State of New York : Department of Health

In the Matter of the Request of

Dr. Allan Roffe (Appellant)

Audit # 14-3289
Provider #01574827

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 March 24, 2015
Parties:	Office of the Medicaid Inspector General (OMIG) Office of Counsel 217 Broadway, 8th Floor New York, NY 10007 BY: Robin Henzel, Esq. Allan Roffe, D.D.S. [redacted] BY: *Pro Se*

The Appellant received $21,250.00 from the Medicaid Program as an incentive to adopt or upgrade to an electronic health records (EHR) system. The OMIG now seeks to recoup that amount on grounds that the Appellant attested falsely to adopting EHR in 2011, when he did not actually adopt EHR until 2012. The Appellant answered that he attested to adopting EHR in 2012 only after he had purchased such a system and that he never signed any attestation mentioning the year 2011. After a hearing, the ALJ finds no grounds exist for recoupment because the evidence fails to establish that the Appellant submitted a false attestation.

Background

The OMIG issued a Notice of Final Agency Action on January 29, 2015 that sought recoupment of the $21,250.00 incentive payment for failure to adopt, implement or upgrade to a certified EHR System in the year for which the Appellant attested to adoption/upgrade [Hearing Exhibit 11]. The Appellant then requested this hearing. The ALJ conducted the hearing in this matter pursuant to New York Social Services Law (SSL) Articles 1 and 5 (McKinney Supp. 2015), New York Public Health Law (PHL) Article 1 (McKinney Supp. 2015), New York Administrative Procedure Act (SAPA) Articles 3-5 (McKinney 2015), Title 18 NYCRR Parts 504, 517, 518 & 540 and Title 42 CFR Part 495. The OMIG presented as hearing witnesses, Tyler Corcoran and Scott Lephart. Mr. Corcoran is a senior consultant with the New York State Technology Enterprise Corporation (NYSTEC), which contracts with OMIG to audit the EHR Incentive Program. Mr. Lephart is an auditor with OMIG. The Appellant spoke on his own behalf, but offered no testimony. Both witnesses testified under oath and subject to cross-examination. The OMIG offered 18 exhibits into evidence that the ALJ received into the record:

Exhibit 1. Audit Notification Letter
Exhibit 2. Attestation
Exhibit 3. Certified Health IT Product List
Exhibit 4. Vendor Letter
Exhibit 5. Log-In Screen Shot
Exhibit 6. Contract
Exhibit 7. Invoices
Exhibit 8. Draft Audit Report
Exhibit 9. Response to Draft Audit Report
Exhibit 10. E-Mail Correspondence OMIG-Appellant
Exhibit 11. Final Audit Report
Exhibit 12. Hearing Request
Exhibit 13. Auditor's Contact Log
Exhibit 14. Audit Review Sheet
Exhibit 15. *Federal Register*, Wednesday July 28, 2010
Exhibit 16. Notice of Pre-Hearing Conference

Exhibit 17. Notice of Hearing
Exhibit 18. Mailing Receipts

The Appellant offered into evidence two exhibits that the ALJ received into evidence:

Exhibit A. Registration and Attestation Print-Out
Exhibit B. Medicare and Medicaid EHR Incentive Program Registration and Attestation System Print-Out

The record also contained the hearing transcript pages 1-98.

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 which 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 *Federal Register*/ Vol. 75, No. 144/ Wednesday July 28, 2010, page 44314].

4. To qualify for the incentive payment, an EP must purchase an EHR System that the Office of National Coordinator has certified and that appears on the Certified Health List IT product list [T 34].

5. The Systems on that list included the Open Dental Version 11.0 Complete EHR from Open Dental Software [Ex 3].

6. The Appellant purchased/upgraded to that certified Open Dental Software product on March 22, 2012 [Ex 4, Ex 6].

7. To receive the incentive payment, an EP must submit an attestation that the EP has adopted/upgraded to a certified EHR System [T 27].

8. The Appellant signed the New York Medicaid Incentive Payment Attestation on April 23, 2012 [Ex 2, fifth page].

9. Nothing on the Attestation stated that the Attestation applied to the year 2011 and no language appeared on the Attestation to the effect that the Appellant had adopted/upgraded to a certified EHR System in the previous calendar year [Ex 2, fifth page].

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. Title 18 NYCRR § 515.2 defines unacceptable practices to include conduct contrary to rules, rates or fees, fraud or abuse, false claims, false statements, failure to disclose, unacceptable record keeping, client deception and failure to meet recognized standards. Title 18 NYCRR § 515.2(b)(6) defines unacceptable practices as failing to maintain or to make available for purposes of audit or investigation records necessary to fully disclose the medical necessity for and the nature and extent of the medical care, services or supplies furnished, or to comply with other requirements of this Title. 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.

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 disqualify and /or to recoup payment.

In its closing statement, OMIG alleged that the Appellant submitted a false attestation for which he received a $21,250.00 overpayment [T 90]. The OMIG argued that the Appellant must return the overpayment, even if the Appellant made the attestation by mistake. The ALJ finds that the Appellant committed no mistake and that the Appellant made no false attestation. As the Appellant stated during the hearing [T 52-53], the Appellant signed the Attestation in April 2012 and there was no other date on the Attestation [Ex. 2, fifth page].

During cross-examination, the Appellant asked Mr. Corcoran if Hearing Exhibit 2 mentioned any year besides 2012 and Mr. Corcoran answered that:

> "It does not specifically [T 84]."

When the Appellant asked about the April 2012 date on the Attestation, Mr. Corcoran replied that:

> "It falls within the grace period for the 2011 payment year [T 83]".

On direct examination, Mr. Corcoran testified that the Incentive Program uses a January 1st to December 31st calendar year and that to receive the incentive payment for adopting/upgrading to an EHR System for any calendar year, an EP must sign an attestation up to 90 days from December 31st of the adoption/upgrade year [T 29]. For the year 2011, there was an extension in the 90 day grace period for all EP until April 30, 2012 [T 33].

The ALJ finds that no evidence in the hearing record indicates that the Appellant was aware that he was submitting the Attestation during the 2011 grace period nor did any evidence show that the Appellant made any representation that he adopted/upgraded to an EHR System in 2011. The evidence does, however, demonstrate the Appellant made a truthful Attestation when he stated on April 23, 2012 that he had adopted/upgraded to a certified EHR System. The Appellant had purchased the certified Open Dental Software product the previous month [Hearing Exhibits 4 and 6]. Further, Mr. Corcoran's direct testimony indicated that an EP must submit an attestation in order to get the incentive payment [T 27], so the Appellant would not have received the incentive payment until sometime after April 2012. The ALJ finds no grounds for recoupment in this case and the ALJ overturns the determination by the OMIG in the January 29, 2015 Final Audit Report [Hearing Exhibit 11].

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: June 16, 2016
Menands, New York

_____

James F. Horan
Administrative Law Judge