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Department of Health

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Acting Commissioner

MEGAN E. BALDWIN
Acting Executive Deputy Commissioner

March 3, 2023

CERTIFIED MAIL/RETURN RECEIPT

Dionne A. Wheatley, Esq.
NYS Office of the Medicaid Inspector General
800 North Pearl Street.
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Rachel Liyun Sun, DMD
[REDACTED]

RE: In the Matter of Rachel Liyun Sun, DMD

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

Natalie J. Bordeaux /ny

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY


In the Matter of the Appeal of :
: **Decision After**
Rachel Liyun Sun, DMD : **Hearing**
Medicaid Provider #02815823 : #10-F-1479
:
from charges of unacceptable practices and a determination :
to recover Medicaid Program overpayments :
:

Before: David A. Lenihan
Administrative Law Judge
Jude Brearton Mulvey
Administrative Law Judge

Held at: New York State Department of Health
90 Church Street
New York, New York 10007
October 18, 2016
Record closed January 25, 2017

Parties: NYS Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Dionne A. Wheatley, Esq.

Rachel Liyun Sun, DMD


By: Michael C. Foster, Esq.
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JURISDICTION

The Department of Health acts as the single state agency to supervise the administration of the Medicaid Program in New York. 42 USC 1396a; PHL 201(1)(v); SSL 363-a. The Office of the Medicaid Inspector General (OMIG), an independent office within the Department, has the authority to pursue administrative enforcement actions against any individual or entity that engages in fraud, abuse or unacceptable practices in the Medicaid Program, and to recover improperly expended Medicaid funds. PHL 30, 31 & 32.

The OMIG determined to exclude Rachel Liyun Sun, DMD (the Appellant) from the Medicaid Program and to recover Medicaid Program overpayments. The Appellant requested a hearing pursuant to SSL 22 and former Department of Social Services (DSS) regulations at 18 NYCRR 519.4 to review the OMIG determinations.

At this hearing, the OMIG presented the audit file and summarized the case, as is required by 18 NYCRR 519.17. The OMIG presented documents (Exhibits A-H) and the testimony of Kerry Quinn, OMIG investigative specialist. The Appellant presented documents (Exhibits 1-3) and the testimony of Appellant Rachel Liyun Sun, DMD. A transcript of the hearing was made. (Transcript, pages 1-183.) The record closed on January 25, 2017 after each side had submitted two post hearing briefs.

SUMMARY OF FACTS

1. During the period under review, Rachel Liyun Sun, DMD was a dentist enrolled as a provider in the New York State Medicaid Program. The Appellant practiced dentistry at various locations in New York City between 2006 and 2012. (Exhibit C.) In 2009 and 2010, she was paid \$474,853 by the Medicaid Program for

claims for Medicaid services submitted under her provider number. (Exhibit F, pages 20-54; Transcript, pages 175-76.)

2. The Appellant's correspondence and "pay to" address with the Medicaid Program from 2006 until 2011 was at 3320 Reservoir Oval, Bronx, New York 10467. (Exhibit C, pages 1-58.) She added 186 East 123rd Street, New York (designated for the purposes of Medicaid billing as locator code "3") as a service address in 2007. (Exhibit C, pages 15-39, 45; Exhibit E, page 27; Transcript, pages 58-60.) She added 934 Myrtle Avenue, Brooklyn as a service address in 2010. (Exhibit E, pages 37-41.) In August 2011 she changed her correspondence and pay to address to 147-15C Roosevelt Avenue, Flushing. (Exhibit C, pages 59-60.) In November 2012, she changed her correspondence and pay to address to 333 15th Street, Brooklyn. (Exhibit E, pages 22, 27.)

3. During the period July 1, 2008 through November 12, 2012, the Appellant was paid \$24,945 by the Medicaid Program for 389 claims for dental services provided to 22 Medicaid recipients at her service location (locator code "3") at 186 East 123rd Street, New York. The 389 claims were submitted under the Appellant's Medicaid provider number for services provided by her. (Exhibit C, page 18; Exhibit F, pages 1-19; Transcript, pages 32-33, 91-92.) All 389 service dates and all 389 Medicaid claim payments were in 2008-2010. Payments were made by check from the Medicaid Program payable to Rachel Liyun Sun, DMD at her Reservoir Oval, Bronx address. (Exhibit F; Transcript, pages 175-76.)

4. By notice dated November 13, 2012, the OMIG requested complete patient records for the 22 patients treated at 186 East 123rd Street and whose claims are at issue in this hearing, along with the office appointment schedule for 49 specific dates in

2008-2010. (Exhibit E, pages 7-9.) The document request was sent to the Appellant at the 934 Myrtle Avenue, Brooklyn address at which she practiced. (Exhibit C, pages 39-41.) In response to that request, which was also faxed to her on November 13 (Exhibit E, page 12; Transcript, pages 48-49), the Appellant advised OMIG investigators, in telephone and fax communications with them, that she was unable to produce the requested records. (Exhibit E, pages 10-17; Transcript, pages 46-50, 88, 105, 109.)

5. On March 29, 2013, the OMIG sent its document request to the Appellant again, this time addressed to her 15th Street, Brooklyn correspondence address of record with the Medicaid Program. (Exhibit E, pages 18-21; Transcript, pages 52-54.)

6. The Appellant failed to produce any patient records or any other documentation demanded by the OMIG to support the claims for which she received Medicaid Program payment.

7. The OMIG issued a notice of proposed agency action dated August 6, 2013. The notice advised the Appellant that the OMIG proposed to exclude her from the Medicaid Program and recover overpayments based upon her failure to comply with the OMIG's request to furnish records supporting her claims. The notice listed each of the 389 disallowed claims totaling \$24,945. Pursuant to 18 NYCRR 515.6 and 517.5, the notice of proposed agency action afforded the Appellant 30 days to submit documents she wished to be considered in response to the proposed action. (Exhibit B, pages 1-28.)

8. The Appellant failed to respond to the notice of proposed agency action. (Transcript, pages 73-74.)

9. By notice of agency action dated July 30, 2015, the OMIG notified the Appellant that it had determined to exclude her from the Medicaid Program for a period

of three years because she had engaged in unacceptable practices. The notice of agency action further advised the Appellant that the OMIG had determined to seek restitution of Medicaid Program overpayments in the total amount of \$24,945 plus interest. (Exhibit B, pages 29-58.)

10. The Appellant requested this hearing by letter dated October 14, 2015. (Exhibit A, page 1.)

ISSUES

Did Appellant Rachel Liyun Sun, DMD, engage in unacceptable practices in the Medicaid Program? If so, did the OMIG properly determine to exclude her from the Medicaid Program?

Is the OMIG entitled to recover Medicaid Program overpayments in the amount of \$24,945 from the Appellant?

APPLICABLE LAW

Medicaid providers are required, as a condition of their enrollment in the program, to prepare, maintain and furnish to the Department upon request, contemporaneous records demonstrating their right to receive payment from the Medicaid Program and fully disclosing the nature and extent of the care, services and supplies they provide. All information regarding claims for payment is subject to audit for six years. 18 NYCRR 504.3(a)&(h), 517.3(b), 540.7(a)(8). Providers are required to permit such audits, the time, manner and place of which will be determined by the Department. 18 NYCRR 504.3(g), 517.3(f).

When the Department has determined that claims for medical services have been submitted for which payment should not have been made, it may require repayment of the amount determined to have been overpaid. 18 NYCRR 504.8, 518.1(b). An

overpayment includes amounts paid as the result of improper claiming, unacceptable practices, fraud, abuse or mistake. 18 NYCRR 515.3(b), 515.9 518.1(c).

An unacceptable practice in the Medicaid Program is conduct contrary to the official rules, regulations, claiming instructions or procedures of the Department. 18 NYCRR 515.2(a)(1). Unacceptable practices include unacceptable recordkeeping, defined 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. 18 NYCRR 515.2(b)(6). Upon a determination that a person has engaged in an unacceptable practice, the Department may impose one or more sanctions, including exclusion from the program, and may require the repayment of overpayments determined to have been made as a result of an unacceptable practice. 18 NYCRR 515.3(a)&(b), 515.9, 518.1(c).

A person is entitled to a hearing to have the Department's determination reviewed if the Department imposes a sanction or requires repayment of an overpayment. 18 NYCRR 519.4. At the hearing, the Appellant has the burden of showing that the determination of the Department was incorrect and of proving any mitigating factors affecting the severity of any sanction imposed. 18 NYCRR 519.18(d).

DISCUSSION

The OMIG's authority to audit Medicaid providers is fundamental to its ability to protect the fiscal integrity of the Medicaid Program. In order to carry out its responsibility the OMIG has been given explicit authority to determine where and in what manner an audit shall be conducted. 18 NYCRR 517.3(f). There is no evidence that the OMIG has behaved unreasonably in its exercise of its authority in this case. The

Appellant's failure to comply with the OMIG's repeated directives to produce records to support claims made under her Medicaid provider number for services provided by her and paid to her is an unacceptable practice under 18 NYCRR 515.2(a)(1). Her failure to produce for audit records to justify her Medicaid claims is also the unacceptable practice of unacceptable recordkeeping under 18 NYCRR 515.2(b)(6).

Medicaid Program Overpayments

The records requested by the OMIG for its review were all for services provided by the Appellant at her East 123rd Street office (locator code "3") in 2008-2010. (Transcript, pages 91-92.) OMIG investigators had visited this location on October 24, 2012 to conduct a "credential verification review," only to find no dental office operating at that address. (Exhibit E, page 1; Transcript, pages 39, 88.) When they reached her by telephone on November 9, 2012, the Appellant confirmed that she was not practicing at that location. (Exhibit E, page 10; Transcript, page 47.)

Claims for 389 services were submitted under the Appellant's Medicaid provider number for services provided by her at East 123rd Street, and Medicaid payment checks were issued to and received by her. The Appellant had the burden of proving her entitlement to the payments. 18 NYCRR 519.18(d). She has failed to meet that burden. She is admittedly unable to produce any records to substantiate her Medicaid claims for services provided at East 123rd Street. The 389 claims are not authorized to be paid under the Medicaid Program because the Appellant failed to maintain and produce upon request documentation demonstrating compliance with Medicaid Program requirements for payment. The OMIG is entitled to recover the overpayments from her. 18 NYCRR 518.3(a).

Exclusion from the Medicaid Program

Upon a determination that a person has engaged in an unacceptable practice, the Department may impose sanctions, including exclusion from the Medicaid Program for a reasonable time. 18 NYCRR 515.3(a), 515.4(a). Exclusion is defined at 18 NYCRR 515.1(b)(6), and means that items of medical care, services or supplies furnished by the provider or ordered or prescribed by the provider will not be reimbursed under the Medicaid Program.

Pursuant to 18 NYCRR 515.4(b), in determining the sanction to be imposed the following factors will be considered:

- (1) the number and nature of the program violations or other related offenses;
- (2) the nature and extent of any adverse impact the violations have had on recipients;
- (3) the amount of damages to the program;
- (4) mitigating circumstances;
- (5) other facts related to the nature and seriousness of the violations; and
- (6) the previous record of the person under the Medicare, Medicaid and social services programs.

The nature of the program violations in this case goes to the essence of the OMIG's ability to oversee the Medicaid Program. Nearly \$25 thousand in Medicaid reimbursement for nearly 400 claims is unaccounted for as a result of the Appellant's failure to provide any patient records as directed by the OMIG.

The OMIG had reviewed Medicaid payment records which indicated the Appellant submitted Medicaid claims for at least one patient who was hospitalized on days services were supposedly provided by her at the East 123rd Street location, suggesting that some of the claimed services may never have been provided. (Exhibit H; Exhibit F, page 9; Transcript, pages 29-35.) The East 123rd Street office was also the service location for other claims that the OMIG investigators questioned and wanted to

investigate, such as numerous instances in which claims had been submitted for services to a patient on three consecutive days. (Transcript, pages 36-37, 100-102.) This “data mining” is what had led the OMIG to visit that office to conduct a “credential verification review” on October 24, 2012, only to find that it no longer existed. (Transcript, pages 38-40; Exhibit E, pages 1-2.) As a result of the Appellant’s failure to produce any patient records, the OMIG has been prevented from even assessing the nature of any violations at the East 123rd Street location or any impact upon Medicaid recipients.

The Appellant has the burden of proving any mitigating factors affecting the severity of any sanction imposed. 18 NYCRR 519.18(d)(2). She has not established mitigating circumstances. She claimed “I personally do not hold the records requested” (Exhibit E, page 16) because they were in the possession of dental offices where she practiced and argued “[t]he medical records in question were the property of the practices she worked for” (Appellant brief, page 1). She also claims she exercised “due diligence” in that she “visited each of the practices where she had worked and made attempts.... Most of the practices where the records were in question had closed.” (Appellant brief, page 3; Exhibit 1; Transcript, pages 112-13, 121-22.) Her claims about attempts to obtain records from other practices have little to do with the records in question, which were all for services performed by her in an individual practice at just one service location. These excuses do not establish mitigating circumstances regarding her failure to produce records.

The Appellant did not and – although she was specifically asked to do so on cross examination – could not identify anyone other than herself who practiced at, or who she “worked for,” or who owned or operated the office at East 123rd Street where the services

in this audit were claimed to have been provided. (Transcript, pages 147-150.) Her 2008 Medicaid Provider Enrollment form for the East 123rd Street practice declared it to be an “individual” practice. (Exhibit C, pages 45, 53-55; Transcript, pages 68-69.)

While the Appellant also claims “she only received a percentage of her Medicaid collections” (Appellant brief, pages 1-2, 4), she produced no proof to controvert the actual Medicaid payment records. She was the treating dentist under whose Medicaid provider number these services were claimed, and she acknowledged that she was also the person who received the Medicaid payments in the form of checks payable to her. (Transcript, pages 175-76.) If she was sharing those payments with anyone else after she received them, that is not the concern of the Medicaid Program. Her excuses do not lessen, they enhance the nature and seriousness of the violations.

In Tobon v. Bane, 192 A.D.2d 851, 596 N.Y.S.2d 495 (Third Dept. 1993), a Medicaid provider also failed to produce records for audit. The Third Department held:

... the penalty of exclusion from the Medicaid program for five years and restitution for all Medicaid services ordered during the audit was not arbitrary and capricious. Disclosure of medical records and cooperation with audits are fundamental conditions of the Medicaid program, and participation therein is a privilege. (see Schaubman v Blum, 49 NY2d 375, 379-380). The penalty reflects consideration of the factors enumerated in 18 NYCRR 515.4(b), including petitioner’s failure to demonstrate mitigating circumstances, and his willful and complete failure – despite considerable advance notice of the probable consequences – to cooperate with the audit and allow respondent to review the services for which Medicaid was paying.

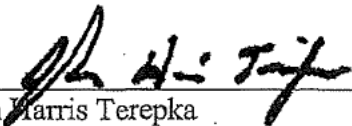
Under the circumstances of this case, exclusion from the Medicaid Program for three years and restitution of the payments to which the Appellant failed to document her entitlement are reasonable and appropriate and within the Department’s discretion to impose.

DECISION: The OMIG's determination to exclude Appellant Rachel Liyun Sun, DMD from the Medicaid Program for three years is affirmed.

The OMIG's determination to recover Medicaid Program overpayments in the amount of \$24,945 from the Appellant is affirmed.

This decision is made by John Harris Terepka, Bureau of Adjudication, who has been designated to make such decisions.

DATED: Rochester, New York
March 2, 2023



John Harris Terepka
Bureau of Adjudication