

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Appeal of

Putnam Ridge

Provider ID: 02997708

**Decision After
Hearing**

From a determination to recover Medicaid
Program overpayments

Audit Number: 17-2782

Before: Jean T. Carney
Administrative Law Judge

Held at: New York State Department of Health
90 Church Street, 4th Floor
New York, New York 10007
and
New York State Department of Health
150 Broadway, Suite 510
Albany, New York 12204

Hearing Dates: March 29, 2019, June 25, 2019, June 26, 2019,
August 21, 2019, and November 20, 2019

Parties: New York State Office of the Medicaid Inspector General
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JURISDICTION

The New York State Department of Health (Department or DOH) acts as the single state agency to supervise the administration of the Medical Assistance (Medicaid) Program in New York. (Public Health Law [PHL] § 201[1][v]; Social Services Law [SSL] § 363-a). The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the DOH, is authorized to investigate and pursue civil and administrative enforcement actions to recover improperly expended Medicaid funds. (PHL §§ 31-32). The OMIG determined to recover Medicaid Program overpayments from Putnam Ridge (Appellant) for the rate period from January 1, 2012 through December 31, 2016. The Appellant requested a hearing pursuant to SSL § 22, and Department of Social Services (DSS) regulations at 18 NYCRR § 519.4 to review the OMIG's determination.

HEARING RECORD

The OMIG presented the audit file, and supporting documents (OMIG Exhibits 1-31); the testimony of Babu Jacob, OMIG Chief Medical Facilities Auditor; and John Jacob, OMIG Senior Auditor. The Appellant presented documents (Appellant Exhibits A and B); and the testimony of Cynthia Treis, DOH Healthcare Fiscal Analyst; Eric E. Greenberger, Putnam Ridge Chief Operating Officer; Martin Schreiber, Certified Public Accountant; and Joel Willinger, Owner of Putnam Ridge. A stenographic transcript of

the proceedings was made (pages 1-474). The parties submitted post-hearing briefs, reply briefs, and the record closed on April 30, 2020.

APPLICABLE LAW

Residential health care facilities are eligible for payment of a Medicaid daily rate billable for resident beds occupied by Medicaid recipients. (10 NYCRR § 86-2.10). The Department's Bureau of Long-Term Care Reimbursement (BLTCR) sets rates for each residential health care facility by using the information that the facility submits annually in a cost report form RHCF-4. (10 NYCRR § 86-2.2). A facility's basic rate is comprised of four separate and distinct cost components: (a) direct; (b) indirect; (c) noncomparable; and (d) capital. (10 NYCRR § 86-2.10[b][1][i]). The capital component is facility specific, and includes "costs reported in the depreciation, leases and rentals, interest on capital debt and/or major movable equipment depreciation cost centers, as well as costs reported in any other cost center under the major natural classification of depreciation, leases and rentals on the facilities annual cost report (RHCF-4)." (10 NYCRR § 86-2.10[a][9]).

A facility's rate of payment is provisional and subject to audit. The Department may adjust a payment rate retroactively if an audit determines that such an adjustment is warranted. (SSL § 368-c; 10 NYCRR § 86-2.7; 18 NYCRR § 517.3). Upon completion of an audit, the OMIG may require the repayment of any amounts not authorized to be paid by the Medicaid Program. (18 NYCRR § 518.1).

A Medicaid provider is entitled to a hearing to review the OMIG's final determination requiring repayment of any overpayments. (18 NYCRR § 519.4). The burden lies with the Appellant to prove by substantial evidence that the OMIG's determination is incorrect. (18 NYCRR § 519.18[d] and 18 NYCRR § 519.18[h]; New York State Administrative Act (SAPA) § 306[1]). Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than preponderance of evidence, but more than mere surmise, conjecture, or speculation, and constituting a rational basis for decision. (*Stoker v. Tarantino*, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3rd Dept. 1984], *appeal dismissed* 63 N.Y.2d 649 [1984]).

ISSUES

Has the Appellant shown that the OMIG erred in disallowing claims for mortgage expenses, and instead calculating allowances based on return of real property equity?

Has the Appellant shown that the OMIG erred in disallowing costs related to cable television service?

FACTS

1. The Appellant is a residential health care facility (RHCF) licensed under Article 28 of the PHL, and is enrolled as a Medicaid provider. The Appellant also

operates an adult day health care (ADHC) program at the facility. (OMIG Exhibit 7; Testimony of Babu Jacob @ p. 33).

2. Medicaid reimburses the Appellant for a portion of its costs associated with providing care to its residents and day health care participants who are Medicaid recipients. The daily rate of reimbursement is based on RHCF-4 cost reports submitted by the facility, and computed by the DOH Bureau of Long-Term Care Reimbursement. (OMIG Exhibits 5, 7, 13-25; testimonies of Babu Jacob @ p. 36, John Jacob @ p. 135 and p. 306, Cynthia Treis @ p.327, and Martin Schreiber @ p. 398).

3. The OMIG conducted an audit of the capital portion of the Medicaid rates paid to the Appellant from January 1, 2012 through December 31, 2016. The audit consisted of a review of the Appellant's records supporting the capital portion of its RHCF-4s for the calendar years of January 1, 2010 through December 31, 2014, as well as the capital portion of the ADHC's Medicaid rates for January 1, 2012 through December 31, 2016. (OMIG Exhibits 1 and 7; testimonies of Babu Jacob @ p. 35, John Jacob @ p. 143-144).

4. On October 16, 2018, the OMIG issued a draft audit report detailing its preliminary findings and calculating an estimated Medicaid overpayment of \$2,154,803.00. (OMIG Exhibit 5).

5. On November 29, 2018, The Appellant submitted objections to two findings in the Draft Audit Report: Finding 1, mortgage expense and return of equity

adjustments; and Finding 4(a), equipment rental expense disallowance for cable television. (OMIG Exhibit 6).

6. On December 27, 2018, the OMIG issued its Final Audit Report, finding additional Medicaid patient days, resulting in an increase in overpayments made to the Appellant, and requesting repayment in the amount of \$2,161,463.00. (OMIG Exhibit 7).

7. The audit showed cable television service was reported as a property cost submitted for reimbursement as an equipment rental expense. The OMIG disallowed those reported costs, finding them operating expenses, and not allowable in the capital component of the Respondent's reimbursement rate. (OMIG Exhibit 7; John Jacob's testimony at p. 193, p. 214 and p. 294).

8. On May 18, 1999, the Appellant's original operators received a mortgage in the amount of \$20,470,600, at an interest rate of 7.675%. This mortgage would have matured on September 1, 2030, and was approved by the BLTCR. (OMIG Exhibit 6).

9. The current operators purchased the facility in 2010; leasing the land, building, and fixtures from the original operator's landlord. (OMIG Exhibit 6; Mr. Willinger's testimony at p. 437).

10. On or about December 21, 2012, the current operators purchased the land, building and fixtures. They financed the \$16,309,754.12 remaining principal from the original mortgage with a short-term commercial loan, adding a gap note in the amount of \$5,190,245.88, for a total principal amount of \$21,500,000.00. They neither advised the

Department of this financing, nor did they seek approval for Medicaid reimbursement. (OMIG Exhibit 6; John Jacob's testimony at p. 150; Ms. Treis' testimony at p. 365-367; Mr. Willinger's testimony at p. 439 and p. 445).

11. In June 2014, the current operators paid off the commercial loan with a HUD mortgage in the amount of \$24,800,000, at 3.68% for a term of 30 years. This financing added another \$3.3 million to its capital debt. They neither advised the Department of this financing, nor did they seek approval for Medicaid reimbursement. (OMIG Exhibits 6 and 11a; John Jacob's testimony at p. 152; Ms. Treis' testimony at pp. 365-367; Mr. Willinger's testimony at p. 440).

12. On April 6, 2017, the BLTCR informed the Appellant that the 2014 refinancing was unacceptable, and DOH would not recognize those mortgage expenses for reimbursement. (OMIG Exhibit 11h at p. 233).

DISCUSSION

The Appellant failed to show the OMIG erred in disallowing claims for mortgage expenses and return of equity adjustments. The Appellant also failed to show the OMIG erred in disallowing claims for cable television service as equipment rental expenses under capital expenses.

Mortgage Expense Disallowances

The Appellant asserts that the OMIG erred in disallowing mortgage expenses for the rate years of 2013 through 2016. In support of its position, the Appellant argues that

the DOH should have recognized the refinancing it obtained in 2012 and 2014 because the interest rates were lower than the original mortgage; and by extension, the OMIG should have allowed the mortgage expenses claimed. The issue in this matter is not whether the DOH erred in not recognizing the refinancing. The mechanism available to the Appellant for appealing these determinations would be by filing a rate appeal pursuant to 10 NYCRR § 86-2.13. The reviewable issue in this proceeding is whether the OMIG properly disallowed mortgage expenses that the Appellant claimed during the relevant audit period. Capital costs allowed to be reimbursed include debt secured by a mortgage, incurred to obtain financing for the purchase of property, and found reasonable by the DOH. (10 NYCRR § 86-2.21[a][1]).

In 2012, the Appellant's owners obtained a commercial loan in order to purchase the facility they had been leasing since 2010. The remaining principal of \$16,309,754.12 from the original approved mortgage was assigned to the lender of that commercial loan, and the Appellant's owners borrowed an additional \$5,190,245.88, for a total loan amount of \$21,500,000.00. (OMIG Exhibit 6). The Appellant's RHCF cost reports did not report any principal payments in 2013 through June 2014, when this debt was refinanced again. (OMIG Exhibits 10a and 10c). Rather than making principal payments to the lenders, the Appellant made payments into a sinking fund that was then transferred into an operating account under the Appellant's control, and used as a down payment to refinance the loan in 2014. (OMIG Exhibit 10g; Testimony of John

Jacob at p. 262, p. 266, and p. 305). Because no payments were made to the lender to pay down the principal amount, the OMIG's disallowance of reported mortgage expenses for the period of December 2012 through June 2014 was reasonable.

With the 2014 mortgage refinance, the Appellant borrowed another \$3,300,000 on top of the \$21,500,000 it borrowed in 2012. (OMIG Exhibit 6). The interest rate is significantly lower than the original mortgage; but the maturity date of June 2044 extends the debt 14 years past the useful life of the facility. For those reasons, the DOH did not approve this mortgage refinance when it later learned of it. (OMIG Exhibits 10h and 11h; Testimony of Ms. Treis at pp. 335-6). In lieu of reimbursing mortgage costs, the OMIG calculated return of equity reimbursement.

The Appellant contends that it cannot survive with its capital reimbursement reduced to return of equity; and that return of equity reimbursement is only appropriate if a facility can meet its capital indebtedness over the useful life of the facility. (10 NYCRR § 86-2.21[e][4]). Instead, the Appellant argues that for the audit period between June 2014 and December 2016, the OMIG should allow reimbursement pursuant to 10 NYCRR § 86-2.21(e)(5)(ii) based on the remaining principal of the original mortgage. That regulation is relevant "where a facility applies to the commissioner for approval to refinance an existing mortgage." (10 NYCRR § 86-2.21[e][5][ii]). The Appellant relies on a regulation that requires seeking approval to refinance. Yet at no time has the Appellant applied for such approval.

The original mortgage from 1999 was the only approved mortgage, and the Appellant was reimbursed for costs associated with it. In refinancing twice without either notifying or seeking the Department's approval, the Appellant significantly increased the principal debt over the original mortgage, and extended the term of the mortgage well beyond the useful life of the facility. Capital indebtedness for any unauthorized purpose will not be recognized for any reimbursement purpose. (10 NYCRR § 86-2.21[e][3][ii][d]). The Appellant now seeks a return to reimbursement based on a mortgage that no longer exists, in an effort to obtain reimbursement for unauthorized mortgages. The OMIG's disallowance of reported mortgage expense, and its determination to apply return of equity reimbursement was reasonable for the period of June 2014 through December 2016.

Equipment Rental Expense Disallowances

The Appellant claimed costs related to cable television service as rental equipment costs, and the OMIG disallowed those claims on the grounds that they are operating costs. In support of its position, the Appellant relies on a previous decision which allowed claims for cable television service as a "quality of life" issue, and therefore constituted costs related to patient care. (*Matter of Susquehanna Nursing & Rehabilitation Center, Audit # 09-2552*). I do not find the Appellant's reliance on the decision in *Susquehanna*, which specifically states that it is limited to the unique facts and geography of that case (*Susquehanna* at p. 26), persuasive in this matter.

The ALJ in *Susquehanna* noted that the CMS Provider Reimbursement Board has repeatedly held that the costs of television service in patient rooms are not reimbursable. (*Susquehanna* at p. 22-23). Furthermore, *Susquehanna* fails to address the three-prong test to determine if a facility may claim rental equipment from a supplying organization not related to the provider, as a capital cost. (Provider Reimbursement Manual (PRM) 2806.3[B]). The PRM states that the capital-related portion of the supplier's charge may be claimed if (1) the capital-related equipment is rented or leased by the provider; and (2) the equipment is located on the facility's premises; and (3) the capital-related portion of the charge is separately specified in the charge to the provider. (PRM 2806.3[B]). The evidence submitted by the Appellant in its response to the draft audit report does not identify the costs related to equipment rental, as opposed to the cable service provided. (OMIG Exhibit 6). At the hearing, the Appellant presented testimony supporting its position that the cost of renting a cable box constitutes a capital cost. (Mr. Schreiber's testimony at p. 416). However, at no time did the Appellant attempt to separate the costs associated with renting the cable box, and the costs of providing the cable service. Therefore, the Appellant failed to show that the OMIG erred in disallowing these reported costs as capital costs.

DECISION

The OMIG's determination under adjustment 1 in the final audit report to disallow mortgage expense costs is affirmed.

The OMIG's determination under adjustment 4(a) in the final audit report to disallow cable television service as a capital cost is affirmed.

This Decision is made pursuant to the designation by the Commissioner of Health of the State of New York to render final decisions in hearings involving Medicaid provider audits.

DATED: September 22, 2020
Albany, New York

A handwritten signature in blue ink, appearing to read "Jean T. Carney", is written over a light blue rectangular background.

JEAN T. CARNEY
Administrative Law Judge