BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF HEALTH

In the Matter of	)	
	)	
JOHN D. ZIPPERER JR., MD LLC dba ZMG CLINICS	)	OAH No. 20-0002-MPC/MDA
	)	
	)	

DECISION AND ORDER OF DISMISSAL

I. Introduction

This case is an appeal by ZMG Clinics, a Medicaid provider, of two actions taken by the Medicaid Program Integrity Unit in 2019. The first was a decision rendered on September 11, 2019 and distributed on September 12, 2019 determining, based on an audit report, that "an overpayment exists in the amount of $8,813,333.39."[1] The second appealed action was a decision issued on December 4, 2019, imposing two 7 AAC 105.410 sanctions, namely, termination from participation in the Medicaid program and issuance of a public notice of the same.[2]

With regard to the second subject matter of the appeal, a contested motion to dismiss was resolved adversely to ZMG on December 6, 2021. Because the administrative law judge does not have authority in this case category to enter final dismissal where dismissal is contested, the substance of that order is now incorporated into this decision. It appears in Part III below.

With regard to the first subject matter of the appeal, much more substantial motion practice took place, which is resolved herein for the first time. The resolution, which is likewise adverse to ZMG, appears in Part IV below.

The net result is that all aspects of ZMG's appeal should be dismissed.

II. Background

ZMG Clinics is the trade name of a limited liability company[3] that received approximately $11 million in Medicaid payments for services rendered between May 1, 2012 and October 12, 2015. Qlarant Integrity Solutions, an auditor contracted to the federal Centers for Medicare & Medicaid Services, conducted an audit of the payments made to ZMG during that time span. Qlarant identified a sample of 914 claim lines to be reviewed, with the result to be extrapolated across the full universe of payments during the audit period. Qlarant states that it did not receive any documentation from ZMG to support any of the claims. It issued a draft audit report finding a

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1 The decision is found at Attachment 1 to the Case Referral Notice initiating this case and at A.R. 0008-0013.
2 The decision is found at Attachment 3 to the Case Referral Notice initiating this case and at A.R. 0004-0006.
3 Although it is rendered many ways in the record, the exact name of the company is John D. Zipperer, Jr., MD LLC.

100% overpayment rate in the sample. It attempted to send the draft report to ZMG at the address ZMG had provided to it, and it notified ZMG that the report was available, but was unable to deliver it and received no comments from ZMG. Qlarant then extrapolated a total overpayment of $8,813,333.39 based on the overpayment rate in the sample.[4]

Program Integrity issued formal notice of the audit findings on September 11, 2019 (mailing it the following day), a formal demand for payment on October 17, 2019,[5] and a notice of provider sanctions (based on nonpayment) on December 4, 2019. ZMG alleges that its principal, Dr. Zipperer, did not receive the first two items,[6] and this assertion will be assumed to be true in this decision. In early December of 2019, contacts between ZMG and Program Integrity resulted in the undisputed receipt of all three items by Dr. Zipperer.[7]

ZMG submitted a request for appeal on December 16, 2019.[8] When read carefully, it is clear that the request related primarily to the September 2019 decision, although it should likely be construed to encompass the December 2019 provider sanction decision as well. Program Integrity, acting in a ministerial capacity as the Commissioner's delegate, timely referred the request to the Office of Administrative Hearings (OAH) on January 2, 2020.

When referring the matter, Program Integrity's counsel mistakenly read the hearing request as related only to the December provider sanction decision, and he described it as such in the referral form. This procedural error led this case to initially be processed solely as an "MPC" case.[9] The characterization did not matter, however, because the case was placed on long-term hold at ZMG's request.

In late 2021, ZMG indicated a desire to have its appeal move forward. Program Integrity filed a pair of motions to dismiss, the resolution of which is the basis of this decision.

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4 The paragraph is drawn from A.R. 0011-0014 and the Affidavit of Donald Czyzewski. Also reviewed for consistency with these materials was the set of exhibits submitted by ZMG with its Nov. 12, 2021 Response to State's Motion to Dismiss Zipperer's Appeal.

5 A.R. 0007.

6 Affidavit of John D. Zipperer, ¶¶ 65, 72.

7 *See, e.g.,* Jan. 12, 2022 Affidavit of Douglas W. Jones, ¶ 21.

8 A.R. 0001-0002.

9 There was a subsequent dispute in this case as to whether Program Integrity's characterization of the case meant that the referral on behalf of the Commissioner did not encompass the Medicaid Audit, or "MDA," aspect of the case. However, AS 44.64.060(b) does not provide for partial referrals. Moreover, even if partial referrals were allowed, the agency would still have to have "immediately" issued a nonreferral notice to ZMG as required by AS 44.64.060(b), providing the company with appeal rights to the Superior Court, and would have had to provide notice to the Chief Administrative Law Judge in accordance with 2 AAC 64.130. This did not occur. There were two attempts to do it retroactively in 2022, but these were both untimely and noncompliant with the statute and regulation. These matters are more fully explored in interlocutory orders issued December 6, 2021 and January 21, 2022.

III. The Provider Sanction Appeal

Under 7 AAC 105.400, there are 42 possible grounds for imposing one or more sanctions on a Medicaid provider. One of these is failing to repay, or to make arrangements for repaying, an overpayment.[10] If a ground exists, the department "may" impose sanctions, including "termination from participation in the Medicaid program"[11] and "public notice of . . . termination of a provider."[12] On December 4, 2019, Program Integrity imposed these two sanctions on ZMG based on its alleged failure to repay, or make arrangements for repaying, the $8,813,333.39 overpayment that had been found to be due in the September 2019 decision.[13] ZMG timely appealed the sanctions under 7 AAC 105.460.[14]

On November 10, 2021, Program Integrity gave notice that it was withdrawing the termination sanction imposed on ZMG. On November 29, 2021, it stipulated at a recorded hearing in this case that it was withdrawing both the termination sanction and the public notice sanction. It also warranted that neither sanction had been carried out in any way up to that time.

Since no sanction has been or is to be imposed, there is nothing to undo and no relief for the Commissioner to provide to ZMG. The provider sanction appeal is therefore moot.

IV. The Audit Findings Appeal

On January 12, 2022, Program Integrity filed a motion to dismiss the audit appeal. Part I of the motion was an introduction, and Part II discussed scope-of-referral issues.[15] The final section, Part III, sought dismissal on the ground that the audit appeal was untimely.

On March 7, 2022, a process was initiated to resolve the untimeliness defense raised in Part III of the motion. The administrative law judge (ALJ) explained that he was considering factual issues surrounding the timing of the appeal. It appeared that these might be resolvable through affidavits and documents. On the other hand, the ALJ explained that after reviewing the

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10 7 AAC 105.410(21).
11 7 AAC 105.410(a)(1).
12 7 AAC 105.410(a)(11).
13 A.R. 0004-0006.
14 Appeals under 7 AAC 105.460 are ordinarily highly expedited. However, ZMG waived its right to an expedited hearing, first because it needed more time to arrange representation and subsequently because it wished this matter to trail a parallel criminal proceeding. This history is detailed in a series of interlocutory orders during 2020 and 2021. In mid-October of 2021 ZMG indicated a desire that this case move forward, though it did not seek expedited handling.
15 *See* footnote 9 above.

parties' submissions, he might find that the motion could not be resolved without an evidentiary proceeding. The parties submitted materials and argument until May 1, 2022.[16]

A. Parameters for Evaluating the Motion to Dismiss

The issue of dismissal for untimeliness requires the development of a factual basis: when the event triggering the time limit occurred, when the appeal was filed, whether any special circumstances attended the delay, and so on. In most instances, and certainly in this one, the factual basis can only be obtained through evidence outside the pleadings.[17] This makes the motion to dismiss effectively a motion for summary adjudication.[18] To grant the motion to dismiss on the paper record or, conversely, to finally reject the timeliness defense based on that record, requires summary adjudication.

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[19] It is a means of resolving disputes without a hearing when the central underlying facts sufficient to resolve the case are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.[20] As the Alaska Supreme Court has observed, "one need not hold a hearing if there is nothing to hold a hearing about; or, more precisely, 'there is no requirement . . . that there be a hearing in the absence of substantial and material issues crucial to (the) determination.'"[21]

When a party wishes to contest the accuracy of evidence offered by the other side in connection with a motion for summary adjudication, it cannot rest on mere assertions and denials, but must instead offer contrary evidence.[22] Insofar as there is competing evidence, the decisionmaker must "draw all factual inferences in favor of, and view the facts in the light most

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16 The ALJ has now reviewed those submissions in detail. ZMG has complained to OAH staff about the delay in completing this review. Although the delay has not been particularly long, the ALJ had indeed hoped to be able to pick up this case immediately upon it becoming ripe. Regrettably, other matters arose that had to be triaged higher.

17 The only true "pleading" in a case like this is the respondent's request for hearing.

18 *Cf., e.g., Moffit v. Moffit,* 341 P.3d 1102 (Alaska 2014) (time limit issues handled by summary adjudication).

19 *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).

20 *See Smith v. State, Dep't of Revenue,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

21 *Miner's Estate v. Commercial Fisheries Entry Commission,* 635 P.2d 827, 834 (Alaska 1981) (citing *NLRB v. Bata Shoe Co.*, 377 F.2d 821, 826 (4th Cir. 1967)).

22 2 AAC 64.250(b).

favorable to, the party against whom summary judgment was [requested]."[23] There is no weighing of the evidence when determining a motion for summary adjudication.[24]

This was explained to parties in an oral conference on March 7, 2022. A follow-up notice sent to both parties the following date contained the following admonition:

> The facts surrounding the late appeal will be determined based on evidence. Mere assertions do not count. Both sides will be given an opportunity to present written evidence on the above issues, in as much detail as possible, before the motion is evaluated. Evidence can be in the form of affidavits sworn to a notary, documents in the record in this case, or new documents. Affidavits may be submitted by scan or fax, but they should bear an actual signature and notarization.[25]

B. Parameters for Enforcing the Appeal Deadline

A department regulation, 7 AAC 160.130, provides:

> (a) A provider may appeal the findings of a final audit conducted under 7 AAC 160.110 and determinations of overpayment amount under the audit. A provider may request reconsideration of the audit findings before a formal appeal. If a provider requests reconsideration, the provider may still request a formal appeal under this section by requesting the appeal not later than 30 days after the date of the notice of decision on reconsideration.
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> (b) An appeal under this section must
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> (2) be submitted to the commissioner no more than 30 days after the date of the letter transmitting the provider's final audit report;
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The regulation contains no express language under which this thirty-day deadline can be relaxed. That being said, the Department concedes that it has consistently interpreted this regulation to contain an implicit "good cause" exception under which the deadline can be extended.[26]

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[23] *Boyko v. Anchorage Sch. Dist.,* 268 P.3d 1097, 1101 (Alaska 2012).

[24] *Meyer v. State,* 994 P.2d 365, 367 (Alaska 1999) ("The court does not weigh the evidence or witness credibility on summary judgment.").

[25] Report of Status Conference (March 8, 2022) (footnote omitted).

[26] In an effort to provide a basis for this exception, Program Integrity cites *Shea v. State, Dep't of Admin., Div. of Retirement and Benefits*, 204 P.3d 1023 (Alaska 2009). But *Shea* applied a good cause exception on the basis of an explicit rule creating the exception—Alaska Appellate Rule 502(b)—which is exactly the kind of explicit provision that is absent from 7 AAC 160.130. It suffices, however, that Program Integrity concedes that 7 AAC 160.130 must be, and is, construed to allow for such an exception.

Program Integrity's view is consistent with basic law and jurisprudence on time limits for appeals internal to an agency or governmental branch. The appeal process in 7 AAC 160.130 exists because it is explicitly mandated by federal statute (*see* 42 U.S.C. § 1396a(a)(42)(B)(ii)(III), implemented without elaboration in 42 C.F.R. §455.512) and because it is implicitly mandated by state statute (*see* AS 47.05.200(b)(2)). But neither statute addresses the time limit for appeal to the Commissioner. Hence, the time limit in 7 AAC 160.103 is best viewed an internal,

The responsibility to make a showing in support of an exception to the time limit falls on ZMG.[27] If there is no such showing, the time limit applies as written.

C. Uncontroverted Material Facts Show the Presumptive Deadline Was Exceeded

The following material facts relating to the deadline are established by uncontroverted evidence:

Program Integrity provided notice of the audit findings on September 12, 2019. A standard, detailed letter describing the audit findings, including an overpayment finding of $8,813,333.39, was mailed to ZMG on September 12, 2019.[28] The notice included a copy of the underlying audit report.[29]

The notice properly stated ZMG's appeal rights. The right to appeal withing 30 days of the date of the letter is set out in detail in several paragraphs in the letter.[30]

The notice was sent to the correct address. As evidenced by a copy of the Certified Mail envelope, Program Integrity mailed the notice to 12641 Old Glenn Highway, Suite 101, Eagle River, AK 99577.[31] This was the contact address ZMG had provided for receipt of audit materials in June of 2019.[32] It was the only address ZMG had provided.[33]

The notice was undeliverable. Program Integrity's notice was returned on September 18, 2019, with a USPS sticker indicating it was unable to forward.[34]

Program Integrity attempted to send the notice to a second address. Although not required to do so, Program Integrity also sent the September notice of findings to a second ZMG location, 751 Old Richardson Hwy Suite 200, Fairbanks, AK 99701.[35] This was apparently

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departmental "claim-processing rule" that is not jurisdictional and is subject to relaxation by the department. *Cf. Hamer v. Neighborhood Housing Services of Chicago*, 583 U.S. ___, 138 S. Ct. 13, 17 (2017) (appeal time limit internal to court system is non-jurisdictional "claim-processing rule," subject to waiver or possible exceptions).

27 *See, e.g., Taylor v. State,* 564 P.2d 1219 (Alaska 1977); *Pollock v. Rengasamy*, 2022 WL 1614402 (N.Y. Sup. Ct. 2022 (granting motion to dismiss where plaintiff failed to show entitlement to exception to time limit).

28 A.R. 0008-0010, 0021

29 A.R. 0008, 0011.

30 A.R. 0008-0009.

31 A.R. 0021; Second Jones Affidavit ¶ 8.

32 Czyzewski Affidavit ¶¶ 26-27 and *passim*.

33 *Id.* ZMG says that it had used an Encino, California address for billing matters. Zipperer Affidavit ¶ 73. This does not controvert that the Eagle River address was the one ZMG designated during the audit.

34 A.R. 0021; Second Jones Affidavit ¶ 8.

35 A.R. 0017; Second Jones Affidavit ¶ 9.

another address ZMG had publicly held out to be a means of contact.[36] However, the fate of this correspondence is uncertain, and it will therefore not be relied upon in this decision.[37]

ZMG did not submit an appeal until December 16, 2019. ZMG dated and mailed a letter of appeal on December 16, 2019.[38] This would be the date the appeal was "submitted to the Commissioner" under 7 AAC 160.130(b)(2).[39]

December 16, 2019 was more than 30 days after the notice of audit findings. The dated of submission of this appeal was 95 calendar days after the notice of audit findings was send to ZMG's address of record.

D. ZMG Has Offered No Evidence of Good Cause for the Delay

A careful search of ZMG's affidavits and documents reveals no evidence to suggest that the September 2019 decision was not sent exactly where ZMG had designated for audit communications, nor any evidence of circumstances that would excuse ZMG's failure to receive it. Dr. Zipperer states in an affidavit that "the Eagle River office was closed when they sent notices there",[40] but that in itself tells us nothing about whether excusable circumstances led it to be so, or led to the failure to arrange forwarding or to designate a new address.

Because no basis has been made out to relax the deadline, it remains as set by regulation: 30 days after the decision was distributed.

E. ZMG's Other Arguments are Unavailing

On behalf of ZMG, Dr. Zipperer contends that "[f]or two years, I labored under the clear impression that my request for appeal had been accepted and would in due time be heard."[41] Dr. Zipperer did not labor during those two years. The case was stayed at his request. As soon as the case was reactivated, proceedings on the motion to dismiss began.

ZMG seems to argue that if a case is referred to OAH, the referring agency has finally and irrevocably determined that the requesting party is entitled to a hearing, waiving all defenses such

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[36] A.R. 0001 (ZMG letterhead in use three months later shows that mailing address).

[37] The envelope was returned as unclaimed and unable to forward, but a return receipt purporting to bear something akin to Dr. Zipperer's signature was also returned, and tracking data on the item number shows it to have been delivered. A.R. 0017-18; Baggett Declaration and exhibits. Since the item cannot both have been delivered and not delivered, and although there are some potential explanations, without some further explanation this item must be disregarded as evidence of actual delivery to ZMG. Moreover, for purposes of this motion I must accept the opinion—albeit equivocal—of ZMG's expert, Bart Baggett, that "there are indicators which suggest" the signature on the return receipt is not Dr. Zipperer's. Baggett Declaration ¶ 8.

[38] A.R. 001-003.

[39] The appeal was not received until December 23, 2019. However, the deadline in the regulation is a submitted-by deadline, not a received-by or a delivered-to deadline.

[40] Zipperer Affidavit ¶ 74.

[41] Surreply to State's April 21, 2022 Brief to the Alaska OAH (May 1, 2022), at 2.

as untimeliness.[42] This is certainly not the intent of the statutory structure for referral. Agencies have only ten days to decide whether to refer a case.[43] It would be wholly impractical for an agency to unravel issues of any complexity in that time, and hence the statute has always been interpreted to permit agencies to refer first and litigate entitlement to a hearing afterward.[44] Moreover, requiring all timeliness determinations to be made before referral would be infeasible where (as here) part of an indivisible hearing request is timely and part of it is not.

ZMG observes that Program Integrity has demonstrated no prejudice from the 95-day gap between decision and appeal. That may be largely so (although the delay in appealing certainly led to a more disorderly and expensive process), but prejudice to Program Integrity does not enter into the discussion if there is no good cause to relax the deadline in the first place.

V. Conclusion

Because uncontroverted evidence shows the appeal of the September 2019 audit findings to be untimely, and because the appeal of the December 2019 decision to impose sanctions has been withdrawn and rendered moot, this matter is dismissed.

DATED: July 18, 2022.

By: *Signed*
Name: Christopher Kennedy
Title: Administrative Law Judge

[42] *Id*. at 2-3.
[43] AS 44.64.060(b).
[44] This option has even been formalized in regulations applicable to other case categories, such as 7 AAC 49.100(1), (3), and (5).

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 _30th_ day of __August___, 2022.

By: ___*Signed*_____
Signature
_Laura O. Russell_____
Name
_Policy Advisor, DOH_____
Title

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