

Oxford Health Plans (NY), Inc. v Scheiner
2005 NY Slip Op 30605(U)
January 12, 2005
Supreme Court, New York County
Docket Number: 108727/2004
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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OXFORD HEALTH PLANS (NY), INC.,

INDEX NO. 108727/2000/4

Petitioner,

- against -

HOWARD L. SCHEINER, M.D.,

Respondent.
-----X

JOAN A. MADDEN, J.:

Petitioner Oxford Health Plans (NY), Inc. brings this Article 75 petition to confirm an arbitrator's award of \$101,498.60. Respondent Howard Scheiner, M.D. cross-petitions the court for a judgment vacating and setting aside the award.

Factual and Procedural Background

Oxford is a medical insurance company, and Scheiner is a medical doctor with offices in Staten Island and Manhattan. In an agreement entered into in February 1993, and modified in 1997 and 1998, Scheiner served as a Primary Care Physician (PCP), providing Oxford's subscribers with any "medically necessary primary care health services" that the members were entitled to receive. The agreement provided for Dr. Scheiner to bill Oxford for payment for services rendered to its insureds, and required that all disputes arising under the agreement be submitted to final and binding arbitration in New York, pursuant to the rules of the American Arbitration Association. Paragraph 5 of the agreement states that "[t]o the extent permitted by law, Oxford shall have the right to inspect at all reasonable times any accounting, administrative or medical records maintained by the [PCP] pertaining to Oxford." Dr. Scheiner was responsible

for ensuring that all claims submitted indicated the Current Procedural Terminology (CPT) codes for all services provided.

On March 24, 2003, Oxford initiated an arbitration proceeding against Dr. Scheiner, claiming breach of the agreement and unjust enrichment. Oxford alleged that Scheiner breached the agreement by upcoding, or assigning CPT codes for office visits by, and services provided to patients that overstated the level of service provided, and by retaining the payments received for the related overbilling. The arbitration demand also alleged that Dr. Scheiner had failed to provide Oxford with requested copies of the medical records of Oxford's members who Scheiner had treated, in violation of paragraph 5 of the agreement.

During the discovery phase of the arbitration, Oxford served Scheiner with document production requests, seeking 25 randomly-selected patient records from April 1997 onwards. Scheiner objected, citing the patient confidentiality requirements of the Federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). Scheiner then instituted an Article 75 proceeding to stay the arbitration, on the grounds that the arbitration was time-barred and that no arbitrable dispute existed under the agreement. Scheiner argued, *inter alia*, that Oxford's request for his patients' records, showed that Oxford had no reason to believe that he was upcoding, and instead was merely engaged in a fishing expedition.

By a decision and order dated September 19, 2003, the Hon. Herman Cahn of this court dismissed Scheiner's petition. Judge Cahn concluded that the arbitration was not-time barred, and that Oxford's request for Scheiner's records to ascertain and state the precise amount of damages did not mean that no arbitrable dispute existed. Justice Cahn reasoned that Oxford's contractual right to review Scheiner's records, "is obviously designed to enable it to ascertain the

types of treatment dispensed, the actual value of such treatment, and concomitantly, the margin of overpayment received by petitioner in respect of such treatment. In other words, in order for Oxford to assess its damages, it presumably needs to review the records maintained by petitioner, but wrongfully withheld by him in derogation of Paragraph 11 of the Agreement. This is clearly a dispute arising out of the Agreement, which by the Agreement's own terms is arbitrable."

Judge Cahn further found that "an arbitrator would be empowered to compel petitioner to allow Oxford access to the records under the Agreement. The extent of remedies available to an arbitrator is not limited to monetary damages, as an arbitrator can award any relief appropriate to alleviate the wrong suffered by an aggrieved party."

Meanwhile, on June 26, 2003, Scheiner's counsel sent a Letter Brief to the American Arbitration Association, objecting to Oxford's discovery demands for patient records. On July 21, 2003, Arbitrator David H. Pfeffer issued a Preliminary Hearing Order No. 2, directing Scheiner to produce the patient records by July 25, 2003. The Arbitrator overruled Scheiner's public policy objections, "in light of the agreement to arbitrate and the provisions of the American Arbitration Association Rule 23 authorizing the Arbitrator to direct production of documents." The Arbitrator also overruled Scheiner's objections based on HIPAA "on the basis *inter alia* of 45 C.F.R. §164.501," but provided that in accordance with HIPAA regulations he would sign a subpoena directing production of the documents and would require that the documents be produced pursuant to a protective order.

On July 22, 2003, Arbitrator Pfeffer signed a Subpoena Duces Tecum for Scheiner to produce the documents by July 25, 2003; on July 23, 2003, the arbitrator signed a Protective Order to ensure the confidentiality of those documents. On September 12, 2003, Arbitrator

[* 4]

Pfeffer issued Preliminary Hearing Order No. 3, after having a telephone hearing with Oxford's counsel, Ms. Savage, Scheiner's counsel, Mr. Supino, and the AAA case manager. Stating that Dr. Scheiner was refusing to comply with the arbitrator's order and subpoena, the arbitrator gave Oxford time to decide how it wished to proceed, and leave, at its option, to seek judicial enforcement of the subpoena. By letter dated September 29, 2003, Scheiner's counsel, Mr. Supino, notified Arbitrator Pfeffer that he had been informed by his client that "he is prepared to produce the documents sought by your subpoena," but explained that Dr. Scheiner needed about three weeks to complete the copying. Counsel also requested a one-month adjournment of the arbitration.

In response to Mr. Supino's September 29, 2003 letter, Arbitrator Pfeffer held a telephone hearing on October 1, 2003 and issued Preliminary Hearing Order No. 4. The order explains that although the AAA notified all parties, only counsel for Oxford participated in the telephone hearing. The arbitrator's order directed Dr. Scheiner "to permit copying of his records at his office during the week of October 6, 2003," and adjourned the arbitration hearing to December.

On October 10, 2003, Arbitrator Pfeffer sent a letter to counsel, following-up on a telephone conference that afternoon. The arbitrator explained that the AAA case administrator advised that Mr. Supino was notified of the telephone conference, and "indicated that he refused to participate." Oxford had requested the conference because Dr. Scheiner had failed to produce the documents, and had not permitted the copying at his office. The arbitrator requested that both counsel, submit written statements suggesting possible alternatives of how to handle this breach of his order in further proceedings in the arbitration.

On October 19, 2003, Mr. Supino wrote to the AAA requesting that Arbitrator Pfeffer be removed from the case, on the grounds that he was biased against Dr. Scheiner. Specifically, Mr. Supino objected to the arbitrator's decision not to dismiss the case, his discovery rulings in Oxford's favor, and his holding an "ex parte phone conference with the undersigned absent."

In a letter dated November 24, 2003, Arbitrator Pfeffer memorialized a preliminary telephone hearing held that day, with both parties represented by counsel. The letter states that the parties have "stipulated that for purposes of this proceeding, doctors Schaefer and Scheiner shall be deemed to have treated the same patient population." Dr. Schaefer was Dr. Scheiner's partner in the Staten Island office, and was previously found liable to Oxford for systematic upcoding and overbilling, in an arbitration proceeding concluded in 2002. The arbitrator further states that he "also made clear that in light of his refusal to comply with the Arbitrator's order and subpoena, Dr. Scheiner and any of his witnesses will be precluded from testifying at the hearing as to any matters that can reasonably be deemed to be within the documents Dr. Scheiner was ordered to produce to Oxford in this proceeding."

At the arbitration hearing held on December 3, 2003, Dr. Bruce Levin, a bio-statistics expert, and Dr. Sandy Cohen, one of Oxford's internists, testified on Oxford's behalf, referencing the medical records of 18 of Dr. Schaefer's patients. Dr. Schaefer's records included an unspecified number of patient charts indicating Dr. Scheiner as the treating physician on some visits. Tina Overby of NJPR (formerly North Jersey Physicians' Review) also testified for Oxford, explaining that she had a bachelor's degree in business administration and 25 years of experience coding medical records, and had been a certified coding specialist since 1994. Dr. Scheiner testified on his own behalf, and produced an expert witness, Dr. Grimson.

On March 18, 2004, Arbitrator Pfeffer issued an award in Oxford's favor, accepting the conclusion of Oxford's experts that the statistical evidence supported the claim that Dr. Scheiner systematically upcoded, and had overbilled Oxford between \$79,110 to \$107,571, at a 95% confidence level. Emphasizing that the arbitration "procedure was severely impeded" by Dr. Scheiner's refusal to allow inspection of patient records, and to abide by his obligations under the contract and the subpoena, Arbitrator Pfeffer explained that he "had to rely on other evidence of record in reaching my decision." The arbitrator also noted that the evidence he considered "included an express stipulation between counsel for the parties that Respondent and his medical office partner, Dr. Schaefer, shall be deemed to have treated the same patient population."

The award recounts the testimony of Dr. Cohen, which the arbitrator credited "very highly." Dr. Cohen testified that the records obtained from Dr. Schaefer indicated that Dr. Scheiner ran a typical internist's practice, which should have a bell curve distribution for coding with mostly 2's and 3's, with one end of the bell curve being mostly 1's, and the other end mostly 4's and 5's, where 1 represented the least complicated and least expensive treatments. Dr. Cohen opined that the evidence showed mostly coding for 4's and 5's by Dr. Scheiner, which was "extremely unusual and clinically implausible in a typical internist's practice," both in the case of new and established patients.

The award also relies on Dr. Levin's testimony as to the statistical differences between Scheiner's coding pattern and that of other internists. The award explains that Dr. Levin testified that "from a statistical standpoint, the only reasonable and statistically sound explanation was that Respondent's coding practice involved upcoding, and were not caused by chance nor extraordinary differences in patient population." Specifically, Dr. Levin testified that in 1999,

Dr. Scheiner used a 5 code 99% of the time, while Oxford's other internists coded 5's only 28% of the time. The award also states that the arbitrator considered the testimony of Scheiner's expert, Dr. Grimson, disputing Dr. Levin's methodology and conclusion, but did not find it persuasive.

The award also recounts Tina Overby's testimony that she regularly reviews doctors' treatment notes on patient charts, and determines the appropriate billing codes pursuant to the Current Procedural Terminology Manual published by the American Medical Association. Overby testified that she had examined Dr. Schaefer's records and selected the 18 patient charts in use at the hearing, and found that the records showed widespread upcoding by Dr. Schaefer plus upcoding in patient visits where Dr. Scheiner had been the treating physician.

Based on this "evidence taken in the aggregate and in the absence of more direct evidence that should have been produced from Respondent's records," Arbitrator Pfeffer concluded that he was "satisfied that the proof establishes that Respondent did 'upcode', i.e. that he systematically and regularly increased the level of service of CPD codes beyond what was warranted by particular patient visits." The arbitrator then determined that Oxford was entitled to overpayment charges of \$79,110, reasoning that "[u]nder the circumstances, in an effort to be as fair as possible to Respondent, I am awarding \$79,110 to Claimant, the low end of the 99% confidence level, because that is also consistent with Dr. Levin's confirmatory use of the HCFA [Health Care Financial Agency] benchmark comparison." Arbitrator Pfeffer also awarded Oxford the costs and expenses of the arbitration, including partial attorney's fees.¹ On May 4,

¹The total award of \$101,498.60, consists of \$79,110.00 in overcharges, \$12,000 in attorneys' fees, \$10,228.12 in administrative fees, and \$160.48 in copying service expenses.

2004, the arbitrator modified the award for the sole purpose of correcting the caption, which had incorrectly listed petitioner as Claimant Health Plans (NY), Inc.

Oxford commenced this Article 75 proceeding on June 9, 2004, seeking to confirm the arbitration award. In response, Dr. Scheiner cross-petitioned to vacate the award.

Discussion

Judicial review under CPLR Article 75 requires that an arbitration award accord with due process and be supported by adequate evidence in the record. Hegarty v Board of Education of the City of New York, 5 AD3d 771, 772 (2nd Dept 2004). The scope of review of an arbitration award is much narrower than that for an order of the Supreme Court, or for an agency determination in the administrative process. See Siegel, New York Practice, § 602, p. 861. The court may not vacate an arbitration award based on errors of law and fact committed by the arbitrator. See Matter of Professional Staff Congress/City University of New York v. Board of Higher Education of the City of New York, 39 NY2d 319, 323 (1976). A party seeking vacatur must show that an arbitration award is irrational, violates public policy, or exceeds a specifically enumerated limitation on an arbitrator's power. See Local 375 v. New York City Health and Hospitals Corp., 257 AD2d 530, 532 (1st Dept 1999); Cady v Aetna Life & Casualty Co., 113 Misc2d 1080 (Sup Ct, Broome Co 1982), aff'd as mod on other gds, 96 AD2d 967 (3rd Dept 1983), aff'd, 61 NY2d 594 (1984).

The grounds for vacating an arbitrator's award are enumerated in CPLR 7511. As pertinent, the statute reads:

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

[* 9]

(ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made

In support of his cross-petition to vacate the arbitration award, Dr. Scheiner contends that the award resulted from misconduct on the arbitrator's part. Dr. Scheiner argues that the arbitrator erred in allowing Dr. Schaefer's records to be admitted as evidence, and in failing to credit his testimony that he treated a high number of AIDS and HIV positive patients in his Manhattan office, but not the Staten Island office where Dr. Schaefer worked, which was not evident from Dr. Schaefer's records.

Dr. Scheiner's objections as to use of Dr. Schaefer's records are baseless. Pursuant to the parties' stipulation, Dr. Scheiner's counsel expressly agreed that "for the purposes of this proceeding, doctors Schaefer and Scheiner shall be deemed to have treated the same patient population." That stipulation was necessitated by Dr. Scheiner's refusal to produce his own records, despite Judge Cahn's order, and the arbitrator's order and subpoena. Scheiner then gave his express consent to the use of Dr. Schaefer's records, in a proceeding where the rules of evidence are usually relaxed. See Professional Staff Congress/City University of New York v. Board of Higher Education of the City of New York, *supra* at 322 (in arbitration, substantive and evidentiary rules applicable in courts of law are waived by the parties); Glen Rauch Securities, Inc. v. Weinraub, 2 AD3d 301 (1st Dept 2003) (courts afford wide discretion to arbitrators in procedural matters); Ghitelman v Ghitelman, 160 AD2d 528 (1st Dept 1990) (methods that arbitrators adopt to obtain evidence and their utilization of evidence produced are matters for their discretion). Likewise, Dr. Scheiner's conduct and the parties' stipulation that Dr. Scheiner's patient population is the same as Dr. Schaefer's, bar Scheiner from presently

objecting to the arbitrator's decision to disregard his testimony about the number of AIDS and HIV positive patients seen in his Manhattan office. See Glen Rauch Securities, Inc. v Weinraub, supra (arbitrator properly precluded the testimony of a witness and the introduction of evidence related to documents that respondent had refused to disclose).

Dr. Scheiner further contends that Oxford's witness, Tina Overby, was not competent to review patient charts, and to assess the appropriateness of the medical treatment that he or Dr. Schaefer, allegedly provided to their patients. This contention is not persuasive. Overby specifically testified that she was neither questioning nor second guessing whether Dr. Scheiner or Dr. Schaefer had rendered or should have rendered, any specific treatment to their patients. Relying on her training as a certified coding specialist and her 25 years of experience, Overby explained that she merely reviewed the patient charts to ascertain whether the stated treatment allegedly provided corresponded with the CPT codes listed on the bills that Dr. Scheiner had submitted to Oxford for payment.

Dr. Scheiner points out that Dr. Cohen, who was Oxford's expert, testified that "a non-physician cannot make a clinical judgment on whether a code should be changed from e.g. 4 to 3; a non-physician should not have that ability to make these clinical determinations." However, as Dr. Scheiner himself notes, Dr. Levin also testified that he had assisted Overby in choosing the patient charts in evidence during the arbitration hearing, and that they "were drawn and selected under his intense supervision." Thus, as Overby simply reviewed whether the treatment corresponded to the code and did not challenge Scheiner's treatment, and based upon the totality of the evidence produced at the hearing, the court cannot conclude that the arbitrator's decision to allow Overby's testimony or permit the use of the patient charts selected by Overby, was "irrational" or in "violation of public policy," or that the arbitrator "exceeded his power or so

imperfectly executed it" as to warrant the court's vacatur. See NY CPLR 7511 (b); see also Sweeney v. Herman Management, Inc., 85 AD2d 34, 38 (1st Dept 1982) ("Unless the award is completely irrational, the arbitrator is free to fashion an award without judicial interference."); Temporary Commission of Investigation v. French, 68 AD2d 681, 690 (1st Dept 1979) (even where arbitrators make errors in fact or law, absent fraud, misconduct, or a completely irrational award, there is no ground to disturb the award); Colletti v Mesh, 23 AD2d 245, 248 (1st Dep.), aff'd 17 NY2d 460 (1965) (arbitration awards are not reviewable by a court for errors of law or fact).

Dr. Scheiner further contends that the arbitrator improperly relied on the testimony of Oxford's experts, because his own expert had challenged their allegedly flawed methodologies used to determine upcoding. Once again it must be emphasized that the use of such methodologies was necessitated by Sheiner's refusal to produce his own records. Under these circumstances, Dr. Scheiner has not alleged any fraud, and has not established misconduct, or irrationality of sufficient nature as would permit any vacatur of the award on such grounds. See NY CPLR 7511(b); see also Sweeney v. Herman Management, Inc., supra; Temporary Commission of Investigation v. French, supra; Colletti v. Mesh, supra. Moreover, the weight that the arbitrator chose to accord to the competing experts' opinions and methodologies is not a matter for the court's review. See Professional Staff Congress/City University of New York v. Board of Higher Education of the City of New York, supra at 323 (arbitrator's resolution of questions of substantive fact not judicially reviewable).

Dr. Scheiner also argues that the arbitrator's acceptance of Dr. Levin's \$79,000 overpayment estimate, with the statement that it compared well with an HCFA calculation, constituted misconduct, as HCFA calculations are not ordinarily accepted into evidence. Again,

[* 12]

this objection unavailing, in light of Judge Cahn's specific determination that Oxford had a contractual right to review Scheiner records to assess its damages, and Scheiner's repeated refusal to produce those records. Moreover, the HCFA calculation was neither the primary nor the sole rationale underlying the arbitrator's acceptance of the conclusions offered by Oxford's experts. See e.g. Curley v. State Farm Insurance Co., 269 AD2d 240, 242 (1st Dept 2000) (where arbitrator relied on medical opinions by two other radiologists, one independent of respondent, and an orthopedist, petitioner could not challenge the interpretation of his own medical expert's conclusions); Colletti v. Mesh, 23 AD2d 245, supra (court may not inquire into the reasoning or process by which an arbitrator arrived at award).

Finally, Dr. Scheiner asserts that, prior to the commencement of the arbitration proceeding, Oxford had no evidence that he was upcoding, and that Oxford's demands for the production of his records, and eventually, for arbitration, were either a fishing expedition or an unlawful attempt to punish him for his prior testimony in favor of Dr. Schaefer in Oxford's arbitration against Schaefer. Dr. Scheiner posits, too, that the confidentiality requirements of the HIPAA law preclude Oxford's demand for his patient records.

Dr. Scheiner previously raised these identical objections in his petition to stay the arbitration, and Judge Cahn explicitly rejected those objections when he dismissed Scheiner's petition. In view of the clear and unambiguous language in paragraph 5 of the parties' agreement, that "Oxford shall have the right to inspect at all reasonable times any accounting, administrative or medical records maintained by the [respondent]," Dr. Scheiner's refusal to produce the patient charts is unsupportable. As already held by Judge Cahn, the parties' contract invalidates Dr. Scheiner's contentions that the HIPAA law precluded Oxford's request for patient records. Accord Westbury Medical Care, P.C. v. Lumberman's Mutual Insurance Co., 5

Misc3d 838 (Dist Ct, Nassau Co 2004)(HIPAA did not preclude health service provider, seeking to recover for services allegedly rendered to insured as a result of motor vehicle accident, from obtaining discovery of insurer's no-fault file concerning issue of concurrent care); People v Bhatt, 160 Misc2d 973 (Sup Ct, Queens Co 1994) (public policy and statutory framework underlying Medicare program required that Medicare provider's records be excepted from physician-patient privilege); LoPucki, Twerski and Cohen's Second Revolution: A Systems/Strategic Perspective, 94 Nw.U.L. Rev. 55, 69-70 (Fall 1999) (medical care "[p]roviders are already evaluated on the basis of their comparative statistics - by their employers, their hospitals, their managed care plans, their large corporate purchasers and their insurers."). Lastly, Dr. Scheiner's assertion that Oxford could not review randomly select records of its insured, absent prior and independent proof that he was actually engaged in upcoding, is not persuasive in light of the broad language in the agreement giving Oxford the right to inspect "at all reasonable times" medical records maintained by Dr. Scheiner.

On this record, therefore, Dr. Scheiner's attempt to vacate the arbitrator's award must fail, and Oxford's petition to confirm the award must be granted.

Accordingly, it is hereby

ORDERED that the petition is granted and the award rendered in favor of petitioner Oxford Health Plans (NY), Inc. and against respondent Howard L Scheiner, M.D., is confirmed; and it is further

ORDERED that the cross petition is denied and dismissed; and it is further

ORDERED AND ADJUDGED that petitioner Oxford Health Plans (NY), Inc., having an address at 1133 Avenue of the Americas, New York, NY 10036, have judgment and recover against respondent Howard L. Scheiner, M.D., having an address at 7 Petrus Avenue, Staten

Island, NY 10017, in the amount of \$101,498.60, plus interest from March 18, 2004, as computed by the Clerk in the amount of \$ 11,513.⁰⁰, together with costs and disbursements in the amount of \$ 610.⁰⁰, as taxed by the Clerk, for the total ~~X~~ amount of \$ 113,622.⁴⁰, and that the petitioner have execution therefor.

This constitutes the decision, order and judgment of this court.

DATED: January 12, 2005

ENTER:

[Signature]
J.S.C.

FILED [Signature]
JUN 21 2005
NEW YORK
COUNTY CLERK'S OFFICE
CLERK