

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2019-D5

PROVIDER –
Presence St. Joseph Hospital, Inc.

Provider No.: 14-0224

vs.

MEDICARE CONTRACTOR –
National Government Services

HEARING DATE –
February 21, 2017

Cost Reporting Period Ended –
June 30, 2008 and June 30, 2009

CASE NOS. – 13-2991 and 13-3853

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ISSUE STATEMENT:

Did National Government Services, the Medicare Administrative Contractor, properly determine the count of full-time equivalent residents (“FTEs”), used for the purposes of calculating payments for direct graduate medical education (“DGME”), indirect medical education (“IME”), and IME capital?¹

DECISION:

After considering Medicare law and regulations, arguments presented, evidence admitted, and the stipulations of the parties, the Provider Reimbursement Review Board (“Board”) finds that the Medicare Contractor properly determined that the FTEs in Attachment B² were not adequately documented, and therefore not allowable for the purposes of calculating payments for DGME, IME, and IME capital for the fiscal years ending June 30, 2008 (“FY 2008”) and June 30, 2009 (“FY 2009”).

INTRODUCTION:

Presence St. Joseph Hospital, Inc. (“St. Joseph” or the “Provider”) is a Medicare-certified short-term acute care teaching hospital located in Chicago, Illinois. St. Joseph’s designated Medicare Administrative Contractor is National Government Services (“Medicare Contractor”).³

St. Joseph operates graduate medical education programs. These appeals concern the calculation of FTEs for residents training in St. Joseph’s Podiatry program. A provider may include in its DGME and IME FTE counts the time residents spend in the provider’s hospital and, under certain circumstances, the time spent in non-provider settings, such as offsite clinics and physicians’ offices.⁴

St. Joseph claimed FTEs for DGME pursuant to 42 U.S.C. § 1395ww(h) and IME pursuant to 42 U.S.C. § 1395ww(d) on its cost reports for FYs 2008 and 2009. The Medicare Contractor audited the FTE counts and disallowed all of the Podiatry DGME and IME FTE’s for FY 2008 and the majority of the Podiatry DGME and IME FTEs for FY 2009.⁵

St. Joseph timely appealed the Medicare Contractor’s disallowance for FYs 2008 and 2009 to the Board, and both appeals met the jurisdictional requirements of 42 C.F.R. §§ 405.1835 - 405.1840. The Board held a consolidated live hearing for these two appeals on February 21, 2017. St. Joseph was represented by Ronald S. Connelly, Esq., Powers, Pyles, Sutter & Verville, PC. The Medicare Contractor was represented by Scott Berends, Esq., of Federal Specialized Services.

¹ Transcript (“Tr.”) at 7-8. Additional issue statements in Case No. 13-3853 were administratively resolved and are not addressed in this decision. Tr. at 12-13.

² See Stipulation of the Parties at Attachment B, Case No. 13-2991 for FY 2008 and Case No. 13-3853 for FY 2009 (both dated Feb. 21, 2017) (collectively “Stipulations for FYs 2008 and 2009”).

³ Medicare Administrative Contractors formerly known as fiscal intermediaries will be referred to as “Medicare Contractors”.

⁴ 42 C.F.R. §§ 413.78(a), (f), 412.105(f)(1)(ii).

⁵ Stipulations for FYs 2008 and 2009.

STATEMENT OF THE FACTS:

The Medicare program reimburses teaching hospitals for their share of the costs associated with DGME and IME. The calculation for reimbursement requires a determination of the total number of FTE residents in the teaching programs. The Medicare statute sets forth the formula for determining the number of FTE residents rotating at a provider. 42 U.S.C. § 1395ww(h) pertains to DGME and states in subparagraph (4)(E) the following, in pertinent part:

(E) COUNTING TIME SPENT IN OUTPATIENT SETTINGS.—Subject to subparagraphs (J) and (K), such rules shall provide that only time spent in activities relating to patient care shall be counted and that—

(i) effective for cost reporting periods beginning before July 1, 2010, all the time; [sic] so spent by a resident under an approved medical residency training program shall be counted towards the determination of full-time equivalency, without regard to the setting in which the activities are performed, if the hospital incurs all, or substantially all, of the costs for the training program in that setting; and

Any hospital claiming under this subparagraph for time spent in a nonprovider setting shall maintain and make available to the Secretary records regarding the amount of such time and such amount in comparison with amounts of such time in such base year as the Secretary shall specify.

42 U.S.C. § 1395ww(d)(5)(B) pertains to IME and states the following in clause (iv)(I):

Effective for discharges occurring on or after October 1, 1997, and before July 1, 2010, all the time spent by an intern or resident in patient care activities under an approved medical residency training program at an entity in a nonhospital setting shall be counted towards the determination of full-time equivalency if the hospital incurs all, or substantially all, of the costs for the training program in that setting.

CMS issued implementing regulations at 42 C.F.R. § 413.78 for DGME and at 42 C.F.R. § 412.105 for IME. The Medicare DGME and IME regulations permit a hospital to include the time residents spend in non-provider settings in the calculation of FTEs, subject to certain conditions.⁶ Additionally, the regulations at 42 C.F.R. § 413.75(d) identify the documentation requirements related to counting residents stating:

⁶ 42 C.F.R. §§ 413.78(f), 412.105(f)(ii)(D).

(d) *Documentation requirements.* To include a resident in the FTE count for a particular cost reporting period, the hospital must furnish the following information. The information must be certified by an official of the hospital and, if different, an official responsible for administering the residency program.

- (1) The name and social security number of the resident.
- (2) The type of residency program in which the individual participates and the number of years the resident has completed in all types of residency programs.
- (3) The dates the resident is assigned to the hospital and any hospital-based providers.
- (4) The dates the resident is assigned to other hospitals, or other freestanding providers, and any nonprovider setting during the cost reporting period, if any.
- (5) The name of the medical, osteopathic, dental, or podiatric school from which the resident graduated and the date of graduation.
- (6) If the resident is an FMG, documentation concerning whether the resident has satisfied the requirements of this section.
- (7) The name of the employer paying the resident's salary.

The preamble to the Final Rule published August 18, 2006, clarifies the documentation requirements for determining the resident FTE count, stating:

Proper documentation is required so that Medicare fiscal intermediaries can determine where and when a resident(s) is training and to allow the fiscal intermediary to make payment to the hospital based on the time the resident(s) spends at the hospital, which may be a percentage of the total time trained. A rotation schedule is the primary documentation that can be used to support the direct GME and IME resident counts but other similar documentation may be acceptable. --- Each hospital must have documentation which demonstrates, for the entire cost reporting period, the amount of time that the resident trained at the hospital and, if applicable, a nonhospital site.⁷

⁷ 71 Fed. Reg. 47869, 48077-78 (Aug. 18, 2006).

St. Joseph trained approximately fifteen Podiatry residents during each of its FYs 2008 and 2009.⁸ For FY 2008, the Provider claimed 9.64 DGME and IME Podiatry FTEs on its cost report and the Medicare Contractor denied all 9.64 Podiatry FTEs.⁹ For FYE 2009, the Provider claimed 9.5 DGME FTEs, and 10 IME FTEs on its cost report and the Medicare Contractor denied 8.59 Podiatry DGME FTEs and 8.98 Podiatry IME FTEs.¹⁰ The Medicare Contractor denied the Podiatry FTEs based on a review of the documentation for a sample of the residents.¹¹ Subsequently, St. Joseph provided additional documentation to the Medicare Contractor in support of its FTEs.¹² The parties stipulated that the FTEs in Attachment A, for rotations at St. Joseph, are allowable.¹³ However, the parties continue to dispute if the FTEs for rotations in Attachment B, are allowable.

The parties agree that the rotations can be grouped into categories based on the resident's location as stated on the rotation schedule,¹⁴ and that the documentation supporting the residents' locations within each category is substantially similar.¹⁵ Further the parties agreed to present to the Board a sample of five rotations, one in each category, and if the Board approves the Provider's method for determining the FTE counts for a category, then that methodology will be applied to all residents with that type of rotation.¹⁶

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

To document its residents, St. Joseph submitted rotation schedules that list the *scheduled location* for the residents' training¹⁷ and case logs from the Podiatry Residency Resource ("PRR") system.¹⁸ The PRR system provides the day, the location, and the type of surgical procedures performed by the residents.¹⁹ By cross-referencing the information in the PRR with the Provider's rotation schedules, St Joseph re-calculated its DGME and IME FTEs for the two years under appeal. The Medicare Contractor agreed to accept the FTE counts for residents assigned to a rotation at St. Joseph but reduced that count when the PRR data showed the resident was working somewhere else.²⁰ The Medicare Contractor has not agreed to include the FTE counts on Attachment B of both the Stipulations for FY 2008 and the Stipulations for FY 2009. Attachment B includes rotations identified as:

⁸ Provider's Post-Hearing Brief at 4. The Provider filed a consolidated Post-Hearing Brief that pertains to both Case Nos. 13-2991 and 13-3853. *See also* Stipulations for FYs 2008 and 2009 at Attachment B.

⁹ Provider's Post-Hearing Brief at 4.

¹⁰ *Id.*

¹¹ Stipulations for FYs 2008 and 2009 at p. 1.

¹² *Id.* at p. 2.

¹³ The Medicare Contractor agreed to accept the FTE counts for residents assigned to a rotation at St. Joseph but reduced that count when the PRR data showed the resident was working somewhere other than St. Joseph. Stipulations for FYs 2008 and 2009 at Attachment A; Provider's Post-Hearing Brief at 26. To this end, Attachment A is not at issue in this case and the Board did not review Attachment A.

¹⁴ Stipulations for FYs 2008 and 2009 at ¶ 8.

¹⁵ *Id.*

¹⁶ *Id.*; Provider's Post-Hearing Brief at p. 2-3.

¹⁷ For the Provider's rotations schedules, *see* Exhibit P-7 (FY 2008); Exhibit P-3 (FY 2009).

¹⁸ Exhibits P-16 to P-30 (FY 2008); Exhibits P-14 to P-28 (FY 2009).

¹⁹ *Id.*

²⁰ Stipulations for FYs 2008 and 2009 at Attachment A; Provider's Post-Hearing Brief at 26.

1. Dr. Zappa's office (also known as "the Foot Clinic");
2. "Multiple" locations including Surgicore/Floating, Surgery Center (also referred to as "Sx Centers/Floating"), Floating, Travel; or
3. "Away" locations (*e.g.*, rotations including Dr. Rodriguez, St Anthony Hospital).²¹

A summary by category of each year's disputed FTEs from Attachment B is included in the Provider's Post-Hearing Brief.²²

St. Joseph contends it used the information on the PRR conservatively to fine-tune the information on its rotation schedules when calculating its DGME and IME FTE counts.²³ The Provider points out the FTE counts for the St. Joseph rotations included in Attachment A of the Stipulations for FYs 2008 and 2009 were reduced using the PRR, and contends the PRR should be used consistently to both add and subtract time or it should not be used at all.²⁴

Finally, St. Joseph asserts that the Foot Clinic meets the requirements of a non-provider setting. Specifically, the Provider claims it paid 100 percent of the salaries and fringe benefits for the residents. In addition, for FY 2009, the Provider had a written agreement that obligated it to pay the costs of the resident training at the Foot Clinic.²⁵

The Medicare Contractor disagrees that the FTEs in Attachment B for FYs 2008 and 2009 are allowable for two reasons. First, the Medicare Contractor contends the PRR reports and other documents do not adequately document the residents' locations for the rotations in Attachment B.²⁶ Second, the Medicare Contractor believes there is a lack of documentation to show that St. Joseph Hospital incurred all or substantially all of the cost of training the residents while rotating through the Foot Clinic, a requirement for the Foot Clinic to be an allowable non-provider setting.²⁷

Specifically, the Medicare Contractor asserts that the PRR data reveals inaccuracies when compared to the rotation schedules,²⁸ providing an example of the Foot Clinic rotation for resident Gumbiner, where he only spent three days of his eleven-week rotation at the Foot Clinic.²⁹ Additionally, the Medicare Contractor points out that the PRR shows that the podiatry residents perform multiple procedures on some days and single procedures on other days.³⁰ The Medicare Contractor believes that St Joseph's methodology that treats multiple procedures on a

²¹ Provider's Post-Hearing Brief at 24-27.

²² Exhibit P-33 (Provider's Post-Hearing Brief).

²³ Provider's Post-Hearing Brief at 2-3.

²⁴ *Id.* at 27.

²⁵ *Id.* at 8-9.

²⁶ Stipulations of the Parties for FYs 2008 and 2009 at ¶ 5.

²⁷ Medicare Contractor's Post- Hearing Brief at 1-2. The Medicare Contractor filed a consolidated Post Hearing Brief that pertains to both Case Nos. 13-2991 and 13-3853.

²⁸ *Id.* at 3.

²⁹ *Id.* at 11.

³⁰ *Id.* at 12.

single day as a partial day and single procedures as a full day³¹ is neither a logical nor a legal basis for calculating the Provider's FTEs.³²

There are two questions before the Board: (1) does the PRR methodology used by the Provider accurately calculate St. Joseph's DGME and IME Podiatry FTEs for FYs 2008 and 2009 in accordance with the regulations? If so, only then must the Board decide whether the Foot Clinic is an allowable non-provider setting (if St. Joseph incurred all or substantially all of the cost of training the residents while rotating through that site).

The Provider explained the methodology it used to calculate the DGME and IME FTEs identified in Attachments A and B of the Stipulations for FYs 2008 and 2009 as follows:

- For residents assigned to a rotation at St. Joseph or the Foot Clinic - all days deemed to be at the assigned location unless there was evidence in the PRR showing otherwise.
- For residents assigned to an away location (*e.g.*, St. Anthony Hospital, KSB Hospital, Dr. Rodriguez, etc.) - all days deemed to be at a non-allowable location unless there was evidence in the PRR of an allowable location on that day.
- For residents assigned to multiple other rotations (*e.g.* Sx centers, Surgicore/Floating, travel) – days were allocated to allowable locations using a proxy based on cases at an allowable location divided by total cases because the Provider could not identify a primary location.³³

The Board reviewed the Provider's methodology for the various categories identified on Attachment B and finds that the Provider did not meet the requirements of 42 C.F.R. § 413.75(d) because it did not furnish information including the dates the resident was assigned to the hospital, other hospitals, or other freestanding providers. Specifically the Board finds that the data in the PRR contradicted the data on the rotation schedules and therefore the exact location of the resident for a particular day or period was often unclear. The Final Rule published August 18, 2006 identifies the documentation requirements related to DGME and IME FTEs stating:

Proper documentation is required so that Medicare fiscal intermediaries can determine **where and when** a resident(s) is training and to allow the fiscal intermediary to make payment to the hospital based on the time the resident(s) spends at the hospital, which may be a percentage of the total time trained. A rotation schedule is the primary documentation that can be used to support the direct GME and IME resident counts but other similar documentation may be acceptable. --- Each hospital must have documentation which demonstrates, for the entire cost reporting

³¹ *Id.*

³² *Id.*

³³ Exhibit P-35 (Provider's Post-Hearing Brief).

period, the amount of time that the resident trained at the hospital and, if applicable, a nonhospital site.³⁴

The Board reviewed the rotations categorized as the Foot Clinic and the Provider's methodology that assumes all days not in surgery are days at the Foot Clinic, and includable in the Provider's DGME/IME FTE counts. The Board finds the record does not support this assumption. Specifically the Board points out the rotation description for the Foot Clinic states in part:

- the resident is to assist with the clinic at St. Joseph or St. Anthony Hospitals, and
- the resident is scheduled to go to Crestwood retirement home on Friday, Windsor on Tuesday, and Golden Year on Tuesday and/or Thursday³⁵

Based on the description, it is clear that the Foot Clinic rotation includes many activities that are neither at the Foot Clinic nor at St. Joseph and, therefore, cannot be included in St. Joseph's DGME/IME FTE counts. Moreover, the record contains no information related to the amount of time the resident spent in surgery, or where and what the resident did when not in surgery. A review of the PRR for Resident Gumbiner's Foot Clinic rotation for the period June 27, 2008 through September 7, 2008 shows procedures on 4 days at the Foot Clinic and 13 days at other locations.³⁶ According to the Provider's methodology, all of the days in this rotation except for the thirteen days spent on procedures at other locations are allowable Foot Clinic time. The Board finds nothing in the record to support finding that Resident Gumbiner was working at the Foot Clinic for all but thirteen days of this eleven-week rotation. To the contrary, the Board finds the rotation description shows he should be working at many other locations during this period.³⁷

Next, the Board reviewed rotations categorized as "multiple" (e.g., Surgery Center, Surgicore/Floating, travel) and the Provider's methodology that allocates the days in the rotation period based on a proposed proxy of allowable cases to total cases. The Board reviewed Resident Gumbiner's six-day Surgery Center rotation for the period June 22, 2009 to June 27, 2009.³⁸ Resident Gumbiner was at St. Joseph for two of these days performing five procedures involving four individuals/cases and at St. Anthony Hospital for two days performing five procedures involving two individuals/cases. The location of Resident Gumbiner is not listed in the PRR for two days of this rotation period.³⁹ The Provider's methodology allocated 66.67 percent of this six-day rotation (four St Joseph cases divided by six total cases), or four days to St. Joseph.⁴⁰ The Board finds that the Provider's documentation does not support four days at St. Joseph. Rather, the documentation shows Resident Gumbiner was at St. Joseph for procedures on two days, at St. Anthony hospital for procedures on two days, with no location information for two days.⁴¹ Based on the record the Board finds that the Provider's use of this proxy does not

³⁴ 71 Fed. Reg. 47869, 48077-78 (Aug. 18, 2006) (emphasis added).

³⁵ See Exhibit P-13 (FY 2009).

³⁶ Exhibit P-24 Tab 1 (FY 2008). Note that this rotation has time in both FYs 2008 and 2009.

³⁷ See Exhibit P-13 (FY 2009).

³⁸ Exhibit P-20 at Tab 6 (FY 2009).

³⁹ *Id.*

⁴⁰ Exhibit P-12 at Tab 1 at 1 (FY 2009).

⁴¹ Exhibit P-20 at Tab 6 (FY 2009).

accurately identify the location of the resident⁴² and, therefore, does not meet the requirements of 42 C.F.R. § 413.75(d).

Finally, the Board reviewed the non-allowable “Away” rotations (*e.g.*, St. Anthony Hospital) to determine if the days that the resident performed a procedure at an allowable location could be included in St. Joseph’s DGME and IME FTE counts. The Board reviewed the August 4, 2008 to September 14, 2008 rotation for Resident Hatfield and found multiple procedures performed on some days and single procedures performed on other days.⁴³ The information in the PRR is limited and does not include such things as: time, what the resident was doing, and where he was located when he was not performing a procedure. The Board concludes that, when a resident is assigned to a non-allowable location (*e.g.*, St. Anthony’s Hospital), the PRR does not contain sufficient information for the Provider to assign a day to St. Joseph’s DGME and IME FTE count simply because a procedure was performed for some portion of that day at an allowable location.⁴⁴

The Board concludes that the Provider’s methodology does not sufficiently document the location of the residents in accordance with 42 C.F.R. § 413.75(d). Additionally, the Board finds the Provider also did not comply with the CMS regulations at 42 C.F.R. §§ 413.20 and 413.24, which require a provider to maintain sufficient financial records and adequate data to assure the proper determination of costs under the Medicare program. These record keeping standards require that data be accurate, maintained in sufficient detail to accomplish its intended purpose, and be capable of verification by qualified auditors. Because St. Joseph’s documentation of its Podiatry DGME and IME FTE’s is insufficient, the Board need not address whether the Provider incurred all or substantially all of the cost of training the residents rotating through the Foot Clinic.

DECISION:

After considering Medicare law and regulations, arguments presented, the evidence admitted and the stipulations of the parties, the Board finds that the Medicare Contractor properly determined the FTEs in Attachment B were not adequately documented and therefore not allowable for the purposes of calculating payments for DGME, IME, and IME capital.

BOARD MEMBERS PARTICIPATING:

Charlotte F. Benson, C.P.A.
Gregory H. Zeigler, C.P.A., CPC-A
Robert A. Evarts, Esq.

⁴² The description of the Surgery Center rotation states: “When there are no surgical cases scheduled at surgery centers or surgical cases are completed early in the day, time is spent assisting other residents at St. Joseph Hospital, St Anthony Hospital, NCVA, or at Dr. Zappa’s office.” See Exhibit P-8 (FY 2008); Exhibit P-13 (FY 2009).

⁴³ Exhibit P-21 at Tab 2 (FY 2009).

⁴⁴ The Board recognizes that the Medicare Contractor reduced the DGME and IME FTEs on Attachment A of the Stipulations of the Parties for FYs 2008 and 2009 when the PRR indicated the resident was performing a procedure at a non-allowable location for a portion of a day. Because the PRR does not include time, the Board agrees with the conservative approach used by Medicare Contractor for the St. Joseph rotations on Attachment A. Again, as previously noted, Attachment A is not at issue in this case and the Board did not review Attachment A.

FOR THE BOARD:

/s/
Charlotte F. Benson
Board Member

DATE: November 28, 2018