PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2016-D3

PROVIDER –
Grinnell Regional Medical Center

Provider No.: 16-0147

vs.

MEDICARE CONTRACTOR –
Wisconsin Physicians Service

DATE OF HEARING -
January 17, 2014

Cost Reporting Period Ended -
December 31, 2008

CASE NO.: 11-0625

INDEX

ISSUE STATEMENT:

Whether the Medicare Contractor properly denied the request of Grinnell Regional Medical Center ("Grinnell" or "Provider") for a volume decrease payment adjustment.[1]

DECISION

The Provider Reimbursement Review Board ("Board") finds that Grinnell is entitled to a volume decrease adjustment ("VDA") payment for its fiscal year ("FY") 2008 because its total number of inpatient discharges decreased more than 5 percent due to circumstances beyond its control. Accordingly, the Board reverses the Medicare Contractor's denial of the Provider's VDA request and remands this case to the Medicare Contractor to calculate the VDA.

INTRODUCTION

Grinnell is an acute care hospital that is located in Grinnell, Iowa and has been designated as a Medicare Dependent Hospital ("MDH"). Grinnell's designated Medicare contractor is Wisconsin Physicians Service ("Medicare Contractor"). In 2010, Grinnell submitted a request for a VDA payment for FY 2008 in the amount of $1,126,349.[2] The Medicare Contractor denied the request stating the Grinnell failed to meet the prerequisites to qualify for a VDA.[3]

STATEMENT OF THE FACTS

In 2010, Grinnell submitted a VDA request asserting its 13.4 percent net decrease in discharges between FYs 2007 and 2008 was due to the departures of five physicians, which it maintains were outside of its control.[4] Following Grinnell's submission of additional supporting documentation,[5] the Medicare Contractor denied the VDA request stating that the "decrease in volume does not seem unusual and does not seem to be out of the hospital's control."[6] Grinnell requested the Medicare Contractor to reconsider its denial and submitted additional information in support of its VDA request.[7] On December 2, 2010 the Medicare Contractor denied Grinnell's request for reconsideration of the VDA and made the following findings:

> 1) It agrees that the departure of one of Grinnell's physicians, a surgeon was outside of the control of the Hospital, but the general surgeons remaining at Grinnell had increased the amount of surgeries performed to offset by more than half of the discharges lost by the departing surgeon.[8]

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[1] *See* Transcript("Tr.") at 7.
[2] *See* Provider Exhibit P-1 (copy of Grinnell's VDA dated Feb. 2, 2010).
[3] *See* Provider Exhibits P-4, P-6 (copy of the Medicare Contactor's initial denial and denial of reconsideration).
[4] *See* Provider Exhibit P-1.
[5] *See* Provider Exhibits P-2, P-3 (copies of the Medicare Contractor's request for information and the Provider's response).
[6] Provider Exhibit P-4 at 2.
[7] *See* Provider Exhibit P-5 (copy of the Provider's request for reconsideration dated Oct. 11, 2010).
[8] *See* Stipulation at ¶ 10.

> 2) The departures of the other four physicians were not outside of Grinnell's control and Grinnell was able to recruit five physicians to replace these four departing physicians.[9]

As part of the denial, the Medicare Contractor found that the departure of one of Grinnell's physicians, a surgeon, resulted in a 3 percent net decrease in discharges.[10] As part of the Stipulations, the Medicare Contractor agreed that the surgeon's departure more specifically resulted in a 3.2 percent net decrease in discharges.[11]

Under the Inpatient Prospective Payment System ("IPPS") established in 1983,[12] Congress authorized certain payment adjustments based on hospital-specific factors. One of these hospital-specific adjustment factors applies only to MDHs. Specifically, 42 U.S.C. § 1395ww(d)(5)(G)(iii) provides for a volume decrease adjustment for qualifying MDHs as follows:

> In the case of a Medicare dependent, small rural hospital that experiences, in a cost reporting period compared to the previous cost reporting period, a decrease of more than 5 percent in its total number of inpatient cases due to circumstances beyond its control, the Secretary shall provide for such adjustment to the payment amounts under this subsection… as may be necessary to fully compensate the hospital for the fixed costs it incurs in the period in providing inpatient hospital services, including the reasonable cost of maintaining necessary core staff and services.

The regulations implementing this statutory provision, 42 C.F.R. § 412.108(d), define the criteria for qualifying for a VDA stating in pertinent part:

> (d) *Additional payments to hospitals experiencing a significant volume decrease. . . .*
>
> (2) To qualify for a payment adjustment on the basis of a decrease in discharges, a Medicare-dependent, small rural hospital must submit its request no later than 180 days after the date on the Medicare contractor's Notice of Amount of Program Reimbursement and it must –
>
> (i) Submit to the Medicare contractor documentation demonstrating the size of the decrease in discharges and the resulting effect on per discharge costs; and
>
> (ii) Show that the decrease is due to circumstances beyond the hospital's control.

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[9] *See id.*
[10] *See* Provider Exhibit P-6 at 1.
[11] *See* Stipulations at ¶ 12.
[12] Social Security Amendments of 1983, Pub. L. No. 98-21, § 601, 97 Stat. 65 149-163 (1983) (codified at 42 U.S.C. § 1395ww(d)).

CMS outlined the basic test for evaluating circumstances beyond a hospital's control in the preamble to the final rule published on April 20, 1990. In particular, CMS stated:

> The basic test … is *whether the decrease in volume is the result of an unusual situation or occurrence that is both externally imposed on the hospital and beyond its control.* These situations *may* include, but are not limited to, strikes, fires, floods, *inability to recruit essential physician staff,* unusual prolonged severe weather conditions that affect the local economy, the closing of a major employer in the hospital's service area resulting in decreased population or loss of inpatient health insurance coverage for large numbers of people, and similar unusual occurrences with substantial cost effects.[13]

The Provider Reimbursement Manual, CMS Pub. No. 15-1 ("PRM 15-1"), incorporates both of these criteria, *i.e.*, that the volume decrease *must result from an unusual situation or occurrence externally imposed on the hospital and beyond its control*. These situations *may* include strikes, floods, inability to recruit essential physician staff, unusual prolong severe weather conditions, serious and prolonged economic recessions that have a direct impact on admissions, or similar occurrences with substantial cost effects.[14]

Finally, CMS reiterated this language most recently in a 2006 Federal Register stating:

> The process for determining the amount of the volume decrease adjustment can be found in section 2810.1 of the Provider Reimbursement Manual. . . . To qualify for this adjustment, the SCH or MDH must demonstrate that: (a) a 5 percent or more decrease of total discharges has occurred; and (b) the circumstances that caused the decrease in discharges were beyond the control of the hospital.[15]

On May 26, 2011, Grinnell timely appealed the Medicare Contractor's denial of its VDA to the Board. Grinnell satisfied the jurisdictional requirements for a hearing before the Board. Grinnell was represented at the hearing by Kirk S. Blecha, Esq., and Whitney C. West, Esq., of Baird Holm LLP. The Medicare Contractor was represented by Robin Sanders, Esq., of the Blue Cross and Blue Shield Association.

DISCUSSION, FINDINGS OF FACT, CONCLUSIONS OF LAW:

The Medicare Contractor agrees that the departure of the surgeon was beyond Grinnell's control[16] but maintains that the departure of the orthopedic physician and the 3 foreign born physicians were not the result of unusual circumstances outside of Grinnell's control.[17] The

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[13] 55 Fed. Reg. 15150-01 (Apr. 20, 1990) (emphasis added) (relevant excerpt included at Medicare Contractor Exhibit I-8 at 10).
[14] CMS Pub 15-1, § 2810.1 (emphasis supplied) (copy included as Medicare Contractor Exhibit I-9).
[15] *See* 71 Fed. Reg. 48056 (Aug. 18, 2006) (copy included at Medicare Contractor Exhibit I-5).
[16] Stipulation at ¶ 10.
[17] Medicare Contractor's Post-Hearing Brief at 6.

Medicare Contractor contends that, in order to satisfy the prerequisites for a VDA, the provider has the burden to prove that "the decrease in volume [was] the result of an unusual situation or occurrence that is *both* externally imposed on the hospital and beyond its control."[18] The Medicare Contractor identifies unusual situations to include "strikes, floods, inability to recruit essential physician staff, unusual prolonged severe weather conditions,"[19] and argues that "This adjustment is not intended to compensate hospitals for an accumulative effect of comings and goings of medical staff."[20] Providers must prove "a cause and effect scenario" in which their decrease in discharges and its inability to recruit essential physicians were due to unusual situations that were both externally imposed and beyond its control.[21]

In testimony at the hearing, Grinnell's witness explained that four doctors at issue left the community from late 2007 to mid-2008. One of those physicians, an orthopedic surgeon, had a "nervous breakdown" and demonstrated various personality issues during his tenure at the hospital. Grinnell demonstrated that it took steps to try to rehabilitate and improve this physician's performance and to address the specific personnel issues.[22] Despite these efforts, the orthopedic surgeon's performance continued to deteriorate until it was necessary for him to cease his medical practice entirely.[23] Further, the record shows that Grinnell took immediate steps to mitigate the loss of the orthopedic surgeon by recruiting for a replacement and by contracting with Iowa Orthopedic Center to provide coverage on a part-time interim basis and that Grinnell was unable to recruit a successful replacement until 2012.[24]

Grinnell's witness also testified that there were three foreign trained physicians hired as hospitalists and that they left the community due to a loss of confidence by local physicians, and inability of Grinnell to resolve language issues between patients and these three physicians.[25] Grinnell's CEO testified on the nature of their hospitalist program, the challenges in recruiting hospitalists, and how these challenges resulted in Grinnell's recruitment of these three foreign trained physicians.[26] Grinnell's CEO further testified on the departures of each of these physicians, specifically one chose not to renew his contract, another left to get additional fellowship training and work in another state, and the last one left to practice in another state.[27]

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[18] Tr. at 25:17-25.
[19] *Id*. at 26:5-10.
[20] *Id.* at 28: 9-13.
[21] *Id.* at 27.
[22] *See* Tr. at 108-125, 142-145, 161-168; 169-179; Provider Exhibit P-3 at 21, 25, 28, 30, 35-36 (meeting minutes of the Grinnell Board of Directors documenting the Provider's efforts to rehabilitate and improve the physician's' performance and address his specific personnel issues).
[23] *See* Tr at 108-125; Provider Exhibit P-8 at 2 (copy of the January 23, 2008 meeting minutes for the Provider's Board of Directors); Provider Exhibit P-11 at 2 (excerpt from a deposition of physician confirming he surrendered his medical license on February 11, 2008 due to his own "medical problem"); Provider Exhibit P-12 at 2 (Iowa Board of Medicine press release dated Feb. 26, 2009 stating that it had entered into a settlement with the physician which prohibited him from practicing surgery and placed certain limitations on any other practice of medicine). *See also* Provider Exhibits P-13 – P-15 (documenting subsequent actions by the Iowa Board of Medicine).
[24] *See* Tr. at 125-131; 179-193; Provider Exhibit P-16; Provider Exhibit P-3 at 25, 28, 37, 41, 44, 51, 59, 66, 91, 96-97.
[25] *See* Tr. at 85-91.
[26] *See* Tr. at 79-105.
[27] *See* Tr. 85-89.

The record also indicates that, during 2008, Grinnell undertook several efforts to mitigate the loss, including recruiting a new physician who resigned less than a year later to return to an outpatient practice; re-assigned an ER doctor on staff to the internal medicine practice; and secured the services of a *locum tenens* internist.[28] Grinnell was finally successful in recruiting new physicians but was unable to do so until 2012 and 2013.[29]

The wording of the MDH low-volume payment exception at 42 U.S.C. § 1395ww(d)(5)(G)(iii) and 42 C.F.R. § 412.108(d)(2) requires demonstration of two criteria: (1) circumstances existed which were externally imposed and beyond the hospital's control; and (2) these circumstances led to a greater than 5 percent decrease in discharges. The parties agree that Grinnell established that it had a 3.2 percent net decrease in discharges due to the loss of the general surgeon,[30] when he voluntarily resigned and moved out of the community, and that this loss was outside of Grinnell's control. As a result Grinnell has only to establish that an additional 1.8 percent of the decrease in discharges was due to the resignation of the orthopedic surgeon and the voluntary departures of the other three physicians and that these departures were externally imposed and beyond its control.

The Board finds that the events leading to the resignation of Grinnell's orthopedic surgeon were an unusual situation or occurrence beyond Grinnell's control. This conclusion is consistent with the Board's decision in *Greenwood Cnty. Hosp. v. BlueCross Blue Shield Ass'n* which found a physician's extended and unanticipated medical absence to be beyond the hospital's control.[31] Testimony at the hearing indicated that the orthopedic surgeon's health issues and professional conduct problems were externally imposed on Grinnell and outside its control. Indeed, the Medicare Contractor's witness conceded to as much before the Board.[32] Grinnell acted promptly to recruit a replacement orthopedic surgeon and demonstrated its inability to recruit a replacement directly contributed to reduced inpatient orthopedic surgery admissions/discharges. The Medicare Contractor, therefore, should have included an additional 2.6 percent net decrease in discharges[33] when calculating the statutory 5 percent threshold to qualify for the low-volume adjustment. The 2.6 percent net decrease attributable to the orthopedic surgeon's departure along with the undisputed 3.2 percent net decrease attributable to general surgeon's departure is more than enough to satisfy the 5.0 percent threshold for a VDA.

As it is evident that Grinnell had more than a 5 percent decrease in patient discharges, the Board need go no further in its analysis of the factual situation regarding the other physicians who left Grinnell voluntarily. However, if the resignation of the orthopedic surgeon was determined not to meet the VDA criteria, the Board would, in any event, conclude that the resignations of the three foreign-trained physicians were also externally imposed and outside the control of Grinnell. Testimony at the hearing indicated that, notwithstanding Grinnell's efforts to assimilate these physicians into its hospitalist program, the physicians were unable to develop successful medical

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[28] *See* Provider's Final Position Paper at 22; Provider Exhibits P-7, P-18; Tr. at 92-98.
[29] Tr. 79-81, 101-105; Provider's Final Position Paper at 10; Provider Exhibit P-19.
[30] Stipulation at ¶ 10.
[31] PRRB Dec. No. 2006-D43 (Aug. 29, 2006), *declined review*, Adm'r (Oct. 13, 2006).
[32] *See* Tr. at 318:18-22.
[33] *See* Medicare Contractor Exhibit I-1 at 8.

practices due to language and assimilation difficulties and left the community through no fault of Grinnell. Grinnell demonstrated that it did what it could to respond to the loss by reassigning staff physicians and recruiting additional physicians. The Board finds that the Medicare Contractor erred by not including the percentage decrease resulting from the loss of these three physicians in the VDA calculation. The Board's conclusion is consistent with its earlier decision in *Standish Cmty. Hosp. v. Blue Cross Blue Shield Ass'n* that the voluntary departure of physicians was beyond the control of the hospital.[34]

DECISION

The Board finds that Grinnell is entitled to a VDA payment for its FY 2008 because its total number of inpatient discharges decreased more than 5 percent due to circumstances beyond its control. Accordingly, the Board reverse's the Medicare Contractor's denial of the Provider's VDA request and remands this case to the Medicare Contractor to calculate the VDA.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, CPA
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FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: December 1, 2015

[34] PRRB Dec. No. 2003-D29 (May 14, 2003), *declined review*, Adm'r (July 10, 2003).