STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

RENDITION NO._____
CON NOS. 9753 & 9754

UNIVERSITY COMMUNITY HOSPITAL, INC.,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

HEALTHSOUTH OF LARGO LIMITED PARTNERSHIP d/b/a HEALTHSOUTH REHABILITATION HOSPITAL OF LARGO,

Intervenor.
_____/

DOAH CASE NO. 04-3133CON
AHCA NO. 2004006501

BAYCARE LONG TERM CARE HOSPITAL, INC.,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

HEALTHSOUTH OF LARGO LIMITED PARTNERSHIP d/b/a HEALTHSOUTH REHABILITATION HOSPITAL OF LARGO and KINDRED HOSPITALS EAST, LLC,

Intervenors.
_____/

DOAH CASE NO. 04-3156CON
AHCA NO. 2004006623

UNIVERSITY COMMUNITY
HOSPITAL, INC.,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent,

and

HEALTHSOUTH OF LARGO LIMITED
PARTNERSHIP d/b/a HEALTHSOUTH
REHABILITATION HOSPITAL OF
LARGO,

Intervenor.
_____/

DOAH CASE NO. 04-3157CON
AHCA NO. 2004006625

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), William R. Pfeiffer, conducted a formal administrative hearing. Subsequent to the hearing, Harry L. Hooper, was assigned to the case and submitted the Recommended Order rendered in this proceeding. At issue in this proceeding is whether the Certificate of Need (CON) applications filed by BayCare Long Term Acute Care Hospital, Inc. ("Baycare") and University Community Hospital, Inc. ("University"), each of which proposed to establish a new long term acute care hospital in District 5, should be approved. The Recommended Order dated November 29, 2005, is incorporated herein by reference, except where noted infra.

RULINGS ON EXCEPTIONS

HealthSouth of Largo Limited Partnership ("HealthSouth") and Kindred Hospitals East, LLC ("Kindred") filed exceptions to which BayCare filed a response. The Agency filed a Notice of Joinder to Kindred's first and fifth exceptions. University did not file any exceptions.

HEALTHSOUTH'S EXCEPTIONS

In its first exception, HealthSouth took exception to the findings of fact in Paragraphs 17C, 29, 45 and 50 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's general findings that there were geographic access problems to long term acute care hospitals ("LTACHs" or "LTCHs") in District 5. It should be noted that the ALJ, in Paragraph 17c of the Recommended Order, erred in finding that the parties stipulated that "both proposals will increase access." The parties never stipulated to this fact, and the record even indicates that the issue was still clearly in dispute during the hearing. See Transcript, Volume III, Page 296. However, in spite of that error, the remainder of Paragraph 17c, as well as Paragraphs 29, 45 and 50 of the Recommended Order was based on competent substantial evidence. See Transcript, Volume II, Pages 199-200; Transcript, Volume III, Pages 242, 244, 269, and 286-287; Transcript, Volume IV, Pages 333-334; Transcript, Volume V, Pages 547-548; Transcript, Volume VI, Page 696; Transcript, Volume VIII, Pages 1062-1063; Deposition of Mark Richardson, Page 94; UCH Exhibit 2, Pages 1-6 – 1-7, 6-1; UCH Exhibit 26 at Page 9; UCH Exhibit 29 at Pages 11 and 17-18; and BayCare Exhibit 3. The Agency can only reject or modify an ALJ's findings of fact if it determines that such findings are not based upon competent substantial evidence in the record. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Department of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Therefore, HealthSouth's first exception is denied. However, based on the fact that the ALJ erred in stating that the parties stipulated to the fact that both proposals will increase access, Paragraph 17c of the Recommended Order is changed to state

> c. With regard to subsection (5), 'The extent to which the proposed services will enhance access to health care for residents of the service district,' the parties disputed whether the proposals would increase access. However, currently there are geographic, financial

and programmatic barriers to access in District 5. The only extant LTCH is located in the southernmost part of District 5.

In its second exception, HealthSouth took exception to the findings of fact in Paragraphs 42 and 43 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's findings that HealthSouth "would not have sufficient capacity to provide for the need" of LTACH patients, and that "[a] CMR is a facility to which persons who make progress in an LTCH might repair so that they can return to the activities of daily living." However, the ALJ's findings in Paragraphs 42 and 43 of the Recommended Order were based on competent substantial evidence. See, Transcript, Volume IV, Page 441; Transcript, Volume VI, Pages 682-683; Transcript, Volume VII, Pages 884-886; BayCare Exhibit 14; and BayCare Exhibit 24 at Pages 79-80. Thus, the Agency cannot reject them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, HealthSouth's second exception is denied.

In its third exception, HealthSouth took exception to the findings of fact in Paragraphs 54, 55, 60 and 61 of the Recommended Order, as well as the conclusion of law in Paragraph 79 of the Recommended Order, arguing the ALJ erred in making findings of fact in these paragraphs that were not supported by competent substantial evidence. Specifically, HealthSouth argued the ALJ erred in finding that the Agency had adopted a geometric mean length of stay ("GMLOS") + 7 numeric need methodology. However, contrary to HealthSouth's argument, the findings of fact in Paragraphs 54, 55, 60 and 61 do not stand for that proposition. Rather, the ALJ correctly found that, "[a]lthough the Agency has not formally adopted by rule a need methodology specifically for LTCHs, by final order it has recently relied upon the 'geometric mean length of stay + 7' (GMLOS + 7) need methodology." This finding was based on competent substantial evidence. See Transcript, Volume VIII, Pages 1036-1037 and 1070-1071. Furthermore, the ALJ's other findings in these paragraphs were also based on competent substantial evidence. See, Transcript, Volume VIII, Pages 1067-1068; BayCare Exhibit 24 at Pages 48-52. Thus, the Agency cannot reject them.

See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Further, the ALJ's conclusion of law in Paragraph 79 of the Recommended Order was based on the findings of fact in Paragraphs 54, 55, 60 and 61 of the Recommended Order, which in turn were based on competent substantial evidence. In Section 120.57(1)(*l*), Florida Statutes (2005), an agency is allowed to "reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." However, in doing so, "the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 79 of the Recommended Order, it could not substitute conclusions of law as or more reasonable than those of the ALJ. However, HealthSouth's statement that there is no competent substantial evidence to support the ALJ's findings in Paragraph 54 that "[t]he GMLOS + 7 is a statistical calculation used by CMS in administering the PPS reimbursement system", and in Paragraph 61 that "BayCare's GMLOS +7 bed need methodology reasonably projects a bed need of 82 beds" is correct. The Agency finds that, based upon a review of the record, there are scrivener's errors in these two findings. See Transcript, Volume III, Page 247; and BayCare Exhibit 24 at Pages 35-39. Therefore, HealthSouth's exception to these sections of Paragraphs 54 and 61 will be treated as a motion to correct scrivener's errors, which is hereby granted. Paragraphs 54 and 61 of the Recommended Order are changed to state

> 54. Although the Agency has not formally adopted by rule a need methodology specifically for LTCHs, by final order it has recently relied upon the "geometric mean length of stay + 7" (GMLOS +7) need methodology. The GMLOS is a statistical calculation used by CMS in administering the PPS reimbursement system in determining an appropriate reimbursement for a particular "diagnostic related group" (DRG).

61. BayCare's GMLOS x 3 bed need methodology reasonably projects a bed need of 82 beds based on BayCare's analysis of the demand arising from the three District 5 BayCare hospitals and the two Mease hospitals.

KINDRED'S EXCEPTIONS

In its first exception, Kindred took exception to portions of the findings of fact in Paragraphs 17c, 29, 45 and 50 of the Recommended Order that state that its LTACH services are not reasonably available to patients' families residing in northern Pinellas County. Kindred argued the ALJ created a standard of LTACH geographic accessibility that is significantly more stringent that the standards that the Agency has adopted on a case-by-case basis in recent years. However, contrary to Kindred's argument, the Agency has not adopted any standards for geographic accessibility. The standards used by the ALJs in the cases cited by Kindred were only specific to those particular cases. In this case, even though there was no evidence presented as to drive times or service areas, there was competent substantial evidence that demonstrated there were geographic access problems in the district. See the ruling on HealthSouth's first exception supra. Therefore, Kindred's first exception is denied.

In its second exception, Kindred took exception to Paragraph 17c of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that there were programmatic barriers to LTACH services in District 5. "Programmatic access concerns arise when specific programs or services are not available at the existing hospitals or when the quality of the existing programs or services is inadequate." See, e.g., Manatee Memorial Hospital, L.P. v. Agency for Health Care Administration and North Port HMA, Inc., 2005 WL 3733782 at Page 18 (Fla.Div.Admin.Hrgs.) (AHCA Final Order Pending). There was competent substantial evidence to show that there were programmatic barriers to LTACH access in District 5. See, e.g., Transcript, Volume VI, Pages 739-743 and 755-757; BayCare Exhibit 19 at Pages 25-26; BayCare Exhibit 20 at Pages 10-12; and BayCare Exhibit 24 at Pages 123-124. Thus, the Agency cannot reject the

ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Kindred's second exception is denied.

In its third exception, Kindred took exception to the findings of fact in Paragraphs 36, 39 and 63 of the Recommended Order, arguing that they erroneously implied that an LTACH can admit patients that do not meet the mandatory admission criteria. However, regardless of what Kindred believed these findings may or may not imply, the findings themselves are based on competent substantial evidence. See, e.g., Transcript, Volume VI, Pages 697, 703-706 and 739-743. Thus, the Agency cannot reject them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Kindred's third exception is denied.

In its fourth exception, Kindred took exception to the findings of fact in Paragraph 38 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "it denies access to a significant number of patients in District 5." Specifically, Kindred argued there was no competent substantial evidence to support the term "significant", and that the Recommended Order did not quantify the number of LTACH-appropriate patients not admitted to Kindred-St. Petersburg because of inability to pay for their anticipated care. However, contrary to Kindred's argument, the ALJ's finding in Paragraph 38 of the Recommended Order was a reasonable inference based on competent substantial evidence. See Transcript, Volume VI, Pages 749-751. Thus, the Agency cannot reject it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Kindred's fourth exception is denied.

In its fifth exception, Kindred took exception to the findings of fact in Paragraphs 54, 55, 60 and 61 of the Recommended Order, as well as the conclusions of law in Paragraph 79 of the Recommended Order, arguing the findings and conclusions were not based on competent substantial evidence. For the reasons set forth in the ruling on HealthSouth's third exception supra, Kindred's fourth exception is denied, except for its exception concerning the second sentence of

Paragraph 54, which was treated as a scrivener's error, as noted in the ruling on HealthSouth's third exception supra.

In its sixth exception, Kindred took exception to the conclusions of law in Paragraphs 76, 78 and 79 of the Recommended Order, arguing the ALJ failed to consider the availability of LTACH beds in District 5 and the extent of utilization of these beds in reaching these conclusions. However, the conclusions of law in Paragraphs 76, 78 and 79 of the Recommended Order were based on the findings of fact, which in turn were based on competent substantial evidence. See the ruling on Kindred's first, second, third, fourth and fifth exceptions supra. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraphs 76, 78 and 79 of the Recommended Order, it could not substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, Kindred's sixth exception is denied.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, University's CON Application No. 9754 and BayCare's CON Application No. 9753 are both granted.

DONE and **ORDERED** this 7 day of April, 2006, in Tallahassee, Florida.

ALAN LEVINE, 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 A 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 AS 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 RENDITION OF THE ORDER TO BE REVIEWED.

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 11th day of April, 2006.

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