

SOAH DOCKET NO. 529-13-1021

NATIONAL ORTHODONTIX
MANAGEMENT, LLC,
Petitioner

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BEFORE THE STATE OFFICE

v.

OF

TEXAS HEALTH AND HUMAN
SERVICES COMMISSION OFFICE
OF INSPECTOR GENERAL,
Respondent

ADMINISTRATIVE HEARINGS

**ORDER NO. 7
DENYING PARTY STATUS TO RELATOR**

On November 9, 2012, Respondent referred a hearing regarding a payment hold on Medicare payments made to Petitioner to the State Office of Administrative Hearings (SOAH), pursuant to Texas Government Code § 531.102(g)(3). On December 21, 2012, Respondent issued a Notice of Hearing regarding that referral.

On April 24, 2012, Dr. Christine Ellis, Relator, brought a *qui tam* action in Travis County District Court under Texas Human Resources Code (Tex. Hum. Res. Code) ch. 36, against certain Medicaid providers, including Petitioner. In that court proceeding, Relator sought recovery of Medicaid payments and civil penalties, among other damages. On June 25, 2012, the Attorney General of Texas, acting on behalf of Respondent, intervened in that court action. On June 18, 2013, the Attorney General filed a Notice of Election of Alternate Remedy under Tex. Hum. Res. Code § 36.109, and filed a Notice of Appearance as lead counsel for Respondent in the instant proceeding. On that same date Relator's attorneys filed a Notice of Appearance in the instant proceeding.

On July 9, 2013, Petitioner filed a Plea to the Jurisdiction arguing, among other matters, that the Respondent and Relator's alternative administrative remedies under Tex. Hum. Res. Code § 36.109 are limited to the remedies available to Respondent in an administrative forum. On August 19, 2013, the Administrative Law Judge (ALJ) convened a prehearing conference. All interested persons appeared and provided answers to questions from the ALJ regarding the jurisdiction of SOAH to hear the alternative administrative remedies sought by Respondent growing out of the *qui tam* action.

Respondent concedes that there is nothing in Ch. 36 of the Tex. Hum. Res. Code, or the rules of Respondent set forth in 1 Texas Administrative Code (TAC) ch. 371 that authorize a *qui tam* Relator to participate in an administrative hearing regarding payment holds. Respondent further concedes that the issues of recoupment and administrative penalties are not before this ALJ. However, Respondent argues that the payment hold process is only one step in its enforcement against Medicaid fraud, and is, therefore, so inextricably intertwined with that process that Relator is a proper party in the payment hold proceeding.

Petitioner argues that the payment hold procedure is merely to determine if there is a credible allegation of fraud to sustain the payment hold. Petitioner asserts that the issues raised in the *qui tam* action are not a part of the payment hold process because there is no question that Relator, whose only authority to participate comes from Ch. 36, has no right to pursue a payment hold on her own behalf. Such a remedy is restricted to Respondent. As a result, Petitioner asserts that Relator has no standing to appear as a party in this proceeding.

A. Texas Government Code § 531.102(g)(2) Provides Authority for Payment Hold

Section 531.102(g)(2) of the Government Code and 1 TAC § 371.109 authorize Respondent to impose a payment hold based on reliable evidence of fraud or willful misrepresentation. Section 531.102(g)(3) provides that, upon written request by a Medicaid provider, Respondent will refer the matter to SOAH for a hearing. Prior to September 1, 2013, this was the only statutory authority for SOAH to hear Medicaid fraud cases. However, recent legislation has expanded SOAH's authority to hear requests for recoupment of payments if requested by the provider.

B. Texas Government Code § 531.102(h) Provides Authority for Respondent to Assess Administrative Penalties

Section 531.102(h)(1) of the Government Code authorizes Respondent to assess administrative penalties against a Medicaid program violator. Although 1 TAC § 371.1715(d)(3) and 371.1615(c) provide that Respondent will assign the matter to the HHSC Appeal Division or to SOAH, there is no statutory jurisdiction at SOAH for such a proceeding.

C. 1 TAC § 371.1711 Provides Procedures for Respondent Seeking Recoupment of Overpayments

1 TAC § 371.1711 authorizes Respondent to seek recoupment of overpayments to Medicaid providers. 1 TAC §§ 371.1711(d)(3) and 371.1615(c) provide that Respondent will assign the matter to the HHSC Appeals Division or to SOAH. Prior to September 1, 2013, there was no statutory jurisdiction at SOAH for such a proceeding. However, as noted above, recent legislation authorizes the requests for recoupment of payments to be referred to SOAH if requested by the provider, effective September 1, 2013.

D. Tex. Hum. Res. Code chapter 36, subchapter C Only Provides For Recovery of Overpayments and Civil Penalties

The *qui tam* action authorized under subchapter C of Ch. 36 only authorizes the recovery of civil penalties and overpayments. There is no authority in such an action to secure a payment hold. Upon election to pursue alternate administrative remedies, the state can pursue any of the administrative remedies available to it, including payment holds, recoupment actions, administrative penalties, and other remedies. However, because the rights of the Relator in the *qui tam* suit is limited to the remedies authorized by subchapter C of Ch. 36, pursuant to Tex. Hum. Res. Code § 36.109(a) the Relator only has the same rights in an administrative proceeding as she would have had if the action had continued in the district court, which rights do not include to right to seek a payment hold. Nothing in § 36.109(a) suggests that Relator would have additional remedies in an administrative proceeding to those available in the *qui tam* proceeding.

E. Conclusion

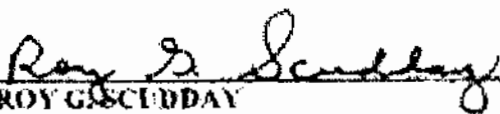
Inasmuch as Respondent has conceded that the recovery of overpayments and administrative penalties are not the subject of the instant proceeding, and the Relator has no rights in a payment hold proceeding under subchapter C, the ALJ concludes that Relator has no standing to participate as a party in this payment hold proceeding. Respondent remains a party

in the payment hold proceeding, but it must seek its other administrative remedies—recoupment and administrative penalties—in a different proceeding.

F. Hearing Dates

The parties are directed to confer and submit three agreeable sets of dates for a week-long hearing on the merits no later than **September 20, 2013**.

SIGNED September 5, 2013.



ROY G. SCUDDAY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OFFICE OF ADMINISTRATIVE HEARINGS

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STYLE/CASE: NATIONAL ORTHODONTIX MANAGEMENT, LLC
SOAH DOCKET NUMBER: 529-13-1021
REFERRING AGENCY CASE:

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

ADMINISTRATIVE LAW JUDGE
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