

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of the Appeal of

Dr. Neal J. Auerbach,
Provider No.: 01081589

Appellant,

from a determination by the NYS Office of the
Medicaid Inspector General to recover Medicaid
Program overpayments.

**Decision
After
Hearing**

#19-2121

Before: John Harris Terepka
 Administrative Law Judge

Held at: New York State Department of Health
 By video conference, September 30, 2020

Parties: NYS Office of the Medicaid Inspector General
 800 North Pearl Street
 Albany, New York
 By: Richard Chasney, Esq.

Dr. Neal J. Auerbach
[REDACTED]
By: Frances Claussell
 Janus Dental PLLC
 1401A Overing Street
 Bronx, New York 10461

JURISDICTION

The Department of Health (the Department) acts as the single state agency to supervise the administration of the Medicaid Program in New York State. 42 USC 1396a; Public Health Law (PHL) 201(1)(v); Social Services Law (SSL) 363-a. The Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority to pursue administrative enforcement actions to recover improperly expended Medicaid funds. PHL 30, 31 and 32.

The OMIG determined to seek restitution of a payment made under the Medicaid Electronic Health Records (EHR) Technology Incentive Program to Dr. Neal J. Auerbach (Appellant.) (Exhibit 3.) The Appellant requested a hearing pursuant to SSL 22 and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the determination. (Exhibit 4.)

The hearing was held by videoconference. The OMIG was represented by Richard Chasney, Esq. The OMIG presented one witness, Bridget McCarthy, and Exhibits 1-16. The Appellant did not appear but was represented by office manager Frances Claussell, who participated by telephone. A transcript of the hearing was made.

SUMMARY OF FACTS

1. The Appellant is enrolled as a provider in the New York State Medicaid Program. (Exhibit 13.) On August 18, 2015, he submitted an attestation in support of an application for payment under the Medicaid EHR Technology Incentive Program for a first payment year of 2015. (Exhibits 11, 12, 14.)

2. The Appellant's attestation certified to the adoption of a certified EHR technology on the approved list of technology products eligible for the EHR incentive payment. The specific EHR product identified on the attestation was:

Practice Fusion EHR version 3.2
CMS EHR Certification ID #1314E01PLWCPEA1

(Exhibits 11, 15.)

3. The Appellant's attestation certified that during the 90-day period July 1 through September 28, 2014, he had a patient volume in excess of 30 percent attributable to individuals receiving Medicaid. (Exhibit 11.)

4. On November 2, 2015, the Appellant received a first year EHR incentive payment for the year 2015 in the amount of \$21,250. (Exhibit 16.)

5. By draft audit report dated August 22, 2019, the OMIG notified the Appellant that it had determined to seek restitution of the Medicaid EHR incentive payment. (Exhibit 2.) Pursuant to 18 NYCRR 517.5(b)&(c), the draft audit report advised the Appellant that he was entitled to object to the proposed determination and to submit documents in response to it. The Appellant did not submit a response to the draft audit report and did not express any objections to the audit findings. (Exhibit 3, page 7.)

6. By final audit report dated November 21, 2019, the OMIG notified the Appellant that its determination remained unchanged and that it continued to seek restitution of a Medicaid Program overpayment in the total amount of \$21,250. (Exhibit 3.)

7. The OMIG's determination was based upon its findings that the Appellant failed to demonstrate that during the year 2015 he adopted, implemented or upgraded certified EHR technology as defined in 42 CFR Part 495; and failed to demonstrate that

during a representative 90-day period during the preceding calendar year, he had a patient volume in excess of 30 percent attributable to individuals receiving Medicaid.

8. The Appellant failed to document that he adopted, implemented or upgraded the EHR system specified on his attestation, or any other certified EHR system, during 2015. The Appellant failed to document that during a representative 90-day period during the preceding calendar year he had a patient volume in excess of 30 percent attributable to individuals receiving Medicaid.

ISSUE

Has the Appellant met his burden of proving entitlement to an EHR Incentive Program payment for the year 2015?

APPLICABLE LAW

Medicaid providers are required, as a condition of their enrollment in the program, to comply with the rules, regulations and official directives of the Department. All information regarding claims for payment is subject to audit for six years. 18 NYCRR 504.3(a),(h)&(i). Providers will be required to reimburse the Department for overpayments discovered by an audit. 18 NYCRR 504.8(a), 518.1(b). A person is entitled to a hearing to have the Department's determination reviewed if the Department requires repayment of an overpayment. 18 NYCRR 519.4. At the hearing, the Appellant has the burden of showing that the determination of the Department was incorrect. 18 NYCRR 519.18(d).

The EHR Technology Incentive Program was authorized by the American Reinvestment and Recovery Act of 2009 and implemented by Federal regulations at 42 CFR Part 495. The program authorizes states to provide incentive payments to Medicaid

Providers for adopting, implementing or upgrading certified EHR technology, or for meaningful use of such technology. 42 CFR 495.300. (Exhibits 17-24.)

In order to be eligible for the incentive, a Medicaid eligible professional (EP) must “acquire, purchase or secure access to certified EHR technology.” 42 CFR 495.302. EHR technologies that have been tested and certified by the Office of the National Coordinator for Health Information Technology (ONC HIT) have been identified by the Centers for Medicare and Medicaid Services (CMS) and that information is available to providers who apply for an incentive payment. www.cms.gov.

The first year of payment is intended to offset the costs associated with initial adoption, implementation or upgrade of the technology. 42 CFR 495.308. The maximum first year payment for Medicaid EPs is \$21,250, while subsequent year payments for meaningful use are significantly lower. 42 CFR 495.310.

The Medicaid EP must also have, for each year for which the EP seeks an EHR incentive payment, a minimum of 30 percent patient volume attributable to individuals receiving Medicaid. 42 CFR 495.304(c)(1). To calculate Medicaid patient volume the EP selects a representative 90-day period during the preceding calendar year, and divides total Medicaid patient encounters by the total patient encounters in that period. 42 CFR 495.306(c)(1).

DISCUSSION

The EHR Incentive Program was designed as an incentive to providers to adopt or upgrade to electronic health records technology. The Appellant applied for and received a first year incentive payment for the year 2015. The purpose of the OMIG audit was to determine whether he had complied with two of the program’s requirements: 1) that he

adopt, implement or upgrade certified EHR technology in the payment year; and 2) that he have a patient volume in excess of 30 percent attributable to individuals receiving Medicaid.

The Appellant did not produce any documentation to establish he adopted, implemented or upgraded Practice Fusion EHR version 3.2, the technology he reported on his attestation, or any other certified EHR system, during 2015. The Appellant also failed to document his Medicaid patient volume during the 90-day period he selected and reported on his application for the incentive payment. (Exhibits 7, 8, 9.)

At the hearing, the Appellant's office manager, who was not employed by him in 2014 and 2015, represented that she was still waiting to receive the necessary records. The Appellant attested in August 2015 to his Medicaid patient volume in 2014 and to his adoption of a certified EHR system in 2015. (Exhibits 11, 12.) This audit was initiated in April 2019 with a notice advising him that he was required to produce documentation of these representations. (Exhibit 1.) He was granted several extensions of time to produce documentation during the audit. (Exhibit 9.) He has offered no credible explanation for failing to secure and produce the required documentation, if it exists, before this audit closed with the issuance of the final audit report on November 21, 2019 (Exhibit 3), or even by the time this hearing was held on September 30, 2020. In particular, he offered no persuasive reason to excuse his failure to submit any documentation he wished to be considered in a response to the August 2019 draft audit report, as is required by 18 NYCRR 517.5, 517.6(a) and 519.18(a).

The Appellant's representative acknowledged that the Appellant may have been misled or received questionable guidance from an EHR consultant who assisted in

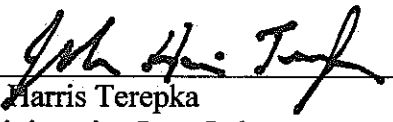
preparing the attestation and whose email address appears on the attestation in place of the Appellant's. (Exhibit 11, page 2.) It is the Appellant, however, who applied for and received a \$21,250 payment not authorized under the Medicaid Program. The OMIG is entitled to recover that overpayment from him. 18 NYCRR 518.1(b), 518.3(a).

The Appellant has failed to meet his burden of proving entitlement to the EHR incentive payment he received.

DECISION: The OMIG's determination to recover an EHR Technology Incentive Program payment for the year 2015 is affirmed.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Rochester, New York
October 2, 2020



John Harris Terepka
Administrative Law Judge