

Fifth Circuit Provides Relief for Providers Facing Medicare Appeal Backlogs

The U.S. Court of Appeals for the Fifth Circuit has provided some relief to health care providers seeking to stop Medicare from "recouping" alleged overpayments before the provider can obtain a hearing before an administrative law judge ("ALJ"). On March 27, 2018, the Fifth Circuit ruled in *Family Rehabilitation, Inc. v. Azar* that a home health provider, Family Rehabilitation, Inc. ("Family Rehab"), could sue in federal court to suspend Medicare's recoupment of approximately \$7.6 million in alleged overpayments, without first exhausting the backlogged, "Byzantine four-stage administrative appeals process."

Family Rehab had challenged the overpayment allegations in the first two stages of the appeals process but, because of the "colossal" backlog, would not receive an ALJ hearing (the third stage and the first opportunity to present live witness testimony) within the 90 days required by statute. In fact, as the Fifth Circuit noted, Family Rehab would not receive a hearing even "within 900 days," because the current backlog has led to a delay of three to five years, which "shows no sign of abating anytime soon." In the meantime, recoupment of the alleged overpayments was about to begin.

Family Rehab sued in federal court to enjoin the recoupment, asserting (among other claims) that the system violated Family Rehab's rights to procedural due process and constituted *ultra vires* government action. The district court dismissed for lack of subject matter jurisdiction, on the ground that Family Rehab's inability to exhaust all four stages of the Medicare appeals process barred jurisdiction. The Fifth Circuit reversed as to Family Rehab's procedural due process and *ultra vires* claims, concluding that the claims were "collateral" to the underlying administrative dispute about overpayment. These claims, coupled with the threat that Family Rehab would be forced to go out of business and the attendant disruption of services to Medicare patients, were sufficient to meet the collateral-claim exception under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Although the court's decision simply confirms the presence of jurisdiction and is not a ruling on the merits, it gives health care providers facing the threat of irreparable harm the opportunity to seek suspension of recoupment while awaiting an ALJ hearing. The Fifth Circuit's opinion helps reestablish procedural due process for providers in a system that is plagued by long delays, and in which ALJs are not even being assigned to administrative appeals for years.

The case is *Family Rehab., Inc. v. Azar*, No. 17-11337, 2018 WL 1478052 (5th Cir. Mar. 27, 2018). Jones Day represented Family Rehab in both the district court and appellate court proceedings.

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