

State of New York : Department of Health

In the Matter of the Request of

Dr. Michael L. Sherman, D.D.S.
Audit # 17-1602
Provider # 01512481


For a hearing pursuant to Part 519 of Title 18 of the Official Compilation of Codes, Rules and Regulations of the State of New York (18 NYCRR) to review the Determination under 18 NYCRR Parts 517 and 518 to recover \$21,250.00 in Medicaid Overpayments.

Before: James F. Horan, Administrative Law Judge

Held at: New York State Department of Health
90 Church Street, 4th Floor
New York, NY 10007
September 9, 2019

Parties: Office of the Medicaid Inspector General (OMIG)
90 Church Street, 14th Floor
New York, NY 10007
BY: Phillip J. Hoffman, Esq.

Michael L. Sherman, D.D.S.


BY: *Pro Se*

Michael L. Sherman, D.D.S. (Appellant) received \$21,250.00 from the Medicaid Program in 2013 as an incentive to adopt or upgrade to an electronic health records (EHR) system. The OMIG now seeks to recoup that amount on grounds that the Appellant failed to support the adoption, implementation or updating to a Certified EHR system and failed to support that he served the Medicaid patient volume necessary to qualify for the incentive. The Appellant answered that no one provided him guidance through the incentive process and that he thought the payment was recognition for a job well done. After a hearing, the ALJ finds that the Appellant failed to meet the criteria to receive the incentive payment and affirms the Determination by the OMIG to recover the \$21,500.00.

Background

The OMIG issued a Final Audit Report on January 18, 2018 that sought recoupment of the \$21,250.00 payment [Hearing Exhibit 3]. The Appellant then requested this hearing. The ALJ conducted the hearing in this matter pursuant to New York Social Services Law (SSL) Articles 1 and 5 (McKinney Supp. 2019), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2015), New York Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2019), Title 18 NYCRR Parts 504, 517, 518, 519 & 540 and Title 42 CFR Part 495.

The OMIG presented one hearing witness, Salvatore Ingalls. Mr. Ingalls is an auditor with the New York State Technology Enterprise Corporation (NYSTEC), which contracts with OMIG to audit the EHR Incentive Program. The Appellant participated in the hearing by telephone from Nevada but made no arrangements to testify. The Appellant gave a statement on his own behalf. Title 18 NYCRR 519.19(b) provides that witnesses will be sworn by the hearing officer and present testimony under direct and cross-examination in view of the hearing officer in order that his/her demeanor may be observed by the hearing officer. Mr. Ingalls was the only witness who testified under oath and subject to cross-examination and he did so in the presence of the ALJ at the hearing site 90 Church Street, after the witness was sworn.

The OMIG offered documents into evidence under 16 tabs, which the ALJ received into the record:

- 1) Audit Notification letter (3/9/17)
with delivery information
- 2) Draft Audit Report (9/28/17)
with delivery information
- 3) Final Audit report (1/18/18)
with delivery information

- 4) Hearing Request
- 5) Notice of Hearing (9/29/18) Scheduling correspondence & delivery
- 6) Contact Log
- 7) Emails
- 8) Attestation Packet
- 9) MEIPASS Screenshot
- 10) Screenshots – Provider Enrollement, eMedNY, Verifications
- 11) Documents Regarding Certified EHR Program
- 12) Patient Volume Data
- 13) eMedNY Payment Information
- 14) Audit Workbook
- 15) Notice of Prehearing Conference and Delivery Information
- 16) Authorities and Cited Sources:

Public Law 111-5 {American Recovery & Reinvestment Act of 2009}

42 CFR 495

42 CFR 495.2

42 CFR 495.4

42 CFR 495.302

42 CFR 495.304

42 CFR 495.306

42 CFR 495.314

Social Services Law 363-a

42 USCA 1396a (Excerpt)

Public Health Law 201

Public Health Law 32

18 NYCRR 504.3

18 NYCRR 517.3

18 NYCRR 517.5

18 NYCRR 517.6

18 NYCRR 518.1

18 NYCRR 518.3

18 NYCRR 518.4

18 NYCRR 519

18 NYCRR 540.1

18 NYCRR 540.7

18 NYCRR 540.8

The Appellant offered no exhibits into evidence. The record also contained the hearing transcript pages 1-72.

Under SAPA § 306(2), all evidence, including records and documents in an agency's possession of which an agency wishes to avail itself, shall be offered and made a part of the record of a hearing. In addition to testimony and documents in evidence, and pursuant to SAPA §306(4), an ALJ may take Official Notice of any matter for which Judicial Notice may be taken. Under SAPA § 306(1), the burden of proof in a hearing falls on the party which initiated the proceeding. Title 18 NYCRR § 519.18(d) provides that the Appellant bears the burden to show a determination of the Department was incorrect and that all claims submitted were due and payable. Title 18 NYCRR 519.18(h) and SAPA § 306(1) provide that a decision after hearing

must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or fact; less than a preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649. The substantial evidence standard demands only that a given inference is reasonable and plausible, not necessarily the most probable, Ridge Road Fire District v. Schiano, 16 N.Y.3d 494 (2011).

Findings of Fact

The ALJ made the following findings of fact (FF) after affording the parties an opportunity to be heard and after considering the evidence. The items in brackets that follow the findings represent documents in evidence [Ex], testimony from the record [T] and matters under Official Notice [ON] on which the ALJ relied in making the findings. In instances in which conflicting evidence appears in the record, the ALJ considered and rejected that other evidence.

1. The New York State Department of Health (Department) is the single state agency responsible for administering the Medicaid Program in New York State [ON SSL § 363-a, PHL § 201.1(v)].
2. The OMIG is an independent office within the Department with the responsibility for investigating, detecting and preventing Medicaid fraud, waste and abuse and for recouping improper Medicaid payments [ON PHL § 30].
3. The Appellant holds licensure as a dentist in the State of New York [Ex 10, Bates Stamp Page 207].
4. The Appellant served as a dental provider in the Medicaid Program during the year 2013 [Ex 10, Bates Stamp page 204].

5. The American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) authorized incentive payments to eligible professionals (EP) participating in the Medicaid and Medicare Programs to adopt and demonstrate meaningful use of EHR technologies [T 16; Ex 16, Bates Stamp Pages 229-244].
6. To qualify for the incentive payment, an EP must purchase an EHR System that the Office of National Coordinator has certified and that appears on the Certified Health List IT product list [T 16-17].
7. To receive the incentive payment, an EP must submit an attestation that the EP has adopted/updated to a certified EHR System [T 18].
8. To prepare the attestation, an EP would log into a portal at the Medicaid HER Incentive Program adjustment support service (MEIPASS) with a password and credentials the EP received [T 18, 22, 25].
9. Prior to signing any attestation, an EP must adopt, implement or upgrade to a certified EHR system [T 18].
10. To qualify for the incentive, an EP must also maintain a 30% Medicaid patient volume [T 19].
11. To demonstrate patient volume, an EP must submit encounters for a 90-day period in the year prior to the year in which the EP signs an attestation, for both Medicaid and non-Medicaid patients [T 19].
12. The Appellant signed the New York Medicaid Incentive Payment Attestation on October 16, 2013 [Ex 8].
13. In the attestation above the Appellant's notarized signature, the Appellant agreed to keep such records as necessary to demonstrate that he met all Medicaid EHR Incentive Program requirements and to provide those records to the Department or any contractor acting on the Department's behalf [Ex 8].
14. The Appellant's attestation identified a Medicaid volume threshold of 69.22 % for the period January 3, 2012 to April 1, 2012, with 1096 Medicaid encounters and 1576 total encounters [Ex 8].
15. The OMIG notified the Appellant in March 9, 2017 that the OMIG was conducting an audit into the payment to the Appellant for the EHR Incentive Program [Ex 7].
16. The Audit Notification Letter indicated that the Appellant needed to submit documentation demonstrating adoption, implementation or upgrade to a Certified EHR system such as a signed contract, vendor invoices for 2013,

payment receipts from 2013, log in reports from the provider, applicable vendor communications or a signed vendor letter [Ex 7].

17. The Appellant submitted a partial 2012 invoice from the vendor Henry Schein [T 46, ex 11].
18. When Mr. Ingalls contacted Henry Schein about the invoice by email, a vendor employee named Cheri Bigler replied on August 28, 2017 that the Appellant's practice had purchased a management software license from the vendor, but not an EHR system [Ex 7, Bates Stamp page 160].
19. Ms. Bigler's reply stated "We are not able to attest for him." [Ex 7, Bates Stamp page 211].
20. The Appellant registered for a Certified EHR system from the vendor Medical Mine Inc. on January 8, 2015 [Ex 11, Bates Stamp page 210].

Controlling Regulations

Title 18 NYCRR § 518.1(c) defines overpayment as any amount not authorized to be paid under the medical assistance program, whether paid as a result of improper claiming, unacceptable practices, fraud, abuse or mistake. Title 18 NYCRR § 515.2 defines unacceptable practices to include conduct contrary to rules, rates or fees, fraud or abuse, false claims, false statements, failure to disclose, unacceptable record keeping, client deception and failure to meet recognized standards. Title 18 NYCRR § 515.2(b)(6) defines unacceptable practices as failing to maintain or to make available for purposes of audit or investigation records necessary to fully disclose the medical necessity for and the nature and extent of the medical care, services or supplies furnished, or to comply with other requirements of this Title. Under Title 18 NYCRR §504.3(e), by enrolling in the Medicaid Program, a provider agrees to submit claims for payment only for services actually furnished and which are medically necessary or otherwise authorized. Title 18 NYCRR § 504.3(h) states that a provider agrees to provide true, accurate and complete

information in relation to any claim. Title 18 NYCRR §504.3(i) provides that by enrolling, a provider agrees to comply with the rules, regulations and official directives of the Department. The standards for the Incentive Payment Program appear at Title 42 USC Part 495.

Discussion and Conclusions

The ALJ concludes that the Appellant received legally sufficient notice concerning the issues in the hearing and that the Appellant received the opportunity to present a defense to the actions to disqualify and /or to recoup payment.

The evidence in the hearing proved that the Appellant failed to adopt, implement or upgrade to a Certified EHR system in 2013. There was also no evidence to show that the Appellant maintained a 30% Medicaid patient volume during a 90-day period in the year prior to the 2013 attestation.

The Appellant argued that no one from OMIG provided guidance about the incentive to the Appellant or the Appellant's [REDACTED] and practice manager, [REDACTED] [T 65]. The ALJ finds that argument unconvincing. The Appellant obviously understood the process well enough to be able to enter the MEIPASS portal and attest that he had a Medicaid volume of 69.22 % for 90-days in 2012 and that the Respondent had adopted, implemented or upgraded to a certified EHR system in 2013. There are extensive emails in evidence at Hearing Exhibit 7 showing communications between Mr. Ingalls and [REDACTED]. Mr. Ingalls testified that OMIG provides an electronic spreadsheet for the provider to use in demonstrating Medicaid volume, although the provider doesn't have to use the spreadsheet [T 21]. At a minimum, the OMIG required date of service, patient first and last name, date of birth and Medicaid ID number [T 21]. There were

emails from [REDACTED] indicating that she was having problems with the spreadsheet [Ex 7 Bates Stamp pages 11-122]. Mr. Ingalls responded that [REDACTED] could enter information manually [Ex 7, Bates Stamp page 128]. Mr. Ingalls also granted extensions of time for the Appellant to submit information [Ex 7, Bates Stamp pages 174, 1184-187]. Eventually, the OMIG issued a Draft Audit Report on September 28, 2017 [Ex 2], to which the Appellant filed no response.

The Appellant argued further that he thought the incentive payment was for doing a great job as a Medicaid provider [T 67]. The ALJ finds that argument unconvincing as well. The Appellant filled in and signed an attestation stating that he implemented an EHR system and that indicated that the Appellant maintained a Medicaid patient volume above 30% for January to April 2012. The Appellant pointed to nothing in the attestation or to anything else connected to the Incentive Program that would lead someone to believe that the Incentive Program was tied to anything other than adopting, implementing or upgrading to an EHR system.

The ALJ finds that the Appellant failed to adopt, implement or upgrade to an EHR system in 2013, the year in which the Appellant received \$21,500.00 as an incentive payment for such adoption, implementation or upgrading. The ALJ finds that the OMIG is acting appropriating in seeking recoupment of the of the incentive payment.

Administrative Law Judge James F. Horan renders this decision pursuant to the designation by the Commissioner of Health of the State of New York to render final decisions in hearings involving Medicaid provider audits.

Dated: August 17, 2020
Menands, New York

James F. Horan
Administrative Law Judge

TO:

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Michael L. Sherman, D.D.S.

