

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2009-D28

PROVIDER –
 “Lunch Hour Dispute” Wage Index Group
 Appeals
 Chicago MSA - FFYs-2004, 2005 and 2006
 Rhode Island MSA - FFYs 2003 and 2004
 Rural Kentucky MSA – FFYs 2004 and 2005
 Provider Nos.: See Attachment 1

vs.

INTERMEDIARY –
 BlueCross BlueShield Association/
 National Government Services, Inc. - IL
 (formerly AdminaStar Federal, Inc.)

DATE OF HEARING -
 March 20, 2008

Cost Reporting Periods Ended -
 See Attachment 1

CASE NOs.:
 Chicago - 04-0597G
 05-0663G
 06-0682G
 Rhode Island – 03-0282G
 Kentucky – 04-0598G

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ISSUE:

Whether paid lunch period time should be added to hours used to calculate the Providers' hourly wage rates.

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. 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 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. §§405.1835-405.1837.

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 indices annually. CMS bases the annual update on a survey of wages and wage related cost taken from costs reports filed by each hospital paid under the PPS.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

These Medicare Group Appeals involve the data that should properly be used for PPS wage index calculations for the Chicago, Illinois Metropolitan Statistical Area (MSA), the Rhode Island MSA and the Rural Kentucky MSA. Some hospitals within these MSAs have a standard work day of 7.5 hours plus a 30-minute meal period which is reported as if paid for purposes of accounting and payroll determinations. Some Providers in the groups filed their Medicare cost reports using total paid hours net of the

meal period hours in their wage data. Other providers in the groups originally filed their cost reports with the lunch hours included but timely requested adjustments to remove those hours during the wage index correction period. In each case, National Government Services (formerly AdminaStar Federal, Inc. and hereinafter Intermediary) denied the adjustments and CMS upheld the Intermediary's decision.

The Providers filed timely appeals with the Board pursuant to 42 C.F.R. §§405.1835-405.1841, and met the jurisdictional requirements of those regulations. The Provider was represented by Keith D. Barber, Esq., of Hall, Render, Killian, Heath & Lyman, PC. The Intermediary was represented by James R. Grimes, Esq., of Blue Cross Blue Shield Association.

For all the appeals at issue the parties reached a stipulation of the facts that summarized the issue and concluded that the cases involve no dispute over material facts or documentation. Rather the dispute in these cases focuses on a policy and law. The substantive issue affecting the participating providers is whether the Intermediary properly included certain lunch hour data in the "paid hours" category of the wage survey for hospitals in each geographic area.

The parties further agree that if the case is resolved in favor of the Providers, the matter will be remanded back to the Providers' Fiscal Intermediaries to finalize consistent with the final determination of the law, of the policy, and according to customary Medicare standards for documentation of specific hours that might be removed for wage index recalculation purposes.

PROVIDERS' CONTENTIONS:

The Providers contend that the controlling statute at 42 U.S.C. §1395ww(d)(3)(E) requires uniform comparison of hospital wage levels in a geographic area with the national average hospital wage level and argue that the comparisons in this case are not consistent because the Intermediary included non-worked lunch hours as total paid hours in these indices while hospitals in other areas excluded such hours. The Providers argue further that consistency requires elimination of paid lunch hours and offered witness testimony of established industry practices that exclude such hours as evidence of a standard national treatment. The Providers' contend that the Intermediary's inclusion of the paid lunch hour period produces a disparate treatment of employee time that understates the average hourly rate for affected hospitals.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the wage index calculations properly used total paid hours. CMS's published administrative process for wage index data accumulation at 68 Fed. Reg. 46299 (Sept. 1, 1993) established paid hours as required basis for reporting a hospital's hours/wages. CMS solicited comments from the public on the possible exclusion of paid lunch hours but remained unconvinced that the change was warranted.¹

¹ 68 Fed. Reg. 45396-45397, August 1, 2003.

The Intermediary contends that CMS's longstanding policy to include all paid hours in the calculation of the wage index is the proper reporting basis and is most reflective of what the wage index actually measures. Accordingly, the Intermediary argues that both the wages and the hours are properly included in the calculations.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

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

The central issue before the Board involves the determination of the proper reporting basis for labor hours in the wage reporting process. The Providers argue that the controlling statute at 42 U.S.C. §1395ww(d)(3)(E) requires uniform comparison of hospital wage levels in a geographic area with the national average hospital wage level. There is no dispute that the Providers within these group appeals and the other providers in the various metropolitan statistical areas are reporting lunch hours in an inconsistent manner. However, it has long been the policy of CMS to calculate the wage index using paid hours rather than hours worked.² Further, CMS recognized that some hospitals provide paid lunch hours at the time that it formulated its policy and solicited comments from the public on their possible exclusion.³ The comments demonstrated that there were significant disagreements on the treatment of paid lunch hours that could not be resolved without substantial CMS involvement.⁴ CMS elected to continue its policy of including paid lunch hours because of its continuing belief that paid hours more appropriately reflect a hospital's total wage cost.⁵ The Board can find no clear resolution in the collective body of evidence before it that the inclusion/exclusion of the paid lunch hours produces a more accurate wage index nor can it find that the Secretary's policy is inconsistent with the statute. Accordingly, the Board defers to the Secretary's policy to include paid lunch hours in the wage index calculations.

DECISION AND ORDER:

Paid lunch period time should be included in total paid hours used to calculate the Providers' average hourly wage rate.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Yvette C. Hayes
Michael D. Richards, C.P.A.
Keith E. Braganza, C.P.A.
John Gary Bowers, C.P.A.

² 68 Fed. Reg. 46299, September 1, 1993.

³ 68 Fed. Reg. 45396-45397, August 1, 2003.

⁴ 68 Fed. Reg. 45393-45399, 45397, August 1, 2003.

⁵ Id.

FOR THE BOARD:

Suzanne Cochran, Esquire
Chairperson

DATE: June 26, 2009