

STATE OF NEW YORK
DEPARTMENT OF HEALTH

In the Matter of the Request of

FRIEDWALD CENTER FOR REHABILITATION
AND NURSING

DECISION

Provider # 0031147214
NPI # 1831147214

Audit # 20-4172

for a hearing pursuant to Title 18 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York (18 NYCRR)

Before: James F. Horan
Administrative Law Judge

Parties: New York State Office of the Medicaid Inspector General (OMIG)
800 North Pearl Street
Albany, New York 12204
By: Richard Chasney, Esq.

Friedwald Center for Rehabilitation and Nursing (Provider)
By: Steven J. Katz, Esq.
Tenzer and Lunin LLP
1120 Avenue of the Americas, 4th Floor
New York, New York 10036

On this motion, the ALJ rules that New York Governor's Executive Order 202.8 did not extend the time limit for the Provider to file a response to a Draft Audit Report, that the OMIG issued a Final Audit Report properly in this case and that the Provider failed to make a timely request for a hearing.

JURISDICTION

Pursuant to New York State Public Health Law (PHL) § 201(1)(v) and New York State Social Services Law (SSL) § 363-a, the Department of Health (Department) acts as the single state agency to supervise the administration of the medical assistance program (Medicaid) in New York State. The Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority pursuant to PHL §§ 30, 31, and 32 to pursue administrative enforcement actions against any individual or entity that engages in fraud, abuse, or unacceptable practices in the Medicaid program and to recover improperly expended Medicaid funds.

The OMIG made a finding of overpayment by Medicaid to the Provider for the Medicaid Rate Period January 1, 2013 to December 31, 2018 identified in the Final Audit Report in Audit Number 20-4172. The Provider requested a hearing to challenge the Final Audit Report pursuant to 18 NYCRR 519.7. The OMIG now requests a determination that the Provider is not entitled to a hearing because the Provider failed to make a timely hearing request. A decision without a hearing may be requested by either party pursuant to 18 NYCRR 519.23. There is no factual issue in dispute necessary to determine whether the Provider filed a timely hearing request.

PARTIES' SUBMISSIONS

The OMIG submitted two letters with attachments. Exhibit 1 was an April 9, 2021 letter that appended following attachments:

- A – November 19, 2020 Final Audit Report,
- B – Return Mail Receipt,
- C – Mailing Label,
- D – New York Governor's Executive Order 202.72.

Exhibit 2 was a May 12, 2021 letter that appended Attachments:

- 1 – November 19, 2020 Final Audit Report,
- 2 – Return Mail Receipt,
- 3 – Mailing Label,
- 4 – New York Governor’s Executive Order 202.72.
- 5 – August 14, 2020 Draft Audit Report.

The Respondent submitted two letters. Exhibit A was an April 22, 2021 letter that appended 5 attachments, which were labeled Exhibits, but are relabeled here as Attachments to avoid confusion:

- A – New York Governor Executive Order 202.8,
- B – New York Governor Executive Order 202.55
- C – New York Governor Executive Order 202.60,
- D – New York Governor’s Executive Order 202.67,
- E - FedEx Proof of Mailing.

Exhibit B was a May 28, 2021 letter with no attachments.

FINDINGS OF FACT

1. At all times relevant to this proceeding, the Provider was enrolled as a provider in the Medicaid Program [Exhibit 1, Attachment A].
2. The OMIG issued a Draft Audit Report in Audit Number 20-4172 on August 14, 2020, finding overpayments to the Provider totaling \$262,254.00 and informing the Provider that 18 NYCRR § 517.5 provided the Provider the opportunity to file a written response within 30 days from receiving the Draft Audit Report [Exhibit 2, Attachment 5].
3. The Provider failed to respond to the Draft Audit Report [Exhibit A].
4. The OMIG issued a Final Audit Report in Audit Number 20-4172 on November 19, 2020, which informed the Provider that it could request a hearing to challenge the Final Audit

Report and directed the Provider to direct any questions about the hearing to the OMIG Office of Counsel [Exhibit 1, Attachment A].

5. The Provider concedes that it failed to file a hearing request within sixty days from receiving the Final Audit Report [Exhibit B]

ISSUE

Is the Provider's request for a hearing on the determination in the Final Audit Report timely?

APPLICABLE LAW

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.) To request a hearing, "[a]ny clear, written communication to the department by or on behalf of a person requesting review of a department's final determination is a request for a hearing if made within 60 days of the date of the department's written determination." (18 NYCRR 519.7[a].)

DISCUSSION

The OMIG Exhibit 1 argued that the Provider made an untimely hearing request. The Exhibit noted that although it could be argued that the provision from Executive Order 202.8 that tolled any specific time limit for "commencement, filing or service of any legal action, notice

motion or other process or proceeding” also applied to Executive Branch hearings, the Executive Order’s provisions ended on November 3, 2020. The OMIG stated that since the Final Audit Report went to the Provider on November 19, 2020, there was no toll on the 60-day limit for requesting a hearing.

The Provider responded that the provisions in 202.8 applied not just to the 60-day limit for requesting a hearing, but to all executive branch regulations with filing time limits, such as the 30-day time period for filing a response to a Draft Audit Report. The Provider argued that it was still entitled to file a response to the Draft Audit Report. The Provider requested that the Final Audit Report be rescinded and that the Provider receive the opportunity to file a response to the Draft and Final Audit Reports.

The OMIG replied that the provisions at Executive Order 202.8 that tolled time limits for commencing, filing or service were in accordance with the directive of New York’s Chief Judge to limit court operations. The Provider responded that Executive Order 202.8 tolled all time limitations in statute and regulation while the Executive Order was in force.

The ALJ finds the Provider’s arguments unconvincing. The relevant section in the Executive Order clearly referenced the Chief Judge’s concern to limit court operations. There is nothing in the Executive Order that referenced the tolling of all time limits in statute and regulations affecting the conduct of an audit, which is distinct from the initiation of the hearing processes in New York State agencies.

The provisions of 18 NYCRR 519.7 specify that a provider may request an appeal of a final determination by any clear, written communication to the department within 60 days of the date of the OMIG’s determination. The OMIG also provided the same explicit instructions to the Provider in the Final Audit Report.

DECISION

The OMIG properly provided written notice of its final determination in Audit Number 20-4172 to the Provider and the Provider failed to request a hearing within the time prescribed by regulation. The time limit for a hearing is jurisdictional and may not be waived, Pasecki v. Blum, 78 A.D.2d 950, 437 N.Y.S.2d 520 (3rd Dept. 1980). The ALJ denies the request for hearing as untimely.

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: October 22, 2021
 Menands, New York

James F. Horan
Administrative Law Judge

TO:

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