PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION

2000-D64

PROVIDER -
Regions Hospital
St. Paul, Minnesota

Provider No. 24-0106

vs.

INTERMEDIARY -
Blue Cross and Blue Shield Association/ Noridian Government Services

DATE OF HEARING-
December 21, 1999

Cost Reporting Period Ended -
December 31, 1992

CASE NO. 96-0847

INDEX

ISSUE:

Was the Intermediary's adjustment offsetting the Provider-paid surcharge [tax] to the Minnesota Medicaid Program Proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Regions Hospital ("Provider") is a 376 bed, non-profit short-term tertiary care facility located in St. Paul, Minnesota. The Provider is affiliated with Ramsey Clinic, a not-for-profit tax-exempt organization that operates a 170-physician multi-specialty group practice.

During the 1992 cost reporting year, the Provider was subject to and paid two Minnesota State surcharge taxes.

The State of Minnesota enacted two separate laws that imposed a surcharge tax on every Minnesota hospital. The first statute stated in part:

> Effective July 1, 1991, each Minnesota hospital ... shall pay to the medical assistance account a surcharge equal to ten percent of medical assistance payments issued to that provider for inpatient services according to the schedule in subdivision 4. Medicare crossovers and indigent care payments paid under section 256.B82 are excluded from the amount of medical assistance payments issued.

Minn. Stat. ' 256.9657.

This statute was amended effective October 1, 1992 to change the amount of the surcharge tax. The statute stated:

> "Effective October 1, 1992, each Minnesota hospital ... shall pay to the medical assistance account a surcharge equal to 1.4 percent of net patient revenues, excluding net Medicare revenues[,] reported by that provider to the health care cost information system. ..."

Minn. Stat. ' 256.9657 (1991 Supp.)

The second statute provided (See Stipulation 6):

> In addition to the percentage contribution paid by a county under Subdivision 1, the governmental units designated in this subdivision shall be responsible for an additional portion of the nonfederal share of medical assistance cost. ...
> Each of the governmental units designated in this subdivision shall on a monthly basis transfer an amount equal to two percent of the public hospital's net patient revenues, excluding net Medicare revenue[,] to the state Medicaid agency. These sums shall be part of the local governmental unit's portion of the nonfederal share of medical assistance costs, but shall not be subject to payback provisions of section 256.025.

Minn. Stat. ' 256B.19

The Provider paid the following surcharge taxes: 1) Minn. Stat. ' 256.9657 - $303,083, and 2) Minn. Stat. ' 256B.19 - $432,978 or an approximate total of $736,061. The total surcharge taxes were claimed by the Provider in its 1992 cost report as an allowable cost pursuant to HCFA's manual instructions, HCFA Pub. 15-1 ' 2122.1 which provides that:

> The general rule is that taxes assessed against the provider, in accordance with the levying enactments of the several States and lower of government ... are allowable costs.

The fiscal intermediary, initially Blue Cross and Blue Shield of Minnesota and replaced by Noridian Government Services ("Intermediary"), issued a final Notice of Program Reimbursement ("NPR"), on August 8, 1995, that disallowed the claimed taxes as unnecessary in the efficient delivery of services to Medicare patients. The Provider timely appealed the NPR to the Provider Reimbursement Review Board ("Board") on January 30, 1996 and has met the jurisdiction requirements at 42 C.F.R. ''.1835-.1841. The estimated amount of Medicare reimbursement is $30,000.

The Provider originally appealed four issues. The parties resolved administratively the Indirect Medical Education issue, and the Provider withdrew the TEFRA rate issue and the Outlier Payment issue. The only issue for adjudication is the disputed Minnesota Surcharge Tax issue described above.

The Provider was represented by Albert W. Shay, Esquire, of the law firm of Sonnenschein Nath & Rosenthal. The Intermediary was represented by Bernard M. Talbert, associate general counsel for Blue Cross and Blue Shield Association.

Stipulation of Facts:

1. Regions Hospital, Provider No. 24-0106, was formerly known as St. Paul-Ramsey Medical Center ("Provider"). The Provider's 1992 cost reporting period was January 1, 1992 through December 31, 1992.

2 At the time this appeal was filed, the Provider's fiscal intermediary was Blue Cross Blue Shield of Minnesota, which no longer serves as an intermediary. Currently, the Provider's Intermediary is Noridian Government Services.

3. During the Provider's 1992 cost reporting period, it was subject to the following assessments: (1) a surcharge assessment imposed by Minn. Stat. ' 256.9657 and (2) a special assessment imposed by Minn. Stat. ' 256B.19.

4. For the first nine months of 1992 (January 1, 1992 through September 30, 1992), the surcharge assessment was calculated based on a "surcharge equal to ten percent of the medical assistance payments issued to that provider for inpatient services ...." Minn. Stat. ' 256.9657, Sufd. 2. The Provider is not claiming any of the payments made under this version of Section 256.9657 as allowable costs.

5. The surcharge assessment was amended effective October 1, 1992. Thus, beginning October 1, 1992 the statute imposing the surcharge assessment (' 256.9657) read as follows:

> "Effective October 1, 1992, each Minnesota hospital ... shall pay to the medical assistance account a surcharge equal to 1.4 percent of net patient revenues, excluding net Medicare revenues[,] reported by that provider to the health care cost information system. ..."
> Minn. Stat. ' 256.9657 (1991 Supp.)

During the three-month period October 1, 1992 through December 31, 1992, the Provider paid the State of Minnesota approximately $303,083 pursuant to this statute. See Provider Exhibit I.

6. In addition to the surcharge assessment discussed in paragraphs 4 and 5, the State of Minnesota imposed an additional special assessment against the Provider pursuant to Min. Stat. ' 256B.19. That statute provided as follows:

> In addition to the percentage contribution paid by a county under Subdivision 1, the governmental units designated in this subdivision shall be responsible for an additional portion of the nonfederal share of medical assistance cost. For purposes of this subdivision, "designated

> governmental unit" means the Hennepin County, and the public corporation known as Ramsey Health Care, Inc. which is operated under the authority of Chapter 246A. For purposes of this subdivision, "public hospital" means the Hennepin County Medical Center, and the St. Paul-Ramsey Medical Center [now, Regions Hospital].
>
> Each of the governmental units designated in this subdivision shall on a monthly basis transfer an amount equal to two percent of the public hospital's net patient revenues, excluding net Medicare revenue[,] to the state Medicaid agency. These sums shall be part of the local governmental unit's portion of the nonfederal share of medical assistance costs, but shall not be subject to payback provisions of section 256.025.

For the three-month period October 1, 1992 through December 31, 1992, the Provider paid the State $432,978 pursuant to this Statute. See Provider Exhibit 2.

7. The $303,083 referenced in paragraph 5 and the $432,978 referenced in paragraph 6 make up the $736,061 that the Provider is claiming as allowable costs in this appeal.

PROVIDER'S CONTENTIONS:

The Provider makes four basic contentions; and lastly, disagrees with the Intermediary's contentions:

1. That the surcharge tax paid to the State of Minnesota is a "reasonable cost" as defined in the Medicare Statute at 42 U.S.C. ' 1395x(v)(1)(A).

2. That pursuant to the clear language of HCFA's Provider Reimbursement Manual provisions, HCFA Pub. 15-1 ' 2122.1, the subject surcharge taxes are an allowable cost.

3. That the character of the payment for the surcharge taxes in this case is a tax paid by the Provider to the State of Minnesota as described in ' 2122.1. Additionally, the Minn. Stat. ' 256.9657 at subdivision 7 states the payment is a tax.

4. That the manual provision description of non-allowable taxes at ' 2122.2 does not include a "surcharge tax" nor are the items stated therein remotely similar to a "surcharge tax," such as excess profit taxes, etc. Further, the Intermediary has not shown that this tax falls within the categories of ' 2122.2.

The Provider also takes exception to the Intermediary's contentions.

I

The Provider contends that the surcharge tax is a reasonable cost under the Medicare statute defining "reasonable costs" which provides in part that:

> The reasonable cost of any services shall be the cost actually incurred ....

There is no question that the disputed cost was incurred and was levied on all Minnesota hospitals. Contrary to the Intermediary's position, there is no Medicare regulation that disallows this particular cost; and the Intermediary has not identified any regulation that makes any such disallowance.

II & III

The Provider states the clear language of HCFA's manual provision at HCFA Pub. 15-1 ' 2122.1 provides that the subject surcharge taxes are an allowable cost. This provision states in part that:

> The general rule is that taxes assessed against the provider, in accordance with the levying enactments of the several States and lower of government ... are allowable costs.

As stated above, the surcharge tax was a uniform tax levied on all Minnesota hospitals and this manual provision recognizes that it should be an allowable cost. The statute identifies the character of the payment as a tax which is allowable under the manual.

The Provider takes exception to the Intermediary's argument that since Medicare revenues are eliminated from the tax calculation it becomes unallowable. That aspect is irrelevant. See last paragraph in V below.

IV

The Provider states the manual provision at 42 C.F.R. ' 2122.2 identifies types of unallowable taxes which does not include this tax. Some of the excluded taxes were Federal and State income and excess profit taxes, taxes associated with financing and refinancing projects, and the like. The Provider asserts the surcharge tax was not listed nor were any of the identified non-allowable taxes even remotely similar to the tax in dispute. Moreover, the Intermediary has failed to demonstrate how the tax in dispute would be includable in this manual section.

V

The Provider takes exception to the Intermediary's contentions. The Intermediary's two prime contentions that the surcharge tax is not a reasonable cost and not related to patient care has been rebutted in the Provider's arguments stated above. The Provider reasserts that HCFA's own reimbursement manual provides the basic rule that a tax assessed by a governmental entity is an allowable cost unless it falls into a category of excluded taxes--in this case it did not.

The Provider states the Intermediary's concern that Medicare revenues were eliminated from the calculation of the tax thereby further tainting its allowability is moot because this fact is simply not relevant.

With regard to the Intermediary's contention of cross subsidization because the surcharge tax is a specific purpose tax to raise funds to meet the State's share of the Medicaid program, the Provider responds that this is also irrelevant. The Provider states it had no choice but to pay the tax because it was a cost of doing business as a hospital; therefore, it must be allowable.

On this point, the Provider submitted additional information in the post-hearing brief ("PHB"), at pp 5 & 6, concerning the practice of provider-specific purpose taxes to fund the State's share of Medicaid expenses.[1] The Medicaid statute is found in Title XIX of the Social Security Act.

1) The Provider states that there is nothing in the Medicaid statute, 42 U.S.C. ' 1396a(t), that could " be construed as authorizing the Secretary to deny or limit payments to a State for expenditures, for medical assistance for items or services, attributable to taxes of general applicability imposed with respect to the provision of such items or services."

2) In September 1991, the Secretary of HHS published an interim final rule that would alter the treatment of revenues from voluntary contributions, provider-specific taxes, and intergovernmental transfers for the state's share of Medicaid expenses. With respect to provider-specific taxes method, the Secretary's proposed rule provided there would be no federal matching funds available. Congress took exception to this proposed rule and enacted the Medicaid Voluntary Contributions and Provider-Specific Tax amendments of 1991, Pub. L. 102-234, Dec. 12, 1991

[1] Generally, States use three methods of funding its Medicaid share: voluntary contributions, provider-specific taxes, and intergovernmental transfers.

("Amendment").[2] The Amendment addressed how states could determine what funds may be used to pay their share of Medicaid expenditures in determining the federal share of Medicaid expenditures (See Legislative History of Public Law 102-234).[3]

The Provider asserts the Secretary's view of imposing a limitation on the manner of determining the federal share of Medicaid expenditures was found to be faulty by Congress. In this instance, if the Secretary believed provider-specific taxes should not be an allowable cost for Medicare purposes, then the manual provision at HCFA Pub. 15-1 ' 2122 requires change. There was no change. Thus, at this time, the manual provisions clearly allow this tax as a cost.

The Provider also asserts that the Amendment characterized the provider-specific tax as a uniform tax for purposes of calculating federal matching funds even if the tax excludes certain revenues from Medicaid or Medicare services. Thus, Congress did not draw any distinctions where Medicare revenues were excluded concerning federal matching funds; and the Provider believes no distinction should be made concerning the allowability of this tax for Medicare reimbursement purposes as advanced by the Intermediary's argument in III.

The Provider concludes that the surcharge tax was a necessary cost of doing business in Minnesota and is an allowable cost both under the Medicare statute and HCFA's manual provisions.

INTERMEDIARY'S CONTENTIONS:

The Intermediary primarily contends that the surcharge tax in dispute is not allowable because it transgresses three principles set forth in the Medicare statute at 42 U.S.C. ' 1395x(v).

1. It is not a "reasonable cost" because it is not necessary in the efficient delivery of needed health services to Medicare patients.

2. It is not related to Medicare patient care services.

3. It is not in accord with the Medicare statutory principle concerning cross subsidization.

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[2] Provider Exhibit 7.

[3] U.S. Code Congressional and Administrative News, 1991, vol. 3 p. 1413. (Provider Exhibit 8).

4. Additionally, the Intermediary disagrees with the Provider's reliance and interpretation of HCFA Pub. 15-1 ' 2122 et seq.

I

The Intermediary relies primarily on the Medicare statute provision defining "reasonable costs" which states in part:

> The reasonable cost of any service shall be the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services, and shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included, in determining such costs for various types or classes of institutions, agencies, and services. ...
>
> Such regulations shall (i) take into account both direct and indirect costs of providers of services (excluding therefrom any such costs, including standby costs, which are determined in accordance with regulations to be unnecessary in the efficient delivery of services covered by the insurance programs established under this title) in order that, under the methods of determining costs, the necessary costs of efficiently delivering covered services to individuals covered by the insurance programs established by this title will not be borne by individuals not so covered, and the costs with respect to individuals not so covered will not be borne by (the Medicare) insurance programs. ..."

42 U.S.C. ' 1395x(v) (emphasis added).[4]

The Intermediary asserts the surcharge tax is not necessary in the efficient delivery of medical services nor is it a cost recognized by Medicare regulations at 42 C.F.R. ' 413.9.

II

The Intermediary argues that the statute provides for regulations to determine the allowability of various costs providers incur. Consistent with the statute, the regulation at 42 C.F.R. ' 413.9 requires reasonable costs to be related to the care of Medicare patients, i.e., related to patient care. Thus, a nexus is required

[4] Intermediary Exhibit 2-4.

between the cost at issue and the Provider's role in rendering the items of services or care to Medicare patients which is absent in this instance.

III

The Intermediary further asserts the surcharge tax is not in accord with the fundamental Medicare statutory principle prohibiting cross subsidization, i.e., that the costs incurred in providing care for Medicare patients will not be borne by non-Medicare patients and vice versa. [See last paragraph of 42 U.S.C. ' 1395x(v) stated in I above.]

In this case, the Intermediary asserts the surcharge tax is not a uniform tax on all classes of patients. In fact, the language of the Minnesota statute provides the surcharge tax (i) excludes Medicare patient revenues from the calculation; and (ii) the funds generated from the surcharge tax itself is used to support the Medicaid program.[5] Thus, the State of Minnesota has created a financing scheme to raise funds to cover the nonfederal share of the State's Medicaid program which is a separate category of patient. Thus, the tax is used for a different type of patient.

The Intermediary states this is a clear violation of the key Medicare reimbursement principles that incurred costs must be related to Medicare patient care; and it clearly violates the prohibition of cross subsidization. The Intermediary believes this particular tax is one of the best examples of cross subsidization.

IV

The Intermediary completely disagrees with all of the Provider's contentions.

1. As discussed in Intermediary's Contentions per "I" above the surcharge tax is not a reasonable cost pursuant to the statutory definition at 42 U.S.C. ' 1395x(v).

2. The Provider's reliance on HCFA Pub. 15-1 ' 2122.1 that the subject surcharge taxes are an allowable cost is incorrect. The Provider has erroneously focused on the first sentence of the manual that states as a general rule taxes assessed by a governmental entity are allowable costs. The Intermediary asserts this generalization must be read in context with the entire Medicare scheme of reimbursement as discussed immediately above in II & III. The surcharge tax is not related to patient care and clearly involves cross subsidization of Medicaid patients which is prohibited by the Medicare statute.

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[5] Intermediary Exhibit 2-2.

3. The Intermediary asserts the Provider misinterpreted the manual provision at ' 2122.2 that lists non-allowable taxes because their view is too all encompassing. Namely, since a "surcharge tax" is not listed therein, then by default it becomes allowable. The list of exclusions was not an all inclusive list or statement, just examples.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.:

' 1395x(v)(1)(A) et seq.	-	Reasonable Costs
' 1396a(t)	-	Authority of Secretary; limitations

2. Regulations - 42 C.F.R.:

'' 405.1835 - 1841	-	Board Jurisdiction
' 413.9	-	Cost Related to Patient Care

3. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

' 2122.1	-	Taxes: General Rule
' 2122 et seq.	-	Costs Related to Patient Care: Taxes

4. Cases:

Florida Group Appeal-Indigent Care Tax v. Blue Cross and Blue Shield Association and Blue Cross and Blue Shield of Florida, Inc., PRRB Dec. Nos. 90-D61 and 90-D62, September 20, 1990, Medicare & Medicaid Guide (CCH) & 38,934; Aff'd, HCFA Admr. Dec. (CCH) & 38,935, November 20, 1990.

5. Other:

Medicaid Voluntary Contributions and Provider-Specific Tax amendments of 1991, Pub. L. 102-234, Dec. 12, 1991

Legislative History of Pub. L. 102-234, U.S. Code Congressional and Administrative News, 1991, vol. 3 p. 1413.

Minn. Stat. ' 256.9657

Minn. Stat. ' 256.9657 (1991 Supp.)

Minn. Stat. ' 256B.19

FINDINGS OF FACT, CONCLUSION OF LAWS AND DISCUSSION:

The Board, after considering the law, regulations, program instructions, facts, parties' contentions, and evidence finds and concludes that the Minnesota Surcharge Tax (MST) is a Medicare allowable cost.

The Board finds that:

1. The MST is a tax levied and imposed on all Minnesota providers.
2. The tax is a liability subjecting the provider to severe sanctions for non-payment.
3. It is a cost incurred for doing business as an ordinary and necessary business expense.
4. The basic legislative intent was to create a source of revenue to pay for indigent care, and the tax is uniformly applied to all providers.

5. The basic calculation of the tax [which excludes Medicare revenues] results in a tax payment that meets all the Medicare statutory, regulatory, and program instruction requirements as an allowable cost.

6. The exclusion of Medicare revenues from the computation does not cause it to be a non-Program expense.

7. The purpose, calculation and use of the funds by Minnesota, as a sovereign entity, is irrelevant in the overall scope of determining whether the tax is an allowable cost.

8. HCFA has not issued any regulations or program instructions that specifically deny the tax as an allowable expense.

9. HCFA has explored and reviewed a variety of similar taxes in other states and has allowed such taxes as an allowable operating expense. Further, the Administrator affirmed Board decision Nos. 90-D61 and 90-D62, Florida Group Appeal - Indigent Care Tax ,[6] where the Board allowed a

[6] Florida Group Appeal-Indigent Care Tax v. Blue Cross and Blue Shield Association and Blue Cross and Blue Shield of Florida, Inc., PRRB Dec. Nos. 90-D61 and 90-D62, September 20, 1990, Medicare & Medicaid Guide (CCH) & 38,934; Aff-d, HCFA Admr. Dec.

similar tax as an operating expense.

The Board finds that the MST meets the requirements of the controlling Medicare authorities which are:

1. The statute at 42 U.S.C. ' 1395x(v)(1)(A);

2. The regulation at 42 C.F.R. ' 413.9; and

3. HCFA Pub. 15-1 '' 2122.1 and 2122.2.

The tax is a reasonable cost within the scope of both the statute and regulation. The statue states:

> The reasonable cost of any services shall be the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services, and shall be determined in accordance with regulations the methods to be used, and the items to be included, in determining such costs for various types of classes of institutions, agencies, and services; . . .

42 U.S.C. ' 1395x(v)(1)(A) (emphasis added).

The implementing regulation states in part:

> Reasonable cost includes all necessary and proper costs incurred in furnishing the services, subject to principles relating to specific items of revenue and cost.

42 C.F.R. ' 413.9 (emphasis added).

As the Board has found in items 8 & 9 above, HCFA has not issued any regulations or program instructions denying this type of tax. After reviewing the entire Medicare scheme of reimbursement in the statute and regulations, the Board concludes the cost at issue is allowable. Moreover, the program instructions at HCFA Pub. 15-1 '' 2122.1 and 2122.2 allows this type of tax. The HCFA Administrator has approved this type of tax in other Board cases such as the Florida Group Appeal-Indigent Care Tax.

The Board disagrees with the Intermediary=s unsupported and unpersuasive characterization that the tax is

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(CCH) & 38,935, November 20, 1990.

unreasonable and unnecessary. It is a necessary and proper expense levied by Minnesota on all providers as a cost of doing business. The Intermediary=s assertion that there are no HCFA instructions allowing this cost is without merit.

The tax also meets the requirements of HCFA Pub. 15-1 ' 2122.1 since the tax is levied by a state government as provided in this section, and the provider is liable for payment. Further, the tax is not listed in ' 2122.2 as a non-allowable type of tax nor does it fall within the scope of any excluded tax listed in this section.

DECISION AND ORDER:

The MST is an allowable cost under the Medicare law, regulations and program instructions. The Intermediary=s adjustment is reversed.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker
Stanley J. Sokolove

FOR THE BOARD:

Irvin W. Kues
Chairman