



State of Maine
Department of Human Services
Office of Administrative Hearings
11 State House Station
Augusta, Maine
04333-0011

John Elias Baldacci
Governor

John R. Nicholas
Commissioner

TO: John R. Nicholas, Commissioner
Department of Human Services
221 State Street
11 State House Station
Augusta, ME 04333

In Re: St. Marguerite d'Youville Pavilion–Appeal of adjusted prospective rate for the correct inflation factor as defined by the Principles of Reimbursement during the MaineCare audit of St. Marguerite d'Youville Pavilion for the fiscal year ending December 31, 2001

RECOMMENDED DECISION

An administrative hearing was held on March 22, 2004, at Lewiston, Maine in the case of St. Marguerite d'Youville Pavilion before Michael L. LeBlanc, Hearing Officer. The Hearing Officer's jurisdiction was conferred by special appointment from the Commissioner, Department of Human Services.

ISSUE PURSUANT TO ORDER OF REFERENCE:

Pursuant to an Order of Reference dated December 1, 2003, this matter was referred to the Office of Administrative Hearings for a Hearing Officer to conduct an administrative hearing and to submit to the Commissioner written findings of fact and recommendations on the following issue:

Was the Department correct when it adjusted the prospective rate for the correct inflation factor as defined by the Principles of Reimbursement during the MaineCare audit of St. Marguerite d'Youville Pavilion for the fiscal year ending December 31, 2001?

APPEARING ON BEHALF OF APPELLANT:

Kathy S. Constantine, Assistant Controller, St. Marguerite d'Youville Pavilion

APPEARING ON BEHALF OF AGENCY:

Herbert Downs, Assistant Director, Division of Audit

ITEMS INTRODUCED INTO EVIDENCE:

Hearing Officer Exhibits:

- HO-1. Rescheduling Notice, 2/11/04
- HO-2. Notice of Hearing, 12/3/03
- HO-3. Order of Reference, 12/1/03
- HO-4. Hearing Report, 11/19/03

- HO-5. Acknowledgment of Request for Hearing, 11/6/03
- HO-6. Request for Hearing, 10/24/03

Department Exhibits:

- DHS-1. Principles of Reimbursement for Nursing Facilities, effective 7/1/00
- DHS-2. Cost Report, 1/1/01 to 12/31/01
- DHS-3. Audit Report Transmittal, 8/13/03
- DHS-4. Request for Informal Review, 9/11/03
- DHS-5. Informal Review Decision, 9/26/03
- DHS-6. Audit Report Transmittal, 12/3/03
- DHS-7a. Case Mix Adjusted Per Diem Rate for Quarter ending 9/15/00, dated 1/9/01
- DHS-7b. Case Mix Adjusted Per Diem Rate for Quarter ending 12/15/00, dated 3/20/01
- DHS-7c. Case Mix Adjusted Per Diem Rate for Quarter ending 3/15/01, dated 6/14/01
- DHS-7d. Case Mix Adjusted Per Diem Rate for Quarter ending 6/15/01, dated 9/26/01
- DHS-8a. Case Mix Adjusted Per Diem Rate for Quarter ending 12/15/00 (Audit settlement purposes), dated 10/30/03
- DHS-8b. Case Mix Adjusted Per Diem Rate for Quarter ending 9/15/00 (Audit settlement purposes), dated 10/30/03

RECOMMENDED FINDINGS OF FACT:

A. Background

1. Notice of these proceedings was given timely and adequately. St. Marguerite d'Youville Pavilion made timely appeal.
2. St. Marguerite d'Youville Pavilion ("d'Youville Pavilion") is a nursing facility located in Lewiston, ME. As a long-term care facility, d'Youville Pavilion is required by MaineCare Benefits Manual, Chapter III to file a cost report with the Department of Human Services, Division of Audit (the "Division of Audit") at the end of its fiscal year.
3. On June 25, 2002, the Department accepted d'Youville Pavilion's cost report for the fiscal year January 1, 2001 through December 31, 2001, which indicated that it had been underpaid \$75,654.00. See, Exhibit DHS-2. After conducting its audit, on or about August 13, 2003, the Division of Audit issued an Audit Report that notified d'Youville Pavilion that it had revised some of the figures contained in d'Youville Pavilion's cost report, and that the underpayment of MaineCare payments was revised to \$62,288.39. See, Exhibit DHS-3.
4. On or about September 11, 2003, d'Youville Pavilion filed a timely request for an Informal Review with the Division of Audit, raising four issues: (1) The revision of the prospective rate for direct and routine costs for the first two quarters of calendar year 2001; (2) The disallowance of \$69,280.00 as a cost of Pastoral Care; (3) The adjustment of rental expense; and (4) The adjustment of interest expense. See, Exhibit DHS-4.
5. On or about September 26, 2003, the Division of Audit issued an Informal Review Decision that upheld the August 13th Audit Report in the first three issues raised by d'Youville Pavilion. With respect to the fourth issue, the Informal Revision Decision agreed with d'Youville Pavilion. See, Exhibit DHS-5. On or about December 3, 2003, the Division of Audit issued a Revised Audit Report that indicated an additional \$12,929.28 in underpaid MaineCare payments. See, Exhibit DHS-6.

6. On or about October 24, 2003, d'Youville Pavilion filed a timely request for an Administrative Hearing. The only issue raised was whether the Division of Audit followed the proper mechanics in setting the prospective rate for direct care cost in its Revised Audit Report.

B. Direct Care Prospective Rate

1. Long-term care facilities receive MaineCare reimbursement for services provided to MaineCare recipients based on a rate that is determined on a prospective basis. The reimbursable costs are grouped in three categories: Direct Care Costs, Routine Costs, and Fixed Costs. Each of these components is determined separately each quarter by the Department of Human Services, Bureau of Medical Services (the "Bureau of Medical Services") who notifies the facility what interim prospective rate will be paid to the facility for the quarter.
2. Of the cost rates determined for each of the three components by the Division of Audit in its Revised Audit Report, only an inflation factor contained in the computation of Direct Care Costs is disputed.
3. On or about January 9, 2001, the Bureau of Medical Services notified d'Youville Pavilion that its interim prospective rate would be \$142.68 for the period January 1, 2001 to March 31, 2001. This was based in part on an inflation factor of 3.68%. See, Exhibit DHS-7a, Line (7).
4. On or about March 20, 2001, the Bureau of Medical Services notified d'Youville Pavilion that its interim prospective rate would be \$140.79 for the period April 1, 2001 to June 30, 2001. This was based in part on an inflation factor of 3.68%. See, Exhibit DHS-7b, Line (7).
5. On or about June 14, 2001, the Bureau of Medical Services notified d'Youville Pavilion that its interim prospective rate would be \$141.54 for the period July 1, 2001 to September 30, 2001. This was based in part on an inflation factor of 3.35%. The notice advised that the inflation factor had been corrected. See, Exhibit DHS-7c, Line (7).
6. On or about September 26, 2001, the Bureau of Medical Services notified d'Youville Pavilion that its interim prospective rate would be \$141.10 for the period October 1, 2001 to December 31, 2001. This was based in part on an inflation factor of 3.35%. See, Exhibit DHS-7d, Line (7).
7. There is no dispute that the correct inflation factor for fiscal year 2001, calculated in accordance with Principle 91, is 3.35%.
8. Notices dated October 30, 2003, from the Bureau of Medical Services, which is after the Division of Audit's Informal Review Decision but before the Division of Audit's Revised Audit Report, advised that the inflation factor for the two quarters ending March 31, 2001 and June 30, 2001, was being corrected to 3.35%. The notices indicated that they were issued for adjustment settlement purposes only.
9. In its Audit and Revised Audit Reports, the Division of Audit changed this inflation factor from 3.68% to 3.35% for the fiscal quarters ending March 31, 2001 and June 30, 2001. Whether the Division of Audit acted in accordance with policy in making this change for these quarters is the only dispute.

RECOMMENDED DECISION:

The Department **was correct** when it adjusted the prospective rate for the correct inflation factor as defined by the Principles of Reimbursement during the MaineCare audit of St. Marguerite d'Youville Pavilion for the fiscal year ending December 31, 2001.

REASON FOR RECOMMENDATION:

It is the position of d'Youville Pavilion that the Bureau of Medical Services sets the prospective interim rate, and that the audit performed by the Division of Audit is for the purpose of verifying the accuracy of the actual costs as reported by the provider, and determining whether those actual costs are less than or greater than the interim prospective rate set by the Bureau of Medical Services. It argues that there is nothing in policy that gives the Division of Audit the authority to change the prospective rate that was set by the Bureau of Medical Services.

It is the position of the Division of Audit that it is responsible for auditing the actual costs as reported by the provider, and for determining the final prospective rate. It argues that the determination of the final prospective rate is accomplished in accordance with the same policy the Bureau of Medical Services must follow in setting the interim prospective rate, and therefore may result in a correction of the interim prospective rate if such correction is warranted.

MaineCare Benefits Manual, Chapter III, Section 67, also known as the Principles of Reimbursement for Nursing Facilities (the "Principles"), Principle 80 provides for the establishment of a prospective per diem rate.

For services provided on or after July 1, 2000, the Department will establish a prospective per diem rate to be paid to each facility until the end of its fiscal year. Each nursing facility's cost components for the fiscal year ending in 1998, as determined from the audited cost report (or as filed cost report) will be the basis for the base year computations (subject to upper limits). Allowable costs are separated into three components – direct, routine and fixed costs.

The base year direct and routine cost components costs will be trended forward using the inflationary factors from the table "HCFA Nursing Home Without Capital Market Basket" from the publication Health Care Costs published by DRI/McGraw-Hill as described in Section 91. (See Section 80.3 for a complete description of the rate setting process for the direct care component and inflation guidelines from the base year through 6/30/00.) ... See, Principle 80.1.

As stated above, Principle 80.3 describes the process for setting the prospective rate for the direct cost component. The following sub-sections are relevant to the instant proceedings:

The Bureau of Medical Services shall compute the direct resident care cost component for each facility on a quarterly basis. See, Principle 80.3.4.

The direct cost, as defined in Section 41, shall be determined by adjusting the allowable necessary and reasonable direct care costs (subject to the limitations cited in Section 41 from the base year by the inflationary factor defined in Section 91, for dates of service on or after July 1, 2000. See, Principle 80.3.4.3.

For dates of service beginning on or after July 1, 2000 facilities that incur allowable direct care costs during their fiscal year which are less than their prospective rate for direct care will receive their actual cost.

Facilities, which incur allowable direct care costs during their fiscal year in excess of their prospective rate for direct care, will receive no more than the amount allowed by the prospective rate. See, Principle 80.3.5.

The audit performed by the Division of Audit is done in accordance with Principle 84:

84.1 All facilities will be required to submit a cost report in accordance with section 32 at the end of their fiscal year on cost report forms approved by the Department. The Department will conduct a final audit of each facility's cost report, which may consist of a full scope examination by Department personnel and which will be conducted on an annual basis.

84.2 Upon final audit of a facility's cost report for the first and subsequent years, the Department will:

84.2.1 Determine the actual allowable fixed costs incurred by the facility during the cost reporting period.

84.2.2 Determine the occupancy levels of the nursing facility.

84.2.3 Determine reimbursable direct care costs incurred by the facility during the reporting period per Section 80.3.5.

84.2.4 Determine the actual allowable routine costs incurred by the facility during the reporting period per Section 80.5.6.

84.2.5 Calculate a final rate.

84.2.6 Determine final settlement by calculating the difference between the audited final rate and the interim rate(s) paid to the provider times the Medicaid utilization.

Nursing facilities that transfer a cost center from one cost component to another cost component resulting in increased Medicaid costs will have the affected cost components adjusted at time of audit.

Upon final audit of a facility's cost report, the Department will calculate a final prospective rate and determine the lump sum settlement amounts either due to or from the nursing facility.

The Division of Audit will consider the impact of days waiting placement as specified in the Principles of Reimbursement for Residential Care Facilities. Fixed cost reimbursement for the nursing facility will not be affected by days waiting placement reimbursement to the nursing facilities.

The inflation factor of the direct care cost component for the first two quarters is the only dispute. That the correct factor is 3.35% as used for the last two quarters is not disputed. Whether the Division of Audit has the authority to change that inflation factor when the Bureau of Medical Services did not notice d'Youville Pavilion of a retroactive change in the inflation factor for the first two quarters is the only dispute.

Simply stated, d'Youville Pavilion argues that the Division of Audit performs an audit of the facility's report of its actual direct care costs, compares that figure to the amount of MaineCare paid to the facility pursuant to the interim rate set by the Bureau of Medical Services, and determines an overpayment if the actual cost is less than the interim rate. Direct care costs than exceed the interim rate are not reimbursable by MaineCare.

The Division of Audit agrees that it does the above. The disagreement is whether the Division of Audit is allowed by policy to change the interim prospective rate established by the Bureau of Medical Services. D'Youville Pavilion argues that it is not allowed. The Division of Audit argues that Principle 84, specifically Principle 84.2.6, "*Upon final audit of a facility's cost report, the Department will calculate a final prospective rate ...*" gives it the authority to audit the interim rate set by the Bureau of Medical Services, and that this is done, with respect to direct care costs, in accordance with Principle 80.3. The audit of the interim prospective rate that results in a change of the interim rate when the final prospective rate is established may result in either an underpayment or an overpayment.

After a *de novo*¹ review of the facts, of which there is no dispute, and the governing Principles of Reimbursement, it is concluded that the Division of Audit's interpretation that since it must establish a final prospective rate, it has the authority to change the interim prospective rate set by the Bureau of Medical Services is correct. The plain meaning of Principle 84.2.6 gives the Division of Audit the

¹ The hearing officer is to determine anew the relevant facts and apply the law to those facts. Therefore no presumptions are to be made for or against the Department concerning the validity of the factual or legal basis for the action or inaction which is the subject matter of the hearing. See Administrative Hearing Regulation, Section VII.C.1, Page 33.

authority to correct the interim prospective rate. It is recommended that the Commissioner affirm this interpretation.

THE PARTIES MAY FILE WRITTEN RESPONSES AND EXCEPTIONS TO THE ABOVE RECOMMENDATIONS WITHIN TWENTY (20) DAYS OF RECEIPT OF THIS RECOMMENDED DECISION. THIS TIME FRAME MAY BE ADJUSTED BY AGREEMENT OF THE PARTIES. RESPONSES AND EXCEPTIONS SHOULD BE FILED WITH THE OFFICE OF ADMINISTRATIVE HEARINGS, 11 STATE HOUSE STATION, AUGUSTA, ME 04333-0011. THE COMMISSIONER WILL MAKE THE FINAL DECISION IN THIS MATTER.

Dated: June 28, 2004

Signed: _____
Michael L. LeBlanc
Hearing Officer

cc: St. Marguerite d'Youville Pavilion, Kathy S. Constantine, Assistant Controller, P O Box 7291,
Lewiston, ME 04243-7291
Herbert Downs, Assistant Director, Division of Audit
Jane Gregory, AAG, Department of the Attorney General