

**PROVIDER REIMBURSEMENT REVIEW BOARD  
DECISION  
ON THE RECORD  
2006-D21**

**PROVIDER -**  
HCT 94-95 Physical Therapy AHSEA  
Exception Group

Provider Nos.: Various

**vs.**

**INTERMEDIARY -**  
Mutual of Omaha Insurance Company

**DATE OF HEARING -**  
November 29, 2005

Cost Reporting Periods Ended -  
December 31, 1994 and December 31, 1995

**CASE NO.:** 01-0546G

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ISSUE:

Whether the Intermediary appropriately denied the Providers' requests for an exception to the Medicare allowable hourly salary equivalency amount for physical therapy.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc. The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA) is the operating component of the Department of Health and Human Services (DHHS) charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and under interpretive guidelines published by CMS. See, 42 U.S.C. §1395(h), 42 C.F.R. §§413.20(b) and 413.24(b).

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the proportion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the issuance of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

The Medicare Program reimburses providers for the reasonable costs they incur to furnish physical and other therapy services to Medicare beneficiaries. 42 U.S.C. §1395x(v)(1)(A) provides, in part, that the reasonable cost of any service shall be the actual cost incurred, excluding any part of such costs found to be unnecessary in the efficient delivery of needed health services. The statute also authorizes the Secretary to establish cost limits. Essentially, the limits recognize reasonable costs based upon estimates of costs found to be necessary in the efficient delivery of covered items and services.

With respect to therapy costs, 42 U.S.C §1395x(v)(5)(A) states:

Where physical therapy services, occupational therapy services, speech therapy services, or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization . . . the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services (as furnished under such arrangements) shall not exceed an amount equal to the salary which would 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) plus the cost of such other expenses . . . incurred by such person, as the Secretary may in regulations determine to be appropriate.

The implementing regulation at 42 C.F.R. §413.106(a) states in relevant part:

*Principle.* The reasonable cost of the services of physical, occupational, speech, and other therapists, and services of other health specialists (other than physicians), furnished under arrangements (as defined in section 1861(w) of the Act) with a provider of services, a clinic, a rehabilitation agency or a public health agency, may not exceed an amount equivalent to the prevailing salary and additional costs that would reasonably have been incurred by the provider or other organization had such services been performed by such person in an employment relationship, plus the cost of other reasonable expenses incurred by such person in furnishing services under such an arrangement. However, if the services of a therapist are required on a limited part-time basis, or to perform intermittent services, payment may be made on the basis of a reasonable rate per unit of service, even though this rate may be greater per unit of time than salary-related amounts, if the greater payment is, in the aggregate, less than the amount that would have been paid had a therapist been employed on a full-time or regular part-time salaried basis.

The regulation recognizes several situations in which a provider may be forced to pay more than the allowable hourly salary equivalency amount (AHSEA) established by Medicare. 42 CFR §413.106(f)(2) identifies “unique circumstances or special labor market conditions” as one such basis for an exception. This section reads: “An exception may be granted under this section by the intermediary if a provider demonstrates that the costs for therapy services established by the guideline amounts are inappropriate to a particular provider because of some unique circumstances or special labor market conditions in the area.”

#### STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

This case involves ten skilled nursing facilities located in Texas and operated by Healthcare Centers of Texas, Inc. (HCT or Providers). HCT was a newly formed entity that purchased the facilities during 1994. Each Provider timely filed its Medicare cost report with the Fiscal Intermediary (FI), Aetna Life Insurance Company, which reviewed each cost report and issued the NPRs. Aetna subsequently ceased operations as a Medicare contractor, and Mutual of Omaha (Intermediary) was selected as the replacement FI.

Each Provider filed its cost report with an AHSEA for physical therapy greater than the AHSEA allowed by Medicare for the respective year. The Providers claim that requests for an exception were also submitted to the Intermediary at the same time that each cost report was filed.<sup>1</sup> Aetna

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<sup>1</sup> Per the Intermediary’s position paper, page 9, the Providers claim that they submitted the request to Aetna for an exception to the AHSEA with each cost report; however, Mutual has not been able to locate any documentation in the individual provider files or home office files supporting the requests.

adjusted the reported AHSEA on each cost report to the standard AHSEA applicable for each Provider's area for the specific cost report year. The adjustments resulted in a reduction of Medicare reimbursement in the amount of \$87,317.

The Providers appealed the adjustments to the Board and met the jurisdictional requirements of 42 C.F.R §405.1835- 405.1841. The Provider was represented by Mr. Joseph F. Widmer of The Park Associates. The Intermediary was represented by Mr. Terry Gouger, Appeals Supervisor, of Mutual of Omaha Insurance Company.

### PROVIDERS' CONTENTIONS:

The Providers assert that they qualify for an exception to the AHSEA rates under 42 C.F.R §413.106(f)(2) due to the presence of unique circumstances or special labor market conditions during the cost reporting periods in question. The Providers were purchased by HCT from a large national skilled nursing facility chain in 1994. Subsequent to the purchase of 58 facilities, HCT was able to retain many of the staff therapists who had worked for the previous owner and many of the therapy contracts that had been negotiated by the large outgoing chain. However, some Providers were forced to find new therapy companies when the contractors which had been furnishing their therapy services were unable to continue. In addition, several of the Providers' in-house staff therapists resigned, and immediate replacements were needed.

The Providers contend that of the 58 facilities purchased, ten encountered unique circumstances which entitle them to an exception, as these circumstances had to do with the special market conditions of the rural areas in which these Providers were located. The Providers argue that the location of these facilities, all in rural areas and at least 36 miles away from the nearest city,<sup>2</sup> made the recruitment of new contracted therapy agencies or individual physical therapists very difficult. The Providers contend that they properly documented the unique circumstances at each of the 10 facilities and also documented the extensive recruitment efforts that they undertook to locate and hire therapists or contract with agencies for therapists at or below the allowable AHSEA rates. The Providers maintain that the fact that they were able to eventually hire staff therapists or obtain contracts with therapy agencies at the allowable rates substantiates that their recruitment efforts were extensive and successful.

A summary of the efforts undertaken by the Providers is as follows<sup>3</sup>

- Reported all open position to the Human Resources Department within its home office, Healthcare Centers of Texas
- Contacted over 75 companies including varies therapy contractors, employment placement firms and health care recruiters;
- Made between 10 and 75 cold calls to therapists in the areas surrounding the 10 facilities. For facilities closer to larger metropolitan areas, more calls were made than were made for those facilities located in smaller, less populated, rural areas;

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<sup>2</sup> Provider's Position Paper, Page 7. Andrews Health Center is the closest to a populated city, 36 miles from Odessa, TX. Childress Health Care Center is the farthest from a populated city, 105 miles from Wichita Falls, TX.

<sup>3</sup> Specific efforts undertaken by each of the ten facilities are detailed in Exhibits P-6 through P-15.

- Mailed an introductory letter and recruitment advertisement to all members of the Texas Physical Therapy Association; and
- Participated in two conventions, a job fair and a career day in order to recruit Physical Therapists to the areas where they were needed.

The facilities used a variety of means to obtain the therapists they needed until they were able to either contract for therapy services at the salary equivalency rates or hire staff therapists:

- Andrews Health Care Center contracted with a local hospital at rates above the AHSEA until it was able to contract with a therapy vendor in August, 1995;
- Borger Health Care Center continued to use the contract signed by the former owner (in 1994) at rates above the AHSEA from January to June 1995. In July of 1995, it was able to contract with a therapy vendor at the salary equivalency rates;
- Childress Health Care Center used a traveling company that charged rates above the AHSEA until its procurement efforts resulted in obtaining therapy services at the salary equivalency rates in July, 1995;
- Gibson Health Care Center used a traveling company that charges rates above the AHSEA until its recruitment efforts resulted in the hiring a staff physical therapist in September, 1995;
- Gilmer Health Care Centers recruitment efforts were unsuccessful; consequently, it used a traveling company throughout its 1995 cost reporting period that charged rates that were above the AHSEA. By February 1996, it was able to contract with a therapy vendor at the salary equivalency rates;
- Nederland Health Care Center used a traveling company that charged rates above the AHSEA until its extensive recruitment efforts resulted in the hiring of a staff physical therapists in July, 1995;
- Olney Health Care Center used a traveling company throughout its 1995 cost reporting period that charged rates that were above the AHSEA. In June of 1996, Olney secured therapy services from a staff therapist that served related facilities and agreed to expand coverage to meet Olney's needs as well;
- Red River Health Care Center used a contract therapist for the last two months of FY 1995 that charged rates above the salary equivalency rate, and it was able to hire a full-time staff therapist in April, 1996.
- Throchmorton Health Care Center used a traveling therapy company that charged rates above the AHSEA until June, 1996 when it secured therapy services from a staff therapist that served related facilities and agreed to expand coverage to meet Throchmorton's needs as well;
- Synder Health Care Center used a traveling therapy company that charged rates above the AHSEA from March through May of 1994. In June 1994, the Provider was able to hire a shared in-house therapist.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Providers are not eligible for an exception to the AHSEA, as their requests for an exception were not timely filed. The Intermediary claims that although it cannot locate any record of the exception requests, the Providers' claim that they were submitted

along with the cost report submissions five months after the cost reporting periods ended would not meet the PRM timeliness requirements; as PRM 15-1, §1414.2 required that an exception request be filed no later than 90 days after the cost reporting year end.

The Intermediary contends that even if the Providers' requests are deemed timely, they did not adequately support that each Provider qualified for an exception to the AHSEA. The Providers requested an exception under 42 CFR §413.106(f)(2) which necessitates that Providers identify "unique circumstances or special labor market conditions" to qualify for an exception. The Intermediary asserts that from reviewing the Providers' position paper, the primary reason for the increased expense at each provider was not the rural location, as claimed by the Providers, but the change in owners and the loss of therapy services by the previous outside provider or salaried employee.<sup>4</sup> The Intermediary claims that the Providers willingly entered into contracts with suppliers at rates higher than CMS would authorize, and argues that PRM 15-1 §1414.2 explicitly states, "An exception is not proper, for instance, where an individual refuses to provide services at the rate prescribed so long as it is possible for the provider to secure such services from other sources." The Intermediary argues that the Providers have not supplied sufficient evidence that other sources were not available. Also, the Intermediary asserts that a rural location, in and of itself, does not meet the requirements to be considered an extraordinary condition or circumstance.

The Intermediary also prepared a survey of 142 providers in the same geographic region as the facilities included in this appeal. The survey included data from settled cost reports covering 152 cost reporting periods over three-year time period from January 1994 to December 1996. Due to a number of factors, including late entry into the Medicare program, a total of 22 were eliminated from the comparison. The Intermediary stated that it believes that the three-year span provides a perspective of the labor market environment in which the Providers were working and whether other providers were experiencing similar circumstances and labor costs.

During approximately 72% of the cost reporting periods included in the survey, providers contracted for their therapy services, and in only 28% of the cost reporting periods, did they exceed the AHSEA limit. Furthermore, twelve of the twenty-six providers that exceeded the limits were in cities with population greater than 100,000. The majority were in rural locations similar to those of this group of providers. Finally, as a means of corroborating the conclusions drawn from its survey, Mutual states that it contacted the Audit and Appeals managers at TrailBlazer Health Enterprises, the FI responsible for the vast majority of the skilled nursing facilities in Texas. According to these managers, none of TrailBlazer's providers requested an exception to the salary equivalency rates and no exceptions had been granted during the periods under appeal in this case. Accordingly, the survey results demonstrate that during the cost reporting periods under appeal, the vast majority of the providers in the areas served by the Providers were able to obtain therapists at or below the salary equivalency rates. This fact contradicts the Provider's argument that rural facilities are more likely to experience costs in excess of the cost limits.

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<sup>4</sup> Intermediary's Position Paper, Page 11

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and program instructions, evidence and the parties' contentions, the Board finds and concludes as follows:

For the time period under appeal, the controlling regulation, 42 CFR §413.106(f), does not place any time constraints on the submission of an exception to the AHSEA. Therefore, the argument that the exception request was submitted late and should be denied based on timeliness has no merit.

The Providers requested the exceptions due to special labor market conditions they claim existed in rural Texas during the 1994 and 1995 time periods. The Providers claim that substantial efforts were made to obtain staff therapists or contract therapy companies to provide services at the salary equivalency rate at each facility, but due to the rural location of the facilities, replacements were not readily available. The recruitment efforts described were nearly identical for each provider, with the differences limited to the number of cold calls placed or interviews held. Upon review of the record, it was noted that although the Providers claim that advertisements were placed in many local newspapers across the region, depending on the facility, only one copy of one advertisement was submitted as support. In addition, the document titled "Healthcare Centers of Texas Physical Therapy Advertising Efforts in 1995" identifies heavy recruiting in the early part of 1995, from January through March, but only two recruiting efforts from April through December. Also, it was noted that although the Providers claim that many cold calls were made to local therapists and that numerous calls were placed to therapy companies and other staffing companies, no list was made of therapists contacted, nor were records kept of the individuals or companies which were contacted.

Although the Providers' representation of advertisement and recruitment efforts was not substantial in the record, the Board finds that genuine and ongoing efforts were made, and those efforts eventually produced positive results in each of the facilities. Of the ten facilities included in this appeal, eight began the year utilizing contracted therapists at rates greater than AHSEA. Of those eight, five facilities found staff therapists or contract therapists at the AHSEA in that year, and the remaining three hired staff therapists within six months of the FYE. Both facilities that began using contract therapists above the AHSEA during their cost reporting year were able to hire a staff therapist or contract therapist at the AHSEA within four months. Therefore, it appears that the utilization of contracted therapists at rates above AHSEA was only temporary in nature, as all of the Providers were eventually able to provide therapy services within the guidelines.

With regard to the Intermediary's arguments relating to its survey, the assertion that approximately 75% of the other facilities in the region did not exceed the AHSEA limits does not justify a conclusion that there was a pool of physical therapists available to provide services for each of these Providers. The distance between many of the Providers and the large population areas may have been too far to have physical therapists available immediately upon demand.

The Board finds that the Providers have met the exception criteria of 42 CFR §413.106(f), as they have demonstrated ". . . that the cost for therapy services established by the guideline

amounts are inappropriate to a particular provider because of some unique circumstance or special labor market conditions in the area.”

DECISION AND ORDER:

The Intermediary inappropriately denied the Providers’ exception requests to the AHSEA. The Intermediary’s adjustments are reversed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire  
Gary B. Blodgett, D.D.S.  
Elaine Crews Powell, C.P.A.

FOR THE BOARD:

DATE: May 25, 2006

Suzanne Cochran  
Chairperson