UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION TO EXCLUDE EXHIBIT DENIED:
October 19, 2018

CBCA 3798

McALLEN HOSPITALS LP, dba
SOUTH TEXAS HEALTH SYSTEM,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Jeffrey Weinstein of The Weinstein Law Group, PLLC, Washington, DC, counsel for Appellant.

Mary A. Mitchell, Office of Regional Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

LESTER, Board Judge.

ORDER

Pending before the Board is a motion that respondent, the Department of Veterans Affairs (DVA), filed on July 18, 2018, objecting to the admission into the record of Exhibit 25 of appellant's Rule 4 appeal file supplement. At the Board's request, appellant, McAllen Hospitals LP (McAllen), responded to that objection on August 27, 2018, and the DVA filed a reply on September 20, 2018. For the reasons set forth below, we deny the DVA's motion to exclude the exhibit, but will provide the DVA an opportunity to introduce evidence in response to that exhibit.

Background

This appeal involves a contractual dispute between McAllen and the DVA regarding the manner in which the DVA authorized payment, under the terms of McAllen's contract, of individual hospital and medical claims for services provided to eligible veterans. Both parties agree that the contract required them to use McKisson InterQual (InterQual) criteria in evaluating payment claims. McAllen describes InterQual as a commercially available software program that assists in determining an appropriate level of care for each patient in light of objective clinical indicators, signs, and symptoms exhibited by the patient. *See* Appellant's Pre-Hearing Brief at 5 n.10.

Discovery in this appeal closed on November 14, 2016, after which time the Board suspended proceedings in this appeal for a significant period of time while the parties pursued mediation. After the parties decided that mediation would not be successful, the Board scheduled prehearing activities, and a five-day hearing is currently scheduled to commence on November 4, 2018.

By orders dated April 5 and July 2, 2018, the Board directed the parties to file prehearing briefs and also indicated that either party could supplement the existing Rule 4 appeal file with additional documents that are relevant to the issues to be heard. When McAllen filed its prehearing brief on July 11, 2018, it also filed a supplement to the appeal file labeled Exhibit 25, which McAllen describes as containing recently retrieved documentation (retrieved from McAllen's own files) that are relevant to McAllen's use of InterQual, as well as another proprietary medical necessity screening system, to justify physicians' initial orders for inpatient status. McAllen asserts that, in response to recent discussions with the DVA during the mediation and to the DVA's requests during mediation for documentary support, McAllen searched a medical information system, MIDAS Care Management System (MIDAS), that is separate from the electronic medical record into which InterQual was integrated, but that McAllen realized is tied to its use of the InterQual system. McAllen asserts that the MIDAS-related documents in Exhibit 25 are relevant to its claim and will assist in its case presentation at the hearing.

The DVA asserts in its motion that McAllen did not mention MIDAS as part of this litigation before submitting Exhibit 25, that the parties have never discussed or considered MIDAS as being part of the InterQual criteria utilized to determine patient status classifications, and that the contract at issue does not utilize the MIDAS criteria. As such, the DVA requests that we decline the introduction of Exhibit 25 at the hearing of this appeal. In response to the DVA's motion, McAllen asserts that the documents in Exhibit 25 are merely "an additional underlying level of information system detail about how the InterQual criteria are incorporated and used from a more technical perspective" and that, contrary to

the DVA's representation, McAllen is not "us[ing] MIDAS 'criteria' in lieu of InterQual." Appellant's Response at 1. McAllen further asserts that, contrary to the DVA's description, "MIDAS is simply another underlying information system that can work with any number of different criteria for care management." *Id.* McAllen claims that Exhibit 25 "constitutes written evidence of [McAllen's] use of InterQual, as well as the use of another care management system, as permitted in the Contract," and that the information in Exhibit 25 "is presented to justify [McAllen's] physicians' initial orders for inpatient status for many of the status cases in dispute." *Id.* at 2.

Discussion

The Board, as an administrative tribunal, has broad discretion in deciding whether to admit evidence into the record, as well as in deciding the weight to accord it. *Southwest Marine, Inc.*, DOT BCA 1661, 93-3 BCA ¶ 26,168, at 130,111; *TDC Management Corp.*, DOT BCA 1802, 91-2 BCA ¶ 23,815, at 119,259-60, *aff'd*, 975 F.2d 869 (Fed. Cir. 1992) (table). Factors that can weigh heavily against the Board's acceptance of an exhibit include (1) its untimely identification and production and (2) unfair prejudice to the other party. *See, e.g.*, *Regency Construction, Inc. v. Department of Agriculture*, CBCA 3246, et al., 17-1 BCA ¶ 36,884, at 179,773 (2016); *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 13125, 96-1 BCA ¶ 28,267, at 141,142; *see DaVita HealthCare Partners, Inc. v. United States*, 125 Fed. Cl. 394, 398 (2016) (discussing standards to apply in evaluating whether to exclude untimely disclosed documents).

Here, pursuant to its orders dated April 5 and July 2, 2018, the Board granted the parties until July 11, 2018, to file their prehearing submissions, including supplements to the Rule 4 appeal file, and McAllen filed Exhibit 25 by that deadline. Accordingly, we cannot find that McAllen's submission of Exhibit 25 on July 11 is, on its face, untimely pursuant to the Board's order.

Nevertheless, McAllen's disclosure of the documents contained in Exhibit 25 on July 11 could still be considered untimely and unfairly prejudicial to the DVA if McAllen was required, either in response to written discovery requests or otherwise, to produce the documents at an earlier stage of the discovery process. Pursuant to Rule 35 of the new rules of procedure that the Board recently adopted,[1] the Board has the authority to preclude introduction of evidence at a hearing if a party has failed to produce it in a timely manner in response to a discovery request. *See Ocwen Loan Servicing, LLC v. Department of Veterans*

[1] The Board's new rules of procedure, which are published at 83 Fed. Reg. 41009 (Aug. 17, 2018), became effective on September 17, 2018, and apply to this appeal.

Affairs, CBCA 1073, 09-1 BCA ¶ 34,102, at 168,624-25 (applying prior Board Rule 33, which corresponds to current Board Rule 35, to preclude introduction of appraisals that respondent failed to produce in response to repeated requests during discovery); *Writing Co. v. Department of the Treasury*, GSBCA 15634-TD, 03-1 BCA ¶ 32,107, at 158,760 (2002) (excluding untimely produced documents). By order dated September 5, 2018, we specifically asked the DVA to address in its reply to McAllen's opposition to the DVA's motion whether the materials contained within Exhibit 25 were the subject of any written discovery requests that would have obligated McAllen to produce them to the DVA at an earlier date and whether there are other rules or regulations that mandated McAllen's production or identification of the materials contained in Exhibit 25 at an earlier date. We also requested that the DVA address the specific prejudice that McAllen's production of the materials on the date that they were produced has caused or will cause and whether there is anything that the Board can order, short of exclusion of the materials, that would eliminate or reduce that prejudice.

In its reply, the DVA focused solely on the merits of the argument that McAllen seeks to pursue through Exhibit 25. It did not identify any prior requests for production to which the documents in Exhibit 25 would have been responsive, and it did not discuss with any specificity any prejudice that the DVA would suffer were the Board to admit the exhibit, other than a general representation that the argument that McAllen is using the exhibit to support is speculative. Accordingly, the DVA has identified no basis upon which we could exclude the document under Rule 35.

It is unclear to the Board at the present time precisely how McAllen intends to use the documents in Exhibit 25 to assist in developing or proving its case, making it difficult for the Board to make relevance findings. Nevertheless, without a showing that McAllen was obligated to produce the documents contained in Exhibit 25 at an earlier date or that the DVA will be prejudiced by the late disclosure, the Board is loath to preclude McAllen from making an effort at the hearing to establish their relevance. Accordingly, the Board will accept Exhibit 25 as a supplement to the appeal file and an exhibit at the hearing, subject to McAllen's obligation to tie the documents contained therein to the contract at issue and the issues in the appeal.

Nevertheless, we sympathize with the DVA to the extent that, when the DVA filed its prehearing submissions on July 11 simultaneously with McAllen's, it did not know that MIDAS would be addressed at the hearing. To ensure a full and fair development of the facts associated with McAllen's claim, we will provide the DVA an opportunity to offer additional documents not currently in the appeal file for use at the hearing, to the extent that it wishes to do so, that rebut or respond to Exhibit 25. If, during the hearing, the DVA determines that McAllen is using Exhibit 25 to address issues in a manner that the DVA

could not reasonably have anticipated and that leaves the DVA insufficient time to develop an adequate response or defense, the DVA should raise its objections during the hearing, at which point the Board have the authority to consider whether to extend the hearing for a period of time to allow the DVA to develop its response. *See J.V. Bailey Co.*, ENG BCA 5348, et al., 90-3 BCA ¶ 23,179, at 116,342 n.3 (permitting judge to admit "unexpected evidence and continue the trial in order to permit the surprised party time to investigate, verify or rebut the unexpected evidence").

Decision

The DVA's motion to exclude Exhibit 25 from the hearing is **DENIED**, subject to the qualifications identified above. The DVA may file a supplement to the appeal file, limited to documents upon which it intends to rely to respond to McAllen's use of Exhibit 25, no later than **Thursday, November 1, 2018**. The Board will address any objections that McAllen may have to the DVA's new documents at the commencement of the hearing on November 5, 2018.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge