



Texas Federal District Court Prevents Withholding of Medicare Payments

In a much-anticipated decision in *Family Rehab., Inc. v. Azar*, Federal Judge Kinkeade enjoined the Centers for Medicare & Medicaid Services ("CMS") from withholding Medicare payments to effectuate the recoupment of the alleged overpayments until an administrative law judge ("ALJ") has heard and rendered a decision on Family Rehabilitation, Inc.'s ("Family Rehab") appeal of CMS's overpayment determination. The court ruled that Family Rehab established a substantial likelihood of success on the merits of its procedural due process claim—that CMS's recoupment of alleged Medicare overpayments without providing the statutorily mandated ALJ hearing within the 90-day prescribed time—was a deprivation of Family Rehab's property interest in Medicare payments.

The court held that, although the applicable statute authorized CMS to begin recoupment before the ALJ rendered a decision, Congress had not anticipated that ALJ decisions would be delayed much longer than the statutorily prescribed 90 days "and certainly not a delay of three to five years." The court therefore found "that forcing Family Rehab to wait three to five years for a hearing while overpayments are in recoupment create[d] a high risk of erroneous deprivation of Family Rehab's property interest."

In so doing, the court rejected the government's argument that escalation was the sole remedy for providers facing three- to five-year delays, finding that the right to an ALJ hearing and decision was "clearly mandatory," whereas the ability to escalate an appeal to the Appeal Counsel was optional at the discretion of the provider. The court specifically distinguished the Supreme Court decision in *Matthews v. Eldridge* from the *Family Rehab* issues, finding that unlike the plaintiff in *Eldridge*, Family Rehab would never have the opportunity to be heard and present witnesses at an evidentiary hearing if forced to escalate its appeal. Accordingly, the court found that escalation was not a remedy to the enormous backlog of ALJ hearings because it did not provide "adequate procedural due process."

Similarly, the court held that neither escalation nor an infeasible repayment plan overcame Family Rehab's substantial threat of irreparable harm. Indeed, Judge Kinkeade wrote: "[a] healthcare agency may be able to float its expenses and survive for the statutorily imposed 90-day period for an ALJ to hear and decide the appeal even while its alleged overpayments are in recoupment. However, it is unreasonable to expect a healthcare agency to scrape by for three to five years waiting for a hearing and decision while CMS recoups the alleged overpayments."

The *Family Rehab* decision is a much-needed win for providers facing multimillion-dollar recoupment actions while awaiting evidentiary hearings before ALJs in what seems to be a never-ending, colossal backlog. We are hopeful that this decision will result in CMS working with providers toward reasonable solutions to the ALJ backlog.

Jones Day represented Family Rehabilitation in the preliminary injunction action.



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