

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2007-D15

**PROVIDER -**  
P-B Health Home Care Agency, Inc.  
Baltimore, Maryland

Provider No: 21-7134

**vs.**

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

**DATE OF HEARING -**  
March 8, 2005

Cost Reporting Period Ended -  
June 30, 1997

**CASE NO.:** 00-1836

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ISSUE:

Whether the Intermediary's adjustment to disallow the cost of accrued compensatory time was proper.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

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

The Medicare program provides health insurance to aged and disabled persons. 42 U.S.C. §§1395-1395cc. The Secretary of the Department of Health and Human Services (Secretary) is authorized to promulgate regulations prescribing the health care services covered by the program and the methods of determining payments for those services. 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 has entered into contracts with insurance companies known as fiscal intermediaries to maintain the program's payment and audit functions. Intermediaries determine payment amounts due providers of health care services (e.g., hospitals, skilled nursing facilities, and home health agencies) under Medicare law and interpretative guidelines issued by CMS.

At the close of its fiscal year, each provider submits a cost report to its intermediary showing the costs it incurred during the period and the portion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider, and notifies the provider in a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803. A provider dissatisfied with the intermediary's determination 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.

42 U.S.C §1395x(v)(1)(A) mandates that for a payment to be considered a reimbursable cost under Medicare, the payment must be the cost actually incurred, and should exclude any cost found to be unnecessary. 42 C.F.R. §413.9 states that payments to providers must be based on the reasonable cost of services covered under Medicare and defines reasonable cost to include all necessary and proper costs. Necessary and proper costs are further defined as costs that are appropriate and helpful in developing and maintaining the operation of patient care facilities and activities and are costs which are common and accepted occurrences in the field of the provider's activities.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

P-B Health Home Care Agency (Provider) is a freestanding home health agency located in Baltimore, Maryland. Since its Medicare certification in 1994, the Provider has maintained personnel policies that included provisions for "Paid Days Off" (PDO) and

compensatory time for overtime. For the fiscal years ended June 30, 1995 and June 30, 1996, the Provider accounted for these costs on a cash basis. In the cost report year in contention, FYE June 30, 1997, the Provider converted from a cash basis of accounting to an accrual basis of accounting for compensatory time. This conversion resulted in a one-time accrual, in the amount of \$100,156 of compensatory time for accounting purposes. Cahaba Government Benefit Administrators (Intermediary) disallowed the cost of the accrued compensatory time as it was deemed non-allowable for Medicare payment. This disallowance resulted in a reduction of Medicare reimbursement of approximately \$96,900.<sup>1</sup>

The Provider appealed the adjustment to the Board and met the jurisdictional requirements of 42 C.F.R. §§405.1835- 405.1841. The Provider was represented by John F. Lessner, Esquire, of Ober, Kaler, Grimes & Shriver. The Intermediary was represented by Bernard M. Talbert, Esquire, of Blue Cross Blue Shield Association.

#### PARTIES' CONTENTIONS:

The Provider contends that its cost of accrued compensatory time satisfies the requirements for Medicare reimbursement because it is a reasonable, necessary and proper cost incurred in furnishing services to Medicare beneficiaries, as required by 42 C.F.R. §413.9.

The Provider asserts that the provision for accrued compensatory time was (1) provided for in the Provider's employee handbook, (2) handled appropriately and in accordance with generally accepted accounting principles, representing a future liability to the Provider, (3) a "common and accepted occurrence in the field of the provider's activities," as required by 42 C.F.R. §413.9, and (4) reasonable in light of total Chief Executive Officer (CEO) and Chief Financial Officer (CFO) compensation. The Provider asserts that although the Intermediary had the opportunity to challenge the cost of the accrued compensatory time as being unreasonable by making a determination as to whether the cost was substantially out of line as compared to compensation packages of other CFOs and CEOs in its industry and region, it did not do so.

The Provider contends that consistent with its written employee handbook policy addressing the provision of benefits to employees, including the provision of compensatory time for exempt employees, compensatory time is an appropriate and allowable Medicare cost. Per P-B Health's compensatory time policy, one hour of compensatory time is provided for each hour that an exempt employee works over 45 hours per week. Compensatory time was only provided to exempt employees when the overtime work was performed in the office. Per the employee handbook, the hours would be accrued as paid days off and could be carried over to the next year.<sup>2</sup>

The Provider asserts that in FY 1997, upon its accountant's recommendation, it converted its books from a cash basis to an accrual basis of accounting in order to achieve more

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<sup>1</sup> See Intermediary's Position Paper, Pg 3.

<sup>2</sup> See Provider's Position Paper Exhibit 6, pages 3 and 11.

accuracy and consistency in reporting.<sup>3</sup> The Provider claims that the process outlined by PRM §2146.4 for the conversion of an entity from a cash basis to an accrual basis was followed. Furthermore, the Provider claims that the accrual itself was performed and recorded appropriately in accordance with generally accepted accounting principles.

The Provider asserts that the rate of pay used to calculate the accrual was the rate of pay an employee was earning at the time the accrual was made, and that the total number of hours claimed was accurate and properly stated. Furthermore, this assertion was confirmed through witnesses for both the Provider and Intermediary. The Provider also claims that 50% of the hours accrued for compensatory time in FY 1997 have been used since that time,<sup>4</sup> and that no evidence to the contrary has been provided by the Intermediary.

The Intermediary contends that the cost related to accrued compensatory time should be disallowed for numerous reasons. First, the Intermediary contends that the benefit of accruing compensatory time is not offered to all employees of the facility, only to exempt employees. Second, the Intermediary argued that the accrued cost for compensatory time is not allowable because it was not a true liability in FY 1997. The Intermediary asserts that the balance for accrued compensatory time had only grown since the inception of the policy, and due to the massive number of compensatory hours which had been accrued (approximately six months for each owner<sup>5</sup>) coupled with the fact that the employees had not utilized many compensatory hours, the accumulated hours were not reasonable as it was unlikely that the employees would ever be able to use those hours in the future. Lastly, the Intermediary asserts that the provision of compensatory time for exempt employees is not a common and accepted occurrence in the home health industry; therefore, the costs related to the compensatory time accrual are not reasonable or necessary and should be disallowed.

#### FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

The Provider and the Intermediary have agreed that: (1) the methodology used to convert the Provider's books from a cash basis to an accrual basis of accounting was appropriate; (2) the total number of hours claimed by the Provider in the accrual of the compensatory time is accurate, and (3) the rate of pay utilized by the Provider in calculating the accrual of compensatory time was correct.

The Intermediary's argument that, based on the evidence presented, the costs associated with the accrued compensatory time were not a true liability, as the employees had not utilized any compensatory hours from 1995 when they began accruing them through December 2000. The Board majority finds, however, that although the compensatory

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<sup>3</sup> See Transcript, Page 106.

<sup>4</sup> See Transcript, Page 54.

<sup>5</sup> Intermediary's Supplemental and Response Position Paper, Page 4.

hours had not been used over several years, that did not negate the fact that the accrued hours were a future liability to the Provider.

The Intermediary also argues that the language of the Provider's employee handbook does not allow for compensatory hours to be exchanged for financial compensation; therefore, the payment for the compensatory hours' accrual should be disallowed. The Provider argues that the policy in the employee handbook stated that an individual could not work and use accumulated time off for that same time period thereby receiving double pay for the same work week. The Board majority finds that this statement does not mean, as the Intermediary asserts that the Provider will not pay employees for accumulated time off when they retire, leave the company or die while employed. The Board majority finds that Provider's accrued compensatory time in FY 1997 represented a future liability.

The Board majority further finds that neither the Medicare regulations and program instructions nor the Provider's internal policies require liquidation of the compensatory time within any prescribed period of time. The parties agreed that the Medicare regulations and program instructions do not provide for specific time lines for liquidating accrued compensatory time.<sup>6</sup> Further, in the absence of specific Medicare requirements for liquidating accrued compensatory time, the Provider's internal policy, which does not require liquidation within any prescribed periods of time, prevails. Thus, the Board majority finds that there are no prohibitions against the Provider permitting its employees an unlimited period of time to utilize accrued compensatory time.

Finally, the Board majority finds no merit in the Intermediary's arguments that the compensatory time is not a common and accepted occurrence and that the accrued costs for compensatory time are not allowable because the benefit is not provided to all employees, exempt and non-exempt alike. The Board majority finds that the Intermediary provided no documentary or testimonial evidence to support the assertions that: (1) the policy is not common nor accepted in the home health agency industry nor, (2) that non-exempt employees would also have to be eligible for this benefit in order for the benefit to be allowable.

#### DECISION AND ORDER:

The Intermediary's adjustment to disallow the cost of accrued compensatory time was improper. The Intermediary's adjustment is reversed.

#### BOARD MEMBERS PARTICIPATING

Suzanne Cochran, Esquire  
Gary B. Blodgett, D.D.S. (Dissenting)  
Elaine Crews Powell, C.P.A.  
Anjali Mulchandani-West  
Yvette C. Hayes

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<sup>6</sup> See Transcript, Page 277.

DATE: January 25, 2007

FOR THE BOARD:

Suzanne Cochran  
Chairperson

I respectfully dissent with the Majority's decision.

In its FY 1997 as-filed cost report the Provider included the costs of accrued compensatory time earned by its exempt employees (those holding executive, administrative, professional or other exempt positions). The Intermediary made adjustments disallowing those costs.

The Provider maintains that the accrual and subsequent payment of compensatory time for its exempt employees is an appropriate and allowable cost to the agency and the Medicare program. One hour of compensatory time is provided for each hour that an exempt employee works in excess of 45 hours per week. The allowability and reasonableness of the Provider's policy is not in dispute. The issue is whether the costs of the accrued compensatory time should be allowed.

Provider's Employee Handbook (Exhibit P-6, pages 3 and 11) directly addresses this issue by stating, "Exempt employees will receive compensatory time for all time worked over 45 hours per week. Compensatory time will be treated as Paid Time Off. Financial compensation is NOT (emphasis added) provided in lieu of paid days off. If an exempt employee is requested to work on a holiday, an alternate day off will be allowed in lieu of taking the holiday." Clearly, exempt employees are not allowed to receive financial compensation in lieu of ("instead of," according to Webster's Dictionary definition of "in lieu of") compensatory time.

Provider contends that the statement "Financial compensation is not provided in lieu of paid days off" is intended to prevent employees from working and getting paid for previously accrued compensatory days off at the same time; that it does not mean that an employee may not get paid for his/her accrued compensatory time." However, as noted in the preceding paragraph, the plain language of the Employee Handbook precludes that connotation.

This issue is addressed in PRM 15-1 (Exhibit P-5), wherein it is stated that Paid Days Off is "a formal plan under which all employees earn accrued vested leave-or payment in lieu of leave taken-for an unallocated combination of occasions such as illness, holidays, vacations . . . based on actual hours worked." Payment in lieu of taking time off for accrued vested leave is permissible. However, the plain language of the Provider's Employee Handbook **specifically precludes** its employees from having this option.

If no financial compensation is allowed in lieu of accrued compensatory time, it follows that although an exempt employee could accrue compensatory time, Provider could NOT accrue any financial obligation (cost) for the accrued time.

The Intermediary's adjustment to disallow the costs of Provider's accrued compensatory time was proper.

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Gary B. Blodgett