

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

APOLLO HEALTH AND)
REHABILITATION CENTER,)
)
Petitioner,)
)
vs.) Case No. 09-5214
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 22, 2010, an administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Peter A. Lewis, Esquire
Law Offices of Peter A. Lewis, P.L.
3023 North Shannon Lakes Drive, Suite 101
Tallahassee, Florida 32309

For Respondent: Kelly Ann Bennett, Esquire
Sheryl Rosen, Legal Intern
Agency for Health Care Administration
Fort Knox Building
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue in the case is whether the Agency for Health Care Administration (Respondent) used the correct nursing home bed capacity in calculating the Medicaid per diem rate for Apollo

Health and Rehabilitation Center (Petitioner) for the rate period beginning July 1, 2009.

PRELIMINARY STATEMENT

By notice dated August 19, 2009, the Respondent advised the Petitioner that the previously-determined Medicaid per diem rate effective on July 1, 2008, was being revised and reduced. The basis for the revision was a "correction" by the Respondent of the Petitioner's reported number of nursing home beds.

On September 9, 2009, the Petitioner filed a Petition for Formal Administrative Hearing with the Respondent. On September 22, 2009, the Respondent forwarded the request to the Division of Administrative Hearings, which scheduled the formal hearing. The hearing was rescheduled upon the filing of an Unopposed Motion for Continuance and was thereafter conducted on March 22, 2010.

At the hearing, the Petitioner presented the testimony of two witnesses. The Respondent presented the testimony of one witness. Joint Exhibits numbered 1 through 19 were admitted into evidence. Stipulated facts set forth in the Respondent's Second Unilateral Pre-hearing Statement have been incorporated herein as necessary.

The Transcript of the hearing was filed on April 5, 2010. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent is the state agency responsible for administering the Florida Medicaid (Medicaid) program.

2. The Petitioner operates a Florida-licensed nursing home and participates as an institutional provider in the Medicaid program.

3. The Medicaid program pays nursing home operators based on a prospective per diem rate which is calculated using cost reports submitted to the Respondent by the nursing home providers.

4. The cost reports are filed pursuant to the "Florida Title XIX Long-Term Care Reimbursement Plan" (the Plan), which the Respondent has adopted by rule.

5. The Plan incorporates guidelines and policies regarding reimbursement and accounting principles set forth by the federal Centers for Medicare and Medicaid Services (CMS) in "CMS Publication 15-1."

6. The Plan establishes the manner in which cost reports are submitted to the Respondent, provides an explanation of allowable costs, and sets forth the methodology by which cost reports are used to establish nursing home per diem rates. The rates are effective for a period of time referred to as the "rate semester."

7. The Respondent's Division of Health Quality Assurance (HQA) is responsible for Certificate of Need (CON) programs, related regulations and procedures, licensure determinations, and identification of licensed bed capacity.

8. Bed capacity is one of the factors used to determine per diem rates. The calculation of the per diem rate is affected by various cost limitations, including a ceiling based, in part, on the classification of the facility by bed capacity.

9. Neither the Plan nor the cost report instructions identify how to calculate the quantity of nursing home beds to be stated in a cost report.

10. The Respondent has historically utilized the number of beds listed on a Medicaid provider's license at the start and the close of the cost reporting period to establish the bed count applicable to calculation of the per diem reimbursement rates.

11. The cost reporting period relevant to this proceeding was calendar year 2008.

12. At all times during calendar year 2008, the Petitioner's licensed bed capacity was 120 beds.

13. In May 2008, Lexington Health and Rehabilitation Center (Lexington), an existing nursing home operator affiliated with the Petitioner, applied through the CON process to expand

its facility by 21 beds, from 134 beds to 155 beds. Lexington is not a party to this proceeding.

14. A statutorily-adopted moratorium in effect at all times material to this case prohibited the licensure of new nursing home beds.

15. Because of the moratorium on new beds, Lexington was required to procure the transfer of 21 licensed beds from an existing nursing home operator in order to proceed with the proposed expansion.

16. The Petitioner agreed to transfer 21 beds to Lexington.

17. The Lexington CON application was approved on August 22, 2008. The approval was unchallenged and became final on September 26, 2008.

18. On September 20, 2008, the Respondent issued a renewal license to the Petitioner for a 120-bed facility, valid through September 19, 2010.

19. Based on the approval of the Lexington CON application, the Petitioner began to reduce capacity by removing beds from service. The beds that were removed from service were no longer ready for immediate occupancy and could not be made so within a 48-hour period.

20. The Petitioner initiated alterations to the physical plant to reflect the reduced number of beds, and such

alterations precluded meeting minimum space requirements for the 21 beds. The Petitioner's patient census began to decline as the beds were decommissioned to that which would be anticipated given the reduction in available beds.

21. As included in the CON application, the Lexington plans were "approved for construction" by letter dated October 23, 2008, from the Respondent's Office of Plans and Construction (OPC).

22. The OPC had the responsibility to review, and approve or deny, construction plans. The OPC also had final authority to determine, post-construction, whether the facility met applicable requirements and was ready for occupancy.

23. The OPC's October 23, 2008, letter required that all local permits and approvals be obtained prior to commencement of construction and stated that the project would be considered abandoned and the approval terminated if construction had not commenced within one year.

24. On October 27, 2008, both the Petitioner and Lexington applied to amend their respective licenses to the post-transfer bed capacities, 155 beds at Lexington and 99 beds at the Petitioner.

25. Both applications identified the effective date of the amendments as "[u]pon final approval by Plans and Construction," referencing the Respondent's OPC.

26. The Respondent's "approval for construction" on October 23, 2008, of the plans included in the Lexington CON was not sufficient to constitute the "final approval by Plans and Construction" referenced in the applications filed October 27, 2008.

27. Through the removal of beds from service, the Petitioner's actual nursing home bed capacity on December 31, 2008, was 99 beds.

28. According to a Licensed Bed Service Memorandum ("Bed Memo") dated January 22, 2009, the Lexington project was essentially complete and ready for occupancy on that date.

29. On February 10, 2009, the Respondent issued an amended license to the Petitioner to decrease the bed capacity to 99 beds and an amended license to Lexington to increase the bed capacity to 155 beds.

30. By letter dated February 24, 2009, the Respondent advised Lexington that based on the January 22, 2009, inspection, the Lexington project was "approved for its intended purpose."

31. On August 17, 2009, the Petitioner filed an amended cost report for the year ending December 31, 2008, wherein the Petitioner stated a "Total Bed Capacity" of 120 beds at the beginning of the period and 99 beds at the end of the period.

32. The Respondent initially calculated the per diem rate based on the Petitioner's representation of a 99-bed capacity; however, on August 19, 2009, the Respondent issued an amended notice of per diem rates, indicating that the Petitioner's reimbursement rate had been calculated to reflect a capacity of 120 licensed beds at the end of the 2008 calendar year.

33. The impact of reducing the Petitioner's licensed bed capacity from 120 to 99 beds is to reduce the prospective per diem reimbursement rate by \$4.34 due to the impact of a cost limitation based on capacity.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

35. The Respondent is the state agency responsible for administering the Medicaid program in Florida.

36. The Petitioner has the burden of establishing entitlement to the relief sought by a preponderance of the evidence. Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The evidence in this case establishes that the Petitioner's actual nursing home bed capacity on December 31, 2008, was 99 beds.

37. Subsection 400.021(11), Florida Statutes (2008), defines a nursing home bed as follows:

"Nursing home bed" means an accommodation which is ready for immediate occupancy, or is capable of being made ready for occupancy within 48 hours, excluding provision of staffing; and which conforms to minimum space requirements, including the availability of appropriate equipment and furnishings within the 48 hours, as specified by rule of the agency, for the provision of services specified in this part to a single resident.

38. In this case, the evidence establishes that on December 31, 2008 (the only date upon which the bed count is relevant in this case), the Petitioner had a total capacity of 99 nursing home beds.

39. Upon final approval of the Lexington CON, the Petitioner began to decommission the 21 beds committed for transfer to Lexington. Alterations of the Petitioner's physical plant that commenced after the Lexington CON approval precluded the utilization of the 21 beds by the end of calendar year 2008. The Petitioner's patient census declined to that which would be anticipated in a 99-bed facility.

40. The Petitioner has asserted that by operation of Subsection 408.806(3)(c), Florida Statutes (2008), the Petitioner's application to amend the licensed number of beds was approved on December 26, 2008. The statute provides a period of 30 days during which the agency may request additional information and states that, "[w]ithin 60 days after the receipt of a complete application, the agency shall approve or deny the

application." There is no evidence that the Respondent requested any additional information. However, the application was contingent on the final approval by the Respondent's OPC, and, accordingly, the application was not complete until the final approval occurred on January 22, 2009, as documented by the Bed Memo of that date.

41. The Petitioner has also suggested that the application to reduce licensed bed capacity by 21 beds could have been approved separately from the Lexington application; however, the unmistakable purpose of both applications was to transfer the 21 beds from the Petitioner to Lexington, a process that could not have occurred prior to the final approval of the project by the Respondent's OPC on January 22, 2009.

42. In any event, it is unnecessary to resolve the issue of whether the license amendment application should have been approved prior to the close of calendar year 2008, because there is no apparent requirement that the number of beds stated on the cost report be consistent with the facility's license.

43. The Respondent has historically relied on the licensed bed capacity to calculate per diem reimbursement rates and has asserted that such reliance was reasonable and entitled to deference. However, in the absence of specific instructions within the rule or related guidelines as to how to quantify bed capacity, it is likewise reasonable to consider evidence that

the license does not correctly reflect actual bed capacity. In the instant case, the evidence establishes that the Petitioner's licensed bed capacity did not reflect the actual number of nursing home beds in the facility.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order identifying the Petitioner's nursing home bed capacity on December 31, 2008, as 99 beds and making the appropriate adjustment to the per diem rate calculations for the relevant rate semester.

DONE AND ENTERED this 5th day of May, 2010, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 2010.

COPIES FURNISHED:

Kelly Ann Bennett, Esquire
Sheryl Rosen, Legal Intern
Agency for Health Care Administration
Fort Knox Building
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Peter A. Lewis, Esquire
Law Offices of Peter A. Lewis, P.L.
3023 North Shannon Lakes Drive, Suite 101
Tallahassee, Florida 32309

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Justin Senior, General Counsel
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Thomas W. Arnold, Secretary
Agency for Health Care Administration
Fort Knox Building, Suite 3116
2727 Mahan Drive
Tallahassee, Florida 32308

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.