

Ostro v Sheehan

2011 NY Slip Op 31193(U)

April 22, 2011

Sup Ct, NY County

Docket Number: 116624/10

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT:

PART 15

Index Number : 116624/2010

OSTRO, ELLIOTT, DMD

vs

SHEEHAN, JAMES G.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2,3

7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED

APR 26 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/22/11



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
ELLIOTT OSTRO, DMD,

Index No.
116624/10

Petitioner,

**DECISION
and ORDER**

-against-

JAMES G. SHEEHAN, New York State Medicaid
Inspector General,

Mot. Seq.
001

Respondent.

FILED

-----X
HON. EILEEN A. RAKOWER:

APR 26 2011

Elliott Ostro ("Petitioner") practices dental surgery at 30 Central Park South in New York County. He brings the instant petition pursuant to Article 78 of the CPLR seeking an order annulling the August 27, 2010 determination of the State of New York Office of Medicaid Inspector General ("OMIG"), which denied Petitioner enrollment as a Medicaid provider. Petitioner states that he is a Doctor of Dental Medicine licensed to practice dentistry in New York since 2001, and provides copies of his license and certification. Petitioner further states that he has also been licensed to practice dentistry in the State of Illinois since 1986, but stopped practicing dentistry there in 2004.

Petitioner states that, while practicing in Illinois, various charges were brought against him that resulted in action by the Illinois Division of Professional Regulation ("IDPR"). In three such cases, Petitioner entered into consent orders as follows:

- On July 13, 1995, Petitioner entered into a consent order in response to allegations that he "improperly retained \$1078 that Principal Financial Group sent to him in payment of an insurance claim; ... billed [a patient's] insurance company for treating a dislocated jaw when [she] never received the treatment; ... told [another] patient ... before performing a procedure, that the charges for this procedure were less than what [Petitioner] actually billed to [the patient's]

insurance company.” In the consent order, Petitioner waived “the right to contest any charges brought,” and agreed to an indefinite suspension of his license until he took five hours of continuing professional education; and paid a fine of \$2,000.

- In mid-March 1999, Petitioner entered into another consent order pertaining to allegations that he had improperly billed for services that were not actually rendered. In the consent order, Petitioner “acknowledge[d] that billing errors did occur and that some of the operative reports and other records generated by him were inconsistent with services actually rendered.” Pursuant to the consent order, Petitioner agreed to have his licenses placed on probation for one year; to attend an ethics course at Loyola University Chicago Center for Ethics with no less than 12 hours of instruction; submit a “complete written overview of his recordkeeping system;” and pay a \$28,000 fine.
- On February 27, 2004, Petitioner entered into another consent order, this time concerning allegations that he “failed to deliver patient records to [IDPR] upon receipt of an executed patient release directing him to do so.” Petitioner admitted the allegations and agreed to a reprimand on his dental license.

On July 30, 2004, the Illinois Department of Financial and Professional Regulation (“IDFPR”), the successor to the IDPR issued a fourth complaint against Petitioner alleging numerous violations and instances of misconduct. These allegations were tried before an administrative law judge, whose findings and conclusions were subsequently reviewed by the Circuit Court of Cook County. Ultimately, Petitioner was found to have (1) engaged in “professional incompetence as manifested by poor standards of care” by improperly leaving bone fragments in a patient’s mouth after performing an extraction of her teeth; and (2) engaged in “unprofessional conduct and gross misconduct” by having his assistant hold another patient down in the dental chair and performed an extraction despite the patient’s asking for the treatment to stop. Based on the sustained charges, the IDFPR suspended Petitioner’s license for two years and fined him \$40,000. The IDFPR explained that the severity of the sanctions imposed was due in part to his history of violations.

[* 4]

Petitioner notes that, notwithstanding the first two consent orders, he received his license to practice dentistry in New York by the New York State Department of Education ("DOE"). Petitioner further notes - and Respondent does not dispute - that Petitioner fully and timely disclosed all subsequent charges to the DOE.

Petitioner applied for enrollment to the Medicaid program on March 19, 2010. By letter dated May 18, 2010, OMIG denied Petitioner's application. OMIG explained that its determination

is based on 18 NYCRR 504.5(a) (11), (12) and (13) and is due to your prior conduct between 1991 and 2004 as a practicing dentist in Illinois which included inappropriate patient care, and resulted in disciplinary actions, fines and suspension of your Illinois license. According to the [IDPR], these actions included leaving sharp pieces of bone in a patient's mouth after full mouth extraction, failure to treat a patient with dignity, incomplete records and improper billings.

Petitioner, through counsel, appealed the denial by letter dated June 22, 2010. In the letter, Petitioner noted that his disciplinary history "was not at all a concern to the New York State Licensing Board as they considered and reviewed the absurd claims made in Illinois." By letter dated August 27, 2010, OMIG upheld its initial determination, finding that "[t]he reconsideration process has disclosed neither mistakes of fact nor contradiction of the findings of the original denial." This petition ensued.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary

and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Pursuant to Social Services Law §336-a, the New York State Department of Health (“DOH”) is the single state agency responsible for the administration of Medicaid in the State of New York. The State regulations governing Medicaid are contained in Title 18 of the NYCRR. In order to submit claims for and receive Medicaid payments for medical services, a provider must first be enrolled in the Medicaid program (18 NYCRR §504.1(b)(1)). 18 NYCRR §504.1(a) provides that the Department of Health (“DOH”) will “contract with only those persons who can demonstrate that they are qualified to provide medical care, services or supplies and who can provide reasonable assurance that public funds will be properly utilized.” The DOH may deny an applicant provider enrollment in the Medicaid program “if it is in the best interest of the medical assistance program to do so” (18 NYCRR §504.4(e)(2)). OMIG is a division within the DOH which was created pursuant to Public Health Law §31. OMIG was established, *inter alia*,

to pursue civil and administrative enforcement actions against any individual or entity that engages in fraud, abuse, or illegal or improper acts or unacceptable practices perpetrated within the medical assistance program, including ... (d) exclu[ding] providers, vendors and contractors from participation in the program (Public Health Law §32(6)).

18 NYCRR §504.5 provides that, in assessing applicants for enrollment in the Medicaid program, OMIG shall consider, *inter alia*, the following factors:

(2) any previous or current suspension, exclusion or involuntary withdrawal from participation in the medical assistance program or the Medicaid program of any other state of the United States or from participation in any other governmental or private medical insurance program, including, but not limited to, Medicare, Workers’ Compensation, Physically Handicapped Children’s Program and Rehabilitations Services;

(11) a prior finding by a licensing, certifying or professional standards board or agency of the violation of the standards or conditions relating to licensure or certification or as to the quality of services provided;

(12) any prior pattern or practices in furnishing medical care, services or supplies and any prior conduct under any private or publicly funded program or policy of insurance;

(13) any other factor having a direct bearing on the applicant's ability to provide high-quality medical care, services or supplies to recipients of medical assistance benefits, or to be fiscally responsible to the program for care, services or supplies to be furnished under the program including actions by persons affiliated with the applicant.

It is well settled that the relationship between Medicaid and providers is contractual in nature, and that there is no protected interest in Medicaid enrollment; on the contrary, enrollment with the Medicaid program is a privilege which can be revoked or denied by OMIG in the exercise of its discretion (*see Schaubman v. Blum*, 49 N.Y.2d 375, 380 [1980]; *L&T Drug Co. v. Dowling*, 224 A.D.2d 193, 194 [1st Dept. 1996]). And that discretion is considerable: courts have held that OMIG has "a wide, virtually unlimited discretion" in denying a provider-applicant an enrollment in the Medicaid program (*Karanja v. Perales*, 163 A.D.2d 264, 268 [1st Dept. 1990], *quoting Bezar v. N.Y.S. Dep't of Social Servs.*, 151 A.D.2d 44, 49 [3rd Dept. 1989]).

Here, the court finds that OMIG's decision to deny Petitioner's application for enrollment as a Medicaid provider was rationally based upon Petitioner's prior disciplinary history in Illinois, which involved uncontested charges that he improperly retained money to which he was not entitled; billed for services never performed; and a finding, after a hearing subsequently sustained on judicial review, that Petitioner had engaged in "unprofessional conduct and gross misconduct". Under the foregoing circumstances, OMIG's denial was a valid exercise of its broad discretion "in administering the Medicaid program to adequately protect the public interest in assuring that funds are not dispensed to untrustworthy providers" (*L&T Drug Co.* at 194).

Mihailescu v. Sheehan, (2009 NY Slip Op 29277 [Sup. Ct. N.Y. Co. 2009]), cited by Petitioner in support of his contention that OMIG's decision was arbitrary and capricious, does not alter the court's conclusion. In *Mihailescu*, the petitioner (a physician) was charged by the State Office of Professional Medical Conduct ("OPMC"), another division within the DOH, with "committing 'boundary violations' involving two patients, including 'inappropriate sexual contact' with

one of them” (*id.* at *2). The petitioner entered into a consent agreement whereby she waived her right to contest the charges, and agreed, among other sanctions, that, for a period of 60 months after her license was reactivated, she would work “only in a supervised setting, such as a facility licensed by New York State, where close practice oversight is available on a daily basis and where quality assurance and risk management protocols are in effect” (*id.*).

Justice Figueroa noted that, by denying petitioner reinstatement into the Medicaid program, OMIG “effectively closed” “a prime avenue of employment contemplated in the [consent agreement] - a ‘facility licensed by New York State,’” essentially barring the petitioner from working as a physician (*id.* at 3). Justice Figueroa found that OMIG’s decision to deny reinstatement was arbitrary and capricious, since DOH (through OMIG) essentially contradicted its own earlier determination (through OPMC), which implicitly acknowledged that the petitioner could safely serve patients (including Medicaid patients) under the conditions of the consent agreement (*id.* at *6).

No such contradictions are present here. Whereas the petitioner in *Mihailescu* was found to have engaged in conduct which posed a danger to the safety of her patients, and was subsequently permitted by the DOH to work under conditions where such risks would be minimized, Petitioner herein was found, among other things, to have engaged in inappropriate billing practices. While the DOE might be satisfied that nothing in Petitioner’s past renders him unsuitable for the practice of dentistry in general, it does not follow that OMIG’s conclusion that contracting with Petitioner is not in the best interest of the State Medicaid program is irrational.

Wherefore, it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

FILED

Dated: April 22, 2011

APR 26 2011



EILEEN A. RAKOWER, J.S.C.

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