PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2019-D3

PROVIDER –
St. Helena Hospital - Clearlake

PROVIDER NO. – 05-1317

vs.

MEDICARE CONTRACTOR –
Noridian Healthcare Solutions

HEARING ON THE RECORD HELD – June 9, 2016

FISCAL YEARS – December 31, 2005 through December 31, 2008

CASE NOS. – 10-1176, 11-0252 11-0733, 12-0400

INDEX

ISSUES: [1]

ISSUE 1 – Whether the costs incurred by the Provider for its physician on-call expenses should be allowed for the four cost reporting periods at issue (2005, 2006, 2007, and 2008).

ISSUE 2 – Whether the Provider's costs of meals furnished to outpatients (sometimes referred to as non-allowable patient statistics) during the 2006, 2007 and 2008 cost reporting periods should be allowed.

DECISION:

After considering the Medicare law and program instructions, the evidence presented, and the parties' contentions, the Provider Reimbursement Review Board ("Board") makes the following findings:

ISSUE 1 – The Board finds that the Medicare Contractor properly determined that the specialty physician on-call expenses were not allowable for the 2005, 2006, 2007, and 2008 cost reporting periods.

ISSUE 2 – The Board finds that the Medicare Contractor's adjustments relating to costs of meals furnished to outpatients for the 2006, 2007, and 2008 cost reporting periods were not proper. The Board remands these adjustments back to the Medicare Contractor to reverse the reclassification that moved these meals to a non-reimbursable cost center.

INTRODUCTION:

St. Helena Hospital Clear Lake ("St. Helena" or "Provider") is a short-term acute care hospital located in Clear Lake, California. The Provider became a critical access hospital ("CAH") in 2005. St. Helena's designated Medicare Contractor[2] during the time at issue was Palmetto GBA ("Palmetto") which was succeeded by Noridian Healthcare Solutions ("Noridian"). The Board will refer to Palmetto and Noridian collectively as the "Medicare Contractor."

St. Helena timely appealed multiple issues resulting from Notices of Program Reimbursement ("NPRs") for FYs 2005, 2006, 2007 and 2008. There are only two issues remaining in these appeals.[3] The first issue concerns the costs incurred by the Provider for its physician on-call expenses for cost reporting periods 2005, 2006, 2007, and 2008. The second issue concerns the costs of meals furnished to outpatients for cost reporting periods 2006, 2007, and 2008.

St. Helena met the jurisdictional requirements for a hearing before the Board. The Board granted the parties request for a hearing on the record. St. Helena was represented by Patric Hooper of Hooper, Lundy and Bookman, P.C. The Medicare Contractor was represented by Jerrod Olszewski, Esq. of Federal Specialized Services.

---

[1] The parties agreed in writing to the issue statements as presented.
[2] The Board will refer to fiscal intermediaries ("FIs") and Medicare administrative contractors ("MACs") as Medicare Contractors.
[3] The remaining issues were either withdrawn by the Provider or administratively resolved.

STATEMENT OF THE FACTS:

ISSUE 1 – PHYSICIAN ON-CALL EXPENSES:

St. Helena contracted with physicians in the specialties of surgery, obstetrics, pediatrics and cardiology to provide on-call coverage and inpatient hospital services for these specialties.[4] On the cost reports under appeal, the Provider reported the on-call costs related to these specialty contracts as Part A Administrative Component costs[5] rather than Emergency Room costs.[6] The Medicare Contractor disallowed these on-call costs because the costs were not emergency room costs and, thereby, were not considered allowable.[7]

The parties stipulated to several facts related to this issue including the following:

- The costs are "on-call physician" costs not "physician availability services" because, among other reasons, the Provider is not paying the physicians at issue to be physically present in the emergency room.[8]
- The on-call physicians must be able to follow patients who are admitted to the hospital through the emergency room to stabilize their emergency medical conditions, including, for example, performing surgery, as required.[9]
- Because of the rural nature of the service area the Provider must pay doctors for being on-call during set hours, which is the only practical way the Provider can adequately staff its hospital with the doctors necessary to serve patients.[10]

CMS regulations related to on-call costs, at 42 C.F.R. § 413.70(b)(4), state:

> (4) *Cost of certain emergency room on-call providers.* (i) Effective for cost reporting periods beginning on or after October 1, 2001, the reasonable costs of outpatient CAH services under paragraph (b) of this section may include amounts for reasonable compensation and related costs for an emergency room physician who is on call but who is not present on the premises of the CAH involved, is not otherwise furnishing physicians' services, and is not on call at any other provider or facility**.** Effective for costs incurred for services furnished on or after January 1, 2005, the payment amount of 101 percent of the reasonable costs of outpatient CAH services may also include amounts for reasonable

---

[4] *See* Attachment to Stipulation #9 (example of an on-call contract). Exhibit P-22 for Case Nos. ("CNs") 11-0733 and 12-0400 contains a contract with Janzen, Johnston & Rockwell of California to have qualified physicians physically present in its Emergency Department. These costs are not on-call costs and are not part of this appeal.
[5] Exhibits P-18 (CNs 10-1176, 11-0252), P-2 (CNs 11-0733, 12-0400).
[6] Provider's Final Position Papers at 16 (CN 10-1176), at 18 (CN 11-0252), at 9 (CN 11-0733) and, at 7 (CN 12-0400).
[7] *See* Medicare Contractors Final Position Papers at 12-13 (CN 10-1176), at 15 (CN 11-0252), at 7-8 (CN 11-0733) and, at 6-7 (CN 12-0400).
[8] Stipulations – On-Call Physician Issue at 4, 5.
[9] Stipulations – On-Call Physician Issue at 8.
[10] Stipulations – On-Call Physician Issue at 11.

> compensation and related costs for the following emergency room providers who are on call but who are not present on the premises of the CAH involved, are not otherwise furnishing physicians' services, and are not on call at any other provider or facility: physician assistants, nurse practitioners, and clinical nurse specialists.

The parties dispute whether the cost associated with the on-call specialty physician contracts are allowable for the four years under appeal.

ISSUE 2 – COSTS OF MEALS FURNISHED TO OUTPATIENTS:

St Helena's had a policy to serve emergency room and ambulatory surgery patients a meal under certain circumstances. The Medicare Contractor determined that the meals served in ancillary departments, primarily to emergency room and outpatient surgery patients, were non-allowable as they were not served to inpatients in a room and board setting. The Medicare Contractor disallowed the cost for meals served to patients in ancillary departments as food is not a medical service in an ancillary department.[11]

The parties stipulated to several facts related to this issue including the following:

- The costs at issue are for meals/snacks to outpatients.[12]
- The serving of liquids, meals, snacks and nutritional supplements is required as part of the patient's care. They are not served for the patients' convenience but are part of the medical regimen required by the patients' conditions.[13]
- The meals, snacks and nutritional supplements served in the emergency room and outpatient surgery areas, are the same as those served to patients in the observation area, which are considered to be an allowable cost related to patient care.[14]

The parties dispute whether the cost associated with the meals, snacks and nutritional supplements served to patients in the Provider's emergency room and outpatient surgery areas are allowable costs on the Provider's 2006, 2007, and 2008 cost reports.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

ISSUE 1 – PHYSICIAN ON-CALL EXPENSES:

St. Helena contends it should be paid its on-call costs for its specialty physicians as it is required to have these physicians available within a 30 minute radius so they can be present when an emergency arises. Additionally, the Provider asserts that, based on 42 C.F.R. § 489.24, the on-call physician must not only be available to treat patients in the emergency room, but must also

[11] Provider's Final Position Papers at 27 (CN 11-0252), at 23 (CN 11-0733), at 17 (CN 12-0400).
[12] Stipulations – Outpatient Meals at 4.
[13] Stipulations – Outpatient Meals at 6-7.
[14] Stipulations – Outpatient Meals at 9.

be available to follow patients who are admitted as inpatients in the hospital in order to stabilize their emergency medical conditions.[15]

St Helena has argued that they are required to provide minimum physician services to meet the Title 22 State licensing and certification requirement for the State of California. Therefore, in order to satisfy the licensing requirements to do business in the State of California, an acute care hospital must provide these physician services on an availability, on-call, or standby nature. St. Helena argues that within the rural setting, standby/on-call physician fees are incurred and considered necessary and related to patient care. If the Provider did not compensate the specialty physicians, they would not be in compliance with Title 22 California licensing requirements.[16]

In addition, the Provider states that the Emergency Medical Treatment and Labor Act ("EMTALA"), 42 U.S.C § 1395dd, requires a hospital to stabilize the medical condition of a patient before they can be transferred to another facility. The Provider states that to stabilize a patient, they need the medical expertise of physicians specializing in surgery, obstetrics, pediatrics and cardiology. Since the specialty physicians may not be needed on a regular basis, the most cost effective way to get this required physician coverage is to contract with the physicians to provide on-call coverage.[17] The CAH is located more than 35 miles from another hospital and would need to have the capability to stabilize patients before they are transferred to an acute care hospital.

The Medicare Contractor argues that 42 C.F.R § 413.70(b)(4) is the only regulation that allows Medicare reimbursement of on-call services and that regulation allows for on-call services only in the emergency room. Additionally, the Medicare Contractor points out that, while these physicians were on call, they were performing services in the clinics and, therefore, the on-call costs are not allowable pursuant to 42 C.F.R § 413.70(b)(4).[18]

To determine if the contracted cost of the on-call services were allowable, the Board has to determine what type of on-call services the Provider contracted to receive. Throughout the record the Provider indicates that the specialty on-call services are related to inpatient services.[19] In the Provider's Supplemental Position Paper it is stated that the on-call costs are Part A inpatient hospital costs,[20] and the stipulations use the language "admitted to the hospital through the hospital's emergency room."[21]

---

[15] Provider's Final Position Papers at 20 (CN 10-1176), at 22 (CN 11-0252), at 13 (CN (11-0733), at 11 (CN 12-0400).

[16] Provider's Final Position Papers at 18-19 (CN 10-1176), at 20-21 (CN 11-0252), at 12 (CN 11-0733), at 10 (CN 12-0400).

[17] Provider's Final Position Papers at 20-21 (CN 10-1176), at 22-23 (CN 11-0252), at 14-15 (CN 11-0733), at 12-13 (CN 12-0400).

[18] *See* Medicare Contractors Final Position Papers at 12-13 (CN 10-1176), at 14-15 (CN 11-0252), at 7-8 (CN 11-0733), at 6-7 (CN 12-0400).

[19] While the Provider insists the on-call services are inpatient services, the Board notes the contracts under dispute state that the hospital "must arrange for the provision of professional consultation and treatment of patients who present to the Hospital and the Emergency Department[.]" *See* attachment to Stipulation #9 – On Call Physician Issue at 1. It is possible that some patients presenting to the emergency department would be seen by these specialty physicians on an outpatient basis. Additionally, the Medicare Contractor states that the specialty physicians are working in the clinics which has not been refuted by the Provider.

[20] *See* Provider's Supplemental Position Paper at 5.

[21] Stipulations – On-Call Physician Issue at 7, 10.

Moreover, the Provider has submitted a final decision rendered by the State of California Department of Health Care Services Office of Administrative Hearing and Appeals that includes as part of its "findings of fact" that "the Provider contracted with physicians to provide on call coverage for the medical, pediatric, and surgical units of the hospital[,]" and "to provide hospital *inpatient services* as necessary to provide for the needs of the medical, pediatric or surgical *inpatients* of the hospital."[22] That decision stated that 42 C.F.R. § 413.70 pertains to on-call costs in an *outpatient* setting so it is "not directly relevant to the issue in dispute which, involves reimbursement for the costs of *inpatient* services."[23]

Finally the Provider included the disputed on-call costs in the inpatient areas of the hospital's cost report, not the emergency room cost center,[24] and stipulated paying on-call doctors was the "only practical way to adequately staff its hospital[.]"[25] Based upon the Provider's representations the Board must find that the on-call costs are related to inpatient areas of the hospital, and not to the emergency room department which is in the outpatient area of the hospital.

The regulation at 42 C.F.R. § 413.70(b)(4) states that effective October 1, 2001, the reasonable cost of outpatient CAH services may include certain emergency room physician on-call costs. This regulation is very specific in the use of the language "emergency room" and "outpatient," and denotes that the on-call services must be related to the emergency room. This language clearly would exclude on-call services performed in the inpatient areas of the hospital or in non-emergency room outpatient settings.[26] Therefore, the Board finds that Medicare reimbursement is only available to CAHs for outpatient on-call services rendered in the emergency room setting.

The Secretary was clear in the *St. Luke Community Health Care* case[27] that emergency room on-call physician expenses are the only reimbursable on-call costs in a CAH. The court in its decision stated "[t]he Secretary's decision construes the Medicare provision at issue to identify

---

[22] *See* Exhibits P-52 (CN 10-1176), P-37 (CN 11-0252), P-14 (CNs 12-0400, 11-0733) at 2-3 (Emphasis added).
[23] *Id*. at 11 (Emphasis in original).
[24] Providers final Position Paper at 16 (CN 10-1176), at 18 (CN 11-0252), at 9 (CN 11-0733) and at 7 (12-0400).
[25] Stipulations – On-Call Physician Issue at 11.
[26] In preambles to final rules published in the Federal Register, CMS has been clear that physician on-call costs are only allowable in the emergency room setting. For example, in the preamble to the May 12, 1998 final rule, CMS made clear that no payment for on-call physician costs was available to hospitals, regardless of where the on-call services were rendered. *See* 63 Fed. Reg. 26318, 26353 (May 12, 1998) (where CMS stated that "As is the case for full-service hospitals, standby costs of emergency room physicians who are present at the emergency room are allowable costs and will, to the extent they are reasonable in amount, be taken into account in computing Medicare payment. However, Medicare does not recognize costs of "on-call" physicians as allowable costs of operating a CAH." (emphasis added)). Similarly, in the preamble to the August 1, 2001 final rule, CMS discusses the implementation of 42 C.F.R. § 413.70(b)(4) and states that, "under existing policy, the reasonable cost of CAH services to outpatients may *not* include any costs of compensating physicians who are not present in the facility but on call." *See* 66 Fed. Reg. 39829, 39922-39923 (Aug. 1, 2001) (Emphasis added). At that time, CMS added a new paragraph (4) to § 413.70(b) to "permit the reasonable costs of CAH outpatient services to include the reasonable compensation and related costs of emergency room on-call physicians under the terms and conditions specified in the statute." *Id.* at 39923. The August 1, 2001 preamble makes it clear that the intent of 42 C.F.R § 413.70(b)(4) is to only reimburse reasonable physician on-call costs that are related to the emergency room and not in other outpatient settings.
[27] *St. Luke Cmty. Health Care v. Sebelius*, No. CV 09-92-M-DWM-JCL, 2010 WL 1839411 (D. Mont. Apr. 14, 2010), *adopted by*, 2010 WL 1839405 (D. Mont. May 5, 2010).

emergency room physician on-call costs as the only on-call costs that are reimbursable under Medicare. This interpretation is not contrary to the plain language of the regulation, and the Court must defer to the Secretary's 'exercise of judgment grounded in policy concerns' seeking to prevent the Medicare program from bearing the costs associated with matters not covered by Medicare."[28]

Despite the clear language of the controlling regulation, the Provider has urged the Board to find that inpatient on-call physician costs should be considered to be allowable in this case on a theory that California state licensing and certification rules require the Provider to have these specialty physician services on an availability, on-call, or standby nature. The Board has reviewed the Title 22 State law, and does not find that the sections to which the provider refers, require that the provider must have a surgeon, cardiologist, obstetric or pediatrician available or on-call to comply with state law.[29]

The Board also finds St. Helena's argument that specialty physicians are needed to be on call to stabilize a hospital inpatient unpersuasive. The Provider's emergency room physicians[30] would be trained in emergency medicine and would have the necessary skills to stabilize a patient and, if necessary, transfer the patient to another hospital.

In conclusion, the Board finds that the costs related to the on-call coverage contracts for specialty physicians providing inpatient services were properly disallowed under 42 C.F.R. § 413.70(b)(4).

ISSUE 2 – COSTS OF MEALS FURNISHED TO OUTPATIENTS:

The Medicare Contractor in these appeals reclassified the costs of meals furnished in the emergency and outpatient surgery departments to a non-reimbursable cost center on the theory that "[u]nder the Medicare program, only medical services are covered in an outpatient setting.

[28] *Id.* at 11 (citing *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); 42 U.S.C. § 1395x(v)(1)(A)).
[29] In fact, the Board finds that the California state law states the ideal physician qualification which are preferred and then provides for an acceptable alternative if the ideal physician qualifications do not exist. In the Providers argument, they refer to several sections of California Title 22 state law, namely 70225 Surgical Services, 70415 Emergency Medical Services, 70417 Basic Emergency Medical Services Physician on Staff, 70495 Intensive Care Service Staff, 70549 Perinatal Unit Staff and 70653 Standby Emergency Medical Service, Physicians on Call. Section 70225 entitled "Surgical Service Staff" which states: "[a] physician shall be certified or eligible for certification in surgery by the American Board of Surgery. If such a surgeon is not available, a physician, with additional training and experience in surgery shall be responsible for the service." In addition, the Provider refers to section 70549 entitled "Perinatal Unit Staff" which states: "[a] physician shall have overall responsibility of the unit. The physician shall be certified or eligible for certification by the American Board of Obstetrics and Gynecologists or the American Board of Pediatrics. If a physician with one of the qualifications is not available, a physician with training and experience in obstetrics and gynecology or pediatrics may administer service." The Board has reviewed the other sections of the Californian Title 22 State law and does not find any information that would convince the Board that a CAH must have on-call contracts with the specialty physicians. Even if the Board could confirm state licensing and certification rules requiring these specialty physicians, state laws that conflict with clear federal Medicare payment regulations would not change the outcome of this appeal.
[30] Exhibit P-22 (CNs 10-1176, 12-0400) contains a contract with Janzen, Johnston & Rockwell of California to have qualified physicians physically present in its Emergency Department. These costs are not on-call costs and therefore not part of this appeal.

Since food is not a medical service, the dietary statistics reported in the Outpatient departments will be reclassified to a non-reimbursable cost center."[31]

The Board disagrees, and finds that the record in this case demonstrates that the outpatient meals are reimbursable because they were reasonable, necessary and related to patient care. Both parties have stipulated that the meals are being provided to ascertain discharge of bodily functions, to ascertain that the patient can retain food after surgery as a condition to be released from the surgical setting, that the serving of liquids and nutritional supplements was part of the patients' care prior to being released, and that the meals are not being provided for convenience but are part of the medical regimen required by the patients' conditions.[32]

42 C.F.R. § 413.9 states that "[a]ll payments to providers must be based on the reasonable cost of services covered under Medicare and related to the care of the beneficiaries. Reasonable cost includes all necessary and proper costs incurred in furnishing the services, subject to principles relating to specific items of revenue and cost." The Provider Reimbursement Manual, CMS Pub 15-1, § 2202.14 provides that "[o]utpatient services include services that are diagnostic in nature as well as those services and supplies which are incident to the services of physicians in the treatment of patients." The record demonstrates that meals were not provided to all outpatients and were not provided for convenience. Rather, when provided, they were part of the regimen required for the patient's condition.[33]

The Board finds based upon the stipulations made by both the Medicare Contractor and the Provider that the meals provided to patients in the emergency and outpatient surgery departments were related to patient care and, therefore, the Medicare Contractor's reclassification of these costs to a non-reimbursable cost center was not proper.

DECISION:

After considering the Medicare law and program instructions, the evidence presented, and the parties' contentions, the Board makes the following findings:

ISSUE 1 – The Board finds that the Medicare Contractor properly determined the specialty physician on-call expenses were not allowable for the 2005, 2006, 2007, and 2008 cost reporting periods.

ISSUE 2 – The Board finds that the Medicare Contractor's adjustments at issue relating to costs of meals furnished to outpatients for the 2006, 2007, and 2008 cost reporting periods were not proper. The Board remands these adjustments back to the Medicare Contractor to reverse the reclassifications that moved these meals to a non-reimbursable cost center.

[31] Exhibits P-38 (CN 11-0252), P-39 (CN 11-0733), P-34 (CN 12-0400).
[32] Stipulations – Outpatient Meals at 5-9.
[33] Stipulations – Outpatient Meals at 7.

BOARD MEMBERS PARTICIPATING:

Charlotte F. Benson, CPA
Gregory H. Ziegler, CPA, CPC-A
Robert A. Evarts, Esq.
Susan A. Turner, Esq.

FOR THE BOARD:

/s/
Board Member

DATE: November 26, 2018