

ISSUE

Whether the Department properly issued an Order of Summary Suspension to Petitioners on August 5, 2020?

FINDINGS OF FACT

1. Petitioner REDACTED REDACTED is the owner, co-owner and/or managing employee of Petitioner's REDACTED REDACTED Pharmacy, REDACTED Pharmacy, REDACTED Pharmacy, and REDACTED Pharmacy. (Exhibits A-D; Testimony of Petitioners' representative).
2. The pharmacies are enrolled as providers in the Medical Assistance Program (Medicaid) and have executed Provider Enrollment Agreements with the Department in which they agreed to all of the terms and conditions listed therein. (Exhibits A-D).
3. On REDACTED 2020, Petitioner REDACTED REDACTED was indicted in the United States District Court for the REDACTED District of Michigan on one count of Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances, in violation of 21 USC §§ 841(a)(1), 846, and four counts of Unlawful Distribution of Controlled Substances, Aiding and Abetting, in violation of 21 USC § 841(a)(1) and 18 USC § 2. (Exhibit F).
4. On August 5, 2020, the Department issued an Order of Summary Suspension with respect to Petitioners. (Exhibit E).
5. In part, that Order of Summary Suspension stated:

MDHHS OIG has determined that evidence exists in support of the exclusion of REDACTED REDACTED (REDACTED), NPI REDACTED and REDACTED and summary suspension of REDACTED REDACTED Pharmacy, NPI REDACTED, REDACTED Pharmacy, NPI REDACTED REDACTED Pharmacy, NPI REDACTED, and REDACTED Pharmacy, NPI REDACTED, and such evidence includes but is not limited to:

1. On REDACTED 2020, REDACTED and REDACTED were each indicted in the United States District Court – REDACTED District of Michigan with one count of Conspiracy to Possess with Intent to Distribute and to Distribute Controlled Substances in violation of 21 U.S.C. §841(a)(1), 846 and four counts of Unlawful Distribution of Controlled Substances, Aiding & Abetting in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. The allegations for REDACTED and

REDACTED include the following:

- a. Beginning in September 2017 and continuing up to and including June 2020, a scheme and pattern of illegal conduct involving the unlawful acquiring and distribution of prescription drug-controlled substances was formed and active in the REDACTED District of Michigan and elsewhere.
- b. REDACTED and REDACTED worked with a co-conspirator who owned multiple medical clinics. The fundamental purpose of these medical clinics was to create prescriptions for controlled substances that could be filled at pharmacies. The purpose of filling the prescriptions was not for the legitimate treatment of patients, but rather to obtain controlled substances that could be sold at a substantial profit on the illegal street market.
- c. The pharmacies identified in the indictment dispensed more than 58,725 dosage units of Schedule II controlled substances.
 - i. REDACTED, as the pharmacy owner, and REDACTED as the pharmacist, would allow patient recruiters to fill controlled substance prescriptions at REDACTED REDACTED Pharmacy.
 - ii. REDACTED, as the pharmacy owner, would allow patient recruiters to fill controlled substance prescriptions at REDACTED Pharmacy.
 - iii. REDACTED, as the managing employee, would allow patient recruiters to fill controlled substance prescriptions at REDACTED Pharmacy.
- d. The Oxycodone and Oxymorphone, alone, carried a conservative street value of more than \$41 million.
 - i. Most of the unlawful controlled substance prescriptions were paid for in cash. However, in addition, both the controlled

substances and the non-controlled “maintenance” medications would be billed to health care benefit programs by the pharmacies.

- ii. This “maintenance medication” was used in order to make the doctor’s prescribing practices appear more legitimate by reducing the percentage of controlled substance prescriptions.
 - iii. The adding of maintenance medications also increase the profits made by the cooperating pharmacies. Billings to the Medicare and Medicaid programs for medically unnecessary prescription drug medications during the course of this conspiracy exceeded \$146,000.
- e. Prior to dispensing the medically unnecessary controlled substance prescriptions, Saiyad failed to exercise his corresponding professional responsibility to determine that the prescriptions were issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice.
- i. In furtherance of the conspiracy, REDACTED and REDACTED with their co-conspirator, would “slot appointments” and only fill prescriptions for certain patients, certain doctors at certain times, irrespective of the medical necessity of the prescription, in an effort to avoid detection of the drug diversion scheme.
 - ii. Once the recruiter or marketer obtained the prescription controlled substances from a pharmacy, the drugs would be transferred and sold on the illegal street market.

Exhibit F, pages 1-3

6. On March 12, 2019, MOAHR received the request for hearings filed by Petitioners in the consolidated matters with respect to the Order of Summary Suspension.

CONCLUSIONS OF LAW

With respect to orders of summary suspension like the one at issue in this case, the Social Welfare Act of 1939, 1939 PA 280, (Act) as amended, specifically MCL 400.111f, provides in pertinent part:

(1) The director may issue an order incorporating a finding that emergency action is required to protect the state's interest, as the state's interest is described in this subsection by the statement of circumstances warranting emergency action, in any of the following: the public health, welfare, or safety; medically indigent individuals; or public funds of the program of medical assistance. Circumstances that warrant emergency action include, but are not limited to, any of the following:

* * *

(b) A reasonable belief that the provider has violated the Medicaid false claims act, Act No. 72 of the Public Acts of 1977, being sections 400.601 to 400.613 of the Michigan Compiled Laws, the health care false claims act, Act No. 323 of the Public Acts of 1984, being sections 752.1001 to 752.1011 of the Michigan Compiled Laws, or a substantially similar statute of another state or the federal government.

* * *

(5) Upon a determination that circumstances described in subsection (1) exist, the director may issue an order for the summary suspension of payments on pending or subsequent claims, in whole or in part, or for the summary suspension of a provider from participation in the program of medical assistance. The summary suspension shall be effective on the date specified in the order or on service of a certified copy of the order on the provider, whichever occurs later, and shall remain in effect during administrative or judicial proceedings on the suspension. Upon request of a provider, a contested case hearing pursuant to chapter 4 and chapter 6 of the administrative procedures act of 1969, Act No. 306 of the Public Acts of 1969, being sections 24.271 to 24.287 and 24.301 to 24.306 of the Michigan Compiled Laws, shall be commenced not later than 15 days after the summary suspension. If a contested case hearing is requested by a provider relative to an emergency suspension under this section, a hearing shall be held to determine whether the

emergency suspension is supported by competent, material, and substantial evidence on the whole record. Under appropriate circumstances, the state department may hold or institute a hearing under section 111c(1), or take an action under section 111d at the same time an action is taken under this section, while an action under this section is pending, or after a decision on an action is made. The presiding officer may consolidate the 2 hearings into a single proceeding in the interest of economy. However, the director shall not make a final decision in a contested case under section 111c(1) or 111d arising from or related to an emergency action or the circumstances upon which an emergency action was taken.

MCL 400.111f

With respect to suspensions, the Medicaid Provider Manual (MPM) also states in part:

6.3 SUSPENSION

Summary suspension prevents further payment after a specified date, regardless of the date of service (DOS).

If an indication of fraud or Medicaid misuse/abuse is discovered during any of the following, MDHHS considers it as a basis for summary suspension:

- An evaluation of billing practices.
- The prior authorization (PA) process.
- An on-site review of financial and medical records and a written report of this review is filed.
- The construction of a profile to evaluate patterns of utilization of Medicaid beneficiaries served by the provider.
- A peer review of services or practices.
- A hearing or conference between MDHHS and the provider (and counsel, if so requested).
- Indictment or bindover on charges under the Medicaid or Health Care False Claims Act or similar state/federal statute.

*MPM, July 1, 2020 version
General Information for Providers Chapter
Page 18*

Accordingly, in order to support a summary suspension in this case, the Department must show by competent, material and substantial evidence on the record that there was a reasonable belief that Petitioners violated the Medicaid False Claims Act, the Health Care False Claims Act, or a substantially similar statute of another state or the federal government.

For the reasons discussed below, the undersigned Administrative Law Judge finds that the Order of Summary Suspension should be upheld because the Department had a reasonable belief that Petitioners violated the Medicaid False Claims Act and the Health Care False Claims.

Petitioner REDACTED, the owner or co-owner of the other petitioners, has been indicted in the United States District Court for the REDACTED District of Michigan and the record in this case establishes a reasonable belief that he and others committed the actions alleged in the that indictment given that they were indicated pursuant to a grand jury's finding of probable cause, see *United States v Sells Eng'g, Inc.*, 463 US 418, 423, 103 S Ct 3133, 3137, 77 LEd2d 743 (1983). A finding of probable cause "requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt.", *People v Yost*, 468 Mich 122, 125, 659 NW2d 604, 606 (2003), and, consequently, the federal indictment alone sufficiently supports the Department's reasonable belief that the actions alleged in the indictment occurred.

Moreover, given the reasonable basis that the actions alleged in the indictment occurred, there is also a reasonable belief that Petitioners violated the Medicaid False Claims Act and Health Care False Claims Act as those statutes prohibit and impose liability on persons for knowingly submitting false or fraudulent claims for payment, see MCL 400.607 and MCL 752.1003, while the indictment in this case alleged that, as part of a scheme and pattern of illegal conduct involving the unlawful acquiring and distribution of prescription controlled substances, Petitioners would both fill prescriptions for purposes other than the legitimate treatment of patients and bill Medicaid, Medicare and other insurances for medically unnecessary prescription drug medications.

Rather than disputing the Department's findings, Petitioners' representative instead asserted that he had no knowledge of what was going on; the Petitioners are willing to give up their licenses to dispense controlled substances; and that preventing them from providing other services through Medicaid will only lead to the pharmacies' closure and harm to their clients, including elderly clients who rely on them. He further testified that he is in the process of selling of the pharmacies and that the suspensions are making those sales more difficult, especially given the ongoing COVID-19 pandemic.

However, the Department must make its own determination as to whether emergency action is required and, regardless of whether the Department could have decided as a matter of discretion not to suspend Petitioners if Petitioners were no longer dispensing controlled substances to Medicaid beneficiaries, MCL 400.111f expressly states both that circumstances that warrant emergency action include a reasonable belief that the provider has violated the Medicaid False Claims Act, the Health Care False Claims Act or a substantially similar federal statute, and that, in such circumstances, the director may issue an order for summary suspension. Moreover, any effects on potential sales of the pharmacies is irrelevant to this proceeding.

Accordingly, as the Department has, based on undisputed facts, met its burden of establishing a reasonable belief that Petitioners violated the Medicaid False Claims Act and Health Care False Claims Act, the undersigned Administrative Law Judge finds that the summary suspension should be upheld.

IT IS THEREFORE ORDERED that:

- The Order of Summary Suspension issued by the Department to Petitioners on August 5, 2020 is UPHELD.