BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES

In the Matter of:	)	
	)	
ANCHORAGE MEDSET PHARMACY	)	OAH No. 10-0641-DHS
	)	

DECISION

I. INTRODUCTION

The Department of Health and Social Services, Division of Health Care Services (Division), conducted an audit of Medicaid payments made to Anchorage Medset Pharmacy. The audit revealed some errors that resulted in overpayments to Anchorage Medset which the Division sought to recover. Anchorage Medset appealed the audit's conclusions.

The audit did not make any finding of fraud. There was no finding that prescriptions were filled under fictitious names, or that a claim was made for a prescription that was not actually dispensed to a patient. There was no finding of duplicate billing. Instead, the findings relate primarily to record keeping errors. Anchorage Medset did not obtain or retain supporting documentation for some of its Medicaid claims. Of the approximately $2.8 million in Medicaid billings during 2007, the Division sought to recover less than $16,000 as an overpayment.

A hearing was held on June 14 and 15, 2011. The parties were represented by counsel and had an opportunity to present evidence and cross-examine witnesses. President Larry Flynn and Manager Paul Brotherton testified on behalf of Anchorage Medset. In addition, Dr. Ted Eschenbach was called by Anchorage Medset as an expert witness. Allan Hansen of the auditing firm Meyers and Stauffer, and Pharmacist Chad Hope testified for the Division.

The record was left open until June 24, 2011 for written closing arguments. Based on the evidence in the record and the arguments of counsel, the Division correctly calculated Anchorage Medset's overpayment at $15,918.94.

II. FACTS

The Division is required to conduct audits of selected Medicaid providers.[1] It is further required to recoup any overpayments identified in those audits.[2] On October 20, 2009, Anchorage Medset was contacted by the Division's contractor, Meyers and Stauffer, and

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1 AS 47.05.200(a).

2 AS 47.05.200(b).

informed that it had been selected for audit of its 2007 paid Medicaid claims.[3] Ninety-five claims were selected by the auditors for review.[4] These claims were numbered D909001 – D909095. During the hearing, they were referred to by the last two digits in the claim number, claims 1 – 95, and will be referred to similarly here.

Strata A consisted of the 30 claims submitted during the year for a dollar value of $1,806.96 or above.[5] Strata B consisted of 65 claims randomly selected from the remaining claims.[6] The audit found no overpayments in any of the 30 high dollar claims (Strata A).[7] In Strata B, the audit found 38 claims with overpayments.[8]

Claim 13 involved a $49 fee charged as part of filling a prescription for Clozapine. Both parties agreed that Clozapine could not be dispensed unless the pharmacist first reviewed a current laboratory report showing that blood test results were within acceptable ranges.[9] Pharmacies are paid $49 for the work involved in reviewing the test results. For Claim 13, Anchorage Medset did not have a copy of the blood test report for this prescription. Anchorage Medset agrees the laboratory report was not reviewed prior to dispensing the prescription and that the $49 they received for reviewing a report was an overpayment.[10]

The remaining 37 claims were determined to be overpayments in the amount of $0.50 each because the medications were dispensed in medisets.[11] According to the testimony at the hearing, medisets consist of medications prepackaged in individual doses to assist the patient in taking the medicine at the prescribed times and in the prescribed amounts. They are typically packaged with a one week supply. Medicaid reimburses pharmacies $0.50 for packaging medicine in a mediset.

One of the 37 mediset claims, Claim 37, was also considered an overpayment for a second reason. The prescription indicated that it should be filled entirely with no partial fill.[12] Anchorage Medset dispensed a partial, one week supply in a mediset. This was considered by

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3 Record 016.
4 Record 023 – 030.
5 Record 212; testimony of Mr. Hansen.
6 *Id.* Mr. Hansen testified as to the computerized method of randomly selecting claims for review.
7 Testimony of Mr. Hansen; Record 215.
8 Record 214 and 228.
9 Clozapine has potential dangerous side effects that must be monitored.
10 The Pharmacy's disagreement concerning this claim relates to how that $49 was extrapolated.
11 Record 214.
12 Record 286.

the auditors to be an overpayment in the amount of $28.65, which includes the $0.50 for the mediset payment.

Medicaid reimbursements generally consist of two parts. There is the fee for the actual medicine or ingredient and an additional professional service fee for the work involved in dispensing that medicine.[13] For some prescriptions, there are also additional fees for additional services.[14] The additional fees relevant to this case are the Clozapine management fee and the mediset fee.

The audit found an average error rate of $1.47 per claim.[15] Applying that average to the total number of claims would produce an overpayment amount of more than $66,000.[16] The statistical method used in the audit, however, recognized that there is a margin of error in calculating an overpayment from a small sample of claims. The amount of overpayment the Division sought to recoup is $15,918.94, which represents the overpayment amount at the 90% confidence interval.[17] This is the level at which one can say with 90% certainty that the actual overpayment to Anchorage Medset, if one were to examine each and every claim, is this amount or more.

III. DISCUSSION

A. Regulatory Scheme

Alaska Statute 47.05.200 provides for audits of selected Medicaid providers each year. Rather than reviewing every claim for reimbursement from a provider, these audits may rely on statistically valid samples of reimbursement claims.[18] When an audit identifies an overpayment, the Division must take steps to recoup the overpayment.[19] By regulation, the Division has established a list of thirteen conditions that constitute an overpayment. The condition applicable in this case is

(a) An overpayment occurs when the division reimburses a provider

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13 Testimony of Mr. Hansen; Testimony of Mr. Brotherton; Testimony of Mr. Hope.
14 *Id.*
15 Record at 228, line C10.
16 Record at 228, line D2.
17 Record at 228, line E3.
18 7 AAC 160.120.
19 AS 47.05.200(b).

(8) incorrectly for services that do not meet standards established for reimbursement of services.[20]

One of the standards established for reimbursement of services is that the service be properly documented.[21] In the absence of proper documentation, the Division may seek to recover the overpayment.[22]

B. Mediset Fees

Of the 65 claims in Strata B, 37 included a fee for dispensing medication in a mediset that the auditors considered to be an overpayment. Pharmacy regulations state that a prescription may only be dispensed in a mediset with the written consent of the patient, caregiver, or prescribing practitioner.[23] Because Anchorage Medset did not have any documentation of the written consent of the patient, caregiver or prescriber, these payments were deemed to be overpayments.

The Division also relied on former regulation 7 AAC 43.591. This regulation was amended effective April 14, 2007, to add a new sections p and q, which provide for additional restrictions on reimbursements for medisets.

Anchorage Medset argues that it had demonstrated that twelve of the contested mediset claims were for patients with mental health problems. Former 7 AAC 43.591(p)(3)(B)(i) did say that a pharmacy could receive payment for packaging medications in a mediset for patients with chronic mental illness. Not every person with a mental health problem has a chronic mental illness. Even assuming that these twelve patients did have a chronic mental illness, the regulation listed four requirements for dispensing medicine in a mediset. Each of those four requirements must be met, including the requirement of obtaining the written consent of the prescriber.[24] Thus, prior to April 14, 2007, reimbursement for a mediset was proper with the written consent of the patient, caregiver, or prescriber. After that date, reimbursement was proper only with the written consent of the prescriber, in addition to the other requirements of former 7 AAC 43.591.

Anchorage Medset also argued that many of these 37 claims involved patients who had prescriptions specifically authorizing dispensing in a mediset previously, and that it was

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[20] Former 7 AAC 43.081(a)(8) (applicable in 2007, the year audited).

[21] Former 7 AAC 43.030.

[22] Former 7 AAC 43.032(d).

[23] 12 AAC 52.520(a). The pharmacy regulations call these "med-paks" while the Medicaid regulations refer to them as "medisets." *Cf.* Former 7 AAC 43.591(q) with 12 AAC 52.520(b).

[24] Former 7 AAC 43.591(p)(2).

reasonable to continue that practice for renewed prescriptions even without specific written authorization. Mr. Hope testified convincingly that there were reasons why a mediset may no longer be appropriate for a particular patient. According to Mr. Hope, the proper procedure to follow when a pharmacist believes the medicine should be dispensed in a mediset but the prescription does not authorize one is to contact the prescribing provider and ask how to fill the prescription. That did not occur here. There is no supporting documentation to indicate that these prescriptions should have been dispensed in a mediset. Absent records supporting dispensing in a mediset, these claims are properly identified as overpayments.[25]

Finally, Anchorage Medset argues that the statistical method used to calculate the overpayments extrapolated the 36 mediset claims without proper documentation[26] over all of its claims, and not just those that sought reimbursement for the mediset packaging services. Anchorage Medset's reasoning misses an important fact. The 65 claims in Strata B were selected randomly. Some included mediset fees and some did not. Thus, when the audit found that 36 out of 65 claims improperly sought reimbursement, this ratio already accounted for the fact that not every claim during 2007 included a mediset reimbursement fee. If the auditors had instead followed the method suggested by Anchorage Medset, they would have found a different error rate which would then have been extrapolated over a smaller set of claims.[27] While Anchorage Medset's suggested method may also be statistically valid, that does not mean that the method actually used was invalid. Dr. Eschenbach was qualified as an expert in statistics and testified on behalf of Anchorage Medset. There was no suggestion in his testimony or expert report that the method actually followed in this case was improper. Mr. Hansen was also identified as an expert in audit procedures, and he testified convincingly that the method used here was appropriate. In addition, he explained that there was no way of determining which claims included mediset fees during the random selection process. The only way to create a separate stratum for mediset claims would be to individually review each of the nearly 45,000 claims.

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[25] Former 7 AAC 43.030(a).

[26] The 37th claim was treated as an overpayment for a different reason and was not counted twice in calculating the error rate.

[27] Depending on the error rate found, this method might have identified a smaller or larger overpayment amount.

Anchorage Medset was required to maintain "accurate financial, clinical, and other records necessary to support the care and services for which payment [was] requested."[28] To support dispensing medicine in a mediset, Anchorage Medset needed to show that it had the written consent of the patient, caregiver, or prescribing practitioner.[29] Anchorage Medset did not have this written consent at the time it dispensed these prescriptions in medisets.[30] Accordingly, these claims were properly identified as overpayments.

C. Partial Fill

Claim 37 concerned a prescription for Norco. This claim was considered a $0.50 overpayment because of the mediset fee but was also challenged because the entire prescription was not filled at one time. As a general rule, it does not appear that a pharmacist is required to fill an entire prescription at one time. Before filling a prescription, a pharmacist must obtain information about the quantity prescribed.[31] At the time of dispensing, the pharmacist must then add to his or her record, the "quantity dispensed, if different from the quantity prescribed."[32] Thus, there is nothing inherently improper with filling less than the entire amount prescribed. If there were, the regulations would not provide for a method of recording this difference.

As discussed above, pharmacies are paid a professional fee each time they dispense medication. Dispensing medications four times during the month instead of once increases the number of dispensing fees paid to the pharmacy. For this particular claim, the prescription had pre-printed instructions that said "FILL ALL OR NONE – NO PARTIAL FILLS."[33] Rather than dispense the entire 120 pill prescription, Anchorage Medset only dispensed 28 pills.[34] This was determined to be an overpayment in the entire amount of $28.65[35] because it was not dispensed in the manner in which it was prescribed.[36]

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[28] Former 7 AAC 43.030(a). The Division also relied on former 7 AAC 43.030(d). This subsection pertains to clinical records. It is not clear from the record or the regulations that pharmacy records are "clinical" records. Accordingly, the holding in this decision is not based on subsection (d).

[29] 12 AAC 52.520(a).

[30] Anchorage Medset provided evidence that the prescriber intended some of these prescriptions to be dispensed in a mediset, but the regulations as they existed in 2007 required written consent at the time of dispensing. Subsequent documentation after dispensing is insufficient to replace written consent at the time of dispensing.

[31] 12 AAC 52.460(a)(5).

[32] 12 AAC 52.460(b)(3).

[33] Record at 286.

[34] Record at 288.

[35] This amount includes the $0.50 mediset fee.

[36] Testimony of Mr. Hansen.

Mr. Brotherton testified credibly concerning the dispensing of this prescription. Two prescriptions were prescribed for this patient at the same time. A prescription for Robaxin had the same pre-printed instructions on the prescription stating that there should be no partial fills, but also stated that it should be dispensed in a weekly mediset.[37] Mr. Brotherton spoke with a nurse from the clinic that prescribed this medicine, and was told that both the Norco and the Robaxin were to be dispensed in medisets. Exhibit B consists of portions of the clinic's records related to these two prescriptions. These documents confirm that it was the clinic's intent to have both medications dispensed in medisets, as was conveyed orally to Mr. Brotherton at the time.[38] That it could dispense the medication in a mediset does not, however, establish that Anchorage Medset could dispense this medication weekly. The same medical records Anchorage Medset relies on for justifying the mediset fee also say: "The other medication she receives (Norco and Robaxin) can be dispensed in a 30 day supply."[39] Even though the clinic did expect the Norco to be dispensed in a mediset, it did not expect the medicine to be dispensed weekly. Instead, it is more likely that the clinic expected the patient to receive her entire 30 day supply of Norco at one time, packaged in weekly medisets.[40]

The evidence in this case does not support dispensing the Norco in a seven day supply rather than the full 30 day supply requested by the prescribing doctor. Because there are no records supporting the partial fill, and because the prescription specifically stated that a partial fill was not allowed, the audit correctly identified this claim as an overpayment.

D. Clozapine

The prescription and payment records for the Clozapine reimbursement are at pages 371 and 372 of the agency record. There is no dispute that the $49 fee for reviewing the blood test results should not have been charged as no results were in fact reviewed. It is Anchorage Medset's contention, however, that this one error should not be extrapolated over all of the pharmacy's claims.

Mr. Brotherton testified that Anchorage Medset only had 15 patients receiving Clozapine during 2007. Clozapine was dispensed a total of 257 times for those patients during 2007. Mr.

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[37] Record at 168.

[38] Exhibit B, page 2 ("She will now have her monthly medication dispensed in the weekly 'punch out' medset.")

[39] Exhibit B, page 2.

[40] It is also more likely that the Robaxin should also have been dispensed in this manner, rather than dispensed four separate times.

Brotherton reviewed all of those claims and found only 17 for which he could not find lab reports to support the $49 review fee. Anchorage Medset asserts that the Clozapine claim should have been extrapolated only over the 257 times Clozapine was dispensed. In the alternative, Anchorage Medset believes its overpayment for dispensing Clozapine should be limited to the $833 actual overpayment based on the 17 times it did not have documentation to support the $49 fee.[41]

This audit could likely have been performed differently. Meyers and Stauffer could have randomly sampled the 257 Clozapine claims. If Anchorage Medset's information is accurate, the audit would likely have shown a 6% to 7% error rate in dispensing Clozapine without the required review of lab reports.[42] Extrapolating that error rate over 257 claims would have produced an overpayment amount to be added to other overpayments identified through the audit.

That the audit could have been done differently does not mean that it was required to be done differently. The Division was required to audit a statistically valid sample of claims. There was no evidence presented that the audit was not statistically valid. While Anchorage Medset's expert testified that he suspected the Clozapine claim was not randomly selected, Mr. Hansen testified as to how claims were selected, and it is more likely true than not true that this claim was in fact randomly selected.

Anchorage Medset had approximately 45,000 Medicaid claims during 2007. Of those, only 65 were selected to be audited in Strata B. Finding this one improper Clozapine claim may have increased the total amount of overpayment the Division is seeking to recoup. Had this claim not been selected for the audit, however, a different claim would have been. That different claim might have been one with no error or a smaller dollar value error. It might also have been a claim with a larger dollar value error. The regulations anticipate using a statistically valid sample of claims. This method will always approximate the exact overpayment amount that would be found if all 45,000 claims were examined. As long as a valid method is used to estimate the overpayment, the Division can properly recoup the overpayment amount.

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[41] Seventeen times $49 = $833.

[42] Seventeen is 6.6% of 257.

IV. CONCLUSION

Proper documentation is a requirement of participation as a provider in the Medicaid program. Because it could not produce this documentation, a portion of Anchorage Medset's claims were properly deemed to be overpayments. The audit correctly used a statistically valid sample to calculate an overpayment amount. The Division's determination that it is entitled to repayment in the amount of $15,918.94 is AFFIRMED.

DATED this 6th day of July, 2011.

By: *Signed*
Jeffrey A. Friedman
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 4th day of August, 2011.

By: *Signed*
Signature
William Streur
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]