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MEDIATION AND MEDICARE PART A PROVIDER APPEALS: A USEFUL ALTERNATIVE

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I. INTRODUCTION

The Provider Reimbursement Review Board (the "PRRB" or "the Board") has begun to use mediation as a way to resolve Medicare Part A[1] provider reimbursement appeals in a more timely fashion. This article will briefly discuss the Medicare Part A provider appeals process, the Board's growing caseload, the development and implementation of the mediation alternative, and our results so far.

II. THE MEDICARE APPEALS PROCESS

Congress created the PRRB[2] in 1972 to give Medicare providers of services[3] an independent forum for resolving payment disputes arising from final determinations made by fiscal intermediaries.[4] The Board is comprised of five members, appointed by the Secretary of the

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1. Medicare was established under Title XVIII of the Social Security Act and is a health insurance program that provides hospital coverage to persons who are sixty-five years of age or older. Medicare also covers long-term disabled persons who require renal dialysis, and certain other individuals who may buy into the program regardless of age. 42 U.S.C. §§1395-1395ggg (1994). The Medicare program is comprised of three separate parts: Part A, Part B, and Part C. Each part is financed differently and offers a specific type of coverage. The Part A appeals process is discussed in this article. Part A covers inpatient hospital care, skilled nursing facility care, home health care, and hospice care. 42 U.S.C. §1395d(a) (1994).

2. See 42 U.S.C. §1395oo(a)(1) (1994) (providing the statutory authority for the Provider Reimbursement Review Board).

3. A Medicare provider of services is defined by statute to include a: "hospital, rural primary care hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency or hospice program. . .." 42 U.S.C. §1395x(u) (1994).

4. A fiscal intermediary is defined by regulation as "an entity that has a contract with [CMS] to determine and make Medicare payments for Part A and Part B benefits payable on a cost basis and to perform other related functions." 42 C.F.R. §400.202 (2001). Fiscal intermediaries are generally private insurance companies such as Empire Blue Cross or Mutual of Omaha Ins. Co.

Department of Health and Human Services, to serve three-year terms.[5] The statute requires that the members are knowledgeable about provider reimbursement, and that one member must be a certified public accountant.[6] The Board is administratively staffed by the Centers for Medicare & Medicaid Services' ("CMS")[7] Office of Hearings.[8]

A provider of services annually files a cost report with a fiscal intermediary. In the cost report, the provider identifies all of the items and services it has provided to Medicare beneficiaries for which it believes it is entitled to reimbursement. The fiscal intermediary audits the provider's cost report. Upon completion of the audit, the intermediary issues to the provider a notice of program reimbursement ("NPR"). If the provider is dissatisfied with the total amount of reimbursement determined by the intermediary, and meets certain jurisdictional requirements, it may appeal within 180 days to the PRRB.[9]

The PRRB holds formal administrative hearings to adjudicate the disputes between the parties. The hearings are adversarial;[10] witnesses are examined,[11] and evidence is presented.[12] After a hearing, the Board issues a written decision setting forth its findings,[13] and the parties may appeal the Board's decision to federal court.[14]

The PRRB currently has a caseload in excess of 10,000 cases.[15] While the Board has implemented several changes to streamline the appeals process, over the last few years the number of new appeals filed continues to increase. At the same time, the number of cases that have resulted in a live hearing before the PRRB has declined.

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5. *See* 42 U.S.C. §1395oo(h) (1994) (providing the statutory authority for the Board's composition, appointment, and duration of a member's term).

6. *Id.*

7. The Centers for Medicare and Medicaid Services, formerly the Health Care Financing Administration, is the federal agency within the U.S. Department of Health and Human Services that administers the Medicare and Medicaid programs. *See* Press Release, U.S. Dep't of Health and Human Servs., Remarks by HHS Secretary Tommy G. Thompson at Press Conference Announcing Reforming Medicare and Medicaid Agency (June 14, 2001), *available at* http://www.hhs.gov/news/press/2001pres/20010614b.html (on file with the Journal of Health Care Law and Policy).

8. Press Release, U.S. Dep't of Health Human Servs., The New Centers For Medicare and Medicaid Services (CMS) (June 14, 2001), *available at* http://www.hhs.gov/news/press/2001pres/20010614a.html (on file with the Journal of Health Care Law and Policy).

9. 42 C.F.R. §405.1835 (a)(1) (2001).

10. 42 C.F.R. §405.1861 (2001).

11. 42 C.F.R. §405.1855 (2001).

12. 42 C.F.R. §405.1859 (2001).

13. 42 C.F.R. §405.1871 (2001).

14. 42 C.F.R. §405.1877 (2001).

15. *See* DEP'T HEALTH AND HUMAN SERVS., PRRB MONTHLY PROGRESS REPORT FY 2001 (2001),

During each of the last three fiscal years, the Board has closed between 3,500 and 4,000 cases through adjudication, dismissal, settlement, or withdrawal. However, in excess of 3,500 new cases have been filed in each of the same three fiscal years. Because of the huge volume of cases pending before the PRRB, it takes approximately three years from the date of filing until the date of hearing. Consequently, an appeal filed in March 2002 will not cycle up for hearing until approximately March 2005.[16]

Although the Board has always encouraged the parties to attempt to resolve their differences informally, it has been the Board's experience that the parties rarely make an attempt to resolve pending appeals until shortly before the scheduled hearing date. While most cases do get resolved before the hearing date (often the day before), or before settlement; considerable resources have been expended by the parties and by the Office of Hearings staff in preparation for hearing. Furthermore, by the time a case cycles up for hearing and the parties begin settlement discussions, relevant documentation frequently has been lost or destroyed. Key reimbursement personnel may no longer work for the provider, and it is not unusual for the provider to be working with a completely different fiscal intermediary than the one that performed the audit and made the cost report adjustments for the year under appeal. Thus, parties often waste time and resources searching for documentation, filing briefs and engaging in protracted discovery for cases that ultimately settle without going before the PRRB. At the same time, the Board's docket remains clogged with hundreds of cases that never go to hearing, but must still be tracked and monitored administratively.

III. THE MEDIATION ALTERNATIVE

The PRRB believed that if the parties engaged in settlement discussions earlier in the appeals process, areas of dispute would be narrowed and or resolved more quickly, thereby decreasing the parties' expenses in pursuing the appeal as well as helping to decrease the Board's caseload. However, based on prior experience, the Board knew the parties would not engage in settlement discussions until a hearing date loomed in the near future. Thus, the Board had to take

16. Providers may request that their appeal be heard on an accelerated schedule. *See* DEP'T HEALTH AND HUMAN SERVS., PROVIDER REIMBURSEMENT REVIEW BOARD INSTRUCTIONS (2000) at Part 1C. While providers are routinely made aware of this option both through the Board's instructions and in the Board acknowledgement letters, only a handful of providers request an accelerated hearing schedule each year.

the initiative in getting the parties to start discussions earlier rather than later in the appeals process.

A. The Pilot Project

In order to determine whether offering mediation would be effective in getting the parties together earlier in the process to discuss settlement options, the CMS Office of Hearings, in conjunction with the PRRB, established an alternative dispute resolution process for the early resolution of pending cases. The Office of Hearings started a pilot mediation project during fiscal year 1998. Office of Hearings staff members were trained as mediators through the U.S. Department of Health and Human Services Departmental Appeals Board Shared Neutrals program.[17]

Providers with appeals pending against three fiscal intermediaries[18] were offered the opportunity to participate in mediation for cases that were less than six months old. The pilot program was also open to providers with appeals pending against the same three intermediaries where position papers had not yet been filed with the Board.

Parties requesting a mediation session exchanged and filed with the mediators a 1-2 page statement describing the issues under appeal. The parties were also directed to exchange all relevant documentation prior to the mediation session. The provider and a representative from the fiscal intermediary participated in each mediation session. Two mediators from the Office of Hearings conducted the sessions, which were held at the offices of the fiscal intermediary to allow for easier access to records. In most cases, several representatives from the provider attended the session, with a single individual designated as the spokesperson. Often the provider would have an attorney or a reimbursement consultant as its spokesperson. The intermediary generally had someone from its appeals staff present as well as either the original auditor or the audit manager. Both parties were required to have in attendance someone with authority to settle the case. Whenever possible cases were grouped for a single provider.

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17. The Departmental Appeals Board Shared Neutrals program offered basic mediation training to all federal agencies. All Office of Hearings mediators have extensive experience in Medicare reimbursement and are either attorneys or accountants. The Office of Hearings mediators were trained in and have primarily used the caucus model when conducting PRRB mediation sessions.

18. Blue Cross of California, Blue Cross of Texas and Health Care Services Corporation (formerly Blue Cross of Illinois) agreed to participate in the pilot project. Shortly thereafter Health Care Services Corporation left the Medicare program. Mutual of Omaha replaced them in the pilot project.

Thus, if the provider had four cases pending with similar issues that were conducive to mediation, all four cases were discussed at the same time.

During fiscal year 1998, the Office of Hearings scheduled 48 cases for mediation. Eight cases settled during initial discussions prior to meeting for the mediation session.[19] Thirty-six cases were mediated. Of those 36 cases, 34 were resolved at the table and the parties signed settlement agreements. In two cases, the parties were not able to come to resolution at the table, and the cases were scheduled for hearing within nine months of the mediation session. Although the parties were unable to reach agreement at the mediation table, discussions between the parties continued and both cases settled prior to the hearing date. The remaining four cases were rescheduled for a later date due to scheduling conflicts for the provider. Thus, of the 48 cases scheduled for mediation during 1998, 44 cases were fully resolved.

The mediation sessions have fallen into two basic formats: traditional caucus model mediation sessions and "quasi-mediation" sessions. The mediators initially expected that all of the mediation sessions would follow the caucus model whereby each party sets forth its position on the issue to the whole group, followed by individual sessions with the mediators, culminating with the group back together for final discussions. In the traditional mediation sessions, the mediators play a very active role in the process by keeping the parties talking, suggesting alternative approaches and offering a certain amount of "reality checking" with respect to timing and further avenues of appeal.

For some cases it is more productive for the parties to review each issue under appeal and establish specific expectations and timeframes for completing both production and a detailed review of documentation. While the mediators initially questioned whether there was any benefit to the parties in having mediators facilitate this type of quasi-mediation session, the parties found it beneficial to have a neutral third party setting and monitoring specific deadlines acceptable to the parties.

19. It is not unusual for cases to settle after the parties agree to mediate, but prior to the actual mediation session. The exchange of mediation summaries and documentation often leads to settlement.

B. After the Pilot Program

Because the pilot project results during the first year were encouraging, the program was expanded to include cases involving all intermediaries. Any provider with a valid pending appeal may request mediation. If the fiscal intermediary agrees to mediate, the case will be scheduled for mediation, generally within six months of the request. While the main reason for offering mediation continues to be to provide a quicker avenue through the appeals process, either party may request mediation at any point in the process. Since 1998, over 400 cases have been mediated in sessions conducted with 15 different intermediaries. In the majority of the cases, the parties were able to reach agreement during the initial mediation session. A few of the cases required additional telephone conferences or a subsequent meeting between the parties in order to finalize documentation review. Less than 10 of the more than 400 mediated cases have actually gone to hearing before the Board.

The mediation process has been successfully used in a wide variety of cases. The typical mediation session lasts approximately one half day and involves a home health agency with two or three pending appeals. However, the process has been used successfully with appeals involving hospitals and skilled nursing facilities as well. Some sessions have involved large chain organizations with many pending appeals. For those providers the mediation has been conducted in multiple sessions with each session focusing on a particular issue common to numerous appeals. For example, while the mediation for a large home health agency took six days to complete, it resulted in the settlement and withdrawal of 38 cases. In this instance, a mediation request was made with the initial appeal letter, and the mediation sessions were begun shortly after the cases were docketed, so resources from both parties focused on resolution through mediation, and were not wasted in filing extensive position papers with the Board or in responding to discovery. In another instance, three providers with individual appeals presenting different variations on the same issue participated in a mediation session. This session was unique in that approximately 200 other providers had pending appeals involving the same issue. The goal of the providers in this instance was to work out a solution to the issue and then use that solution as a model for settling the other 200 pending cases. Two of the three variations on the issue settled at the table, the third variation is still under discussion.

C. Participant Feedback

During fiscal year 2001, the Office of Hearings mediation staff conducted an informal survey of parties that had participated in the mediation program. Approximately 50 participants were mailed a written survey and asked to comment on the mediation process in general. Participants were asked why they chose the mediation alternative, whether the mediators helped to facilitate the discussion between the parties, whether the participant was satisfied with the outcome of the session, and whether the participant would use mediation in the future. After mediation sessions were completed, the mediators also informally asked participants about their reaction to the mediation and whether they would consider participating again. The responses to the informal survey were overwhelmingly favorable. In addition to speeding up the appeals process the participants identified several other benefits from the program. The mediation session often was the first time either party had an opportunity to fully explain its position in person to the other party. Several participants stated that spending several hours at the table with the other side helped to establish a working relationship that had not existed prior to the meeting. As many cost reporting issues re-occur year after year, the parties were frequently able to develop a methodology for resolving an issue in the current year's appeal as well as for subsequent years.

Many who responded to the survey identified the cost savings they were afforded by using the mediation process as a primary benefit. Providers appreciated the opportunity to resolve several appeals at one informal session rather than going through a more costly, formal adversarial hearing process. Additionally, smaller providers felt that the lower cost of going through the appeals process using mediation, coupled with the speedier resolution time may have helped some to stay in business.

A benefit identified by the fiscal intermediary was that using the mediation alternative helped in caseload control. Several intermediaries now identify cases that are good candidates for mediation as soon as the appeal has been filed and the intermediary contacts the provider to suggest using mediation. This eliminates the rigorous task of writing position papers for both parties, and thus allows the intermediary to allocate its appeal resources more effectively. That intermediaries identified this as a benefit was particularly noteworthy because when initially approached about participating in the program, several intermediaries expressed concern that participating

in the mediation process would just increase their already unmanageable appeals workload.

Finally, the survey participants uniformly indicated their intention to use mediation again in the future. Several reimbursement consultants and attorneys stated that they would recommend mediation to all of their provider-clients. One consultant went so far as to say that the "Board sponsored alternative dispute resolution process is the best single idea that has been implemented, in terms of a party-neutral expedition of the PRRB Appeal process, since the first hearing held on April 1, 1975."[20]

IV. CONCLUSION

The use of mediation has proven to be an effective alternative for providers seeking to resolve Medicare Part A provider appeals in a more expeditious fashion. While the use of mediation will not completely eliminate the Board's caseload, it has assisted parties in resolving appeals in a more timely and less costly manner. The PRRB with the Office of Hearings will continue to offer mediation as an alternative dispute resolution option.

20. *See* Survey response from a participant in the Mediation Pilot Program for Provider Reimbursement Review Board cases to Kathleen Scully-Hayes (received Mar. 30, 2001) (on file with the Journal of Health Care Law).