

STATE OF NEW YORK : DEPARTMENT OF HEALTH

DECISION

In the Matter of the Appeal of

AFTER

LONG ISLAND MEDICAL ASSOCIATES

HEARING

Appellant

from a Determination to Recover Medicaid
Overpayments

Medicaid ID #0813867

Audit #05-1670

On September 10, 2009, The New York State Department of Health Office of the Medicaid Inspector General¹ issued a Final Audit Report # 05-1670 for the rate period January 1, 1999 through December 31, 2004. Long Island Medical Associates requested a hearing to appeal the Final Audit Report. A Notice of Hearing was issued for February 2, 2010, and after mutually agreed upon adjournments the first day of hearing was held on September 21, 2010, before KIMBERLY A. O'BRIEN, ESQ, ADMINISTRATIVE LAW JUDGE at the Offices of the New York State Department of Health, 90 Church Street, 4th Floor, New York New York. LONG ISLAND MEDICAL ASSOCIATES ("Appellant") appeared by Counsel JEFFREY A. GRANAT, ESQ, JACOBSON, GOLDBERG & KULB L.L.P. The New York State Department of Health, Office of the Medicaid Inspector General ("Department") appeared by MAURA HAYES-CHAFFE, ESQ with ROBYN E. HENZEL, ESQ (Reply Brief). Evidence was received and argument heard, and transcripts of these proceedings were made. The record was closed upon the submission deadline for reply brief April 22, 2015.

¹ The New York State Department of Health Office of the Medicaid Inspector General ("OMIG") is an independent office within The New York State Department of Health and is solely authorized to conduct Medicaid Audits [Public Health Law Sections 31 & 32].

PROCEDURAL HISTORY

Draft Medicaid Audit Reimbursement Report	May 15, 2007
Final Medicaid Audit Reimbursement Report	September 10, 2009
Originally Scheduled Hearing Date	February 2, 2010 ²
Pre Hearing Conference	September 14, 2010
Hearing Dates	September 21, 2010, November 9, 2010
Witness for Appellant	██████████ CPA, Charles, Boudin & Company L.L.P.
Department Representative	Anit Maitra, OMIG-Chief Medical Facilities Auditor
Briefs ³	December 10, 2010
Reply Briefs	April 1, 2015

CONCLUSIONS OF LAW

The Department determines a provider's initial Medicaid rate ("rate") based on the costs provided in its certified cost report ("cost report") [Title 10 of the Official Compilation of Codes Rules and Regulations of the State of New York ("NYCRR") 86-4.4]. The cost report "shall be certified by an independent licensed public accountant or an independent certified public accountant" and by the provider's operator [10 NYCRR 86-4.6 (a) & (c)]. The information contained in the certified cost report is subject to audit and until audited the rate is provisional in nature [10 NYCRR 86-4.6 (a) & (b)]. The facility must be able to substantiate the reported costs that form the basis of the Medicaid rate before the rate can be finalized, by showing "[a]ll

² William Lynch, ALJ was originally assigned to hear this matter. On or about January 27, 2010, ALJ Lynch granted the parties' mutual request to adjourn the hearing scheduled on February 2, 2010. There were several status conferences to discuss the hearing schedule [Tr. 6].

³ Ms. Chaffe represented the Department at the hearing, authored OMIG's first brief and requested an opportunity to submit a reply brief. Robyn E. Henzel, Esq. authored OMIG's reply brief.

underlying books records and documentation” [10 NYCRR 86-4.6(b)]. Pursuant to 18 NYCRR 517.5, the Department may issue a draft audit report if it is determined that that Medical Assistance for Needy Persons Program (“Medicaid”) overpayments may have been made. A provider has the right to submit written objections in response to the draft audit report and the Department considers this information before making its final audit determination [10 NYCRR 517.5(b)]. The Department may demand reimbursement of overpayments [18 NYCRR 518.3]. Pursuant to Social Services Law Section 22 and 18 NYCRR 519.4, a provider may request a hearing to appeal the overpayment determination. At the hearing, the Department must provide a representative to present its final determination and the audit file [18 NYCRR 519.17]. The provider/ appellant has the burden of showing the Department’s final determination was incorrect and that all costs claimed are allowable [18 NYCRR 519.18 (d)(1) & (d)(2)].

STATEMENT OF THE CASE

The Department issued a final audit report on September 10, 2009. The Department adjusted and/or disallowed Appellant’s operating expense for prior year start up–costs and four categories of capital expense disallowances including auto lease expense, amortization expense, prior period rental expense and related party rental expense. The Department determined that Appellant had received Medicaid overpayments in the amount of \$931,442.00, and demanded reimbursement of this amount. Appellant requested a hearing to appeal the Department’s final audit determination to challenge the adjusted and/or disallowed expenses.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. Numbers or letters below in parentheses refer to exhibits (denoted by the prefix “Ex.”) or transcript page numbers

(denotes by the prefix “9-21 Tr.” or “11-10 Tr.”)⁴. These citations refer to evidence found persuasive by the Administrative Law Judge in arriving at a particular finding.

1. Appellant, Long Island Medical Associates (“LIMA”), is a licensed diagnostic and treatment center, located at 393 Sunrise Highway-Suite 7, West Babylon, New York. During the audit period January 1, 1999 through December 31, 2004 it was enrolled in the Medicaid program under MMIS number 0183867 [Ex. 1 *Draft Audit Report*].
2. Mohamed Hassanien, Appellant’s administrator/ operator (“operator”), signed and submitted to the Department Appellant’s cost report (“cost report”), wherein he certified that the information contained in the cost report reflects costs that were actually incurred by Appellant [Ex. 1 *Draft Audit Report*, Ex. 5 *Final Audit Report*; 10 NYCRR 86-4.4].
3. Based on Appellant’s “1999 reported costs” the Department determined Appellant’s provisional reimbursement rate for the period January 1,1999 - December 31, 2004 [9-21 Tr. 19-21; Ex. 11 *Pre-audit Medicaid Rate*].
4. The Department audited ⁵ the costs reported by the operator in the cost report and issued a May 15, 2007 Draft Audit Report 05-1670 (“draft audit report”) for the rate period January 1, 1999 through December 31, 2004 [Ex. 1- *Draft Audit Report*; 9/21 Tr. 19-22; 10 NYCRR 86-4.6].
5. A related organization is “defined as any entity which controls the facility or which the facility controls, either directly or indirectly, or an organization or institution whose actions or policies the facility has the power, directly or indirectly, to significantly influence or direct, or a special purpose organization or where an association of material interest exists in an entity

⁴ The 9-21 transcript and the 11-10 transcript begin with page number “1”.

⁵ The Department contracted with an outside auditor “KPMG” to conduct the audit but the Department reviewed, approved, and issued both the draft and final audit report [9/21-Tr. 17-23, 32-33; Ex. 1- *Draft Audit Report*; Ex. 5- *Final Audit Report*]

which supplies goods and/or services to the facility, or any entity which is controlled directly or indirectly by the immediate family of the operator.” [10 NYCRR 86-4.28(a); 9/21 Tr. 50-52].

6. Appellant/ LIMA and Sunrise Health Care Holding Corporation (“Sunrise”) are related organizations both located at 393 Sunrise Highway, West Babylon, New York (“Sunrise Highway”). LIMA and Sunrise are owned by Mohamed Hassanien and Roy Shannon. The Sunrise Highway lease was signed by Mohamed Hassanien as both tenant and landlord [Ex. 3 7/19/07 Letter with Attachments at p.14, Ex. 5 Final Audit Report, Ex. 7 B4 Workpapers at p. 10 & 39; 9/21 Tr. 18, 47-50; 11-10 Tr. 28-29].
7. Charles, Boudin & Company LLP is an independent certified public accounting firm (“firm”) that prepared and certified and Appellant’s cost report and Appellant’s and Sunrise’s income tax returns based on unaudited information provided by the operator [11-10 Tr. 6-8, 26, 38-40, 28, 31].
8. Pursuant to Appellant’s request, the Department granted multiple extensions of the usual 30-day draft audit response period (“response period”) [9/21 Tr. 25 -27, 71-73, 93, 116-17; 18 NYCRR 517.5].
9. The Department ultimately set November 30, 2007 as the final response deadline (“final response deadline”), which was more than six months after the May 15, 2007 draft audit report was issued [9-21 Tr. 23-27, 58; Ex 1-Draft Audit Report, Ex. 4 11/5/07 Letter and attachments].
10. Appellant submitted three written responses to the draft audit report [Ex. 2 -Appellant’s Written Responses at p. 1-16]. Appellant’s July 26, 2007 response and its November 26, 2007 response were considered by the Department [Ex. 2 -Appellant’s Written Responses at p. 3-16;

9/21 Tr. 25 -27]. Appellant's January 24, 2008 response was not considered by the Department because it was submitted after the final response deadline [9/21 Tr. 37, 44-45, 57, 59, 102-103; Ex 2 at p.1-2; 18 NYCRR 517.5 (c)]

11. On or about September 10, 2009, OMIG issued the Final Medicaid Reimbursement Rate Audit Report (“final audit report”) and Appellant requested a hearing to appeal the final overpayment determination [Ex. 2- *Appellant’s Hearing Request*; Ex. 5 *Final Audit Report*].
12. Operating expenses are “expenses the facility incurs on a day to day basis for the care of the patient” [9/21 Tr. 35, 59 citing Ex. 5 *Final Audit Report* & NYCRR 86-4.21 *Allowable costs*].
13. AUDIT ADJUSTMENT A1- *OPERATING EXPENSE DISALLOWANCE FOR PRIOR YEAR START –UP COSTS* The Department determined to disallow \$145,860.00 in operating costs relating to prior year startup costs [9/21 Tr. 35-37, 59-66; Ex. 5 *Final Audit* at p.7, Ex. 10 *A1 Workpapers*].
14. “Capital costs are the costs that are like rent, depreciation, interest ...” [9/21 Tr. 35; See 10 NYCRR 86-4.20 *Capital cost reimbursement*].
15. AUDIT ADJUSTMENT B1 - *AUTO LEASE EXPENSE DISALLOWANCE*
The Department determined to disallow \$5,680.00 the full reported cost of automobile leases for vehicles driven by Mohamed Hassanien and Roy Shannon [9/21 Tr. at 57-59, 102 -103; Ex. 5- *Final Audit* at p.9; Ex 9-*B1 Workpapers*].
16. AUDIT ADJUSTMENT B2 - *AMORTIZATION EXPENSE DISALLOWANCE*
The Department determined to disallow Appellant’s reported rental expense \$35,900.00 (“rental expense disallowance”) [9/21 Tr. 53-58; Ex. 5 -*Final Audit* at p.10, Ex. 8 - *B2 Workpapers*, Ex. B *November 26, 2007 Response Letter*].

17. AUDIT ADJUSTMENT B3 - *PRIOR PERIOD RENT EXPENSE DISALLOWANCE*

The Department determined to disallow \$10,450.00 of Appellant's reported rental expenses incurred prior to the reporting period 1/1/1999 to 12/31/1999 [9/21 Tr. 41-46; Ex. 5 *Final Audit at p.12, Ex. 6 – B3 Workpapers*].

18. AUDIT ADJUSTMENT B4 - *RELATED PARTY RENTAL EXPENSE DISALLOWANCE*,

The Department determined to disallow \$66,245.00, which equals the full reported cost of Appellant's Sunrise Highway lease, \$88, 200.00, minus Sunrise's depreciation cost, \$21,955.00 [9/21 Tr. 47-52 *citing* 10 NYCRR 86-4.23 *Depreciation*, 81-91, 96-97; Ex. 5 *Final Audit at p.13, Ex 7 – B4 Workpapers*].

QUESTION

Was the Department's determination to lower the Appellant's Medicaid Reimbursement Rate based on five categories of adjustments/ disallowances set forth in the September 10, 2009 final audit report and recover \$931,442.00 in overpayments correct?

WITNESSES

Anit Maitra, Chief Medical Facilities Auditor ("Mr. Maitra")⁶ was the Department's sole witness. Mr. Maitra reviewed and approved the final audit report before it was issued, presented the audit file and case for the determination that the Department requires restitution of Medicaid overpayments. [REDACTED]⁷ is [REDACTED] at the firm of Charles, Boudin & Company L.L.P. ("firm") was Appellant's sole witness. [REDACTED] firm prepared and certified Appellant's cost report and both Appellant's and Sunrise's tax returns ("tax returns"), and he participated in discussions with the Department during the response period.

⁶ 9-21 Tr. 1-129.

⁷ 11-10 Tr. 1-60.

The ALJ found both Mr. Maitra and [REDACTED] to be credible by training and experience to offer testimony. However, [REDACTED] testimony was limited by the fact that his firm prepared and certified Appellant's cost report and Appellant's and Sunrise's tax returns based on unaudited information provided by Appellant's operator, and neither he or his firm are familiar with Medicaid rules [FOF 7].

AUDIT ADJUSTMENT A1 - OPERATING EXPENSE DISALLOWANCE FOR PRIOR YEAR START –UP COSTS

Appellant challenged the operating expense disallowance for the prior year startup costs. It is undisputed that during the response period the Department agreed to amortize a portion of the expense over a five-year period instead of a ten-year period; thereby reducing the total disallowance from \$152,490.00 to \$145,860.00 [9/21 - Tr. 64-67]. Appellant did not offer testimony or documentation to show that the expense occurred in 1999, the determination to disallow the expense was incorrect or it was entitled to more than the amortized amount [FOF 4,10,11,12 &13].

AUDIT ADJUSTMENT B1- DISALLOWANCE OF AUTO LEASE EXPENSE

Appellant challenged the audit finding disallowing the reported cost for automobile leases, \$5,680.00, for vehicles driven by Mohamed Hassanien and Roy Shannon. Mr. Maitra testified that Appellant claimed that the vehicles were used "by two officers" to travel between medical facilities [9/21 Tr. at 58]. Appellant was required to produce a vehicle log documenting the daily use of the vehicle(s), gas receipts or other documentation to substantiate that any part of the automobile lease expense was "properly charged to patient care" [9/21 Tr. 59 quoting 10 NYCRR 86-4.21]. Appellant offered no witness testimony or documentation to substantiate the disallowed auto lease expense, and failed to show that the determination to disallow the auto lease expense was incorrect or that any part of the expense should have been allowed [FOF 15].

AUDIT ADJUSTMENT B2 - AMORTIZATION EXPENSE DISALLOWANCE

Appellant challenged the adjustment of its reported prior year rental expense. It is undisputed that in the draft audit report the Department determined to disallow Appellant's pre-1999 rental expense, \$44,100.00. It is also undisputed that after considering Appellant's November 26, 2007 response letter, the Department agreed that the pre-1999 rental expense should be amortized over a five-year period rather than a ten-year period, and it allowed \$8,200.00 ("amortized amount") [9/21 Tr. 55]. The final audit report reflected the reduced disallowance, \$35,900.00 ("prior year rental expense") [FOF 16]. Mr. Maitra testified that the allowance of the amortized amount is consistent with rate setting methodology under which capital costs are reimbursed as actually expended [9/21 Tr. 55 -57]. Appellant did not offer testimony or documentation to show that the determination to disallow the prior year rental expense was incorrect or that it was entitled to more than the amortized amount.

AUDIT ADJUSTMENT B3 - PRIOR PERIOD RENT EXPENSE DISALLOWANCE

Appellant challenged the prior period rent expense disallowance. Mr. Maitra testified that the Department disallowed Appellant's reported rent expense for Appellant's "leases at various locations because the costs were incurred in a prior year" and "prepaid rents and security deposits constitute assets and are not reimbursable costs [9/21 Tr. 45-46; FOF 17]. Appellant offered no witness testimony or documentation to show that the rental expense was not incurred before 1999 and did not constitute assets or that the determination to disallow the prior period rent expense was incorrect.

AUDIT ADJUSTMENT B4 - RELATED PARTY RENTAL EXPENSE DISALLOWANCE

Appellant challenged the related party rental expense disallowance. The Department determined that Appellant and its landlord Sunrise are related parties [FOF1, 2, 5, 6, 14, and 18].

Mr. Maitra testified that when the parties to the lease are related the Department compares the fair market value of the lease to the cost of ownership to the related company [9/21 Tr. 88-89]. In this case the landlord's ("Sunrise's") depreciation cost, \$21, 955.00 was lower than the cost of Appellant's/tenant's Sunrise Highway lease agreement, \$88, 200.00. Other capital costs in addition to depreciation are allowed when calculating a related party's cost of ownership including mortgage interest and real estate taxes ("other related party costs of ownership"), but here depreciation was the only "authenticated" reported cost of ownership [9-21 Tr. 91, 97-98].

██████████ concurred with the Department that the parties to the lease, Appellant and Sunrise, are related entities; for this reason, in addition to depreciation, the Department should have allowed other related party costs of ownership [11-10 Tr. 28, 31]. When a client of his firm is audited it is the client, in this case the operator "Mr. Hassanien," who would substantiate the reported costs by producing bank statements, checks and other documentation [11-10 Tr. 37-38; FOF 7]. It came as a "surprise" to ██████████ that Appellant suggested to the Department that his firm may be in possession of books and records that could substantiate the disallowed costs [11-10 Tr. 39-40].

It is undisputed that ██████████ and the Department concurred that the Appellant and Sunrise are related entities and that the Department allowed a related party cost of ownership, depreciation, in the final audit. Assuming *arguendo* that ██████████ concurrence with the Department that the parties to the lease are *related* relieved Appellant of its burden to show that the parties to the lease are *not related*, and that in addition to depreciation other related party costs should have been allowed; Appellant did not provide any documentation to substantiate any other related party costs.

It is also undisputed that throughout the response period Appellant purported that LIMA and Sunrise were not related entities and the full cost of Appellant's lease should be allowed [FOF 10, 18]. Accordingly, it was Appellant's burden to show that the parties to the lease were not related and that the Department was wrong when it disallowed the cost of the lease. Appellant failed to provide witness testimony or documentation to show that the Department incorrectly determined that Appellant and Sunrise are related entities or that the cost of Appellant's lease should have been included in its Medicaid reimbursement rate.

CONCLUSIONS⁸

The record is clear that the parties engaged in protracted settlement discussions from 2007 when the draft audit report was issued through 2015 when a date was set for the submission of reply briefs.⁹ The ALJ was not privy to the sum and substance of these discussions or any unrealized settlement terms.

This decision is limited to whether the Department erred in some or all of its disallowances and/or overpayment calculations, and if so whether Appellant showed that some or all of the disallowed expenses should be allowed in its Medicaid reimbursement rate. Based on the record alone, the ALJ determined that Appellant has failed to show that the Department's final Medicaid overpayment determination was incorrect and that any of the disallowed costs should have been allowed.

⁸ OMIG alleged in its reply brief that Appellant committed fraud by intentionally supplying "false information" in its cost report about the related party rental expense disallowance [OMIG Reply Brief at p.6]. However, the Department's final audit determination sought only restitution of Medicaid overpayments not sanctions for fraud and abuse.

⁹ 9/21 Tr. 6-7, 125-127; ALJ 2 e-mails including OMIG's 12/30/10 request to submit a reply brief & 2015 e-mails regarding status conference calls to determine when or if the parties would settle the matter or submit reply briefs.

DECISION

The Department's determination to require repayment of \$931,442.00 in Medicaid Program overpayments during the audit period January 1, 1999 through December 31, 2004 is **AFFIRMED;**

This decision is made by Kimberly A. O'Brien, who has been designated by the Commissioner of the New York State Department of Health to make such decisions.

DATED: Albany, New York
March 22, 2016

KIMBERLY A. O'BRIEN
Administrative Law Judge

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