

**PROVIDER REIMBURSEMENT REVIEW BOARD
 DECISION
 ON THE RECORD
 2004-D18**

PROVIDER –
 Woodland Terrace Extended Care Center

Provider No. 10-5930

vs.

INTERMEDIARY –
 Blue Cross Blue Shield Association/First
 Coast Service Options, Inc.



DATE OF HEARING -
 November 5, 2003

Cost Reporting Period Ended
 December 31, 1998

CASE NO. 01-1017

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ISSUE:

Whether the Intermediary's adjustment reducing the adjusted hourly salary equivalency amount allowed for the services of Physical Therapy Aides was proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The Medicare Program's payment and audit functions are contracted out to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under the Medicare law and under interpretative guidelines published by the Center for Medicare and Medicaid Services ("CMS").

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 what proportion of those costs are to be allocated to Medicare. 42 C.F.R. §413.20. The Fiscal intermediary reviews the cost reports and determines the total amount of Medicare reimbursement due the provider, which it publishes in a notice of program reimbursement ("NPR") that sets forth the individual expenses allowed and disallowed by the intermediary. 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 NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835.

Woodland Terrace Extended Care Center ("Provider") is a 120-bed Skilled Nursing Facility ("SNF") located in Deland, Florida. During the cost reporting period ended December 31, 1998, the Provider purchased Physical Therapy ("PT"), Occupational Therapy ("OT"), and Speech-Language Pathology ("SLP") services under arrangements from Sundance Rehabilitation Corporation, an entity not related to the Provider.

During a review of the Provider's cost report, First Coast Service Options ("Intermediary") reduced the hourly rate allowed for the services provided by Physical Therapy Aides on or after April 10, 1998 from \$24.84 to \$11.76. No adjustment was made to the rate allowed for PT Aide services rendered before April 10, 1998. Instead, the Intermediary allowed the \$19.31 rate claimed in the filed cost report.

An NPR containing the adjustment was issued to the Provider on August 23, 2000. The Provider disagreed with the NPR and requested a hearing before the Board. The Provider met the jurisdiction requirements of the regulations at 42 C.F.R §§405.1835-1841. The amount of reimbursement in contention is approximately \$21,189.

The Provider was represented by Elaine C. Powell, CPA, of Sun Solution Consulting. The Intermediary was represented by Eileen Bradley, Esq., of the Blue Cross and Blue Shield Association.

PROVIDER'S CONTENTIONS:

The Provider argues that CMS's published schedules of salary equivalency guidelines do not discuss limits for PT Aide services, except to specify that the "schedule is not to be used for PT assistants or aides." 48 FR 44922 (1983). In short, intermediaries do not have the legal authority to arbitrarily establish cost limits for PT Aide services.

The Provider contends that Medicare regulations and instructions are in full agreement with the Provider's position. The regulation at 42 C.F.R. §413.9 titled "cost related to patient care" discusses the conditions under which providers will be paid for the cost of covered services rendered to Medicare beneficiaries. It states in relevant part:

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.

* * * * *

The reasonable cost basis of reimbursement contemplates that the providers of service would be reimbursed the actual cost of providing quality care however widely the actual costs may vary from provider to provider and from time to time for the same provider.

42 C.F.R. §413.9(c)(2) and (3).

The Provider points out that since PT salary equivalency guidelines were first published more than twenty-five years ago, hourly rates for non-licensed therapy professionals have customarily been set at a given percentage of the published Registered Physical Therapy Salary Equivalency Rates. Regarding the reimbursement of PT Assistant services, CMS Pub. 15-1 §1412.2B states:

The additional allowance for the cost of services of a therapy assistant will be based on the going hourly rate paid by providers in the area to salaried therapy assistants

The Provider argues that, in response to the above section, it has become common and accepted industry practice to use the provisions of the next two sentences of CMS Pub. 15-1 §1412.2B to set the PT Assistant rate:

If the going rate for each therapy assistant discipline or type in the area is unobtainable, the therapy assistant's compensation

may be evaluated at a rate not to exceed three-quarters of the adjusted hourly salary equivalency amount.

The Provider maintains that by using this alternative method to establish allowable rates for PT Assistant services, vendors are able to offer providers reasonable rates of compensation, and Medicare is able to provide equitable reimbursement.

The Provider also contends that §1412.2A of CMS Pub. 15-1 establishes rates for PT Aide services. That manual section reads in part:

The additional allowance for the cost of services of a therapy aide or trainee will be based on the hourly rate paid to the provider's employees of comparable classification and/or qualifications; e.g., nurses' aides. The base hourly rate will be adjusted by the appropriate fringe benefit and expense factor, as indicated in section C., below, to arrive at the maximum hourly allowance.

The Provider maintains that it has become routine practice in the industry to reimburse these services at 50% of the salary equivalency rate published for registered PTs. As evidence of this custom, the therapy vendor in this case charged the provider for PT Aide services at a rate that was 50% of the rate it charged for Registered PT services. Furthermore, the Intermediary allowed this rate for PT Aide services rendered before April 10, 1998.

The Provider argues that the Intermediary's adjustment is inconsistent with CMS Pub. 15-1. The only concrete evidence of the rate CMS would accept as reasonable for PT Aide wages is found in the sample overtime calculations that appear in §1412.4. Three example calculations all set the base wage for PTs at \$10 and the base wage for Aides at \$5, thereby acknowledging that the wage rate for Aides is approximately 50% of that for therapists. Even the current CMS Pub. 15-1 §1412.4, which was updated to reflect the April, 1988 change in regulations, uses the very same examples.

The Provider argues that if CMS had changed its mind regarding how a reasonable wage rate for PT Aide services was to be established, the examples in its manual would have been updated to reflect its current thinking. By allowing the long-standing examples to remain in place, CMS has given credence to the validity of the Provider's understanding that unless and until an Intermediary performs an analysis of the "going rates" paid for PT Aide services by comparable facilities in the Provider's geographical area or analyzes the wages of its nurses aides and computes a reasonable rate with actual provider-specific data, the long-standing standard set by §1412.4 remains the litmus test for reasonableness.

The Provider contends that, in making its reasonable cost comparison, the Intermediary is required to perform a thorough analysis to establish the "going rates" within local markets for similar services. In Eagle Healthcare -1993 Prudent Buyer Group Appeal v.

Aetna Life Insurance Company, PRRB Dec. No 97-D83, July 17, 1997, Medicare and Medicaid Guide (CCH) ¶ 45,504, the Board found:

The disallowance of costs that are substantially out of line with those of comparable providers is generally limited to instances that can be specifically proved on a case-by-case basis, and clear demonstration of the specific reason that a cost is high is generally very difficult. However, this does not relieve the Intermediary of its burden to prove that the Providers' costs of OT and ST services were substantially out of line with other institutions in the same area that are similar in size, scope of service, utilization and other relevant factors.

The Provider argues that the Intermediary did not perform the audit, investigation, or analysis necessary to determine the salary rate paid to employees of "comparable classification," and there is no regulatory or statutory authority for an intermediary to make an arbitrary cut-off for allowable salary as has been done in the instant case.

The Provider points out that the cost the Provider claimed for PT Aides services prior to April 10, 1998 were allowed as claimed - \$19.31 per hour, or 50% of the rate allowed for PT services. The second half of the Provider's 1998 fiscal year is being singled out for the application of a cost limit on its PT Aide services which is unsupported by Medicare law, regulations, and instructions and is inconsistent with the Intermediary's own practice. Therefore, the Provider contends that the Intermediary's adjustment was arbitrary, capricious and incorrect.

INTERMEDIARY'S CONTENTIONS:

The Intermediary points out that it calculated the Physical Therapy Aide rate using the Final Rule at 63 F.R. 5106 (January 30, 1998). That rule states in part: "As provided for in existing regulations at §413.106(e) and explained in section 1412 of the Provider Reimbursement Manual, the following are additional allowances for cost incurred for services furnished by an outside supplier." The Intermediary contends that it followed CMS Pub. 15-1 §1412.2A in reviewing the PT Aide rate. That section states in part:

Therapy Aides and Trainees . . . the additional allowance for the cost of services of a therapy aide or trainee will be based on the hourly rate paid to the provider's employees of comparable classification and/or qualification; e.g., nurses' aides. The base hourly rate will be adjusted by appropriate fringe benefit and expense factor, as indicated in section C., below, to arrive at the maximum hourly allowance.

The Intermediary argues that since the Provider did not provide the Intermediary with the comparable employee allowance, the Intermediary used what was available, which was the 1997 Bureau of Labor Statistics ("BLS") hospital occupational/wage survey data for

nursing aides. The Intermediary points out that it adjusted the rate with the inflation factor and the fringe benefit factor to arrive at the maximum hourly allowance, as prescribed by CMS Pub. 15-1 §1412.2A.

In response to the Provider's contention that the PT Aide hourly rate should be set at 50% of the salary equivalency rate published for Registered Physical Therapy, the Intermediary quotes from the Federal Register, 63 FR 5106, (January 30, 1998) Summary of Public Comments and Departmental Response:

Several commenters requested that we pay aides as a function of the hourly salary equivalency amount at 50 percent of these amounts. . . .

In response, CMS states:

Because the commenters did not supply any substantiating evidence in the comments to support their request for paying aides as a function of the hourly salary equivalency amount at 50 percent, we will continue our policy of having the intermediary look at a comparable position, e.g., the nurses' aide in order to determine the reimbursement amount. Because there are no educational requirements for coverage of aides' services and we continue to believe that their services are comparable to nurses aides, we do not feel that it is necessary to conduct a study of the classification and compensation of therapy aides.

The Intermediary concludes that it properly adjusted the PT Aide rate in accordance with CMS's regulations.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the Medicare law and guidelines, the parties' contentions and evidence presented on the record, finds and concludes that the Intermediary properly adjusted the Provider's Physical Therapy Aides rate.

The Board notes that the Provider made a convincing case that its rates were historically correct. However, absent any substantiating documentation from the Provider in support of its paying Physical Therapy Aides as a function of the hourly Physical Therapy salary equivalency amount at 50 percent, the Board concludes that Provider's Physical Therapy Aide hourly rate must be determined according to the provisions of the Final Rule at 63 FR 5106, with an effective date of April 1, 1998.

DECISION AND ORDER:

The Intermediary properly adjusted the hourly rate of the Physical Therapy Aides. The Intermediary's adjustment is affirmed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esq.
Dr. Gary Blodgett, D.D.S.
Martin W. Hoover, Jr., Esq.
Elaine Crews Powell, C.P.A. (Recused)

DATE: April 29, 2004

FOR THE BOARD

Suzanne Cochran, Esq.
Chairman