

PUBLICATION

Court Finds Jurisdiction to Bar Recoupment Associated with Pending Claims Appeal

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On March 27, 2018, the United States Court of Appeals for the Fifth Circuit published an opinion that provides Family Rehabilitation, Inc. (Family Rehab) a second chance to postpone recoupment of about \$7.6 million in Medicare payments while seeking an Administrative Law Judge (ALJ) hearing. The Fifth Circuit's decision is significant in itself; providers generally must exhaust all levels of administrative appeals before seeking judicial review of Medicare issues. However, the Fifth Circuit agreed with Family Rehab that limited judicial redress might be available before exhausting the administrative appeals process.

Described by the Fifth Circuit as the "harrowing labyrinth," the Medicare claims appeals process includes five levels:

1. Redetermination by the Medicare contractor that made the initial denial
2. Reconsideration by a Qualified Independent Contractor
3. Hearing before an ALJ
4. Review by the Medicare Appeals Council
5. Judicial review by a federal district court

Family Rehab pursued its appeal through the redetermination and reconsideration levels, without success. Although recoupment of the overpayment can be stayed through these first two levels of appeal, recovery of the overpayment from the provider begins thereafter. Faced with recoupment of about \$7.6 million in alleged Medicare overpayments, Family Rehab filed a temporary restraining order and an injunction in federal court against the recoupment until it could receive an ALJ hearing, the third level of the appeals process. The district court dismissed Family Rehab's injunction for lack of subject matter jurisdiction for failure to exhaust administrative remedies under the Social Security Act (SSA). On appeal, the Fifth Circuit reversed the district court's decision and remanded the case on Family Rehab's procedural due process and ultra vires claims.

In general, when dealing with claims that arise under the SSA (the "Medicare Act"), federal courts are vested with jurisdiction only over final decisions of the Department of Health and Human Services (HHS). This generally means that appealing entities may seek judicial redress for a claims appeal only after receiving a decision from the Medicare Appeals Council at the fourth level of appeal. Many courts have held that financial losses alone are insufficient to overcome the exhaustion requirements. However, the Fifth Circuit found that Family Rehab successfully met the "collateral-claim exception" to that rule.

The collateral-claim exception provides the court jurisdiction over claims that are "'entirely collateral' to a substantive agency decision and . . . for which 'full relief cannot be obtained at a post deprivation hearing.'" The Fifth Circuit held that Family Rehab's procedural due process and ultra vires claims are unrelated to the substantive merits of the recoupment because the court does not have to "wade into the Medicare Act or regulations . . . [and] only require[s] the court to determine how much process is required under the Constitution and federal law before recoupment."

Additionally, the Fifth Circuit held that Family Rehab has "raised at least a colorable claim" that recoupment will cause irreparable injury that is not recompensable after the administrative appeals process. Specifically, Family Rehab alleged that it will not receive an ALJ hearing for "at least three to five years," which counsel to the Secretary of HHS affirmed while admitting that the "logjam of Medicare appeals shows no signs of abating anytime soon."

Due to the prolonged delay in obtaining review, Family Rehab further alleged that it would have to shut down and file for bankruptcy before reaching the ALJ hearing because of the recoupment, and thus it would never be afforded due process. Family Rehab also described the detrimental effects such a shutdown would have on its employees and patients.

The Fifth Circuit stated that it "must 'be especially sensitive' to irreparable injury 'where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the [rights] they should have been afforded in the first place.'" Therefore, the court held that it had jurisdiction over Family Rehab's procedural due process and ultra vires claims because the "combined threats of going out of business and disruption to Medicare patients are sufficient for irreparable injury." After finding that the court had jurisdiction, the Fifth Circuit remanded the case to the district court where Family Rehab can proceed with its procedural due process and ultra vires claims.

Baker Donelson Comments

The Fifth Circuit seemed to rely heavily on the potential harm of recouping several million dollars, leaving Family Rehab in a dire financial state that could drive it out of business, all while facing a prolonged timeline for an ALJ hearing. This is not a new phenomenon facing many providers, but it appears to be getting worse. The backlog of appeals is growing at the ALJ level, and this will subject more providers to dire financial circumstances by delaying their ability to seek timely redress. This Fifth Circuit decision may pave the way for providers to suspend recoupment efforts while seeking an ALJ hearing, which is why providers should stay tuned by following this case as it goes back to the district court on remand for a determination of whether the provider is entitled to the temporary restraining order and injunction against recoupment.