CENTERS FOR MEDICARE AND MEDICAID SERVICES

Decision of the Administrator

In the case of:	Claim for:
Ochsner Clinic—New Orleans Renal Dialysis Facility and Houma/Bayou Facility **Provider** **vs.** **Blue Cross Blue Shield Association/ Trispan Health Services** **Intermediary**	**Provider Reimbursement for Cost Reporting Period Ending: 12/31/96** **Review of:** **PRRB Dec. No. 2004-D43** **Dated: September 20, 2004**

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision of the Provider Reimbursement Review Board (Board). The review is during the 60-day period in Section 1878(f)(1) of the Social Security Act (Act), as amended (42 USC 1395oo(f)). Comments were received from CMS, Center for Medicare Management (CMM) requesting reversal of the Board's decision. The parties were then notified of the Administrator's intention to review the Board's decision. The Intermediary also submitted comments, requesting that the Administrator reverse the Board's decision. All comments were timely received. Accordingly, this case is now before the Administrator for final administrative review.

ISSUE AND BOARD DECISION

The issue before the Administrator is whether the Intermediary correctly disallowed Medicare bad debts related to amounts not included in the End-Stage Renal Disease (ESRD) composite rate.

The Board held that the Intermediary's adjustment disallowing the subject Medicare bad debts was improper. The Board found that the controlling the regulation provides reimbursement for bad debts relating to all covered ESRD items and services. The Board noted that Epoietin (EPO) is a covered item under

Medicare. The Board further found that the Providers met the regulatory requirements regarding collection efforts and that the Providers established that the bad debts at issue were related to administration of EPO. Thus, the Board concluded that the bad debts related to EPO are reimbursable.

SUMMARY OF COMMENTS

CMM commented, requesting reversal of the Board's decision. CMM argued that, although bad debts are reimbursable for services paid on the basis of a prospective payment system (including a composite rate), payment for bad debts has never applied to services paid based on a fee schedule, flat fee, or charge methodology. CMM explained that under a fee schedule or flat fee, Medicare does not share proportionately in a provider's incurred costs; instead, Medicare makes payment for specific services. The fee payment is not related to a specific provider's cost outlay for the services and does not include the concept of unrecovered cost. CMM further explained that the fee for providing and administering EPO, at issue in this case, includes a margin for profit.

Moreover, CMM argued that Medicare consistently has applied the bad debt policy to only cost reimbursement or cost-based prospective payment systems. CMM cited to examples where bad debts are not reimbursable for services paid on a fee schedule basis. Thus, CMM concluded that the bad debt provision does not apply to deductible and coinsurance amounts for services paid on a flat fee or fee schedule system.

The Intermediary commented, requesting reversal of the Board's decision and stating that CMM correctly analyzed the flaws in the Board's decision.

DISCUSSION

The entire record furnished by the Board has been examined, including all correspondence, position papers, exhibits, and subsequent submissions. All comments timely received have been included in the record and considered.

Section 1861(v)(1)(A) of the Social Security Act requires that providers of services to Medicare beneficiaries are to be reimbursed the reasonable cost of those services. Reasonable cost is defined as the "the cost actually incurred, excluding therefrom part of the incurred cost found to be unnecessary in the efficient delivery of needed health services, and shall be determined in accordance with regulations establishing the method or methods to be used, and the items to be included …" Id. This section does not specifically address the determination of reasonable cost, but authorizes the Secretary to promulgate regulations and

principles to be applied in determining reasonable costs. One of the underlying principles set forth in the Act is that Medicare shall not pay for costs incurred by non-Medicare beneficiaries, and vice-versa, i.e., Medicare prohibits cross-subsidization of costs.

These principles are reflected and further explained in the regulations. The regulations at 42 CFR §413.9(c) provides that the determination of reasonable cost must be based on costs related to the care of Medicare beneficiaries. However, if a provider's costs include amounts not reimbursable under the provider, those costs will not be reimbursable.

Relevant to this case, Section 1881 of the Act established Medicare coverage for ESRD patients and authorized the Secretary to promulgate appropriate regulations. Consistent with the statute, the regulations, at 42 CFR 413.170, et. seq., establish a prospective payment system for outpatient maintenance dialysis furnished in or under the supervision of an ESRD facility. The regulation also provides for additional payments above the composite rate for certain items and services, including payment for administration of EPO.

With respect to ESRD bad debts, similar to other prospectively paid facilities, the regulations provide that Medicare will reimburse for certain bad debts when an ERSD facility is unable to collect the coinsurance and deductible. Specifically, the regulation at 42 CFR 413.170(e) (1996) states that:

> (1) HCFA will reimburse each facility its allowable Medicare bad debts up to the facility's costs, as determined under Medicare principles, in a single lump-sum payment at the end of the facility's cost reporting period.
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> (2) A facility must attempt to collect deductible and coinsurance amounts owed by beneficiaries before requesting reimbursement from HCFA for uncollectible amounts Section 413.80 specifies the efforts facilities must make.
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> (3) A facility must request reimbursement for uncollectible deductible and coinsurance amounts owed by beneficiaries by submitting an itemized list of all specific noncollections related to covered services.

In 1997, the regulation at 42 CFR 413.170 was clarified and recodified as section 413.178. In the preamble to the final rule, the Secretary, in responding to a commenter, noted that the proposed regulation had not changed the existing bad

debt policy that reimbursement for bad debts is available only for covered services under the composite rate. The Secretary stated:

> Comment : One commenter suggested that the language in proposed §413.178, implies that ESRD facilities can be reimbursed for Medicare bad debts incurred *for all* covered services provided. The commenter contended that past policy had allowed reimbursement for Medicare bad debts incurred in the provision of "composite rate" dialysis services only. Therefore, the commenter recommended that the wording be modified to clarify that only bad debts related to composite rate services are subject to reimbursement.
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> Response : We have not made any changes to our existing bad debt policy. Medicare bad debts for ESRD services (that is, services covered under the composite rate) will continue to be determined by calculating a facility's unrecovered reasonable costs, which represent the difference between a facility's total Medicare revenues (including beneficiaries' payments) and Medicare total reasonable costs. Payment for allowable bad debts is limited to the lesser of the unrecovered reasonable costs or the total of Medicare uncollectible deductibles and coinsurance. An example can be found in chapter 27 of the PRM. We reimburse each facility its allowable Medicare bad debts in a single lump sum payment after the facilities' cost reporting period ends. As the commenter suggested, we have revised §413.178(c) to clarify, consistent with out longstanding policy, that reimbursement for bad debts is available only for covered services under the composite rate. (Emphasis added.)

Thus, the regulation was modified to state that the bad debt noncollections "related to covered services under the composite rate."

Further, under the Secretary's interpretive authority, the Provider Reimbursement Manual (PRM) has been issued, which provides instructions. Relevant to the issue in this case, Section 2710.2 of the PRM (PRM) states, in part:

> Reimbursable bad debts claimed on Supplemental Worksheet 1-3 (provider-based ESRD's) and Schedule D (Free-standing ESRD's), relate to Composite rate services and are not for separately billed items.

As cited above, an ESRD facility is reimbursed based on a prospectively determined composite rate based on historic costs using a certain provider base period. However, these historic base period costs do not reflect base period Medicare bad debts. Thus, consistent with congressional intent that Medicare costs not be borne by non-Medicare patients, Medicare bad debts are reimbursed as long certain criteria are met.

Conversely, certain services are not reimbursed as part of a facility's prospectively determined rate, but are separately billed, paid as an “add-on,” amount and are based on a fee schedule, flat fee, or charge methodology. Under such a payment methodology, Medicare does not share proportionately in a provider's costs, but makes a payment for a specific service. The fee payment is not related to specific provider cost outlay, thus, does not include the concept of unrecovered cost. Rather, payment is based on a pre-determined rate which includes a margin for profit. In this instance, the Administrator finds that the payment for the provision of EPO is such an “add-on” amount above the facilities' composite rate. The Administrator finds that longstanding CMS policy does not allow for the payment of bad debts related to the administration of EPO. Thus, consistent with the statutory prospective payment scheme, the regulations, and manual provisions, the Administrator finds that bad debts related to administration of EPO at issue in this case are not reimbursable as part of the Providers' Medicare bad debts.

DECISION

The decision of the Board is reversed in accordance with the foregoing opinion.

THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES.

Date: 11/17/04

/s/
Leslie V. Norwalk, Esq.
Deputy Administrator
Centers For Medicare & Medicaid Services