

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 00926

DR. KAREN J. WILLIAMS, LPC,

Petitioner,

v.

NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES,
DIVISION OF MEDICAL ASSISTANCE,

Respondent.

FINAL DECISION

THIS MATTER came on for hearing before Administrative Law Judge, Selina M. Brooks, on August 27, 2012 in Charlotte, North Carolina.

APPEARANCES

For Respondent: Tracy J. Hayes
Special Deputy Attorney General
N.C. Department of Justice
Raleigh, North Carolina

For Petitioner: Carlos D. Watson, Esq.
Watson Law Firm
Charlotte, North Carolina

ISSUE

Whether the decision of Respondent's Hearing Officer to uphold DMA's suspension of payments to Petitioner in accordance with 42 C.F.R. § 455.23 was erroneous, contrary to law, rule or procedure, or arbitrary and capricious.

EXHIBITS

For Respondent: Exhibits 1 – 14 and 20 were admitted.
The Court took judicial notice of Exhibits 14-19.

TESTIMONY

Patrick Piggott, DMA Program Integrity Behavioral Health Section Chief, and Jean Sibbers, DMA Program Integrity Behavioral Health Investigator, testified at the hearing on August 27, 2012 in Charlotte, North Carolina.

APPLICABLE STATUTES, RULES, REGULATIONS AND POLICIES

1. The Social Security Act, 42 U.S.C. 1396 *et seq.*
2. The Patient Protection and Affordable Care Act, Public Law 111-148
3. 42 CFR § 455.2
4. 42 CFR § 455.23
5. 42 CFR § 1007.9
6. 42 CFR § 1007.11
7. 42 CFR § 447.90
8. Federal Register, Vol. 76, No. 22
9. North Carolina Administrative Code, Title 10A, Subchapter 22F

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, along with documents and exhibits received and admitted in evidence and the entire record in this proceeding, the Undersigned makes the following Findings of Fact. In making the Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which each witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Respondent, the Department of Health and Human Services (“DHHS”), is the single state agency responsible for administering the North Carolina Medicaid program in accordance with federal and state law pursuant to the Social Security Act, N.C.G.S. §108A-25(b), §108A-54 and the North Carolina State Plan for Medical Assistance. The Division of Medical Assistance (“DMA”) is a Division of DHHS and is responsible for ensuring the integrity of the Medicaid program by conducting investigations and monitoring of enrolled NC Medicaid providers and implementing sanctions, including payment suspensions.

2. Petitioner is enrolled in the North Carolina Medicaid program to deliver outpatient therapy services pursuant to a duly executed North Carolina Medicaid Provider Administrative Participation Agreement. (Respondent’s Exhibit 5)

3. DMA opened an investigation into Petitioner’s billing practices following a referral from the IBM Fraud Abuse Management System (FAMS), a complaint from Mecklenburg Local Management Entity, and an anonymous hotline complaint. The FAMS referral identified a pattern of overbilling through claims data mining and the other complaints

included allegations that Petitioner was billing for services despite not seeing the client, back dating service orders, soliciting business and paying consumers to refer family members in violation of the Anti-Kickback Statute, continuing services after the consumer had requested discharge, not withholding taxes for some employees, paying some employees “under the table” and allowing employees to bill under her individual provider number. (Respondent’s Exhibit 4) At the hearing, Petitioner stipulated that DMA had received a credible allegation of fraud.

4. After verifying that the allegations were credible, DMA referred the case to the Attorney General’s Office Medicaid Fraud Investigations Unit (“MIU”) on November 21, 2011. (Respondent’s Exhibit 9) MIU is the North Carolina Medicaid fraud control unit established and certified under 42 CFR Part 1007.

5. MIU notified Respondent that payment suspension would not compromise or jeopardize the MIU investigation on December 2, 2011. (Respondent’s Exhibit 10)

6. In accordance with the requirements of 42 C.F.R. §455.23, DMA suspended Petitioner’s Medicaid payments on December 9, 2011 based upon receipt of a credible allegation of fraud identified through a provider audit and claims data mining. The payment suspension took effect on December 13, 2011. (Respondent’s Exhibit 20) Petitioner does not dispute whether she received proper notice of DMA’s action or make any allegations that her due process rights were violated.

7. Petitioner filed a request for reconsideration of this decision on December 20, 2011 (Respondent’s Exhibits 2-3)

8. DMA Investigator Jean Sibbers prepared a summary of the allegations for the DHHS Hearing Officer assigned to the reconsideration review, and Petitioner filed two written responses to that summary. (Respondent’s Exhibits 4, 6-7)

9. The DHHS Hearing Officer issued a written decision on January 26, 2012 upholding DMA’s decision to suspend payments due to credible allegations of fraud. (Respondent’s Exhibit 8)

10. MIU accepted the referral on February 2, 2012 (Respondent’s Exhibit 11), and issued two subsequent quarterly notices (on March 30, 2012 and June 29, 2012), stating that Petitioner continued to be under investigation. (Respondent’s Exhibits 12 and 13)

11. Petitioner agreed “to operate and provide services in accordance with all federal and state laws, regulations and rules, and all policies, provider manuals, implementation updates and bulletins published by the Department, its Divisions and/or its fiscal agent in effect at the time the service is rendered, which are incorporated into this Agreement by this reference.” (Respondent’s Exhibit 9, Paragraph 3; T pp 35-36)

12. DMA considered the good cause exceptions enumerated in 42 CFR §455.23 and determined that Petitioner did not meet any of those exceptions.

13. Access to patient care will not be jeopardized if the suspension of Petitioner’s Medicaid reimbursements continues. There are sufficient numbers of outpatient therapy

providers enrolled in the North Carolina Medicaid program within the geographic area served by Dr. Williams.

CONCLUSIONS OF LAW

Based on the foregoing facts, the Undersigned makes the following Conclusions of Law:

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. §150B-23 *et seq.* All necessary parties have been joined. The parties received proper notice of the hearing in this matter.

2. To the extent that the findings of facts contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Indep. Sch. Bd.*, 835 F. Supp. 340 (S. D. Tx. 1993).

3. Pursuant to 42. C.F.R. § 431.10 (e), the authority of the State Medicaid agency “must not be impaired if any of its rules, regulations, or decisions are subject to review, clearance, or similar action by other offices or agencies of the State. If other State or local agencies or offices perform services for the Medicaid agency, they must not have the authority to change or disapprove any administrative decision of that agency, or otherwise substitute their judgment for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency.”

4. There is no property interest in approved Medicaid payments for future services rendered or in participation in the North Carolina Medicaid program. *See, e.g., St. Joseph Hospital v. Electronic Data Systems, Inc. et al.*, 573 F. Supp. 443, 447 (S.D. Tx. 1983). Provider participation in the NC Medicaid program is contract-based. In North Carolina, all Medicaid provider “contracts are terminable at will” and nothing in the regulations governing the NC Medicaid program “creates in the provider a property right or liberty right in continued participation in the Medicaid program.” 10 NCAC § 22F.0605.

5. In order to prevail on his administrative appeal, the Petitioner must be able to show that the “respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights, and that the agency: (1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; or (5) Failed to act as required by law or rule.” N.C.G.S. § 150B-23(a) (emphasis added). Because Petitioner has no property interest in future Medicaid reimbursement, Petitioner cannot prevail on her appeal.

6. In February 2011, the Centers for Medicare and Medicaid Services (CMS), the federal agency responsible for overseeing all fifty State Medicaid programs, issued new and revised federal fraud and abuse regulations to comply with the mandates of the Patient Protection and Affordable Care Act of 2010 (Public Law 111-148), including significant revisions to the process for State Medicaid agencies to impose payment suspensions against enrolled Medicaid

providers. 42 C.F.R. § 455.23.

7. Effective March 25, 2011, 42 C.F.R. § 455.23(a)(1) requires the State Medicaid agency to “suspend all Medicaid payments to a provider after the agency determines there is a credible allegation of fraud for which an investigation is pending under the Medicaid program against an individual or entity unless the agency has good cause to not suspend payments or to suspend payment only in part.” DMA complied with this requirement.

8. The purpose of the payment suspension regulation is to “protect Medicaid funds.” FEDERAL REGISTER 76:22 (February 2, 2011) p. 5932.

9. “A credible allegation of fraud may be an allegation, which has been verified by the State, from any source, including but not limited to the following: (1) Fraud hotline complaints; (2) Claims data mining; (3) Patterns identified through provider audits, civil false claims cases, and law enforcement investigations. Allegations are considered to be credible when they have indicia of reliability and the State Medicaid agency has reviewed all allegations, facts, and evidence carefully and acts judiciously on a case-by-case basis.” 42 C.F.R. § 455.2. Petitioner stipulated and I find that DMA received a credible allegation of fraud concerning Petitioner.

10. 42 C.F.R. § 455.23(d)(2)(i) further requires the State Medicaid agency to make a written referral to the state Medicaid fraud control unit no later than the next business day after the suspension was enacted. DMA complied with this requirement.

11. 42 C.F.R. § 455.23(d)(3)(ii) requires the State to request a quarterly certification from the Medicaid fraud control unit that any matter accepted on the basis of a referral continues to be under investigation thus warranting continuation of the suspension. DMA complied with this requirement.

12. 42 C.F.R. § 455.23(e) states that “[a] State may find that good cause exists not to suspend payments, or not to continue a payment suspension previously imposed, to an individual or entity against which there is an investigation of a credible allegation of fraud if any of the following are applicable” and lists six possible exceptions. DMA considered the exceptions and did not find them to be applicable, and Petitioner did not specifically contend that any exception applied in this case.

13. In any event, the good cause exception is discretionary. The North Carolina Supreme Court has repeatedly held that use of the term ‘may’ “generally connotes permissive or discretionary action and does not mandate or compel a particular act.” *Campbell v. First Baptist Church*, 298 N.C. 476, 483, 259 S.E.2d 558 (1979), quoting *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938).

14. “In determining whether an agency decision is arbitrary or capricious, the reviewing court does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law.” *Mann Media, Inc. v. Randolph*

County Planning Bd., 356 N.C. 1, 565 S.E.2d 9 (2002). “The ‘arbitrary or capricious standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are ‘patently in bad faith,’ [*Burton v. City of Reidsville*, 243 N.C. 405, 407, 90 S.E.2d 700, 702 (1956),] or ‘whimsical’ in the sense that “they indicate a lack of fair and careful consideration’ or ‘fail to indicate [] any course of reasoning and the exercise of judgment. []’ [*State ex rel. Comm’r of Ins. v. [N.C.] Rate Bureau*, 300 N.C. [381,] 420, 269 S.E.2d [547,] 573 [(1980)].” *Lewis v. N.C. Dep’t of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989).

15. Petitioner has not presented any evidence which demonstrates that DMA’s decision was not exercised in good faith or in accordance with the law.

16. Petitioner has not presented any evidence that DMA’s or the Hearing Officer’s decision in this matter was erroneous, arbitrary or capricious, contrary to law or rule or failed to use proper procedure.

17. Pursuant to N.C. Gen. Stat. § 150B-34, based upon the preponderance of the evidence and “giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency,” the Undersigned finds that Respondent DMA did not act erroneously, fail to use proper procedure, act arbitrarily or capriciously, or fail to act as required by law or rule when it suspended payments to Petitioner in accordance with 42 C.F.R. §455.23.

DECISION

NOW, THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned determines that the Respondent’s decision to suspend payments to Petitioner was not erroneous, contrary to law, rule or policy, or arbitrary and capricious.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Final Decision.** In conformity with the Office of Administrative Hearings’ rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of

Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This is the 17th day of September, 2012.

Selina M. Brooks
Administrative Law Judge