

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
FEB 23 PM 2:22

AMEDISYS WEST VIRGINIA, L.L.C.
DBA AMEDISYS HOME HEALTH OF WEST VIRGINIA,
ST. MARY'S MEDICAL CENTER HOME HEALTH SERVICES, L.L.C., and
LHC GROUP, INC.

Petitioners,

v.

Civil Action No.: 19-AA-145
Judge Tod Kaufman

PERSONAL TOUCH HOME CARE OF W.VA. INC., et al.
and THE WEST VIRGINIA HEALTH CARE AUTHORITY,

Respondents.

ORDER

Pending before the Court is an administrative appeal of the Certificate of Need (CON) Decision granting Personal Touch Home Care of W. Va., Inc. ("Personal Touch") a certificate of need for the expansion of home health services in Cabell and Wayne counties, West Virginia. After consideration of the parties' briefs, the administrative record and applicable legal authorities, the Court **FINDS** that the decision of the Office of Judges is correct and hereby **AFFIRMS** its decision for the reasons set forth below.

PROCEDURAL OVERVIEW

Personal Touch filed an application to provide home health care services in Cabell and Wayne counties on August 10, 2018. The Application was deemed complete on August 14, 2018, and a Notice of Review was issued on August 16, 2018. On September 14, 2018, St. Mary's Medical Center Home Health Services, LLC ("St. Mary's") and LHC

Group, Inc. ("LHCG") requested affected person status and requested an administrative hearing. Also, on September 14, 2018, Amedisys West Virginia LLC d/b/a Amedisys Home Health of West Virginia ("Amedisys") requested affected person status and an administrative hearing. The West Virginia Health Care Authority ("Authority") held a public hearing on December 12, 2018. The Authority issued a Decision approving the Application on April 4, 2019. On May 3, 2019, Amedisys and St. Mary's jointly filed a Request for Review with the Office of Judges. Upon completion of briefing by the parties, the Office of Judges issued its Decision dated September 26, 2019, affirming the Authority's April 4, 2019, Decision. Petitioners filed an appeal with the Circuit Court of Kanawha County on October 23, 2019.

FINDINGS OF FACT

1. On August 10, 2018, Personal Touch filed an application with the Authority proposing to provide home health care services in Cabell and Wayne counties. Personal Touch will provide the full array of home health services including nursing, physical therapy, occupational therapy, social work and aides. Services will be offered to all ages. (Ex. 3)
2. The proposed capital expenditure for the project is \$47,000.
3. The application was deemed complete on August 14, 2018 (Ex. 7), and the Notice of Review was issued on August 16, 2018. (Ex. 8)
4. On September 14, 2018, St. Mary's and LHCG requested affected person status and requested an administrative hearing. (Ex. 11). Additionally, on September 14, 2018, Amedisys requested affected person status and requested an administrative hearing. (Ex. 12.)

5. A Hearing Order was issued by the Authority (Ex. 15) and the parties engaged in discovery.

6. The Authority conducted a pre-hearing conference on December 5, 2018, at which the parties exchanged witness lists, a summary of proposed anticipated testimony, and documents intended to be submitted. (Exs. 30-33)

7. A public hearing was conducted on December 12, 2018. The Authority issued a decision granting the CON on April 4, 2019.

8. On May 3, 2019, Amedisys and St. Mary's jointly filed a Request for Review with the Office of Judges. Upon completion of briefing by the parties, the Office of Judges issued its Decision dated September 26, 2019, affirming the Authority's April 4, 2019, Decision.

9. Petitioners filed an appeal of this decision on October 23, 2019, to the Kanawha County Circuit Court.

10. The Authority calculates need for home health services on a county-by-county basis. The Authority publishes and regularly updates the need calculations for home health care services and posts these calculations on its website.

11. At the time Personal Touch filed its application, the Authority's most recent home health survey demonstrated an unmet need of 29 unduplicated patients in Cabell County and 55 unduplicated patients in Wayne County.

12. The Need Methodology for the Home Health Standards are found in "Section V. Need Methodology." The methodology to determine whether a need exists for home health services in a county involves four calculations.

13. The first calculation determines the utilization rate for the county in question and compares that rate to the state-wide utilization rate. If the county rate falls below the state rate, the applicant moves to the second calculation.

14. The second calculation determines the actual number of home health recipients needed in the county to meet the state-wide utilization rate.

15. The third calculation produces the number of actual home health recipients below the state-wide utilization rate for the county in question by taking into account the number of persons receiving home health services from existing providers.

16. The fourth calculation provides for the "Calculation of the Threshold (Adjustment Factor)." This calculation is only performed if there are agencies in the proposed county which received CON approval in the previous 12 months. Where an agency in the proposed county received CON approval in the previous 12 months, an "adjustment factor" of 229 projected home health recipients is applied to the unmet need and the calculation operates to determine if there is an unmet need above the 229 adjustment threshold.

17. The "Conclusion" of the calculation provides that if "the threshold is at least 229 projected home health recipients, an unmet need exists." The "Conclusion" language is the primary issue on appeal. The Authority has long held that this "Conclusion" only applies to calculation four and only comes into play in instances in which another applicant has been granted a CON in that same county within the prior 12 months. Petitioners, on the other hand, contend the conclusion language applies to the entirety of the calculations, i.e., that an applicant must show an unmet need of 229 home health recipients regardless of the findings of calculation four.

CONCLUSIONS OF LAW

1. The standard of review for decisions appealed from the Office of Judges is set forth in W. Va. Code § 16-2D-16 which provides, in pertinent part, that an appeal be processed "in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code." See also *Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W.Va. 558, 328 S.E.2d 164 (1985). The specific standard of review is found at W. Va. Code § 29A-5-4(g), which provides

(g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are

- (1) In violation of the constitutional or statutory provision; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence of the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See Syl. Pt. 2 *Shepherdstown Volunteer Fire Dep't. v. Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

2. Under the Administrative Procedures Act, "the task of the circuit court is to determine whether the [agency's] decision was based on a consideration of the relevant factors and whether there is a clear error of judgment." See *Frymier-Halloran v. Paige*, 193 W.Va. 687, 695, 458 S.E.2d 780, 788 (1995) quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136, 153 (1971).

3. Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review. *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995). "An inquiring court – even a court empowered to conduct *de novo* review – must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Id.* At 195 W.Va. 582, 466 S.E.2d at 433. However, deference should only be given to an agency's construction of a statute or legislative rule if the legislative intent is not clear. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-843, 104 S.Ct. at 2781, 81 L.Ed.2d at 703; *Sniffin v. Cline*, 193 W.Va. 370, 374; 456 S.E.2d 451, 455 (1995).

4. Evidentiary findings made at a contested case hearing should not be reversed unless they are clearly wrong. *Stewart v. W. Va. Bd. Of Examiners for Registered Professional Nurses*, 197 W.Va. 386, 389, 475 S.E.2d 478, 481 (1996). The clearly wrong and arbitrary and capricious standards of review are deferential ones that presume that the agency's actions are valid as long as they are supported by substantial evidence or a rational basis. *Frymlier-Halloran, supra*.

5. A reviewing court may not substitute its own judgment for the agency's factual findings, regardless of whether the court would have reached a different conclusion on the same set of facts. *Frank's Show Store v. W. Va. Human Rights Comm'n.*, 179 W.Va. 53, 56, 365 S.E.2d 251, 254 (1986).

6. An agency's determination of matters within its area of expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning Development Agency*, 174 W.Va. 558, 564, 328 S.E.2d 164, 171 (1985).

7. An agency does not need to extensively discuss each proposed finding, such ruling must be sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed. *St. Mary's Hosp. v. State Health Planning & Dev. Agency*, 178 W.Va. 792, 796, 364 S.E.2d 805, 809 (1987).

8. The CON program exists pursuant to W. Va. Code § 16-2D-1, *et seq.*

9. The Authority's purpose is to contain and reduce costs by reducing unnecessary duplication of institutional health services by ensuring that the development of any new institutional health service is orderly, economical and that the type, level and quality of care is appropriate and needed for persons in the service area. W. Va. Code § 16-2D-1.

10. The Circuit Court's review of the Authority's interpretation in this appeal is limited to asking (1) whether the Home Health Standards were enacted pursuant to the procedures required by law; and (2) whether the Authority's interpretation and application of the rules were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. An agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference. Court's must, however, reject administrative orders and rules that are contrary to legislative intent. *See West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W.Va. 326, 335, 472 S.E.2d 411, 420.

11. The Need Methodology for the Home Health Standards are found in "Section V. Need Methodology." The introductory paragraphs to this section, provide that "[e]xpansion of services and the addition of new providers should be planned such that

they occur in areas with clearly documented unmet need. The need should be based on measurable and readily available data in such a manner that the health care system is not negatively impacted." The unmet need is not defined as any particular number, only that the unmet need be based on measurable and readily available data.

12. Subparagraph A, Assumptions, provides for assumptions underlying the projection of need for home health services. One assumption provides as follows:

An adjustment of 229 home health recipients has been added to the formula to allow for the development of agencies approved for CON in the previous 12 months. An unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients. The threshold/adjustment factor of 229 is the median number of home health recipients receiving care from an agency identified in the 1995 West Virginia Health Care Cost Review Authority Home Health Services Survey Summary. The HCCRA shall consider adjusting the threshold/adjustment factor at the time it updates the need calculations.

(emphasis added). This assumption indicates an adjustment of 229 home health recipients has been added to the formula when there has been a CON granted in a county during the previous 12 months. This assumption is consistent with the methodology found in calculation four.

13. Subparagraph C, Determining Unmet Need for Home Health Services, contains the actual calculations, and it begins by noting the following:

Need calculations based on 1995 data have been completed by HCCRA using the following methodology. (See appendix for calculations). The HCCRA shall update the need calculations and shall consider updating the threshold/adjustment factor on a yearly basis. These calculations performed by the HCCRA shall be used to determine unmet need; this is the only demonstration of need that the HCCRA shall consider. They shall remain in effect until updated by HCCRA.

The Home Health Standards provide that the need methodology is comprised of four calculations which must be completed for each county to be served.

14. Subparagraph C, specifically provides that

[c]alculation 4 involves an adjustment factor for the agencies receiving Certificate of Need approval in the previous 12 months to allow for their initiation and development of home health services. Each agency is allowed a 229 home health recipient adjustment factor for each county in the approved service area. An unmet need or threshold of at least 229 projected home health recipients must occur in the county before consideration will be given to issuing another Certificate of Need for the county.

Thus, Calculation 4 would only be performed if there are agencies in an applicable county which have received a CON approval to provide home health service within the previous 12 months.

15. Calculation 4 is set forth in the Standards as follows:

4. CALCULATION OF THE THRESHOLD (ADJUSTMENT FACTOR)
(This calculation is done only if there are agencies in the proposed county which received CON approval in the previous 12 months.)

Formula $a-b=c$

- a. List the current county home health recipients below state rate (3.c)
- b. Subtract adjustment factor for agencies receiving CON approval in previous 12 months.
- c. Number above threshold adjustment.

Conclusion:

If the threshold is at least 229 projected home health recipients, an unmet need exists.

16. Petitioners contend this "Conclusion" section applies to the entirety of the need calculations rather than only applying to Calculation 4. Such an interpretation is without merit and ignores the plain language of the Home Health Standards as a whole. A reading of the Home Health Standards as a whole clearly indicates that the 229 recipient threshold found in Calculation 4 is only to be utilized in instances in which a provider has been issued a CON in that county within the last 12 months. This language appears in the Assumptions of the Standards, the initial language of subparagraph C

determining the unmet need, as well as the explanation of Calculation 4 itself. It appears the purpose of this threshold is to allow for the initiation and development of home health services for providers who have been operating for less than a year. Absent a showing of a large unmet need of 229 recipients, it allows the provider time to get its operation up and running before another CON will be granted.

Moreover, Petitioner has failed to show the Authority's interpretation of the Standards is clearly wrong. A reading of the Standards in their entirety supports the Authority's contention that the "Conclusion" language is only intended to apply to Calculation 4. This Calculation is titled "Calculation of the Threshold (Adjustment Factor)." Calculation 4 is the only calculation that contains the word "threshold." The "Conclusion" Petitioners contend applies to all of the calculations clearly states, "If the threshold is at least 229 projected home health recipients, an unmet need exists." Given the "Conclusions" proximity to Calculation 4 and the fact that only the conclusion and calculation 4 use the word "threshold," it is clear that the Authority intended the "conclusion" to apply only to Calculation 4.

17. The CON law in West Virginia is found at W. Va. Code § 16-2D-1, *et seq.*, and provides that any new health service as defined therein, shall be subject to review by the Authority prior to the offering or development of the service. This law became effective July 8, 1977. Additionally, W. Va. Code § 16-2D-12(a) provides that a CON may only be issued if the proposed new health service is 1) found to be needed, and 2) consistent with the State Health Plan, unless there are emergency circumstances that pose a threat to public health.

18. The applicable review criteria for Personal Touch's CON application to expand their home health services in Cabell and Wayne counties are found in the West Virginia State Health Plan Home Health Services Standards ("Home Health Standards") approved by the Governor on November 13, 1996.

19. The Authority, however, has consistently applied the need methodology to mean any number is considered an unmet need and that the threshold of 229 applies to the calculation used only when another entity had been granted a CON in the last twelve months. See *In re: Three Rivers Home Care*, CON File No. 00-2-7110-X/Z (Feb. 26, 2002) in which an unmet need of 69 patients in Wayne County resulted in CON approval; *In re: Pleasant Valley Hospital d/b/a Pleasant Valley Home Health and Pleasant Valley Private Duty*, CON File No. 01-2/3/5-7206-Z (May 2, 2002) in which an unmet need of 75 patients in Wayne County, 127 in Jackson County, 386 in Putnam County and 97 patients in Lincoln County resulted in CON approval; *In re: Memorial Hospital Home Health d/b/a Mingo Wayne Home Health and Preferred Home Health*, CON File No. 02-1/2/3-7399-Z (Jul. 3, 2003) in which an unmet need of 125 patients in Boone County, 5 patients in Cabell County, 98 in Lincoln County, 180 in Logan County and 212 in Wyoming County resulted in CON approval; *In re: Jefferson Memorial Home Care*, CON File No. 03-9-7597-X/Z (Jan. 9, 2004) in which an unmet need of 195 patients in Berkeley County resulted in CON approval; *In re: Elite Health Care, Inc.*, CON File No. 04-1-7801-Z (Jun. 22, 2004) in which an unmet need of 76 patients in Wyoming County resulted in CON approval; *In re: Medi Home Health Agency, Inc.*, CON File No. 07-2-8664-Z (Nov. 14, 2008), Decision on Request for Reconsideration, in which an unmet need of 30 patients in Lincoln County and 19 patients in Wayne County resulted in CON approval; *In re:*

Caring Angels Home Health, LLC, CON File No. 14-8/9-10231-Z (Oct. 30, 2015), in which an unmet need of 961 patients in Berkeley County, 203 in Hampshire County, 606 in Jefferson County, 116 in Morgan County and 130 in Mineral County all resulted in CON approval; and *In re: Stonerise Reliable Healthcare, LLC*, CON File No. 17-5-11187-Z (Dec. 11, 2017) in which an unmet need of 8 patients in Pleasants County and 6 in Tyler County resulted in CON approval.

20. A review by an appellate court pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 842-843, 104 S.Ct. at 2781, 81 L.Ed.2d at 703, must begin with an analysis of whether the Legislature has directly spoken to the precise question at issue. If not, a reviewing court cannot simply impose its own construction in its review of a statute, legislative rule, or other rule carrying the force of law. *Id.* The Legislature has not directly spoken to the precise question at issue. Rather, the Legislature has delegated to the Authority the task of developing standards to determine whether an unmet need exists to develop additional health care services based upon criteria established by the Authority.

21. In *Cookman Realty Group, Inc. v. Taylor*, 211 W.Va. 407, 566 S.E.2d 294 (2002), Justice Starcher noted in his concurring opinion that

[t]he agency's construction, while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgement to which a reviewing court should properly resort for guidance. The weight that must be accorded an administrative judgement in a particular case will depend upon 1) the thoroughness evident in its consideration, 2) the validity of its reasoning, 3) its consistency with earlier and later pronouncements, and 4) all those factors which give it power to persuade, if lacking power to control.

Cookman, W.Va. at 417-418, 566 S.E.2d at 304-305 (Starcher, J. concurring). The Authority, as the body that drafted the Home Health Standards, is in the best position to

interpret the meaning it intended when drafting the Standards. Moreover, the Authority has consistently interpreted the Standard in the same manner, thoroughly considered the criteria in the Standard when applying it to Personal Touch's CON application, and provided a valid reckoning of its decision-making process. The Authority's interpretation of the Standard cannot be said to be arbitrary and capricious, clearly wrong, or an error of law.

22. Petitioners rely on a decision of the Circuit Court of Mason County, *Pleasant Valley Hospital, Inc. v. West Virginia Health Care Authority and Family Home Health Plus, Inc. dba Ohio Valley Home Health, Inc.*, Civil Action No. 06-AA-20, dated March 27, 2007, to support their position. Petitioners' reliance on this decision is misplaced. This decision has no precedential value upon this Court. Moreover, this decision is wrongly decided. The decision of the Mason County Circuit Court committed error by ignoring the plain language of the Home Health Standards and substituting its own interpretation of the Home Health Standards for those of the Agency charged with developing and applying them. The court in *Pleasant Valley*, found there to be conflict within the provisions of the Standards that simply does not exist. The court ignored the rational interpretation of the Authority and substituted its own interpretation in clear contravention of the applicable case law noted above.

23. At the time the Personal Touch application was prepared and filed, the Authority provided Personal Touch with the 2015 Home Health Need Methodology, which was the most current Home Health Need Methodology available at the time of the application. The 2017 Home Health Need Methodology was issued by the Authority on December 7, 2018, and was not available on the Authority's website until December 8,

2018. As such, Personal Touch utilized the correct Home Health Need Methodology and, pursuant to the Authority's calculations, there was an unmet need of 29 patients in Cabell and 55 in Wayne County.

Accordingly, for the reasons set forth in this Order, the Court **AFFIRMS** the decision of the Office of Judges and **FINDS** that the Office of Judges decision is correct and that the Authority did not err in approving the Personal Touch CON for home health services in Cabell and Wayne counties, West Virginia. Further, the Court **ORDERS** that this administrative appeal is hereby **DISMISSED** from the active docket of this Court.

Petitioner's exceptions and objection to this ruling are hereby preserved.

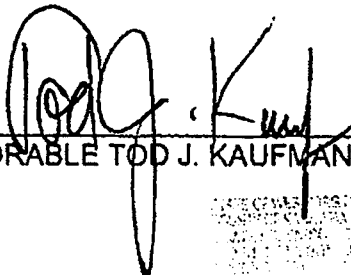
The Clerk is directed to forward certified copies of this Order to all parties and counsel of record below:

Thomas G. Casto, Esq.
Lewis Glasser PLLC
P.O. Box 1746
300 Summers Street
Charleston, WV 25326

B. Allen Campbell, Esq.
Senior Assistant Attorney General
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV 25311

Robert L. Coffield, Esq.
Flaherty Sensabaugh Bonasso PLLC
P.O. Box 3843
200 Capitol Street
Charleston, WV 25338

ENTERED: This 28 day of February, 2020.


HONORABLE TOD J. KAUFMAN

STATE OF WEST VIRGINIA
CLERK OF CIRCUIT COURT OF SAID COUNTY
FILED FOR RECORD
JAN 30 2020
3
A. MACH 2020
CITY S. GALT