IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

CHARLESTON DIABETES AND ENDOCRINE CONSULTANTS, PLLC, a West Virginia Professional Limited Liability Company, PRASUNA JAMI, M.D., individually and on behalf of all other similarly situated parties,

Plaintiffs,

v.

HIGHMARK WEST VIRGINIA, INC., a West Virginia Corporation, formerly known as MOUNTAIN STATE BLUE CROSS & BLUE SHIELD, INC., and formerly known as BLUE CROSS AND BLUE SHIELD OF WEST CENTRAL WEST VIRGINIA, INC.,

Defendant.

Civil Action No. 16-C-457
Presiding: Judge James A. Matish
Resolution: Judge Russell Clawges

ORDER DENYING PLAINTIFF'S AMENDED MOTION FOR CLASS CERTIFICATION

Pending before the court is a an Amended Motion for Class Certification filed by Plaintiffs, Charleston Diabetes and Endocrine Consultants, PLLC, and Prasuna Jami, M.D. on July 7, 2017. A hearing was held on the Amended Motion on May 22, 2018, at which Plaintiffs appeared by and through their counsel, Scott Segal, C. Edward Amos II, and Joseph Amos Jr., and Defendant appeared through its counsel, Russell Jessee, J. Zachary Balasko, and Courtney Lemley.

After conducting the aforementioned hearing on May 22, 2018, reviewing the Amended Motion for Class Certification, conducting a thorough examination of the record, including the Court File, and reviewing pertinent legal authority, this Court makes the following findings of fact and conclusions of law:

9/10/18 CCx4 J. Amos, S. Segal, C. Miller, R. Jessee

FINDINGS OF FACT

1. Plaintiff Charleston Diabetes and Endocrine Consultants is a West Virginia Professional Limited Liability Company chartered in Kanawha County, West Virginia. Plaintiff Prasuna Jami is a licensed medical doctor in West Virginia and a resident of Kanawha County. Plaintiffs are "providers" within the scope of the Prompt Pay Act.

2. Highmark WV is a non-profit health care service corporation chartered in Wood County, West Virginia that is licensed by the West Virginia Insurance Commissioner. Defendant is subject to the West Virginia Prompt Pay Act, W. Va. Code § 33-45-1, *et seq.*

3. Plaintiffs and Defendant entered into a Network Agreement that became effective on October 29, 2009. This agreement included the following provisions:

    a. [Highmark WV] shall adhere to and comply with the standards for processing and payment of claims for health care service set forth in the Prompt Pay Act [W.Va. Code § 33-45-1, *et seq.*] for claims subject to this law and as set forth in the Provider Manual."

    b. [Highmark WV] may retroactively deny or negatively adjust a previously paid claim within the time periods specified in the Provider Manual and according to applicable legal requirements governing such actions, including among other things, the West Virginia Ethics and Fairness in Insurer Business Practices Act (commonly referred to as the "Prompt Pay Act"), the West Virginia Unclaimed Property Act, and any [Highmark WV] contractual obligations to self-funded groups and other third parties.

    c. [Highmark WV] reserves the right to have its representatives conduct on-site or off-site audits without charge [and] examine such original records of Provider as may be necessary to verify performance under this Agreement.

4. On September 23, 2014, Defendant notified Plaintiffs that it was conducting a preliminary review of Plaintiffs' previous claim submissions. This letter requested a sample of patients' medical records related to approximately ten (10) claims submissions for review. This review concerned claims submissions for office visits that used evaluation and management Current Procedural Technology ("CPT") codes.

Evaluation and management codes range from Level 1 to Level 5, ascending based on the complexity of the office visit. Plaintiffs submitted claims for Level 4 Office Visits approximately 96% of the time, which Defendant claims is an unusually high rate for higher-level codes.

5. On January 15, 2015, Defendant notified Plaintiffs that, based upon its findings from the preliminary review, it would conduct an expanded review of Plaintiffs' previously paid insurance claim submissions. The review was expanded to a Statistically Valid Random Sample ("SVRS") of Plaintiffs' patient records related to 150 randomly-selected claims for Level 4 office visits from January 1, 2013, to January 1, 2015.
6. On September 9, 2015, Defendant notified Plaintiffs of the results of the expanded audit. Defendant demanded Plaintiffs remit to it an overpayment of previously paid claims in the amount of $145,367. The letter included a chart setting forth the specific results of the certified professional coder's scoring of each claim based upon the provided patient documentation. The letter also included methods by which to remit the payment, and information on how to appeal the results of the audit.
7. To date, Plaintiffs have not remitted any sum of money to Defendant.
8. Plaintiffs allege that Defendant's audit results and process violated the Prompt Pay Act.
9. The Prompt Pay Act sets forth that:
    a. No insurance company may retroactively deny a previously paid claim unless:
        i. The claim was submitted fraudulently;
        ii. The claim contained material misrepresentations;
        iii. The claim payment was incorrect because the provider was already

paid for the health care services identified on the claim or the health care services were not delivered by the provider;

iv. The provider was not entitled by reimbursement;

v. The service provided was not covered by the health benefit plan; or

vi. The insured was not eligible for reimbursement. *See* § 33-45-2(a)(7).

10. The Act further provides that a health plan may only retroactively deny claims for the reasons set forth in subparagraphs (iii), (iv), (v), and (vi) within one year from the date the claim was originally paid. The Act further provides that there are no time limitations for denying a claim based on the reasons set forth in subparagraphs (i) and (ii). *See* § 33-45-2(a)(7)(C).

11. Defendant claims that when a provider submits a claim, the provider makes a representation to Defendant that the provider has performed the services for which it is seeking reimbursement; if a provider's records do not support the claim as submitted, the provider made a misrepresentation. Defendant further contends that if a provider submits a claim intentionally seeking repayment for services it did not perform, then the claim would be submitted fraudulently, and if the misrepresentation results in the provider being paid more money than it should be entitled to, the misrepresentation is material.

12. During discovery, Defendant produced the investigation files for each audit Defendant performed over the last ten years, including letters to audited providers that explain the reason(s) for the audits, identify the results of the audits, explain the process by which Defendant arrived at the audit results, and state the amount of overpayments identified by the audits.

13. Pursuant to Rule 23 of the *West Virginia Rules of Civil Procedure*, Plaintiffs seek to represent a class of:

> [a]ll health care professionals and professional health care entities which are "providers" as defined by the West Virginia Prompt Pay Act, domiciled in West Virginia, licensed and providing specific health care services in the State of West Virginia from ten (10) years prior to the filing of this complaint to the present who were within Highmark WV's network, had a contractual relationship with Highmark WV in the State of West Virginia and who received an "audit" letter from Highmark WV.

14. Plaintiffs claim to have identified 248 other providers having contracts with Defendant that have been subjected to the same auditing process.

15. Defendant alleges that this action does not qualify for class certification based on several arguments. First, Defendant argues that Plaintiffs' claims are time-barred, so Plaintiffs cannot be class representatives.

16. Second, Defendant argues that Plaintiffs' circumstances and claims are unique to Plaintiffs, so Plaintiffs cannot certify a class that meets the Rule 23(a) factors.

17. Third, Defendant argues that Plaintiffs cannot establish any Rule 23(b) criterion; that Plaintiffs cannot show that common questions of law or fact predominate and that class treatment is superior, or that a class-wide injunction is appropriate on their claims for statutory violations that require individual analysis.

CONCLUSIONS OF LAW

The Prompt Pay Act

1. The Prompt Pay Act sets forth that:

   No insurance company may retroactively deny a previously paid claim unless:

   i. The claim was submitted fraudulently;

   ii. The claim contained material misrepresentations;

iii. The claim payment was incorrect because the provider was already paid for the health care services identified on the claim or the health care services were not delivered by the provider;

iv. The provider was not entitled to reimbursement;

v. The service provided was not covered by the health plan; or

vi. The insured was not eligible for reimbursement.

The Act further provides that a health plan may only retroactively deny claims for the reasons set forth in subparagraphs (iii), (iv), (v), and (vi) within one year from the date the claim was originally paid. The Act further provides that there are no time limitations for denying a claim based on the reasons set forth in subparagraphs (i) and (ii). *See* § 33-45-2(a)(7)(C).

2. A "Retroactive Denial" is defined as "the practice of denying previously paid claims by withholding or setting off against payments, or in any other manner reducing or affecting the future claim payments to the provider, or to seek direct cash reimbursement from a provider for a payment previously made to the provider." W. Va. Code § 33-45-1(9).

3. The alleged "overpayment" and subsequent denial of a previously paid claim, as a result of Defendant's post-payment audits, satisfies the definition of a "Retroactive Denial" under the Prompt Pay Act.

4. The Prompt Pay Act applies only to claims submitted for reimbursement pursuant to a "Health Plan" as defined in W. Va. Code § 33-45-1(5), which is, *inter alia*, "offered, arranged, issued or administered in the state." The Prompt Pay Act thus does not apply to "Blue Card" claims submitted pursuant to out-of-state insurance plans. The Prompt Pay Act

also does not apply to claims submitted pursuant to certain federal and state health benefits programs.

5. For Plaintiffs and each purported class member to prevail on their claims for violations of the Prompt Pay Act, they must demonstrate that (i) Highmark WV retroactively denied a previously paid claim subject to the Prompt Pay Act, *i.e.*, a claim submitted for a patient covered by a Highmark WV health plan and not a Blue Card claim or claim under a federal or state program to which the Prompt Pay Act does not apply, (ii) for an impermissible reason or for one of the four time-limited reasons set forth in W. Va. Code § 33-45-2(a)(7), and (iii) that denials pursuant to one of the time-limited reasons were more than one year from the date of claim payment.

Rule 23(a) Requirements

6. In order to certify a class under Rule 23 of the West Virginia Rules of Civil Procedure, a circuit court must determine that the party seeking class certification has satisfied all four prerequisites contained in Rule 23(a), which provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

7. "When a circuit court is evaluating a motion for class certification under Rule 23 of the West Virginia Rules of Civil Procedure [1998], the dispositive question is not whether the plaintiff has stated a cause of action or will prevail on the merits, but rather whether the requirements

of Rule 23 have been met." Syl. pt. 7, *In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 56, 585 S.E.2d 52, 56 (2003).

8. "The party who seeks to establish a the propriety of a class action has the burden of proving that the prerequisites of Rule 23 of the West Virginia Rules of Civil Procedure have been satisfied." Syl. Pt. 6, *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W.Va. 15, 393 S.E.2d 653 (1990).

Numerosity

9. The numerosity provision of Rule 23(a)(1) requires that a class be so numerous that joinder of all of its members is "impracticable."

10. "The test for impracticability of joining all members does not mean 'impossibility' but only difficulty or inconvenience of joining all members." Syl. Pt. 9, *Rezulin*, 214 W.Va. at 65, 585 S.E.2d at 65.

11. "There is 'no magic minimum number that breathes life into a class . . . and lack of knowledge of the exact number of persons affected is not a bar to certification[.]'" *Id.*, 214 W. Va. at 65, 585 S.E.2d at 65 (quoting *Clarkson v. Coughlin,* 789, 798 (S.D.N.Y. 1992)).

12. The plaintiffs are not required, at the class certification stage, to identify the specific injuries of each class member, and it was error for the circuit court to so hold. *Id.*, 214 W. Va. at 67, 585 S.E.2d at 67.

13. Plaintiffs assert that they have identified 248 providers that are potentially members of their proposed class—that is, Plaintiffs assert that they have identified 248 providers, including hospitals, which (i) received a letter describing results of various audits, (ii) voluntarily remitted identified overpayments, and (iii) did not enter into a specific written settlement agreement and release.

14. Defendant argues that each member of the proposed class is a sophisticated business capable of retaining counsel and protecting its own interests.

15. Defendant's argument does not bear on the impracticability of joining all members. Given the large number of proposed class members involved, joinder is impracticable. Therefore, this court finds that the numerosity requirement is met.

Commonality

16. The "commonality" requirement of Rule 23(a)(2) requires that the party seeking class certification show that "there are questions of law or fact common to the class." *Id.* at Syl. Pt. 11.

17. "A common nucleus of operative fact or law is usually enough to satisfy the commonality requirement." *Id.*

18. "The threshold of 'commonality' is not high, and requires only that the resolution of common questions affect all or a substantial number of the class members." *Id.*

19. "Commonality requires that class members share a single common issue. However, not every issue in the case must be common to all class members. The common questions need be neither important nor controlling, and one significant common question of law or fact will satisfy this requirement. In other words, the class as a whole must raise at least one common question of law or fact to make adjudication of the issues as a class action appropriate to conserve judicial and private resources." *Id.*

20. Plaintiffs argue that the fact that Plaintiffs were the only ones to file suit pursuant to the Prompt Pay Act does not destroy commonality. Plaintiffs also assert that the Defendant's use of standardized scoresheets to check codes and generate audit results further establishes commonality. According to Plaintiffs, the questions of whether Defendant's business conduct

constitutes a breach of contract and a breach of the Prompt Pay Act give rise to the same common questions of law.

21. In response, Defendant states that its use of over forty different contract forms for different types of providers does not establish commonality. Defendant also argues that each overpayment letter sent to a provider is materially different, thus destroying commonality. Defendant further asserts that its use of standardized scoring sheets do not demonstrate commonality because they do not have any bearing to Plaintiffs' claims and because the application of the standardized guidelines to a specific patient records is a unique inquiry that cannot be extrapolated on a class-wide basis. Lastly, Defendant argues that Plaintiffs have not shown commonality because Plaintiffs have not sufficiently shown that Defendant violated the Prompt Pay Act as to any member of the proposed class.

22. As stated in *In re Rezulin Litigation*, the class as a whole must raise at least one common question of law or fact. Plaintiffs' proposed class includes any providers who received an audit letter from Defendant and have not signed a valid contractual release of claims. This proposed class would include providers who received audit letters related to claims not covered by the Prompt Pay Act (such as claims submitted pursuant to out-of-state insurance plans, or claims submitted pursuant to certain federal and state health benefits programs), and providers who received audit letters whose claims were denied for a time-barred reason within one year of the claim submission. Such providers would not have a claim under the provisions of the Prompt Pay Act that are at issue in this case. Through class discovery, Plaintiffs had access to all of Defendant's audit files from the last ten years, which include the reasons for retrospective denials of claims. Plaintiffs therefore had the opportunity to distinguish providers who were audited for claims that were exempt from the Prompt Pay Act

or that were denied for a time-barred reason within one year, and thus could have narrowed their prospective class to include only providers whose claims were denied on an allegedly improper basis.

23. Therefore, the Court finds that Plaintiffs have not shown that there are any common questions of law or fact applicable to the class as a whole.

Typicality

24. "The 'typicality' requirement of Rule 23(a)(3) of the West Virginia Rules of Civil Procedure [1998] requires that the 'claims or defenses of the representative parties [be] typical of the claims or defenses of the class.'" *Id.* at Syl. pt. 12.

25. "A representative party's claim or defense is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.*

26. "Rule 23(a)(3) only requires that the class representative's claims be typical of the other class members' claims, not that the claims be identical." *Id.*

27. "When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Id.*

28. Plaintiffs again claim that the use of standardized guidelines for handling audits evidences typicality. Plaintiffs further argue that the fact that defenses can be raised against some members and not others does not destroy typicality.

29. Defendant argues that Plaintiff's claims are not typical of the class because each member of the proposed class has repaid Defendant following a request for repayment. Defendant further asserts that resolution of Plaintiff's claims will not resolve the claims of the other

providers in the proposed class because of the fact-specific inquiries involved in each retroactive denial.

30. Here, Plaintiffs are uniquely situated in comparison to the putative class members. Plaintiffs are the sole claimants who have refused to repay Defendant following an audit letter. All other putative class members, rather than disputing the audit results, chose instead to remit to Defendant the allegedly overpaid amount. Further, the Plaintiffs have not made any effort to present evidence showing that the audit letter they received and their contract with the Defendant are at all similar to the putative class members' audit letters from or contracts with Defendant. Plaintiffs had access to all of the putative class members' audit letters and investigation files, and have failed to point to specific examples that support their claim of typicality.

31. Therefore, the Court finds that Plaintiffs have not shown that their claims are typical of the putative class members.

Adequacy of Representation

32. "The 'adequacy of representation' requirement of Rule 23(a)(4) of the West Virginia Rules of Civil Procedure (1998) requires that the party seeking class action status show that the 'representative parties will fairly and adequately represent the interest of the class.' First, the adequacy of representation inquiry tests the qualifications of the attorneys to represent the class. Second, it serves to uncover conflicts of interest between the names parties and the class they seek to represent." *Id.* at Syl. pt. 3.

33. Defendant has not challenge the adequacy of Plaintiffs' counsel under this requirement.

34. Plaintiffs claim that certain inherent conflicts of interest may naturally arise from the nature of this class action litigation, and that Plaintiffs' counsel has been transparent with this Court

at all times regarding potential ethical issues. Plaintiffs also point to West Virginia Rule of Civil Procedure Rule 23(c)(4) and state that if conflicts arise between Plaintiffs and proposed class members, they may be divided into subclasses.

35. Defendant points out that Plaintiffs' discovery was not directed to discovering whether any other providers are similarly situated or disputing Defendant's attempt to obtain repayment. Defendant further argues that because Plaintiffs have not repaid anything to Defendant, their interests are not aligned with providers who have. Additionally, Defendant points to Dr. Jami's testimony in her deposition. Dr. Jami stated that she does not have time for a lawsuit, and "[does not] want to go through this process." *See* Highmark WV's Opposition to Plaintiffs' Amended Motion for Class Certification, Exhibit 6. Dr. Jami also testified that she did not know whether any of the purported class members were engaged in a dispute with Defendant similar to Plaintiffs'. *Id.* Defendant contends that her testimony shows that Dr. Jami is not willing to undertake the responsibilities and burdens of serving as a class representative.

36. Plaintiffs have presented no evidence of audit letters to or contracts of other putative class members. Plaintiffs have repeatedly asserted that the proposed class members are similarly situated, but have not put forth any evidence to support that assertion, evidencing their lack of commitment to representing the other providers' claims. Defendant has correctly noted that Plaintiffs are in a different position than the other providers. The putative class members chose to remit payment to Defendant, while Plaintiffs have chosen instead to challenge Defendant's request for repayment. Dr. Jami's statements and Plaintiffs' lack of attention to the other providers' retroactively denied claims lead this Court to conclude that Plaintiffs will not fairly and adequately protect the interests of the class.

Rule 23(b) Requirements

37. In addition to demonstrating each of the four required Rule 23(a) factors, Plaintiffs must also demonstrate that class certification is appropriate under at least one of the three Rule 23(b) factors.

38. In this case, Plaintiffs argue that class certification is appropriate under Rule 23(b)(2) and Rule 23(b)(3).

Final Injunctive Relief

39. West Virginia Rules of Civil Procedure Rule 23(b)(2) provides that a class may be certified if the conditions of 23(a) are met, and if "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

40. "The key is whether the actions of the party opposing the class would affect all persons similarly situated, so that the acts apply generally to the whole class." *In re West Virginia Rezulin Litigation.*, 214 W. Va. at 70, 585 S.E.2d at 70.

41. Plaintiffs have not identified any of Defendant's actions that are generally applicable to the proposed class. Plaintiffs have identified other providers who were audited and received an audit results letter requiring remittance of any overpayment. However, Plaintiffs have only put forth general assertions that Defendant violated the Act with regard to these other providers without providing any evidence to support that assertion. Plaintiffs have not produced any of the audit letters received by putative class members to show that the claims were retroactively denied in excess of one year, or that the claims were retroactively denied for impermissible or time-barred reasons. As noted above, Plaintiffs were given access to investigation files for every audit Defendant performed in the last ten years. The

investigation files included letters to the providers that identified the reasons for the audits, the results of the audits, and explain the process by which Defendant arrived at the audit results. Despite their access to these letters, Plaintiffs have not provided the Court with an analysis of any such letters to indicate that the Defendant's audits of other providers violate the Prompt Pay Act.

Common Questions of Law or Fact Predominate

42. Rule 23(b)(3) provides that a class may be certified if the conditions of 23(a) are met, and if the Plaintiffs establish that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." West Virginia Rule of Civil Procedure Rule 23(b)(3).

43. Factors pertinent to the 23(b)(3) inquiry include "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action." West Virginia Rule of Civil Procedure Rule 23(b)(3).

44. This Court has found the Plaintiffs have not met their burden of showing questions of law or fact that are common to the class. Accordingly, questions of law or fact common to the class do not predominate over questions affecting only individual members.

CONCLUSION

Accordingly for the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' Amended Motion for Class Certification is **DENIED**.

The Clerk is directed to send certified copies of this Order to the following:

Russell D. Jessee, Esq.
Steptoe & Johnson PLLC
Chase Tower, 17th Floor
P.O. Box 1588
Charleston, WV 25326

Joseph L. Amos
Miller & Amos
2 Hale Street
Charleston, WV 25301

Scott S. Segal
Segal Law Firm
810 Kanawha Blvd., East
Charleston, WV 25301

Ms. Carol Miller
Business Court Division Central Office
Berkeley County Judicial Center
380 W. South Street
Martinsburg, WV 25401

ENTER: 09/05/2018

Judge James A. Mazzone