

STATE OF NEW YORK: DEPARTMENT OF HEALTH

In the Matter of the Request of

Pediatric Dental Associates, PC and
Elan Kaufman, DMD
Provider ## 02257665 and 02072315

DECISION ON MOTION
Audit No.: 07-4666

for a hearing pursuant to Title 18 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York (18 NYCRR 517)

Before: Jean T. Carney
Administrative Law Judge

Parties: Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Patrick F. Scully, Esq.

Pediatric Dental Associates, P.C.
Elan Kaufman, DMD
2120 Ocean Avenue
Brooklyn, New York 11229
By: Margaret Surowka Rossi, Esq.
Barclay Damon
80 State Street
Albany, New York 12207

PROCEDURAL HISTORY

By letter dated February 15, 2018, the Office of the Medicaid Inspector General (OMIG) submitted a request for a determination as to whether Pediatric Dental Associates, PC, and Elan Kaufman, DMD (Providers) had timely requested a hearing regarding two audits: Audit No.: 2011Z10-14P; and Audit No.: 07-4666. In support of its request, the OMIG submitted correspondence from the Providers, a Final Audit Report for Audit #2011Z10-14P, and a Notice of Agency Action (NOAA) for Audit #07-4666. In response, the Providers submitted correspondence to the OMIG, including a letter asserting that the Final Audit Report for Audit #07-4666 had not been received by the Providers.

Based on the Parties' submissions, this ALJ issued a decision on June 14, 2018, determining that the request for a hearing on Audit #2011Z10-14P was not timely made. It was also determined that there was insufficient evidence in the record to support the Providers having received the Final Audit Report for Audit #07-4666, and therefore that request was timely made.

On or about November 9, 2018, the OMIG submitted a Motion to Renew and Reargue that portion of the Decision regarding audit #07-4666. A scheduling Order was issued, and the record closed on December 3, 2018, upon receipt of the Providers' sur-reply.

DISCUSSION

In order to prevail on a motion for leave to reargue, the movant must make the motion within thirty days after service of the decision on the previous motion. (CPLR §2201[d][3]). The Decision that the OMIG moves for leave to reargue was issued on June 14, 2018. The OMIG's motion was submitted on November 9, 2018, nearly five months after the decision was issued. Therefore, the motion to reargue is denied as being untimely.

A motion for leave to renew must be based on "new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the

law that would change the prior determination”. (CPLR §2201[e][2]). Here, the OMIG asserted that the facts not offered in the original submission that would change the prior determination were the Final Audit Report, and proof that the Final Audit Report was delivered to the Providers on March 20, 2017. As a result of these omissions, the ALJ was unable to consider those facts when rendering the prior decision. However, it is well settled that the new facts sought to be considered should be either not known or not available to the movant at the time of the original submission. (*Abmad v. Purcell*, 82 A.D.2d 802, 441 N.Y.S.2d 423 [2d Dept. 1981]; *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 [1st Dept. 1979]). Here, the facts the movant wishes to be considered were known at the time of the original submission, but they were nonetheless omitted from the original submission. In its motion, the OMIG does not offer a valid excuse for failing to include the Final Audit Report and proof of mailing in its original submission. Consequently, the OMIG failed to meet the requirements of showing “reasonable justification for the failure to present such facts on the prior motion.” (CPLR §2201[e][3]; *Foley v. Roche*, at 568). The OMIG’s motion to renew is denied.

DECISION

The OMIG’s motion to renew and reargue is denied, and the hearing on Audit #07-4666 may proceed. As soon as practicable, and no later than February 25, 2019, the parties will submit mutually acceptable dates for conducting the hearing.

This Decision is made 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: January 28, 2019
 Albany, New York

JEAN T. CARNEY
Administrative Law Judge

