PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

ON THE RECORD
2007-D57

PROVIDER –
University of Chicago Hospitals & Clinics
Chicago, IL

Provider No.: 14-0088

vs.

INTERMEDIARY –
BlueCross BlueShield Association/
National Government Services - Illinois

DATE OF HEARING -
May 22, 2007

Cost Reporting Period Ended -
June 30, 1996

CASE NO.: 00-2326

INDEX

ISSUE:

Whether the time spent by residents conducting research in the Provider's facility as part of an approved residency program should be included in the Indirect Medical Education FTE calculation.

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. 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(b) and 413.24(b).

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. 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.

Since the inception of the Medicare program, Congress has allowed the cost of training physicians based on the premise that " . . . these activities enhance the quality of care in an institution." [1] In 1983, Congress recognized that teaching hospitals have indirect operating costs that would not be reimbursed under the prospective payment system or by the Direct Graduate Medical Education (DGME) payment methodology and authorized an additional payment known as the Indirect Medical Education (IME) payment to hospitals with GME programs. 42 U.S.C. §1395ww(d)(5)(B). Specifically, the IME payment compensates teaching hospitals for the higher-than-average operating costs that are associated with the presence and intensity of residents' training in an institution but which cannot be specifically attributed to, and does not include, the costs of residents' instruction. The IME adjustment attempts to measure teaching intensity based on "the

[1] H.R. Rep. No. 213, 89th Cong., 1st Sess., 32 (1965); see also Report to the Congress, Rethinking Medicare's Payment Policies for Graduate Medical Education and Teaching Hospitals, at 5 (Aug.1999). Intermediary Exhibit I-25.

ratio of the hospital's full-time equivalent interns and residents to beds." Id. Thus, the IME payment amount is based, in part, on the number of intern and resident full-time equivalents (FTE) participating in a provider's GME Program.

For fiscal 1996, the year at issue here, the regulations governing IME reimbursement were codified at 42 C.F.R. §412.105(g)(1995).[2] The regulations state in pertinent part:

> For cost reporting periods beginning on or after July 1, 1991, the count of full-time equivalent residents for the purpose of determining the indirect medical education adjustment is determined as follows:
>
> (i) The resident must be enrolled in an approved teaching program…
> (ii) ... the resident must be assigned to one of the following areas:
> (A) The portion of the hospital subject to the prospective payment system.
> (B) The outpatient department of the hospital.

In 1997, the regulation was amended to include time spent by residents providing direct patient care in non-hospital settings within the count. The amendment stated:

> (C) Effective for discharges occurring on or after October 1, 1997, the time spent by a resident in a nonhospital setting in patient care activities under an approved medical residency program is counted towards the determination of full-time equivalency if the criteria set for at §413.86(f)(3) or §413.86(f)(i)(iii) are met.

42 C.F.R. §412.105(f)(1)(ii)(C)

The issue in this case involves the interpretation of the regulation for the proper accounting of FTEs in the IME calculation.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The University of Chicago Hospitals and Clinics (Provider) is a teaching medical center located in Chicago, Illinois. For the fiscal period ended 06/30/96, the Provider reported 474.29 resident FTEs in its indirect medical education calculations. National Government Services of Illinois (Intermediary[3]) excluded 50.86 FTEs from the IME calculation that represented the time that residents spent conducting research as a part of their approved medical residency programs. The Intermediary contends that the time spent conducting research is not directly related to the treatment of particular patients and is not, therefore, an allowable Medicare cost. The Provider counters that the

[2] This regulation was re-designated from 42 C.F.R §412.105(g) to §412.105(f). See 62 Fed.Reg. 45966, 46029 (Aug. 29, 1997).
[3] Formerly AdminaStar Federal.

Intermediary's standard "related to the care of particular patients" is unsupported by the regulations and overly restrictive. At issue is whether the time spent by residents conducting research as a part of an approved residency program should be included the IME calculation.

PROVIDER'S CONTENTIONS:

The Provider contends that the time residents spend performing research activities as part of an approved residency program should be included in the IME FTE calculation based upon the pertinent statute and controlling regulation. While 42 U.S.C. §1395ww(d)(5)(B) provides specific instructions for calculating the IME adjustment, it does not exclude time spent by residents performing research activities. Regulations at 42 C.F.R. §412.105(f) provide more specific rules for counting FTE residents for IME. These rules require only that residents who worked in non-hospital settings be engaged in patient care activities in order to be included in the IME FTE resident count. The Provider further argues that in analogous cases, both the Board[4] and the courts[5] have concluded that IME research time is properly included in the IME FTE calculation.

The Provider also contends that the August 1, 2001 amendment to the IME regulation cannot be viewed as a clarification of existing policy since it establishes new recordkeeping requirements; i.e., time spent by residents performing patient and non-patient care activities while assigned to a research rotation. This amendment cannot be applied to the subject cost reporting period because retroactive rule making is prohibited.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that time spent by residents performing research activities that are not directly related to the care of patients is excluded from the resident count. In the instant case, only resident rotations specifically titled "research" were excluded from the Provider's IME FTE count, and the Provider submitted no documentation to show that the time was, in fact, patient-care related. The Intermediary cites section 2405.3.F.2 of the Provider Reimbursement Manual, which states that a resident must not be included in the IME count if "[t]he individual is engaged exclusively in research," and 66 Federal Register No. 148, 39896, August 1, 2001, where CMS explains that "exclusively" means that the research is not associated with the treatment or diagnosis of a patient. The Intermediary also cites 42 C.F.R. §412.105(f)(1)(iii)(B), amended through the August 1, 2001, Federal Register, which CMS notes as a clarification of long-standing policy. The section states that, "[t]he time spent by a resident in research that is not associated with the treatment or diagnosis of a particular patient is not countable."

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[4] Univ. Med. Ctr. (Tucson, Ariz.) v. BCBS/Blue Cross and Blue Shield of Ariz., PRRB Dec. No. 2005-D36, Medicare and Medicaid Guide (CCH) ¶81,307 (Apr.11, 2005).

[5] Riverside Methodist Hospital v. Thompson, No. C2-02-94 (S.D. Ohio, July 31, 2003); University Medical Center Corp. v. Leavitt, 2007 WL 891195 (D.Ariz., March 21, 2007); see also H.R. Conf.Rep. No. 98-25, reprinted in 1983 U.S.C.C.A.N. 219.

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of Medicare law and guidelines, the parties' contentions and stipulations, and the evidence contained in the record, finds and concludes that the Intermediary's calculation of the Provider's IME reimbursement was improper.

The single issue in this case is whether the time spent by residents conducting research as a part of an approved residency program should be included the IME calculation. The Board addressed this issue in its decision in Univ. Med. Ctr. (Tucson, Ariz.) v. BCBS/Blue Cross and Blue Shield of Ariz.[6] In that case the Board found that the regulation[7] in effect during the subject cost reporting periods did not exclude research time from the IME FTE resident count, nor did it require resident time to be related to patient care. In pertinent part, the regulation states:

> (1) . . . the count of full-time equivalent residents for the purpose of determining the indirect medical education adjustment is determined as follows:
>
> (i) The resident must be enrolled in an approved teaching program. . . .
>
> (ii) In order to be counted, the resident must be assigned to one of the following areas:
>
> (A) The portion of the hospital subject to the prospective payment system.
>
> (B) The outpatient department of the hospital.
>
> (C) Effective for discharges occurring on or after October 1, 1997, the time spent by a resident in a nonhospital setting. . . .

It is undisputed that the residents at issue in this case were enrolled in an approved GME program and that they worked in either the portion of the Provider's facility subject to PPS or an outpatient area. Consequently, the Intermediary's adjustment removing them from the count was improper.

The Board notes that this finding is consistent with the court's findings in Riverside Methodist Hospital v. Thompson.[8] In part, the court concluded that "the [IME] regulation as it was written at the time in question, does not by its plain language contain any requirement that the time spent by residents had to be spent in direct patient care in

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[6] Univ. Med. Ctr. (Tucson, Ariz.) v. BCBS/Blue Cross and Blue Shield of Ariz., PRRB Dec. No. 2005-D36, Medicare and Medicaid Guide (CCH) ¶81,307 (Apr.11, 2005).

[7] 42 C.F.R. §412.105(f).

[8] Riverside Methodist Hospital v. Thompson, No. C2-02-94 (S.D. Ohio, July 31, 2003)

order to be counted."[9] The Board also notes that both its findings and the findings of the court in Riverside were affirmed by the court in University Medical Center Corp. v. Leavitt,. [10] There, the court concluded:

> The [pre-2001] regulation is not ambiguous, and when considered in context with the historical intent of both the regulation and its governing statute, it is evident that all time spent by residents in research and other scholarly activities while they are "assigned to" the Hospital must be included when determining the Hospital's resident count for purposes of calculating the IME payment.

Additionally, the Board finds that the 2001 amendment to the IME rule excluding non-patient care research time from the resident count represents a change in policy that cannot be applied retroactively to the subject 1996 cost reporting period. As the court in Riverside explained, the IME regulation is clear, in that the time spent by residents performing non-patient care related activities is not excluded from the resident count, and "if the Secretary desires to include a new requirement regarding excludable time, it must be done by amendment, and in compliance with the necessary administrative procedures for amending regulations . . . "[11]

DECISION AND ORDER:

The Intermediary's adjustments reducing the Provider's Indirect Medical Education full-time equivalent resident count for the time spent by residents in research that was required by the residents' approved medical residency program were improper. The issue is remanded to the Intermediary to recalculate the IME adjustment to incorporate the time spent by residents in research activities that were part of their approved medical residency program.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Elaine Crews Powell, C.P.A.
Anjali Mulchandani-West
Yvette C. Hayes

DATE: August 8, 2007

FOR THE BOARD:

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[9] See Riverside, pg. 15.
[10] University Medical Center Corp. v. Leavitt, 2007 WL 891195 (D.Ariz., March 21, 2007), p.7.
[11] See Riverside, pg. 15.

Suzanne Cochran, Esquire
Chairperson