IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-39

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HOLISTIC, INC.,

Petitioner below, Petitioner,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, BUREAU OF MEDICAL SERVICES,

Respondent below, Respondent.

PETITIONER'S REPLY BRIEF

J. Zak Ritchie (WVSB #11705)
Counsel of Record
Isaac R. Forman (WVSB #11668)
Skyler A. Matthews (WVSB #13532)
HISSAM FORMAN DONOVAN RITCHIE PLLC
P.O. Box 3983
Charleston, WV 25339
(681) 265-3802 *office*
(304) 982-8056 *fax*
zritchie@hfdrlaw.com
iforman@hfdrlaw.com
smatthews@hfdrlaw.com

Counsel for Petitioner Holistic, Inc.

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INTRODUCTION

In its opening brief, Holistic explained that Respondent West Virginia Department of Health and Human Resources, Bureau for Medical Service ("BMS") unilaterally and with no meaningful explanation indefinitely suspended *all* Medicaid payments to Holistic and its providers under a regulation allowing the agency to do so based on a "credible allegation of fraud for which an investigation is pending." What BMS ignores, however, is that the federal regulation comes with a mandatory caveat. The agency is required to suspend payments "*unless* the agency has good cause to not suspend payments or to suspend payment only in part." 42 U.S.C. § 455.23(a)(1) (emphasis added).

In its Response, BMS ignored these legal requirements and the fact that the actual *performance of the evaluation* of whether good cause exists is *mandatory*. Instead, BMS doubles down on the claim that it can indefinitely suspend all payments to Holistic based upon an undisclosed review of a mere eight (8) patient charts over four-month period that ended in December of 2018. And although BMS does not dispute that Holistic provided legitimate care to West Virginians suffering from addiction, the agency still makes no effort whatsoever to differentiate between the payments which are legitimately and indisputably payable and those which may be the subject of a credible allegation of fraud. Given the lackluster defense, the BMS decision is legally flawed and was made in violation of constitutional and regulatory provisions, as well as in violation of its own Provider Manual. Accordingly, the decision should be reversed, or at least vacated and remanded to require the agency to do its job as the law requires. Should this Court determine,

however, that it lacks appellate jurisdiction, it is constrained to dismiss and await potential appeal of a final order from the parallel action filed in the Circuit Court.

ARGUMENT

I. BMS's argument for appellate jurisdiction is questionable.

To protect its appellate rights, Petition filed a protective appeal in this Court directly from the agency proceedings although Petitioner has doubts about this Court's appellate jurisdiction, for the reasons set forth in the opening brief. *See* Pet. Br. at 8–10. As this Court (or any other) has yet to render a decision on the appellate jurisdiction over this Court to directly review an agency decision that appears from binding caselaw to be excluded from the West Virginia Administrative Procedures Act ("APA"), Petitioner believes that this Court must first assess jurisdiction before proceeding to the merits of the appeal.

For its part, BMS barely engages on the issue of this Court's appellate jurisdiction. And nothing BMS argues has changed the analysis set forth in Petitioner's opening brief that strongly suggests this Court lacks jurisdiction.

As BMS has noted, Petitioner has separately filed a petition for writ of certiorari to seek review of the BMS decision in the Circuit Court of Kanawha County, consistent with binding precedent. *See State ex rel. Ginsberg v. Watt*, 168 W. Va. 503, 505, 285 S.E.2d 367, 369 (1981). Petitioner's certiorari proceeding is ongoing, and it may be appealed by the losing party in the ordinary course to this Court upon entry of final order.

II. The BMS decision should be reversed.

If this Court concludes that it has appellate jurisdiction, it should reverse the agency decision for the reasons set forth in the Petitioner's brief. Throughout its response, however, BMS makes assertions and conclusory statements with little persuasive force to support its claims. Even more alarming, the agency wholly ignores portions of the federal regulations that are unfavorable to its position and highlights only the cherry-picked sections that cast its arguments in an advantageous light. The Court should rightfully consider these federal regulations in their entirety and reverse the BMS decision. If the Court finds reversal unwarranted, the decision should at least be vacated and remanded to require the agency to do its job as the law requires.

A. The legal rules are clear.

In its Response, BMS (1) refuses to acknowledge that the agency is required to suspend payments "*unless* the agency has good cause to not suspend payments or to suspend payment only in part;" and (2) declines to recognize or consider evidence of good cause.

Under 42 U.S.C. § 455.23(a)(1), BMS is required to suspend Medicaid payments to providers, like Holistic, where the agency determines that a "credible allegation of fraud for which an investigation is pending" exists. 42 U.S.C. § 455.23(a)(1). As its response brief emphasizes, that is the *end* of BMS's analysis—which is in violation of constitutional and federal regulatory provisions and its own Manual. The plain text of the federal regulation requires more. It commands BMS to take to take affirmative steps and to perform an evaluation to determine whether good cause exists. Read in its entirety, the regulation holds that an agency seeking

to suspend a provider's Medicaid payments *must* first consider whether good cause exists *before* implementing the suspension. *See Victoria Transcultural Clinical Center, VTCC v. Kimsey*, 477 F. Supp. 3d 457, 464 (E.D. Va. 2020).

Other than conclusory argumentation, BMS also neglects to address the plain violations of its own Provider Manual. BMS's Provider Manual states that "OPI *will* determine if good cause exception exists to not suspend payment." BMS Manual § 800.9 (emphasis added). Instead, BMS addresses each component of § 455.23—other than the caveat that mandates the agency analyze whether good cause exists. *See* Resp. Br. at 11. To support its proposition that (1) the agency is "not obligated" to refrain from suspending payments to a provider against whom a credible allegation of fraud has been made "simply because some 'good cause'" factors exist; and (2) that "[s]ection 455.23 expressly vests BMS with the *discretion* to do so under circumstances where it believes one of the factors set forth in 42 CFR §455.23(e)-(f) warrants such action, BMS relies on inapposite case law. *Id*. In fact, the majority of the cases relied upon by BMS in its response *supports* Holistic.

For example, BMS relies on *Victoria Transcultural Clinical Ctr., VTCC, LLC v. Kims*ey. *See* Resp. Br. at 11. In *Kimsey*, VTCC (a business that provides mental and behavioral health services) admitted to fraudulent activity and that its providers billed Medicaid for services not provided. *See Kimsey*, 477 F. Supp. 3d at 463. Because VTCC admitted to fraud, the Court found that it had not established a likelihood of success on the merits of its claim for a declaratory judgment or a violation of 42 C.F.R. § 455.23. Critically, to begin its analysis, the Court found that

"it is necessary to determine … whether there is a credible allegation of fraud to justify the suspension of Medicaid payments ***and*** *whether any good-cause exception applies that necessitates such suspension not take place*." *Id*. at 463 (emphasis added.) Like the court in *VTCC*, the Court here should find that BMS's failure to conduct an analysis of whether any good cause exception applies (necessitating the suspension not take place) was legal error. It clearly was.

Next, BMS relies on *Rehab Ariz., LLC v. Ariz. Health Care Cost Containment Sys*. to support its argument that "[t]he State has discretion to forego the suspension." *See* Resp. Br. at 11. The language quoted by BMS is not only misleading and taken out of context, but highlights only a fraction of the Court's analysis—which, when read in its entirety, favors Holistic. *First*, the selective language refers to the ACA and 42 U.S.C. § 1396b(i)(2)(C)—not 42 C.F.R. § 455.23. *Second*, BMS wholly ignores the portion of the paragraph that cast serious doubt on its arguments. Read in its entirety, the excerpt states as follows:

> Under the ACA, the State has discretion to forego the suspension if it determines "there is good cause not to suspend such payments." 42 U.S.C. § 1396b(i)(2)(C). The federal regulation implementing this statute likewise provides that a state Medicaid agency "must suspend all Medicaid payments to a provider **after the agency determines there is a credible allegation of fraud ... unless the agency has good cause to not suspend payments**."

Rehab Ariz., LLC v. Ariz. Health Care Cost Containment Sys. No. 1 CA-CV 18-0511, 2019 WL 1530112, at *3 (Ariz. Ct. App. Apr. 9, 2019) (emphasis added); *see also* 42 C.F.R. § 455.23(a)(1). BMS again disregards the mandatory, plain text caveat: "unless the agency has good cause to not suspend payments." *Id*.

Finally, the Court in *Bergeron v. Dep't of Health Servs*. analyzed whether the challenger was deprived of a significant property interest in violation of due process. *See Bergeron*, at 71 Cal. App. 4th at p. 27, 83 Cal. Rptr. 2d 481. The Court found that due process did not require the state agency to compromise an ongoing investigation by holding a hearing before imposing a temporary hold on payments due to a Medi–Cal provider suspected of fraud or abuse. *Id.* at 71. These facts are meaningfully different than those faced here. Indeed, the *Bergeron* Court did not analyze whether good cause existed because the "good cause" component of the regulation was *not challenged*.

Although BMS asserts that it indeed analyzed the "good cause" factors not to suspend payments and the "good cause" factors to partially suspend payments, the record reflects otherwise. First, its Response does not even attempt to defend the federal regulatory violations present in its initial letter. How could it? In its first letter, BMS offered zero discussion, much less application, of the mandatory "good cause" factors. Indeed, BMS only sent the second letter after Holistic's counsel pointed out the glaring legal deficiencies. BMS's attempt to argue that the second letter "from Andrew Pack" somehow satisfies the good cause exception analysis is unpersuasive, unsupported by record, and falls far short of satisfying the requirements of 42 C.F.R. §455.23(e)-(f).

Next, the second letter—which is from Cynthia Beane, not Andrew Pack—contains *no* "analysis" of the good cause factors. *See* Resp. Br. at 12. In fact, the letter includes no mention of Andrew Pack at all. D.R. at 25-26. In a single line, the

letter states that "BMS reviewed all good cause exceptions to payment suspension allowed by statute and determine none are applicable in this instance." *Id.* The letter fails to explain *how* that conclusion was reached. *Id.* In its Response—as it has done throughout its appeal papers—BMS simply states its post-hoc, shaded interpretation of the facts. For example, BMS contends that "the facts show [Pack's] analysis was reasonable; for example, law enforcement did not request that a suspension be withheld … ." *See* Resp. Br. at 12. Not so. Law enforcement officers did, at one stage, recommend that the suspension not be imposed, though this recommendation was later lifted. D.R. 220. BMS's view of the facts of this case plainly departs from an impartial, reasonable view of the record.

Finally, as demonstrated throughout its Response, even when BMS purports to undertake consideration of these factors as an exercise of discretion, the agency still cannot "entirely ignore aspects of the problem." *Bedford Cnty. Mem'l Hosp. v. Health & Hum. Servs.*, 769 F.2d 1017, 1022 (4th Cir. 1985); *see also In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996). As such, the agency's actions here were, arbitrary and capricious. For these reasons, the Court should reverse the agency's decision because it offered an explanation (or lack thereof) that reflected an erroneous application of the law and otherwise ran counter to the evidence before it. *Id.* at 487.

B. BMS's decision is a result of manifest legal and factual errors.

1. In an attempt to persuade the Court that BMS did not commit legal error by indefinitely suspending Medicaid payments to Holistic in direct violation of the text of the controlling regulation, 42 C.F.R. § 455.23, BMS asserts that the

suspension is not "indefinite." *See* Resp. Br. at 13. BMS argues that "if the MFCU accepts the fraud referral for investigation, the payment suspension is allowed to continue 'until such time as the investigation and any associated enforcement proceedings are completed.'" *Id*. However, BMS has completely ignored its concomitant—and equally mandatory—obligation under the same regulation "to not suspend payments or to suspend payments only in part" if enumerated "good cause" factors are met. BMS's refusal to even try to apply this mandatory provision is acutely illustrated by the agency's implementation of the inordinate, sweeping suspension of the "entirety" of Medicaid payments to Holistic. D.R. 18.

Courts are not favorable to indefinite withholdings. *See Rizkallah v. Att'y Gen.*, 100 Mass. App. Ct. 533, 540, 181 N.E.3d 517, 524 (2021) (holding that "[w]e also are not moved by the Commonwealth's assertion that the withholding was required by Federal law, once the Commonwealth received a "credible allegation" of fraudulent charges." 42 C.F.R. § 455.23(a)(1). "The fact that it may be proper to initiate withholding under such circumstances does not mean that the courts are unavailable to test the basis for the ongoing withholding.") BMS's wholesale suspension of Medicaid payments has effectively served as an indefinite suspension despite their litigation spin.

Next, in response to Holistic's explanation as to why Holistic satisfies each of the "good cause" factors, BMS merely asserts that it is "expressly vested with the discretion to determine if good cause exists to continue making Medicaid payments." *See* Resp. Br. at 11. Essentially, BMS claims that it is entitled to special

deference and therefore owes no real explanation. Again, BMS continues to make broad, conclusory statements—which lack any substantive analysis or merit. There is no doubt that Holistic satisfies nearly all of the "good cause" factors, which went entirely—and unlawfully—*ignored* by the agency in dereliction of its statutory and regulatory obligations.

Further, BMS provides no meaningful (or lawful) justification for why it failed to even provide Holistic with a single example of a fraud allegation *to which Holistic could respond*. Only *after* the filing of a writ proceeding, BMS was forced to even try to follow the law—in violation constitutionally required due process (notice and opportunity to be heard, etc.) and mandatory regulatory requirements.

Finally, BMS spends several pages attempting to distinguish *Pressley Ridge Schools, Inc. v. Stottlemeyer*. BMS's attention to *Pressley Ridge* is somewhat of red herring. Holistic relied on *Pressley Ridge* to demonstrate that the agency's suspension practices have grown even more draconian since its suspension decisions were overturned by Judge Haden. *See Pressley Ridge Schools, Inc. v. Stottlemeyer*, 947 F. Supp. 929, 940 (S.D. W. Va. 1996). Regardless of the *Pressley Ridge* decision, in its Response, (as it has done throughout the administrative process), BMS continues to ignore the regulations requiring it "to not suspend payments or to suspend payments only in part." 42 CFR §455.23. Because of BMS's continued refusal to follow the law as written, the arbitrary process has resulted in substantial harm to BMS and the West Virginians it would otherwise be able to serve.

2. BMS violated Holistic's substantial rights by failing to adhere to the legal requirement that it disclose sufficient information about the alleged credible allegation of fraud to permit Holistic to meaningfully defend itself. In its Response, BMS attempts to use 42 C.F.R. § 1007.11(f) as shield to cover up its failure to comply with the regulatory provisions, due process, and its own Manual. 42 C.F.R. §1007.11 describes, in part, the duties and responsibilities of the MFCU as follows:

> (a) the unit will conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan. …
>
> (f) The unit will safeguard the privacy rights of all individuals and will provide safeguards to prevent the misuse of information under the unit's control.

42 C.F.R. §1007.11(a) and (f).

The protections and safeguards afforded by the federal regulation do not mean that the individuals and entities who are the subject of the investigations do not receive the critical information they need to defend against those allegations. In its Annual Report, the MFCU explained what type of situations fall within 42 C.F.R. § 1007.11(f), none of which are not applicable here. For example, one circumstance which would fall within the regulation is when a Unit receives a request for investigative records under a State public disclosure law. According to the Annual Report, in order to meet the confidentiality requirements of the regulations, a MFCU must make lawful efforts to protect the identities of witnesses,

victims, and informants. *See* ¶ 530,065 State Medicaid Fraud Control Units-annual Report, Healthcare Compl. Rep. P 530065.

Properly read, the federal regulation does not contemplate withholding information *about the alleged credible allegation of fraud* to permit Holistic to meaningfully defend itself. Like its federal counterpart, W.Va. Code §9-7-3(d), provides protections "for the name or identity of a person whose acts or conduct is investigated." Stated a different way, the statute does not require BMS to withhold critical information from the alleged wrongdoer under the guise of "protect[ing] privacy rights." *See* Resp. Br. at 16.

BMS insists that courts do not require "substantial information" to be disclosed, citing to *NSCH Rural Health Clinic v. Snyder*. *See* Resp. Br. at 16. The *Snyder* court indeed required the Medicaid fraud unit of Mississippi to disclose the general allegations concerning its ongoing investigation. *See generally*, *NSCH Rural Health Clinic v. Snyder*, 321 So. 3d 565, 571–72 (Miss. Ct. App. 2020).

Finally, BMS's attempt to distinguish *Alexandre* is unpersuasive. As explained in the opening brief, this case is analogous to *Alexandre*. As explained in Holistic's opening brief, the May 6, 2022, letter to BMS contained zero information about the underlying allegations and left Holistic completely unable to provide supporting documentation or detail in its defense as required by the administrative review process. *See* D.R. 27. Like Dr. Alexandre, Holistic and its providers have been left "wrestling with a ghost." This Court should require the agency to follow the law, which requires fairness during the administrative process.

III. Alternatively, the BMS decision should be vacated with directions to modify for only suspension in part.

BMS's Response contains a fleeting mention of its purported analysis of the good cause factors to suspend payments only in part. *See* Resp. Br. at 12. This is telling. Again, BMS offers only conclusory statements to justify its wholesale payment suspension. The agency asserts that the good cause exceptions for a *partial suspension* were also "considered by Andrew Pack as stated in his May 16, 2022, letter to Holistic." *Id*. As explained in its opening brief, BMS's initial letter provided Holistic offered zero discussion, much less application, of the mandatory "good cause" factors. After Holistic's counsel pointed out this legal deficiency, BMS's second letter merely added the conclusory (and obviously hollow) statement that "BMS reviewed all good cause exceptions to payment suspension allowed by statute and determined none are applicable in this instance." D.R. 25. The second letter contains no mention of partial suspension at all—let alone an analysis of the good cause factors supporting partial suspension. It was all plain assertion, to which now the bureaucracy now demands deference.

As explained in detail in Holistic's opening brief, the "good cause" inquiry does not end after consideration of a whether a full suspension is warranted—the state Medicaid agency must also consider whether good cause exists to implement only a *partial* suspension of Medicaid payments before arriving at a decision. *See* 42 C.F.R. § 455.23(a), (f). The agency ignored these legal requirements. It not only failed to explain the "credible allegation of fraud," and to satisfy the "good cause" element as to whether it should "not suspend payments," but it critically failed to

analyze whether it should suspend payments "only in part." *See* 42 C.F.R. § 455.23(a), (f).

There is therefore no reason why, if BMS truly remains concerned about Holistic's billing practices, that the payments for just the particular codes in question could not be suspended.

CONCLUSION

If this Court concludes that it has appellate jurisdiction, this Court should reverse the DHHR's decision for failure to satisfy the "good cause" standard not to suspend payments. Alternatively, this Court should vacate the DHHR's decision and remand with directions to the agency to modify the decision to suspend payments "only in part."

HOLISTIC, INC.,

By Counsel:

/s/ Skyler A. Matthews
J. Zak Ritchie (WVSB #11705)
Counsel of Record
Isaac R. Forman (WVSB #11668)
Skyler A. Matthews (WVSB #13532)
HISSAM FORMAN DONOVAN RITCHIE PLLC
P.O. Box 3983
Charleston, WV 25339
(681) 265-3802 *office*
(304) 982-8056 *fax*
zritchie@hfdrlaw.com
iforman@hfdrlaw.com
smatthews@hfdrlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2023, *Petitioner's Reply Brief* was filed and served via File&ServeXpress on all counsel of record.

/s/ Skyler A. Matthews
Skyler A. Matthews (WVSB #13532)