



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
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**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on MAR 16 2010**



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. HMA 05145-09

CAMPUS PHARMACY,

Petitioner,

v.

**DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES,**

Respondents.

Angelo Cifaldi, Esq., on behalf of petitioner (Wilentz, Goldman & Spitzer, P.A.)

Dianna Rosenheim, Deputy Attorney General, on behalf of respondents (Paula
T. Dow, Attorney General of New Jersey)

Record Closed: February 11, 2010

Decided: March 15, 2010

BEFORE JOANN LASALA CANDIDO, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Campus Pharmacy (Campus or petitioner) appeals the determination of respondent Division of Medical Assistance and Health Services (DMAHS or respondent) to withhold payment for Medicaid claims for prescriptions that were dispensed to Medicaid patients between February 20, 2008 and June 3, 2008. On April

28, 2009, the case was transmitted to the Office of Administrative Law, (OAL) where it was filed as a contested matter. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was scheduled for November 20, 2009. The parties appeared on that date and agreed to have the case decided on a summary basis and submitted briefs and a Joint Stipulation of Facts in lieu of a hearing. Petitioner filed its motion for summary decision on December 19, 2009. Respondent opposed the motion and filed a response and motion for summary decision on December 22, 2009. Reply briefs were submitted by the parties and on February 11, 2010, oral argument was heard and the record closed.

FACTUAL DISCUSSION

The parties stipulated to the following, which is **FOUND as FACT**:

1. In 2006, the Division of Criminal Justice (DCJ) began an investigation into Campus Pharmacy ("Campus") and related providers.
2. In February 2008, DCJ recommended that DMAHS place Campus Pharmacy on pre-payment monitoring.
3. DMAHS placed Campus on prepayment monitoring on February 20, 2008. J-1. From that time forward, all unpaid claims were 'pended' which means they were held in DMAHS' claim system and not processed for payment.
4. Between February 20, 2008, and June 3, 2008, Campus continued to fill and dispense medications to beneficiaries and submitted claims for these prescriptions. Campus was not paid for the medications it dispensed during this period.
5. During 2008, DMAHS began a review of the pended claims and Campus provided documentation for DMAHS' review.
6. In a letter dated May 1, 2008, DMAHS requested Campus to provide a Corrective Action Plan ('CAP') and Campus did so in a letter dated May 2, 2008. J-2.
7. In October 2008, DCJ recommended to DMAHS that Campus be placed on federal withholding. At that time, DCJ believed there was a total amount of fraud for prescriptions related to Samaritan Medical Center in the amount of \$924,519.
8. DMAHS obtained the necessary approvals and placed Campus on Federal Withholding as of January 2, 2009. J-3. Campus requested a hearing. J-4.
9. DMAHS sent the letters to the Medicaid HMO's requesting that if Campus was a provider in their network, that it be placed on federal withholding. The

letters to the HMOs were dated December 22, 2008, but were allegedly not mailed out until January 2, 2009.

10. AMERIGROUP, a Medicaid HMO, advised that they initiated withholding in June 2008 due to an investigation into this provider's billing practices. AMERICHOICE, another Medicaid HMO, advised that withholding became effective January 22, 2009 and would remain in effect until instructed by DMAHS to resume payments. HEALTHNET, another Medicaid HMO, stated that payments would be withheld beginning January 21, 2009, and remain in effect until they receive notification from DMAHS as to the resolution of this matter.
11. DMAHS is holding \$743,479.66 in pharmacy claims submitted by Campus. Unisys has not processed these claims yet.
12. Claims can be submitted for up to a year after the date of services, so the claims included in the above amount should be for dates of service from 2008 and back to February 2007. However, pharmacy claims are generally paid at the time of sale, thus, it is not likely that there are many claims that date back beyond February 20, 2008. None of the amounts can be for dates of service after June 18, 2008 because Campus' provider number was terminated at that time.
13. DMAHS terminated Campus' provider number after a DCJ search warrant took all of Campus' records and their computer on June 3, 2008, and Campus advised it was unable to serve its Medicaid beneficiaries as of June 18, 2008 because the DCJ removed these items. Campus asked for a hearing.
14. A hearing was held regarding the termination of Campus' provider number, and the Honorable Jeffery A. Gerson affirmed the agency action in an initial decision dated May 27, 2009. J-5. There is no final agency decision yet due to a mix up in service of the initial decision on the parties. Exceptions by petitioner have been filed.
15. The New Jersey Division of Criminal Justice announced on October 26, 2009 indictments of Campus and its pharmacist in charge, Calvin Osei. J-6.

LEGAL DISCUSSION AND CONCLUSIONS

New Jersey has elected to participate in the Medicaid program and must comply with the Medicaid statute and federal regulations, in accordance with a federally approved "State Plan" which sets forth methods and standards by which providers of Medicaid services will be reimbursed and how abuses will be prosecuted. 42 C.F.R. 447.252(b). If a state does not adhere to the approved State Plan there is a risk of losing federal funding. New Jersey participates in the Medicaid program pursuant to the

New Jersey Medical Assistance and Health Services Act (the Act), N.J.S.A. 30:4D-1 to -64. The Department of Human Services (DHS) is the State agency designated pursuant to 42 U.S.C.A. § 1396a(a)(5), to administer the Medicaid program in New Jersey. The expressed intent of the legislation is that the State be enabled, within the limits of funds available for any fiscal year, to obtain all benefits for medical assistance provided by the Federal Social Security Act and thereby provide medical assistance on behalf of persons whose resources are determined to be inadequate to enable them to secure quality medical care at their own expense. N.J.S.A. 30:4D-2. Thus, the Act requires that DHS take all necessary steps, consistent with fiscal responsibility, for the proper administration of the New Jersey Medicaid Program.

In New Jersey the administration and supervision of the Medicaid program is the responsibility of DMAHS, which is a division of DHS. N.J.S.A. 30:4D-7. DMAHS, in accordance with its statutory responsibilities and consistent with the State Plan, has promulgated Medicaid regulations establishing the scope of covered services, provider approval, rate-reimbursement methodology, the eligibility process, recipient and provider appeals processes and numerous other regulatory activities.

The New Jersey Medicaid program is operated for the benefit of the recipients of medical assistance, N.J.S.A. 30:4D-2, and not for the benefit of providers of services. See Monmouth Med. Ctr. v. State, 80 N.J. 299, 302 (1979), cert. denied 444 U.S. 942, 100 S. Ct. 297, 62 L. Ed. 2d 308 (1979).

In the present case, the parties jointly requested that this matter be determined by Summary Decision. DMAHS contends that there is sufficient reliable evidence to support a federal withholding against petitioner pending the criminal court's determination of the guilt of petitioner on the Medicaid fraud and Health Care Claims fraud indicted charges.

Petitioner requests that DMAHS' motion for summary decision be denied and submits a motion for summary decision seeking the withheld payments be released immediately.

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), the motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539.

Petitioner asserts that DMAHS has failed to offer any evidence that justifies the withholding. Petitioner argues that DMAHS' actions in this matter violated petitioner's right to due process and the federal and state regulations that it is bound by.

The federal withholding regulation provides in pertinent part that DMAHS "may withhold Medicaid payments . . . to a provider upon receipt of reliable evidence that the

circumstances giving rise to the need for a withholding of payments involve fraud or willful misrepresentation” 42 C.F.R. § 455.23. This regulation was “specifically designed to encourage Medicaid State agencies to withhold all Medicaid payments to any provider where the State agency had reliable evidence that the provider had committed fraud against the program” or “was under criminal investigation.” 52 Fed. Reg. 48814. Withholding remains in effect until “the State agency or prosecuting authorities conclude that fraud has not been committed by the provider” or “all legal proceedings are concluded against the provider.” Ibid. The State agency is required to send “notice of its withholding or program payments within 5 days of taking such action” and “set forth the general allegations as to the nature of the withholding action.” 42 C.F.R. § 455.23(b).

State rules mandate that when DMAHS, “in accordance with 42 C.F.R. § 455.23, receives reliable evidence of fraud or willful misrepresentation by a provider . . . the Division **shall** withhold Program payments” N.J.A.C. 10:49-9.10(a) (emphasis added). Withholding shall be terminated when DMAHS “determines there is insufficient evidence of fraud or willful misrepresentation, or legal proceedings relating to the fraud or willful misrepresentation are completed.” N.J.A.C. 10:49-9.10(d) 2. Similar to the federal regulations, the state rules require that DMAHS “shall send notice of its withholding to the affected provider . . . within five days of taking such action” and the notice “shall set forth the general allegations as to the nature of the withholding action, but need not disclose specific information concerning any ongoing civil or criminal investigation.” Id. at 9.10(d). “The notice shall also be sent to HMOs.” Ibid.

Petitioner asserts that DMAHS did not inform them of the withholding within five days of taking such action as required by N.J.A.C. 10:49-9.10(d) and 42 C.F.R. 455.23(b). On January 2, 2009, DMAHS served petitioner with a Notice of Withholding advising that DMAHS was “in receipt of reliable evidence that there are circumstances giving rise to the need for withholding of Medicaid payments from [petitioner] which involve fraud and/or willful misrepresentation. An investigation by the Medicaid Fraud Section of the [DCJ] has discovered that there is reliable evidence of fraudulent

prescription billing activity at Campus Pharmacy.” J-3. The notice also informed petitioner that the withholding of Medicaid payments was to “continue for six (6) months or until the conclusion of the investigation and any subsequent proceedings.” Ibid.

Notices were also mailed to the Medicaid HMOs requesting that if petitioner was a provider in their network, that petitioner be placed on federal withholding. The notices sent to the Medicaid HMOs were dated December 22, 2008. The notices provided that “DMAHS intends to withhold all Medicaid payment from Campus Pharmacy effective the date of this letter.” J-3. Petitioner argues that since the notices provided to the HMOs were dated December 22, 2008, and the notice provided to petitioner was dated January 2, 2009, DMAHS did not inform petitioner of the withholding within five days of taking such action as required by N.J.A.C. 10:49-9.10(d) and 42 C.F.R. 455.23(b).

Frederick Wish, medical review analyst, certified that during the months of December 2008 and January 2009 he and Teresa Cook (medical review analyst) both performed the duties of placing providers on federal withholdings at DMAHS. Wish further certified that on December 22, 2008, prior to leaving for vacation, Cook drafted the letter to notify petitioner of the federal withholding. On or about January 2, 2009, Wish was notified that the approvals for the federal withholding for petitioner were received and he re-printed the notice Cook prepared, which was dated December 22, 2008, without correcting the date on the notice. Wish certified that he mailed the notices on January 2, 2009.

The notices to the HMOs were dated December 22, 2008, however, this has no impact in light of Wish’s certification that said notice was not mailed until January 2, 2009. N.J.A.C 1:1-12.4(a) provides that “all motions . . . shall be supported by affidavits for facts relied upon which are not of record or which are not the subjects of official notice.” Moreover, it is undisputed that Medicaid HMOs, Health Net and AmeriChoice, began withholding payments effective January 21, 2009, and January 22, 2009, respectively. Amerigroup, another Medicaid HMO, advised that it initiated withholding in June 2008, during the prepayment monitoring period due to an investigation into

petitioner's billing practices. That action was not connected to DMAHS' action to place petitioner on federal withholding in early 2009. Therefore, I **CONCLUDE** that DMAHS provided petitioner with adequate notice.

DMAHS contends it had reliable evidence of fraud or willful misrepresentation. It is undisputed that petitioner was the subject of a criminal investigation by DCJ into petitioner's alleged fraudulent Medicaid practices. Furthermore, DCJ obtained a search warrant to seize all of petitioner's pharmaceutical records. No search warrant can issue on mere "belief or suspicion," but only on probable cause. Thus, to issue the warrant, a judge must conclude that the applicant has presented "facts or circumstances which would warrant a prudent [person] in believing that the law was being violated." State v. Macri, 39 N.J. 250, 260 (1963).

Reliable evidence includes, but is not limited to "[r]eceipt of information from . . . a law enforcement, investigatory, or prosecutorial agency that indicates fraud or willful misrepresentation has occurred or is occurring." N.J.A.C. 10:49-9.10. Moreover, DCJ recommended to DMAHS in October 2008 that petitioner be placed on federal withholding. At that time, DCJ believed there was a total amount of fraud for prescriptions related to Samaritan Medical Center in the amount of \$924,519.

I **CONCLUDE** that DMAHS' had "reliable evidence" of fraud or willful misrepresentation sufficient to withhold Medicaid payments. See L&Z v. DMAHS, No. A-5525-98 (App. Div. October 5, 2000) (unreported) ("the issuance of a search warrant fully supports DMAHS' contention that it had 'reliable evidence' . . . of fraudulent activity sufficient to . . . withhold Medicaid payments"); TNT Med. Equip. v. DMAHS, HMA 5888-04, Final Decision (June 29, 2005) <<http://lawlibrary.rutgers.edu/oal/search.html>> (found that the federal withholding shall continue pending the outcome of the criminal investigation where petitioner engaged in upcoding, filling altered prescriptions, dispensing without a prescription and dispensing the wrong item).

DMAHS asserts that petitioner's subsequent indictment is additional reliable evidence that fraud or willful misrepresentation occurred. However, this indictment occurred on October 26, 2009, well after DMAHS placed petitioner on federal withholding. Therefore, the indictment is irrelevant to the determination of whether the withholding in this matter was warranted.

Petitioner contends that DMAHS' distinction that the time period from February 20, 2008, until January 2, 2009, was prepayment monitoring and the time period since January 2, 2009, is designated as withholding is a distinction without a difference and an effort to circumvent the due process requirements of State and Federal regulations. Petitioner asserts that DMAHS did not take any action during the eleven month prepayment monitoring period. Petitioner further asserts that DMAHS' decision to engage in prepayment monitoring was an unjustified effort to suspend petitioner's payments indefinitely and, consequently, the withholding period essentially began in February 2008.

Petitioner cannot base its deprivation of due process claim on the temporary withholding of its Medicaid funds since it had no protected property interest in these funds. A person has a property interest in a benefit if they have "a legitimate claim of entitlement to it" that derives from statute, regulation or contract. Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005) (quoting Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Federal law requires that state Medicaid plans "provide for procedures for prepayment and post payment claims review, including review of appropriate data with respect to the . . . provider of a service and the nature of the service for which payment is claimed, to ensure the proper and efficient payment of claims and management of the program." 42 U.S.C.A. § 1396a(a)(37)(B); see N.J.A.C. 10:49-8.2(a)(1)(ii). Prepayment review, implemented by 42 C.F.R. 447.45(f), permits DMAHS to examine petitioner's claims prior to authorizing any reimbursement from the Medicaid program. Federal regulations provide that a "State Medicaid agency may withhold Medicaid payments, in whole or in part, to a provider upon receipt of reliable

evidence that the circumstances giving rise to the need for a withholding of payments involve fraud or willful misrepresentation under the Medicaid program.” 42 C.F.R. § 455.23(a)

The purpose of the State and Federal rules is to “protect the integrity of Medicaid program funds and to assure that program beneficiaries receive services to which reimbursement is made.” 52 Fed. Reg. 48814. Thus, the purpose of federal withholding is to prevent reimbursement for improper claims. A provider’s interest in compensation from the Medicaid program is superseded by DMAHS’ “overriding public interest involved in the proper administration of the Medicaid program in New Jersey.” Greenspan v. Klein, 442 F. Supp. 860, 862 (D.N.J. 1977).

The governing statutes and regulations, therefore, do not create any entitlement to funds withheld pending a fraud investigation. See Yorktown Med. Lab., Inc. v. Perales, 948 F.2d 84, 89 (2d Cir. 1991) (citing similar provisions and stating that “Yorktown has no property interest grounded in either the Medicaid Act or New York regulations to payment for claims pending investigation to determine illegality”). Given the federal statutes and regulations cited above, courts have generally held that a plaintiff is not entitled to Medicaid funds that are the subject of a pending investigation.¹ “The provider has no property interest in continued participation in the Medicaid program and the public’s interest in the program’s integrity [is] ‘overwhelming.’” TNT, supra, HMA 5888-04, Final Decision at 4.

¹ See Peterson v. Weinberger, 508 F.2d 45, 48-50 (5th Cir.), cert. denied, 423 U.S. 830, 96 S. Ct. 50, 46 L. Ed. 2d 47 (1975) (where authorities investigated Peterson, a physician, for acts of fraud and misrepresentation. During the investigation, Medicare payments to Peterson were temporarily suspended. Peterson brought suit alleging, among other things, that his property was taken without due process. The Fifth Circuit rejected Peterson’s argument, determining that a Medicare provider has no due process right to a hearing during the course of an investigation for acts of fraud and misrepresentation.); Yorktown, supra, 948 F.2d at 89 (“Plaintiff’s first claim - that the Commissioner denied its due process right to payment for services rendered - fails for lack of a cognizable property interest. Yorktown has not demonstrated a legitimate claim of entitlement to the payments withheld”); Tekkno Lab., Inc. v. Perales, 933 F.2d 1093, 1098-99 (2d Cir. 1991) (“... the district court stated that it was persuaded [by two cases] ‘that plaintiffs like Tekkno have a constitutionally protected property interest in reimbursement for Medicaid services already performed.’ Neither of those cases, however, involved the State’s withholding of payments pending investigation. ... ‘An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation,’” quoting FDIC v. Mallen, 486 U.S. 230, 240-47, 100 L. Ed. 2d 265, 108 S. Ct. 1780 (1988)).

In 2006, DCJ began an investigation into petitioner's Medicaid billing activities. DMAHS was advised by DCJ Medicaid Fraud Control Unit that there were indications of incorrect claims at Campus and in February 2008, DCJ recommended that DMAHS place petitioner on prepayment monitoring. On February 20, 2008, DMAHS placed petitioner on prepayment monitoring advising petitioner that, from that date forward, DMAHS would "pend" all unpaid claims, holding petitioner's Medicaid claims in DMAHS' claim system and not processed for payment. J-1 During 2008 DMAHS began a review of the pended claims and petitioner provided documentation for DMAHS' review. In a letter dated May 1, 2008, DMAHS requested petitioner to provide a Corrective Action Plan and petitioner did so in a letter dated May 2, 2008.

DMAHS terminated petitioner's Medicaid provider number on June 18, 2008, after DCJ obtained a search warrant to seize all of petitioner's records and its computer on June 3, 2008. Petitioner requested a hearing challenging the termination of its Medicaid provider number. A hearing was held regarding the termination of petitioner's provider number, and the Honorable Jeffery A. Gerson affirmed the agency action in an initial decision dated May 27, 2009. J-5.²

Pursuant to DCJ's ongoing investigation, in October 2008 DCJ recommended to DMAHS that petitioner be placed on federal withholding. N.J.A.C. 10:49-9.10(a) requires approval by the DMAHS Director, Assistant Director or designee to withhold payments. Thus, DMAHS performed its own review to assure there was reliable evidence to support a federal withholding and the approvals for the federal withholding for petitioner were received on or about January 2, 2009.

Therefore, based on the facts previously set forth, and the applicable law, I **CONCLUDE** that DMAHS took appropriate action during the eleven month prepayment monitoring period. I further **CONCLUDE** that DMAHS' action to place petitioner on

² There is no final agency decision yet due to a mix up in service of the initial decision on the parties. Exceptions by petitioner have been filed.

prepayment monitoring was separate and distinct from DMAHS' later action to place petitioner on federal withholding.

Based on the briefs, exhibits and certifications submitted, as well as oral argument by the parties, I **CONCLUDE** that the federal withholding of Medicaid payments due petitioner is supported by sufficient reliable evidence and DMAHS actions are consistent with federal and state law.

ORDER

Based on the foregoing findings of fact and legal authority, DMAHS' motion for summary decision is **GRANTED** and petitioner's motion for summary decision is hereby **DENIED**.

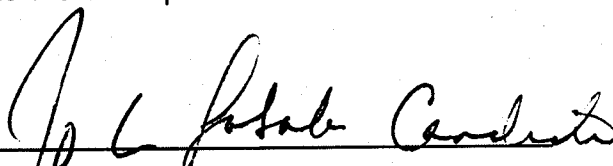
I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within seven days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES, Mail Code #3, PO Box 712, Trenton, New Jersey 08625-0712**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 15, 2010

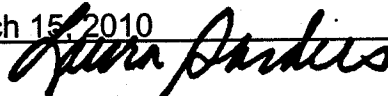
DATE



JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

March 15, 2010



Date Mailed to Parties:
ljb

MAR 16 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EXHIBIT LIST

- J-1 Prepayment monitoring letter dated February 20, 2008
- J-2 Request for corrective action plan and corrective action plan submitted by Campus.
- J-3 Federal Withholding letter dated January 2, 2009
- J-4 Campus' request for a hearing and other letters dated April 6, 2009, January 7, 2009 and December 10, 2008.
- J-5 Initial Decision in provider number termination matter dated May 27, 2009.
- J-6 Indictment dated October 26, 2009.
- J-7 Campus' Medicaid Provider Agreement (***J-7 is NOT in the file but DMAHS refers to it in its 12-22-09 brief, p.3.***)