⁵ Tr. at 28:10-32:17.

⁶ Exhibit I-3, and Tr. at 30:24-32:10.

FINDINGS OF FACT, CONCLUSION OF LAW AND DISCUSSION:

The Board, after consideration of the Medicare law and guidelines, parties' contentions and evidence presented finds and concludes that the adjustment made by the Intermediary of the tax penalty costs and the advertising cost was proper.

This case involves two issues, the common theme of which is the Provider's responsibility to properly document its costs. The Provider has taken the position that the Intermediary did not come to the Provider facility to perform an on-site audit and, therefore, the Provider does not have the responsibility of proving that its claimed costs are allowable. The Provider's witness testified that "the way an audit works is the cost report is filed, the Intermediary comes in and the Intermediary looks at the documentation to prove that it is not allowable. The Provider doesn't have to prove it's allowable."⁷

The Provider's reliance on the "Yellow Book" in support of its position is misplaced. The audit guidelines do not shift the burden of proof to the Intermediary. The Board finds that the Provider was not in compliance with the Medicare regulation at 42 C.F.R. § 413.24 - Adequate Cost Data and Cost Finding. That regulation states, in part:

- (a) . . . Providers receiving payment on the basis of reimbursable cost must provide adequate cost data.

* * * * *

- (c) . . . adequate cost information must be obtained from the provider's records to support payments made for services furnished to beneficiaries. The requirement of adequacy of data implies that the data be accurate and in sufficient detail to accomplish the purposes for which it is intended.

With regard to advertising costs, the Board finds that the Provider was informed by the Intermediary that it was the Provider's responsibility to maintain proper documentation. During the hearing the Provider's witness was asked to read an excerpt from a letter the Intermediary had written in response to a proposal the Provider had made regarding advertising costs. The Intermediary stated, "Again, it is not acceptable for Medical (sic) purposes to allow an arbitrary amount of advertising costs, i.e. \$5,000, which has not been specifically supported. You will need to provide specific support for each facility for the advertising expenses claimed, which were not for patient solicitation."⁸

Based on the evidence submitted and the above mentioned testimony, the Board concludes that the Provider did not furnish sufficient documentation to support its position.

⁷ Tr. at 133

⁸ Tr. at 86:20-87:10.

The Board finds that the Intermediary made several attempts to obtain the necessary documentation. This was done prior to the finalization of the notice of program reimbursement as well as shortly before the hearing. The Provider did not respond and did not present documentation at the hearing to support its position.

The Board finds that although payroll cost is an allowable expense, the penalty for late filing of payroll tax returns is not reimbursable under the Medicare program. Therefore, the Intermediary's adjustment disallowing the tax penalty cost was justified.

DECISION AND ORDER:

ADVERTISING COST:

The Intermediary's adjustment to the Provider's advertising cost was proper due to a lack of documentation. The Intermediary's adjustment is affirmed

TAX PENALTIES:

The Provider is not entitled to reimbursement for payroll tax penalties cost. The Intermediary's adjustment is affirmed.

Board Members Participating:

Suzanne Cochran, Esq.
Henry C. Wessman, Esq.
Gary D. Blodgett, DDS
Martin W. Hoover, Jr., Esq.

DATE: August 28, 2003

FOR THE BOARD:

Suzanne Cochran
Chairperson