

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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Opinion No. 05-171

Physical and Occupational Therapy Reimbursements Under the Medical Fee Schedule

QUESTION

Does the method of reimbursing physical and occupational therapy (“PT/OT”) facilities under the medical fee schedule, as prescribed in Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09, violate the equal protection provisions of the Tennessee Constitution?

OPINION

No. The method of reimbursing PT/OT facilities under the medical fee schedule, as prescribed in Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09, does not violate the equal protection provisions of the Tennessee Constitution because reimbursing PT/OT facilities differently, based on whether the referring physician has an interest in the facility, is rationally related to a legitimate state interest.

ANALYSIS

Pursuant to Tenn. Code Ann. § 50-6-204(i)(1) (2005) the Commissioner of the Department of Labor and Workforce Development promulgated, by public necessity rules, a comprehensive medical fee schedule for the reimbursement of medical services provided in a workers’ compensation matter.¹ The medical fee schedule is a “Medicare-based system,” employing conversion factors. Tenn. Comp. R. & Regs. 0800-2-18.01(1). The amount of reimbursement is determined by a two-step process: Determine what Medicare would reimburse for such services, then multiply that amount by the applicable percentage listed in the medical fee schedule.²

Under two of the medical fee schedule rules, Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) and Tenn. Comp. R. & Regs. 0800-2-18-.09, PT/OT facilities are reimbursed differently, for the same services, based on whether the facility is “physician- affiliated” or “independently-owned.”

¹On April 13, 2005, this Office approved the rules for legality. See Tenn. Code Ann. § 4-5-211.

²The result of this formula will be used only if it is less than the service provider’s usual charge or any other contracted price, i.e., reimbursement will be the lesser of all these amounts. Tenn. Comp. R. & Regs. 0800-2-18-.02(2)(b).

Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) prescribes the applicable percentages for reimbursement of PT/OT services as follows:

	Conversion Factor	As a percent of TN Medicare Rate
Physical and Occupational Therapy		
Independently-owned Facilities-For First 6 visits..	\$56.85	150%
Visits 7-12.....	\$49.27	130%
Visits over 12.....	\$37.90	100%
Physician-affiliated Facilities-For First 6 visits.....	\$49.27	130%
Visits 7-12.....	\$39.79	105%
Visits over 12.....	\$37.90	100%

Tenn. Comp. R. & Regs. 0800-2-18.09(1) defines a “physician-affiliated” facility as:

one in which the referring physician has any type of financial interest, which includes, but is not limited to, any type of ownership, interest, debt, loan, lease, compensation, remuneration, discount, refund, rebate, dividend, distribution, subsidy, or other form of direct or indirect benefit of any kind, whether in money or otherwise, between the facility to whom the physician refers a person for services and that physician. Any hospital based PT or OT facility shall also be deemed “physician-affiliated” if the referring physician is an employee of such hospital, or if he or she receives a benefit of any kind from the referral.

Thus, if a physician refers a patient to a facility in which he has an interest, that facility is considered a “physician-affiliated” facility, and its reimbursements for the first 6 visits is 130% of the Medicare rate. Visits 7 through 12 would be reimbursed at 105% of the Medicare rate. However, if a physician refers a patient to a facility in which she does not have an interest, that facility is considered independently-owned and will receive 150% of the Medicare rate for the first 6 visits and 130% of the Medicare rate for visits 7 through 12.

The question posed is whether this method of reimbursement is permissible under Tennessee law. The request suggests that reimbursing facilities differently, based on whether the referring physician has an interest in the facility, may unfairly discriminate against physical/occupational therapists working in a “physician-affiliated” facility.³ The question also encompasses the issue of

³For the purposes of this Opinion, we assume that it is possible for individual physical/occupational therapists to be paid differently, based on the reimbursement their facility will receive, even though individual physical/occupational therapists are paid directly by their facility, not as a reimbursement under the medical fee schedule.

whether the different treatment of facilities under Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09 is an appropriate legislative classification that comports with the equal protection provisions of the Tennessee Constitution. We conclude that Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09 bear a rational relation to a legitimate state interest and are therefore constitutional.

Two equal protection provisions of the Tennessee Constitution must be considered. Tenn. Const. art. I, § 8 provides as follows:

No man to be disturbed but by law.--That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property but by the judgment of his peers or the law of the land.

Similarly, Tenn. Const. art. XI, § 8 provides, in relevant part, as follows:

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pay the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

We begin analyzing an equal protection issue by ascertaining the level of scrutiny to be applied. *State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994). Because there are no suspect classes or fundamental rights at issue here, the method of reimbursing PT/OT facilities is subject to reduced scrutiny. *See Brown v. Campbell County Bd. of Educ.*, 915 S.W.2d 407, 413 (Tenn. 1995). Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09 do not violate the equal protection provisions of the Tennessee Constitution if they have “a reasonable relationship to a legitimate state interest,” *Gallaher v. Elam*, 104 S.W.3d 455, 461 (Tenn. 2003), or if “any set of facts can reasonably be conceived to justify” them. *Brown*, 915 S.W.2d at 414.

It is the opinion of this Office that reducing workers’ compensation premiums is a legitimate state interest. *See generally* 2004 Tenn. Pub. Acts ch. 962 § 42(a). Lower workers’ compensation premiums encourage employers, and the jobs they create, to locate or stay in Tennessee.

Providing lower reimbursements to “physician-affiliated” facilities than to “independently-owned” facilities, according to Tenn. Comp. R. & Regs. 0800-2-18.02(4)(a) & 0800-2-18-.09, is rationally related to this interest because it creates a lower profit for the “physician-affiliated” facility. Doing so decreases the referring physician’s incentive to make unnecessary referrals, thereby decreasing costs to insurance companies. Lower costs for insurance companies translates to lower workers’ compensation premiums for employers.

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