

Alert | Health Care & FDA Practice



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Fifth Circuit Provides the Possibility of Injunctive Relief for Providers Awaiting Medicare Appeals Hearings

On March 27, 2018, the U.S. Court of Appeals for the Fifth Circuit – in *Family Rehabilitation, Incorporated v. Azar*¹ – opened the door for Medicare providers to seek injunctive relief from the recoupment of alleged overpayments while awaiting a hearing before an Administrative Law Judge (ALJ).

In 2016, 43 claims of Family Rehab, a home health provider in Texas, were audited and during that audit, the Centers for Medicare & Medicaid Services (CMS) determined that Medicare had been overbilled in 93 percent of cases. Using a statistical method to extrapolate all of Family Rehab’s billings, CMS determined that Family Rehab received overpayments of nearly \$7.9 million. As part of the “Byzantine four-stage administrative appeals process,” Family Rehab completed the first two appeal stages before the \$7.6 million² overpayment became subject to recoupment, meaning CMS could reduce Family Rehab’s Medicare payments to recover the overpayment. Family Rehab then sought a hearing before an ALJ – as part of stage three of the appeals process. Under statute, an ALJ must render a decision no later than 90 days after a timely request; however, according to the government’s own account getting a hearing scheduled could take more than three years. Family Rehab contends that the delay, coupled with the recoupment, essentially renders the administrative process ineffective and will drive it out of business.³ In

¹ No. 17-11337 (5th Cir., Mar. 27, 2018)

² During the second stage, the QIC, or Qualified Independent Contractor hired by CMS, reduced the claim to \$7,622,122.31.

³ Family Rehab contends that Medicare accounts for between 88 – 94% of its annual revenues.

an effort to stave off the recoupment until the ALJ hearing is scheduled and an ALJ reviews the claim, Family Rehab sought an injunction in court. The District Court dismissed the case for lack of subject-matter jurisdiction, as Family Rehab had not exhausted all four stages of the Medicare administrative appeals process in that it had neither received a hearing before an ALJ, nor appealed the ALJ decision to the Office of Medicare Hearings and Appeals.

Family Rehab appealed claiming that the District Court's decision "(1) violates its rights to procedural due process, (2) infringes its substantive due-process rights, (3) establishes an '*ultra vires*' cause of action, and (4) entitles it to a 'preservation of rights' injunction under the Administrative Procedure Act."⁴ The Fifth Circuit, while not granting relief, did reverse and remand as to Family Rehab's procedural due process and *ultra vires* claims and affirmed all other claims. The Court found that these claims were "collateral" – not requiring the Court to wade into the "merits of the underlying dispute"⁵ – and thus subject to an exception to the general rule that a party exhaust all administrative remedies prior to seeking judicial review.⁶ The Court was also persuaded by the fact that Family Rehab faces "irreparable injury" in that it is likely to go bankrupt as a result of the recoupment.

While the District Court has not yet issued a final decision on remand, the Fifth Circuit's decision provides a potential avenue for interim relief – through an injunction – for the many providers that may be the subject of a recoupment while they await the years long journey to an ALJ hearing.

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⁴ Family Rehab at 5.

⁵ Family Rehab at 9.

⁶ It is through this exception that the Fifth Circuit determined it had jurisdiction.