



## Department of Health

**KATHY HOCHUL**  
Governor

**JAMES V. McDONALD, M.D., M.P.H.**  
Commissioner

**MEGAN E. BALDWIN**  
Acting Executive Deputy Commissioner

August 18, 2023

**CERTIFIED MAIL/RETURN RECEIPT**

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800 North Pearl Street  
Albany, New York 12204

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Buffalo, New York 14202

**RE: In the Matter of MA Surgical Supplies, Inc.**

Dear Parties:

Enclosed please find the Decision in the above referenced matter.

If the appellant did not prevail, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

Natalie J. Bordeaux  
Chief Administrative Law Judge  
Bureau of Adjudication

NJB: cmg  
Enclosure

STATE OF NEW YORK  
DEPARTMENT OF HEALTH

**COPY**

In the Matter of the Appeal of

MA Surgical Supplies, Inc.  
Provider No.: 02209805

Appellant,

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

**Decision**

Audit No.  
#21-4015

Before: Jeanne T. Arnold  
Administrative Law Judge

Parties: NYS Office of the Medicaid Inspector General  
800 North Pearl Street  
Albany, New York 12204  
By: Michael J. Derevlany, Esq.  
michael.derevlany@health.ny.gov

MA Surgical Supplies, Inc.  
314 Roebling Street  
Brooklyn, New York 11211  
By: William L. Busler, Esq.  
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MA Surgical Supplies Inc. (Appellant) requested a hearing pursuant to Social Services Law § 145-a and 18 NYCRR 519.4 to appeal a Final Audit Report dated April 13, 2023, by the Office of the Medicaid Inspector General (OMIG) determining to recover Medicaid Program overpayments of durable medical equipment claims.

The OMIG contends that there is no jurisdiction to review the Final Audit Report (FAR) because the hearing request is untimely. By letter dated June 30, 2023, the OMIG

requested a decision on the timeliness issue. In support of its position, the OMIG submitted the following exhibits:

- Exhibit A: The FAR dated April 13, 2023.
- Exhibit B: United State Postal Service (USPS) tracking of the certified mailing of the FAR to the Appellant, indicating that the mailing had arrived at a Brooklyn Distribution Center by April 14, 2023 at 10:16 AM, and was received by the Appellant on April 19, 2023.
- Exhibit C: USPS return receipt.
- Exhibit D: The Appellant's appeal letter dated June 8, 2023, marked received by the OMIG on June 15, 2023.
- Exhibit E: Federal Express tracking, detailing that the Appellant's appeal letter was mailed on June 13, 2023, and received on June 15, 2023.

The Appellant's owner submitted a letter via electronic mail (email) dated July 6, 2023, contending that the Appellant's request for appeal of the FAR was timely.

By letter dated July 10, 2023, the Administrative Law Judge indicated receipt of the above documents and advised that the OMIG's letter request for a decision on timeliness would be considered pursuant to 18 NYCRR 519.23 and the parties would have until August 9, 2023 to submit any additional information. On August 9, 2023, Appellant's counsel submitted a legal memorandum by email further contending that the Appellant's hearing request is timely.

#### APPLICABLE LAW

Social Services Law (SSL) § 145-a(2) provides:

Upon the issuance to the provider of a written notice of a final determination, the department must also notify the provider in writing of the provider's right to request a hearing. **The provider's right to request a hearing shall not expire earlier than sixty days from the mailing of such notice of the provider's right to a hearing.** If no administrative hearing or proceeding for judicial review shall then be pending and if the time for initiation of such hearing or proceeding shall have expired, the commissioner or his or her agents, representatives or designees may file with the clerk of the county where the provider resides or has a place of

business a certified copy of the final administrative determination of the commissioner or his or her agents, whether in the form of a written final audit report or other final determination that such provider has engaged in unacceptable practices or has received payment to which such provider is not entitled, containing the amount found to be due. The filing of such final administrative determination shall have the full force and effect of a judgment duly docketed in the office of such clerk. The final administrative determination may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment. Such final administrative determination shall not be filed until at least sixty days after the department has posted by ordinary mail to the provider at the address of such provider on file with the department a copy of the final administrative determination which shall contain notice of the amount found to be due and owing. (Emphasis added.)

Department regulations applicable to this Medicaid provider hearing state that “[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**

It is undisputed that the FAR was dated at the OMIG’s Albany office on April 13, 2023 and delivered via USPS certified mail return receipt requested with tracking. (Exhibits A, B, C.) By the morning of April 14, 2023, the certified mail package was in transit at a USPS distribution center in Brooklyn. The Appellant received and signed for it on April 19, 2023. (Exhibits B, C.)

The FAR advised, pursuant to 18 NYCRR 517.6(b)(4), that the Appellant was required to request a hearing “within sixty (60) days of the date of this report.” (Exhibit A.) Sixty days from the date of the FAR was June 12, 2023. The Appellant requested a hearing by a letter that, although dated June 8, 2023, was not mailed until June 13, 2023,

and was not received by the OMIG until June 15, 2023. (Exhibits D, E.) The Appellant's request for a hearing, therefore, is not timely.

The Appellant argues that the 60-day period to appeal does not begin to run until receipt of the FAR and, thus, because the Appellant received the FAR on April 19, 2023, the appeal request received by OMIG on June 15, 2023 is timely. In the alternative, the Appellant argues that good cause exists to extend the 60-day period. Both arguments fail.

First, the Appellant's position that the 60 days to request a hearing should run from the time the Appellant receives the FAR is contrary to the applicable statute, which provides for commencement of that period "from the mailing of such notice of the provider's right to a hearing." SSL § 145-a(2). It is also contrary to the applicable regulation, which states that the 60 days runs from "the date of the department's written determination." 18 NYCRR 519.7(a). Finally, it is contrary to the explicit language of the notice in the FAR itself, which is very specific in stating that a hearing must be requested "within sixty (60) days of the date of this report." (Exhibit A, page 9.) Date of receipt is nowhere implied by any of these mandates as an applicable factor.

SSL § 145-a(2) is specific about the process and about the Department's obligations: once the Department issues the FAR, it must mail the FAR and notice of hearing rights to the provider. After it does so, the Department must wait 60 days to see if the provider is going to challenge the FAR. If after 60 days, the Department is not notified of an appeal, the Department may then file a certified copy of the FAR with the clerk of the county where the provider resides or has a place of business. The Department thus can measure the 60 days from the date it takes the affirmative step of mailing or delivery, before it can complete its next task of filing the FAR. If the provider disagrees

with the FAR, it is the provider's obligation to provide a clear, written communication to the Department requesting a hearing before the Department acts to file the FAR, which is why notice of an intent to appeal the FAR must arrive to the OMIG within 60 days of the date of the FAR. 18 NYCRR 519.7(a).

The Appellant acknowledges that both SSL § 145-a(2) and 18 NYCRR 519.7 apply here but argues that the Court of Appeals has interpreted the straightforward language of the statute and regulation to mean that the 60-day limitations period begins when the Appellant receives the FAR, citing *West Midtown Management Group v NYS Dep't of Health* (31 NY3d 533, 538 [2018]).

In *West*, the OMIG issued its final audit report on June 16, 2010 and “delivered it” to the provider. The Court determined that the 60-day deadline to request a hearing expired on August 15, 2010, 60 days after the report was both issued and delivered. The Appellant contends that because the *West* Court stated that “[w]ith the delivery of the FAR, the . . . 60-day limitations period. . . began to run” this means that the 60 days did not commence until the FAR was handed over or left for the Appellant, or in other words that “delivery” means receipt. (Appellant's legal memorandum dated August 9, 2023, page 2.)

“Delivery” is not synonymous with “receipt.” As even the Appellant's counsel admits, the *West* Court did not specify a method of delivery and does not state whether the final audit report was mailed or hand delivered that day (Appellant's legal memorandum dated August 9, 2023, page 2); or whether the provider actually received it on the date it was both issued and delivered. Delivery encompasses mailing; thus “delivery” as used by the *West* Court could mean mailed, although not specified. The

Appellant also cites the administrative determination in *Matter of West Midtown Medical Group, Inc. Audit #08-3717* (decided November 19, 2010), in which the Administrative Law Judge held that 18 NYCRR 519.7 (a) requires a provider to request an appeal within sixty days from the date of the FAR. That administrative hearing decision was affirmed on appeal, as is noted without comment by the Court of Appeals in *West*. (*Supra*, 31 NY3d 533, at footnote 1.)

The 60-day period's commencement upon the FAR's date of issuance, as stated in the FAR itself, is consistent with the decision in *West*, and affords the Appellant adequate notice of the right to request an appeal and how and when to do so, as required by SSL § 145-a(2) and 18 NYCRR 517.6(b)(4).

The FAR dated April 13, 2023 clearly instructs, in relevant part, that “[a]s allowed by state regulations, you must make your request for a hearing, in writing, within sixty (60) days of the date of this report. . .” (Exhibit A.) It does not advise the Appellant that it has 60 days “from the day you receive or read this report.” The notice also provides a telephone number to call if there are any questions. (Exhibit A.) Thus, once the Appellant's owner received the FAR, he was instructed that if he did not agree, he could appeal by requesting a hearing within 60 days of April 13, 2023, or by June 12, 2023. If the Appellant's owner did not understand this clear instruction, he could have called the telephone number provided for further clarification. (Exhibit A.)

Once delivery of the FAR is accomplished by mailing or otherwise (*e.g.*, hand-delivery or email), the OMIG's obligation is complete (SSL § 145-a[2]) for at least 60 days while it waits to discern whether the Appellant will appeal the FAR pursuant to 18 NYCRR 519.7(a). Sixty days affords enough time for the FAR to reach the Appellant and

for the Appellant to read the FAR and its instructions on how to appeal the FAR should the Appellant wish to do so.

Alternatively, the Appellant argues that there is good cause to determine that the appeal request is timely because the Appellant did not receive the FAR for six days after the date of the report. The Appellant cites *Matter of Grandell Rehabilitation and Nursing Center Audit No. 15-5357* (2018), where the Administrative Law Judge noted that there was neither a delay in the mailing or transit of the final audit report which might constitute reason to extend the 60-day limitations period.

In this case, there also was no such delay. The FAR was in transit by April 14, 2023, having already arrived in a Brooklyn facility by 10:14 AM. (Exhibit B.) Presumably this means that the OMIG mailed the FAR from Albany on the same day it is dated, April 13, 2023. Although the OMIG could have easily clarified this by issuance of an affidavit of mailing, even if the FAR was mailed on April 14, 2023, the 60-day limitations period would then expire on June 13, 2023, and the appeal request was not received by OMIG until June 15, 2023. While the Appellant argues that that the timeliness of his request for an appeal should likewise run from the date he mailed his request for a hearing (Appellant's email dated July 6, 2023), he cites no authority, and does not indicate that he made any attempt on June 13, 2023 to contact the OMIG, by email or otherwise, to express that he wished to appeal and to forestall the OMIG from taking further action as permitted in SSL § 145-a(2).

In any event, it is undisputed that the FAR was received by the Appellant on April 19, 2023, affording the Appellant still 54 days to request an appeal. Any clear, written communication requesting review of the FAR would suffice. 18 NYCRR 519.7(a). Here,

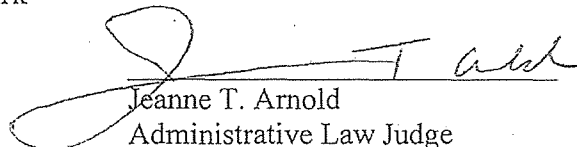


the Appellant's owner did not convey any hearing request until he mailed an appeal letter, via express-two-day mail, on June 13, 2023, ensuring its (late) arrival on June 15, 2023. Although the Appellant's owner indicated in his email dated July 6, 2023, that "due to unforeseen circumstances" he was unable to mail the appeal letter earlier, he does not indicate what if any those unforeseen circumstances were, nor does his counsel in the legal memorandum dated August 9, 2023. Therefore, the Appellant did not establish good cause for its failure to timely appeal the FAR.

**DECISION**

The Appellant is not entitled to a hearing to review the Final Audit Report dated April 13, 2023.

DATED: Rochester, New York  
August 18, 2023

  
Jeanne T. Arnold  
Administrative Law Judge