

**STATE OF NEW YORK
OFFICE OF THE MEDICAID INSPECTOR GENERAL**

**IN THE MATTER
OF THE REQUEST OF**

**LEMBERG HOME & GERIATRIC INSTITUTE
Medicaid Provider # [REDACTED], Appellant**

From Audit # 06-7423, a Determination of the Office of the
Medicaid Inspector General to Recover Medicaid
Overpayments and Interest Pursuant to 18 NYCRR Part 518

DECISION

Before: Frederick Zimmer
Administrative Law Judge

Parties: State of New York Office of the Medicaid
Inspector General
800 North Pearl Street
Albany, New York 12204

By: Sharon Miller, Esq.

Lemberg Home & Geriatric Institute
8629 Bay Parkway
Brooklyn, New York 11214

By: Alexander Schlossberg
1117 85TH Street
Brooklyn, New York 11228

THE STATE OF NEW YORK OFFICE OF THE MEDICAID INSPECTOR GENERAL

("OMIG") issued a Final Audit Report, 06-7423, dated October 14, 2008, relating to an audit of the **LEMBERG HOME & GERIATRIC INSTITUTE** ("Lemberg", "Appellant" or "Facility"). The Final Audit Report disallowed claims for 500 bed hold days submitted by Lemberg for dates of service during the audit period of January 1, 2002 through December 31, 2004. As a result, OMIG demanded restitution of alleged overpayments of \$112,199.35. After disallowing the 500 bed hold days, and applying the information contained in Periodic Census Reports submitted by Lemberg, OMIG determined that the Facility was, also, periodically operating above a 5% vacancy rate during the audit period. Consequently, OMIG found that a total of 1,047 bed hold days were inappropriately billed to Medicaid while Lemberg's vacancy rate exceeded 5%. This resulted in additional overpayments of \$236,562.45. In addition, OMIG concluded that \$17,563.21 was owed, with respect to the above overpayments, due to reimbursement received by the Facility of the 6% cash receipt assessment related to each disallowed bed reserve payment. The total overpayments were \$366,325.01. Additionally, accrued interest of \$110,119.06 was due from Lemberg. The total overpayments, including interest, amounted to \$476,444.07.

Appellant appealed and requested a hearing via a November 21, 2008 letter. **OMIG** appeared by **SHARON MILLER, ESQ.**, of counsel. **LEMBERG** appeared without an attorney and through its consultant, **ALEX SCHLOSSBERG**. On March 5, 2009, the parties stipulated to certain facts via a document entitled "Stipulations".

Hearings were held on April 1 and August 12, 2009. Witnesses were sworn or affirmed and examined. A stenographic record of the hearing was made. Evidence was received, in the form of testimony and documents, and made part of the record.

Following the initial hearing date of April 1, 2009, an April 2, 2009 letter was submitted by Wilbur Kranz, President, Board of Directors of Lemberg, confirming that Mr. Schlossberg has full authorization to represent Appellant. Mr. Kranz testified that it was impracticable for the Facility to retain legal counsel (Transcript of April 1, 2009 hearing at page 50).

QUESTION PRESENTED

Does Lemberg owe \$366,325.01 in Medicaid overpayments, plus interest, resulting from the submission of Medicaid claims for undocumented bed hold days, for bed hold days when the Facility was periodically operating above a 5% vacancy rate, and for cash receipt assessment payments related to each disallowed bed reserve payment?

FINDINGS OF FACT

The following findings of Fact were made after a review of the entire record in this matter. Numbers in parentheses refer to transcript page numbers or exhibits. These citations represent evidence found persuasive by the Administrative Law Judge in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence.

1. Lemberg is enrolled in the Medicaid Program as a skilled nursing facility (undisputed).
2. The term “bed-hold” means a decision by Lemberg to reserve a bed for an individual who resided at Lemberg but who was hospitalized on the date that the bed’s status was counted (Exhibit [“Ex.”] 23, Paragraph D of Definitions).
3. A “reserved bed day” is a day for which the Department pays a medical institution to reserve a Medicaid recipient’s bed while he or she is temporarily hospitalized or on

leave of absence from the institution. The recipient must be absent from the institution overnight for the day to be considered a reserved bed day. A recipient is considered to be absent overnight when he or she is absent later than the time at which the institution normally conducts its patient census. The date of departure is considered a reserved bed day. The date of return is not (18 NYCRR 505.9(d)(1)).

4. By an October 17, 2006 letter, OMIG informed Lemberg that it would be conducting a review of Lemberg's Medicaid bed reserve billing for service dates of January 1, 2002 through December 31, 2004. The letter requested, among other things, that Lemberg submit to OMIG its Monthly Periodic Census Reports and any other documentation supporting its daily patient activity and reserved bed-holds during the audit period (Ex. 3).
5. Via an April 19, 2007 letter, OMIG requested that Lemberg submit, among other things, documentation supporting the hospital discharge planning coordinator's determination that the Medicaid recipients listed on a document, entitled Hospital Confirmation Request, Bed Hold Audit, 2002-2004, were expected to return to Lemberg within fifteen days from the hospital admission date, that supporting documentation be submitted if an extension had been requested to extend the resident's bed-hold to 20 days, and that information be provided regarding the recipient's readmission date to the Facility (Ex. II of Ex. 1).
6. In a May 30, 2007 letter, Anthony Ponzo, Assistant to the Administrator of Lemberg, acknowledged that the Facility had no documentation supporting the hospital discharge planning coordinator's determination that the recipients, listed in the Hospital Confirmation Request were expected to return to Lemberg from day 15 through day 20 of the hospital admission date (Attachment 1 of Exhibit II of Ex.1,

and Exhibit III of Exhibit 1).

7. OMIG issued a Draft Audit Report to Lemberg, via an August 27, 2008 letter. The Draft Audit Report covered the period of January 1, 2002 through December 31, 2004, and was hand delivered to Mr. Schlossberg, on behalf of Lemberg, on September 4, 2008 (Transcript at page ["T."] 25-37; Ex. 2, 2A and 23).
8. The scope of the audit involved a review of Lemberg's bed-hold reservations to determine whether they were properly made using the required less than 5% vacancy rate, and reviewed documentation for bed reservations for patients who were hospitalized for more than 15 days and did not to return to the Facility on the day immediately following their bed release (T. 79-95).
9. The Draft Audit Report set forth disallowed claims, including alleged overpayments of \$112,199.35 for 500 disallowed bed hold days. The disallowed claims, also, included alleged overpayments of \$236,562.45 based on Periodic Census Reports submitted by Lemberg that indicated that the Facility was periodically operating above a 5% vacancy rate during the audit period. Specifically, a total of 1,047 bed hold days were inappropriately billed to Medicaid while Lemberg's vacancy rate exceeded 5%. Additionally, the disallowed claims included alleged overpayments of \$17,563.21 based upon reimbursement received by the Facility of the cash receipt assessment related to each disallowed bed reserve payment. OMIG, also, sought to recover accrued interest of \$110,119.06. The total overpayments amounted to \$366,325.01, and with interest, the amount due totaled \$476,444.07 (Ex. 2, in particular Ex. I, VI and VIII of Ex. 2).
10. Lemberg did not respond to the August 27, 2008 Draft Audit Report within 30 days of its receipt of the report on September 4, 2008 (T. 37).

11. OMIG issued its Final Audit Report, confirming its previous findings, to Lemberg on October 14, 2008 (Ex. 1 and 23).
12. Lemberg did not file any objections, and provided no documentation to the auditors, in response to the Draft Audit Report, prior to the issuance of the Final Audit Report on or about October 14, 2008 (Ex. 23, Stipulations # 3, 4 and 8).
13. Lemberg responded to the Draft Audit Report via an October 17, 2008 letter (Ex. 19; T. 37).
14. Via its October 17, 2008 letter, and at the hearing, Lemberg conceded that it billed for bed reservations when its vacancy rate exceeded 5%, and that the Facility did not contest any findings relating to the vacancy rates, particularly with regard to the \$232,994.49 disallowance, indicated on Line 3 of Ex. VIII of Ex. 1. The difference between the total vacancy rate disallowance of \$236,562.45 and the \$232,994.49 amounted to \$3,567.96. The \$3,567.96 difference was attributable to a carryover into 2002 from a 2001 vacancy rate audit (Ex. V of Ex.1; Ex. VIII of Ex. 1; Ex. 19; T. 96-97, 119-124, 150-151, 159, 162-168).
15. OMIG only sought overpayment in those instances when Lemberg had actually billed for a bed-hold, but in one instance involving recipient, "M.G.", found a 20 day overpayment when the Facility had only billed for seventeen days (T. 205-232; Attachment 1 of Ex. II of Ex. 1; Ex. IV of Ex. 1).

BACKGROUND

New York's Medical Assistance for Needy Persons Program ("Medicaid Program") is a jointly funded federal-state program providing for the furnishing of medically necessary care, services and supplies to the needy and impoverished of New York State. Services under the Medicaid Program are provided through private practitioners and other health

care providers who agree to accept payment under the Medicaid Program as payment in full for such services, and to abide by the rules, regulations and official directives of the Program. As part of its responsibility for oversight of New York State's Medicaid Program, the New York State Department of Health ("Department") is responsible for conducting audits of provider claims and for maintaining a system to recover Medicaid overpayments when claims are improperly or erroneously paid by the program. These functions were transferred to OMIG in February of 2006.

Medicaid Program participation is a voluntary contractual relationship between the provider of service and the state. By electing to participate in the Medicaid Program, a service provider is deemed to have entered into a contract with the Medicaid Program, and thereby assumes responsibility for meeting all program requirements as a prerequisite to payment. The act of enrollment, coupled with program participation and submission of billings certifying compliance with Medicaid rules and regulations connotes the provider's acceptance of its contractual responsibilities.

The August 27, 2008 Draft Audit Report disallowed Medicaid claims by Lemberg, for the audit period of January 1, 2002 through December 31, 2004. The total amount of proposed recovery, including interest, amounted to \$476,444.07. Of the \$476,444.07 amount, the report alleged that overpayments were made in the amount of \$112,199.35 for 500 disallowed bed hold days. This disallowance was based on 18 NYCRR §§505.9(d)(6)(i) and (iv).

18 NYCRR §§505.9(d)(6)(i) requires a nursing home to reserve a Medicaid recipient's bed when the recipient is hospitalized and expected to return to the institution in 15 or fewer days. According to this regulation, when a nursing home reserves the bed, it must notify the hospital by telephone and in writing, according to Department instructions, of the

reservation. It, also, must notify the nursing home, by telephone and in writing, of the following duties of the hospital; that the hospital must notify the nursing home by telephone of any changes in the recipient's condition during the period of bed reservation, that the hospital must notify the nursing home by the morning of the fourth day of hospital care, of the recipient's planned discharge date, and must notify the nursing home by telephone if the discharge date must be adjusted after the 3rd and before the 16th day of hospital care because the recipient's condition has changed or additional medical information has become available. The hospital must confirm in writing all bed reservation telephone communications.

18 NYCRR § 505.9(d)(6)(iv) allows the bed reservation to be extended to 20 days if the hospital adjusted the recipient's planned discharge date between the morning of the 4th day of hospital care and the 16th day of hospital care.

OMIG interprets these regulations, in conjunction with other Medicaid record keeping requirements such as 18 NYCRR §§ 487.10(d)(1) and (2), 504.3 and 517.3(a)(1) and (2), as requiring certain hospital and/or nursing home documentation to be maintained by the nursing home. In the absence of such documentation, bed hold payments may be disallowed. In OMIG's view, there are three critical communication points that must be documented for bed-hold reservations. These are the initial contact with the hospital concerning the bed hold reservation, the fourth day when the hospital must communicate with the nursing home concerning the recipient's discharge date, and communications regarding extending the bed hold from fifteen to twenty days.

Pursuant to 18 NYCRR § 505.9(d)(5), bed reservations are only allowable if the recipient has been a patient in the nursing home for at least 30 days since the date of initial admission, and the part of the nursing home to which the recipient will return has a

vacancy rate of no more than 5% on the date of hospitalization.

OMIG argues that, based on its review of Periodic Census Reports submitted by Lemberg, the 500 disallowed bed hold days resulted in Lemberg's vacancy rate exceeding 5% at various times. Therefore, certain bed holds should not have been allowed. This resulted in further disallowances of \$236,562.45 based on 1,047 disallowed bed hold days. Lemberg is not contesting the vacancy rate disallowances, at least with respect to \$232,994.49 of the disallowance, if not the total vacancy rate disallowance (Ex. 19; T. 96-97, 162-164). The difference between the total vacancy disallowance of \$236,562.45 and the \$232,994 cited by Lemberg, amounted to \$3,567.96, attributable to a carryover into 2002 from a 2001 vacancy rate audit of Lemberg.

An additional disallowance of \$17,563.21 was imposed for reimbursement made to Lemberg of tax it paid associated with the Cash Assessment Program under Public Health Law § 2807-d. Specifically, Lemberg paid a special tax on the revenues that it received as a result of the overpayments discussed above, and then was reimbursed for the tax it paid. It is this reimbursement that OMIG seeks to recover.

Finally, inclusive of interest, the Draft Audit Report alleged that the total amount due from Lemberg was \$476,444.07. A Final Audit Report was, subsequently, issued confirming the disallowance of \$476,444.07, inclusive of interest.

Lemberg did not respond in a timely manner to the Draft Audit Report. 18 NYCRR § 517.5(c) requires that a provider's objections to a Draft Audit Report must be mailed within thirty days of the provider's receipt of the Draft Audit Report, presumed, in the absence of evidence to the contrary, to be five days after the date of audit. In this instance, the Draft Audit Report was dated August 27, 2008, and was received by Lemberg, through hand delivery, on September 4, 2008. Therefore, Lemberg's October 17, 2008 response was

submitted beyond the time provided for by regulation. 18 NYCRR § 519.18(a) provides that the issues and documentation to be considered at hearing are limited to issues directly relating to the final determination. An appellant may not... raise any new matter not considered by the department upon submission of objections to a draft audit or notice of proposed agency action.

Via a May 18, 2009 letter (Ex. 25), I ruled that Lemberg was barred from affirmatively introducing “new matter”, such as documentation, not considered by the Department upon the submission of objections to the Draft Audit Report. Westmount Health Facility v. Bane, 195 A.D. 2d 129 (3d Dept. 1994), Lock v. NYDSS, 220 A.D. 2d 825 (3d Dept. 1995). As noted above, Lemberg did not submit any timely objections or documentation in response to the Draft Audit Report. I, further, ruled, though, that Lemberg was entitled to a hearing to demonstrate that OMIG’s determination was not supported by OMIG’s own documentation or that OMIG’s legal assertions were incorrect as a matter of law.

CONCLUSIONS

Pursuant to 18 NYCRR § 519.18(d), the Appellant, Lemberg, has the burden of showing that the Department’s determination was incorrect and that all claims submitted and denied were due and payable under the program, or that all costs claimed were allowable. With one exception noted below, I did not find, on the basis of the record, that Lemberg met its burden.

At hearing, OMIG presented four witnesses, Patrick W. Dufresne, Director of the Bureau of Managed Care Audit & Provider Review Program of OMIG, Joseph Gagnon, Management Specialist for OMIG’s audit unit, Christopher I. Phillips, Health Care Administrator, in charge of the bed reserve program, for the New York State Department of Health’s Office of Long Term Care, and Roland J. Guilz, Chief Healthcare Management

Systems Analyst for the New York State Department of Health's Division of Healthcare Financing, all of whom presented testimony supporting the conclusions in the Final Audit Report and supporting OMIG's interpretation of the regulatory requirements pertaining to this case.

OMIG presented testimony that the phrase in 18 NYCRR §505.9(d)(6)(i) to the effect that the recipient must "be expected to return to the institution in 15 or fewer days", required Lemberg to have documentation from a medical professional on the first day of hospitalization explaining why the recipient was "expected" to return to Lemberg within 15 days (T. 278-280). In OMIG's view, the propriety of the entire bed reservation is predicated on the legitimacy of the first bed reserve day, and in the absence of appropriate documentation being produced, the entire bed reservation must be disallowed (T. 100-101, 278-279). Lemberg neither objected nor provided any medical documentation to the OMIG auditors, in response to the Draft Audit Report, with regard to whether recipient's were expected to return within fifteen days. Furthermore, the record does not indicate that any such documentation was submitted, at any time, prior to Lemberg's receipt of the Final Audit Report.

Lemberg's representative, Alex Schlossberg, testified briefly, on the first hearing day, as to why the Draft Audit Report was not timely responded to (T. 38, et seq.). He declined to testify under oath, on the second hearing day, after OMIG presented its case, preferring to submit his arguments against recovery of the overpayments in writing (T. 303-305). Mr. William Kranz, President of Lemberg's Board of Directors, testified briefly, authorizing Mr. Schlossberg to represent the Facility (T. 45-52). Lemberg chose not to offer any further testimony. As noted above, I had ruled (Ex. 25) that any documentation not reviewed by OMIG, prior to issuance of the Final Audit Report, would constitute prohibited "new matter"

that was not considered by the Department upon submission of objections to a draft audit, under 18 NYCRR § 519.18(a). Lemberg was, therefore, foreclosed from offering any documents rebutting the Final Audit Report.

Lemberg's closing brief sets forth a number of arguments in opposition to the Final Audit Report. First, it argues that the disallowance of \$112,199.35 should be reversed because the documentary requirements are not contained in the relevant regulations. I conclude that reasonable minds could well differ as to what nursing home documentation, if any, 18 NYCRR § 505.9(d)(6)(i) requires with regard to a nursing home's expectation that a recipient will return in fifteen days to the Facility. With regard to the other requirements posited by OMIG, there may well be factors that would cause one to question OMIG's interpretation of the regulations. However, only OMIG presented testimony as to the interpretation of 18 NYCRR § 505.9(d)(6)(i) and (iv). Lemberg has the burden of proof and it did not meet that burden or adequately rebut OMIG's testimony. In the absence of contrary evidence or testimony, OMIG's interpretation of 18 NYCRR § 505.9(d)(6)(i) and (iv) must stand. In that regard, I take note of the long line of cases cited by OMIG in support of the proposition that an agency's reasonable interpretation of the statutes and regulations that it administers is entitled to substantial deference (pg. 21 of OMIG's brief). Suffice it to say that the Court of Appeals has held that even if the Department's interpretation is not the most natural reading of a regulation, or even if a regulation could be interpreted differently, this does not make the government's interpretation irrational. Matter of Elcor Health Services v. Novello, 100 NY 2d 273 (Court of Appeals, 2003).

Similarly, with regard to Lemberg's argument that Mr. Phillips was not head of the bed reserve unit during the audit period, the Facility did not present any sworn testimony from the nursing home provider community or documentation that rebutted Mr. Phillips'

interpretation of 18 NYCRR § 505.9(d)(6)(i) and (iv). Consequently, I give greater weight to the testimony presented by OMIG as to the interpretation of the regulations than to the Facility's arguments that were not supported by testimony or documentation.

Because the bed hold would fail based upon OMIG's interpretation of the first day requirements, I see no reason to reach the other arguments raised by Lemberg with regard to documentation requirements for subsequent bed hold periods. With regard to the other disallowances, I note that Lemberg is not contesting the disallowances based upon the vacancy requirements, at very least with regard to \$232,994.49 of the total \$236,562.45 vacancy disallowance. Lemberg had raised questions at hearing regarding the \$3,567.96 difference between these two amounts because the \$3,567.96 disallowance appeared on a separate exhibit from the other vacancy rate disallowances. This issue was not raised in response to the Draft Audit Report. However, even if Lemberg had timely objected to the \$3,567.96 difference between these two figures, I conclude that there was a rational basis for the 17 disallowed days in 2002 that gave rise to the \$3,567.96 disallowance. The 17 disallowed days in 2002 were a continuation of a vacancy rate disallowance that began in 2001. This explains why the recipient in question was listed on a separate exhibit in both the Draft and Final Audit Reports (Ex. V of Ex. 1 and 2; T. 118-124).

Additionally, Lemberg did not timely contest, or present any sworn testimony or evidence regarding recovery of the cash assessment portion of the overpayment, which would effectively counter OMIG's sworn testimony (T. 107-108, 194, 259-271; Ex. 14-16).

Appellant specifically challenged disallowed claims for six recipients, on page 2 of its closing brief. Lemberg argued that these six recipients returned to Lemberg within twenty days of their initial hospitalization date and, consequently, they were not within the scope of the audit. Lemberg is foreclosed from raising this argument as it was not raised in its

response to the Draft Audit Report. However, even if this argument were to be considered, I conclude that the scope of the audit was, in fact, those recipients who were expected to return to the Facility within fifteen days and did not return to the Facility within that period, and who, also, did not return to the Facility the day following their bed release (T. 79-93). Therefore, the scope of the audit was not limited to those recipients who were absent for at least twenty days.

Lemberg. also, argued that the exhibits demonstrate that days were disallowed for recipients who had less than a fifteen day absence, as evidenced by Ex. IV of Ex. 1 in the column under Days. It should be noted, though, that this column delineates days disallowed based upon Lemberg's billing and not the actual length of the bedhold (T. 236-238). In other words, OMIG only sought recovery for days actually billed for.

In one instance, Lemberg did demonstrate, through cross-examination, that OMIG's own documentation (Ex. IV of Ex. 1), indicated that recipient "██████" was disallowed for a twenty day bed-hold when the Facility had only billed for seventeen days (T. 205-232; Attachment 1 of Ex. II of Ex. 1; Ex. IV of Ex. 1). OMIG's own testimony indicated that the Facility should only have been charged for an overpayment for days it actually billed for (T. 236-237). An adjustment should be made to correct for the three days that should not have been subject to disallowance. While it is true that this particular argument was not raised by Lemberg in response to the Draft Audit Report, I indicated in my May 18, 2009 ruling that it would not constitute "new matter" for Lemberg to point out that OMIG's determination is not supported by its own documentation. My finding on "██████" is consistent with that ruling.

With regard to Lemberg's request for a waiver of interest, I note that Lemberg is in the process of closing down and has limited, if any, resources. However, Lemberg, also,

currently has no patient care responsibilities that would justify a waiver. Under the circumstances, I see no basis for granting a waiver of interest.

Lemberg requested that I consider a recent decision dealing with an audit of bed-hold reservations that was issued by Administrative Law Judge Lynch, In the Matter of the Request of Metropolitan Jewish Geriatric Center (“Metro”). In the Metro matter, Judge Lynch did not uphold OIMIG’s interpretation of 18 NYCRR § 505.9(d)(6). However, it appears that Metro made a timely response to the Draft Audit Report, and, also, presented a witness who effectively rebutted OIMIG’s testimony. Had Lemberg responded in a timely manner to the Draft Audit Report, preserved its issues, and presented relevant documentation and/or testimony, a different outcome may have been justified in this matter. As such, this Decision should not be construed beyond the particular circumstances of this case.

The answer to the “Question Presented”, does Lemberg owe \$366,325.01 in Medicaid overpayments, plus interest, resulting from the submission of Medicaid claims for undocumented bed hold days, for bed hold days when the Facility was periodically operating above a 5% vacancy rate, and for cash receipt assessment payments related to each disallowed bed reserve payment, is answered in the affirmative, except that an adjustment should be made for the three days pertaining to recipient [REDACTED]” as described above.

DECISION:

The determination of the New York State Office of the Medicaid Inspector General requiring Lemberg Home & Geriatric Institute, Inc. to make restitution of the total overpayments set forth in the Final Audit Report, plus interest, is affirmed with the exception of the adjustment, contained in this Decision, pertaining to the reversal of the disallowance for the three days regarding recipient "M.G."

This decision is made by Frederick Zimmer, who has been designated by the Commissioner of the New York State Department of Health to make such decisions.

Dated: _____, 2010
Troy, New York

Frederick Zimmer
Administrative Law Judge

Sharon Miller, Esq.
State of New York Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204

Alex Schlossberg
Lemberg Home & Geriatric Center, Inc.
8629 Bay Parkway
Brooklyn, New York 11214

Alex Schlossberg
Lemberg Home & Geriatric Center, Inc
1117 85TH Street
Brooklyn, New York 11228