

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2010-D41

PROVIDER -
Norfolk MSA 2004 Wage Index Group

DATE OF HEARING -
March 7, 2008

Provider Nos.: Various

Cost Reporting Periods Ended -
Federal Fiscal Year (FFY) 2004

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
National Government Services, Inc. - WI

CASE NO.: 04-0495G

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ISSUE:

Whether the Intermediary erred in excluding certain contract labor costs, home office costs, and wage-related costs that were claimed by Bon Secours-DePaul Medical Center (“DePaul”), Maryview Medical Center (“Maryview”), and Mary Immaculate Hospital (“Mary Immaculate”) (collectively, the “Bon Secours Hospitals”) and used to calculate the federal fiscal year 2004 wage index for the Norfolk Metropolitan Statistical Area (“MSA”).

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 was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc (2009). 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 interpretive guidelines published by CMS. See, 42 U.S.C. §1395h; 42 C.F.R. §§413.20 and 413.24 (2009).

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 (2009). 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 (2009). 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 (2009).

The operating costs of inpatient hospital services are reimbursed by Medicare primarily through the Prospective Payment System (PPS). 42 U.S.C. §1395ww(d) (2009). The Medicare statute requires as part of the methodology for determining prospective payments to hospitals, the Secretary to adjust the standardized amounts for area wages based on the geographical location of the hospital compared to the national average hospital wage level. 42 U.S.C. §1395ww(d)(3)(E)(2009). The Secretary establishes a wage index for each MSA and for each statewide area that is not within an MSA (i.e., rural areas). Beginning October 1, 1993, the statute required HCFA (now 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 prospective payment system (PPS).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

There are twelve providers represented in this group appeal, all of which are located in the Norfolk MSA for the federal fiscal year ending September 30, 2004. The Providers in this case filed an appeal within 180 days of the August 1, 2003 publication of the final rule establishing PPS rates for federal fiscal year 2004. The Providers complain that the PPS rates for the Norfolk MSA are understated due to the exclusion of certain contract labor costs, home office costs, and wage-related costs claimed by the Bon Secours Hospitals. The cost report year used to determine the wages and wage-related costs for the Bon Secours Hospitals in calculating the federal fiscal year 2004 wage index is September 1, 2000 through August 31, 2001.

Pursuant to Medicare program requirements, the Bon Secours Hospitals each submitted a Medicare cost report and accompanying Worksheet S-3, Parts II and III for fiscal year 2001¹ and Form CMS-339.² Each of the Bon Secours Hospitals submitted a request for a correction to its wage data.³ The Intermediary received the request from DePaul on February 7, 2003, and from Maryview and Mary Immaculate on February 6, 2003, which was at least 10 days before the February 17, 2003⁴ deadline established by CMS for requests to revise the wage data.⁵

The requested wage data corrections consisted of contract labor costs reported on line 9 of Worksheet S-3, Part II, wage-related costs reported on lines 13-16, and home office costs reported on line 11. Where applicable, the hospitals also requested adjustments to the hours corresponding to these costs. The Intermediary, by letter dated March 31, 2003, denied DePaul's requested adjustments to home office costs and wage-related costs, but the Intermediary approved a partial adjustment to contract labor costs.⁶ The Intermediary by letters dated March 31, 2003, denied corrections requested by Maryview and Mary Immaculate to their contract labor costs, home office costs, and wage-related costs.⁷

The Intermediary gave a similar explanation for rejecting the contract labor claims of both Maryview and Mary Immaculate. The rejections stated, "**Contract Labor** will not be adjusted due to insufficient documentation . . . No adjustment will be made."⁸

The Intermediary also gave a similar explanation for rejecting the wage-related cost (or domestic claims) correction requests for Maryview and Mary Immaculate. The rejections stated:

¹ Exhibits P-13, P-14, and P-15.

² Exhibits P-16, P-17 and P-18.

³ Exhibits P-23, P-24 and P-25.

⁴ This deadline was initially announced as February 10, 2003, but was changed due to the need to report some of the data. *See*, 68 Fed. Reg. 45401 dated August 1, 2003.

⁵ Exhibit P-26 at 498, Exhibit P-27 at 501, Exhibit P-28 at 503.

⁶ Exhibit P-26.

⁷ Exhibits P-27 and P-28.

⁸ *Id.*

“**Wage Related Cost** will not be adjusted. The documentation submitted did not support the adjustment or the originally filed cost report. The adjustment being proposed is not in accordance with the original filed cost report and P&L statement. Worksheet S-3 adjustments must be made in accordance with the filing of the cost report and the Provider’s financial information.”⁹

The Intermediary provided a more detailed explanation for rejecting DePaul’s wage-related cost correction, although the substance was essentially the same.¹⁰

The Intermediary rejected the revision of home office costs of Maryview and Mary Immaculate, stating, “**Home Office** will not be adjusted. The documentation submitted did not support the adjustment. The basis for the adjustment was computed incorrectly. No adjustment will be made.”¹¹ The Intermediary provided a similar explanation for rejecting DePaul’s home office cost correction.¹² The Intermediary’s determination resulted in a full disallowance of the “indirect” or pooled home office costs for the Bon Secours Hospitals.

The Bon Secours Hospitals submitted a combined request to CMS to review the Intermediary’s determinations regarding their wage data correction requests for contract labor, waged-related, and home office costs.¹³ By letters dated August 7, 2003, CMS denied the request for review made by DePaul and Mary Immaculate and, by letter dated July 29, 2003, CMS rejected Maryview’s request.¹⁴

The Secretary published the federal fiscal year 2004 average hourly wages of each PPS hospital, each MSA and rural area, as well as the wage index for each MSA and rural area on August 1, 2003 and subsequently issued a correction to some of this data.¹⁵ The

⁹ Exhibits P-27 and P-28.

¹⁰ Exhibit P-26 at 498 stated in part: “Worksheet S-3 adjustments must be made in accordance with the filing of the cost report and the Provider’s financial information. Sufficient documentation was not presented to allow an examination of records or accounts to prove the accuracy of the amount submitted for consideration, nor did time allow for such an examination.”

¹¹ Exhibits P-27 and P-28.

¹² Exhibit P-26 stated in part: “A **Home Office** requested adjustment will not be accepted, nor an adjustment proposed. . . . Sufficient documentation was not presented to allow an examination of records or accounts to prove the accuracy of the amount submitted for consideration.”

¹³ Exhibit P-29.

¹⁴ Exhibit P-31.

¹⁵ Providers’ Position Paper Exhibit P-1 at 001-038 containing 68 Fed. Reg. 45,548-66 (Table 2); 45,566-68 (Tables 3A and 3B); 45,568-76 (Tables 4A and 4B) (Aug. 1, 2003). Providers’ Position Paper Exhibit P-11 at 109-119 containing 68 Fed. Reg. 57,732; 57,735-45 (Oct. 6, 2003). The Secretary’s correction amended the average hourly wages for some geographic areas, but not the Norfolk MSA. The wage index for the Norfolk MSA was amended, however, because the Secretary amended the national average hourly wage which is the denominator in determining the wage index. Providers’ Position Paper, Exhibit P-1 at 035 containing 68 Fed. Reg. at 45,573 (2003). (Which shows the original Secretary’s wage index and GAF for Norfolk MSA (MSA No. 5720) before the amendments). Providers’ Position Paper Exhibit P-11 at 108 containing 68 Fed. Reg. at 57,733 (2003) states that the corrected national average hourly wage is \$24.7202. However, Providers’ Position Paper Exhibit P-12 is an email from a CMS official which confirms that the “corrected” national average hourly wage should be \$24.7072.

Secretary determined that the federal fiscal year 2004 average hourly wage for the Norfolk MSA was \$21.2953 and that the wage index for the Norfolk MSA was .8619.¹⁶

The Providers in this case have met the jurisdictional requirements of 42 C.F.R. §§405.1835-405.1841 (2009). The Providers were represented by Barbara Straub Williams, Esquire of Powers, Pyles, Sutter & Verville, P.C. The Intermediary was represented by James R. Grimes, Esquire, of Blue Cross Blue Shield Association.

PARTIES' STIPULATIONS:

The parties stipulated to the following pertinent facts:¹⁷

1. General and Procedural Background

1i. The parties entered into a Joint Scheduling Agreement in February 2007 in an attempt to resolve this case.

1j. Pursuant to the Joint Scheduling Agreement, the parties exchanged information and documentation related to the wage costs at issue and the Intermediary compiled draft audit adjustments. Those audit adjustments are at Exhibit P-41. CMS then refused to review the draft adjustments stating they would allow for information not available at the time of the desk review (Exhibit I-8).

1k. If the Board determines that the Intermediary should have adjusted the wage data of the Bon Secours Hospitals, the audit adjustments at Exhibit P-41 are the adjustments that should be implemented.

2. Contract Labor Costs

2j. In their wage data correction requests, each of the Bon Secours Hospitals submitted a schedule of their contract labor invoices for fiscal year 2001, including amounts paid and corresponding hours, for each vendor that they used. This schedule was in substantially the same format for each of the Bon Secours Hospitals.

2k. The contract labor schedules submitted by the Bon Secours Hospitals in their wage data correction requests complied with the instructions in PRM § 3605.2 and with the instructions for CMS Form 339.

2l. By email dated March 4, 2003; the Intermediary requested that DePaul recategorize by department the documentation on contract labor that DePaul had originally submitted regarding contract labor costs. The Intermediary also asked for a description of each department and "the working trial balance number to which these vendor contract labor costs were charged."

¹⁶ 68 Fed. Reg. at 45,567, Exhibit P-1 at 029; 68 Fed. Reg. at 57,741, Exhibit P-11 at 115.

¹⁷ See Providers' Exhibit P-50. Stipulation of Parties executed on March 5, 2008.

2m. As a result of its review of the contract labor wage data correction requests submitted by the Bon Secours Hospitals, the Intermediary accepted DePaul's request for a wage data correction to contract labor costs, with some adjustments, and rejected Maryview's and Mary Immaculate's requests.

3. [sic] Domestic Claims

3a. Wage-related costs (more commonly known as fringe benefits) are included in the calculation of the wage index. Among the wage-related costs that the Secretary includes in the wage index computation is "health insurance (purchased or self-funded)."

3c. "Domestic claims" is a term used in the Medicare program to define costs incurred by hospitals for providing care to employees who are covered under a self-insured plan.

3d. The Bon Secours Health System, Inc. offered a self-insured health insurance plan to its employees.

3f. The accounting system for the Bon Secours Hospitals underreported the domestic claims costs for the Bon Secours Hospitals because there was an error in that system.

3g. The accounting system for the Bon Secours Hospitals recorded . . . domestic claims as a credit rather than an expense. Stated differently, when an employee of the Bon Secours Hospitals received hospital services from the Bon Secours Hospitals, the Bon Secours Hospital charged the self-insured fund and received payment. The Bon Secours Hospitals' accounting system incorrectly recorded that payment as a credit rather an expense.

3h. The payments incorrectly credited for self-insured health services were recorded under Account No. 50400 for all the Bon Secours Hospitals.

3i. As a result of its preliminary review of wage data for the Bon Secours Hospitals (prior to the wage data correction submissions by the Bon Secours Hospitals), the Intermediary decreased DePaul's wage-related costs (line 13 on Worksheet S-3, Part II) by \$165,666, reduced Maryview's wage-related by \$935,365, and reduced Mary Immaculate's wage-related costs by \$627,419.

3j. In their wage data correction requests to the Intermediary, the Bon Secours Hospitals requested an adjustment to their wage-related domestic claims costs.

3k. In their wage data correction requests to the Intermediary, the Bon Secours Hospitals provided a listing of their health insurance costs and explained the accounting error related to their domestic claims costs.

3l. The Intermediary did not adjust the domestic claims costs for the Bon Secours Hospitals as a result of the wage data correction process.

4. Home Office Costs

4a. The Bon Secours Hospitals have a home office that files a home office cost statement. Costs from the home office cost statement can be claimed on the cost reports of the Bon Secours Hospital if they are either directly or indirectly allocable to the Bon Secours Hospitals. This Intermediary was not the intermediary for the home office and had not audited the finalized home office cost statement.

4b. In their wage data correction requests to the Intermediary, the Bon Secours Hospitals requested an adjustment to include an allocation of indirect home office costs.

4c. The Intermediary did not adjust the home office costs for any of the Bon Secours Hospitals as a result of the wage data correction process.

INTERMEDIARY'S CONTENTIONS:

The Intermediary explained that the Secretary is charged with annually updating the wage index portion of the standardized rate to reflect area wage differences. The FY 2004 update utilizes the hospitals' FY 2000 wage data which is obtained from the submitted Medicare cost report. CMS establishes a wage index development timetable each year that outlines due dates for all data submissions to support the reported wage data or to support corrections or changes to the wage data. The time period in which the FY 2004 wage index was to be reviewed was from November 2002 through October 2003. This timetable was communicated to all hospitals on numerous occasions.¹⁸ The timeline for the notification of the parties and the responses are documented at P-50 at ¶ 1f.

The Intermediary asserts that in September of 2002, requests for wage index data documentation were sent to all three Providers. Mary Immaculate and Maryview did not respond to this request, and DePaul supplied limited information. Adjustments were then proposed and submitted to the Providers based on the desk reviews completed by the Intermediary. In January 2002, CMS published all of the hospital wage index data on the public use file. Providers were given until February 17, 2003 to submit requests to revise the wage data reported on the public use file. Maryview and Mary Immaculate filed their requests on February 6, 2003 and DePaul filed its request on February 7, 2003.

The Intermediary contends that the February 2003 revision requests submitted by the three Providers in question did not include the complete supporting documentation necessary to support revisions to the contract labor, home office and wage related costs. The Intermediary's witness testified that the revisions to contract labor were not properly supported because the Intermediary did not have a complete list of vendors and therefore

¹⁸ Tr. at pg. 244.

could not confirm the nature and extent of the services provided.¹⁹ In addition, the submissions by the Providers only identified contract labor cost by department number and the Intermediary would have to relate which departments corresponded to cost centers of the cost report and therefore could not determine if the services were in a PPS unit of the hospital or an excluded unit. The Intermediary asserts that the submission was not complete in that they would have had to obtain significant additional information and do significantly more audit work to verify the proposed revisions. Since February 17, 2003 was the last day for providers to submit revision requests for wage data, and the revision requests were to include all supporting documentation, the Intermediary denied the Providers' requests for wage revisions as they could no longer accept additional data.

The Intermediary contends that the requests for revisions to the wage related costs (domestic claims) and home office costs did not relate to adjustments previously made to the hospitals' wage data, but instead were based on omissions or errors noted on their submitted cost reports. Although the Intermediary acknowledges that they were aware of problems with the way domestic claims were reported on the cost report prior to the revision request, the Intermediary asserts that it was not until 2007 that the Providers were able to document the problems and identify the cost of the domestic claims. Similarly, the Intermediary asserts that the home office cost allocation problem could not have been addressed at the time of the wage index review in 2003 because, until the home office cost statement reopening was completed in 2007, the home office wage cost allocation could not have been corrected.

The Intermediary argues that the burden of proof was on the hospitals to include all necessary documentation in the requested revisions to the wage index. Although it may be difficult to determine what and how much documentation is necessary to support the wage revision requests, the Providers disadvantaged themselves by not participating in the wage index process until the last possible moments before the revised final due date of February 17, 2003, thereby leaving no time to ensure that all change requests were properly explained and documented.

PROVIDER'S CONTENTIONS:

The Providers contend that source documents are not required with requests for wage data revisions and that the Bon Secours Hospitals submitted all required documentation with the wage data correction request. In addition, the Providers contend that the Intermediary had a duty to seek clarification regarding the wage data if it had questions. The Providers assert that a comparison of the documents submitted by the Bon Secours Hospitals with the initial wage data correction request and the documents submitted pursuant to the Joint Scheduling Agreement (JSA) shows no significant differences. It follows that if the Intermediary was able to make adjustments based on the documents submitted during the JSA process, it could have made adjustments based on the documents submitted during the wage data correction process.

¹⁹ Tr. at 261.

In addition, the Providers contend that the Medicare statute requires uniformity and comparability in the treatment of wage data and that the Intermediary's failure to adjust their wage data destroys the uniformity required by the Medicare statute. The Providers also assert that the Intermediary violated the Administrative Procedure Act (APA) by treating similar situations dissimilarly without offering a reasoned analysis for doing so. The Providers contend that the Intermediary's decisions regarding the Bon Secours Hospitals' wage data correction requests were arbitrary and capricious because the reasons offered by the Intermediary conflict with the evidence before the Intermediary. Finally, the Providers contend that the Board must consider all the evidence presented to it.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and program instructions, parties' contentions and the evidence presented, the Board finds and concludes that the wage data correction requests submitted by the Providers for revised wage-related, home office and contract labor costs, were substantially complete and in sufficient detail to support the requested corrections to update the FY 2004 wage index.

The Maryview and Mary Immaculate revision requests for contract labor were denied by the Intermediary allegedly because the submissions did not contain all invoices and contracts and they did not submit their vendor listings with department names. However, the Board finds that the documentation submitted for these two providers was substantially the same documentation submitted for DePaul that was found to be sufficient with only a slight explanation needed. Also, the summaries submitted with the revision requests were almost identical to the summary submitted with the JSA and accepted, except for the department names.²⁰ It appears that simple communication between the Intermediary and the Providers could have cleared any discrepancies and satisfied the Intermediary. The Board finds that the Intermediary has a duty to follow up and to make inquiries seeking clarification and additional documentation, especially on minimal data elements needed such as the department names on the summary report, where one reviewer did find the information submitted to be complete.

The Board also finds that a simple discussion could have also cleared up the Intermediary's concerns regarding the domestic claims issue. The Intermediary's witness testified that during the JSA process, once the Providers were able to ". . . provide all the pieces of the puzzle so that we could put it together and see,"²¹ they were able to determine that an adjustment was appropriate. However, the Intermediary also testified that it ". . . was the same information that we had had a discussion with the Provider with . . .,"²² but that it was finally "just more clearly presented information."²³ Therefore, the information provided did not change, just the way it was explained to the auditors. Had

²⁰ Tr. at pg. 316.

²¹ Tr. at pg. 332.

²² Tr. at pg. 331.

²³ Tr. at pg. 333.

the discussion taken place in February 2003, it appears the issue could have been resolved and the proper revisions implemented by the Intermediary.

The parties have stipulated as to the adjustments that will be implemented if the Board finds that the Intermediary should have adjusted the wage data of the Bon Secours Hospitals as requested. As the Board has found in favor of the Providers, the case will be remanded to the Intermediary to implement the stipulated adjustments.²⁴

DECISION AND ORDER:

The Intermediary erred in excluding certain contract labor costs, home office costs and wage-related costs that were claimed by Bon Secours DePaul Medical Center, Maryview Medical Center and Mary Immaculate Hospital resulting in an understatement of the FY 2004 wage index for the Norfolk MSA. The Intermediary's adjustments are reversed and the case is hereby remanded to the Intermediary to implement the stipulated adjustments.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Yvette C. Hayes
Gary Bowers, C.P.A.

FOR THE BOARD:

Suzanne Cochran, Esquire
Chairperson

DATE: August 3, 2010

²⁴ See Stipulation of Parties ¶ 1k. See also Provider's Exhibit P-41.