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Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, MD, MPH
Commissioner

JOHANNE E. MORNE, MS
Executive Deputy Commissioner

November 20, 2024

CERTIFIED MAIL/RETURN RECEIPT

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NYS OMIG
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Heritage Village Rehabilitation and Skilled Nursing, Inc.
4570 Route 60
Gerry, New York 14740

RE: In the Matter of Heritage Village Rehabilitation and Skilled Nursing, Inc.

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

A handwritten signature in black ink that reads "Natalie J. Bordeaux". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:nm
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Appeal of

Heritage Village Rehabilitation and Skilled Nursing, Inc.,

Appellant,

from a determination by the NYS Office of the Medicaid
Inspector General to recover Medicaid Program overpayments.

COPY

DECISION

Audit #: 19-5864

Before: Natalie J. Bordeaux
Administrative Law Judge

Held via: Cisco Webex Videoconference

Hearing Dates: August 23 and September 17, 2024
The record closed October 31, 2024

Parties: New York State Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Dionne Wheatley, Esq.

Heritage Village Rehabilitation and Skilled Nursing, Inc.
4570 Route 60
Gerry, New York 14740
By: John F. Darling, Esq.
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350 Linden Oaks
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JURISDICTION

The New York State Department of Health (Department) acts as the single state agency to supervise the administration of the Medical Assistance (Medicaid) Program in New York. PHL § 201(1)(v); SSL § 363-a. The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department, 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 Heritage Village Rehabilitation and Skilled Nursing, Inc. (Appellant) for the rate period January 1, 2015 through December 31, 2018. The Appellant requested a hearing pursuant to Social Services Law § 145-a and Department of Social Services (DSS) regulations at 18 NYCRR § 519.4 to review the OMIG's determination.

HEARING RECORD

OMIG witnesses: Anthony Paolucci, Auditor 3 (Medicaid)

OMIG exhibits: 1-3, 4a-f, 5a-c, 6a-f, 7a-c, 8

Appellant witnesses: Matthew Boswell, CPA, Vice President of Finance, Heritage Ministries

Appellant exhibits: A-G

A transcript of the hearing was made. (T 1-130.) Each party submitted a post-hearing brief.

FINDINGS OF FACT

1. At all times relevant hereto, the Appellant was a residential health care facility (RHCF) in Chautauqua County, licensed under Article 28 of the Public Health Law, organized as a not-for-profit corporation, and enrolled as a Medicaid provider. (Exhibits 1, 2; T 15, 95.)

2. The Appellant obtained a certificate of need from the Department in 2008. (T 96, 110.)

3. The Appellant is a member of, and wholly owned by, the Heritage Ministries Charitable Care Network (Heritage Ministries), a community of multiple care facilities. (T 15-16, 95-96.)

4. The Appellant receives a daily rate for each Medicaid recipient occupying a bed in its facility. (Exhibits 1, 2.)

5. Auditors from the OMIG reviewed the capital portion of the Appellant's Report of Residential Health Care Facility (RHCF-4) cost reports submitted annually for the 2013-2016 calendar years. These RHCF-4 cost reports were used to determine the capital portion of the Appellant's daily rate from the Medicaid Program for the period January 1, 2015 through December 31, 2018. (Exhibits 1, 2.)

6. On December 28, 2021, the OMIG issued a draft audit report which identified five categories of disallowances for claimed property expenses and proposed to recover an estimated Medicaid overpayment of \$151,536. The draft audit report advised the Appellant, pursuant to 18 NYCRR § 517.5, that it was entitled to submit objections to the proposed action, which objections were required to include any additional material or documentation that the Appellant wished to be considered. (Exhibit 1.)

7. On January 25, 2022, the Appellant submitted its objections to the draft audit report. (Exhibit A.)

8. On March 14, 2022, the OMIG issued a final audit report, which advised the Appellant that, after review of the Appellant's objections and supporting documentation, the overpayments totaling \$151,536 identified in the draft audit report remained unchanged. (Exhibit 2.)

9. On May 12, 2022, the Appellant requested this hearing to review the findings set forth in the final audit report. (Exhibit 3.)

10. The parties having resolved all other findings in the final audit report, the only audit determinations remaining for resolution in this hearing decision are:

Property Expense Disallowance 1: Mortgage expenses

Property Expense Disallowance 4: Building rent

Property Expense Disallowance 5: Related company expenses. (Exhibit A; T 16-19.)

ISSUES

Was the OMIG's determination to disallow mortgage interest and mortgage costs associated with a refinanced mortgage correct?

Was the OMIG's determination to disallow lease expenses for a pharmacy located in a related company's building correct?

Was the OMIG's determination to disallow lease expenses for the portion of a related company's building where administrative functions are performed correct?

APPLICABLE LAW

Residential health care facilities (also referred to as nursing homes in other applicable state regulations) 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 Nursing Home and Long-Term Care Rate Setting (BNHLTCRS) 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)(ii). The capital component of the rate is facility-specific, and includes leases and rentals, and interest on capital debt. 10 NYCRR §§ 86-2.10(a)(9)&(g), § 86-2.20, and § 86-2.21.

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 costs were inaccurately or

improperly reported or are otherwise not includible in the Medicaid rate. SSL § 368-c; 10 NYCRR § 86-2.7; 18 NYCRR § 517.3. Upon completion of an audit, the Department 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 to require repayment of any overpayment. 18 NYCRR § 519.4. The Appellant has the burden of establishing that the OMIG's determination was incorrect and that all costs claimed were allowable. 18 NYCRR § 519.18(d).

DISCUSSION

At the hearing, the OMIG presented the audit file and summarized the case, as required by 18 NYCRR § 519.17. The Appellant is contesting disallowances of three types of expenditures included in its 2013-2016 cost reports as property expenses.

Property Expense Disallowance 1: Mortgage expenses.

The Appellant refinanced two mortgages in the calendar year 2013, and reported interest and costs associated with the mortgages in its 2013-2016 cost reports, including financing costs associated with the refinancing. (T 100.) The OMIG disallowed those expenses because the new mortgage was not approved by the Department. (Exhibits 1, 2, 7c; T 47-48.) All financing costs associated with refinancing were also disallowed. (T 48.)

To be considered as allowable in determining reimbursement rates, costs shall be properly chargeable to necessary patient care. 10 NYCRR § 86-2.17(a). Allowable costs shall not include expenses or portions of expenses reported by individual residential health care facilities which are determined by the Commissioner not to be reasonably related to the efficient

production of service because of either the nature or amount of the particular item. 10 NYCRR § 86-2.17(d).

The Appellant argued that the remaining unpaid balance of the originally approved debt remained reimbursable after refinancing. (Appellant's Brief, pp. 12-14.) The refinanced mortgage was an amalgam of "several pieces of debt", but the Appellant claims that the only amounts reported on its cost report pertained to the portion related to the Appellant's original debt. (Exhibit A; T 101.) Matthew Boswell, Vice President of Finance of Heritage Ministries, testified that the refinanced mortgage included the Appellant's original mortgages, but also other liabilities, including a pension buyout. Mr. Boswell stated that costs unrelated to the refinancing of the original mortgages were excluded from the Appellant's cost reports, using an allocation percentage derived from comparing the total amount of the Appellant's original mortgages to the amount of the refinancing. (T 101, 104.) The Appellant further argues that the refinancing was determined to be "appropriate, in order to maintain a sustainable cash flow, to consolidate its existing debt...into one mortgage loan." (Appellant's Brief, p. 12.)

The Appellant's references to Medicare principles of reimbursement are inapplicable in reviewing the OMIG's determination because the basis for disallowing the reported costs at issue is already addressed in 10 NYCRR Subpart 86-2. *See* 10 NYCRR § 86-2.17(a). The Appellant has failed to establish that the reported portion of total refinancing costs was related to necessary patient care. Further, no evidence was shown to establish that the reported costs were reasonably related to the efficient production of service. As discussed below, reported mortgage costs increased immediately after the refinancing.

Interest on capital indebtedness (all debt obligations incurred by a facility incurred for the purpose of financing the acquisition, construction or renovation of land, building or non-

moveable equipment) is an allowable cost if the debt generating the interest is approved by the Commissioner of Health, incurred for authorized purposes, and the principal of the debt does not exceed either the approval of the Commissioner or the cost of the authorized purposes. Interest related to refinancing indebtedness shall be considered an allowable cost only to the extent that it is payable with respect to an amount equal to the unpaid principal of the indebtedness being refinanced. However, interest incurred on refinanced debt in excess of the previously unpaid balance of the refinanced indebtedness will be allowable on acceptable demonstration to the Commissioner of Health that such refinancing will result in a debt service savings over the life of the indebtedness. 10 NYCRR § 86-2.20(e).

The Appellant acknowledged that it failed to obtain required Departmental approval before entering into a new mortgage, but asserted that the Department's Bureau of Residential Health Care Reimbursement (BRHCR) recognized the refinancing by reimbursing the reported interest and other costs associated with refinancing. (Exhibit A; T 121-22.) Rates are provisional until an audit is performed and completed. 10 NYCRR § 86-2.7(a).

The Appellant also argued that reported interest on the refinanced mortgage was reimbursable simply because the costs were incurred to satisfy a financial need pursuant to 10 NYCRR § 86-2.20(b). (Appellant's Brief, pp. 13-14.) No evidence was offered to show that the refinanced mortgage was approved by the Department, nor did the Appellant establish that the refinanced mortgage will result in a debt service savings over the life of the loan, as required by 10 NYCRR § 86-2.20(e). (T 34-35.)

The refinanced mortgage has resulted in a significant increase in the Appellant's reported debt. (T 44-45, 47, 123-24.) Whereas the Appellant's original two mortgages totaled \$1,197,044 (\$714,544 payable over seven years and \$482,500 payable over nine years) in

principal debt, the Appellant's refinanced mortgage totals \$2,996,444 in principal debt. The Appellant's interest rate on the original loans was 2.21 percent, but increased to 5.95 percent after refinancing. While the original 2008 mortgage was set to mature in 2015 and the 2009 mortgage would have matured in 2018, the refinanced loan has a new term of 15 years and will mature in 2028. (T 40-41, 123-24.) Whereas the Appellant's 2012 RHCF-4 form reported a mortgage interest expense of \$8,406, the 2013 RHCF-4 form reported a mortgage interest expense of \$36,390, and its 2014 RHCF-4 form reported a mortgage interest expense of \$34,580. Reported mortgage expense amortization also increased after the Appellant's refinancing in its 2013 and 2014 cost reports. (Exhibits 4a-c, 4f, 5a-c.)

The refinanced mortgage was not approved by the Department, and the refinanced mortgage has resulted in increased costs. The OMIG's disallowance of the reported mortgage interest and other mortgage-related costs was correct.

Property Expense Disallowance 4: Building rent.

The OMIG disallowed the Appellant's reported rent expenses incurred in 2014 and 2016 for pharmacy space. (Exhibits 2, 4f.) On January 1, 2014, the Appellant entered into a lease with The Gerry Homes for 1600 square feet of the lower level of a two-story building owned by The Gerry Homes to be used as a pharmacy. (Exhibit A; T 95-97.) The Gerry Homes is wholly owned by Heritage Ministries, a related organization as defined in 10 NYCRR § 86-2.26(a). (T 15-16, 96-97; Exhibit A.) The pharmacy occupies the building's first floor, and services all related Heritage companies. The building's second floor is occupied by Heritage Ministries staff performing various other services, discussed below with respect to the Property Expense Disallowance 5. (T 110.)

The Appellant's response to this disallowance and to Property Expense Disallowance 5 relied heavily on the Provider Reimbursement Manual (PRM-1) prepared by the Centers for Medicare and Medicaid Services (CMS). (Exhibit A.) A review of the principles of reimbursement developed for determining payments under the Medicare program is not appropriate here because there are specific regulations addressing the reimbursability of the lease expenses at issue in this case. 10 NYCRR § 86-2.17(a).

A lease with a related organization shall be deemed to be a non-arm's length lease. Any capital expenditures associated with non-arm's length leases shall be approved and certified to, if required, pursuant to Article 28 of the Public Health Law. In computing reimbursement for non-arm's length leases, the capital cost shall be included in allowable costs only to the extent that it does not exceed the amount which the facility would have included in allowable costs if it had legal title to the asset (the cost of ownership), such as straight-line depreciation, insurance, and interest. 10 NYCRR §§ 86-2.19(f)(2)-(3).

The OMIG allowed the costs of renting movable equipment (a prescription drug dispenser) in the leased pharmacy space as a capital expense. Administrative costs associated with the leased pharmacy space are reimbursable through the operating component of the Appellant's rate. (T 51.) The disallowance only involved the leased pharmacy space.

While the Appellant conceded that 21.46% of the reported expense did not pertain to patient care, it asserted that 78.54% of the reported expense of the pharmacy lease was related to patient care, and asked the OMIG to allow that percentage of its originally reported costs. (Exhibit A.) The costs incurred for the related company's building lease are not reimbursable at any percentage, as explained in 10 NYCRR § 86-2.19(f)(3). The OMIG's determination was correct.

Property Expense Disallowance 5: Related company expenses.

The OMIG determined to disallow the Appellant's reported costs in 2014 and 2016 pertaining to the expenses of its management company. (Exhibit 2.) Heritage Ministries renders "various accounting, nursing, facility and plant operations, and general and administrative services to the Appellant and other affiliated entities." (Exhibit 4f.)

The Appellant contended that the reported costs were necessary administrative costs, and that it obtained the Department's approval before forming the related management company. (Exhibit A.) The approval was not provided for this hearing.

More importantly, the lease payments are not reimbursable, for reasons described above with respect to Property Expense Disallowance 4. The Appellant unpersuasively contends that various administrative functions integral to its provision of services are performed on the second floor of the related management company's building which would otherwise need to be performed on its own premises at greater expense since the related management company performs these services for all affiliated senior health care entities. (T 112.) The Appellant argues further that its own building lacks the physical capacity to house staff performing those administrative functions. (T 117-18.)

Regardless of the location in which those functions are performed, the costs of those functions are reimbursable if properly chargeable to necessary patient care. *See* 10 NYCRR 86-2.17. Administrative functions are reimbursed in the operating component of the Appellant's rate. The OMIG's determination at issue only involves the cost of renting the space for performing those functions. The rental expense is not reimbursable. The OMIG's determination was correct.

DECISION

The OMIG's determination to disallow mortgage interest and mortgage costs associated with a refinanced mortgage was correct and is affirmed.

The OMIG's determination to disallow lease expenses for a pharmacy located in a related company's building was correct and is affirmed.

The OMIG's determination to disallow lease expenses for the portion of a related company's building where administrative functions are performed was correct and is affirmed.

DATED: November 20, 2024
Menands, New York



Natalie J. Bordeaux
Administrative Law Judge