

Texas District Court issues temporary injunction preventing CMS from recouping overpayments



Courtney G. Tito, Elizabeth Sullivan | Friday, June 8, 2018

On June 4, 2018, the U.S. District Court for the Northern District of Texas entered an order granting Family Rehabilitation, Inc.'s (Family Rehab) motion for a temporary injunction seeking to enjoin CMS from continuing to recoup alleged overpayments pending an Administrative Law Judge (ALJ) hearing regarding its appeal of a \$7.5 million overpayment demand. The temporary injunction is set to expire in 14 days unless it is extended by the court – this allows the court to set a hearing on the issues for a final determination.

BACKGROUND

Family Rehab was subject to a post-payment review of its CMS reimbursements in October 2016, which resulted in an overpayment by CMS demand of more than \$7.5 million. Family Rehab timely appealed the overpayment and was denied at each of the first two levels of appeal. During the first two levels of appeal, recoupment of overpayments is halted. It then went on the third level of appeal and requested an ALJ hearing. CMS is permitted to begin recoupment at this level. Due to the extreme backlog of these ALJ hearings, it will likely be three to five years before Family Rehab's hearing will take place – well outside of the statutorily required 90 days. CMS began recouping the overpayment demand after the denial of Family Rehab's second level appeal. As a result of this recoupment, Family Rehab laid off 39 employees (which accounts for nearly 90 percent of its former staff), and only provides services to eight of its prior 289 patients. On Oct. 31, 2017, Family Rehab filed its complaint and initial emergency motion for temporary injunction^[1] and subsequently filed an amended motion for temporary injunction. In its motion, Family Rehab argued it would need to file bankruptcy and close its doors if the recoupment continued until the ALJ hearing.

THIS OPINION

A temporary injunction order is put in place to prevent irreparable injury and preserve the status quo *only* until a hearing is held and no longer. Family Rehab was required to demonstrate four prongs to establish entitlement to a temporary injunction. These prongs are:

- Substantial likelihood of success on the merits. For this prong, Family Rehab argued that it would

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be likely to win on its underlying procedural due process claim because CMS's recoupment began before CMS provided Family Rehab the statutorily required due process under the statute that mandated CMS to conduct an ALJ hearing and issue a decision within 90 days of the request. The court found that Family Rehab made a sufficient showing on this given that a hearing will not be set for another three to five years. Accordingly, Family Rehab demonstrated a substantial likelihood of success on the merits of its procedural due process claim.

- **Irreparable Injury.** In support of this prong, Family Rehab argued that the irreparable injury was the fact that it would be forced to close its doors and file for bankruptcy long before an ALJ hearing would be set. Due to the fact that Family Rehab had already laid off nearly 90 percent of its staff and that it was continuing to care for only eight patients, the court found the Family Rehab was suffering a dramatic financial hardship that could result in a permanent closure of the business, the remaining employees losing their jobs, and patients losing their healthcare provider. Accordingly, the court found that Family Rehab had shown a substantial threat of immediate and irreparable harm.
- **Weighing the balance of injury to the parties.** The court found that this prong weighed in favor of granting the injunction for the following reasons: (1) Family Rehab would close its doors, employees would lose their jobs and patients would lose their healthcare provider if the injunction was not granted; and (2) CMS would not suffer harm from the grant of the injunction because it had the opportunity to recoup the overpayment if the ALJ found in CMS's favor.
- **Public interest.** The court stated that only the reimbursements for Family Rehab's services were at issue – not the quality of care provided by Family Rehab. Therefore, the court found that no public interest would be affected by granting the temporary injunction.

The court noted that it would set the date and time for the full hearing in a separate order, which at the time of publication has not yet been entered. We will monitor this case for ongoing developments, but please feel free to contact the attorneys below if you have any questions.

[1] The court initially dismissed the motion for lack of jurisdiction and that was appealed to the Fifth Circuit court of appeals. The Fifth Circuit reversed the dismissal and stated that the N.D. Texas court had jurisdiction which paved the way for this injunctive relief to be granted.



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