

In the Matter of

West Midtown Medical Group, Inc.  
OMIG Audit # 08-3717

Decision on  
Motion

Proceeding to determine the timeliness of an appeal  
from final audit findings under Article 2 of the Social  
Services Law of the State of New York and Title 18  
(Social Services) of the Official Compilation of Codes,  
Rules and Regulations of the State of New York (18 NYCRR)

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James F. Horan, Administrative Law Judge

For the State of New York:

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For the Respondent:

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By Jeffrey J. Sherrin, Esq.

West Midtown Medical Group, Inc. (West) moves for review of a determination by the Office of the Medicaid Inspector General (OMIG) that West failed to file a timely notice of appeal from a final audit report under the appeal standards at Title 18 NYCRR § 519.7. West concedes that it can locate no formal letter requesting a hearing, but argues that other electronic and verbal communications between West and OMIG reflect a request for hearing and knowledge by OMIG that West requested a hearing. The ALJ rules that § 519.7 requires that West should have filed a formal appeal letter within sixty days from receiving the final audit report and that the failure to file the appeal letter within sixty days in this case amounts to a waiver of the right to a hearing.

West serves as a provider under the Medical Assistance Program (Medicaid) and OMIG conducts audits and reviews of providers to assure compliance with laws rules and regulations of the Medicaid Program [West Submission, Exhibit A]. The June 2010 final audit report from OMIG found that West received Medicaid overpayments that OMIG estimated at \$1,857,401.00 and that OMIG now sought to recover. Title 18 NYCRR § 519.7 provides a provider an opportunity for a hearing to challenge the audit if the provider makes the hearing request in writing, within sixty days from the final audit report. The OMIG has determined that West failed to file a timely request.

Attorneys for West now request a ruling on the appeal's timelines from the Department of Health's (DOH) Bureau of Adjudication, the office of the Administrative Law Judges (ALJ) who conduct the hearings to review OMIG audits. West's request included an October 27, 2010 cover letter and four attached exhibits: A.) Draft Audit Report, B.) West Reply to Draft Audit Report, C.) Final Audit Report and D.) Electronic mail message 7/2/10 from West attorneys to Charlene D. Fleszar, Esq., OMIG Associate Counsel. The ALJ received no submissions from OMIG. The West cover letter indicated that OMIG suggested that West submit the request for an ALJ ruling and that OMIG would abide by the ruling.

The issue of whether an appellant made a timely request for a hearing presents a question of fact for resolution in such a hearing, People ex rel. Walker v. NYS Board of Parole, 98 A.D.2d 33, 469 N.Y.S.2d 780 (2<sup>nd</sup> Dept. 1983). Prior to 1998, the former Department of Social Services (DSS) conducted Medicaid audit hearings and DSS took the position that determinations on the timeliness of hearing requests provided questions for resolution by the ALJs who conducted those hearings, *see: Matter of Auburn*

*Memorial Hospital (FH # 1911618M, 1993); Matter Of Edmund Sperling, D.P.M (FH # 1801330K 1993); Matter of Alcare Respiratory Services (FH #2530325N 1997<sup>1</sup>)*. After the New York Legislature dissolved DSS in 1997, DOH became responsible to conduct Medicaid provider audits and audit hearings<sup>2</sup>. When appeal timeliness arose as an issue in a DOH hearing, DOH followed the DSS precedents authorizing ALJs who conduct audit hearings to decide whether the appellant filed a timely audit appeal, *see Matter of 820 River Street, Inc. (2003)*. In 2006, the New York Legislature placed the Medicaid provider audit and recovery function within OMIG<sup>3</sup>, but DOH ALJs remained responsible to conduct the hearings. The request for ruling by West appears to be the first request for a determination on appeal timeliness since OMIG became the entity that receives the hearing requests. By agreeing to submit this matter for ruling by a DOH ALJ, OMIG is following the DSS precedent to submit the determination on timely audit appeals to the ALJs who conduct the audit hearings.

West argues on its motion that West submitted a substantial and detailed response [Exhibit B] to the OMIG draft audit report [Exhibit A] and also indicated verbally to several OMIG officials that a hearing was requested, would occur and was absolutely necessary. Also, an electronic mail message [Exhibit D] from an attorney for West to Counsel's Office at OMIG stated:

*“ I anticipate we will be requesting a hearing and will let you know within the sixty day period provided.”*

West argues that the appeal provisions at § 519.7 intend no rigid form or manner for requesting a hearing, that an overly rigid approach would be inconsistent with provisions

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<sup>1</sup> All ALJ Decisions that this Ruling cites are available electronically, by request to the Bureau of Adjudication at 518.402.0748.

<sup>2</sup> 1997 Laws of New York, Chapter 436

<sup>3</sup> 2006 Laws of New York, Chapter 442

guaranteeing hearings on overpayments under the Federal Medicaid statute at 42 U.S.C. § 1320a-7a and that New York Administrative Act § 301(1) (McKinney 2010) contains no provision requiring that hearing requests must be in writing. West concedes that agencies may establish procedures for hearings, but West argues that agencies should never deny a hearing for a technical defect, when the request has been made and is known.

The ALJ rules that West never made a request for a hearing in this case because West failed to submit a timely, written request. The provisions at § 519.7 provide clearly and simply that a provider may request an appeal by clear, written communication requesting a hearing, within sixty days from the written determination by the agency. The sixty-day limit derives from the provisions on requesting hearings at New York Social Services Law § 22(4)(a)(McKinney Supp. 2010). A statutory time limit for requesting a hearing is jurisdictional and may not be waived, Piasecki v. Blum, 78 A.D.2d 950, 437 N.Y.S.2d 520 (3<sup>rd</sup> Dept. 1980). West is in effect requesting a waiver from the sixty-day limit on this motion.

The West Submission attached two written communications from West to OMIG, the reply to the draft audit report [Exhibit B] and the electronic mail message [Exhibit D]. A draft audit report went from OMIG to West on January 4, 2010 [Exhibit A] and West submitted Exhibit B in reply February 16, 2010. The Final Audit Report, the final agency action by OMIG, went to West on June 16, 2010. The ALJ rules that Exhibit B fails to amount to an appeal, because it pre-dated the final audit report. Under § 519.7, the time for an appeal runs from the final determination. In *Matter Of Edmund Sperling* (supra), a DSS decision on timeliness, the appellant failed to file a timely appeal request but argued that a written request for a personal conference that pre-dated a final agency action

constituted an appeal request. In rejecting that argument, DSS ALJ Reginald Brantley ruled that the right to an appeal attaches only upon a final agency action and that correspondence prior to the final action fails to substitute for a timely hearing request. Exhibit D, the electronic mail message, indicated that the author anticipated filing a hearing request and would let the OMIG know within sixty days. In *Matter of Alcare Respiratory Services* (supra), another DSS decision on timeliness, a provider failed to file a timely written hearing request, but attempted to establish an intent to file from notes by the provider's staff. In rejecting that argument, DSS ALJ Stephen Fry ruled that the appeal regulations required a written request rather than an indication of intent to file. On the current motion, it is clear that the author of Exhibit D realized that the electronic message was insufficient to request an appeal and that the author still needed to make an appeal request within sixty days. West never made that request. The ALJ holds that OMIG determined correctly that West failed to make a timely appeal request.

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.

November 19, 2010  
Troy, NY

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James F. Horan  
Administrative Law Judge