

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2007-D20

**PROVIDER -**  
Western Reserve Care System  
Youngstown, Ohio

Provider No.: 36-0141

**vs.**

**INTERMEDIARY -**  
BlueCross BlueShield Association/  
AdminaStar Federal, Inc.

**DATE OF HEARING -**  
January 25, 2006

Cost Reporting Period Ended -  
December 31, 1999 (2003 Wage Index)

**CASE NO.:** 03-0573

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ISSUES:

1. Did the Intermediary err in refusing to include Provider's cost for contracted perfusionist services in its wage index calculations?
2. Did the Intermediary err in refusing to include Provider's costs for contracted pharmacy services in its wage index calculations?

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. §1395h, 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 operating costs of inpatient hospital services are reimbursed by Medicare primarily through the Prospective Payment System (PPS). See 42 U.S.C. §1395ww(d). The PPS provides Medicare payment for hospital inpatient operating and capital-related costs at predetermined, specific rates for each hospital discharge. The rates are average standardized amounts that are divided into a labor-related share and a non labor-related share. The labor-related share is adjusted by the wage index applicable to the geographic area wherein the hospital is located. The wage index is calculated by dividing the average hourly wage paid by hospitals in that area by the national average hourly hospital wage.

CMS is required to update the wage index annually and bases the annual update on a survey of wages and wage related costs taken from cost reports filed by each hospital paid under PPS. 42 U.S.C. §1395ww(d)(3)(E). Based on the substantial amount of time

that is needed for providers to compile and submit cost reports and for intermediaries to review these reports, there is generally a four-year lag between the reporting of wage data and the date when the wage index is published.

On August 1, 2002, CMS issued the final rule for the development of the federal fiscal year (FFY) 2003 wage index update, which required the use of fiscal year (FY) 1999 wage data.<sup>1</sup> There is no dispute that the final rule is controlling in this appeal. Rather, the dispute centers on the elimination of some elements of the Provider's FY 1999 costs from the wage index calculations.

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

Western Reserve Care System (Provider) is a general acute care hospital located in Youngstown, Ohio that is subject to PPS. The Provider included contract labor costs for perfusionist and pharmacy services on its cost report for FY 1999. AdminaStar Federal, Inc., (Intermediary) made no adjustment to the costs associated with the contract services during its audit of the cost report but excluded these costs for purposes of calculating the Provider's FFY 2003 wage index. The specifics of the exclusions were as follows:

##### Issue 1: Contracted Perfusionist Services:

The Provider operates a pediatric and adult cardiothoracic and vascular surgery program and contracts with Allegheny General Hospital (Allegheny) to secure perfusionist services for the program. Under the terms of the contract, Allegheny was to provide the services of qualified cardiovascular perfusionists to the Provider's program while retaining all responsibilities for recruitment, training and employment of the perfusionist(s). The contract required the Provider to pay for the services of the perfusionists on a fee-per-case basis that varied based on volume<sup>2</sup> and the type of service rendered. The fee included compensation for the perfusionists' time, benefits, continuing education, travel and communication expenses. The Provider included the full amount of the contracted services in the data that was used to calculate its wage index.<sup>3</sup> The Intermediary believed that the amount claimed for contracted perfusionist services included indirect costs that are not allowable under the regulations and excluded all of the contract labor costs and hours from the wage index calculation. The two-fold question at issue is whether the amount claimed for perfusionist services included non-wage related costs and, if so, whether the perfusionists' cost should be disallowed in their entirety.

##### Issue 2: Contracted Pharmacy Services

The Provider executed a pharmacy management agreement with Owen Healthcare, Inc. (Owen) under which Owen agreed to own the inventory and manage a pharmacy service on behalf of the hospital. The terms of the contract required the Provider to provide registered pharmacists and support personnel, while Owen provided pharmacy inventory

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<sup>1</sup> 67 Fed. Reg. 49982, 49984 (August 1, 2002).

<sup>2</sup> See: Provider's Revised Position Paer Exhibit P-9, Appendix B.

<sup>3</sup> Form CMS-2552-96 Worksheet S-3, Part II, line 8.

and management personnel. The Provider determined that a portion of the amount paid under the agreement related to personnel costs and reported that portion as contract labor.<sup>4</sup> The Intermediary considered the Owen agreement a contract for management services and excluded 100% of the claimed contracted labor costs and hours from the wage index calculation. At issue is whether the cost incurred under the agreement may be properly claimed as pharmacy service contract labor costs.

The Provider filed an appeal on January 28, 2003 with the Board pursuant to 42 C.F.R. §§405.1835-1841 and met the jurisdictional requirements of those regulations. The Provider was represented by James F. Flynn, Esq., of Bricker and Eckler, LLP. The Intermediary was represented by James R. Grimes, Esq., of Blue Cross Blue Shield Association.

### PARTIES' CONTENTIONS:

#### Issue 1: Contracted Perfusionist Services

The Provider argues that its wage index calculation should include the full amount of its claimed perfusionist contract labor costs.<sup>5</sup> The Provider asserts that it contracted and paid for the costs of personnel providing direct patient care and reported only those personnel costs associated with its contract as required by PRM15-2, §3605.2. The Provider further contends that its service agreement details the responsibilities of the parties and, if read in its entirety, evidences that only personnel costs associated with the contract were included.

The Provider also argues that its wage index is not properly stated by the 100% exclusion of the amount paid for perfusionist personnel. The Provider contends that its per-case charge is uniform and unaffected by the circumstances of the services, and that “wage-related” under §3605.2 encompasses the related costs of providing personnel. The Provider further contends that the amount disallowed by the Intermediary includes direct labor costs that are allowable, and that the costs related to training, travel and communications were insignificant relative to the cost of the personnel.

The Intermediary contends that its adjustment is consistent with PRM 15-2, §3605, which precludes recognition of amounts for travel expenses or miscellaneous items. The Intermediary argues that the amount claimed included costs that were not for direct labor (i.e., travel, communications equipment and continuing education, and that such costs should be segregated within the service fee.<sup>6</sup> The Intermediary concludes that the

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<sup>4</sup> Form CMS-2552-96, Worksheet S-3, Part II, line 9.

<sup>5</sup> Included in Provider Exhibit P-10 is a schedule of the perfusionist cost and hours the Provider maintains should be included in the 1999 wage index calculation. The Board notes that the Provider has included cost (\$78,729) and hours (395.20) that were billed by Allegheny for services rendered during November and December 1998 – the prior fiscal year. If the cost of these services was accrued by the Provider and claimed in its 1998 cost report, the cost and hours must be removed from the 1999 wage index computation.

<sup>6</sup> See Provider’s Exhibit P-9, first page of Appendix B. Open Heart Surgery Program Supportive Services Agreement.

Provider's claimed perfusionist costs included costs other than direct labor costs, and since these other costs have not been identified and eliminated, all perfusionist costs must be disallowed.

#### Issue 2: Contracted Pharmacy Services

The Provider contends that the amounts claimed under the Owen agreement were for pharmacy service personnel costs. The Provider argues that the agreement encompassed services for more than personnel, and the Intermediary's classification of the agreement as a management services agreement is too narrow, given the scope of Owen's duties. The Provider also contends that Owen pharmacists performed duties that were integral to the operations of the Provider's pharmacy which included providing licensed pharmacists and other personnel to manage and supervise the day-to-day responsibilities over the operation of the pharmacy and the identification/acquisition of pharmacy inventory for patient needs. The Provider further argues that the personnel costs for pharmacy services were derived from information provided by Owen, and the allocation methodology went unchallenged by the Intermediary.

The Intermediary argues that its adjustment is consistent PRM 15-2, §3605 which precludes inclusion of amounts paid for management and consulting contracts. The Intermediary contends that the Provider appropriately labeled the Owen agreement a "management contract" because the services rendered were for supervising staff, strategic planning and developing policies/procedures. The Intermediary argues that, according to the agreement, the hospital provided the pharmacists who provided services to patients; consequently, the contract price is not a wage cost of pharmacy services.

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

After consideration of Medicare law and guidelines, the parties' contentions and the evidence presented at the hearing, the Board finds and concludes as follows:

#### Issue 1: Contracted Perfusionist Services

PRM15-1, §2118 recognizes payments for services that are related to patient care and rendered under a fee-for-service arrangement as an allowable cost for Medicare purposes. In addition, PRM 15-2, §3605.2, Part II, instructs providers to include the payment for services furnished under contracts for direct patient care in the provider's wage index calculations.<sup>7</sup> CMS instruction further directs the provider to "report only personnel costs associated with these contracts."<sup>8</sup> There is no dispute that direct patient care services were performed under an agreement with Allegheny and that the Provider paid for those services at the rate set by the agreement. The question at issue is whether the amount claimed by the Provider for wage index reporting purposes was exclusively personnel costs related to patient care.

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<sup>7</sup> PRM 15-2, §3605.2, Part II-Wage Index Information; Form CMS-2552-96; Instructions for line 9.

<sup>8</sup> Id.

The Board considers the agreement between Allegheny and the Provider the controlling source for determining the services contracted and paid.<sup>9</sup> The Board's examination of the agreement indicates that Section 3.1 sets the scope of services to be furnished and requires Allegheny to "provide the services of qualified cardiovascular Perfusionists to provide services at NSH [Provider] for operation of the cardiopulmonary bypass equipment for open heart surgery procedures." Section 3.13 establishes the compensation for the services and, under its terms, Allegheny will accept as payment in full for the Perfusionist services provided ". . . reimbursement of all costs associated with Perfusionists' employment." The agreement itemizes the compensation amounts at its Appendix B. The Board's examination of the agreement and Appendix B indicates that the amounts paid by the Provider and included as contract labor costs were incurred for the expressed purpose of placing the perfusionists in position to provide patient services. Consequently, the Board concludes that the contracted perfusionist services are personnel costs of the contract and are "wage related" for wage index purposes. Further, the Board finds PRM 15-2, §3605.2 does not require any further breakdown of the costs incurred by Allegheny to provide these personnel services claimed under the agreement, and, therefore, concludes that such a breakdown is beyond Medicare requirements. Accordingly, the Board finds that the total cost incurred for contracted perfusionist services is properly included in the Provider's wage index calculation.

## Issue 2: Contracted Pharmacy Services

The Medicare program recognizes payments for patient care services rendered under a fee-for-service arrangement as an allowable cost and requires their inclusion in wage index calculations. However, PRM 15-2, §3605.2, Part II, specifically excludes from the calculation payments for management and consulting contracts or any other payments not directly related to patient care.<sup>10</sup> There is no dispute that services were provided under an agreement with Owen and that the Provider paid for those services at the rate set by the agreement. The issue for the Board's consideration is whether the amount claimed for wage index purposes is related to patient care or limited to management services.

The Board considers the agreement between Owen and the Provider the controlling source for determining the services contracted and paid.<sup>11</sup> The Board's examination of the agreement indicates that Section 2 delegates the authority to manage and supervise the operation of the pharmacy to Owen and states that Owen will advise and assist the Provider in strategic planning, protocol development and staff development. Section 5.2 of the agreement requires the Provider to provide full-time, registered pharmacists and other full-time personnel for the operation of the pharmacy while assigning all management and supervisory responsibilities of any "Hospital Employee" working in the Pharmacy to Owen. This language suggests that all direct patient care activities are performed by hospital employees. Furthermore, the Board finds nothing in the agreement that calls for Owen to work directly with patients. Rather, Owen's functions are limited to management, oversight and consulting. Accordingly, the Board concludes that the

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<sup>9</sup> Provider Exhibit P-9.

<sup>10</sup> PRM 15-II, §3605.2, Part2; Form CMS-2552-96-06-03; Instructions, line 9.

<sup>11</sup> Provider Exhibit P-14.

agreement between the Provider and Owen is a management services contract that is not directly related to patient care. The Board concludes further that the cost of the Pharmacy service contract is subject to exclusion under PRM 15-21, §3605, and its costs may not be included in the wage index calculation.

DECISION AND ORDER:

Issue 1: Contracted Perfusionist Services

All of the costs incurred by the Provider for perfusionist services pursuant to the contract with Allegheny are personnel costs and are “wage related” for wage index purposes. Therefore, the costs must be included in the Provider’s wage index calculation. The Intermediary’s adjustment is reversed and the issue is hereby remanded to the Intermediary for a determination of whether the cost related to perfusionist services furnished during 1998 but included in the wage index information for 1999 was accrued and claimed by the Provider in its 1998 cost report. If so, the cost and hours must be removed from the 1999 wage index computation.

Issue 2: Contracted Pharmacy Services:

The agreement between the Provider and Owen for pharmacy services is a management services contract that is subject to exclusion under PRM 15-2, §3605, and its costs may not be included in the wage index calculation. The Intermediary’s adjustment is affirmed.

BOARD MEMBERS PARTICIPATING:

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

DATE: February 23, 2007

FOR THE BOARD:

Suzanne Cochran, Esquire  
Chairperson