

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

In the Matter of)
)
STERLING ASSISTED LIVING, INC.) OAH No. 18-0355-MDA
) Agency No. RL0003
_____)

DECISION

I. Introduction

Sterling Assisted Living, Inc. (“Sterling”) was a Medicaid-approved provider that provided residential supported living services to Medicaid-eligible persons. The Department of Health and Social Services (“the Department”), Medicaid Program Integrity Unit (“Program Integrity”), through its agent Meyers & Stauffer, LC (“M & S”), audited Sterling’s Medicaid billings for calendar year 2010. Due to inadequate documentation of services, the M & S audit identified a total overpayment of \$106,333.71, and Program Integrity demanded reimbursement in that amount. Sterling challenged the audit findings. Because the failure to retain documentation of services encompasses all claims submitted by Sterling, the M & S audit results are affirmed.

II. Factual and Procedural Background¹

Sterling, which was owned and operated by Karen Walsh Roe, provided residential supported living services at its Lake House Assisted Living Home.² Lake House was the residence for three “high acuity care” Medicaid recipients, V.A., D.P., and J.S.³ Sterling billed Medicaid \$106,333.71 for 22 claims for V.A., D.P., and J.S. in 2010.⁴

Ms. Roe closed her assisted living business in October 2012.⁵ As part of her business closure and to reduce the amount of paperwork in storage, Ms. Roe destroyed the residents’ daily care sheets—records that Ms. Roe claims documented the assisted daily living (ADLs) provided to each resident on a daily basis.⁶ Ms. Roe explained, “At the time I remember thinking it was not necessary to keep records of what each resident ate; their shower schedules; daily oral care; blood pressure readings; etc.”⁷ Ms. Roe kept each resident’s Plans of Care, quarterly reports, financial records, admission paperwork,

¹ The following facts were established by a preponderance of the evidence.

² Agency Record (“AR”) 22.

³ Testimony of Karen Walsh Roe.

⁴ AR 17 – 20.

⁵ Roe Testimony; AR 5.

⁶ Roe Testimony; AR 5. *See* AR 7 for an example of Sterling’s daily care sheets.

⁷ AR 5.

and billing information.⁸ Ms. Roe believed that the records she maintained satisfied Medicaid requirements; however, Ms. Roe admitted that she was not focused on the Medicaid record-keeping regulations when she decided which records to retain.⁹ Instead, Ms. Roe was more focused on records needed for tax purposes.¹⁰

On May 29, 2013, Program Integrity sent Ms. Roe a letter, notifying her that Sterling had been selected for an audit of its Medicaid-paid claims for the period of January 1, 2010 through December 31, 2010.¹¹ That letter further informed Ms. Roe that the audit would be conducted by Myers & Stauffer, LLC (M & S).¹² M & S contemporaneously asked for documentation for all of Sterling's claims during the audit period.¹³ Due to the relatively small number of claims submitted by Sterling, the audit encompassed all claims, rather than reviewing a random sample and extrapolating the results over the entire population of claims as is often done in Medicaid audit cases.¹⁴

Ms. Roe submitted the records she had retained for the three residents (i.e., Plans of Care, quarterly reports, financial records, admission paperwork, and billing information).¹⁵ After reviewing the documentation Ms. Roe submitted, M & S selected Sterling for an on-site field examination.¹⁶ The on-site review is an expanded review of the provider's records to ensure compliance with Medicaid statutes, regulations, provider agreements, and provider billing manuals and to give providers an additional opportunity to submit supporting documentation for claims.¹⁷ After Ms. Roe informed the auditors that she did not have additional records for them to review, M & S cancelled the on-site field examination.¹⁸

M & S notified Ms. Roe of the preliminary audit findings on September 3, 2013.¹⁹ M & S made overpayment findings for all 22 claims, concluding that the records provided by Ms. Roe were insufficient documentation to support the provision of the supported living services included in the Medicaid recipients' plans of care for the dates of service during the period audited.²⁰ In particular,

⁸ Roe Testimony; AR 5.

⁹ Roe Testimony; AR 5.

¹⁰ Roe Testimony.

¹¹ AR 62.

¹² AR 62.

¹³ AR 63 – 71.

¹⁴ Testimony of T. Allan Hansen; AR 63 – 71.

¹⁵ Roe Testimony; AR 5, 60 – 61.

¹⁶ AR 50.

¹⁷ AR 51; Hansen Testimony.

¹⁸ AR 48; Hansen Testimony; Roe Testimony.

¹⁹ AR 43.

²⁰ AR 46.

Medicaid reimburses residential supported living services on a per diem basis,²¹ and the M & S auditors found that Ms. Roe failed to submit documentation to support the activities of daily living for each day of the year for the three Medicaid recipients.²² Program Integrity gave Ms. Roe an opportunity to respond and provide additional information or documentation.²³

After receiving the preliminary audit findings, Ms. Roe requested an extension of 30 days to respond.²⁴ She explained that she needed additional time to gather information from family members and care coordinators to verify the accuracy of the Medicaid claims.²⁵ Program Integrity approved an extension until November 4, 2013 for Ms. Roe to submit additional information.²⁶

On November 1, 2013, Ms. Roe responded to the preliminary findings.²⁷ In her response, she explained:²⁸

The assisted living home was the residence for the three high-acuity care clients that were the focus of this audit. Because it was their ‘home’ and not a skilled nursing facility, the focus of their care and the assistance they received with their activities of daily living was not charted in daily detail, however it was implemented as required in their Plan of Care Each resident’s care was monitored by myself, a registered nurse, and further monitored by each client’s care coordinator. The staff documented, on a daily note sheet, what the resident ate, how many bowel movements they had daily, if they had visitors or appointments, etc. Unfortunately these records were not kept as part of the permanent record when I closed the business in 2012. At the time I felt these notes were not necessary documentation to keep on file, which I now realize was a mistake on my part.

Ms. Roe asserted that the residents received the best of care and that she was meticulous about reporting to her contract biller each month, billing only for care that was provided.²⁹ Ms. Roe submitted letters from the three residents’ care coordinators asserting that the care coordinators made regular visits to their clients and verifying that Sterling provided quality care and assistance on a daily basis as required by each resident’s plan of care.³⁰

M & S responded to Ms. Roe’s additional information on November 8, 2013.³¹ M & S noted the letters from the residents’ care coordinators and acknowledged Ms. Roe’s statements that although

21 Hansen Testimony.

22 AR 46.

23 AR 46.

24 AR 42.

25 AR 42.

26 AR 41.

27 AR 36 – 40.

28 AR 36 – 40.

29 AR 36 – 37.

30 AR 38 – 40.

31 AR 30 – 32.

Sterling maintained records related to the supported living services provided to each resident on a daily basis Ms. Roe failed to retain the records when she closed the business in 2012.³² M & S maintained the overpayment findings for all 22 claims, reasoning that the Medicaid regulations require providers to “identify the individual receiving services, the specific services provided, the extent of each service provided, the date on which each service was provided, and the individual who provided the service.”³³ M & S explained that the Medicaid regulations require providers to maintain records “to confirm that services were provided for each date of service billed,” and providers must “retain the records of an individual for which services have been billed to the Medicaid program for at least seven years from the date the service is provided, even if the provider’s business is no longer operating.”³⁴ M & S concluded that Ms. Roe’s explanations and the letters from the residents’ care coordinators are not a substitution for the daily, contemporaneous records required to be maintained.³⁵

Program Integrity issued the final determination and M & S audit report on November 29, 2018.³⁶ In short, Program Integrity found overpayments for all 22 claims for a total of \$106,333.71 due to insufficient documentation to support the provision of residential supported living services included in the residents’ plans of care.³⁷ The audit report explains:³⁸

Residential supported living services consist of assistance to residents with activities including bathing, personal hygiene, grooming, cleaning, toileting, medication administration, meal preparation, etc. In order to document the provision of residential supported living services, it is not sufficient to merely establish that residents were present in the assisted living facility. Rather, documentation must describe the assistance that residents received with their activities of daily living as authorized in the residents’ plans of care. For the claims reviewed, the submitted documentation did not support assistance with the activities of daily living for the sampled residents.

On December 16, 2013, Ms. Roe submitted a blank copy of the daily care sheet that Sterling used to document each resident’s daily care and asked Program Integrity to reconsider the overpayment findings.³⁹ Ms. Roe explained that each resident received full assistance, that Sterling documented that

³² AR 30 – 31.

³³ AR 31.

³⁴ AR 31.

³⁵ AR 31.

³⁶ AR 8 – 23.

³⁷ AR 8, 13.

³⁸ AR 13.

³⁹ AR 5 – 7.

daily assistance, and that it was an error for Ms. Roe to dispose of that documentation when she closed the business.⁴⁰

Due to “a miscommunication with the Department of Law,” Program Integrity failed to respond to Ms. Roe’s Request for Reconsideration until February 9, 2018.⁴¹ In its letter, Program Integrity summarized the procedural background of the case, noting that Ms. Roe admitted to destroying records of the residents’ daily care after she closed the business in 2012.⁴² Program Integrity concluded that Ms. Roe did not submit any relevant additional documentation, and thus, her request for reconsideration was denied.⁴³ Program Integrity stood by the original audit findings and assessed an overpayment finding of \$106,333.71.⁴⁴ Sterling appealed. And the case was referred to the Office of Administrative Hearings.

An evidentiary hearing was held by telephone on October 1, 2018. Assistant Attorney General Scott Friend represented Program Integrity. With the help of her husband, Jeff Roe, Ms. Roe represented herself and Sterling and testified on her own behalf. M & S auditor, T. Allen Hansen; and Program Integrity Manager Douglas Jones testified on behalf of Program Integrity. At the hearing, the numbered agency record and all exhibits submitted by the parties were admitted without objections.

III. Discussion

For a business to receive payment from the Medicaid system for services provided to Medicaid recipients, that business must be enrolled as a Medicaid provider with the Department.⁴⁵ A Medicaid provider is required to comply with all applicable federal and state requirements.⁴⁶ An overpayment occurs when the Department pays a provider incorrectly for services that do not meet standards established for payment of services.⁴⁷ Federal law requires the Department to seek recoupment of overpayments.⁴⁸ Because Program Integrity is seeking affirmative financial relief against Sterling, based upon its allegation that Sterling has not complied with Medicaid requirements, it has the burden of proving by a preponderance of the evidence that Sterling did not comply with the Medicaid requirements.⁴⁹ The central issue in this case, that applies to all 22 claims, is whether Sterling failed to

⁴⁰ AR 5.

⁴¹ AR 2.

⁴² AR 2.

⁴³ AR 2.

⁴⁴ AR 2.

⁴⁵ 7 AAC 105.210(a).

⁴⁶ See 7 AAC 105.220.

⁴⁷ 7 AAC 105.260.

⁴⁸ 42 CFR § 431.1002.

⁴⁹ See *In re Accredo Health Group*, OAH No. 13-0622-MDA (Comm’r Health & Soc. Services, 2014).

provide the required documentation to show that it rendered the residential supported living services for which it billed.

A Medicaid provider must maintain accurate records to support the services for which payment is requested.⁵⁰ Specifically, the Medicaid provider must record, and be able to document upon audit, the name of the recipient receiving service, the service provided, the extent of the service provided, the date it was provided, and the individual providing the service.⁵¹ The provider must retain copies of the records for seven years from the date of service.⁵² And if the provider is unable to produce copies of the records after they are requested, the Department may consider the records to be nonexistent.⁵³ The Department may then initiate a recoupment action to “recover an overpayment . . . based on a determination of the record’s nonexistence.”⁵⁴

The residential supported living services for which Sterling billed Medicaid, and which were the subject of the audit, consisted of assistance to residents with their activities of daily living—assistance with activities including bathing, personal hygiene, grooming, cleaning, toileting, medication administration, meal preparation, etc. Records establishing that residents were present or resided at the assisted living facility do not sufficiently document that Sterling provided residential supported living services. Instead, Sterling was required to maintain, and provide upon request, documentation that identified and described the resident receiving services, the assistance residents received with their activities of daily living as authorized in the residents’ plans of care, the dates the services were provided, and the individual providing the services. Because Medicaid reimburses residential supported living services on a per diem basis, Sterling was required to retain documentation to support the activities of daily living for each day of the year for the three Medicaid recipients. M & S requested copies of Sterling’s records for this audit. Ms. Roe provided some records documenting that the Medicaid recipients were residents of Lake House and that they received care in that home, but she did not provide any documentation of the daily supported living services or the extent of those services provided to each resident.

Ms. Roe’s defense was that she provided residential supported living services to the three residents, that she only billed Medicaid for services she provided, and that she maintained daily records of those services. She claims that she mistakenly destroyed the daily service records when she closed

⁵⁰ 7 AAC 105.230; 7 AAC 105.220.
⁵¹ 7 AAC 105.230; 7 AAC 105.220(b).
⁵² 7 AAC 105.230(e).
⁵³ 7 AAC 105.240(d)(1).
⁵⁴ 7 AAC 105.240(d)(2).

her business. She also argues that Program Integrity’s failure to respond to her request for reconsideration in a timely manner put her at a disadvantage for the hearing. She maintains that had Program Integrity acted on her request for reconsideration in a timely manner, she could have called witnesses to confirm that Sterling provided the services at issue. But this case is about documentation, not fraud. It is well settled that Medicaid payments will be denied, or recoupment will be allowed, if the required documentation has not been maintained. This is so even if one might be able to infer that it is more likely than not that the services billed, or at least some services, were actually rendered.⁵⁵ In *re Alaska Children’s Services, Inc.*, the Commissioner of Health and Social Services affirmed Program Integrity’s recoupment of funds from a conscientious provider on the basis of substandard documentation, even though most, and perhaps all, of the claimed services had probably been performed.

The single potential exception to this principle is where failure to comply with some nuance of a documentation requirement is “so insubstantial that the department must consider the records complete.”⁵⁶ The point of the documentation requirements is to allow the Department to audit individual claims and cross-check them against other information that may be available. In the case of Medicaid residential supported living services, the combination of a vulnerable clientele and a lack of close supervision creates significant opportunities for fraud. By requiring providers to maintain and retain contemporaneous and accurate records of the services provided, the Department can ensure that recipients are receiving services that the state is billed for. Moreover, by making enforcement possible, it deters misconduct in the first place. Thus, the Department’s interest in requiring specific and real time records is substantial.

Ms. Roe admitted that she failed to retain the daily service records. Unfortunately, although the records Ms. Roe retained may provide support that V.A., D.P., and J.S. were residents of Sterling’s Lake House, they do not reflect the daily services provided to the Sterling Medicaid recipients. They do not shed any light on the specific services provided to V.A., D.P., and J.S. on a daily basis. And the letters provided by the residents’ care coordinators—with statements made several years after services were purportedly provided—do not meet the Medicaid documentation standards. Likewise, any testimony to that effect would not remedy the deficiency in documentation. According to Ms. Roe, in 2012, she destroyed the only records that documented each resident’s daily care. Although a very unfortunate

⁵⁵ OAH No. 13-0182-MDA (2014) (published at <http://aws.state.ak.us/officeofadministrativehearings/Documents/MDA/MDA130182.pdf>).

⁵⁶ *Id.*

mistake, Ms. Roe's decision to destroy those records left her unable to document upon audit, the name of the recipients receiving services, the services provided, the extent of the services provided, the dates the services were provided, or the individuals providing the services for each date of service. None of the records she retained meet the Medicaid documentation requirements.⁵⁷ Ms. Roe's failure to maintain (or at least retain) supporting documentation, if accepted, would undermine the documentation requirement.

Based upon the facts of this case and the regulations cited, Program Integrity has established by a preponderance of the evidence that Sterling failed to maintain the requested records for the audited billing claims. Because these were records which were Ms. Roe's responsibility, and which were kept solely by her, Program Integrity has correctly determined that the documents do not exist. Program Integrity did not err in seeking recoupment for claims based on non-existent records. For these reasons, the M & S audit results are upheld.

IV. Conclusion

Due to inadequate documentation of services, the M & S audit identified a total overpayment of \$106,333.71, and Program Integrity demanded reimbursement in that amount. Program Integrity has established by a preponderance of the evidence that Sterling failed to maintain the requested records for the audited billing claims. Because Ms. Roe destroyed the only records that purportedly documented the residential supported services provided to each resident daily, Program Integrity has correctly determined that the documents do not exist. Because testimony from former employees, care coordinators, or family members would not remedy the documentation deficiencies at issue in this case, Program Integrity's delay in responding to Ms. Roe's request for reconsideration did not prejudice Ms. Roe's ability to present a defense. And although destroying the records was a very unfortunate mistake, the M & S audit results are upheld.

Dated: October 26, 2018

Signed _____
Jessica Leeah
Administrative Law Judge

⁵⁷ 7 AAC 105.230; 7 AAC 105.220(b).

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 20th day of November, 2018.

By: Signed _____
Name: Deborah Erickson
Title: Project Coordinator
Agency: Office of the Commissioner, DHSS

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]