PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2003-D28

PROVIDER –
All Care Home Health, Inc.
Lansing, Illinois

Provider No. 14-7614

vs.

INTERMEDIARY –
Blue Cross Blue Shield Association/
Palmetto Government Benefits
Administrator, LLC

DATE OF HEARING -
March 26, 2002

Cost Reporting Period Ended -
April 30, 1998

CASE NO. 00-3416

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ISSUE:

Was the Intermediary's adjustment to disallow accrued bonuses for employees proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

AllCare Home Health, Inc. ("Provider") is a Medicare certified home health agency located in Lansing, Illinois. For the cost reporting period ended on April 30, 1998 the Provider claimed costs for accrued bonuses paid to employees in the subsequent fiscal year. These costs were disallowed by the fiscal intermediary based on the Provider's failure to properly liquidate the bonus accruals. The Provider appealed the Intermediary's determination to the Provider Reimbursement Review Board ("Board") and has met the jurisdictional requirements of 42 C.F.R. § 405.1835-.1841.[1] Two other issues that were originally a part of this case have been administratively resolved by the parties. The Provider was represented by Elizabeth Zink Pearson, Esquire, of Pearson & Bernard PSC. The Intermediary's representative was Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

SUMMARY OF FACTS:

The Provider was sold in a stock purchase agreement at the close of the 1998 fiscal year.[2] However, the new owner maintained the former owner as Administrator and retained other employees, as well. The sale was consumated just prior to the introduction of a new Medicare payment system for home health agencies (Interim Payment System) which had the effect of lowering payments for the Provider for operations beginning May 1, 1998.[3]

The new owner then authorized a bonus accrual for payment to employees it claimed were needed to maintain continued operations to assure their retention. The Board of Directors issued a resolution establishing the bonuses effective prior to the close of fiscal year 1998. Paychecks to these employees paid in the initial weeks of the 1999 fiscal year were claimed as liquidation of the prior years's bonus accruals. The Provider claimed that the bonuses were paid in lieu of actual paychecks[4] to assure ongoing compensation at the levels the key employees had received in the prior fiscal year. As such, the new owner hoped to shield the employees from the salary reductions which it claimed were made necessary under

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[1] Provider Exhibits P-1 & P-2.
[2] Intermediary Exhibit I-12.
[3] Provider Exhibit P-35.
[4] Provider Exhibit P-36.

the Interim Payment System and retain their services. Amounts claimed as bonuses were liquidated by August 18, 1998.[5]

Following the audit of the fiscal year 1998 Medicare cost report, the Intermediary issued a Notice of Program Reimbursement ("NPR") reflecting the disallowance of $102,848 in accrued bonuses. The stated basis was that "it appears that payments were actual payroll amounts and the bonuses were not paid separately."

PROVIDER'S CONTENTIONS:

The Provider does not deny that the bonus payments were made in lieu of regular payroll. Instead, the Provider argues that the payments were made to assure the employees' continued regular pay which would have been reduced over the year as a result of the IPS. The Provider argued that it could have used bonuses to supplement reduced salaries, but instead liquidated the amounts on regular pay periods to maintain employees' pay scales.[6]

The Provider further contends that such a bonus accrual is not improper under the reimbursement rules and that there is no question that the amounts paid were properly and timely liquidated within the required year period, as required by CMS Pub. 15-1 §2305; See also Continue Care Home Health II, Inc. v. Blue Cross and Blue Shield Association/Palmetto GBA, PRRB Dec. No. 2001-D48, August 21, 2001, Medicare & Medicaid Guide (CCH) ¶ 80,744, decl'd rev., CMS Admin., November 1, 2001. The Provider claims that reimbursement rules offer no guidelines or specific requirements for bonus payments to employees other than the liquidation rules and in no way prohibit or preclude the allowance of bonuses paid in lieu of actual wages. As a result, the Provider asserts it should be allowed to rely on the stated reimbursement rules to receive reimbursement for legitimate costs. The Provider also asserts that because it documented the payments as bonus liquidations,[7] the Intermediary's analysis that the bonuses appear "illusory" and "appear" to be wages or salaries and not bonuses is not justified.

The Provider also points out that the new owner chose to pay these bonuses rather than fund the 401K plan or another deferred compensation plan to assure that the employees could maintain their salaries at their then-current level. The Provider's

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[5] Exhibit P-36. The actual bonus accrual totaled $120,000. $17,152 of that amount was disallowed on the basis of a failure to timely liquidate. The Provider appealed only the remaining disallowance of $102,848 based on the failure to liquidate.

[6] Provider Exhibit P-40.

[7] Provider Exhibit P-41.

new payment limit necessitated severe cost cutting to maintain operations and continue providing services to patients in the greater Chicago area. The Provider relies on the Intermediary's testimony that, if the Provider had paid a minimal salary supplemented by the bonus accrual, a disallowance would not have been proper. The Provider contends that it only used the accruals to maintain existing salary levels rather than reduce salaries and run the risk of losing employees.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that it does not appear the Provider liquidated the accrued bonuses within one year after the end of the cost-reporting period in which the liability was incurred. The question at hand is not if the accruals were proper, but if they were properly liquidated. The Intermediary contends that all the Provider's employees were ever compensated for was their regular pay for carrying out their day-to-day jobs during the 1999 fiscal year.

The Intermediary points to CMS Pub. 15-1 § 2305 as the primary basis for its adjustment.

The operative language in § 2305 states:

> A. General. - A short term liability must be liquidated within 1 year after the end of the cost reporting period in which the liability is incurred, subject to the exception specified in §§ 2305.1 and 2305.2. Liquidation must be made by check or other negotiable instrument, cash or legal transfer of assets such as stocks, bonds, real property, etc. Where liquidation is made by check or other negotiable instruments, these forms of payment must be redeemed through an actual transfer of the provider's assets within the time limits specified in this section. Where the liability (1) is not liquidated within the 1 year time limit or (2) does not qualify under the exceptions specified in §§ 2305.1 and 2305.2, the cost incurred for the related goods and services is not allowable in the cost reporting period when the liability is incurred, but is allowable in the cost reporting period when the liquidation of the liability occurs.

The Intermediary also references 42 C.F.R. § 413.9(c)(3), which states:

> (3) The determination of reasonable cost of services must be based on cost related to the care of Medicare beneficiaries. Reasonable cost includes all necessary and proper expenses incurred in furnishing services, such as administrative costs, maintenance costs, and premium payments for employee health and pension plans.

The Intermediary recognizes that bonuses may be reasonable costs as well as salaries or wages as compensation for employee services. However, it contends that the same dollars cannot be both bonuses and regular salary at the same time. It labels the bonus designation that the Provider applied to all or part of the first eight paychecks in the 1999 fiscal year as an "accounting contrivance." The effort was simply an attempt to shift normal FY 1999 operating expenses into the 1998 cost report. The Intermediary contends that employees, in fact, did not receive a bonus, by any definition, for their effort in the 1998 fiscal period under appeal.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law, guidelines, parties' contentions and evidence presented, the Board finds and concludes that the Intermediary properly disallowed accrued bonuses.

It is undisputed that on April 22, 1998, the Provider's Board of Directors passed a resolution that no bonuses would be paid for the fiscal year ended April 30, 1998. On April 28, 1998, the Provider was sold in a stock purchase agreement. In a document dated the same date as the sale, the new Board resolved to make bonus payments to Provider employees in an amount to be determined. Specific employees were not identified in the resolution. The amounts ultimately claimed to be a bonus were accrued in the Provider's April 30, 1998 Medicare cost report and were paid in the initial weeks of the 1999 fiscal year (May 1, 1998, to August 18, 1998).

The Board further finds that its review of the record in this case as well as the testimony at the hearing revealed the following:

- The Provider's resolution providing for bonuses was not explicit as to who would receive the payments or in what amount.
- Testimony was undisputed that all paychecks were treated on the Provider's financial records as regular pay rather than as a bonus at the time the payments were made.
- Further examination of the Provider's payroll register, cancelled checks, etc., revealed that employees received no amounts that differed from their regular pay.

The Intermediary disallowed the accrued bonuses, stating that the Provider did not timely liquidate the bonuses in accordance with the instructions at CMS Pub. 15-1 § 2305. In effect, the Intermediary determined that the payments were not bonuses at all but rather were regular employee compensation.

Although the Medicare guidelines are silent as to what constitutes a bonus, the Board notes the following definitions:

> Webster's New Collegiate Dictionary
> Bonus - something given in addition to what is usual or strictly due.
>
> Black's Law Dictionary, 7th Edition
> Bonus – a premium paid in addition to what is due or expected. In the employment context, workers' bonuses are not a gift or gratuity; they are paid for services or are consideration in addition to or in excess of the compensation that would ordinarily be given.

In the instant case, the Board finds that the evidence indicates that no additional amounts were paid to employees over or above their regular compensation. The practical effect of the purported bonuses is that employees would have been working without compensation for several months during the bonus payment period if the amounts they were receiving were recognized as valid bonuses. The Provider's claim that the employee compensation payments were a bonus from the prior year is also in conflict with the employment agreement[8] dated one day after the sale of the Provider and the effective date of the resolution authorizing bonuses. In the employment agreement, the former owner agreed to work for five years at a specified annual compensation. The same document identified other employees as 'key' and the Provider agreed to employ them at specified compensation.[9] The employees actual pay was very close to the amounts specified.[10] The agreement refers to the compensation as "wages and benefits." There is no mention of a bonus. Nor is there any evidence whatsoever that the employees who purportedly received the 'bonuses' were ever notified that they had earned a bonus from the prior year, that they were working without compensation for the first eight weeks of the year or that the compensation they received would be recharacterized as a bonus in records provided to Medicare.[11]

The Board also notes that the Provider was to remain liable for the cost report year at issue, even subject to the sale. As such, it is apparent the Provider would have benefited for Medicare cost reporting purposes by characterizing the payments as accrued bonuses in the April 30, 1998 Medicare cost report, as a new reimbursement methodology was coming into effect for the next Medicare cost

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[8] Intermediary Exhibit I-12, Attachment A.
[9] The prior owner was the only employee who was a party to and signed the agreement.
[10] See Intermediary Exhibit I-63.
[11] Tr. 60:7-76:22

reporting year beginning May 1, 1998 that capped Medicare payments at lower amounts.

DECISION AND ORDER:

The Board finds that the payments in question were not bonuses but merely a continuation of the employees' regular pay. As such, there was no liquidation of an accrued liability. The Intermediary's adjustment disallowing the accrued bonuses is affirmed.

Board Members Participating:

Suzanne Cochran, Esquire
Henry C. Wessman, Esquire
Stanley J. Sokolove
Gary B. Blodgett, DDS

Date: May 2, 2003

FOR THE BOARD:

Suzanne Cochran
Chairperson