CENTERS FOR MEDICARE AND MEDICAID SERVICES

Decision of the Administrator

In the case of:	Claim for:
Bayside Community Hospital	**Provider Reimbursement for Cost Reporting Periods Ending: 9/30/02, 9/30/03, 9/30/04**
Provider	
vs.	
Blue Cross Blue Shield Association/ Trailblazer Health Enterprises, LLC	**Review of: PRRB Dec. No. 2007-D33 Dated: May 10, 2007**
Intermediary	

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the Provider Reimbursement Review Board (Board) decision. The review is during the sixty-day period mandated in §1878(f)(1) of the Social Security Act (Act) [42 USC 1395oo(f)(1)], as amended. The parties were notified of the Administrator's intention to review the Board's decision. Comments were received from CMS' Center for Medicare Management (CMM) requesting reversal of the Board's decision. Comments were received from the Provider requesting affirmation of the Board's decision. Accordingly, the case is now before the Administrator for final administrative review.

ISSUE AND BOARD DECISION

The issue is whether the Provider is eligible to receive payment on a reasonable cost basis pursuant to 42 CFR 412.113(c) for certified registered nurse anesthesia services provided in a critical access hospital (CAH).

The Board found that the Provider is entitled to receive reasonable cost reimbursement for the services of certified registered nurse anesthetists (CRNAs) obtained under the arrangement and should be reimbursed by the Intermediary pursuant to 42 CFR 412.113(c). The Board noted that CMS acknowledged in the August 1, 2001 *Federal Register* that the purpose of the pass-through legislation was to provide small rural hospitals with low surgical volumes with relief from the difficulties they might otherwise have in furnishing CRNA services for their patients. Critical access care hospitals or CAHs are by definition limited-services facilities located in rural areas and, as such, they serve a population much like those served by hospitals eligible for the pass through payments. Thus, CMS, in accordance with section 1861(e) of the Act and in light of the context of the pass-through legislation cited above, considered CAHs to be "hospitals" for purposes of extending eligibility for the CRNA pass-through payments to them."[1] The Board found that there was no distinction between CAHs that are located in rural areas and those that are "treated as being located in a rural area."

The Board further found that the term "rural" has the same meaning in the CRNA statute[2] as it does in section 1886(d) of the Act, as the CRNA statute adopts the language in the Act. The Board observed that Congress intended that urban hospitals that are redesignated and treated as rural hospitals would receive "all categories and designations available to rural hospitals" which would include pass-through payments for CRNA services.[3] Moreover, the Board stated that CMS' rationale for the denial of the pass-through payments to CAHs would frustrate the intent of Congress as well as that expressed by CMS in its own regulations.

The Board concluded that the Intermediary improperly denied the Provider's request to receive reasonable cost reimbursement for the services of CRNAs obtained under arrangement, and should approve the request and reimburse the Provider for CRNA services pursuant to CFR 412.113(c).

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[1] See Federal Register Vo. 66 No.143 dated 8/1/2001, page 39922.

[2] Pub. Law 100-485.

[3] See House & Senate Conference Agreement on Medicare, Medicaid, and SCHIP Provisions, Pub. L. No. 106-113 Sec. 401 (November 29, 1999).

SUMMARY OF COMMENTS

CMM commented, requesting that the Board's decision be reversed. CMM argued that the Board's finding that the Provider's claim for CRNA pass-through payments met the regulatory requirement that it be located in a rural area as defined in 42 FCR 412,62(f) is incorrect. CMM pointed out that section 410 of the Balanced Budget Refinement Act of 1999 allowed hospitals in urban areas to be treated as being located in a rural areas if certain conditions were met. CMM stated that the provision is strictly limited to three specific payments and not CRNA payments.

CMM cited examples of when section 1886(d) rural classification is not considered rural for other payment purposes outside of section 1886(d) of the Act. CMM argued that the reasonable cost reimbursement provision related to the CRNA services is outside of section 1886(d) of the Act. CMM asserted that hospitals reclassified under 1886(d)(8)(E) are not considered rural for purposes of the CRNA reasonable cost payment. CMM further argued that the regulations at 42 CFR 412.113(c)(2)(A) clearly limit application of the CRNA pass-through to a "hospital or CAH that is located in a rural area as defined in §412.62(f) and not deemed to be located in an urban area under the provisions of §412.64(b)(3)." CMM maintained that the regulations at §412.62(f) do not include rural designation under §412.103. Therefore, if the hospital is only considered to be located in a rural area by meeting the requirements at §412.103, the hospital would not be considered rural for purposes of §412.113.

CMM concluded that the Administrator should affirm the Intermediary's determination that the Provider was not entitled to Medicare pass-through payments for CRNA services since it is not physically located in a rural area as defined in the regulations at 42 CFR 412.62(f).

The Provider commented, requesting that the Board's decision be affirmed. The Provider argued that the Board's decision that the Provider is entitled to receive "pass-through" payment for the services of CRNAs obtained under arrangement is supported by substantial evidence in the record and is consistent with applicable law.

The Provider argued that CMS certified the Provider as a CAH effective March 1, 2001, thereby formally recognizing that the Provider met all of the regulatory requirements for CAHs, including the rural status requirement.[4] The Provider maintained that pursuant to 42 CFR 485.610(b) a hospital must have its "location in

[4] See Provider's Position Paper, Exhibit 1.

a rural area or treatment as rural" in order to be certified as a CAH. The Provider noted that the Intermediary agreed that the Provider was a CAH and is treated as rural for such purposes; that CAHs are eligibly for CRNA pass-through payments; and that the Provider properly submitted its request for CRNA pass-though payments for the relevant years.[5] The Provider disagreed with the Intermediary's position that the Provider's treatment as a rural hospital pursuant to Section 1886(d)(8)(E) of the Act had no bearing on whether the Provider is considered "rural" for purposes of the pass-through payment established by Public Law 100-485 and 42 CFR 412.113(c)(2)(A). The Provider maintained that by statutory definition, it is entitled to CRNA pass-through payments as a CAH.

Finally, the Provider argued that the Board's decision is supported by the plain language of the relevant statutes, the clearly expressed intent of Congress, and the purpose expressed by CMS in adopting the regulations applying the CRNA pass-through payment to CAHs. The Provider concluded that CAHs cannot be considered rural for some purposes but not for others, and that recognition as a rural facility is part and parcel of the definition of a CAH. Therefore, the Provider argued that the Board's decision should be affirmed.

DISCUSSION

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

Certified registered nurse anesthetist services or CRNAs are generally not included in either the prospective payment rate or cost based payments to hospitals and critical care hospitals.. These services are typically billed as professional services to Medicare Part B and reimbursed on a fee schedule. The Family Support Act of 1998 authorized the continuation of a reasonable cost pass-through payment status for CRNA services to hospitals that, inter alia, are "located in a rural area (as defined for purposes of section 1886(d) of the Social Security Act)."[6]

Separate from the CRNA payment provision, payment for critical access hospitals or CAHs for inpatients services are not made under the inpatient prospective payment system mandated under section 1886 of the Act. CAHs are considered not to be hospitals excluded from the inpatient hospital prospective payment system.

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[5] See Stipulation Agreement at 2.

[6] Section 608(c) of Pub. Law No. 100-485 (October 13, 1988).

Instead, payment is made on a reasonable cost basis under section 1814(l) of the Act.

Pursuant to section 401(b)(2) of Pub. Law 106-113, section 1820(c)(2)(B) of the Act was amended to authorize a State to designate a hospital in an urban area as a CAH if under one of the criteria set forth in section 1886(d)(8)(E) of the Act were met.[7] Consequently, Section 1820(c)(2)(B) of the Act established a statutory requirement that a CAH must be "a hospital located in a county… in a rural area" (as defined in section 1886(d)(2)(D)) or considered "as being located in a rural area pursuant to 1886(d)(8)(E)."[8] CMS acknowledged this expanded ability for certain facilities to be considered rural in an interim final rule at 65 Fed. Reg. 47041 (Aug. 1, 2000)[9] and revised the regulations on location for CAHs at 42 CFR 485.610(b) to reflect this amendment.

However, prior to October 1, 2001, the reasonable cost pass-through benefits for CRNAs payment were not available to critical access hospitals as only hospitals were determined to be eligible. However, the regulation at 42 CFR §412.113(c)(2)(iii) expanded the CRNA pass-through opportunity to include a hospital or CAH that meet, inter alia, the criteria of 42 CFR 412.113(c)(2)(1)(A).[10] Consequently, pertinent to this case, the regulation stated that:

> The hospital or CAH is located in a rural area as defined in § 412.62(f) and is not deemed to be located in an urban area under the provisions of 42 CFR § 412.64(b)(3).

The regulation at 42 CFR § 412.62(f) followed the §1886(d)(2)(D) definition of an urban area and defined a rural area as "any area outside an urban area." [11]

In this case, the issue is whether the Provider was entitled to CRNA pass-through payments for services rendered during cost reporting periods ending September 30, 2002, September 30, 2003, and September 30, 2004. The area of contention arises over 42 CFR §412.113(c)(2)(i) which states that, inter alia, in order to receive the CRNA pass-through payment, the hospital or CAH must be "located in a rural area as defined in §412.62(f) and is not deemed to be located in an urban area under the

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[7] 66 Fed. Reg. 39828 39921 (Aug 1, 2001).
[8] Section 401(b)(2) of the Balanced Budget Refinement Act of 1999 (BBRA).
[9] See also 66 Fed. Reg. 39828, 39921 (Aug. 1, 2001)
[10] 66 Fed. Reg. 39922 (Aug 1, 2001).
[11] After October 1, 2004, the reference to 42 CFR § 412.62(f) was replaced by 42 CFR § 412.64(b)(3), but the definition of "rural area" did not change.

provisions of §412.64(b)(3)." The Provider contended that, as it is a critical care access hospital designated rural under section 1886(d)(8)(E) of the Act, it is to be treated rural for all purposes including 42 CFR 412.113.

Section 1886(d)(8)(E) of the Act allows hospitals located in urban areas to be treated as being located in a rural area if certain conditions are met. However, the provision is specific in application only to the following provisions: payment for inpatient services for Inpatient Prospective Payment Services (IPPS) under section 1886(d); payment for outpatient services under the Outpatient Prospective Payment Services (OPPS) under section 1833(t) of the Act, and payment for Critical Access Hospitals (CAH) under section 1820 of the Act. The rural designation under section 1886(d)(8)(E) of the Act is limited to the foregoing three applications and does not specifically refer to the reasonable cost pass-through payment for CRNA services.

The Administrator finds that, while the Provider may have been allowed to become a CAH under section 1886(d)(8)(E) of the Act and the implementing regulations at 42 CFR 412.103, neither the statute nor regulation specify that this designation for purposes of qualifying under section 1820 of the Act impacts the determination of its location for the purposes of receiving reasonable cost payment for CRNA services. A review of the statute indicates that, even if a hospital is reclassified as rural for purposes of payment under section 1886(d) of the Act, it is not considered rural for purposes of determining payments to the hospital where those payments are based on other parts of section 1886 and the Act.[12] While the Provider may have been allowed to become a CAH through redesignation under Section 1886(d)(8)(E) and 42 CFR 412.103(a)(2) even though it is located in an MSA, that status does not determine whether they are "rural" for purposes of §412.113(c)(A).

Section 1886(d)(2)(D) and 42 CFR § 412.62(f) definitions of urban/rural areas were law and regulation when the provisions that allowed the reasonable cost payment for CRNAs were enacted and later continued in 1989. Neither 42 CFR § 412.62(f) nor 42 CFR § 412.64(b)(3), was amended to expand or contract any definitions of rural under the subsequent provisions which allowed certain urban hospitals to be designated as CAHs. As a result, facilities that are located in an urban area, but treated as rural for certain purposes, were not covered under that definition as used under 42 CFR 412.113. While the Provider should be treated as rural for CAH designation purposes, the same treatment is not authorized for CRNA pass-through

[12] For example, while CMS has applied the effects of rural status to a hospital's indirect medical education (IME) payments since they are made under section 1886(d) of the Act, CMS does not apply the effect of rural status to direct graduate medical education (GME) payments, since they are made under section 1886(h) of the Act.

reimbursement purposes. Because the Provider was located in a MSA, the Provider does not meet the location requirement of the regulation and does not qualify for the CRNA pass-through payments.

Furthermore, the CRNA reasonable cost reimbursement payment provision is outside the scope of section 1886(D) of the Act. The CRNA reasonable cost payments were continued through section 608(c)(2) of the Family Support Act of 1988 (October 13, 1988) and is not part of section 1886(d) of the Act. Therefore, hospitals reclassified under 1886(d)(8)(E) are not considered rural for purposes of the CRNA reasonable cost payment. Consistent with this, the regulation at 42 CFR 412.113 (c)(2)(A) clearly limit application of the CRNA pass-through to a "hospital or CAH that is located in a rural area as defined in §412.62(f) and not deemed to be located in an urban area under the provisions of §412.64(b)(3)."[13] The regulations at §412.62(f) also do not include rural designation under §412.103. Therefore, the Administrator finds that if the hospital is only considered to be located in a rural area by meeting the requirements at §412.103, the hospital would not be considered rural for purposes of §412.113.

In conclusion, the Administrator finds that the Provider was not entitled to Medicare pass-through payments for CRNA services since it is not physically located in a rural area as defined in the regulations at 42 CFR 412.62(f).

[13] The Provider states that, because it is a CAH, it should, automatically be defined or deemed as being located in a rural area and be found to meet this part of the CRNA pass-through payment criteria. However, if CAHs were deemed to be rural for CRNA payment purposes, the Secretary would not have required CAHs to meet the rural criteria of 42 CFR 412.113 to receive CRNA pass-through payment.

DECISION

The Administrator reverses the decision of the Board in accordance with the foregoing opinion.

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

Date: 7/6/07 /s/

Herb B. Kuhn
Acting Deputy Administrator
Centers for Medicare & Medicaid Services

DECISION

The Administrator reverses the decision of the Board in accordance with the foregoing opinion.

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

Date: _____ _____

Leslie V. Norwalk, Esq.
Acting Administrator
Centers for Medicare & Medicaid Services