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IN THE COURT OF APPEALS OF IOWA

EUGENE L. SHAY, D.C., and JEFFREY A. SHAY, D.C., jointly d/b/a SHAY CHIROPRACTIC ARTS,	)	
Petitioners-Appellants,	)	Filed September 25, 1984
vs.	)	
DEPARTMENT OF HUMAN SERVICES, f/k/a DEPARTMENT OF SOCIAL SERVICES,	)	4-308 84-139
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Muscatine County - Jack L. Burns, Judge.

Petitioners appeal the district court's decision to affirm the respondent agency's withholding of Medicaid payments as a sanction for failing to comply with record keeping requirements. REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH OUR DIRECTIONS.

Walter Conlon of Metcalf, Conlon & Siering, Muscatine, Iowa, for petitioners-appellants.

Thomas J. Miller, Attorney General of Iowa, and Matthew W. Williams, Assistant Attorney General, for respondent-appellee.

Considered by Oxberger, C.J., Schlegel and Hayden, JJ.

Petitioners, Eugene Shay, D.C., and Jeffrey Shay, D.C., appeal the district court's decision to affirm the respondent agency's withholding of Medicaid payments as a sanction for failing to comply with record keeping requirements. We reverse in part and remand to the Department of Human Services (D.H.S.) for further proceedings consistent with our directions.

I. Background. The issues of this case revolve around whether the Shays kept adequate records of the Medicaid services for which they sought reimbursement. We begin this division by setting forth the record keeping guidelines issued by the D.H.S. We then describe the Shays' recordkeeping methods. Finally, we set forth the action of the D.H.S. in auditing the Shays' records.

1. Agency Record Keeping Guidelines. At all times relevant to this case the record keeping standards for providers of Medicaid services were set out in an administrative rule, which has the force and effect of law. See Davenport Community School District v. Civil Rights Commission, 277 N.W.2d 907, 909 (Iowa 1979).

The rule states:

> Maintenance of clinical and fiscal records by provider of service. Providers of service shall maintain clinical and fiscal records in support of services for which a charge is made to the program and shall make such records available to duly authorized representatives of the department on request. The fiscal records shall support each item of service for which a charge is made to the program and the clinical records shall specify the procedure or procedures performed, the dates of service, the medications or other supplies or services prescribed or provided to the recipient together with information concerning progress of treatment. Such clinical and fiscal records shall be retained for a minimum of five years. After five years the records may be destroyed.

498 Iowa Admin. Code 79.3.

This rule requires the provider to maintain two kinds of records: fiscal and clinical. The fiscal records must "support each item of service for which a charge

is made." We construe this requirement to mean that the provider's business records must show that the provider actually performed the services. In addition, the clinical records must contain four specific items detailing the nature of the service rendered: (1) the specific procedure performed, (2) the date the service was performed, (3) the medication and supplies prescribed, and (4) information concerning progress of the treatment. We note that while rule 79.3 is fairly specific about the content of the required records, it is silent about the form of those records.

The D.H.S. never provided the Shays with a copy of rule 79.3. Instead, the Shays' notice of record keeping requirements was limited to two items. The first item was a "provider certification" clause which appears above the space for endorsement on Medicaid reimbursement checks. The clause states:

> I hereby agree to keep such records [as] are necessary to disclose fully the extent of services provided to individuals under the Medical Assistance Program and to furnish information regarding any payments claimed for providing such services as the Department of Social Services or the Department of Health and Human Services may request for a period of five years from the date service was provided.

This clause does require the provider to maintain records and furnish those records when requested. However, the clause does not contain any requirements relating to the form or the content of those records.

The second item of notice the Shays received from the D.H.S. was a providers manual. The only provision in that manual regarding record keeping requirements stated, "Federal law and state regulations require that providers maintain records necessary to fully disclose the extent of services, care and supplies furnished to Medicare recipients." This provision is more specific than the "provider certification" clause because it refers to "the extent of services, care and supplies" furnished. However, this provision is not as specific as rule 79.3. It does not state that the dates of treatment or information concerning progress of treatment are required to be kept as part of the records. Nor does it state that both fiscal and clinical records must be kept.

In short, the two items of notice regarding record keeping which the Shays received from the D.H.S. did not specifically list all the requirements found in rule 79.3.

2. The Shays' Records. As chiropractors performing services chargeable to Medicaid, the Shays are subject to regulations other than rule 79.3. 498 Iowa Admin. Code 79.3.

Under Medicaid, chiropractors can only be reimbursed for the most traditional of chiropractic services: adjustments of spinal subluxation. Except in the cases of young children and pregnant women, such adjustments must be supported by an x-ray, which may not be more than one year old. Thus, to maintain proper records, the Shays were obligated to keep the x-rays of all Medicaid patients for five years.

The Shays' record keeping system was not sophisticated. However, it apparently was adequate for their needs. While the records they kept did not satisfy the requirements of rule 79.3, the Shays did try to keep the records they believed were necessary for compliance with Medicaid regulations.

The records for the Shays' Medicaid patients consisted of four items: a fiscal record card, a patient history sheet, a radiology patient form, and a notation in the doctor's daybook. The fiscal record for each Medicaid patient contained a mark "OV" indicating the doctor had manipulated the patient's spine, the date of the treatment, and an entry showing the date that the required x-ray had been taken. The patient history sheets were used to record the diagnosis and the case history. The radiology patient form was used to record observations made from the x-rays. The daybook notations were written in a special colored pencil for Medicaid patients, and set forth the particular procedure peformed. In some instances the notation also included observations about the patient's progress. The use of colored pencil and the recording of the particular procedure performed were done only for Medicaid cases. Private insurance companies did not require such specific records.

The multiplicity of the Shays' records makes them somewhat difficult to audit. Nonetheless, when viewed together, the records showed the specific procedure performed, the date of the procedure, and the existence of x-rays which would show the need for such procedures.

Two other aspects of the Shays' records need mentioning. First, the records used certain abbreviations devised by the Shays as a code. In particular, the Shays used the abbreviation "O.V." Testimony at the administrative hearing established that this abbreviation referred exclusively to spinal manipulation. Other services performed were designated separately. The day books also contained simple coded entries to indicate the specific procedures performed and the costs of those procedures.

Second, the case histories were recorded on sheets labeled "Ryodoruku Test." In fact, no such tests were given. The Shays were simply using the excess printed forms for recording the patients' case histories.

3. The Audit and Following Proceedings. In February, 1983, the D.H.S. began an audit of the Shays' past Medicaid claims. The two auditors examined the x-rays, the radiology report forms, the case histories, and the fiscal record card. From these, they determined that the Shays had kept the required x-rays and had fiscal records sufficient to meet the requirements of rule 79.3. 498 Iowa Admin. Code 79.3. However, they also decided that the Shays either had no clinical records or insufficient clinical records to meet the requirements of rule 79.3. Our record is not clear, but it appears the auditors refused to examine the daybook entries, even though the Shays asked them to do so.

After the audit, the D.H.S. notified the Shays that it was disallowing reimbursement claims of $3,368.63 because of failure to keep adequate records. The sum of $3,368.63 was determined by totalling all claims which the D.H.S. had decided were not supported by adequate records. The agency's notice, however, did not list actual failure to provide services as a ground for disallowing the claims.

The Shays appealed the respondent agency's decision, and an administrative hearing was held. At the hearing, the Shays argued that they should only be held responsible for keeping records that complied with the providers manual which was furnished to them by the agency. The Shays also argued that the records which they did keep, when read together, substantially complied with the provisions of rule 79.3. Finally, the Shays argued that the penalty imposed by the agency was arbitrary and capricious.

The hearing officer upheld the D.H.S., ruling that the Shays' records had to comply with rule 79.3 and finding that the Shays' records were not in such compliance. The hearing officer also concluded that the Shays' use of code in keeping their records made those records impossible to audit. Because the Shays were not in compliance with rule 79.3, the hearing officer upheld the sanction imposed. On judicial review, the district court affirmed the hearing officer's decision. The court's decision was based on its conclusion that the Shays' records did not even comply with the standards of the providers manual.

II. Violation of Record Keeping Requirements. We must initially decide whether the district court properly found the Shays to be in violation of the respondent agency's record keeping rule. 498 Iowa Admin. Code 79.3. Pursuant to Iowa Code section 17A.20 (1983), this court's duty in reviewing a decision of the district court is to correct errors of law made by the district court. Jackson County Public Hospital v. PERB, 280 N.W.2d 426, 429 (Iowa 1979). The district court, when exercising its powers of judicial review under section 17A.19, is itself functioning in an appellate capacity to correct the errors of law specified in section 17A.19(8). Id. In order to determine whether the district court correctly reviewed the agency decision, this court applies the standards of section 17A.19(8) to the agency action. If this court's conclusions are the same as the district court, affirmance is required; if not, reversal may be in order. Id. at 429-30.

The Shays' principal argument was that their records only needed to meet the standards set out in the providers manual that they received from the D.H.S. They argued it would be unjust to hold them to the standard of rule 79.3 when the D.H.S. never notified them of the rule's requirements. We reject this argument.

Rule 79.3 has the force and effect of law. See Davenport Community School District v. Civil Right Commission, 277 N.W.2d 907, 909 (Iowa 1979). In Drainage District No. 119 v. Incorporated City of Spencer, the supreme court held the appellant could not rely upon representations made by a Department of Transportation engineer when the engineer's statements had no statutory basis. 268 N.W.2d 493, 504 (Iowa 1978). The court reasoned that the appellant was "charged with knowledge of the law and could not ignore the plain meaning of that law." Id. We believe that the Shays were similarly charged with knowledge of rule 79.3 in this case. The providers manual stated "[f]ederal law and state regulations require" that proper records be maintained. (Emphasis added). That language was sufficient to put the Shays on notice that rule 79.3 existed. Once the Shays had notice, a simple phone call to the D.H.S. would have given the Shays actual knowledge of the requirements of rule 79.3. Their failure to take such action should not be excused.

It cannot be disputed that the Shays' records did not comply with rule 79.3. Those records contained no entries listing the required information about the progress of treatment. Therefore, the Shays violated rule 79.3 and are subject to sanctions under rule 79.2(2)(j). 498 Iowa Admin. Code 79.2(2)(j).

III. The Sanction Imposed. The hearing officer and district court both concluded the D.H.S. could withhold payment of $3,368.63 as a sanction for keeping inadequate records. That conclusion is erroneous. We find the sanction to be in violation of agency rule, and therefore, reverse the district court's decision affirming the sanction. See Iowa Code § 17A.19(8)(c) (1983).

"Withholding of payments" is defined in rule 79.2(1)(i) as "a reduction or adjustment of the amounts paid to a provider on pending and subsequently submitted bills for purposes of offsetting overpayments previously made to the provider." 498 Iowa Admin. Code 79.2(1)(i) (emphasis added). We believe the language of this rule requires a finding of overpayment before withholding can be used as a sanction. However, there has been no finding of overpayment in this case. Nor is there any specific evidence of overpayment. The sole ground for imposing sanctions was inadequate record keeping. Because there was no finding of any overpayments, we conclude the sanction imposed was in violation of rule 79.2(1)(i).

We also find the sanction imposed to be in violation of rule 79.2(4). 498 Iowa Admin. Code 79.2(4). Subsection (b) of rule 79.2(4) lists factors to be considered in determining sanctions to be imposed. The D.H.S. has not at any time shown how the sanction it imposed is supported by these factors. We, therefore, review each factor below.

(1) "Seriousness of the offense." Adequate records must be kept to insure the integrity of the Medicaid program. We do not doubt that a total failure to keep records would be a very serious offense. However, this is not a case of total failure to keep records. The Shays' records did not meet the requirements of rule 79.3 in two respects: (1) they did not list medications and supplies prescribed, and (2) they did not contain information about the progress of treatment. We find the first omission excusable because chiropractors are not allowed to bill Medicaid for such services. Therefore, the only real violation was failure to record information of progress of treatment. The Shays did meet other record keeping requirements which we believe were sufficient to establish that they performed the services for which they claimed reimbursement. We therefore find the Shays' offense to be relatively minor.

(2) "Extent of violations." The only violation shown is the relatively minor record keeping violation.

(3) "History of prior violations." There is no history of prior violations.

(4) "Prior imposition of sanctions." There were no prior sanctions.

(5) "Prior provision of provider education." The only relevant education given to the Shays by the D.H.S. was the provider manual. That manual was insufficient, by itself, to adequately inform the Shays of all the requirements of rule 79.3.

(6) "Provider willingness to obey program rules." The Shays' actions and expressions indicate a willingness to obey program rules.

(7) "Whether a lesser sanction will be sufficient to remedy the problem." Given the Shays' willingness to comply, we believe the lesser sanction of probation would be a sufficient remedy.

(8) "Actions taken or recommended by peer review groups or licensing boards." No such action was taken.

After reviewing these factors, we conclude they mandate a penalty of minor severity. We view the sanction imposed by the D.H.S.--complete disallowance of the Shays' claims--as a sanction more severe than called for by the circumstances. We therefore conclude the D.H.S. ignored rule 79.2(4) and in doing so violated that rule. Ignoring that rule also made the agency's action arbitrary and capricious.

> The terms "arbitary," and "capricious," when applied to test the propriety of agency action . . . mean that the action complained of was without regard to established rules or standards, or without consideration of the facts of the case.

Churchill Truck Lines, Inc. v. Transportation Regulation Board, 274 N.W.2d 295, 299-300 (Iowa 1979) (citations omitted).

We therefore reverse the portion of the district court's decision upholding the sanction imposed by the D.H.S.

Section 17A.19(8) of the Iowa Code gives us authority to "modify, or grant any other appropriate relief from the agency action, equitable or legal . . . ." We therefore remand this case to the D.H.S. with instructions that they place the Shays on probation for a period no longer than three months. The conditions of probation shall require the Shays to maintain records as directed by rule 79.3. In addition, the fiscal and clinical records must be maintained separately, and the clinical records shall be maintained in such a manner that all required information for each patient is maintained in one place.[1]

As we noted above, there has been no finding that the Shays did not provide the services which they claimed they provided. We authorize the D.H.S. to reopen its audit to determine whether the claimed services were provided. If they were not provided, the D.H.S. may withhold the appropriate amount as a sanction. We have read the transcript and find the personal codes used by the Shays to be consistent and relatively simple.

IV. Attorney Fees. The Shays have asked that they be awarded attorney fees incurred in the judicial review of this case. We conclude they are not entitled to such an award.

An individual seeking judicial review of a contested case may be entitled to an award of attorney fees if the individual prevails. 1983 Iowa Acts ch. 107, § 2(1). To be eligible, "[t]he party seeking relief must establish that the state's case was not supported by substantial evidence." Id. § 2(3). In this case there was substantial evidence that the Shays violated rule 79.3. 498 Iowa Admin. Code 79.3. Hence, the Shays are not entitled to attorney fees.

REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH OUR DIRECTIONS.

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[1] This condition does not mean that all clinical records of a patient must be kept in one form. Rather, the clinical records of an individual patient should be easily accessible without unnecessary cross-referencing to sources in which the clinical records of several individuals are kept.