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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VINOD KURUVADI, Petitioner and Appellant, v. DEPARTMENT OF HEALTH CARE SERVICES, Defendant and Respondent.	B235446 (Los Angeles County Super. Ct. No. BS126251)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Norman L. Schafler, for Petitioner and Appellant.

Kamala D. Harris, Attorney General, Julie Weng-Guiterrez, Assistant Attorney General, Richard T. Wadlow and Gregory M. Cribbs, Deputy Attorneys General, for Defendant and Respondent.

Appellant Vinod Kuruvadi appeals from a judgment denying his petition for a writ of mandate to set aside an administrative decision that he had been overpaid $63,491.55 by respondent Department of Health Care Services under the Denti-Cal program. Appellant contends that judgment should have been entered against his corporation and not against him as an individual. Since appellant failed to produce the administrative record, he cannot show this determination was in error. Appellant also challenges respondent's audit as untimely under Welfare and Institutions Code section 14124.1, which requires Denti-Cal providers to retain records for a three year period. He argues it was improper for respondent's on-site audit to review records older than three years, although appellant received notice of the audit within the three-year record retention period. Because appellant received timely notice, appellant was required to maintain the requested records until the audit could be completed. Therefore, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Appellant was a dentist enrolled as a provider in the Denti-Cal program. which is administered by respondent. On June 7, 2002, respondent notified appellant that it would conduct a post-payment audit of the dental services that appellant billed to Denti-Cal for the period of June 7, 1999 to October 31, 2000. Delta Dental, the "fiscal intermediary" for the Denti-Cal program, conducted an on-site review of these records on September 22, 2003. On April 19, 2004, the department issued an audit report which found that appellant had been overpaid, entitling respondent to recover $63,491.55.

In response to the audit report, appellant filed a statement of disputed issues and requested a formal hearing. Appellant made two contentions: (1) the audit process was untimely because the September 22, 2003, on-site audit reviewed records more than three years old, in violation of the three-year record retention requirement in Welfare and Institutions Code section 14124.1; and (2) the specific findings of the audit were not supported by the evidence. An administrative appeal commenced. The two issues were bifurcated and formal proceedings were held before an administrative law judge (ALJ). On the first issue, the ALJ determined the audit was timely since respondent gave notice

of the audit on June 7, 2002, and requested records from June 7, 1999 to October 31, 2000, which fell within the three-year requirement of the statute. On the second issue, after multiple days of hearings and respondent's admission of 32 exhibits, the ALJ found the audit was supported by the evidence and affirmed it.

Appellant filed a petition for a writ of administrative mandamus (Code Civ. Proc., § 1094.5) and for a writ of mandate (Code Civ. Proc., § 1095) in superior court. He contended the audit was untimely and that judgment should have been entered against his corporation rather than against him in his individual capacity. In support of his petition, appellant submitted correspondence from respondent addressed to the corporation, the letter informing him when the on-site audit would occur, the corporation's articles of incorporation filed with the California Secretary of State in February 1995, and a May 2001 notice from the California Secretary of State treating the corporation as terminated beginning in January 1999. Appellant did not submit any part of the administrative record.

A trial setting conference was held on August 9, 2010, but it was continued to November 15, because appellant had not yet obtained the administrative record. On the same day as the conference, respondent sent a letter to appellant informing him that it was his responsibility to procure the record and explaining how to do so.

On November 15, the court continued the trial setting conference because appellant still had not requested the administrative record. On December 17, the court was informed that counsel had the administrative record. Based on this representation, the court set the case for a hearing to be held on April 27, 2011.

Between December 2010 and March 2011, respondent's attorney attempted to obtain a copy of the administrative record from appellant for the briefing, but appellant did not produce it. Because the record still had not been produced, the parties stipulated to continue the hearing until July 1, 2011.

Appellant filed an untimely opening brief and did not submit or cite to any portion of the administrative record. Respondent filed a request for judicial notice of appellant's statement of disputed issues, respondent's acceptance of these documents, respondent's

final decision on the timeliness issue, and respondent's final decision on the merits of the audit findings.

On July 1, 2011, the hearing on the petition was held. The trial court denied the petition because the administrative record had not been filed or produced by appellant. This timely appeal followed.

DISCUSSION

Appellant repeats the claims he made in his petition for a writ of mandate. He asserts that the judgment should have been entered against the corporation rather than himself and that the audit was untimely. He does not identify error in the trial court's decision to deny the petition on the ground that he did not file the administrative record.

Trial courts review the final decisions of administrative agencies according to the procedure in Code of Civil Procedure section 1094.5. (*Elizabeth D. v. Zolin* (1993) 21 Cal.App.4th 347, 353.) "In a section 1094.5 proceeding, it is the responsibility of the petitioner to produce a sufficient record of the administrative proceedings." (*Id.* at p. 354.) Because it is the petitioner's burden to show error, it is his or her responsibility to present a record demonstrating this error. (*Ibid.*)

At the administrative proceedings, hearings were held and oral testimony and documentary evidence were submitted. From the limited record before us, which includes the index of the admitted evidence, we ascertain that respondent submitted 32 documentary exhibits and proffered testimony from multiple witnesses. The trial court had none of this evidence because appellant failed to obtain and file the record even after he was granted continuances to do so. Thus, appellant did not demonstrate to the trial court that respondent's final decision was erroneous.

In his reply brief, appellant justifies his failure to submit the administrative record by arguing that the trial judge "has had a long standing rule that he doesn't want all of the administrative record, but only the documents relevant to the issues raised by the petition and Bates stamped." This claim is not well taken. Appellant did not submit any portion of the administrative record, let alone the specific portions of the record relevant to his

claims. Further, the court continued the hearing on the petition specifically to enable appellant to obtain the record.

Appellant also contends that portions of the hearing transcripts are missing. He provides no support for this claim and did not inform the trial court of this fact. In fact, after briefing was concluded here, appellant filed a notice of lodging the administrative record, which attempted to augment the record on appeal with three volumes of transcripts from the administrative hearing. The transcripts do not appear to be missing. Moreover, since these transcripts were not filed or lodged in superior court, appellant's attempt to file them here violates California Rules of Court, rule 8.155(a)(1)(A). We do not consider them in reaching our decision. (See *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

In the alternative, appellant argues that the evidence he submitted in support of his petition is sufficient to show the decision to enter the order against him in his individual capacity was erroneous. He submitted correspondence from respondent addressed to the corporation, the articles of incorporation, and terminating documents for the corporation. Respondent contends these documents were not produced at the administrative proceedings, and what actually was produced showed that the Denti-Cal provider application was received from appellant personally, not as a corporation. In fact, the corporation was formed after appellant began providing services under the Denti-Cal program.

Without the administrative record we do not know whether appellant produced this evidence at the administrative hearing and what other evidence, including any lodged by respondent, the ALJ considered in fixing liability on appellant in his individual capacity.[1] By failing to produce the administrative record, appellant has failed to show

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[1] Respondent argues this evidence is inadmissible and could not be considered by the trial court. Code of Civil Procedure section 1094.5, subdivision (e) imposes limitations regarding the trial court's authority to admit and consider new evidence in a proceeding under section 1094.5. (*Elizabeth D. v. Zolin, supra*, 21 Cal.App.4th at p. 355.) It provides: "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly

that the determination that liability should be entered against him as an individual was erroneous.

On his claim that the audit was untimely, appellant argues it is a question of law suitable for review without the administrative record. He contends the ALJ made factual findings as to the dates when respondent provided notice of the audit and when the on-site audit occurred, and he accepts these findings as true. We note that appellant did not make this argument in the trial court. But since we have the ALJ's findings and these are undisputed, we review de novo the timeliness of the audit. (See *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 928.)

Welfare and Institutions Code section 14124.1 provides: "Each provider . . . of health care services rendered under the Medi-Cal program or any other health care program administered by the department or its agents or contractors, shall keep and maintain records of each such service rendered, the beneficiary or person to whom rendered, the date the service was rendered, and such additional information as the department may by regulation require. Records herein required to be kept and maintained shall be retained by the provider for a period of three years from the date the service was rendered."

"Applicants, providers, or others receiving or seeking reimbursement under the Medi-Cal program or other health care programs administered by the department or its agents or contractors shall furnish information or copies of records and documentation upon request by the department. Unannounced visits to request this information shall be reserved for those exceptional situations where arrangement of an appointment

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excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case." (Code Civ. Proc., § 1094, subd. (e).) Because we do not know whether this evidence was produced at the administrative proceedings, we cannot make an admissibility determination.

beforehand is clearly not possible or is clearly inappropriate to the nature of the intended visit. . . ." (Welf. & Inst. Code, § 14124.2, subd. (b)(1).)

The ALJ found that respondent notified appellant by letter dated June 7, 2002, that it intended to conduct an audit. This notice informed appellant that the audit would consist of an examination of records pertaining to services rendered to Denti-Cal beneficiaries from June 7, 1999, to October 31, 2000. It admonished appellant that he was required to maintain these records. The ALJ concluded that this letter began the audit and tolled the record retention period under Welfare and Institutions Code section 14124.1 until the audit was concluded.

We agree. The audit statute does not have a statute of limitations as to when respondent must conduct its audits. Rather, the record retention statute requires providers to keep records for at least three years from the date of service. Appellant was provided notice of the time period for which his records would be audited within three years of the earliest date in the audit period. Under section 14124.1 of the Welfare and Institutions Code, he was required to have these records when he received notice from respondent. We conclude that because appellant was provided notice of the audit and the time period for which records would be reviewed while he was still required to keep these records, the record retention period was tolled and appellant was obligated to maintain the records until respondent could complete the audit.

Were it otherwise, providers that receive notice could delay the scheduling of the on-site visit and destroy any records more than three years old that coincide with services rendered during the audit period in the notice. Such a rule also would prompt respondent to conduct unannounced audits to eliminate the time between sending notice and scheduling the on-site visit during which a provider could destroy his or her records. The statute contemplates unannounced visits to be reserved only for extraordinary cases.

DISPOSITION

The judgment is affirmed. The Department is to have its costs on appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.