

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

98-D10

PROVIDER -
North Florida Physical Therapy Services
Marianna, Florida

DATE OF HEARING-
March 5, 1997

Provider No. 10-6639

Cost Reporting Period Ended -
June 30, 1988

vs.

INTERMEDIARY -
Aetna Life Insurance Company

CASE NO. 93-1749

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ISSUE:

Was the Provider entitled to the lower of cost or charges (“LCC”) carryforward which was generated under the prior ownership?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

1. North Florida Physical Therapy Services (“Provider”) is a rehabilitation agency located in Marianna, Florida.
2. During its fiscal year ending May 31, 1987 (“FY 87”), the Provider was owned by North Florida Physical Therapy, Inc., a Florida corporation.
3. Pursuant to an asset purchase agreement dated July 1, 1987, North Florida Physical Therapy, Inc. agreed to sell the goodwill, business, contract rights and assets of the company, including the Provider, and to assign the liabilities and contractual obligations of the company, to Florida East Coast Rehabilitation, Inc., a wholly-owned Florida subsidiary of In-speech, Inc., a Pennsylvania corporation. The sale was closed on August 26, 1987.
4. In conjunction with the sale, the Provider filed a short-year cost report for the period from June 1, 1987, through August 26, 1987, and the Provider’s Medicare provider agreement was assigned to Florida East Coast Rehabilitation, Inc., the new owner. After the sale, the Provider continued to participate in the Medicare program under the same provider number.
5. The Provider’s first cost reporting period under the new corporate ownership was the period beginning August 26, 1987 and ending June 30, 1988 (“FY 88”), which is the fiscal year at issue in this appeal.
6. On July 24, 1990, the Intermediary issued a Notice of Program Reimbursement (“NPR”) for the Provider’s FY 88. For that period, the Provider’s Medicare charges exceeded its allowable costs by \$121,157.
7. In 1992, the Provider requested that the Intermediary reopen the audited cost report for FY 88. The Provider requested reopening to allow for the recovery of \$96,926 for costs which exceeded its charges for FY 87 and were disallowed for that period due to LCC under 42 C.F.R. § 413.13.
8. The Intermediary reopened the audited cost report for FY 88 and issued a revised NPR dated February 12, 1993 to reimburse the Provider for \$96,926 of costs that were disallowed under the LCC limitation for FY 87 and carried forward from FY 87 to FY 88.
9. By a letter dated September 24, 1993, the Intermediary notified the Provider of its intent to reopen the revised cost report with respect to the LCC recovery allowed in the revised NPR

dated February 12, 1993. The Intermediary issued a second revised NPR dated February 25, 1994, which disallowed the LCC recovery for FY 88.

10. The Intermediary disallowed the LCC recovery in the second revised NPR dated February 25, 1994, because there had been a sale of the assets of the corporate owner of the Provider between the FY 87 and the FY 88. The Intermediary contends that Section 2614.A of the Provider Reimbursement Manual (“Manual”) does not permit the Provider to recover the LCC carryover from FY 87 to FY 88.

11. The Provider’s appeal filing has met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-.1841. The Provider was represented by Christopher L. Keough, Esquire, of Powers, Pyles, Sutter & Verville, P.C. The Intermediary was represented by Paul R. Gulbrandson, CPA, of Aetna Life Insurance Company.

PROVIDER’S CONTENTIONS:

The Provider contends that the “provider of services,” which is entitled to the LCC carryforward under 42 C.F.R. § 413.13(d), is the patient care institution that was certified to participate in the Medicare program as a provider of outpatient physical therapy and speech pathology services. That patient care institution is the rehabilitation agency, as in this case, not its corporate owner. Several authorities clearly demonstrate that the rehabilitation agency in this case, not its corporate owner, is the provider of services for LCC purposes. The definition of “new provider” for purposes of the LCC carryforward provisions, 42 C.F.R. § 413.13(b)(5), shows that the terms “provider of services” and “provider” mean the institution that furnishes patient care. The ownership of the institution is irrelevant. Further, the above definition of new provider is consistent with other applicable Medicare regulations and program policies defining the terms “provider of services” and “provider.” 42 C.F.R. § 400.202; 42 C.F.R. § 488.1; Provider Reimbursement Manual, HCFA Pub. 15-1 (“HCFA Pub. 15-1”) § 2150. Those regulations and program instruction demonstrate that the provider of services in this case is the patient care institution that was certified to participate in the Medicare program as a rehabilitation agency. The corporate owner of that institution is not itself a provider for Medicare reimbursement purposes. It is treated as a related party under HCFA Pub. 15-1 § 2150.

The Provider asserts that the courts and the Health Care Financing Administration (“HCFA”) Administrator have maintained a long-standing distinction between a patient care institution that is certified to participate in the Medicare program as a “provider” and the owner of that institution. See The Board of Trustees of the University of Alabama v. Califano, CA 76-H (N.D. Ala. 1978). In Cleveland Clinic Foundation v. Blue Cross and Blue Shield Association/Community Mutual Insurance Company, HCFA Admin. Dec. No. 94-D56, Medicare & Medicaid Guide (CCH) ¶ 42,746 September 21, 1994, aff’d, Cleveland Clinic Foundation v. Shalala, CV 2414, (N.D. Ohio 1996) the HCFA Administrator ruled and the court affirmed that for Medicare

reimbursement purposes, a provider is a patient care institution (the Cleveland Clinic Hospital) not its owner (the Cleveland Clinic Foundation). The Administrator added that the owner of a patient care institution is treated as a related party.

The Provider contends that the undisputed evidence in this case shows that the rehabilitation agency's provider agreement was not terminated as a result of the sale.¹ The rehabilitation agency did not submit an application to participate in the Medicare program as a new applicant or change the basis of its participation in the Medicare program in connection with the sale.² The purchaser of the Provider accepted automatic assignment of the rehabilitation agency's provider agreement with the Medicare program.³ After the sale, the rehabilitation agency continued to participate in the Medicare program under the same provider agreement and the same provider number.⁴ Thus, the 1987 acquisition did not affect the rehabilitation agency's right to the LCC carryforward provided under 42 C.F.R. § 413.13(d). The LCC regulation entitles a "provider" whose charges were lower than its costs in any cost reporting period beginning after 1973 to carry forward, and be reimbursed for, the unreimbursed costs attributable to the Medicare program in any of the two succeeding cost reporting periods. 42 C.F.R. § 413.13(d). Further, 42 C.F.R. § 489.18(d) provides that an assigned provider agreement is subject to all of the terms and conditions under which it was originally issued. Those terms and conditions include the right to the LCC carry-forward provided under 42 C.F.R. § 413.13(d). See United States v. Vernon Home Health, 21 F. 3d 693, 696 (5th Cir. 1994) ("Vernon Home Health"). Thus, the Intermediary's disallowance of the LCC carryforward must be reversed.

The Provider notes that the Intermediary mistakenly believes that there is no difference between a patient care institution that is certified to participate in the Medicare program as a provider of services and the owner of the institution. Thus, the Intermediary improperly construes HCFA Pub. 15-1 § 2614.A to mean that every change of ownership is a termination of the provider resulting in forfeiture of the LCC carryforward. The Intermediary's construction of the manual is clearly wrong.

The Provider further notes that the rehabilitation agency did not terminate its participation in the Medicare program in connection with the 1987 sale. If it had, the Provider would have had to submit an application to participate in the program as a new applicant, and there would have been an interruption of service to Medicare beneficiaries pending completion of the Medicare survey and certification process. See Vernon Home Health, Inc. The Provider did

¹ Transcript ("Tr.") at 47.

² Tr. at 41, 48.

³ Tr. at 41.

⁴ Tr. at 41, 47.

not have to do that, and there was no interruption of service because the rehabilitation agency did not terminate its participation in the Medicare program. Further, if the Provider's participation in the Medicare program was terminated merely by reason of the 1987 sale, it would follow that the rehabilitation agency would have been a new provider after the sale. Even the Intermediary acknowledges, however, that the rehabilitation agency was not a new provider after the sale, as defined in Section 413.13(b)(5) of the LCC regulation.⁵ After the sale, the rehabilitation agency had participated in the Medicare program as a rehabilitation agency, under the same provider agreement and the same provider number, for at least three years.⁶ Thus, it was not a new provider for purposes of the LCC regulation.⁷

The Provider contends that 42 C.F.R. § 413.13(d) does not provide for forfeiture of the LCC carryforward upon a change of ownership.⁸ To the contrary, inasmuch as short-period cost reports are commonly filed upon a change of ownership, the plain language of the regulation clearly contemplates that the LCC carryforward is not forfeited merely because the ownership of a provider changes. 42 C.F.R. § 413.13(d) provides that when the two cost reporting periods following the imposition of an LCC disallowance comprise less than 24 months, the provider is entitled to carryforward the LCC penalty to a third cost reporting period. Thus, as construed by the Intermediary, HCFA Pub. 15-1 § 2614.A would be invalid. The carryforward provisions of the LCC regulation apply to a “provider of services,” which is defined to mean the patient care institution that has been certified to provide services to Medicare beneficiaries. As long as an institution participates in the Medicare program, it is a “provider of services” entitled to the LCC carryforward provided under 42 C.F.R. § 413.13(d). As construed by the Intermediary, HCFA Pub. 15-1 § 2614.A is clearly inconsistent with the plain meaning of 42 C.F.R. § 413.13(d).

The Provider notes that as construed by the Intermediary, HCFA Pub. 15-1 § 2614.A is also inconsistent with 42 C.F.R. § 489.18(d) and HCFA policy under that regulation. Section 489.18(d) states that an assigned agreement is subject to all applicable statutes and regulations and to the terms and conditions under which it was originally issued. Based on that regulation, HCFA has taken the position that the new owner of a provider is liable for overpayments made to the provider before a change of ownership. In HCFA's view, the determining factor is the purchaser's acceptance or rejection of assignment of the original provider agreement.”⁹ If the purchaser accepts assignment, it is liable for prior

⁵ Tr. at 88-89.

⁶ Tr. at 41, 47- 49.

⁷ Tr. at 47-49.

⁸ Tr. at 49, 104.

⁹ Provider Exhibit 25.

overpayments.¹⁰ If the purchaser rejects assignment, it is not liable.¹¹ HCFA's policy in this regard was affirmed by the Fifth Circuit in the Vernon Home Health case. The court ruled that the operative effect of 42 C.F.R. § 489.18(d) is that if assignment of the provider agreement is accepted, the provider and the new owner are subject to all of the terms and conditions and regulations under the Social Security Act which were applicable to the provider prior to the change of ownership.¹² Thus, the court essentially affirmed HCFA's view that the assignment of a provider agreement does not result in termination of the provider.¹³ The rule of law decided in the Vernon Home Health case is a two-way street. In Vernon Home Health, the court upheld the application of the rule established under 42 C.F.R. § 489.18(d) with respect to obligations imposed on a provider under the Social Security Act and implementing regulations. In this case, the Board must likewise uphold the application of that rule with respect to benefits bestowed upon the provider under the LCC carryforward provisions in 42 C.F.R. § 413.13(d).

The Provider observes that as construed by the Intermediary, HCFA Pub. 15-1 § 2614.A is inconsistent with the usual treatment of Medicare carryforward items and terms under other analogous Medicare reimbursement regulations and is, therefore, arbitrary and capricious. Medicare reimbursement terms that carryforward from one cost reporting period to the next, such as the LCC carryforward or the target amount limit on increases in inpatient hospital operating costs under Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), are not lost or revised when there is a change of ownership.

Finally, the Provider notes that the Intermediary has failed to cite a single legal authority that supports its position in this case. The Board decisions cited by the Intermediary¹⁴ do not address the LCC carryforward issue involved in this case. Neither case addressed the question whether the LCC carryforward may be reimbursed after a change of ownership when the provider continues to participate in the Medicare program under the same provider agreement and the same provider number (as in this case). In each of the cases cited by the Intermediary, the provider terminated participation in the program and argued that the LCC limitation should not apply to the year in which the provider terminates participation in the program. Thus, the providers sought not to carryforward an LCC penalty to future years but to carryback an LCC penalty to prior cost reporting periods. There is no provision in the LCC regulation allowing a provider to carryback an LCC penalty to prior cost reporting periods.

¹⁰ Id.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ See Intermediary Exhibit I-1 & I-2.

- § 413.13 - Amount of Payments if Customary Charges for Services Furnished Are Less Than Reasonable Costs
 - § 488.1 - Definitions
 - § 489.18 - Change of Ownership or Leasing: Effect on Provider Agreement
3. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):
- § 2150 - Home Office Costs -- Chain Organizations
 - § 2614.A - Carryover of Reasonable Cost Not Reimbursed Due to Lower of Reasonable Cost or Customary Charges Provision
4. Medicare Intermediary Manual, Part 4 (HCFA Pub. 13-4):
- § 4501.1 - Medicare Certification and Reimbursement Reviews
 - § 4501.2 - Transaction Identification Process
5. Cases:
- United States v. Vernon Home Health, 21 F.3d 693 (5th Cir.1994).
- The Board of Trustees of the University of Alabama v. Califano, CA 76-H (N.D. Ala. 1978).
- Cleveland Clinic Foundation v. Blue Cross and Blue Shield Association/Community Mutual Insurance Company, HCFA Admin. Dec. No. 94-D56, Medicare & Medicaid Guide (CCH) ¶ 42,746 September 21, 1994, aff'd, Cleveland Clinic Foundation v. Shalala, CV 2414, (N.D. Ohio 1996).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after considering the controlling law, regulations, manual instructions, facts, parties' contentions, evidence submitted and post-hearing briefs finds and concludes that the Intermediary improperly disallowed the Provider's LCC carryforward. The Board finds that a

continuity of services by the Provider, North Florida Physical Therapy Services, existed even though there was a change of ownership. Thus, there was no termination from the Medicare program by the Provider. There was no new application for certification to participate in the Medicare program. The Provider has the same provider number even though there was a change of ownership. Further, the contract of sale between the owners of the Provider stated that contract rights, such as the Medicare certification, were assets of the Provider and were transferred to the new owner upon execution of the contract. Based on all of these findings, the Board concludes that the change of ownership did not result in a termination of the Provider. As such, the Provider is entitled to the claimed LCC carryforward.

DECISION AND ORDER:

The Provider properly claimed and is entitled to be reimbursed its LCC carryforward. The Intermediary's adjustment is reversed.

Board Members Participating:

Irvin W. Kues
James G. Sleep
Teresa B. Devine
Henry C. Wessman, Esquire

FOR THE BOARD:

Irvin W. Kues
Chairman