STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of

Norwegian Christian Home and Health Center,
Appellant,

appealing a determination to recover Medicaid Program overpayments.

DECISION

Administrative Law Judge: Ann H. Gayle

Parties: Office of the Medicaid Inspector General (OMIG)

By: Sharon G. Miller, Esq.
Senior Attorney
800 North Pearl Street
Albany, New York 12204

Norwegian Christian Home and Health Center

By: John F. Darling, Esq.
Bond Schoeneck & King
350 Linden Oaks, Suite 310
Rochester, New York 14625

Provider Number: 00308498

Audit Number: 13-1946

Jurisdiction and Relevant Statutes and Regulations

The New York State Department of Health acts as the single state agency to supervise the administration of the Medical Assistance Program (Medicaid Program) in New York State. Social Services Law (SSL) §363-a. Pursuant to PHL Sections 30, 31 and 32, the New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department of Health, has the authority to pursue administrative enforcement actions against any individual or entity that engages in fraud, abuse or unacceptable practices in the Medicaid Program, and to recover improperly expended Medicaid funds. The Department determined to recover Medicaid Program overpayments from Norwegian Christian Home and Health Center (Appellant). The Appellant requested an appeal pursuant to SSL §22 and former Department of Social Services (DSS) regulations at 18 NYCRR §519.4 to review the overpayment determination.

DSS regulations most pertinent to this hearing decision are at 18 NYCRR Part 517 (Provider Audits), Part 518 (Recovery and Withholding of Payments or Overpayments), Part 519 (Provider Hearings), and Section 505.9 (Residential Health Care).

As a condition of their enrollment in the program Medicaid providers are required to maintain and furnish to the Department upon request contemporaneous documentation fully disclosing the nature and extent of the care, services and supplies they provide and demonstrating their right to receive payment from the Medicaid Program. All information regarding claims for payment submitted by a provider is subject to audit for a period of six years. 18 NYCRR §§504.3(a) and (g), 504.8, and 517.3.

When the Department has determined that claims for medical services have been submitted for which payment should not have been made, it may require repayment of the amount determined to have been overpaid. 18 NYCRR §518.1(b). An overpayment includes any amount not authorized to be paid under the Medicaid Program, whether paid as the result of inaccurate or improper cost reporting, improper claiming, unacceptable practices, fraud, abuse or mistake. 18 NYCRR §518.1(c).

Pursuant to 18 NYCRR §518.4, interest may be collected on overpayments. §518.4 reads, in pertinent part:

> (a) Interest may be collected upon any overpayments determined to have been made...
> (b) Prior to the issuance of a notice of determination, interest will accrue at the current rate from the date of the overpayment.
> (c) After the issuance of a notice of determination, interest will accrue at the current rate, plus two percentage points, or the maximum legal rate, whichever is lower.
> …
> (e) Interest may be waived in whole or in part when the department determines the imposition of interest would effect an unjust result, would unduly burden the provider or would substantially delay the prompt and efficient resolution of an outstanding audit or investigation. No interest will be imposed upon any inpatient facility established under article 28 of the Public Health Law as a result of an audit of its costs for any period prior to the issuance of a notice of determination, nor for a period of at least 90 days after issuance of such notice.

Audit procedures include the issuance of a draft audit report, to which the provider is entitled to respond. Any objection to the draft audit report requires the provider to include a statement detailing the specific items of the draft report to which the provider objects and to provide any additional material or documentation that the provider wishes to be considered in support of the objections. 18 NYCRR §517.5(c). The Department must consider any response to the draft audit report before issuing a final

audit report. 18 NYCRR §517.5 and 517.6. The provider is then entitled to a hearing to have the final determination reviewed if the Department requires the repayment of an overpayment. 18 NYCRR §519.4. Appellant may not raise any new matter not addressed in its response to the draft audit report. 18 NYCRR §519.18(a).

The Parties agreed to submit this case for decision without hearing pursuant to 18 NYCRR §519.23. The burden of proof is on Appellant and the standard of proof is substantial evidence. §519.18(d) and (h). The record consists of written submissions and other documents which are marked as Exhibits [Ex] 1-7 as follows:

1. Notice of Hearing and Affidavit of Service by Mail dated November 24, 2014
2. Parties' request for decision without hearing via OMIG's email dated November 21, 2014
3. Stipulations dated December 9, 2014, with attached Exhibits 1-4[1]. Exhibits 1-4 are
    1. Final Audit Report dated October 9, 2014
    2. Hearing Request dated November 11, 2014
    3. Draft Audit Report dated June 5, 2013
    4. Response to Draft Audit Report dated August 8, 2013
4. OMIG's brief dated December 11, 2014
5. Appellant's brief dated December 12, 2014
6. OMIG's reply brief dated December 23, 2014
7. Appellant's reply brief dated December 23, 2014

Findings of Fact

An opportunity to be heard having been afforded the parties and the exhibits having been considered, it is hereby found:

1. At all times relevant hereto, Appellant, located in Brooklyn, New York, was a voluntary, not-for-profit, 135-bed skilled nursing facility within the meaning of Article 28 of the Public Health Law. [Ex 3; Ex 5]

[1] *Any exhibit with an attached exhibit will be cited as the main exhibit number followed by the attached exhibit number; e.g. attached Exhibit 2 to Exhibit 3 would be cited Ex 3.2.*

2. At all times relevant hereto, Appellant was enrolled as a provider in the Medicaid program and received Medicaid reimbursement in the form of per diem rates. [Ex 4]

3. Commencing in March 2013 (audit engagement letter), OMIG conducted an audit in order to determine whether the Appellant had complied with Medicaid Program requirements. The auditors reviewed bed reserve payments for which the Medicaid Program paid the Appellant during the period July 1, 2007 to June 30, 2010. The audit included an analysis of the Monthly Periodic Census Reports that Appellant submitted to support the daily activity and bed reserve payments for that period. [Ex 3.3]

4. OMIG's June 5, 2013 draft audit report sought to recover overpayments made to Appellant. Appellant objected to the overpayments in its August 8, 2013 reply to the draft audit report. OMIG issued its final audit report on October 9, 2014, and by letter dated November 11, 2014, Appellant requested an administrative hearing. [Ex 3.1, 3.2, 3.3, 3.4]

5. The final audit report (Audit #13-1946) notified Appellant of OMIG's specific audit findings and advised Appellant that it had determined to recover Medicaid Program overpayments in the amount of $269,061. This amount includes overpayments for two categories: (1) Bed Reservation/Vacancy Rate in Excess of 5% ($221,373.87) and (2) Cash Receipt Assessment Due Medicaid ($14,442.24). The overpayment also includes interest in the amount of $33,245.62. This amount includes interest on the overpayments prior to the issuance of the final audit report. [Ex 3.1]

6. Appellant does not dispute the amount of the overpayment in categories 1 and 2, but does dispute whether interest should have been collected. [Ex 3, Stipulation #6 and 7; Ex 5]

7. The parties do not dispute the accuracy of the interest calculation but do dispute whether interest prior to the issuance of a final audit report is permitted to be assessed. If it is determined that interest was properly assessed in this audit, the parties agree that the amount due as of the date of the final audit report is $33,245.62. [Ex 3, Stipulation #10]

ISSUE

Was the Department's determination to collect interest for the period prior to the issuance of its final audit report correct?

DISCUSSION

Appellant is a residential health care facility, or nursing home, within the meaning of Article 28 of the Public Health Law. It receives reimbursement from the Medicaid Program in the form of a per diem payment for each resident per bed per day. Reimbursement also includes a per diem for bed reserve days. The categories of overpayment identified in the audit report were Bed Reservation/Vacancy Rate in Excess of 5%, and Cash Receipt Assessment Due Medicaid. Appellant is not contesting the overpayment or the amount of overpayment for either category. The only issue for this decision is whether the Department can collect interest for the period prior to the issuance of OMIG's final audit report. This is an appropriate issue to be decided in this decision as Appellant objected to the imposition of interest in its response to the draft audit report (response) [Ex 3.4].

In that response Appellant argued that this bed reserve audit "is essentially a cost audit of the facility" and as such, the "imposition of pre-notice plus 90 day interest charges is in violation of" the language in 18 NYCRR §518.4(e) which reads:

> No interest will be imposed upon any inpatient facility established under article 28 of the Public Health Law as a result of an audit of its costs for any period prior to the issuance of a notice of determination, nor for a period of at least 90 days after issuance of such notice.

Appellant argued that the regulatory prohibition on accruing and assessing interest on any overpayment prior to at least 90 days from the date of the overpayment determination applies in this case on the grounds that Appellant is an Article 28 facility and this bed reserve audit is a cost-based audit.

This was not an audit of Appellant's costs. Appellant is clearly a cost-based provider but every audit of a cost-based provider is not a rate audit or audit of its costs. Records were not reviewed here to revise the reimbursement rate, nor was the rate revised, therefore, the instant audit was not a cost-based/rate audit; it was a claim-based audit/audit of claims for individual bed reserve days.

Appellant's reliance on *Matter of Northern Metro. Residential Healthcare Facility, Inc. v Novello,* 24 A.D.3d 1069 (3rd Dept. 2005) is misplaced [Ex 5]. That decision supports OMIG's position that the types of records being reviewed were census records, reviewed for the purpose of retrospectively justifying the per diem payments (and not the rate of those payments). The records reviewed were not "used for the purpose of establishing rates of payment." §517.3(a)(1). Since this is not an audit of Appellant's costs, the language in §518.4(e) which provides for no interest to be imposed until at least 90 days after issuance of a notice of determination is not applicable.

Appellant also relies on the additional language in §518.4(e) which reads,

> Interest may be waived in whole or in part when the department determines the imposition of interest would effect an unjust result, would unduly burden the provider or would substantially delay the prompt and efficient resolution of an outstanding audit or investigation.

Appellant claims there was ample reason for OMIG to waive the interest pursuant to this regulation, and iterated several arguments in support of this claim. [Ex 3.4] OMIG concedes that Appellant raised in its response the following four arguments to support why interest should be waived:

1. The Facility's errant claiming of bed reserve days was not intentional but rather an "innocent error in calculation"
2. Interest is a "penalty" and would "effect an unjust result"
3. The Facility will be "seriously harmed" by the imposition of interest by affecting cash flow
4. Failure to waive interest will impede the Facility's ability to resolve this matter in a "prompt and efficient" manner.

The burden of proof on this issue is upon Appellant to establish that the Department should have made a determination to waive interest, not upon the Department to establish that it should not have made such a determination. Appellant has offered no persuasive argument why the Department should be obliged to waive interest in whole or in part under the circumstances of this case.

Appellant further argues that OMIG's determination to impose interest from the date of the alleged overpayment is arbitrary and capricious. According to Appellant, the Department's imposition of interest for this Article 28 nursing home provider was arbitrary and capricious when compared with the Department's imposition of interest in the three Article 28 hospital audits referenced in and attached to its December 12 brief [Ex 5, Appendix B].

OMIG suggests that Appellant's arbitrary and capricious argument should be barred on grounds that this is new matter not raised in its response. §519.18(a). As was stated in *Lock*[2] and *Westmount*[3], the objections and arguments in the provider's response to the draft audit report should be specific so as to give the Department sufficient notice of its objections and to preserve its objections for consideration at a hearing. The Appellant's objection that the imposition of interest would "effect an unjust result" is sufficient to satisfy the requirement.

The evidence, however, does not support Appellant's argument that the result in this case is inconsistent with the three cited audits. As OMIG points out on page 7 of its December 23 reply brief [Ex 6] not only was interest included in those three hospitals' overpayments in the same manner as it was for Appellant but the interest also accrued from the date of the identified overpayment and not 90 or more days after issuance of a notice of determination.

In summary, Appellant does not dispute the amount of the overpayment but does dispute whether interest should have been collected. The accuracy of the interest calculation is not disputed. OMIG properly assessed interest in this audit of claims for individual bed reserve days for this cost-based provider. OMIG's choice to not use its discretion to waive interest was permitted under the circumstances, and such assessment was not arbitrary and capricious. The Department's determination to assess interest from the date of the overpayments is affirmed, and pursuant to the parties' stipulation, the amount of interest due as of the date of the final audit report is $33,245.62.

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[2] *In the Matter of Abraham Lock v. New York Department of Social Services, 220 A.D.2d 825; 632 N.Y.S.2d 300 (3rd Dept. 1995)*

[3] *In the Matter of Westmount Health Facility v. Mary Jo Bane, as Commissioner of the New York State Department of Social Services, 195 A.D.2d 129; 606 N.Y.S.2d 832 (3rd Dept. 1994)*

DECISION

OMIG's determination to impose interest upon the overpayments is affirmed.

This decision is made by Ann H. Gayle, Bureau of Adjudication, who has been designated to make such decisions.

DATED: New York, New York
September 10, 2015

Ann H. Gayle
Administrative Law Judge

TO:

Ricja Rice, Esq.
Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204

John Darling, Esq.
Bond Schoeneck & King
350 Linden Oaks, Suite 310
Rochester, New York 14625