

State of New York : Department of Health

In the Matter of the Request of

David A. Petti, D.D.S.

Audit # 13-F-2272 and 16-2419
Provider ID# 02264491

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 a Determination under 18 NYCRR Parts 515, 517 and 518 to exclude David A. Petti, DDS, as a provider in the Medicaid Program for a period of three years, pursuant to 18 NYCRR § 515.3(a)(1), and until reinstated pursuant to 18 NYCRR § 515.10 and to recover \$25,007.00 in Medicaid Overpayments.

Before: James F. Horan, Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, NY 10007
July 22 and November 6, 2019, January 14-16, 2020

Closing Statements: January 23, 2020 (By telephone conference)

Parties: Office of the Medicaid Inspector General (OMIG)
Office of Counsel
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BY: Mara Pandolfo, Esq. and Ferlande Milord, Esq.

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Title 18 NYCRR §519.4 entitles a Medicaid provider to a hearing to review the Department's determination to impose sanctions or require repayment (Recoupment). The OMIG determined that the Appellant Medicaid Dental Provider engaged in unacceptable practices and excluded the Appellant as a provider in the Medicaid Program for three years (Exclusion). After a hearing on this matter, the ALJ overturns the exclusion.

I. Background

After the OMIG issued the Notice of Final Agency Action (NFAA) seeking Recoupment and Exclusion, the Appellant requested the hearing, which took place at the Department's Metropolitan Regional Office in New York City. 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. 2019), New York State Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2019) and Title 18 NYCRR Parts 504, 515, 517, 518 & 519.

The NFAA that began this case excluded the Appellant as a Medicaid Provider for three years; sought recoupment of \$15,296.00 jointly and severally from the Appellant and his former employer, Wilson Dental, P.C. (Wilson); censured Wilson and sought recoupment of \$9,711.00 from Wilson alone. Wilson withdrew its hearing request shortly before the hearing and the OMIG recovered all the funds sought by Recoupment from Wilson, so the hearing involved only the Appellant's Exclusion [Hearing Transcript page 6]. The NFAA at Paragraph 3 found that the Appellant and Wilson, or Wilson acting through affiliates other than the Appellant, failed to

comply with Medicaid Dental Manual requirements, failed to meet professionally recognized dental standards, failed to adequately document that services were rendered, failed to adequately document the need for services billed and included inappropriate billings [Hearing Exhibit 2]. The Appellant's closing statement noted that the allegations against the Respondent involved three things: wisdom tooth extraction, sinus closures and sedation times [Closing Statement Transcript page 4].

The OMIG presented as hearing witnesses: OMIG Investigative Specialist Kerry Quinn and OMIG Public Health Dentist Anthony Maiello, DDS. The Appellant testified on his own behalf and called no other witnesses. All witnesses testified under oath and subject to cross-examination. The OMIG offered 50 exhibits into evidence that the ALJ received into the record:

- Exhibit 1 Notice of Proposed Agency Action (NPAA) with attachments,
- Exhibit 2 NFAA with attachments,
- Exhibit 3 Dr. Petti's response to the NPAA with attachments,
- Exhibit 4 Provider Notice of Appearance,
- Exhibit 5 Provider hearing request,
- Exhibit 6 Patient #2 [REDACTED],
- Exhibit 7 Patient #3 [REDACTED],
- Exhibit 8 Patient #4 [REDACTED],
- Exhibit 9 Patient #6 [REDACTED],
- Exhibit 10 Patient #7 [REDACTED],
- Exhibit 11 Patient #9 [REDACTED],
- Exhibit 12 Patient #10 [REDACTED],
- Exhibit 13 Patient #12 [REDACTED],
- Exhibit 14 Patient #13 [REDACTED],
- Exhibit 15 Patient #14 [REDACTED],
- Exhibit 16 Patient #15 [REDACTED],
- Exhibit 17 Patient #19 [REDACTED],
- Exhibit 18 Patient #21 [REDACTED],
- Exhibit 19 Patient #22 [REDACTED],
- Exhibit 20 Patient #24 [REDACTED],
- Exhibit 21 Patient #25 [REDACTED],
- Exhibit 22 Patient #26 [REDACTED],
- Exhibit 23 Patient #28 [REDACTED],
- Exhibit 24 Patient #29 [REDACTED],
- Exhibit 25 Patient #30 [REDACTED],
- Exhibit 26 Patient #31 [REDACTED],

- Exhibit 27 Patient #32 [REDACTED]
- Exhibit 28 Patient #33 [REDACTED]
- Exhibit 29 Patient #34 [REDACTED]
- Exhibit 30 Patient #35 [REDACTED]
- Exhibit 31 Patient #36 [REDACTED]
- Exhibit 32 Patient #37 [REDACTED]
- Exhibit 33 Patient #38 [REDACTED]
- Exhibit 34 Patient #39 [REDACTED]
- Exhibit 35 Patient #40 [REDACTED]
- Exhibit 36 NYS Medicaid Update March 2009, Volume Number 3,
- Exhibit 37 New York State Medicaid Program Information for all providers General Policy Version 2008-2,
- Exhibit 38 New York State Medicaid Program Information for all providers General Policy Version 2010-1,
- Exhibit 39 New York State Medicaid Program Information for all providers General Policy Version 2010-2,
- Exhibit 40 New York State Medicaid Program Information for all providers General Policy Version 2011-2,
- Exhibit 41 New York State Medicaid Program Dental Procedure Codes Version 2009-1,
- Exhibit 42 New York State Medicaid Program Dental Procedure Codes, Version 2010-1,
- Exhibit 43 New York State Medicaid Program Dental Manual Policy Guidelines Version 2006-1,
- Exhibit 44 New York State Medicaid Program Dental Policy and Procedures Code Manual Version 2011-1,
- Exhibit 45 New York State Medicaid Program Dental Policy and Procedures Code Manual Version 2012,
- Exhibit 46 New York State Medicaid Program Dental Policy and Procedures Code Manual Version 2013,
- Exhibit 47 New York State Medicaid Program Dental Billing Guidelines Version 2008-2
- Exhibit 48 New York State Medicaid Program Dental Billing Guidelines, Version 2011-01
- Exhibit 49 New York State Medicaid Program Dental Prior Approval Guidelines Version 2008-1,
- Exhibit 50 Selected relevant regulations
 - (a) 18 NYCRR 504.3
 - (b) 18 NYCRR 504.8
 - (c) 18 NYCRR 515.1
 - (d) 18 NYCRR 515.2
 - (e) 18 NYCRR 515.3
 - (f) 18 NYCRR 515.4
 - (g) 18 NYCRR 515.5
 - (h) 18 NYCRR 515.6
 - (i) 18 NYCRR 515.10
 - (j) 18 NYCRR 515.18
 - (k) 18 NYCRR 519.18
 - (l) 18 NYCRR 506.2
 - (m) 18 NYCRR 506.3

The Appellant offered no exhibits into evidence. The Appellant had submitted extensive documentation in response to the NPAA, which the OMIG placed into evidence as various exhibits. The record also contained the hearing transcript pages 1-866. Following the hearing, the parties presented oral closing statements during a telephone conference (Closing Arguments Transcript pages 1-57).

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.

Title 18 NYCRR § 519.18(a) limits the issues and documentation for consideration at hearing to issues directly relating to the NFAA. 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, except where the determination is based upon an alleged failure of the provider to comply with generally accepted business, accounting, professional or medical practices or standards of health care, the department must establish the existence of such practice standards. 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).

II. 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 Dental Surgeon in the State of New York [T 623].
4. The practice of Dentistry in the State of New York entails the diagnosing, treating, operating or prescribing for any disease, pain, injury, deformity or physical condition of the oral and maxillofacial area relating to restoring and maintaining dental health, including the prescribing and fabrication of dental prostheses and appliances [ON New York Education Law § 6601(McKinney's 2016)].
5. Licensure as a Dental Surgeon requires four to six years additional hospital-based training than general dentistry, including training in anesthesia and rotations through hospital-based services such as surgery and emergency medicine [T 623-624].
6. The Appellant participated as a dental provider in the Medicaid Program [T 17].

7. Between June 1, 2010 and December 31, 2013, the Appellant worked as a Dental Surgeon at Wilson Dental's Offices in Binghamton and Syracuse, New York [T 17].
8. The records at Wilson Dental were centralized and beyond the Appellant's control [T 639].
9. The Appellant saw patients from a large area of upstate New York because not all oral surgeons in the region took the patients' insurance [T 653].
10. The billing department at Wilson Dental reviewed billings before submission to Medicaid and provided the billings to the Wilson Dental practice owner for further review [T 79].
11. The Appellant was not involved in the billing process [T 640].
12. The OMIG conducted a review of billings by the Appellant and Wilson Dental for the period from June 1, 2010 through December 31, 2013 [T 15].
13. The OMIG issued a December 27, 2017 NFAA, which found that the Appellant committed unacceptable practices under the Medicaid Program and received Medicaid overpayments [Ex 2].
14. The review of 40 dental records determined that Wilson Dental submitted 108 inappropriate claims for services the Appellant provided, in the amount of \$20,936.00, which Medicaid paid [Ex 2].
15. The NFAA found unacceptable practices under Title 18 NYCRR §§ 515.2(b)(6), 515.2(b)(11) and 515.2(b)(12) for unacceptable record keeping, excessive services and failure to meet recognized standards [Ex 2].
16. The NFAA determined to exclude the Appellant from the Medicaid Program for three years and to recoup overpayments from the Appellant and Wilson Dental jointly and severally [Ex 2].
17. The Appellant received prior approval from Medicaid for the extractions at issue in this proceeding [T 144-145].
18. Prior approval of the dental director and prior authorization of the social services official is required for all preventative, prophylactic and other routine dental care, services, treatment and supplies [ON 18 NYCRR § 506.3(b)(1); Ex 43, Bates Stamp 2052; T 43-44].
19. Prior approval for wisdom tooth extraction should be made by a dentist or oral surgeon [T 357]

20. Prior approval is the process of evaluating the aspects of a plan of care which may be for a single service or ongoing service or an ongoing series of services in order to determine the medical necessity and appropriateness of the care requested [Ex 37, Bates Stamp 1779: New York State Medicaid Program, Information For All Providers, General Policy]

III. Conclusions

The issues for determination in this matter are whether the Appellant engaged in unacceptable practices in the Medicaid Program [Practices] and whether the Appellant established that the OMIG erred in excluding the Appellant as a Medicaid provider for three years [Exclusion].

Practices: The services at issue in this case are wisdom teeth extractions and sinus closures by a dental surgeon. The Appellant has been a dental surgeon since 1998 and testified on his own behalf. As their expert, the OMIG presented Anthony Maiello, DDS, a general dentist with no advanced training after dental school and no specialty [T 141, 325]. Dr. Maiello testified that he had performed some wisdom tooth extractions in emergency situations, but usually referred such extractions to a dental surgeon [T 327]. Dr. Maiello never performed a surgical closure of a sinus and referred sinus closures to dental surgeons as well [T 139]. The New York Courts have ruled that in Health Department disciplinary hearings, a licensed professional is generally qualified to render an expert opinion concerning a licensee in the same profession, so long as the witness possesses the requisite skills, training, knowledge, education and experience upon which to base a reliable opinion, Sundarum v. Novello, 53 AD3d, 861 NYS2d 822 (3rd Dept. 2008) leave to appeal denied 11 NY3d 708; Conteh v. Daines, 52 AD3d 994, 860 NYS2d 649 (3rd Dept. 2008). Following *voir dire* on Dr. Maiello's credentials, the ALJ ruled on the first hearing day that Dr. Maiello is not an expert on dental surgery [T 143]. The ALJ finds the

Appellant more credible in his testimony on the necessity for the surgery and closures in these cases than Dr. Maiello.

The ALJ also finds corroboration in the record for the Appellant's opinion that the surgeries and closures at issue in this proceeding were necessary. In each of the cases, a general dentist referred the patient to the Appellant for the extractions and, in each of the cases, the dental director from Medicaid granted prior approval for the procedure. Dr. Maiello testified that the dental director would be a general dentist or an oral surgeon [T. 357]. The Medicaid Provider Manual indicates that the prior approval is the process of evaluating the aspects of a plan of care which may be for a single service or ongoing service or an ongoing series of services in order to determine the medical necessity and appropriateness of the care requested [Finding of Fact 20; Exhibit 37]. The Appellant's counsel asked Dr. Maiello on several occasions about prior approval being a determination of medical necessity. On each occasion, Dr. Maiello answered that the prior approval did not guarantee payment. The ALJ found those answers evasive. The question was not about payment but about professionally recognized dental standards and the need for services.

The ALJ finds that the Appellant demonstrated that the OMIG erred in finding that the Respondent performed unnecessary extractions and sinus closures. The ALJ finds further that the OMIG failed to demonstrate that the Appellant deviated from the standard of care. On cross-examination, the Appellant asked Dr. Maiello the appropriate process or standard of care in assessing a tooth for extraction. The witness answered: "everybody has their own standard of care" [T 341]. The ALJ dismisses the charges of unacceptable practices under 18 NYCRR 515.(b)(11) and 515.2(b)(12).

The remaining allegations of unacceptable practices involved record-keeping violations and failures to document. The Appellant's testimony and defense concentrated on the charges concerning unnecessary procedures. Dr. Maiello testified that the Appellant failed to provide records on the audit that would demonstrate the necessity for the procedures. The Appellant answered that record-keeping at Wilson Dental was centralized and out of his control [T 639]. The ALJ finds that Dr. Maiello's expertise as a general dentist and his experience as a Public Health Dentist qualified him to testify on dental record-keeping in general and in the record-keeping standards of the Medicaid Program. Dr. Maiello's testimony on record-keeping did establish that the record-keeping constituted unacceptable practices. The ALJ finds that the Appellant failed to demonstrate error by the OMIG on the record-keeping allegations. The ALJ sustains the allegations that the Respondent committed unacceptable practices under 18 NYCRR §515.2(b)(6) by failing to comply with Medicaid Dental Manual requirements for dental records and by failing to document adequately that services were rendered.

Exclusion: Kerry Quinn, an Investigative Specialist at OMIG, testified concerning how the OMIG determined to exclude the Appellant for three years. Ms. Quinn testified that the OMIG considered the six factors enumerated under Title 18 NYCRR §515.4(b) in determining the sanction:

- the number and nature of the program violation or other related offenses,
- the nature and extent of any adverse impact the violations have had on recipients,
- the amount of damages to the Medicaid Program,
- mitigating circumstances,
- other factors related to the nature and seriousness of the violations, and

- the previous record of the provider under the Medicaid, Medicare and social services programs.

Ms. Quinn conceded that the Appellant had no prior disciplinary actions [T59], but she testified OMIG found no mitigating factors in this case. On cross-examination, Ms. Quinn then conceded that there were mitigating factors in the case, such as the prior approvals [T 85]. Ms. Quinn conceded further that there were no findings that the surgeries were done improperly [T 75] and admitted that she never asked the Appellant whether he reviewed the billings submitted to Medicaid in his name [T 79]. Ms. Quinn had testified that the practice at Wilson Dental was for the billing department to present Medicaid billings to the practice owner for review prior to submission to Medicaid [T 78-79].

Ms. Quinn also testified that, in making the decision to disqualify, the OMIG considered information from private insurers who indicated that they were removing the Appellant the private insurance program [T 109-110]. The ALJ finds that nothing enumerated in Title 18 NYCRR §515.4(b) includes actions by other insurers as a ground for consideration in determining a penalty.

The ALJ overturns the disqualification. The OMIG based the disqualification largely on the allegations about the extractions and sinus closures, but evidence at the hearing disproved those allegations. The ALJ finds there were record-keeping violations, but Ms. Quinn testified that the failure to document is a less severe violation than providing substandard care [T 92]. The Appellant has no prior disciplinary history and the Appellant has established mitigating factors as required under Title 18 NYCRR §515.4(b), which demonstrate that exclusion from the Medicaid Program is not an appropriate sanction. The OMIG recouped Medicaid payments from Wilson Dental, which the ALJ finds to be a sufficient sanction for the record-keeping.

V. Decision

After reviewing the evidence from the hearing and the parties' post-hearing briefs, the ALJ:

1. Affirms the charge of unacceptable practices with regard to record keeping requirements in the Medicaid Program § 515.2(b)(6),
2. Dismisses the charges that found unacceptable practices under Title 18 NYCRR §§ 515.2(b)(11) and 515.2(b)(12) for excessive services, and
3. Directs the OMIG Determination to end the exclusion immediately.

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 sanctions.

Dated: July 3, 2020
Menands, New York

James F. Horan
Administrative Law Judge

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