PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2010-D34

PROVIDER -
Canon Healthcare Hospice, LLC
New Orleans, Louisiana

Provider No.: 19-1555

vs.

INTERMEDIARY -
BlueCross BlueShield Association/
Palmetto Government Benefits
Administrator

DATE OF HEARING -
May 11, 2009

Cost Reporting Periods Ended -
October 31, 2003 and October 31, 2004

CASE NOs.: 08-0382 and 08-0383

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ISSUE:

Whether the Intermediary followed the proper reopening procedures prior to the issuance of the Intermediary's letter dated June 11, 2007 (Notice of Effect of Inpatient Day Limitation and Hospice Cap Amount) recalculating the hospice cap for years ending October 31, 2003 and October 31, 2004, respectively.

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

This is a dispute over the 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 to insurance companies known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due the providers under Medicare law and under interpretive guidelines published by CMS. 42 U.S.C. §1395h; 42 C.F.R. §§413.20 and 413.24.

The Medicare program provides coverage for terminally ill beneficiaries who elect to receive care from a participating hospice. 42 U.S.C. §1395x(dd). Medicare limits total reimbursement to a hospice for a fiscal year. That limit, the cap amount, is calculated by multiplying the cap amount by the number of Medicare beneficiaries admitted to the hospice program in that year. 42 U.S.C. § 1395f(i)(2). The intention of the cap was to ensure that payments for hospice care would not exceed the amount that would have been spent by Medicare if the patient had been treated in a traditional setting. The implementing regulations provide for payment in one of four prospectively-determined rate categories (routine home care, continuous home care, inpatient respite care, and general inpatient care) based on each day a qualified Medicare beneficiary is under a hospice election. 42 C.F.R. §418.302. The total payment to the hospice for inpatient care is subject to a limitation that total inpatient care days for Medicare patients not exceed 20 percent of the total days for which those patients had elected hospice care. 42 C.F.R. §418.302 (f). The fiscal intermediary notifies the hospice of the determination of program reimbursement at the end of the cap year. 42 C.F.R. 418.308(c) (cross reference 42. C.F.R. §405.1803). Payments made to a hospice during a cap period that exceed the cap amount are overpayments and must be refunded. 42 C.F.R §418.308(d). A hospice dissatisfied with a fiscal intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (the Board) within 180 days of the issuance of that determination. 42 C.F.R. §418.311; 42 C.F.R. §405.1835.

The Medicare regulation provides that a determination of an intermediary may be reopened with respect to findings on matters at issue in such determination. 42 C.F.R. §405.1885(a). A request to reopen must be made within three years of the date of the notice of the intermediary determination. An intermediary determination must be reopened and revised if, within the three

year reopening period, CMS provides notice to the intermediary that, at the time the determination was rendered, it was inconsistent with the applicable laws , regulations and/or CMS policy, and CMS explicitly directs the intermediary to reopen and revise the determination. 42 C.F.R. 1885(b)(1)(i) and (ii). No reopening of an intermediary determination is permitted after three years unless it is determined to have been procured by fraud or similar fault. 42 C.F.R. §405.1885(d). The regulations also specify what is required in the notice of reopening, it provides that all parties to any reopening shall be given written notice of the reopening and, when such reopening results in any revision, a complete explanation of the basis for the revision is to be mailed to the parties. 42 C.F.R. §405.1887(a). In addition, the parties shall be allowed a reasonable period of time in which to present any additional evidence or arguments in support of their position. 42 C.F.R. §405.1887(b).

The Medicare manual further delineates requirements of a notice of reopening. Specifically, CMS Pub. 15-1 §2931 entitled "Reopening and Correction" states in relevant part: [T]he term "reopening" means an affirmative action taken by an intermediary . . . to reexamine or question the correctness of a determination or decision otherwise final. CMS Pub. 15-1 §2932.A states the following with regard to notices of reopening and correction: "[t]he provider or other party will be advised in the notice as to the circumstances surrounding the reopening, i.e., why it was necessary to take such action, and the opportunity to comment, object, or submit evidence in rebuttal." Section 2932.A further states when a correction is made in a determination following the reopening, the notice of correction will bear the legend "Notice of Correction-Program Reimbursement."

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Canon Health Care Hospice, LLC (Provider) is a Medicare certified hospice located in New Orleans, Louisiana. Palmetto Government Benefits Administrator (GBA) (herein the Intermediary) is the Provider's Medicare fiscal intermediary.

On October 12, 2004 the Intermediary issued a letter entitled "Notice of Effect of Inpatient Day Limitation and Hospice Cap Amount" to the Provider for fiscal year ending October 31, 2003.[1] In the notice, the Intermediary determined the Provider did not exceed the twenty percent limitation on inpatient days nor did it exceed the hospice cap amount; consequently, no amount was due the Medicare program. On July 15, 2005 the Intermediary issued an identical letter to the Provider for fiscal year ending October 31, 2004.[2]

On June 11, 2007, the Intermediary issued a "Notice of Effect of Inpatient Day Limitation and Hospice Cap Amount," advising the Provider that it was overpaid by Medicare because it exceeded the twenty percent limitation on inpatient days for fiscal years ending October 31, 2003 and October 31, 2004.[3]

The Provider appealed the Intermediary's adjustments to the Board and met the jurisdictional requirements of 42 C.F.R. §418.311 and 42 C.F.R. §§405.1835-405.1841. The Provider was represented by Lester W. Johnson, Jr., Esquire of Breazeale, Sachse & Wilson, LLP. The

[1] Provider's Exhibit P-1 (Case No. 08-0382).
[2] Provider's Exhibit P-1 (Case No. 08-0383).
[3] Provider's Exhibits P-2 (Case Nos. 08-0382 and 08-0383).

Intermediary was represented by Bernard M. Talbert, Esquire, of BlueCross BlueShield Association.

PARTIES' CONTENTIONS:

The Provider contends the Intermediary failed to issue a Notice of Reopening, as required by the regulations and the manual provisions. The Intermediary issued only the overpayment notice dated June 11, 2007.[4] The Provider acknowledges that CMS issued directions to the Intermediary in program instructions, *Medicare Program, Correction of Hospice Cap for Fiscal Years 2003 and 2004*, Transmittal No. 1226 (April 20, 2007) indicating that the hospice cap amounts for fiscal years 2003 and 2004 were incorrect, and requiring the Intermediary to reopen and recalculate the hospice cap amounts for those fiscal years.[5] The Provider asserts that while the transmittal instructions may fall within the scope of mandatory reopening provisions under 42 CFR 405.1885(b)(1), the Intermediary in this case never issued a written Notice of Reopening as required under 42 C.F.R. 405.1887.[6] Moreover, even if Transmittal No. 1226 could somehow be considered a valid notice of reopening, the transmittal only directed the Intermediary to reopen and revise the hospice cap determination, not the inpatient day limitation determination.[7] In this case the June 11, 2007 notice made changes to the payment only for inpatient day limitations. Although the hospital caps were revised, payments to the Provider were not affected since it did not exceed the caps.

The Provider asserts that the notice of June 11, 2007 cannot serve as both a Notice of Reopening and a notice of revision because, prior to issuing a revised determination, the Intermediary must reopen the initial determination, and reference the initial determination in the notice of reopening.[8] Even if the June 11, 2007 letter could serve as a notice of reopening, the Provider contends that the letter does not satisfy the regulatory and manual requirements for such notices in that there is no reference to the prior determinations dated October 12, 2004 and July 15, 2005; the word "reopening" is never mentioned in the correspondence; and the notice is absent any explanation as to why a reopening or a revision was necessary.[9] The Provider asserts that the June 11, 2007 notice is simply a new determination.

Finally, the Provider asserts that since issuing the initial determinations,[10] the Intermediary never sent any correspondence containing the word "re-opening," or anything else that meets the requirements of 42 C.F.R. §405.1887 or the manual provisions at CMS Pub. 15-1 §§2930, 2931 and 2932.[11] Consequently, the Provider argues that since the Intermediary never reopened the original determinations, then, *ipso facto*, the June 11, 2007 determination is invalid and without effect.

The Intermediary acknowledges that while the record lacks a discrete separably identifiable

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[4] Transcript (Tr.) at 10.
[5] Provider's Final Position Papers at 6; Provider's Exhibit P-4.
[6] Provider's Final Position Papers at 6-7.
[7] Provider's Final Position Papers at 6-8; Tr. at 11.
[8] Tr. at 11-12.
[9] Tr. at 13.
[10] Provider's Final Position Paper at Exhibit P-1 (Case Nos: 08-0382 and 08-0383).
[11] Provider's Final Position Papers at 8.

notice of reopening; the letter of June 11, 2007 actually combines both a notice of reopening and a notice of revision.[12] The Intermediary contends that 42 C.F.R. §405.1887(a) suggests that the reopening and revisions communication may be combined in one notice.[13] The Intermediary asserts that the June 11, 2007 Notice was issued in accordance with 42 C.F.R. §405.1885(b)(1) and CMS Transmittal No. 1226, and is well within the three year reopening period from the initial determinations dated October 12, 2004 and July 15, 2005.[14] The Intermediary conceded that while it was not at all transparent as to what was occurring, the Provider could tell what was corrected by comparing the notice of June 11, 2007 with the initial determinations.[15]

The Intermediary asserts that the Provider was informed of the overpayment prior to June 11, 2007. The Intermediary notes that the Provider's preliminary position papers, which the Intermediary acknowledged are not part of the formal record, indicate the Provider was notified by the Intermediary on May 22, 2007 of a pending hospice cap and inpatient day overpayment for cap years 2003 and 2004.[16] The Intermediary represented that the Provider acknowledged receipt of the notice on May 29, 2007 and requested more time to review the calculation before the overpayments were to be determined. The Intermediary requested that these documents be submitted into the record in order to reflect all communications and to contradict the Provider's assertions that June 11, 2007 was the first time it was notified of an overpayment for the hospice services.

The Provider objected to the Intermediary's late submission of evidence, as the documents were not included in parties' Final Position Papers, the Intermediary's Supplemental or Revised Supplemental Position Papers, or in the approved List of Exhibits.[17] In the event the Board allows the documents into evidence, the Provider requested additional time to submit post-hearing briefs on the contents of the documents and their effect on the reopening procedures.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and guidelines, the parties' contentions and evidence submitted, the Board, finds and concludes as follows:

First, the Board grants the Intermediary's request to submit the Intermediary's notice entitled "Notification of Pending Hospice Cap Overpayments for Canon Health Care Hospice" dated May 22, 2007 and the Provider's response letter to the notice, dated May 29, 2007.[18] The Board also grants the Provider's request to comment on these documents in its post-hearing brief. The Board finds the Provider has not been unduly prejudiced by the submission of these documents, as they were initially introduced by the Provider as part of its preliminary position paper and

[12] Tr. at 21-23; Intermediary's Revised Supplemental Position Papers at 8.
[13] Intermediary's Revised Supplemental Position Paper at 10.
[14] Intermediary's Final Position Papers at 5; Tr. at 21 – 22.
[15] Tr. at 22.
[16] Tr. at 42 and 43, Intermediary's letter (June 11, 2009). The Intermediary requested that the Intermediary's "Notification of Pending Hospice Cap Overpayments for Canon Health Care Hospice" dated May 22, 2007 and Provider's response letter dated May 29, 2007 be added as Intermediary Exhibit I-8(a) (Case No.08-0382) and Intermediary Exhibit I-8(b) (Case No. 08-0383).
[17] Tr. at 44; Provider's Post-hearing brief 2 (June 9, 2009).
[18] Intermediary's Exhibit I-8(a) for Case No. 08-0382 and Intermediary's Exhibit I-8(b) for Case No. 08-0383.

because of the Board's findings, discussed below.

The Board finds that while the Intermediary's notice of May 22, 2007 was issued within the three year reopening period, the notice lacks a complete explanation as to the circumstances surrounding the revision as required by 42 C.F.R. §405.1887(a) and CMS Pub. 15-1 §2932A. The Intermediary conceded that the process was not wholly transparent and that a notice of reopening was never furnished to the Provider. The Intermediary argued that the Provider could determine what correction was being made by comparing the revised calculation with the original calculation.[19] The Board notes that the Provider requested the original calculations in its response letter dated May 29, 2007;[20] however, the record does not indicate the Intermediary furnished the requested information. Instead, on June 11, 2007, the Intermediary issued a "Notice of Effect of Inpatient Day Limitation and Hospice Cap Amount," and demanded repayment of amounts related to the inpatient days limitation.

The Board also finds that the June 11, 2007 letter does not meet the prior notification requirement for purposes of "reopening." While the June 11, 2007 notice provides a revised calculation, it offers no further explanation as to why the changes were needed. The Intermediary also failed to allow the Provider an adequate opportunity to submit evidence rebutting the revisions as required by the regulations and manual provisions. 42 C.F.R. §405.1887(b) and CMS Pub. 15-1 §2932.A.

The Intermediary argues that the June 11, 2007 letter satisfies the reopening provisions, as it actually combines both the notice of reopening and notice of revision.[21] The Board notes that the regulations anticipate two distinct steps in the reopening process. First a notice of reopening is issued, which is followed by a notice of revision. Moreover, the manual provisions require that when a correction is made in a determination following the reopening, the notice will bear the legend "Notice of Correction-Program Reimbursement." In this case, the Intermediary did not insert the appropriate legend on the June 11, 2007 notice and therefore failed to follow the reopening procedures as required in the regulations and manual provisions. The June 11, 2007 letter is, therefore, ineffective as a reopening and revision to the initial determination of reimbursement.

DECISION AND ORDER:

The Intermediary failed to follow the proper reopening procedures prior to the issuance of the Intermediary's letter dated June 11, 2007. The Intermediary's determination dated June 11, 2007 is reversed.

[19] Tr. at 22-23.
[20] Intermediary's Exhibit I-8(a) (Case No. 08-0382); Intermediary's Exhibit I-8(b) (Case No. 08-0383).
[21] Tr. at 21-23; Intermediary's Revised Supplemental Position Papers at 8.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire
Yvette C. Hayes
Keith E. Braganza, C.P.A.
John Gary Bowers, C.P.A.

FOR THE BOARD:

Suzanne Cochran, Esquire
Chairperson

Date: June 4, 2010