

State of New York Department of Health

IN THE MATTER OF THE REQUEST OF

B.O.G. HEALTH SUPPLIES CORP.

Decision
Audit Number
2010Z58-035C

Provider # 02256128

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 of the Office of the Medicaid Inspector General to recover \$164,135.30 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
November 20, 2013

Parties: Office of the Medicaid Inspector General
Office of Counsel
217 Broadway, 8th Floor
New York, NY 10007
BY: Ferlande Milord, Esq.

B.O.G. Health Supplies Corp.
No Appearance

Summary and Jurisdiction

The Appellant, a provider under the Medical Assistance Program (Medicaid), requested a hearing pursuant to Title 18 NYCRR §519.4 to appeal a determination by the Office of the Medicaid Inspector General (OMIG) seeking repayment, following an audit, for overpayments totaling \$164,135.30, inclusive of interest. On November 20, 2013, the ALJ conducted the requested hearing pursuant to New York Social Services Law Articles 1 and 5 (McKinney Supp. 2013), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2013), New York Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2013) and Title 18 NYCRR Parts 504, 517, 518 & 519. The Appellant failed to appear and no person appeared on the Appellant's behalf. The ALJ proceeded with the hearing and determined that the Appellant abandoned the appeal.

The OMIG appeared for the hearing and offered eight documents that the ALJ received into evidence:

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| Exhibit 1 | October 1, 2012 Draft Audit Report, |
| Exhibit 2 | December 18, 2012 Final Audit Report, |
| Exhibit 3 | Request for Hearing, |
| Exhibit 4 | Notice of Pre-Hearing Conference, |
| Exhibit 5 | Notice of Hearing and U.S. Postal Service Tracking Receipt, |
| Exhibit 6 | Electronic Mail Messages, |
| Exhibit 7 | November 13, 2013 Letter and Postal Service Tracking, |
| Exhibit 8 | Medicaid Provider Inquiry. |

The record from the hearing included a transcript that a stenographic reporter prepared (pages 1-23). The OMIG also presented a witness, Jean Hanson, to testify concerning the audit that resulted in the overpayment determination [see Hearing Transcript page 18]

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. Under Title 18 NYCRR § 519.18(f), computer generated documents prepared by the Department or its fiscal agent to show the nature and amounts of payments made under the program will be presumed, in the absence of direct evidence to the contrary, to constitute an accurate itemization of the payments made to a provider. 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 conclusion or fact; less than 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). Substantial evidence demands only that a given inference is reasonable and plausible, not necessarily the most probable, Ridge Road Fire Dept. 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 is a medical appliance dealer and a provider in the Medicaid system [Ex 8].
- 4 The OMIG conducted an audit on all payments from Medicaid to the Appellant for durable medical equipment services with service dates from January 1, 2007 through December 31, 2009 [Ex 2].
- 5 A December 18, 2012 Final Audit Report Number 2010Z58-035C found that the Appellant received overpayments and directed the Appellant to make repayment, inclusive of interest, totaling \$164,135.40 [Ex 2].

- 6 The Appellant's attorney, Julia Greenberg, Esq., then requested a hearing [Ex 3].
- 7 The OMIG provided notice to the Appellant for a pre-hearing conference pursuant to 18 NYCRR § 519.14 on November 7, 2013 and for the hearing in the matter for November 20, 2013 [Ex. 4, Ex. 6, Ex. 7].
- 8 The Appellant's attorney, Ms. Greenburg, acknowledged receiving the Notice of Hearing and advised that she would no longer be representing the Appellant through an electronic mail note on September 30, 2013 [Ex 6].
- 9 The Appellant failed to appear at the pre-hearing conference and no one appeared on the Appellant's behalf [Ex 7].
- 10 The Appellant failed to appear at the hearing, no one appeared on the Appellant's behalf and neither party requested to re-schedule the hearing [T 17].
- 11 The ALJ ruled that the Appellant had received proper notice and the ALJ found that the Appellant defaulted in appearing [T 17-22].

Discussion and Conclusions

Title 18 NYCRR § 518.1(c) defines overpayment as any amount not authorized to be paid under the Medicaid Program, whether paid as a result of improper claiming, unacceptable practices, fraud, abuse or mistake. 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. Title 18 NYCRR § 519.4(a)(2) entitles a person to a hearing any time that an OMIG audit requires repayment or restitution of an overpayment. Under 18 NYCRR § 519.12(a), an appellant abandons a hearing request when no appellant or appellant's representative appears at a hearing.

The Appellant failed to appear for the requested hearing, after the Appellant received notice of the time, date and place for the hearing. The Appellant made no request for an adjournment in the hearing date and in the time since the default the Appellant has made no request to reopen the default. The ALJ concludes that the Appellant abandoned the challenge to the OMIG's Final Audit Report. The ALJ affirms the OMIG's Determination to recover, from the Appellant, \$165,135.30 in overpayments and interest.

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: December 16, 2013
Menands, New York

James F. Horan
Administrative Law Judge

To:

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