PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION

ON THE RECORD
2015-D12

PROVIDER –
Tehachapi Valley Hospital
Tehachapi, California

Provider No.: 05-0446

vs.

INTERMEDIARY –
Noridian Healthcare Solution/
Blue Cross and Blue Shield Association

DATE OF HEARING -
April 21, 2015

Cost Reporting Period Ended -
June 30, 1998

CASE NO.: 05-1647

INDEX

Page No.

ISSUE STATEMENT

Whether the Medicare Contractor's denial of Tehachapi Valley Hospital's ("Tehachapi" or "Provider") request for a low volume adjustment payment under 42 C.F.R. § 412.92(e) was proper?[1]

DECISION

After considering the Medicare law and regulations, the parties' contentions, and the evidence in the record, the Board finds that Tehachapi experienced a decrease of more than 5 percent in its total number of inpatient cases for fiscal year ("FY") 1998 but failed to demonstrate that this decrease was due to external circumstances beyond its control. Accordingly, the Board finds that the Medicare Contractor properly denied Tehachapi's request for a low volume adjustment payment.

INTRODUCTION

Tehachapi is a 28-bed hospital located in Tehachapi, California and participates in the Medicare program as a sole community hospital. The Medicare Contractor assigned to Tehachapi was United Government Services, LLC – California ("Medicare Contractor").[2] On March 26, 2001, Tehachapi applied to the Medicare Contractor for a low volume adjustment payment under 42 C.F.R. § 412.92(e) for FY 1998.[3] After numerous exchanges of correspondence and documentation, the Medicare Contractor denied Tehachapi's request for a low volume adjustment payment. Tehachapi timely appealed this determination to the Provider Reimbursement Review Board ("Board") and satisfied all jurisdictional requirements.[4] The sole issue in the appeal is whether the Medicare Contractor properly denied Tehachapi's request for a low volume adjustment?[5]

The Board conducted a hearing on the record. Tehachapi was represented by Frank P. Fedor, Esq. and Karen S. Kim, Esp., of Murphy Austin Adams Schoenfeld LLP. The Medicare Contractor was represented by Brendan G. Stuhan, Esq., of the Blue Cross and Blue Shield Association.

STATEMENT OF FACTS

42 U.S.C. §1395ww(d)(5)(D)(ii) authorizes the Secretary to adjust the Medicare payment to sole community hospitals that incur a decrease in discharges of more than 5 percent from one cost reporting year to the next, stating:

> In the case of a sole community hospital that experiences, in a cost reporting period compared to the previous cost reporting period, a

[1] *See* Provider's Final Position paper at 2 (Provider's statement of the issue).
[2] The term "Medicare contractor" refers to fiscal intermediary or Medicare administrative contractor as relevant.
[3] *See* Provider Exhibit P-1.
[4] *See* 42 C.F.R. §§ 405.1835 – 405.1841.
[5] *See* Provider Exhibit P-11.

> decrease of more than 5 percent in its total number of inpatient cases due to circumstances beyond its control, the Secretary shall provide for such adjustment to the payment amounts . . . as may be necessary to fully compensate the hospital for the fixed costs it incurs in the period in providing inpatient hospital services, including the reasonable cost of maintaining necessary core staff and services.

The regulations implementing this statutory adjustment are located at 42 C.F.R. § 412.92(e) and, in particular, they restate the requirement that the 5 percent decrease in a sole community hospital's volume must be "due to circumstances beyond the hospital's control."[6] The Provider Reimbursement Manual, Pub. No. 15-1 ("PRM 15-1") § 2810.1(A)(1) provides further guidance on what this requirement means by specifying that the decrease in volume must be the result of an unusual occurrence that was "externally imposed." Specifically, § 2810.1(A)(1) states in pertinent part:

> In order for an SCH to qualify for additional payment, the decrease in volume must result from an *unusual situation or occurrence externally imposed on the hospital and beyond its control*. These situations may include strikes, floods, inability to recruit essential physician staff, … or similar occurrences with substantial cost effects.[7]

Tehachapi maintains that the decrease in discharges was caused by: (1) the closure of the Hospital's operating room because weather damage required the roof to be replaced; and (2) its inability to recruit essential physician staff, in part, because "political turmoil" involving the Tehachapi's Board of Directors and the local community erupted in 1998 and damaged the reputation of Tehachapi. Tehachapi further maintains that both of these factors were outside the control of Tehachapi and resulted in decreased discharges that reduced its Medicare reimbursement by more than $168,000.[8]

The Medicare Contractor contends that Tehachapi is not entitled to a volume decrease adjustment because Tehachapi has not demonstrated that the decrease in discharges was externally imposed and beyond its control.[9]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

ARGUMENTS RELATED TO WEATHER DAMAGE

Tehachapi contends that the roof was damaged during "the El Nino Winter of '97 –'98" and that this weather event fell squarely within the types of unusual situations externally imposed on a

[6] 42 C.F.R. § 412.92(e)(2(ii) (1998).
[7] (emphasis added)
[8] *See* Provider Exhibit P-11 at 1.
[9] *See* Stipulations dated June 4, 2014.

provider and outside of its control that is contemplated by the PRM 15-1 guidance.[10] Tehachapi asserts that it took prompt and prudent action, both for its patients and staff, and closed the operating room so that the leaky ceiling could be replaced.[11]

The Board finds that the closure of the operating room due to the weather damage was not externally imposed and outside of its control. In making this finding, the Board gave great weight to the meeting minutes of the Tehachapi Board of Directors that are in the record.

The record shows that the roof had been a problem for many years, that it could have been replaced relatively quickly, that Tehachapi's action to address the issue was prompted by a visit from the State Department of Health Services, and that the closure of the surgery room was voluntary. The record further shows that, concurrent with the roof replacement, it came to Tehachapi's attention that it also needed to replace its air conditioning system and humidifier and to complete its on-call physician schedule for its surgery room. The March 26, 1998 Board of Directors minutes suggest that the replacement of the air conditioning system and humidifier and the completion of its on-call physician schedule rather than the roof replacement resulted in Tehachapi's voluntary decision to shut down the operating room for several months. These minutes show that Tehachapi's Chief Executive Officer ("CEO") reported the following:

> [T]he Department of Health Services made a visit with regard to five complaints. He stated that the complaints were a leak in the surgery room ceiling; dust in the surgery room; and not having the on-call schedule complete. He explained that if a hospital has surgery, they need to have an on-call surgical team. . . . [The CEO] stated that the serious problem for the hospital and the community is surgery. He explained that the roof has been repaired over the course of many years. With the heavy winds and rain we have had, water came through again. *The hospital has voluntarily suspended* surgery until these items have been repaired. *The hospital was not red-tagged, cited or ordered out of the surgical business*. The surgical infection rate is nil. *This action was totally precautionary*. He stated that this is an old building with a lot of needs. The new roof will cost $2,950, and this can be done within three days after we place the order. We need a new air conditioning system and humidifier. It was learned *last year* that the humidifier had been disconnected years ago, which nobody knew about. The price for these units is $31,500 which includes design by a mechanical engineer. It can take roughly four to five months before we can get surgery back in order . . . . *[The CEO] recommended that the hospital will not do any surgeries until the repairs are made, but, in the interim, to protect the hospital for not having nonphysicians on call, we will change our license to a Rural General Acute-*

[10] *See* Provider's Supplemental Final Position Paper at 2-3; Provider Exhibit P-23.
[11] Provider's Supplemental Final Position Paper at 3.

> *Care Hospital, which means you can have a hospital without the surgical services.*[12]

Based on these Board of Directors minutes the Board finds that Tehachapi was aware that the roof had been leaking long before the bad weather season of 1997-1998, and that the roof had leaked intermittently for many years.[13] Accordingly, the Board finds that, while the El Nino weather event may have precipitated the immediate need to replace the roof, the need to replace the roof was not externally imposed and outside of Tehachapi's control because the record suggests that Tehachapi was aware of the roof's condition prior to the El Nino weather event and the Board is unable to conclude that Tehachapi acted promptly and prudently.

Even if the Board were to find that the need to replace the roof was externally imposed and outside Tehachapi's control, the above Board of Directors minutes show that the roof replacement itself would have only closed the operating room for a few days at a maximum. Indeed, the above Board of Directors minutes suggest that the replacement of the air conditioning and humidifier systems and the incomplete on-call physician schedule resulted in Tehachapi's decision to close the operating room for several months. The Board finds that, while the need for maintenance and repair of the air conditioning and humidifier systems may have caused, in part, the decreased patient discharges, the record does *not* establish that this maintenance and repair was externally imposed and beyond Tehachapi's control. For example, the above Board of Directors minutes show that the state did not force or require Tehachapi to close the surgery room notwithstanding the citations regarding the leaking roof and dust in the surgery room. Rather, Tehachapi "voluntarily" chose to close the surgery room. Moreover, it is unclear whether this voluntary decision was prudent because the record contains no information on what bases Tehachapi made this decision (*e.g.*, whether the length of the closure for "several months" was prudent and whether other options were considered). Finally, similar to the roof replacement, there are issues of deferred maintenance as the above Board of Directors minutes reflect that Tehachapi was aware sometime in 1997 that the humidifier had been disconnected "years ago."

ARGUMENTS RELATED TO THE INABILITY TO RECRUIT PHYSICIANS

Tehachapi also claims that the decline in patient discharges was due its inability to recruit essential physician staff. Tehachapi asserts that the difficulty in physician recruitment exists because Tehachapi is located in a remote, low-income rural location.[14] It also claims that the local community provided little support for Tehachapi and that "political turmoil" surrounding the Tehachapi Board of Directors adversely affected physician recruitment and retention.[15] According to Tehachapi, its board of directors is an elected body of community members who

---

[12] Provider Exhibit P-13 at 4 (copy of the March 26, 1998 meeting minutes for the Tehachapi Board of Directors*).*

[13] Tehachapi's prior knowledge of the roof issues is also reflected in the BoD minutes from April 23, 1998. *See id*. at 21 (where the Tehachapi Chief Financial Officer states: "Since June of last year, we have had – three or four separate times had people go up to fix the leaks in the roof. We have been battling this for a long time. The air-handling problems, we thought we had it fix [*sic* fixed]. Surgery was dusted in-between surgeries. The state came in on a Tuesday which is the day we usually go over it again because it's our regularly scheduled surgery day, but the person in there was dusting two to three times a week.").

[14] *See* Provider's Supplemental Final Position Paper at 7.

[15] *See id.* at 9.

are not employed by Tehachapi and do not directly manage Tehachapi. Tehachapi asserts that it became caught in the crossfire between the community and community-elected board members and that these circumstances were outside of its control.[16]

The Board finds that the record confirms that there was significant "political turmoil" involving Tehachapi's Board of Directors and the local Tehachapi community and that this turmoil resulted in a recall election of the Tehachapi's Board of Directors. The record shows much of this turmoil involved renovation/expansion activities, and how funds were spent in connection with those activities.[17] Indeed, the record suggests that bickering between the community and hospital over these activities had existed for many years.[18] The record further suggests that physicians in the community may have not wanted to refer their patients to Tehachapi.[19]

However, there is no evidence in the record to establish that the "political turmoil" or the recall election affected Tehachapi's ability to recruit physicians. Moreover, the record contains no evidence of Tehachapi's effort to recruit physicians. In particular, there is no evidence of physician advertisements, numbers and types of vacant positions, recruiting activities, candidate interviews, or declined job offers. While Tehachapi asserts that it experienced the general difficulties rural hospitals can encounter when recruiting physicians, it offers no evidence of its actual recruitment efforts or any of the specific difficulties it experienced in filling positions. Therefore, based on the record, the Board cannot conclude that Tehachapi was actively engaged in physician recruitment during the time at issue or that any such recruitment was impacted by circumstances that were externally imposed and beyond its control.

In summary, the Board concludes that Tehachapi failed to demonstrate that the closure of its operating room and its purported inability to recruit essential physicians was due to external circumstances beyond Tehachapi's control. Therefore, the Board finds that Tehachapi does not meet the requirements in PRM 15-1 § 2810.1(A)(1) and is not entitled to a volume decrease adjustment. Since Tehachapi is not entitled to a volume decrease adjustment, the Board has determined that there was no need to address any other arguments raised by the parties, including cost data arguments related to fixed and semi-fixed costs.

DECISION AND ORDER:

After considering the Medicare law and regulations, the parties' contentions, and the evidence in the record, the Board finds that Tehachapi experienced a decrease of more than 5 percent in its total number of inpatient cases for FY 1998 but failed to demonstrate that this decrease was due to external circumstances beyond its control. Accordingly, the Board finds that the Medicare Contractor properly denied Tehachapi's request for a low volume adjustment payment.

[16] *See id.*
[17] *See* Provider Exhibits P-13 at14-18, P-17.
[18] *See* Provider Exhibit P-13 at 13-14.
[19] *See id.*

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.
Charlotte F. Benson, C.P.A.

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: June 18, 2015