

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2009-D2

PROVIDER –
Rochester 2004 MSA Wage Index Group

Provider Nos.: See accompanying listing

vs.

INTERMEDIARY –
Blue Cross Blue Shield Association
National Government Services – NY

DATE OF HEARING -
May 30, 2008

Fiscal Years Ended -
December 31, 2003 and
December 31, 2004

CASE NO.: 04-0596G

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ISSUE:

Whether the intermediary properly determined the Rochester New York Metropolitan Statistical Area (MSA) wage index for fiscal year 2004 in a manner that reflected the relative hospital wage level in that geographic area as compared to the national average.

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 and 413.24.

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 portion 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 - 405.1837.

The operating costs of inpatient hospital services are reimbursed by Medicare primarily through the Prospective Payment System (PPS). The Medicare statute, 42 U.S.C. §1395ww(d)(3)(E), requires that, as part of the methodology for determining prospective payments to hospitals, the Secretary must adjust the standardized amounts for area wages based on the geographical location of the hospital compared to the national average hospital wage level. Beginning October 1, 1993, the statute required CMS to update the wage index annually. CMS bases the annual update on a survey of wages and wage related costs taken from cost reports filed by each hospital paid under the PPS.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

This case involves the development of the Rochester New York MSA for fiscal year 2004 and its application to the hospitals subject to its wage indices. The Providers in this appeal fund short-term disability benefits for their employees through their standard payroll systems. Their practice differs from the usual industry practice of insuring such

benefits through an insurance carrier and reporting the related the premiums as wage related costs. Any hours pertaining to such wage related costs are not reported on the cost reports. For FY 2004, the Providers requested that their disability costs be treated as wage related costs and that the hours related to their “disability payments” be removed from the hours reported on Worksheet S-3, Column 4 line 1, in their respective cost reports. It is undisputed that had the Providers followed the industry practice and used a commercial underwriter, no hours related to the hospital’s short-term disability program would have been reported. National Government Services-NY (formerly Empire Medical Services and hereinafter Intermediary) denied the request and CMS, in turn, supported the denial. The participating hospitals in the appeal then timely filed appeals with the Board. At issue are the hours reported as “paid hours” for purposes of calculating payments under the Hospital’s short-term disability policy. The Board previously addressed the same issue for these providers for an earlier cost report period and a majority decided the issue in favor of the Intermediary/CMS.¹ However, both parties have relied upon the Board’s decision for their arguments and provided the case transcript (post hearing) for inclusion in the Board’s considerations.

Various providers² in the Rochester MSA appealed the Intermediary’s determination to the Board, and their appeal meets the jurisdictional requirements of 42 C.F.R. §§405.1835-405.1841. The Providers were represented by Keith D. Barber, Esquire, of Hall, Render, Killian, Heath & Lyman, P.S.C. The Intermediary was represented by Bernard Talbert, Esquire, of Blue Cross Blue Shield Association. The estimated Medicare reimbursement amounts in dispute total \$1,215,602 for fiscal 2004.

PROVIDERS’ CONTENTIONS:

The Providers contend that the Intermediary’s treatment is inconsistent with the requirements of the statute. 42 U.S.C. §1395ww(d)(3)(E) controls the wage index calculation and requires uniform calculation/comparison of the wage level in a geographic area with the national average wage level. The Providers argue that the comparisons in this case are not consistent because the Intermediary included hours for disability payments for self insured hospitals while excluding hours related to disability payments for hospitals with insurance. The Providers acknowledge that the Board previously decided the issue in favor of the Intermediary.³ However, the Providers argue that the Board’s decision equated hours recorded with paid hours. The Providers contend that the Board’s assumption is unsupported by Program Guidance and conflicts with the Court’s ruling in *Sarasota Memorial Hospital*.⁴ There the Court held that similar cost items must be treated uniformly or the wage index is compromised.

¹ Rochester 02-03 MSA Wage Index Group v. Blue Cross Blue Shield Association/Empire Medicare Services (herein after Rochester); PRRB Decision 2007-D67 (August 31, 2007).

² See Index of Providers, Attachment 1 of this Decision.

³ Rochester, *Supra*.

⁴ Sarasota Memorial Hospital, et. al. v. Shalala, 60 F.3d. 1507 (11th Cir, 1995).

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the program guidance at Provider Reimbursement Manual 15-2 (CMS Pub. 15-2) §3605.2 requires inclusion of amounts paid and hours recorded for time off. The Board, in its earlier decision, concluded that the Providers' direct payment of short-term disability benefits to their employees was a form of paid time off and, accordingly, both the costs and the hours were properly included in the wage index calculations. The Intermediary argues that the issue is decided and that the hours should be included in the calculation.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and guidelines, the evidence and the parties' arguments, the Board finds and concludes that the short-term disability hours should be excluded from the wage index data used to calculate the FFY 2004 Wage Index for the Rochester, New York MSA.

CMS' Program Instructions for cost report preparation require that salary and wages paid to hospital employees be included in the wage index calculation. See, CMS Pub. 15-2 §3605.2. The pivotal question is whether the short-term disability expense should be included as "salaries and wages" versus "wage *related* costs." Salaries and wages include direct compensation for employment. In addition, holiday, vacation, and sick pay are standard and customary forms of paid time off that are also typically included as salaries and wages. The salaries and wages and the associated hours are included in the wage index calculation so that an average hourly wage rate can be calculated. Typical wage *related* costs are payroll taxes, life and health insurance, workers compensation insurance and other fringe benefits.

CMS Pub. 15-2 §§1100ff requires that the Provider Cost Report Reimbursement Questionnaire, Form CMS-339, be completed by all providers submitting cost reports to the Medicare intermediary under Title XVIII of the Social Security Act to assist with the preparation of an acceptable cost report. CMS Program Instructions for Form CMS-339, Exhibit 7, advise that wage related costs may be different from fringe benefits allowed under Medicare because Generally Accepted Accounting Principles (GAAP) are used in reporting wage related costs. In addition, some costs such as payroll taxes, which are reported as wage related costs on Exhibit 7, are not considered fringe benefits under Medicare payment principles. Exhibit 7, Part I – Wage Related Cost (Core List), Health and Insurance Costs specifically lists costs incurred for health insurance, accident insurance, disability insurance, long-term care insurance and workmen's compensation without regard to whether the insurance is purchased or self-funded as long as the employee is the owner/beneficiary. Whether the short-term disability payment is made via accounts payable (AP) check issued by the hospital, an insurance carrier or via the hospital's payroll accounting, the employee is being directly compensated for time off. The method of payment does not affect the nature of the underlying costs – it remains a wage related cost.

The Board finds the inclusion of the disability insurance costs as salaries and wages and the inclusion of related hours is not proper treatment for these types of costs. Rather, these types of costs should be treated as wage related costs as required by the cost reporting instructions to ensure consistent treatment by all providers for the sake of uniformity and comparability.

The Board's earlier decision made a distinction between providers based on simply their method of payment. It held that short-term disability payments should be classified based on how the payment is processed - - either through the hospital's payroll or general accounting systems. However, this rationale creates a disparity in how these types of costs are treated and classified for wage index purposes, since that would depend on how providers chose to fund the benefit to their employees. The Court in Sarasota Memorial Hospital, et. al. v. Shalala, 60 F.3d. 1507 (11th Cir, 1995) made clear that such a distinction is improper when it held that the uniformity of the wage index is compromised if the Secretary does not classify the same items of costs as wages for all providers. Accordingly the Board concludes that the fact that the Providers opted to pay an employee benefit through their payroll systems does not change the nature or type of the underlying costs. Moreover, the classification of short-term disability expense as "wage related costs" is required according to CMS program instructions.

DECISION AND ORDER:

Short-term disability hours should be excluded from the wage index data used to calculate the FFY 2004 Wage Index for the Rochester, New York MSA. Short-term disability pay and hours should be excluded from salaries and wages and included as wage related costs for calculation of the hospitals' Medicare wage index.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Elaine Crews Powell, C.P.A.
Yvette C. Hayes
Michael D. Richards, C.P.A.
Keith E. Braganza, C.P.A.

FOR THE BOARD

Suzanne Cochran
Chairperson

DATE: November 10, 2008

Attachment 1

Index of Providers
&
Fiscal Years (FYs) Included in Appeal

<u>Provider #</u>	<u>Provider Name</u>	<u>FYs</u>
33-0030	Newark-Wayne Community Hospital	12/31/03
33-0030	Newark-Wayne Community Hospital	12/31/04
33-0037	Lakeside Memorial Hospital	12/31/03
33-0037	Lakeside Memorial Hospital	12/31/04
33-0068	Geneva General Hospital	12/31/03
33-0068	Geneva General Hospital	12/31/04
33-0074	F.F. Thompson Hospital	12/31/03
33-0074	F.F. Thompson Hospital	12/31/04-
33-0125	Rochester General Hospital	12/31/03
33-0125	Rochester General Hospital	12/31/04
33-0164	Highland Hospital of Rochester	12/31/03
33-0164	Highland Hospital of Rochester	12/31/04
33-0226	Park Ridge Hospital	12/31/03
33-0226	Park Ridge Hospital	12/31/04
33-0238	Nicholas H. Noyes Memorial Hospital	12/31/03
33-0238	Nicholas H. Noyes Memorial Hospital	12/31/04
33-0265	Clifton Springs Hospital & Clinic	12/31/03
33-0265	Clifton Springs Hospital & Clinic	12/31/04
33-0285	Strong Memorial Hospital of Rochester	12/31/03
33-0285	Strong Memorial Hospital of Rochester	12/31/04