

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

2001-D44

PROVIDER –
Tulsa Home Health Services
Tulsa, Oklahoma

Provider No. 37-7093

vs.

INTERMEDIARY –
Blue Cross and Blue Shield Association/
Cahaba Government Benefits Administrators

DATE OF HEARING-

December 8, 2000

Cost Reporting Period Ended -
December 31, 1994

CASE NO. 97-1917

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ISSUE:

Was the Intermediary's adjustment to physical therapy labor costs proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Tulsa Home Health Services (AProvider@) is a Medicare certified home health agency located in Tulsa, Oklahoma. It is licensed in the State of Oklahoma to provide skilled nursing, physical therapy, occupational therapy, speech pathology, medical social services and home health aide services. In its as-filed cost report for the fiscal year ended (AFYE@) December 31, 1994, the Provider claimed costs for providing physical therapy services that were performed by both employees and contracted physical therapists. The employee physical therapists were paid on a salary plus a per-visit rate for overtime visits. The contracted physical therapists who performed services pursuant to arrangements established with outside suppliers were paid on a fee-for-service basis for actual visits performed. Included in the total services rendered for FYE December 31, 1994 were 5,245 physical therapy visits, of which 5,178 were provided to Medicare beneficiaries.

Cahaba Government Benefits Administrators (AIntermediary@) reviewed the Provider's compensation for the employee physical therapists and concluded that the compensation of all physical therapists was subject to the guidelines set forth under ' 1403 of the Provider Reimbursement Manual (AHCFA Pub. 15-1@). Since the Provider did not maintain records of how many employees performed therapy visits while being paid on a per-visit basis or the number of hours worked, the Intermediary was unable to calculate the hourly compensation for each of these physical therapists. Accordingly, the Intermediary measured the quantity of services rendered by the employee therapists using the number of patients treated (i.e., patients visited). The Intermediary determined that one hour per visit would be appropriate and made adjustments to Worksheet A-8-3 to apply the physical therapy guidelines to the Provider's employee physical therapists. Worksheet A-8-3 was adjusted as follows:¹

<u>Worksheet A-8-3 Line #</u>	<u>As-Filed</u>	<u>Audit Adjustment</u>	<u>Finalized</u>
3 - Number of Unduplicated HHA Visits - Therapists	1,456	3,636	5,092
4 - Number of Unduplicated HHA Visits-Therapy Assistants	153	0	153

¹ See Intermediary Exhibit I-1.

7 - Total Hours Worked- Therapists	1,397	3,695	5,092
7 - Total Hours Worked- Assistants	129	24	153
48 - Total Cost of Outside Supplier Services	\$78,239	\$285,288	\$363,527
49 - Excess Over Limitation	\$0	\$111,331	\$111,331

On September 27, 1996, the Intermediary issued a Notice of Program Reimbursement which included an adjustment to apply the physical therapy guidelines to the Provider's employees, which reduced allowable physical therapy cost by approximately \$111,000. The Provider appealed the Intermediary's determination to the Provider Reimbursement Review Board (ARRB) pursuant to 42 C.F.R. ' ' 405.1835-.1841 and has met the jurisdictional requirements of these regulations. The Provider was represented by J. Clay Christensen, Esquire, and Debra L. Chionopoulos, Esquire, of Day, Edwards, Propester & Christensen. The Intermediary's representative was Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider contends that the Intermediary improperly applied the physical therapy guidelines to its employee physical therapists. In support of this contention, the Provider cites the statutory provisions of 42 U.S.C. ' 1395x(v)(5)(A), and the implementing regulations at 42 C.F.R. ' 413.106, which establish a clear distinction between physical therapy services furnished under arrangements with a provider, and those furnished by employees of a provider. The statute at 42 U.S.C. ' 1395x(v)(5)(A) provides that, ' ' Where the physical therapy services are furnished under an arrangement with a provider of services or other organization, the amount allowable for Medicare cost reimbursement purposes shall not exceed an amount equal to the reasonable salary that would have been paid for the same services. ' ' Further explanation and implementation of the statutory language is set forth in 42 C.F.R. ' 413.106 which states that, ' ' The reasonable cost of physical therapy services furnished under arrangements with a provider of services may not exceed an amount equivalent to the prevailing salary and additional costs that would reasonably have been incurred by the provider had such services been performed by such a person in an employment relationship. ' ' Id.

The Provider argues that it is evident by the statutory and regulatory language that a distinction has intentionally been made between physical therapists who are employees of providers and physical therapists who provide services under arrangements with providers. In accordance with the Supreme Court's decision in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, (1984), ' ' [t]he plain meaning of a statute controls, if there is one, regardless of an agency's interpretation. ' ' The Provider insists that the language clearly differentiates between a physical therapist who is under an arrangement from one in an employment relationship, and that such a distinction is

significant because reimbursement rates and record-keeping requirements are different for each employment relationship.

With respect to the physical therapy guidelines set forth in the Provider Reimbursement Manual (AHCFA Pub. 15-1"), the Provider argues that ' 1403 expressly addresses and recognizes the distinction between physical therapist employees of a provider and physical therapists who provide services under arrangements with a provider. The Provider further contends that HCFA Pub. 15-1 ' 1403 specifically states that the guidelines apply only to the costs of services performed by outside suppliers, and not to the salaries of a provider's employees. In making its adjustments to Worksheet A-8-3 of the Provider's 1994 cost report, the Intermediary incorrectly used the additional language of HCFA Pub. 15-1 ' 1403 which states:

In situations where compensation, at least in part, is based on a fee-for-service or on a percentage of income (or commission), these arrangements will be considered nonsalary arrangements, and the entire compensation will be subject to the guidelines in this chapter.

HCFA Pub. 15-1 ' 1403.

The Provider notes that the manual language relied upon by the Intermediary appears to relate to changes made to 42 C.F.R. ' 413.106 (c) (5) in or about 1998. Citing the circuit court's decision in In Home Health, Inc. v. Shalala, 188 F.3d 1043, (8th Cir. 1999) (In Home),² the Provider contends that such a change cannot be retroactively applied to this case. The court in In Home further construed that HCFA Pub. 15-1 contained only nonbinding interpretative rules that have not been subjected to APA [Administrative Procedures Act, 5 U.S.C. ' 553] rulemaking procedures. The court went on to state that "[t]o the extent the PRM [HCFA Pub. 15-1] supports the Secretary's view that paid [-] per-visit employees are subject to the guidelines, we conclude that this agency interpretation is contrary to the plain language of the statute as articulated above." The court also rejected the Secretary's position in In Home that the guidelines should be applied to the home health agency employee physical therapists thereby subjecting the employee physical therapists to the same cost limitations as those therapists furnishing services under other arrangements. Accordingly, even if the Intermediary's position is supported by the language of HCFA Pub. 15-1 ' 1403, the Eight Circuit Court of Appeals has stated that the manual language is nonbinding as it is contrary to the law and, therefore, such a position is without credence.

²

See Provider Exhibit P-7.

In the event the guidelines are deemed to be applicable to fee-for-service amounts paid to employees, the Provider does not agree with the Intermediary's decision to apply the guidelines to all of its physical therapy costs. It is undisputed that the physical therapy services in controversy were provided by employees of the Provider,³ and that the employees were paid overtime based upon a rate-per-visit scheme rather than the standard time and one half overtime pay.⁴ Accordingly, the primary issue before the Board concerns the proper application of HCFA Pub. 15-1 ' 1403 which was promulgated pursuant to governing law and regulations. The Provider contends that the continued out of context interpretation of the guidelines by the Intermediary further compounds the reimbursement impact in several ways. First, the guidelines did not apply to employees in 1994, whether paid on a fee-for service basis or a salaried/hourly basis. Second, unlike contracted outside suppliers, employed physical therapists are not required to maintain visit-specified treatment hours. Therefore, such information is not available to be incorporated into the calculation of the limitation. Third, employed physical therapists will have varied levels of productivity depending on patient census and individual patient needs. Thus, their utilization is extremely different from that of an outside supplier, which in this Provider's case, were used to supplement employee hours during high census periods and/or employee staffing shortages. Fourth, the Provider refers to the Eight Circuit Court's decision in Hennepin County Medical Center v. Shalala, 81 F.3d 743, 748 (8th Cir. 1996), wherein the court found that A[a]n agency's interpretive rules, which are not subject to APA rulemaking procedures, are nonbinding and do not have the force of law.® Accordingly, the Provider believes that the Intermediary's interpretation of the guidelines strays from the legislative and regulatory intent which were designed to prevent abuses by outside physical therapy contractors.

The Provider further notes that its position has been affirmed by the Board in several prior decisions including In Home Health, d/b/a Home Health Plus v. Blue Cross and Blue Shield Association/ Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 96-D16, February 27, 1996, Medicare and Medicaid Guide (CCH) & 44,065 and High Country Home Health Care, Inc. v. IASD Health Services Corporation, PRRB Dec. NO. 97-D35, March 19, 1997, Medicare and Medicaid Guide (CCH) & 45,130.⁵ In both cases, the Board concluded that the manual guidelines were not applicable to employees of a provider.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that its adjustment properly applied the physical therapy guidelines to the Provider's employee physical therapists in accordance with the reasonable cost requirements established under 42 U.S.C. ' 1395x(v)(1)(A) and 1395x(v)(5)(A), the regulatory provisions at 42

³ See Tr. at 15-16.

⁴ See Tr. at 24-25.

⁵ See Provider Exhibits P-7 and P-8.

C.F.R. ' ' 413.9 and 413.106, and the manual instructions set forth in Chapter 14 and ' 2103 of HCFA Pub. 15-1.

The regulation at 42 C.F.R. ' 413.9(c)(2) states:

The costs of providers= services vary from one provider to another and the variations generally reflect differences in scope of services and intensity of care. The provision in Medicare for payment of reasonable cost of services is intended to meet the actual costs, however widely they may vary from one institution to another. This is subject to a limitation if a particular institution=s costs are found to be substantially out of line with other institutions in the same area that are similar in size, scope of services, utilization, and other relevant factors.

42 C.F.R. ' 413.9(c)(2).

The Medicare regulation at 42 C.F.R. ' 413.106(c)(5) further expands upon the reasonable cost requirements for physical and other therapy services by stating:

Until a guideline is issued for a specific therapy or discipline, costs are evaluated so that such costs do not exceed what a prudent and cost conscious buyer would pay for a given service.

42 C.F.R. ' 413.106(c)(5).

The prudent buyer provisions under HCFA Pub. 15-1 ' 2103 further clarify the regulatory requirements by stating that A[t]he prudent and cost conscious buyer not only refuses to pay more than the going price for an item or service, he/she also seeks to economize by minimizing cost.@ Consistent with the reasonable cost provisions cited above, it is the Intermediary=s position that the specific guidelines in Chapter 14 of HCFA Pub. 15-1 effectively apply the prudent buyer principle. The fact that the Provider=s physical therapy costs exceeded the physical therapy guidelines is proof that the costs are not reasonable and that they are, in fact, substantially out of line.

The Intermediary does not dispute that the Provider=s physical therapists were employees. However, the Intermediary insists that the guidelines established under Chapter 14 of HCFA Pub. 15-1 do apply to certain salaried employment relationships, and that such an employment relationship was identified in the instant appeal. The instructions in HCFA Pub. 15-1 ' 1403 state in pertinent part:

In situations where compensation, at least in part, is based on a fee-for-service or on a percentage of income (or commission), these arrangements will be considered nonsalary arrangements, and the entire

compensation will be subject to the guidelines in this chapter.

HCFA Pub. 15-1 ' 1403 (emphasis added).

Since the Provider's employee physical therapists were paid on a per-visit basis for overtime visits, it is the Intermediary's position that their compensation is subject to the physical therapy guidelines under Chapter 14 of HCFA Pub. 15-1. While the Provider argues that the therapists were not contractors, it is the Intermediary's position that the compensation of all physical therapists paid on a per-visit basis (i.e. contracted therapists as well as employee therapists) must be compared to the physical therapy guidelines.

The Intermediary points out that HCFA Pub. 15-1 ' 1403 identifies several situations in which the compensation of a salaried physical therapist would be subject to the limitation guidelines. This section states in part that the costs of the services of a salaried employee who was formerly an outside supplier of therapy or other services, or any new salaried employment relationship will be closely scrutinized to determine if an employment situation is being used to circumvent the guidelines. Any costs in excess of an amount based on the going rate for salaried employee therapists must be fully justified. The fact that the compensation of the physical therapists in question was determined on a fee-for-service basis requires their compensation to be treated as non-salary arrangements, the same as outside suppliers.

In response to the Provider's contentions that the Intermediary arbitrarily estimated and assumed one hour of services for each physical therapy visit performed by an employed physical therapist, the Intermediary notes that the Provider acknowledges that it did not maintain records or time studies to support the number of hours worked by the physical therapists. Since the total hours for the Provider's contracted physical therapy services appeared to be approximately one hour per visit based on the Provider's records, the Intermediary determined that one visit equaled one hour in adjusting total physical therapy hours on Worksheet A-8-3. The Intermediary also cites the manual instructions at HCFA Pub.15-1 ' 1409.2 which states in part:

Where time records of home health visits are unavailable, or found to be inaccurate, the reasonable cost evaluation is based on visits rather than actual hours of services rendered. Each home health agency visit is considered the equivalent of 1 hour of service.

HCFA Pub. 15-1 ' 1409.2 (emphasis added).

In further support of its position, the Intermediary refers to the HCFA Administrator's reversal of the Board's decisions as follows:⁶

⁶ See Intermediary Exhibits I-8 and I-9.

- C In Home Health, d/b/a Home Health Plus v. Blue Cross And Blue Shield Association/ Blue Cross of Iowa, PRRB Dec. No. 96 -D16, February 27, 1996, Medicare and Medicaid Guide (CCH) & 44, 065, rev'd HCFA Administrator, April 29, 1996, Medicare and Medicaid Guide CCH & 44,595.
- C High Country Home Health Care, Inc. v. IASD Health Services Corporation, PRRB Dec. No. 97-D35, March 19, 1997, Medicare and Medicaid Guide (CCH) & 45,130, rev'd HCFA Administrator, May 20, 1997, Medicare and Medicaid Guide (CCH) & 45,543.

In both of the above decisions, the HCFA Administrator ruled that the intermediary properly applied the Salary Equivalency Guidelines to the per visit compensated physical therapists pursuant to Chapter 14 of HCFA Pub.15-1. While the Intermediary is aware that the HCFA Administrator's decision in In Home was overturned by the Eight Circuit Court of Appeals, that decision does not apply to this case, as the Provider is located in Oklahoma.

The Intermediary concludes that the Medicare regulations and program instructions relating to compensation of physical therapists based on a fee-for-service clearly provide for the disallowance of such costs which exceed a reasonable level (i.e., costs in excess of the physical therapy guidelines are not prudent). Accordingly, the Intermediary requests that the Board affirm its adjustment.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Law - 42 U.S.C.
 - ' 1395x(v)(1)(A) - Reasonable Cost
 - ' 1395x(v)(5)(A) - Services Under Arrangement
2. Law - 5 U.S.C.
 - ' 553 - Administrative Procedures Act - Rule Making
3. Regulations - 42 C.F.R.
 - ' ' 405.1835 -.1841 - Board Jurisdiction
 - ' 413.9 et seq. - Cost Related to Patient Care
 - ' 413.106 et seq. - Reasonable Costs of Physical Therapy

Services Furnished Under Arrangement

4. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):
- | | | |
|------------|---|------------------------------------------------------------------------------|
| Chapter 14 | - | Reasonable Cost of Therapy and Other Services Furnished by Outside Suppliers |
| ' 1403 | - | Guideline Application |
| ' 1409.2 | - | Full-Time or Regular Part-Time Services - No Time Records Available |
| ' 2103 | - | Prudent Buyer |

5. Case Law:

In Home Health d/b/a Home Health Plus v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 96-D16, February 27, 1996, Medicare and Medicaid Guide (CCH) & 44,065, rev-d HCFA Administrator, April 29, 1996, Medicare and Medicaid Guide (CCH) & 44,595, rev-d In Home Health, Inc. v. Shalala, U.S. District Court, District of Minnesota, Civ. No. 97-2598/RHK/FLN, (June 16, 1998), Medicare and Medicaid Guide (CCH) & 300,005, aff-d In Home Health, Inc. v. Shalala, 188 F.3d 1043 (8th Cir. 1999).

High Country Home Health Care, Inc. v. IASD Health Services Corporation, PRRB Dec. No. 97-D35, March 19, 1997, Medicare and Medicaid Guide (CCH) & 45,130, rev-d HCFA Administrator, May 20, 1997, Medicare and Medicaid Guide (CCH) & 45,543.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-843, (1984).

Hennepin County Medical Center v. Shalala, 81 F3d 743, 748 (8th Cir. 1996).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, testimony elicited at the hearing, and post-hearing brief, finds and concludes that the Intermediary inappropriately applied the physical therapy guidelines in Chapter 14 of HCFA Pub 15-1 (AGuidelines@) to the Provider's employee physical therapists resulting in an improper adjustment to the Provider's cost report for the FYE December 31, 1994.

Based on the evidence in the record, there is no dispute that the physical therapy services in controversy were provided by bona fide employees of the Provider. Accordingly, the issue to be decided concerns the application of the Guidelines in determining the reasonable cost of such services under the controlling law and regulations which were in effect for the cost reporting period in contention. The Board finds that 42 U.S.C. ' 1395x(v)(5)(A) and 42 C.F.R. ' 413.106 provide no basis for the application of the Guidelines to the compensation of employee physical therapists. Both the legislative and regulatory history of the Guidelines indicate that their purpose was to curtail and prevent perceived abuses in the practices of outside physical therapy contractors. The Board also notes that the term Arrangement is commonly referred to and used interchangeably with the term Outside Contractors. The Board is aware that the regulations and manual instructions were changed in 1998 to include the application of the Guidelines to employee physical therapists who are paid on a fee-for-service or percentage of income basis. However, since the cost reporting period under review in the instant case concerns the Provider's FYE December 31, 1994, the Board finds that the Guidelines cannot be retroactively applied based on this substantive change in policy.

With respect to the Intermediary's argument that the Guidelines effectively apply the prudent buyer principle required under the provisions of 42 C.F.R ' 413.9 and HCFA Pub. 15-1 ' 2103, the Board finds that the Guidelines should not be utilized in place of a prudent buyer analysis. The fact that the Provider's physical therapy costs exceeded the Guidelines is not proof that the costs are Substantially out of line and, thus, Unreasonable. Rather than comparing the physical therapy costs to the Guidelines, the Intermediary should have determined whether the Provider's costs were Substantially out of line by performing an appropriate survey which compares the Provider's costs to other similarly situated providers pursuant to the regulations at 42 C.F.R. ' 413.9. The Intermediary's failure to apply an appropriate methodology for evaluating the Provider's costs precludes a determination that the costs were unreasonable under the prudent buyer concept.

Finally, the Board acknowledges that the parties have cited various decisions rendered by the Board and the HCFA Administrator in which the issue also concerned the application of the Guidelines to costs associated with employee physical therapists. Both parties relied upon the decision rendered for In Home, wherein the HCFA Administrator reversed the Board's finding that there was no basis under the law and regulations for the application of the Guidelines to the employee physical therapists. The Board notes that its decision in In Home was later affirmed by the District Court's decision which concluded that:

[t]he Secretary's interpretation of 42 U.S.C. ' 1395x(v)(5)(A) to include In Home's employee therapists who are paid on a fee-per-visit basis and to apply the Guidelines to these physical therapists is contrary to the language of the Act, therefore, the court will grant In Home's motion to set her decision aside.

In Home Health, Inc. v. Shalala, U.S. District Court, District of Minnesota, Civ. No. 97-2598 /RHK/FLN, (June 16, 1998).

The Board further notes that the District Court's decision in In Home was upheld by the Eight Circuit Court of Appeals which found as follows:

We find that 42 U.S.C. ' 1395x(v)(5)(A) does not provide a basis for the application of the Guidelines to In Home's employee physical therapists. The first part of the sentence in 42 U.S.C. ' 1395x(v)(5)(A) explains that the subsection applies to persons providing physical therapy services Aunder an arrangement@ with a provider. The second part of the sentence explains that the reasonable cost of compensation for persons Aunder an arrangement@ is calculated by reference to the salary which would reasonably have been paid to the person if that person had been in an Aemployment relationship@ with the provider. The plain meaning of 42 U.S.C. ' 1395x(v)(5)(A) and 42 C.F.R. ' 413.106, which uses similar language, distinguishes between services provided Aunder an arrangement@ and those provided by a person in an Aemployment relationship@. It is clear from the language that a physical therapist who is Aunder an arrangement@ is different from a person in an Aemployment relationship@ with the provider. The Guidelines apply to a person Aunder an arrangement@. The final notice in the Federal Register indicates that a person A under an arrangement@ is an outside contractor. The Secretary's attempt to now further limit the term Aemployment relationship@ to mean only salaried employees is not supported by the statute or the Secretary's contemporaneous interpretation as reflected in the 1992 regulation.

The statutory reference to Athe salary which would reasonably have been paid@ to a person in an employment relationship does not render a nonsalaried employee subject to the Guidelines as a person Aunder an arrangement@. The term Asalary@ as used in this manner and not specifically defined in the statute can be as generic as Aa remuneration for services given@. See Webster's Third New International Dictionary 2003 (1986). Thus, the statute requires nothing more than that a provider should be reimbursed for the services performed by a nonemployee, i.e., an outside contractor working under an arrangement with the provider, similarly to what an employer reasonably would pay its employee for such services. Services provided by a provider's employee are themselves subject to a reasonableness requirement. See 42 U.S.C ' 1395x(v)(1).

* * *

We have construed the PRM to contain only nonbinding interpretative rules that have not been subjected to APA rulemaking procedures. Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 527-28 n. 4 (1995). To the extent the PRM supports the Secretary's view that paid per-visit employees are subject to the Guidelines, we conclude that this agency interpretation is contrary to the plain language of the statute as articulated above. Accordingly, we cannot defer to the Secretary's interpretation.

* * *

We affirm the district court's reversal of the Secretary's decision and hold that the Secretary may not apply the Guidelines to In Home's employee physical therapists.

In Home Health, Inc. v. Shalala, 188 F.3d 1043 (8th Cir. 1999).

With respect to the 1998 modification to 42 C.F.R. ' 413.106(c)(5), the circuit court's decision included the following footnote on this matter:

(FN4.) The language of 42 C.F.R. ' 413.106(a) has not changed since 1992. However, in 1998, 42 C.F.R. ' 413.106(c)(5) was amended to provide:

If therapy services are performed in situations where compensation to a therapist employed by the provider is based, at least in part, on a fee-for-service or on a percentage of income (or commission), the guidelines will apply. The entire compensation will be subject to the guidelines in cases where the nature of the arrangements is most like an Aunder arrangement@situation, although technically the provider may treat the therapists as employees. The intent of this section is to prevent an employment relationship from being used to circumvent guidelines.

The Secretary acknowledges in her brief that this amendment does not apply in this case.

Id.

It is the Board's conclusion that the facts and circumstances in the instant case are analogous to those set forth in the In Home decision and, thus, the circuit court's analysis and findings are equally applicable to the Board's decision in this case.

DECISION AND ORDER:

The Intermediary's adjustment to physical therapy labor costs was not proper. The Intermediary's determination is reversed.

Board Members Participating

Irvin W. Kues
Henry C. Wessman, Esquire
Stanley J. Sokolove

Date of Decision: August 30, 2001

FOR THE BOARD

Irvin W. Kues
Chairman