

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

RESPIRATORY & MEDICAL
SERVICES, INC.,

APPELLANT,

vs.

STATE OF ALASKA, DEPT. OF
HEALTH & SOCIAL SVCS., DIV.
OF HEALTH CARE SVCS.,

APPELLEE.

Case No. 3AN-05-10680 CI

DECISION AND ORDER ON APPEAL

Facts and Proceedings Below

This appeal involves claims of alleged Medicaid overpayments by the State of Alaska, Department of Health and Social Services, Division of Healthcare Services (hereafter "Division") against Respiratory & Medical Services, Inc. (hereafter "RAMS"). RAMS is an enrolled Medicaid provider of durable medical equipment and supplies and respiratory therapy to patients who are eligible for Medicaid.¹ The Division has the responsibility for administering Medicaid payments in the state and has the responsibility and authority to audit Medicaid providers such as RAMS.²

¹ RAMS is wholly owned by Joseph L. Leyva and provides medical supplies to a small number of Medicaid eligible patients in Anchorage and rural Alaska.

² See, AS 47.07.040, AS 47.07050, and 7 AAC 43.067.

On March 15, 2004, the Division notified RAMS that they were selected for an audit. The Division contracted with the accounting firm of Meyers and Stauffer to conduct the audit. On March 18, 2004, Meyers and Stauffer requested that RAMS provide documentation for services provided for 45 of 84 claims RAMS had submitted during the period April 1, 2002 to March 31, 2003.³

Meyers and Stauffer also conducted a field examination of RAMS on September 1, 2004. Following that on-site visit and review of the documentation provided by RAMS, Meyers and Stauffer issued a preliminary finding on September 16, 2004, that no documentation had been provided regarding certain claims.⁴ RAMS was given 21 days to respond to the preliminary findings. On October 8, 2004, RAMS provided additional information purportedly documenting their claims. On January 14, 2005, Meyers and Stauffer issued a finding that the documentation provided by RAMS was insufficient to change its preliminary determination that overpayments were made on 37 of the audited claims. The reason for this finding was that Meyers and Stauffer believed that the documentation submitted by RAMS to support the claims was suspect and possibly fraudulent. The overpayments on these 37 claims totaled \$21,236.06. Meyers and Stauffer determined this to be an average of \$471.91 in overpayments per claim. It then applied the overpayment average to the

³ R. at 412-416.

⁴ R. at 179-192.

remaining claims in the 84 claims that were subject to audit to calculate a total overpayment for the audit period of \$39,640.65. The final audit was submitted by Meyers and Stauffer to the Division on January 14, 2005.⁵

On January 27, 2005, the Division notified RAMS that its audit was complete and that it could appeal by filing a written request to the Commissioner.⁶ On February 12, 2005, RAMS advised the Division in its appeal form that it had "corroborated all services and products with attending physician, caregivers and family" and that "they are also willing to testify receipt of all services and supplies during [the audit period] as per submitted claims."⁷ RAMS attended a pre-hearing conference on April 18, 2005. At the pre-hearing conference RAMS indicated that more documentation could be provided. RAMS eventually submitted additional documentation on June 24, 2005, after two separate requests by the Division. The Division found the documents provided by RAMS to be similar to documentation already provided. A final decision regarding the overpayments was sent to RAMS on August 3, 2005, advising RAMS that it could request an evidentiary hearing or appeal to the Superior Court.⁸ RAMS elected to file this appeal.

⁵ R. at 663-680

⁶ R. at 164-165.

⁷ R. at 163.

⁸ R. at 7.

**Was the Determination of Overpayments
by the Division Supported by Substantial Evidence?**

On appeal, questions of fact are reviewed using the substantial evidence test.⁹ "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'".¹⁰ The Division's determination of overpayments is a factual finding to be reviewed under this standard.

RAMS asserts on appeal that the sole reason for the auditors' finding that there was insufficient evidence supporting its claims was that RAMS did not submit "original" documentation. RAMS argues that it has no duty to submit "original" documents in support of a claim. RAMS is correct in this assertion. State regulations allow a provider to provide a copy of a record unless the original record is specifically requested.¹¹ It is also true that the summary finding of the Meyers and Stauffer audit lists the reasons for the denial of claims as "[n]o original documentation provided."

But RAMS' argument on appeal is misleading. The audit report of Meyers and Stauffer clearly indicates that its reason for denying the RAMS' claims was that it found the documentation to be suspicious and fraudulent. Specifically, Meyers and Stauffer found in its audit report of January 14, 2005, that

⁹ *Handley v. State, Dept. of Revenue*, 838 P.2d 1231, 1233 (Alaska 1992).

¹⁰ *Id.*

¹¹ See, 7 AAC 43.032(b).

"overpayments were identified for thirty-seven of the forty-five sampled claims due to lack of documentation (such as invoices, delivery sheets or service notes) to establish that services were actually performed or supplies actually delivered."¹² Meyers and Stauffer further noted that after RAMS submitted additional information that "these delivery slips do not appear to be original documentation."¹³ Meyers and Stauffer noted in its final report its concern that documents provided by RAMS might be fictitious.¹⁴

In a letter dated October 27, 2004, Meyers and Stauffer explained its concerns to the Division.¹⁵ It noted that the "delivery slips" RAMS subsequently provided did not exist during the on-site visit of RAMS. These delivery slips were atypical in that they listed specific Medicaid procedure codes when such codes are typically not used on delivery slips. Most importantly, Meyers and Stauffer observed that there was no variation in the patient signatures from one delivery slip to another and that photocopying smudge marks appeared to be duplicated on each delivery slip for the same patient. Based on this information, the Division referred the matter to the Medicaid Fraud Unit of the Department of

¹² R. at 666.

¹³ *Id.*

¹⁴ "Areas of concern include the legitimacy of documentation submitted by the provider subsequent to the on-site field examination." R. at 667.

¹⁵ R. at 659-661.

Law.¹⁶ A review of the "delivery slips" submitted by RAMS in the record supports the conclusions by Meyers and Stauffer.¹⁷

RAMS never contested the findings by Meyers and Stauffer that its records appeared to be fraudulent or the same records were submitted repeatedly. When given the opportunity, it never requested a hearing in which it could have provided additional evidence to rebut the auditors' doubt as to the authenticity of the records. Under 7 AAC 43.032(a), the Division is empowered to recover an overpayment based on a determination of the record's nonexistence. In this case substantial evidence supported the Division's determination that no original documentation existed to support the disputed claims.

Is the Division's Use of Statistical Extrapolation Valid?

A portion of the overpayments assessed against RAMS by the Division's audit were not the result of auditing individual claims. Meyers and Stauffer individually audited only 45 of the 84 Medicaid claims of RAMS that were subject to the audit period. Of these individually audited claims, thirty-seven were determined to involve overpayments.

Meyers and Stauffer determined that the average overpayment per claim for these thirty-seven claims amounted to \$471.91. It then extrapolated this average overpayment to the number of remaining claims to calculate a total

¹⁶ R. at 241-242

¹⁷ See, e.g., the signatures on delivery slips at R. 269-281.

overpayment of \$39,640.65 for the entire 84 claims subject to audit. RAMS challenges the Division's use of extrapolation to calculate overpayments asserting that it is not authorized by law and results in an arbitrary and capricious result.

Under AS 47.07.050 the Division is authorized to adopt regulations necessary to implement the state's Medicaid program. Medicaid provider audits are a necessary component of the Medicaid Act.¹⁸ One of the regulations the Division adopted governing audits, 7 AAC 43.068,¹⁹ allowed the Department to use "standard statistical sampling methods to select claims for . . . audit and to calculate overpayments to providers." This regulation will be upheld if, upon review, the court determines that it is reasonable and not arbitrary.

The use of statistical sampling in the Medicaid and Medicare programs has been generally permitted by the courts. The District of Columbia Court of Appeals determined that the use of sampling and extrapolation to audit payments did not violate the Medicare Act or offend due process in *Chaves County Home Health Service v. Sullivan*.²⁰ In *Yorktown Medical Laboratory, Inc. v. Perales*,²¹ the use of statistical sampling to calculate Medicaid overpayments was upheld because of its low risk of error and the need to minimize administrative burdens in managing the program.²² Similarly, in *State of Georgia*

¹⁸ 42 USC Sec. 1396(a)(42).

¹⁹ Since recodified as 7 AAC 43.1470.

²⁰ 931 F. 2d 914 (D.C. Cir 1991).

²¹ 948 F.84 (2nd Cir. 1991).

²² *Id.*, at 90.

Dept. of Humans Resources v. Califano,²³ random claim sampling to calculate Medicaid overpayments was approved as a valid audit technique. The use of statistical extrapolation has been approved for use in other public benefit programs. In *Illinois Physicians Union v Miller*,²⁴ the use of random sampling and extrapolation was upheld in a state medical services program. In *Ratanasen v. State of California, Dept. of Health Services*,²⁵ the use of random sampling and extrapolation was upheld in the California Department of Health Services audit of claims for medical services. RAMS has cited to two New York cases, *Graziosi v. New York State Dept. of Social Services*²⁶ and *Matter of Allen v. Commissioner of Social Services of State of New York*,²⁷ as authority disapproving the use of statistical extrapolation for auditing in Medicaid programs.²⁸

The Department justifies its use of statistical extrapolation on the nature of the Medicaid program and the need to reduce administrative burdens associated with auditing individual claims. The state is obligated under federal law to audit providers to insure that proper payments are made under the Medicaid plan. State law requires the Division to annually contract for

²³ 446 F. Supp. 404 (N.D. Ga. 1977).

²⁴ 675 F.2d 151 (7th Cir. 1982).

²⁵ 11 F.3d 1467 (9th Cir. 1993).

²⁶ 167 A.D. 2nd 793 (N.Y.A.D. 3rd Dept. 1990).

²⁷ 116 A.D. 2d 35 (N.Y.A.D. 3rd Dept. 1986).

²⁸ *Graziosi* and *Allen* do not state whether the Medicaid providers were given the opportunity to contest the overpayments calculated by the use of statistical extrapolation. In the federal cases cited above, the Medicaid providers, like RAMS, were given the opportunity to challenge the overpayments determined by statistical sampling and extrapolation. This difference may explain the contrary results in these cases.

independent audits of Medicaid providers.²⁹ The Medicaid program is one of general benefit to the public where the state has a legitimate interest in reducing administrative expenses. The state points out that RAMS is one of nearly 80 Medicaid providers audited during 2004-2005, some of whom involved hundreds of claims. Each "claim" itself involves auditing multiple "claim lines".

The court finds the Division's reasoning is persuasive and concludes that 7 AAC 43.068 is a valid exercise of the Division's rulemaking authority consistent with its obligations under the Medicaid Act and state law.

RAMS also argues that even if statistical extrapolation is authorized, it produces an arbitrary and capricious result. RAMS' reasoning is based on the fact that statistical extrapolation ignores individual claim records and therefore may impose an overpayment when none is warranted. This is a question of law reviewed under the substitution of judgment standard.

RAMS' argument might have merit but for the fact that it was given numerous opportunities by the Division to contest the audit results and request a hearing. The preliminary audit report by Myers and Stauffer, which included the extrapolated overpayments, was sent to RAMS on September 16, 2004, and gave RAMS 21 days to respond and submit additional documentation. After the final audit report was sent to RAMS on January 27, 2005, and RAMS appealed the audit findings to the Commissioner, RAMS was permitted by 7 AAC 43.085(i) to

²⁹ AS 47.05.200(a).

provide additional information to resolve the appeal. RAMS also indicated its desire to submit additional documentation to refute the audit findings at a pre-hearing conference held on April 18, 2005, and eventually did submit additional materials on June 24, 2005. Finally, RAMS was given the opportunity to request and evidentiary hearing, which RAMS declined to do. At any one of these opportunities after the preliminary audit report was submitted to RAMS, it could have provided information to the Division to contest the overpayments based on statistical extrapolation. These opportunities to contest the audit results preclude the extrapolated overpayments from being found arbitrary and capricious as a matter of law.

Was RAMS Afforded Due Process?

Administrative proceedings must comply with the requirements of due process.³⁰ RAMS argues that due process was violated because no hearing was held on its claims. RAMS asserts that when it was notified by the Division on August 3, 2005 that it could request a hearing or appeal to the Superior Court, the notice meant it could do one or the other, but not both. As this issue presents a question of law not involving agency expertise it is reviewed under the substitution of judgment standard.³¹

³⁰ *K&L Distributors, Inc. v. Murkowski*, 486 P.2d 351, 357 (Alaska 1971).

³¹ *Handley v. State Dept. of Revenue*, at 1233.

RAMS is incorrect that the Division's notice gave it the choice of either requesting a hearing and foregoing its right to appeal, or appealing and foregoing its right to a hearing. RAMS has a right to bring an administrative appeal under Appellate Rule 602 which the Division has no authority to extinguish.³² Had RAMS requested a hearing the Division would have accorded that request and RAMS would have retained its right to appeal. No wording of the Division's notice can be read to restrict RAMS opportunity for a hearing and right to appeal.

RAMS cites to *State, Dept. of Natural Resources v. Greenpeace, Inc.*³³ as support for its argument that its due process rights were violated. In *Greenpeace*, the Alaska Supreme Court discussed the factors applicable to due process claims regarding administrative proceedings³⁴ as articulated by the United States Supreme Court in *Mathews v. Eldridge*.³⁵ RAMS argues that application of these factors results in the conclusion that an evidentiary hearing was required. But RAMS argument is built on a false premise, i.e. that it was denied an evidentiary hearing. To the contrary, RAMS was given the opportunity to request an evidentiary hearing but declined to request one. The *Mathews*

³² Unless the legislature provides otherwise, administrative decisions are presumed to be judicially reviewable. *Bethel Utilities Corp. v. City of Bethel*, 780 P. 2d 1018 (Alaska 1989).

³³ 96 P.3d 1056 (Alaska 2004).

³⁴ These factors include: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of this interest through the procedures used, and; (3) burden on the government that the procedural requirement would entail. *Greenpeace*, at 1065.

³⁵ 424 U.S. 319 (1976).

factors are therefore inapplicable. RAMS was afforded numerous opportunities to contest the audit findings, including a right to a hearing, and was not denied due process.

Conclusion

The determination of overpayments by the Division against Respiratory & Medical Services, Inc., as reflected by its final decision dated August 3, 2005, is AFFIRMED.

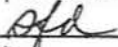
DATED: January 9, 2008, at Anchorage, Alaska.



PHILIP R. VOLLAND
SUPERIOR COURT JUDGE

*I certify that on the 9th day of JAN-08
a copy of the above was distributed
to each of the following:*

AGO-Juneau | S. Priddle


Judicial Assistant