9-21-01

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

AP

BROOKWOOD-WALTON COUNTY
CONVALESCENT CENTER AND
BROOKWOOD-WASHINGTON COUNTY
CONVALESCENT CENTER,

Petitioner,

SDC-CWS

DOAH CASE NO. 00-3580
AHCA CASE NO.
RENDITION NO.: AHCA-02

vs.

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

This cause was referred to the Division of Administrative Hearings and assigned to an Administrative Law Judge (ALJ) for a formal administrative hearing and the entry of a Recommended Order. The Recommended Order of September 21, 2001, is attached to this Final Order, and incorporated herein by reference except as noted below.

RULING ON EXCEPTIONS

This case concerns a provider (Brookwood-Walton County Convalescent Center and Brookwood-Washington County Convalescent Center) that filed an interim request to raise its Medicaid rates so as to recoup, retroactively, some of a substantial increase in the premiums that the provider paid for insurance. The provider made two arguments. The provider asserted that:

(1) the Florida Legislature created new law by enacting the Patient Bill of Rights;

(2) the Patient Bill of Rights caused increased litigation;

(3) increased litigation created increased litigation expenses;

(4) insurance companies had to pay these increased litigation expenses, so they either stopped doing business in Florida or increased the cost of insurance (premiums);

(5) the increased premiums significantly increased the provider's operating expenses.

The provider also asserted that it was entitled to recoup the increased operating expense retroactively through an interim rate adjustment because its maintenance of insurance is a Medicaid "standard" that the provider was obliged to meet. The "standard," according to the provider, is articulated in HIM15, which advises providers that the agency will not allow them to recoup litigation losses as operating expenses when those losses are caused by management's imprudent failure to self insure or purchase insurance.[1] The ALJ agreed with the provider, but the Agency must respectfully disagree with the ALJ. See, eg., Eulo v. Florida Unemployment Appeal Comm'n, 724 So.2d 636, 637 (Fla. 2d DCA 1999) ("While the (agency) must accept...factual findings if they are supported by substantial, competent record evidence, it may reject the...legal conclusions based on that evidence."); Florida Public Employees Council 79, AFSCME v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994) ("An agency has the principal responsibility of

[1] Arguably, had Brookwood incurred such a loss and been denied its recovery of that loss by application of HIM15 to a prospective rate increase, the agency's action would be subject to an administrative challenge to ascertain whether Brookwood had acted reasonably in failing either to self insure or secure insurance at such an exorbitant increase in its cost. That case, however, is not before us.

interpreting statutes dealing with matters within (its) regulatory jurisdiction and expertise...Therefore, (the agency) has authority to overrule statutory interpretation and applications...").

In Section 409.908(2)(b), Florida Statutes (2000), the Florida Legislature specifically addressed the issue of interim rate adjustments to recoup increases in the cost of insurance, saying that, in developing the Long Term Care Reimbursement Plan, AHCA could not grant interim rate adjustments to reflect increases in the cost of general or professional liability insurance except under enumerated circumstances. Whether the instant provider meets those enumerated circumstances is not at issue here. But the prohibition against interim rate increases to cover the increased cost of insurance except in proscribed circumstances signals Legislative intent to disfavor using Medicaid funds to offset retroactively the cost of insurance. The decision in the instant case must be guided by that Legislative intent.

Interim Rate Increases, Generally

Section IV.J. of the Long Term Care Reimbursement Plan (hereafter referred to as "the Plan") generally addresses interim rate adjustments. It does not, however, specifically address interim rate adjustments to reflect increases in the cost of general or professional liability insurance. This omission should be construed to comport with the Legislature's reluctance to divert the use of Medicaid funds from the program's primary goal, which is patient care.

Even if the omission is not so-construed, the Plan, in relevant part, reads:\

> 2. Interim rate changes reflecting increased costs occurring as a result of ...operating changes shall be considered only if such changes were made to comply with existing State or Federal rules, laws, or standards ...

> (a) If new State or Federal laws, rules, regulations, licensure and certification requirements, or new interpretations of existing laws, rules, regulations, or licensure and certification requirements require providers to make changes that result in increased... operating...costs, requests for component interim rates shall be considered for each provider based on the budget submitted by the program...
> (b) In cases where new State or Federal requirements are imposed that affect all providers, (however,) appropriate adjustments shall be made to the class ceilings to account for changes in costs caused by the new requirements effective as of the date of the new requirements or implementation of the new requirements, whichever is later.[2]

The respondent took exception to paragraph #6 of the Recommended Order. This exception is denied. In paragraph #6, the ALJ found that "in determining the prospective rate, AHCA inflates the reported allowable costs in each category forward subject to various class ceiling limitations and target limitations." This finding is supported by competent substantial evidence. Within limits, the cost of insurance is an operating expense that a provider may prospectively recoup in a rate increase.

Respondent's exception to paragraph #11, however, is granted. While it was not necessary for the provider to self-insure, it was error for the ALJ to rely on a witness' statement outside the area of that witness' expertise to find that self- insurance is generally only feasible for facilities larger than Brookwood.

More importantly, to recoup the increase retroactively through an interim rate increase under Section IV.J.2, the burden of proof was on the provider to show either:

[2] If we assume that the enactment of the Patient Bill of Rights was solely responsible for the increase in the cost of insurance, then, according to the above-cited 2(b), the proper remedy would have been for the agency to make appropriate adjustments to the class ceiling because, as the evidence revealed, the increase affected all providers, not just the provider in the instant case.

(1) the enactment of new laws, rules, regulations, licensure or certification requirements that caused providers to have to make changes that resulted in increased operating costs, or

(2) the existence of new interpretations of existing laws, rules, regulations or licensure and certification requirements that caused providers to have to make changes that resulted in increased operating costs.

The evidence at hearing reveals that Respondent's initial denial of the interim rate increase relied on the provider's failure to show either that the enactment of the Patient Bill of Rights required providers to make changes that result in increased operating costs, or that HIM15 was a standard.

The Patient Bill of Rights

At hearing, the provider asserted that the enactment of the Patient Bill of Rights constituted new legislation that required providers to make changes that resulted in increased operating costs. While agreeing that the Patient Bill of Rights was new, the parties disputed the nexus between the enactment of the Patient Bill of Rights and the increased cost of insurance. Indeed, the nexus is tenuous, but to demonstrate its existence the provider relied on the testimony of its accountant and the introduction of the Brogan Report. The Brogan Report, however, was inconclusive on any single cause to explain the increase in the cost of litigation, and the accountant's testimony regarding that nexus was not within the purview of his expertise. Consequently, the provider failed to meet its burden of proof in this regard.

HIM15

At hearing, the provider argued that HIM15 constitutes a "standard," and in paragraphs 18, 21, 23, 30 and 31, the ALJ agreed. Those findings, however, are conclusions of law infused with policy consideration, and ACHA must respectfully disagree. Florida Public Employees Council 79, AFSCME v. Daniels, supra.

AHCA has great flexibility in determining the methodology by which to reimburse providers. The Florida Pharmacy Ass'n v. Cook, 17 F. Supp.2d 1293 (N.D. Fla. 1998). Additionally, AHCA's interpretation of whether HIM15 constitutes a standard should be afforded great deference, Baptist Hospital, Inc., v. Dept. of Health and Rehabilitative Services, 500 So.2d 620 (Fla.1st DCA 1986); Dept. of Professional Regulation Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984); Pan Am Airways v. Fla. Pub. Serv. Com'n, 427 So.2d 716 (Fla. 1983), because the interpretation is infused with policy determinations consistent with AHCA's statutory obligation to administer the Medicaid Program effectively and efficiently so as to preserve funding for patient care. Heifetz v. Department of Professional Regulation, Division of Alcoholic Beverages and Tobacco, 475 So.2d 1277, 1282 (Fla. 1st DCA 1985); Holmes v. Turlington, 480 So.2d 150, 153 (Fla. 1st DCA 1985). An agency's interpretation of its own rules and regulations is entitled to great weight and should not be overturned unless the interpretation is clearly erroneous. Orange Park Kennel Club, Inc., v. DBPR, 644 So.2d 574 (Fla. 1st DCA 1994).

AHCA's interpretation of HIM15 is articulated in the record through its witnesses, and that interpretation, as further explained in this Final Order, are more reasonable than the interpretations made by the ALJ. Section 120.57(1)(l), Fla. Stat.

Unlike a law, rule or regulation, HIM15 does not impose a requirement upon providers to purchase insurance.[3] Respondent's exceptions to the ALJ's conclusions at paragraphs #18, 21, 23, 30 and 31 are granted.

FINDINGS OF FACT

Except as modified herein, the Agency adopts the findings set forth in the Recommended Order, which is attached hereto and incorporated by reference.

CONCLUSIONS OF LAW

The Agency rejects the conclusions of law set forth in the Recommended Order.

IT IS THEREFORE ADJUDGED THAT:

The requests for an interim rate increase are denied.

DONE and ORDERED this 22nd day of February, 2002, in Tallahassee, Florida.

for RHONDA M. MEDOWS, MD., SECRETARY
Agency for Health Care Administration

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE ORDER TO BE REVIEWED.

[3] This conclusion is bolstered by reference to Florida's subsequent enactment of such a requirement in legislation that did not exist when the instant provider incurred the increased expense.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail, or by the method indicated, to the persons named below on this 28 day of February, 2002.

Virginia Daire

Virginia Daire, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Tallahassee, FL 32308-5403

COPIES FURNISHED TO:

Diane Cleavinger
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

Steven A. Grigas, Esquire
Agency for Health Care Administration
2727 Mahan Drive Building 3 Suite 3431
Tallahassee, FL 32308-5403

Theodore E. Mack, Esquire
Powell & Mack
803 North Calhoun Street
Tallahassee, FL 32303

Elizabeth Dudek, Deputy Secretary
Mail Stop #12