

DISTRICT OF COLUMBIA
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RIGHT AT HOME DC,
Petitioner,

v.

DISTRICT OF COLUMBIA DEPARTMENT
OF HEALTH, STATE HEALTH PLANNING
AND DEVELOPMENT AGENCY,
Respondent.

Case No.: 2011-DOH-00012

FINAL DECISION
ON RIGHT AT HOME'S CERTIFICATE OF NEED APPLICATION

I. Introduction

Respondent, the State Health Planning and Development Agency (SHPDA), denied Petitioner's, Right at Home DC's, Certificate of Need (CON) application to establish a home health services agency in the District of Columbia. Right at Home requested reconsideration of the denial, which SHPDA denied. Right at Home then appealed the denial by filing a Notice of Appeal with the Office of Administrative Hearings (OAH).

I convened an evidentiary hearing on the appeal on September 14, 2011. Melanie LaMar, Co-owner, President, and Director of Home Care, Right at Home, appeared for Right at Home with Thomas Martin, Esquire. Amha Selassie, SHPDA Director, appeared for SHPDA with Michael A. Stern, Esquire, Senior Assistant Attorney General.

Based on governing law and the record in this case, including testimony, exhibits, and the record of administrative proceedings before the SHPDA, I affirm SHPDA's decision denying Right at Home's CON application to establish a new home health agency.

II. Findings of Fact

General

1. Right at Home filed a CON application with SHPDA to establish a new home health services agency to serve soldiers, especially female soldiers, returning from the Iraqi and Afghanistan wars who suffer from combat related trauma, including post-traumatic stress disorders (PTSD), "horrific" wounds, multiple amputations, head trauma, and paralysis. If approved, the proposed agency would provide skilled nursing and physician house call services to this target population using nurses, care coordinators, physical therapists, occupation therapists and physicians who are veterans or have extensive histories working with veterans. CON Application, Tab 1 of SHPDA Admin. Record.

Target Population – Area Presence

2. Right at Home submitted data, which showed a total of 44,486 veterans in the District of Columbia in calendar year 2000, including 23,580 male veterans between 18 and 64 years of age; 17,119 male veterans 65 years of age and older; 2756 female veterans between 18 and 64 years of age; and 1,031 female veterans 65 years of age and older. According to the data, 50% of veterans living in the District of Columbia in calendar year 2000 were between 18 and 64 years of age. CON Application, Tab 9, Part Two Narrative at p. 3, Table A.

3. Right at Home referenced a report prepared by the Department of Veterans Affairs in 2007, which projected that, from 2006 through 2036, more than 39,000 veterans will reside in the “District area.” Response to SHPDA staff questions, p. 6.
4. Right at Home referenced statistics compiled by the Center for Women Veterans, which showed that in calendar year 2009, more than 3,800 female veterans resided in the District of Columbia. Response to SHPDA staff questions, p. 6.
5. Right at Home referenced a fact sheet, which stated that 20% of veterans returning from Iraq and Afghanistan have PSDT and an additional 320,000 have traumatic brain injury; and of those numbers 7.5% are women. Response to SHPDA Staff Questions, p. 6.

Services

6. Right at Home surveyed at least 55 home health agencies that serve District residents and determined that only two contracted with the Veterans Administration; none specialized in providing house calls by physicians or care coordination services; none had staff specifically trained to interact with soldiers experiencing PTSD, horrific wounds, multiple amputations, or head trauma; and none had a “clinical specialty” for treating returning female veterans. CON Application, Part Two Narrative at p. 3.
7. Right at Home provided results of its July 2010 survey of 17 home health agencies that serve District residents. The survey showed that none specialized in providing services to returning female veterans; none provided physician house call services; one provided home based primary care services; one had a contract with the Veterans Administration to provide

skilled services; and one provided home based primary care. Response to SHPDA Staff Questions, Table 1, p. 5.

8. Relying on a Department of Veterans Affairs' projection that 39,000 veterans will reside in the District from 2006 through 2036, Right at Home concluded that the projection indicated an "upward trajectory for future skilled home health services that will go unmet if the current levels of skill home health services are not increased." It reasoned that "a [home health agency] specializing in Veterans, returning soldiers and female soldiers/Veterans would be uniquely equipped to meet this expected demand." Response to SHPDA staff questions, p. 6.
9. The Chief of the Discharge Planning Nursing Service, Walter Reed Army Medical Center, submitted a letter in support of the CON application. The Chief observed that the home health agencies that Walter Reed refers patients to do not provide physician house calls or offer clinical training to staff that is tailored specifically to the needs of veterans. The Chief concluded that a home health agency with this focus would be better positioned to serve veterans and ease their transition back into the community; and would be an additional resource Walter Reed could refer to families selecting home health agency services. The Chief asked the SHPDA to "take into consideration the strong need [for] a home care agency that provides physician house calls specializing in the care of the armed forces personnel."
10. The Program Director, Community Services, Social Work Services, Veterans Affairs Medical Center, submitted a letter in support of the CON application. The Program Director shared its observation that home health agencies that are "over capacity" have subcontracted to other agencies; and, caretakers in over capacity agencies have failed to show up for veterans who are dependent on their care. The Program Director concluded that "this is

enough evidence that in the *near future* this will greatly impact our ability to support our veterans with the current home health aide services that are licensed in the District; and that this limited access to care due to agencies that operate over capacity will have a real impact on the daily lives of veterans we serve.” (Emphasis added).

11. A physician who offers house call services submitted a letter in support of the CON application. The physician expressed his commitment to “a model of care that includes physician housecalls for primary and urgent care tailored to the needs of armed forces personnel.” The physician concluded that it “would be a mistake to limit care to only a select group of agencies, especially when these agencies do have a limit to the number of patients they can effectively care for as evidenced by agencies who have to refer clients out because they are over capacity.”
12. A physician at the Department of Veterans Affairs Medical Center submitted a letter of support for the CON application. The physician stated that: Right at Home has expressed intent to specialize in care for veterans, female veterans, and returning soldiers. . . . Neither the Veterans Affairs Hospital of Washington DC or I endorse any particular home Health Agency; however I feel that having the accessibility to an agency that focuses on this demographic could be an asset to the patients we serve.”
13. Two veterans with medical credentials submitted letters of support for the CON application. Each stated that: “Right at Home has expressed intent to specialize in care for Veterans, female veterans, and returning soldiers. We feel this will be an asset since this is an undeserved population in the District and they would greatly benefit from an agency that

focuses on their demographic.” The writers did not explain how they reached the conclusion that the population was underserved.

Referral Sources

14. Right at Home listed Walter Reed Army Medical Center and the Veterans Administration Hospital as principal patient referral sources for its new services. Response to SHPDA Questions, pp. 6-7; Staff Report, p. 8.
15. Right at Home did not submit discharge data from either Walter Reed or the Veterans Administration Hospital. The District of Columbia Hospital Association did not provide Right at Home discharge data for the military institutions. Response to SHPDA staff questions, Table 1, p. 5. The District of Columbia Department of Health (DOH) does not require the military institutions to report discharge data to SHPDA.
16. Neither Walter Reed nor the Veterans Administration Hospital responded to Right at Home’s request for discharge data. Additional Information, Veterans Administration Response to Applicant’s FOIA; Applicant’s Response to SHPDA Questions, p. 6. During the hearing, Right at Home complained that the DOH’s failure to require the military institutions to report discharge data frustrated its efforts to obtain data that would support its application, but Right at Home cited no legal requirement or authority for DOH to require the military institutions to report. See also, *Id.*
17. Neither Walter Reed nor any Veteran’s Administration hospital committed, in writing, to referring patients to the proposed agency and neither identified any specific number of patients who need the proposed services.

18. SHPDA's analysis of hospital discharge data and survey of the District's self-care disabled population revealed that the number of persons accessing home health care has remained steady over the last 20 years, the self-care population is not growing, and patients discharged from hospitals who need home health care are being served by existing providers. Staff Report, pp. 9-12, 20.
19. SHPDA noted that Medicaid recently reduced the number of covered per person personal care hours by half and concluded that the demand for home health services by Medicaid beneficiaries would not likely increase. Staff Report, pp. 12-13.
20. SHPDA projected slower growth in the demand for home health services by persons enrolled in Medicare and attributed the projection to a recent change in Medicare policy that requires a physician to approve home health services provided to Medicare beneficiaries. Staff Report, pp. 13.

Revenue Sources

21. Right at Home expressed its intent to become a Tri-Care in-network-provider, which would afford the widest level of access to District veterans and the highest level of reimbursement; and its intent to seek Medicare and Medicaid certification. Right at Home also represented that proposed services would be provided on a private pay basis. Staff Report, p. 18.

Violation of Rules Governing Moratoriums

22. In a statement filed before the hearing, Right at Home identified a violation of 22-B District of Columbia Municipal Regulations (DCMR) 4210, which governs moratoriums on applications, as an issue in this case, but presented no evidence on the alleged violation.

II. Discussion and Conclusions of Law

A. Jurisdiction

This case is governed by the Health Services Planning Program Re-establishment Act of 1996 (D.C. Official Code §§ 44-401 *et seq.*) (Health Services Planning Re-establishment Act or Act), including D.C. Official Code § 44-413(b), which authorizes OAH to hear this appeal; the District of Columbia Administrative Procedure Act (D.C. Official Code §§ 2-501 *et seq.*); and the Office of Administrative Hearings Establishment Act (D.C. Official Code § 2-1831.01 *et seq.*). Right at Home has the burden of proving the need for the proposed service.¹

B. SHPDA's Decision

SHPDA denied Right at Home's CON application on grounds that it failed to demonstrate need for the proposed services or that the new home health agency would be financially viable if approved.

In reaching a decision on Right at Home's appeal of the denial, this administrative court must review the record before the SHPDA and any additional evidence presented on behalf of the parties to the appeal; and take due account of the presumption of official regularity, the experience and specialized competence of the SHPDA, and the purposes of the Health Services Planning Re-establishment Act.² If SHPDA's findings are supported by substantial evidence, the

¹ D.C. Official Code § 2-509(b); OAH Rule 2822.1, 1 DCMR 2822.1; D.C. Official Code § 44-413(c).

² D.C. Official Code § 44-413(b).

findings must be accepted, even though the record could support a contrary finding.³ “Substantial evidence is ‘relevant evidence such as a reasonable mind might accept as adequate to support a conclusion.’”⁴

Taking due account of the presumption of official regularity; the experience and specialized competence of the SHPDA; the purposes of the Health Services Planning Re-establishment Act; and the record as a whole, I find that SHPDA’s decision to deny Right at Home’s CON application is supported by substantial evidence and, therefore, should be affirmed.

SHPDA found, in essence, that Right at Home did not demonstrate a need for the proposed agency because it did not quantify patients in need of the proposed services; demonstrate that patients have not been able to access needed care; or demonstrate that current providers cannot meet the demand for proposed services. Decision Letter, p. 6. The record evidence supports SHPDA’s conclusions. An examination of the record shows that Right at Home described its proposed patient base and service delivery model in broad terms, but it did not show the size of the targeted patient base residing in the District or show that targeted patients were not receiving needed services because the proposed service delivery model is not available.

- Right at Home submitted data on the overall number of veterans in the service area in calendar year 2000, but did not show how many of that number continue to reside in the

³ *Brown v. Watts*, 993 A.2d 529, 532 (D.C. 2010) quoting *Zhang v. D.C. Dep’t of Consumer & Regulatory Affairs*, 834 A.2d 97, 101 (D.C. 2003).

⁴ *Davidson v. Office of Empl. Appeals*, 886 A.2d 70, 72 (D.C. 2005) quoting *Mills v. D.C. Dep’t of Empl. Servs.*, 838 A.2d 325, 328 (D.C. 2003).

District and are among the target population –veterans returning from wars in Iraq or Afghanistan who suffer from combat related trauma and need skilled nursing and physician house call services provided by nurses, care coordinators, physical therapists, occupation therapists and physicians who are veterans or have extensive histories working with veterans.

- Right at Home submitted data to show that 39,000 female veterans will reside in the District between 2006 and 2036, but did not show how many of that number are in the target population and will reside in the District in any given year.
- Right at Home submitted data which showed 3,800 female veterans in the District in 2009, but did not show how many of that number were in the target population.
- Right at Home submitted data on the overall number of female veterans returning from Iran and Afghanistan suffering from PTSD and traumatic brain injury, but did not show the number residing in the District.
- Right at Home did not provide specifics to support its claim that existing home health agencies are not meeting the needs of the target population. It showed that existing agencies do not provide physician house call services, do not specialize in treating veterans, or specifically recruit staff who are or have experience treating veterans, but did not provide proof of any effect of their failure to do so. Specifically, Right at Home did not prove that the needs of the target population were not being met because the proposed service delivery model is not available.
- Right at Home did not substantiate its claim that its target population is underserved. Letters of support did not establish the claimed deficiency. None included data. Most simply stated

it would be good to have a resource that focused on veterans, but none went so far as to claim that veterans were not receiving needed care.

- While supporters claimed that home health agencies are operating over capacity, none claimed that the overcapacity was systemic. The letters indicated that the overflow from some agencies was accommodated by other home health agencies through subcontracts or referrals.
- Right at Home did not submit data on non-veteran populations traditionally served by home health agencies, but SHPDA took the extra step and concluded that existing home health agencies were meeting the needs of traditionally served populations. Based on its analysis of census data, hospital discharge data, a survey of the District's self-care disabled population, data on persons accessing home health care services and recent changes in the Medicaid and Medicare, SHPDA concluded that patients discharged from hospitals who need home health care are being served by existing providers. Right at Home complained that some of the data SHPDA analyzed was dated, but did not offer evidence that rebutted SHPDA's analysis or conclusions relative to traditionally served populations.

SHPDA also concluded that Right at Home failed to demonstrate that the proposed agency would be financially feasible because it did not establish a reliable patient referral source. SHPDA's finding is supported by substantial evidence in the record.

- Right at Home's failure to quantify its proposed patient base is discussed above.
- Right at Home identified Walter Reed and the Veterans Administration hospitals as primary referral sources; and it showed that only two home health agencies contract with the Veterans

Administration. But, while letters of support from staff affiliated with Walter Reed and the Veterans Administration hospitals evinced support for Right at Home's service delivery concept, the military institutions did not indicate the number of patients who would need the proposed services or commit, in writing, to referring patients to the proposed agency.

C. Conclusion

SHPDA denied Right at Home's CON application because it did not meet its burden of proof.⁵ Right at Home did not document the number of veterans eligible for the proposed service; show that the target population is not being served by existing agencies; show that existing providers are unable or unwilling to care for the target population; demonstrate that there are sufficient numbers of veterans who need the proposed service to justify the establishment of a new home care agency; or demonstrate that the proposed agency would be financially feasible. SHPDA's findings are supported by substantial evidence in the record. I affirm the decision to deny.

IV. Order

Therefore, on this 28th day of October 2011, it is hereby

ORDERED, that SHPDA's denial of Right at Home's application for a Certificate of Need is **AFFIRMED**; it is further

ORDERED, that SHPDA's denial of Right at Home's request for reconsideration is **AFFIRMED**; it is further

⁵ D.C. Official Code § 2-509(b); OAH Rule 2822.1, 1 DCMR 2822.1.

ORDERED, that any party may file a request for reconsideration within 15 calendar days of the date of mailing listed below.⁶ Any such request must be **RECEIVED** by the Clerk of the Office of Administrative Hearings within the deadline; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

Wanda R. Tucker
Administrative Law Judge

⁶ 1 DCMR 2828.5, 2812.5.