State of New York : Department of Health

In the Matter of the Request of

Carine Louissaint (Appellant)

Project Number 16-4335
Provider #02935784

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 Department 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 New York, NY 10007 July 11, 2018
For the Department:	Office of the Medicaid Inspector General (OMIG) Office of Counsel 800 North Pearl Street Albany, NY 12204 BY: Phillip Hoffman, Esq.
For the Appellant	Tumelty & Speir, LLP 160 Broadway, Suite 708 New York, NY 10038 BY: Joseph Tumelty, Esq.

The Appellant received $21,250.00 from the Medicaid Program in 2014 as an incentive to adopt or upgrade to an electronic health records (EHR) system. The Office of the Medicaid Inspector General (OMIG) now seeks to recoup that amount on grounds that the Appellant worked in a hospital-based setting in 2012 and was ineligible to receive the EHR incentive payment in 2014. After a hearing, the ALJ finds no grounds exist for recoupment because the OMIG erred in finding the Appellant ineligible for the incentive payment.

Background

The OMIG issued a Final Audit Report on November 30, 2017 that sought recoupment of the $21,250.00 incentive payment due to ineligibility [Hearing Exhibit 3]. The Appellant then requested this hearing [Hearing Exhibit 5]. The ALJ conducted the hearing pursuant to New York Social Services Law (SSL) Articles 1 and 5 (McKinney Supp. 2018), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2018), New York Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2018), Title 18 NYCRR Parts 504, 517, 518 & 540 and Title 42 CFR Part 495. The OMIG presented as a hearing witness, Stacy McGowan. Ms. McGowan is employed by the New York State Technology Enterprise Corporation (NYSTEC), which contracts with OMIG to audit the EHR Incentive Program. The witness testified under oath and subject to cross-examination. The OMIG offered 22 exhibits into evidence:

Exhibit 1 Audit Notification Letter 10/13/16,
Exhibit 2 Draft Audit Report 2/2/17,
Exhibit 3 Revised Draft Audit Report 8/10/17,
Exhibit 4 Final Audit Report 11/30/17,
Exhibit 5 Hearing Request Received 2/2/18,
Exhibit 6 Notice of Hearing 3/8/18,
Exhibit 7 Notice of Pre-Hearing Conference 6/15/18,
Exhibit 8 Contact Log,
Exhibit 9 Auditor E-Mails,
Exhibit 10 Attestation,
Exhibit 11 MEIPASS Screenshot,
Exhibit 12 Provider Enrollment and EMEDNY Screenshots,
Exhibit 13 Documents Regarding Certified EHR Program,
Exhibit 14 Medicaid Encounter Inquiries,
Exhibit 15 Provider's Medicaid Encounter Spreadsheet,
Exhibit 16 CenterLight Information Page,
Exhibit 17 Bronx Lebanon Provider Encounters,
Exhibit 18 Medicaid Data Warehouse Detailed Query,
Exhibit 19 Payment Report,
Exhibit 20 Audio Workbooks,
Exhibit 21 Relevant Statutes and Regulations,
Exhibit 22 Screenshots of Payment.

During the hearing, the ALJ accepted into evidence Exhibits 1-7, 10 and 21 [T 45-46]. Later in the hearing, the ALJ ruled that the evidence and testimony that the OMIG had submitted into the hearing record demonstrated that there were no grounds for recoupment and the ALJ shut down the hearing [T 75-76]. The ALJ now accepts Exhibits 8-9, 11-20 and 22 into the record. The record also contained the hearing transcript pages 1-81.

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 who 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 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 [ON 42 CFR § 495.2].

4. The Appellant holds licensure in New York State as a Nurse Practitioner in Adult Health and participates as a provider in the Medicaid Program [Ex 1, Ex 10 page 123].

5. The Appellant worked at Bronx Lebanon Hospital from 2007 to 2013, at which time the Appellant switched employment to CenterLight Health System [T 19].

6. The Appellant and other practitioners at CenterLight applied to receive payments under the EHR incentive program in 2014 [Ex 10, Ex 11]].

7. To receive the incentive payment, a provider must be Medicaid enrolled in a non-hospital-based practice, must adopt, implement or upgrade to a certified EHR system and must maintain a 30% Medicaid patient volume [T 28-29].

8. In assessing whether an EP has a 30% Medicaid patient volume, NYSTEC examines a 90-day period either in the calendar year before the payment year or in the 12 months prior to the date the EP attests to adopting the EHR system [T 29].

9. The payment year is defined as the first calendar year for which the EP receives an incentive payment [T 14].

10. For the application by CenterLight, NYSTEC assessed the reporting period from April 1, 2013 to June 29, 2013 [Ex 10 page 227].

11. NYSTEC determined that, as a member at CenterLight Health System, the Appellant met the 30% patient volume [T 42].

12. CenterLight also adopted an EHR system that NYSTEC found to have satisfied the requirements for the incentive program [T 43].

13. The Appellant signed the Attestation to the Application for the EHR incentive program payment on February 26, 2014 [Ex 10 page 230].

14. The Medicaid Program provided payment for the Appellant under the EHR incentive program on April 14, 2014, with the payment adjustment information indicating that there had been no prior payment to the Appellant [Ex 22].

15. The November 30, 2017 Final Audit Report determined to recoup $21,250.00 from the Appellant on the grounds that, for the 2013 payment year, the Appellant failed to produce documentation upon audit to demonstrate that less than 90% of her covered professional services occurred in a hospital setting in the year preceding the payment year, as required by Federal regulations, and, therefore, was not eligible to receive an incentive payment for 2013 [Ex 4 page 039].

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. 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. The Federal regulations at 42 CFR § 495.304(c) require that, for each year an EP seeks an EHR incentive payment, the EP must not be hospital-based. Title 42 CFR § 495.4 defines a hospital-based EP as one who furnishes 90% of her covered professional services in a hospital setting in the year preceding the payment year.

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 recoup payment.

The ALJ concludes that OMIG erred in using the year 2012 to assess whether the Appellant was in a hospital-based practice. This error resulted from the November 30, 2017 Final Audit Report designating 2013 as the payment year for the incentive payment. In its opening statement at hearing, the OMIG defined the payment year as the first calendar year for which the EP receives an incentive payment [T 14]. The OMIG's own Ex 22 showed that the Appellant received the payment under the EHR incentive program on April 14, 2014, rather than 2013, with the payment adjustment information indicating that there had been no prior payment for the Appellant. With 2014 as the payment year, OMIG should have looked to 2013 to assess whether the Appellant worked in a hospital-based practice. By 2013, the Appellant had left Bronx

Lebanon Hospital and joined the non-hospital-based practice at CenterLight Health Service. Ms. McGowan testified at hearing that CenterLight met the eligibility criteria for payments under the EHR incentive program [T42-43].

Decision

The ALJ overturns the OMIG Determination to recoup the $21,250.00 EHR incentive program payment from the Appellant.

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: March 25, 2019
Menands, New York

_____

James F. Horan
Administrative Law Judge

To:

Phillip Hoffman, Esq.
Office of the Medicaid Inspector General
800 North Pearl Street, 2nd Floor
Albany, NY 12204

John Tumelty, Esq.
Tumelty & Spier, LLP
160 Broadway, Suite 708
New York, NY 10038