

appropriate, based on objective clinical criteria. In addition, before the patients receive any new or different respiratory therapy services, their treating physicians must be contacted and agree that the services are medically appropriate. The general managers of American Home Patient would be eligible to receive this bonus compensation based on the overall revenue growth of the revenue volume of the entire American Home Patient location that they manage, and there would be no additional or special bonus compensation based on the particular services that the manager recommends or provides.

2. Respiratory Care Practitioner – Bonus Pool

The second bonus structure involves Respiratory Care Practitioners who regularly provide respiratory therapy services to patients. In the course of treating patients, the Respiratory Care Practitioners may recommend that patients receive new or different respiratory therapy services. The Board again has been told that it should assume, for purposes of this ruling, that these recommendations always would be based on assessments of a patient's condition and are clinically appropriate, based on objective clinical criteria; and before the patients receive any new or different respiratory therapy services, their treating physician must be contacted and agree that the services are medically appropriate.

Respiratory Care Practitioners employed by American Home Patient would become eligible to receive bonus compensation through a location bonus pool system. All employees at a specific American Home Patient location, other than the general manager and sales representatives, are eligible to receive bonus compensation from the location bonus pool if they (i) are employed on the date the bonus is paid; (ii) have worked for the entire defined period (*e.g.*, 1 year) covered by the bonus; and (iii) have demonstrated satisfactory performance. The bonus pool establishes a set amount (*e.g.*, \$500) per eligible employee per period. Bonus compensation is paid from the location bonus pool if the location as a whole (i) achieves its target for net revenue for the period; (ii) achieves its target for unbilled revenue; and (iii) maintains the quality of orders and supporting documentation. There is no other bonus compensation, and specifically there is none calculated for individual Respiratory Care Practitioners based on the services that they specifically recommend or provide.

3. Sales Representative/Respiratory Care Practitioner – Bonus Pool

The third bonus structure involves Respiratory Care Practitioners who work primarily as sales representatives. The primary responsibility of the sales representative for a location is to call upon physicians and other potential referral sources in an effort to increase the location's market share of respiratory therapy services. However, the sales representatives may occasionally provide respiratory therapy services to patients. In the course of treating these patients, the sales representatives may recommend that patients receive new or different respiratory therapy services, as they do generally in carrying out their sales responsibilities.

The Board has been told that it should again assume, for purposes of this ruling that these recommendations for treatment always would be based on assessments of a patient's condition and are clinically appropriate, based on objective clinical criteria. In addition, before the patients receive any new or different respiratory therapy services, their treating physician must be contacted and agree that the services are medically appropriate.

The compensation of the sales representatives has a significant commission-based component that reflects growth of the location's market share. For each sales representative, a quarterly minimum

sales threshold is established for selected service lines (e.g., oxygen and respiratory assist devices). If the sales representative does not have a full year's worth of sales history at the location, then the quarterly minimum sales threshold is set at ¼ of the sales representative's annual salary. If the sales representative has a sales history at the location, then the quarterly minimum sales threshold is set at ¼ of the average number of new services for the prior year. If a sales representative spends less than full time on sales activities, the minimum threshold is reduced by the percentage of time the sales representative spends on non-sales activities. At the end of each quarter, the total number of new services is compared to the minimum sales threshold. Any new services above the threshold are multiplied by a certain dollar amount depending on the type of service up to 150% of the threshold. Any new services above 150% of the threshold are multiplied by a higher dollar amount depending on the type of service. Thus, the sales representative's compensation relates directly to both the volume of new services and the types of services provided, resulting from the efforts of the individual sales representative.

The Board has received specific assurances that the records used by American Home Patient to compute bonuses for the Respiratory Care Practitioners who serve as sales representatives in North Carolina will be compiled in such a way to ensure that no portion of the bonus computation for a sales representative would be based upon any part of the value of services rendered to any patient to whom a sales representative actually provided respiratory therapy services. This constitutes the complete and exclusive statement of facts upon which this ruling is based.

ANALYSIS

Under the circumstances described in the request for the Declaratory Ruling, the Board has been informed that it should assume, for purposes of this ruling, that any services, goods, appliances, or medications provided by any of the individuals in the various bonus pool arrangements described, always will be medically indicated or necessary and authorized by a physician. This is certainly an key consideration, but the bonus arrangements also implicate other considerations under the Board's rules.

The provisions to which this Declaratory Ruling relates are found in the Board's rule that sets out the various grounds for license denial or discipline, 21 NCAC 61 .0307. There are two different sections of that rule that pertain specifically to the request:

* * * * *

(18) Exercising influence on the patient for the financial gain of the licensee or a third party by promoting or selling services, goods, appliances, or drugs that are not medically indicated or necessary.

* * * * *

(21) Paying or receiving any commission, bonus, kickback, or rebate to or from, or engaging in any fee-splitting arrangement in any form whatsoever with, a person, organization, or agency, either directly or indirectly, for goods or services rendered to patients referred by or to providers of health care goods and services, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent the licensee from receiving a fee for professional consultation services.

Each of these provisions was adopted to eliminate any significant risk that the chance of pecuniary gain would be a substantial motivation in any particular Respiratory Care Practitioner's conduct. Thus, the analysis of the impact of these bonus provisions under the cited provisions of the Board's discipline rule should address the potential for pecuniary gain to become a factor that motivates the conduct of an individual Respiratory Care Practitioner, and the resulting potential for the exercise of improper influence on a patient by the Respiratory Care Practitioner.

Viewed in that light, the Board has determined that each of the first two bonus arrangements, those for general managers and those for Respiratory Care Practitioners who regularly provide care, are not computed based on the individual's efforts, but instead are predicated upon the overall revenue of the entire location that the general manager supervises, or from which an individual Respiratory Care Practitioner works. Therefore, based upon the Board's understanding and present analysis of the information provided, it does not appear that there is a significant risk that an opportunity could arise for exercising influence on the patient for financial gain which is set out as a basis for license denial or discipline in 21 NCAC 61.0307(18); or that either of these bonus arrangements should be viewed as an improper kickback that would violate 21 NCAC 61.0307 (21). Accordingly, and based on its present understanding of the arrangements, the Board has concluded that the bonus arrangements in described in Bonus Structure Number 1 and Bonus Structure Number 2 are consistent with the cited rule provisions.

As to Bonus Structure Number 3, for those individuals who serve as sales representatives and also provide respiratory care, the Board had concerns about the potential for exercising influence on the patient for financial gain. The Board recognizes that the main focus of sales representatives will be on increasing the revenues of the office locations from which they work and this will mainly involve encouraging the persons whom they contact to utilize the various services that are available through American Home Patient. As a result of these natural pressures, it may be a challenge for individual Respiratory Care Practitioners to divorce pecuniary considerations from individual cases, when the main focus of their work is on developing sales and increasing revenues. Therefore, the Board believes that for the sake of uniformity and the ease of administration, the better practice is to exclude any of these sales representatives from the provision of any respiratory care.

However, The Board has been assured that American Home Patient offices which serve patients in North Carolina will implement this particular bonus method for sales representatives to exclude from the computation any revenues that result from respiratory care or other health services actually rendered by an individual sales representative. The Attorneys for American Home Patient have presented an "Addendum to Plan for NC Branches" (Exhibit A) which requires all North Carolina branches to review all equipment setups and home evaluations and exclude those setups/evaluations from any RCP bonus calculations. The Board understands that implementing this procedure will ensure that none of the respiratory care or other health services provided by a sales representative will be counted in the bonus computation. Thus, the Board's concerns under 21 NCAC 61.0307(18) and (21) will be addressed by the adoption of this procedure.

CONCLUSION

For the foregoing reasons, and based upon the Board's present understanding of the present bonus arrangements and its current analysis of the relationship of the bonus arrangements to pertinent provisions in its rules, the North Carolina Respiratory Care Board concludes that payment of bonuses

under the arrangements described in Bonus Structure Number 1 (General Manager/Respiratory Care Practitioner), and in Bonus Structure Number 2 (Respiratory Care Practitioner-Bonus Pool) may proceed for the reasons articulated in this Declaratory Ruling.

As described above, in the Board's opinion, payment of bonuses to sales representatives described in Bonus Structure Number 3 has the potential for creating a situation in which a Respiratory Care Practitioner might exercise influence on the patient for financial gain. However, the Board concludes that based on the information presented the payment of bonuses to sales representatives, who also provide respiratory care may continue as long as the quarterly documentation for equipment setups and home evaluations is completed and these setups/evaluations are excluded from any RCP bonus calculations.

In closing, the Board also emphasizes that it reserves the right to review and reassess the issue of bonuses generally, as well as the particular bonuses paid by American Home Patient, in light of further experience with any issues that may come to the Board's attention in the future pertaining to the payment of such bonuses.

This the 3rd day of July, 2003

Joseph Coyle, MD
Chair
North Carolina Respiratory Care Board

CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Declaratory Ruling on the following persons by depositing the copy by certified mail, return receipt requested in an official depository under the exclusive care and custody of the United States Postal Service in the properly addressed postage-paid wrapper.

William T. Mathias
Ober, Kaler, Grimes & Shriver
120 East Baltimore Street
Baltimore, MD 21202-1643

This _____ day of July 2003.

Floyd E. Boyer, RRT, RCP
Executive Director
North Carolina Respiratory Care Board