OAH 8-1800-36762

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the SIRS Appeal by the Duluth Health Center

RECOMMENDATION ON MOTION FOR SUMMARY DISPOSITION

This matter came before Administrative Law Judge Eric L. Lipman upon receipt of the Department's Motion for Summary Disposition. The hearing record closed on August 21, 2020, the due date for a response to the motion.

Gail A. Feichtinger, Assistant Attorney General, appears on behalf of Minnesota Department of Human Services (the Department). Troy Otterson, Sole Owner, appeared on behalf of Otterson Mental Health Services, Incorporated, doing business as the Duluth Heath Center (DHC).

Based on the submissions of the parties and the oral argument, and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION:

1. The Department's Motion for Summary Disposition should be **GRANTED**.

2. Duluth Health Center's appeal should be **DISMISSED**.

Dated: October 2, 2020

ERIC E. LIPMAN
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64254, St. Paul, MN 55164-0254, (651) 431-4319 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Facts

Troy Otterson owns DHC, a mental-health counseling clinic. DHC is licensed by the Department under provider number 71816700.[1]

On February 24, 2014, the Department's Surveillance and Integrity Review Section (SIRS) fraud hotline received a report from a DHC employee that Mr. Otterson was not meeting with clients for the entire time of their scheduled therapy sessions, but was billing MCHP for an unadjusted segment of services.[2]

SIRS opened an investigation into DHC's practices. It later concluded that $29,503.87 of Minnesota Health Care Programs (MHCP) funds were overpaid to DHC.[3]

This overpayment was based on progress notes that did not indicate start or stop time or total time of service; missing progress notes, group notes, and diagnostic evaluations; progress notes that did not have information to support using a particular add-on procedure code; progress notes that did not have information to support using

[1] Affidavit (Aff.) of Amanda Novak (May 26, 2020).
[2] *Id.*
[3] *Id.*

crisis billing codes; and claims submitted when a patient was receiving inpatient treatment and could not have received services.[4]

On August 21, 2017, SIRS sent DHC a Notice of Agency Action seeking to recover the $29,503.87 overpayment and a $5,000 fine.[5] DHC did not appeal this determination, but instead entered into a Stipulated Provider Agreement and a Payment Agreement to repay these sums, with interest.[6] The Payment Agreement stated:

> If [the Department] is unable to collect the full deduction amount on each warrant, the remaining amount will be carried forward and added to the amount due on the next weekly deduction. If this carry forward continues for three or more deductions, or if [DHC] withdraws or is terminated from the MHCP, the entire remaining balance will be due immediately.[7]

On February 6, 2018, the Department and DHC entered into an Amended Payment Agreement for Notice of Overpayment. In this agreement, DHC authorized the Department to deduct $635.57 from its warrant payments on a bi-weekly basis.[8]

On October 9, 2019, Mr. Otterson notified SIRS that there was an issue with his bank account, and stated that he wanted to provide a new account for deductions.[9] A SIRS investigator informed Mr. Otterson that deductions cannot come from individual accounts, but rather must be drawn from warrant payments.[10] SIRS further informed Mr. Otterson that due to continued nonpayment, the Department would be terminating DHC's participation in the MCHP.[11]

The next day, Mr. Otterson spoke with a supervisor in the SIRS unit. During that conversation, Mr. Otterson noted that he had missed several payments because he was having difficulty with the program's billing system.[12] The supervisor notified Mr. Otterson that because DHC had missed seven consecutive bi-weekly payments (the then-most recent payment was made on July 9, 2019), the full amount of the remaining overpayments, fine and interest was now due.[13]

On October 14, 2019, SIRS issued a Notice of Termination and Payment Withhold terminating DHC's participation in the MHCP. It based its action on DHC's failure to repay the $29,503.87 overpayment and $5,000 fine.[14] On January 21, 2020,

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[4] Novak Aff. at Exhibit (Ex.) 1.
[5] Novak Aff.
[6] *Id.*
[7] Novak Aff. at Ex. 3.
[8] Novak Aff. at Ex. 4; *see also* Novak Aff. ("When there is a payment agreement between SIRS and an MHCP provider, SIRS submits an invoice called a receivable to DHS's Financial Operations Division detailing the amount owed to DHS from each bi-weekly payment, known as a warrant payment, of claims submitted by the provider.").
[9] Novak Aff. at Ex. 5.
[10] *Id.*
[11] *Id.*
[12] Novak Aff. at Ex. 6.
[13] *Id.*
[14] Novak Aff. at Ex. 7.

SIRS issued an Amended Notice of Termination and Continued Payment Withhold.[15] DHC currently owes the Department $21,527.25.[16]

The parties to this case appeared at a telephone Prehearing Conference on April 15, 2020.[17] Following the Prehearing Conference, the Administrative Law Judge entered a scheduling order that included a briefing schedule for dispositive motions and an oral argument. In accordance with that schedule, the Department filed a Motion for Summary Disposition on May 28, 2020.[18] DHC did not file a response to the Department's motion or appear at the oral argument held on June 25, 2020.[19]

Taking into account Mr. Otterson's earlier appearance at the April 15 conference, and concerns about service of the scheduling order, the Administrative Law Judge recalibrated the briefing schedule so as to provide DHC with both an opportunity to make a written response to the motion and appear at a re-scheduled oral argument on August 4, 2020.[20] DHC did not file a response to the motion under the revised and extended deadline and no one appeared on behalf of DHC at the August 4, 2020, oral argument.[21]

On August 6, 2020, Mr. Otterson left a voicemail with the Administrative Law Judge's legal assistant indicating that he was not able to access the telephone oral argument held two days earlier. On August 11, 2020, the Administrative Law Judge sent correspondence by electronic mail and U.S. mail to Mr. Otterson. The letter indicated that the judge was granting DHC the opportunity to submit written arguments into the record, if they were received by August 21, 2020.[22]

On August 21, 2020, Mr. Otterson sent an electronic message to the Administrative Law Judge's legal assistant, Anne Laska, stating: "See enclosed." However, no documents were attached to that electronic message. On August 24, 2020, Ms. Laska notified Mr. Otterson that his message lacked an attachment. Mr. Otterson did not respond. Again, on August 27, 2020, Ms. Laska notified Mr. Otterson that the Administrative Law Judge would "waive the filing requirement and accept an email from you." Mr. Otterson did not reply. The hearing record closed on August 21, 2020, the second extended due date for DHC's response.

II. The Legal Standard for Summary Disposition

Summary disposition is the administrative law equivalent of summary judgment.[23] A motion for summary disposition shall be granted when there is no genuine issue

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[15] *Id.*
[16] Novak Aff. at Ex. 8.
[17] *See* First Prehearing Order, OAH 8-1800-36732 (June 19, 2020).
[18] *See id*.
[19] *See* Scheduling Order, OAH 8-1800-36732 (July 2, 2020).
[20] *Id*.
[21] *See* Correspondence to Mr. Otterson, OAH 8-1800-36732 (August 11, 2020).
[22] *Id*.
[23] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).

regarding any material fact, and the moving party is entitled to judgment as a matter of law.[24] The Office of Administrative Hearings follows the summary judgment standards developed in the state district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[25] The Administrative Law Judge does not weigh the evidence;[26] instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[27]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[28] A fact is material if its resolution will affect the outcome of the case.[29] If the moving party meets the initial burden, the burden shifts to the non-moving party to prove the existence of any genuine issue of any material fact.[30] A genuine issue is not a "sham or frivolous" one,[31] and it cannot rely on mere allegations or denials.[32] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[33]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[34] Thus, summary disposition is only proper when no fact issues need to be resolved.[35]

III. Analysis

The Commissioner of Human Services has broad powers to administer the MHCP. In order to prevent abusive practices she may: suspend or withhold payments to a vendor; suspend or terminate participation in the MHCP; impose a fine against a vendor who has committed fraud, theft, or abuse in connection with the provision of medical care to recipients of public assistance; or some combination of these responses.[36] In the case of an MHCP vendor, "abuse" is defined as:

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[24] *See Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[25] *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[26] *See id.*
[27] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[28] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[29] *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).
[30] *See Thiele,* 425 N.W.2d at 583.
[31] *See Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984).
[32] *See DLH*, 566 N.W.2d at 71.
[33] *See* Minn. R. Civ. P. 56.05.
[34] *See Sauter*, 70 N.W.2d at 353.
[35] *See id*.
[36] Minn. Stat. § 256B.064, subd. 1a(a) (2020); *see also* Minn. R. 9505.2210, subps. 1, 2 (2019).

> a pattern of practices that are inconsistent with sound fiscal, business, or health service practices, and that result in unnecessary costs to the programs or in reimbursements for services that are not medically necessary or that fail to meet professionally recognized standards for health service.[37]

The law further requires that the Department obtain monetary recovery from a provider who has been improperly paid for medical services as a result of fraud, theft, abuse or error.[38] The Department is authorized to recover improperly paid sums by: voluntary, lump-sum repayments; installment payments; using any legal collection process; deductions from program payments; or withholding payments to the provider.[39]

It is undisputed that DHC did not challenge the merits of the underlying overpayment and fine. Mr. Otterson agreed to pay $36,058.19 to the Department.[40]

In both the original and amended payment agreements, the following provision appears:

> If [the Department] is unable to collect the full deduction amount on each warrant, the remaining amount will be carried forward and added to the amount due on the next weekly deduction. If this carry forward continues for three or more deductions, or if [DHC] withdraws or is terminated from the MHCP, the entire remaining balance will be due immediately.[41]

It is likewise undisputed that DHC missed seven consecutive payments, in breach of its agreement. The Department is legally entitled to recover $21,527.25 in overpayments of MHCP funds and to terminate DHC's participation in the MHCP.

IV. Conclusion

Because there are no material facts in dispute, the Department's Motion for Summary Disposition should be **GRANTED**.

E. L. L.

[37] Minn. R. 9505.2165, subp. 2(A) (2019).
[38] Minn. Stat. § 256B.064, subds. 1a(a)(1), 1c(a) (2020) (permitting recovery); Minn. R. 9505.0465, subp. 1D, .2215, subp. 1A (2019) (mandating recovery).
[39] Minn. R. 9505.2215, subp. 2 (2019).
[40] Novak Aff. at Ex. 3.
[41] Novak Aff. at Exs. 3-4.